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Environmental Criminal Enforcement in the 1990's

Joseph G. Block

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ENVIRONMENTAL CRIMINAL ENFORCEMENT
IN THE 1990's

JOSEPH G. BLOCK†

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I. INTRODUCTION

THIS past year, with the celebration of the twenty-first Earth Day, concern for the environment has come of age. Nowhere has this concern manifested itself as greatly as in the area of environmental criminal enforcement, the government's most potent weapon in seeking strict environmental compliance by business and industry. As former Attorney General Richard Thornburgh announced two years ago, when speaking to the National District Attorneys Association, the Department of Justice (DOJ) is "moving to an even-higher [sic] ground in [its] stand to defend the environment."¹ In January 1991, at a conference of more than 900 federal, state and local environmental law enforcement officials, Thornburgh sounded a clarion call to save "the Blue Planet":

So let us resolve to take a more realistic, truly proportional view of these grave offenses against the environment, and pursue white-collar environmental criminals as vigorously as we have chased down other white-collar rip-off artists. I do not exaggerate when I suggest that the ultimate environmental damage to our earth from

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1. See Former Attorney General Richard L. Thornburgh, Address at National Association of District Attorneys (July 19, 1989) (transcript on file with author).

too much criminal trespass—taken economically, leaving aside other life consequences—will far outweigh any half-trillion-dollar loss from the S & L debacle.²

II. GROWTH OF ENVIRONMENTAL CRIMINAL ENFORCEMENT

The growth of the Environmental Crimes Section (ECS) at DOJ demonstrates the rapid expansion of environmental criminal enforcement efforts. The ECS began in the fall of 1982 as a three-attorney unit within the civil Environmental Enforcement Section. In May 1987, it became a separate section within the Environment and Natural Resources Division of DOJ. Today, ECS has twenty-eight attorneys, all dedicated to criminal enforcement, and future growth of ECS to fifty or sixty attorneys is contemplated.

United States Attorneys' Offices (USAOs) around the country are also actively prosecuting environmental crimes. USAOs in Boston, Miami, San Diego and Buffalo, to name a few, have already formed their own environmental crimes units. More than 140 Assistant United States Attorneys and thirty-six United States Attorneys at the recent convention attended the criminal enforcement presentation organized by ECS, an indication that other jurisdictions may soon follow the lead of those cities which have already created local criminal enforcement units.

Increases in the number of indictments and convictions, the amount of fines and penalties, and length of prison terms imposed for environmental crimes all confirm the growth of environmental criminal enforcement at the federal level. From the beginning of fiscal year 1983 through fiscal year 1991, there have been 571 individuals and 267 corporations indicted for environmental crimes.³ With a number of those matters still pending, there have been 409 individuals and 204 corporations convicted through guilty pleas or trials.⁴ The conviction rate runs higher than eighty percent.⁵ More than \$74.5 million in criminal fines and penalties have been imposed (more than \$60 million of that

2. See Former Attorney General Richard L. Thornburgh, Address at 1991 Environmental Law Enforcement Conference (January 8, 1991) (transcript on file with author).

3. See Memorandum from Peggy Hutchins, paralegal, to Neil S. Cartusciello, Chief, Environmental Crimes Section, United States Department of Justice (October 24, 1991) (on file with author).

4. *Id.*

5. *Id.*

since October 1988), and more than 173 years of imprisonment have been imposed (more than 110 of those years since October 1988).⁶ As these figures demonstrate, the central focus of many environmental criminal investigations has been the identification of high-level corporate officers responsible for the violations, a manifestation of DOJ's long-held position that penalizing individuals with jail time and heavy fines strongly deters environmental violations. Put plainly, in DOJ's view, incarceration is the one cost of doing business that cannot be passed along to the consumer.

In addition to criminal enforcement efforts at the federal level, both state and local prosecutors are actively prosecuting environmental crimes. New Jersey, Pennsylvania and Ohio have well-organized, longstanding criminal enforcement programs. In fact, New Jersey employs about half as many criminal investigators for state environmental crimes alone as the Environmental Protection Agency (EPA) employs for the entire country.⁷ More than forty states now belong to four regional environmental enforcement organizations,⁸ partially funded by EPA for the purpose of promoting state environmental criminal enforcement. The National District Attorneys Association has formed an Environmental Protection Subcommittee for the purpose of establishing a central clearinghouse and training center to teach local prosecutors how to prosecute environmental crimes. Local district attorneys in California, Colorado and other states are bringing successful prosecutions against both individuals and corporations.⁹

6. *Id.*

7. EPA currently employs 62 environmental crimes investigators. Telephone Interview with Howard Berman, Esq., Acting Deputy Director of Criminal Enforcement Counsel Division within office of Criminal Enforcement of Environmental Protection Agency (February 18, 1992). New Jersey employs approximately 35. Telephone Interview with Charles Davis, Press Spokesman for Office of New Jersey Attorney General (February 10, 1992).

8. These are the Northeast Hazardous Waste Project, based in Trenton, New Jersey, the Southern Environmental Enforcement Network, based in Montgomery, Alabama, the Western States Hazardous Waste Project, based in Phoenix, Arizona, and the Midwestern Environmental Enforcement Association, based in Elgin, Illinois.

9. *See e.g.*, *California v. Marmon*, No. 104552 (Super. Ct. Alameda County, Jan. 10, 1991). Marmon pled no contest to charges of illegal transportation and disposal of hazardous waste. The court sentenced him to 16 months in prison, a \$5,000 fine, and \$39,000 restitution. *See also California v. Federated Weiner Metals*, No. 89-M-06086 (Compton Mun. Ct. July 10, 1991). Federated Weiner Metals, a metal recycling company, pled no contest to 32 misdemeanor violations of the state's lead standards. The company was ordered to contribute \$200,000 to a lead education program fund and was fined \$25,000. *See also Col-*

While numerous environmental criminal prosecutions at the federal level have been aimed at small and mid-sized businesses,¹⁰ the roster of companies charged with and/or convicted of environmental crimes also contains a number of major corporations, including Pillsbury, Orkin Exterminating, International Paper, Marathon Oil, Exxon, Weyerhaeuser, Pennwalt, Nabisco, United Technologies, Ocean Spray, Keebler, W.R. Grace and Ashland Oil.¹¹ The types of businesses and industries which have been investigated and prosecuted include shipbuilders, ship repair facilities, oil companies, oil refineries, gas and oil pipelines, chemical manufacturers and storage facilities, tanneries, wood treatment facilities, electroplating operations, steel companies, lumber companies, furniture strippers, barrel recycling operations, pesticide companies, demolition and asbestos removal companies, food producers and processors, aircraft companies and refinishers, companies dealing with the storage, treatment, disposal and transportation of hazardous waste, real estate developers, automobile importers, sewage treatment plants, auto body and repair shops, dairies, and dry cleaners.¹²

orado v. Adolph Coors Co., No. 90-M-3294 (Colorado County Ct. October 23, 1990). Coors pled guilty to two misdemeanor charges stemming from a continual discharge of contaminated water into a local stream. The company was fined \$200,000.

10. See e.g., *United States v. Rutana*, 932 F.2d 1155 (1991) (operator of metal finishing plant); *United States v. Dean*, CR2-90-101 (E.D. Tenn. 1991) (metal fabricating company); *United States v. Collins*, CR-88-A-0019-NE (N.D. Ala. 1987); *United States v. Nanticoke Homes Inc. of Greenwood Delaware*, CR-91-23-LON (D. Del. 1991) (prefabricated home manufacturer).

11. See, *United States v. Exxon Corp.*, No. A90-15-CR (D. Alaska 1991) (guilty plea); *United States v. International Paper*, CR-91-00051-B (D. Me. 1991) (guilty plea); *United States v. Marathon Oil Co.*, RT 91-68 CR (S.D. Ind. 1991) (guilty plea); *United States v. United Technologies*, No. 2-91 CR-00028 (D. Conn. 1991) (guilty plea); *United States v. Weyerhaeuser*, CR-90-00019 (W.D. Wash. 1991) (guilty plea); *United States v. Pillsbury Co.*, No. 90-05020-01-CR-SW-4 (W.D. Mo. 1990) (guilty plea); *United States v. Orkin Exterminating Co.*, 688 F. Supp. 223 (W.D. Va. 1988) (denying defendant's motion to dismiss indictment); *United States v. Pennwalt*, CR-88-55T (W.D. Wash. 1988) (guilty plea); *United States v. Ashland Oil, Inc.*, 705 F. Supp. 270 (W.D. Pa. 1989); *United States v. W.R. Grace*, No. 88-2412K (D. Mass. 1987) (consent decree); *United States v. Keebler*, No. 86-0401 (D. Colo. 1986) (guilty plea); *United States v. Nabisco*, CR-86-41T (W.D. Wash. 1986) (guilty plea); *United States v. Ocean Spray*, No. 85-909 (D. Mass. 1986) (guilty plea).

12. *United States v. Greer*, 850 F.2d 1447 (11th Cir. 1989) (transporter of hazardous waste); *United States v. Baytank*, 934 F.2d 599 (5th Cir. 1991) (transporter of hazardous waste); *United States v. Protex*, 874 F.2d 740 (10th Cir. 1989) (barrel recycling); *United States v. Brittain*, 931 F.2d 1413 (10th Cir. 1991) (municipal sewage treatment plants); *United States v. Macdonald and Watson Waste Oil Co.*, 933 F. 2d 35 (1st Cir. 1991) (transporter and disposer of hazardous waste); *United States v. Exxon Corp.*, No. A90-15-CR (D. Alaska 1991) (oil company); *United States v. Orkin Exterminating Co.*, 688 F. Supp.

Legislative efforts in the area of criminal enforcement have also intensified. Over the last ten years, Congress has enhanced criminal penalties in the Resource Conservation and Recovery Act (RCRA),¹³ the Clean Water Act,¹⁴ the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),¹⁵ and most recently the Clean Air Act (CAA),¹⁶ raising misdemeanors to felonies. The Pollution Prosecution Act of 1990, signed by President Bush in November 1990, mandates the expansion of EPA's cadre of criminal investigators. The EPA began with twenty-two criminal investigators in 1982. The Pollution Prosecution Act requires an increase from the current number of approximately sixty investigators, to more than 200 by October 1995.¹⁷ This number will be complemented by substantial resources of the FBI, which already has more than 100 special agents working on environmental criminal cases, and other federal agencies, including Customs, the Defense Criminal Investigative Service, the Army Corps of Engineers, and the Coast Guard.

The impact of increased criminal enforcement in the environmental arena is perhaps most vividly illustrated by the Exxon case.¹⁸ Under the recently accepted plea bargain in the criminal prosecution of Exxon Corporation and its subsidiary, Exxon Shipping, for the oil spill in Prince William Sound, Alaska, the two companies will pay \$25 million in fines for criminal misdemeanors, as well as another \$100 million to restore the Prince William Sound.¹⁹ These penalties are separate and apart from the \$1 billion that Exxon has already agreed to pay pursuant to a

223 (W.D. Va. 1988) (pesticide company); *United States v. Derecktors Shipyard Builders*, 639 F. Supp. 1064 (D.R.I. 1986) (shipbuilders); *United States v. Nabisco*, CR-86-41T (W.D. Wash. 1986) (food manufacturer and distributor).

13. See 42 U.S.C. § 6928(d) (1988).

14. See 33 U.S.C. § 1319(c) (1988).

15. See 42 U.S.C. § 9603(b) (1988).

16. See 42 U.S.C. § 7413(c) (1988). During the 1990 debate over the Clean Air Act Amendments, the regulated community for the first time sought to have certain protective provisions for good faith, diligent efforts to comply with the law included in the amendments to the criminal sections. Although the effort to secure both statutory immunity for violations discovered and corrected as a result of internal environmental audits, and an evidentiary privilege for audit reports, was unsuccessful, it signals increased activity by the regulated community in the development of environmental legislation.

17. The Act, passed as a rider to H.R. 3338 (101st Cong.), authorizes EPA to quadruple the size of the criminal enforcement program over a five-year period. Pollution Prosecution Act of 1990, Pub. L. No. 101-593, 104 Stat. 2962, Nov. 16, 1990, Title II, § 202.

18. See *Exxon*, No. A90-015 CR (D. Alaska 1991).

19. *Id.* (Plea Agreement).

civil consent decree with state and federal governments.²⁰

While the Exxon case set a record, fines exceeding the million-dollar mark for environmental criminal convictions are becoming more common.²¹ Hazardous waste cases under RCRA illustrate this point. In the summer of 1990, Unichem International, Inc. pleaded guilty to a number of RCRA violations at its Wyoming and New Mexico facilities and paid a record criminal fine of \$1.25 million.²² Less than a year later, United Technologies Corporation pleaded guilty to six RCRA felonies at its Sikorsky aircraft unit in Connecticut and agreed to pay a \$3 million criminal fine.²³ And in July 1991, International Paper pleaded guilty to RCRA violations at its Jay, Maine plant and agreed to pay a \$2.2 million fine.²⁴

Large fines are just one of the potential sanctions for environmental criminal conduct. In addition to receiving fines, companies and individuals convicted of violations under the Clean Water Act and Clean Air Act are automatically "listed," *i.e.*, banned from contracting with the government until the "condition(s) of noncompliance" that led to the criminal conviction is remedied to the satisfaction of the EPA Assistant Administrator of the Office of Enforcement.²⁵ Under both statutes, listing is mandatory upon conviction, although the ban applies only to the facility at which the violation occurred, rather than to the entire company.²⁶ However, in the recent amendments to the Clean Air Act, Congress granted the EPA Assistant Administrator discretion to extend the ban to any or all of a company's other facilities.²⁷

Due to EPA's broad ability to define the "condition(s) of non-compliance,"²⁸ its listing authority is a powerful enforcement

20. Summary of Action on Criminal Cases: Environmental Crimes Section Dep't of Justice Press Release, October 15, 1991 (On file with author).

21. *See, e.g.*, United States v. International Paper, CR-91-00051-B (D. Me. 1991) (\$2.2 million); United States v. United Technologies, 2-91-CR-00028 (D. Conn. 1991) (\$3 million); United States v. Ashland Oil, CR-88-146 (W.D. Pa. 1989) (\$2.25 million); United States v. U.S. Sugar, 91-8125CR-Paine (\$3.75 million).

22. *See* United States v. Unichem Int'l, Inc., CR-90-057 (D. Wyo. 1990).

23. *See* United States v. United Technologies, No. 2-91-CR-00028 (D. Conn. 1991).

24. United States v. International Paper, CR-91-00051-B (D. Me. 1991).

25. *See* 33 U.S.C. § 1368 (Clean Water Act) and implementing regulations at 40 C.F.R. § 15; *See* 42 U.S.C. § 7606 (Clean Air Act) and implementing regulations at 40 C.F.R. § 15.

26. *See id.* *See also* 33 U.S.C. § 1368 and implementing regulations at 40 C.F.R. § 15.

27. *See* 42 U.S.C. § 7413.

28. *See generally* Jonathan S. Cole, *EPA's Contractor Listing Program: A List You*

tool.²⁹ For example, in one case, EPA determined that the fundamental condition of noncompliance leading to the conviction of the violator, Valmont Industries, Inc., for false reporting under the Clean Water Act, was the company's "bad corporate attitude."³⁰ Although Valmont ultimately convinced EPA that it had sufficiently rectified this condition, "corporate attitude" became and remains one of the conditions of noncompliance upon which listing may rest.

In addition to large fines and the prospect of being listed, companies convicted of environmental crimes may also face suspension and debarment from federal contracting.³¹ The suspension and debarment process differs in three fundamental ways from the listing process under the Clean Water Act and Clean Air Act. First, the decision whether to suspend and debar is totally discretionary.³² Second, it need not await a conviction—the debarment official can take action upon the return of a criminal indictment before any trial or conviction.³³ Third, suspension and debarment can result from criminal conduct under any environmental statute, not just the Clean Water Act or Clean Air Act.³⁴ EPA has its own suspension and debarment official who determines what action the federal government will take with respect to federal contracts. In recent years, EPA has also coordinated its efforts with the Department of Defense, the General Services Administration, other federal government debarment officials, as well as recent initiatives with the states.³⁵ Whereas several years ago, few companies convicted of environmental crimes had to worry seriously that the conviction would affect their ability to contract with the federal government, the landscape is now changing.³⁶

Likewise, the landscape is changing with respect to sentenc-

Do Not Want To Make, 2 FED. FACILITIES ENVTL. J. 129 (Summer 1991) [hereinafter Cole, *Contractor Listing*].

29. *Id.*

30. See *In re Valmont Industries, Inc.*, EPA Contractor Listing Docket No. 07-89-L068 (January 12, 1990).

31. See 48 C.F.R. § 9.4 and 40 C.F.R. § 32.

32. *Id.*

33. *Id.*

34. *Id.*

35. Telephone Interview with Robert F. Meunier, Chief of Compliance Branch, Environmental Protection Agency (February 20, 1992).

36. See, e.g., Cole, *Contractor Listing*, *supra* note 29.

ing in environmental cases.³⁷ The days of probation, or at worst, a sixty-day sentence, are over, as corporate executives face the increasing likelihood of not only substantial fines, but mandatory jail time under the Federal Sentencing Guidelines.³⁸ Perhaps the starkest example of this change can be seen in the criminal prosecutions of wetlands cases. Prior to the institution of the Guidelines in November 1987, the longest jail sentence imposed for a wetlands violation was seven days.³⁹ Since the Guidelines went into effect, sentences of up to three years in prison have been imposed for wetlands violations.⁴⁰

Sentences for other Clean Water Act violations and for hazardous waste disposal violations have increased even more drastically. In Massachusetts, seventy year-old John Borowski was convicted of knowing endangerment under the Clean Water Act for allowing employees at his metal-plating shop to dump nitric acid and other toxic wastes into the sewer and for failing to provide them with any safety equipment.⁴¹ Borowski was sentenced to twenty-six months in jail.⁴² In South Carolina, the head of a sewage treatment plant was convicted of making false statements on discharge monitoring reports and sentenced to thirty-three months in jail.⁴³ In Erwin, Tennessee, the production manager of the General Fabricators Plant was convicted of five RCRA storage and disposal counts for ordering employees to bury hazardous waste in a pit behind the plant and to discharge hazardous wastewaters to an unlined lagoon on the property. On August 5, 1991, the manager was sentenced to forty months in prison.⁴⁴ Additionally, an appellate court recently upheld a prison sentence of forty-one months for the illegal disposal of hazardous waste by a transporter in Mississippi.⁴⁵

Sentences for companies are also becoming more severe.⁴⁶ On November 1, 1991, the United States Sentencing Commission's new guidelines for organizations became effective.⁴⁷ The

37. See Federal Sentencing Guidelines Manual (West 1992) (hereinafter Federal Sentencing Guidelines).

38. *Id.*

39. *United States v. Bieri*, 87-CR-20030 (E.D. Mich. 1987).

40. *United States v. Pozsqai*, CR. 88-00450-01 (E.D. Pa. 1988).

41. *United States v. Borowski*, CR. 89-256 (D. Mass. 1990).

42. *Id.*

43. *United States v. Irby*, CR. 90-180 (D.S.C. 1990).

44. *United States v. Dean*, CR2-90-101, (E.D. Tenn. 1991).

45. *United States v. Sellers*, 926 F.2d 410 (5th Cir. 1991).

46. See, e.g., Federal Sentencing Guidelines, § 8B1.1.

47. *Id.*

new guidelines mandate that the sentencing judge order restitution except in limited circumstances.⁴⁸ In environmental cases, this raises the question as to whether courts will order restitution for damage to natural resources. The new guidelines further require the sentencing judge to issue remedial orders and to seek assistance from EPA in structuring the remedies in environmental criminal cases.⁴⁹

The guidelines also require the court to impose probation if a company does not already have an "effective program to prevent and detect violations of law."⁵⁰ The new guidelines detail the elements of such a program, effectively creating a blueprint of the type of compliance audit the government will likely expect companies to implement.⁵¹ The conditions of probation set forth in the guidelines may also include unannounced inspections of appropriate books and records, or require the convicted company to place advertisements in newspapers and other media acknowledging its guilt.⁵²

III. ENVIRONMENTAL AUDITS

Voluntary environmental auditing is one measure that a com-

48. *Id.*

49. *Id.* § 8B1.2

50. *Id.* § 8D1.1(a)(3).

51. *Id.* § 8A1.2 (Application Note K). An "effective program" would include: (1) establishing compliance standards and procedures reasonably capable of reducing the prospect of criminal conduct; (2) making sure that specific individuals within its high level personnel are assigned responsibility for the relevant area of conduct, *e.g.*, environmental compliance; (3) exercising due care not to delegate responsibility to irresponsible individuals; (4) communicating the standards and procedures effectively by training practical publications that workers can understand; (5) making sure that the company is actually achieving compliance by establishing an effective monitoring and auditing system that would include a "hotline" reporting system for employees to use; (6) setting in place appropriate internal disciplinary mechanisms; and (7) after an offense is detected, responding appropriately to prevent future offenses. *Id.*

52. *Id.* § 8D1.4(a), (b)(2). An example of such an advertisement appeared in a Wilmington, North Carolina newspaper on March 23, 1989 and reads as follows:

WE APOLOGIZE FOR POLLUTING THE ENVIRONMENT

General Wood Preserving Company recently pled guilty in federal court to illegally disposing of hazardous waste in 1985 at its plant in Leland, North Carolina. As a result of that crime, General Wood Preserving was fined \$150,000, and was ordered to publish this advertisement. We are sorry for what we did, and we hope that our experience will be a lesson to others that environmental laws must be respected.

Board of Directors

General Wood Preserving Co., Inc.

WILMINGTON MORNING STAR, March 23, 1989 at 10B.

pany can take to reduce the risk of criminal and civil exposure. Not only does discovering and correcting environmental problems by means of a voluntary compliance program make good business sense, it may also be a means of convincing the government not to pursue a matter criminally.⁵³

Congress has considered a number of measures which would mandate that companies convicted of environmental criminal violations conduct compliance audits to ensure that the violations are not repeated.⁵⁴ The Federal Omnibus Violent Crime Control Act of 1991,⁵⁵ which was passed by the Senate, had included an amendment requiring any organization convicted of an environmental felony to hire an independent auditor to conduct an environmental compliance audit.⁵⁶ The House of Representatives passed a version of the crimes measure in October 1991 without the audit amendment,⁵⁷ and the amendment has been deleted by a joint conference committee,⁵⁸ in effect killing the measure.

Additionally, on July 1, 1991, the Environment and Natural Resources Division of DOJ published a memorandum containing guidelines on prosecutorial discretion in environmental criminal cases where the violator has made voluntary disclosure, cooperated with regulatory authorities and/or implemented a system of environmental compliance auditing or other compliance monitoring systems.⁵⁹ While the guidelines are merely a directive for federal prosecutors and create no additional rights for those in the regulated community, they do indicate that in appropriate cases, companies may potentially avoid criminal prosecution for serious environmental offenses when they have made their best efforts to prevent and detect such violations.

IV. PROVING ENVIRONMENTAL CRIMES

Because environmental crimes are considered health and welfare offenses, the government's burden of proof is substan-

53. See generally AUDITING IN CRIMINAL ENFORCEMENT, ENVIRONMENTAL FORUM 36-43 (Jan.-Feb. 1992).

54. See *infra* notes 56-59 and accompanying text.

55. S. 1241, 102nd Cong. 1st Sess. (1991).

56. *Id.*

57. H.R. 3371, 102nd Cong., 1st Sess. (1991).

58. H.R. CONF. REP. NO. 405, 102nd Cong., 1st Sess. (1991).

59. See United States Department of Justice, Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator (July 1, 1991) (on file with author).

tially easier to meet than it is in the prosecution of more traditional crimes.⁶⁰ In criminal cases which potentially affect the health and welfare of the general public, the government must prove only the general intent of the violator to commit the acts charged, as opposed to specific intent to engage in unlawful conduct.⁶¹ Thus, where the offense requires "knowing" conduct, the government may prove the defendant's knowledge simply by showing that the action was not done by accident or mistake.⁶² For example, to obtain a conviction for illegal disposal of hazardous waste, the government need only prove that the defendant knowingly buried drums containing solvents and degreasers and knew of the contents' potential for harm. The government need not prove that the defendant knew the contents of the drums were listed as hazardous waste, that he knew he needed a permit, or that he intended to violate the law.⁶³

Two developing legal doctrines have also facilitated the government's ability to prove environmental crimes. The first is the responsible corporate officer doctrine.⁶⁴ The government has argued that the responsible corporate officer doctrine, derived from two Supreme Court cases, *United States v. Park*,⁶⁵ and *United States v. Dotterweich*,⁶⁶ holds that (1) a corporate officer, (2) who is directly responsible within the management scheme for the conduct

60. *United States v. International Minerals*, 402 U.S. 558 (1971); *United States v. Dotterweich*, 320 U.S. 277 (1943). *Dotterweich* involved the liability of Buffalo Pharmacal Company and its president for violations of the Federal Food, Drug and Cosmetic Act (21 U.S.C. §§ 301-92 (1938)). 320 U.S. at 278. The Court described the standard under the Act for proving wrongdoing as follows: "Such legislation disposes with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." *Id.* at 281. See also *United States v. Hayes Int'l, Inc.*, 786 F.2d 1499 (11th Cir. 1986).

61. See *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir.), *cert. denied sub nom.*, *Angel v. United States*, 469 U.S. 1208 (1984); *United States v. Hayes International, Inc.*, 786 F.2d 1499 (11th Cir. 1986); see also *United States v. Hoflin*, 880 F.2d 1033 (9th Cir. 1989) *cert. denied* 493 U.S. 1083 (1990); see also *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990) *cert. denied* 1991 U.S. Lexis 1605 (March 18, 1991).

62. See, e.g., *Hayes International*, 786 F.2d at 1503. The statute at issue in the *Hayes International* case, § 6928 of CERCLA, "is not drafted in a manner which makes knowledge of illegality an element of the offense." *Id.* The court also found that § 6928(d)(1) was "a public welfare statute, involving a heavily regulated area with great ramifications for the public health and safety." *Id.*

63. See, e.g., *United States v. Baytank (Houston) Inc.*, 934 F.2d 608 (5th Cir. 1991).

64. See *infra* notes 66-72 and accompanying text.

65. 421 U.S. 658 (1975).

66. 320 U.S. 277 (1943).

in question, and (3) knew that the type of improper activity alleged was occurring, may be held criminally liable for environmental crimes committed by his subordinates.⁶⁷ It is not clearly established, however, that the responsible corporate officer doctrine dispenses with the requirement of actual knowledge. In *United States v. MacDonald & Watson Waste Oil Co.*,⁶⁸ for example, the trial court had instructed the jury that if the defendant, the head of the corporation, met the three criteria set forth above, it could find the defendant liable for a known violation under RCRA, even absent proof of his actual knowledge of the specific violation.⁶⁹ The Court of Appeals reversed the conviction, holding that guilty knowledge could not be inferred.⁷⁰ However, in *United States v. Brittain*,⁷¹ the court noted in *dicta* that under the Clean Water Act, "a 'responsible corporate officer,' to be criminally liable, would not have to 'willfully or negligently' cause a permit violation. Instead, the willfulness or negligence of the actor would be imputed to him by virtue of his position of responsibility."⁷² While the scope of the responsible corporate officer doctrine remains uncertain, government prosecutors will continue to argue that corporate officers should be held criminally responsible for the misconduct of those who work under their supervision although their knowledge of such conduct is minimal.

The second doctrine which helps the government prove criminal conduct is the doctrine of collective corporate knowledge.⁷³ Under this doctrine, the government may prove the collective knowledge of the company to commit an environmental violation by proving that certain employees took the requisite actions and that other employees possessed the requisite *mens rea*, even where it cannot prove that any single employee both took the requisite action and had sufficient intent.⁷⁴ The combined use of the collective knowledge doctrine and the longstanding rule of corporate criminal liability—that a company may be held criminally liable for the acts of an employee acting within the scope of his duties, no matter how low he is in the chain of com-

67. See, e.g., *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 50-51 (1st Cir. 1991).

68. 933 F.2d 35 (1st Cir. 1991).

69. *Id.* at 50.

70. *Id.*

71. 931 F.2d 1413 (10th Cir. 1991).

72. *Id.* at 1419.

73. *United States v. Bank of New England*, 821 F.2d 844 (1st Cir.), cert. denied, 484 U.S. 943 (1987).

74. *Id.* at 856.

mand—make the threat of corporate criminal prosecution decidedly real.⁷⁵

The expansion of legal doctrines which ease the government's burden of proving knowledge or intent has been accompanied by an increase in the number of environmental criminal provisions requiring a lower threshold of *mens rea*. The Clean Water Act, and now the Clean Air Act, for example, both contain criminal misdemeanor provisions which require the government to prove only negligent conduct.⁷⁶ As both the *Ashland Oil* and *Exxon* prosecutions⁷⁷ demonstrate, the impact of a conviction for an environmental misdemeanor should not be underestimated. Penalties for such negligent conduct can, in some instances, actually exceed those for knowing or intentional conduct.⁷⁸

V. CONCLUSION

Each of the developments discussed above augurs an increase in environmental criminal enforcement efforts in the 1990's. As enforcement efforts have expanded, the regulated community has become increasingly vocal in its call for protective measures to guard against what it views as arbitrary decision-making regarding which violations are selected for criminal prosecution rather than administrative or civil enforcement. A number of developments, such as DOJ's recently published memorandum on voluntary disclosure,⁷⁹ and the provision in the new sentencing guidelines on effective compliance programs,⁸⁰ suggest that a balance may be reached which continues to punish misconduct but also begins to reward good faith efforts to achieve environmental compliance.

75. One issue which escaped public attention in the criminal prosecution of Exxon Corporation for the Exxon Valdez oil spill was that the government indicted both the company that owned and operated the Exxon Valdez oil tanker, Exxon Shipping Company, and also the parent company, Exxon Corporation. This is a relatively novel proposition in criminal law and was seriously challenged by the company in pre-trial motions to dismiss. The government did not base its right to prosecute on an alter ego theory, but rather, on a theory of criminal agency.

76. See 33 U.S.C. § 1319(c)(1) and 42 U.S.C. § 7413(c)(4) (1991).

77. *United States v. Ashland Oil Inc.*, 88-146 (W.D. Pa. 1988); *Exxon*, A-90-015-CR.

78. Alternative Fines Act, 18 U.S.C. § 3571(d).

79. See *supra* note 60 and accompanying text.

80. See *supra* note 38 and accompanying text.

