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ENVIRONMENTAL CRIMES AND THE FEDERAL EMPLOYEE:
ENVIRONMENTAL COMPLIANCE IS PART OF THE MISSION

A Thesis
Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, or any other governmental agency.

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ENVIRONMENTAL CRIMES AND THE FEDERAL EMPLOYEE:
ENVIRONMENTAL COMPLIANCE IS PART OF THE MISSION

by Captain James P. Calve

ABSTRACT: This thesis analyzes the liability of federal employees to environmental criminal prosecutions. Environmental crimes impose criminal liability under unique legal theories that erode traditional bases of liability. Federal supremacy and sovereign immunity protect federal employees in most instances from state criminal prosecution. However, federal employees must make environmental compliance a part of their mission to ensure that they avoid prosecution for environmental crimes.

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"Well, is it possible, Mr. Dee, that when [the environmental coordinator] raised those issues that you simply turned off your ears because environmental compliance was not something that was important to your mission?"

- United States v. Dee¹

"Federal employees are not above the law."

- United States v. Dee²

I. INTRODUCTION

Environmental prosecutions are a threat to federal employees. In addition to adverse administrative personnel actions that may result from their violation of environmental laws, federal employees face the possibility of felony conviction and jail.

On June 15, 1988, a federal grand jury in the Northern District of New York returned a forty-two count indictment against a Department of Army civilian employee at Fort Drum, New York for illegally disposing of old cans of waste paint. On October 14, 1988, a jury found him guilty of failing to report the disposal, as federal law requires.³

On June 28, 1988, a federal grand jury in the District of Maryland indicted three civilian managers at Aberdeen Proving Grounds on felony charges for illegally storing and disposing of toxic chemicals.⁴ The trial generated a great deal of publicity and acrimony. The Assistant United States Attorney who tried the case charged the defendants with abandoning

their responsibility to comply with environmental laws.⁵ The defendants countered with allegations that the government was conducting a witch hunt.⁶ On February 23, 1989, a jury returned guilty verdicts against each defendant on various counts of the indictment.⁷

These cases are not aberrations. Protection of the environment is a topic of great concern to many Americans.⁸ Americans annually generate three to four billion tons of waste.⁹ Besides consuming limited resources, this activity, if unregulated, threatens human health and the environment.¹⁰ In order to protect the public and the environment from persons who ignore environmental regulations, the federal government has turned to criminal sanctions as a way to enforce environmental laws.

The federal government finds itself on both sides of the issue, however.¹¹ In its role as regulator, the federal government enacts and enforces air, water, hazardous waste, and other environmental laws. As the national government, it owns almost one-third of the land in the United States¹² and operates 27,000 installations and 387,000 facilities.¹³ Although these facilities perform missions that are vital to the country, they pollute the environment.¹⁴

Of course, pollution at federal facilities does not just occur; it results from the conscious actions and decisions of federal employees. Accordingly, Executive Order 12088 directs federal agencies and their employees to comply with federal, state, and local environmental laws.¹⁵

Most states actively regulate pollution. Federal supremacy and sovereign immunity have shielded federal activities from state regulation and enforcement. In the past decade Congress has waived federal supremacy and sovereign immunity to many state regulatory requirements. The waivers also allow states to enforce their standards against federal agencies with suits for injunctive and civil relief.

State environmental prosecutions are just over the horizon. Like the federal government, state and local governments increasingly prosecute environmental crimes.¹⁶ They want the ability to prosecute federal employees.¹⁷ A recently enacted federal statute, the Medical Waste Tracking Act of 1988, allows states to prosecute federal employees. Congress may soon amend other federal environmental laws to allow states to prosecute federal employees for violating state air, water, and hazardous waste laws.

The Aberdeen and Fort Drum prosecutions are not the final chapter of federal employee liability for environmental crimes. At least they are not the final chapter if federal employees disregard their clear message--federal employees, like other citizens, are not above the law. The job of every federal employee includes environmental compliance.

Environmental crimes are a particular threat because they punish conduct that many people, including the defendants at Aberdeen and Fort Drum, consider "innocent" behavior. If the defendants recognized their behavior as incorrect, they viewed it as a regulatory offense and not a crime. The defendants in

the Aberdeen and Fort Drum cases were outstanding federal employees. They are convicted felons, because the prosecution proved that they neglected their responsibilities under environmental laws.

This article examines federal employees' liability to federal, state, and local environmental criminal prosecution. Part I of the article explains the reasons for the federal government's use of criminal sanctions to enforce environmental laws. Part II discusses the unique legal theories under which these statutes impose criminal liability and the way in which those theories affect federal employees. Part III examines federal employees' criminal liability under particular federal environmental statutes. Part IV explores their criminal liability under state environmental laws.

Part V recommends ways that federal employees can avoid criminal prosecution while doing their jobs and accomplishing their federal missions. Environmental compliance requires a "combined arms" approach involving employees with widely varying skills. Federal employees must also plan for environmental compliance. Finally, environmental compliance requires a change in attitude.

II. FEDERAL ENFORCEMENT OF ENVIRONMENTAL LAWS

Environmental laws increasingly regulate every aspect of society. Environmental compliance is often expensive.¹⁸ The cost and perceived unimportance of many environmental laws create incentives to avoid

compliance. Given this reality, environmental statutes provide a variety of administrative, civil, and criminal sanctions to enforce compliance.¹⁹ Federal employees must understand criminal sanctions within this context.

A. Administrative Sanctions

The Environmental Protection Agency (EPA) has broad administrative authority to promote compliance with environmental laws. When EPA discovers a violation, it can notify the offender of the nature of the violation, a proposed schedule for compliance, and the penalty for noncompliance. If the violation continues, EPA can file a compliance order or a complaint assessing penalties.²⁰ During fiscal year 1989, EPA issued 4,017 administrative orders.²¹

B. Civil Sanctions

If violators ignore administrative sanctions, EPA can seek civil sanctions. Civil sanctions, normally assessed per day of violation, eliminate the economic incentive to evade regulatory requirements.²² Some statutes authorize a penalty directly related to the benefit gained by noncompliance.²³ In fiscal year 1989, EPA referred 364 civil cases to the Department of Justice (DOJ) for enforcement.²⁴ Courts assessed \$24 million in civil penalties.²⁵

The Unitary Executive Theory limits EPA's ability to impose administrative and civil sanctions on federal

agencies. Under this theory, DOJ refuses to litigate interagency disputes for constitutional, ethical, and practical reasons.²⁶ Although the Unitary Executive Theory insulates federal agencies and employees from civil and administrative sanctions, it leaves criminal sanctions as the only means to enforce compliance at federal facilities.

Congress has considered legislation to circumvent the Unitary Executive Theory.²⁷ Until Congress acts, the Unitary Executive Theory may give federal employees a false sense of security. If they misconstrue the absence of civil and administrative regulatory pressure as a carte blanche to disregard environmental laws, they set themselves up for criminal prosecution.

C. Criminal Sanctions

The ultimate goal of criminal sanctions is deterring intentional violations of environmental laws.²⁸ Civil sanctions do not deter violations as well as criminal penalties. They penalize the corporate entity, and ultimately the shareholder or consumer. Consequently, corporate officers, whose policies and decisions determine whether the corporation complies with environmental laws, view civil penalties as a cost of doing business.²⁹ That attitude is incompatible with the purpose of environmental laws--protecting public health and the environment.

Criminal sanctions address this problem. They punish the person responsible for violating the law.³⁰

They drive home the fact that noncompliance is often a crime rather than a business decision. The adverse publicity and the stigma of a criminal prosecution provide additional incentives to voluntarily comply with environmental laws.³¹ Criminal sanctions get the attention of the regulated community and persuade it to obey the law. If the Aberdeen prosecution provides any indication, criminal sanctions have the same effect on federal employees.³²

Despite the recognized deterrent value of criminal sanctions, federal officials did not rely on them until very recently. Several factors account for this apparent anomaly.

1. Criminal Enforcement at EPA

The EPA did not exist until 1970.³³ Its first task was to administer new, complex statutes, all of which required regulatory implementation. The compliance deadlines for the Clean Air and Clean Water Acts did not arrive until 1977. In 1976, Congress enacted the Resource Conservation and Recovery Act, which imposed new regulatory requirements upon EPA. Finally, EPA spent a great deal of time defending itself against lawsuits attacking its efforts to enforce compliance and implement the statutes.³⁴

When it began to enforce compliance with environmental statutes, EPA initially relied on administrative and civil sanctions.³⁵ Civil sanctions were easier to impose, because the burden of proof was lower.³⁶ Also, the breadth and complexity of the

recently enacted, and amended, statutes necessitated a grace period for the regulated community to understand its obligations and for courts to gain experience in civilly enforcing the statutes.³⁷

On January 5, 1981, EPA created the Office of Criminal Enforcement within its Office of Enforcement and Compliance Monitoring.³⁸ Emphasis on criminal enforcement as part of EPA's overall compliance effort increased accordingly.³⁹ In March 1982, the Federal Bureau of Investigation (FBI) and EPA executed a memorandum of understanding in which the FBI agreed to investigate 30 environmental crimes per year.⁴⁰

In October 1982, EPA hired its first criminal investigators, allowing it to investigate its own cases in addition to those investigated by the FBI.⁴¹ Although most of the investigators had no background in environmental law, they were experienced criminal investigators. DOJ subsequently deputized them as United States Marshals, authorized to carry weapons and execute search and arrest warrants.⁴²

EPA also created the Office of Criminal Investigations (OCI) within its National Enforcement Investigations Center (NEIC) in Denver, Colorado. The OCI has ten offices that serve EPA's ten Regional Offices. Each Regional Office has a "criminal contact person" who advises United States Attorneys and others in criminal cases.⁴³ To strengthen state enforcement, the NEIC funds four regional organizations, which forty states have joined.⁴⁴ In FY 1988, EPA referred 59 criminal cases to DOJ.⁴⁵

2. Criminal Enforcement at DOJ

At the same time as EPA focused resources on criminal enforcement, DOJ created the Environmental Crimes Unit (ECU) within the Environmental Enforcement Section of its Land and Natural Resources Division.⁴⁶ DOJ staffed the ECU with attorneys who had criminal and environmental law experience.⁴⁷ DOJ subsequently elevated the ECU to the status of a section within the Land and Natural Resources Division.⁴⁸ It staffed the Environmental Crimes Section with fifteen attorneys, who soon developed the expertise to handle increasingly complex cases.⁴⁹

Initially, DOJ received little assistance from the field, because United States Attorneys' Offices (USAO) lacked the expertise and interest to prosecute environmental crimes. (In this respect, the Aberdeen prosecution was an aberration; the case proceeded largely because the Assistant United States Attorney who tried the case previously worked for EPA⁵⁰). This situation has changed, however. Many USAOs have prosecutors working full-time on environmental crimes.⁵¹

DOJ prosecutes all cases.⁵² Depending upon the complexity of a case, attorneys of DOJ's Environmental Crimes Section have sole responsibility with administrative support from USAOs, joint responsibility with the USAOs, or monitoring responsibility.⁵³

Statistics reflect the increased emphasis on prosecuting environmental crimes. During the 1970s, DOJ prosecuted twenty-five cases.⁵⁴ Prosecutions arose

as ancillary matters in compliance cases, or they stemmed from particularly egregious conduct.⁵⁵ In contrast to these earlier efforts, from 1983 through January 1990, DOJ indicted almost 600 individual and corporate defendants for environmental crimes and convicted over 450 of those indicted.⁵⁶

3. Criminal Enforcement Policies

Despite EPA and DOJ's increased emphasis on prosecuting environmental crimes, violations exceed both agencies' ability to investigate and prosecute.⁵⁷ As a result, they have investigative priorities to ensure that they address violations that pose the greatest threat to public health and the environment.⁵⁸ These priorities explain, in part, the Aberdeen and Fort Drum prosecutions.

Investigators first try to identify persons who disregard the regulatory system. Examples include "midnight dumpers" who dispose of hazardous wastes without a permit.⁵⁹ A hazardous waste "recycler" who outfits a truck with a 750 gallon tank and spray nozzle so that his employees can drive the truck down rural country roads spraying PCBs onto the ground deserves criminal prosecution.⁶⁰ Equally important, federal regulators want persons with similar attitudes to understand that "midnight dumping" is a crime.

Another example is the Aberdeen prosecution. The defendants routinely disposed of highly toxic chemicals in a sump that could not neutralize them. The defendants, who were chemists, used a "sniff test" to

determine which substances the sump would neutralize. If the substances did not smell "hazardous," the defendants disposed of them in the sump, which ultimately discharged the untreated chemicals through a sewer system into a stream.⁶¹

Because environmental regulation relies heavily on self-monitoring and reporting, the next priority is persons who disregard regulatory requirements and cover their actions through false reporting.⁶² The Fort Drum prosecution is an interesting twist on this problem. The defendant ordered several employees to dispose of five-gallon cans of waste paint in a man-made pit that had filled with water. Several weeks later he directed another employee to use a tractor to cover the pond and paint cans with dirt. The jury convicted him of failing to report the disposal as federal law requires.⁶³

When it investigates an environmental crime, DOJ tries to identify, prosecute, and convict the highest ranking person responsible for the violation.⁶⁴ The government wanted to indict the commander of Aberdeen Proving Grounds but could not gather enough evidence to try him with the other defendants.⁶⁵

Commentators have criticized the lenient sentences that courts impose on persons convicted of environmental crimes. Many defendants serve little or no time in jail.⁶⁶ The federal sentencing guidelines, recently upheld by the Supreme Court,⁶⁷ will eliminate much of that criticism.⁶⁸ Under the guidelines, persons convicted of "serious" offenses serve a minimum period of confinement.⁶⁹ Environmental crimes are a

category of offense under the guidelines.⁷⁰ Had they been sentenced under the guidelines, the Aberdeen defendants would have served a minimum of fifteen months in jail.⁷¹

Federal employees have another incentive to avoid criminal prosecution. Although the court sentenced each of the Aberdeen defendants to three years' probation and 1,000 hours of community service, they collectively spent over \$100,000 defending themselves. DOJ will not represent federal employees in federal criminal prosecutions.⁷² The federal government will not provide funds for private counsel, either.⁷³

III. CORPORATE LIABILITY UNDER PUBLIC WELFARE STATUTES

In addition to federal regulators' increased emphasis on criminal prosecutions, federal employees face another threat. Environmental prosecutions involve federal employees in white-collar crime, which can reach all federal employees.⁷⁴ Environmental crimes also impose liability under controversial legal theories that apply to federal employees. Criminal liability normally requires the concurrence of a mens rea (guilty mind) and an actus reas (guilty act).⁷⁵ Environmental crimes erode both bases of liability while, in most cases, imposing felony sanctions.

A. Public Welfare Statutes

Environmental crimes punish persons who lack the mens rea typically associated with felonies such as

murder and larceny. Mr. Dee was the father of binary chemical weapons. His work was important to national security. The government never alleged that Mr. Dee intended to commit an environmental crime in the sense that a murderer intends to kill his victim. The government simply proved that he ignored his duties under environmental laws.

The government wanted to indict the commander of Aberdeen Proving Grounds not because he personally took any of the illegal actions but because he knew of, or should have known of, the defendants' illegal activities. He had a duty to ensure that his command complied with environmental laws.⁷⁶

While this approach may trouble some, the alternative is worse. Allowing the defendants to store and dispose of hazardous wastes in complete disregard of regulatory requirements designed to protect public health and welfare is unacceptable. Allowing the commander of an installation to remain blissfully ignorant of the environmental crimes committed "on his watch" is equally unacceptable. It is also a crime.

1. Traditional Criminal Liability

To prevent the criminalizing of innocent conduct, the common law required proof that a mens rea or guilty mind motivated the defendant's conduct.⁷⁷ Courts and commentators also refer to mens rea as scienter or criminal intent. The terms that defined mens rea at common law--"malicious," "fraudulent," "felonious," "with intent to," "willful and corrupt"--clearly

conveyed the sense of culpability based on a guilty or "criminal" mind.⁷⁸

Crimes that require specific intent or subjective fault most closely embody the traditional mens rea. The person who purposely⁷⁹ or knowingly⁸⁰ commits a criminal act has much the same appearance of guilt as the person who acted maliciously or feloniously at common law.⁸¹

The requirement of subjective intent or fault begins to erode with general intent, or "objective fault," crimes.⁸² These statutes impose a duty of care and punish acts committed negligently or recklessly in regard to that duty. A defendant's subjective state of mind is irrelevant to guilt or culpability.⁸³

2. Strict Criminal Liability

With the emergence of "public welfare offenses," legislatures imposed strict criminal liability without requiring proof of subjective or objective fault.⁸⁴ Not surprisingly, the statutes became the subject of strong debate, because they offended the deeply-rooted principle of basing criminal liability on a guilty or criminal mind.⁸⁵ As a result, courts will not construe a statute to impose strict criminal liability absent clear legislative intent.⁸⁶

Although they do so at a high cost to individual defendants, strict liability public welfare statutes serve an important purpose. They regulate activities that threaten the public welfare--activities involving food, narcotics, industrial safety, traffic, and the

environment.⁸⁷ They are Congress' response to the dangers that exist in modern, industrialized society.

Public welfare statutes impose strict liability to force the regulated community to learn of, and comply with, the law. "In the interest of the larger good [the statute] puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."⁸⁸ Congress weighed the equities and chose to put the risk on the regulated community, which can inform itself of the dangerous conditions that it creates, rather than on an innocent public, helpless to protect itself.⁸⁹

Imposing strict criminal liability under complex public welfare statutes does not offend due process, at least when the statutes impose misdemeanor sanctions. The emphasis of the statutes is on achieving some social good--protecting the public health and welfare--rather than upon punishing criminal conduct in the traditional sense involving malum in se offenses such as murder, robbery, and arson.⁹⁰

3. Public Welfare Hybrids

Sacrificing individual liberties to the public welfare does not support public welfare statutes that impose felony sanctions.⁹¹ When they impose felony sanctions, as most environmental statutes do, public welfare statutes no longer involve minor regulatory offenses. They are bona fide criminal statutes. Regulators and prosecutors treat environmental crimes

as serious offenses, and they seek criminal sanctions to punish and deter that criminal conduct.⁹²

Fortunately, environmental statutes that impose felony sanctions also require "knowing" violations. These so-called public welfare hybrids fall somewhere between strict liability public welfare offenses and traditional felonies. Unfortunately, their mens rea does not provide much protection to federal employees.

4. Element Analysis

Analysis of public welfare hybrids requires not only interpretation of the mens rea element and its definition but also analysis of the extent to which that mens rea--the terms "purpose," "knowledge," "recklessness," or "negligence"--modifies each element of an offense.⁹³ Commentators term this approach "element analysis."⁹⁴

The majority of courts treat public welfare hybrids more like strict liability public welfare statutes than traditional felony crimes. They impose strict liability for some elements of the offense and require a reduced "knowledge" or scienter as to others.⁹⁵

In traditional felony crimes, "knowledge" and "willfulness" require proof of specific intent or knowledge of one's actions and their consequences. In public welfare hybrids "knowledge" and "willfulness" correspond to general intent or awareness of one's actions but not their consequences.⁹⁶

The Aberdeen prosecution illustrates the distinction. Prosecutors had to prove that the defendants were aware that they disposed of harmful substances. Prosecutors did not have to prove that the defendants knew that the substances were hazardous as defined by federal law, that disposal was illegal, that the disposal polluted a nearby stream and threatened the environment, or that the law required a permit to dispose of the substances.

5. Ignorance of the Law

Although ignorance of the law does not excuse criminal conduct, defendants routinely argue that the mens rea in public welfare hybrids indicates Congress' intent to require knowledge of regulatory requirements as an element of the offense. They argue that public welfare hybrids require proof that a defendant knew that his conduct violated the law.

The Aberdeen defendants raised this defense.⁹⁷ Should the defendants at Aberdeen have known that pouring toxic chemicals into a sump that could not neutralize them was a crime? Should the defendant at Fort Drum have known that throwing paint into a pond was a crime? Conversely, should society expect them to know this or should it allow their purported, or actual, ignorance to excuse their conduct when that conduct threatens the public welfare?

Traditionally, "ignorance of the law" did not excuse criminal behavior. To the extent that an accused murderer could not cite the statute that he

violated, his "ignorance of the law" did not excuse his conduct. Moreover, to the extent that he claimed ignorance of the law's proscription against the act of killing another, he had no defense.⁹⁸

Courts extend this principle to public welfare hybrids despite the fact that such statutes regulate activities that are not inherently immoral.⁹⁹ This interpretation does not offend due process, because public welfare hybrids regulate activities that a reasonable person should realize is subject to regulation.¹⁰⁰ Public welfare hybrids merit the same treatment as other criminal statutes.¹⁰¹

The Supreme Court recognized ignorance of the law as a defense in Lambert v. California.¹⁰² The Court struck down a criminal ordinance that required convicted felons who resided in Los Angeles in excess of five days to register with the police. The ordinance was not a public welfare statute. Thus, Lambert represents less of an exception to the rule that ignorance of the law is no excuse than it does a logical extension of the due process considerations underlying public welfare statutes.¹⁰³ If a criminal statute does not involve activity that affects the public welfare, it may not impose strict liability consistent with due process notice requirements, because it punishes "innocent" conduct.¹⁰⁴

The phrase "ignorance of the law is no excuse" does not apply when knowledge of a legal requirement is an element of an offense.¹⁰⁵ For example, Congress could require knowledge of a facility's permit status as an element of a hazardous waste disposal crime. The

prosecution would not have to prove that the defendant knew of the law proscribing his actions. Nor would the prosecution have to prove knowledge of the requirement to have a permit; knowledge of the law's requirements is presumed.

The prosecution would have to prove that the defendant disposed of hazardous waste knowing that the disposal exceeded the facility's permit conditions or that the facility lacked a permit. The prosecution could not convict a person who reasonably believed that the disposal complied with permit conditions or that the facility had a permit authorizing the disposal.

Courts are reluctant to interpret knowledge of a statutory requirement as an element of a public welfare hybrid offense.¹⁰⁶ This judicial approach requires the regulated community to learn the requirements affecting its activities and to ensure that its activities comply with those requirements.¹⁰⁷ Defendants cannot escape liability through willful ignorance.

B. Responsible Corporate Officer Doctrine

The duty to learn of, and comply with, the requirements of public welfare statutes extends to federal employees at all levels. Public welfare statutes impose criminal liability on federal employees and supervisors who fail to do so. Their method of imposing liability differs from traditional principles of corporate liability.

Under the doctrine of respondeat superior, an organization is liable for the crimes of its employees

who act within the course and scope of their employment.¹⁰⁸ Its officers are not.

To incur criminal liability under traditional theories, corporate officers must perform or direct the criminal activity.¹⁰⁹ Imposing liability on a supervisor who orders subordinates to dispose of waste paint in a pond is an example of traditional corporate criminal liability. Environmental laws and other public welfare statutes impose liability under this theory.

They also extend criminal liability to corporate officers and supervisors who have not taken, and may not even be aware of, the prohibited activities.¹¹⁰ They eliminate actus reas as a basis of liability. Convicting a supervisor for improperly storing hazardous waste that belongs to his directorate but over which he exercises no direct control is an example of the additional liability that public welfare statutes impose. The supervisor is liable for failing to learn of hazardous waste storage requirements and to ensure that his directorate complies with those requirements.

1. "Responsible Share"

The Supreme Court recognized that the literal enforcement of public welfare statutes in a large organization "might operate too harshly by sweeping within its condemnation any person however remotely entangled" in the activity.¹¹¹ In United States v. Dotterweich, it limited liability to employees who

have a "responsible share in the furtherance of the transaction which the statute outlaws."¹¹² The Court did not define the categories of employees who have a "responsible share."¹¹³

In United States v. Park,¹¹⁴ the Court elaborated on its earlier holding in Dotterweich. Responsible corporate officers--those with a "responsible share" in the criminal transaction--included all employees who had the responsibility and authority to prevent violations of a public welfare statutes.¹¹⁵

In Park, the government convicted a corporation, Acme Markets, and its president and chief executive officer (CEO), Mr. John R. Park, for allowing food that was held for sale in Acme's Baltimore warehouse to become contaminated by rodents. The contamination violated the Food, Drug, and Cosmetic Act, a strict liability public welfare statute.¹¹⁶ Acme was a national retail food chain with approximately 36,000 employees, 874 retail outlets, and sixteen warehouses.¹¹⁷

The holding of Park is important to senior federal employees. It illustrates that public welfare statutes impose legal duties on supervisors and officers who are far-removed from the day-to-day operations of the organization. It also illustrates the ease with which the government establishes liability for violations of a public welfare statute.

Mr. Park's liability resulted from two factors--the duty imposed by the Act to seek out and prevent violations and Mr. Park's corporate responsibility and authority, which enabled him to meet

that duty.¹¹⁸ Although the opinion in Park does not address how the responsible corporate officer doctrine applies to a public welfare hybrid, it provides a good indication.

2. Park and Public Welfare Hybrids

The addition of mens rea in public welfare hybrids, such as environmental laws, would not affect the first factor, a supervisor's authority and responsibility. Authority and responsibility depend on corporate or organizational structure and not on a statute's mens rea requirements.

The government established Mr. Park's responsibility and authority through Acme's by-laws, as interpreted by Acme's vice president for legal affairs. Mr. Park's duties included "general and active supervision of the affairs, business, offices and employees of the company." As chief executive officer, Mr. Park delegated normal operating duties, including sanitation, but retained the "big, broad, principles of the operation of the company" and the responsibility of seeing that they work together.¹¹⁹

The Court emphasized that Mr. Park's liability arose not from his corporate position per se but from the responsibility and authority that his position gave him to prevent violations of the Act.¹²⁰ The distinction is virtually meaningless, however, because corporate presidents and CEOs are normally responsible for the overall operation of a corporation.

Commanders and supervisors have similar authority and responsibility. Agency regulations, directives, and policies delineate responsibility and authority in broad terms. Job descriptions also define responsibilities. In addition, commanders have inherent authority over, and responsibility for, the activities on their installation.¹²¹ Their authority and responsibility extends to environmental compliance.¹²²

Whether these general delineations of authority and responsibility are sufficient to establish culpability is a question of fact.¹²³ The Aberdeen prosecutors used local regulations and civilian job descriptions to establish Mr. Dee's responsibility and authority for the illegal storage and disposal of hazardous waste within his directorate.¹²⁴

3. Willful Ignorance

Although mens rea does not affect authority and responsibility, it might arguably affect the duties imposed by a public welfare hybrid. The issue is whether a public welfare hybrid imposes a duty to seek out violations and a duty to prevent violations from occurring. If it does, ignorance of violations within a person's authority and responsibility is not a defense when the ignorance results from a failure to meet those duties.

The Court's treatment of objective impossibility as a defense to violations of public welfare statutes strongly suggests that willful ignorance is not a

defense to violations of public welfare hybrids.¹²⁵ Mr. Park, in effect, raised the defense by arguing that, as CEO of a large corporation, he delegated many duties to subordinates whom he considered dependable.¹²⁶ He relied on his subordinates to meet his obligations under the Act. Mr. Park argued that the violations occurred despite his authority and responsibility.¹²⁷

The government rebutted Mr. Park's defense by proving that regulators informed him of violations at Acme's Philadelphia warehouse in April 1970. When Mr. Park learned of his subordinates' failure to prevent violations at the Philadelphia warehouse, he "knew" that he could not rely on his subordinates to prevent contamination at Acme's other warehouses.¹²⁸

The government introduced evidence of Mr. Park's knowledge of the violations for the limited purpose of "rebutting" his defense of relying on subordinates. Mr. Park had a duty to seek out and prevent violations at Acme's warehouses. He was not powerless to prevent violations at Acme's Baltimore warehouse two years later; he failed to supervise his subordinates.¹²⁹ Thus, supervisors cannot delegate away responsibility and wait until they "know" of violations.¹³⁰

4. Duty to Supervise Subordinates

The duty to supervise subordinates is a hallmark of military command. Abandoning that obligation can have dire consequences as illustrated by In re Yamashita.¹³¹ The holding in In re Yamashita parallels

the responsible corporate officer doctrine in Park.¹³² The Articles of War imposed a duty on General Yamashita, who commanded Japanese forces in the Phillipines, to control the soldiers of his command in order to protect prisoners of war and civilians. His failure to take measures within his authority to meet that duty was culpable.¹³³

5. Duties under Hybrids

Although their obligations vary with their authority and responsibility, all federal employees face liability for environmental crimes. They are liable as principals if they perform, command, or authorize a criminal act.¹³⁴ They have a duty to disobey improper orders, such as an order to dump paint cans into a pond. If prosecutors had indicted the employees who actually dumped the paint cans into the pond, the employees could not have avoided liability by claiming that they acted within the course of their employment or pursuant to orders.¹³⁵

Commanders and supervisors do not have a duty to inspect every facility or warehouse within their control for criminal violations of environmental laws. They do have an obligation to institute policies and procedures to ensure that their organizations comply with environmental laws. They must also supervise their subordinates. They cannot assume that their subordinates will flawlessly perform assigned duties.

IV. LIABILITY UNDER FEDERAL ENVIRONMENTAL STATUTES

Federal regulators impose criminal penalties under a wide variety of environmental laws that regulate air, water, hazardous waste, and other types of pollution. With one exception the statutes require proof of a mens rea. They also impose a positive duty on the regulated community to know their requirements. Most impose felony penalties, and Congress continues to amend the statutes to increase their penalties. Courts struggle to balance the statutes' public welfare status, which supports stricter criminal liability, against their requirement of a mens rea and their felony sanctions.

A. Resource Conservation and Recovery Act

Prosecution under the Resource Conservation and Recovery Act (RCRA), which regulates hazardous waste, presents the greatest threat to federal employees. Federal activities generate and dispose of a lot of hazardous waste.¹³⁶ The number of cases involving hazardous waste crimes indicates regulators emphasis on prosecuting hazardous waste crimes.¹³⁷ The Aberdeen and Fort Drum prosecutions involved hazardous waste offenses.

1. Requirements of RCRA

Congress enacted RCRA as an amendment of the Solid Waste Disposal Act.¹³⁸ RCRA reveals Congress' concern that the unregulated disposal of "hazardous waste"¹³⁹

threatens human health and the environment.¹⁴⁰ The Act's stated findings,¹⁴¹ objectives,¹⁴² and legislative history indicate Congress' intent to create a public welfare statute that protects public health and the environment by requiring persons who handle hazardous waste to learn of, and comply with, RCRA's requirements.¹⁴³

RCRA requires EPA to identify and list hazardous wastes.¹⁴⁴ EPA promulgates recordkeeping, labeling, and reporting requirements for generators of hazardous waste.¹⁴⁵ RCRA also mandates the use of a manifest system to track hazardous waste from its generation to its treatment, storage, and disposal.¹⁴⁶

Hazardous waste transporters must comply with labeling and manifesting standards.¹⁴⁷ Operators of hazardous waste treatment, storage, and disposal facilities must follow recordkeeping, inspection, and monitoring requirements.¹⁴⁸ They must also obtain operating permits from EPA.¹⁴⁹

Section 3008(d) contains RCRA's criminal provisions. It imposes felony sanctions¹⁵⁰ for "knowing" violations of RCRA's cradle-to-grave regulatory scheme.¹⁵¹ Congress increased section 3008(d)'s penalties in 1984 to indicate its intent to treat criminal violations harshly and to provide adequate enforcement authority to EPA and DOJ.¹⁵² Section 3008(e) imposes severe felony sanctions on violations that knowingly endanger the life of another person.¹⁵³

2. RCRA and Federal Employees

The Aberdeen defendants argued that RCRA's criminal provisions do not apply to federal employees. RCRA's general definition of "person" applies to section 3008(d).¹⁵⁴ "Person" includes "individuals."¹⁵⁵ RCRA separately defines federal agency.¹⁵⁶ The Aberdeen defendants argued that the omission of federal agency from RCRA's definition of "person" indicated Congress' intent to exempt federal agencies from criminal prosecution. That exclusion protects federal employees who commit RCRA violations in the performance of their official duties.¹⁵⁷

Their argument fails on two counts. First, RCRA does not include "corporate employee" or "responsible corporate officer" within its definition of "person." Yet, courts liberally construe the term "person," in light of RCRA's public welfare status, to include low-level corporate employees and responsible corporate officers.¹⁵⁸

Second, courts treat federal employees who violate federal criminal laws as individuals.¹⁵⁹ Sovereign immunity, which may protect federal employees from state criminal prosecution or civil suit, is inapplicable to a federal criminal prosecution.¹⁶⁰ The federal government does not pay its employees to violate federal criminal law.¹⁶¹

3. Element Analysis

A knowing violation of RCRA requires proof of a general intent. RCRA does not define "knowingly."¹⁶² Congress left that task to the courts under "general principles."¹⁶³ In traditional crimes, "knowingly" requires knowledge of one's actions and their consequences.¹⁶⁴ In public welfare hybrids, "knowingly" only requires awareness of one's actions.¹⁶⁵

By implication, RCRA's "knowing endangerment" offense supports this view. Section 3008(f) defines the "knowledge" required for "knowing endangerment" as specific intent--knowledge of the nature of one's actions and their consequences.¹⁶⁶

RCRA's public welfare status provides the best basis for analyzing the elements of a RCRA offense. Section 3008(d)'s language is ambiguous.¹⁶⁷ Courts construing the same provision reach opposite conclusions.¹⁶⁸ Their opinions demonstrate the futility and danger of relying on the wording of section 3008(c) to determine which elements require proof of knowledge.

The first element concerns the activity. Courts require proof that a defendant knowingly transported, treated, stored, or disposed of hazardous waste.¹⁶⁹ This interpretation follows from defining "knowingly" as a general intent, requiring awareness of one's actions.

Proving knowledge of this element is relatively straight-forward when it involves persons who order or perform an illegal disposal.¹⁷⁰ A jury can infer knowledge from circumstantial evidence and the past

practice or ordering disposals with seemingly innocuous language.¹⁷¹ Corporate officers' knowledge of company operations provides evidence of their knowledge of the disposal of hazardous waste.¹⁷²

The second element concerns the substance. Although the government must prove that the material is "hazardous waste" as defined by RCRA, it must only prove that the defendant knew the substance was harmful to others or to the environment.¹⁷³ Ignorance of RCRA's definition of "hazardous waste" is not a defense.¹⁷⁴ However, a person who believes in good faith that he disposed of waste is not criminally liable.¹⁷⁵

Under the same theory, "knowingly" modifies RCRA's false statement offense in section 3008(d)(3). A person must know that the statement is false. Congress did not intend to punish accidental alterations or omissions of material information.¹⁷⁶

Ignorance of RCRA's permit requirement should not be a defense. Ignorance of the law is not an excuse.¹⁷⁷ With the exception of the Third Circuit, courts impose strict liability as to this element.¹⁷⁸ The Third Circuit's opinion in Johnson & Towers raises an interesting issue.¹⁷⁹ The court recognized that prosecuting low-level managers for disposing of hazardous wastes without a permit, or in violation of permit conditions, may lead to harsh results. These employees often lack the authority and ability to obtain a RCRA permit.¹⁸⁰

Although the court raised an important concern, its holding ignores the well-established principle that ignorance of the law is not a defense.¹⁸¹ All persons

have a duty to comply with the law. The court confused the manner in which employees at different levels in a corporation fulfill that duty. Owners and operators must obtain a permit. Mid-level managers, such as the defendants in Johnson & Towers, must know whether their supervisors have obtained a permit. Blindly following an employer's orders is not a defense.¹⁸²

The court could have reached the same result by requiring knowledge of a facility's permit status and recognizing a mistake of fact defense.¹⁸³ Employees could avoid liability by proving that they questioned orders to illegally dispose of hazardous wastes and received reasonable assurances (which later proved untrue) that the company had a permit.¹⁸⁴

Requiring knowledge of the permit status of a facility would not excuse deliberate ignorance. RCRA imposes a duty on persons who handle hazardous waste to know the permit status of a facility.¹⁸⁵ Juries may infer knowledge from a person's corporate position¹⁸⁶ or from circumstantial evidence, such as the abnormally low price of a disposal contract or the corporation's failure to manifest wastes as it would have to do if the facility were properly permitted.¹⁸⁷

RCRA's public welfare status also supports strict liability for this element.¹⁸⁸ A permit is an essential prerequisite to regulating hazardous waste.¹⁸⁹ Strict liability does not place an unacceptable burden on the regulated community; it simply requires persons who generate or handle hazardous waste to request a copy of a facility's permit and verify the permit with EPA.¹⁹⁰ They have a

duty to comply with RCRA's permit requirements.¹⁹¹ They, rather than an innocent public, should bear the risk of mistake.¹⁹²

4. Knowing Endangerment

RCRA's "knowing endangerment" offense creates a two-step inquiry. First, the defendant must knowingly violate one of section 3008(d)'s criminal provisions. Second, the defendant must know that the violation places another person in imminent danger of death or "serious bodily injury."¹⁹³

Only one reported case construes RCRA's knowing endangerment provision.¹⁹⁴ In Protex Industries, the Tenth Circuit upheld the conviction of a corporation for knowingly endangering the lives of three of its employees who worked in the company's drum recycling facility.¹⁹⁵

Protex Industries recycled 55-gallon drums to store and ship products that it manufactured. Many of the drums previously contained toxic chemicals.¹⁹⁶ The safety provisions in the recycling facility did not protect the employees from solvent poisoning, which causes permanent brain damage.¹⁹⁷ Two employees suffered permanent injuries from their exposure to the toxic chemicals.¹⁹⁸

The decision should be a warning to federal agencies that handle hazardous wastes. An employer can knowingly endanger the lives of its employees, as well as the public. The offense might have reached the Aberdeen defendants who stored hazardous wastes in a

shed that became so fouled with their fumes that employees could not enter it.¹⁹⁹

Protex also demonstrates that criminal prosecutions can arise without warning. State regulators conducted annual inspections of Protex's facility in 1984 and 1985, as required by RCRA. The regulators took soil samples but did not report the results to Protex. In March 1986, federal investigators executed search warrants at Protex's drum recycling facility. A federal grand jury subsequently returned a nineteen count indictment against Protex.²⁰⁰

Protex also demonstrates the duties imposed under a public welfare hybrid. The Tenth Circuit rejected Protex's argument that the regulators' failure to notify Protex of the results of their soil analysis, as RCRA section 3007(a) required them to do, relieved Protex of liability. RCRA imposed an independent duty on Protex to ensure that its operations complied with RCRA's civil and criminal provisions.²⁰¹ Even if the government had notified Protex of the test results, Protex's subsequent remedial measures would not have abrogated its criminal liability.²⁰²

B. Comprehensive Environmental Response,
Compensation, and Liability Act

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as a complement to RCRA. RCRA regulates existing hazardous waste practices. CERCLA addresses the clean up of improperly disposed waste.²⁰³ CERCLA creates a

five-year, \$1.6 billion trust fund (Superfund) to clean up waste sites and future releases of hazardous substances.²⁰⁴

1. Requirements of CERCLA

CERCLA requires former and current owners and operators of hazardous waste facilities to notify EPA of unpermitted facilities, the types and amounts of hazardous substances found there, and any known or suspected releases. Failure to do so subjects the person to criminal liability.²⁰⁵ CERCLA requires EPA to develop recordkeeping requirements for these facilities. Knowing violation of the requirements results in criminal liability.²⁰⁶

CERCLA addresses the threat of future releases of hazardous substances. It requires persons in charge of vessels or facilities to notify the National Response Center²⁰⁷ of the release (other than a federally permitted release) of "reportable quantities"²⁰⁸ of hazardous substances.²⁰⁹ Section 103(b) imposes felony sanctions on persons who know of releases and fail to report them.²¹⁰ It also provides use immunity to persons who comply with its requirement.²¹¹

2. Element Analysis

CERCLA broadly defines "hazardous substance" to include substances listed under RCRA, the Clean Water Act, and other environmental laws.²¹² The term also includes any substances designated by EPA.²¹³ Although

the government must prove that the substance is a "hazardous substance" as defined by CERCLA, it must only prove that the defendant knew the substance had the potential to be harmful.²¹⁴

CERCLA defines "release"²¹⁵ and "facility"²¹⁶ broadly enough to include any type of release within its reporting requirement. In United States v. Carr, CERCLA's reporting requirement covered waste paint thrown from a truck into a pond.²¹⁷ In United States v. Greer, it covered trichloroethane poured onto the ground from a truck.²¹⁸

CERCLA's broad sweep makes identification of "persons in charge" who must report a release crucial. Neither CERCLA nor its implementing regulations defines the term.²¹⁹ Congress patterned section 103(b) after the national contingency plan of the Clean Water Act (CWA).²²⁰ Under the CWA, the term "persons in charge" includes all supervisory personnel with responsibility for a vessel or facility.²²¹

Courts use the responsible corporate officer doctrine to define "person in charge." The term includes persons who have responsibility for a "facility" and who are in a position to detect, prevent and abate the release of hazardous substances.²²² Thus, "persons in charge" will vary with the "facility." When the "facility" is a hazardous waste recycling plant, the term includes an owner or operator.²²³ When the "facility" is a truck, the term includes a relatively low-level employee.²²⁴ Mr. Carr was a maintenance foreman of Fort Drum's firing range.²²⁵ He

was also "in charge" of the truck from which the release occurred.²²⁶

The holding in Carr demonstrates that supervisors at all levels have responsibilities under environmental laws. Excluding low-level supervisors who are otherwise responsible officers would "frustrate congressional purpose by exempting from the operation of the [statute] a large class of person who are uniquely qualified to assume the burden imposed by it."²²⁷

If CERCLA is to prevent harm to human health and the environment from releases of hazardous substances, responsible corporate officers at all levels must bear responsibility for reporting releases. The reporting requirement would become useless if it only applied to installation commanders and senior supervisors, because they will not know of a release in many instances. The facility owner and operator in Greer knew of the release because he involved himself in the daily operations of the facility.²²⁸

The troubling aspect of the Fort Drum prosecution is that other "persons in charge" of the truck or the firing range escaped liability. Perhaps, Mr. Carr's supervisors, who were Army officers, did not "know" of the release. However, Mr. Carr attempted to raise, as a defense, the fact that he merely carried out the orders of his supervising officers when he ordered the disposal.²²⁹ The court excluded this evidence at the request of the prosecutor.²³⁰

In both prosecutions involving federal employees, commissioned officers have escaped liability. They

have done so despite the fact that officers are responsible for the operations of their commands and sections. To escape liability, they had to claim ignorance of the activities under their command and supervision. That attitude indicates that environmental compliance is not a command priority.

C. Clean Water Act

Congress enacted the earliest version of the CWA in 1948.²³¹ The CWA attained its present form when Congress enacted the Federal Water Pollution Control Act Amendments of 1972.²³² Congress wanted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."²³³ To achieve this objective, it required EPA to develop "effluent limitations"²³⁴ for "point sources"²³⁵ based on the best practicable control technology currently available.²³⁶

1. Requirements of CWA

To enable EPA to enforce effluent limitations, the CWA established the National Pollution Discharge Emission System (NPDES).²³⁷ The NPDES translates the generally applicable effluent limitations and standards of Title III into specific obligations for each point source.²³⁸ An NPDES permit prescribes discharge limits, compliance schedules, and monitoring requirements.²³⁹ The discharge of any pollutant into the navigable waters of the United States without, or in violation of, an NPDES permit is illegal.²⁴⁰

Title III provides standards for particular sources. Section 302 allows EPA to impose more stringent effluent limitations on point sources that threaten water quality at prescribed effluent limitations.²⁴¹ Section 306 allows EPA to establish effluent limitations for new sources.²⁴² Section 307 prescribes special effluent limitations for toxic pollutants and pre-treated wastes introduced into publicly-owned waste treatment plants.²⁴³

Section 308 authorizes EPA to establish reporting, monitoring, and inspection standards.²⁴⁴ EPA can also prescribe effluent standards for aquaculture projects²⁴⁵ and the disposal of sewage sludge.²⁴⁶ Section 301(f)'s prohibition against the discharge of radiological, chemical, and biological warfare agents into navigable waters is particularly important to federal employees who handle those substances.²⁴⁷

Section 309(c) punishes negligent and knowing violations of Title III and NPDES permit standards.²⁴⁸ Congress amended section 309(c) in 1987 to increase its penalties.²⁴⁹ Subsection 309(c)(4) contains the Act's false statement provision.²⁵⁰ Congress also added a "knowing endangerment" offense.²⁵¹ Section 311(b)(5) requires persons in charge of vessels or facilities to report the release of oil or a hazardous substance into navigable waters.²⁵² The Act provides use and derivative use immunity to persons who comply with section 311(b)(5)'s reporting requirement.²⁵³

2. Element Analysis

The CWA's definition of "person" reaches employees at all levels of an organization. Section 309(c) incorporates the Act's general definition of person.²⁵⁴ The definition includes individuals and corporations.²⁵⁵ Section 309(c) also includes any "responsible corporate officer" within its definition of persons liable for criminal violations.²⁵⁶ Consequently, the responsible corporate officer doctrine of Park applies to CWA offenses.²⁵⁷

Corporate officers have a duty to seek out and prevent violations of the CWA.²⁵⁸ They do not have to intentionally violate the CWA or NPDES requirements. The CWA's public welfare status only requires proof of general intent.²⁵⁹ The owners of a mushroom composting operation could not discharge pollutants into a stream in ignorance of the CWA's permit requirement.²⁶⁰ They had a duty to learn the requirements of the CWA and to apply for a permit.²⁶¹

Similarly, a "knowing" false statement requires proof that a person intentionally made a statement that he knew to be false.²⁶² In United States v. Ouelette, the government convicted the defendant of making false statements in monthly discharge monitoring reports that he filed with EPA.²⁶³ The government did not have to prove specific intent to violate subsection 309(c)(4) or to mislead the government.²⁶⁴ "Knowingly" only protects persons from prosecution when they make false statements through mistake or accident.²⁶⁵

The broad definitions of key terms make the CWA's criminal provisions far-reaching. "Discharge" includes "any addition of any pollutants."²⁶⁶ The CWA further

defines "pollution" as "the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of the water."²⁶⁷ Although the government does not proceed criminally against all violations, the CWA covers a wide range of discharges.²⁶⁸

The CWA defines "navigable waters" equally broad as all waters of the United States.²⁶⁹ Congress wanted courts to give "navigable waters" the broadest constitutional interpretation under the Commerce Clause and not limit jurisdiction to the traditional test of navigability.²⁷⁰ Courts include wetlands within the CWA's definition of "navigable waters" because they "play a key role in protecting and enhancing water quality."²⁷¹

Combining the broad definitions with the responsible corporate officer doctrine allows prosecution of senior corporate officers for relatively innocent acts.²⁷² In Marathon Development Corporation, the government convicted a corporation and its senior vice-president for bull-dozing five acres of wetlands and filling them with gravel in order to build a shopping mall.²⁷³ The defendants in Marathon ignored an Army Corps of Engineers' notice that they needed a permit to fill in the wetlands. However, the CWA's general intent requirement would allow prosecution of any person who fills in wetlands without a permit.²⁷⁴

The Marathon decision discusses a potential defense to CWA criminal prosecutions.²⁷⁵ The Army Corps of Engineers, which regulates the discharge of dredged or fill material into navigable waters, issues

nationwide permits for activities that do little or no harm to the environment.²⁷⁶ Nationwide permits allow persons who engage in those activities to discharge dredged or fill material into navigable waters without a permit.²⁷⁷ Marathon's defense failed, because Massachusetts refused to recognize the nationwide permit under its state water pollution control program.²⁷⁸

Criminal prosecutions under the CWA can come without warning. EPA does not have to pursue administrative or civil remedies or notify a person before it institutes criminal proceedings under the CWA.²⁷⁹ Nor does a United States Attorney's Office have to refer a violation to EPA before instituting criminal proceedings.²⁸⁰

The lack of warning and the CWA's far-reaching language require responsible officers to seek out and prevent violations or risk prosecution. Illegal discharges can result from innocent activities. The government successfully prosecuted the owners of a mushroom growing operation for illegally discharging pollutants into a stream.²⁸¹ The discharge resulted from the runoff of excess waste water that the defendants sprayed onto their irrigation fields. The excess waste water flowed into the stream through a break in a berm that surrounded the field.²⁸²

Although prosecutors have not convicted federal employees under the CWA, the Act's criminal provisions provide a threat equal to that of RCRA. Prosecutors indicted the Aberdeen and Fort Drum defendants for negligently discharging pollutants into navigable

waters without an NPDES permit. Many federal facilities discharge "pollutants" into "navigable waters." If they do so without, or in violation of an NPDES permit, they face criminal prosecution.

D. Refuse Act

Although commentators trace environmental crimes back to the common law,²⁸³ the Refuse Act, enacted as part of the River and Harbors Act of 1899, was the first environmental statute enacted by Congress.²⁸⁴ It provides misdemeanor penalties for persons who discharge "refuse" into the navigable waters of the United States.²⁸⁵ Courts construe the Act's language and purpose to impose strict criminal liability.²⁸⁶

Federal employees do not face much threat of prosecution under the Refuse Act. The federal government only used the Act's criminal provisions for a brief period in the 1960s and early 1970s before Congress enacted the Federal Water Pollution Control Act Amendments of 1972.²⁸⁷ It may use the Refuse Act to reach discharges from non-point sources. "Refuse" includes gasoline and oil discharges, as well as any substances that change the natural quality of the water.²⁸⁸ However, courts construe "navigable waters" more narrowly than the CWA's expansive definition.²⁸⁹

E. Clean Air Act

With the Clean Air Amendments of 1970, Congress placed the federal government in the fore in regulating

air pollution.²⁹⁰ Congress amended the Clean Air Act (CAA) in 1977 to further strengthen its provisions.²⁹¹ The Act's stated purpose is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."²⁹²

In support of this goal, Congress charged EPA with developing national primary and secondary ambient air quality standards (NAAQS).²⁹³ EPA prescribes NAAQS for each air quality control region in the country.²⁹⁴ The Act also charged EPA with developing standards of performance for new stationary sources²⁹⁵ and hazardous air pollutants.²⁹⁶ Owners and operators of primary nonferrous smelters must apply for an order if they cannot meet the requirements of an applicable state pollution control plan.²⁹⁷

Section 113(c) imposes misdemeanor penalties for "knowing" violations of these provisions.²⁹⁸ It also punishes persons who knowingly make false statements or tamper with monitoring devices to evade the Act's monitoring requirements.²⁹⁹

The responsible corporate doctrine applies to violations of the CAA. Section 113(c) incorporates the Act's general definition of person.³⁰⁰ "Person" includes federal agencies and their employees.³⁰¹ The term "person" also includes any "responsible corporate officer."³⁰²

Federal criminal prosecutions under the CAA are rare.³⁰³ Like prosecutions under other environmental laws, liability depends upon the Act's definition of key terms. In Adamo Wrecking Co. v. United States, the

government charged the defendant with violating a national emission standard for asbestos when it demolished a building.³⁰⁴ The district court dismissed the indictment because the standard that the defendant allegedly violated was a "work-practice standard." Violation of a "work-practice" standard did not subject the defendant to criminal sanctions under section 113(c)(1)(C), which only applied to "emission standards."³⁰⁵

The Court's holding avoided the more difficult issue of review preclusion.³⁰⁶ Environmental statutes preclude review of standards promulgated by EPA after a statutorily-specified period of time.³⁰⁷ In criminal cases, review preclusion may violate due process, because it denies affected persons the ability to challenge a pollution control standard.³⁰⁸ Courts balance the need for finality in rule-making and uniformity in regulatory standards against the right of person to influence standards that affect them in a criminal proceeding.³⁰⁹

F. Toxic Substances Control Act

Federal employees face some potential for prosecution under the Toxic Substances Control Act (TSCA), enacted to regulate toxic chemicals whose manufacture, distribution, use, and disposal present an unreasonable risk of injury to public health and the environment.³¹⁰ An estimated 50,000 different chemicals are in use in the United States.³¹¹

Under TSCA, EPA identifies toxic chemicals whose manufacture, distribution, use, or disposal present an unreasonable risk of injury to health or the environment.³¹² EPA may prohibit the manufacture of such chemicals or regulate them through monitoring and recordkeeping requirements.³¹³ The best-known substance regulated under the TSCA is polychlorinated biphenyls (PCBs).³¹⁴

Section 16(b) imposes misdemeanor penalties on persons who knowingly or willfully violate any of the provisions of section 15³¹⁵ of the TSCA.³¹⁶ As with other environmental crimes, the TSCA only requires a general intent to cause the disposal of toxic substances.³¹⁷

G. Federal Insecticide, Fungicide, and Rodenticide Act

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) regulates pesticides, herbicides and agricultural chemicals.³¹⁸ Section 14 of FIFRA contains the Act's criminal provisions.³¹⁹ Section 14(b)(1) punishes knowing violations of the Act by wholesalers, dealers, retailers, and other distributors.³²⁰ Section 14(b)(2) punishes "commercial applicators" or other persons who knowingly violate FIFRA.³²¹ "Knowingly" requires a general intent to do the acts that violate FIFRA's regulatory requirements.³²²

H. Medical Waste Tracking Act

Its growing concern over the improper disposal of medical waste prompted Congress to add the Medical Waste Tracking Act (MWTA) as subtitle J to RCRA.³²³ The MWTA establishes a demonstration program, allowing states to petition in or opt out of the program.³²⁴ It requires EPA to list "wastes" that the Act will track.³²⁵ EPA must also establish a program for tracking medical wastes.³²⁶

Section 11005(b) contains the Act's criminal provisions. It imposes felony sanctions for knowing violations of the Act.³²⁷ The MWTA also creates a knowing endangerment offense with identical scienter requirements to RCRA section 3008(f).³²⁸

I. Related Offenses

1. Title 18 Criminal Offenses

Person who commit environmental crimes may also face charges for violating federal criminal law.³²⁹ Prosecutors may charge defendants with conspiracy,³³⁰ accessory after the fact,³³¹ misprision of a felony,³³²

aiding and abetting,³³³ false statements,³³⁴ obstruction of justice,³³⁵ or mail fraud.³³⁶

2. Uniform Code of Military Justice

In addition to any liability that they face under environmental statutes and federal criminal law, military personnel may face charges under the Uniform Code of Military Justice (UCMJ). A memorandum of understanding between DOJ and the Department of Defense gives military authorities the first opportunity to prosecute crimes committed on an installation by persons subject to the UCMJ.³³⁷

Commanders and officers who avoid criminal liability under environmental statutes by claiming ignorance of violations within their commands and sections may face charges for dereliction of duty.³³⁸ Soldiers and officers may face charges under Article 92 for violating an order or a regulation regarding pollution control.³³⁹ They may also face charges for false statements,³⁴⁰ damage or destruction of government property,³⁴¹ willful or reckless destruction of property other than military property,³⁴² and murder through an act inherently dangerous to others.³⁴³

V. LIABILITY UNDER STATE ENVIRONMENTAL STATUTES

Federal environmental laws recognize EPA's role in establishing national standards and States' roles in regulating water, air, and hazardous waste pollution within their territories.³⁴⁴ This federal-state

partnership relieves EPA of the impossible task of regulating pollution nationwide and allows states to protect their environments.³⁴⁵ States have limited ability to protect their environments against pollution from federal facilities. Federal statutes' waivers of federal supremacy and sovereign immunity do not currently allow states to impose criminal sanctions against federal employees.³⁴⁶

A. Federal Supremacy

The Constitution and laws of the United States are the supreme law of the land.³⁴⁷ The Supremacy Clause shields the United States, and its activities,³⁴⁸ from direct state regulation unless Congress provides "clear and unambiguous" authorization.³⁴⁹

Congress may incrementally waive federal supremacy to state regulation.³⁵⁰ For example, Congress may require federal activities to comply with state pollution control standards yet shield federal activities from state civil or criminal enforcement of those requirements.³⁵¹ As the Supreme Court stated in Hancock v. Train:

Given agreement that section 1118 makes it the duty of federal facilities to comply with state-established air quality and emission standards, the question is ... 'whether Congress intended that the enforcement mechanisms of federally approved state implementation plans, in this case permit systems, would be' available to the States to enforce that duty.³⁵²

Congress may determine that "incidental regulatory pressure is acceptable, whereas direct regulatory authority is not."³⁵³

B. Sovereign Immunity.

Sovereign immunity is a judicially-created doctrine. It is not based on the Supremacy Clause.³⁵⁴ The United States and its instrumentalities are immune from suit absent an express waiver of sovereign immunity by Congress.³⁵⁵ Sovereign immunity prevents all suits against the United States, including those by states.³⁵⁶ Courts strictly construe waivers of immunity in favor of the sovereign and do not modify them by implication.³⁵⁷

Although courts and commentators occasionally use the terms interchangeably, sovereign immunity and federal supremacy require separate analysis.³⁵⁸ Congress could waive federal supremacy to state regulation but retain sovereign immunity to state civil or criminal suit to enforce those regulations.³⁵⁹

C. Federal Facilities Provisions

Congress waived federal supremacy and sovereign immunity in varying degrees in the federal facilities provisions of each environmental statute. The language of the waivers, interpreted in light of each statute's purpose and legislative history, determines whether states can criminally enforce their environmental laws against the United States.³⁶⁰

1. Resource Conservation and Recovery Act

RCRA establishes national standards for hazardous waste management and encourages states to implement programs.³⁶¹ States may apply to EPA for approval to operate hazardous waste plans in lieu of the federal program.³⁶² EPA approves state plans that are equivalent to RCRA, consistent with RCRA and approved state programs, and adequately enforced.³⁶³ States may enact more stringent standards than RCRA requires.³⁶⁴ EPA may withdraw authorization for a state program that fails to meet federal requirements.³⁶⁵

State action under an EPA-approved program has the same force and effect as action taken by EPA.³⁶⁶ States have primary authority for enforcing their programs, but EPA retains authority to enforce RCRA.³⁶⁷ Over forty states have final authorization for their programs.³⁶⁸

The federal-state partnership established by RCRA allows some argument that Congress intended for states to regulate federal facilities. However, neither RCRA's structure nor the language of its federal facilities provision indicates Congress' clear and unambiguous intent to subject the United States or its employees to state criminal prosecution.³⁶⁹

Section 6001, RCRA's federal facilities provision, waives federal supremacy to all State substantive and procedural requirements.³⁷⁰ Criminal penalties are not "requirements."³⁷¹ They are "sanctions" or the means by which states enforce their requirements.³⁷²

Interpreting "sanctions" to mean criminal penalties follows from RCRA's waiver of sovereign immunity in the second clause of section 6001. Congress "clearly and unambiguously" waived sovereign immunity only in those instances in which states use "process and sanctions" to enforce injunctive relief.³⁷³ Thus construed, RCRA's waiver of federal supremacy does not exceed its waiver of sovereign immunity.

Interpreting "requirements" to include criminal sanctions results in section 6001's waiver of federal supremacy exceeding its waiver of sovereign immunity. Congress would subject federal facilities to all state criminal provisions but only waive sovereign immunity to state "sanctions" (criminal or civil) to enforce injunctive relief.³⁷⁴ Under this interpretation, federal facilities would be subject to state criminal "requirements," but states would have no recourse when federal facilities violated the criminal provisions.

The legislative history of RCRA establishes that Congress only intended to waive sovereign immunity to injunctive relief and criminal and civil sanctions to enforce that relief.³⁷⁵ Congress drafted section 6001 to clarify the issues created by Hancock v. Train. In Hancock, the Court held that state Clean Air Act permits were "procedural requirements" and not within the Act's waiver of federal supremacy, which Congress limited to state "substantive requirements."³⁷⁶

Section 6001 waives federal supremacy to all substantive and procedural requirements. At most, section 6001's language indicates Congress' intent, following Hancock, to subject federal facilities to all

state procedural requirements, such as permits, licenses, monitoring, and recordkeeping.³⁷⁷ It does not allow states to enforce those requirements against federal facilities with criminal sanctions.

The parenthetical modifying procedural requirements in section 6001 demonstrates congressional intent.³⁷⁸ It specifically includes permits and reports within procedural requirements, further indicating Congress' intent to overturn Hancock. It also waives federal supremacy to "sanctions" used to enforce injunctive relief, thus complementing the waiver of sovereign immunity to state injunctive relief and any sanctions needed to enforce injunctive relief.³⁷⁹

The Medical Waste Treatment Act's federal facilities provision provides conclusive evidence that Congress knows how to select "clear and unambiguous" language to waive sovereign immunity to state criminal penalties.³⁸⁰ Its language stands in stark contrast to that of section 6001. Section 6001 is not a "clear and unambiguous" waiver of federal supremacy or sovereign immunity to state criminal prosecution.³⁸¹ Courts resolve ambiguity in favor of the sovereign.³⁸²

Critics of the strict judicial treatment of federal supremacy and sovereign immunity waivers ignore the realities of a democratic form of government. Waivers of federal supremacy and sovereign immunity have important implications.³⁸³ Only Congress has the authority to waive federal supremacy and sovereign immunity.

Requiring the use of clear and unambiguous language ensures that the decision remains with

Congress and not the courts. It also enables interested parties to exert their influence. Considered in this light, Congress' inability or unwillingness to amend section 6001 with language that clearly and unambiguously waives sovereign immunity is telling. It prevents courts from doing so via a contorted or novel construction.³⁸⁴

Federal employees have little cause to celebrate, however. Congress has considered amending section 6001's waiver of supremacy and immunity to allow state criminal prosecutions of federal employees. The language of H.R. 1056, introduced but not enacted during the 1st Session of the 101st Congress, clearly and unambiguously indicates congressional intent to subject federal employees to state criminal sanctions while retaining sovereign immunity for federal agencies.³⁸⁵

2. Clean Water Act

When it enacted the Clean Water Act, Congress expected states to bring the majority of enforcement actions.³⁸⁶ States that want to operate water pollution control programs submit plans to EPA for approval.³⁸⁷ States programs may impose more stringent standards than EPA requires.³⁸⁸ After approving a state program, EPA may not issue NPDES permits.³⁸⁹ However, EPA retains the authority to monitor,³⁹⁰ enforce,³⁹¹ and withdraw approval of State permit programs.³⁹² Approximately forty states operate EPA-approved programs.³⁹³

Section 313 waives federal supremacy to all state requirements, administrative authority, and process and sanctions.³⁹⁴ Its waiver of sovereign immunity appears equally broad. Congress qualified section 313's waiver of sovereign immunity. Federal employees are not personally liable for civil penalties, and the United States is only liable for state civil penalties imposed to enforce a court order or process.³⁹⁵

The language is ambiguous with respect to state criminal penalties. Congress could have intended to expose federal facilities to state criminal sanctions and not civil penalties, but the language of section 313 does not clearly and unambiguously indicate this intent. Although the waiver of supremacy to process and sanctions might support such an assertion, the legislative history of section 313 indicates otherwise.

Congress amended section 313 to overturn the Supreme Court's holding in Hancock v. Train.³⁹⁶ Congress intended to waive federal supremacy and sovereign immunity to the same extent that it waived them in section 6001 of RCRA. Despite language in section 313's waiver of supremacy subjecting federal facilities to process and sanctions, Congress only intended to subject federal facilities and employees to state injunctive relief and sanctions to enforce that relief. Section 313 does not subject federal employees to state criminal sanctions, except to enforce injunctive relief.³⁹⁷

3. Clean Air Act

States have primary responsibility for regulating air pollution under the CAA.³⁹⁸ Once EPA established national ambient air quality standards,³⁹⁹ states submitted plans to implement, maintain, and enforce those standards in each air quality control region within the state.⁴⁰⁰ Although a state implementation plan (SIP) may impose more stringent requirements than EPA requires, the CAA preempts state regulation of new motor vehicles,⁴⁰¹ motor vehicle fuels and additives,⁴⁰² and aircraft and aircraft engines.⁴⁰³

EPA does not require SIPs to provide for criminal enforcement of their standards in order to receive EPA's approval to operate.⁴⁰⁴ Several SIPs impose no criminal sanctions for air pollution. Others do not punish permit violations or emissions without a permit.⁴⁰⁵

Congress amended section 118 of the CAA, following Hancock, to expand its waiver of federal supremacy and sovereign immunity.⁴⁰⁶ It chose language very similar to that in section 313 of the CWA. Section 118's waiver of supremacy subjects federal facilities and employees to state and local requirements and to any process and sanctions.⁴⁰⁷ Section 118's waiver of sovereign immunity is equally broad, with the qualification that federal employees are not personally liable for state civil penalties.⁴⁰⁸

The CAA's legislative history indicates Congress' intent to subject federal facilities and agencies, but not federal employees, to state injunctive relief,

sanctions to enforce injunctive relief, and civil and criminal penalties.⁴⁰⁹ The House Conference Report provides additional evidence that Congress did not intend to make federal employees personally liable for civil or criminal penalties.⁴¹⁰

The legislative history does not specifically mention criminal liability. Whether Congress intended to treat it the same as civil liability or never considered the issue, the result is the same. The language and history of section 118 do not indicate a clear and unambiguous intent to subject federal employees to state criminal sanctions.

4. Medical Waste Treatment Act

The MWTa allows states to conduct inspections and take enforcement actions under section 11005 to the same extent as EPA.⁴¹¹ Section 11006 provides the clearest and least ambiguous waiver of federal supremacy and sovereign immunity in federal environmental statutes. Section 11006 clearly and unambiguously subjects federal employees to state criminal sanctions.⁴¹²

Although Congress has not waived federal supremacy and sovereign immunity to state criminal sanctions under the RCRA, CWA, or CAA, federal employees may not rely on their federal facilities provisions for protection much longer. Section 11006's waiver probably represents the future for federal employees. H.R. 1056 is further evidence of the legislative trend.

D. Official Immunity

Analysis of the federal facilities provisions in environmental statutes does not entirely resolve whether federal employees enjoy immunity from state criminal prosecution. A second issue is the degree to which federal supremacy--to the extent that Congress has not waived it--protects federal employees from state criminal prosecution.⁴¹³

Federal supremacy shields federal officials from state criminal prosecution when their actions are necessary and proper to the performance of their federal duties.⁴¹⁴ Although the majority of cases involve state criminal prosecutions of federal law enforcement officials carrying out their federal functions,⁴¹⁵ federal supremacy protects all federal employees.⁴¹⁶

To determine whether a federal employee was performing federal duties, courts look to several sources. A specific federal law authorizing the employee's duty will suffice.⁴¹⁷ Any duty derived from the general scope of an employee's duties under the laws of the United States is "a law" under the Supremacy Clause.⁴¹⁸ The only cases holding that federal law authorizes criminal activity per se are those involving federal agents engaged in undercover operations.⁴¹⁹

In the broadest sense, federal employees carrying out the federal function--training, maintenance, research and development, munitions manufacturing--act pursuant to federal law though no specific statute or regulation authorizes their activity. Mr. Carr had no

specific statutory authority for disposing of waste paint, but he did so pursuant to his duties as a range maintenance foreman. His work undoubtedly included the duty to clean up the firing range. The Aberdeen defendants generated and disposed of waste in the course of their federal duties developing chemical weapons.

The more difficult issue is whether federal employees can prove that they had an honest and a reasonable belief that their actions were necessary in the performance of their duties.⁴²⁰ Errors in judgment will not subject federal employees to state criminal prosecution.⁴²¹ A federal marshal's decision to release tear gas into a crowd causing a riot and the death of two persons did not subject him to state criminal prosecution though the decision may have been unwise. He had a reasonable belief that his actions were necessary to carry out his federal duties.⁴²²

Although errors in judgment do not subject an employee to state prosecution, the belief must be reasonable.⁴²³ Mr. Carr might have difficulty proving that his duty to maintain the Fort Drum firing range required him to dispose of waste paint in a pond. The Aberdeen defendants might also have difficulty justifying their actions in dumping hazardous wastes into chemical sumps and storing hazardous wastes in a shed as being reasonable actions to carry out their duties of testing and developing chemical weapons.

The issue will be one of first impression for the court that addresses it. It will also be fact-specific, and it may present enough difficulties

to dissuade a state from prosecuting a federal employee for state environmental crimes.

E. State Prosecutions on Federal Enclaves

Not all federal activities occur within the criminal jurisdiction of the state. Some activities occur on federal enclaves--areas over which the United States exercises exclusive legislative jurisdiction.⁴²⁴ In addition to any protection that they receive from federal supremacy and sovereign immunity, federal employees also receive protection from state prosecution when the alleged environmental crime occurs on a federal enclave.⁴²⁵

Legislative authority is a distinct concept from federal ownership interests in land.⁴²⁶ The United States exercises authority over land it owns under the Property Clause, but that authority does not prevent States from enforcing their criminal and civil laws on federal property when the laws do not conflict with federal law.⁴²⁷ Although the United States has only a proprietary interest in the vast majority of its land,⁴²⁸ many DOD activities occur on federal enclaves.⁴²⁹

Exclusive legislative authority differs from federal supremacy to state regulation.⁴³⁰ Federal supremacy prevents a state from regulating federal activities that occur within its jurisdiction. Federal enclaves are not within a state's legislative authority even though they are physically situated within a state's territory.⁴³¹ States lack authority to

legislate, and thus regulate and sanction, activities that occur on federal enclaves.⁴³²

Congress may adopt state law as federal law or allow state law and authority to operate on federal enclaves. It often does so to fill voids in federal law. When Congress adopts state law or allows states to enforce their laws on federal enclaves, it uses precise statutory language that differs from the language in the federal facilities provisions of environmental laws.⁴³³

The federal facilities provisions in federal environmental statutes do not explicitly allow state environmental programs to operate on federal enclaves. Implicitly, they may adopt state law, not because the concepts are synonymous, but because the considerations that motivate Congress to waive federal supremacy to state regulation may also cause it to adopt state law for federal enclaves.⁴³⁴

In Howard v. Commissioners of Louisville, the Supreme Court held that states may disregard the state-within-a-state fiction of enclaves if the exercise of state sovereignty does not interfere with exclusive federal jurisdiction on the enclave.⁴³⁵ Although Howard places enclaves within the sovereignty of a state, exclusive jurisdiction over the enclave remains with the United States unless modified by statute.⁴³⁶

Howard involved the annexation of an ordnance plant in the City of Louisville. Louisville wanted to tax the income of government employees who worked at the plant. This exercise of state authority over the

enclave did not interfere with exclusive federal jurisdiction, because the Buck Act allows states to tax the income of federal employees who work on enclaves.⁴³⁷ Howard does not provide precedent for state annexations of federal enclaves.⁴³⁸

Howard does not provide precedent for the exercise of state criminal jurisdiction on federal enclaves either. State prosecution of enclave activities interferes with exclusive federal jurisdiction.⁴³⁹ Congress has only allowed state civil laws to operate on enclaves. Although Congress adopted state fish and game laws as federal law on enclaves, the laws are criminally enforceable by federal officials.⁴⁴⁰ State courts continue to recognize their inability to prosecute crimes that occur on enclaves.⁴⁴¹ The limitation should apply with equal force to a state's prosecution of environmental crimes on an enclave.⁴⁴²

The government has used Howard to extend state benefits to residents of federal enclaves.⁴⁴³ Extending state citizenship to enclave residents to allow them to vote does not interfere with the exclusive legislative jurisdiction of the United States. State prosecution of enclave activities does. It forces activities under the exclusive jurisdiction of the federal government to comply with state regulatory requirements.⁴⁴⁴ Assuming that federal facilities provisions indicate Congress' intent to subject federal activities on enclaves to state regulation, state criminal enforcement of those regulations does not necessarily follow.

Congress enacted the Assimilative Crimes Act (ACA)⁴⁴⁵ to fill gaps in the federal criminal code

applicable to federal enclaves⁴⁴⁶ and to conform the criminal law of federal enclaves to that of the state in which the enclave exists.⁴⁴⁷ The ACA assimilates state criminal law in effect at the time of the offense as federal law.⁴⁴⁸ The Act recognizes a state's interest in controlling criminal activity within its territory by adopting state law for federal enclaves.⁴⁴⁹ It does not allow states to enforce their criminal laws on federal enclaves.⁴⁵⁰

Environmental crimes on federal enclaves do not escape punishment as the Aberdeen prosecution illustrates. Federal environmental statutes and their criminal provisions reach enclaves. To the extent that federal facilities provisions subject federal activities on enclaves to state regulation, the provisions would allow the assimilation of state environmental criminal sanctions as the federal law of the enclave.⁴⁵¹ They would not allow state criminal enforcement of those sanctions on the enclave.

F. Extraterritorial State Criminal Prosecutions

The final way in which state environmental criminal prosecutions might reach federal employees on an enclave is extraterritorially. The issue would arise when pollution from an enclave harmed a surrounding community or an adjacent state. The affected state might attempt to assert its criminal jurisdiction extraterritorially over persons who caused the pollution on the enclave.

The scenario is likely to occur. The effects of pollution often extend beyond the immediate area in which it originates. Air pollution provides an obvious example because the illegally discharged pollutants will travel far beyond the enclave's boundaries. Illegal discharges of pollutants into navigable waters that run off of the enclave will reach communities outside the enclave. An illegal disposal of hazardous wastes can also affect surrounding communities when it contaminates underground aquifers from which surrounding communities draw their water supply.

States may have difficulty exercising criminal jurisdiction over persons on federal enclaves despite the fact that the resulting harm or effect from enclave pollution occurs within the territory of a state. States exercise criminal jurisdiction over offenses that occur outside their territory if an essential element of the crime occurs within the state's jurisdiction. A typical statute allows the exercise of criminal jurisdiction if the conduct or the result, both of which are elements of the offense, occurs within the state.⁴⁵²

Although state courts liberally construe criminal elements to find some connection with the state, environmental statutes present unique problems.⁴⁵³ Federal environmental statutes, which serve as models for state programs, regulate pollution at its source. Congress structured the statutes in this manner to ease enforcement by eliminating the need to trace pollution from its result to its source.⁴⁵⁴ The result of pollution would reach state territory. The issue is

whether that result is an essential element of a state environmental crime.

Arguably, the elements of an environmental crime occur exclusively on the enclave.⁴⁵⁵ The criminal provisions in environmental statutes punish violations, including those involving knowing endangerment, irrespective of the "result."⁴⁵⁶ Knowingly exceeding NPDES permit conditions, transporting or disposing of hazardous waste without a permit, and violating state air pollution control standards are crimes regardless of the harm or pollution that results. The injury, harm, or "result" caused by the violation is not an element of the offense.

The elements of an environmental crime involve violation of the regulatory scheme, regardless of the effect. That interpretation agrees with the general approach of public welfare statutes, which eliminate harm and causation as elements. They regulate activities that threaten the public welfare and punish violations that could harm the public in order to prevent actual harm from occurring.⁴⁵⁷

Allowing extraterritorial application of state criminal sanctions would subject activities on an enclave, or those in a state for that matter, to other states' standards. An enclave in Ohio would have to comply not only with Ohio's requirements but also with the requirements of adjoining states that pollution from the Ohio enclave might reach.

Federal environmental statutes create comprehensive regulatory schemes that preempt application of a states' pollution control program to

out-of-state sources. In Ouellette, the Supreme Court held that the Clean Water Act precluded application of Vermont's nuisance statute to a New York pulp mill. Although Ouellette involved a common law nuisance suit against an out-of-state source, the rationale should at least apply to extent that the pollution control program of the state exercising extraterritorial jurisdiction imposes more stringent standards. Control of interstate pollution is primarily a matter of federal law. An affected state may have remedies under the laws of the state in which the polluting activity is located.⁴⁵⁸

VI. LIMITING LIABILITY

Commentators have suggested that the Aberdeen prosecution represents federal regulators' efforts to make a "whipping boy" out of the federal employee.⁴⁵⁹ The statistics do not support this argument. DOJ has prosecuted eleven criminal enforcement actions against federal employees and government contractors. Of the four criminal prosecutions brought against federal employees, three resulted in conviction and one in acquittal.⁴⁶⁰ Federal employees have not been the subject of an inordinate number of prosecutions. On the other hand, these prosecutions probably do not represent the full criminal liability of the federal government.⁴⁶¹

The real tragedy of the Aberdeen and Fort Drum prosecutions is that they were easily avoidable. Both cases resulted from "whistleblowers."⁴⁶² At Aberdeen an

employee informed the installation's environmental coordinator of the violations that ultimately formed the basis of the indictment. When the violations continued, the employee went to the Baltimore Sun and the Maryland State Police. The installation commander first learned of the violations when he read the newspaper.⁴⁶³

At Fort Drum the workers who disposed of the waste paint returned to the defendant at the end of the day and confronted him with their concerns about the illegality of the disposal. Rather than seek guidance or clean up the site, the defendant ordered an employee to cover the waste paint and pond with dirt. Another worker subsequently reported the disposal to his brother-in-law, a special agent with the Department of Defense, and an investigation ensued.⁴⁶⁴

These incidents will recur if federal employees do not address the underlying issue that they raise. They demonstrate that environmental compliance was not part of the mission of those installations. In neither case did federal or state regulators target federal employees or activities for prosecution. They responded to the complaints of federal employees who were unable to have their concerns addressed by someone at the installation.

An effective environmental compliance program could have avoided these prosecutions. Although the decision to prosecute is essentially a discretionary judgment,⁴⁶⁵ federal regulators and prosecutors consider several factors in determining whether to proceed with criminal charges.⁴⁶⁶ A program that addresses these

factors will not only protect federal employees from criminal prosecution but also ensure that federal activities comply with environmental laws.

A. Evidence of Knowledge

The first factor that prosecutors and regulators consider is evidence of knowledge or intent to avoid environmental laws. A notice of violation is evidence of knowledge as it was in United States v. Park when the Food and Drug Administration notified the defendant of violations at the company's warehouses. Regulators can easily reach a commander or supervisor with a notice of violation. The prosecution in the Aberdeen case introduced evidence that state regulators informed the defendants of violations on several occasions. The defendants ignored the notices.⁴⁶⁷

Some commanders have wondered whether they would be wiser to remain ignorant of violations at their installations in order to avoid criminal prosecution. The answer is an emphatic "No." The responsible corporate officer doctrine and the public welfare status of environmental laws require commanders to seek out and prevent violations. Deliberate ignorance is evidence of knowledge. It is also a factor that DOJ considers in deciding whether to pursue criminal prosecution.⁴⁶⁸

Prosecutors consider the decisionmaking process and the information flow within an organization to determine whether responsible corporate officers set the standard for environmental compliance or whether

they avoid their responsibilities--responsibilities that only they can fulfill because of their positions and authority. Commanders view proper information flow or the "chain of command" as vital to accomplishing their unit's missions.⁴⁶⁹ Commanders and supervisors must integrate environmental compliance into their command structure.

Commanders and supervisors must first identify key players and their areas of responsibility. Key players include environmental coordinators, legal advisors, public affairs specialists, safety officers, preventive medicine specialists, and engineers.⁴⁷⁰ Commanders must not only communicate with each person but also ensure that the specialists communicate among themselves on environmental compliance issues. The specialists must attend training, installation planning, and commanders' meetings to inject environmental considerations into agency decisionmaking.

Commanders and supervisors must actively supervise their subordinates to ensure that subordinates perform their assigned tasks.⁴⁷¹ Under Park, commanders and supervisors can delegate duties to dependable subordinates; they cannot delegate away their responsibility. Commanders and supervisors must seek information. They must also focus their subordinates' efforts on preventing violations involving hazardous wastes and the pollution of water sources--violations that are more likely to threaten human health and the environment and thus incur criminal prosecution.⁴⁷²

Key players, such as the environmental coordinators, need access to commanders. In fact, all

employees with concerns about environmental compliance need access to commanders. Many commanders have boss-lines or phone numbers that persons call when they have important concerns. Commanders must open those lines to persons with complaints about environmental compliance. They should learn of violations from within their commands and activities and not from regulators or the newspaper.

When they receive a notice of violation, commanders and supervisors must correct it. Federal prosecutors and regulators especially consider voluntary compliance and cooperation in disclosing and remedying violations as factors in deciding whether to pursue criminal prosecution.⁴⁷³ Federal regulators will work out compliance agreements with federal facilities.⁴⁷⁴ The Unitary Executive Theory allows only one option if federal agencies refuse to cooperate--the federal grand jury.

Commanders and supervisors also have a duty to train subordinates at all levels for the environmental compliance mission. Legal advisors have responsibility to assist in the education and training process. Employees must understand that they place themselves at risk of criminal conviction if they know of a violation and do nothing. To avoid criminal liability, employees must report violations to their supervisor and up the chain of command if violations continue. Liability will normally extend to more employees than DOJ indicts; some potential defendants will become the government's key witnesses against those ultimately indicted.

Legal advisors have a special obligation to low and mid-level supervisors upon whom the rules of liability can operate particularly harshly. Ignorance of the law is not a defense. These employees normally lack access to a legal advisor or a person to inform them of their responsibilities under environmental laws. Yet, these employees, such as Mr. Carr and the Aberdeen defendants, are responsible corporate officers and incur liability while those ultimately responsible may escape liability.

B. Budget

Commanders and supervisors must treat environmental compliance as they do any other mission. They must devote resources to compliance. Federal regulators and prosecutors consider the economic gain that results from noncompliance as a factor in deciding whether to prosecute a violation.⁴⁷⁵ Although federal agencies do not have a profit motive as corporations do, they have budget priorities that affect the allocation of personnel and money.

The first area to which commanders and supervisors must devote resources is personnel. The demands of environmental compliance require trained specialists. One or two environmental coordinators cannot manage an installation's environmental compliance program and deal with regulators. Commanders and supervisors would not entrust an installation training, maintenance, or safety program to several low-level employees. They

cannot entrust environmental compliance to a few poorly trained, overworked individuals.

Commanders must also conduct long and short-range planning for environmental compliance. They must budget for environmental compliance--hazardous waste disposal, asbestos removal, sewage treatment--the same way that they budget for construction, maintenance, and training. Regulators are sensitive to the complexities and delays of the federal budget process. However, their tolerance for budgetary excuses has limits. Federal agencies have had requirements to budget for environmental compliance for some time.⁴⁷⁶ In many cases they have ignored those responsibilities.

Congress's ever-expanding waivers of federal supremacy and sovereign immunity make budgeting for environmental compliance a necessity. Federal agencies can take the initiative and budget for compliance in a way that least affects their other federal missions or they can risk having a court order for injunctive dictate their budget priorities. Although federal environmental statutes allow the President to exempt federal facilities from environmental compliance requirements if they lack funds, the President has only granted one exemption.⁴⁷⁷

C. Environmental Compliance as a Mission

The most important aspect of an effective environmental compliance program is leadership. Policies, whistleblower hotlines, environmental compliance teams, special training, and budgeting are

meaningless if commanders and supervisors do not send the message to subordinates that environmental compliance is important and part of the mission. Federal agencies are consummate professionals at establishing policies, regulations, and procedures for their various missions. Subordinates knew when a commander or supervisor is actually concerned about a matter and when the leadership is simply going through the motions.

Environmental compliance does not require treatment different from any other part of the federal mission. In fact, the requirements of public welfare statutes and the responsible corporate officer doctrine fit perfectly within the philosophy of command. They emphasize authority and responsibility as the basis of imposing criminal liability; the key elements of command are authority and responsibility.⁴⁷⁸

Federal service is a public trust.⁴⁷⁹ The public entrusts not only the national defense, the lives of its sons and daughters, and the public welfare to the federal government, it also entrusts protection of its natural resources. Commanders and supervisors must view environmental compliance in the same manner that they view training, maintenance, and safety--as part of their mission. As one former officer succinctly noted:

Defense is more than planes and missiles to protect the country against an enemy attack. Part of the defense job is the safeguarding of the land, timber and waters, the fish and wildlife, the priceless natural resources which make this country worth defending.⁴⁸⁰

VII. CONCLUSION

Environmental crimes involve federal employees in very complex, ever-changing areas of the law. Case law is far from settled. Courts have struggled with balancing federal-state relations and issues of federal supremacy, sovereign immunity, and legislative jurisdiction since the founding of the Republic. They have similarly struggled with defining mens rea and criminal liability.⁴⁸¹ Imposing criminal liability on federal employees under federal or state environmental laws strains these doctrines to the breaking point.

The solution for the federal employee is to make environmental compliance part of the federal mission. An effective environmental compliance program not only achieves this goal, it avoids criminal prosecutions. The unresolved legal issues discussed in this article provide another reason for "staying on the civil side" as one commentator terms it and avoiding criminal investigations. Once the process begins, it can sweep any federal employee into its net.

The one constant in the whole morass is that environmental prosecutions are here to stay. To federal regulators and prosecutors, environmental prosecutions are essential to enforcing environmental laws. Society increasingly recognizes the threat of environmental crimes.⁴⁸² Society's mores have changed. For many "pollution is not just an unfortunate by-product of an industrialized America--it is not something that just happens--it is a crime."⁴⁸³

There was a time, not so long ago, when to many pollution was a 'so what' crime.... It was cheaper to dump industrial wastes illegally and be fined for it than it was to properly process those wastes. It was cheaper for cities to release raw sewage into rivers and harbors than it was to build the necessary water treatment facilities. It was cheaper for citizens to take the waste oil from their cars and pour it on the ground than it was to have it recycled. In point of fact, it was a small enough price to pay. Small enough until miles and miles of beaches were closed because garbage and medical wastes had washed ashore. Until supplies of fresh water became undrinkable. Until radioactive wastes threatened the health of entire communities. Until vast bodies of water were changed from cradles of life into crucibles of death for innumerable, and once-thought inexhaustible, species of aquatic life. And until governments, at all levels, began to respond forcefully to the crime of pollution.⁴⁸⁴

ENDNOTES

1. Record of Trial at 3729, United States v. Dee, No. HAR-99-0211 (D. Md. May 11, 1989) (government's cross examination of Mr. William Dee).
2. Army Times, Mar. 6, 1989, at 10, col. 3 (statement of Mr. Breckenridge L. Willcox, United States Attorney, Baltimore, Maryland).
3. United States v. Carr, No. 88-CR-36 (N.D.N.Y. Oct. 14, 1988).
4. Brown, Harris & Cox, The Liability of the Employee of a Federal Agency Charged with Criminal Environmental Violations: Do the Rules of Fair Play Apply to the Football?, 35 Fed. Bar News & J. 441, 442 (1988).
5. Baltimore Sun, Jan. 11, 1989, at B3, col. 1 (government's opening statement).
6. Baltimore Sun, Jan. 11, 1989, at B8, col. 1 (quoting attorney for defendants).
7. United States v. Dee, No. HAR-88-0211 (D. Md. May 11, 1989).
8. A survey of 60,000 people ranked environmental crimes seventh in seriousness among all crimes. U.S. Department of Justice, Bureau of Justice Statistics

Bulletin, January 1984, cited in Starr, Countering Environmental Crimes, 13 B.C. Env't'l Aff. L. Rev. 379, 380 n.1 (1986)).

9. H.R. Rep. No. 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. Code Cong. & Admin. News 6238, 6239 (estimating an eight percent annual increase in the amount of waste generated).

10. See U.S. Congress, Office of Technology Assessment, From Pollution to Prevention: A Progress Report on Waste Reduction--Special Report OTA-ITE-347 19 (1987) (estimating that one billion tons of hazardous waste are generated each year), cited in Note, In Search of Effective Hazardous Waste Legislation: Corporate Officer Criminal Liability, 22 Val. U.L. Rev. 385, 387 n.6 (1988) (noting that the Environmental Protection Agency believes that 90% of hazardous waste is disposed of improperly).

11. As Congress worked on legislation to impose more stringent standards under federal environmental laws, the federal government powerplant, which provided electricity to light congressional offices, polluted the air over Washington, D.C.. See Breen, Federal Supremacy and Sovereign Immunity Waivers in Federal Environmental Law, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) Editors' Summary, 10326 (1985).

12. Council on Environmental Quality, Environmental Trends 75 (1989) (noting that land use for the national defense accounts for four percent of all land in the United States).
13. U.S. Environmental Protection Agency, Federal Facilities Compliance Strategy III-1 (Dec. 1988).
14. See, e.g., Hazardous Waste: Federal Civil Agencies Slow to Comply With Regulatory Requirements (GAO/RCED-86-50, Dec. 26, 1985).
15. Exec. Order No. 12088, 43 Fed. Reg. 47707 (1978).
16. See Rich, Getting Tough on Environmental Crime, Resources, Oct. 1989, at 11 (noting that the theme of the National District Attorneys Association's (NDAA) July 1989 conference was the environment as crime victim and that the NDAA leadership wants to promote environmental prosecutions); McElfish, State Hazardous Waste Crimes, 17 Env'tl. L. Rep. (Env'tl. L. Inst.) 10465 (1987).
17. See Resolution, National District Attorneys Association, July 16, 1989 (urging Congress to subject federal facilities and employees to the same standards of accountability as states, local governments, and private industry face and specifically requesting the ability to impose state criminal sanctions against federal employees).

18. See, e.g., Hazardous Waste: Corrective Action Cleanups will Take Years to Complete 22 (GAO/RCED-88-48, Dec. 9, 1987) (estimating that cleanup at Superfund sites may cost \$22.7 billion); Hazardous Waste Problems at Department of Defense Facilities: Hearing Before the House Committee on Government Operations, Subcommittee on Environment, Energy and Natural Resources, 100th Cong., 2d Sess. 57, 76 (1987) (statement of Mr. Carl J. Schafer, Jr., Deputy Assistant Secretary of Defense (Environment), that DOD spent over \$350 million per year in fiscal years 1986 and 1987 and that the president's budget for fiscal years 1988 and 1989 requested over \$400 million per year).

19. The statutes contain "citizen suit" provisions that allow "any person" to commence a civil action on his own behalf against any person who is in violation of applicable pollution control standards or against the Administrator of EPA for alleged failure to perform acts or duties required under a statute. See e.g., Clean Air Act (CAA) Section 304, 42 U.S.C. Section 7604 (1982); Clean Water Act (CWA) Section 505, 33 U.S.C. Section 1365 (1982); Noise Control Act (NCA) Section 12, 42 U.S.C. Section 4911 (1982); Resource Conservation and Recovery Act (RCRA) Section 7002, 42 U.S.C. Section 6972 (1982); Toxic Substances Control Act (TSCA) Section 20, 15 U.S.C. Section 2619 (1982).

20. EPA sometimes can effectively close a facility that is not in compliance with environmental regulations by revoking its permit to operate. RCRA Section 3005(d), 42 U.S.C. Section 6925(d) (1982). It can issue compliance orders that establish timetables for bringing a facility into compliance with applicable pollution control standards. CAA Section 113(d), 42 U.S.C.

Section 7413(d) (1982 & Supp. IV 1987); CWA Section 309(a), 33 U.S.C. Section 1319(a) (1982 & Supp. IV). See generally Walker, High Stakes on a Fast Track: Administrative Enforcement at EPA, 35 Fed. B. News & J. 453 (1988) (explaining EPA's use of administrative sanctions).

21. Address by William K. Reilly, Administrator, Environmental Protection Agency, The Turning Point: An Environmental Vision for the 1990s, Marshall Lecture to the Natural Resources Defense Council (Nov. 27, 1989) [hereinafter Address by W. Reilly], reprinted in 20 Env't Rep. (BNA) 1386, 1387 (1989).

22. McMurtry & Ramsey, Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws, 18 Land Use & Env't. L. Rev. 427, 430 (1987) (Mr. Ramsey was formerly Chief of the Department of Justices Environmental Enforcement Section); Habicht, The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side 17 Env'tl. L. Rep. (Env'tl.

L. Inst.) 10478 (1987) (Mr. Habicht was formerly Assistant Attorney General in charge of the Land and Natural Resources Division of the Department of Justice).

23. CAA Section 120, 42 U.S.C. Section 7420 (1982).

24. Address by W. Reilly, supra note 21, at 1387. EPA referred 372 civil cases to DOJ in fiscal year 1988. Environmental Protection Agency, Fiscal Year 1988 Enforcement Accomplishments Report 1 (December 1988), cited in Seymour, Civil and Criminal Liability of Corporate Officers Under Federal Environmental Laws, 20 Env't Rep. (BNA) 337, 337 n.1 (1989).

25. Seymour, supra note 24, at 337.

26. DOJ believes that the "case or controversy" requirement of Article III of the United States Constitution prevents lawsuits between executive branch agencies. DOJ would also face ethical problems if it represented both parties to the same lawsuit. Federal law prohibits the use of private counsel to represent a federal agency, and DOJ has successfully rebuffed federal agencies' efforts to litigate matters in federal court without the assistance of DOJ. See Stever, Perspectives on the Problem of Federal Facility Liability for Environmental Contamination, 17 Env'tl. L. Rep. (Env'tl. L. Inst.) 10114, 10114-15 (1987).

27. The unitary executive theory may not protect federal agencies much longer, however. H.R. 3782, introduced during the first session of the 100th Congress, would create a "special environmental counsel" who could sue federal agencies that violate federal hazardous waste laws. See Brown, Harris & Cox, supra note 4, at 443.

28. Starr, supra note 8, at 382. See also Note, Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, 92 Harv. L. Rev. 1227, 1235-36 (1979) (arguing that criminal sanctions are most effective against the calculated decision making of corporate officials, who weigh compliance with regulations in terms of its costs and benefits).

29. See Glenn, The Crime of "Pollution": The Role of Federal Water Pollution Criminal Sanctions, 11 Am. Crim. L. Rev. 835, 836 (1973) (noting that it is often less expensive to pay fines than it is to install equipment and comply with environmental laws); Comment, Putting Polluters in Jail: The Imposition of Criminal Sanctions on Corporate Defendants Under Environmental Statutes, 20 Land & Water L. Rev. 93, 95, 106 (1985) [hereinafter Putting Polluters in Jail] (quoting a corporate manager's statement that "[i]t's cheaper to pay claims than it is to control flourides").

30. Remarks by Dick Thornburgh, Attorney General of the United States, before the National Association of

District Attorneys, in Portland, Maine (Jul. 19, 1989); Reisel, Criminal Prosecution and Defense of Environmental Wrongs, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 10065, 10067 (1985) (Mr. Reisel was formerly Chief, Environmental Protection Unit, United States Attorneys Office, Southern District of New York).

31. Glenn, supra note 29 at 857-58; Comment, Prosecuting Corporate Polluters: The Sparing Use of Criminal Sanctions, 62 U. Det. L. Rev. 659, 670 (1985).

32. After the Aberdeen prosecution, DOJ received many inquiries from federal employees concerning compliance with environmental laws. Nat'l. Env'tl. Enforcement J. 41-42 (Nov. 1989) (testimony of Richard Stewart, Assistant Attorney General, DOJ, Before House Subcommittee on Transportation and Hazardous Materials, Committee on Energy and Commerce). See also Rich, supra note 16, at 10 (discussing the affect of the Aberdeen prosecution on federal employees attitudes and noting an Aberdeen public affairs specialist's statement that "people are worried about whether or not they're doing something they shouldn't be--double checking all their work to make sure it's going right").

33. Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623 (1970).

34. See generally McMurry & Ramsey, supra note 22, at 428-30. EPA still has to defend itself against lawsuits challenging its implementation and enforcement activities. See Address by W. Reilly, supra note 21, at 1386 (noting that he is currently named as a defendant in 489 lawsuits).

35. McMurry & Ramsey, supra note 22, at 428. When the same activity violates the criminal and civil provisions of environmental statutes, DOJ may institute parallel civil and criminal proceedings. See generally Marzulla, Guidelines for Civil and Criminal Parallel Proceedings, Land and Natural Resources Division Directive, No. 5-87, Oct. 13, 1987, reprinted in 4 Department of Justice Manual, (Prentice Hall) Section 5-1.301A (1990) [hereinafter DOJ Manual]. Administrative and civil enforcement actions are not prerequisites to criminal prosecution. See United States v. Frezzo Brothers Inc., 602 F.2d 1123, 1126 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980).

36. McMurry & Ramsey, supra note 22, at 430 (noting that the government could request injunctive relief by relying on reports that corporations filed under the various statutes).

37. See Habicht, supra note 22, at 10479.

38. The Office of Criminal Enforcement is responsible for policy development, program guidance and liaison with DOJ. McMurry & Ramsey, supra note 22, at 434, 438.

39. Reisel, supra note 30, at 10065-66.

40. Habicht, supra note 22, at 10479.

41. Starr, supra note 8, at 381.

42. Habicht, supra note 22, at 10479 (noting that EPA has over 50 investigators who operate out of EPA's ten Regional Offices).

43. Address by David Bullock, trial attorney, Environmental Crimes Section, DOJ, Criminal Prosecution for Environmental Prosecution: A Novelty No Longer, Environmental Hazards Houston Conference (1989) (Mr. Bullock is an attorney in DOJ's Environmental Crimes Section)[hereinafter Address by D. Bullock].

44. See generally Wills & Murray, State Environment Enforcement Organizations, Nat'l. Env'tl. Enforcement J. 3, 4-5 (Aug. 1989) (The regional organizations help state and local investigators, regulators, and prosecutors build strong criminal enforcement programs in each state. They also provide computerized information sharing systems to facilitate communication

among states. The NEIC assigns a Special Agent in Charge to each regional organization.).

45. Environmental Protection Agency, Fiscal Year 1988 Enforcement Accomplishments Report 1 (1988), cited in Seymour supra note 24, at 337.

46. McMurry & Ramsey, supra note 22, at 434-35. See generally 4 DOJ Manual, supra note 35, at Section 5-11.000.

47. Starr, supra note 8, at 381.

48. Memorandum from F. Henry Habicht II, Assistant Attorney General, to employees of the Lands and Natural Resources Division (May 7, 1987) (explaining that separating the civil and criminal environmental functions in DOJ will allow better management of both sections), reprinted in 4 DOJ Manual supra note 35, at Section 5-3.710A.

49. Address by D. Bullock, supra note 43 (stating that the Environmental Crimes Section has over twenty attorneys and continues to expand).

50. Interview with Ms. Jane F. Barrett, Assistant United States Attorney, Maryland, in Charlottesville, Virginia (Jan. 11, 1989) [hereinafter Interview with Ms. Jane F. Barrett] (discussing Ms. Barrett's prosecution of the Aberdeen case).

51. As prosecution of environmental crimes received greater media and public attention and as Assistant United States Attorneys developed environmental law expertise, USAOs began to handle more cases without assistance from DOJ. Address by D. Bullock, supra note 43.

52. 4 DOJ Manual, supra note 35, Section 5-11.312 (stating that only attorneys employed by DOJ, or authorized by DOJ to represent the United States, may prosecute environmental criminal cases).

53. Id. at Section 5-3.721 (stating that primary responsibility for handling cases is determined on a case-by-case basis but DOJ monitors all prosecutions).

54. Habicht, supra note 22, at 10479.

55. See McMurry & Ramsey, supra note 22, at 431-32. See, e.g., United States v. Distler, 9 Env'tl. L. Rep. (Env'tl. L. Inst.) 20700 (W.D. Ky. 1979), aff'd, 671 F.2d 954 (6th Cir. 1980) (illegal discharge of chemical pollutants into Louisville sewer system forced city employees to abandon the wastewater treatment plant and resulted in the release of the pollutants and approximately 100 million gallons of untreated sewage per day into the Ohio River for over two months).

56. See Memorandum from Peggy Hutchins, Environmental Crimes Section, to Joseph Block, Chief Environmental

Crimes Section (January 2, 1990) (Statistics FY83 Through FY90). This memorandum notes the following information:

(FY)	Fines Imposed	Jail Terms		Actual Confinement	
83	341,100	11 yrs		5 yrs	
84	384,290	5 yrs	3 mos	1 yr	7 mos
85	565,850	5 yrs	5 mos	2 yrs	11 mos
86	1,917,602	124 yrs	2 mos	31 yrs	4 mos
87	3,046,060	32 yrs	4 mos	14 yrs	9 mos
88	7,091,876	39 yrs	3 mos	8 yrs	3 mos
89	12,750,330	51 yrs	25 mos	36 yrs	14 mos
90	335,161	13 yrs	7 mos	2 yrs	11 mos
	\$26,432,269	280 yrs	49 mos	100 yrs	59 mos

57. "For every case of criminal pollution that is detected and prosecuted, dozens, even hundreds, continue undetected and unabated." Starr, supra note 8, at 383.

58. See Habicht, supra note 22, at 10480.

59. Id. at 10481-82. See, e.g., United States v. Hamel, 551 F.2d 107,108 (6th Cir. 1977) (defendant illegally discharged gasoline onto ice-covered lake from dispenser on a pier); United States v. Ralston Purina Co., 12 Env'tl. L. Rep. (Env'tl. L. Inst.) 20257 (W.D. Ky. 1982) (release of hexane into city sewer

system caused explosion under highway and millions of dollars of damage).

60. United States v. Ward, 676 F.2d 94 (4th Cir.), cert. denied, 459 U.S. 835 (1982).

61. Address by Ms. Jane F. Barrett, Contract Law Symposium, The Judge Advocate General's School, Charlottesville, Virginia (Jan. 11, 1990).

62. Habicht, supra note 22, at 10482. See, e.g., United States v. A. C. Lawrence Leather Co., No. 82-37-01-L (D.N.H. Apr. 7, 1983) (Company concealed its illegal disposal of untreated wastes into a nearby river through false reports, including reports required by EPA under a grant program, which the company applied for, and received, to study the success of its wastewater treatment plant in removing pollution from its industrial waste.).

63. United States v. Carr, 880 F.2d 1550, 1551 (2d Cir. 1989).

64. Habicht, supra note 22, at 10480. As one attorney in DOJ's Environmental Crimes Section states, "[we]'re working our way up the corporate ladder We learned on the small fry and now we're trying to move up to the bigger fry." Rich, supra note 16, at 9 (quoting Paul Rosenzweig, trial attorney in DOJ's Environmental Crimes Section).

65. Interview with Ms. Jane F. Barrett, supra note 50.

66. See Putting Polluters in Jail supra note 29, at 95-97 (discussing reluctance of the courts to punish corporate criminals).

67. Mistretta v. United States, 109 S. Ct. 647 (1989) (upholding sentencing guidelines against challenge that they are an unconstitutional delegation of legislative authority).

68. U.S. Sentencing Commission, Federal Sentencing Guidelines Manual (West 1988).

69. Id. at Section 5C1.1 (If the minimum term of imprisonment listed in the Sentencing Table is zero, the court may impose no confinement. If the minimum term of imprisonment is one to ten months, the court may impose intermittent confinement, community confinement, or home detention in conjunction with probation. If the minimum term of imprisonment is more than ten months, the defendant must serve at least the minimum term.).

70. Id. at Part Q.

71. Id. at Sections 2.135, 5.2 (The continuous release or mishandling of hazardous or toxic substances results in an offense level of fourteen, for which the

Sentencing Table requires a minimum sentence of fifteen months).

72. See Bartus, Federal Employee Personal Liability Under Environmental Law: New Ways for The Federal Employee to Get in Trouble, 31 A.F.L. Rev. 45, 46, 52 (1989).

73. Id. at 52.

74. See generally Comment, White-Collar Crime: Third Annual Survey of Law, 22 Am. Crim. L. Rev. 279 (1984).

75. "Even a dog distinguishes between being stumbled over and being kicked." *Morrisette v. United States*, 342 U.S. 246, 250-52, n.9 (1951) (quoting, O. Holmes, *The Common Law* (1881)). See also W. LaFave & A. Scott, *Criminal Law* 3.1, 3.11(a) (1986).

76. Interview with Ms. Jane F. Barrett, supra note 50.

77. "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morrisette*, 342 U.S. at 250-51, quoted in *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978).

See also United States v. Balint, 258 U.S. 251, 251-52 (1921).

78. W. Lafave & A. Scott, supra note 75, at 3.4(a).

79. "A person acts purposely ... [if] it is his conscious object to engage in conduct of that nature or to cause such a result...." Model Penal Code Section 2.02(2)(i) (Proposed Official Draft 1962).

80. "A person acts knowingly ... [when] he is aware that it is practically certain that his conduct will cause such a result." Id. at Section 2.02(b)(ii).

81. See Liparota v. United States, 471 U.S. 419, 423 n.5 (1985) ("We have also recognized that the mental element in criminal law encompasses more than the two possibilities of 'specific' and 'general' intent.) (citing United States v. Bailey, 444 U.S. 394, 403-07 (1980) and Model Penal Code Section 2.02 (Proposed Official Draft 1962)).

82. Morissette, 342 U.S. at 251 n.8 ("Most extensive inroads upon the requirement of intention, however, are offenses of negligence, such as involuntary manslaughter or criminal negligence and the whole range of crimes arising from omission of duty.").

83. See W. Lafave & A. Scott, supra, note 75, at 3.4(a).

84. Morissette, 342 U.S. at 252-56 (discussing the origin of public welfare statutes as a legislative response to the dangers created by the industrial revolution--powerful and complex machinery, automobiles, traffic, crowded cities and quarters, and the wide distribution of food, drink, and drugs). See generally Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55 (1933).

85. "This case stirs large questions--questions that go to the moral foundations of the criminal law. Whether postulated as a problem of "mens rea," or "willfulness," of "criminal responsibility," or of "scienter," the infliction of criminal punishment upon the unaware has long troubled the fair administration of justice." United States v. Int'l Mineral & Chem. Corp., 402 U.S. 558, 565 (1971) (Harlan, J., Brennan J. & Stewart J., dissenting). "The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." Smith v. California, 361 U.S. 147, 150 (1959) (quoting Dennis v. United States, 341 U.S. 494, 500 (1951)). See also Note, Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, 92 Harv. L. Rev. 1227, 1236-37, n.27 (1979).

86. "Consequences of a general abolition of intent as an ingredient of serious crimes have aroused the concern of responsible and disinterested students of penology. Of course, they would not justify judicial

disregard of a clear command to that effect from Congress, but they do admonish us to caution in assuming that Congress, without clear expression, intends in any instance to do so." Morissette, 342 U.S. at 254 n.14.

87. Liparota, 471 U.S. at 432-33.

88. United States v. Dotterweich, 320 U.S. 227, 281 (1943).

89. Id. at 284-85 (paraphrased). See also Balint v. United States, 258 U.S. 251, 254 (1921) (The purpose of the Narcotics Act was "to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and, if he sells the inhibited drug in ignorance of its character, to penalize him. Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided.").

90. See Balint, 258 U.S. at 252.

91. Morissette, 342 U.S. at 258 (quoting People ex rel. Price v. Sheffield Farms-Slawson-Decker Co., 225 N.Y. 25, 32-33, 121 N.E. 474, 477 (1918) (Cardozo, J.) ("[I]n sustaining the power so to fine unintended

violations 'we are not to be understood as sustaining to a like length the power to imprison. We leave that question open.'").

92. See discussion supra at notes 28-32.

93. Freed, 401 U.S. at 612-4 (Brennan, J., concurring) (explaining that "mens rea is not a unitary concept, but may vary as to each element of a crime.... To determine the mental element required for conviction, each material element of the offense must be examined and the determination made what level of intent Congress intended the Government to prove....").

94. See Robinson & Grall, Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond, 35 Stan. L. Rev. 681 (1983).

95. See Note, Element Analysis Applied to Environmental Crimes: What Did They Know and When Did They Know It?, 16 B.C. Env'tl. Aff. L. Rev. 53 (1988).

96. F. Habicht, supra note 22, at 10483.

97. Appellants' Brief, United States v. Dee, No. 89-5606 at 31-38 (4th Cir. Oct. 16, 1989).

98. "If the ancient maxim that 'ignorance of the law is no excuse' has any residual validity, it indicates that the ordinary intent requirement--mens rea--of the

criminal law does not require knowledge that an act is illegal, wrong, or blameworthy." United States v. Freed, 401 U.S. 601, 612 (1971) (Brennan J., concurring).

99. W. LaFave & A. Scott, supra note 75, at 5.1(d) & n.75 (discussing commentators' concern with applying the rule "ignorance of the law is no excuse" to regulatory crimes that do not involve conduct traditionally viewed as criminal according to the "mores of the time").

100. "Where ... dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." Int'l Mineral and Chem. Corp., 402 U.S. at 563. See also Freed, 401 U.S. at 607-11 (rejecting argument that conviction for possessing unregistered hand grenades required knowledge of the law because "one would hardly be surprised to learn that possession of hand grenades is not an innocent act").

101. "But it is too much to conclude that in rejecting strict liability the House was also carving out an exception to the general rule that ignorance of the law is no excuse." Int'l Minerals & Chem. Corp., 402 U.S. at 563 (construing a public welfare hybrid that

punished knowing violations of Interstate Commerce Commission regulations for transporting hazardous substances, in this case sulfuric acid).

102. *Lambert v. California*, 355 U.S. 225, 229-30 (1957).

103. "Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in language foreign to the community." *Id.* at 229-30. *See* *Freed*, 401 U.S. at 613 n.4 (Brennan J., concurring) (noting *Lambert* as precedent that due process concerns limit a legislature's ability to create strict liability offenses). *Cf.*, *Powell v. Texas*, 392 U.S. 514, 535 n.27 (1968) ("It is not suggested that *Lambert* established a constitutional doctrine of mens rea....").

104. *Lambert v. California*, 355 U.S. at 228 (holding that the ordinance was not a public welfare statute and that the failure to register was "unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed").

Cf., *Liparota*, 471 U.S. at 426-28, 432-33 (holding that a statute punishing illegal possession or acquisition

of food stamps required knowledge-of-illegality and noting that although Congress could have intended to impose strict liability as to knowledge of the regulatory requirements and rely upon prosecutors to exercise their discretion to avoid harsh results, the lack of clear legislative intent or public welfare benefit precluded such an interpretation because the statute would otherwise "criminalize a broad range of apparently innocent conduct"). See generally Note, Ignorance of the Law as an Excuse, 86 Colum. L. Rev. 1392 (1986) (arguing that due process requires a mistake of law defense for laws that criminalize ordinary behavior and noting the reluctance of the Supreme Court to impose constitutional limitations upon a legislature's ability to create criminal offenses).

105. "It should be noted that the general principle that ignorance or mistake of law is no excuse is usually greatly overstated; it has no application when the circumstances made material by the definition of the offense include a legal element.... The law involved is not the law defining the offense; it is some other legal rule that characterizes the attendant circumstances that are material to the offense." Freed, 401 U.S. at 615-16. See W. LaFare & A. Scott, supra note 75, at 5.1(d).

106. Freed, 401 U.S. at 609.

107. Cf., United States Gypsum Co., 438 U.S. at 441 n.17 (noting that "in the antitrust context, the excessive caution spawned by a regime of strict liability will not necessarily redound to the public's benefit. The antitrust laws differ in this regard from, for example, laws designed to insure that adulterated food will not be sold to consumers. In the latter situation, excessive caution on the part of producers is entirely consistent with the legislative purpose....").

108. See United States v. A & P Trucking Co., 358 U.S. 121, 125-27 (1958) (imputing criminal liability to a partnership for the acts of its employees); Apex Oil Co. v. United States, 530 F.2d 1291 (8th Cir.) (imputing employee's knowledge of oil spill to corporation to hold it criminally liable under the Clean Water Act), cert. denied, 429 U.S. 827 (1976). Cf., W. LaFave & A. Scott, supra note 75, at 3.10(b) (criticizing courts' unquestioning application of the tort principle respondeat superior to corporations without regard to the positions and authority of the employees involved).

109. Nye & Nissen v. United States, 336 U.S. 613, 619-20 (1949); United States v. Amrep Corp., 560 F.2d 539, 545 (2d Cir.), cert. denied, 434 U.S. 1015 (1977). See generally Brickey, Criminal Liability of Corporate Officers for Strict Liability Offenses -- Another View, 35 Vand. L. Rev. 1337, 1338-1342

(1982) (discussing theories under which courts hold corporate officers criminally liable).

110. "There is no evidence in this case of any personal guilt on the part of the respondent. There is no proof or claim that he ever knew of the introduction into commerce of the adulterated drugs in question, much less that he actively participated in their introduction. Guilt is imputed to the respondent solely on the basis of his authority and responsibility as president and general manager of the corporation." Dotterweich, 320 U.S. at 286 (Murphy, J., dissenting).

111. Id. at 284-85

112. Id.

113. "To attempt a formula embracing the variety of conduct whereby persons may responsibly contribute in furthering a transaction forbidden by an Act of Congress ... would be mischievous futility. In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted." Id. at 285.

114. United States v. Park, 421 U.S. 658, 660 (1975).

115. Id. at 672.

116. Id. at 660 (The Food, Drug, and Cosmetic Act, Section 331(k) prohibited "[t]he alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.").

117. Park, 421 U.S. at 660.

118. "The failure thus to fulfill the duty imposed by the interaction of the corporate agent's authority and the statute furnishes a sufficient causal link. The considerations which prompted the imposition of this duty, and the scope of the duty, provide the measure of culpability." Id. at 674.

119. Id. at 662-63, n.7. When questioned on cross examination, Park conceded that his overall responsibilities encompassed sanitary conditions at Acme's warehouses. Id. at 664-65.

120. Id. at 675.

121. See Greer v. Spock, 424 U.S. 828 (1976); Cafeteria & Restaurant Workers Union v. Mc Elroy, 367 U.S. 886 (1961).

122. See, e.g., Army Reg. 200-1, Environmental Protection and Enhancement, para. 1-6i (15 June 1982).

123. Park, 421 U.S. at 676 (noting that juries may demand more evidence than corporate by-laws before they find that a corporate officer has the requisite authority and responsibility for criminal liability).

124. After Mr. Dee equivocated about his responsibility for managing hazardous wastes generated within his directorate, the prosecutor introduced his job description into evidence. His responsibilities included "life cycle design," which required him to manage the chemical warfare agents that his directorate developed from design to disposal. Local regulations imposed additional hazardous waste management responsibilities. Record of Trial, United States v. Dee, No. 88-CR-36, 3661-68, 3719-20.

125. Park, 421 U.S. at 673 (noting that "[t]he theory upon which responsible corporate agents are held criminally accountable for 'causing' violations of the Act permits a claim that a defendant was 'powerless' to prevent or correct the violation....").

126. Id. at 677 (noting that Park did not request an instruction on the impossibility defense and thus not deciding whether his testimony entitled him to one).

127. Id. at 677.

128. Id. at 677-78.

129. "Assuming arguendo, that it would be objectively impossible for a senior corporate agent to control fully day-to-day conditions in 874 retail outlets, it does not follow that such a corporate agent could not prevent or remedy promptly violations of elementary sanitary conditions in 16 regional warehouses." Id. at 677, n.1. See also *United States v. Starr*, 535 F.2d 512, 515-16 (9th Cir. 1976) (holding that a corporate officer could not delegate his responsibility to subordinates and that the standard of foresight and vigilance imposed on responsible corporate officers included a duty to anticipate and counteract the shortcomings of delegees, including willful disobedience of orders).

130. See *Boyce Motor Lines v. United States*, 342 U.S. 337, 342 (1952) (holding that willful ignorance of corporate compliance with the requirements of a public welfare statute establishes knowledge).

131. See *In re Yamashita*, 327 U.S. 1 (1945) (failure of commander of occupying force in the Phillipines during World War II to control his subordinates resulted in death and injury to over 25,000 people and his sentence to death under the Articles of War).

132. See Comment, The Criminal Responsibility of Corporate Officials for Pollution of the Environment,

37 Alb. L. Rev. 61, 74 (1972) (analogizing the responsibilities of a military commander to those of a corporate officer under the responsible corporate officer doctrine of Park).

133. In re Yamashita, 327 U.S. at 13-17 (noting that the defendant never argued that performing these duties was beyond his control).

134. See Nye & Nissen, 336 U.S. at 619; United States v. Ward, 676 F.2d 94 (4th Cir.) (holding defendant liable for aiding and abetting the illegal disposal of toxic substances), cert. denied, 459 U.S. 835 (1982).

135. Park, 421 U.S. at 670 (noting the established principle that a corporate agent, through whose act the corporation commits a crime, is individually guilty of that crime); United States v. Wise, 370 U.S. 405, 409 (1962) (refusing to exculpate corporate officers from criminal liability when they act in a representative capacity for corporation).

136. EPA's Federal Agency Hazardous Waste Compliance Docket lists hundreds of federal facilities that regulators must evaluate for possible hazardous waste contamination. Although the Docket focuses on the cleanup of hazardous waste at federal facilities, it illustrates the number of federal facilities that handle hazardous waste. EPA Federal Agency Hazardous Waste Compliance Docket, 53 Fed. Reg. 4,280 (1988),

amended by, 53 Fed. Reg. 46,364, corrected by, 53 Fed. Reg.

49375 (1988), reprinted in, 41 Env't. Rep. (BNA) 3361 (1989).

137. EPA funds four regional hazardous waste task forces to assist states in prosecuting hazardous waste offenses. See Wills & Murray, supra note 44, at 3-4.

138. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. Sections 6901-6991i (1982 & Supp. V 1987)).

139. "The term 'hazardous waste' means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." RCRA Section 1004(5), 42 U.S.C. 6903(5) (1982). "The term 'solid waste' means any garbage, refuse, ... and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities." RCRA Section 1004(27), 42 U.S.C. Section 6903(27) (1982).

140. See H.R. Rep. No. 1491, 94th Cong., 2d Sess. 2-4, 11, reprinted in 1976 U.S. Code Cong. & Admin. News 6238, 6238-41, 6249.

141. RCRA Section 1002, 42 U.S.C. Section 6901 (1982 & Supp. V 1987) (noting the ever-increasing amounts of solid and hazardous waste generated by society and the threat that unregulated disposal of such wastes presents to public health and welfare).

142. RCRA Section 1003, 42 U.S.C. Section 6902 (1982 & Supp. V 1987) (declaring the national policy to reduce the generation of hazardous waste and regulate its treatment, storage, and disposal to minimize the threat to human health and the environment).

143. See United States v. Hayes Int'l Corp., 786 F.2d 1499, 1503 (11th Cir. 1986); Wyckoff Co. v. Env'tl. Protection Agency, 796 F.2d 1197, 1198 (9th Cir. - 1986).

144. RCRA Section 3001, 42 U.S.C. Section 6921 (1982 & Supp. V 1987). See 40 C.F.R. Part 261 (1989) (Subpart B lists criteria for identifying hazardous wastes; Subpart C lists characteristics of hazardous wastes by ignitability, corrosivity, reactivity, and EP toxicity; Subpart D identifies particular substances that EPA considers hazardous).

145. RCRA Section 3002(a), 42 U.S.C. Section 6922(a) (1982 & Supp. V 1987). See 40 C.F.R. Part 262 (1989).
146. RCRA Section 3002(a)(5), 42 U.S.C. Section 6922(a)(5) (1982 & Supp. V 1987). See 40 C.F.R. Part 262 (1989). See Hayes Int'l Corp., 786 F.2d at 1501.
147. RCRA Section 3003, 42 U.S.C. Section 6923 (1982 & Supp. V 1987). See 40 C.F.R. Part 263 (1989)..
148. RCRA Section 3004, 42 U.S.C. Section 6924 (1982 & Supp. V 1987). See 40 C.F.R. Parts 264-267 (1989).
149. RCRA Section 3005(a), 42 U.S.C. Section 6925(a) (1982 & Supp. V 1987). See 40 C.F.R. Part 270 (1989).
150. Persons who violate section 3008(d) are subject to a maximum fine of \$50,000 for each day of violation, imprisonment for two years (five years for a violation of subparagraphs (1) or (2)), or both. The maximum punishment doubles for a second conviction. RCRA Section 3008(d), 42 U.S.C. Section 6928(d) (Supp. V 1987).
151. Section 3008(d) punishes "[a]ny person who--
(1) knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter or pursuant to title I

of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. Section 1411 et seq.],

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter--

(A) without a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. Section 1411 et seq.]; or

(B) in knowing violation of any material condition or requirement of such permit; or

(C) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards;

(3) knowingly omits material information or makes any false material statement or representation in any applications, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subtitle;

(4) knowingly generates, stores, treats, transports, disposes of, exports or otherwise handles any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter (whether such activity took place before or takes place after the date of the enactment of this paragraph) and who knowingly destroys, alters, conceals, or fails to file any record, application, manifest, report, or other document required to be maintained or filed for purposes of compliance with regulations promulgated by

the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(5) knowingly transports without a manifest, or causes to be transported without a manifest, any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter required by regulations promulgated under this subchapter (or by a State in the case of a State program authorized under this subchapter) to be accompanied by a manifest;

(6) knowingly exports a hazardous waste identified or listed under this subchapter (A) without the consent of the receiving country or, (B) where there exists an international agreement between the United States and the government of the receiving country establishing notice, export, and enforcement procedures for the transportation, treatment, storage, and disposal of hazardous wastes, in a manner which is not in conformance with such agreement.

(7) knowingly stores, treats, transports, or causes to be transported, disposes of, or otherwise handles any used oil not identified or listed as a hazardous waste under subchapter--

(A) in knowing violation of any material condition or requirement of a permit under this subtitle C; or

(B) in knowing violation of any material condition or requirement of any applicable regulations or standards under this chapter." RCRA Section 3008(d), 42 U.S.C. Section 6928(d) (Supp. V 1987).

152. Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, Sec. 232(a)(3), 98 Stat. 3256. See H.R. Rep. No. 198, 98th Cong., 2d Sess. 55, reprinted in 1984 U.S. Code Cong. & Admin. News 5614.

153. "Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subchapter or used oil not identified or listed as a hazardous waste under this subchapter in violation of paragraph (1), (2), (3), (4), (5), or (6) of subsection (d) of this section who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment for not more than fifteen years, or both...." RCRA Section 3008(e), 42 U.S.C.

Section 6928(e) (1982 & Supp. V 1987).

154. See United States v. Johnson & Towers, Inc., 741 F.2d 662, 665 (3d Cir. 1984), cert. denied 469 U.S. - 1208 (1985).

155. "The term 'person' means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, Municipality, commission, political subdivision of a State, or any interstate body." RCRA Section 1004(15); 42 U.S.C. Section 6903(15) (1982).

156. "The term 'federal agency' means any department, agency, or other instrumentality of the Federal Government, any independent agency or establishment of the Federal Government including any Government corporation, and the Government Printing Office." RCRA Section 1004(4); 42 U.S.C. Section 6903(4) (1982).

157. Memorandum in Support of Defendants' Joint Motion to Dismiss Counts of Indictment Alleging Violations of the Resource Conservation and Recovery Act, United States v. Dee, Cr. No. HAR-88-0211 at 11-13 (Aug. 29, 1988). See also Brown, Harris & Cox, supra note 4, at 442-43.

158. United States v. Northeastern Pharmaceutical & Chem. Co., Inc., 810 F.2d 726, 745 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987) ("As defined by the statute, the term 'person' includes both individuals and corporations and does not exclude corporate officers and employees."); Johnson & Towers, Inc., 741 F.2d at 664-65.

159. See Government's Consolidated Responses to Defendant's Motions, United States v. Dee, Cr. No. HAR-88-0211 at 10-12 (Sep. 16, 1988)[hereinafter Government's Response]; United States v. Isaacs, 493 F.2d 1124, 1144 (7th Cir. 1974) ("We conclude that whatever immunities or privileges the Constitution confers for the purpose of assuring the independence of the co-equal branches of government, they do not exempt

the members of those branches 'from the operation of the ordinary criminal laws.'").

160. "Whatever may be the case with respect to civil liability generally, ... we have never held that the performance of the duties of judicial, legislative, or executive officers requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights.... On the contrary, the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress'" (emphasis in original). *United States v. Gillock*, 445 U.S. 360, 372 (1980) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974); *Gravel v. United States*, 408 U.S. 606, 627 (1972) ("But we cannot carry a judicially fashioned privilege so far as to immunize criminal conduct proscribed by an Act of Congress The so-called executive privilege has never been applied to shield officers from prosecution for crime"). See Government's Response *supra* note 159, at 10-11 (citing *O'Shea* and *Gravel*).

161. See *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976) ("This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of criminal law"); *United States v. Claiborne*, 727 F.2d 842, 848 (9th Cir. 1984) ("[C]riminal conduct is not part of the necessary functions performed by public

officials. Punishment for that conduct will not interfere with the legitimate operation of a branch of government.'" (quoting Isaacs, 493 F.2d at 1144).

162. Hayes Int'l, Corp., 786 F.2d at 1502.

163. S. Rep. No. 172, 96th Cong., 2d Sess. 39, reprinted in 1980 U.S. Code Cong. & Admin. News 5019, 5038, cited in Id. at 1504.

164. See Model Penal Code Section 2.02(2)(b) (Proposed Official Draft 1962) (one acts "knowingly" if "he is aware that it is practically certain that his conduct will cause such a result").

165. See discussion supra at notes 95-96. See also Johnson & Towers, Inc., 741 F.2d at 669. Cf., Hayes Int'l Corp., 786 F.2d at 1504 (relying on precedent that construed "knowledge" in criminal statutes that were not public welfare statutes).

166. "A person's state of mind is knowing with respect to--(A) his conduct, if he is aware of the nature of his conduct;

(B) an existing circumstance, if he is aware or believes that the circumstance exists; or

(C) a result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury...."

RCRA Section 3008(f)(1), 42 U.S.C. Section 6928(f)(1)

(1982). See also H.R. Conf. Rep. No. 1444, 96th Cong., 2d Sess. 39, reprinted in 1980 U.S. Code Cong. & Admin. News 5038 (choosing to define "knowledge" as Congress defined it in the Criminal Code Reform Act).

167. Hayes Int'l Corp., 786 F.2d at 1503.

168. Cf., Hoflin, 880 F.2d at 1037-38 (holding that the addition of "knowing" in subsections 3008(d)(2)(B) and (C) requires knowledge of the permit status of a facility for those offenses but not for subsection 3008(d)(2)(A) where Congress omitted the term) with Johnson & Towers, Inc., 741 F.2d at 668-69 (holding that the omission of "knowing" in 3008(d)(2)(A) was either inadvertent or that "knowingly" in section 3008(d)(2) applies to subsection 3008(d)(2)(A)).

169. United States v. Greer, 850 F.2d 1447, 1450 (11th Cir. 1988); Johnson & Towers, Inc., 741 F.2d at 668.

170. See Hoflin, 880 F.2d at 1033 (upholding conviction of defendant who ordered an employee to bury paint drums); Johnson & Towers, Inc., 741 F.2d at 664.

171. Greer, 850 F.2d at 1451 (proving the defendant's knowledge of illegal disposal through his statements to the plant manager to "keep the drum count down," "a rainy day is a good day to get your drum count down," and "you handle it" where local ordinances limited the

company to 1,300 drums in which it could store hazardous waste).

172. Hayes Int'l Corp., 786 F.2d at 1504.

173. Greer, 850 F.2d at 1452.

174. Hayes Int'l Corp., 786 F.2d at 1505 ("There is no dispute that the appellees knew that the waste was a combination of paint and solvents; nor is there any dispute that the mixture was a hazardous waste. Accordingly, the evidence was sufficient for the jury to find the appellees knowingly transported hazardous waste.").

175. See Hoflin, 880 F.2d at 1039; Johnson & Towers, Inc. 741 F.2d at 668 ("[a] person thinking in good faith that he was [disposing of] distilled water when in fact he was [disposing of] some dangerous acid would not be covered") (quoting, International Minerals & Chem. Corp., 402 U.S. 558, 563-64 (1971)).

176. See H.R. Rep. No. 198, 98th Cong., 2d Sess. 54-55, reprinted in 1984 U.S. Code Cong. & Admin. News 5613-14 (emphasizing that failing to file material information due to accident or mistake is not a criminal violation under RCRA). See also H.R. Conf. Rep. No. 1444, 96th Cong., 2d Sess. 37, reprinted in 1980 U.S. Code Cong. & Admin. News 5036 (explaining the addition of "knowingly" in section

3008(d)(4), immediately preceding "destroys, alters, conceals," as excluding accidental and inadvertent document destruction or alteration from section 3008(d)'s reach).

177. Hayes Int'l Corp., 786 F.2d at 1503. But see Johnson & Towers, Inc., 741 F.2d at 669 (holding that "jury must find that each defendant knew that Johnson & Towers was required to have a permit").

178. See, e.g., Hoflin, 880 F.2d at 1039 (omitting knowledge of RCRA's permit requirement from a list of elements needed to prove the offense of disposing of hazardous waste without a permit).

179. Johnson & Towers, Inc., 741 F.2d at 664-65.

180. The opinion does not explicitly frame the issue in this manner. This interpretation of the court's motives follows from its holding that RCRA's criminal provisions applies to all corporate employees and not just owners and operators of hazardous waste treatment, storage, and disposal facilities and its framing of the issue as being "whether the criminal provision may be applied to the individual defendants who were not in the position to secure a permit...." Id. at 664-65, 666.

181. The Third Circuit held that the government must prove knowledge of RCRA's permit requirement but that a

jury could infer such knowledge from their corporate positions. The holding, which correctly states the responsible corporate officer doctrine of Park, ignores the fact that employees who are not responsible corporate officers also have a duty to obey the law. Id. at 669. See discussion supra note ____.

182. See discussion supra at note 135 (noting that actions on behalf of the corporations are not a defense to criminal prosecution).

183. The Third Circuit's holding did require the government to prove knowledge of a facility's permit status in addition to RCRA's requirement for a facility to have a permit. It did not consider allowing the defendants to raise a mistake of fact defense. Johnson & Towers, Inc., 741 F.2d at 669.

184. A mistake of fact defense also protects a person who reasonably believes that a facility has a permit but has been misled by people at the site. See Hayes International, 786 F.2d at 1505-06.

185. Hayes Int'l Corp., 786 F.2d at 1504 ("[I]n this regulatory context a defendant acts knowingly if he willfully fails to determine the permit status of the facility.").

186. Johnson & Towers, Inc., 741 F.2d at 670.

187. Hayes Int'l Corp., 786 F.2d at 1504 ("It is common knowledge that properly disposing of wastes is an expensive task, and if someone is willing to take away wastes at an unusual price or under unusual circumstances, then a juror can infer that the transporter knows the wastes are not being taken to a permit facility.").

188. Hoflin, 880 F.2d at 1039.

189. Id. at 1038-39.

190. Hayes Int'l Corp., 786 F.2d at 1505.

191. Hoflin, 880 F.2d at 1038. See H.R. Rep. No. 198, 98th Cong., 2d Sess. 54, reprinted in 1984 U.S. Code Cong. & Admin. News 5613 (emphasizing duty that RCRA places on hazardous waste generators to arrange for the transportation and disposal of waste at a permitted facility).

192. RCRA's legislative history indicates Congress's intent to rely on DOJ's discretion to avoid unjust results. See H.R. Rep. No. 198, 98th Cong., 2d Sess. 54, reprinted in 1984 U.S. Code Cong. & Admin. News 5613 (expressing Congress' intent to rely on DOJ to continue to wisely exercise its discretion in prosecuting cases under section 3008(d)'s potentially far-reaching language).

193. "The term 'serious bodily injury' means--
 (A) bodily injury which involves a substantial risk of death;
 (B) unconsciousness;
 (C) extreme physical pain;
 (D) protracted and obvious disfigurement; or
 (E) protracted loss or impairment of the function of a bodily member, organ, or mental faculty." RCRA Section 3008(f)(6), 42 U.S.C. Section 6928(f)(6) (1982).
194. United States v. Protex Indus. Inc., 874 F.2d 740 (10th Cir. 1989).
195. Protex Indus., Inc., 874 F.2d at 746 (rejecting the argument that the offense is unconstitutionally vague).
196. Id. at 741.
197. Id. at 742 (upholding conviction and rejecting defendant's argument that the statute was unconstitutionally vague, as applied).
198. Id. at 742 (explaining employees' injuries as Type 2-A psychoorganic syndrome, in which the person suffers changes in personality, has difficulty controlling impulses, engages in unplanned and unexpected behavior, lacks motivation, and usually experiences severe mood swings).

199. Address by Ms. Jane F. Barrett, supra note 61.
200. Protex Indus., Inc., 874 F.2d at 741-42.
201. Id. at 745-46.
202. Id. at 746.
203. Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at, 42 U.S.C. Sections 9601-9675 (1982 & Supp. V 1987)).
204. See United States v. Chem-Dyne Corp., 572 F. Supp. 802, 805 (W.D. Ohio 1983); H.R. Rep. No. 1016, 96th Cong., 2d Sess., at 17-18, reprinted in 1980 U.S. Code Cong. & Admin. News 6119, 6119-20. Congress extended CERCLA in 1984 for five years as the Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. 99-499, 100 Stat. 1613 (increasing Suprefund to \$8.5 billion).
205. "[A]ny person who owns and operates or who at the time of disposal owned or operated, or who accepted hazardous substances for transport and selected, a facility at which hazardous (as defined in section 9601(14)(C) of this title) are or have been stored, treated, or disposed of shall, unless such facility has a permit ... notify the Administrator of the

Environmental Protection Agency of the existence of such facility, specifying the amount and type of any hazardous substance to be found there, and any known, suspected, or likely releases of such substances from such facility.... Any person who knowingly fails to notify the Administrator of the existence of any such facility shall, upon conviction, be fined not more than \$10,000, or imprisoned for not more than one year, or both." CERCLA Section 103(c), 42 U.S.C. Section 9603(c) (1982).

206. "[I]t shall be unlawful for any such person [required to notify EPA of a facility under subsection (c)] knowingly to destroy, mutilate, erase, dispose of, conceal, or otherwise render unavailable or unreadable or falsify any records identified in paragraph (1) of this subsection. Any person who violates this paragraph shall, upon conviction, be fined in accordance with the applicable provisions of Title 18 or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both." CERCLA Section 103(d), 42 U.S.C. Section 9603(d) (1982 & Supp. V 1987).

207. See 40 C.F.R. Part 302 (1989).

208. A "reportable quantity" is one pound or the amount specified in section 1321 of the Clean Water Act. CERCLA Section 102(b), 42 U.S.C. Section 9602(b)

(1982). See 40 C.F.R. Section 117.3 (1989) (listing reportable quantities for the Clean Water Act).

209. CERCLA Section 103(a), 42 U.S.C. Section 9603(a) (1982). See 40 C.F.R. Part 302 (1989).

CERCLA specifically excludes "federally permitted releases" from its reporting requirements. This exemption excludes properly permitted releases under the Clean Water Act, Clean Air Act, RCRA, Marine Protection, Research and Sanctuaries Act, Safe Drinking Water Act, and Atomic Energy Act from CERCLA's reporting requirement. CERCLA, section 101(10), 42 U.S.C. section 9601(10) (1982 & Supp. V 1987).

210. "Any person--

(1) in charge of a vessel from which a hazardous substance is released, other than a federally permitted release, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or

(2) in charge of a vessel from which a hazardous substance is released, other than a federally permitted release, which may affect natural resources belonging to, appertaining to, or under the exclusive management of the United States ... and who is otherwise subject to the jurisdiction of the United States at the time of the release, or

(3) in charge of a facility from which a hazardous substance is released, other than a federally permitted release, in a quantity equal to or greater than that

determined pursuant to section 9602 of this title who fails to notify immediately the appropriate agency of the United States Government as soon as he has knowledge of such release or who submits in such a notification any information which he knows to be false or misleading shall, upon conviction, be fined in accordance with the applicable provisions of Title 18 or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both." CERCLA Section 103(b), 42 U.S.C. Section 9603(b) (1982 & Supp. V 1987).

211. CERCLA Section 103(b); 42 U.S.C. Section 9603(b) (1982 & Supp. V 1987).

212. CERCLA section 101(14), 42 U.S.C. section 9601(14) (1982 & Supp. V 1987).

213. CERCLA Section 102, 42 U.S.C. Section 9602 (1982 & Supp. V 1987).

214. See United States v. Greer, 850 F.2d 1447, 1452-53 (11th Cir. 1988);

215. "The term 'release' means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment" CERCLA Section 101(22), 42 U.S.C. Section 9601(22) (1982 & Supp. V 1987).

The term "environment" means (A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States ... and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States." CERCLA Section 101(8), 42 U.S.C. Section 9601(8) (1982 & Supp. V 1987).

216. "The term 'facility' means (A) any building, structure, installation, equipment, pipe or pipeline ... well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located" CERCLA Section 101(9), 42 U.S.C. Section 9601(9) (1982 & Supp. V 1987).

217. United States v. Carr, 880 F.2d 1550, 1551 (2d Cir. 1989).

218. Greer, 850 F.2d at 1451.

219. Carr, 880 F.2d at 1552.

220. Id. at 1552-53. The national contingency plan appears at 40 C.F.R. Section 300 (1989).

221. Id. at 1554 (relying on United States v. Mobil Oil Corp., 464 F.2d 1124, 1128 (5th Cir. 1972)).

222. Id. See also Kelly, ex rel. Michigan Natural Resources Commission v. ARCO Indus. Corp., No. K87-372-CA4 (W.D. Mich. Sep. 27, 1989) (defining "person in charge" in terms of the person's corporate position, responsibility, and authority to prevent or abate a hazardous waste discharge), reported in, Nat'l. Env'tl. Enforcement J. at 23-24 (Nov. 1989).

223. Greer, 850 F.2d at 1453.

224. Carr, 880 F.2d at 1553-54.

225. Id. at 1551.

226. The district court instructed the jury that "[i]f you find that [Carr] had any authority over either the vehicle or the area, this is sufficient [to convict], regardless of whether others also exercised control.'" Id. at 1554.

227. Id. at 1554 (quoting Mobil Oil, 464 F.2d at 1127).

228. Greer, 850 F.2d at 1453.

229. Memorandum of Law in Support of Motion under Rule

29(c), United States v. Carr, No. 88-CR-36 at 2
(Oct. 14, 1988).

230. Id.

231. Federal Water Pollution Act of 1948, 62
Stat. 1155.

232. Federal Water Pollution Control Act Amendments of
1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as
amended at, 33 U.S.C. Sections 1251-1387) (1982 &
Supp. V 1987). See 1A F. Grad, Treatise on
Environmental Law Section 3.03 (1989) (discussing the
history of the CWA).

233. CWA Section 101(a), 33 U.S.C. Section 1251(a)
(1982) (Congress intended to eliminate the discharge of
pollutants into navigable waters by 1985.).

234. "The term 'effluent limitation' means any
restriction established by ... the Administrator on
quantities, rates, and concentrations of chemical,
physical, biological, and other constituents which are
discharged from point sources into navigable
waters...." CWA Section 501(11), 33 U.S.C. Section
1362(11) (1982).

235. "The term 'point source' means any discernible,
confined and discrete conveyance, including but not
limited to any pipe, ditch, channel, tunnel, conduit,

well, discrete fissure, container... This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." CWA Section 502(14), 33 U.S.C. Section 1362(14) (1982 & Supp. V 1987).

236. CWA section 301(b), 33 U.S.C. Section 1311(b) (1982 & Supp. V 1987).

237. CWA Section 402, 33 U.S.C. Section 1342 (1982). See 40 C.F.R. Part 122 (1989).

238. See Env'tl. Protection Agency v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 205-08 (1976) (discussing the NPDES).

239. Id. at 205.

240. Id. "Except in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this title, the discharge of any pollutant by any person shall be unlawful." CWA Section 301(a), 33 U.S.C. Section 1311(a) (1982).

241. CWA Section 302, 33 U.S.C. Section 1312 (1982 & Supp. V 1987).

242. CWA Section 306, 33 U.S.C. Section 1316 (1982).

243. CWA Section 307, 33 U.S.C. Section 1317 (1982 & Supp. V 1987).

244. CWA Section 308, 33 U.S.C. Section 1318 (1982 & Supp. V).

245. CWA Section 318, 33 U.S.C. Section 1328 (1982).

246. CWA Section 405, 33 U.S.C. Section 1345 (1982).

247. CWA Section 301(f), 33 U.S.C. Section 311(f) (1982 & Supp. V 1987).

248. Section 309(c)(1) punishes "[a]ny person who--

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title or in a permit issued under section 1344 of this Act by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to

violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State.... (emphasis added)." CWA Section 309(c)(1), 42 U.S.C. Section 1319(c)(1) (1982 & Supp. V 1987).

Section 309(c)(2) punishes "knowing" violations of the same provisions. CWA Section 309(c)(2), 33 U.S.C. Section 1319(c)(2) (1982 & Supp. V 1987).

249. Water Quality Act of 1987, Pub. L. No. 100-4, Section 312, 101 Stat. 42-45.

"Negligent" violations can result in fines of \$25,000 per day of violation and imprisonment for 1 year. The maximum punishment doubles for subsequent convictions. CWA Section 309(c)(1), 42 U.S.C. Section 1319(c)(1) (1982 & Supp. V 1987).

"Knowing" violations can result in fines of \$50,000 per day of violation and imprisonment for 3 years. The maximum punishment doubles for subsequent convictions. CWA Section 309(c)(2), 42 U.S.C. Section 1319(c)(2) (1982 & Supp. V 1987).

250. "Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this Act, shall upon conviction, be punished by a fine of not more than

\$10,000, or by imprisonment for not more than 2 years, or by both (emphasis added)." CWA Section 309(c)(4), 33 U.S.C.

Section 1319(4) (1982 & Supp. V 1987) (penalties double for subsequent convictions).

251. "Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment of not more than 15 years, or both.... (emphasis added)." CWA Section 309(c)(3)(A), 33 U.S.C. Section 1319(c)(3)(A) (1982 & Supp. V 1982) (punishment doubles for subsequent violations).

252. "Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States government of such discharge. Any such person (A) in charge of a vessel from which oil or a hazardous

substance is discharged in violation of paragraph (3)(i) of this subsection, or (B) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) of this subsection and who is otherwise subject to the jurisdiction of the United States at the time of the discharge, or (C) in charge of an onshore facility or an offshore facility, who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than \$10,000, or imprisoned for not more than one year, or both (emphasis added)." CWA Section 311(b)(5), 33 U.S.C.

Section 1321(b)(5) (1982).

253. Id. See United States v. Hamel, 551 F.2d 107, 112 (6th Cir. 1977) (relying on Apex Oil Co. v. United States, 530 F.2d 1291, 1292 (8th Cir. 1976)); United States v. Republic Steel Corp., 491 F.2d 315, 318 (6th Cir. 1974) (holding that section 1321(b)(5) does not provide transactional immunity and that independently derived information is admissible).

254. CWA Section 309(c)(3), 42 U.S.C. Section 1319(c)(3) (1982 & Supp. V 1987).

255. "The term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." CWA Section 502(5), 33 U.S.C. Section 1362(5) (1982).

256. CWA Section 309(c)(6), 33 U.S.C. Section 1319(c)(6) (1982 & Supp. V 1987). Although the CWA's legislative history is silent regarding the definition of responsible corporate officer, Congress relied on this language in its 1977 amendments of the Clean Air Act so that "criminal penalties [will] be sought against those corporate officers under whose responsibility a violation has taken place, and not just those employees directly involved in the operation of the violating source." A Legislative History of the Clean Air Act Amendments of 1977, Serial No. 90-16, Aug. 1978, Volume 6, at 4741.

257. *United States v. Frezzo Bros., Inc.*, 602 F.2d 1123, 1130 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980).

258. Id. at 1129; *United States v. A.C. Lawrence Leather Co.*, No. 82-01-07-L (D.N.H. 1982) (convicting president and vice president's for failure to seek out, discover, and stop the company's illegal practice of bypassing its wastewater treatment plant and discharging untreated waste into a river), explained in Starr, supra note 8, at 391-92.

259. *United States v. Frezzo Brothers, Inc.*, 546 F. Supp. 713, 720-21 (E.D. Pa. 1982) (holding that the CWA's status as a public welfare statute obviated the need for the government to prove specific intent to

violate its criminal provisions), aff'd 703 F.2d 66 (1983).

260. Frezzo Bros., Inc., 602 F.2d at 1128 (holding that EPA's promulgation of effluent standards for a particular activity, composting operations in this case, was not a prerequisite to criminal prosecution under section 309(c)).

261. Id.

262. United States v. Ouelette, 15 Env't Rep. (BNA) 20899 (E.D. Ark. Sep. 19, 1977) (holding that the CWA's status as a public welfare statute required the government to prove only that the defendant made the statement aware of its misleading nature).

263. Id. at 1351.

264. Id. at 1352.

265. Id. at 1352.

266. CWA Section 502(12), 33 U.S.C. Section 1362(12) (1982). "The term 'pollutant' means any dredged spoil, solid waste, incinerator residue, sewage, garbage, sewer sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar direct and industrial, municipal and agricultural waste discharged

into water." CWA Section 502(6), 33 U.S.C. Section 1362(6) (1982). See 40 C.F.R. Part 116 (1989).

267. CWA Section 502(19), 33 U.S.C. Section 1362(19) (1982). Congress added the definition to "refine the concept of water quality measured by the natural chemical, physical and biological integrity." See S. Rep. No. 92-414, reprinted in 1972 U.S. Code Cong. & Admin. News. 3668, 3742.

268. See, e.g., United States v. M.C.C. of Florida Inc., 772 F.2d 1501 (11th Cir. 1985) (holding that "dredged spoil" includes sea grass cut and redeposited on adjacent sea beds by tugboat propellers); Romero-Barcelo v. Brown, 643 F.2d 835, 861-62 (1st Cir.), cert. denied, 454 U.S. 816 (1981) (holding that Navy jets dropping munitions off the coast of Puerto Rico during training exercises violated the CWA); United States v. Frezzo Bros., Inc., 602 F.2d 1123 (manure from mushroom compost manufacturing operations).

269. CWA Section 502(7), 33 U.S.C. Section 1362(7) (1982).

270. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131-39 (1985) See also S. Rep. No. 92-1236, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News, 3776, 3822, cited in Oxford Royal Mushroom Prod., 487 F. Supp, at 855.

271. Riverside Bayview Homes, Inc., 474 U.S. at 133, 131-39.

272. United States v. Marathon Dev. Corp., 867 F.2d 96 (1st Cir. 1989); United States v. Key West Towers, Inc., 696 F. Supp. 1467 (S.D. Fla. 1988).

273. Id. at 97.

274. Key West Towers, INC., 696 F. Supp at 1468.

275. Marathon Dev. Corp. 867 F.2d at 98. See also Key West Towers, Inc., 696 F. Supp. at 1468-69.

276. CWA Section 404, 33 U.S.C. Section 1344 (1982). See 33 C.F.R. Part 330 (1989).

277. Marathon Dev. Corp. 867 F.2d at 97. EPA exempts activities from NPDES permit requirements. Examples include discharges from agricultural activities such as crop growth and nursery operations. If applicable, EPA exemptions provide a legal defense to prosecution under the CWA. United States v. Frezzo Bros., Inc., 546 F. Supp. at 717-19. See 40 C.F.R. Section 125.5 (1989).

278. Marathon Dev. Corp., 867 F.2d at 102. See also Key West Towers, Inc. 696 F. Supp. at 1469 (rejecting the defense because defendants failed to raise it pretrial).

279. *Frezzo Bros., Inc.*, 602 F.2d at 1126-27
(rejecting argument of defendants that civil sanctions
are a prerequisite to criminal prosecution). See also
Phelps Dodge, 391 F. Supp. 1181, 1184 (D. Ariz. 1975).
280. *Oxford Royal Mushroom Prod.*, 487 F. Supp. at 855
(rejecting defendant's argument that the United States
Attorney's failure to initially refer the matter to EPA
violated fundamental fairness).
281. *Oxford Royal Mushroom Prod.*, 487 F. Supp. at 854.
282. *Id.* at 854 (rejecting defendants' argument that
the discharge was from a "nonpoint source" because it
involved surface runoff).
283. See Mix, The Misdemeanor Approach to Pollution
Control, 10 Ariz. L. Rev. 90, 90 (1968) (discussing the
execution of an Englishman in the fourteenth century
for violation of a royal proclamation on smoke
abatement).
284. The Rivers and Harbors Act of 1899, ch. 425, 30
Stat. 1152. See generally Trip & Hall, Federal
Enforcement Under the Refuse Act of 1899, 35 Alb. L.
Rev. 60 (1970).
285. Section 16, 33 U.S.C. Section 411 (1982) (imposing
fines up to \$2,500 and imprisonment up to one year).

286. United States v. White Fuel Corp., 498 F.2d 619, 622 (1st Cir. 1974).

287. M. Glenn, The Crime of "Pollution": The Role of Federal Water Pollution Criminal Sanctions, 11 Am. Crim. L. Rev. 835, 837-38 (1973).

288. United States v. Standard Oil, 384 U.S. 224, 226 (1966).

289. See United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940) (holding that navigable waters under the Refuse Act only includes water courses that could reasonably be made navigable).

290. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676.

291. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended at 42 U.S.C. Sections 7401-7626 (1982 & Supp. V 1987)).

292. CAA Section 101(b)(1), 42 U.S.C. Section 7401(b)(1) (1982).

293. CAA Section 109, 42 U.S.C. Section 7409 (1982). Primary NAAQS are those standards that are necessary to protect the public health. Secondary NAAQS are the level that EPA decides is needed to protect the public

welfare from known or anticipated effects of air pollutants. Id.

294. CAA Section 107, 42 U.S.C. Section 7407 (1982).

295. CAA Section 111(b), 42 U.S.C. 7411(b) (1982).

296. CAA Section 112, 42 U.S.C. 7412 (1982).

297. CAA Section 119, 42 U.S.C. 7419 (1982).

298. "Any person who knowingly--

(A) violates any requirement of an applicable implementation plan (i) during any period of Federally assumed enforcement, or (ii) more than 30 days after having been notified by the Administrator under subsection (a)(1) that such person is violating such requirement, or

(B) violates or fails or refuses to comply with any order under section 7419 of this title or under subsection (a) or (d) of this section, or

(C) violates section 7411(e) or, section 7412(c) of this title, or

(D) violates any requirement of section 7419(g) (as in effect before August 7, 1977), subsection (b)(7) or (d)(5) of section 7420 of this title (relating to noncompliance penalties), or any requirement of part B of this subchapter (relating to ozone) shall be punished by a fine of not more than \$25,000 per day of violation, or by imprisonment for not more than one

year, or by both. If the conviction is for violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$50,000 per day of violation, or by imprisonment for not more than two years, or by both (emphasis added)." CAA Section 113(c)(1), 42 U.S.C. Section 7413(c)(1) (1982).

299. "Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Act, shall upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than six months, or by both (emphasis added)." CAA Section 113(c)(2), 42 U.S.C. Section 7413(c)(2) (1982).

300. CAA Section 113(c)(3), 42 U.S.C. Section 7413(c)(3) (1982).

301. "The term 'person' includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof." CAA section 302(e), 42 U.S.C. section 7602(e) (1982).

302. CAA section 113(c)(3), 42 U.S.C. section 7413(c)(3) (1982).

303. The CAA requires states to enact air pollution control plans that implement EPA's NAAQS. The states enforce their standards against polluters. See 1 F. Grad, *Treatise of Environmental Law*, 2.08[1][b] (1989).

304. *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978).

305. Id at 277-78.

306. Id at 289.

307. CAA Section 307(b)(2), 42 U.S.C. Section 7607(b)(2) (1982) (precluding review 60 days after EPA approves or issues a standard); CWA Section 509(b)(2), 33 U.S.C. Section 1369(b)(2) (1982 & Supp. V 1987) (60 days); RCRA Section 7006(b), 42 U.S.C. Section 6976(b) (1982 & Supp. V 1987) (90 days).

308. Id at 289-91 (Powell, J., concurring).

309. Id. Review preclusion involves analysis of issues that are beyond the scope of this article. For a detailed discussion of those issues see Aurelius, Letton, Macbeth, Menotti, & Lentin, Review of Criminal

Provisions in Environmental Law: Task Force Report, 40
Bus. Law 761 (1984).

310. Toxic Substances Control Act, Pub. L. No. 94-469,
90 Stat. 2003 (1976)(codified as amended at 15 U.S.C.
Sections 2601-2671 (1988)). See 40 C.F.R. Part 761
(1989).

311. Council on Environmental Quality, Environmental
Trends 139 (1989).

312. TSCA Section 6, 15 U.S.C. Section 2605 (1988).

313. TSCA Section 6(a), 15 U.S.C. Section 2605(a)
(1988).

314. 40 C.F.R. Part 761 (1989).

315. "It shall be unlawful for any person to--

(1) fail or refuse to comply with (A) any rule
promulgated or order issued under section 2603 of this
title, (B) any requirement prescribed by section 2604
or 2605 of this title, or (C) any rule promulgated or
order issued under section 2604 or 2605 of this title,
or (D) any requirement of subchapter II of this chapter
or any rule promulgated or order issued under
subchapter II of this chapter;

(2) use for commercial purposes a chemical
substance or mixture which such person knew or had
reason to know was manufactured, processed, or

distributed in commerce in violation of section 2604 or 2605 of this title, a rule or order under section 2604 or 2605 of this title, or an order issued in action brought under section 2604 or 2606 of this title;

(3) fail or refuse to (A) establish or maintain records, (B) submit reports, notices, or other information, or (C) permit access to or copying of records, as required by this chapter or a rule thereunder; or

(4) fail or refuse to permit entry or inspection as required by section 2610 of this title." TSCA Section 15, 15 U.S.C. Section 2614 (1988).

316. "Any person who knowingly or willfully violates any provision of section 2614 of this title, shall, in addition to or in lieu of any civil penalty which may be imposed under subsection (a) of this section for such violation, be subject, upon conviction, to a fine of not more than \$25,000 for each day of violation, or to imprisonment for not more than one year, or both (emphasis added)." TSCA Section 16(b), 15 U.S.C. Section 2615(b) (1988).

317. United States v. Ward, 676 F.2d 94, 96 (4th Cir.), cert denied, 459 U.S. 835 (1982).

318. Federal Insecticide, Fungicide, and Rodenticide Act, Pub. L. No. 92-516, 86 Stat. 973 (1972) (codified as amended at 7 U.S.C. Section 136 (1988)).

319. FIFRA Section 14, 7 U.S.C. Section 1361 (1988).

320. "(A) Any registrant, applicant for a registration, or producer who knowingly violates any provision of this subchapter shall be fined not more than \$50,000 or imprisoned for not more than 1 year, or both.

(B) Any commercial applicator of a restricted use pesticide, or any other person not described in subparagraph (A) who distributes or sells pesticides or devices, who knowingly violates any provision of this subchapter shall be fined not more than \$25,000 or imprisoned for not more than 1 year, or both." FIFRA Section 14(b)(1), 7 U.S.C. Section 1361(b)(1) (1988).

321. "Any private applicator or other person not included in paragraph (1) who knowingly violates any provision of this subchapter shall be guilty of a misdemeanor and shall on conviction be fined not more than \$1,000, or imprisoned for not more than 30 days, or both." FIFRA Section 14(b)(2), 7 U.S.C. Section 1361(b)(2) (1988).

322. United States v. Corbin Farm Serv., 444 F. Supp. 510, 519 (E.D. Cal.), aff'd, 578 F.2d 259 (9th Cir. 1978).

323. The Medical Waste Tracking Act, Pub. L. 89-272, Title II, Section 11001, as added by, Pub. L. No.

100-582, 102 Stat. 2950 (1988) (codified at 42 U.S.C.A. Section 6992 (West Supp. 1989)).

324. MMTA Section 11001, 42 U.S.C.A. Section 6992 (West Supp. 1989).

325. MMTA Section 11002, 42 U.S.C.A. Section 6992a (West Supp. 1989) (including, but not limited to, cultures, tissues, organs, blood products, needles, surgery waste, laboratory waste, contaminated animal carcasses, and discarded medical equipment).

326. MMTA Section 11003, 42 U.S.C.A. Section 6992b (West Supp. 1989).

327. "Any person who--

(1) knowingly violates the requirements of or regulations under this subchapter;

(2) knowingly omits material information or makes any false material statement or representation in any label, record, report, or other document filed, maintained, or used for purposes of compliance with this subchapter or regulations thereunder; or

(3) knowingly generates, stores, treats, transports, disposes of, or otherwise handles any medical waste (whether such activity took place before or takes place after November 1, 1988 and who knowingly destroys, alters, conceals, or fails to file any record, report, or other document required to be maintained or filed for purposes of compliance with

this subchapter or regulations thereunder shall, upon conviction, be subject to a fine of not more than \$50,000 for each day of violation, or imprisonment not to exceed 2 years (5 years in the case of a violation of paragraph (1)). If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment (emphasis added)." MMTA Section 11005(b), 42 U.S.C.A. Section 6992d(b) (West Supp. 1989).

328. "Any person who knowingly violates any provision of subsection (b) of this section who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall upon conviction be subject to a fine of not more than \$250,000 or imprisonment for not more than 15 years, or both.... The terms of this paragraph shall be interpreted in accordance with the rules provided under section 3008(f) of this Act (emphasis added)." MMTA Section 11005(c), 42 U.S.C.A. Section 6992d(c) (West Supp. 1989).

329. See McMurry & Ramsey, supra note 22, at 443-45 (discussing federal criminal offenses that apply to environmental crimes).

330. 18 U.S.C. Section 371 (1988).

331. 18 U.S.C. Section 3 (1988).

332. 18 U.S.C. Section 4 (1988).

333. 18 U.S.C. Section 2 (1988)(aiders and abettors are liable as principals). See United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984)(aiding and abetting illegal disposal of hazardous wastes in violation of RCRA), cert. denied 469 U.S. 1208 (1985); United States v. Ward, 676 F.2d 94 (4th Cir.)(aiding and abetting illegal disposal of PCBs in violation of TSCA), cert. denied, 459 U.S. 835 (1982).

334. 18 U.S.C. Section 1001 (1988).

335. 18 U.S.C. Section 1503 (1988).

336. 18 U.S.C. Section 1341 (1988). See United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979)(indicting corporation and its officers for making false representations to EPA).

337. Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation of Crimes Over Which the Two Departments have Concurrent Jurisdiction, Section 1 (Jul. 19, 1955)(reprinted in, Manual for Courts-Martial, United States, Appendix 3, 1984).

338. Uniform Code of Military Justice art. 92(3), 10 U.S.C. Section 892(3) (1988) ([hereinafter UCMJ art 92]).

339. UCMJ art. 92(1), 10 U.S.C. Section 892(1) (1988).

340. UCMJ art 107, 10 U.S.C. Section 907 (1988)

341. UCMJ art 108, 10 U.S.C. Section 908 (1988).

342. UCMJ art. 109, 10 U.S.C. Section 909 (1988).

343. UCMJ art. 118(3), 10 U.S.C. Section 918(3) (1988).

344. See generally DeCicco & Bonanno, A Comparative Analysis of the Criminal Environmental Laws of the Fifty States: The Need for Statutory Uniformity as a Catalyst for Effective Enforcement of Existing and Proposed Laws, 9 Crim. Just. Q. 216, 222 (1988)- (listing the criminal provisions and penalties in state air, water, and hazardous waste pollution control programs at appendix); McElfish, State Hazardous Waste Crimes, 17 Env'tl. L. Rep. (Env'tl. L. Inst.) 10465 (1987) (listing state

hazardous waste offenses, scienter requirements, and penalties).

345. See generally, Schnapf, State Hazardous Waste Programs Under the Resource Conservation and Recovery Act, 12 Env't'l. L. Rpt. (Env't'l. L. Inst.) 679 (1982). See also DOJ Manual supra note 35, at 5-11.308 (noting that federal prosecution may be necessary if state criminal enforcement does not vindicate all federal interests).

346. *Hancock v. Train*, 426 U.S. 169, 172 (1976).

347. U.S. Const. art. IV, cl. 2. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426, (1819) ("[T]hey control the constitution and laws of the respective States, and cannot be controlled by them.").

348. See *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988) (holding that federal supremacy protects the activities of private contractors who perform federal functions); *Hancock v. Train*, 426 U.S. at 174 n.23.

349. *Hancock v. Train*, 426 U.S. at 178-79 (quoting *Mayo v. United States*, 319 U.S. 441, 445, 447 (1943)); *Env'tl. Protection Agency v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 211 (1976). Supremacy Clause analysis varies with the activity. When analyzing state regulation of private activities, courts consider whether federal law pre-empts the

relevant state regulation. When analyzing state regulation of federal activities, courts focus on the extent to which Congress authorized state regulation of federal activities. *Goodyear Atomic Corp.*, 486 U.S. at 181 n.1.

350. See Breen, supra note 11, at 10326-27 (categorizing waivers of federal supremacy and sovereign immunity as those requiring: (1) substantive compliance with state law; (2) procedural compliance; (3) payment of permit fees; (4) payment of state penalties for noncompliance; (5) state-directed cleanup of federal hazardous waste sites; and (6) specialized waivers for particular facilities).

351. See, e.g., *Hancock v. Train*, 426 U.S. at 181, 198-99 (holding that the Clean Air Act's waiver of sovereign immunity required federal facilities to comply with state air pollution standards but did not allow states to enforce their standards against the federal facilities by requiring federal facilities to apply for and obtain a state permit).

352. Id. at 183 (emphasis added).

353. *Goodyear Atomic Corp.*, 486 U.S. at 186.

354. *United States v. Shaw*, 309 U.S. 495, 501 (1939) (explaining that sovereign immunity has its roots in the legal philosophy which favors dignity and decorum,

practical administration, and an impregnable government operating undisturbed by litigants); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695 (1949) (holding that sovereign immunity finds its basis in the notion that "the king can do no wrong").

355. *Library of Congress v. Shaw*, 478 U.S. 310, 315 (1986); *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

356. *Block v. North Dakota*, 461 U.S. 273 (1983).

357. *Ruckelhaus v. Sierra Club*, 463 U.S. 680, 683-85 (1983).

358. See Breen, supra note 11, at 10326-27.

359. Cf., *Hancock v. Train*, 426 U.S. 185, 183 (1976) (Congress waived federal supremacy to state substantive requirements but not to procedural requirements.). It is interesting to note that the Supreme Court, in analyzing section 118 of the Clean Air Act, did not address whether Congress also waived sovereign immunity to state suits to enforce permit standards against federal facilities. Perhaps the Court felt that its holding--that Congress did not waive federal supremacy to state permit requirements--obviated or mooted the need to explore whether section 118 also waived sovereign immunity to state civil suit to enforce permit requirements.

Perhaps, it felt that Congress addressed both issues with the language in section 118. If Congress used language to address both concepts, it is interesting to note that Congress, when it amended section 118 to expressly waive federal supremacy to state permit requirements following Hancock, also added two sentences at the end of section 118(a), expressly waiving sovereign immunity to suit. See

H. R. Rep. No.

294, 95th Cong., 1st Sess. 198, reprinted in 1977

U.S. Code Cong. & Admin. News 1077, 1276 ("Adoption of section 118 of the Act was intended to remove all legal barriers to full Federal compliance.... The historic defense of sovereign immunity was waived by Congress.").

360. See Hancock v. Train, 426 U.S. 167, 182 (1976) (Court began with an analysis of the language then looked to the legislative history). See also Blum v. Stenson, 465 U.S. 886, 896 (1984) (in determining Congressional intent, "we look first to the statutory language and then to the legislative history if the statutory language is unclear.").

361. See Note, Issues of Federalism in Hazardous Waste Control: Cooperation or Confusion, 6 Harv. Envtl. L. Rev. 307, 312 (1982).

362. RCRA Section 3006, 42 U.S.C. Section 6926 (1982 & Supp. V 1987). See 40 C.F.R. Part 271 (1989).

363. RCRA Section 3006(b), 42 U.S.C. Section 6926(b) (1982 & Supp. V 1987). See 40 C.F.R. Section 271.4 (1988). If a state does not establish its own program or if EPA does not approve a proposed state program, EPA continues to administer the federal program in that state. Washington Dep't. of Ecology v. Env'tl. Protection Agency, 752 F.2d 1465, 1466-67 (9th Cir. 1985).

364. RCRA Section 3009, 42 U.S.C. Section 6929 (1982 & Supp. V 1987). See 40 C.F.R. Section 271.16(a)(3)(ii) (1989) (requiring criminal fines of at least \$10,000 per day of violation and at least six months imprisonment).

365. RCRA Section 3006(e), 42 U.S.C. Section 6926(e) (1982 & Supp. V 1987).

366. RCRA section 3006(d), 42 U.S.C. Section 6926(d) (1982).

367. RCRA Section 3008(a), 42 U.S.C. Section 6928(a) (1982 & Supp. V 1987). See Wyckoff v. Env'tl. Protection Agency, 796 F.2d at 1200-01 ("Congress did not intend, by authorizing a state program 'in lieu of the Federal program,' to preempt federal regulation entirely.").

368. DeCicco & Bonanno, supra note 343, at 222.

369. California v. Walters, 751 F.2d 977, 978 (9th Cir. 1984) (per curiam).

370. "Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief (emphasis added)...." RCRA Section 6001, '42 U.S.C. Section 6961 (1982)

371. Id. at 978. Cf., Romero-Barcelo v. Brown, 643 F.2d 835, 854-56 (1st Cir. 1981) (holding that "requirements" in the federal facilities provision of the Noise Control Act referred to precise state

standards and did not include a criminal nuisance statute), rev'd on other grounds, sub nom. Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).

372. *California v. Walters*, 751 F.2d at 978.

373. *Id.* ("Section 6961 [6001] plainly waives immunity to sanctions imposed to enforce injunctive relief, but this only makes more conspicuous its failure to waive immunity to criminal sanctions.").

374. Although no cases analyze the two clauses separately, they deserve separate treatment for two reasons. First, Congress used different language in each clause. The language referring to immunity in the latter clause clearly implies treatment of sovereign immunity. Second, sovereign immunity and federal supremacy are different concepts and merit separate treatment. If Congress treated them identically, the second clause discussing immunity is superfluous.

375. "After considering all aspects of the jurisdictional enforcement problem, the Committee decided to retain sovereign immunity over federal facilities. However, in order to be an environmental leader in discarded materials and hazardous waste management, the Committee requires federal agencies to implement all standards developed by EPA pursuant to this Act in the treatment of wastes." H.R. Rep. No. 1491, 94th Cong., 2d Sess. 51, reprinted in 1976 U.S.

Code Cong. & Admin. News 6289

376. Id. at 6283-89 (discussing need to resolve controversy between states and federal facilities). See also Parola v. Weinberger, 848 F.2d 956, 961 (9th Cir. 1988); Ohio v. Dept. of Energy, 689 F. Supp. 760, 762 (S.D. Ohio 1988).

377. Cf., Tennessee Valley Auth. v. Tennessee Water Quality Bd., 717 F.2d 992, 997 (6th Cir. 1983) (holding that Congress amended the CWA and CAA following Hancock to include permit requirements by making those provisions applicable as "procedural requirements").

378. California v. Walters, 751 F.2d at 978; Meyer v. U.S. Coast Guard, 644 F. Supp. 221, 223 (E.D.N.C. 1986) (RCRA does not waive government's immunity to civil penalties of state agencies). But see Ohio v. Dept. of Energy, 689 F. Supp. 760, 764-65 (S.D. Ohio 1988).

379. States are not powerless to enforce their standards against federal facilities. If states obtain injunctive relief, section 6001 allows state courts to impose civil and criminal "process" and "sanctions" against federal facilities to enforce injunctive relief. See Stever, supra note 26, at 10116-17, n.47.

380. Infra note 412. While Congress chose language that clearly and unambiguously waived federal supremacy and sovereign immunity to state criminal sanctions in the MMTA, it used language almost identical to that in section 6001 when it added section 9007, RCRA's federal facilities provision pertaining to underground storage tanks, in 1984. RCRA Section 9007, 42 U.S.C. Section 6991f (1982 & Supp. V 1987). "In short, Congress demonstrated that it knows how to select language to waive sovereign immunity to criminal penalties and civil damages, if it so intends." Parola v. Weinberger, 848 F.2d at 962, n.3.

381. Cf., McClellan Ecological Seepage Situation v. Weinberger, 655 F. Supp. 601, 603 (E.D. Cal. 1986).

382. "In view of the undoubted congressional awareness of the requirement of clear language to bind the United States, our conclusion is that with respect to subjecting federal installations to state permit requirements, the Clean Air Act does not satisfy the traditional requirement that such intention be evinced with satisfactory clarity. Should this nevertheless be the desire of Congress, it need only amend the Act to make its intention manifest." Hancock v. Train, 426 U.S. at 198. Cf., United States v. Mitchell, 445 U.S. 535, 538 (1980) (holding that waivers of sovereign immunity will not be implied).

383. See Note, Assuring Federal Facility Compliance with the RCRA and Other Environmental Statutes: An Administrative Proposal, 28 Wm. & Mary L. Rev. 513, 532-36 (1987) (discussing the House of Representatives' concern with subjecting federal agencies to a multitude of different State and local procedures, its reluctance to subject federal facilities to any state enforcement authority, and the adoption of the Senate's ambiguous waiver).

384. Congress has considered expanding section 6001's waiver of supremacy and immunity to allow state criminal prosecution of federal employees. See Brown, Harris, & Cox, supra note 4, at 443 (discussing H.R. 3785, which would have expanded section 6001's waiver of supremacy and immunity to allow state criminal prosecutions of federal employees but which failed to pass the 1st Session of the 100th Congress).

385. "For purposes of enforcing any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order, or civil or administrative penalty or fine) against any such department, agency, or instrumentality, the United States hereby expressly waives any immunity otherwise applicable to the United States. No agent, employee, or officer of the United States shall be personally liable for any civil penalty under Federal or State solid or hazardous waste law with respect to any act or omission within the scope of his official duties. An

agent, employee or officer of the United States shall be subject to any criminal sanction (including, but not limited to, any fine or imprisonment) under any Federal or State solid or hazardous waste law, but no department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government shall be subject to any such sanctions (emphasis added)." H.R. 1056, 101st Cong., 1st Sess. (1989).

386. See S. Rep. No. 414, 92d Cong., 2d Sess., at 64, reprinted in 1972 U.S. Code Cong. & Admin. News 3668, 3730.

387. CWA Section 402(b), 33 U.S.C. Section 1342(b) (1982). See 40 C.F.R. Section 123.27 (1989) (listing the minimum criminal provisions required for a state program).

388. CWA Section 510, 33 U.S.C. Section 1370 (1982). See United States v. Marathon Dev. Corp., 867 F.2d 96 (1st Cir. 1989); United States Steel Corp. v. Train, 556 F.2d 822, 835 (7th Cir 1977).

389. CWA Section 402(c)(1), 33 U.S.C. Section 1342(c)(1) (1982). See 40 C.F.R. Section 124.2(b) (1989).

390. CWA Section 402(d), 33 U.S.C. Section 1342(d) (1982).

391. CWA Section 309(a), 33 U.S.C. Section 1319(a) (1982).

392. CWA Section 402(c), 33 U.S.C. Section 1342(c) (1982).

393. As of April 1, 1988, thirty-eight states have federally approved NPDES programs. 52 Fed. Reg. 45,-823 (1987) (to be codified at 40 C.F.R. Part. 123), cited in DeCicco & Bonnano, supra note 344, at 228, n.117.

394. "Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government ... and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other

manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.... No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court (emphasis added)...." CWA Section 313(a), 33 U.S.C. Section 1323(a) (1982).

395. Id.

396. "This act has been amended to indicate unequivocally that all Federal facilities and activities are subject to all the provisions of State and local pollution laws. Though this was the intent of Congress in passing the 1972 Federal Water Pollution Control Act Amendments, the Supreme Court, encouraged by the Federal agencies, has misconstrued the original intent." Sen. R. No. 370, 95th Cong., 1st Sess., reprinted in, 1977 U.S. Code Cong. & Admin. News 4326, 4392.

397. See Id. at 4392 (stating that the "[waiver of supremacy] includes, but is not limited to, requirements to obtain operating and construction permits, reporting and monitoring requirements, any

provisions for injunctive relief and such sanctions imposed by a court to enforce such relief and the payment of reasonable charges."). Cf., California v. Dept. of Navy, 845 F.2d 222 (9th Cir. 1988) (holding that states cannot impose civil penalties on federal facilities for violations of state waster pollution discharge permit).

398. See California v. Dep't of the Navy, 624 F.2d 885, 887 (9th Cir. 1980).

399. CAA Section 109, 42 U.S.C. Section 7409 (1982).

400. CAA Section 110(a), 42 U.S.C. Section 7410(a) (1982).

401. CAA Section 209, 42 U.S.C. Section 7543 (1982).

402. CAA Section 211, 42 U.S.C. Section 7545 (1982).

403. CAA Section 233, 42 U.S.C. Section 7573 (1982). See California v. Department of the Navy, 624 F.2d 885, 887 (9th Cir. 1980) (allowing state regulation of engine emissions from Navy jet engine test 'cells).

404. CAA Section 110(a), 42 U.S.C. Section 7410(a) (1982) (subsection (a)(2)(A)-(K) lists the requirements that a SIP must meet to receive EPA approval).

405. See DiCicco & Bonanno, supra note 344, at 231.

406. "The new section ... is intended to overturn the Hancock case and to express, with sufficient clarity, the committee's desire to subject Federal facilities to all Federal, State, and local requirements--procedural, substantive, or otherwise--process and sanctions."

H.R. Rep. No. 294, 95th Cong., 1st Sess. 199, reprinted in 1977 U.S. Code Cong. & Admin. News 1077, 1278.

407. "Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal government ... and each officer, agent, or employee thereof, shall be subject to, and comply with, all Federal State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty for which he is

not otherwise liable (emphasis added)." CAA Section 118(a), 42 U.S.C. Section 7418(a) (1982).

408. Id. See Ohio ex rel. Celebrezze v. Dep't. of the Air Force, 17 Env'tl. L. Rep. (Env'tl. L. Inst.) 21210 (S.D. Ohio 1987).

409. "The amendment is also intended to resolve any question about the sanctions to which noncomplying Federal agencies, facilities, officers, employees, or agents may be subject.... Federal facilities and agencies may be subject to injunctive relief (and criminal and civil contempt citations to enforce any such injunction), to civil or criminal penalties, and to delayed compliance penalties. However, the amendment indicates that any officer, employee, or agent of the U.S. Government may not be held liable personally." H.R. Rep. No. 294, 95th Cong., 1st Sess. 200, reprinted in 1977 U.S. Code Cong. & Admin. News 1077, 1279. See Alabama v. Veterans Admin., 648 F. Supp. 1200 (M.D. Ala. 1986) (holding that section 118 waived sovereign immunity to state citizen suits against federal agencies).

410. H.R. Conf. Rep. 564, 95th Cong., 1st Sess. 137, reprinted in 1977 U.S. Code Cong. & Admin. News 1502, 1517-18 (clarifying the intent of section 118 by adopting the Senate amendment, which ensures that

federal employees are not held personally liable for civil penalties).

411. RCRA Section 11007, 42 U.S.C.A. Section 6992f (West Supp. 1989).

412. "Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government ... shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of medical waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges.... The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders, civil, criminal, and administrative penalties, and other sanctions, including injunctive relief, fines, and imprisonment. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal court with respect to the enforcement of any such order, penalty, or other sanction. For purposes of enforcing any such substantive or procedural requirement (including, but

not limited to, any injunctive relief, administrative order, or civil, criminal, administrative penalty, or other sanction), against any such department, agency, or instrumentality, the United States hereby expressly waives any immunity otherwise applicable to the United States." RCRA Section 11006(a), 42 U.S.C.A. Section 6992e(a) (West Supp. 1989).

413. "Sovereign immunity does not ipso facto exempt federal agencies and officers from the operation of ordinary criminal laws" California v. Walters, 751 F.2d 977, 979 n.1. (9th Cir. 1984) (per curiam).

414. "[I]f the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as [an officer] of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the state of California." In re Neagle, 135 U.S. 1, 75 (1890) (emphasis in original); Tennessee v.

Davis, 100 U.S. (10 Otto) 257, 263 (1879) ("[The federal government] can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offense against the law of the state, yet warranted by the Federal authority they possess, and if the general government is

powerless to interfere at once for their portection
... the operations of the general government may at any
time be arrested at the will of one of its members.").

415. In re Neagle, 135 U.S. at 1 (deputy U.S. marshall
accused of murder while protecting Supreme Court
justice); Kentucky v. Long, 837 F.2d 727, 746 (6th Cir
1988) (FBI agent accused of burglary for approving
informant's participation in two burglaries as part of
investigation of individuals involved in interstate
transportation and sale of stolen property); Morgan
v. California, 743 F.2d 728, 731 (9th Cir. 1984) (Drug
Enforcement Agency agents).

416. See Ohio v. Thomas, 173 U.S. 276, 284
(1899) (holding that governor of federal home for
disabled soldiers was not subject to Ohio law that
imposed criminal sanctions upon proprietors of eating
establishments that served oleomargarine without
posting notice); United States ex rel. Drury v. Lewis,
200 U.S. 1 (1906) (Army officer charged with murder for
the shooting death of a suspected felon while carrying
out orders of his commander to guard the base).

417. Baucom v. Martin, 677 F.2d 1346, 1350 & n. 6
(11th Cir. 1982) (federal law authorized Attorney
General to appoint FBI agents to "detect and prosecute
crimes against the United States"). In re McShane, 235
F. Supp. 262, 270 (N.D. Miss. 1964) (federal marshal
acting under express statutory authority of federal law

that commits to the United States marshal of each district the authority to 'execute all lawful writs, process and orders issued under authority of the United States' and subjects marshals to the supervision of the United States Attorney General who instructed McShane to execute two federal court orders).

418. In re Neagle, 135 U.S. at 59 (duties of marshal); Baucom v. Martin, 677 F.2d at 1348.

419. See Kentucky v. Long, 837 F.2d at 747-749; Baucom v. Martin, 677 F.2d at 1350 (FBI agent acted within his authority while participating in bribery scheme to expose public corruption in Georgia); United States v. Brown, 635 F.2d 1207 (6th Cir. 1980) (undercover FBI agent who participated in burglaries).

420. See e.g., Morgan v. California, 743 F.2d 728, 731 (9th Cir. 1984).

421. Kentucky v. Long, 837 F.2d 727, 745 (6th Cir. 1988); Baucom v. Martin, 677 F.2d 1346, 1350 (11th Cir. 1982) (noting that agent acted solely because he believed his duty required him to bribe state officials in sting operation and not for personal interest, malice, or actual criminal intent); Clifton v. Cox, 549 F.2d 722, 727 (9th Cir. 1977) (Agent's mistaken belief that decedent shot his partner supported his action in shooting and killing suspect.).

422. In re McShane, 235 F. Supp. at 274.

423. Kentucky v. Long, 837 F.2d at 745.

424. "The Congress shall have Power ... [t]o exercise exclusive Legislation ... over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings...." U.S. Const. art. I, section 8, cl. 17 (emphasis added). See Surplus Trading Co. v. Cook, 281 U.S. 647 (19) (construing "exclusive legislation" as synonymous with exclusive jurisdiction).

States may also cede exclusive legislative jurisdiction to the United States. Fort Leavenworth Railroad R.R. v. Lowe, 114 U.S. 525, 540-42 (1885). Cf., United States v. Unzeuta, 281 U.S. 138, 142 (1929) (states may cede less than exclusive jurisdiction to United States by imposing conditions on the cession).

425. The enclave theory protects all persons on an enclave from state prosecution, because exclusive jurisdiction applies to the entire enclave and not just those portions used for federal purposes. Black Hills Power & Light Co. v. Weinberger, 808 F.2d 665 (8th Cir.), cert. denied, 484 U.S. 818 (1987).

426. The United States may exercise exclusive jurisdiction over privately-owned lands. See Peterson

v. United States, 191 F.2d 154 (9th Cir.) (State ceded exclusive jurisdiction over privately-owned lands in King's Canyon National Park to United States.), cert. denied, 342 U.S. 885 (1951).

427. U.S. Const. art. IV, section 3, cl. 2. See Kleppe v. New Mexico, 426 U.S. 529, 541-43 (1976) (holding that legislative jurisdiction over lands within a State "has nothing to do with Congress' powers under the Property Clause").

428. The federal government has varying degrees of legislative authority and jurisdiction over its lands. A "proprietary interest" in land indicates some ownership interest in the land. The United States has no legislative authority over the land. See Fort Leavenworth R.R. v. Lowe, 114 U.S. at 532-34 (discussing types of federal legislative jurisdiction).

429. Shapiro, Coastal Zone Management, 7 Ecology L.Q. 1011, 1014 n.22 (1979) (noting that the United States holds 95% of the 770 million acres that it owns in a proprietary capacity).

430. Cf., Hancock v. Train, 426 U.S. 167, 178 (1976) (noting that Plenary Powers Clause, art I, Section 8, cl. 17, exemplifies the principle of federal supremacy).

431. United States v. Mississippi Tax Comm'n, 412 U.S. 363, 378 (1973) (although situated within Mississippi, federal enclave is "to Mississippi as the territory of one of her sister states or a foreign land") (quoting district court opinion).

432. United States v. Unzeuta, 281 U.S. at 142.

433. Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 181-82 (1988) (construing 40 U.S.C. Section 290 (1982), which provides that "States shall have the power and authority to apply [workmen's compensation] laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any State ... in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be....").

434. The federal facilities provisions subject each federal department, agency, and instrumentality to state and local requirements. The phrase may indicate congressional intent to subject all federal facilities, including located those on enclaves, to state requirements. See Hancock v. Train, 426 U.S. at 178-81 (apparently equating analysis under Supremacy and Plenary Powers Clauses and not distinguishing treatment of federal installations located on enclaves from those that are not).

The Supreme Court has held that federal law allowing application of state law on enclaves waives federal supremacy to state regulation of all federal facilities, wherever situated. *Goodyear Atomic Corp. v. Miller*, 486 U.S. at 182 n.4 ("Although the language and history of Section 290 indicate that it is addressed to federal enclaves, areas over which the United States has assumed exclusive jurisdiction ... both appellant and the Solicitor General concede, and we agree, that it authorizes the application of workers' compensation laws to federal facilities like the Portsmouth plant that are not federal enclaves.").

435. *Howard v. Comm'rs of Louisville*, 344 U.S. 624, 627 (1953) (annexation of federal ordnance plant situated within the city boundaries of Louisville "did not interfere in the least with the jurisdiction of the United States within the area or with its use or disposition of the property").

436. *Id.* at 627, 629 (paraphrased).

437. *Id.* at 627-29 (noting that Congress enacted the Buck Act to allow state taxation of income earned on enclaves).

438. *See United States v. McGee*, 714 F.2d 607, 612 n. 1 (6th Cir. 1983) (holding that potential for friction in event of annexation of large military base was sufficient justification for permanent injunction

and distinguishing Howard where United States did not challenge annexation and where potential for friction was much greater because annexation involved a key military base rather than a "mere ordnance plant").

439. Stewart & Co. v. Sadrakula, 309 U.S. 94, 101 (1940) ("While exclusive federal jurisdiction attaches, state courts are without power to punish for crimes committed on federal property.").

440. 10 U.S.C. Section 2671(c) (1988). See generally Dep't of Army, Pam. 27-21, Military Administrative Law, para. 2-12 (1 Oct. 85) (discussing Congress' adoption of various state civil laws as state law or as federal law for federal enclaves).

441. See, e.g., Hankins v. State, 766 S.W.2d 467 (Mo. 1989) (state court had jurisdiction over homicide that occurred in national forest because defendant failed to prove that United States accepted tendered cession of jurisdiction from state); Harris v. State, 368 S.E.2d 527, 186 Ga.App. 756 (1988) (federal government did not have exclusive jurisdiction over robbery that occurred in U.S. Post Office because state retained criminal jurisdiction over persons when it ceded territory to federal government.); State v. Parker, 294 S.C. 465, 366 S.E.2d 10 (1988) (state could prosecute murder and robbery provided that United States had not accepted exclusive jurisdiction over federal property on which body was found).

442. See State v. Ingraham, 226 N.J. Super. 680, 545 A.2d 268, 271-72, 274 (1988) (holding that territorial jurisdiction was an essential element of the offense of unlawful abandonment or disposal of hazardous waste and that New Jersey could not prosecute the illegal disposal of hazardous waste at Army Corps of Engineers' site because it failed to prove that federal government, which had exclusive jurisdiction over some areas, did not have exclusive jurisdiction over the area in issue).

443. See e.g., Evans v. Corman, 398 U.S. 419, 421-22 (1970) (voting rights).

444. Cf., Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 390 n.8 (1944) (noting the difficulties in assimilating penal laws that are part of a state regulatory system as federal law on an enclave because "[t]hese penal statutes are designed to enforce a system of licensing such imports by special permits issued by a state agency. Importation of liquors without a special permit is made penal. To hold, therefore, that the assimilative crimes statute adopts Oklahoma's penal liquor laws the Court might further have to hold that that statute compels federal officials on the Fort Sill Reservation to apply for and obtain state permits before they can lawfully import any liquors for any purpose. And a strong argument might be made that had Congress intended such drastic result, it would have considered the problem and used

more express language."), cited in, United States v. Marcyes, 557 F.2d 1361, 1364 (9th Cir. 1977).

445. 18 U.S.C. Section 13 (1988).

446. United States v. Williams, 327 U.S. 711, 718-19 (1946).

447. United States v. Sharpnack, 355 U.S. 286, 290-93 (1958).

448. Id. at 292, n.8 (1957) (Congress amended the ACA in 1948 to assimilate state law in force at the time of the alleged criminal act to avoid the need of "periodic pro forma amendments of [the Act] to keep abreast of changes of local laws.").

449. Id. at 292 ("Congress has thus at last provided that within each federal enclave, to the extent that offenses are not preempted by congressional enactments, there shall be complete current conformity with the criminal laws of the respective States in which the enclaves are situated.").

450. See Puerto Rico v. Shell Co., 302 U.S. 253, 266 (1937) ("Prosecutions under [the ACA] ... are not to enforce the laws of the state, territory, or district, but to enforce the federal law, the details of which, instead of being recited, are adopted by reference."). See generally J. Garver, The Assimilative Crimes Act

Revisited: What's Hot, What's Not, The Army Lawyer,
Dec. 1987, at 12.

451. See Johnson v. Yellow Cab Transit Co., 321
U.S. at 390.

452. See Model Penal Code Section 1.03(1)(a)
(Proposed Official Draft 1962) ("a person may be
convicted under the law of this State ... if either the
conduct that is an element of the offense or the result
that is such an element occurs within this State");
N.J.S.A. 2C:1-3 ("... a person may be convicted under
the law of this State of an offense committed by his
own conduct ... if: (1) either the conduct which is an
element of the offense or the result which is such an
element occurs within this state."). See State
v. Schaaf, 234 Neb. 144, 449 N.W.2d 762 (1989) (Nebraska
court has jurisdiction over crime when essential
element is committed or occurs in Nebraska).

453. See State v. Sanders, 230 N.J. Super. 233, 553
A.2d 354 (1989) (New Jersey had jurisdiction to try
mother for endangering the welfare of a child because
defendant boarded bus in New Jersey for express purpose
of abandoning her baby in Philadelphia.); People
v. Harvey, 174 Mich.App. 58, 435 N.W.2d 456
(1989) (Though defendant retained child in another
state, Michigan had jurisdiction over parental
kidnapping because effect of intentional retention of

child in violation of custody order occurred in Michigan).

454. See *Env't'l Protection Agency v. State Resource Control Bd.* ex rel. *California*, 426 U.S. 202, 203-07 (1976) (discussing Congress' complete dissatisfaction with former version of CWA and its decision to impose effluent limitations on point sources and thus "facilitate enforcement by making it unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible and which must be abated."). See also Glenn, supra note 287 at 841-44 (discussing Refuse Act permit system, which was innovative for its time because it imposed specific effluent limitations on individual polluters).

455. Cf., *State v. Lane*, 112 Wash.2d 464, 771 P.2d 1150 (1989) (State had jurisdiction over murder that occurred on federal enclave because premeditation and abduction of victim--essential elements of the offense--occurred outside enclave and within state's jurisdiction.).

456. See H.R. Conf. Rep. No. 1444, '96th Cong., 2d Sess. 38, reprinted in 1980 U.S. Code Cong. & Admin. News 5038 (noting Congress' concern in drafting RCRA's knowing endangerment offense as carefully and precisely as possible because "no concrete harm need actually result for a person to be prosecuted").

457. See United States v. Morissette, 342 U.S. 246, 256 (1951) (noting that violations of public welfare statutes "result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize....").

458. International Paper Co. v. Ouellette, 107 S. Ct. 805, 812-13 (1987) ("After examining the CWA as a whole, its purposes and its history, we are convinced that if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the 'full purposes and objectives of Congress.'... we conclude that the CWA precludes a court from applying the law of an affected State against an out-of-state source.").

459. See Brown, Harris & Cox, supra note 4, at 444.

460. Nat'l Env't'l Enforcement J. at 41 (Nov. 1989) (excerpting the testimony of Richard B. Stewart, Assistant Attorney General, Land and Natural Resources Division, DOJ, before the House Subcommittee on Transportation and Hazardous Materials, Committee on Energy and Commerce).

461. See Hazardous Waste: New Approach Needed to Manage the Resource Conservation and Recovery Act 35 (GAO/RCED-88-115, Jul. 19, 1988) (noting the existence

of many serious violations of hazardous waste laws at federal military and civilian facilities).

462. Environmental laws have provisions that protect persons who report suspected violations. CAA Section 322, 42 U.S.C. Section 7622 (1982 & Supp. V 1987); CERCLA Section 110, 42 U.S.C. Section 9610 (1982 & Supp. V 1987); CWA Section 507, 33 U.S.C. Section 1367 (1982); RCRA Section 7001, 42 U.S.C. Section 6971 (1982); TSCA Section 23, 15 U.S.C. Section 2622 (1988). CERCLA goes one step further. When Congress amended CERCLA in 1986, it added a "citizen award" provision authorizing EPA to pay up to \$10,000 from the Superfund to any person who provides information of a criminal violation of CERCLA. CERCLA Section 109(c), 42 U.S.C. Section 9609(c) (1982 & Supp. V 1987). See 40 C.F.R. Part 303 (1989).

463. Address by Ms. Jane F. Barrett, supra note 61.

464. United States v. Carr, 880 F.2d 1550, 1551 (2d Cir. 1989).

465. DOJ issues very general guidance concerning the exercise of prosecutorial discretion. Federal prosecutors consider: (1) federal enforcement priorities; (2) the nature and seriousness of the offense; (3) the deterrent effect of the prosecution; (4) the person's culpability in connection with the offense; (5) the person's history with respect to

criminal activity; (6) the person's willingness to cooperate in the investigation; (7) the probable sentence or other consequences if the person is convicted. U.S. Department of Justice, Principles of Federal Prosecution (1980).

466. Habicht, supra note 22, at 10481 (discussing the factors that federal prosecutors weigh in deciding whether to proceed civilly or criminally against a violator). Mr. Habicht was Assistant Attorney General of DOJ's Land and Natural Resources Division when he wrote the article. See also Memorandum from EPA Associate Administrator, Robert M. Perry, to Regional Counsels, Regions I-X, entitled Criminal Enforcement Priorities for the Environmental Protection Agency (Oct. 12, 1982), reprinted in 13 Env't. Rep. (BNA) 859 (1982) (emphasizing criminal enforcement as an important part of EPA's overall enforcement program and discussing the subjective considerations involved in seeking criminal sanctions).

467. Address by Ms. Jane F. Barrett, supra note 61.

468. Habicht, supra note 22, at 10481 (explaining that operating policies that encourage cutting corners, fail to meet regulatory standards, or shield managers from the facts are evidence of knowledge and support criminal liability).

469. Army Reg. 600-20, Army Command Policy, para. 2-1 (30 March 1988).

470. Address by Brigadier General (P) John L. Fugh, The Assistant Judge Advocate General (designee), Department of the Army, to the 38th Graduate Class, The Judge Advocate General's School, Charlottesville, Virginia (Aug. 25, 1989).

471. The United States Army Corps of Engineers publishes an excellent book entitled Commander's Guide to Environmental Compliance (undated). In addition to explaining the various environmental statutes that regulate installation activities, the book provides questions for a commander, or supervisor, to ask each specialists involved in environmental compliance.

472. Habicht, supra note 22, at 10481, Memorandum from Robert M. Perry, supra note 467. The United States Army Corps of Engineers publishes material to assist federal facilities in conducting environmental audits. The manual lists compliance areas that federal facilities should inspect under the major environmental statutes. United States Army Corps of Engineers Construction Engineering Research Lab, Environment Review for Management Action (undated).

473. "Even if a criminal prosecution is unavoidable, substantial assistance rendered to the government may lead to immunity or a favorable plea bargain for

cooperative defendants in appropriate cases." Habicht, supra note 22, at 10481, 10284 (emphasizing and reemphasizing that "cooperation in disclosing a serious violation, and in remedying the hazard, is regularly weighed in the decision whether to proceed civilly or criminally").

474. See EPA Memorandum from J. Winston Porter, Assistant Administrator Office of Solid Waste and Emergency Response to Regional Administrators, Region I-X, entitled Enforcement Actions at Federal Facilities under RCRA and CERCLA (January 25, 1988), reprinted in 41 Env't. Rep. (BNA) 3341 (1989).

475. Habicht, supra note 22, at 10481.

476. See Office of Management and Budget Circular No. A-106 (Dec. 31, 1974).

477. See Exec. Order 12327, reprinted in 3 C.F.R. 185 (1988) (exemption to allow use of Fort Allen to house Haitian refugees).

478. Army Reg. 600-20, Army Command Policy, para 1-5b (30 March 1988).

479. Army Reg. 600-50, para. 1-4, Standards of Conduct for Department of the Army Personnel (28 January 1988).

480. Council on Environmental Quality, Environmental Quality, 149 (1989) (quoting, General Thomas D. White, U.S. Air Force, Chief of Staff, 1957-60).

481. "Few areas of criminal law pose more difficulty than the proper definition of the mens rea required for any particular crime." United States v. Bailey, 444 U.S. 394, 403 (1980).

482. See discussion supra note 8.

483. Remarks by Dick Thornburgh, Attorney General of the United States Before the National Association of District Attorneys, Portland, Maine (July 19, 1989).

484. Id.