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**The Criminalization of Environmental Law:
Implications for Agriculture**

by

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THE CRIMINALIZATION OF ENVIRONMENTAL LAW: IMPLICATIONS FOR AGRICULTURE

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Introduction

The federal environmental criminal enforcement program began in the mid- to late 1970s when the Department of Justice (DOJ) undertook some well-publicized prosecutions for environmental violations. The DOJ also created an environmental crimes section devoted exclusively to criminal prosecutions under the federal environmental protection laws.¹

It was not, however, until the mid-1980s that the federal criminal enforcement program became aggressive. Increased public concern over the environment encouraged Congress to enact new environmental crimes provisions. At the request of the Environmental Protection Agency (EPA), Congress added new environmental crimes to existing statutes and significantly increased environmental criminal provisions already on the books. In addition, the EPA was given new investigatory powers and additional resources directed towards the criminal prosecution effort.² Many of the changes enacted by Congress were part of the Pollution Prosecution Act of 1990.³ The criminal enforcement of environmental laws is now viewed as a national priority.⁴

Twenty-five years ago, none of the major environmental laws in effect contained significant criminal enforcement provisions. But not today. Severe criminal sanctions can now be found in every major piece of environmental legislation. There are those, such as Dick Thornburgh, former United States Attorney General, who favor increased criminal sanctions:

We clearly have set new standards as to which acts of pollution are criminal, both socially and legally. If we are to continue to move

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1. Richard J. Lazarus, *Assimilating Environmental Protection Into Legal Rules and the Problem With Environmental Crime*, 27 LOY. L.A. L. REV. 867, 869 (1994).

2. *Id.* at 869-70.

3. Pollution Prosecution Act of 1990, Pub. L. No. 101-593, §§ 201-205, 104 Stat. 2954, 2962-63 (1990) (codified at 42 U.S.C. § 4321 (1988)).

4. Susan Hedman, *Expressive Functions of Criminal Sanctions in Environmental Law*, 59 GEO. WASH. L. REV. 889 (1991); Dick Thornburgh, *Criminal Enforcement of Environmental Laws—A National Priority*, 59 GEO. WASH. L. REV. 775 (1991); Earl Devaney, *Criminal Enforcement of Environmental Laws: An EPA Perspective*, TRIAL, Oct. 1992, at 32.

forward in our efforts to restore our environment and preserve it in as near a pristine condition as possible, we must continue to raise those standards until no citizen thinks it is acceptable to throw trash from a car, no factory finds a greater reward in polluting than in cleaning up, and no corporate executive believes illegal dumping of toxic waste is a sound business decision. Our long-term goal, therefore, must be to continue to set an ever-higher standard of protecting our environment from criminal depredation.⁵

Agricultural activities put farmers, ranchers and agribusinesses at risk as to environmental violations. Raising livestock, plowing, clearing land, draining water off property, repairing levees, fencing property, clearing draining ditches, using pesticides and other chemicals, controlling predators, harvesting, storing and processing crops⁶ can all potentially expose a farmer, rancher or agribusiness to criminal prosecution for environmental crimes.

The exposure of farmers, ranchers, and agribusinesses to criminal prosecutions is increased by the actions of some environmental groups which seem to be inherently hostile to modern agricultural operations and issue reports highly critical of agriculture's impact on the environment. For example, the Environmental Working Group (Group) has in the past year issued two reports blaming agriculture for the contamination of the drinking water of 14 million people.⁷ On October 18, 1994, the Group issued a report entitled *Tap Water Blues*⁸ which was touted as the first comprehensive analysis of herbicides in drinking water. The report concluded that the contamination of drinking water by herbicides is "a serious public health issue."⁹

Although the EPA said that the Group's report exceeded the EPA's own analysis of unacceptable levels of herbicides in drinking water, EPA Administrator Carol M. Browner went on to describe the study as "another in a series of wake-up calls telling us that we can no longer take for granted that every water system is safe all the time."¹⁰ The American Crop Association was more direct in its criticism of *Tap Water Blues*. The Association pointed out that farmers and ranchers have adopted a wide variety of pollution prevention practices to significantly reduce agriculture's impact on water quality. The Association issued a press release asking, "Why has the Environmental Working Group chosen to unnecessarily attempt to scare the public again?"¹¹

5. Thornburgh, *supra* note 4, at 780.

6. Sweet corn husks may be considered a hazardous substance under Michigan's Environmental Response Act according to a Michigan appeals court. The husks fermented while being stored in a feed bunker located near a stream. The husks allegedly produced 1.3 million gallons of leachate that flowed into a lake, killing aquatic life. *Cipri v. Bellingham Frozen Foods, Inc.*, 539 N.W.2d 526 (1995).

7. *Farm Herbicides Pollute Water Sources of 14 Million People, Two Groups Report*, 25 *Env't Rep. (BNA)* 1224, 1224 (1994).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 1224-25.

On August 17, 1995, the Environmental Working Group issued another report blaming agriculture for water pollution. In *Weed Killers by the Glass: A Citizen's Tap Water Monitoring Project in 29 Cities*, the Group concluded that herbicide contamination in twenty-nine Midwest cities sometimes exceeded federal standards for weeks and months during agricultural seasons.¹² Once again, the EPA put some distance between itself and the Group's report. EPA officials expressed concern about the methodology of the study. At the same time, EPA officials also expressed some praise for the report¹³ and a number of EPA water quality studies blame agriculture for at least one-half of the nation's water quality problems.¹⁴ In addition, the public has expressed its concerns over agriculture's use of chemicals.¹⁵

The conclusion is inescapable that agriculture is no longer viewed as a benign activity and has become a target defendant in civil and criminal actions.¹⁶ There already existed numerous examples of federal and state criminal prosecutions of farmers, ranchers, and agribusinesses, as indicated by the following:

- Frank C. Alegre, a prominent trucker and rancher in the San Joaquin Valley of California, was charged by a federal grand jury with long-term pollution of the San Joaquin river and adjacent wetlands. According to an affidavit filed by an investigator with the Army Corps of Engineers, Alegre, without the required permit, dumped broken concrete, dirt, and other debris into wetlands on property adjacent to the river. Alegre contended that erosion was washing away his ranch and that it had been reduced from 318 acres to 275 acres.¹⁷

- A Minnesota farmer was fined \$45,000 for filling in a one-acre glacial pothole that made farming his property difficult. Besides fining the farmer, the U.S. Army Corps of Engineers made him dig the fill material out of the pothole.¹⁸

- State officials took action against an eastern Iowa farmer accused of killing more than 170,000 fish by siphoning livestock sewage into a prime trout stream. The farmer, Eldon Waller, siphoned up to four inches of liquid from his hog and cattle manure lagoon onto his land near the mouth of the creek. Waller told officials he thought the water was clean, but officials said it depleted oxygen in the stream. Waller faces up to two years in jail and \$50,000 in fines.¹⁹

12. *Environmental Group's Report on Pesticides in Drinking Water Distorts Risks*, *Official Says*, 26 *Env't Rep.* (BNA) 865, 865-66 (Sept. 1, 1995).

13. *Id.*

14. See EPA, NATIONAL WATER QUALITY INVENTORY: 1992 REPORT TO CONGRESS (1994); U.S. GEN. ACCOUNTING OFFICE, ANIMAL AGRICULTURE, INFORMATION ON WASTE MANAGEMENT AND WATER QUALITY ISSUES 8-9 (1995); U.S. DEPT OF AGRIC., AGRICULTURAL RESOURCES AND ENVIRONMENTAL INDICATORS 60-61 (1994).

15. *Public Poll: Pesticides Top List of National Concerns*, NAT'L FARM FIN. NEWS, Aug. 3, 1990, at 10.

16. *Farm Wastewater Blamed for Wildlife Deaths at Salton Sea*, SACRAMENTO BEE, May 1, 1995, at B4.

17. Denny Walsh, *Rancher Faces U.S. Charges, Accused of Polluting Wetlands*, SACRAMENTO BEE, Dec. 24, 1994, at B1.

18. Walter Williams, *Here's How Congress Meddles in Our Lives*, CIN. ENQUIRER, Oct. 2, 1994, at E03.

19. *Fish Kill to Stir Legal Action*, OMAHA WORLD-HERALD, May 30, 1993, at 8C.

- The EPA proposed a \$49,500 fine against a Tipton County, Tennessee farmer who cleared and drained acreage that agency officials called "functional and valuable wetlands." According to the EPA, J.E. Warren, seventy-four, of the Quito Community in Tennessee, cleared trees and dug ditches across a tract containing up to eighty acres of wetlands. The digging was done between 1988 and 1990. The clearing took place on bottom land near the Mississippi river and some thirty miles upstream from Memphis. According to the EPA, Warren failed to apply for the federal Clean Water Act permit.²⁰

- An Indianola, Iowa farmer was fined \$15,000 and placed on probation for one year for negligently dumping hog waste into the South River. The defendant admitted his responsibility for the pollution, but argued "extenuating circumstances." He said the state fell behind in approving a permit for a new lagoon to be built for hog waste. The defendant contended that a state environmental official refused the defendant's permission to use the new lagoon when the two older lagoons filled. Instead of using the new lagoon, the defendant was instructed to spread the waste on farmland. Wet soil conditions allegedly led to the pollution. The defendant was also ordered to make restitution of \$3448 for an estimated 6000 fish killed.²¹

- Brian Odden, a farmer from Kingsbury County, S.D., has been accused of damaging a slough that borders his farm. The U.S. Agricultural Department is threatening to fine him as much as \$500,000.²²

- The Iowa Environmental Protection Commission has asked the Iowa Attorney General's office to consider prosecuting A.J. "Jack" DeCoster, a Maine agribusiness man, for allegedly polluting the Iowa river with hog manure. DeCoster owns no hogs in Iowa, but built a number of large scale operations that he leases to other hog producers. DeCoster is accused of letting manure run into the Iowa river after the manure was applied to thirty-six acres of an eighty-acre field. DeCoster faces fines of \$5000 a day for each day the spill occurred.²³

- Brant Child, a Utah property owner, had to abandon his plans to build a campground and golf course near three lakes located on his 500 acres of desert land. The Fish and Wildlife Service told him he couldn't use the property because of the 200,000 thumb-sized kanab amber snails which inhabit his lakes and are protected under the Endangered Species Act. Child was also threatened with a \$50,000 fine for every snail eaten by the ten domestic geese abandoned on his lakes. After a state wildlife official and highway patrolman were unsuccessful in getting the geese

20. Tom Charlier, *EPA Fines Tennessee Farmer \$49,500 in Wetlands Case*, THE COMMERCIAL APPEAL (Memphis, Tenn.), Aug. 24, 1994, at B1.

21. Perry Beeman, *Indianola Farmer Fined \$15,000 for Pollution*, DES MOINES REG., May 20, 1993, at 3.

22. Philip Brasher, *Farmers Rebel Over Wetlands Regulations Environment: The Furor is Fueling a Movement that Could Lead Congress to Gut Protective Laws in the Name of Property Rights*, L.A. TIMES, Apr. 23, 1995, at 9.

23. Jerry Perkins, *Manure Spill Case Sent to Attorney General*, DES MOINES REGISTER, July 18, 1995, at 8.

to "vomit snails," the threat of fines was dropped. Child estimates, however, that his inability to develop his property has cost him \$2.5 million.²⁴

• Larry Miner, president of San Jacinto California-based Agri-empire, Inc., was arraigned on thirty-three federal counts, including drug conspiracy, mail fraud, and illegally handling hazardous waste. Miner and his company allegedly bought partly treated sewage water and used it on potato crops sold for human consumption. He and his company were also accused of dumping and burying hazardous waste in stored banned pesticides. The company faces up to \$16.5 million in fines and Miner faces 159 years in jail plus \$8.25 million in fines.²⁵

I. Criminal Prosecutions

To those espousing "green values" virtually any violation of an environmental statute is viewed as criminal, regardless of the violator's criminal intent and the fact that some environmental crimes occur inadvertently as a side effect of normal productive activities.²⁶ As then Attorney General Richard Thornburgh told the National District Attorneys Association in 1989, "a polluter is a criminal who has violated the rights and sanctity of a living thing—the largest living organism in the known universe—the earth's environment."²⁷

A. Federal Prosecutions

It is the belief of some EPA officials that 75% of individuals will comply with the law only if violators are punished and the requirements are perceived as mandatory. Criminal enforcement measures extend to that 75%.²⁸

Attorney General Janet Reno told attendees in a course on the criminal enforcement of environmental law sponsored by the American Law Institute and American Bar Association, "Those who violate the law will have a heavy price to pay."²⁹

Given the comments of EPA and DOJ officials, one has to wonder if there is any environmental violation that the government does not consider to be criminal. Ronald Sarachan, head of the DOJ's Environmental Crimes Section, has stated criminal charges may be filed in some "paper cases" of improper reporting.³⁰ Lois J. Schiffer, assistant attorney general for environment and natural resources, has said

24. *A Snail Retreat*, WALL ST. J., Dec. 27, 1993, at 6 (Review and Outlook column).

25. *Alleged Sewage Use Puts Spud Company in a Stink*, AGWEEK, June 28, 1993, at 9.

26. Rick Henderson, *Crimes Against Nature: The New Vice Crusade Is Turning Justice Upside Down*, REASON, Dec. 1993, at 18.

27. *Id.*

28. Devaney, *supra* note 4, at 32 (paraphrasing the 1941 comments of Chester Bowles, a member of the World War II-era Office of Price Administration, who said, "There will always be 5% of individuals who will violate no matter what; 20% who will comply no matter what, and 75% who will comply only if the violators are punished and the requirements are perceived as nonarbitrary.")

29. *Reno Says DOJ Has 'Aggressive Program' to Protect Urban, Wilderness, Environments*, 25 Env't Rep. (BNA) 1269 (1994).

30. *Id.*

that "paper violations are not victimless. Honest reporting is a direct and central part of statutes to keep direct harm from the public."³¹

An example of how seriously the government considers reporting violations can be found in the recent case involving a seventy-three-year-old apple juice producer, Benjamin Lacy, of Linden, Virginia.³² Lacy's environmental problems began after a fire occurred at his plant. Following the resignation of his plant manager, Lacy took over the task of getting the operation restarted. During this period of time, officials from the Virginia Department of Environmental Quality (DEQ) demanded his Discharge Monitoring Reports.³³

Lacy's Discharge Monitoring Reports pertained to the amount of waste apple juice that ran off with rinse water. After reviewing thirty-four monthly reports, the DEQ found incorrect figures on three of the reports and referred the case to the Virginia Commonwealth attorney. After the state's attorney refused the case, the U.S. Department of Justice decided to pursue it and obtained an indictment. A former Lacy employee was charged with two felony counts that were dismissed after he agreed to testify against Lacy. A jury convicted Lacy, who now faces up to twenty-four years in prison for the three incorrect reports.³⁴

Between fiscal years 1983 and 1993, the DOJ obtained environmental criminal indictments against 911 corporations and individuals and obtained 686 guilty pleas and convictions. A total of \$212,408,903 criminal fines were assessed and 388 years of imprisonment were imposed (with nearly 191 years of actual confinement).³⁵

In recent years the EPA has "beefed up" its efforts to bring criminal cases against polluters. At least 200 criminal investigators will soon be working on EPA criminal cases. Also, the Federal Bureau of Investigations has allocated an increasing number of staff hours to investigating EPA criminal cases³⁶ and has 500 pending cases.³⁷ The DOJ recently shifted thirty-three attorneys to its Environmental Crimes Section in response to the new demands.

The determination of federal prosecutors to go after corporate officials as well as individuals on criminal charges in environmental cases is exemplified by a quote from a Justice Department official who said: "It has been, and will continue to be, Justice Department policy to conduct environmental criminal investigation with an

31. *Id.*

32. Paul Craig Roberts, *Ax the Department of Injustice*, ARK. DEMO.-GAZ., Sept. 30, 1995, at 8B.

33. *Id.*

34. *Id.*

35. Lazarus, *supra* note 1, at 870. The impact of EPA's more aggressive prosecutorial attitude is evident in its impact on average criminal fines per individual and corporation. In 1992, for example, individuals paid an average criminal fine of \$240,000 while corporations paid an average of \$502,000. Devaney, *supra* note 4, at 32.

36. M. Brown, *Government Inspection and Enforcement Actions*, in ENVIRONMENTAL HEALTH & SAFETY MANAGER'S HANDBOOK, 83, 87 (1988).

37. *Reno Says DOJ Has 'Aggressive Program' to Protect Urban, Wilderness Environments*, 25 Env't Rep. (BNA) 1269 (1994).

eye toward identifying, prosecuting and convicting the highest ranking truly responsible corporate officials."³⁸

Individuals convicted of environmental crime are much more likely to go to jail than in the past. The federal sentencing guidelines which took effect in 1987 leave judges with very little discretion in deciding whether a defendant should serve jail time.³⁹ The guidelines create a point system for every federal crime. Jail time is determined by comparing points corresponding to the defendant's crime and prior criminal history.

The sentencing guidelines create four categories of environmental violations:

- Knowing endangerment of human life;
- Offenses involving hazardous or toxic substances;
- Offenses involving other pollutants;
- Conservation and wildlife.⁴⁰

Each category has a base penalty level for knowingly violating the law. Penalties increase if pollutants are released into the environment and for ongoing or continuous violations. A prior history of criminal violations can also increase a penalty. Reduced penalties are provided for acts of negligence and record keeping and reporting violations.⁴¹

Under the current basic scoring and grading level, most serious environmental offenses would result in actual jail terms of two years or more.⁴² Even stricter sentencing guidelines have recently been proposed for companies which violate environmental laws.⁴³

Criminal fines have also been increased in excess of the limits set in the applicable environmental statutes. Under the Criminal Fine Improvements Act of 1987⁴⁴ a defendant may be fined the maximum amount level established by:

- The law setting forth the offense;
- The amount specified in the Criminal Fine Improvements Act for the type of offense; or
- The amount allowed under a new gain/loss formula.⁴⁵

38. F. Henry Habrich II, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,478, 10,480 (1987).

39. 28 U.S.C. §§ 994-998 (1988 & Supp. V 1993).

40. Robert W. Adler & Charles Lord, *Environmental Crimes: Raising the Stakes*, 59 *GEO. WASH. L. REV.* 781, 798 (1991) (citing Sentencing guidelines for United States Courts, 52 *Fed. Reg.* 18,046-99 (1987), reprinted in U.S. SENTENCING COMM'N, *GUIDELINES MANUAL* §§ 2Q1.1-2Q2.1 (1990) [hereinafter *GUIDELINES MANUAL*]).

41. *Id.* at 798; see also *GUIDELINES MANUAL*, *supra* note 40, at §§ 2Q1.1-3.

42. Gerald Krovin, *Criminal Environmental Investigations: Caution Flags for Corporate Managers*, 12 *CARDOZA L. REV.* 1291, 1291-1292 (1991).

43. Jeffrey M. Rosin, *New Chapter 9: An Analysis of the Proposed Sentencing Guidelines for Organizational Environmental Offenders and the Historic Evolution of a Compliance Nightmare*, 3 *N.Y.U. ENVTL. L.J.* 559 (1994).

44. Pub. L. No. 100-185, 101 Stat. 1279 (1987).

45. Adler & Lord, *supra* note 40, at 799; see also 18 U.S.C. § 3571 (1994).

Fines can be increased based on the harm caused or gained by the violation.⁴⁶ Fines for corporations are double those for individuals.⁴⁷

1. Federal Environmental Statutes and Criminal Provisions

Federal environmental statutes are loaded with criminal penalties applicable to corporations and individuals. Criminal penalties as set forth in key environmental statutes have grown increasingly severe. As recently as 1990 a number of environmental statutes were amended and increased the severity of criminal penalties to be imposed on violators. The following is no more than a thumbnail sketch of some of the criminal provisions found in federal environmental statutes and laws applicable to agriculture. The information, however, is sufficient to stress the seriousness of environmental criminal prosecutions.

a) Clean Water Act

The Clean Water Act (CWA)⁴⁸ is potentially the most important piece of federal legislation to impact agriculture. The CWA divides water pollution sources into the categories of point sources and nonpoint sources.

(1) The NPDES Program

Point sources are regulated through the mandatory permit system known as the National Pollutant Discharge Elimination System (NPDES).⁴⁹ The NPDES⁵⁰ is a national permit system which controls discharges of pollutants from a point source into waters of the United States. The NPDES program governs indirect discharges through municipal sewage and treatment plants and industrial waste and sewage as well as direct discharges, from both new and existing sources.⁵¹

Most states administer the NPDES requirements upon approval of their state's program.⁵² Permits contain source specific effluent limitation and incorporate water quality standards of the state. Although permits may be issued by the state, the EPA may also review those permits and in some cases may disapprove the permit issuance.

Point sources under the NPDES program are defined as "discernable, confined, and discrete conveyances, including but not limited to . . . concentrated animal feeding operations . . . from which pollutants are or may be discharged."⁵³ The term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

46. 18 U.S.C. § 3571(d) (1994).

47. *Id.* § 3571(b)(c).

48. 33 U.S.C. §§ 1311-1326 (1988 & Supp. V 1993).

49. *Id.* § 1342.

50. *Id.* §§ 1251-1376.

51. *Id.* § 1342 (1988 & Supp. V 1993).

52. Thirty-nine states administer the NPDES program. JOHN D. COPELAND & JANIE SIMMS HIPP, ENVIRONMENTAL LAWS IMPACTING OKLAHOMA LIVESTOCK PRODUCERS 2 n.6 (1994).

53. 33 U.S.C. § 1362 (1988).

Discharges *not* requiring NPDES permits include discharges from "non-point source agricultural and silvicultural activities including stormwater runoff from orchards, cultivated crops, pastures, rangelands, and forest land, *but not* discharges from concentrated animal feeding operations"⁵⁴

54. EPA Administered Permit Programs: The National Pollutant Discharge Elimination System, 40 C.F.R. § 122.3(e) (1994). Permits for discharges are also required for aquaculture projects and for silvicultural point sources. Aquatic facilities are governed by requirements in 40 C.F.R. § 122.24 (1994), and silvicultural point sources by requirements in 40 C.F.R. § 122.27 (1994).

Concentrated animal feeding operations are:

- a lot or facility where;
- animals are, will be, or have been stabled or confined and fed or maintained 45 days or more in any 12 month period;
- crops, vegetation forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility, *or*
- determined on a case-by-case basis as being significant contributors to water pollution, considering the following factors:
 - size and amount of wastes
 - location
 - conveyance of wastes into waters
 - slope, vegetation, rainfall, and
 - other relevant factors.

Animal feeding operations are concentrated and an NPDES permit will be required if more than the following numbers of animals in any one category are confined.

- 1000 slaughter and feeder cattle
- 700 mature dairy cattle
- 2500 swine (over 55 pounds)
- 500 horses
- 10,000 sheep or lambs
- 55,000 turkeys
- 100,000 laying hens or broilers (if the facility has continuous over flow watering)
- 30,000 laying hens or broilers (if the facility has a liquid manure system)
- 5,000 ducks, or
- 1000 animal units

If more than the following number and types are confined, the operation is considered concentrated as well:

- 300 slaughter or feeder cattle
- 200 mature dairy cattle
- 750 swine (over 55 pounds)
- 150 horses
- 3,000 sheep or lambs
- 16,500 turkeys
- 30,000 laying hens or broilers (with overflow watering)
- 9,000 laying hens or broilers (with liquid manure system)
- 1500 ducks
- 300 animal units

In addition to meeting the foregoing animal quantity requirements, an operation must meet one of the following criteria in order to be considered a concentrated animal feeding operation:

- pollutant discharge into navigable waters through a manmade ditch or flushing system, *or*
- pollutant discharge directly into waters passing through or coming into contact with the facility or animals. 40 C.F.R. § 122.23 & app. B (1994).

(2) *Southview Farm Decision and Point Sources*

On September 2, 1994, the Second Circuit Court of Appeals rendered a decision in a water pollution case which could significantly impact all livestock producers and expose them to even more criminal prosecutions under the Clean Water Act (CWA). In *Concerned Area Residents for the Environment v. Southview Farm*,⁵⁵ the Second Circuit found Southview Farm's dairy operation to be in violation of the CWA. The dairy, located in rural Wyoming County in New York state, maintains a dairy herd of approximately 1200 animals in a confinement area and operates on a total of 2200 acres. Liquid manure from the animals is stored in lagoons and then applied as fertilizer to approximately 1100 acres of land adjacent to the confinement area by a center pivot irrigation system and conventional manure spreading equipment.⁵⁶

The activity of gathering and confining animals and managing the attendant manure operations by separation, storage, and eventual land application is a common practice within the agricultural sector. Southview's dairy operation is not unlike the operations of thousands of livestock producers. Traditionally, these activities have not been designated point sources of pollution since the manure is not conveyed to a navigable body of water by means of a man-made discrete device, such as a pipe or ditch. As a result, the EPA has not required such operations to obtain National Pollution Discharge Elimination System (NPDES) permits prior to the manure's application. According, however, to the Second Circuit Court of Appeals, Southview Farm is a point source of pollution under the CWA and, by implication, so are all other similar agricultural operations.⁵⁷

Southview's legal problems began when area residents claimed that manure leakage from Southview Farm's storage lagoon and runoff from Southview Farm's crop operation polluted the Genesee river, a navigable body of water protected by the CWA. Complaints were made to the EPA and state environmental authorities, both of whom declined to take any action against Southview Farm because of the lack of evidence that Southview was a substantial source of pollution. Subsequently,

55. 34 F.3d 114, 115 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995).

56. *Id.* at 116.

57. *Id.* at 115. After the Second Circuit's ruling, Southview Farm filed a petition for a *writ of certiorari* with the United States Supreme Court. Because of the potential impact of the Southview Farm case on modern animal raising operations, the National Pork Producers Council (NPPC), American Farm Bureau Federation, and the New York Farm Bureau, filed *amicus curiae* (friend of the court) briefs in support of Southview Farm, contending that Southview Farm was erroneously labeled a point source of pollution subject to the CWA permit requirements.

In its *amicus* brief, NPPC addressed the potential economic impact of the *Southview* decision on the pork industry, as well as the legal issues. Pork production in the United States has risen steadily over the past 40 years with annual gross sales of over \$11 billion. Approximately 236,000 pork producers annually raise 17 billion pounds of pork. In the state of New York, which ranks 31st in the annual marketing of hogs, 93 million head were commercially slaughtered in 1993. According to NPPC, the application of the *Southview Farm* decision to cases in other jurisdictions could have an adverse economic impact on at least 30,000 pork producers who each produce more than 1,000 head of swine per year. *Amicus curiae* Brief of NPPC (NPPC Brief) at 1. *Southview Farm v. Concerned Area Residents for the Env't*, 34 F.3d 114 (2d Cir. 1994) (No. 94-1316).

a citizen's lawsuit was filed by the Concerned Area Residents for the Environment (CARE) against Southview in a United States district court claiming that Southview had violated the CWA by failing to obtain the required NPDES permits.⁵⁸ A jury ruled in favor of CARE. The U.S. district court judge, however, granted judgments to the defendants as a matter of law, Southview Farm was not subject to the CWA's permit requirements because it was not a point source of pollution.⁵⁹ CARE appealed the district court ruling to the Second Circuit Court of Appeals who reversed the district court's decision.⁶⁰

On appeal, the Second Circuit addressed three critical questions: (1) is a dairy farm that uses its animal manure to fertilize its feed crop fields a "concentrated animal feeding operation (CAFO)" and thus a point source subject to the CWA's permitting requirements; (2) are manure-spreading machines, or depressions (swales) in a farm field, which do not directly discharge pollutants into navigable waters, point sources subject to the CWA's permitting requirements; and (3) is liquid manure washed off farm fields by a rainstorm considered "agricultural storm water discharge" and therefore exempt from the CWA's definition of point source? On each question, the Second Circuit answered in favor of CARE and against Southview Farm.⁶¹

(a) *CAFOs and AFOs*

Concentrated Animal Feeding Operations (CAFOs) are subject to NPDES permit requirements. An agricultural livestock operation is a CAFO only if it is first an animal feeding operation (AFO) which requires a minimum number of animal units as set forth in CWA regulations.⁶² In addition, to qualify as an AFO for Clean Water Act purposes, the lot or facility on which the animals are raised must meet the following conditions: (1) animals are or will be stabled or confined and fed or maintained for a total of forty-five days or more in any twelve-month period and (2) crops, vegetative forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the "lot or facility."⁶³

Southview Farm contended that its dairy was not an animal feeding operation for CWA purposes because it grew substantial crops and forage on the land adjacent to the animal confinement area. The Second Circuit Court of Appeals, however, refused to find that Southview's "lot or facility" included the entire 2200 acres of land encompassing both the animal confinement area and adjacent crop land.⁶⁴ In holding Southview Farm to be a CAFO, the Second Circuit Court of Appeals stated

58. 834 F. Supp. 1422 (W.D.N.Y. 1993).

59. See *Concerned Area Residents for the Env't v. Southview Farm*, 834 F. Supp. 1410, 1418 (W.D.N.Y. 1993) (CARE I); *Concerned Area Residents for the Env't v. Southview Farm*, 834 F. Supp. 1422, 1423 (W.D.N.Y. 1993) (CARE II).

60. 34 F.3d 114 (2d Cir. 1994).

61. *Southview Farm*, 34 F.3d at 115.

62. 40 C.F.R. § 122.23(b) (1994).

63. *Id.* § 122.23(b)(1)(i), (ii).

64. 34 F.3d 114 (2d Cir. 1994).

that a confined animal feeding operation is synonymous with "feedlot."⁶⁵ As defined in the CWA regulations, a feedlot is a concentrated, confined animal growing operation for meat, milk, egg production, or stabling, in pens or houses wherein the animals or poultry are fed at the place of confinement and crop or forage growth or production is not sustained *in the area of confinement*.⁶⁶

An animal feeding operation, however, is defined differently in the CWA. Although some animal feeding operations may be feedlots, not all such operations are feedlots. The key difference in the definition of a feedlot and an animal feeding operation is that an animal feeding operation for CWA purposes does not include an operation which sustains crops, vegetation, or post-harvest residues *over any portion of the lot or facility*. Only feedlots require crops to be grown in the specific area of confinement to avoid being classified as CAFOs.⁶⁷

Southview Farm and its supporters argued that the EPA clearly intended animal feeding operations to be subject to a broader definition than feedlots. Instead of limiting the vegetative forage growth or crops to the area of animal confinement, as in feedlot situations, the EPA used the terms "lot or facility." The National Pork Producers Council's (NPPC) *amicus curiae* brief pointed out that, although the term "lot or facility" is not defined in the Clean Water Act, it is defined in several places in the Clean Air Act (CAA).⁶⁸ The CAA makes it clear that a lot or facility includes all buildings, structures, and operations on one contiguous site, *as well as adjacent properties under the control of the same person or persons*.⁶⁹ If the Second Circuit had adopted the CAA's definition of "lot or facility," it would have had no choice but to uphold the district court's finding that Southview Farm is not an animal feeding operation subject to CWA permit requirements because it grew crops on the land adjacent to the animal confinement area and the entire operation was under Southview's control.⁷⁰

(b) Manure Equipment as Point Source

The Second Circuit Court of Appeals also held Southview Farm's manure spreading equipment to be a point source.⁷¹ NPPC argued in its brief that holding land application vehicles to be point sources ignores the distinction between nonpoint and point sources.⁷² A nonpoint source conveys material in a diffuse manner as opposed to a point source's discrete man-made conveyance. Land application of animal manure is a traditional nonpoint source and to hold land application vehicles to be point sources creates no viable alternative for getting liquid manure onto fields. NPPC contended that, if this type of land application is a point source, it would be virtually impossible to use land application as a method

65. *Id.*

66. *Southview Farm*, 34 F.3d at 123.

67. NPPC Brief at 8, *Southview Farm* (No. 94-1316).

68. *Id.* at 9.

69. 42 U.S.C. §§ 7401-7671q (1988 & Supp. V 1993).

70. NPPC Brief at 9, 10, *Southview Farm* (No. 94-1316).

71. *Southview Farm*, 34 F.3d at 119.

72. NPPC Brief at 16, *Southview Farm* (No. 94-1316).

for disposing of manure.⁷³ However, almost all states encourage the use of land application by animal feeding operations in order to cut down on liquid waste disposal problems. The land application of manure is an effective and inexpensive means of waste disposal, and is also a less chemically-dependent method of fertilization. In fact, the EPA's Region VI general permit authorizes the use of land application of waste generated by CAFOs when done so in accordance with recognized practices of good agricultural management. To hold that a roving piece of equipment used in the application of waste to the land is a point source raises the question as to whether other moving vehicles used in agricultural operations can also be considered point sources.⁷⁴

(c) Swale as Point Source

Besides designating manure spreading vehicles as point sources, the Second Circuit also found a depression in the ground (swale) on the property to be a point source.⁷⁵ The Second Circuit, in declaring the swale to be a point source, found that manure collected in the swale flowed into a pipe under a stone wall, ran into a ditch, then into a stream, and eventually into the Genesee river.⁷⁶ NPPC argued that the collection of manure in a swale and the subsequent meandering of the manure after a rainfall fits the nonpoint source definition of waste spread in a diffuse manner and that a swale is not a man-made discrete conveyance contemplated by the statutory definition of a point source.⁷⁷

(d) Storm Water Discharges

Beginning in 1987, Congress specifically exempted all agricultural storm water discharges from the CWA's permitting requirements.⁷⁸ As a matter of law, storm water discharges cannot be point sources. Southview Farm contended that manure from its fields migrated off the property only after heavy rainstorms. While the district court held that the manure runoff from Southview Farm's cultivated crops was an agricultural storm water discharge exempt from CWA permitting requirements, the Second Circuit found otherwise. It ruled that there are two classes of storm water discharges, those which are exempt from CWA provisions and those that are not. The court held that if "sufficient" quantities of manure are present in the agricultural runoff, the runoff cannot be classified as "storm water." The court, however, did not identify what constitutes a "sufficient quantity."⁷⁹

73. *Id.* at 16-17.

74. NPPC Brief at 16-18, *Southview Farm* (No. 94-1316).

75. *Southview Farm*, 34 F.3d at 118.

76. *Id.* at 118-19.

77. NPPC Brief at 16-18, *Southview Farm* (No. 94-1316).

78. Water Quality Act of 1987, Pub. L. No. 100-4, § 503, 101 Stat. 7, 75 (codified at 33 U.S.C. § 1342(p) (1988 & Supp. V 1993)).

79. *Southview Farm*, 34 F.2d at 121.

(3) *Nonpoint Source Pollutants*

Animal production systems not subject to NPDES point source requirements are governed under the CWA provisions for nonpoint source pollution. Agriculture, in general, has been named in a number of studies as the single largest contributor to nonpoint source pollution. Agriculture, including crop and animal production, has been identified as the leading source of nonpoint source pollution affecting rivers, lakes and wetlands.⁸⁰ In response to the concern over nonpoint source agricultural pollution Congress has enacted several additional provisions to the CWA to address the problem. The following is a brief summary of those provisions:

Section 208⁸¹ requires each state to develop management plans to address significant water problems. The management plans must assess both point source and nonpoint source problems. Return flows from irrigated agricultural land, runoff from manure disposal and runoff from land used for livestock must be covered in the management plans. Section 208 also requires states to specify feasible measures for controlling nonpoint source agricultural pollution and establishes the Rural Clean Water Program.

Section 305(b)⁸² requires a state to assess its water quality and to report its findings to the EPA every two years. Reports must describe the nature and extent of nonpoint sources of pollutants with recommendations to state programs to control the problem.

Section 319⁸³ added the following new policy statement to the CWA's goals and policy provisions: "[I]t is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and non-point sources of pollution."⁸⁴

Although section 319 does not require the states to implement mandatory regulatory controls, states must identify those waters that cannot attain or maintain state water quality standards without additional controls on nonpoint sources of pollution.⁸⁵

(4) *Section 404 Clean Water Act — Wetlands Protection*

The Clean Water Act⁸⁶ (CWA) has as its goal restoring and maintaining of the integrity of the nation's waters. Along with regulation of discharge of pollutants into navigable waters of the country, otherwise known as "point source" regulation,

80. USEPA, *MANAGING NONPOINT SOURCE POLLUTION 2* (1992); see also George A. Gould, *Agriculture, Nonpoint Source Pollution, and Federal Law*, 23 U.C. DAVIS L. REV. 461 (1990).

81. 33 U.S.C. § 1288(b)(F) (1988).

82. *Id.* § 1315(b).

83. *Id.* § 1329.

84. *Id.* § 1251(a)(7).

85. *Id.* § 1329.

86. *Id.* §§ 1251-1376.

CWA regulates what is known as "dredge and fill" activity. Section 404 of CWA provides protection to what are known as "wetlands" from dredge and fill activity.⁸⁷

When determining whether section 404 applies, five questions must be answered:

1. Is the area a wetland;
2. Is the activity a dredge and fill activity;
3. Is there a general permit available which will allow the activity;
4. Is an individual permit required; and
5. Are there exceptions for the type of activity involved?⁸⁸

(a) *Wetlands*

Wetlands are lands that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and under normal circumstances does support vegetation typically adapted for life in saturated soil conditions. Wetlands include swamps, marshes, bogs, and similar areas.⁸⁹

There has been considerable regulatory indecision regarding the definition of a wetland. This indecision stems, in part, from the shared jurisdictional authority for determining whether wetlands exist and enforcing wetlands preservation requirements. The United States Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) share jurisdiction over wetlands. Permits to conduct dredge and fill activities are obtained from the Corps, while the EPA sets standards for the permitting process and has veto power over permits granted by the Corps. Both the EPA and the Corps have enforcement roles, both to require compliance with a permit or to enforce the requirement that a permit be obtained.

There have been several interpretations offered by both the Corps and the EPA regarding hydrology criteria, acceptable indicators of hydrology criteria, depth of soil saturation required, and the definition of growing season, all components of the wetlands definition. These interpretations were set forth in EPA and Corps documents: a 1987 manual, a 1989 manual, and a 1991 revision to the 1989 manual.⁹⁰ The issue of which standards to use to define a wetland is still unresolved. At present, however, there are basically three criteria for determining if a wetland exists: (1) presence of water; (2) presence of soil type, specifically hydric soil type; and (3) presence of vegetation supported by hydric soil inundated or saturated with water. Prior converted croplands are not considered wetlands.⁹¹

87. *Id.* § 1344.

88. COPELAND & HIPP, *supra* note 52, at 8.

89. 40 C.F.R. § 230.3(t) (1995) (EPA Regulations defining wetlands); 33 C.F.R. § 328.3(b) (1995) (Corps of Engineers regulations defining wetlands).

90. EPA, WETLANDS DELINEATION MANUAL: 1987 EDITION (1987); EPA, WETLANDS IDENTIFICATION: FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS (1989); 56 Fed. Reg. 40,446 (1991).

91. CORPS OF ENGINEERS REGULATORY GUIDANCE LETTER 90.7 (June 16, 1992) (proposing an amendment to Corps regulations, 57 Fed. Reg. 26,894 (1992)).

(b) *Waters of the United States*

Section 404 regulates discharge of dredge or fill material into "Waters of the United States." "Waters of the United States" includes:

- traditional navigable waters including adjacent wetlands;⁹²
- tributaries to navigable waters, including adjacent wetlands (excluding manmade drainage and irrigation ditches);
- interstate waters and other tributaries, including adjacent wetlands; and
- other waters of the United States, such as isolated wetlands and lakes, intermittent streams and prairie potholes.⁹³

(c) *Discharge, Dredge and Fill*

In order for section 404 to apply, there must be some discharge into the waters of the United States. In *Avoyelles Sportsmen's League, Inc. v. Marsh*,⁹⁴ the court held that removing vegetation from a wetland and then burying the material back into the wetland constituted a discharge. The court did not rule on whether mere removal of vegetation without redepositing required compliance with permit requirements. Later proposed regulations reflect that if the overall project is to destroy or degrade the area, and by the nature of the project there will be some redepositing, a permit is required.⁹⁵ According to the Corps, any activity involving land clearing, ditching, channelizing, and excavating is a regulated activity, but that pumping water from a wetland is not a regulated activity.⁹⁶

(d) *Permits*

If the area is a wetland and the activity is dredge and fill in nature, a permit may be required.⁹⁷ Permits must be obtained prior to engaging in dredge and fill activity. Before the permit is issued, the Corps will decide whether the proposed activity will adversely affect the waters of the United States or whether the impact will be minimal. Permits granted by the Corps may be vetoed by the EPA.

(e) *Types of Permits*

There are two types of permits: general and individual. General permits are usually statewide, regional, or national in scope and involve minor impacts of

92. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

93. 33 C.F.R. § 328.3(a) (1995) (stating Corps definition of waters of the United States).

94. 715 F.2d 897, 900-01 (5th Cir. 1983).

95. 57 Fed. Reg. 26,894 (1992). EPA proposed regulations were inconsistent with the Corps regulations. EPA took the position that excavation with redepositing on upland sites was not a regulated activity.

96. A Texas court held that pumping water from a wetland is a regulated activity since it has the effect of converting the wetland. *Save Our Community v. EPA*, 741 F. Supp. 605, 611 (N.D. Tex. 1990), *rev'd*, 971 F.2d 1155 (5th Cir. 1992).

97. 33 U.S.C. § 1344 (1988 & Supp. V 1993).

wetland resources.⁹⁸ General permits are put in place using the federal rulemaking procedures.

Individual permits may be granted for those activities for which there is no general permit and there are no practicable alternatives.⁹⁹ For non-water dependent projects, the assumption is made that there will be a practicable alternative, and if there is not, the permit will contain mitigating requirements or site change requirements. Mitigation may be on-site or off-site, such as through the donation of land to conservation.

If a state or local law is more protective of wetlands, a permit which might otherwise be granted by the Corps could be denied due to lack of permission for the permit from the state authority.¹⁰⁰

(f) Exceptions

There are statutory exceptions to the permit requirements of section 404.¹⁰¹ These exceptions are for normal farming, ranching, or logging activities, if those activities are already occurring and will be ongoing and continuous in nature. If there is an alteration in operations, permits are required.¹⁰²

Finally, if property is a wetland and a permit is denied, a "taking" for which compensation must be made to the landowner has occurred if the land is left with no economically beneficial or productive use. Generally, value determinations will be made based on the wetland specific area for which the permit is denied.¹⁰³

Section 1319 of the Clean Water Act provides criminal penalties for both "negligent" and "willful" violations of effluent limitations or permit conditions. Negligent violations may be punished by fines between \$2500 and \$25,000 per day and/or incarcerations up to one year for a first offense. Subsequent offenses subject the perpetrator to fines up to \$50,000 per day and jail terms up to two years.¹⁰⁴

Knowing violations may be punished by fines up to \$250,000 and/or imprisonment up to fifteen years. Subsequent violations may be punished by fines up to double for a single violation.¹⁰⁵

b) Clean Air Act

The Clean Air Act (CAA)¹⁰⁶ is now one of the most comprehensive and complex pieces of U.S. environmental legislation. What was a fifty-page document in 1970 now runs more than 750 pages. On November 15, 1990, President Bush signed into law the new clean air standards.¹⁰⁷

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *United States v. Akers*, 785 F.2d 814 (9th Cir. 1986), *cert. denied*, 479 U.S. 828 (1986).

103. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994).

104. 33 U.S.C. § 1319(c)(1) (1988 & Supp. V 1993).

105. *Id.* § 1319(c)(3).

106. 42 U.S.C. §§ 7401-7671q (1988 & Supp. V 1993).

107. Pub. L. No. 101-549, 104 Stat. 2399 (codified at 42 U.S.C. §§ 7401-7671q (1988 & Supp. V

The 1990 amendments require sources subject to pollution controls to obtain operating permits, which must include a comprehensive statement of the source's Clean Air Act obligations as to emission limits, fee requirements, inspection, monitoring and reporting duties.¹⁰⁸ Violators are exposed to administrative compliance orders and federal court injunctions.

Under the 1990 amendments, all criminal penalties are now felonies. Fines of up to \$250,000 per day may be imposed on individuals and up to \$500,000 for corporations. Prison terms of up to five years may be imposed. Subsequent violations may result in the doubling of sanctions.¹⁰⁹

Knowing endangerment offenses for the release of hazardous air pollutants may subject individuals to fines of up to \$250,000 and to jail sentences of up to fifteen years. Corporations may be fined up to \$1,000,000.¹¹⁰ Negligently releasing hazardous air pollutants can subject the polluter to fines up to \$250,000 and/or one year in jail if the polluter knows that his actions will place another person in imminent danger of death or serious bodily injury.¹¹¹ Making false statements on reports or tampering with monitoring devices may result in fines up to \$250,000 per day and/or jail terms up to two years.¹¹²

In April 1994, the EPA announced its reward program for citizens who report companies that violate the Clean Air Act. Rewards up to \$10,000 are awarded to citizens whose information results in a criminal conviction or fine under the Clean Air Act.¹¹³

c) CERCLA

The Comprehensive Environmental Response, Compensation and Liability Act¹¹⁴ (CERCLA) was passed to rectify perceived inadequacies of earlier environmental legislation, especially the Resource Conservation and Recovery Act of 1976 (RCRA).¹¹⁵ RCRA was deemed inadequate to address past hazardous waste disposal sites.¹¹⁶

CERCLA creates three types of liability. Section 104 authorizes the federal government to conduct cleanup operations with funds from the "Superfund."¹¹⁷ The government may then seek under section 107 to recover the costs from "potentially responsible parties" (PRPs).¹¹⁸ The government is also authorized under section

1993)).

108. 42 U.S.C. §§ 7401-7671q (1988 & Supp. V 1993).

109. *Id.* § 7413(c)(1).

110. *Id.* § 7413(c)(5).

111. *Id.* § 7413(c)(4).

112. *Id.* § 7413(c)(2).

113. *Citizens Could Gain Reward for Reporting Clean Air Violations, Under EPA Proposal*, 25 *Env't Rep. (BNA)* 12 (May 6, 1994).

114. 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993).

115. 42 U.S.C. §§ 6901-6986 (1988).

116. Linda J. Oswald & Cindy A. Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 *Nw. U. L. Rev.* 259, 264 (1992).

117. 42 U.S.C. § 9604 (1988 & Supp. V 1993).

118. *Id.* § 9607.

106 to issue cleanup directives or seek injunctive relief ordering PRPs to conduct responsive actions to abate an "immediate and substantial endangerment to public health or the environment."¹¹⁹ Also, private parties are authorized under section 111 to seek reimbursement from the "Superfund" or they may file cost recovery actions against PRPs under section 107.¹²⁰

CERCLA and the courts have broadly defined the term "persons" as used in the act. "Person" includes individuals, corporations and other corporate actors, such as officials, as well as other types of business entities.¹²¹

Under CERCLA criminal penalties may be levied for failing to report releases, knowingly reporting false or misleading information or knowingly destroying or falsifying records.¹²² Fines may go up to \$250,000 for individuals and \$500,000 for corporations, or may be based upon the pecuniary gain or loss. Jail terms of up to three years for a first conviction and up to five years for subsequent convictions are also available.¹²³

CERCLA also has an interesting "snitch" feature to it. An individual who provides information leading to the arrest and conviction of a person failing to report a release can receive up to \$10,000.¹²⁴

d) Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act criminalizes a variety of knowing violations as to the transportation of waste to unpermitted facilities, and/or transporting, treating, storing, or disposing of waste without a permit.¹²⁵ Also, making false statements or knowingly omitting material information in applications, manifests, reports, etc., constitutes criminal conduct.¹²⁶ Fines can go as high as \$50,000 per day of violation and imprisonment may be from two to five years depending on the violation. Subsequent convictions result in a doubling of penalties.¹²⁷

Any person who knowingly violates the law and subjects another person to imminent danger of death or serious injury may be fined up to \$250,000 and/or imprisoned up to fifteen years. A corporation found guilty of knowing endangerment is subject to a fine up to \$1,000,000.¹²⁸

119. *Id.* § 9606.

120. LAWRENCE P. SCHNAPF, ENVIRONMENTAL LIABILITY: LAW & STRATEGY FOR BUSINESSES AND CORPORATIONS §§ 5.09, 5.10-.11 (1992).

121. 42 U.S.C. § 9601(21) (1988).

122. *Id.* § 9603(b).

123. *Id.*

124. *Id.* § 9609(d).

125. 42 U.S.C. § 6901-6986 (1988 & Supp. V 1993).

126. *Id.* § 6928.

127. 42 U.S.C. § 6928(d) (1988).

128. *Id.* § 6928.

e) *Endangered Species Act (ESA)*

The Endangered Species Act¹²⁹ also prohibits private persons from taking any endangered or threatened species of animal listed under the Act without a permit or exemption. "Taking" is defined as harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting the animal.¹³⁰ An intent to take the animal is a required element of a violation of the Act. The U.S. Fish and Wildlife Service has taken action against farmers and ranchers who kill protected animals with meat illegally laced with pesticides.¹³¹ Note also that in *Christy v. Hodel*,¹³² the court upheld the authority under the Act of the U.S. Fish and Wildlife Service to assess penalties against livestock owners who deliberately kill grizzly bears, an endangered species, in order to protect their livestock. Livestock owners had challenged the Act on various federal constitutional grounds.

Section 1538 of the Endangered Species Act sets out acts prohibited under the ESA. The ESA makes it unlawful for anyone to import, take, possess, sell, deliver, or transport an endangered species of fish or wildlife¹³³ or an endangered species of plant.¹³⁴ Any person who knowingly violates such prohibited conduct is liable for a criminal fine up to \$50,000 and/or one year of imprisonment.¹³⁵ All other ESA violations, such as reporting violations, are subject to a criminal fine up to \$25,000 and/or six months imprisonment.¹³⁶

f) *Migratory Bird Treaty Act*

The Migratory Bird Treaty Act¹³⁷ implements conventions between the United States and Canada, Japan, Mexico, and the USSR for the protection of migratory birds. Note that birds protected under the Act are not necessarily endangered. The Act provides that except as permitted by regulation, it is unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, or kill any migratory bird.¹³⁸ Violation of the Act is a misdemeanor with penalties of fines up to \$500 and imprisonment up to six months.¹³⁹ Federal courts have split on the question of requisite intent to impose liability under the Act in cases where birds are poisoned by pesticides.¹⁴⁰

129. 16 U.S.C. §§ 1531-1543 (1994).

130. *Id.* §§ 1532(8), (19), 1538(a).

131. *Three Men Sentenced for Illegal Pesticide Use on Wildlife in Wyoming*, U.S. Newswire, Jan. 13, 1994, available in Westlaw, 1993 WL 7128431.

132. 857 F.2d 1324, 1336 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989).

133. 16 U.S.C. § 1538(a)(1)(A)-(G) (1994).

134. *Id.* § 1538(a)(2).

135. *Id.* § 1540.

136. *Id.*

137. *Id.* §§ 703-711.

138. *Id.* § 703.

139. *Id.* § 707(a).

140. See *United States v. Van Fossan*, 899 F.2d 636, 639 (7th Cir. 1990) (ruling that the Act is a strict liability statute and approved its application to a defendant who used pesticides to poison birds, even though the defendant did not know that his use of the pesticide would kill protected migratory

g) *Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)*

The U.S. Environmental Protection Agency (EPA) administers the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA),¹⁴¹ the major federal statute governing pesticide use. FIFRA establishes minimum national standards for the use of pesticides. The Act also regulates the registration, production, and sale of pesticides.

FIFRA grants primary, but not exclusive, enforcement responsibility for pesticide use to the states.¹⁴² States retain the authority to regulate the sale or use of any federally registered pesticide or device in the state under state law, but only if and to the extent that regulations do not permit any sale or use prohibited under FIFRA.¹⁴³ In addition, states may not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under FIFRA.¹⁴⁴

(1) *Use of Pesticides*

FIFRA provides that it shall be unlawful for any person to use any registered pesticide in a manner inconsistent with its labeling.¹⁴⁵

Based on toxicity or degree of adverse effects on humans and the environment, the EPA divides pesticides into two broad groups, either unclassified (general use) or restricted use pesticides.¹⁴⁶

Pesticides for unclassified or general use may be purchased and used by any person in a manner consistent with the pesticide's label. Restricted use pesticides may be applied only by or under the direct supervision of a certified applicator. Note that "under the direct supervision of a certified applicator" means that the pesticide is applied by a competent person acting under the instructions and control of a certified applicator who is available if and when needed, even though such certified applicator is not physically present at the time and place the pesticide is applied, unless the pesticide label prescribes a greater degree of supervision.¹⁴⁷

birds); *United States v. FMC, Corp.*, 572 F.2d 902, 905-06 (2d Cir. 1978) (resolving the scienter issue by noting that a "technical" violation of the Act could be punished by a small or nominal fine); *United States v. Rollins*, 706 F. Supp. 742, 745 (D. Idaho 1989) (ruling that the Act was unconstitutionally vague as applied to a defendant farmer whose application of pesticide resulted in the death of a flock of geese when the defendant used due care in applying the pesticide); *United States v. Corbin Farm Servs.*, 444 F. Supp. 510, 535-36 (E.D. Cal. 1978), *aff'd* 518 F.2d 259 (9th Cir. 1978) (ruling that the Act can be constitutionally applied to persons whose use of pesticides is not intended to kill migratory birds but results in bird kills).

141. 7 U.S.C. §§ 136-136y (1994).

142. *Id.* §§ 136w-1, 136w-2.

143. *Id.* § 136v(a).

144. *Id.* § 136v(b).

145. *Id.* §§ 136(ee), 136j(a)(2)(G).

146. *Id.* § 136a(d). Pesticides classified under FIFRA for restricted use are listed at 40 C.F.R. § 152.175 (1995).

147. 7 U.S.C. § 136(e)(4) (1994).

FIFRA requires the certification of applicators of restricted use pesticides and provides for EPA-approved state certification programs.¹⁴⁸

(2) Reporting Requirements

Under FIFRA regulations,¹⁴⁹ commercial applicators must keep and maintain, for a period of at least two years, routine operational records containing information on kinds, amounts, uses, dates, and places of application of restricted use pesticides.

The 1990 Farm Bill added the following recordkeeping and disclosure requirements for pesticide use:

- certified pesticide applicators must maintain restricted use pesticide application records comparable to those of commercial applicators under state law;
- within thirty (30) days of restricted use pesticide application, a certified commercial applicator shall provide a copy of records of the pesticide application to the person for whom the application was provided;
- the records must be made available to any federal or state agency that deals with pesticide use or any health or environmental issue related to the use of pesticides on the request of the agency. A government agency may not release data from the records that directly or indirectly reveals the identity of individual producers. The USDA is charged with administering access to the records by federal agencies. States shall designate a lead agency to administer access by state agencies;
- when a health professional determines that pesticide information maintained in the records is necessary to provide medical treatment or first aid to an individual who may have been exposed to pesticides, upon request, persons required to maintain the records shall promptly provide the record and available label information to the health professional. In the case of an emergency, the information shall be provided immediately;
- penalties in the form of fines imposed by the Secretary of Agriculture are included; and
- the amendment requires that the USDA and the EPA use the records to develop and maintain a data base sufficient to enable the USDA Secretary and the EPA Administrator to publish annual comprehensive reports concerning agricultural and nonagricultural pesticide use.¹⁵⁰

(3) Disposal of Pesticide Containers

A pesticide's labeling may contain specified procedures for disposal of the pesticide and the pesticide's container. Disposal of such pesticide in a manner inconsistent with the labeling violates FIFRA.¹⁵¹ Note also that the EPA has

148. *Id.* § 136i; 40 C.F.R. § 171 (1995).

149. 40 C.F.R. § 171.7(b)(1)(iii)(E) (1995).

150. Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, § 1491, 104 Stat. 3359, 3627-28 (1990) (codified at 7 U.S.C. § 136i-1 (1994)).

151. 7 U.S.C. § 136q (1994).

promulgated regulations for the EPA's disposal of specified pesticides which can no longer be legally used because their registration has been canceled.¹⁵² The agency has also promulgated recommended procedures for the disposal of unwanted pesticides.¹⁵³

(4) *Worker Protection Standard*

Agricultural employers must also comply with the Worker Protection Standard for Agricultural Pesticides (WPS) which became effective April 15, 1994.¹⁵⁴ The WPS covers all agricultural employers and their employees. The WPS contains requirements for training employees who handle pesticides, provisions from protecting employees from pesticide exposure, and the providing of emergency assistance to exposed employees. The WPS follows the civil and criminal penalties as set out in FIFRA.¹⁵⁵

2. *Other Federal Criminal Provisions: Non-Environmental Laws*

In addition to the criminal penalties set forth in specific federal environmental statutes, there are other federal criminal laws which are often applicable in such cases. For example, under 18 U.S.C. § 1001, a person who knowingly and willfully makes false statements to the federal government is subject to a fine of up to \$10,000 and/or imprisonment up to five years.¹⁵⁶

Mail fraud charges may be brought under sections 1341 and 1343 of 18 U.S.C. if the mails, airwaves, or interstate wires are used in connection with a "scheme or artifice" to defraud, or obtain money or property by means of false or fraudulent representation.¹⁵⁷ In *United States v. Gold*,¹⁵⁸ mail fraud indictments were obtained against a chemical corporation and its officers for false statements made to the EPA.

Conspiracy charges under 18 U.S.C. § 371 may also be brought if two or more corporate officials conspire to violate criminal laws.¹⁵⁹

B. *State Prosecutions*

Many states have enacted state environmental statutes that closely parallel federal legislation. Forty states, for example, have enacted laws similar to CERCLA.¹⁶⁰ These "mini-superfunds" vary considerably from state to state, but they hold in common severe criminal sanctions. The same can be said for other state environmental statutes.

152. 40 C.F.R. § 165 (1994).

153. *Id.*

154. 40 C.F.R. § 170 (1995).

155. *Id.*

156. 18 U.S.C. § 1001 (1994).

157. *Id.* §§ 1341, 1343.

158. 470 F. Supp. 1336 (N.D. Ill. 1979).

159. 18 U.S.C. § 371 (1994); see *United States v. Olin Corp.*, 465 F. Supp. 1120 (W.D.N.Y. 1979).

160. L.P. SCHNAPE, ENVIRONMENTAL LIABILITY: LAW AND STRATEGY FOR BUSINESSES AND CORPORATIONS § 6.07, at 6-15 (1992).

1. In General

Not to be outdone by federal prosecutors, state prosecutors also now demonstrate a greater willingness to bring criminal actions against individuals, corporations, and corporate officers in environmental cases. As one prosecutor states: "We want the company's money and the owner's liberty"¹⁶¹

In some cases, federal law specifically delegates enforcement responsibility for an environmental statute to the states. For example, the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) delegates enforcement responsibility to the states.¹⁶² However, FIFRA violators may be prosecuted under both state and federal law regardless of the delegation.¹⁶³ In *United States v. Orkin Exterminating Co.*,¹⁶⁴ Orkin was prosecuted in federal court under a five-count criminal indictment for the pesticide poisoning of an elderly Virginia couple. The defense moved to dismiss the federal indictments on the basis that the state of Virginia had enforcement responsibility under FIFRA.¹⁶⁵ The court held, however, that the delegation of primary enforcement authority does not mean that a state is given "exclusive enforcement authority."¹⁶⁶ The court thus refused to dismiss the federal indictments and permitted the United States Attorney General's Office to proceed with the prosecution.¹⁶⁷

In recent years, state enforcement authorities have vigorously prosecuted environmental crimes. Many of the environmental prosecutions now take place at the state level, as state environmental statutes have criminal provisions similar to those found in federal statutes.¹⁶⁸

Also, some states have passed far reaching environmental legislation containing severe criminal penalties. The California Corporate Criminal Liability Act of 1989, which became effective January 1991,¹⁶⁹ places extensive reporting requirements on corporations and backs those up with criminal penalties. Corporations, including officers and managers, are required to report serious concealed dangers of which they have actual knowledge.¹⁷⁰ Reports are made to CALOSHA. Failure to report such dangers makes officers and managers subject to fines up to \$25,000 and/or imprisonment up to three years. Corporations may be fined up to \$1,000,000.¹⁷¹

161. JOHN D. COPELAND, ENVIRONMENTAL LAWS IMPACTING LIVESTOCK PRODUCERS AND OTHER AGRICULTURAL OPERATIONS 43 (1993).

162. 7 U.S.C. § 136w-1 (1994).

163. *Id.*

164. 688 F. Supp. 223 (W.D. Va. 1988).

165. *Id.* at 224.

166. *Id.*

167. *Id.* at 224-25.

168. Daniel Riesel, *Corporate and Individual Criminal Liability Arising from Environmental Crimes*, in A.L.I.-A.B.A. COURSE OF STUDY: SUPERFUND, AND TOXIC SUBSTANCES (1988), available in Westlaw, C352 ALI-ABA 281.

169. See CAL. PENAL CODE § 387 (West Supp. 1995).

170. *Id.*

171. See MARSHA S. CRONINGER & ERIC P. BEREZIN, ENVIRONMENTAL REPORTING AND THE FIFTH AMENDMENT UNDER CALIFORNIA'S NEW CORPORATE CRIMINAL LIABILITY ACT 113 (PLI Litigation & Administrative Practice Course Handbook Series No. 409, 1991), available at Westlaw, 409 PLI/LIT 113.

In New Jersey, a conviction for a second-degree offense under the environmental laws creates a presumption of incarceration.¹⁷² The only way to defeat the presumption is by the defendant proving his imprisonment would be a serious injustice which overrides the need to deter such conduct by others.¹⁷³ Pennsylvania has adopted an absolute liability standard for criminal misdemeanor violations of its Solid Waste Management Act.¹⁷⁴

2. Common Law Prosecutions Under State Law

Although for years states treated air and water pollution as regulatory offenses instead of common law crimes, there is plenty of precedent for invoking state criminal law as to polluters. Examples of common law theories for the prosecution of environmental crime include assault, battery, and homicide, as well as traditional statutory offenses such as conspiracy, attempt, and solicitation.¹⁷⁵ States have often invoked their traditional police powers to prosecute polluters for the infliction of toxic harms on individuals and the environment.¹⁷⁶ State common law prosecutions for environmental crimes are not preempted by federal law. The supremacy clause of the United States Constitution provides for federal preemption. Article VI provides in pertinent part that "[t]his constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . ."¹⁷⁷ Thus, as to some matters, the federal regulation of an activity is so pervasive as to totally preempt state law. For example, in *Ray v. Atlantic Richfield Co.*,¹⁷⁸ the U.S. Supreme Court held that the uniform federal standards for the design and construction of tanker vessels preempted more stringent state design requirements. Besides arising from the pervasiveness of the federal regulatory scheme, preemption may arise from explicit statutory language, by inference from Congressional intent to supersede state law, or from the situation where compliance with both state and federal law is physically impossible.¹⁷⁹

Given the extensive federal environmental statutes that have arisen since 1970, it has frequently been argued that the environmental field is preempted by federal

172. N.J. REV. STAT. § 2C:44-1(d) (1995).

173. *Id.*

174. 35 PA. CONS. STAT. § 6018.606(i) (1993) (Health and Safety).

175. Steven L. Humphreys, *An Enemy of the People: Prosecuting the Corporate Polluter as a Common Law Criminal*, 39 AM. U. L. REV. 311, 325 (1990).

176. *Id.* at 331 n.114 (citing *People v. Union Oil Co.*, 74 Cal. Rptr. 78, 82 (Cal. Ct. App. 1969) (allowing prosecution under Fish and Game Act for petroleum deposited into state waters); *Commonwealth v. Sonneborn*, 66 A.2d 584, 587 (Pa. Super. Ct. 1949) (permitting prosecution under statute prohibiting discharge of industrial waste into public waters); Humphreys, *supra* note 175, at 331 n.116 (citing *State v. Buckman*, 8 N.H. 203, 206 (N.H. 1836) (holding the pollution of well by throwing dead animal carcass into it was indictable at common law); *id.* at 331 n.117 (citing *Attorney Gen. v. Woburn*, 79 N.E.2d 187 (Mass. 1948) (upholding statute prohibiting discharge into public waters of matter likely to create a public nuisance)); *see also* *Commonwealth v. Straight Creek Coal & Coke Co.*, 145 S.W. 738 (Ky. Ct. App. 1912) (upholding indictment under water pollution statute).

177. U.S. CONST. art. VI, § 2.

178. 435 U.S. 151, 166 (1978).

179. Humphreys, *supra* note 175, at 338-39, nn.167-71.

law, leaving little or no room for state regulations, including prosecution under state criminal common law. However, in three state court cases, state prosecutors prevailed when faced with preemption defenses. All three cases involved workers exposed to toxic substances:

- *New York v. Pymm Thermometer*.¹⁸⁰ The New York Supreme Court upheld a guilty verdict against a company and its officials that operated an illegal mercury reclamation operation. The defendants were found guilty of conspiring to falsify business records to hide the existence of working conditions which recklessly endangered the lives of workers. The court held that state prosecution was not preempted by the Occupational Safety and Health Act of 1970 (OSHA).¹⁸¹

- *Illinois v. O'Neill*.¹⁸² Three executives of Film Recovery Systems, Inc. were found guilty of the murder of an employee who died from acute cyanide toxicity. Cyanide was used to extract silver from used film. It was held that the defendants were knowledgeable of the dangers associated with the use of cyanide and had failed to impart that knowledge to the employee. Although the case was later reversed on other grounds, it was held that the state prosecution was not preempted by OSHA.¹⁸³

- *People v. Chicago Magnet Wire Corp.*¹⁸⁴ A wire manufacturer and five corporate officials were indicted on multiple counts of aggravated battery, reckless conduct, and violation of the Illinois conspiracy statute. The trial court and an Appellate Court of Illinois both held that the comprehensiveness of OSHA preempted state criminal statutes as to the workplace conditions and worker safety. The Illinois Supreme Court reversed the lower court decisions on preemption and the United States Supreme Court declined to review the decision.¹⁸⁵

II. The Controversy Surrounding Criminal Prosecutions

As criminal prosecutions for environmental violations have rapidly increased, so has the criticism of the appropriateness of such prosecutions. The criticism towards federal prosecutions has been especially intense because of some high profile and highly controversial prosecutions, some of which are described in this article. Although all federal departments responsible for enforcing environmental laws have been criticized, the Department of Interior, the EPA and the DOJ have borne the brunt of the criticism.

There is no question that some violators of environmental laws need to be prosecuted as criminals. A Wyoming sheep rancher recently received a fifteen-month prison sentence and a \$16,175 fine for capturing and mutilating fourteen bald

180. 591 N.Y.S.2d 459, 459 (1992).

181. *Id.*

182. 2 Toxics L. Rep. (BNA) 206 (Ill. App. Ct. July 7, 1987), *rev'd on other grounds*, 14 O.S.H. Cas. (BNA) 1377 (Jan. 31, 1990) (Ill. App. Ct. Jan. 19, 1990).

183. *Id.*

184. 510 N.E.2d 1173 (Ill. App. Ct. 1987), *rev'd* 534 N.E.2d 962 (Ill. 1989), *cert. denied sub nom.*, *Asta v. Illinois*, 493 U.S. 809 (1989).

185. *Id.*

or golden eagles.¹⁸⁶ The only controversy in such a case is why was he not punished more severely. Similarly, another Wyoming rancher was sentenced to two years of supervised probation and fines totalling \$22,000 for violations of the Endangered Species Act and Federal Insecticide, Fungicide, and Rodenticide Act after the poisoning of one bald eagle and the shooting of a golden eagle on his ranch.¹⁸⁷

The EPA and DOJ also deserve praise for their recent attempts to prosecute Noble Cunningham and his R&D Chemical Co. On April 1, 1995, Cunningham was featured on "America's Most Wanted." Cunningham and his family members allegedly shipped 400 tons of hazardous waste from their farm in Mansfield, Ohio, to Atlanta where it was illegally dumped. R&D Chemical Co. has been successfully prosecuted and Cunningham is still being pursued.¹⁸⁸

Many more examples of appropriate criminal prosecutions could be listed. Still, serious questions have been raised about a number of federal environmental crimes prosecutions, and, as a result, the government and those who support environmental criminal prosecutions have been placed on the defensive.

A. Arguments in Favor of Environmental Criminal Prosecutions

Supporters of criminal prosecutions contend that environmental laws are public welfare statutes.¹⁸⁹ Because these laws protect the general health, safety, and welfare of the public, criminal prosecutions are absolutely necessary in that:

- environmental laws seek to prevent harms that can be just as significant as those associated with more traditional criminal acts;¹⁹⁰
- the moral culpability of violators of environmental laws is just as great as those who commit traditional crimes such as murder, robbery, or assault, and that environmental violations have the potential of harming large numbers of people;¹⁹¹ and

186. Gary Gerhardt, *Wyoming Rancher Convicted of Killing Eagles, 15-Month, \$16,175 Sentence Is First Under Protection Act*, ROCKY MTN. NEWS, May 19, 1995, at 10A.

187. *Three Men Sentenced for Illegal Pesticide Use on Wildlife in Wyoming*, *supra* note 131.

188. Carey Gillam, *No More Slaps on the Wrist: The U.S. Attorney, the FBI, the EPA and State Officials are Working Together to Crack Down on Local Environmental Crimes*, ATLANTA BUS. CHRON., Apr. 14, 1995, at 1B.

189. Public Welfare statutes have been described by the United States Supreme Court as a congressional response to the Industrial Revolution:

"Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare. *Morrisette v. United States*, 342 U.S. 246, 254 (1952).

190. Lazarus, *supra* note 1, at 879-80.

191. *Id.*

• unless criminal sanctions are severely applied to both individuals and corporations, environmental sanctions will simply be viewed as another cost of doing business.¹⁹²

The EPA has been particularly defensive about its selection of cases for criminal prosecution. The EPA contends that it carefully evaluates and screens cases so that criminal charges are filed only against those most deserving of criminal prosecution. In evaluating whom to prosecute the agency looks at a number of factors including, but not limited to: a history of noncompliance or repeated violations; knowing and willful behavior; the concealment or falsification of violations; potential deterrent effect; and the impact of the violation's harm on human health or the depletion of natural resources.¹⁹³

The screening process includes a review by the agent in charge before opening a case, approval by the appropriate EPA regional counsel, early approval by an assistant U.S. attorney or the Department of Justice, and a final formal DOJ review before indictment.¹⁹⁴ The EPA contends that its evaluation and screening process creates a checks and balances system which equals or surpasses other systems in place within federal law enforcement. According to the EPA, its system assures that criminal sanctions are reserved for those cases most deserving of criminal enforcement.¹⁹⁵

B. Arguments Against the Use of Criminal Laws

Critics of federal criminal prosecutions agree that only the most serious environmental cases should be handled as criminal prosecutions and they point to legislative history in support of their position. They question, however, whether the EPA and DOJ are following Congressional intent. Testimony from Senate hearings on the Pollution Prosecution Act indicate that criminal prosecutions are to be undertaken only as to the most egregious offenders. For example, Robert Adler, senior attorney, Natural Resources Defense Council, made the following remarks during Senate hearings:

EPA should take aggressive civil and criminal enforcement action against repeat offenders, or particularly egregious offenders. . . . Criminal action is particularly appropriate where conduct is willful, where it is negligent and causes or threatens severe human health or environmental effects, or for chronic violators. Criminal action should also be taken where it will have important deterrent or punitive value, and where it is believed that civil action alone will not achieve future compliance.¹⁹⁶

192. *Id.*

193. Devaney, *supra* note 4, at 33.

194. *Id.* at 34. The EPA has 10 regional offices located in Atlanta, Boston, Chicago, Dallas, Denver, Kansas City, New York, Philadelphia, San Francisco, and Seattle. Each regional office contains an area office of the Criminal Investigations Division of the Office of Criminal Enforcement.

195. *Id.* at 34.

196. *Id.* at 32.

The legislative history of a number of environmental statutes indicate Congressional intent that criminal actions should not be taken against minor or inconsequential violations, but only in truly meritorious cases.¹⁹⁷ The conference notes of the 1990 Clean Air Act Amendments state:

EPA is authorized to initiate a range of enforcement actions for a number of violations of specified sections and titles of the Act. Included is authority to issue administrative penalty orders, file civil actions, and initiate criminal proceedings via the Attorney General.

It is the conferee's intention to provide the Administrator with prosecutorial discretion to decide not to seek sanctions under [this Act] for *de minimis* or technical violations in civil and criminal matters.¹⁹⁸

Similar language can be found in the Senate Committee on Agriculture and Forestry discussions on pesticide laws: "Civil penalty provisions are considered a necessary part of a regulatory program such as pesticides control. While the Criminal provisions may be used where circumstances warrant, the flexibility of having civil remedies available provides an appropriate means of enforcement without subjecting a person to criminal sanctions."¹⁹⁹

Even CERCLA enforcement actions are supposed to reserve criminal prosecutions for the most serious violations. CERCLA's notice provision states: "[This section] establishes, in addition to civil penalties, criminal penalties for any person who knowingly fails to provide notice in accordance with [the section requiring notice]. Such criminal penalties, of course, would not be mandatory should EPA determine that a violation has occurred, and standard prosecutorial discretion would apply."²⁰⁰

The critics of environmental prosecutions make two somewhat paradoxical claims: (1) The EPA and DOJ have overzealously prosecuted individuals on technical, relatively harmless violations of the law; and (2) have failed to prosecute more meritorious cases against major corporate polluters or, when such polluters have been prosecuted, they have been given lenient treatment.²⁰¹

I. Unfair Selection of Cases

According to Judson W. Starr, the director of the Environmental Crimes Section from 1982 to 1987, EPA's screening system for criminal prosecutions is not nearly as effective as the EPA contends. Starr says that the way a case is handled often

197. Devaney, *supra* note 4, at 32.

198. *Id.* at 34 (citing H.R. CONF. REP. NO. 592, 101st Cong., 2d Sess. 347 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3391, 3879).

199. Devaney, *supra* note 4, at 34.

200. *Id.*

201. Lazarus, *supra* note 1, at 871; *see also Status of the Nation's Wetlands and Laws Related Thereto: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 101st Cong., 1st & 2d Sess. 930-78, 1024-41, 1096-164 (1991); *EPA's Criminal Enforcement Program: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 102d Cong., 2d Sess. 2 (1992) (commonly referred to as the 1992 Dingell Hearings).

depends on whose desk the case first arrives. If the case is first reviewed by an EPA regulatory employee, the case usually proceeds through administrative channels. If, however, the case is initially handled by an EPA criminal investigator, it tends to remain a criminal matter.²⁰²

Starr goes on to state: "Unable to predict how EPA will handle a violation, the regulated community is faced with uncertainties that further complicate its efforts at self-policing. Worse, the present system enhances the risk that different courts will apply inconsistent sanctions to identical violations."²⁰³

Also, although more corporate entities and their officers are being targeted for enforcement efforts, the targets are rarely the major corporations or their officers.²⁰⁴ If major corporations are not being targeted for environmental prosecutions, and, according to EPA statistics, criminal prosecutions are increasing each year with more to come, farmers, ranchers, and small to medium-sized agribusinesses have reason to fear they are and will be the targets of many of these prosecutions.

In support of their criticism of the government's selection process, critics can point to a number of highly controversial and questionable criminal prosecutions. Ironically, many of these controversial prosecutions involve farmers, ranchers, and agribusinesses. The following is a brief summary of some of the cases:

- Taung Ming-Lin, an immigrant from Taiwan, arrived in the United States in 1991 and purchased 720 acres of desert land near Bakersfield, California. He planned to grow herbs and vegetables on what was described as barren soil. Unfortunately for Lin, his property was listed as natural habitat for the Tipton kangaroo rat, an endangered species. On Sunday, February 20, more than two dozen state and federal agents, accompanied by helicopters, descended upon Lin's farm to look for dead kangaroo rats. The agents supposedly found the remains of five rats and charged Lin with violating the Endangered Species Act. Eventually, authorities also accused him of farming San Joaquin kit foxes and blunt-nosed leopard lizards. Authorities seized numerous farm tools belonging to Lin and even filed a lawsuit against his Ford tractor which allegedly had killed the kangaroo rats. The authorities threatened Lin with a three-year prison term and a \$300,000 fine. They also demanded that he give up title to 363 acres of his 723-acre holding for which he had paid \$1.5 million and that he pay another \$172,425 to fund the operation of a wildlife preserve on the land he was deeding to the government. It was only after Lin suffered a mild stroke and the public expressed its outrage at the government's treatment of Lin that the charges against him were dropped. The government eventually agreed to only charge his corporation and finally settled with the corporation for a payment of \$5000 to a local habitat conservation fund.²⁰⁵

202. Judson W. Starr, *Turbulent Times at Justice and EPA: The Origins of Environmental Criminal Prosecutions and the Work that Remains*, 59 GEO. WASH. L. REV. 900, 913-14 (1991).

203. *Id.* at 914.

204. Adler & Lord, *supra* note 40, at 796.

205. Russell Clemings, *Species Law Enforcement Is Promised*, FRESNO BEE, May 21, 1995, at B1; Aaron Epstein, *Friends, Foes of Law Tell Horror Stories to Court*, L.A. DAILY NEWS, Apr. 16, 1995, at U2; Tony Snow, *Species Cops Arrest Tractor, Sift Rat Parts*, SACRAMENTO BEE, June 10, 1994, at

- William Ellen, a lifelong conservationist, received a six-month prison term for creating ten duck ponds on Tudor Farms owned by Paul Tudor Jones II on Maryland's eastern shore in Dorchester County. He was convicted of violating the Clean Water Act by knowingly adding water to wetland areas. Ellen, a life-long conservationist, opposes indiscriminate hunting, donates to the environmental group, Greenpeace, and supports a Wildlife Fund sticker on the bumper of his Chevrolet Blazer.

While working on the ten freshwater duck ponds for Tudor Farms, Ellen consulted frequently with local state and federal agencies, obtaining thirty-eight permits in the process. The oversight agencies he consulted included the Soil Conservation Service, the Army Corps of Engineers, Maryland's Department of Natural Resources, and Dorchester County's Zoning and Planning Boards, all of which approved Tudor Farms' construction at some point. To supervise day to day operations and to ensure that no wetlands were filled, Ellen hired two former natural resources employees with experience in drawing state maps that delineated wetlands from uplands.²⁰⁶ Despite Ellen's precautions, the Corps of Engineers accused him of damaging wetlands. The accusations against Ellen were made after the 1987 rules which expanded the technical meaning of wetlands and increased the wetland acreage of Dorchester County from 84,000 acres to 259,000 acres. Ellen was offered immunity from prosecution if he would testify against Jones. Ellen refused because he did not believe that anything wrong had been done. Federal prosecutors then went ahead and prosecuted Ellen, obtained a conviction, and asked the court to sentence Ellen to thirty-three months in prison, the maximum allowed under federal guidelines. Ellen received a six-month prison term and Jones eventually paid \$2,000,000 in fines and restitution.²⁰⁷

- In 1979, Paul Hobbs and his son, Paul Hobbs, Jr., began converting to pastureland a wooded 205-acre tract of land located in eastern Virginia. The plan used by the Hobbses to clear the land was prepared with the assistance of the U.S. Soil Conservation Service. In 1988, an official with the U.S. Corps of Engineers visited the site to determine if it was a wetland. He never informed the Hobbses of his determination. Eventually the EPA charged the Hobbses with violating the Clean Water Act in that they had illegally cleared and filled their property. The Hobbses were convicted and the EPA asked the court to impose a \$55,000 fine. The federal judge imposed a fine of \$300. Court attorney Frances S. Higgins defended the prosecution, saying it was "what we're going to have to do to save this planet."²⁰⁸

- Ocie Mills and his son Cary spent most of 1989 and 1990 in jail for filling with clean sand a dry ditch on their quarter acre Florida lot. In addition, Mills and his son were each fined \$10,000. The dry ditch was determined to be a wetland and the sand to be a pollutant. According to documents obtained under the Freedom of Information Act, officials of the Army Corps of Engineers were angry at Mills and

B7.

206. Richard Minter, *'Wetlands' Send Man up the River*, INSIGHT MAG., Dec. 14, 1992, at 6.

207. *Id.*

208. Commentary, Editorial, *Swamped by EPA*, WASH. TIMES, June 27, 1990, at F2.

his son, whose criticisms of the Corps for the Corps efforts to regulate dry lands had been highly publicized.²⁰⁹ After the Mills were released from jail, the government attempted to also charge them for not removing the sand. Fortunately, a federal judge rebuffed the government's efforts.

- In 1991, Missouri farmers James A. and Mary Ann Moseley were accused of violating the Clean Water Act. The Moseleys unlawfully built a levee to prevent their farm from flooding. Prosecutors sought a \$25,000 a day criminal fine for every day the levee was in place. The criminal fine totaled \$14 million. The government's wetlands expert testified that technically a Clean Water Act violation would occur during a recreational game of softball played near the levee if a batter knocked dirt from his shoes back onto the field. The jury voted to acquit.²¹⁰

- Barry and Barbara Horner of New Jersey were charged by the New Jersey Department of Environmental Protection and Energy (DEPE) with violating the state's Dam Safety Act which became law in 1981. The act requires dam owners to maintain their structures under new safety standards and to obtain a permit before modifying their structures. The Horners contended they improved the dike on their twenty-five-acre irrigation pond before the state's Dam Safety Act became law. The Horner's dike and pond had been on the family farm since the 1760s, and repairs were done every few years over the centuries as routine maintenance and for safety precautions. According to the Horners, they had a safe impoundment long before there was a law requiring property owners to maintain them. The DEPE acknowledged that the commission did not question whether the Horners repairs were good or bad, but simply whether repairs were done in accordance with the Dam Safety Act.

As a result of the DEPE action, the U.S. Army Corps of Engineers decided to take action against the Horners for violating section 401 of the Federal Clean Water Act. The Corps contended the Horners failed to file an application with the Corps before repairing the dike. The Horners faced civil penalties and criminal fines of up to \$50,000 a day for each violation of the wetlands section of the Clean Water Act.²¹¹

At the same time state and federal authorities were taking action against the Horners, the Horner family farm was being honored by the state as a "pioneer forester." Also, Mr. Horner is an acknowledged environmentalist. Since 1963 he has been a member of the National Wildlife Association and has served as a member of the Ocean Township Environmental Commission and the Citizen's Conservation Council of Ocean County.²¹²

- John Schuler and his wife own a sheep ranch near Dupuyer, Montana. They lost approximately \$1200 worth of sheep to marauding grizzly bears. Repeated attempts by the government to stop the bears were unsuccessful. On the night of

209. Paul Craig Roberts, *Beware the Wetlands Stalkers*, WASH. TIMES, June 15, 1994, at A16.

210. Henderson, *supra* note 26.

211. Gordon Bishop, *Fickle State Family Honored, Then Sued by DEPE*, STAR-LEDGER (Newark, N.J.), May 1, 1994, available in Westlaw, 1994 WL 7875422.

212. *Id.*

September 9, 1993, Schuler thought he saw a bear running along the yard fence, past his living room window. He raced outdoors in only his underwear and toting a rifle. Three bears charged through his flock of sheep. Schuler fired at them at which point a fourth bear appeared from the darkness and attacked him. Schuler shot for the throat and retreated to his house. The next day he went outside expecting to find a dead bear. Instead the bear was very much alive and attacked Schuler again. Fearing for his life, Schuler shot and killed the bear. The Interior Department assessed Schuler a \$7000 penalty for taking a bear in violation of the Endangered Species Act. The judge rejected Schuler's argument that he was simply protecting his life. According to the court, Schuler purposefully placed himself in the zone of imminent danger of a bear attack and was really protecting his property rather than his life. The judge did, however, reduce Schuler's fine to \$4000.²¹³

- Nevada rancher Wayne Hage was threatened with a five-year sentence under the Clean Water Act for redirecting streams. Hage's crime consisted of hiring someone to clear scrub brush from irrigation ditches on his property. The ditches had been in use since the turn of the century.²¹⁴

- A case which generated substantial controversy in Colorado involved two Carbondale brothers accused of violating wetlands regulations. To prevent the flooding of their land and the loss of top soil, they rebuilt a restraining wall on their land. This was done after consulting their attorney. The Corps of Engineers sought a penalty of \$45 million against the brothers based on \$25,000 a day penalty.²¹⁵

- A Florida citrus company agreed to pay a \$40,000 fine and restore some of the forty acres of native habitat on the Santa Clara river it bulldozed. The company president, Glen Griswold, said the company did not know it had broken the law by clearing land it owned along the river. The company had received a permit from the flood control department for the work, but had failed to get permits from the U.S. Army Corps of Engineers and the California Department of Fish and Game. The district attorney's office of Consumer and Environmental Prosecution, which prosecuted the case, said ignorance was not a legal excuse for violating the law.²¹⁶

- The Simpson Timber Company for years conducted tours of its Sacramento Valley eucalyptus plantation. The 12,000 acre tree farm was shown to school children, civic groups, the University of California forestry faculty and federal environmental experts. To Simpson's surprise, and surprised officials of the U.S. Fish and Wildlife Service with whom Simpson has worked in preserving habitat for the endangered fairy shrimp, the EPA in January of 1995 appeared with a search warrant and formal charges that Simpson had been systematically destroying wetlands.²¹⁷

213. Ike C. Sugg, *Rule of If a Grizzly Attacks, Drop Your Gun*, WALL ST. J., June 23, 1993, at A15.

214. Henderson, *supra* note 26, at 18.

215. Sherry Keene-Osborne, *Has Environmental Zeal Gone Too Far?*, COLO. BUS. MAG., Apr. 1992, at 43.

216. Scott Hadly, *Fillmore Firm to Pay Fine and Restore Habitat*, L.A. TIMES, Nov. 12, 1993, at 2.

217. Frank Clifford, *Raising the Price of Protecting Nature: Does Government Too Zealously Regulate Private Property? Some Say Making U.S. Pay Owners When Land Is Devalued Could Curb*

2. Justice or Extortion

Since 1991, the EPA has had a policy on the use of Supplemental Environmental Projects (SEPs) in enforcement agreements. SEPs are defined as projects, other than those required to correct the underlying violation, which a defendant in judicial proceedings or respondent in administrative proceedings may undertake in exchange for a reduction in the amount of the assessed penalty.²¹⁸ Acceptable SEPs include projects of: pollution prevention, pollution reduction, environmental restoration, environmental auditing, and public awareness. In 1993, private expenditures compelled by injunctions or negotiated as part of SEPs adopted to settle violations totaled \$800 million.²¹⁹

Given the extensive use of SEPs, the suspicion naturally arises as to whether some SEPs are not a trade off for the EPA and DOJ foregoing criminal prosecutions. Certainly, the threat of the filing of a criminal action would be a strong incentive for a defendant to accept a civil settlement and engage in a costly SEP.

Also, in a number of criminal cases, the government has proposed settlements in which substantial donations to environmental causes have been exacted from defendants or in which attempts to exact such settlements have been made. The following two examples raise serious questions about the propriety of the government's conduct. In the case involving Bill Ellen and multi-millionaire Paul Tudor Jones, as part of the deal in which Jones received 18 months of probation, he agreed to make a \$1 million contribution to the National Fish and Wildlife Foundation.²²⁰

In the case filed against Taung Ming-Lin for allegedly killing kangaroo rats, the government threatened Ming-Lin with a \$300,000 fine and a three-year prison term. As part of a proposed settlement of the criminal charges, the government demanded that he give up title to 363 acres of his 720-acre holding for which he had paid \$1.5 million. The government also demanded that he pay another \$172,425 to fund the operation of a wildlife preserve on the acreage he was to deed to the government. Intense cries of public outrage finally forced the government to settle for a \$5000 donation to a local habitat conservation fund.²²¹

In a 1994 case involving Emmett Runde, a swine producer accused of polluting a Wisconsin stream, the Wisconsin Department of Natural Resources fined Runde \$5000 and as part of the process publicly humiliated him. Instead of asking for a

Excesses, Others Fear It Would Gut Enforcement, L.A. TIMES, May 25, 1995, at 1.

218. James J. Periconi & David Nelson, *The Precedent Setting Use of a Pollution Prevention Project in a Pollution Prevention Project in an EPA Enforcement Settlement: The First Dollar-for-Dollar Penalty Offset*, 24 *Env't Rep. (BNA)* 2049, 2050 (Apr. 1, 1994).

219. *Id.*

220. Henderson, *supra* note 26, at 19.

221. Kent Ward, *Endangered Species Case Teaches Lesson*, BANGOR DAILY NEWS (Bangor, Me., June 24, 1995, available at 1995 WL 8763339. According to Dale Mitchell, an environmentalist with the California Department of Fish and Game, some developers have been able to get permits for the "incidental taking" of endangered species by deeding over three acres of land for every acre taken in development. *May We See Your Papers, Please? On [sic] Rats!*, LAS VEGAS REV.-J., July 5, 1995, at 6B.

donation to an environmental organization or money for an environmental project, the state required Runde to write and publish the following letter:

A NOTICE TO MY FELLOW FARMERS:

Water quality protection is the responsibility of everybody, including farmers. I understand that now.

For over 10 years I have known that at times my farm has been a source of water pollution. I constructed a manure pit that was inadequate to protect the stream running through my farm. Manure repeatedly entered the stream and polluted the water. The Department of Natural Resources (DNR) issued me a notice advising me of this problem. The Grant County Land Conservation Department, the Soil Conservation Service, and the Wisconsin Departments of Agriculture and Natural Resources all tried to help, but I did not fix the manure pit at that time. The DNR issued a Wisconsin Pollutant Discharge Elimination System Permit which I did not comply with.

The state filed a lawsuit against me and now I have agreed to a court order not to use my hog buildings because I did not protect the stream. I have also incurred substantial penalties.

I urge all farmers to take whatever actions they can to protect the environment. A WPDES permit is designed to protect streams and lakes and it contains a number of requirements that are very important and should be complied with. It is better to listen to the local, state and federal regulatory agencies and to take their advice. I know that now. If I had realized this ten years ago I would have saved myself and the DNR a lot of trouble, and, at the same time, I would have done a better job protecting the waters of the State of Wisconsin.

Emmett Runde
Cuba City²²²

Many individuals accused of environmental crimes have no choice but to accept whatever settlement proposal is made by the government. They simply lack the financial resources to do otherwise. Oklahoma criminal defense attorney, Jarry McCombs, estimates that a competent environmental defense costs between

222. HERALD INDEPENDENT, June 2, 1994, at A16. Actually, *mea culpa* letters might not be a bad idea, so long as the government is required to issue similar letters whenever it drops, loses, or has a case dismissed. The government's *mea culpa* letter should also be accompanied by a check reimbursing the former criminal defendant for all attorneys fees and other costs expended in his or her defense.

\$250,000 and \$500,000. In a RCRA case against an aircraft painting and repair shop, McCombs said the defendant spent \$300,000 to have his conviction overturned on appeal. The federal government spent \$468,000 on its prosecution.²²³

3. *Diminished Mens Rea*

Much of the criticism of the criminal enforcement of environmental laws revolves around the issue of *mens rea*. The common law generally did not condemn acts as criminal unless the actor had "an evil purpose or mental culpability."²²⁴ In addition, under common law an accused can only be convicted upon proof beyond a reasonable doubt that the accused acted with the "specific intent" to violate the law, in other words, that the accused acted with a conscious objective to cause the specific result proscribed by the statute.²²⁵

In comparison, environmental offenses require only a diminished *mens rea*. The United States Supreme Court and the courts of appeal have generally held that the government can prove that a defendant "knowingly violated" a particular environmental standard without proving either that defendant knew of the applicable legal standard and its violation or of all the relevant facts underlying its violation.²²⁶ The diminished *mens rea* requirement in environmental criminal cases is justified under the doctrine that environmental crimes are public welfare offenses.²²⁷

4. *Additional Arguments Against the Environmental Criminal Prosecutions Include:*

- Environmental standards are not necessarily based on traditional notions of criminal culpability. Environmental standards are set at precautionary, risk-averse levels of protection against risk to human health and the environment.²²⁸
- Standards of compliance do not necessarily reflect standards of performance that are either economically or technologically feasible. As a result, full compliance with environmental laws is the exception rather than the norm.²²⁹
- Criminal sanctions are more than just another enforcement tool. A criminal sanction is fundamentally different in character than a civil sanction and should be reserved for the more culpable offenses.²³⁰
- Environmental laws are extraordinarily complex and therefore difficult to understand. The laws include Congressional micromanagement, broad delegation of authority to the EPA, thousands of implementing regulations, guidance documents,

223. Henderson, *supra* note 26, at 22.

224. Richard Lazarus, *A New Faultline-Mens Rea*, 12 ENVTL. FORUM 9 (1995). See also M. Diane Barber, *Fair Warning: The Deterioration of Scierter Under Environmental Criminal Statutes*, 26 LOY. L.A. L. REV. 105, 144-47 (1992).

225. *Id.*

226. *Id.*

227. United States v. International Minerals & Chem. Corp., 402 U.S. 558, 564 (1971).

228. Lazarus, *supra* note 1, at 881.

229. *Id.* at 882.

230. *Id.* at 883.

judicial opinions, and letters of agency interpretation. In addition, these laws are constantly expanding through creative interpretation as evidenced by the expanding definition of wetlands.²³¹

5. Counter Productive

Besides questions of fundamental fairness, some people believe that the prospect of a jail sentence actually discourages companies from reporting environmental accidents that could be cleaned up before they caused harm. In noting that a cooperative corporate officer may be cutting his or her own throat by reporting an environmental accident, Donald Hensel, then head of environmental compliance at the American Newspaper Association, stated in 1991: "Government regulators may not be interested in working with the industry to achieve compliance. They may use jail sentences as a mechanism to enforce compliance."²³²

An unduly cooperative approach may sacrifice the legal rights of the company and its employees.²³³ The same is true as to individuals accused of environmental crimes.

III. Reactions to Environmental Crimes Prosecutions

Federal and state environmental enforcement agencies believe they have strong public and political support of the vigorous prosecutions of environmental crimes. Certainly, there is both public and political support for punishing a company such as Exxon after an Exxon Valdez disaster which caused enormous ecological and financial damage. Few would argue with charging Exxon with criminal fines in excess of \$600 million.²³⁴

A. Public Reaction

But although few would question the imposition of a large criminal fine imposed on Exxon, many question the wisdom and fairness of filing criminal actions against someone like William Ellen,²³⁵ Taung Ming-Lin,²³⁶ or Ocie Mills.²³⁷

231. James V. DeLong, *New Crimes, High Fines: The Criminalization of Nearly Everything*, CURRENT, Sept. 1994, at 21. In 1993 the *National Law Journal* and Arthur Anderson Environmental Services surveyed more than 200 corporate counsels as to the ability of corporations to comply with environmental laws. Seventy percent said that full compliance with all state and federal environmental laws was impossible. Two-thirds said that their companies had violated environmental regulations within the past year. Such a response is not surprising given the fact that the Clean Air Act alone has produced 60,000 to 80,000 pages of regulations. Henderson, *supra* note 26, at 19.

232. Henderson, *supra* note 26, at 19 (quoting Donald Hensel from remarks made in 1991 before the ANPA's convention).

233. *Id.*

234. Adler & Lord, *supra* note 40, at 781-84.

235. Commentary, *Do You Sleep Better Now That Ellen's In Jail?*, WASH. TIMES, Jan. 19, 1993, at F2; H. Jane Lehman, *Trials and Tribulations of Landowners Series: This Land Is My Land: The Property Rights Movement in the United States. Part 3 Probes What Happens When Property Rights are Taken to an Extreme, Including Visits With Some Landowners Now Behind Bars*, L.A. TIMES, Oct. 18, 1992, at 2; Real Estate Notes, *Maryland Wetlands Conviction Stirring Heated Debate*, WASH. POST, Feb. 20, 1993, at FO6; *Review and Outlook: EPA's Most Wanted*, WALL ST. J., Nov. 18, 1992, at A16.

And it is not just the editorial writers, farmers, ranchers, agribusinesses, and farm organizations, such as the American Farm Bureau Federation,²³⁸ who have become critical of environmental criminal prosecutions.²³⁹ Sen. Diane Feinstein (D.-Cal.) was incensed by the government's treatment of Mr. Lin. She contacted Interior Secretary Bruce Babbitt to enquire as to why the U.S. Fish and Wildlife Service didn't work out an agreement with Lin. She further stated "There is something terribly wrong when a man is arrested and faced with jail time, hundreds of thousands of dollars in fines and loss of property because he inadvertently killed a rat while plowing his field."²⁴⁰

At the time of Ellen's conviction, Sen. David Pryor (D.-Ark.) called upon then President Bush to pardon Ellen. Senator Pryor expressed his concern that Arkansas farmers would be victimized in similar litigation with federal prosecutors and agencies. Senator Pryor stated, "In my opinion, Ellen's story is a prime example of the strange and twisted consequences that can result from a bureaucracy out of touch with reality."²⁴¹

Senator Feinstein wrote to EPA administrator Carol Browner in regard to the Simpson case. She stated: "I find EPA's enforcement action overbearing and unwarranted. This is the kind of federal agency action which is causing the public and the Congress to question all federal environmental regulation."²⁴²

It is especially difficult for the public to accept the jailing of persons whose violations do not truly endanger the public health, safety, or welfare. Former Justice Department attorney, Mark L. Pollott, states, "In 99 percent of the cases that the

Contra Commentary, *Don't Call Bill Ellen an Eco-Martyr*, WASH. TIMES, Jan. 3, 1993, at B2; Tom Horton, *A Closer Look at the Case of an 'Eco-Martyr'*, BALTIMORE SUN, Dec. 26, 1993, at 1F.

236. Snow, *supra* note 205, at B7; Ward, *supra* note 221; Ray Sotero column, Gannett News Serv., May 15, 1995, available in Westlaw, 1995 WL 2897060. *Contra* Editorials, Letters, SACRAMENTO BEE, May 21, 1995, at F05.

237. Roberts, *supra* note 209, at A16; see also Charles S. Cushman, *Debate on the Environment. Mean Green Team Carries Out Cultural Genocide*, WASH. TIMES, July 27, 1995, at F6.

238. Don Muhm, *Farm Bureau Convening, is Wary of Regulations American Farm Bureau Federation President Dean Kleckner of Iowa Expects Voting Delegates to Speak Out Against Government Rules*, DES MOINES REG., Jan. 10, 1993, at 1.

239. The backlash against criminal prosecutions of environmental violators includes many attorneys. In 1993 the California Lawyer featured a special section on environmental law with articles entitled Robert Wyman, *The Truth: 'There Are No Environmental Crimes,' Enforcement Laws Tilt in Favor of Prosecutors*, 13 CAL. LAW. 89 (1993); David P. Bancroft, *Faulty 'Priority' Prosecutions: Federal Statutes Treat Mere Negligence As Crime*, 13 CAL. LAW. 93 (1993). One attorney wrote, "When the criminalization of negligence is coupled with the criminal law doctrines of vicarious liability, roping in "responsible corporate officers" who knew nothing about the alleged crime, the result can be truly draconian." Henderson, *supra* note 26, at 24 (quoting David P. Bancroft, partner with Sideman & Bancroft in San Francisco).

240. David Kligman, *Feinstein Backs Farmer in Rat-Habitat Incident: Agriculture: The Senator Wants Interior Secretary Bruce Babbitt to Resolve Taung Ming-Lin's Case*, ORANGE COUNTY (CAL.) REG., Sept. 1, 1994, at B08.

241. *Review & Outlook: The Ellen Pardon*, WALL ST. J., Jan. 15, 1993, at A10.

242. Frank Clifford, *Raising the Price of Protecting Nature Does Government Too Zealously Regulate Private Property? Some Say Making U.S. Pay Owners When Land is Devalued Could Curb Excesses. Others Fear it Would Gut Enforcement*, L.A. TIMES, May 25, 1995, at 1.

Corps regulates, there is no threat of a pollutant getting into drinking water. Most often the pollutant in question is dirt, and usually dirt dumped on the same land it was dug from.²⁴³

Also, many of the major corporations have avoided both jail time for their executives and felony charges. Although Exxon faced substantial criminal fines after the Exxon Valdez disaster, the charges were all misdemeanors and no corporate officials were charged. Not only did the government not indict senior Exxon management and other corporate officers, it also elected not to indict the consortium of oil companies, Alaska Pipeline, Service Co., which was responsible for responding to the oil spill and failed to properly do so.²⁴⁴

Between 1984 and 1991, only 1.6% of the nation's 500 largest industrial corporations, the so-called Fortune 500, had ever been prosecuted for environmental damage. It is rather remarkable that companies which produce over 54% of the nonfarm gross national product could be responsible for less than 2% of the nation's environmental violations.²⁴⁵

B. Political Fallout

Political fallout over the criminal enforcement of the nation's environmental laws has also occurred. Although the EPA and DOJ may want to believe that criticism of their prosecutorial efforts is primarily a result of the efforts of the Republicans, the criticism is bipartisan as demonstrated in the remarks of Democratic Senators Feinstein and Pryor. In addition, questionable criminal prosecutions are having an effect on federal legislation. For example, the Endangered Species Act is under serious attack and may not be reauthorized. And, even if it is, it may be drastically modified. Sen. Slade Gorton (R.-Wash.) has introduced a bill that would abolish criminal fines or imprisonment for those who destroy an endangered species' habitat.²⁴⁶

One Clean Water bill in the U.S. House of Representatives would dramatically reduce criminal prosecutions under the CWA.²⁴⁷ House Bill 961, for example, permits a new defense—statistical noncompliance.²⁴⁸ Companies have long contended that EPA's compliance standards are based on the assumption that a certain number of dischargers will violate the standards a certain percentage of the time. The statistical noncompliance defense would prohibit dischargers from being punished for that percentage of violations.²⁴⁹

243. Miniter, *supra* note 206, at 8.

244. Adler & Lord, *supra* note 40, at 783-84.

245. *Id.* at 796.

246. William K. Stevens, *Law Aiding Imperiled Species is in Danger*, SAN DIEGO UNION & TRIB., May 16, 1995, at A1.

247. H.R. 961, 104th Cong., 1st Sess. (1995).

248. *Id.* § 404.

249. *H.R. 961 Raises Concerns by EPA, Justice over Effects on Federal Enforcement Efforts*, 26 Env't Rep. (BNA) 460 (June 23, 1995).

House Bill 961 also makes it harder for the federal government to bring criminal charges in wetlands violations. It requires the Corps of Engineers to file suit within a specified time as to a violation or be barred from pursuing it.²⁵⁰

The greatest danger, however, to the EPA's criminal enforcement measures comes from proposed budget cuts. Dissatisfaction over EPA enforcement activities, both civil and criminal, has resulted in dramatic proposals in Congress to drastically cut the EPA's budget for fiscal year 1996. The House has proposed a 34% budget reduction from \$7.27 billion to \$4.87 billion.²⁵¹ The Senate proposal is to cut the EPA's budget to \$5.66 billion.²⁵² Both the House and Senate have proposed a reduction in Superfund expenditures to \$1 billion.²⁵³ In addition, the House has proposed a \$450 million reduction in enforcement programs.²⁵⁴

C. Judicial Reaction

Even the judiciary is beginning to question some of the criminal prosecutions by the EPA and the DOJ. In a number of recent decisions, the federal courts have expressed dissatisfaction with the general intent *mens rea* standard currently applicable to environmental crimes. It is interesting that the dissatisfaction is being expressed by both conservative and liberal jurists. In *United States v. Weitzenhoff*,²⁵⁵ for example, the Ninth Circuit Court of Appeals upheld a classic diminished *mens rea* jury instruction in a Clean Water Act prosecution. Five dissenting justices, however, discussed the special difficulties inherent in the wholesale criminalization of a regulatory scheme as complex as environmental law.²⁵⁶

Even more significant is a majority opinion written by Justice Clarence Thomas in the case of *Staples v. U.S.*²⁵⁷ Although the case did not involve an environmental crime, Justice Thomas stated that *mens rea* has traditionally been a necessary element in every crime and cited authority for the view that some indication of Congressional intent, expressed or implied, is required to dispense with *mens rea* as an element of a crime.²⁵⁸

Justice Thomas further stated:

250. *Id.* at 460-61.

251. *GOP Seeking to Cut EPA Budget by One-Third, Eliminate CEQ, Limit Environmental Programs*, 26 Env't Rep. (BNA) 549, 549 (June 14, 1995).

252. *Id.*

253. *Id.* at 551.

254. Carol M. Browner, EPA administrator, has characterized the budget proposal as "the clearest indication to date that the Republican Congress is about undermining this agency's ability to perform its responsibility for the American people." *Id.* at 549. President Clinton has threatened to veto the appropriations bills of the EPA and Department of Interior if more funding is not provided. *President Would Veto Pending Bills for EPA, Interior, Head of CEQ Says*, 26 Env't Rep. (BNA) 938 (Sept. 22, 1995).

255. 1 F.3d 1523 (9th Cir.), *amended on denial of reh'g and reh'g en banc*, 35 F.3d 1275, 1283-86 (9th Cir. 1993).

256. *United States v. Weitzenhoff*, 35 F.3d 1275, 1293-99 (9th Cir. 1993) (Kleinfeld, J., dissenting).

257. 114 S. Ct. 1793 (1994).

258. *Id.* at 1796-97.

If we were to accept as a general rule the Government's suggestion that dangerous and regulated items place their owners under an obligation to inquire at their peril into compliance with regulations, we would undoubtedly reach some untoward results. Automobiles, for example, might also be termed "dangerous" devices and are highly regulated at both the state and federal levels. Congress might see fit to criminalize the violation of certain regulations concerning automobiles, and thus might make it a crime to operate a vehicle without a properly functioning emission control system. But we probably would hesitate to conclude on the basis of silence that Congress intended a prison term to apply to a car owner whose vehicle's emissions levels, wholly unbeknownst to him, began to exceed legal limits between regular inspection dates.²⁵⁹

The court went on to express doubt about the lesser *mens rea* applied in public welfare offenses, including environmental offenses, noting that such regulatory offenses have formerly been punished with small penalties.²⁶⁰ The court concluded that punishing a violation as a felony is incompatible with the theory of a public welfare offense, absent a clear statement from Congress that *mens rea* is not required.²⁶¹

Regardless of the criticism of the continued criminalization of environmental law and ever more burdensome penalties, the current trend is towards increased criminal prosecutions at the federal and state level. As a result, farmers, ranchers, and officers in agribusinesses need to know what they can do to protect themselves, and also what will not protect them.

IV. Individual and Corporate Liability

As already explained, the current criminal provisions of environmental laws require only a diminished *mens rea* for criminal culpability. In addition, environmental laws stress both individual and corporate liability for environmental crimes.

A favorite legal device used by business people to protect their personal assets from liability claims is the corporate structure. A corporation is an "artificial person" and constitutes a separate legal entity. Many farmers have incorporated their farming operations in order to take advantage of the liability protection offered by the corporate structure. Even those states with anti-corporate farming statutes permit family farm operations to incorporate in order to take advantage of the limited personal liability offered by the corporate structure. But the corporate structure is not an effective shield for individual liability in environmental cases. Many of the cases cited in this section are civil in nature, but the legal doctrines expressed are applicable to criminal prosecutions.

259. *Id.* at 1801-02.

260. *Id.* at 1802-03.

261. *Id.* at 1801-02.

A. Traditional Doctrine

Obviously, corporations can be held liable for environmental damage. It is a basic theory of corporate law that a corporation is a separate entity, a legal being with an existence separate and distinct from that of its owners. As a separate legal entity, it can act and be held accountable for its actions.²⁶² Of course, being an artificial being, with "no soul to be damned, and no body to be kicked," a corporation can act only through its employees.²⁶³ Corporations are thus held liable for their employees' conduct through the doctrine of *respondent superior*.

It is also a fundamental characteristic of corporations that corporate owners are protected by limited liability. Shareholders and their personal wealth are insulated to some extent from the risks associated with owning a business enterprise. Other corporate actors, such as officers and parent corporations, have been similarly shielded from personal liability from the tortious or illegal acts of their corporations. But the corporate business form does not offer complete protection and in appropriate circumstances the corporate veil may be pierced to impose liability upon those corporate actors who have traditionally been protected.²⁶⁴

With ever greater frequency, courts are willing to go beyond traditional legal doctrines and hold parent corporations, corporate officials, and even shareholders liable as well. This is especially true of federal courts in enforcing environmental laws.²⁶⁵ Although some commentators argue that expanding the scope of liability beyond the immediate corporation doing the environmental harm is in accordance with traditional corporate law doctrine, there is no denying the tendency of courts to expand the scope of liable parties in environmental cases.²⁶⁶

B. Shareholder Liability

Corporate shareholders expect their maximum liability exposure to be limited to their capital contributions. But there are circumstances in which the corporate veil can be pierced, such as where a corporation has been illegally formed, or is used for fraudulent or unjust purposes. Also, if shareholders ignore the corporate form and use the corporation for their own purposes, the courts can pierce the corporate veil under an alter ego theory.²⁶⁷

262. See generally HARRY G. HENN & JOHN R. ALEXANDER, *LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES* §§ 68, 73 (3rd ed. 1983); Oswald & Schipani, *supra* note 116, at 262.

263. John C. Coffee, Jr., "No Soul to Damn: No Body to Kick:" *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 (1981) (quoting Edward, First Baron Thurlow, Lord Chancellor of England).

264. Oswald & Schipani, *supra* note 116, at 262-63; see also David H. Barber, *Piercing the Corporate Veil*, 17 WILLAMETTE L. REV. 371 (1981).

265. Tom McMahon & Katie Moertl, *The Erosion of Traditional Corporate Law Doctrines in Environmental Cases*, 3 NAT. RESOURCES & ENV'T 29 (1988).

266. See Oswald & Schipani, *supra* note 116, at 262 (defending the expansion of liability in environmental cases to corporate officers, shareholders, parent corporations and successor corporations). *Contra* M. Patricia Casey, *Pollution Claims Against Directors and Officers Arising from Environmental Hazards*, 4 ENV'TL CLAIMS J. 81, 81 (1991) (noting that many commentators predict environmental claims against directors and officers to be the wave of the future).

267. Oswald & Schipani, *supra* note 116, at 295-96; see also WILLIAM MEADE FLETCHER,

In *United States v. Mottolo*,²⁶⁸ the corporate veil was pierced to impose liability on an individual shareholder. The defendant originally operated a waste disposal site as a sole proprietorship. By his own admission, he incorporated his business to "escape potential personal liability by using the corporate entity as a shield."²⁶⁹ The defendant's plan failed as the court pierced the corporate veil in order to hold the defendant, who was the corporation's shareholder, personally liable under CERCLA for illegally disposing hazardous waste.²⁷⁰

While the *Mottolo* decision involved a closely held corporation, theoretically the doctrines set forth in the case could apply to publicly traded corporations as well. Shareholders in publicly traded corporations, however, are in little danger of being held personally liable for environmental damage since they lack the unity of interest and ownership necessary to sustain an alter ego theory.²⁷¹

Also, the courts have not imposed direct statutory liability on shareholders under such statutes as CERCLA. For example, shareholders have never been defined as "owners or operators" in accordance with section 107(a)(1). There is also no evidence that Congress intended to impose CERCLA liability on shareholders.²⁷²

C. Liability of Corporate Officers

With ever greater frequency, corporate officers are being individually targeted in environmental claims. Even when acting within the scope and course of his/her corporate duties, individual corporate officers are being held personally liable for environmental damage under a number of legal theories.

1. Personal Participation Theory

An individual who personally participates in violating an environmental law, such as CERCLA, may be held personally liable regardless of their status as a corporate officer.²⁷³ The best example of this personal participation theory is found in the case of *United States v. Northeastern Pharmaceutical and Chemical Co. (NEPACCO I)*.²⁷⁴ The case involved the improper disposal of the chemical dioxin in the Times Beach, Missouri area. As a result of the dioxin contamination, the federal government and the state of Missouri initiated a multi-million-dollar environmental cleanup of various contaminated sites in Missouri. The cost to the federal government was \$33.7 million, while the state of Missouri paid \$3.3 million.²⁷⁵ A chemical manufacturer, two of its officers, and a waste transporter

CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41.10, at 615 (rev. perm. ed. 1986).

268. 695 F. Supp. 615 (D.N.H. 1988).

269. *Id.* at 624.

270. *Id.*

271. Oswald & Schipani, *supra* note 116, at 296, 298.

272. *Id.* at 299, 301.

273. *Id.* at 275.

274. 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, modified in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

275. *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 811 F.2d 1180, 1182 n.2 (8th Cir. 1987) (NEPACCO II).

were held jointly and severally liable for cleanup costs under section 107 of CERCLA.

The chemical manufacturing company's vice-president was found liable as both a generator under section 107(3) of CERCLA and as an owner and operator under section 107(a)(1).²⁷⁶ The court rejected the vice-president's defense that he could not be held liable since the waste was owned by NEPACCO. The court found that he "had the responsibility to and did arrange for the disposal of the hazardous waste" and that was sufficient to hold the vice-president liable for cleanup costs.²⁷⁷

2. Control Theory

Corporate officers can also be held liable for environmental damage under a control theory. For example, in NEPACCO I the chemical company's president was personally liable for cleanup costs because he had the ability to control corporate activities and policies.²⁷⁸ This was true even though the evidence showed that the president was not present at the plant at the time of the illegal disposal and the government was unable to show that the president had any prior knowledge of the illegal practices.²⁷⁹

Since NEPACCO I, a number of other decisions have been handed down imposing liability on corporate officers under a control theory. An analysis of the cases suggests that managerial control from an officer status is not sufficient to create liability. The courts look to see if the officer had operational control, or participated in the "nuts-and-bolts, day-to-day production aspects of the business."²⁸⁰

3. Prevention Theory

Closely analogous to the participation and control theories is the prevention theory. This theory is articulated in *Kelley v. ARCO Industries Corp.*²⁸¹ In imposing liability on corporate officers, the ARCO court acknowledged that relevant factors include the individual's power to control corporate practices and policies, as well as the individual's actual efforts expended in that regard.²⁸² The court further held, however, that the question to be answered in imposing personal liability is "whether the individual in a closely held corporation could have prevented or significantly abated the release of hazardous substances."²⁸³

Although the ARCO court dealt with a closely held corporation, the reasoning could apply to corporations in general. However, in a case involving a closed

276. See *NEPACCO I*, 579 F. Supp. at 828.

277. *Id.* at 847-848.

278. *Id.* at 849.

279. *Id.*

280. Oswald & Schipani, *supra* note 116, at 284; see also *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985); *United States v. Northernair Plating Co.*, 670 F. Supp. 742, 748 (W.D. Mich. 1987).

281. 723 F. Supp. 1214 (W.D. Mich. 1989).

282. *Id.* at 1220.

283. *Id.*; see also Oswald & Schipani, *supra* note 116, at 292.

corporation, it would probably be much easier to measure an individual's prevention abilities.

V. Environmental Compliance Programs

Given the severe civil and criminal law consequences associated with environmental claims, ensuring compliance with environmental laws is critical to a farmer's survival. Like any other business operation, a farmer must have an environmental compliance program. The following material highlights some compliance measures which can be taken by farmers. Farmers can receive help in putting together an environmental compliance program from such organizations as Farm*A*Syst.²⁸⁴

A. The Basics

While any compliance needs to be tailored to the needs of each agricultural operation, and some operations which are not particularly vulnerable to environmental actions may need a relatively simple compliance program, there are some basic rules to be followed.²⁸⁵

1. Articulate an Environmental Policy and Communicate It

There must be a written farm policy as to environmental issues and it must be communicated to all employees. Also, the policy must be adhered to and be visibly supported by farm management.²⁸⁶

2. Resource Allocation and Training

A farmer must be willing to allocate money and personnel to environmental compliance. A farmer also must be devoted to the continued training of personnel responsible for environmental compliance.²⁸⁷ While this obviously entails considerable expense on the part of a farm operation, the severe consequences associated with environmental claims leave no alternative but to make a major business commitment in this area.

Also, some training requirements are mandated by RCRA, SARA, and OSHA. In other words, it is the law. For example, RCRA regulations require treatment, storage, and disposal facility personnel to have expertise in their areas of assignment.²⁸⁸

284. The Farm*A*Syst program is a unique partnership between state and federal professionals from the Extension Service, Soil Conservation Service, and EPA. The program was created to provide farmers and rural residents with the ability to identify and reduce drinking water and groundwater contamination. Farm*A*Syst currently operates in 18 states, with another 17 starting the development process. For more information contact: The National Farm*A*Syst Staff, B-142 Skenbock Library, 550 Babcock Drive, University of Wisconsin-Madison, Madison, WI 53706, (608)262-0024.

285. S. Richard Heymann, *Watch What You Discharge: The Government Is (Stricter Enforcement of Environmental Laws Affecting Dairy Companies)*, 95 DAIRY FOODS 44 (July 7, 1994).

286. R.W. Michaud, *Human Resources Management*, in ENVIRONMENTAL HEALTH & SAFETY MANAGER'S HANDBOOK 19, 20 (1988).

287. *Id.*

288. Thomas F.P. Sullivan, *Environmental Training and Education*, in ENVIRONMENTAL HEALTH

The 1986 Superfund amendments on SARA require OSHA to promulgate training requirements to protect workers. Employers must comply with the regulations. The regulations cover workers involved in cleanup responses under CERCLA and RCRA.²⁸⁹

OSHA has over 100 standards with some training requirements. OSHA has also promulgated a right-to-know law as to employees exposed to hazardous chemicals. Many states have similar such laws.²⁹⁰

3. Discipline

An effective environmental compliance program must include adequate discipline. Employees who will not follow the program must be put into positions where they have no responsibility for environmental compliance. In many cases, it will be best to simply terminate the employment of an employee who does not appreciate the importance of environmental compliance.²⁹¹

4. Design and Implement Audit or Assessment Programs

While such programs are unique to each business, there are some basic and common elements which could be found in all such programs. An audit program should measure environmental compliance systematically. It should provide assurance to farm management that relevant regulatory requirements are being met.

Auditors will typically perform the following duties:

- Ascertain the maintenance of schedules and records as to all operations with environmental compliance requirements.
- Inspect facilities and equipment, as well as evaluate personnel performance to assure adherence to institutional standards;
- Make written reports to management explaining any deviations from the farm's environmental policy and make recommendations for corrective action.²⁹²

To ensure the integrity of an audit, it should be conducted by independent auditors. This means that the auditors should come from outside the company or, if an audit is done internally, it should be conducted by persons outside the chain of command of the facilities which they are auditing.²⁹³ The integrity of an internal audit requires that those conducting the audit be adequately trained for the purpose, be properly staffed, and be supported by top management.²⁹⁴ Audits should be conducted at least once a year, but preferably every six months or even quarterly depending on the operation and its vulnerability to environmental claims.

& SAFETY MANAGER'S HANDBOOK 31, 34 (1988).

289. *Id.*

290. *Id.*

291. Martha E. Candiello, *What Is an "Effective" Environmental Compliance Plan Under the Federal Sentencing Guidelines?*, 2 CORP. CONDUCT Q. 39, 40 (1992).

292. G.A. West, *How Do I Protect My Company*, in ENVIRONMENTAL HEALTH & SAFETY MANAGER'S HANDBOOK 127, 134 (Thomas F. Sullivan & G. David Williams eds., 1988).

293. Candiello, *supra* note 291, at 40.

294. *Id.*

5. *Timely Follow Up*

Timely follow up is critical to a good compliance program. Difficulties and environmental violations revealed by the audit require prompt remedial action.²⁹⁵ One of the worst things an agricultural operation could do would be to ignore the findings of its own audit by failing to take remedial action.

6. *Documentation*

Documentation is a necessity in an environmental program. Documentation should include a statement of the operation's environmental policies and procedures, a description of the training program, and who has been trained, dates, and results of audits and corrective action taken, complaints of third parties and responses to those complaints.²⁹⁶ Many operations find themselves at a disadvantage in dealing with regulators and prosecutors because they fail to document their environmental compliance.

B. *Benefits and Disadvantages*

Environmental compliance programs offer farmers, ranchers, and agribusinesses both advantages and disadvantages. On the whole, the advantages outweigh the disadvantages. This is certainly true if the information contained in an audit is privileged. But the issue of privilege is one currently being debated between the EPA and federal and state governments.

1. *Practical*

The primary benefit of a corporate compliance program is preventive in character. By instituting an effective compliance program, many environmental mistakes can be avoided, as well as the accompanying legal liability associated with such mistakes. But there are other practical benefits to be derived from a compliance program.

Environmental compliance programs can:

- improve internal management practices;
- improve production processes and efficiency;
- train employees in environmental compliance and more efficient production processes;
- improve risk management practices;
- increase waste minimizations;
- provide data regarding cost of regulatory compliance useful for promoting regulatory reform at the local, state, and federal level;
- improve company public relations and market perceptions; and
- mitigate civil or criminal penalties for noncompliance.²⁹⁷

295. *Id.*

296. *Id.*

297. Kenneth D. Woodrow, *The Proposed Federal Environmental Sentencing Guidelines: A Model For Corporate Environmental Compliance Programs*, 25 *Env't Rep. (BNA)* 325, 326 (June 17, 1994).

2. Legal — In General

Thus far, the courts have failed to give compliance programs the legal significance they deserve. Some commentators have criticized the failure of the courts to give more legal significance to compliance programs and have noted that this failure actually decreases the incentive of companies to effectively supervise their employees.²⁹⁸

There is also an interesting irony as far as environmental actions based on negligence and compliance with environmental statutes is concerned. Many courts have accepted the arguments of plaintiffs that the failure to comply with environmental regulations constitutes negligence *per se*. In other words, the environmental regulations set the standard of care.²⁹⁹ However, the reverse is not true. Compliance with government statutes does not necessarily prevent a finding of negligence. Many courts hold that statutes, ordinances, and regulations only establish a minimum floor of acceptable conduct. Compliance only serves as evidence of an exercise of due care and will not defeat a negligence claim if a reasonable person would have taken additional precautions.³⁰⁰

But compliance programs are being used in mitigation of civil and criminal penalties for noncompliance. There are indications that the EPA and the DOJ are attaching increased importance to such programs.

3. The EPA Position

The EPA is actively encouraging the development and implementation of compliance programs. On January 12, 1994, the EPA's Office of Criminal Enforcement published a guidance document as to the EPA's exercise of investigative discretion.³⁰¹ According to the memo, violations which are discovered and remedied as a result of a corporation's compliance program will not ordinarily result in a criminal prosecution. Conversely, a criminal prosecution is appropriate if a corporation fails to implement remedial recommendations made in an audit.³⁰²

4. The DOJ Position

In July 1991, the DOJ released its criminal environmental enforcement policy.³⁰³ The policy is entitled "Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure

298. See Harvey L. Pitt and Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559 (1990).

299. See Shelia G. Bush, *Can You Get There From Here?: Noncompliance With Environmental Regulations As Negligence Per Se in Tort Cases*, 25 IDAHO L. REV. 469, 470-71 (1988-89).

300. See Paul Dueffert, Note, *The Role of Regulatory Compliance in Tort Actions*, 26 HARV. J. ON LEGIS. 175, 175 (1989).

301. Memorandum from Earl E. Devaney, Director, EPA Office of Criminal Enforcement (Jan. 12, 1994).

302. *Id.*

303. Kenneth D. Woodrow, *The Proposed Federal Environmental Compliance Programs*, 26 Env't Rep. (BNA) 325, 326 (June 17, 1995).

Efforts by the Violator." U.S. attorneys are instructed to consider the following mitigating factors in exercising prosecutorial discretion:

- voluntary disclosure of environmental violations;
- cooperation with the government's investigation; and
- implementation of preventive measures and compliance programs.³⁰⁴

The DOJ has formulated guidelines for compliance programs.³⁰⁵ A compliance program should include:

- an institutional policy to comply with environmental laws;
 - implementation of safeguards beyond those required by existing law;
 - regular internal and external audits of compliance;
 - timely implementation of auditor's recommendation;
 - dedication of adequate company resources;
 - effective system of disciplining employees' participating in unlawful activities;
- and
- corporate policy of rewarding employees' contribution to environmental compliance.³⁰⁶

5. Problems With the EPA and the DOJ Positions

The main problem with both the EPA's and the DOJ's position on environmental compliance programs is that they are nonbinding. There is no guarantee the implementation of a compliance program and the voluntary disclosure of violations will not result in criminal investigation. In addition, the information disclosed to the government is not confidential. The government may use the information in a criminal, civil, or administrative action, or turn it over to state or local authorities.³⁰⁷

Critics of voluntary compliance programs frequently cite fines assessed against Coors Brewing Co. and WMX Technologies as examples of self audits which cost the companies dearly. Coors discovered that it was emitting a significant level of volatile organic compounds. Although Coors' self-audit and remedial action identified a previously unknown industry-wide problem, Colorado attempted to fine the company \$1.7 million. Eventually, the fine was reduced to \$237,000.³⁰⁸

WMX operated a municipal landfill in Pennsylvania. Its audit revealed that its local operators had violated permits and taken in more waste than allowed. WMX

304. *Id.*

305. *Id.*

306. *Id.*

307. Not all environmental attorneys favor internal audits. A number of corporate attorneys fear that internal company audits can turn into "smoking guns" in court if they identify problems that need correcting. Some view audits as guilty pleas. Henderson, *supra* note 26, at 157 (quoting from a NATIONAL LAW JOURNAL survey in which one third of the lawyers said they feared that internal audits might be used in prosecuting their companies).

308. *See Companies Say EPA Enforcement Policy Collides with Voluntary Audit Programs*, 25 Env't Rep. (BNA) 416, 417 (June 24, 1994).

fired the responsible employees and notified state authorities. Pennsylvania rewarded WMX with a \$4 million fine.³⁰⁹

6. State Actions on Audits

In response to cases such as *Coors* and *WMX*, a growing number of states have enacted environmental privilege laws. These state laws commonly provide privilege for audit reports and immunity from civil and criminal penalties in some cases for voluntary disclosure of violations. Fourteen states currently have such laws: Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Minnesota, Mississippi, Oregon, Texas, Utah, Virginia, and Wyoming. Oklahoma and California are currently working on similar legislation.³¹⁰

The EPA is vehemently opposed to state privilege and immunity laws concerning voluntary environmental audits. To stall further state action, the EPA has promised to lessen penalties as to those violations voluntarily disclosed by companies after internal audits. The EPA has also threatened to withdraw from state control certain state-run environmental programs as to any state which enacts a privilege and immunity law.³¹¹ On March 27, 1995, EPA Administrator Carol M. Browner told the National Association of Attorneys General that state legislation to protect corporate environmental audits from disclosure cause environmental programs delegated to the states (e.g., solid waste management, waste water discharge permits), to revert to the EPA's control. Browner went on to say, "I don't think that would be in any of our interests."³¹²

7. Federal Action on Audits

Congress is now attempting to take the lead on protecting the confidentiality of information obtained in a voluntary audit, as well as providing some immunity from prosecution. Senators and representatives in favor of a national audit privilege act can point to a Price Waterhouse report issued April 9, 1995, which found that two-thirds of the companies responding to a survey on environmental audits indicated that they would audit more frequently if the results would not be used to penalize them.³¹³

In the House, House Bill 1047 has been introduced by Rep. Joel Hefley (R.-Colo.).³¹⁴ In the Senate, Sen. Mark Hatfield (R.-Or.) and Sen. Hank Brown (R.-Colo.) have introduced Senate Bill 582, the Environmental Audit Privilege Act.³¹⁵ Both bills provide confidentiality for environmental audit reports done in good faith.

309. *Id.*

310. *Number of States with Laws Granting Audit Privilege Grows to 14 with Texas*, 26 *Env't Rep.* (BNA) 270 (June 2, 1995).

311. *States with Audit Privilege, Immunity Laws Could Lose Delegated Authority, Browner Says*, 25 *Env't Rep.* (BNA) 2378, 2378 (Mar. 31, 1995).

312. *Id.*

313. *Companies Would Perform More Audits if Penalties Wee Eliminated, Survey Says*, 25 *Env't Rep.* (BNA) 2447, 2447 (Apr. 14, 1995).

314. H.R. 1047, 104th Cong., 1st Sess. (1995).

315. S. 582, 104th Cong., 1st Sess. (1995).

The confidentiality extends to the testimony of environmental auditors. A presumption of immunity is created as to administrative, civil, or criminal penalties if a company voluntarily discloses its audit report to federal agencies. The EPA would still, however, be able to take legal action as to information independently obtained.³¹⁶

Conclusion

This article is not a defense of polluters who willfully, knowingly, and egregiously violate our nation's environmental laws, thereby endangering the public health, safety, and welfare. Such individuals and corporations are criminals and should be prosecuted accordingly.

This article also is not an attempt to denigrate those government agencies and individuals responsible for the enforcement of federal and state environmental laws. Most of those involved in environmental enforcement activities are dedicated to prompt results, the fair treatment of those accused of environmental crimes, and equitable solutions and penalties.

There is no doubt, however, that the growing body of environmental laws and regulations, along with their increased complexity and diminished *mens rea* requirement for criminal prosecutions, can entangle and punish those persons and businesses who would not normally be characterized as criminals. When otherwise responsible citizens are stigmatized as environmental criminals and subjected to fines and even incarceration, their initial disbelief eventually turns to contempt for the law.³¹⁷

Individual contempt then develops into group contempt for the law as the public becomes aware of questionable and controversial criminal prosecutions. Cases such as the prosecution of Taung Ming-Lin for allegedly killing five endangered kangaroo rats and that of Bill Ellen for allegedly destroying wetlands, while creating even more wetlands, severely damages public respect for environmental laws and those who enforce them. Demands by enforcement officials that the accuseds deed over private property or make substantial financial contributions to environmental programs in order to avoid even more serious criminal penalties only serve to exacerbate this lack of trust.

Those who oppose what they view as the tendency of the government to criminalize virtually everything and to then overzealously prosecute trivial or inadvertent environmental violations recognize that these prosecutions are undertaken because the prosecutions are believed to be in society's best interest. But, as C.S. Lewis observed:

Of all tyrannies, a tyranny exercised for the good of its victims may
be the most oppressive. It may be better to live under robber barons

316. Sen. Mark Hatfield, *The Environmental Audit Privilege Act*, 12 ENVTL. FORUM 21 (May/June 1995); see also James T. O'Reilly, *Environmental Audit Privileges: The Need for Legislative Recognition*, 19 SETON HALL LEGIS. J. 119 (1994).

317. James V. DeLong, *supra* note 174, at 21.

than under omnipotent moral busybodies. The robber baron's cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end, for they do with the approval of their own consciences.³¹⁸

Constraints on prosecutorial discretion in pursuing criminal actions against alleged environmental violators are needed now. This is especially true since Attorney General Janet Reno recently granted the ninety-four separate U.S. attorneys' offices across the country even greater prosecutorial discretion in the prosecution of environmental crimes. In August 1994, Reno made what is known as a "Bluesheet" revision to the U.S. Attorneys' Manual section relating to prosecution of environmental crimes. U.S. attorneys' offices have broad authority to initiate and manage all environmental criminal cases except those in the narrow category of "national interest." In national interest cases the DOJ's Environmental Crimes Section will serve as co-lead prosecutor.³¹⁹

This change significantly limits the role of the Environmental Crimes Section in initiating and managing most environmental criminal cases. In particular, it means that the EPA's evaluation and screening process in the case initiative report process, and final review by the Environmental Crimes Section, is eliminated for most cases.³²⁰

The single most effective and dramatic reform of the criminal provisions of environmental laws would be the elimination of the diminished *mens rea* requirement, either by judicial decree or legislative action. As a matter of fundamental fairness, and common sense, a distinction needs to be made between those who knowingly and willfully violate environmental laws, and, thus, possess the traditional specific intent to engage in criminal conduct, and those who lack such specific intent. As the dissenting judges stated in *Weitzenhoff*: "If we use prison to achieve social goals regardless of the moral innocence of those we incarcerate, then imprisonment loses its moral opprobrium and our criminal law becomes morally arbitrary."³²¹

318. Paul Craig Roberts, *Nature is a More Gentle Adversary than the Government: The Stealing of Property Rights by Our Government*, 60 VITAL SPEECHES 371, 372 (Apr. 1, 1994).

319. Kevin A. Gaynor & Thomas R. Bartman, *Specific Intent Standard for Environmental Crimes: An Idea Whose Time Has Come*, 25 Env't Rep. (BNA) 2206, 2209 (Mar. 10, 1995).

320. *Id.*

321. *United States v. Weitzenhoff*, 35 F.3d 1275, 1293 (9th Cir. 1993) (Kleinfeld, J., dissenting).