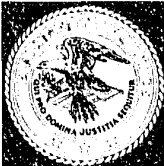


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U.S. Department of Justice  
Office of Justice Programs  
National Institute of Justice



# NATIONAL INSTITUTE OF JUSTICE

*Issues and Practices*

## Local Prosecution of Environmental Crime

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National Institute of Justice

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- *Sponsor special projects and research and development programs* that will improve and strengthen the criminal justice system and reduce or prevent crime.
- *Conduct national demonstration projects* that employ innovative or promising approaches for improving criminal justice.
- *Develop new technologies* to fight crime and improve criminal justice.
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- Pioneering scientific advances such as the research and development of DNA analysis to positively identify suspects and eliminate the innocent from suspicion.
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- Creation of a corrections information-sharing system that enables State and local officials to exchange more efficient and cost-effective concepts and techniques for planning, financing, and constructing new prisons and jails.
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The National Institute of Justice has a long history of accomplishments, including the following:

- Basic research on career criminals that led to development of special police and prosecutor units to deal with repeat offenders.
- Research that confirmed the link between drugs and crime.

The Institute Director, who is appointed by the President and confirmed by the Senate, establishes the Institute's objectives, guided by the priorities of the Office of Justice Programs, the Department of Justice, and the needs of the criminal justice field. The Institute actively solicits the views of criminal justice professionals to identify their most critical problems. Dedicated to the priorities of Federal, State, and local criminal justice agencies, research and development at the National Institute of Justice continues to search for answers to what works and why in the Nation's war on drugs and crime.

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# **Local Prosecution of Environmental Crime**

by  
**Theodore M. Hammett, Ph.D.**  
and  
**Joel Epstein, Esq.**

June 1993

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*Issues and Practices in Criminal Justice* is a publication series of the National Institute of Justice. Each report presents the program options and management issues in a topic area, based on a review of research and evaluation findings, operational experience, and expert opinion on the subject. The intent is to provide information to make informed choices in planning, implementing and improving programs and practice in criminal justice.

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Prepared for the National Institute of Justice, U.S. Department of Justice, by Abt Associates Inc., under contract #OJP-89-C-009. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

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# Foreword

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In recent years the criminal prosecution of environmental offenders by local authorities has emerged as an important element of a national strategy for protecting the environment and the public health. Although the immediate, short-term effects of environmental crime are often negligible or imperceptible, the long-term damage and cost can be severe.

While local criminal enforcement is still in its relative infancy in the United States, in the decades to come the Nation's district attorneys will represent a potent force in environmental prosecution. In its Enforcement Four-Year Strategic Plan for the 1990s, the U.S. Environmental Protection Agency called for greater local government involvement in enforcement and promised expanded training opportunities and information exchange for district attorneys and investigators. To date, the Environmental Protection Agency and the States have largely taken an administrative and civil approach to environmental enforcement. The call for intensified criminal enforcement indicates an awareness that the determined offender will not be deterred by administrative and civil sanctions alone.

This report describes the experience of five local prosecutors' offices that have met the challenges posed by environ-

mental crime with robust and coordinated action. Thus far, only a relatively small number of local prosecutors are known to have given serious and sustained attention to environmental crime. The programs described in this report represent some of the most committed and successful in the Nation.

The report describes the strategies that have been employed by district attorneys in combating environmental crime. It dispels the myths that environmental cases are too complex, take too much investigative time, cost too much, or are beyond the expertise of local authorities. In recent years, some progress has been made in enlisting local prosecutors and investigators in the battle against environmental crime, but the magnitude of the problem requires much broader participation. The National Institute of Justice hopes that this report will encourage more local law enforcement officials to become involved in the national struggle against environmental crime.

Michael J. Russell  
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# Acknowledgements

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Many people assisted us in the preparation of this report. Thanks are due especially to the numerous dedicated prosecutors, investigators, and regulatory agency staff whom we interviewed during our site visits. In particular, we thank David Guthman (Los Angeles County District Attorney's Office), Gilbert Jensen (Alameda County [California] District Attorney's Office), Jay Magnuson (Cook County [Chicago] State's Attorney's Office), Donald Mielke (former District Attorney, First Judicial District [Golden], Colorado), Robert Honecker (Monmouth County [New Jersey] Prosecutor's Office), and Steven Madonna (New Jersey State Environmental Prosecutor, Department of Law and Public Safety). Members of our advisory board also provided useful suggestions and information. They included Herbert G. Johnson (Environmental Crimes Section, Environment and Natural Resources Division, U.S. Department of Justice), James Prange (former Director, Criminal Investigation Division,

National Enforcement Investigation Center, Environmental Protection Agency), and Dwight Price (National District Attorneys Association).

Cheryl Crawford, our NIJ project monitor, contributed valuable advice and assistance throughout the research and writing phases. She also participated in two of the site visits.

At Abt Associates, Dr. Jan Chaiken reviewed drafts of the report and made many useful suggestions. Wendy Sanderson coordinated production and administration, and Mary-Ellen Perry and Winn Sinclair produced the document's many drafts with patience and grace. Laura Evers prepared the camera ready version.

Theodore M. Hammett, Ph.D.  
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December 1992

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# Executive Summary

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Environmental crime is a serious problem for the United States. Although the immediate consequences of an individual offense may not be obvious or serious, environmental crimes *do* have victims. The American public and the Nation's environment have suffered and will continue to suffer serious harm from the acts of polluters: death, serious illness, injury, and property damage all result from the acts of environmental violators.

As environmental laws covering hazardous waste, toxic substances, air, and water have become more complex and stringent over the past 20 years, the regulated community has found it increasingly expensive to comply. Thus, there has been a growing temptation to save costs by violating environmental laws and regulations. While the public apparently considers environmental crime, in general, to be a serious matter, individual juries may be reluctant to convict a community's business leaders and significant employers if the alleged environmental damage does not have an apparent and immediate deleterious effect. Judges, moreover, may consider these cases to be more appropriately handled through administrative or civil channels. Finally, environmental offenders and their defense counsel are increasingly sophisticated in their methods. All of these factors represent significant obstacles for prosecutors. Indeed, in part because of these obstacles, relatively little attention has been paid to criminal prosecution of environmental offenses.

A comprehensive and balanced approach to environmental offenses is needed. This means involvement by all levels of government — local, State, and Federal — and coordination among the key cognizant agencies — prosecutorial, law enforcement, and regulatory. The response rightly includes administrative, civil, and criminal remedies. Criminal penalties may, however, offer the most potent deterrent effect on potential violators.

Environmental crime varies from locality to locality. It tends to be driven by patterns of local industry and business. Local prosecutors and law enforcement agencies may be more attuned to the particular problems and needs of local communities. They may respond more quickly to potentially dangerous pollution problems. Local law enforcement and prosecutorial agencies represent critical, but

hitherto underused, resources in the battle against environmental crime.

This report is based largely upon site visits to five local prosecutors' offices: Alameda County, California; Cook County (Chicago), Illinois; Jefferson and Gilpin Counties (Golden), Colorado; Los Angeles County, California; and Monmouth County, New Jersey. These offices have demonstrated that local prosecutors, with the assistance of law enforcement and regulatory agencies, can aggressively and successfully pursue environmental offenders.

Based on the experience of the five local prosecutors' programs visited, as well as a review of relevant literature, statutes, and case law, the following steps are recommended. They are intended to help local authorities enhance their response to environmental crime.

- *Increased attention and commitment to environmental crime by local prosecutors, law enforcement officials, and regulators.* A strong advocate in the prosecutor's office is very helpful but not essential. Smaller offices or those without strong advocates at the top for environmental prosecution may be able to tap existing interest and expertise to pursue cases. Environmental prosecution can be handled through a separate unit or as part of a larger prosecutorial unit; attorneys may have different degrees of specialization.
- *Heightened public awareness of environmental crime.* Local officials can help to educate the public about environmental crime and encourage citizens to report suspected violations.
- *More effective interagency cooperation and coordination.* There are various models of task forces, strike forces, and other arrangements that help bring prosecutors, law enforcement officials, and regulatory agencies together in developing criminal cases. The variations primarily affect the degree of formalization and systematization in interagency relations. Each community must develop an approach that is best suited to local conditions and personalities. Local law enforcement officers can serve as valuable "eyes and ears" in the community. Regulators often naturally focus more

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on obtaining compliance than on punishing noncompliance, and this can pose problems for cooperation among regulators and prosecutors. On the other hand, regulators can play critical roles in investigation and preparation of criminal cases, through technical examination of sites, collection of samples for laboratory analysis, and other activities.

- *Enhanced interjurisdictional cooperation.* Many environmental crimes are complex and involve activities in more than one jurisdiction. In some cases, Federal, State, and local officials all have important contributions to make. The U.S. Environmental Protection Agency (EPA) funds four regional associations intended to improve the investigation and prosecution of environmental crimes. Multilevel task forces, often coordinated by the U.S. attorney's office, can also facilitate cooperation in particular investigations.
- *Improved information exchange.* Task forces and regional associations are important vehicles for exchange of information on particular investigations as well as information of general interest to the field of environmental prosecution. Other strategies, such as case-law newsletters, brief banks, and pleadings data bases are helpful in disseminating valuable professional information to investigators and prosecutors. There are a number of legal issues critical to environmental prosecution (search and seizure, corporate responsibility, and state of mind) on which prosecutors could benefit from regularly updated information.
- *Improved training for all key actors in environmental prosecution.* Prosecutors, law enforcement officials, and regulators could benefit from increased training opportunities. In particular, "cross-training" of regula-

tors and criminal investigators helps to educate each on the primary responsibilities of the other and can foster cooperation in investigations. Prosecutors and judges are also in need of ongoing training on environmental cases.

- *Better laboratory services.* A critical element of almost every environmental prosecution is proving the presence of a hazardous waste or other pollutant. This generally requires laboratory analysis. Many prosecutors suffer from lack of access to competent, timely laboratory services. Many laboratories are overloaded with drug cases and other work that relegates environmental cases to a lower priority. Many also lack technicians with the requisite training and experience to conduct laboratory analyses for environmental cases. The EPA's laboratory can assist with some cases but has insufficient capacity to cover many local cases. Other laboratory services need to be developed, including use of private laboratories on a contract basis.
- *Improved environmental criminal statutes.* There is a pressing need for consistency and codification of environmental laws. Presently, there are many inconsistencies across (and sometimes even within) States and other levels of government regarding definitions of and criminal sanctions for environmental offenses. This makes it possible for many environmental offenders to move operations into another jurisdiction where their activities are either not covered by criminal laws or carry much lighter penalties. In many States, moreover, environmental provisions are scattered through the statutes and have not been brought together in a unified and consistent code. All of these deficiencies pose serious problems for prosecutors.

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# Introduction

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In 1984, a poll conducted for the United States Department of Justice found that Americans believed environmental crime to be more serious than heroin smuggling, bank robbery, and attempted murder.<sup>1</sup> More recently, a 1991 survey taken by Arthur D. Little discovered that 84 percent of Americans believe that damaging the environment is a serious crime; the same study found that 75 percent of Americans believe that corporate officials should be held personally responsible for environmental offenses committed by their firms.<sup>2</sup> Despite this high rate of public concern and almost twenty years of regulatory activity, however, ground, water, and air pollution still threatens the public health and the ecological balance in the United States.<sup>3</sup> While the immediate effects of an environmental crime may not always be manifest, the cumulative costs in environmental damage and the long-range toll in illness, injury, and death may be considerable. The willingness of the public, government, and law enforcement officials to prosecute environmental crime, often without "smoking gun" evidence, is an important precondition in the fight against this growing problem.

Experience has demonstrated that environmental regulation, although absolutely essential, is not always enough to protect the public and the environment. The stigma of criminal indictment and the threat of criminal penalties, including incarceration, have been urged as necessary to deter environmental criminals.<sup>4</sup> While important prosecutorial work has been done, and continues to be done, at the Federal and State levels, local prosecutors represent an important and hitherto underused resource in the war on environmental crime.

This Issues and Practices report is addressed to district attorneys and policymakers — in short, those in a position to increase local prosecutorial and law enforcement attention to environmental crime. Its purposes are twofold: (1) to encourage more local prosecutors to involve their offices in this important area, and (2) to provide basic information necessary to establish an environmental prosecution program and to achieve success in environmental cases. The report is not, however, intended to be an in-depth manual on the investigation and prosecution of environmental cases. Such information is available in various forms elsewhere.

In particular, training courses and materials developed by the four EPA-funded Regional Environmental Enforcement Associations, the Environmental Prosecution Center of the National District Attorneys Association, the Environmental Law Institute, and various other organizations provide in-depth, "how-to" information for environmental investigators and prosecutors. (Contact information for all of these organizations is provided in Appendix B of this report.)

This report draws on the experience of five district attorneys' offices that have made the prosecution of environmental crime a major priority. In the course of the document, the approaches taken by these offices are described, as are some of the obstacles they face. The five offices represent a diverse national sample of local environmental prosecution programs. They are Alameda County and Los Angeles County, California; Cook County, Illinois; Jefferson and Gilpin Counties, Colorado; and Monmouth County, New Jersey. Site visits were conducted at each of these offices, during which prosecutors, investigators, regulatory agency staff, and other key actors were interviewed. The research also included an extensive literature and statutory review.

The five sites were selected following a lengthy consultation with the project's advisers and other experts in the field. The sites chosen have been among the leaders in local prosecution of environmental crime: all have received strong leadership from the district attorney (or equivalent) in taking a more aggressive approach to environmental prosecution; all have established special units or groups of specialist attorneys to handle environmental cases; all have attempted to develop (with varying degrees of success) close working relationships with environmental regulatory agencies and law enforcement agencies in the development of cases; and all have achieved some success in prosecuting environmental offenders and sending them to prison. Otherwise, the offices differ significantly in the types of environmental offenses they target and the organizational approaches they have taken to the interagency collaboration that is vital to achieving success in environmental prosecution. Some have established formal strike forces with permanent agency representatives and regularly sched-

uled meetings, while others rely on more informal interagency contacts and collaboration.

Most of these sites have faced, and continue to face, difficulties in agreeing on common enforcement goals and establishing smooth working relations, particularly among prosecutors and regulators. Regulatory agencies have historically focused on achieving compliance with environmental regulations and remediating environmental damage. As a result, they tend to favor working cooperatively with the regulated community as much as possible. If enforcement action becomes necessary, they generally favor administrative or civil procedures. Law enforcement and prosecutorial agencies, by contrast, generally take a more combative or adversarial stance toward violators in the belief that punishment will deter others from committing similar offenses. These differing perspectives pose challenges for the development of environmental crime units.

Cooperation and collaboration among prosecutors, law enforcement officials, regulators, laboratories, and legislators are all the more essential because of the growing sophistication of environmental criminals and their defense attorneys. Although there are still numerous cases of "midnight dumping" — that is, simply dumping or abandoning hazardous materials or waste by the roadside or in vacant lots — increasing numbers of businesses systematically and knowingly are violating the environmental laws to save money and increase profit margins.<sup>5</sup> A large number of these firms have learned to shield their involvement in illegal activities through the use of intermediaries and dummy corporations. Many environmental defense attorneys are former prosecutors who know the laws and are adept at the use of procedural techniques.

Throughout this report, the importance of improving the sometimes contentious relationships among key agencies and actors is emphasized. Local prosecution of environ-

mental crime can make a major contribution to protecting the environment and the public. As the chief law enforcement officials at the local level, prosecutors can play a key role in mobilizing public involvement in the detection and reporting of environmental crime and in orchestrating an aggressive multiagency approach to investigation and prosecution.<sup>6</sup>

Note: a glossary of terms and acronyms and a list of cases appear at the end of the text.

## Endnotes

1. A. J. Celebrezze, et al., "Criminal Enforcement of State Environmental Laws: The Ohio Solution," *Harvard Environmental Law Review* 14 (1990): 217, 218.
2. Arthur D. Little, Inc., "Environmental Damage Rated as Most Serious among Business Crimes; Corporate Executives Should Be Held Liable, Survey Shows" (Press release, July 1991).
3. J. DeCicco and E. Bonanno, "A Comparative Analysis of the Criminal Environmental Laws of the Fifty States: The Need for Statutory Uniformity as a Catalyst for Effective Enforcement of Existing and Proposed Laws," *Florida State University Journal of Land Use and Environmental Law* 5, no. 1 (Summer 1989).
4. J. Yelverton, "Expanding the Role of District Attorneys in Prosecuting Environmental Crime" (Concept paper, draft 4, National District Attorneys Association, June 22, 1990), p. 1.
5. DeCicco and Bonanno, "Comparative Analysis," p. 2.
6. Yelverton, "Expanding the Role of District Attorneys," p. 1.

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## **Part One:**

# **Environmental Crime and the Current Response**

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# Chapter 1

## Nature and Extent of Environmental Crime

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### What Is Environmental Crime?

Defining environmental crime is no easy matter. Pervasive statutory inconsistencies, both within and across jurisdictions, and the scarcity of uniform codification of State environmental laws pose difficulties for prosecutors and offer environmental criminals opportunities to evade prosecution by moving their operations across jurisdictional lines.<sup>1</sup> Since much State environmental law is patterned after Federal statutes, a starting point for any discussion of environmental crime is the basic Federal statutory and regulatory framework. Concepts common to State environmental enforcement including *prohibition* and *permitting* of regulated activities, notice requirements (before a regulated act takes place, as in the case of asbestos removal; during the regulated act, as in the case of discharge monitoring; and after the act, as in the case of a release of hazardous materials), *cradle-to-grave* regulation, and labeling and placarding requirements all attest to the prominent role the Federal approach has played in the shaping of State-level responses to environmental enforcement. Understanding these concepts can make environmental law more accessible for the local prosecutor new to the field.

State laws and regulations also reflect the complex enforcement patterns called for by the Federal framework. Many environmental violations do not constitute criminal offenses, while others may be handled administratively, civilly, or criminally at the discretion of the authorities, and still others require criminal prosecution. It is important to note at the outset that an important and challenging aspect of environmental enforcement, in many instances, is deciding what enforcement option or path to select.

The Federal environmental regulatory scheme includes minimum requirements for the handling and disposal of hazardous waste and criminal penalties for their violation.

(For a comprehensive summary of Federal environmental criminal statutes, including the Resource Conservation and Recovery Act, see Appendix A.) In addition, Federal statutes (and their State analogues) extend to such media as air, water, toxic substances, pesticides, and solid waste. The Federal laws and regulations in these areas have varying applicability to the activities of local prosecutors, as the subsequent discussion will demonstrate.

Hazardous waste enforcement probably constitutes the bulk of environmental investigation and prosecution undertaken at the local level. The Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901 et seq., established a framework for regulating hazardous waste from generation to disposal ("from the cradle to the grave"). RCRA defines hazardous waste (based on such characteristics as toxicity, reactivity, corrosivity, and flammability) and gives the U.S. Environmental Protection Agency power to regulate hazardous waste labeling, containment, transportation, and record keeping. The primary regulatory vehicles provided for under RCRA include record keeping and reporting requirements for hazardous waste generators, and a complex permitting system for hazardous waste treatment, storage, and disposal facilities (TSDFs).<sup>2</sup> All TSDFs, whether on the waste generator's own site ("on-site") or elsewhere ("off-site"), must obtain permits requiring them to meet certain standards in the handling of the hazardous waste.

RCRA authorizes the EPA to define as hazardous any solid waste, or combination of solid wastes, that

because of its quantity, concentration, or physical, chemical or infectious characteristics may

- (a) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or

- (b) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported or disposed of, or otherwise managed. (42 U.S.C. §§ 6903, 1983 ed., Supp. IV, 1991)

The EPA has listed specific wastes as hazardous and has defined certain characteristics of hazardous waste (including ignitability, corrosivity, reactivity, and some forms of toxicity). Under Federal and State hazardous waste laws, the prosecutor must establish that the waste involved in the alleged violation is hazardous in order to obtain a criminal conviction.<sup>3</sup>

Under 42 U.S.C. § 6928(d) of the RCRA, any person who knowingly transports or causes to be transported hazardous waste to an unpermitted facility or treats, stores, or disposes of hazardous wastes without a permit or in knowing violation of a material condition or requirement of a permit or interim status regulations or standards may be guilty of a class D felony. The maximum term of imprisonment under this section of the act is five years, while the maximum fine for an individual is \$50,000 per day, or \$250,000, or twice the wrongdoer's gain or society's loss from the illegal activity, whichever is greater. The maximum fine for a corporation is \$50,000 per day, or \$500,000, or twice gain or loss, whichever is greater. For a subsequent violation, a class C felony, the maximum term of imprisonment is 10 years, and the maximum fine can go as high as \$100,000 per day or \$500,000 for an individual or \$1,000,000 for a corporation to twice the gain or loss, whichever is greater.

States desiring to implement their own regulatory programs are required to meet the minimum standards and procedures contained in RCRA. Indeed, most States have now been delegated authority to implement at least portions of the minimum hazardous waste control programs. Levels of experience with criminal prosecution of environmental offenses at the State and local levels vary widely, however. While some States have developed extensive programs, resulting in numerous convictions of environmental offenders, others continue to rely primarily on administrative and civil procedures to achieve compliance with environmental laws and regulations.

In the 1970s, as a result of these new environmental laws and regulations, the United States witnessed the emergence of a relatively new brand of criminal activity now commonly referred to as illegal hazardous waste disposal. Although hazardous waste dumping has existed for years, only recently has it been considered serious enough to justify criminal penalties.<sup>4</sup> By 1984, the growing perception

that the existing laws and regulations were insufficient to prevent future problems of hazardous waste disposal led to passage of the Hazardous and Solid Waste Amendments (HSWA) to RCRA. The problem also prompted a number of States to develop sophisticated criminal enforcement programs with a focus on hazardous waste offenses.<sup>5</sup> Elsewhere, in States with little or no previous experience in environmental criminal enforcement, the growing problem of improper hazardous waste disposal prompted the building of investigative staffs in order to initiate hazardous waste criminal programs.<sup>6</sup>

The Resource Conservation and Recovery Act's Hazardous and Solid Waste Amendments include bans on the land disposal of a broad range of hazardous wastes; more stringent technical and financial requirements for treatment, storage, and disposal facilities; and extension of regulations to small-quantity generators (SQGs)—facilities that generate less than 1,000 kg. of hazardous wastes per month.

The Hazardous and Solid Waste Amendments increased the criminal penalties available under RCRA. Penalties provided for under 42 U.S.C. § 6928(d) currently include a fine of not more than \$50,000 for each day of violation, or imprisonment not to exceed two years (five years in certain cases), or both. If the conviction is for an offender's second or subsequent violation under this paragraph, the maximum punishment is doubled. Under subsection (e) of 42 U.S.C. § 6928, any person who knowingly transports, treats, stores, disposes of, or exports any identified or listed hazardous waste or used oil knowingly causing imminent danger of death or serious bodily injury, may receive a fine of not more than \$250,000 or imprisonment for not more than fifteen years, or both. An organization convicted under this subsection may be subject to a fine of not more than \$1,000,000 [42 U.S.C. § 6928(e)].

The HSWA increased the cost of legal hazardous waste disposal, thus probably tempting an increasing number of generators to turn to illegal methods of disposal to save money. While the public often associates illegal hazardous waste disposal with the "midnight dumper," in recent years the methods of environmental criminals and their defense attorneys have attained an increased degree of sophistication. Midnight dumping, the earliest and cheapest form of illegal disposal, requires no more than "a truck and a lack of regard for public safety."<sup>7</sup> This simply involves disposing of the wastes in the nearest isolated area. Other "primitive" methods include open storage of materials in deteriorating drums, disposal in unlined or insufficiently lined landfills, and burning in defective incinerators.<sup>8</sup> In recent years, hazardous waste violations have increasingly



involved forging waste transportation manifests, mislabeling drums and waste shipments, disposing of waste on the generator's property (for example, pouring it down the drain or burying it), mixing hazardous waste with nonhazardous waste (sometimes called cocktailing), and shipping wastes to neighboring states or nations with less stringent or effective regulation and enforcement. There have been numerous suggestions that organized crime is involved in illegal disposal of hazardous waste. Indeed, a study funded by the National Institute of Justice is examining the extent of organized crime involvement in "specialty" waste disposal in the New York City area. This includes disposal of hazardous waste, construction and demolition debris, medical and infectious waste, waste oil, and asbestos.<sup>9</sup>

One study of hazardous waste crime in the Northeast found that bribery and offers of employment at hazardous waste facilities were prevalent methods of manipulating public officials to meet offenders' ends.<sup>10</sup> In addition, TSDF operators often hire attorneys with prior regulatory agency work experience. These lawyers bring to their new positions a detailed knowledge of environmental laws and regulations.<sup>11</sup> Although in no way is it improper to hire such professionals, in those instances in which the lawyer is buying a polluter time to comply, the real victims are the public and the environment. Moreover, hazardous waste generators and other environmental wrongdoers are increasingly using intermediaries and dummy corporations to shield their involvement in illegal disposal operations. Prosecution of environmental criminals thus often involves "piercing the corporate veil" in addition to proving corporate liability through *respondeat superior* or vicarious liability theories. This challenge, together with the defense bar's effective use of dilatory trial practices, poses obstacles to successful environmental prosecution.

The remaining components of the Federal environmental statutory and regulatory scheme include, inter alia, the Clean Air Act (CAA), 42 U.S.C. §§ 7401 et seq., the Clean Water Act (CWA), 33 U.S.C. §§ 1251 et seq., the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601 et seq., the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 et seq., the Comprehensive Environmental Resource Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601 note, et seq., and the Noise Control Act of 1972, 42 U.S.C. §§ 4901 et seq. Each of these statutory schemes criminalizes certain acts as well as the falsification and in some instances omission of information required to be provided to the government.

The Clean Water Act (CWA), originally enacted in 1972 under the Federal Water Pollution Control Act (FWPCA)

amendments, established a system of standards, permits, and enforcement designed to achieve "fishable and swimmable" waters by 1983. In addition, it sought the total elimination of pollutant discharges into navigable waters by 1985. Under § 301 of the Clean Water Act, effluent limitations for all point sources (that is, specific, identifiable sources of discharge into waters) except publicly owned treatment works (POTWs) were required to reflect the "best practicable control technology currently available" by 1987 and the "best available technology economically achievable" by 1983. Subsequent amendments of CWA have extended compliance deadlines for these requirements.

The central enforcement component of the CWA is the National Pollutant Discharge Elimination System (NPDES) program. NPDES, which regulates discharges from point sources including industrial dischargers and municipal treatment plants, provides for the issuance by the EPA of permits for pollutant discharges from point sources into any of the country's waters. Permits regulate effluent discharges and establish deadlines for discharge limits. Section 402(b) of the Clean Water Act provides, upon EPA administrator approval, for the administration by individual States of their own permitting systems. In order to establish its own NPDES scheme, a State must meet certain EPA permitting provisions. Moreover, State NPDES programs "must have approved pretreatment programs which allow for incorporation of publicly-owned treatment works pretreatment conditions into permits issued to POTW."<sup>12</sup> General NPDES permits regulate certain categories of discharges within a regulation-specified geographic area.

Under the 1987 amendments to CWA creating criminal provisions for "knowing endangerment," any person who "knowingly" violates certain sections of the act or any permit condition, knowing at that time that such conduct thereby places another in imminent danger of death or serious bodily injury, will be subject to a fine of up to \$250,000 or imprisonment up to fifteen years, or both.<sup>13</sup> The "knowing endangerment" provision further provides that a "person" defined as an "organization" may be fined up to \$1,000,000 for its violation.<sup>14</sup> Lastly, a person convicted of a second or subsequent violation of the statute faces double the maximum penalty with respect to both the fine and the punishment.<sup>15</sup> Under EPA regulations, in order to be delegated authority to implement this CWA program, a State must provide minimum criminal fines of \$10,000 per violation for "willful" or "negligent" conduct by "any person who . . . violates any applicable standards or limitations; any NPDES permit condition; or any NPDES filing requirement."<sup>16</sup>

The Toxic Substances Control Act is intended to protect the public against numerous new and existing chemicals and other substances that may be introduced without being adequately tested for their effects on human health and environmental safety. The act provides for testing and notice procedures before new substances are released into the marketplace or designated for new applications. Section 6 of TSCA contains a special provision for the phasing out of polychlorinated biphenyls (PCBs). The act prohibits the manufacture, processing, transportation and use of PCBs in anything other than a totally enclosed state except in certain carefully defined circumstances. TSCA also prohibits the disposal of liquids containing more than a certain concentration of PCBs except in regulated incinerators, landfills, boilers, or other EPA-approved facilities. Section 7 of the act allows EPA to obtain emergency judicial relief in the event of "imminent hazards." The act also establishes criminal penalties for any "knowing" or "willful" violation of TSCA. Under 15 U.S.C. § 2615, the penalties provision of the Toxic Substances Control Act, any person who knowingly or willfully violates any provision of the Prohibited Acts section of TSCA, shall, in addition to or in lieu of any TSCA civil penalty, be subject, upon conviction, to a fine of not more than \$25,000 for each day of violation, or to imprisonment for not more than one year, or both. TSCA is generally of little concern to local prosecutors because, except for the PCB regulations, its requirements are centrally administered by EPA headquarters in Washington.

Enacted in 1980 and revised by the Superfund Amendments and Reauthorization Act of 1986 (SARA), the Comprehensive Environmental Response Compensation and Liability Act, or "Superfund," was designed to complete the statutory and regulatory coverage of toxic substances and hazardous waste. TSCA and RCRA primarily govern the generation, transport, treatment, storage, and disposal of these substances and wastes. The sanctions in TSCA and RCRA are intended to reach illegalities in these activities as they occur and regardless of their results. CERCLA's focus is the environmental damage wrought by past noncompliance. It provides for the identification and priority ranking of contaminated sites that could pose threats to the environment and requires all firms that contributed to the contamination of National Priority List (NPL) sites to conduct or pay for their cleanup.<sup>17</sup> Section 106 of CERCLA authorizes the U.S. Attorney General to seek injunctive relief where an actual or threatened release poses "imminent and substantial endangerment" to the public health or welfare of the environment. Alternatively, the President may issue administrative orders directing responsible parties to take protective action.

Section 107 of CERCLA provides that any and all generators of hazardous waste found in, transporters of waste to, and owners and operators of an NPL site may be liable for (1) all costs of removal or remedial action incurred by the Federal or State government "not inconsistent with" the National Contingency Plan (NCP); (2) any other "necessary" response costs incurred by any other person "consistent with" the NCP; and (3) damages to "natural resources" resulting from release of hazardous substances. Thus, CERCLA imposes "joint and several liability" on contributors to problems posed by designated Superfund sites. Moreover, the courts have held that section 107 imposes strict liability on all participants, independent of fault or state of mind.

Under 42 U.S.C. § 9603(b) of CERCLA, anyone in charge of a facility from which a hazardous substance is released (other than a federally permitted release) in quantities equal to or greater than specified, who fails immediately to notify the National Response Center as soon as he or she had knowledge, or who submits in such notification any information he or she knows to be false or misleading may, upon conviction, be subject to a maximum term of imprisonment of three years, or a maximum fine of \$250,000 or twice the gain or loss, whichever is greater. If the violator is a corporation, however, the maximum fine can be \$500,000 or twice the gain or loss, whichever is greater. For a subsequent violation, a class D felony, the maximum penalty is five years in prison, \$250,000 for an individual or \$500,000 for a corporation or twice the gain or loss, whichever is greater. It should be noted, however, that aside from these provisions related to reporting, few violations of CERCLA may be prosecuted criminally.

The Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136 et seq., may be employed to prosecute defendants whose misuse of pesticides is alleged to have resulted in physical injury or even death. Under 7 U.S.C. § 1361(b) of FIFRA a registrant, applicant, or producer who knowingly violates the act or a commercial applicator or other person not described above who distributes or sells a banned pesticide in knowing violation of the act may be subject to a maximum term of one year in prison. The section, conviction of which is a class A misdemeanor, also carries a maximum fine for an individual of \$100,000 or twice the gain or loss incurred through the illegal activity, whichever is greater. The fine levied against an individual may be \$250,000 if the illegal activity results in death. If the defendant is a corporation, the maximum fine may be \$200,000 or twice the wrongdoer's gain or loss from the illegal activity, whichever is greater, or \$500,000 if the

wrong results in death. Some of the State FIFRA programs can be as potent a source of local prosecutions as State Occupational Safety and Health Administration (OSHA) programs.

## How Serious Is Environmental Crime?

The common absence of a "smoking gun" in environmental cases complicates the task for prosecutors. While the immediate, short-term effects of environmental crime are often negligible or imperceptible, the long-term damage can be very severe. According to Jefferson and Gilpin Counties' district attorney, Donald Mielke, "an environmental criminal could become the next mass murderer, even though the cancers, birth defects and other problems he causes may take years to appear."<sup>18</sup> Illegally disposed hazardous wastes can cause serious harm to the environment and human health through contamination of surface water or groundwater, pollution of the air via evaporation, fires, and explosions, poisoning via food chain contamination, and direct human contact.<sup>19</sup>

Exposure to many common industrial solvents can cause severe damage to every human organ system. Prolonged exposure to xylene, for example, can damage the central nervous system, liver, and heart. Inhaling or handling methyl ethyl ketone can cause severe irritation to the skin, eyes, and throat. Significant dose exposure to ethyl benzene can produce pulmonary edema, a fluid buildup in the lungs that can be fatal. Where 1,1,1 trichloroethane has leaked into groundwater, it is suspected of causing birth defects. In short, these and other common pollutants are extremely dangerous substances whose mishandling can cause serious harm to persons and to the natural environment.

However, it is often difficult to show obvious or immediate injury to the public or the environment. The damage established may be too technical to impress a lay jury of the risk involved. Attorneys in the Jefferson and Gilpin Counties' district attorney's office believe that juries and judges are reluctant to convict corporate defendants and high-level business officials of environmental crimes. Similarly, prosecutors in the Alameda County district attorney's office have found that many California judges see environmental cases as the proper domain of regulatory agencies, while juries often do not see or focus on the criminal aspect of environmental problems. Convincing the public that the environmental criminal is as hazardous to its health as a drug dealer or murderer remains a serious challenge.

## *Regional/Local Variations in Environmental Crime*

Certain types of businesses, such as metal-plating shops, service stations, dry cleaners, and waste haulers seem to be suspect for environmental violations almost everywhere. Beyond these businesses, however, the characteristics of illegal disposal of hazardous waste in an area tend to mirror the dominant industries and business types in that region.<sup>20</sup> For instance, a 1986 study of illegal hazardous waste disposal in four Northeast and mid-Atlantic states found that Maine's cases evidenced textile, wood, and fishing industry wastes, while much of New Jersey's caseload involved the chemical-producing and petrochemical industries. Pennsylvania and Maryland cases included many in which the primary waste sources were metal electroplating, galvanizing, and other metal-treatment processes. Another waste source common in Maryland cases was medical research debris. According to Maryland interviewees, the large number of Federal institutions and medical research facilities in the vicinity of Washington, D.C., and Baltimore has made the proper treatment of medical wastes a significant problem for the State.<sup>21</sup>

The Monmouth County (New Jersey) prosecutor's office identified the illegal disposal of construction and demolition debris, much of it trucked in from nearby New York City, as a growing problem. In one instance, Monmouth County prosecutors uncovered a sophisticated waste management scheme in which construction debris from New York was shredded and laced with toxic chemicals. The debris was dumped in four areas of the county. In the indictment, the Monmouth County prosecutor asserted that the haulers had planned to mix the shredded waste with topsoil and sell it to people for use on their lawns. Had the scheme succeeded, it would have created small hazardous waste "hot spots" all over the county.

The Alameda (California) County district attorney's office has also found that the character of local industry drives the environmental caseload. Prosecutors in this county with a wide range of environmental problems noted that while agricultural runoff cases (for example, pesticides, fungicides, and herbicides) are quite common in the rural areas, steel mills and automobile plants are responsible for the bulk of the office's work referred from the older urban areas of the county.

Just as the types of industry in a county drive the nature and volume of cases for prosecution, information on patterns of industry and potential sources of illegal activity should

drive detection strategies. Inspection or surveillance programs targeting the firms most likely to commit dangerous violations would probably represent an improvement on a system that relies on tips from disgruntled employees, business competitors, and neighbors as the primary source of leads. Intensified inspections of fewer firms selected on the basis of their probability of committing violations may be more cost-effective than routine inspection of all firms, or a simple random sample of firms.<sup>22</sup> Air surveillance of suspect industries is sometimes effective, although it may have the effect of driving violators to conduct their activities at night and indoors.<sup>23</sup>

## Extent of Environmental Crime

Estimating the extent of environmental crime is conceptually and practically very difficult. Environmental crime may be divided into three basic categories. The first involves violation of permit conditions or other illegal acts committed by individuals or firms already part of the regulatory scheme. An example of this is the shearling tannery that bypassed its wastewater treatment plant in violation of its CWA permit and discharged untreated waste into the river. Another example from this first category is a waste-hauling firm that is permitted under TSCA but improperly disposes of PCBs while invoicing the generators as if legal disposal procedures had been followed. The second category involves acts committed by individuals or firms outside of the regulatory scheme — for example, the storage and/or disposal of hazardous waste without a RCRA permit. The third category of environmental crime involves acts that would be illegal regardless of whether the actor was within the regulatory scheme. This category is exemplified by the classic “midnight dumper” who discharges PCBs alongside the highway.

It is impossible to produce precise figures on the extent of crime in any of these categories. As in the case of arson, it is often not immediately clear that a crime has been committed. Indeed, the problem is exacerbated in the environmental area because it may be years before the crimes, and their often devastating effects, are discovered.

A look at the illegal disposal of hazardous waste, probably the largest component of environmental crime, offers a glimpse of not only the potential immensity but also the difficulty of quantifying the problem. National estimates of hazardous waste generation are highly uncertain. Several widely cited studies done in the mid-1980s yielded estimates of 247–275 million metric tons per year.<sup>24</sup>

Several factors account for the difficulty of developing precise figures regarding hazardous waste generation. First, hazardous waste is heterogeneous, including both liquids and solids and a large set of diverse chemicals. Because nonhazardous waste that is mixed with hazardous waste becomes legally hazardous itself, total quantities of hazardous waste generated are sensitive to changes in industrial practices and processes. For example, water used to flush out a container of hazardous wastes may become legally hazardous. If firms use less water to clean these containers, the quantity of hazardous waste they generate will be smaller.<sup>25</sup>

Estimation is also hampered by regulatory agencies’ employment of conflicting definitions of hazardous waste. Moreover, both Federal and State definitions have changed over time as wastes are added to or removed from the list. The distinction between legally hazardous and nonhazardous waste can be subtle. For instance, whether a waste stream is legally hazardous can depend on how much other waste the generator produces and thus on whether it exceeds RCRA’s limitation for “very small generator,” thus qualifying for regulation.<sup>26</sup>

A third obstacle to obtaining an accurate estimate of hazardous-waste generation is the difficulty of identifying the universe of hazardous waste generators and treatment, storage, and disposal facilities. As of 1990, the EPA reported that there were 211,000 generators of hazardous waste in the United States subject to RCRA regulation. The number had increased ninefold since 1980, due primarily to the addition of 118,000 small-quantity generators to the regulated universe by the Hazardous and Solid Waste Amendments that took effect in 1985. In 1990, there were reported to be 4,700 transportation, storage, and disposal facilities subject to RCRA.<sup>27</sup> However, the list of firms that initially notified the EPA that they were generators includes many that are not actually subject to RCRA regulation.<sup>28</sup> While knowledge of the regulations is presumably better now than it was in 1980, the extent to which overreporting and underreporting affect estimates of numbers of generators is still unclear.

Although calculating the number of facilities and the amounts of hazardous waste generated and handled poses serious difficulties of estimation, it is only one aspect of the process of learning the extent of hazardous waste crime. A second obstacle in the way of a full understanding of the breadth of the problem is determining how many of these facilities are violating the law and how much of the waste they account for is being illegally managed and disposed of. Here, the estimates are even less reliable and certain. Figures from a 1983 study prepared for the Office of Policy

Analysis of the U.S. Environmental Protection Agency suggested that 85–90 percent of large-quantity generators (LQGs) were complying with RCRA regulations.<sup>29</sup> Increasing knowledge of the regulations and more extensive enforcement programs may account for the higher level of compliance among LQGs since 1983. The major problems of noncompliance probably lie with the small-quantity generators (SQGs). For example, one study revealed that 30–50 percent of New Jersey SQGs failed to use required hazardous waste manifests, while a San Francisco Bay area survey found that 57 percent of SQGs disposed of at least some of their hazardous waste illegally. Surveys of SQGs in 42 Florida counties revealed that, in the aggregate, only about one-half of their waste is disposed of in compliance with the law.<sup>30</sup> Thus, while the precise extent of illegal handling and disposal of hazardous waste is unknown, it is probably very large.

The considerable increase in the cost of hazardous waste disposal following the enactment of the Hazardous and Solid Waste Amendments to RCRA in 1984 appears to have had a major impact on hazardous waste handling and disposal practices. Waste generators face an array of options for responding to disposal price increases. These include paying the higher rates, reducing waste generation through process or product changes, recycling or selling wastes to other firms that can use them, and dumping wastes illegally. A firm's response may include more than one of these options. As the costs of legal disposal rise, the financial incentive for illegal disposal also increases, leading to more disposal in sewers or storm drains, evaporation, burial, or abandonment on land. While the incentive remains greatest for generators, waste haulers and TSDFs also have heightened incentives for disposing of wastes improperly.<sup>31</sup>

Explanations for inappropriate waste disposal by industry range from ignorance to conscious disregard for the harmful consequences in an attempt to reduce disposal costs.<sup>32</sup> The availability of legal disposal facilities plays an important role in waste generator compliance with legal methods of disposal. Availability varies widely from State to State. In 1988 there was only one legally operating hazardous-waste land-disposal site in highly developed southern California. This site was more than 100 miles from the principal generation locations. Evidencing a lack of available legal disposal facilities in that State, Massachusetts shipped an estimated 75 percent of its waste out of state in 1988, one-half of it to New York.<sup>33</sup>

Firms that dispose of their wastes illegally, and thereby avoid the high cost of legal disposal, can gain a competitive advantage. In industries where legal disposal costs are large

relative to profits, this advantage may be so significant that legal disposers cannot compete.<sup>34</sup> Take, for example, a small dry cleaning business for which the cost of legal disposal of its monthly output of perchloroethylene (perc) sludge is \$200 per month. This represents a substantial portion of the cleaner's \$2,000 per month net revenue.<sup>35</sup>

While some commentators allege that a combination of corporate naiveté regarding environmental damage, corruption, and regulatory inefficiencies are the chief causes of illegal waste disposal,<sup>36</sup> others take a less charitable view of generators. Because hazardous waste management generally receives a small share of a firm's resources and attention, a suspect generator may claim to be unaware of disposal regulations, its responsibility to comply, or even how to comply with known regulations. On the other side are critics who view industry as disingenuously attempting to exonerate itself by claiming ignorance of the possible damage caused by what are today recognized as grossly substandard disposal methods. Similarly, many critics warn, industry may claim that it had no reason to suspect that contract disposal firms might be dumping improperly.

Although the debate goes on, increasingly the public is coming to the view that these explanations of improper activity are of questionable veracity. The emerging view holds, whatever may have been the case in the past, that today many firms may be consciously disregarding potential harmful consequences simply in order to reduce their waste disposal costs.<sup>37</sup>

Government has historically relied upon administrative procedures and civil actions such as injunctions to enforce environmental laws. At first glance, the lesser burden of proof and the availability of quickly obtained injunctions may make civil action against environmental wrongdoers appear to be the preferred alternative. However, a closer look reveals that civil cases may take several years to get to trial, while the civil injunction obtained may only temporarily halt the discharge of pollutants. Similarly, civil enforcement actions are usually directed against a corporation or commercial entity, even where specific individual wrongdoers have been identified. As a result, the costs incurred in defending a civil action, together with the payment of any judgment, are often absorbed by the enterprise and regarded as a "cost of doing business."<sup>38</sup> Ultimately this "cost" is merely passed on to the consumer.

It is widely agreed that criminal prosecution is an essential part of any comprehensive environmental enforcement policy. In a study assessing the progress of the Nation's hazardous waste management program, the EPA emphasized that "[a]n enforcement program aimed only at bring-

ing facilities into compliance and not at deterring future violations and encouraging voluntary compliance will be unsuccessful in the long run. . . . Criminal enforcement is viewed [by most study respondents — largely staff at EPA and state agencies] as the most effective tool for achieving deterrence.<sup>39</sup>

Economic analyses of environmental-regulatory enforcement and of criminal behavior generally suggest that a firm will violate regulations if and only if the expected disposal cost savings exceed the expected penalty — that is, the possible legal sanctions weighted by the probability of apprehension.<sup>40</sup> The stigma of criminal indictment and the threat of incarceration are necessary to gain the attention and change the behavior of environmental wrongdoers. The stigma of criminal indictment for environmental crime and the adverse publicity it creates may weigh heavily upon the business executive. The executive, like anyone else, wishes to protect his or her personal liberty. The State may be able to deter illegal conduct by threatening that personal liberty through imprisonment.<sup>41</sup> Moreover, according to Cook County assistant State's attorney Jay Magnuson, punishment of the individual corporate officer for misconduct carried out under the name of corporate purpose "satisfies society's desire to make 'the actor' responsible for his [her] actions."<sup>42</sup>

Unlike an executive, a corporation has no soul, no conscience. It cannot be imprisoned. Its liberty is reflected in the freedom it enjoys to do acts that enable it to make a profit.<sup>43</sup> Criminal sanctions directed at corporations include revoking corporate status and voiding corporate tax benefits. In *State of New Jersey v. Imperial Oil / Champion Chemical*, Indictment No. 87-02-0287, the case that provided the impetus for the formation of the Monmouth County prosecutor's environmental prosecution unit, the defendant company was barred from government contracts, which had been a major source of its business. The revocation or suspension of licenses and permits for environmental violations may mean the end of fiscal viability for many companies. Successful criminal prosecution of environmental crime involves fashioning a punishment that reaches both the corporation and the corporate officeholder and deters other firms and executives from engaging in similar conduct.

## Endnotes

1. DeCicco and Bonanno, "A Comparative Analysis," p. 2.

2. J. K. Hammitt and P. Reuter, *Measuring and Deterring Illegal Disposal of Hazardous Waste: A Preliminary Assessment* (Santa Monica, Calif.: Rand Corporation, October 1988), pp. 1-2.

3. D. Rebovich, *Understanding Hazardous Waste Crime: A Multistate Examination of Offense and Offender Characteristics in the Northeast* (Northeast Hazardous Waste Project and New Jersey Division of Criminal Justice, June 1986), p. 5. A revised version of this work has been published, D. Rebovich, *Dangerous Ground: The World of Hazardous Waste Crime* (New Brunswick, N.J.: Transaction Publishers, 1992); however, all citations to Rebovich in this report refer to the earlier version of the work.

4. *Ibid.*, p. 5.

5. Such States include Pennsylvania, New York, and Maryland.

6. J. M. McElfish, Jr., "State Hazardous Waste Crimes," *Environmental Law Reporter*, 17 ELR 10465 (December 1987), p. 1.

7. Rebovich, *Understanding Hazardous Waste Crime*, p. 6.

8. *Ibid.*

9. For information on this study, contact Ronald Goldstock, Organized Crime Task Force, Post Office Plaza, 143 Grand St., White Plains, NY 10601, Telephone (914) 422-8700.

10. Rebovich, *Understanding Hazardous Waste Crime*, p. 40.

11. *Ibid.*

12. 40 C.F.R. § 403.10 (1990 ed.).

13. 33 U.S.C. § 1319(c)(3)(A) (1986 ed., 1991 Supp.).

14. *Ibid.*

15. *Ibid.*

16. 40 C.F.R. § 123.27(a)(3)(ii) (1990 ed.).

17. Hammitt and Reuter, *Measuring and Deterring*, p. 2.

18. D. E. Mielke, "Remarks of Donald E. Mielke to the Subcommittee on Toxic Substances, Environmental Oversight, Research and Development of the Committee on Environmental and Public Works of the United States Senate" (November 15, 1989), p. 2.

19. Ibid., p.5; S.M. Wolf, "Hazardous Waste Trials and Tribulations," *Environmental Law* 13 (Winter 1983): 367-491.
20. Ibid., p. 23.
21. Ibid.
22. Hammitt and Reuter, *Measuring and Deterring*, p. 44.
23. Ibid., p. 45; Rebovich, *Understanding Hazardous Waste Crime*.
24. J. E. McCarthy and M. E. A. Reisch, *Hazardous Waste Fact Book* (Washington, D.C.: Congressional Research Service, January 1987), pp. 5-7 (Tables 1-2). These studies covered only RCRA-regulated facilities. The inclusion of nonregulated generators might increase the figure by more than 300 million tons per year. Moreover, derived national generation estimates based on a survey of a portion of the chemical industry run as high as 1 billion metric tons per year. Thus, it is clear that this country generates a staggering amount of hazardous waste each year, somewhere between 247 million and 1 billion metric tons.
25. Ibid., p. 47.
26. Ibid., p. 48
27. U.S. Environmental Protection Agency, Office of Solid Waste and Emergency Response, *The Nation's Hazardous Waste Management Program at a Crossroads: The RCRA Implementation Study* (Washington, D.C.: U.S. Environmental Protection Agency, July 1990), p. 7.
28. Ibid. Apparently, many of these companies notified the EPA either mistakenly or protectively, to avoid any possible sanctions for failure to notify.
29. Savant Associates, Inc., and Response Analysis Corporation, *Experiences of Hazardous Waste Generators with EPA's Phase I RCRA C Program: A Survey and Assessment* (Washington, D.C.: U.S. Environmental Protection Agency, Office of Policy Analysis, September 1, 1983).
30. B. L. Bozeman et al., *New Jersey Small Quantity Generator Survey and Analysis*, 4 vols. (Trenton, N.J.: New Jersey Hazardous Waste Facilities Siting Commission, Project X-067, December 1986); L. J. Russell and E. C. Meiorin, *The Disposal of Hazardous Waste by Small Quantity Generators: Magnitude of the Problem* (Oakland, Calif.: Association of Bay Area Governments, June 1985); S. I. Schwartz et al., *Managing Hazardous Wastes Produced by Small Quantity Generators* (Davis, Calif.: University of California at Davis, Division of Environmental Studies; Sacramento, Calif.: State of California, Senate Office of Research, April 1987).
31. Ibid.
32. Yelverton, "Expanding the Role of District Attorneys," p. 2.
33. Hammitt and Reuter, *Measuring and Deterring*, p. 10.
34. Ibid., p. 11.
35. Ibid., pp. 11-12.
36. Rebovich, *Understanding Hazardous Waste Crime*, p. 5.
37. Ibid.
38. DeCicco and Bonanno, "A Comparative Analysis", p. 6.
39. U.S. Environmental Protection Agency, *The Nation's Hazardous Waste Management Program*, pp. 60, 62.
40. Hammitt and Reuter, *Measuring and Deterring*, p. 37.
41. J. C. Magnuson and G. C. Leviton, "Policy Considerations in Criminal Prosecutions after *People v. Film Recovery Systems, Inc.*," *Notre Dame Law Review* 62 (1987): 913, 930.
42. Ibid.
43. Ibid., p. 929.



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## Chapter 2

# The State of Criminal Prosecution

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Criminal prosecution of environmental crime is still in its relative infancy in the United States. At the Federal level, the Environmental Protection Agency has expanded its criminal enforcement program over the past several years, but the numbers of matters referred to U.S. attorneys' offices, cases filed, and convictions obtained remains quite modest relative to the likely dimensions of environmental crime. EPA referred 318 cases to the U.S. Department of Justice for prosecution between 1982 and 1989.<sup>1</sup> Between fiscal years 1986 and 1990, 137 criminal matters relating to Federal environmental laws were received by U.S. attorneys' offices. These matters were distributed as follows:

RCRA (Hazardous waste)	40
CERCLA (Superfund)	35
CWA (Water)	25
FIFRA (Pesticides)	20
CAA (Air)	13
TSCA (Toxic substances)	<u>4</u>
Total	137

The matters referred to the U.S. Department of Justice between 1982-1989 resulted in the conviction of 351 defendants. In fiscal year 1989, 76 defendants were convicted, *inter alia*, 24 for violations of RCRA and 30 for violations of the Clean Water Act.<sup>2</sup>

Resource limitations have certainly constrained criminal enforcement activity. For example, between 1982 and 1984, the EPA's National Enforcement Investigations Center (NEIC)<sup>3</sup> received 240 allegations that were characterized as having potential for criminal prosecution, but could investigate only 70 because of limited resources.<sup>4</sup> Between 1982 and 1989 the number of EPA criminal investigators increased from 20 to more than 60, evidencing a major commitment to criminal enforcement on the part of the agency.<sup>5</sup> But investigative resources still fall far short of the need.

On balance, the EPA and the States have taken an overwhelmingly administrative and civil approach to environ-

mental enforcement. Simply stated, the theory is that regulation of waste, its storage, transportation, discharge, and disposal would compel compliance by waste generators, thereby resulting in a cleaner environment.<sup>6</sup> Self-regulation and compliance monitoring have always been the central themes of EPA enforcement, and until the mid-1970s criminal sanctions were not pursued because many regulations were not in place and compliance deadlines had not yet run for those already functional.<sup>7</sup> For example, congressional passage of CAA, CWA, and RCRA was aimed at deterring indiscriminate discharge of pollutants, but Federal enforcement of criminal statutes did not begin in earnest until after Congress voiced its displeasure at the lack of effective enforcement during the hearings to reauthorize CAA and CWA.<sup>8</sup>

As the EPA has acknowledged, there is a need for the complete integration of its civil, judicial, and criminal enforcement programs. This requires more networking between criminal and civil enforcement personnel and a recognition on the part of EPA regions that criminal enforcement is a powerful tool for promoting Environmental Protection Agency goals.<sup>9</sup>

Environmental officials at all levels of government concede that where criminal enforcement is pursued it continues to be almost entirely reactive. Responding to questions during a Senate hearing about the extent of organized crime involvement in illegal hazardous waste disposal, a special agent of the Illinois Department of Law Enforcement gave the following characterization of his agency's approach to environmental crime: "We have to play catch-up responding to worst case situations. If we had the luxury of going after proactive investigations, I cannot predict what we would be finding." The chief of Environmental Prosecutions in New Jersey, testifying before the same hearing, stated, "I don't think anybody in this country is doing proactive investigations now . . . I suggest . . . that if you do not do proactive investigations on environmental matters, as you do on any other organized crime target, you are not going to . . . find [organized crime involvement]."<sup>10</sup>



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Some state attorneys general (for example, those in Arizona, New Jersey, Ohio, and Massachusetts) have fairly aggressive environmental prosecution policies and have established good records of success (see section 7.2). The National Association of Attorneys General (NAAG) has an active environmental committee and has done important advocacy and lobbying work on behalf of environmental legislation. NAAG's compilations of State environmental legislation and its model statutes represent important resources for environmental prosecutors. (See Appendix B for examples of the NAAG model statutes and for information on obtaining the statutory compilations.) NAAG's work may advance the hoped-for progress toward greater uniformity and codification of State environmental statutes.

In many States the criminal jurisdiction of the attorney general (A.G.) is sharply limited. This jurisdictional impediment is a major obstacle to greater A.G. participation in criminal environmental enforcement. In Illinois, for instance, the attorney general does not have access to the grand jury process. Published analyses of RCRA enforcement at the State level, though somewhat dated, have found small numbers of prosecutions.<sup>11</sup> Although prosecution has increased significantly since these studies were published, State efforts still represent a critical and significantly underused part of environmental enforcement.

## The Local Role

Because of their complexity and scope, many environmental criminal cases require the attention of authorities at different levels of government and in different jurisdictions. However, local prosecutors may be in a better position than State or Federal authorities to handle many cases that affect primarily the local community. Local police and fire departments may be more likely to learn about environmental incidents and respond more quickly, whereas State authorities may be less attuned to the concerns of the local community. Respondents in the visited jurisdictions noted little competition for environmental cases between the State attorney general and local prosecutors. Indeed, more often, local prosecutors perceive themselves as complementing the efforts of Federal and State authorities and as adding needed resources to the fight. According to the National District Attorneys Association (NDAA), which maintains an active environmental committee and has established an environmental prosecution center, the Nation's district attorneys will represent a potent force in environmental crime prosecution in decades to come. For

now, however, with more than 2,800 district attorneys nationwide, local prosecutors are the most underutilized resource in the war on environmental crime.

Despite the evidence of public concern regarding environmental crime, thus far, only a relatively small number of the Nation's district attorneys (D.A.s) are known to have given serious attention to environmental crime. The sites visited for this report represent some of the most committed and successful of these programs. Nevertheless, even in those jurisdictions in which the D.A. has demonstrated a strong commitment to criminal environmental prosecution, the efforts are sometimes hampered by four significant problems: (1) differences in outlook and objectives between prosecutors and regulatory agencies, (2) shortages of trained environmental attorneys and investigators, (3) lack of adequate laboratory and other technical resources,<sup>12</sup> and (4) insufficient exchange of information among agencies and jurisdictions.

According to Donald Mielke, the Jefferson and Gilpin Counties' (Colorado) district attorney, State regulators are at least partly to blame for not bringing D.A.s into environmental enforcement sooner. Local district attorneys have been told that somehow environmental cases are "too complex," "take too much investigative time," "cost too much," or "are beyond their expertise."<sup>13</sup> Dispelling the mystique surrounding environmental cases is an essential part of any plan to increase the role of local prosecutors in environmental enforcement.

Attorneys interviewed for a study of hazardous waste crime in the Northeast listed the following special pressures and obstacles as ingrained in the prosecution of hazardous waste offenses:

1. Business community pressure against criminal prosecution of corporations and their officials,
2. The technical problems of establishing the dangerousness of disposed wastes to the satisfaction of judges and jurors,
3. Resource limitations that make it difficult to compete with defense attorneys' increasing utilization of expert witnesses and other expensive technical assistance,
4. Inconsistent standards regarding sewer discharge. Some municipalities' liberal discharge standards were seen by interviewees as representing an attempt by local government to avoid alienation of certain businesses,

5. Deficiencies in the hazardous waste manifest tracking system that makes it subject to exploitation by offenders,
6. Failure by environmental inspectors to ensure the satisfactory collection of evidence to be used in criminal prosecution,
7. Public and special interest group pressures for speed in the prosecution of cases. These pressures were due to the perception that the cleanup of illegal disposal sites and risk remediation are contingent on successful prosecution of the criminal case.<sup>14</sup>

The experiences of the district attorneys' offices for Jefferson and Gilpin Counties, Colorado, and Alameda County, California, confirm that these obstacles are not unique to the Northeast. Prosecutors in Jefferson and Gilpin Counties have found that juries often view indicted CEOs as upstanding community leaders and their companies as providing needed employment in the community. In light of these sentiments, a jury's reluctance to convict may be understandable.

As more local prosecutors make a commitment to prosecuting environmental cases, it is important that they involve and employ the resources and experience of local authorities. Local law enforcement agencies such as city police, county sheriffs, fire departments, and the state highway patrol are routinely "in the field" where unreported criminal activities are occurring. Local police, because of their constant, mobile presence in their communities, are natural troubleshooters, the "eyes and ears" of the community. Properly trained local law enforcement officers are more likely than anyone else to notice an unreported pipe discharging waste into a nearby stream.<sup>15</sup> If they are aware of what to look for, police may frequently uncover evidence of environmental crime during routine investigations of other suspected illegal activities. The execution of a search warrant on a suspected methamphetamine laboratory, for instance, may turn up containers of hazardous chemicals that pose a serious threat to the investigating officers as well as neighbors of the illegal operation. The buildings and grounds around the laboratory may well have been contaminated, requiring cleanup monitored by a regulatory agency.<sup>16</sup> The quicker local law enforcement officials respond, the sooner the violation can be halted and the matter prosecuted.

EPA's Enforcement Four-Year Strategic Plan for the 1990s calls for greater local government involvement in enforcement and promises expanded training opportunities and

information exchange for district attorneys and investigators.<sup>17</sup> The increasing emphasis of the EPA and the U.S. Department of Justice on criminal enforcement is an acknowledgement that the historical approach has not been adequate in relation to growing national environmental problems. The increasing use of criminal sanctions (as envisioned in the 1985 RCRA amendments) reinforces the view that certain acts against the public and the environment are so egregious that a criminal penalty must be imposed to punish and deter.<sup>18</sup>

## Endnotes

1. U.S. Environmental Protection Agency, *Enforcement Four-Year Strategic Plan: Enhanced Environmental Enforcement for the 1990's* (Washington, D.C.: U.S. Environmental Protection Agency, September 1990), p. 3.
2. Ibid; U.S. Environmental Protection Agency, *The Nation's Hazardous Waste Management Program at a Crossroad*, p. 62 (Figure 15).
3. In 1991, the NEIC was renamed the Criminal Investigation Division within EPA's Office of Criminal Enforcement. The headquarters was moved from Denver to Washington.
4. Hammitt and Reuter, *Measuring and Deterring*, p. 23.
5. U.S. Environmental Protection Agency, *Enforcement Four-Year Plan*, p. 58.
6. Yelverton, "Expanding the Role of District Attorneys," p. 3.
7. DeCicco and Bonanno, "A Comparative Analysis," p. 9.
8. Ibid.
9. U.S. Environmental Protection Agency, *Enforcement Four-Year Plan*, p. 4.
10. U.S. Congress, Senate, *Profile of Organized Crime: Great Lakes Region*, hearings before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, (S. Hrg. 733) January 25, 26, 31, and February 1, 1984, p. 274, 279.
11. Rebovich, *Understanding Hazardous Waste Crime*, p. 20.

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12. An NIJ-funded study of local prosecution of corporate crime recommends, among other measures, establishment of regional laboratories. See M.L. Benson, F.T. Cullen, and W.J. Maakestad, *Research in Brief: Local Prosecutors and Corporate Crime* (Washington, D.C.: National Institute of Justice, 1992).
  13. D.E. Mielke, "Bringing District Attorneys Into the Enforcement Community," National District Attorneys Association Environmental Protection Committee (September 27, 1990), p. 3.
  14. Rebovich, *Understanding Hazardous Waste Crime*, p. 4.
  15. Yelverton, "Expanding the Role of District Attorneys," p. 5.
  16. *Ibid.*, pp. 5-6.
  17. U.S. Environmental Protection Agency, *Enforcement Four-Year Plan*, p. 6.
  18. Yelverton, "Expanding the Role of District Attorneys," p. 6.

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## **Part Two:**

# **Developing More Effective Local Prosecution of Environmental Crime**

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## Chapter 3

# An Introduction to the Investigation and Prosecution of Environmental Crime

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As stated earlier, this report is designed to induce more local prosecutors to involve their offices in environmental cases and to summarize some of the information and issues that prosecutors need to enter and succeed in this area. It is not intended to be a step-by-step manual on investigating and prosecuting environmental cases. Such information, most commonly embodied in various training sessions and associated materials, is available elsewhere. For example, the Environmental Prosecution Center of the National District Attorneys Association and the Environmental Law Institute (ELI), among other organizations, offer courses on environmental prosecution for State and local prosecutors. Participants in such training sessions generally receive a course notebook that provides detailed, step-by-step guidance on the investigation and prosecution process for environmental cases. Information on this and other resources is included in Appendix B.

Although this report is not intended to be a "how-to" manual for environmental prosecutors, readers may benefit from an overview of the process of investigation and prosecution. Therefore, before discussing some issues and options in the development of more effective local prosecution of environmental crime, we offer an overview of the basic stages of environmental investigation and prosecution.

Environmental crimes come in many shapes and sizes. No two are exactly alike. However, there are generally some common elements. Figure 1 divides the process of investigation and prosecution into eight stages and shows which agencies and actors may be involved at each stage. It is important to note that not all cases go through all of these stages in this sequence. Rather, Figure 1 attempts to summarize the major activities and events in a case and how they might relate to one another. Figure 2 summarizes key characteristics of the five local environmental prosecution programs visited for this report.

In Figure 1, stage 1 is the detection of an environmental offense or at least of the possibility that an offense has occurred or will occur. Such information can come from many sources, including tips from employees or former employees of a firm, members of the public, and environmental advocacy groups. In addition, various agencies may detect environmental offenses: regulatory agencies through routine (randomized) inspection or monitoring programs or through actions targeting specific suspect businesses or types of businesses; fire departments or other agencies that respond to environmental incidents such as spills, leaks, or motor vehicle and railroad accidents; and law enforcement agencies that may discover environmental offenses during routine or specifically targeted activities.

Cases may be referred to the prosecutor as soon as the possibility of a criminal offense is identified, or referral may be delayed until other law enforcement or regulatory agencies conduct further investigation. This depends upon local practices and procedures. In addition, the detection of an offense may trigger a response by a multiagency strike force or task force, if such a group exists. In Los Angeles, the Environmental Crimes Strike Force (discussed in greater detail below) is a useful forum for the apportioning of investigative tasks and responsibilities among a number of prosecutorial, regulatory, and law enforcement agencies.

In stage 2, background information on the suspect firm or individual may be collected. Such information, constituting an "environmental rap sheet" on the history of the suspect individual or company, may be most efficiently assembled in the context of a multiagency response team in which the knowledge and experience of a variety of actors can be mobilized. A number of different agencies may have, at one time or another, investigated and/or gathered information on the suspect's conduct in relation to environmental laws and regulations.

**Figure 1**  
**Investigation and Prosecution of Environmental Crime**

Stages of Investigation/ Prosecution	1 Detection of Offense	2 Collection of Background Information	3 Surveillance of Suspects	4 Evidence Collection	5 Laboratory Analysis	6 Charging	7 Adjudication	8 Cleanup and Compliance
	<ul style="list-style-type: none"> <li>■ Tips from employees and citizens</li> <li>■ Information from environmental groups</li> <li>■ Information from agencies: Routine inspection/monitoring Targeted inspection/monitoring Emergency response to environmental incident (e.g. fire departments) Police/ law enforcement</li> </ul>	<ul style="list-style-type: none"> <li>■ "Environmental rap-sheet" on suspects</li> </ul>	<ul style="list-style-type: none"> <li>■ Aerial photography</li> <li>■ Sewer discharge monitoring</li> <li>■ Stake-out (surveillance van, video monitoring)</li> </ul>	<ul style="list-style-type: none"> <li>■ Preparation/execution of search warrant</li> <li>■ Collection of samples for laboratory analysis</li> <li>■ Interviews</li> <li>■ Collection of documents</li> </ul>	<ul style="list-style-type: none"> <li>■ Establishment of presence of material meeting legal requirements for prosecution</li> <li>■ Preparation of expert witness testimony</li> <li>■ Maintenance of chain of custody</li> </ul>	<ul style="list-style-type: none"> <li>■ Determination as to criminal or civil process (this decision may come earlier)</li> <li>■ Indictment/Information</li> </ul>	<ul style="list-style-type: none"> <li>■ Plea negotiation</li> <li>■ Trial</li> <li>■ Sentencing/settlement</li> <li>■ Possibility of cleanup as condition of probation</li> <li>■ Debarment from government contracting</li> </ul>	<ul style="list-style-type: none"> <li>■ Monitoring cleanup &amp; compliance</li> <li>■ Collection of fines and penalties</li> </ul>
<b>Agencies Involved</b>								
Prosecutor	☒ (Case may be referred to prosecutor at any of stages 1-4)	☒	☒	☒	☒	☒	☒	☒
Regulatory agencies: (e.g., environmental protection agency, health department, sewer authority, air quality agency)	☒	☒	☒	☒ (May focus on sample collection)			☒	☒
Law enforcement agencies	☒	☒	☒	☒ (May focus on criminal investigation aspects)			☒	
Fire departments	☒			☒ (Heavy equipment for excavation)				
Public works departments					☒			
Laboratory					☒			
Multiagency task force	☒	☒	☒	☒	☒		☒	
Court							☒	☒

Source: Adapted from a description in Ira Reiner, "Fighting Toxic Crime: A New Approach," *Prosecutor's Brief* (California District Attorneys Association, 1986).

**Figure 2**  
**Characteristics of Visited Environmental Prosecution Programs**

Name of Program	Number of Attorneys	Number of In-house Investigators	Location within Office	Jurisdiction	Vertical Prosecution Scheme	Attorney Specialization within Program
Alameda County, California District Attorney's Environmental Protection Unit	3-1/2	1-1/2	Part of DA's Consumer and Environmental Protection Division	Criminal and civil	Yes	Yes, 1 attorney specializes in underground tank cases, 1 in release response cases, and 1 in hazardous waste disposal cases
Cook County (Chicago), Illinois State's Attorney's Environmental/Occupational Health Unit	8	0	Part of Public Interest Bureau	Criminal, civil, and administrative (regulatory)	Yes	No
Jefferson and Gilpin Counties (1st Judicial District), Colorado Environmental Prosecution Unit	2	1	Part of Complex Prosecutions Unit	Criminal and civil	Yes, for complex cases	No
Los Angeles County District Attorney's Environmental Crime/ OSHA Division	9	8	Part of Bureau of Special Operations	Criminal and civil	Yes	Informal specialization: asbestos cases, petroleum industry cases, cases with complex search and seizure issues
Monmouth County, New Jersey County Prosecutor's Environmental Unit	2	4 <sup>a</sup>	Part of Major Crimes Section	Criminal only	Yes	No

<sup>a</sup>In addition, the unit has a full-time paralegal.

**Figure 2—Continued**  
**Characteristics of Visited Environmental Prosecution Programs**

Name of Program	Other Agencies Involved		Laboratory Resources	Interagency Organization/ Procedure	Participation in Regional Associations	Training of Prosecutors	Training of Investigators/ Regulators	Primary Type of Cases Handled	Normal Active Caseload <sup>b</sup>
	Regulatory	Law Enforcement							
Alameda County, California District Attorney's Environmental Protection Unit	County and city health departments, water district	California Highway Patrol, police and fire departments	Primarily, County health department; also Fish and Game Department	Regular interagency meetings; written agreement regarding investigation rules/ responsibilities	Member of Western States Hazardous Waste Project	Participates in California District Attorneys Association courses	Provides awareness/ interrogation training for regulatory and law enforcement staff	Underground storage tanks, hazardous materials/waste management; hazardous waste disposal	200
Cook County (Chicago), Illinois State's Attorney's Environmental/ Occupational Health Unit	Illinois EPA, Metropolitan Water Reclamation District	State police, local police, fire departments	Illinois EPA and Metropolitan Water Reclamation District	Metropolitan Chicago Task Force (CHEMHT) includes county and State agencies	Member of Midwest Environmental Enforcement Association	Primarily on the job	Provides awareness training for regulatory and law enforcement staff	Workplace safety, illegal disposal of hazardous waste/ materials	50
Jefferson and Gilpin Counties (1st Judicial District), Colorado Environmental Prosecution Unit	State and county health departments	State police, local police	State health department, USEPA, private laboratories	None currently, but interest in forming local task force	Member of Western States Hazardous Waste Project	Federal Law Enforcement Training Center (FLETC) courses	Provides awareness training for law enforcement staff, attend FLETC courses	Illegal disposal of hazardous waste, underground storage tanks, agricultural runoff	5
Los Angeles County District Attorney's Environmental Crime/ OSHA Division	County health department, city and county sanitation districts, Air Quality Management District, county department of public works	California Highway Patrol, local police and fire departments, sheriffs' departments	Primarily, county sanitation district; also City of Los Angeles and California Health Departments, Air Quality Management District, private laboratories	Environmental Crime Strike Force with 20+ member agencies; regular meetings but no written procedures/ agreement	Member of Western States Hazardous Waste Project	Attended California District Attorneys Association courses	Primarily on the job for in-house investigators; also participates in California Specialized Training Institute courses, provides awareness training for law enforcement and fire departments	Illegal transportation/ storage/ disposal of hazardous waste, air pollution	150 open formal investigations
Monmouth County, New Jersey County Prosecutor's Environmental Unit	County health department, State department of environmental protection	Local police	County health departments; also private laboratories	No	Member of Northeast Hazardous Waste Project	State environmental prosecutor provides training	State environmental prosecutor conducts awareness training; Northeast Hazardous Waste Project provides training as well	Illegal transportation/ disposal of hazardous waste, shredded construction and demolition debris commingled with hazardous waste	50 open investigations

<sup>b</sup>Based on caseload at time of site visit.



Stage 3 involves surveillance of a suspect in an effort to develop direct evidence of criminal activity. This close scrutiny of suspect firms may take many forms, including aerial photography, sewer discharge monitoring, and traditional "stakeouts," perhaps utilizing vans outfitted with video equipment. A variety of regulatory and law enforcement agencies may participate in surveillance activities either independently or under the direction of the prosecutor. This depends upon the stage at which the prosecutor is brought into the investigation.

In stage 4, additional evidence is collected to support a criminal prosecution. In almost every case, the prosecutor will have to be involved at this stage to render legal advice in the preparation and execution of a search warrant. In some instances, regulatory agencies will collect evidence based on an inspection warrant or consent of the owner, but it is advisable to have the advice of a prosecutor on these types of proceedings as well. Types of evidence normally collected in environmental cases include samples of water, soil, or other material for laboratory analysis, documents, and statements of witnesses and other involved parties.

Stage 5 centers on laboratory analysis of samples. Most prosecutors rely on public laboratories, but private contract laboratories may also be used. The analysis is aimed at establishing the presence of substances meeting the legal requirements for prosecution under the applicable statute. Careful maintenance of the evidentiary chain of custody and preparation of expert witness testimony on the laboratory findings are also important parts of this stage of a prosecution.

In stage 6, the prosecutor files charges by indictment or information, depending on local rules of criminal procedure. Of course, the determination may be made, for evidentiary or other reasons, that a case does not warrant criminal prosecution and should instead be pursued civilly. Indeed, such a decision may be made by the prosecutor at any stage of the investigation. Some prosecutors have authority to proceed either civilly or criminally, whereas others may bring only criminal charges. In the latter instance, civil cases must be referred to the State attorney general or some other designated office empowered to bring civil cases. In addition, if the prosecutor determines that the case warrants a misdemeanor rather than a felony filing, it may be necessary to refer the case to a city attorney's office or other prosecutorial agency.

Stage 7 brings the case to adjudication or settlement. The prosecutor may negotiate a plea agreement or the case may go to a jury or bench trial. In most jurisdictions, the vast

majority of cases are settled prior to trial. Sentences range from prison terms to fines to probation conditional on cleanup of environmental damage. In some jurisdictions, convicted defendants may also be debarred from government contracting, which may impose a very severe, even ruinous, economic hardship on an offending firm.

Finally, in stage 8, compliance with the sentence or settlement is monitored. The prosecutor's office may be involved in collecting fines or penalties imposed on the offender, while regulatory agencies may oversee site remediation and cleanup.

As noted above, environmental cases are extremely diverse and may not follow all of the outlined stages in precisely the same sequence. However, the sketch provided does suggest the major elements of most environmental cases. In order to provide additional specificity for the discussion of the stages of environmental investigation and prosecution, it may be useful to consider a major case developed by one of the programs visited for this project: the Los Angeles County Environmental Crimes Strike Force, headed by the Los Angeles County district attorney's office.<sup>1</sup>

Various member agencies of the Strike Force, including the County Health Department and the California Highway Patrol, had long suspected that Raymond Franco, a licensed transporter of hazardous waste operating out of El Toro, California, had been violating various laws and regulations regarding record keeping and disposal of waste. Franco allegedly made a practice of visiting small businesses, pointing out hazardous waste violations, and offering to take care of these problems for the businesses at low prices. Given the high cost of legal disposal and the financial stresses suffered by many businesses, Franco was apparently able to tempt a number of them to take advantage of his bargain rates. Stage 1 of this investigation involved not receipt of a particular employee's tip or other evidence of a particular act or incident, but rather the accumulating suspicion among several investigators that Franco was involved in illegal activities. These suspicions became the subject of Strike Force meetings and discussions, and more intensive coordinated investigative efforts were planned.

In the Franco case, stages 2 (gathering of additional evidence) and 3 (surveillance) were reversed. Based on increasing suspicion about Franco's activities, the California Highway Patrol's (CHP) Hazardous Materials Investigation Unit began following him on his visits to businesses. Thereby, the unit identified the Laminating Company of America, a firm that manufactured portions of electronic circuit boards, as a potential Franco customer and initiated

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surveillance at its Garden Grove location. This surveillance resulted in the observations that triggered the criminal case against Franco.

In October 1988, on the second day of surveillance at the Laminating Company of America, CHP officers observed Franco and several associates loading full 55-gallon drums onto two enclosed trucks with Mexican license plates. The drums were carefully concealed on the truck. The CHP officers took more than 300 photographs of these activities and then followed both trucks when they left the plant. One was lost as it headed north from Garden Grove, but the other was stopped not far from the Mexican border. It seemed clear that the waste was destined for illegal disposal in Mexico, but the California authorities had not yet made arrangements with Mexican officials for joint investigation of the case.

The Mexican truck driver was arrested on suspicion of illegal transportation of hazardous waste. He was not licensed by the State health department as a waste hauler. Laboratory analysis later revealed that the drums contained flammable hazardous waste. The driver told the officers he had been ordered to take the barrels to Tijuana. The driver pleaded guilty to a misdemeanor and spent several weeks in Orange County Jail. This was only the beginning of the case, however.

Several weeks after the Laminating Company stakeout and arrest of the Mexican truck driver, the Los Angeles district attorney's office used the incident to obtain a search warrant for Franco's El Toro office. Execution of the warrant yielded substantial documents related to hazardous waste transportation and disposal (stage 2). On inspection, these records revealed numerous discrepancies, including failure to file required manifests for transported wastes, disposal of waste at facilities other than those shown on manifests, and the apparent disappearance of many shipments.

In the meantime, Los Angeles Strike Force agencies, working with the U.S. Environmental Protection Agency, began to uncover additional evidence of Franco's activities (stage 4). A letter supplied by the EPA revealed that an aluminum-processing firm with a plant in Torrance had paid Franco \$12,000 (about half the estimated cost of legal disposal) to dispose of 57 drums of hazardous waste. The company believed that it had hired a reputable hauler to dispose of its waste in a legal manner. However, the customer never received copies of the required papers tracking the waste from "cradle to grave," became suspicious, and reported the matter to the EPA.

Strike Force investigators learned that Franco had arranged with a Mexican truck driver named Torres, who also owned a small pottery factory in Tijuana, to haul and dispose of the aluminum firm's waste. Torres was already known to investigators: the northbound truck that had been lost after it left the Laminating Company's plant had been traced to him.

Through a CHP connection, Mexican authorities were induced to check out Torres's factory, which was found to include a sealed warehouse. Based on the evidence assembled thus far, investigators believed that Franco was using agents, such as Torres, to transport waste to Tijuana, where it was probably being illegally stored or disposed of at the pottery factory.

At this point, Strike Force investigators referred the case to the Orange County district attorney's office, since the principal violations had occurred in that jurisdiction. The Orange County D.A.'s office, however, suggested that there might be Federal violations for international transportation and disposal. This was confirmed by Federal prosecutors, who noted that a critical missing piece of evidence for a Federal prosecution was the tracing of wastes known to have originated in the United States to a location in Mexico.

Obtaining this final link required the full cooperation of Mexican authorities, which the FBI was able to arrange. Thus, in February 1990, almost 1 1/2 years after the Laminating Company stakeout, U.S. and Mexican agents raided the Torres pottery factory and found numerous rusting and leaking drums, several of which had serial numbers matching those shown by the aluminum company's records to be on drums consigned to Franco for hauling and disposal.

The final investigative stage (stage 5) involved a laboratory analysis of samples of the wastes that had been traced from the Torrance aluminum plant to the Tijuana pottery factory. This analysis revealed the presence of combinations of highly toxic and combustible industrial solvents, including toluene, xylene, methyl ethyl ketone, and 1,1,1 trichloroethane. The warehouse in which these drums were found was adjacent to an elementary school. Leaking fumes could have harmed persons in the vicinity or an explosion and fire could have occurred. Luckily, a disaster was averted. The EPA spent \$100,000 to dispose properly of the waste found in this site. According to the Los Angeles Strike Force attorney who ultimately prosecuted the case in Federal court (with cross-designation as a special assistant U.S. attorney), "[w]e think such activity [as Franco's] is a violent crime and people should pay for that crime with time in custody."

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In May 1990, Franco and Torres were indicted in the first case alleging international smuggling of hazardous waste brought under U.S. environmental laws (stage 6). Franco was charged with six counts of illegal transportation of hazardous waste, one count of illegal disposal, one count of illegal export (all under the Resource Conservation and Recovery Act), and one count of conspiracy.<sup>2</sup> He was arrested in New York and his case was scheduled for trial in December 1990. Ultimately, Franco pleaded guilty and, on December 2, 1991, he was sentenced to ten months in Federal prison. He was also ordered to pay the costs of cleanup and disposal of the wastes (stage 8). Torres fled following the indictment and has not been apprehended. He is believed to be in Mexico.

The *Franco* case may not be a typical environmental case developed by a local prosecutor's office. Indeed, it contained some relatively unusual elements, such as the international dimension and the cross-designation of the assistant D.A. as a special assistant U.S. attorney. However, the

case does illustrate most of the key elements in the development and prosecution of environmental cases faced by local prosecutors on a regular basis.

With this overview and illustrative examples of the key elements of environmental cases in mind, let us turn to a discussion of organizational and strategic factors in the development and enhancement of local efforts in the investigation and prosecution of environmental crime.

## Endnotes

1. The following account is based on interviews with Strike Force members, as well as Sarah Henry, "The Poison Trail: How Environmental Cops Tracked Deadly Waste Across the Border," *Los Angeles Times Magazine*, September 23, 1990.
2. United States v. Franco and Torres, U.S. District Court, Central Dist., Calif., No. 90-3520-TJH.

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## Chapter 4

### Initiating a Program

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#### The Role of the District Attorney

Support and leadership from the top of the prosecutorial agency can be extremely helpful in the establishment and growth of an environmental prosecution program. A district attorney who strongly supports environmental prosecution can be critical to the development of local prosecution efforts. However, local prosecutors who do not have the resources or are not prepared to make environmental cases a major priority of their offices can still make a difference in the battle against environmental crime. Smaller district attorneys' offices should not overlook the related professional experience of their deputy prosecutors. For instance, an office might find that one of its attorneys had worked in the environmental area before coming to the D.A.'s office. The role of the D.A. in this instance is to keep abreast of the interests and abilities of deputy prosecutors. By conducting an inventory of available experience, training, and interests prosecutors may identify formerly untapped resources in the fight against environmental offenders.

The local prosecutors in the jurisdictions visited for this project exemplify the roles strong leaders can play in fostering environmental prosecution. Jefferson and Gilpin Counties (Colorado) D.A. Donald Mielke has helped promote the prosecution of environmental crime both locally and nationally. Prior to becoming D.A., he served in the Colorado State legislature, where he authored and sponsored title 18, the "midnight dumping" statute. Colorado's title 18 was one of the first strong State criminal statutes on the environment. As a State legislator Mielke was also instrumental in gaining passage of the Hazardous Substances Incident Bill and a Reimbursement Bill (cost recovery) for local response teams.

Mielke has become a nationally known advocate of increased prosecutorial action on environmental crime at the local level. As chair of the National District Attorneys Association Environmental Protection Committee, Mielke has promoted the creation of a U.S. Department of Justice-

funded National Center for the Prosecution of Environmental Crime including a national training institute for environmental prosecutors. At the local level, Mielke has sought to formalize a task force to coordinate all of the agencies involved in environmental investigation and prosecution.

In Cook County, Illinois, both former State's attorney Richard Daley, now mayor of Chicago, and current State's attorney Cecil Partee have played important roles in promoting local criminal prosecution of environmental offenses. According to Environmental Unit staff, Daley and Partee have been very supportive of the unit, which is a part of the larger Public Interest Bureau.

In 1983, John Kaye became Monmouth County prosecutor (New Jersey). An outdoorsman with a strong interest in the environment, Kaye took on an important environmental case within his first year in office when, pursuant to a State-county environmental protocol, the New Jersey attorney general referred the prosecution of *International Flavors and Fragrances (State of New Jersey v. International Flavors and Fragrances, Accusation No. 1701-10-86)* to Monmouth County. Kaye also assigned a full-time prosecution staff to environmental cases and instituted training programs with various State and Federal agencies including the EPA, the Federal Law Enforcement Training Center (FLETC), and the New Jersey State Department of Environmental Protection (DEP). The activist D.A. made Monmouth County one of the first four counties in New Jersey with a full-time environmental prosecution unit. Unit staff have developed expertise in relevant environmental legislation and regulations, as well as environmental incident response procedures, and evidence gathering and sampling. The unit, which began with four referrals, had fifty active investigations during the first half of 1990. Monmouth County prosecutor Kaye, who is consulted on every case, has created an environmental prosecution unit that other New Jersey counties are now approaching for ideas and strategies on the creation of their own units.

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Alameda County district attorney John Meehan (California) has received considerable praise for his establishment (in 1984) and ongoing support of the office's environmental prosecution unit. Meehan is credited with enabling the unit to maintain its core of dedicated and experienced attorneys. The first cases handled by the unit were referred by the Sanitary District and the Fish and Game Department and were pursued as fraud prosecutions. These initial cases provided the D.A.'s office with some technical familiarity with environmental issues.

## The Role of a Major Case

Leadership and commitment from the district attorney is certainly important, but a major case, and the internal and external interest it spawns, can also play a central role in getting an environmental unit started. *People v. Film Recovery Systems, Inc.*, 84 C. 5064, 84 C. 11091 (Cook Cnty. Cir. 1985), resulted in the convictions of a corporate president, plant manager, and plant foreman for murder and several counts of reckless conduct. The cases involved occupational exposure of company employees to hydrogen cyanide, resulting in the death by poison of one worker and serious injury to several others.<sup>1</sup> *Film Recovery*, tried by then State's attorney Richard Daley, received considerable national and local press attention because it was the first verdict of corporate homicide in history. (For a more detailed discussion of this case, see Chapter 8.)

Although the *Film Recovery* case has been ordered retried (retrial is scheduled for the fall of 1992), its impact on the promotion of local prosecution of environmental crime in Cook County, Illinois, is irreversible. Jay Magnuson, the Cook County assistant State's attorney on the case, sees no distinction between exposing workers to the danger of cyanide poison in the "gas chamber" that was the workplace of *Film Recovery* and firing a weapon into a crowd. In both cases, he asserts, one has created a strong probability of death. *Film Recovery* increased the general public's consciousness of the dangers posed in the workplace and elsewhere by toxic substances. It also assured the environmental unit a secure presence in the Cook County State's attorney's office.

*People of the State of Colorado v. Colorado Chemical Specialties, Inc., Ralph Mika, and Ronald Drake*, 88 CR 181 (District Ct. Golden), helped establish the need for specialized environmental prosecution in the Jefferson and Gilpin Counties' D.A.'s office. *Colorado Chemical* was the first felony conviction for an environmental offense obtained in Colorado. Indeed, the case occurred even before

the Federal government had prosecuted an environmental offense as a felony. The involvement of the EPA's National Enforcement Investigation Center in the case helped foster a close working relationship between NEIC and the Jefferson and Gilpin Counties' D.A.'s office. It also contributed to the evolution of a specialized case management approach for "complex" cases in the D.A.'s office.

In 1983, the Monmouth County prosecutor assumed responsibility for the *International Flavors and Fragrances* case, which had been referred to the county by the New Jersey attorney general's office. Prior to initiation of the criminal case, there had been considerable regulatory action against International Flavors and Fragrances (IFF). New Jersey environmental groups reported that they could document the discharge of contamination from the plant, and fish in an adjacent creek and bay smelled and tasted of blueberries and oranges, two artificial flavorings and fragrances manufactured by IFF.

In conjunction with the New Jersey Department of Environmental Protection and the Monmouth County Health Department, Monmouth County prosecutor Kaye obtained a warrant, seized a large quantity of documents, took soil samples, and conducted surveillance flyovers of the IFF site. Former company employees were willing to testify that they had been directed to dump toxic chemicals, such as hydrochloric and sulfuric acid, into holes on the property, and investigators uncovered a pipe in the plant's discharge system that had not been properly sealed.

The investigation of IFF took three years and prompted company employees to take out a large ad in a local newspaper prior to the trial which read: "Mr. Kaye, we are not criminals." IFF ultimately agreed to pay for the total cost of cleanup and a \$75,000 administrative penalty to the DEP. The company also agreed to plead guilty to the third-degree offense of Abandonment of Discharge. The case served as an invaluable learning experience for the environmental unit of the Monmouth County Prosecutor's office. It also helped to raise public consciousness in Monmouth County of the need for local prosecution of environmental crime.

## Attracting Attorneys to the Unit

In order to attract high-caliber attorneys to an environmental unit, it may be useful to appeal to an attorney's desire to do socially useful work. The image of the prosecutor as the protector of the public and of the environment is a powerful one. Many environmental prosecutors comment that work in this area is more socially satisfying than "traditional"

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criminal work. David Guthman, chief of the Los Angeles County D.A.'s Office Environmental Crimes/OSHA Division, speculates that the low turnover on his staff is attributable to the sense of satisfaction the division's attorneys derive from "doing the right thing" by prosecuting environmental cases. Moreover, as the staff in the Cook County State's attorney's office noted, the environmental unit probably offers the most marketable professional skills in the Cook County State's attorney's office.

Attorneys in environmental prosecution units come from a variety of backgrounds, including both criminal and civil practice. Most environmental prosecutors have accrued significant professional experience before joining the unit and few are hired directly out of law school. However, recently admitted attorneys who specialized in environmental law in law school may be appropriate candidates for these units. (Law schools with distinguished environmental law programs include Boalt Hall School of Law at the University of California at Berkeley, the University of Vermont, Pace University, George Washington University, the University of Colorado, and Lewis and Clark University.)

As part of the environmental prosecution unit, environmental prosecutors gain substantial criminal and civil trial experience as well as invaluable exposure to regulatory law practice. Unlike traditional criminal prosecutors, who may find themselves indelibly labeled "criminal lawyers" after a stint with the D.A., environmental prosecutors learn to move from the criminal courtroom to the regulatory arena and back again. As civil injunctive relief is often used to halt environmental violations pending adjudication, unit attorneys also learn to make use of these important civil remedies. Environmental prosecutors observe that one good environmental prosecution seems to carry a greater deterrent effect than "yet another" robbery conviction. This suggests that as statistics become available, they will indicate that the "burnout" rate among environmental prosecutors is considerably lower than the rate for "traditional" line prosecutors.

## Setting the Example

Successful local environmental prosecution units, such as those described in this report, can serve as important examples and sources of information for other county prosecutors. For example, Monmouth County has become a resource for other counties in New Jersey and elsewhere seeking to replicate Monmouth County's experience and

achievements. There are currently excellent networking opportunities to help prosecutors learn from model units about what works and what does not. Examples include the highly successful forums offered by the four Regional Environmental Enforcement Associations. These meetings present an opportunity to discuss in detail many issues regarding environmental prosecution. The forums are held 10 to 12 times per year at locations throughout the country. Also, the quarterly newsletters published by these associations serve as particularly effective vehicles for describing successful approaches to environmental prosecution across the Nation. The national Environmental Prosecution Center, established by the National District Attorneys Association, provides additional opportunities for networking and interchange.

## Resource Issues

Many environmental cases are highly resource-intensive. Proper investigation and prosecution of these cases may require substantial staff time, expert witnesses, sophisticated equipment, laboratory analysis, and examination of large amounts of documentary material. When a case is won, there may be a need for extensive follow-up oversight to ensure compliance with site cleanup and remediation requirements that may be part of the sentence or settlement. Even prosecutors with a particular interest in environmental enforcement often find that they have inadequate resources to handle traditional street crimes, let alone take on an entire new area requiring the commitment of substantial resources.

Resource constraints represent a real and serious problem in the establishment of local programs of environmental prosecution. They may preclude the establishment of separate environmental crimes units or require difficult caseload trade-offs for individual attorneys, who may have competing interests and assignments.

The workers at the five offices, on whose experiences this report is primarily based, are no doubt atypical. Even though they all complain, to a greater or lesser degree, of resource limitations, they surely enjoy resources far beyond those available for environmental cases in most local prosecutors' offices.

We believe, however, that with commitment and creativity, many local prosecutors can become effectively involved in environmental enforcement, adopting at least some of the approaches described in this document.

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There are several possible strategies for making do with limited resources. One possibility is to enter the environmental area selectively, that is, concentrating, at least at first, on types of cases that are usually fairly straightforward to investigate and prosecute. Such cases include solid waste violations, wetland filling, and "midnight dumping" of hazardous waste. Once the office has achieved some success in handling these types of cases, sufficient momentum and support may exist to obtain the additional resources necessary to begin pursuing more complex cases, such as those involving industrial processes and waste transportation and disposal schemes.

A second approach is to make use of outside resources to compensate for limitations on staff and budget within the office. In particular, local offices should take advantage of the many services offered by the four regional environmen-

tal enforcement associations that are funded by the U.S. Environmental Protection Agency. These services include training sessions for prosecutors and investigators, regional forums, networking and information exchange programs, legal research services, and data base research on targets of environmental investigations. Additional information regarding some of these services may be found elsewhere in this report, and Appendix B provides contact names, addresses, and telephone numbers for all of the regional associations.

### Endnote

1. Magnuson and Leviton, "Policy Considerations," p. 913.

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# Chapter 5

## Internal Organizational Issues

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### Placement of an Environmental Unit within the Office

The decision whether to establish a separate environmental crimes unit or make it part of a larger component of a prosecutor's office will generally be made by the district attorney based on anticipated caseload, available resources, and the existing organization of the prosecutor's office. The programs visited for the preparation of this report represent a variety of organizational placements. In Cook County, Illinois, the environmental unit of the State's attorney's office is part of the Public Interest Bureau. The Public Interest Bureau also handles paternity, child support, public utilities, mental health, and nursing home regulatory cases. Cook County's environmental unit is authorized to prosecute both environmental and occupational health cases. The Monmouth County, New Jersey, environmental prosecution unit is part of the major crimes section of the Monmouth County prosecutor's office. In Monmouth County, environmental crime is treated with the same commitment accorded to homicide, robbery, burglary, and arson. The decision to include environmental crime in major crime is evidence of Monmouth County prosecutor Kaye's strong commitment to environmental prosecution and an acknowledgement of the severity of the problem.

The two California county district attorney's offices examined for this study reveal distinct approaches to the prosecution of environmental crime. In Alameda County, the environmental prosecution unit is part of the Consumer and Environmental Protection Division of the Alameda County district attorney's office. In Los Angeles, environmental crime was split off from consumer protection and grouped with occupational safety and health cases in a separate unit of the Special Operations Bureau. Other divisions of the Special Operations Bureau of the Los Angeles County district attorney's office deal with juvenile crime, special crimes (crimes against peace officers, nursing home cases, and child abduction cases), hard-core gang cases, major narcotics cases, major frauds, and consumer protection.

Finally, the environmental unit of the Jefferson and Gilpin Counties' district attorney's office is part of a specialized team assigned to handle complex cases.<sup>1</sup>

### Specialization within the Unit/Office

Specialization within environmental crimes units typically occurs when caseloads are quite large. With an active caseload of about 200 cases, Alameda County's environmental prosecution unit has found that specialization best meets its needs. One deputy D.A. specializes in underground storage tank cases, another focuses on "release response" cases, and a third specializes in hazardous waste disposal cases. In Los Angeles, where the unit has about 150 ongoing formal investigations and about 600 open matters at any given time, no formal specialization has been established. However, some informal specialization has developed. For example, one attorney is particularly expert on asbestos cases, another has amassed considerable experience in petroleum industry cases, and a third is well versed in the search-and-seizure issues that are often important in environmental prosecutions.

D.A. Mielke's office in Colorado has a specialized team of two attorneys within the Complex Prosecutions Unit who are reserved to handle complex cases. The team "floats" among different types of cases according to the unit's needs, with one of the two solely responsible for organized crime prosecution.

In Cook County, environmental matters are assigned by the level of experience of the prosecutor rather than by specialty. Some environmental cases may require the filing of civil forfeiture claims, and many cases require familiarity with a variety of chemical substances. The technical issues, however, are not unduly burdensome, and the required expertise can generally be acquired on the job. Attorneys with the Cook County office note that many environmental cases are no more challenging technically than other types of criminal prosecutions. Still, prosecutors note, such cases



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are typically more time consuming to prepare for trial. Attorneys with the Monmouth County unit do not specialize in any particular way. The office has emphasized that the unit's investigative staff be well trained and have familiarity with chemicals and hazardous substances.

## Vertical Prosecution

Vertical prosecution, an approach to case management in which the same assistant prosecutor handles a case from the time it comes into the office through final adjudication, seems to be the rule in environmental cases. These are generally complex cases, many involving concurrent criminal and civil investigations, which require intense and ongoing supervision. The attorneys in the Cook County unit make it a point to be involved from very early on in the investigation and to remain on the case all the way through to final adjudication. Similarly, in Monmouth County, prosecutors are involved from the outset of an investigation.

Unit attorneys review and provide legal advice on the drafting of search warrants and commonly conduct site visits jointly with criminal investigators. In Alameda County, one environmental prosecutor is on call around the clock. The office's policy on environmental case management is the vertical prosecution of cases. This is the policy in Los Angeles as well. Early, close, and ongoing cooperation between prosecutors and investigators in environmental prosecutions, as well as continuity of attorney assignment, is extremely important in complex environmental criminal cases.

## Endnote

1. NIJ's study of the local prosecution of corporate crime recommends considering the establishment of special prosecution units to handle such cases. See Benson, Cullen, and Maakestad, *Local Prosecutors and Corporate Crime*.

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# Chapter 6

## Interagency Cooperation

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Successful environmental prosecution requires cross-disciplinary and interagency cooperation. Particularly important is the participation of environmental investigatory and regulatory agencies. Potential actors include police and fire departments, State police agencies, health departments, water and sewer districts, air quality districts, departments of public works, fire departments, and occupational safety and health agencies. Procedures and arrangements for interagency cooperation can take many forms, and the participation of law enforcement/investigative and regulatory agencies poses its own set of issues.<sup>1</sup>

### Forms of Interagency Cooperation

Because the local prosecutor's office often coordinates investigation of environmental crimes, the office can serve as an important catalyst for interagency cooperation. However, there are many approaches to interagency cooperation. Degree of formalization in interagency relations is an issue faced by most environmental prosecution programs. Two contrasting approaches are offered by Alameda and Los Angeles Counties. The Alameda County environmental unit works closely with many different investigatory and regulatory agencies in the preparation of environmental prosecutions. The prosecutor receives referrals from the county health department, the City of Berkeley Health Department, the Alameda County Water District, the State highway patrol, and local fire and police departments. All of these agencies operate independently, though there are regular monthly meetings of their representatives to discuss active environmental cases.

In Alameda County, arrangements among participating agencies are specified in written agreements. Alameda County's "Guidance Document on Hazardous Materials Incident Investigation" spells out the roles and responsibilities of all of the investigative, regulatory, and prosecutorial agencies involved. This document includes a job description for the incident commander and the lead investigator. Police responsibilities include identifying criminal and

civil violations, locating and interviewing witnesses, and assisting in the collection of physical evidence. The fire department is to call health department personnel to the scene when chemicals are involved and to assist in scene documentation and evidence sample collection. The county hazardous materials response team is assigned to procure and preserve evidence and to assist police, fire, and health officials in formulating technical questions that will aid the prosecution in the preparation of its case. The guidance document also specifies the informational content of incident reports, procedures for systematic follow-up of investigations, quarantining of materials, site access procedures, and procedures for sample and other evidence collection.

The approach Los Angeles County takes is quite different. The L.A. County Environmental Crimes Strike Force includes representatives from numerous agencies permanently assigned to develop environmental prosecutions under the county prosecutor's leadership. However, pursuant to the wishes of the chief of the D.A.'s environmental crimes division, there are no written agreements covering Strike Force procedures.<sup>2</sup> Originally known as the Hazardous Waste Strike Force, the project (which changed its name in 1989) began with the participation of five key regulatory agencies. Today more than twenty local and state agencies are involved, although the core entities remain the D.A.'s office, the L.A. Police Department, the California Highway Patrol, and the County Fire Department's Hazardous Materials Control Program (formerly in the County Health Department).

A third approach might be termed the temporary task force. In this model, agencies are brought together for formal meetings and training sessions for a period of time. Once training has been provided and personal and institutional relations have been established, a formal schedule of meetings and sessions is discontinued. Agencies work together informally and may convene on an as-needed basis. This was the approach taken by the Environmental Protection Forum set up by a State's attorney in central Florida.<sup>3</sup>

A fourth model, essentially the reverse of the central Florida approach, is exemplified by the Environmental Crimes Task Force established by the U.S. attorney's office in the Western District of New York (Buffalo). This began with line investigators and prosecutors getting together for informal discussions and evolved into a small, tight group that continued to work on cases informally without any written protocols or procedures. After the informal group had worked successfully for some time, interagency relations were reduced to formal written agreements.

In Cook County, the environmental unit participates in CHEMHIT, an interagency task force that also includes the State police, the Illinois Environmental Protection Agency, the Metropolitan Water Reclamation District of Greater Chicago, and the Illinois attorney general's office. Following meetings, State police further network with local police and fire departments. CHEMHIT's purpose is to coordinate environmental investigations in the Chicago metropolitan area. The head of the State's attorney's environmental unit, Jay Magnuson, reports that a good working relationship exists between participants and that the meetings have become a reliable source of information on environmental issues.

While Monmouth County does not have a local task force for the sharing of information on environmental cases, Ocean County, New Jersey, has instituted a program in which each local law enforcement agency designates one or more officers to accompany investigators on these cases. The county has found that its program increases local police involvement in environmental enforcement and exposes the officers to people trained in environmental investigation. At the same time, environmental investigators have the opportunity to work with officers intimately familiar with the locality. Interaction of this sort can only improve all of the players' sense that by working cooperatively they can make a difference in the battle against environmental crime.

In Jefferson and Gilpin Counties there is considerable interest in setting up a local task force to conduct environmental investigations. Local prosecutors envision a group that would include representatives from police and sheriffs' departments, the state (highway) patrol, county health departments, the association of fire districts, and perhaps other agencies as well. This force would be operational, able to work as a team, sharing and coordinating resources in particular investigations. The idea is "to marry" law enforcement and technical expertise, and while some of the goals of this plan can be achieved through cross-training of individuals (for example, John Moody, a health department

official, is also fire chief and a graduate of FLETC), it will also require the cooperation of persons and agencies with specialized training in particular disciplines.

With or without formal arrangements and agreements, the establishment and maintenance of close interagency relationships in environmental criminal investigation require time and energy. On the whole, several of the jurisdictions studied have achieved high levels of interagency cooperation and information sharing among prosecutorial, investigatory, law enforcement, and regulatory agencies. *People v. Shell Oil Company*, Civ. #H-140991-0 (Alameda Co. Super. Ct., filed April 28, 1989), demonstrates the effectiveness of the cooperative interagency approach developed in Alameda County. The case involved the widespread noncompliance of Shell service stations with California's underground storage tank laws. Shell was also charged with violations of hazardous materials response and reporting requirements, the Hazardous Waste Control Act, and unfair business competition laws. There had been a tremendous amount of foot-dragging on compliance by service stations reported by city and county hazardous materials units, a water district, and health and fire departments. These reports were aired at the county's monthly environmental enforcement network meetings. Finally, after notices of violation had been sent to many stations and compliance deadlines had passed, a civil lawsuit was filed asking Shell to answer the litany of complaints received from throughout the county. The collective pressure exerted on Shell by the cooperating agencies prompted the company to enter into a stipulated settlement the same day the complaint was filed. Similar instances of interagency cooperation could be cited for the other jurisdictions studied.

Interagency relations have not been completely trouble-free in any of the jurisdictions studied, however. The local prosecutors' relationships with health departments and other regulatory agencies has at times been strained. There have been disagreements regarding priorities. Regulatory agencies, as discussed below, may prefer a civil or administrative approach to achieving compliance rather than the criminal approach to punishment of offenders. In underground storage tank removals, the fire department's response has often been to say, "Let's get rid of the problem," or to cite the offender for a violation (lower than a misdemeanor). This complicates prosecution if the D.A. believes that a more serious charge should be pursued. In another case, the D.A. and State OSHA disagreed over how to charge a company allegedly involved in the illegal storage and transport of sodium cyanide.<sup>4</sup> The D.A. wanted to pursue a criminal prosecution of the company, but State occupational safety and health officials argued for a lesser

administrative penalty. Some jurisdictions have also encountered difficulties in asking police departments to assign specific officers to environmental investigations.

## Law Enforcement and Investigative Agencies

### *Availability of Investigators within Prosecutor's Office*

Some local prosecutors' offices have their own investigators while others rely on outside law enforcement agencies for criminal case development. The Cook County prosecutor's office has no investigators of its own. The office works with the local and State police agencies, fire departments, and State regulatory agencies. In Monmouth County, by contrast, much of the investigative work is currently done by the prosecutor's office's own unit of four investigators. Monmouth and other jurisdictions have found some police officers reluctant to get involved in investigating nontraditional offenses such as environmental crimes. Both Alameda and Los Angeles Counties and Jefferson and Gilpin Counties have their own investigators but continue to rely on outside investigators as well as their in-house staff.

Although hard evidence is lacking, prosecutors with their own investigators certainly believe that they possess an advantage over prosecutors who do not have such staff. Responsiveness and control are likely to be better when working with staff from the same agency. Staff of prosecutors' offices currently without their own investigators generally expressed the desire to have such an internal resource. Budgetary constraints were cited as the reason for the current lack of internal investigators.

### *Types of Investigative Expertise Required*

In the local prosecution of environmental crime, "good sound police work" is usually the most important type of investigative expertise required. Basic criminal investigative techniques such as witness interviewing, warrant preparation and execution, gathering and analyzing documents, collecting evidence samples, and maintaining the chain of custody of evidence are all critical. Procedures such as hazardous substance sample collection and lab analysis are best left to regulatory agencies in much the same way as chemical analysis of evidence in drug or homicide cases is acknowledged to be the proper domain of crime and pathology labs. The notion that environmental cases are too

complex is simply not borne out by the experiences of the five D.A.s' offices researched for this report. It fails to recognize the professional sophistication of investigators who for years have aided in the preparation for trial of truly confounding narcotics conspiracy and securities fraud cases. "You Don't Have to Be a Chemist to Prove Environmental Violations" is the title of a workshop on environmental prosecutions for prosecutors and regulatory and investigative personnel presented by the California District Attorneys Association. The title aptly summarizes a hard-to-dispel misconception among law enforcement, regulatory personnel, and the public in general that investigating environmental incidents should be left to scientists. Interviews with prosecutors suggest that good criminal investigators "produce" in environmental investigations just as frequently as they do in traditional criminal cases. The challenges of fighting environmental crime are strikingly similar to those of halting narcotics trafficking, and they require the same investigative skills and commitment by law enforcement.<sup>5</sup>

### *Local Police as "Eyes and Ears"*

Local police are the "eyes and ears" of the community in the detection of illegal environmental activities. Police officers and sheriffs' deputies are constantly on patrol. They dramatically increase the likelihood that illegal environmental activities will be detected.<sup>6</sup> Many cases are referred to prosecutors by local police who spot abandoned drums or the release of materials during routine patrolling. A law enforcement officers' training video on environmental criminal enforcement prepared by the Midwest Environmental Enforcement Association (MEEA) drives home the point that police, better than anyone, know law enforcement. The officer in this training film declares that in asking officers to be on the lookout for environmental crime he is really not asking them to do anything they are not already doing, "protecting people and property." "Pay attention to factories discharging substances into neighboring streams and tanker trucks passing along roads and highways through your communities," is the video's message. Furniture refinishers, plating or metal-working shops, automotive body shops, neighborhood service stations, dry cleaners, photo shops, funeral homes, and hospitals are just some of the businesses identified in the film as suspect environmental offenders that most police officers drive or walk past every day. (Information on this video may be found in Appendix B.)

Referrals by law enforcement have increased as officers become better trained in identifying environmental offenses. As police learn more about environmental crime,

they will become less resistant to involvement in environmental criminal enforcement. In Alameda County, D.A.'s office investigators reported they had never seen a police referral of an environmental crime until six months prior to a site visit conducted for this project. Alameda staff expressed the opinion that training can considerably increase the number of police referrals.

Fire departments can also be an important source of leads for prosecutors, but department personnel need training to know what to look for. For example, in Monmouth, interviewees reported that fire departments do not always know how to identify an incident involving hazardous materials or when to call in the prosecution unit for investigative assistance. The Alameda County district attorney's office provides training to fire departments in the danger posed by underground storage tank removal and similar environmental hazards. Efforts are also under way in Alameda to provide training on the prosecutorial perspective to fire department hazardous materials response personnel.

A September 1990 EPA publication entitled *Environmental Criminal Enforcement: A Law Enforcement Officer's Guide* offers a good summary of the potential role of law enforcement in environmental enforcement.<sup>7</sup> Wider distribution of these materials to police departments might help to change the persistent widespread perception of law enforcement agencies that they are not appropriate participants in the war on environmental crime.

## Regulatory Agencies

### *The Role of Regulatory Agencies*

Regulation and prosecution are, ultimately, equal means of protecting the environment and the public. Although sometimes tension between prosecutors and regulators exists, they can and do work together cooperatively. One of the roles of regulatory agencies in criminal enforcement is to notify prosecutors of potential environmental crime. Though not considered law enforcement agencies, regulatory agencies also play an important role in successful criminal investigation of environmental crime. Health departments, environmental protection agencies, and sewer authorities are the types of regulatory agencies most likely to become key actors in local environmental criminal prosecution. Local or State environmental regulatory agencies are those to which U.S. EPA and/or the State environmental department delegates authority to implement Federal or State environmental regulations. In most States the State envi-

ronmental agency is the EPA-designated entity with overall responsibility for regulatory implementation. County and local health departments assist in implementation, particularly regarding hazardous waste and hazardous materials, through inspections, administrative actions, and other monitoring functions. More emphasis should be placed on utilizing local health departments, sewage authorities, and building inspectors as sources of information and assistance.

The variety of agencies involved may result in difficulties in coordination. Alternatively, it may increase effectiveness by expanding the pool of sources from which enforcement personnel can obtain information and by subjecting the regulated community to more attention and observation. For example, businesses may be inspected by several agencies, including fire departments, the Occupational Safety and Health Administration or similar State agencies, and in some jurisdictions the air and water quality control board. Although none of these entities are specifically charged with enforcing hazardous waste regulations, they may notice violations and refer these to the appropriate enforcement agencies.<sup>8</sup> Inspection by any particular agency may have the effect of improving compliance by the inspected business with *all* health and environmental regulations.

While conflicting objectives and turf issues may produce tension, another obstacle that must be recognized and overcome by prosecutors involves the statutory and regulatory framework itself. Environmental statutes are drafted broadly to assure that they assert jurisdiction over all activities of concern. As a consequence they sometimes assert jurisdiction over activities of little or no real environmental concern. Yet almost all violations of the statutes may be prosecuted either civilly or criminally. Some do not warrant any prosecution, some warrant civil, and some criminal. Sorting this out requires a fairly broad perspective on what is important. Prosecutors and regulators may not always make the same decisions, but attempts to do so in advance of investigations or prosecutorial decisions may make the prosecutor's efforts serve larger programmatic goals and have a more focused deterrent effect. They can also avoid prosecution of trivial offenses.

A 1987 Rand Corporation study of illegal hazardous waste disposal in three states found a striking diversity of arrangements regarding regulatory agency participation in enforcement. The study notes that Massachusetts and Pennsylvania have highly centralized systems, whereas in California most regulatory authority is delegated by the State to county health departments.<sup>9</sup> In a few cases, implementation

is even delegated to city health departments, as is the case with the city of Berkeley, California. In Alameda County, among other jurisdictions, the County Health Department is the main regulatory agency that the environmental prosecution unit works with on a daily basis. The extent of county level authority and activity in environmental regulation derives from a formal memorandum of understanding (MOU) between the State and the County Health Department. Although the State retains statutory responsibility for enforcement, some of its regulatory authority is delegated on a county level to the health officer. The health officer is deputized to act as the State's agent in the permitting and enforcement of storage, transportation, and disposal of hazardous waste. The MOU mandates coordination between the State and the county, including monthly meetings and information exchange.

With responsibility for the regulation of 3,000 to 4,000 generators of hazardous waste as well as handlers of hazardous materials and underground storage tank operators, the Alameda County Health Department oversees a massive pool of potential violators. Most case referrals follow a regulated party's failure to comply with a notice of violation sent by the Health Department. By formal arrangement the D.A.'s environmental prosecution unit receives copies of all violation notices issued by the Health Department. Following a third notice of violation, if a noncomplying party continues to ignore the Health Department's call for compliance, civil or criminal action is warranted. Such referrals are deemed to allege all of the elements of a criminal offense charged in the Health Department's notice of violation.

The Alameda prosecution unit also works closely with the Alameda County Water District (ACWD). ACWD may be contacted by a fire department or other agency that has identified a leaking underground storage tank. Normally this information would be referred to the Water Quality Control Board for enforcement or technical advice, but as the board is short-staffed and often unable to handle these cases, ACWD has been asked to step in as technical middleman. ACWD will then supervise mediation and cleanup and make sure the investigation proceeds in a timely manner.

The Los Angeles D.A.'s office works with a variety of regulatory agencies, including the Hazardous Materials Control Program of the County Fire Department (formerly in the County Department of Health Services), City and County Sanitation Districts, Departments of Public Works, and the regional Air Quality Management District. The Hazardous Materials Control Program is charged with

regulating generators of hazardous waste within the county, while the State Health Department has responsibility for regulating TSDFs. However, the lines are often blurred, as cases may involve both generation of hazardous waste and TSDFs, and the Hazardous Materials Control Program is present at all stages.

In Cook County, the environmental unit of the State's attorney's Public Interest Bureau receives referrals from the Illinois EPA Environmental Response Unit and the Metropolitan Water Reclamation District of Greater Chicago. Illinois EPA reports primarily abandonment of drums and spills, while the water reclamation district commonly refers cases of criminal disposal into the water supply.

Regulators perform most compliance inspections and, in many jurisdictions, maintain the unit that responds to hazardous materials incidents such as accidents, spills, and fires involving hazardous materials. Because regulators often have the most information on the offending firm, they are a critical source for leads and other information on crimes committed.

In Monmouth County, the D.A.'s environmental unit has proposed that regulators monitor compliance records and hazardous waste manifests to identify potential criminal violators for proactive investigations. In general, prosecutors in the five D.A.s' offices studied for this report repeatedly emphasized the need for a more proactive approach. However, due to resource constraints, most local prosecutions continue to be reactive rather than proactive. In the future, a more proactive approach using data bases on inspection and compliance may be used to assist prosecutors in identifying suspected environmental criminals. For now, however, due to resource limitations and uncertainty about the number and location of generators, most environmental cases begin with tips from employees or other citizens rather than with information obtained during regulatory inspections.<sup>10</sup>

In many jurisdictions regulatory agency personnel are responsible for preserving samples of suspect hazardous substances for lab analysis. Sample taking is a critical part of the criminal investigation and requires technicians who are well versed in proper hazardous substances sample collection techniques. Likewise, these professionals must be "current" on proper hazardous substances safety procedures so as to protect themselves, their co-workers, and the public from injury or illness. Site samples, which are generally collected by regulatory agency personnel, must be representative of the section of the site from which they are taken. In Cook County "split," or duplicate, samples are

taken at the scene because defendants are entitled to their own samples for analysis by their experts. Environmental unit attorneys note that for representativeness, samples taken by "core bore" (a procedure to extract samples from the approximate center of the total substance) are often preferred to those taken by "surface scraping."<sup>11</sup> Unfortunately, a lack of funding sometimes precludes "doing it right," and prosecutors have to settle for what they can get.

Alameda County takes a cooperative approach to sample collection. With its technical equipment and the expertise necessary to process environmental crime scenes, the Department of Health conducts the actual sampling while the D.A.'s investigator supervises the chain of custody. The investigator and Health Department officials often confer regarding the most likely location on the site to take samples that will be representative of the area of interest. Working together enhances both agencies' understanding of the needs and concerns of the other.

Conflicts could arise at the site of an environmental incident between the interests of public safety and evidence collection for a criminal prosecution. However, in every jurisdiction studied, the strict policy is that public safety must always take precedence, even if this means losing evidence or seriously jeopardizing a criminal investigation. Universal concern with public safety has prevented the emergence of conflict on this point.

Regulatory agency staff who evaluate documentary and physical evidence to determine whether the continued operation of a facility would jeopardize the public's health play another important role in criminal prosecution.<sup>12</sup> Regulators may be called upon to testify at trial as expert witnesses on matters within their area of expertise or about which they have personal knowledge. A witness who has spent years monitoring regulatory compliance and is intimately familiar with the behavior of a particular firm on trial can make a profound impression on a judge and jury. Moreover, the experience of testifying against an environmental defendant can be extremely empowering for a regulator used to "slapping the wrists" of offending firms. Indeed, using regulators as witnesses may help to foster ties between prosecutors and regulators. In fact, there is room for improvement in these relations, as the next section demonstrates.

New Jersey's State environmental prosecutor, Steven Madonna, notes that poor communication is a problem that flows both ways. Sometimes agencies that refer cases to the prosecutor never hear about what happened to the case. Moreover, criminal procedure may be foreign to regulators,

and there may be no one in the prosecutor's office available to explain the criminal prosecution process.

There is a need for better two-way communication, according to Madonna. Prosecutors need to tell regulators what is happening with their referrals: is a case being prosecuted, being sent back for administrative action, or on hold? Once regulatory personnel understand criminal procedure, they may be able to use it to their advantage — for example, they may achieve compliance by advising a regulated company that if it does not comply, they will refer the case for criminal prosecution.

### *Problems of the Regulatory "Mind-Set"*

A recurrent theme in environmental enforcement is the tension between regulators whose natural focus is on obtaining present compliance with regulations and prosecutors whose primary objective is to punish offenders and thereby deter future offenders. Many prosecutors believe that a compliance program has a better chance of success if it is backed by a real threat of criminal action for past or continuing noncompliance. Differences between law enforcement and regulatory agencies may weaken the criminal prosecution effort. For example, regulators' emphasis on compliance may mean that they are not trained in evidence chain of custody and other prosecution procedures. Enforcement agencies complain that regulators do not investigate or refer cases quickly enough, so the trails grow cold.<sup>13</sup> Prosecutors interviewed for a Northeast Environmental Enforcement Project study of environmental offender characteristics confirmed this. They noted a lack of familiarity with aspects of criminal justice processes on the part of environmental agency inspectors. The area perceived to be most in need of improvement was the conduct of interviews with officials and staff of suspect firms.<sup>14</sup>

The perception that the regulatory "mind-set" is an obstacle to intensified local prosecution of environmental crime was expressed by attorneys with the Monmouth County prosecutor's office. According to these prosecutors, the regulators do not use the enforcement tools at their disposal. The whole regulatory approach is very frustrating to them and seems to be completely at odds with the criminal enforcement or prosecutorial approach.

Although relations between the Alameda D.A. and regulatory agencies are generally quite good, environmental unit attorneys there also pointed out the problem of conflicting priorities. They noted that while enforcement and prosecution are the primary concern of prosecutors, regulators remain focused on compliance or, alternatively, "just get-



ting the guy out of town." The result may be the displacement of the offender to a neighboring county where the despoiling of the environment and exposure of the public to a health hazard is resumed unchecked.

Just how disparate the priorities of regulators may be from those of prosecutors is demonstrated by the Alameda County Water District's (ACWD) view of criminal prosecution. For ACWD, the deterrent effect of prosecution lies not in the punitive impact of fines and the threat of incarceration but rather in demonstrating to defendants a more environmentally sound option for managing their business. The logic of this perspective is that once shown the cleaner way, businesses will pursue that approach. From the regulatory standpoint, compliance rather than prosecution is the favored approach. Regulators tend to view the glass as half full and they want to fill it up by obtaining compliance from the violator. The D.A. meanwhile sees the glass as half empty and seeks to prosecute the thief who stole the missing half.

Regulators tend to move cautiously. They are more likely to have ongoing relationships with firms and to be more sensitive to business pressures for seeking noncriminal enforcement.<sup>15</sup> Rather than pursue precipitous criminal prosecution or even harsh civil sanctions, which the regulator fears may drive the offender further into noncompliance and permanently impair his or her ability to comply in the future, regulators tend to favor a cooperative and patient approach to noncompliant firms. An illustration of the tendency of regulators to give companies multiple opportunities to comply with environmental regulations is the case that provided the impetus for the formation of the Monmouth County environmental prosecution unit. In *State of New Jersey v. Imperial Oil/Champion Chemical*, Indictment No. 87-02-0287, criminal action was initiated only after a long period of administrative supervision by the Monmouth County Department of Environmental Protection (DEP) which had failed to produce corrective action. The case charged defendants with the illegal storage and disposal of hazardous waste and violation of water pollution laws. The defendants' defective filtering of oil had resulted in PCB contamination of a county drinking-water source. Only when criminal action was finally initiated did Imperial Oil and its parent company, facing a formidable case, plead guilty and agree to pay an \$800,000 penalty. In this case, only the threat of criminal prosecution and debarment from government contracts was able to alter the company's behavior.

Dealing with regulators who will consider prosecution only as "a last resort" can be frustrating for prosecutors. In

*People v. Robert A. Shearer, et al.*, Civ. No. 656387-5 (Alameda Co. Super. Ct., filed October 1989), a California case involving the illegal storage and transportation of sodium cyanide, the State's OSHA wanted to pursue a lesser administrative penalty. Only through the considerable efforts of the Alameda D.A. was the environmental prosecution unit able to bring a civil action against the company. Charging the company involved overcoming the opposition of the fire marshal, among others, who, according to a prosecutor, just "wanted . . . [Shearer] out of town by sundown."

Criminal prosecution becomes an uphill battle where regulators view the defendant firm as a client and the D.A. as a collection agency. In Colorado, for example, even when the need for a judicial approach is acknowledged, the Health Department tends to view most environmental violations as civil offenses. Thus, the agency refers the vast majority of cases to the A.G. rather than the D.A. With only one part-time investigator for criminal environmental matters, the Health Department has clearly demonstrated its preference for civil enforcement where administrative procedures are not proving effective. Only after the total failure of a firm to comply with a cleanup order will the Health Department refer a case for criminal prosecution. Even then, however, the defendant company benefits from its characterization as a firm "working with the Health Department" toward a rectification of the problem.

In the negotiated plea of *State of Colorado v. Colorado Chemical Specialties, Inc., Ralph Mika and Ronald Drake*, 88 CR 181 (Dist. Ct. Golden), defendants agreed to pay a \$100,000 fine (all but \$10,000 of which was suspended) and to clean up a parcel of land contaminated by their illegal dumping of hazardous waste. Defendants were placed on unsupervised probation for eight years, but two years into the probation period serious disputes arose between the company and the State Health Department, the agency responsible for monitoring the clean up. The company has resisted the Health Department's supervision. Jefferson and Gilpin Counties' staff believe that the Health Department may be afraid of losing control of environmental enforcement if it refers too many cases for criminal prosecution. In their efforts to enlist greater regulatory agency cooperation in and support for environmental prosecution, it might help prosecutors to be more attentive to regulators' perception of environmental enforcement as their "turf." D.A.s are the newcomers to environmental enforcement and are likely to make more friends by acknowledging the historic contributions of regulators to enforcement than by chastising them for not pursuing a more aggressive enforcement strategy. In some jurisdictions, regulators willingly play an integral role



in environmental prosecution programs. In Los Angeles County, health inspectors have been involved with the Environment Crime Strike Force from the very beginning. They are extremely committed to criminal prosecution and aggressive in their approach to investigation of cases.

### *Laboratory Resources*

Testifying before a 1989 U.S. Senate Subcommittee on Toxic Substances, Environmental Oversight, Research and Development, Jefferson and Gilpin Counties' D.A. Donald Mielke identified the frequent unavailability of adequate laboratory and technical resources as a major stumbling block to effective local prosecution of environmental crime. The laboratory analysis needed in many environmental prosecutions requires a degree of scientific sophistication that may not always be available in State and local laboratories. Sample collection procedures and testing techniques are constantly changing and require state-of-the-art equipment and technical training to be accepted in court.

As the need for scientific support of local environmental prosecutions has become more apparent, some States have set up laboratories to analyze hazardous materials samples. Typically, this function has been assigned to State health departments, in part because they have seemingly similar regulatory responsibilities. Unfortunately, health department personnel are not always well trained in forensic procedures necessary to the proper testing and preservation of evidence and maintenance of the chain of custody necessary to make that evidence admissible at trial.<sup>16</sup>

D.A. Mielke has put forth two alternative strategies for a resolution of the environmental laboratory problem. The first idea calls for transferring much of the civil investigatory work load from the EPA's lab to the various regional EPA labs across the country. This would free the EPA lab to devote itself to criminal matters. Mielke's alternative plan calls for increasing the abilities of EPA's regional labs to perform chemical analysis for criminal prosecutions. One attractive feature of this latter plan is that, if technical assistance were available at the regional level, law enforcement officers and their toxic materials sample would not have to travel as far to reach the lab. Moreover, the EPA's scientists and engineers would not have far to travel to testify as expert witnesses. Finally, the use of regional laboratories could help to enhance the communication between the EPA's scientific personnel and local law enforcement officers in the field.<sup>17</sup>

In some cases, prosecutors have turned to local police labs and national facilities such as the FBI's and EPA's Denver laboratory. This is an excellent laboratory and "the greatest

friend of local law enforcement," according to Donald Mielke. But, with only forty scientists and thirty field engineers, it is hard-pressed to meet the need for analysis of samples in criminal cases from all over the U.S. Furthermore, with the present level of staffing, it is difficult to expect that EPA scientists will be able to testify in court cases brought by local prosecutors from across the entire country.<sup>18</sup>

Two common problems with understaffed laboratories are the loss of samples and slow turnaround time on analysis. Both occurrences can effectively incapacitate or at least drastically impede criminal prosecution. Several Colorado cases involving a furniture refinishing business and a car dealership exemplified these problems. In the first case, samples of toluene were lost, and in the second an analysis of sludge samples was completed only after the statute of limitations on bringing the action had expired. In both cases the inefficiency of the public laboratory effectively incapacitated the prosecution and prompted the D.A. to use considerably more costly private laboratories in the future.

In Cook County, State and local laboratories are often backed up due to the heavy volume of drug cases in the system. Though a legitimate area for concern among prosecutors, the State's attorney's office has not encountered any chain of custody problems involving laboratory analysis of samples. According to Cook County prosecutors, laboratory work is not only very slow but also extremely expensive. In one case the office spent \$138,000 on laboratory analysis. Moreover, such figures are likely to continue to be commonplace. Prosecutors are increasingly finding that the quality of the work and the service provided by private laboratories justifies the greater expense.

### **Endnotes**

1. In general, effective prosecution of corporate crime requires cross-agency cooperation and coordination. See Benson, Cullen, and Maakestad, *Local Prosecutors and Corporate Crime*.
2. A more extended discussion of the Los Angeles Strike Force appears in a separate NIJ Program Focus: T. M. Hammett and J. Epstein, *Los Angeles County Environmental Crimes Strike Force* (Washington, D.C.: National Institute of Justice, 1993).
3. M. A. O'Brien, "The Environmental Protection Forum," *FBI Law Enforcement Bulletin* (Washington, D.C.: Federal Bureau of Investigation, April 1991), pp. 9-12.

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4. *People v. Robert A. Shearer, et al.*, Civ. No. 656387-5 (Alameda County Superior Court, filed October 2, 1989).
  5. Yelverton, "Expanding the Role of District Attorneys," p. 7.
  6. Mielke, "Bringing District Attorneys into the Enforcement Community," p. 4.
  7. See also M. Wright and W. Imfeld, "Environmental Crimes: Investigative Basics," *FBI Law Enforcement Bulletin* (Washington, D.C.: Federal Bureau of Investigation, April 1991), pp. 2-5.
  8. Hammitt and Reuter, *Measuring and Deterring*, pp. 26-27.
  9. *Ibid.*, p. 26.
  10. *Ibid.*, p. 25.
  11. The method of sampling chosen will vary depending on its intended use. In certain cases, "surface scraping" will be the proper sampling method.
  12. Wright and Imfeld, "Environmental Crimes," p. 4.
  13. Hammitt and Reuter, *Measuring and Deterring*, pp. 27-28.
  14. Rebovich, *Understanding Hazardous Waste Crime*, p. 54.
  15. Hammitt and Reuter, *Measuring and Deterring*, p. 28.
  16. *Ibid.*, p. 6.
  17. *Ibid.*, p. 11.
  18. *Ibid.*, p. 5.

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# Chapter 7

## Interjurisdictional Issues

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### Sharing Information across Jurisdictional Lines

Many environmental crimes are complex and involve individuals and firms in different jurisdictions. In such instances, it is extremely important for authorities to share information across jurisdictional boundaries. In an effort to foster better information sharing, the EPA funds four regional environmental enforcement groups. Originally formed in 1980 in response to media and public pressure regarding hazardous waste, the Northeast Environmental Enforcement Project (NEEP) was the first of the regional organizations. It has grown to a current membership of 14 States. The primary purpose of the NEEP is to (1) promote and coordinate investigations among member States, (2) provide technical assistance, (3) provide an information bank for all public records information with respect to the various components of the hazardous waste industry, and (4) develop the law enforcement partnership and provide annual training on environmental crimes investigations to all levels of government.<sup>1</sup> Through their individual enforcement efforts, NEEP's founders realized that hazardous waste violations were far too numerous, transient, and diverse to be dealt with by one jurisdiction. A regional approach was viewed as necessary in order to contend with this highly mobile industry.<sup>2</sup>

NEEP's information exchange network assembles public records information on violations, licensing, license revocation, civil complaints, criminal indictments, and other matters relevant to actual or potential violations of hazardous waste legislation. A good illustration of the effectiveness of the network is that it makes it much more difficult for a TSD operator who has lost his or her license in one member State to transfer operations to a neighboring member State. Toward the goal of providing members with the most comprehensive information on the regulation and enforcement of hazardous waste activities, NEEP, together with the New Jersey Division of Criminal Justice, issued

*Understanding Hazardous Waste Crime: A Multistate Examination of Offense and Offender Characteristics in the Northeast* (recently published as *Dangerous Ground: The World of Hazardous Waste Crime*). This widely disseminated publication was designed as a resource tool that would be helpful to managerial and enforcement personnel in detecting and investigating hazardous waste crime. The consensus of NEEP participants was that crime-specific data concerning hazardous waste offense and offender criminal characteristics were essential to the success of environmental enforcement programs across the country.<sup>3</sup> The research study is an excellent example of constructive collective thinking on environmental crime.

In recent years the EPA has used NEEP, an effort jointly funded by the EPA and the participating States, as a model for the establishment of three other multistate regional environmental organizations. Set up to help meet national environmental enforcement goals, the three groups are the Midwest Environmental Enforcement Association, the Western States Hazardous Waste Enforcement Network, and the Southern Environmental Enforcement Network. Even the names of some of the organizations reflect their multimedia approach to environmental enforcement. The groups have shifted away from a narrow focus on hazardous waste enforcement to one that includes surface water and groundwater issues, pesticides, and air pollution as well as hazardous waste.

The Cook County State's attorney's office is a member of MEEA. According to prosecutors, the association's members share information at their regularly scheduled meetings on active cases, ongoing investigations, and policy and environmental legislation. The association's straightforward law enforcement training film (discussed earlier) enthusiastically endorses the view that law enforcement has a major role to play in detecting and prosecuting environmental crime. The video represents the cooperative multistate approach to environmental enforcement at its best.

Local prosecutors nationwide are members of the Regional Enforcement Associations and have access to the training, information, and networking resources available through these organizations. Many statewide district attorney groups are represented on the associations. For example, the California District Attorneys Association, the Statewide Association of Public Attorneys of Utah, and the Colorado District Attorneys Council have representatives on the Western States Hazardous Waste project. The Regional Enforcement Associations' membership includes 47 States and 3 Canadian provinces: Ontario, Alberta, and British Columbia. The information services provided by the Regional Enforcement Associations are extensive. The Western States project, for example, is making available State and local criminal case information, a brief bank, model documents, business financial records, and expert witness services, among others. The four associations' information programs, linked electronically, represent a nationwide information network for State and local prosecution of environmental crimes.

Sometimes international as well as interjurisdictional coordination may be required in the battle against environmental crime. Today it is not unusual for environmental criminals to haul hazardous waste across international borders for improper disposal in nations with less effective criminal environmental enforcement. *United States v. Franco and Torres*, U.S. District Court, Central Dist. CA, No. 90-3520-TJH, involved a scheme to transport hazardous waste through California and illegally dispose of it in Mexico. This case was discussed in detail in Chapter 3.

## State-Level Prosecution

While the focus of this report is on local prosecution efforts, it is important for readers to be aware that there are a number of aggressive and effective State-level environmental prosecution programs. State programs may be important allies and supporters to local prosecutors as they develop cases. Below, the efforts of several State-level programs are sketched.

The Arizona attorney general's office instituted an environmental enforcement program in 1984, in response to incipient organized crime involvement in the State's hazardous waste industry. The Attorney General's program centers on a team approach involving a number of regulatory and investigative agencies at the Federal, State, and local levels. Three regional task forces, coordinated through the A.G.'s office, have been created in Arizona to develop environmental prosecutions.

Within the attorney general's office, the environmental unit is staffed by trained and experienced prosecutors and criminal investigators with full police powers. All staff have been cross-trained in criminal investigative procedures and the technical aspects of environmental crimes.

The Massachusetts Department of Environmental Protection (DEP) employs a strike force model to attack environmental crime in the Commonwealth. The force consists of a small number of experienced environmental criminal investigators who work closely with the attorney general's environmental prosecution unit.

The DEP has also created a hotline that citizens can call to report suspected environmental violations. Since its inception the toll-free number has proved to be an important source of tips on environmental cases. Although many of the calls involve relatively localized problems such as a neighbor's pouring used motor oil down the drain, other calls have led to the investigation of large-scale suspected violations of State environmental law. The Department of Environmental Protection employs helicopter flyovers as well as routine inspection visits by the department's staff of trained inspectors of the workplaces of suspected and identified environmental wrongdoers.

In 1982 the New Jersey attorney general's office formed an environmental unit and asked each county in the State to designate an assistant prosecutor and a county investigator who would become well versed in environmental statutes. In 1990, New Jersey Governor James Florio created the position of State environmental prosecutor to coordinate the State's response to environmental crime. In order to achieve an effective coordination and prioritization of the criminal, civil, and administrative aspects on the State level, State Environmental Prosecutor Steven Madonna works closely with the county prosecutors to make decisions regarding who will take the lead on cases and by what route (civil or criminal) they will be pursued. The State environmental prosecutor has the last word on such decisions, but the process is viewed as a cooperative one. Madonna oversees the prosecution of "priority environmental cases" and coordinates approaches to cases that cross State lines. Also responsible for fostering the development of county environmental task forces and providing them with training, Madonna is the Nation's first State environmental prosecutor with this role.

Madonna's office is also charged with ensuring that the county prosecutors receive the necessary support and resources to complete county-level investigations, and ensuring that matters of multicounty or statewide impact are

referred to the State grand jury and the State Division of Criminal Justice, either as the sole prosecuting agency, or in a cooperative mode with the county prosecutors. The State environmental prosecutor also works in concert with established environmental groups to harness and focus their eyes and ears as environmental enforcement "deputies" and to utilize their insights, energies, and expertise.

The Environmental Enforcement Section of the Ohio Attorney General's Office has advocated for and subsequently built an aggressive program on an important statutory revision. In its first criminal hazardous waste case, the Ohio environmental prosecutors learned an important lesson. In *State v. Campbell*, 13 Ohio App.3d 348, 469 N.E.2d 882 (1983), the Environmental Enforcement Section learned that a potential defense of environmental defendants was to claim a lack of knowledge or understanding of the complexities of the hazardous waste regulatory system. The attorneys recognized that the "knowing" culpable mental state in Ohio Revised Code § 3734.99 served as an incentive to handlers of hazardous waste to avoid becoming familiar with legal requirements for handling such materials. Claims of unfamiliarity with the regulations would make proof of knowledge more difficult.<sup>4</sup>

In 1984, as a result of this experience the attorney general advocated to the Ohio general assembly that the culpable mental state for hazardous waste crimes be reduced from "knowing" to "reckless." The general assembly agreed and enacted a bill that resulted in a revision of the State's statute on culpable mental state. Ohio Revised Code § 3734.99 provides Ohio's environmental prosecutor with an important strategic advantage over jurisdictions that employ a "knowing" mental state for environmental crimes.<sup>5</sup>

The degree of State-level prosecution of environmental crime varies from State to State. State environmental crimes units may be better equipped logistically to deal with environmental violators who cross municipal and county lines.<sup>6</sup> In many instances, however, as is the case in Monmouth County, small sites may not attract the attention of the State. Timing is another consideration. Unless a case presents an extreme emergency, the State will probably not be able to respond as quickly as the local or county unit. According to Monmouth county prosecutors, the county should do the "bread and butter" cases.

Under New Jersey's Criminal Justice Act, the A.G. may supersede the county prosecutor on any criminal matter. In practice, however, this rarely occurs. The main concern is that the case be properly handled and that the county have

the resources to manage its prosecutions. Steven Madonna of the New Jersey A.G.'s office likens environmental cases to drug prosecutions, with the exception that environmental cases are, on the whole, more dangerous to investigators because of hazards at the scene. Sample collection issues in environmental cases are often more complex than in "traditional" criminal investigations. Madonna believes that the State should undertake the long-term proactive environmental investigations that may be too taxing on a county's resources.

In Illinois, the A.G.'s role in environmental prosecutions is severely limited by his or her lack of access to the grand jury. Consequently, there is little competition for the spotlight between the A.G. and the State's attorneys.

Under California law, the attorney general has primary responsibility for civil and appellate matters but has no original jurisdiction in criminal cases. However, if the district attorney declines to prosecute a case, the A.G. may pursue the prosecution. Also, if a district attorney's office declines prosecution, the case can be referred to the A.G. for possible civil proceedings.

New York Attorney General Robert Abrams has taken an aggressive posture on State-level environmental prosecutions. In *People v. Pymm Thermometer*, No. 930/86 (N.Y. Sup. Ct., Kings City, Nov. 13, 1987), the New York State A.G.'s office teamed up with the Brooklyn D.A. to obtain a 21-count indictment against a Brooklyn electroplating company, its owners, and a foreman for unlawful management of hazardous waste; endangering public health, safety, and the environment; violating sewer authority pretreatment standards; tampering with monitoring equipment; and reckless endangerment. After a month-long trial, a Brooklyn jury convicted the company and two of its officers of assault with a dangerous instrument as well as other charges. The instrument in this case was mercury, a toxic substance as dangerous as a knife or gun.<sup>7</sup> A few months after viewing a videotape of the search warrant executed against the company, A.G. Abrams wrote, "It depicted Dickensian conditions in an antiquated factory; large open vats of plating solutions without required ventilation, pools of chemicals on the work floor; leaking drums piled high. . . ."<sup>8</sup> In the occupational safety field Abrams sees the role of the State prosecutor as stepping in to fill a void caused by weak Federal enforcement of occupational safety. Abrams's acknowledgement of the severity of the problem of environmental crime is a welcome one. His office has followed up with aggressive criminal prosecution.

## Federal Activity

The Federal government's involvement in criminal environmental prosecution is typically confined to very major cases. Traditionally, Federal participation has come in the form of technical assistance offered and laboratory analysis conducted by the EPA's laboratory in Colorado (it has recently moved to Washington) or FBI assistance on interjurisdictional matters. The EPA's involvement in *People of the State of Colorado v. Colorado Chemical Specialties, Inc., Ralph Mika, and Ronald Drake*, 88 CR 181 (District Ct. Golden), helped develop a close working relationship between the agency and the Jefferson and Gilpin Counties' D.A.'s office. Similarly, the United States Department of Justice (DOJ) and EPA have played important roles in international environmental cases such as *Franco* (discussed earlier).

Enforcement of air pollution laws tends to be dominated by Federal involvement. However, because of the severity of its smog problem, Los Angeles is an exception among counties for its active criminal enforcement of air pollution statutes. The South Coast Air Quality Management District (covering the Los Angeles area) has 14 investigators, and all its criminal cases are referred to the D.A.'s office. The District also has its own prosecutor, who handles civil and administrative matters and makes the determination whether a case is to be handled through civil or criminal processes. A case referred to the D.A. for criminal prosecution but declined may be referred back to the Air Quality Management District or to another regulatory agency for civil enforcement action. The EPA has promised greater Federal

participation in criminal environmental enforcement in the 1990s. Even as it has done so, however, EPA has declared that State rather than Federal authorities should have the front-line responsibility for enforcement of most of the environmental laws.<sup>9</sup>

## Endnotes

1. V. A. Matulewich, "Environmental Crime Prosecution: A Law Enforcement Partnership," *FBI Law Enforcement Bulletin* (Washington, D.C.: Federal Bureau of Investigation, April 1991), p. 24.
2. Rebovich, *Understanding Hazardous Waste Crime*, p. iii.
3. Ibid.
4. Celebrezze et al., "Criminal Enforcement," p. 227.
5. Ibid.
6. Matulewich, "Environmental Crime Prosecution," p. 23.
7. R. Abrams, "Safeguarding the Workplace: Environmental Hazards May Be Criminal," *Trial* (June 1991): 20.
8. Ibid., p. 19.
9. U.S. Environmental Protection Agency, *Enforcement Four-Year Strategic Plan*, p. 58.

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## Chapter 8

# Developing and Trying Cases

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### Sources of Information on Environmental Cases

In addition to the law enforcement and regulatory agency staff discussed earlier, individual private citizens who are aware of what to look for can be an important source of information on environmental crimes. *The Public's Role in Environmental Enforcement*, a March 1990 EPA publication, offers a good overview of how the public can help stop pollution and environmental violations. It describes approaches that can help the reader deal with the types of violations most often encountered by the public. The three most important pieces of advice are (1) to make full and careful observations of the problem, (2) to commit these observations to writing, and (3) to report the observations to the proper authorities.<sup>1</sup> The Midwest Environmental Enforcement Association is making a video to heighten public awareness of environmental crime and to encourage the public to provide authorities with information on suspected violations.

In Cook County, citizen calls to regulatory or law enforcement agencies often initiate investigative or remedial responses to illegal disposal or toxic exposure. Indeed, multijurisdictional studies confirm that most cases originate with tips by unrelated citizens or current or former employees of the suspect firm.<sup>2</sup> The joint Northeast Hazardous Waste Project (NEHWP)<sup>3</sup> / New Jersey Division of Criminal Justice study of offense and offender characteristics in the Northeast found that most cases were reported by neighbors of firms where wastes were being handled; they were alerted by direct observation of activities, by chemical odors, or by extraordinary nocturnal activities or noises.<sup>4</sup> Local law enforcement officials and prosecutors play an important role in fostering public awareness of environmental crime by encouraging community members to report suspicious nighttime trucking activity, unpleasant odors emanating from neighboring land, and sewage discharges into lakes and streams. Business competitors,

present and former disgruntled employees, and environmental groups are also potentially important to detection efforts. Prosecutors, however, report receiving little assistance from environmental groups. According to D.A.s, community and environmental groups tend to misunderstand criminal procedure and the rules of evidence and expect prosecutors to act in ways they are not empowered to do. This may lead to frustration and anger on the part of the advocacy groups.

Citizen tips are an important source of information on environmental crimes, and the public should be encouraged to provide information to the appropriate enforcement authorities. However, at least one study has found that the majority of tips are of low quality, and many agencies are overwhelmed with citizen complaints or reports to toll-free telephone hotlines.<sup>5</sup> As the public becomes better educated about environmental crime, the proportion of tips that are of real value may increase.

The Rand Corporation study of hazardous waste enforcement found that the primary sources of leads regarding illegal disposal of hazardous waste are regulatory inspections, surveillance, and emergency-response operations. Trash collectors on occasion find hazardous waste mingled with other solid waste, and workers have been injured when these wastes spill, ignite, or explode during compaction. The elaborate hazardous waste manifest system has not yet proven useful for developing cases, in part because most States have apparently not yet developed adequate data-processing systems.<sup>6</sup>

### Civil versus Criminal Lawsuits

As noted earlier, many environmental offenses can be addressed through criminal prosecution or civil lawsuits. It is up to the prosecutor to decide the best course of action in each case. Most prosecutors believe that the deterrent effect of criminal conviction on environmental offenders is con-

siderable. According to D.A. Donald Mielke, a leading advocate for expanding the local prosecution of environmental crime, "experience has taught us that true polluters view . . . [civil and administrative action] as a part of the cost of doing business. Until a potential for criminal prosecution is added to the equation, many of these environmental criminals will continue to illegally store, transport and dump hazardous wastes in blatant violation of the law." Many prosecutors also feel that the deterrent effect is particularly strong on major businesses and their officials and that criminal enforcement may tip the scale as would-be polluters weigh financial savings against punitive consequences.<sup>8</sup>

Procedurally, many cases can be effectively handled both civilly and criminally. Under some circumstances, both civil and criminal proceedings may be initiated concurrently, and if this occurs, parallel prosecution issues may arise. Cook County has relied on criminal prosecution coupled with a civil cost-recovery action. In addition, sometimes suits for injunctive relief and cost recovery, as well as criminal charges, may be pending simultaneously. Since the Supreme Court's decision in *U.S. v. Halper*, 490 U.S. 435 (1989), holding that the double jeopardy doctrine barred a civil suit for recoupment following a criminal prosecution, concurrent civil and criminal actions have exposed the prosecution to defense motions seeking dismissal of the "second" action. The State's attorney's office has not had problems with parallel prosecution, but it has had motions filed against it for abuse of prosecutorial discretion. This has occurred when it has filed criminal charges against defendants who allege they were improperly charged under the criminal statutes. The motions have the effect of confounding and prolonging the case by forcing the parties and the court to focus attention on nonsubstantive, procedural matters.

In the case of parallel prosecutions, Cook County prosecutors have had to take care that information from the criminal investigations (for example, obtained through the grand jury) is not used to advance the civil action. As part of its "screening" of the criminal prosecution from the civil case the office assigns different attorneys to the separate actions.

The difficult decision whether to proceed civilly or criminally may involve considering the relative speed of prosecution, the different standards of proof required, the deterrent effect, and the desirability of compliance and site remediation versus punishment. Some local prosecutors have both civil and criminal jurisdiction. Though almost all of its work to date has been criminal, the Jefferson and Gilpin Counties' D.A.'s office is one such office. Cook

County has criminal, civil, and administrative jurisdiction and has worked out an effective system for designating a case's approach. Civil cases, consisting primarily of injunctions and cost recovery and forfeiture cases, are pursued if the office believes the defendant is willing to cooperate in a resolution of the problem. Criminal prosecution is reserved for so-called bad guys. Included here are those who seem intent on engaging in willful violation of the law and/or are taking advantage of helpless employees or others and offenders who are unwilling to cooperate in remedying the problem.

The Alameda County D.A.'s office has both civil and criminal jurisdiction but prepares all of its cases as though they will be tried criminally. From an investigative perspective, preparing for criminal trials that require proof "beyond a reasonable doubt" assures that even if the case is ultimately pursued civilly, the higher standard of proof will have been met. Typically, the office will proceed with a civil case when some kind of evidentiary shortfall precludes criminal prosecution. It is a case-by-case determination, and in addition to weighing evidentiary concerns, the decision hinges on the egregiousness of the conduct and the defendant's character. The office will seek injunctive relief where there is a need to put a quick stop to harmful environmental conduct. Moreover, civil penalties are an important source of operating revenue for the office. Awards are commonly shared with the other investigative and regulatory agencies involved in the case. Alameda prosecutors report that criminal prosecution is generally less labor- and document-intensive than civil litigation with its lengthy discovery.

The Los Angeles County D.A.'s office has both civil and criminal jurisdiction, but under a directive from the D.A. prosecutors are instructed to use civil proceedings only when criminal remedies are not available. L.A. prosecutors report that defense attorneys frequently propose a civil settlement in order to avoid a criminal case against their clients. The office's policy is to turn down such offers and not permit the deterrent value of the criminal proceeding to be diluted in this way. In fact, L.A. prosecutors expressed the view that environmental crimes are crimes of violence against the environment (and often the public) which must not be allowed to go unpunished. Prosecutors in Los Angeles also noted that criminal prosecution is faster than the civil route and that the availability of criminal fines and penalties is just as great as in civil proceedings.

Unlike the other offices studied for this report, the Monmouth County prosecutor's office has only criminal jurisdiction. If it recognizes the need to bring civil or administrative action,



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this must be initiated by other departments or agencies at the local, county, or State level. In New Jersey as well as in many other States, authority to proceed by way of civil action against an environmental offender rests with city attorneys and the State attorney general. Lacking the civil action alternative, Monmouth's environmental unit will often resort to bringing criminal charges against an environmental offender with the intention of pressuring the offender into regulatory compliance. Though effective, a variation on this approach is not universally endorsed. Although there may be a temptation to file criminal charges against a "deep-pocketed" defendant, and then, using the threat of criminal penalties, switch to a civil proceeding, the temptation should be resisted. A defendant may offer a civil settlement but the prosecutor cannot be the one to suggest it.

It is also important that civil and administrative proceedings against a violator not frustrate criminal action. Indeed, guarding against such problems is one of the main purposes of New Jersey's State-county protocol on environmental prosecution (discussed earlier). According to State Environmental Prosecutor Steven Madonna, his policy is to consider a case "holistically" to determine which types of proceedings are most important to pursue and how various approaches to a matter can be pursued complementarily.

## Overcoming Obstacles to Environmental Prosecution

### *Prosecutors' Attitudes*

Prosecutors will have to overcome formidable attitudinal obstacles and misconceptions about environmental crime if they wish to expand their role. Many D.A.s may initially resist getting involved in environmental cases because they think these cases are hopelessly complicated and impossible to win. As elected officials, prosecutors are keenly aware of their offices' rates of success in particular crime areas. In California, the State district attorney's association has sought to counter reluctance to undertake environmental cases by offering workshops on the subject for local prosecutors and regulatory and investigative personnel. Sponsoring environmental prosecution conferences is an acknowledgement that the key to ensuring proper control of the environment is a consistent and continuing local government presence in enforcement. Assuring prosecutors that one does not need an advanced degree in environmental sciences to prosecute environmental criminals with success

has been a central aim of workshops held by the California District Attorneys' Association.

Though environmental cases pose unique problems, as with "traditional" criminal cases a sound approach to investigation and prosecution will usually yield success. Often, much of the technical expertise required for environmental prosecutions can be learned on the job through environmental law training programs. Prosecutors in the Cook County Public Interest Bureau reported that while environmental cases require a familiarity with a variety of chemical substances, the technical demands are not unduly burdensome. On average, environmental prosecutions can be expected to require fewer hours of preparation as more offices formulate environmental case strategies and as prosecutors learn to counter the defense's dilatory tactics. County prosecutors in the five jurisdictions studied for this report appear to have succeeded in instilling in their assistant prosecutors a confidence in their environmental prosecutorial abilities. The tendency of environmental unit attorneys to be older and professionally more mature has also helped the five jurisdictions achieve success in this "nontraditional" criminal realm.

### *Defense Attitudes and Tactics*

Environmental defendants and their defense counsel often take the view that if charges are to be brought at all they should be civil rather than criminal. To many corporate defendants, civil penalties and one-time cleanup costs are part of the cost of doing business. Offending companies wish to keep it that way. Ongoing compliance, however, is generally quite expensive and may put offenders at a competitive disadvantage. Criminal penalties, especially jail sentences, may also serve to change the widespread attitude that pollution and illegal disposal of hazardous waste are acceptable business practices. In drafting charges and negotiating final settlements, some prosecutors have begun to consider the amounts that companies allegedly have saved over the years by operating out of compliance with environmental laws.

The widespread use of dilatory trial tactics by defense counsel for environmental defendants allows companies to continue to operate in violation of environmental laws pending final adjudication. In Cook County, if an administrative body such as the Pollution Control Board rules against a firm, the defense attorneys will immediately appeal the case to the appellate court, and if necessary back and forth between the board and the appellate court. Many environmental defendants are able to "stonewall" the pros-

ecution for several years by using this tactic. In the meantime the strategy is saving the offender the cost of compliance and increasing the likelihood that witnesses will die or disappear and evidentiary weaknesses in the case will develop. The tendency of counsel for environmental defendants to initiate settlement negotiations with prosecutors with questions like, "How much money are you looking for?" reflects the tendency of defendants and defense counsel to view environmental matters as essentially civil. Undoubtedly, it also betrays a defendant company's or individual's concern with the stigma of being labeled an environmental criminal.

The quality of the environmental defense bar, which now includes many former prosecutors, can only be expected to improve as offenders commit still greater resources to ensure the clearing of their names. In *People v. Chicago Magnet Wire Corp.*, 17 O.S.H. Rep. (BNA) 195 (Ill. App. Ct. July 8, 1987), a major case brought by the Cook County State's attorney's environmental unit, the defendant's twelve-attorney defense team relied on favorable use of the press and sophisticated pretrial tactics to delay the start of the trial for seven years. Typically, once a case does go to trial, environmental defendants waive their right to a jury out of fear that prosecutors will be able to exploit a jury bias against "deep-pocketed" corporations. With the exception of corporate prosecutions in "company towns," where defendants believe prosecutors will be less likely to make emotional appeals to the jury, the defense usually favors a bench trial.

### *Attitudes of the Public*

The NEHWP/New Jersey Division of Criminal Justice study of offense and offender characteristics in the Northeast found that hazardous waste prosecutions are often exposed to the dual pressures from the public demanding acceleration of criminal cases and from corporate interest demanding that they be abandoned. In the first instance, these demands are largely due to the public fear of harm from hazardous waste crime sites; in the second instance the demands are due to the power of a criminal prosecution to ruin a corporation's reputation.<sup>9</sup>

In fact, the public's attitude toward environmental criminal prosecution is considerably more complex than either the Northeast study or the defense bar's fears reflect. While some environmental crime may be so devastating as to bring local residents into the streets protesting any delay in an offender's prosecution, criminal investigation of large local employers may elicit resounding demonstrations of public support for defendant companies. Prosecutors often

must fight an uphill battle in trying to convince the public of the severity of illegal behavior by an offender which may have no immediate manifestations. An environmental criminal's actions today may produce deleterious results that may not be discernible for years. If criminal prosecution is to have the maximum deterrent effect, the prosecutor's dilemma is that charges need to be pursued now, at what may be the most difficult time to prove a case against an environmental offender. Acknowledging the historic attitudinal obstacles to criminal prosecution of environmental crime, EPA has enlisted the participation of the FBI in its Enforcement Four-Year Strategic Plan. The EPA plan recognizes the need to develop the concept of the environment as a victim and foresees working with the FBI to develop environmental cases that send a specific message to preselected geographic or industrial segments of the regulated community as well as the general public.<sup>10</sup>

Public consciousness can also be raised by cases with immediate and serious consequences for victims. For example, in Cook County, the two most important environmental criminal cases brought by the State's attorney to date were actually occupational safety cases in which prosecutors were able to produce dramatic evidence of tangible harm to individuals in the workplace.<sup>11</sup> However, both cases faced serious legal and other obstacles. Indeed, one ultimately resulted in an acquittal. *People v. Film Recovery Systems, Inc.*, 84 C. 5064, 84 C. 11091 (Cook Cnty. Cir. 1985), involved the death of a Polish immigrant worker from cyanide poisoning. The defendant company, Film Recovery Systems, was engaged in the business of recovering silver from used X-ray film using a sodium cyanide-based recovery process. The largely undocumented work force at the primitive plant was not provided with adequate protective clothing or breathing apparatus, and many workers had complained of headaches, nausea, and eye and skin irritation prior to Stefan Golab's death. In fact, workers at the plant never even knew they were being exposed to cyanide.

The prosecution resulted in the conviction of the corporation's president, plant manager, and plant foreman of murder and several counts of reckless conduct for their actions in exposing company employees to hydrogen cyanide. This was one of the first criminal prosecutions of a corporation and its officials for offenses traditionally considered individual in nature. According to Assistant State's Attorney Jay Magnuson, legally speaking, *Film Recovery* was nothing new: "We were just applying the old basic law in a different area." Factually speaking, however, *Film Recovery* was so extreme one doubts it will soon, or often, be duplicated.<sup>12</sup> The *Film Recovery* defendants' actions

were so unconscionable and the lack of concern for employee safety so egregious that a united public's condemnation of the company was understandable. The case clearly presented a greedy corporation treating its unsuspecting employees as utterly dispensable. The *Film Recovery* defendants appealed their convictions to the First District Appellate Court. After nearly three years and a second round of arguments, the appeals court reversed the convictions finding that in convicting defendants of both murder and reckless conduct, the trial court had in effect convicted them of having two incompatible states of mind. If they had *intended* to kill somebody, they could hardly be guilty of reckless conduct, which is a disregard for the results of one's actions.<sup>13</sup> The Cook County State's attorney's office is preparing the case for retrial.

Prosecutors have also experienced disappointments in bringing cases about which they feel especially strongly. In *People v. Chicago Magnet Wire Corp.*, 17 O.S.H. Rep. (BNA) 195 (Ill. App. Ct., filed July 8, 1987), Cook County's second major occupational safety and health case, defendants were alleged to have exposed employees to toxic substances in the workplace. The trial court granted the defendant company's motion to dismiss criminal charges of aggravated battery and reckless conduct and the Illinois Appellate Court affirmed. In its decision, the appellate court wrote that "OSHA does not permit the state to prosecute conduct or conditions in the workplace under state criminal laws in so far as the conduct or conditions are regulated by OSHA." The case was recently retried, but the State's attorney was unsuccessful in its bid to convict defendants.

### *Attitudes of Judges*

In the view of prosecutors, some judges view environmental cases as more appropriately handled by civil or administrative means than by criminal adjudication. They may dismiss environmental prosecutions that they believe should not be tried criminally. Judges may also think it necessary to turn to regulatory agencies for advice on determining a monetary fine, further perpetuating the administrative and regulatory bias of many jurisdictions. In one Colorado case, the judge, concerned that an excessive fine would deter or delay cleanup of the site, which he considered the case's primary objective, sought out the district head of the Health Department for guidance. According to prosecutors, the judicial fear that imposing a severe fine on an environmental offender will place too great a financial burden on a company, rendering it even less able to bring itself into

compliance and possibly further perpetuating the environmental damage, is widespread. Cook County prosecutors believe that judges often resist sending white-collar defendants to prison because there is barely enough room in the jails for the "hard-core" street criminals. According to these prosecutors, there is a need to educate some judges that "a criminal is a criminal."

Prosecutors in Los Angeles believe that they, as well as pressure from the public in a State where judges must stand for reelection, have succeeded in making judges more receptive to criminal environmental cases. By contrast, staff in the Alameda County D.A.'s office report that the resistance of the judiciary to environmental cases is a major problem. Judges with crowded dockets often assign environmental criminal cases a low priority.

## **Key Legal Issues**

A number of legal issues are particularly relevant to environmental investigation and prosecution. Those include search and seizure, legal evidence for the presence of hazardous waste or other pollutants, the defendant's state of mind, and corporate responsibility. Each of these is discussed briefly below. These discussions are not intended to be in-depth treatments of the subjects, each of which is extremely complex in its own right. Rather, the sections seek to raise some key issues for consideration of prosecutors new to the field. Other resources and training that provide more intensive coverage of these topics are available. An Ohio assistant attorney general produces a periodic update of case law on important constitutional and other legal issues relevant to environmental prosecution. Details on this case-law update and other available resources are presented in Appendix B.

### *Search and Seizure*

Obtaining evidence that will be admissible in court in environmental prosecutions, as in all other types of criminal cases, requires compliance with the search and seizure provisions of the Federal constitution and the relevant State constitution. In an environmental investigation, the search for evidence normally involves obtaining access to the premises of an individual or firm suspected of a violation for the purpose of securing samples for laboratory analysis, relevant documents, interviews, or other material evidence. In order to gain access to a site a government agent must either secure a warrant authorizing the search or meet the conditions necessary for a warrantless search.

Most jurisdictions define a search warrant as a court order in writing, in the name of the People, signed by a judge and directed to a peace officer, commanding him or her to search for personal property. In the view of Deputy District Attorney Larry Blazer, a prosecutor with the Alameda County D.A.'s Consumer and Environmental Protection Division, in environmental investigations the search warrant is generally the safest and most effective tool available to secure samples of suspected hazardous wastes or materials, to seize or photograph instrumentalities used in the commission of a criminal violation, and to locate and seize documentation relating to the violations.

The Fourth Amendment applies no differently to environmental crime searches than to other searches, so prosecutors new to environmental prosecution should already be familiar with this area of criminal procedure. Following the United States Supreme Court's ruling in *Camerav. Municipal Court*, 387 U.S. 523 (1966), creating the distinction between administrative inspection warrants and search warrants, a number of States took steps to codify the procedural distinction (see California Code of Civil Procedure § 1822.51). In California and the other jurisdictions that have made the distinction between a search warrant and an administrative inspection warrant, the attractiveness of the search warrant is that it can authorize the search and seizure of items anywhere on a suspect's premises in which there is probable cause to believe the evidence sought in the warrant may be located. An administrative inspection warrant can be obtained with less than a showing of criminal probable cause, but the resulting search is limited by the provisions of the State's legislative or regulatory sections authorizing the inspection. As an illustration, if a regulation states that a city building inspector is authorized to inspect the foundation of a building to determine whether the building is structurally sound, the building inspector, armed with an administrative inspection warrant, will not be able to search parts of the building that have no bearing on the building's structural soundness.

A search warrant cannot be issued except upon probable cause supported by an affidavit, naming and describing the person, and particularly describing the property and the place to be searched. Under the U.S. Supreme Court's ruling in *Zucker v. Stanford*, 436 U.S. 547 (1978), probable cause exists for the issuance of a search warrant when the facts known to the affiant, or related to the affiant by a reliable source, are sufficient to create a reasonable and prudent belief that the items sought are connected to criminal activity and that they will be found on the property to be searched. To obtain a search warrant, the government's agent must be able to demonstrate that there is probable and

reasonable cause to believe and the agent does believe that the said property (1) is stolen or embezzled, (2) is or was used as a means of committing a crime, (3) is in the possession of any person with the intent to use it as a means of committing a public offense or in the possession of another to whom he or she may have delivered it for the purpose of concealing it or preventing its being discovered, or (4) consists of any item or constitutes any evidence that tends to show a crime has been committed.

In the view of Alameda County assistant D.A. Larry Blazer, in many investigations requiring the inspection of a site suspected of involvement in environmental violations, a search warrant will not be necessary. Prosecutors and investigators must weigh the potential effects of proceeding without a search warrant on the subsequent evidentiary needs of the case and the legal arguments that may be raised by defense counsel.

Warrantless searches and seizures can generally occur through statutorily authorized inspections, consensual searches, and lawful observations. However, warrantless searches must still pass constitutional muster.<sup>14</sup> Statutorily authorized searches such as routine fire code, sanitation department, and building code inspections may disclose the illegal storage of hazardous waste or hazardous substances and other environmental violations. In California, for instance, in order to enforce the transportation provisions of the State's hazardous waste control laws, members of the California Highway Patrol have broad statutory powers authorizing officers to stop and inspect vehicles on State highways. Moreover, under section 25180 of the California Health and Safety Code, the CHP can stop and inspect any vehicle reasonably suspected of transporting hazardous wastes as defined in the code.

Obtaining voluntary written consent to searches is another important option that both regulatory and law enforcement personnel may employ to gain warrantless access to a suspect's premises. According to Deputy D.A. Blazer, in some circumstances, consent inspections or searches may be the only option available to obtain evidence. Blazer adds that this is especially true where there exists no statutory provisions authorizing a warrantless inspection or where there is insufficient probable cause to obtain a search warrant. In the case of a consensual search, the government has the burden of proving that the consent was freely and voluntarily given. In the experience of investigators interviewed for this report, it is commonly possible to obtain a suspect's consent. Many times an owner believes that he or she has nothing to hide or grants investigators access out of concern that denying permission will create antagonism or raise an investigator's suspicions.

Absent statutory authority or consent for a search, lawful observation of the premises remains a possibility. The location of the observing party or the item seized may help determine the legality of the search and/or seizure. The courts inquire as to whether there is a reasonable expectation of privacy under the Fourth Amendment in the location searched and the item seized. For example, no reasonable expectation of privacy exists in areas or items that are visible to the public. In some States this rule has been extended such that trespassing upon the property of another in order to examine or collect evidence will not invalidate a search where the object of the search was in plain view from outside the premises. Other circumstances that are upheld as valid searches include the discovery of evidence under "exigent circumstances" such as emergency situations involving a potential of public endangerment, the destruction of evidence, or the flight of a suspect.

In some jurisdictions, in the past, regulatory agencies routinely conducted warrantless searches of the premises of firms suspected of environmental offenses. In California, a State court's ruling in *Los Angeles Chemical v. Superior Court*, 226 Cal. App. 3d. 703 (December 1990), put an end to this practice, holding searches by investigators of the Los Angeles County Department of Health Services unconstitutional under the U.S. Constitution's Fourth Amendment prohibition against unreasonable search and seizure. As a result of the ruling, health officers must now obtain either a party's consent or a search warrant before conducting a search, in effect removing an advantage previously held by health and other regulatory agencies over law enforcement. This ruling will probably serve to confirm the conclusion that the execution of a search warrant is, in most instances, the safest and surest method of obtaining needed evidence in environmental criminal investigations.

### *Establishing the Presence of Hazardous Waste*

The quality of laboratory analysis and its presentation in court can make or break a hazardous waste prosecution. At trial, to prove a material element of the crime charged, a prosecutor must establish that a substance was hazardous waste or some other improperly disposed of pollutant. Even the best testing technology and procedures must be supported by expert witnesses who can testify that the results have scientific validity "beyond a reasonable doubt."<sup>15</sup>

In one Monmouth County, New Jersey, case, the laboratory was able to detect 39 of the EPA's top 100 priority pollutants in a truckload of shredded "construction and demolition debris." This evidence was critical to the success of this

prosecution, in which the government alleged that defendants had deliberately mixed hazardous waste with shredded construction debris in order to facilitate its illegal disposal. In another case that grew out of a Monmouth County investigation of a scheme to mix waste oil with toxic chemicals, lab results from five sites revealed high concentrations of cadmium, lead, asbestos, PCBs, mercury, and benzoate-pyrene. Benzoate-pyrene is the single most dangerous toxic chemical rated by the EPA. Both cases illustrate the central role lab analysis plays in hazardous waste prosecutions.

### *State of Mind Required*

In order to prove a defendant's guilt "beyond a reasonable doubt," a prosecutor must be able to demonstrate every element of the criminal offense charged. In *People of the State of Colorado v. Colorado Chemical Specialties, Inc., Ralph Mika, and Ronald Drake*, 88 CR 181 (District Ct. Golden), the key to the prosecution's case was establishing that indicted company officials "knew" that their company was engaging in the illegal disposal of hazardous waste. The D.A.'s criminal investigation had turned up evidence of a long-simmering dispute between Colorado Chemical and the neighboring Coors Brewing Company. Coors alleged that Colorado Chemical's dumping practices were not only causing pollution but also tarnishing Coors' reputation for environmental consciousness. Several years prior to the initiation of criminal prosecution, Coors had hired its own investigators to evaluate the damage caused by Colorado Chemical's improper dumping activity. The Coors investigation produced a lengthy report demonstrating Colorado Chemical's responsibility for the local pollution. Coors had presented the report to Colorado Chemical's president and vice president. At the trial the D.A. offered evidence that company officials had knowledge of this report but continued to operate the plant employing the same waste disposal methods as before. Upon objection to the report as evidence, the prosecution argued that it was being offered to show what Colorado Chemical officials "knew" rather than to show that pollution was occurring. Immediately following the judge's ruling that the report could be admitted, the defendants pleaded guilty.

Proving "knowledge" in Colorado involves demonstrating that the defendant's conduct was voluntary and practically certain to cause the result that in fact occurred. Prior to the prosecution's "offer of proof," the defense in *Colorado Chemical* had maintained that the damage to the environment was accidental and that the indicted officials had no knowledge of the illegal dumping practices. The prosecu-

tion had bolstered its case with demonstrative evidence as well, producing photographs of company officials on the scene of environmental damage to rebut their assertions that they had never gone to the site.

The indictments for murder in *People v. Film Recovery Systems, Inc.*, 84 C. 5064, 84 C. 11091 (Cook Cnty. Cir. 1985), required the prosecution to demonstrate that the defendant knew his actions created a strong probability of death or great bodily harm to the victim or someone else.<sup>16</sup> According to Jay Magnuson, the assistant State's attorney on the case, the appellate court's reversal of the murder conviction was "a first-time application of a doctrine which is inconsistent with every other appellate court decision." The appellate court found that a "knowing" mental state is inconsistent with a "reckless" mental state, but as Magnuson points out, the two cannot negate one another because a "reckless" mental state is defined as a conscious disregard of known facts.

The Monmouth County D.A. has identified proving "knowledge" as its major problem in environmental prosecutions. In *State of New Jersey v. Capp Recycling, Frank Cappola, Anthony Cappola, et al.*, Indict. #90-12-1882-T; Super. Ct. App. Div. #A-3669-91T1F (Decided Nov. 9, 1992), defendants approached the owners of a gully behind a residential property with an offer of a quantity of clean "fill." Upon agreement to locate the fill in the gully, permits were obtained and dumping in the gully began. Shortly thereafter, a tip to the D.A. identified the material being dumped as "screened" construction and demolition debris (C & D). The town engineer had approved the dumping but claimed that the approval was not for the type of material dumped. The operator claimed to have submitted the "clean fill" for chemical analysis, but no one could identify the material that had been given to the lab for analysis. What followed was a string of denials from everyone along the chain, from the generator to the owner of the disposal site, that the material was anything other than clean fill. In this case the prosecutor was able to demonstrate "knowledge" circumstantially, but prosecutors claim it is often extremely difficult to demonstrate that a particular defendant had knowledge of illegal acts. As environmental criminals become more practiced in their "art," the complexities of proving "knowledge" can only be expected to increase.

As a result of their experience in prosecuting environmental defendants for hazardous waste crime, attorneys of the Environmental Enforcement Section of the Ohio attorney general's office realized that a potential defense for environmental defendants was to claim a lack of knowledge of the hazardous waste regulatory system. Early on, the attor-

ney general's office recognized that the "knowing" culpable mental state in Ohio Revised Code § 3734.99 served as a "back door" for handlers of hazardous waste seeking to avoid becoming familiar with legal requirements. Aware that claims of unfamiliarity with the regulations would make proof of knowledge more difficult, in 1984 the Ohio attorney general asked the Ohio general assembly to reduce the culpable mental state for hazardous waste crimes from "knowing" to "reckless." The assembly agreed and enacted Amended House Bill 651. The "reckless" mental state in Revised Code § 3734.99 provides Ohio's environmental prosecutors with an important strategic advantage over jurisdictions that employ a "knowing" mental state for environmental crimes.<sup>17</sup> Similar changes have been made in California and other States. California's Hazardous Waste Control Act, as originally enacted, provided only for misdemeanor penalties and only when the defendant was shown to have committed the violation knowingly. In 1984, the statute was amended to include felony-level penalties, and the knowledge requirement for conviction was changed to proof that the defendant "knew or should have known" the violation was taking place.

The view that the "knowing" standard is a poor one with which to achieve effective environmental enforcement, however, is not universally held. Ty Cobb, a criminal defense attorney, argues that environmental laws, as "public welfare statutes," contain significantly less rigorous *scienter* requirements than other legislation. In Cobb's view "willful blindness" and "collective knowledge" are potent devices, which enable prosecutors to avoid the problems of proving actual knowledge in the prosecution of corporations and their employees.<sup>18</sup> Cobb identifies the "willful blindness" standard as a concept under which the criminal element requirement of *mens rea* ("guilty knowledge") may be satisfied by demonstrating that the defendant deliberately closed his or her eyes to what would have been otherwise obvious or available. "Collective knowledge" is defined as a doctrine under which "the requisite knowledge necessary to support a corporate conviction need not be imputed to the corporation from a single individual but may be established by imputing to the corporation the aggregate or collective knowledge of the employees or agents as a group."<sup>19</sup> An examination of Cobb's objections to a relaxation of statutory knowledge requirements may help legislators and D.A.s better identify what works and what does not.

### *Corporate Responsibility*

Corporate criminal liability for environmental offenses may be established by resort to either a "vicarious liability"

or *respondeat superior* theory. Under these doctrines, if a mere agent or employee of the corporation, acting with the requisite intent, commits an illegal act within the scope of his/her employment and with intent to benefit the corporation, the corporation may be held either criminally or civilly liable for the act. Corporate criminal liability may also be established under the Model Penal Code method, adopted in 21 states. This approach is less inclusive than the more traditional *respondeat superior* doctrine.<sup>20</sup> In *People v. Film Recovery Systems, Inc.*, 84 C. 5064, 84 C. 11091 (Cook Cnty. Cir. 1985), the Cook County prosecutor relied on offenses that had historically been considered "individual" in nature to prosecute corporations and corporate officials. Under article 2 of the Illinois criminal code a "person" is defined as an individual, *public or private corporation*, government, partnership, or unincorporated association. Most other States and the Model Penal Code have adopted essentially the same definition.<sup>21</sup> Illinois prosecutors also found support for their action against a corporation in article 5 of the Illinois criminal code. In relevant part, § 5-4 states that criminal liability may be imposed upon a corporation in any of the following circumstances: (1) the offense is a misdemeanor, (2) there is a legislative intent that the offense apply to corporations, and (3) the offense is approved by the board of directors or a high managerial agent. Here, too, the Model Penal Code and several states have enacted similar provisions.<sup>22</sup>

The way the law has developed, it is not enough that defendants engage in conduct of a generally dangerous nature. The emerging trend indicates a requirement of specific foreseeability or a showing that the defendant was able to foresee that his/her conduct might result in death or great bodily harm.<sup>23</sup> In the case of murder, the fact finder must scrutinize the prosecution's case to determine whether the ordinary prudent or reasonable person would foresee the strong probability of death or harm. Absent ability to foresee, the State can establish neither the mental state of recklessness nor knowledge against a defendant.<sup>24</sup>

As the number of corporate environmental criminal prosecutions increases, D.A.s will find it increasingly necessary to "pierce the corporate veil" to reach the legally accountable parties behind a corporate entity. Piercing the corporate veil permits prosecutors to keep pace with sophisticated environmental offenders who are increasingly relying on incorporation, partnership, and other limited liability business entities to insulate themselves from criminal indictment. The willingness of courts to "pierce the corporate veil," allowing the prosecution to reach the wrongdoer behind the dummy corporation, is the triumph of substance

over form. It places the realities of corporate conduct, which may be criminal, over the corporate structure's purpose of expediting business conduct.<sup>25</sup> Effective defenses to corporate criminal liability include due diligence and asserting Federal preemption of State law. Essentially, the affirmative defense of due diligence serves to negate the required mental state or *mens rea* that a high managerial agent must have in order for the corporation to commit a crime.<sup>26</sup> The defense of Federal preemption of State law relies on the supremacy of Federal law over all other legislation. Where Congress has expressed an intent that the Federal government exclusively occupy a legislative niche, States may not create laws that govern in that field.

## Endnotes

1. U.S. Environmental Protection Agency, *The Public's Role in Environmental Enforcement* (Washington, D.C.: U.S. Environmental Protection Agency, March 1990), p. 1.
2. Hammitt and Reuter, *Measuring and Deterring*, p. 25.
3. The Northeast Hazardous Waste Project has since changed its name to the Northeast Environmental Enforcement Project.
4. Rebovich, *Understanding Hazardous Waste Crime*, p. 3.
5. Hammitt and Reuter, *Measuring and Deterring*, p. 25.
6. *Ibid.*, p. 26.
7. Mielke, "Remarks of Donald E. Mielke," p. 3.
8. Yelverton, "Expanding the Role of District Attorneys," p. 2.
9. Rebovich, *Understanding Hazardous Waste Crime*, p. 53.
10. U.S. Environmental Protection Agency, *Enforcement Four-Year Strategic Plan*, p. 58.
11. For a discussion of a similar case in New York State, see Abrams, "Safeguarding the Workplace," pp. 19-23.
12. H. Henderson, "Murder in the Air," *Reader* (June 15, 1990): 20.
13. *Ibid.*, p. 18.
14. On warrantless searches for pervasively regulated activities, see *New York v. Burger*, 482 U.S. 691 (1987).

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- (chop shop); Commonwealth v. Blosneski Disposal Service, 566 A. 2d 845 (Pa. 1989) (waste transfer station).
15. Mielke, "Remarks of Donald E. Mielke," p. 4.
16. Illinois Annotated Statutes, ch. 38, para. 9-1.
17. Celebrezze et al., "Criminal Enforcement," pp. 227-28.
18. T. Cobb, "Criminal Enforcement of Environmental Statutes: Strict Criminal Liability for Reporting Violations?" unpublished treatise, pp. 36-37.
19. Ibid., p. 39.
20. Celebrezze et al., "Criminal Enforcement," p. 240.
21. Magnuson and Leviton, "Policy Considerations," p. 916.
22. Ibid., p. 917.
23. Ibid., p. 920.
24. See Illinois Annotated Statutes, ch. 38, paras. 9-1(a), 9-3.
25. Magnuson and Leviton, "Policy Considerations," p. 925.
26. Ibid.



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## Chapter 9

# Training Needs and Opportunities

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### Training for Prosecutors

Although much of the information prosecutors need to achieve success in environmental cases can be learned on the job, formal training sessions can be useful as well. The Regional Environmental Enforcement Associations, the Environmental Prosecution Center of the National District Attorneys Association, the Environmental Law Institute, and other organizations offer extensive training programs for prosecutors and investigators. During 1991-1992, the Regional Associations trained 288 local attorneys and 374 State attorneys in environmental prosecution. The Western States Hazardous Waste Project presents an environmental crimes prosecution training course that includes coverage of the following topics: the structure of environmental law; gathering and maintaining evidence; search and seizure issues (Fourth and Fifth Amendments); what to charge — the availability of traditional criminal statutes in environmental prosecution; pre-filing case evaluation; parallel proceedings; whom and when to charge; approaches to sentences and remedies; environmental science for prosecutors; developing an environmental crimes program; and trial tactics. The EPA has established a National Enforcement Training Institute, which will offer training to Federal, State, and local prosecutors and government attorneys handling civil cases, as well as criminal investigators and civil inspectors.<sup>1</sup> Contact information for all the mentioned organizations may be found in Appendix B.

Continuing Legal Education (CLE) environmental law sessions may also be good training in environmental law for prosecutors. Particularly good are the one-day American Bar Association (ABA) Natural Resources and Environmental Law Section workshops focused on particular statutes and the annual American Law Institute- (ALI-) ABA five-day workshop on Environmental Litigation.<sup>2</sup> State and local bar association environmental law sections also offer useful educational opportunities.

Several of the local prosecution programs visited for this study have developed their own training programs. The Alameda County district attorney's office has been training attorneys in environmental prosecution since 1983. The office works closely with the California District Attorneys' Association (CDAA) on enhancing prosecutor and investigatory personnel training in this "new" criminal area. CDAA, which has created an "environmental liaison" position for coordinating training efforts, offers two introductory courses as well as one advanced course each year. The format of CDAA's introductory course on environmental prosecutions for prosecutors and regulatory and investigatory personnel touches on the key titles in criminal environmental enforcement. Seminar/workshop titles include "Major Laws for Environmental Enforcement", "Penalties/Remedies/Sentencing," "Investigation," "Evidence," "Trial," "Civil Litigation of Environmental Cases," and one entitled "You Don't Have to Be a Chemist to Prove Environmental Violations." The advanced course's focus is on current issues, motions, charging and settling environmental cases, defense tactics, ethics, and current legislation and policy.

Donald Mielke, chair of the NDAA environmental committee, believes that 100 additional environmental prosecutors should be trained in the U.S. each year. The close proximity of Mielke's Golden, Colorado, office to the EPA laboratory has dramatically enhanced the exposure of Jefferson and Gilpin Counties' prosecutors to effective enforcement techniques and technical training. This important asset, however, is not as accessible to prosecutors who work for D.A.s located farther away from the EPA lab. The Jefferson and Gilpin Counties' assistant prosecutors have also benefited from attending the EPA-sponsored course on hazardous waste investigation given at the Federal Law Enforcement Training Center. In addition to training personnel in their own field in the hazardous waste area, the two-week course cross-trains the regulatory and investigatory staff who attend so that they have a better understanding of each other's roles and responsibilities.

Both Monmouth and Cook County prosecutors interviewed for this study reported the need for environmental science training that would give unit attorneys expertise in chemistry. While Cook County prosecutors felt that their training and preparation for environmental prosecutions was otherwise adequate, Monmouth interviewees thought it would be helpful to have better knowledge of how to protect oneself from the risks related to contact with certain metals and hazardous chemicals. The State's environmental prosecutor, Steven Madonna, conducts one-week environmental "awareness seminars" followed up by on-the-job training. The seminars, which emphasize practical skills, teach search and seizure, environmental legislation, the use of demonstrative evidence, safety, and the procedural differences between the administrative and the criminal search warrant. A package of materials on environmental prosecution developed by the Monmouth County prosecutor's office is another useful resource for prosecutors, regulatory personnel, and investigators. The packet was put together to help other counties replicate the successful experience of Monmouth's environmental prosecution unit. To date, a number of New Jersey counties have expressed interest in the resource.

As a review of the state of training for investigative and regulatory personnel makes clear, effective training courses and materials on environmental prosecution already exist. More than anything, it is the slow pace of dissemination among investigators and regulators that has delayed greater use of what is already known. As with other issues in criminal enforcement, the lack of adequate funding is partly to blame. In the case of low-cost training and resources, all that may be required is a prosecutor's commitment to pursuing criminal environmental offenders. Information on training resources is included in Appendix B.

## Training for Investigators/Regulators

The Regional Environmental Enforcement Associations also offer training for investigators. During 1991-92, the associations provided training to 134 local investigators and 207 State investigators.

California appears to be the State with the greatest number and diversity of training opportunities for investigators and regulators. In addition to the California District Attorneys' Association's Awareness Training for Local Law Enforcement and the University of California's week-long practice workshop for law enforcement and investigators, the California Specialized Training Institute (CSTI) in San Luis Obispo conducts a course on hazardous materials investiga-

tion. In Alameda County, training and information dissemination occurs at the monthly meetings of the countywide environmental enforcement network, and the D.A.'s office sponsors a training seminar for police, fire and health officers. The one-day program includes an overview of the local government's role in environmental enforcement and examples and a description of environmental crimes to help the law enforcement officer identify and distinguish between these offenses. Moreover, the seminar provides technical information on substances frequently encountered (including definitions of hazardous waste and hazardous substances), investigative and interview techniques, sampling strategies, evidence preservation and chain of custody procedures, scene safety, criminal investigation procedures, and issues to be considered in the charging decision. The interplay between public safety and evidence collection is explored, as is the importance of cooperation among the various environmental response agencies involved. Alameda interviewees reported that additional training is needed on site-safety and environmental science issues. Refresher sessions at which investigators and regulatory personnel can be brought up-to-date on the latest environmental offender strategies was also recommended. Although originally created to enhance law enforcement involvement in environmental prosecution, the MEEA training film is another excellent resource for investigators and regulatory personnel.

The Cook County State's attorney's office, like the Alameda and Los Angeles County D.A.s' offices, is very involved in local law enforcement and investigatory and regulatory staff training. In Cook County, attorneys from the environmental unit have made presentations to Metropolitan Water Reclamation District of Greater Chicago (MWRDGC) and Illinois Environmental Protection Agency (IEPA) staff as well as to a number of local police departments. These talks focus primarily on what to look for and whom to call when something suspicious is observed. Discouragingly, despite these efforts, the need for expanded and enhanced training for investigative and regulatory personnel is readily apparent in Cook County and elsewhere. Interviewees in Cook County related one case in which a local police officer observed a tank truck in the middle of a field pumping liquid into an old, rusted tank. Instead of investigating further, the officer left the scene without even recording the truck's license number. Without training in environmental enforcement, many police officers feel that environmental offenses are equivalent in severity to traffic violations.

Having recognized the importance of giving greater priority to environmental crime, the Cook County prosecutor has

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employed novel methods of funding training. The settlement in one of the environmental unit's civil cases required the defendant corporation to pay for a training seminar for law enforcement officers. The settlement demonstrates the role of imagination and creativity in environmental enforcement strategy.

New Jersey environmental prosecutor Steven Madonna has demonstrated a strong commitment to the training of law enforcement, regulatory, and investigatory personnel. In addition to those provided for prosecutors, Madonna's office provides a series of environmental "awareness seminars" for law enforcement officers and investigatory personnel, which have the added effect of helping to build a grass-roots case-referral network across the State. Madonna is working to get a unit on environmental crime added to the State's standard police academy curriculum and to regular in-service training for law enforcement officers in New Jersey.

Nonetheless, Monmouth County prosecutors interviewed identified a need for more and enhanced environmental education for local police agencies in their county. Interviewees also reported a need for training in site-safety procedures. In one Monmouth County case, a police officer used a Styrofoam cup to scoop up some liquid from a site. When the cup began to disintegrate in his hand the undaunted officer sniffed the substance, blacked out, and had to be hospitalized for several hours. The Northeast Hazardous Waste Project is doing its part by offering its own courses on environmental awareness in the hazardous waste area. Even with the training efforts of NEHWP and a number of other organizations, however, the present level of training reportedly falls short of the need. With many counties moving to form their own environmental prosecution units and with the hazardous waste disposal techniques of environmental criminals becoming increasingly sophisticated, this situation can be expected to become more pronounced. According to prosecutors in Monmouth County, there is a need for Federal and State courses at least four times a year. Monmouth County prosecutors expressed the view that the merging of the EPA/FLETC course with the EPA's course on personal protective gear would create an ideal training program for investigative and regulatory enforcement personnel. New Jersey now offers a one-week course at the State level with instructors from the Department of Environmental Protection, the Division of Criminal Justice, and the State Police. In the view of interviewees at the Monmouth County prosecutor's office, training should impress upon investigators how a State's criminal statutes apply to and shape the investigation.

## Cross-Training of Criminal Investigators and Regulatory Staff

The concept of cross-training involves the training of personnel from one discipline in the skills of another. In the case of regulators, for example, cross-training means providing regulatory personnel with basic instruction in criminal investigation: interviewing, evidence collection, and other rudimentary investigative techniques. Likewise, law enforcement officers working on regulatory matters benefit from exposure to the rudiments of environmental science, as well as more specific concepts in regulatory enforcement. The Jefferson and Gilpin Counties' D.A.'s office sees a great need for technical training for law enforcement officers and firefighters so that when they enter a site, they know how to protect themselves from hazardous substances. Admittedly, even in this "activist" D.A.'s office, prosecutors have a lot to learn. One of the office's attorneys found that his footwear disintegrated after he walked through toxic materials on the site of the Colorado Chemical Plant.

Cross-training does not mean that regulators and investigators will become fungible cogs available for use interchangeably in whatever position may be called for. In building an investigative unit, for example, the consensus among prosecutors is that training experienced criminal investigators in technical environmental matters is more effective than training environmental regulators in criminal investigation. In the view of Donald Mielke and many others, it is simply easier to train a police detective in the scientific and technical nuances of pollution-related investigations than it is to train a regulator to do criminal investigations.<sup>3</sup>

The EPA/FLETC course, discussed briefly above, is probably the best example of cross-training in the environmental enforcement area. Program participants hail the course, which is offered free of charge, for both its content and its fostering of contacts and cooperation between law enforcement officers and regulatory personnel who attend jointly. The EPA/FLETC Hazardous Waste Investigations Training Program is designed for both criminal investigators and regulatory personnel. The course format provides for both simultaneous and separate training for criminal investigators and regulatory staff. Upon completion of the course, criminal investigators possess concrete skills such as training in standard techniques in the investigation of environmental criminal offense, a working understanding of factors that influence whether violations should be addressed civilly or criminally, an ability to identify the regulatory programs that apply to the various environmental media,

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and an understanding of the criminal enforcement provisions associated with violations of environmental statutes and regulations. Conversely, regulatory staff will be able to employ the practical skills they require in their work, including securing a crime scene, discriminating between items having evidentiary significance and those of lesser significance, proper sample collection, methods for preserving and transmitting specific items of physical evidence, and the legal requirements for admitting evidence as they relate to the "chain of custody," to name a few. (Information on the EPA/FLETC Hazardous Waste Investigations Training Program is included in Appendix B.) The popularity of the course is evidenced by the one-year waiting list.

## Training for Judges

Because of the technical issues raised by environmental cases, judges may benefit from specialized training in this area. As increasing numbers of civil and criminal cases regarding environmental matters are reaching the courts, some members of the judiciary have requested training sessions. A judges' training session on environmental is-

sues was held in Massachusetts in April 1991, attracting judges from all over New England.<sup>4</sup> As attendees at the Massachusetts conference pointed out, "hands-on" formats such as mock trials and exercises based on real or hypothetical cases may be appealing to and effective for judicial audiences.<sup>5</sup>

## Endnotes

1. The Pollution Prosecution Act of 1990, enacted on November 16, 1990, as Public Law 593, specifically mandated the establishment of EPA's National Enforcement Training Institute.
2. For contact information on the American Bar Association's Environmental and Natural Resources Section and the ALI-ABA, see Appendix B.
3. Mielke, "Remarks of Donald E. Mielke," p. 9.
4. N. Pierce, "School for Judges: The Environment Demands It," *NACO County News*, June 10, 1991, p. 8.
5. Ibid.

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# Chapter 10

## Statutory Issues

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### Environmental Statutes

State criminal environmental laws cover three primary areas: (1) hazardous waste, (2) water pollution, and (3) air pollution. Although, as noted earlier, many States' laws follow the Federal statutes, a comparative analysis of the criminal environmental laws of the fifty States by John DeCicco and Edward Bonanno found that "a lack of uniformity exists in the states' hazardous and toxic waste criminal provisions, both in terms of their scope and their available penalties."<sup>1</sup> Typically, criminal sanctions are imposed on the following persons: (1) individuals who dispose, treat, store, or transport hazardous waste without proper licensure; (2) individuals who give false information, make false statements, or render inaccurate monitoring devices pertaining to hazardous waste, water pollution, or air pollution; (3) individuals who discharge water pollutants without a permit or who do not meet toxic or effluent standards; and (4) individuals who discharge contaminants into the air in excess of permit limitations or without a permit. According to DeCicco and Bonanno, "while the aforementioned criminal conduct virtually covers the spectrum of possible offenses, not all fifty states have laws prohibiting all these forms of conduct, and more importantly, those that do have them do not prosecute them in a similar manner."<sup>2</sup> The major discrepancies have to do with categories of criminal offense and severity of sentences. Such diversity is an incentive for interjurisdictional displacement of criminal activities.

Statutory inconsistencies hamper efforts to integrate and coordinate environmental enforcement on a national basis.<sup>3</sup> Under present circumstances, an individual who could be sentenced to many years in prison for illegal hazardous waste disposal in one State, could face only a brief period of incarceration in another. Moreover, it is likely that the States with the lightest penalties will also have the least aggressive criminal enforcement programs.<sup>4</sup> DeCicco and Bonanno note that the result is not only that similarly situated violators are being treated differently, but that there

is a "potential for perpetuating pollution of the environment by virtue of the 'displacement' of the crime."<sup>5</sup> In this view, not until the Nation has adopted uniformly stringent criminal environmental legislation will the opportunity be severely constrained.

In the future the Federal sentencing guidelines for environmental crimes may become a potent reference when seeking significant sentences at the State or local level. These guidelines assure prison sentences for almost any conviction of an environmental crime.

State criminal statutes in the area of water pollution reflect a wide variety of approaches to the problem.<sup>6</sup> Moreover, except for water pollution incidents involving a hazardous or toxic waste element (meaning a discharge of hazardous or toxic waste into water rather than land), "most states do not have or enforce comprehensive criminal programs in the area of water pollution."<sup>7</sup> Among the States that have adopted criminal air pollution statutes, many of those laws closely follow the criminal provisions of § 1319(c) of the Clean Water Act prior to its amendment in 1987. Before it was amended, § 1319(c) provided for criminal penalties for "willful" or "negligent" conduct by any person who violated certain provisions of the act. The penalty structure under these States' criminal statutes are similar to the penalties for only "negligent" conduct under § 1319(c)(1) following the 1987 amendment.<sup>8</sup> Although several States have enacted legislation featuring penalty provisions that exceed those for "negligent" conduct under the existing CWA, only Arizona and Hawaii have penalty provisions comparable to those for "knowing" conduct under § 1319(c)(2), as amended in 1987.<sup>9</sup>

Most States have adopted criminal water pollution statutes that contain provisions proscribing false statements.<sup>10</sup> While the Federal government now has stiffer penalties under the 1987 amendments to the Clean Water Act, most State statutes do not impose strict enough penalties to deter future violations.

Of all environmental areas, air pollution has the least stringent criminal sanctions. As with water pollution and hazardous waste, there is an absence of uniformity in State statutes. Most State criminal air pollution statutes contain less severe penalties than those in the Federal Clean Air Act. Following the EPA administrator's establishing of National Ambient Air Quality Standards, as provided for in CAA, the States are responsible for developing plans for implementing, maintaining, and enforcing standards within each air-quality region, or portion thereof, in their State.<sup>11</sup> Unlike similar requirements under RCRA and CWA, however, CAA does not require the States to enact minimum criminal provisions to receive EPA approval for their air-quality State implementation plans (SIP).

While several States' statutes do track CAA, imposing fines of up to \$25,000 or imprisonment up to a year or both,<sup>12</sup> a number of States provide for lesser fines or prison sentences than those provided in CAA. A number of States' statutes, for example, do not include jail sentences,<sup>13</sup> while another thirteen States do not have any criminal penalties for air pollution.<sup>14</sup>

The National Association of Attorneys General has prepared an excellent compilation of environmental criminal laws in all 50 States. The document is entitled *Summaries of Federal and State Environmental Criminal Enforcement Statutes* and may be obtained from the National Association of Attorneys General. (Further information on this document appears in Appendix A).

The five jurisdictions studied for this document report statutory concerns representative of the national problems discussed above. Among the most important is the general belief that despite many States' upgrading of environmental offenses to felonies, the penalty structures in many of these statutes remain inadequate to serve as strong deterrents. An exception may be New Jersey, where the State hazardous waste law contains harsher penalties than the minimums required by RCRA. Moreover, unlike those in many States, New Jersey's penalties are graduated according to levels of knowledge and intent. For example, a person who acts "purposely" or "knowingly" in causing an illegal release or abandonment of hazardous waste or toxic substance is guilty of a second-degree felony and is subject to a fine of up to \$100,000, five to ten years in prison, or both.

Elsewhere, most prosecutors interviewed complain that criminal fines are too low and other penalties too weak to exert effective pressure on the determined offender. The statutory scheme in many States seems to reflect the resistance of industry to environmental law reform. Laws

already on the books have been enacted in a piecemeal fashion, which helps explain their troublesome inconsistencies. In the case of Colorado's "midnight dumping" law, for example, the definition of hazardous waste is very broad, while related State laws define the term much more narrowly. Similarly, some early environmental legislation confuses "hazardous waste" with "hazardous materials" and uses either or both of these terms incorrectly.

According to Donald Mielke, the legislature in Colorado is influenced by business interests that oppose stricter environmental legislation. At the same time, the legislature is subject to pressures for greater enforcement from Colorado citizens with a strong environmental consciousness and environmental groups that maintain a formidable presence in the State. The two sides regularly debate proposed environmental legislation, as in the conflict over the proposed Polluters' Immunity Bill, which encourages self-auditing on the part of industry. The bill is backed by industry groups, who argue that businesses are responsible enough to look after themselves. Meanwhile, environmental advocacy groups and law enforcement officials maintain that the bill's effect would be to place serious limits on environmental investigation of suspect violators. D.A. Mielke contends that only if the penalties for environmental offenses are increased to a point where they represent more than an acceptable cost of doing business will any real deterrent effect be achieved.

At the local level, the drafting of county environmental ordinances by popularly elected officials may mean that scientifically sophisticated laws are being drafted by persons only vaguely familiar with the subject. The result is the drafting of insufficient or, in some instances, outright ineffective environmental legislation. In Cook County, for instance, the situation is such that the State's attorney's office has recommended overhauling the county's environmental ordinances.

In many States, environmental offenses, including severe ones, may still be classified as misdemeanors or violations. The law has not kept pace with current knowledge regarding the damage caused by environmental noncompliance, though in some cases the lag time in the drafting of effective environmental statutes may be overcome where the prosecution can prove the elements of an occupational safety and health offense or a "traditional" criminal statute (that is, murder in *People v. Film Recovery Systems, Inc.* 84 C. 5064, 84 C. 11091 [Cook Cnty. Cir. 1985]). As mentioned above, inconsistencies in statutory language, such as the use of contradictory definitions of hazardous waste, may further hamper criminal enforcement. On the other hand, New

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Jersey is often cited as a State that has achieved considerable success in the codification of criminal environmental laws.

Interviewees in the Jefferson and Gilpin Counties' D.A.'s office reported that there is a need for more consistency and uniformity in environmental legislation. These prosecutors feel that the changes have to be made at the Federal level, though they also expressed frustration over the ineffectiveness of Federal legislation in the area of air pollution. Although most air pollution violations are currently handled under Federal law, the view was expressed that the "air inversion" problems being experienced in Colorado warrant enactment of stronger State air pollution statutes. Prosecutors feel that the Federal authorities are out of touch with this "local" issue.

Although no State has yet been able to accomplish this, Monmouth County prosecutors stressed the potential benefits of having all of a State's environmental laws codified as an environmental chapter of the code. Presently, environmental legislation is scattered throughout the New Jersey statutes, complicating the task of the local prosecutor and law enforcement officials. As a result, enforcement personnel may find themselves spending precious time searching for the correct statute under which to charge a suspected offender rather than on investigation, apprehension, and obtaining injunctions against further noncompliance pending trial.

To assist county prosecutors in New Jersey, the office of State Environmental Prosecutor Steven Madonna has created an Environmental Crimes Index. The index is designed to assist county prosecutors with the prosecution of environmental cases by making it easier for them to identify the proper statutes under which to charge offenses.

As for specific legislation they hope to see in the upcoming years, Monmouth County prosecutors favor enactment of a law prohibiting disposal of shredded construction and demolition ("C & D") debris. Monmouth is experiencing an increasing problem with illegal disposal of C & D debris trucked in from New York City. It is often impossible to detect the actual composition of such debris without complex sample analysis, but unscrupulous companies have been known to dispose of hazardous substances by commingling them with shredded C & D debris. State laws should keep pace with the growing sophistication of environmental offenders. Likewise, greater coordination of regional enforcement through the use of multistate compacts must occur, so that offenders are not free to turn to neighboring States when new laws in their home State make it too risky

to continue their illegal practices. New York State has enacted a law prohibiting disposal of shredded debris, but no similar law has been passed in New Jersey. Absent effective and regionally uniform statutes addressing this problem, Monmouth County can expect it will continue to be a favorite illegal C & D dumping ground for debris from New York.

Ultimately, States might look to the adoption of a uniform environmental code. (See Appendix C for model environmental criminal statutes drafted by the National Association of Attorneys General.) Until then, however, there is a great deal States can do on their own. A State's enactment of strong criminal environmental statutes may prompt D.A.s to engage in more aggressive prosecution of polluters. In passing strict and consistent criminal statutes, legislatures will be giving prosecutors tools they need in the fight against environmental crime.

## Use of Other Statutes

### *Forfeiture*

The increasing use of forfeiture and its demonstrated effectiveness in "traditional" criminal enforcement has encouraged prosecutors to test its worth in fighting environmental crime. In the criminal enforcement of the environmental statutes, forfeiture actions can be used to raise the stakes for criminal polluters. For example, as Donald Mielke has noted, the trucks used in the illegal transportation of hazardous substances can be seized by law enforcement pending prosecution of defendants.<sup>15</sup> Forfeitures are most effective when they are employed in coordination with other available criminal sanctions. D.A. Mielke reports that in Colorado prosecutors have found that the economic loss to environmental offenders resulting from a forfeiture is often greater than the total dollar amount of fines imposed. A civil case involving the illegal disposal of pesticides, brought by the Jefferson and Gilpin Counties' D.A.'s office, illustrates this view. In this case, an eyewitness observed an individual dumping pesticides into a local creek, but law enforcement was unable to book the suspect on anything other than a misdemeanor. Relying on videotaped evidence, the prosecutor charged the defendant with spraying pesticide without a license. The tape revealed that the defendant had stored the pesticide in the truck, justifying seizure under the Colorado forfeiture statute of an instrumentality used in the commission of a crime. Upon conviction, the trial judge ruled that the prosecution was entitled to the truck. In addition, the defendant was fined \$10,000 for

the misdemeanor. Because Colorado had not classified the pesticide involved as hazardous waste, only a misdemeanor charge could be leveled against the defendant.

In Monmouth County, the prosecutor's office makes extensive use of New Jersey's forfeiture statute. Any equipment actually used or intended for use in the furtherance of or commission of a crime can be forfeited. The items seized may include trucks, heavy equipment, and other costly items. Monmouth interviewees reported that the seizure for forfeiture of expensive pieces of equipment "gets the most attention" and may have the greatest deterrent value. Forfeiture can also help the office cover the cost of environmental prosecution. Indeed, during the first half of 1990, proceeds from the sale of forfeited items accounted for a \$200,000 contribution to the environmental unit's operating budget. The successful use of forfeiture in both the Colorado and New Jersey jurisdictions studied demonstrates the important role this high-deterrence weapon can play in a prosecutor's environmental enforcement plan.

Monies recovered through settlements may be used to bolster the environmental prosecutorial response, as in the case of the Western States Project, which in 1990 received settlement monies from the Solano County (California) district attorney's office. These funds were used to underwrite the cost of an environmental prosecutor's course. Since that time other settlements have directed funds toward prosecution training. In New Jersey, a major settlement with Exxon funded a nine-member Harbor and Rivers Task Force to undertake clean water enforcement. The funding was provided through a revolving Clean Water Enforcement Trust (CWET). State prosecutors are attempting to obtain additional resources for the CWET from settlement of other environmental cases. These examples further demonstrate the role of imagination and creativity in environmental enforcement strategy.

### *Traditional Criminal Statutes*

In Illinois, most environmental laws deal with the management of hazardous waste. Under these statutes criminal sanctions are imposed only for hazardous waste violations. In addition, the State's attorney prosecutes defendants under chapter 38 of the Illinois statutes, which permits the bringing of murder and manslaughter charges against corporate defendants. These prosecutions can have the greatest deterrent effect on environmental crime, though prosecutors often face a judiciary reluctant to try corporate defendants, except in the most egregious of cases. Cook County has also used the "traditional" criminal charge of reckless

endangerment to prosecute environmental violators where it can be shown that their acts constitute a reckless disregard for human health and safety.

Other "traditional" criminal statutes and legal concepts employed by local prosecutors in the war on environmental crime include conspiracy, false documentation, theft by deception, and the corporate responsibility doctrine. Monmouth County prosecutors reported that they sometimes file conspiracy charges against environmental offenders. Likewise, the Monmouth D.A.'s office has used the corporate responsibility doctrine to reach a CEO whose direct participation in an environmental offense is difficult to prove. Possible fines have been increased under New Jersey law to \$100,000 a day for every day a corporation is out of compliance, and it has been proposed that this amount be increased to \$250,000. The Monmouth County prosecutor also uses false documentation charges against offenders when State environmental criminal statutes cannot be successfully applied to a defendant. Lastly, theft by deception statutes have been used by the Monmouth prosecutor in cases involving waste-hauling firms that charge generators for legal disposal of hazardous wastes, only to dump the waste illegally later.

### *RICO Laws*

Prosecutors have yet to make much use of the Federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 et seq., or similar State statutes against environmental offenders. Because RICO's environmental potential remains untested, one can only speculate on its future importance to environmental prosecution. Just as prosecutors have increasingly come to rely on forfeiture in environmental prosecution, perhaps in the years to come D.A.s will turn to RICO as its effectiveness in other criminal areas is established.

### *Cost Recovery Statutes*

Interviewees in Cook County reported that Illinois' cost recovery laws are written adequately, but interpretation and education are required. The Monmouth County prosecutor routinely relies on New Jersey's cost recovery laws. The office has recognized that making payment of cleanup costs a condition of probation is one means for the prosecutor to supervise site remediation. In New Jersey, treble damages (punitive damages) are available if the company does not cooperate in the cleanup schedule. However, firms may be able to avoid environmental cleanup costs and penalties if they go into bankruptcy.



### *Consumer Protection, Unfair Competition*

The only jurisdiction studied for this report that has made considerable use of State consumer protection law is Alameda County. The Alameda D.A. has charged defendants with "unfair competition" where a repetitive pattern of conduct can be established. Similarly, under California proposition 65, a private cause of action is available to the Environmental Defense Fund and environmental groups. The law created penalties for exposing the public to carcinogens without a warning and/or introducing carcinogens into the groundwater. Use of the penalties available under proposition 65 requires that the case be first offered to the D.A. or the A.G. Only if the D.A. or A.G. declines to prosecute can a civil action be commenced. Under the law the D.A. has 60 days within which to investigate such cases. Interviewees believe that a decision to decline prosecution creates the perception that the office is inefficient or uninterested in the case. Consequently, there is a good deal of office resentment of this law. The Alameda D.A. has given its backing to legislation that would allow courts to put corporations on probation. Unlike New Jersey, where corporate entities may be "debarred" for their unlawful acts from contracts and certain other business activities, California does not employ debarment.

### **Endnotes**

1. DeCicco and Bonanno, "A Comparative Analysis," p. 21.
2. Ibid., p. 8.
3. Ibid., p. 4.
4. Ibid., p. 5.
5. Ibid.
6. Ibid., p. 26.
7. Ibid., p. 21.
8. Ibid., p. 26.
9. Ariz. Rev. Stat. Ann. § 49-263(A),(C) (1988); Haw. Rev. Stat. § 342-101 (Supp. 1988).
10. See DeCicco and Bonanno, "A Comparative Analysis," p. 27.
11. 1970 Clean Air Act § 110, 42 U.S.C. § 7410 (1982).
12. See Fla. Stat. § 403.161(1)(a) (Supp. 1988); Ind. Code Ann. § 13-7-3(a) (Burns 1987); La. Rev. Stat. Ann. § 30:2025(F)(2) (1989); Mass. Gen. Laws Ann. ch. 111, § 142A (West Supp. 1989); N.D. Cent. Code § 23-25-10(2) (1978); Ohio Rev. Code Ann. § 3704.99(A) (Anderson 1988); Wyo. Stat. § 35-11-901(j) (1988).
13. Michigan, Mississippi, Nebraska, Tennessee, Utah, Vermont, and Virginia.
14. Colorado, Georgia, Iowa, Minnesota, Missouri, Nevada, New Jersey, New Mexico, South Dakota, Texas, West Virginia, and Wisconsin.
15. Mielke, "Remarks of Donald E. Mielke," p. 16.

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# Glossary

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**ABA:** American Bar Association.

**ACWD:** Alameda County (California) Water District.

**A.G.:** Attorney General.

**ALI:** American Law Institute.

**CAA:** Clean Air Act, 42 U.S.C. §§ 7401 et seq.

**C & D:** A term used in the construction trade to connote construction and demolition debris.

**CDAA:** California District Attorneys Association.

**CEO:** Chief Executive Officer.

**CERCLA:** Comprehensive Environmental Resource Compensation and Liability Act, 42 U.S.C. §§ 9601 note, et seq.

**CHEMHIT:** An interagency environmental task force that includes the Illinois State Police, the Illinois Environmental Protection Agency, the Metropolitan Water Reclamation District of Greater Chicago, and the Illinois Attorney General's Office. CHEMHIT's purpose is to coordinate environmental investigations in the Chicago metropolitan area.

**CHP:** California Highway Patrol.

**CSTI:** The California Specialized Training Institute in San Luis Obispo, California, conducts a course on hazardous materials investigation.

**CWA:** Clean Water Act, 33 U.S.C. §§ 1251 et seq.

**CWET:** Clean Water Enforcement Trust.

**D.A.:** District Attorney.

**DEP:** Monmouth County (New Jersey) Department of Environmental Protection. Also Massachusetts Department of Environmental Protection.

**DOJ:** United States Department of Justice.

**ELI:** Environmental Law Institute.

**EPA:** United States Environmental Protection Agency.

**FBI:** Federal Bureau of Investigation.

**FIFRA:** Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136 et seq.

**FLETC:** The Federal Law Enforcement Training Center is an interagency law enforcement training facility.

**FWPCA:** Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq.

**Hazardous Waste:** Pursuant to RCRA, EPA is authorized to define hazardous waste as any solid waste, or combination of solid wastes, that, because of its quantity, concentration, or physical, chemical, or infectious characteristics may

a. cause, or significantly contribute to an increase in mortality or an increase in serious, irreversible, or incapacitating reversible illness; or

b. pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported or disposed of, or otherwise managed (42 U.S.C. §§ 6903, 1983 ed., Supp. 1991)

**HSWA:** Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. § 6901.

**IEPA:** Illinois Environmental Protection Agency.

**IFF:** International Flavors and Fragrances.

**LADHS:** Los Angeles County (California) Department of Health Services.

**LQG:** Large-quantity generator of hazardous waste.

**MEEA:** The Midwest Environmental Enforcement Association is one of the Nation's four regional environmental enforcement organizations; its members include the Midwestern States.

**MOU:** Memorandum of understanding.

**MWRDGC:** Metropolitan Water Reclamation District of Greater Chicago.

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**NAAG:** National Association of Attorneys General.

**NCP:** National Contingency Plan.

**NDAA:** National District Attorneys Association.

**NEEP:** The Northeast Environmental Enforcement Project is one of the Nation's four regional environmental enforcement organizations; its members include the states of the Northeast and mid-Atlantic region.

**NEIC:** National Enforcement Investigations Center of the Environmental Protection Agency.

**NIJ:** National Institute of Justice.

**Noise Control Act of 1972:** 42 U.S.C. §§ 4901 et seq.

**NPDES:** The National Pollution Discharge Elimination System is the central component of the Clean Water Act, 33 U.S.C. §§ 1251 et seq. It regulates discharges from point sources, industrial discharges, and municipal treatment plants and provides for the issuance of permits by EPA for pollutant dischargers from point sources into any of the Nation's waters.

**NPL:** National Priority List of contaminated sites for cleanup. This list is established pursuant to CERCLA (Superfund).

**OSHA:** Occupational Safety and Health Administration.

**PCBs:** Polychlorinated biphenyls.

**POTWs:** Publicly owned treatment works.

**RCRA:** Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901 et seq.

**RICO:** Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 et seq.

**SARA:** Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601 et seq.

**SIP:** State Implementation Plan (for air quality). The Clean Air Act, 42 U.S.C. §§ 7401 et seq., does not require States to enact minimum criminal provisions to receive EPA approval for their SIP.

**Southern Environmental Enforcement Network:** One of the Nation's four regional environmental enforcement organizations; its members include the Southern States.

**"Split" Sample:** Duplicate site samples taken by law enforcement and/or regulatory investigators to be provided to defendants.

**SQG:** Small-quantity generator of hazardous waste.

**TSCA:** Toxic Substances Control Act, 15 U.S.C. §§ 2601 et seq.

**TSDF:** Treatment, storage, and disposal facility.

**Western States Hazardous Waste Enforcement Network:** One of the Nation's four regional environmental enforcement organizations; its members include the Western States.

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## List of Cases

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- Camera v. Municipal Court, 387 U.S. 523 (1966).
- People of the State of Colorado v. Colorado Chemical Specialties, Inc., Ralph Mika, and Ronald Drake, 88 CR 181 (Dist. Ct. Golden).
- Commonwealth v. Blosenski Disposal Service, 566 A. 2d 845 (Pa. 1989).
- Los Angeles Chemical v. Superior Court, 226 Cal. App. 3d (December 1990).
- New York v. Burger, 482 U.S. 691 (1987).
- People of the State of California v. California Industrial Salvage, Industrial Movers and Stanley Steves, Los Angeles Co. Municipal Court #A790399 (filed 10/8/86)
- People v. Chicago Magnet Wire Corp., 17 O.S.H. Rep. (BNA) 195 (Ill. App. Ct. July 8, 1987).
- People v. Film Recovery Systems, Inc., 84 C. 5064, 84 C. 11091 (Cook Cnty. Cir. 1985).
- People v. Pymm Thermometer, No. 930/86 (N.Y. Sup. Ct. Kings County, November 13, 1987).
- People v. Robert A. Shearer et al., Civ. No. 656387-5 (Alameda Co. Super. Ct., filed October 2, 1989).
- People v. Shell Oil Company, Civ. No. H-140991-0 (Alameda Co. Super. Ct., filed April 28, 1989).
- People of the State of California v. Precision Specialty Metals, Inc., Plessy Precision Metals, Inc., C. Edwin Brady, et al., Los Angeles Co. Municipal Court #31271386 (filed October 18, 1983).
- State of New Jersey v. Capp Recycling, Frank Cappola, Anthony Cappola, et al., Indict #90-12-1882-T, Superior Ct. App. Div. #A-3669-91T1F (Decided November 9, 1992).
- State of New Jersey v. Imperial Oil/Champion Chemical, Indictment No. 87-02-0287.
- State of New Jersey v. International Flavors and Fragrances, Accusation No. 1701-10-86.
- State v. Campbell, 13 Ohio App. 3d 348, 469 N.E. 2d 882 (1983).
- United States v. Franco and Torres, U.S. District Court, Central District, Calif., No. 90-3520-TJH.
- U.S. v. Halper, 490 U.S. 435 (1989).
- Zucker v. Stanford, 436 U.S. 547 (1978).

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# **Appendix A**

## **Federal Environmental Criminal Enforcement Statutes**

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The following compilation of Federal Environmental Criminal Enforcement Statutes was prepared by the National Association of Attorneys General. (This version dated October 31, 1991.)

# FEDERAL ENVIRONMENTAL CRIMINAL ENFORCEMENT STATUTES

## HAZARDOUS WASTE

Prohibited Act	Level of Violation	Maximum Imprisonment	Maximum Fine		Subsequent Violation
			Individual	Corporation	
<p><b>42 U.S.C. § 6928</b></p> <p><b>Knowingly:</b></p> <p>Transports or causes to be transported to facility which does not have permit</p> <p>Treats, stores or disposes without permit or in knowing violation of material condition or requirement of permit or of interim status regulations or standards</p>	Class D Felony	5 years	\$50,000/day or \$250,000 or twice gain or loss, whichever greater	\$50,000/day or \$500,000 or twice gain or loss, whichever greater	Class C Felony: 10 years; \$100,000/day or \$500,000 for individual or \$1,000,000 for corporation or twice gain or loss, whichever greater
<p><b>Knowingly:</b></p> <p>Omits material information or makes any false material statement or representation in document filed, maintained or used for purposes of compliance with federal or state regulations</p> <p>Generates, stores, treats, transports or handles and knowingly destroys, alters, conceals or fails to file any document required to be maintained or filed for purposes of compliance with federal or state regulations</p>	Class E Felony	2 years	\$50,000/day or \$250,000 or twice gain or loss, whichever greater	\$50,000/day or \$250,000 or twice gain or loss, whichever greater	Class E Felony: 4 years; \$100,000/day or \$500,000 for individual or \$1,000,000 for corporation or twice gain or loss, whichever greater

## FEDERAL ENVIRONMENTAL CRIMINAL ENFORCEMENT STATUTES

## HAZARDOUS WASTE (cont.)

Prohibited Act	Level of Violation	Maximum Imprisonment	Maximum Fine		Subsequent Violation
			Individual	Corporation	
<p>42 U.S.C. § 6928 (cont.)</p> <p>Transports without required manifest or causes to be transported without manifest</p> <p>Exports without consent of receiving country or not in conformance with applicable international agreement</p>	Class E Felony	2 years	\$50,000/day or \$250,000 or twice gain or loss, whichever greater	\$50,000/day or \$500,000 or twice gain or loss, whichever greater	Class E Felony: 4 years; \$100,000/day or \$500,000 for individual or \$1,000,000 for corporation or twice gain or loss, whichever greater
*If done knowingly and knows at time that places another person in imminent danger of death or serious bodily injury	Class C Felony	15 years	\$250,000 or twice gain or loss, whichever greater	\$1,000,000 or twice gain or loss, whichever greater	

\* Enhanced penalties

# FEDERAL ENVIRONMENTAL CRIMINAL ENFORCEMENT STATUTES

## HAZARDOUS WASTE (cont.)

Prohibited Act	Level of Violation	Maximum Imprisonment	Maximum Fine		Subsequent Violation
			Individual	Corporation	
<p><b>42 U.S.C. 9603(b)</b></p> <p>Any person in charge of vessel or facility from which hazardous substance is released (other than federally permitted release) in quantity equal to or greater than specified, fails immediately to notify National Response Center as soon as had knowledge, or submits in such notification any information known to be false or misleading</p>	Class E Felony	3 years	\$250,000 or twice gain or loss, whichever greater	\$500,000 or twice gain or loss, whichever greater	Class D Felony: 5 years; \$250,000 for individual or \$500,000 for corporation or twice gain or loss, whichever greater
<p><b>42 U.S.C. 9603(d)(2)</b></p> <p>Knowingly destroys, mutilates, erases, disposes of, conceals or renders unavailable or unreadable, or falsifies, any records regarding disposal of hazardous substances at facility</p>	Class E Felony	3 years	\$250,000 or twice gain or loss, whichever greater	\$500,000 or twice gain or loss, whichever greater	Class D Felony: 5 years; \$250,000 for individual or \$500,000 for corporation or twice gain or loss, whichever greater



## FEDERAL ENVIRONMENTAL CRIMINAL ENFORCEMENT STATUTES

## HAZARDOUS WASTE (cont.)

Prohibited Act	Level of Violation	Maximum Imprisonment	Maximum Fine		Subsequent Violation
			Individual	Corporation	
<p><b>42 U.S.C. § 9612(b)(1)</b></p> <p>Knowingly gives or causes to be given false information as part of claim under federal Superfund statute</p>	Class E Felony	3 years	\$250,000 or twice gain or loss, whichever greater	\$500,000 or twice gain or loss, whichever greater	Class D Felony: 5 years; \$250,000 for individual or \$500,000 for corporation or twice gain or loss, whichever greater
<p><b>42 U.S.C. § 11045(b)(4)</b></p> <p>Knowingly and willfully fails to provide required notification under federal Emergency Planning and Community Right-to-Know Act</p>	Class E Felony	2 years	\$250,000 or twice gain or loss, whichever greater	\$500,000 or twice gain or loss, whichever greater	Class E Felony: 4 years; \$250,000 for individual or \$500,000 for corporation or twice gain or loss, whichever greater

# FEDERAL ENVIRONMENTAL CRIMINAL ENFORCEMENT STATUTES

## HAZARDOUS WASTE (cont.)

Prohibited Act	Level of Violation	Maximum Imprisonment	Maximum Fine		Subsequent Violation
			Individual	Corporation	
<p><b>49 U.S.C. App. § 1809(b)</b></p> <p>Knowingly unlawfully, alters, removes, defaces, destroys or tampers with any marking, label, placard or description on document, or with any package, container, motor vehicle, rail freight car, aircraft or vessel, required or used for transportation of hazardous material</p> <p>Willfully violates federal Hazardous Materials Transportation Act, or order or regulation</p>	Class D Felony	5 years	\$250,000 or twice gain or loss, whichever greater	\$500,000 or twice gain or loss, whichever greater	

## FEDERAL ENVIRONMENTAL CRIMINAL ENFORCEMENT STATUTES

## WATER POLLUTION

Prohibited Act	Level of Violation	Maximum Imprisonment	Maximum Fine		Subsequent Violation
			Individual	Corporation	
<b>33 U.S.C. § 406</b>  Violates provisions prohibiting obstruction of navigable waters	Class A Misdemeanor	1 year	\$100,000 or twice gain or loss, whichever greater (\$250,000 if results in death) (minimum \$500)	\$200,000 or twice gain or loss, whichever greater (\$500,000 if results in death) (minimum \$500)	
<b>33 U.S.C. § 411</b>  Violates provisions prohibiting deposit of refuse in navigable waters	Class A Misdemeanor	1 year (minimum 30 days)	\$100,000 or twice gain or loss, whichever greater (\$250,000 if results in death) (minimum \$500)	\$200,000 or twice gain or loss, whichever greater (\$500,000 if results in death) (minimum \$500)	

# FEDERAL ENVIRONMENTAL CRIMINAL ENFORCEMENT STATUTES

## WATER POLLUTION (cont.)

Prohibited Act	Level of Violation	Maximum Imprisonment	Maximum Fine		Subsequent Violation
			Individual	Corporation	
<p><b>33 U.S.C. § 1319(c)</b></p> <p><b>Negligently:</b></p> <p>Violates sections providing effluent limitations, national standards of performance, and toxic and pretreatment standards; covering records and reports, and inspections; prohibiting discharges of oil or hazardous substances; or covering aquaculture or disposal or use of sewage sludge</p> <p>Violates any permit condition or limitation implementing any such section in NPDES or SPDES permit</p> <p>Violates requirement in federal or state pretreatment program or in permit for dredged or fill material issued by Corps of Engineers or state</p> <p>Introduces into sewer system or POTW any pollutant or hazardous substance which knew or reasonably should have known could cause personal injury or property damage or (other than in compliance with all federal, state or local requirements or permits) which causes POTW to violate effluent limitation or federal or state permit condition</p>	Class A Misdemeanor	1 year	<p>\$25,000/day or \$100,000 or twice gain or loss, whichever greater (\$250,000 if results in death) (minimum \$2,500/day)</p>	<p>\$25,000/day or \$200,000 or twice gain or loss, whichever greater (\$500,000 if results in death) (minimum \$2,500/day)</p>	<p>Class E Felony: 2 years; \$50,000/day or \$250,000 for individual or \$500,000 for corporation or twice gain or loss, whichever greater (minimum \$2,500/day)</p>

## FEDERAL ENVIRONMENTAL CRIMINAL ENFORCEMENT STATUTES

## WATER POLLUTION (cont.)

Prohibited Act	Level of Violation	Maximum Imprisonment	Maximum Fine		Subsequent Violation
			Individual	Corporation	
<b>33 U.S.C. § 1319(c) (cont.)</b>  * If done knowingly - many acts are enumerated	Class E Felony	3 years	\$50,000/day or \$250,000 or twice gain or loss, whichever greater (minimum \$5,000/day)	\$50,000/day or \$500,000 or twice gain or loss, whichever greater (minimum \$5,000/day)	Class D Felony: 6 years; \$100,000/day or \$250,000 for individual or \$500,000 for corporation or twice gain or loss, whichever greater (minimum \$5,000/day)

\* Enhanced penalties

# FEDERAL ENVIRONMENTAL CRIMINAL ENFORCEMENT STATUTES

## WATER POLLUTION (cont.)

Prohibited Act	Level of Violation	Maximum Imprisonment	Maximum Fine		Subsequent Violation
			Individual	Corporation	
<b>33 U.S.C. § 1319(c) (cont.)</b>  *If done knowingly and knows at time that places another person in imminent danger of death or serious bodily injury	Class C Felony	15 years	\$250,000 or twice gain or loss, whichever greater	\$1,000,000 or twice gain or loss, whichever greater	Class B Felony: 30 years; \$500,000 for individual or \$2,000,000 for corporation or twice gain or loss, whichever greater
Knowingly makes any false material statement, representation or certification in any document filed or required, or knowingly falsifies, tampers with or renders inaccurate any monitoring device or method	Class E Felony	2 years	\$250,000 or twice gain or loss, whichever greater	\$500,000 or twice gain or loss, whichever greater	Class E Felony: 4 years; \$20,000/day or \$250,000 for individual or \$500,000 for corporation or twice gain or loss, whichever greater

\* Enhanced penalties

## FEDERAL ENVIRONMENTAL CRIMINAL ENFORCEMENT STATUTES

## WATER POLLUTION (cont.)

Prohibited Act	Level of Violation	Maximum Imprisonment	Maximum Fine		Subsequent Violation
			Individual	Corporation	
<b>33 U.S.C. § 1921(b)(5)</b>  As person in charge of vessel or onshore or offshore facility, as soon as has knowledge of discharge of oil or hazardous substance in excess of specified quantity, fails immediately to notify appropriate federal agency	Class D Felony	5 years	\$250,000 or twice gain or loss, whichever greater	\$500,000 or twice gain or loss, whichever greater	
<b>33 U.S.C. § 1415(b)</b>  Knowingly violates provisions regulating ocean dumping or regulations or permits	Class A Misdemeanor	1 year	\$100,000 or twice gain or loss, whichever greater (\$250,000 if results in death)	\$200,000 or twice gain or loss, whichever greater (\$500,000 if results in death)	
*If activity involves dumping medical waste into ocean waters	Class D Felony	5 years	\$250,000 or twice gain or loss, whichever greater	\$500,000 or twice gain or loss, whichever greater	

\* Enhanced penalties

# FEDERAL ENVIRONMENTAL CRIMINAL ENFORCEMENT STATUTES

## WATER POLLUTION (cont.)

Prohibited Act	Level of Violation	Maximum Imprisonment	Maximum Fine		Subsequent Violation
			Individual	Corporation	
<b>33 U.S.C. § 1908(a)</b>  Knowingly violates Marpol Protocol or chapter governing prevention of pollution from ships	Class D Felony	6 years	\$250,000 or twice gain or loss, whichever greater	\$500,000 or twice gain or loss, whichever greater	
<b>33 U.S.C. § 2609(c)</b>  Knowingly violates chapter governing shore protection from municipal or commercial waste	Class E Felony	3 years	\$250,000 or twice gain or loss, whichever greater	\$500,000 or twice gain or loss, whichever greater	
<b>42 U.S.C. § 300h-2(b)</b>  Willfully violates any requirement of underground injection control program under Safe Drinking Water Act or order	Class E Felony	3 years	\$250,000 or twice gain or loss, whichever greater	\$500,000 or twice gain or loss, whichever greater	



## FEDERAL ENVIRONMENTAL CRIMINAL ENFORCEMENT STATUTES

## WATER POLLUTION (cont.)

Prohibited Act	Level of Violation	Maximum Imprisonment	Maximum Fine		Subsequent Violation
			Individual	Corporation	
<p><b>42 U.S.C. § 300i-1</b></p> <p>Tampers with public water system</p>	Class D Felony	5 years	\$250,000 or twice gain or loss, whichever greater	\$500,000 or twice gain or loss, whichever greater	
<p>Attempts to tamper, or makes threat to tamper, with public drinking water system</p>	Class E Felony	3 years	\$250,000 or twice gain or loss, whichever greater	\$500,000 or twice gain or loss, whichever greater	
<p><b>42 U.S.C. § 9603(b)</b></p> <p>As person in charge of vessel from which hazardous substance is released (other than federally permitted release) into or onto navigable waters, adjoining shorelines or waters of contiguous zone, or which may affect natural resources of United States, in quantity equal to or greater than specified, fails immediately to notify National Response Center as soon as has knowledge, or submits in such notification any information known to be false or misleading</p>	Class E Felony	3 years	\$250,000 or twice gain or loss, whichever greater	\$500,000 or twice gain or loss, whichever greater	Class D Felony: 5 years; \$250,000 for individual or \$500,000 for corporation or twice gain or loss, whichever greater

# FEDERAL ENVIRONMENTAL CRIMINAL ENFORCEMENT STATUTES

## AIR POLLUTION

Prohibited Act	Level of Violation	Maximum Imprisonment	Maximum Fine		Subsequent Violation
			Individual	Corporation	
<p><b>42 U.S.C. § 7413(c)</b></p> <p>Knowingly violates any requirement or prohibition of state implementation plan, any compliance or penalty order, any requirement or prohibition regarding new source performance standards, any NESHAP, section relating to inspections, section relating to solid waste combustion, section relating to preconstruction requirements, any emergency order, permit, or requirement or prohibition relating to acid deposition control or stratospheric ozone control, or any requirement of any rule, order, waiver or permit or for payment of fee (other than for mobile source) to United States</p>	Class D Felony	5 years	\$250,000 or twice gain or loss, whichever greater	\$500,000 or twice gain or loss, whichever greater	Class C Felony: 10 years; \$500,000 for individual or \$1,000,000 for corporation or twice gain or loss, whichever greater
<p>Knowingly:</p> <p>Makes any false material statement, representation, or certification in, or omits material information from, or alters, conceals or fails to file or maintain any document</p> <p>Fails to notify or report as required</p> <p>Falsifies, tampers with, renders inaccurate or fails to install any monitoring device or method</p>	Class E Felony	2 years	\$250,000 or twice gain or loss, whichever greater	\$500,000 or twice gain or loss, whichever greater	Class E Felony: 4 years; \$500,000 for individual or \$1,000,000 for corporation or twice gain or loss, whichever greater

## FEDERAL ENVIRONMENTAL CRIMINAL ENFORCEMENT STATUTES

## AIR POLLUTION (cont.)

Prohibited Act	Level of Violation	Maximum Imprisonment	Maximum Fine		Subsequent Violation
			Individual	Corporation	
<b>42 U.S.C. § 7413(c) (cont.)</b>  Knowingly fails to pay fee owed to United States	Class A Misdemeanor	1 year	\$100,000 or twice gain or loss, whichever greater	\$200,000 or twice gain or loss, whichever greater	Class E Felony: 2 years; \$200,000 for individual or \$400,000 for corporation or twice gain or loss, whichever greater
Negligently releases into ambient air except in accordance with standard or permit any hazardous air pollutant or extremely hazardous substance, and at time negligently places another person in imminent danger of death or serious bodily injury	Class A Misdemeanor	1 year	\$100,000 or twice gain or loss, whichever greater (\$250,000 if results in death)	\$200,000 or twice gain or loss, whichever greater (\$500,000 if results in death)	Class E Felony: 2 years; \$250,000 for individual or \$500,000 for corporation or twice gain or loss, whichever greater

# FEDERAL ENVIRONMENTAL CRIMINAL ENFORCEMENT STATUTES

## AIR POLLUTION (cont.)

Prohibited Act	Level of Violation	Maximum Imprisonment	Maximum Fine		Subsequent Violation
			Individual	Corporation	
<p><b>42 U.S.C. § 7413(c) (cont.)</b></p> <p><b>*If done knowingly and knows at time that places another person in imminent danger of death or serious bodily injury</b></p>	Class C Felony	15 years	\$250,000 or twice gain or loss, whichever greater	\$1,000,000 or twice gain or loss, whichever greater	Class B Felony: 30 years; \$500,000 for individual or \$2,000,000 for corporation or twice gain or loss, whichever greater

\* Enhanced penalties

## FEDERAL ENVIRONMENTAL CRIMINAL ENFORCEMENT STATUTES

## OTHER

Prohibited Act	Level of Violation	Maximum Imprisonment	Maximum Fine		Subsequent Violation
			Individual	Corporation	
<b>Pesticides 7 U.S.C. § 136l(b)</b>  As registrant, applicant or producer, knowingly violates subchapter  As commercial applicator or other person not described above who distributes or sells, knowingly violates subchapter	Class A Misdemeanor	1 year	\$100,000 or twice gain or loss, whichever greater (\$250,000 if results in death)	\$200,000 or twice gain or loss, whichever greater (\$500,000 if results in death)	
As private applicator or other person not described above, knowingly violates subchapter	Class C Misdemeanor	30 days	\$5,000 or twice gain or loss, whichever greater (\$250,000 if results in death)	\$10,000 or twice gain or loss, whichever greater (\$500,000 if results in death)	

# FEDERAL ENVIRONMENTAL CRIMINAL ENFORCEMENT STATUTES

## OTHER (cont.)

Prohibited Act	Level of Violation	Maximum Imprisonment	Maximum Fine		Subsequent Violation
			Individual	Corporation	
<p><b>Toxic Substances 15 U.S.C. § 2614</b></p> <p>Fails or refuses to comply with any rule or order under section covering testing of chemicals; any requirement, rule or order under sections covering pre-manufacture notice for new chemicals and marking, recordkeeping, storage and disposal of specified hazardous chemical substances such as PCBs; or any requirement, rule or order under Asbestos Hazard Emergency Response Act</p> <p>Uses for commercial purposes chemical substance or mixture which knew or had reason to know was manufactured processed or distributed in violation of sections covering pre-manufacture notice and marking, recordkeeping, storage and disposal, or any rule or order thereunder, or any order issued under section covering imminent hazards</p> <p>Fails or refuses to establish or maintain records; or to submit reports, notices or other information; or to permit access to or copying of records, under chapter</p> <p>Fails or refuses to permit entry or inspection as required</p>	Class A Misdemeanor	1 year	\$25,000/day or \$100,000 or twice gain or loss, whichever greater (\$250,000 if results in death)	\$25,000/day or \$200,000 or twice gain or loss, whichever greater (\$500,000 if results in death)	

**FEDERAL ENVIRONMENTAL CRIMINAL ENFORCEMENT STATUTES****OTHER (cont.)**

Prohibited Act	Level of Violation	Maximum Imprisonment	Maximum Fine		Subsequent Violation
			Individual	Corporation	
<b>Noise Control 42 U.S.C. § 4910(a)(1)</b>  Willfully or knowingly violates paragraphs on distribution of new products in conformity with regulations on noise emission standards or notice of level of noise; on importation of new products; or failure or refusal to comply with order, requirement or regulation regarding maintaining or providing records or products for inspection or testing, or railroad or motor carrier noise emission standard	<b>Class A Misdemeanor</b>	<b>1 year</b>	<b>\$25,000/day</b>	<b>\$25,000/day</b>	<b>2 years; \$50,000/day</b>

# FEDERAL ENVIRONMENTAL CRIMINAL ENFORCEMENT STATUTES

## OTHER (cont.)

Prohibited Act	Level of Violation	Maximum Imprisonment	Maximum Fine		Subsequent Violation
			Individual	Corporation	
<p><b>Used Oil 42 U.S.C. § 6928</b></p> <p><b>Knowingly:</b></p> <p>Omits material information or makes any false material statement or representation in document filed, maintained or used for purposes of compliance with federal or state regulations</p> <p>Generates, stores, treats, transports or handles and knowingly destroys, alters, conceals or fails to file any document required to be maintained or filed for purposes of compliance with federal or state regulations</p> <p>Transports without required manifest or causes to be transported without manifest</p> <p>Stores, treats, transports or causes to be transported, disposes of or handles in knowing violation of any material, condition or requirement of permit or regulations or standards</p>	<b>Class E Felony</b>	<b>2 years</b>	<p>\$50,000/day or \$250,000 or twice gain or loss, whichever greater</p>	<p>\$50,000/day or \$500,000 or twice gain or loss, whichever greater</p>	<p><b>Class E Felony:</b> 4 years; \$100,000/day or \$500,000 for individual or \$1,000,000 for corporation or twice gain or loss, whichever greater</p>



## FEDERAL ENVIRONMENTAL CRIMINAL ENFORCEMENT STATUTES

## OTHER (cont.)

Prohibited Act	Level of Violation	Maximum Imprisonment	Maximum Fine		Subsequent Violation
			Individual	Corporation	
<b>Used Oil 42 U.S.C. § 6928 (cont.)</b>  *If done knowingly and knows at time that places another person in imminent danger of death or serious bodily injury	Class C Felony	15 years	\$250,000 or twice gain or loss, whichever greater	\$1,000,000 or twice gain or loss, whichever greater	
<b>Medical Waste 42 U.S.C. § 6992d</b>  Knowingly violates requirements or regulations under subchapter	Class D Felony	5 years	\$50,000/day or \$250,000 or twice gain or loss, whichever greater	\$50,000/day or \$500,000 or twice gain or loss, whichever greater	Class C Felony: 10 years; \$100,000/day or \$250,000 for individual or \$500,000 for corporation or twice gain or loss, whichever greater

\* Enhanced penalties

# FEDERAL ENVIRONMENTAL CRIMINAL ENFORCEMENT STATUTES

## OTHER (cont.)

Prohibited Act	Level of Violation	Maximum Imprisonment	Maximum Fine		Subsequent Violation
			Individual	Corporation	
<p><b>Medical Waste 42 U.S.C. § 6992d (cont.)</b></p> <p><b>Knowingly:</b></p> <p>Omits material information or makes any false material statement or representation in document filed, maintained or used for purposes of compliance</p> <p>Generates, stores, treats, transports, disposes of or handles and knowingly destroys, alters, conceals or fails to file any document required to be maintained or filed for purposes of compliance</p>	Class E Felony	2 years	\$50,000/day or \$250,000 or twice gain or loss, whichever greater	\$50,000/day or \$500,000 or twice gain or loss, whichever greater	Class E Felony: 4 years; \$100,000/day or \$250,000 for individual or \$500,000 for corporation or twice gain or loss, whichever greater
*If any of above violations done knowingly and knows at time that places another person in imminent danger of death or serious bodily injury	Class C Felony	15 years	\$250,000 or twice gain or loss, whichever greater	\$1,000,000 or twice gain or loss, whichever greater	

\* Enhanced penalties

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# Appendix B

## Resources for Local Environmental Criminal Prosecution

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### State and National Organizations

#### *American Bar Association, Natural Resources and Environmental Law Section*

The Natural Resources and Environmental Law Section of the American Bar Association (ABA) periodically conducts one-day workshops on particular environmental statutes. The American Bar Association is the nation's largest professional organization of lawyers, law students, and other legal professionals. The ABA offers continuing legal education programs covering a broad range of topics of concern to legal professionals.

Contact: Ms. Patricia Brennan

Address: Natural Resources and  
Environmental Law Section  
American Bar Association  
750 N. Lakeshore Drive  
Chicago, IL 60611

(312) 988-5577  
Fax: (312) 988-5500

#### *American Law Institute-American Bar Association*

The American Law Institute-American Bar Association (ALI-ABA) is a non-profit organization providing continuing professional education for lawyers since 1947. ALI-ABA offers a five-day workshop on Environmental Litigation.

Contact: Alexander Hart, Esq.

Address: ALI-ABA  
American Law Institute  
4025 Chestnut Street  
Philadelphia, PA 19104-3099

(215) 243-1630  
Fax: (215) 243-1664

#### *California District Attorneys Association*

The California District Attorneys Association (CDAA) offers introductory and advanced training courses in environmental prosecutions for prosecutors, and regulatory and investigative personnel. The intensive workshops, presented in cooperation with the University Extension of the University of California, are part of CDAA's California Specialized Training Institute. Past seminar titles have included "Major Laws for Environmental Enforcement"; "Penalties, Remedies, Sentencing"; "You Don't Have to Be a Chemist to Prove Environmental Violations"; and "Investigations."

Contact: Michael W. Sweet, Executive Director

Address: California District Attorneys Association  
1414 K Street, Suite 300  
Sacramento, California 95814

(916) 443-2017  
Fax: (916) 443-0540

### *Environmental Law Institute*

The Environmental Law Institute (ELI) developed and delivered its course entitled "Hazardous Waste: Crime and Punishment" in cooperation with the Northeastern Environmental Enforcement Project and the Midwestern Environmental Enforcement Association. Initial funding to develop the course was provided by the Geraldine Dodge Foundation.

The course is designed to bridge the information gap between environmental law specialists and criminal prosecutors. It addresses the critical shortage of attorneys in State and local government who have experience in both criminal enforcement and litigating environmental cases. It was initially targeted for a select audience of experienced criminal prosecutors and civil environmental attorneys from 20 States in the Northeast and Midwest. Subsequently it has been offered to a similar group of State and local government attorneys from Southern States.

The course employs an innovative "cross-training" format, which provides the prosecutors with in-depth training in environmental law, while the environmental attorneys are simultaneously being trained in criminal law. The groups then also work together on hypothetical case studies, culminating in a mock trial in which participants play the role of prosecutor, defendant, agency witness, and defense counsel and a faculty member serves as judge.

By training their attorneys through this course, State and local environmental agencies have been able to develop comprehensive enforcement programs and include criminal prosecutions as a valuable part of their environmental cleanup strategies.

Contact: Suellen T. Keiner, Senior Attorney

Address: Environmental Law Institute  
1616 P Street, NW, Suite 200  
Washington, DC 20036

(202) 328-5150  
Fax: (202) 328-5002

### *Federal Bureau of Investigation*

The Federal Bureau of Investigation (FBI) should be contacted if an environmental case appears to involve Federal criminal laws or if the resources of the Bureau are required to assist with a major investigation. Reflecting the FBI's enhanced interest and involvement in environmental crime,

the April 1991 *FBI Law Enforcement Bulletin* is devoted to environmental crimes and includes articles entitled "Environmental Crimes: Investigative Basics," "The Environmental Protection Forum," and "Environmental Crimes Prosecution." The *Bulletin* is published monthly and can be obtained from the Bureau.

Contact: Every major metropolitan area has an office.

Address: Federal Bureau of Investigation  
9th and Pennsylvania Avenue, N.W.  
Washington, D.C. 20535

(202) 324-4260  
Fax: (202) 324-4705

### *Federal Law Enforcement Training Center*

The Federal Law Enforcement Training Center (FLETC) is an interagency law enforcement training facility with responsibility for training personnel from State and local law enforcement agencies in advanced topic areas designed to develop specialized law enforcement skills. Twice each year FLETC offers an excellent hazardous waste investigations training program. Classes are specifically designed to meet the needs of regulatory personnel and criminal investigators by training participants in the skills and techniques required for an effective response to hazardous waste crime. The training program stresses a multidisciplinary team approach to criminal environmental enforcement and emphasizes the importance of a good working relationship between criminal investigators and regulatory personnel. This emphasis on cross-training means that upon completion of the program participants will be trained in the skills they require in their respective disciplines as well as have an enhanced understanding of the role and needs of personnel from other fields.

For acceptance into the program, applicants must be full-time investigators of public regulatory or law enforcement agencies assigned to hazardous waste investigations. Since the program is designed to encourage a team approach, jurisdictions registering teams of investigators and regulatory personnel will be given priority. The program is offered free of charge.

Contact: Phil Andrew, EPA-CID Representative

Address: Federal Law Enforcement Training Center  
Glynco, Georgia 31524

(912) 267-2726  
Fax: (912) 267-2894

### *National Association of Attorneys General*

The National Association of Attorneys General (NAAG) has compiled and summarized Federal and State environmental enforcement laws in an easy-to-use document entitled *Summaries of Federal and State Environmental Criminal Enforcement Statutes*. NAAG has also drafted model environmental laws and presented them in a booklet called *Sample Environmental Criminal Enforcement Statutes*. The two publications are sold together for \$50 for government agencies and \$100 for others.

Contact: Ann Hurley, Esq., Environment Project Counsel  
Nancy Szabo, Environment Project Manager

Address: National Association of Attorneys General  
444 North Capitol Street, Suite 339  
Washington, D.C. 20001

(202) 434-8000  
Fax: (202) 434-8008

### *National District Attorneys Association*

The National District Attorneys Association (NDAA) has taken an aggressive approach to criminal environmental enforcement. A former chairperson of NDAA's Environmental Protection Committee was Donald Mielke, the Jefferson and Gilpin Counties' district attorney and an outspoken advocate of enhanced criminal enforcement efforts.

Contact: Richard Nixon, Esq., Director

Address: National Environmental Crime  
Prosecution Program  
National District Attorneys Association  
99 Canal Center Plaza, Suite 510  
Alexandria, Virginia 22314

(703) 519-1645  
Fax: (703) 836-3195

### *The New Jersey State Environmental Prosecutor*

The New Jersey State environmental prosecutor is an assistant attorney general with access to the State grand jury and to all criminal intelligence information. The environmental prosecutor's responsibilities include criminal, civil, and administrative aspects of environmental enforcement matters. His or her task is to coordinate and prioritize the use of these resources in conjunction with the responsibility to oversee prosecutions in priority cases and to create a comprehensive environmental enforcement program. The

prosecutor has the authority, jurisdiction, and mandate to cross all State department and division lines to effectively coordinate the state's environmental enforcement efforts.

Contact: Steven J. Madonna, New Jersey State  
Environmental Prosecutor

Address: Office of the Environmental Prosecutor  
25 Market Street  
CN 085  
Trenton, New Jersey 08625

(609) 292-3924  
Fax: (609) 984-7299

### *Ohio Attorney General's Office, Environmental Enforcement Section*

Assistant Attorney General J. Michael Marous of the Environmental Enforcement Section, Ohio attorney general's office, and two co-workers prepare a periodic criminal procedure update for environmental prosecutors. The March 1991 publication is a compilation of Federal Supreme, circuit, and district court case annotations dealing with Fourth, Fifth, and Sixth Amendment procedural matters.

Contact: J. Michael Marous, Assistant Attorney General

Address: Environmental Enforcement Section  
Ohio Attorney General's Office  
30 East Broad Street, 25th Floor  
Columbus, Ohio 43266-0410

(614) 466-2766

### *U.S. Department of Justice, Environment and Natural Resources Division: Environmental Crimes Section*

The Environmental Crimes Section and individual U.S. attorneys' offices nationwide prosecute environmental criminal cases under Federal law.

Contact: Herbert G. Johnson, Esq., Trial Attorney

Address: Environmental Crimes Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
601 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

(202) 272-9846  
Fax: (202) 272-4389

***U.S. Environmental Protection Agency:  
Criminal Investigation Division (previously,  
the National Enforcement Investigation Center  
[NEIC] located in Denver, Colorado)***

The Criminal Investigation Division with the EPA's Office of Criminal Enforcement is the investigative component of the EPA's criminal enforcement efforts. The Criminal Investigation Division maintains a staff of trained criminal investigators who are located throughout the country, where they work closely with the regional counsel's office and the U.S. attorneys in pursuing environmental offenders.

Contact: Earl Devaney, Director

Address: Criminal Investigation Division's National  
Investigative Unit  
U.S. Environmental Protection Agency  
LE 134X  
401 M Street, S.W.  
Washington, D.C. 20460  
(202) 260-4539

***U.S. Environmental Protection Agency:  
National Enforcement Training Institute***

The Institute will provide training to prosecutors and government attorneys who handle civil cases, criminal investigators, and civil inspectors from the Federal, State, and local levels.

Contact: Winston Haythe, Senior Attorney Advisor

Address: National Enforcement Training Institute  
U.S. Environmental Protection Agency (LE-133)  
112 N.E. Mall  
401 M Street, S.W.  
Washington, D.C. 20460  
(202) 260-8783

**District Attorneys' Offices**

***Alameda County District Attorney's Office***

The Alameda County district attorney's office periodically conducts one-day environmental training seminars for police, fire, and health officers in Alameda County, Califor-

nia. Seminar participants receive a packet of materials entitled *Environmental Cases*. The comprehensive materials are designed for everyday use as well as the training workshops. The Alameda County district attorney's Consumer and Environmental Protection Division has made a substantial commitment to expanding training of Alameda County's investigative and regulatory personnel. Senior Deputy District Attorney Gilbert Jensen believes that training is the key to effective criminal environmental enforcement.

Another helpful resource is the recently completed *Alameda County Environmental Enforcement Plan*. The objective of the plan is to enhance coordination of the county's multiagency team approach to hazardous material and hazardous waste enforcement. The document spells out the roles of the respective players in environmental enforcement, proposes questions that an investigator may wish to ask a witness or suspect, and provides a compilation of the relevant statutes. Useful forms such as a "Tracking Document" and a "Hazardous Materials Release and Notification Report" are included, as are sample "Inspection and Search Warrants" and a "Memorandum of Points and Authorities" in support of the warrant. The Enforcement Plan's appendixes contain a comprehensive list of public agencies and contacts and definitions of terms common to environmental incidents.

Contact: Gilbert A. Jensen, Esq., Senior Deputy District Attorney

Address: Consumer and Environmental  
Protection Division  
Alameda County District Attorney's Office  
7677 Oakport Street, Suite 400  
Oakland, CA 94621  
(510) 569-9281  
Fax: (510) 569-0505

***Cook County State's Attorney's Office***

Cook County assistant State's attorney Jay Magnuson, the deputy chief of the Public Interest Bureau, has had the bureau take an active role in environmental and occupational safety and health cases. Magnuson has also written on the subject of corporate criminal prosecutions in the environmental and occupational safety area. His article, "Policy Considerations in Corporate Criminal Prosecutions After *People v. Film Recovery Systems, Inc.*," (*Notre Dame Law*

*Review* 62 [1987]: 913) examines a useful tool in the county prosecutor's pursuit of environmental criminals. The article notes that "civil suits and workers' compensation will not deter illegal and injurious conduct in situations where the profits of such conduct exceed the monetary punishment meted out."

Contact: Jay C. Magnuson, Esq., Deputy Chief,  
Public Interest Bureau

Address: Public Interest Bureau  
Cook County State's Attorney's Office  
500 Daley Center  
Chicago, Illinois 60602  
(312) 443-4605  
Fax: (312) 443-3000

### *Jefferson and Gilpin Counties (Colorado) District Attorney's Office*

District Attorney Donald Mielke has testified and lectured widely on the importance of enhanced use of local prosecution of environmental crime. A former chair of the Environmental Protection Committee of the National District Attorneys Association, Mielke believes in the importance of networks through which prosecutors can exchange information about trends, both in environmental crime and in environmental crime prosecution, and for the sharing of prosecutorial resources and experience.

Contact: Donald Mielke, District Attorney

Address: District Attorney's Office  
First Judicial District  
1726 Cole Boulevard, Suite 300  
Golden, Colorado 80401-2697  
(303) 271-6800  
Fax: (303) 271-6888

### *Los Angeles County District Attorney's Office*

The Los Angeles County district attorney's office Environmental Crimes/OSHA Division is the lead agency in the Los Angeles County Environmental Crimes Strike Force, probably the leading example of the interagency strike force approach to environmental prosecution. As such, Michael Delaney is a valuable informational resource on establishing environmental crimes strike forces.

Contact: Michael Delaney, Esq., Head Deputy,  
Environmental Crimes/OSHA Division

Address: Environmental Crimes/OSHA Division  
Los Angeles County District Attorney's Office  
320 West Temple Street, Room 345  
Los Angeles, California 90012  
(213) 974-5901  
Fax: (213) 893-0150

### *Monmouth County Prosecutor's Office*

The Monmouth County prosecutor's office has produced a package of materials that are available to other New Jersey county prosecutor's offices interested in establishing their own environmental crimes units. The materials are designed to help jurisdictions initiating their first environmental prosecutions to replicate the achievements of Monmouth County while avoiding some of the pitfalls. In its own one-week prosecutors' training program the Monmouth prosecutor's office has conducted environmental "awareness seminars" and screened the film *Poisoning for Profit*.

Contact: Robert Honecker, Esq.,  
Second Assistant Prosecutor

Address: Environmental Unit  
Monmouth County Prosecutor's Office  
Court House  
Freehold, New Jersey 07728-1261  
(908) 431-6506  
Fax: (908) 409-7521

### **Regional Environmental Enforcement Associations**

The U.S. Environmental Protection Agency has funded the establishment of four multistate regional environmental enforcement associations. These provide extensive training, networking, informational resources, and customized research services to State and local prosecutors. In recent years, through these regional organizations, the EPA, as the nation's environmental regulatory body, has encouraged the expanded use of criminal prosecution of environmental offenders. *Environmental Criminal Enforcement: A Law Enforcement Officer's Guide*, a 1990 EPA publication,

emphasizes the central role that law enforcement plays in effective environmental monitoring. Another important EPA publication deals with the public's role in environmental enforcement.

The Midwest Environmental Enforcement Association (MEEA) has prepared an excellent law enforcement officer's training video entitled *Environmental Awareness for Local Law Enforcement*. MEEA is also producing a video to heighten public awareness of environmental crime.

In 1986, together with the New Jersey Division of Criminal Justice, the Northeast Environmental Enforcement Project published *Understanding Hazardous Waste Crime: A Multistate Examination of Offense and Offender Characteristics in the Northeast*. This excellent document, prepared by Donald Rebovich, has served as a useful tool, to managerial and enforcement personnel in detecting and investigating hazardous waste crimes. The study was the first research of hazardous waste offense and offender characteristics in the United States. It has been published as *Dangerous Ground: The World of Hazardous Waste Crime* (New Brunswick, N.J.: Transaction Publishers, 1992).

### *Midwest Environmental Enforcement Association*

Contact: Thomas Fahey, Director

Address: Midwest Environmental Enforcement Association  
595 South State Street  
Elgin, Illinois 60123  
  
(708) 742-1249  
Fax: (708) 742-1478

### *Northeast Environmental Enforcement Project*

Contact: Carmen Hutchison, Director

Address: Northeast Environmental Enforcement Project  
Richard J. Hughes Justice Complex  
25 Market Street, CN 085  
Trenton, New Jersey 08625  
  
(609) 292-0987  
Fax: (609) 984-4473

### *Southern Environmental Enforcement Network*

Contact: A. Geary Allen, Director

Address: Southern Environmental Enforcement Network  
Office of the Attorney General  
State of Alabama  
11 South Union Street  
Montgomery, Alabama 36130  
  
(205) 242-7369  
Fax: (205) 242-7458

### *Western States Hazardous Waste Project*

Contact: Roger L. Hartzog, Director

Address: Western States Hazardous Waste Project  
1275 West Washington  
Phoenix, Arizona 85007  
  
(602) 542-3881  
Fax: (602) 542-3522



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## **Appendix C**

# **Sample Environmental Criminal Statutes**

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The following sample state environmental criminal statutes were developed by the National Association of Attorneys General.

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## Hazardous Waste

### **In general**

#### Example 1

(a) Any person who knowingly:

(1) transports or causes to be transported any hazardous waste identified or listed under [the section defining hazardous waste] to a facility which does not have a permit as required under [the federal RCRA statute or the Marine Protection, Research and Sanctuaries Act, or the state hazardous waste laws]; or

(2) treats, stores, or disposes of any hazardous waste identified or listed under [the section defining hazardous waste]--

(i) without a permit under [the federal RCRA statute or the Marine Protection, Research and Sanctuaries Act, or the state hazardous waste laws];

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

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

shall be guilty of [define crime and punishment].

(b) Any person who knowingly:

(1) transports without a manifest, or causes to be transported without a manifest, any hazardous waste required by regulations promulgated under [the federal RCRA statute] or under [the state hazardous waste laws] to be accompanied by a manifest; or

(2) exports a hazardous waste identified or listed under [the section defining hazardous waste]--

(i) without the consent of the receiving country; or

(ii) where there exists an international agreement between the United States and the government of the receiving country establishing notice, export and enforcement procedures for the transportation, treatment, storage, and disposal of hazardous wastes, in a manner which is not in conformance with such agreement,

shall be guilty of [define crime and punishment].

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**In general (cont.)**

(c) Any person who knowingly transports, treats, stores, disposes of or exports any hazardous waste identified or listed under [the section defining hazardous waste] in violation of any of the provisions of subsection (a) or (b) of this section, and who knows at that time that he or she thereby places another person in imminent danger of death or serious bodily injury, shall be guilty of [define crime and punishment].

Derived from FEDERAL (RCRA), 42 U.S.C. Sec. 6928, which punishes a violation of subsection (a) as a 5-year/maximum felony (with doubled maximum penalties for subsequent convictions); a violation of subsection (b) as a 2-year/maximum felony (with doubled maximum penalties for subsequent convictions); and a violation of subsection (c) as a 15-year/maximum felony, including a \$1,000,000 maximum fine for corporations.

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## Water Pollution

### **In general**

#### Example 1

**(a) Any person who negligently:**

(1) violates [section 1311 (effluent limitations), 1312 (water quality related effluent limitations), 1313 (water quality standards and state implementation plans), 1316 (national categorical standards of performance), 1317 (toxic or pretreatment standards), 1318 (record-keeping requirements), 1321(b)(3) (discharges of oil or hazardous substances), 1328 (aquaculture projects) or 1345 (disposal of sewage sludge) of the federal Clean Water Act and/or the state-delegated statutory equivalents], or any permit condition or limitation implementing any of such sections in a permit issued by the Administrator of the U.S. Environmental Protection Agency under [section 1342 (NPDES) of the federal act] or by [the director of the state water pollution control agency] under [the state SPDES statutory equivalent], or any requirement imposed in a pretreatment program approved under [section 1342(a)(3) or 1342(b)(8) of the federal act and/or the state-delegated statutory equivalent] or in a permit issued by the U.S. Secretary of the Army under [section 1344 (dredged or fill material) of the federal act] or by [the director of the state water pollution control agency] under [the state-delegated statutory equivalent]; or

(2) introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable federal, state, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works by the Administrator of the U.S. Environmental Protection Agency under [section 1342 of the federal act] or by [the director of the state water pollution control agency] under [the state-delegated pretreatment program statutory equivalent],

shall be guilty of [define crime and punishment].

**(b) Any person who knowingly commits any of the violations set forth in subsection (a) of this section shall be guilty of [define crime and punishment].**

**(c) Any person who knowingly violates [sections 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of the federal Clean Water Act and/or the state-delegated statutory equivalents], or any permit condition or limitation implementing any of such sections in a permit issued by the Administrator of the U.S. Environmental Protection Agency under [section 1342 of the federal act] or by [the director of the state water pollution control agency] under [the state-delegated statutory equivalent], or in a permit**

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**In general (cont.)**

issued by the U.S. Secretary of the Army under [section 1344 of the federal act] or by [the director of the state water pollution control agency] under [the state-delegated statutory equivalent], and who knows at that time that he or she thereby places another person in imminent danger of death or serious bodily injury, shall be guilty of [define crime and punishment].

Derived from FEDERAL (Clean Water Act), 33 U.S.C. Sec. 1319(c), which punishes a violation of subsection (a) as a 1-year/maximum misdemeanor (with doubled maximum penalties for subsequent convictions); a violation of subsection (b) as a 3-year/maximum felony (with doubled maximum penalties for subsequent convictions); and a violation of subsection (c) as a 15-year/maximum felony, including a \$1,000,000 maximum fine for corporations (with doubled maximum penalties for subsequent convictions).

---

## Air Pollution

### **In general**

#### Example 1

(a) Any person who knowingly violates any requirement or prohibition of the implementation plan provided for in [the section establishing a state implementation plan] or of any order, requirement or prohibition of section 7411 [relating to new source performance standards], section 7412 [relating to NESHAPs], section 7414 [relating to inspections, access, etc.], section 7429 [relating to solid waste combustion], or section 7475 [relating to preconstruction requirements], or of any order under section 7477 [relating to preconstruction requirements] or section 303 of title III [relating to emergency orders], or of section 502(a) or 503(c) of title V [relating to permits], or any requirement or prohibition of title IV [relating to acid deposition control] or title VI [relating to stratospheric ozone control] of the federal Clean Air Act, including any requirement of a rule, order, waiver, or permit promulgated or approved under such sections or titles, and including any requirement for the payment of any fee owed to [the state] under such act (other than title II) shall be guilty of [define crime and punishment].

(b) Any person who knowingly fails to pay any fee owed to [the state] under [the state air pollution control laws] shall be guilty of [define crime and punishment].

(c) Any person who negligently releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of the federal Clean Air Act or [the section of state law defining hazardous air pollutants], or any extremely hazardous substance listed pursuant to section 302(a)(2) of the federal Superfund Amendments and Reauthorization Act of 1986 (42 U.S.C. 11002(a)(2)) or [the section of state law defining extremely hazardous air pollutants], and who at that time negligently places another person in imminent danger of death or serious bodily injury, shall be guilty of [define crime and punishment].

(d) Any person who knowingly releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of the federal Clean Air Act or [the section of state law defining hazardous air pollutants], or any extremely hazardous substance listed pursuant to section 302(a)(2) of the federal Superfund Amendments and Reauthorization Act of 1986 (42 U.S.C. 11002(a)(2)) or [the section of state law defining extremely hazardous air pollutants], and who knows at that time that he or she thereby places another person in imminent danger of death or serious bodily injury, shall be guilty of [define crime and punishment]. For any air pollutant for which the administrator of the U.S. Environmental Protection Agency has set an emissions standard or for any source for which a permit has been issued under title V of the federal Clean Air Act or [the section of state law providing for air pollution control permits], a release of such pollutant in accordance with that standard or permit shall not constitute a violation of this subsection or subsection (c) of this section.

---

### **In general (cont.)**

Derived from FEDERAL (Clean Air Act), 42 U.S.C. Sec. 7413(c), which punishes a violation of subsection (a) as a 5-year/maximum felony (with doubled maximum penalties for subsequent convictions); a violation of subsection (b) as a 1-year/maximum misdemeanor (with doubled maximum penalties for subsequent convictions); a violation of subsection (c) as a 1-year/maximum misdemeanor (with doubled maximum penalties for subsequent convictions); and a violation of subsection (d) as a 15-year/maximum felony including a \$1,000,000 maximum fine for corporations (with doubled maximum penalties for subsequent convictions).

---

## **Medical and infectious waste**

### **Example 1**

(a) Any person who knowingly violates the requirements of [the state laws regulating medical waste] or any regulations thereunder shall be guilty of [define crime and punishment].

(b) Any person who knowingly:

(1) omits material information or makes any false material statement or representation in any label, record, report, or other document filed, maintained, or used for purposes of compliance with such laws or any regulation thereunder; or

(2) generates, stores, treats, transports, disposes of, or otherwise handles any medical waste, and knowingly destroys, alters, conceals, or fails to file any record, report, or other document required to be maintained or filed for the purposes of compliance with such laws or any regulation thereunder,

shall be guilty of [define crime and punishment].

(c) Any person who knowingly violates any provision of subsection (a) or (b) of this section and who knows at that time that he or she thereby places another person in imminent danger of death or serious bodily injury, shall be guilty of [define crime and punishment].

Derived from FEDERAL (Medical Waste Tracking Act), 42 U.S.C. Sec. 6992(d), which punishes a violation of subsection (a) as a 5-year/maximum felony (with doubled maximum penalties for subsequent convictions); a violation of subsection (b) as a 2-year/maximum felony (with doubled maximum penalties for subsequent convictions); and a violation of subsection (c) as a 15-year/maximum felony, including a \$1,000,000 maximum fine for corporations.



---

## **Pesticides**

### **Example 1**

(a) Any registrant, applicant for registration, or producer who knowingly violates any provision of [the state laws regulating pesticides] shall be guilty of [define crime and punishment].

(b) Any commercial applicator of a restricted use pesticide, or any other person not described in subsection (a) of this section, who distributes or sells pesticides or devices and who knowingly violates any provision of such laws, shall be guilty of [define crime and punishment].

(c) Any private applicator or other person not included in subsection (a) of this section who knowingly violates any provision of [the state laws regulating pesticides] shall be guilty of [define crime and punishment].

Derived from FEDERAL (FIFRA), 7 U.S.C. Sec. 136l(b), which punishes a violation of subsection (a) or (b) as a 1-year/maximum misdemeanor, including a \$200,000 maximum fine for corporations; and a violation of subsection (c) as a 30-day/maximum misdemeanor.

### **Example 2**

(a) Any person who violates any provision of [the state laws regulating pesticides], or any rule or regulation thereunder, shall be guilty of [define crime and punishment].

(b) Any person who negligently, knowingly or intentionally commits a violation of subsection (a) of this section, and thereby creates or reasonably could create a hazard to human health or the environment, shall be guilty of [define crime and punishment].

Derived from CALIFORNIA, Sec. 12996, which punishes a violation as a 6-month/maximum misdemeanor (with doubled maximum fine for subsequent violations).

---

## Asbestos

### Example 1

Any person who enters into, engages in, or works at the business of removal, containment or encapsulation of asbestos or materials containing asbestos, involving any building or structure, including those owned or leased by the state or any of its political subdivisions or authorities, without a license therefor issued by [the commissioner of the state environmental regulatory agency], or in violation of any provision of such license or of [the state laws regulating asbestos], shall be guilty of [define crime and punishment].

Derived from MASSACHUSETTS, Ch. 149 Secs. 6B and 6F, which punish a violation as a fine-only crime.

### Example 2

(a) Any person who knowingly violates any provision of [the state laws regulating asbestos] or any rule, regulation, standard or order thereunder, shall be guilty of [define crime and punishment].

(b) [The state environmental regulatory agency] may suspend, deny, or revoke the accreditation of, or reprimand, any person who:

- (1) fraudulently or deceptively obtains or attempts to obtain accreditation;
- (2) fails to meet the qualifications for accreditation or to comply with [the state laws regulating asbestos], or any rule, regulation, standard or order thereunder; or
- (3) fails to meet any applicable federal or state standard for activities involving asbestos.

Derived from MONTANA, Sec. 75-2-514, which punishes a violation as a 6-month/maximum misdemeanor.

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