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ENVIRONMENTAL CRIME PROSECUTION:

A Comprehensive Analysis of District  
Attorneys' Efforts in This Emerging  
Area of Criminal Enforcement

The National Environmental  
Crime Prosecution Center

The APRI  
Research Center

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## INTRODUCTION

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## INTRODUCTION

The following report represents the first formal effort to depict the status of environmental crime prosecution on the local level throughout the United States. While others have attempted to accomplish this, their efforts have resulted in much more objective recitations of facts and statistics. In contrast, the National Environmental Crime Prosecution Center, in conjunction with the Research Center of the American Prosecutors Research Institute, has compiled an enormous amount of qualitative and quantitative data in this report. Unlike other seemingly similar efforts in this area, this report goes much further. The data was not only compiled and reported, as you will see, it was also analyzed by the prosecution/research team responsible for the work.

More specifically, this effort began with the assembly of a working group comprised primarily of environmental crime prosecutors from various jurisdictions throughout the country. With their assistance, comprehensive national surveys of environmental crime prosecutors were developed and distributed randomly throughout the United States. From these instruments an enormous amount of quantitative data was received. This data is particularly helpful in that it demonstrates that local prosecutors are performing the overwhelming amount of environmental prosecutions in this country. It also indicates which jurisdictions are responsible for environmental crime prosecutions. Of equal importance are the trends that may be detected, as well as predicted, based on the data.

The working group was also consulted regarding the selection of seven local jurisdictions for the purpose of conducting site visit interviews of prosecution, law enforcement and regulatory

personnel. The resulting information, which we refer to as qualitative data, reveals the thoughts and decision-making processes of these personnel. To a great extent, this serves as a guide to how the elected district attorneys, as well as the "line prosecutors" approach these often complicated matters. This section reflects the inner-most workings of an environmental crime prosecution unit. It also demonstrates the manner in which district attorneys are challenged to become innovative in their coordination of these multi-agency efforts.

Also included in this report is a literature review of salient publications. This section should be of great interest to all parties concerned with environmental crime. Whether the reader is a prosecutor or a mere observer, this particular piece is foundational to a keener insight into environmental crime prosecution.

We have included a state-by-state matrix and compilation of frequently utilized environmental statutes. These are particularly useful to individuals who seek to modify or create new legislation in their states. They also serve as a point from which to create model legislation in the future.

Finally, as a very practical feature, we have included a list of the environmental crime prosecution and investigation personnel who participated in this report. Each individual listed possesses an extraordinary level of expertise in this burgeoning field of prosecution. You are encouraged to "borrow" from these sources when the situation so warrants.

SUMMARY

## SUMMARY

The substantive findings of this report were in some respects well anticipated, and in other respects quite surprising to the researchers involved. Among the greatest surprises was the quantitative finding that local district attorneys were performing the vast majority of environmental prosecutions. As you will recall from the report's quantitative analysis section, district attorneys accounted for 882 environmental crime prosecutions during the first six months of 1992. It should be noted that these statistics were gathered from jurisdictions whose populations exceed 250,000 people (178 local jurisdictions). Furthermore, the response rate of the survey used to gather this information was 56%. Therefore, 100 local jurisdictions were responsible for those 882 prosecutions. Meanwhile on the federal level, the Department of Justice, including the Environmental Crime Section's approximately 30 attorneys and the 92 United States Attorneys (and their staffs) prosecuted 834 "indictments" between the years of 1983 and 1991. Given the fact that environmental crime prosecution yields great deterrence, the foregoing statistics clearly demonstrate that local prosecutors are leaders in this area.

Of equal surprise to the researchers was the manner in which local environmental crime prosecutions increased between 1990 and 1992. It is accurate to say that this increase in prosecutions approaches exponential growth. It will be interesting to determine whether this growth will continue in the future, or will it recede in light of difficult economic times and reduced budgets?

One very interesting outcome of this study is that virtually all individuals interviewed regarded environmental crimes as essentially criminal activity. More specifically, the emphasis from the perspective of law enforcement (police, investigators and district attorneys) was to be placed on the criminal nature of the act. One individual said that a crime scene is a crime scene. In other words prosecutors, investigators and other task force personnel employ basic law enforcement techniques in the investigation and prosecution of these crimes. The approach to these enforcement actions was shared by many of the subjects of this study. In particular, they seemed to strive to simplify the cases. Again, the use of basic law enforcement techniques was one manner in which this was accomplished. One individual stated that these were "who done it" crimes. Another said that environmental crimes were similar to other types of criminal cases, with the one exception that prosecutors may rely more heavily on scientific experts. Further evidence of considering environmental crimes as they would other forms of criminal prosecution was the willingness of prosecutors to proceed with only circumstantial evidence. This is an important development for environmental prosecutors who, in the past, were reluctant to prosecute a case without the more traditional scientific, direct evidence.

Also important is the need to establish some sort of network of expertise that will serve to support the investigative requirements of an environmental crime case. Many jurisdictions refer to these "networks" as task forces. In this respect environmental crime prosecution is unlike most other forms of prosecution. These task forces or response teams are comprised of law enforcement and regulatory personnel. Conversely, it is one of the few areas of law enforcement where non-law enforcement or regulatory personnel are so integrally involved in a law

enforcement matter. The problems that typically arise are communications among members, obtaining and preserving evidence, confidentiality and anticipating the needs of the prosecution. All parties agreed that these problems may be overcome through training. They assert the need for more training in general, but particularly in the critical areas of investigation and task force coordination.

Many environmental crime prosecutors articulated the need for better environmental crime statutes. They believe that they need stronger laws as well as laws that are consolidated in a better organized and more coherent statutory scheme. Many also discussed the need for model environmental crime legislation which would yield more uniform and comprehensive enforcement.

One of the most interesting "collateral" findings of this study is the self-sufficiency of local environmental crime prosecution units. The overwhelming majority of the subjects interviewed have succeeded by utilizing only local regulatory and law enforcement personnel. Many do believe, however, that greater enforcement would occur if there were regional or national coordination of these enforcement efforts. This might be possible if there were a way to increase shared Federal/local prosecutions. One of the ways to accomplish this would be the cross-designation of prosecutors. For example, a local district attorney may be sworn as a specially designated United States Attorney. This sort of activity would increase coordination and communication between the different levels of prosecution. Consequently, the breadth of enforcement would be increased.

Finally, all parties agree that cooperation is an essential element of any environmental crime prosecution effort. Communication, consideration and cross-training are realistic means by which effective cooperation may be realized. Without it environmental crime investigations may be commenced, but rarely are they successfully prosecuted. Therefore, cooperation among local task force members, as well as a greater partnership between local and federal environmental crime prosecutors, would result in greater environmental crime enforcement.

A QUANTITATIVE ANALYSIS:

Survey Results of Local Environmental  
Crime Prosecutions

# NATIONAL SURVEY OF ENVIRONMENTAL CRIME PROSECUTION

## Introduction

To meet the national need for expanding and improving the enforcement of environmental laws, the National District Attorneys Association (NDAA) through its affiliate, the American Prosecutors Research Institute (APRI), established the National Environmental Crime Prosecution Center in 1991. The Center's design is based on the model used successfully by APRI to develop centers for the prosecution of drug crime and child abuse. Components guided by experienced environmental crime prosecutors include: 1) development of model legislation; 2) policy development; 3) development of a clearinghouse; 4) training and publications; 5) research and evaluation; and 6) coordination with federal, state and local agencies.

In conjunction with APRI's Research Center, the NECPC undertook the following project in an effort to define the status of environmental crime prosecution at the local level. Among the project's goals are the following:

- 1) To bring the accumulated knowledge, experience and expertise of the prosecutorial community to the attention of the full range of major organizations, associations, and disciplines that share responsibility for the handling of environmental crime prosecution. The purpose is that when these various organizations make policy, develop programs, and devise strategies related to environmental crime, they do so with a complete understanding of the concerns, issues, and problems of the local prosecutor handling the criminal aspects of these cases;
- 2) To bring the accumulated knowledge, research, experience, and expertise of the various organizations – whether research, policy or program – to the attention of the prosecutorial community in a systematic, organized, and efficient manner;
- 3) To bring about improvements in the quality of state legislation as it relates to environmental crime by assisting state prosecutor associations in gaining a better understanding of the impact of various statutory schemes on the prosecution of environmental offenses at the local level (both within their jurisdictions and within other jurisdictions) and, to assist state associations to gain a better understanding of the training needs of the prosecutors at the local level within their jurisdiction. Generally, to keep state associations abreast of the state-of-the-art of prosecution of environmental offenses;
- 4) To improve the quality of the prosecution of environmental crime cases at the local level by assisting the elected prosecutor in the identification and implementation of improved policies, practices, procedures, and management of

external relationships and by aiding the elected prosecutor with the management, policies and procedures for the internal operations of the office.

The objectives of the project are:

- 1) To review and utilize relevant literature on environmental crime prosecution;
- 2) To conduct a review and analysis of relevant statutes and case law not otherwise available through other sources such as the Environmental Protection Agency or the National Association of Attorneys General;
- 3) To conduct a national survey of environmental crime prosecution.

The project, in its first twelve months, sought to survey the field of prosecution: 1) to identify substantive needs of local prosecutors of environmental offenses; 2) to synthesize these needs into report form; 3) to use this information to form the basis of a local environmental training curriculum; 4) to develop a plan for the administration of this training; 5) to develop a plan for the comprehensive evaluation of training; 6) to design a technical assistance delivery process; 7) to provide some technical assistance; and 8) to schedule the second year technical assistance and publications schedules.

The project's primary clients are prosecutors and those organizations that serve prosecutors within states. These client groups include the state prosecutor associations and the executive directors of those state associations called prosecutor coordinators; the elected prosecutors, bureau chiefs and assistant prosecutors most directly responsible for the prosecution of environmental offenses.

Additionally, the Center serves those organizations and groups that have an interest at the national and local level in environmental enforcement and prosecution. Consequently, they may benefit from a better understanding and knowledge of the capabilities of the criminal justice system in relation to these cases.

To respond to the concerns of local prosecutors who currently prosecute environmental offenses or who expect to prosecute environmental offenses, the project's preliminary activities included a national needs assessment, problem definition and "exemplary practice" identification. These objectives were, in large part, met through a national survey of local prosecutors. This report focuses upon these findings.

### Survey Focus and Design

A primary component of the NIJ-funded *Environmental Crime Prosecution Project* involved a mail survey to local prosecutors throughout the United States. The purpose of the survey was to collect and analyze data to identify major patterns of action, preferences, and perceptions for a "total analysis" of factors relating to the outcome of local environmental crime prosecutions. It was anticipated that survey results would facilitate: 1) an explanation of differences in local prosecution program implementation and prosecution outcomes among jurisdictions; 2) a listing of explanatory factors; and 3) a rating of the relative importance of each of the factors as they relate to the effective prosecution of environmental crime at the local level.

It was expected that the level of complexity/sophistication of environmental crime units in District Attorneys' offices would run the spectrum from very low to very high.

The survey instrument was devised jointly by the Research Center and the National Environmental Crime Prosecution Center with the use of consultants from the NECPC's Environmental Crime Advisory Board for the purpose of collecting baseline information on the local prosecution of environmental crime. The questionnaire included open-ended formats crafted to provide a wide range of responses conducive to exploratory studies of this nature, but depended mainly on closed-ended, Likert constructed queries in which response ranges could be reliably structured. The survey was intended to facilitate an understanding of the quality and the quantity of resources and approaches to the prosecution of environmental crime in America. The survey obtained information in the areas of: 1) prosecutor office organizational structure; 2) extent of environmental offense prosecution; 3) offense characteristics; 4) offense identification; 5) decisions to prosecute environmental offenses; 6) ability/willingness to prosecute environmental offenses; 7) evidentiary standards/technical needs; and 8) plea and trial issues. The survey provides a qualitative and quantitative description of "state-of-the-art" local prosecution of environmental offenses (e.g., impact of state statutes and decisions on local prosecution, active case information, and assessment of the utility of expert witnesses) that can be used for baseline data in the assessment of needs and the development of a local training curriculum for environmental prosecutors. The survey will provide the basis for many subsequent products and activities; however, it also serves as a source for informing us on "what" and "who" is out there at the local level prosecuting environmental crime cases. The survey and initial

contacts provides the first opportunities to identify and collect written materials from these local offices which will become an important ingredient in the preparation of manuals and other publications.

Based upon prior knowledge of the level of environmental offense prosecutions within local prosecutors' offices, the authors expected that the highest level of prosecution activity would be concentrated in larger jurisdictions. For that reason, two separate questionnaires were designed - one was designed for rural/suburban jurisdictions (i.e., serving populations up to 250,000) that contained general questions of the level of environmental criminality, volume of environmental prosecutions and reasons for the absence of such prosecutions. These questionnaires were sent to a sample of offices randomly selected from NDAA's master list of local prosecutors' offices which are proportionately representative of jurisdictional size strata comprising populations ranging from under 1,000 to 250,000. The second questionnaire was a much more detailed questionnaire that posed questions falling into the general survey result categories stated earlier. This questionnaire was mailed to the entirety of local prosecutors' offices representing jurisdictional populations of over 250,000. Content and format of the questionnaire were constructed with the assistance of prosecutor representatives within NDAA's Environmental Protection Committee. These representatives served as the core group for the pre-testing of the instruments.

Initial mailings of the surveys were followed by multi-stage mail and telephone contacts in efforts to maximize compliance rates. As predicted, highest response rates came from those

prosecutors' offices representing jurisdictions of over 250,000 (100 of 178 or 56%). The following material describes the results of the "large jurisdiction" survey involving environmental offense prosecutions. Unfortunately, response rates for the smaller jurisdictions were disappointingly low (248 of 882 or 28%) and, for this reason, are not analyzed here. However, this low response rate for small jurisdictions may be, as we might expect, an indication of a lack of environmental crime prosecutions in these regions.

Offices responding to the "large jurisdiction" survey represented 32 respective states. The highest concentration of responses by state were California (15), Florida (11), New York (9), New Jersey (8) and Texas (7).<sup>1</sup>

## Results

### *Organizational Structure*

To gain a sense of salient organizational features of the offices of local prosecutors responding to the survey, respondents were asked seven questions on the subject of organizational structure as it pertains to environmental offense prosecutions. Questions were posed on: 1) whether environmental crime cases were prosecuted by discrete environmental crime units within offices; 2) the number of part-time and full-time prosecutors assigned to prosecute

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<sup>1</sup> Other states represented were Alabama (1), Arizona (1), Colorado (3), Georgia (3), Indiana (1), Illinois (1), Iowa (1), Kansas (1), Louisiana (2), Massachusetts (3), Maryland (2), Maine (1), Michigan (2), Minnesota (2), North Carolina (2), New Mexico (1), Nevada (1), Ohio (2), Oklahoma (1), Oregon (3), Pennsylvania (3), South Carolina (3), Tennessee (2), Utah (1), Virginia (1), Washington (1), and Wisconsin (3).

environmental crimes; 3) the number of part-time and full-time investigators assigned to prosecute environmental crimes; 4) whether local prosecutors' offices rely on other law enforcement agencies to assign investigators to offices; 5) whether local prosecutors participate in investigative processes; 6) whether the cases are prosecuted vertically and 7) whether the offices participate in environmental task forces.

Offices responding were found to be split fairly evenly on the existence of special prosecution units within the organizational structure of offices (50 [50%] yes, 49 [49%] no). The plurality of responding offices (30 [48%]) reported that they *did not* assign full-time prosecutors to specifically prosecute environmental offenses. However, 23 (37%) reported the assignment of at least one full-time prosecutor per office to prosecute such offenses and 9 (14%) reported the assignment of between two and four full-time environmental assistant prosecutors. Assignment of part-time prosecutors to environmental prosecutions was somewhat higher with 33 (45%) assigning at least one part-time prosecutor, 15 (21%) assigning two per office, 8 (12%) assigning between two and four and 2 (2%) assigning between 16 and 18 part-time prosecutors per office. Like the assignment results for full-time environmental prosecutors, the assignment of full-time *investigators* to environmental offenses was found to be low with the majority (41 [67%]) refraining from assigning any full-time investigators and 9 (15%) assigning one per office. There was a greater chance for responding offices to assign part-time investigators with 21 (30%) reporting the assignment of at least one investigator per office and 10 (13%) reporting between two and nine per office. Fifty-seven offices (59%) reported that they relied on other

law enforcement agencies to assign investigators to them to handle environmental offense investigations.

The vast majority of offices responding were found to assign *active* roles to prosecutors and demand that they assume a continuous role in cases to be prosecuted, from case initiation to disposition. Sixty-eight (71%) indicated that prosecutors in their offices were routinely active participants in the investigative processes of environmental offense cases. Furthermore, 71 (82%) added that all environmental offense cases were prosecuted vertically. On the issue of task force participation, offices were, once again, split with 42 (44%) acknowledging office participation in environmental crime task forces and 54 (56%) reporting non-participation.

Organizational survey data affords us a multi-faceted picture of local prosecutors' offices and the manner in which local prosecutors address environmental violations in their jurisdictions. In some respects, it is a study in contrasts. While approximately half of the sample confirmed the presence of bona fide environmental prosecution units within their offices, almost half responding to the question on full-time prosecution assignment indicated no such personnel assigned. On the other hand, part-time assignment to environmental prosecutions *was prevalent*. Many prosecutors' offices must rely on investigators whose case loads are only partially comprised of environmental cases and on investigative assistance from outside agencies. While a little less than half responded affirmatively to task force participation, most, by far, indicated early involvement in the investigative process plus vertical prosecution of environmental offenses.

### *Extent of Environmental Offense Prosecutions*

To assess the volume level of environmental offense prosecutions carried out by responding offices, survey respondents were asked to report the number of criminal and civil environmental offense prosecutions for the calendar years of 1990, 1991, and the first six months of 1992. Information provided demonstrates a consistent rise in these prosecutions, especially for criminal cases.

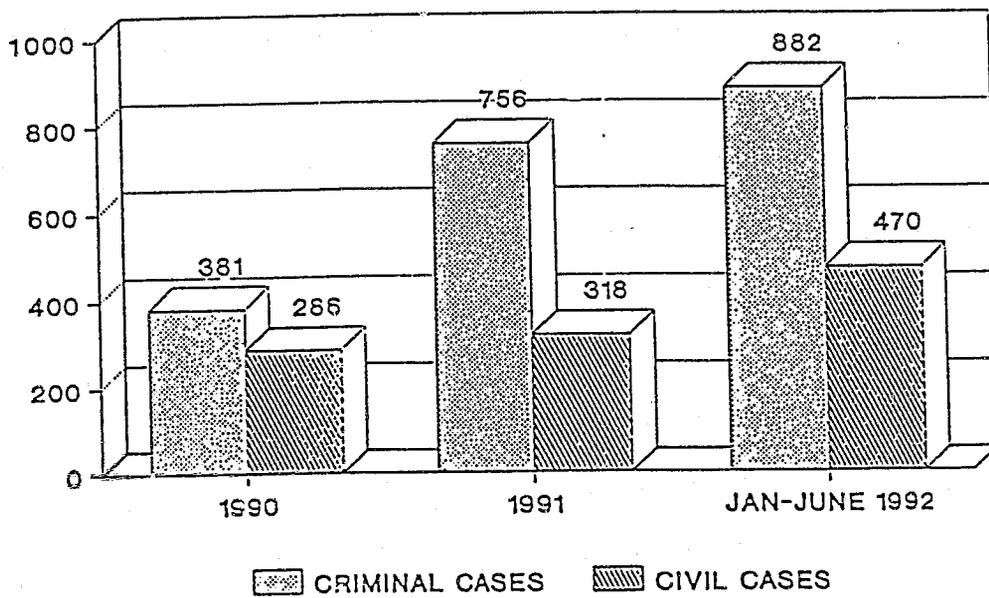
(Insert Chart 1 Here)

As the above histogram illustrates, civil cases rose between 1990 and 1991 from 286 to 318 representing an 11% increase. Civil prosecutions then rose to 470 cases in only the first six months of 1992 representing a 48% rise over the entire year of 1992. The surge in criminal prosecutions over the same time period is significantly more striking. Between 1990 and 1991, criminal prosecutions of environmental offenses in the sample jumped from 381 in 1990 to 756 in 1991 - a 98% increase. The first six months of criminal prosecutions in 1992 eclipsed those for all of 1991, going from 756 to 882 representing a 17% increase. This figure for criminal prosecutions in the first half of 1992 also represents a 132% increase over 1990's criminal prosecution total.

The following three charts should be viewed from a different perspective, that of the number of environmental cases *prosecuted yearly per office* (1990, 1991) and the number of cases per office prosecuted for the first half of 1992. A comparison of the three charts reveals

Chart 1

Environmental Offense Cases Prosecuted  
at Local Level (1990, 1991, Jan-  
June 1992): Total Cases Prosecuted by Yr



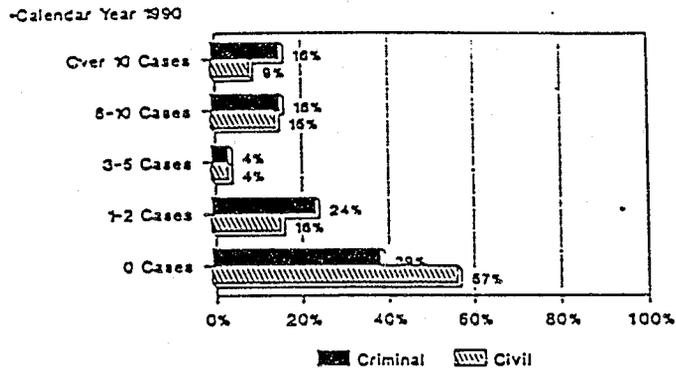
a sharp decline in offices prosecuting no environmental criminal cases per year and, overall, a gradual increase in offices prosecuting more criminal cases throughout the 2½ year time period studied.

(Insert Charts 2, 3 and 4 Here)

As can be seen from the first chart, 39% of responding offices prosecuted no environmental criminal violations and 39% and 57% prosecuted no environmental civil violations in 1990. In contrast, only 16% had prosecuted over 10 criminal cases for that year and 9% had prosecuted over 10 civil cases. The next chart (1991) displays a drop in those offices prosecuting no criminal cases to 27% of the sample and a general increase in the prosecution of criminal cases with the most noticeable increase being in those offices prosecuting over 10 criminal cases for the year. The third chart (Jan. - June, 1992) shows the offices prosecuting no criminal cases dropping to only 19% of the sample and increases in all other criminal case prosecution frequency categories except for the 6-10 case range.

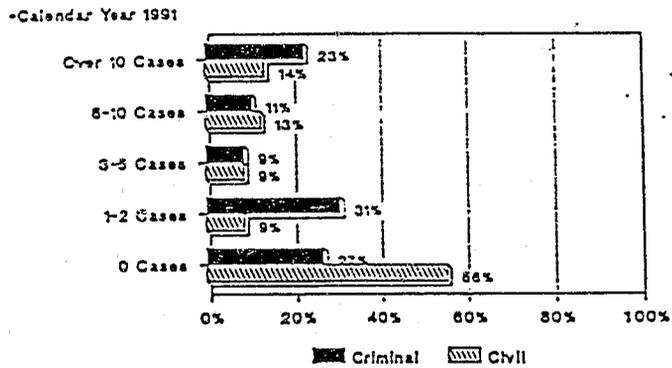
Of special note in this comparative analysis is the change in the mean, median and maximum number of criminal and civil environmental prosecutions among the three time periods and the implications of these changes. As can be seen, while the medians for yearly case totals changed little for both criminal and civil case categories, mean and maximum case prosecutions changed more dramatically. Since medians represent the 50th percentile of collected case data, they are less likely to be affected by extreme cases (i.e., small numbers of offices representing

Chart 2 Environmental Offense Cases Prosecuted at Local Level (1990)  
Frequency of Cases Per Office



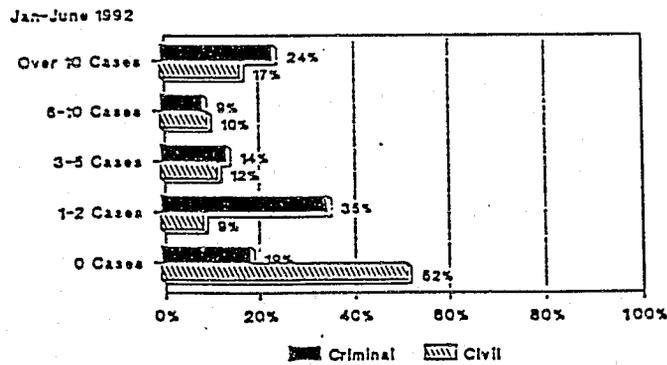
Offices Responding-70, Total Cases,  
Criminal-381, Civil-288

Chart 3 Environmental Offense Cases Prosecuted at Local Level (1991)  
Frequency of Cases Per Office



Offices Responding-78, Total Cases,  
Criminal-758, Civil-318

Chart 4 Environmental Offense Cases Prosecuted at Local Level (Jan-June 1992)  
Frequency of Cases Per Office



Offices Responding-78, Total Cases,  
Criminal-882, Civil-470

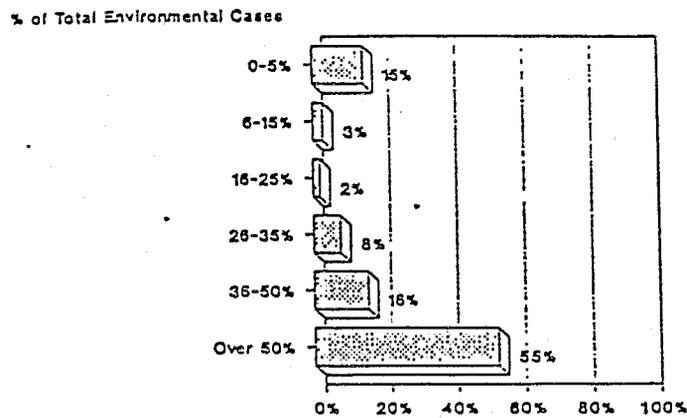
high environmental case volume) and are more reliable as representations of averages in instances where the ranges are wide. Neither criminal case nor civil case medians varied widely through time, however, criminal and civil case means and maximums did. The most dramatic example being the criminal case maximums rising from 79 in 1990, to 100 in 1991 and 154 in the first half of 1992. This underscores the point that while most offices prosecuted more environmental cases as time went on, it was a relatively small number of offices that significantly increased criminal prosecution aggregates in 1991 and the first half of 1992, having a measurable impact on the total number of cases reported for the post 1990 time periods.

#### *Offense Characteristics*

To discern primary characteristics of environmental cases prosecuted by local prosecutor offices in the sample, respondents were asked questions regarding the types of activities prosecuted and the types of wastes involved in the offenses. The following five charts present information on the types of activities prosecuted by the offices sampled. The types of offense activities are categorized as those involving the improper dumping/disposal of solid, hazardous, medical/infectious or "other" wastes (i.e., *Disposal Violations*); those involving the improper hauling/transporting of such wastes (i.e., *Transportation Violations*); those involving the improper storage/stockpiling of such wastes (i.e., *Storage Violations*); those involving the improper treatment of such wastes (i.e., *Treatment Violations*) and *Other Violations*.

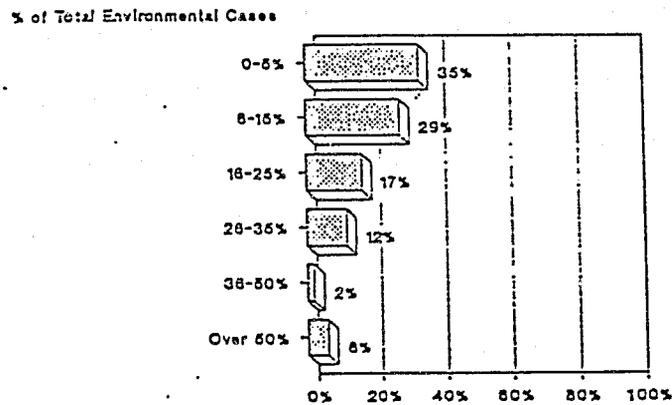
(Insert Charts 5, 6, 7, 8, and 9 Here)

Chart 5 Percentage of Local Prosecutor Cases Involving Disposal Violations



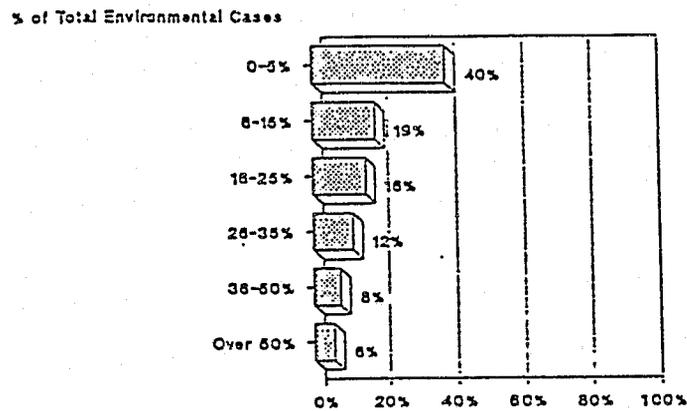
Offices Responding: 78, Mean: 58%  
Median: 50% note: 32% over 90%

Chart 6 Percentage of Local Prosecutor Cases Involving Transportation Violations



Offices Responding: 52 Mean: 17%  
Median: 10%

Chart 7 Percentage of Local Prosecutor Cases Involving Storage Violations

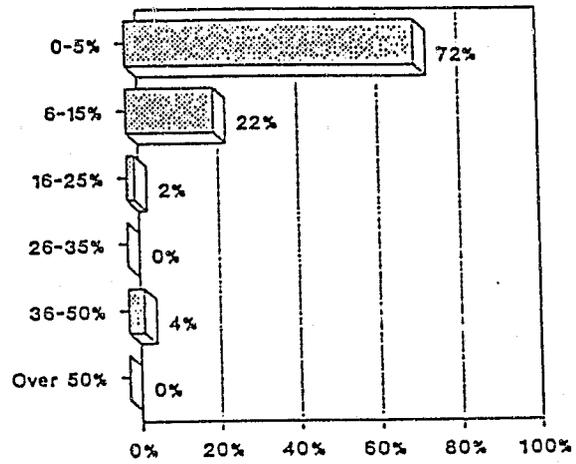


Offices Responding: n=53 Mean: 19%  
Median: 10%

Chart 8

Percentage of Local Prosecutor Cases Involving Treatment Violations

% of Total Environmental Cases

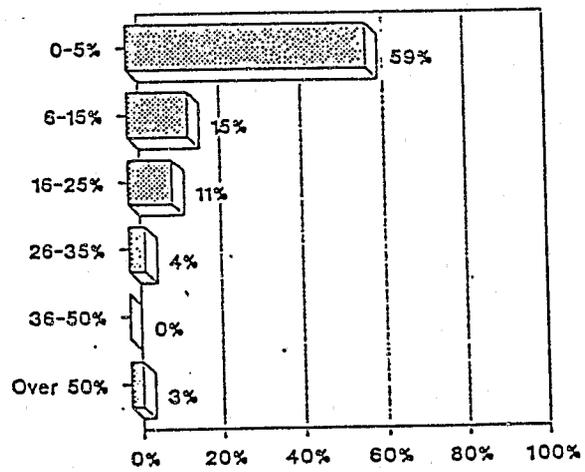


Offices Responding-48 Mean-7%  
Median-10%

Chart 9

Percentage of Local Prosecutor Cases Involving Other Violations

% of Total Environmental Cases



Offices Responding-27 Mean-17%  
Median-1%

A comparison of the charts reveals an overall dominance of disposal violation prosecutions within the caseloads of survey respondents. Slightly more than half of those responding reported that over 50% of their cases prosecuted involve violations of improper *disposal* of wastes. Furthermore, within this group, one-third reported that over 90% of their cases prosecuted were for disposal violations. Only 6% of those responding indicated that over 50% of their prosecuted cases were for transportation violations with the majority of the respondents (64%) divulging that disposal violations account for a small portion (between 0 and 15%) of their total environmental offense prosecutions. Similar findings were reported for prosecutions for *storage* violations (i.e., 69% reporting these cases making up between 0 and 15% of their environmental prosecutions). *Treatment* and *Other* violative behavior represented negligible percentages of total environmental prosecutions (i.e., "Treatment" case median - 5% and "Other" case median -1%).

The following four charts describe cases prosecuted by responding offices, categorized by the *types of wastes* involved in the violations prosecuted. As defined by the Resource Conservation and Recovery Act (RCRA), these waste categories are *Hazardous*, *Solid*, *Medical/Infectious* and *Other*.

(Insert Charts 10, 11, 12 and 13 Here)

Comparing the charts, it becomes clear that the typical case prosecuted by the offices in the sample was for violations associated with wastes that are considered *hazardous*. Nearly half

Chart 10 Percentage of Local Prosecutor Cases Involving Hazardous Wastes

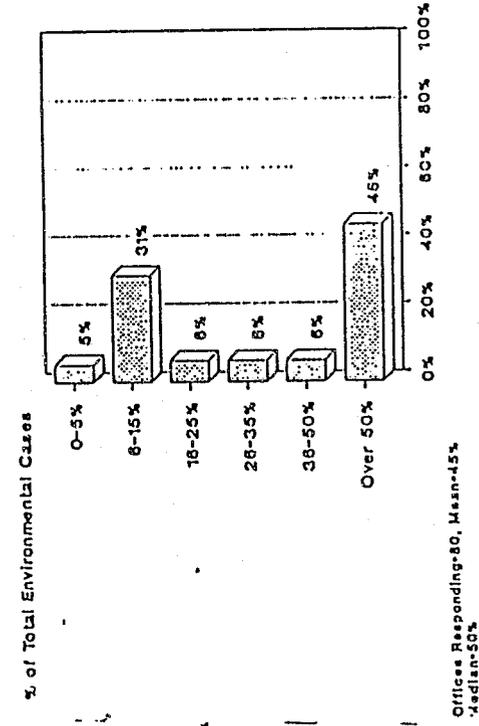


Chart 11 Percentage of Local Prosecutor Cases Involving Solid Wastes

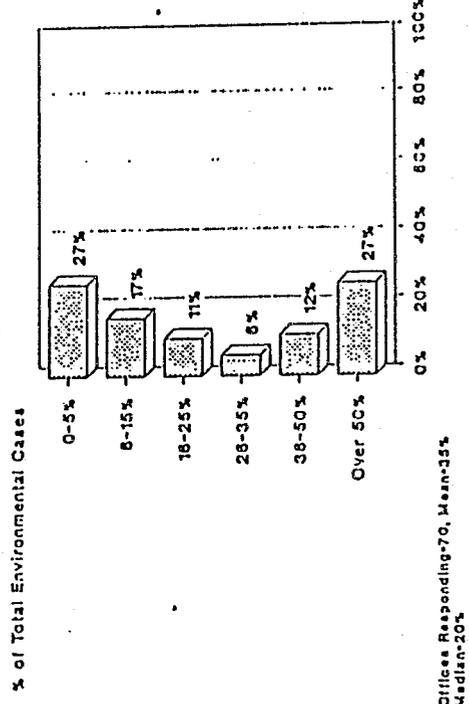


Chart 12 Percentage of Local Prosecutor Cases Involving Medical/Infectious Wastes

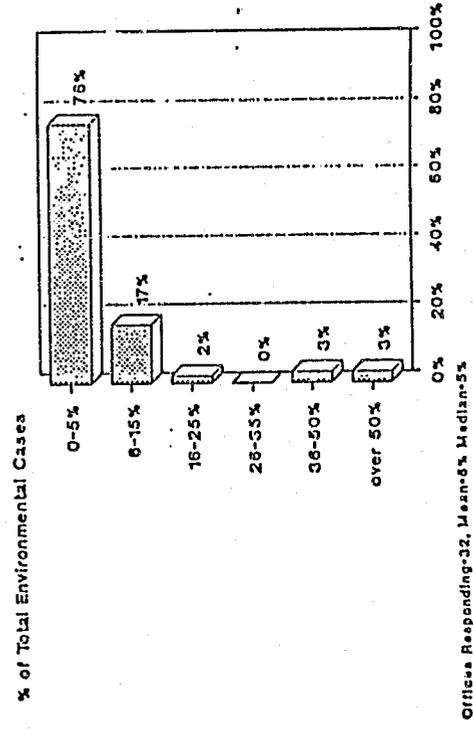
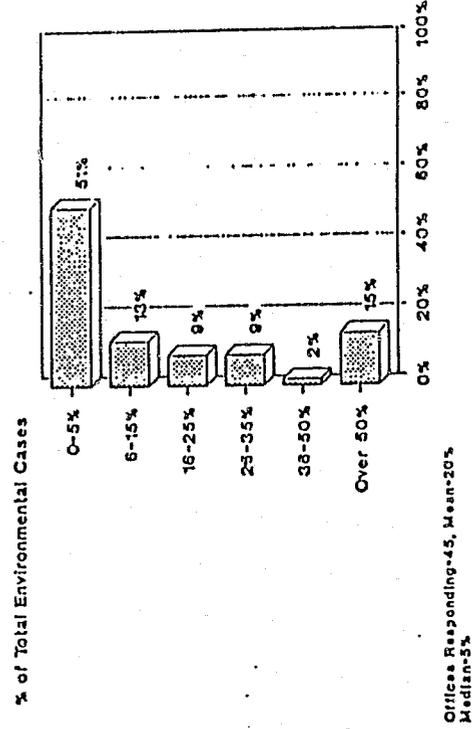


Chart 13 Percentage of Local Prosecutor Cases Involving Other Wastes



of the respondents reported that over 50% of their prosecutions involve *hazardous wastes*. This figure drops significantly for *solid waste* violation prosecutions (i.e., slightly more than one-quarter accounting for over 50% of environmental prosecution caseloads) and is virtually non-existent for *medical/infectious* waste violations.

### *Offense Identification*

A critical question area offered through the questionnaire survey focused on the manner in which environmental offenses have been identified by local prosecutors' offices. Results were thought to have potential implications for the development and incorporation of offense awareness/reporting strategies to enhance abilities of local prosecutors in addressing greater percentages of environmental offenses committed. Respondents were asked to indicate which are the most common methods of offense identification at the local level - *Referrals from environmental agencies, Referrals from local law enforcement, Emergency responses, Citizen reports, Proactive investigation by trained detectives* and *other*. Respondents were permitted to identify more than one method as "common" sources of information. Of the 217 common methods reported, the plurality (75 [35%]) stipulated environmental referrals as the most common identification method. However, as a most common method of identification, referrals from local law enforcement was not far behind, registering 61 or 28%. *Emergency Response* and *Citizen Reports* registered, respectively, only 14% as most common methods for identification with *Proactive Investigations* representing only 7% as a most common method.

Follow-up questions on citizen awareness/reporting uncovered a general lack of involvement with programs that could enhance the capabilities of the community to recognize and report environmental offenses and may partially explain the low percentage of citizen referrals described above. When asked if prosecutors had created programs in community awareness, public relations or education to develop the public's offense recognition and reporting capabilities, only 18 (19%) answered affirmatively. In addition, only 9 (10%) reported developing environmental crime "hotlines."

Finally, in this section, prosecutors were asked to what degree local health agencies were responsive to prosecution needs for technical assistance/investigations. Here, of the 96 responding, 60 (62%) contended that these agencies were responsive with only 10 (10%) claiming the agencies were unresponsive.

### *Decisions to Prosecute Environmental Offenses*

Decision-making processes associated with the decision to prosecute environmental violations criminally was identified to be an important study area considering 1) the highly technical nature of determining sufficient harm or threat of harm posed by the pollutants in question, 2) the often uncertain circumstances surrounding the level of criminal intent and 3) the latitude of discretion that local prosecutors possess in deciding whether to prosecute criminally. Only 13 offices (13%) expressed that their offices have instituted specific procedural guidelines for decisions to prosecute environmental cases. The following table presents data on what the

sampled prosecutors believed were the most significant factors in their decision-making processes to prosecute environmental offenses criminally.

(Insert Chart 14 Here)

The decision-making data highlight that the prosecutors believe that the *degree of environmental harm* was considered to be the most important factor (i.e., 92% either agreeing or strongly agreeing) followed closely by the *degree of criminal intent* of the offender (i.e., 87% either agreeing or strongly agreeing). Although not ranked as being *as* important, the *offender's record* did appear to play an important part in the decision to prosecute criminally (i.e., 72% either agreeing or strongly agreeing). Although the majority of the respondents agreed that the cooperation of the offender in the case and the offender's willingness to remediate could also be influential factors, the level of strong agreement dropped off considerably here.

Besides being queried on factors important to the decision to prosecute criminally, respondents were also asked about the "flip side" of this issue – *What are the most important reasons for rejecting the option to prosecute criminally?*

(Insert Chart 15 Here)

Chart 14

Significant Factors in the Decision to  
Criminally Prosecute Environmental  
Offenses

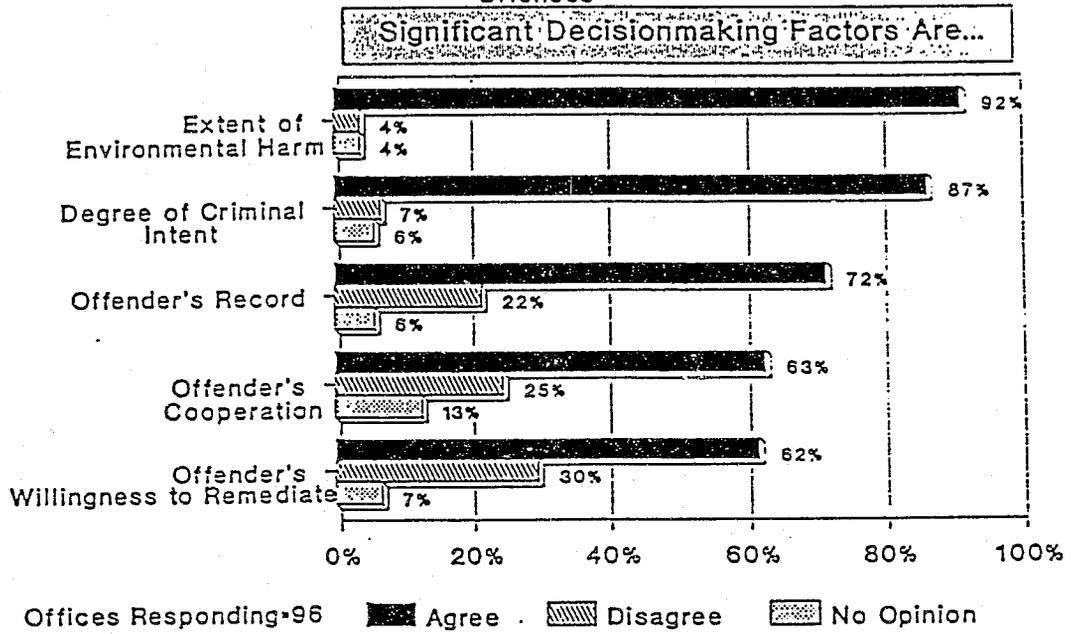
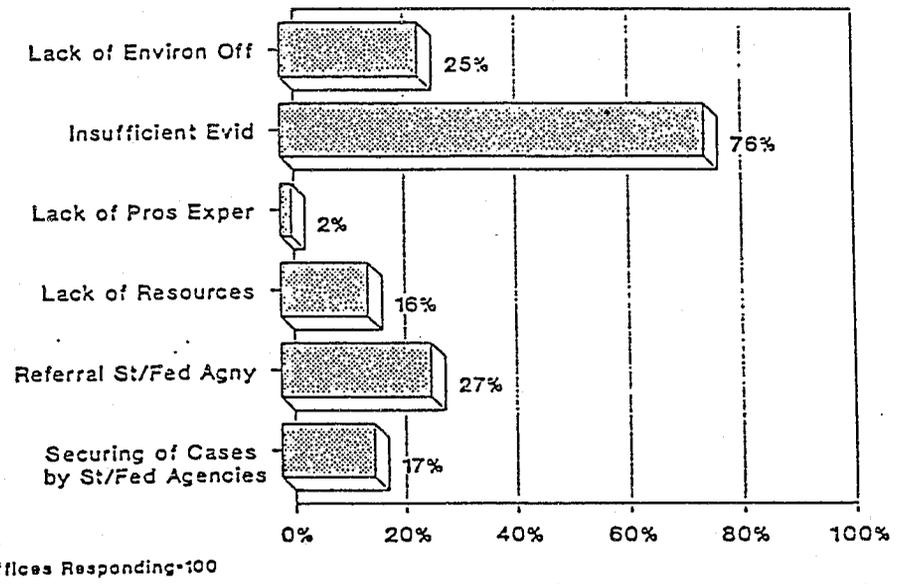


Chart 15 Reasons For Rejecting Environmental Criminal Prosecution



The table above reveals that the sample reported, overwhelmingly, that *insufficient evidence* was the most significant factor in decisions to reject criminal prosecution (i.e., 76% reporting this being the case). It is uncertain, however, what portion of these cases entailed the ability of prosecutors to recognize satisfactorily the presence of evidence to warrant criminal prosecution. Of special note, is that only 16% voiced *lack of resources* as being an important criminal case rejection determinant. Also noteworthy, is that while 27% indicated that *referrals to state/federal agencies* was an important reason for rejection of local criminal prosecution, 17% claimed that the *active securing of cases from local prosecutors* by state and federal agencies was an important explanation for local criminal prosecution absence.

Respondents also furnished information on their *level of willingness to charge* individual officers and employees of corporations, as well as the corporations themselves, as a sign of attaching individual criminal intent to the offenses. Clearly, prosecutors reported a proclivity for considering prosecuting directors/officers (76%) and management-level employees (73%) to a much greater extent than lower-level employees (45%). Prosecutors were found to be split on whether they had ever granted immunity to an employee in exchange for testimony against corporate officers/managers (i.e., 42% had granted such immunity while 58% had not).

Since *civil proceedings* can be a viable option in offices having civil jurisdiction over environmental offenses - 40 (40%) confirmed that they had such jurisdiction. Prosecutors in the sample were asked about the use of this option. Of those with civil jurisdiction, 37 (93%) believed that the appropriateness of alternative civil statutes is a significant factor in the decision

to prosecute criminally. When questioned on whether they were more likely to proceed civilly if the prosecution target was a corporation/business entity, 24 (61%) responded affirmatively.

Once prosecutors had decided to move forward with an environmental prosecution, it was discovered that case priority was fundamentally determined by the *level of harm or threat of harm* involved in the respective cases (i.e., 70% expressing agreement with this statement). Only 33% indicated that the *high profile* of the offender was a factor and only 22% of the sample noted the *type of environmental offense* (e.g., hazardous waste, solid waste) as being a factor. In addition, only 22% of the sample reported that they had a preference for environmental cases that could be investigated/prosecuted inexpensively.

#### *Ability/Willingness to Prosecute Environmental Offenses*

Traditionally, effective environmental prosecution strategies and programs have been contingent on the amount of system and public support for this relatively new brand of criminal prosecution and the technical expertise and resources available to prosecutors. A series of questions was asked of the sample having to do with the *extent of support* they receive to prosecute environmental crimes vigorously, *the types and amounts of resources* that are available to enable aggressive prosecution and the *technical assistance* needed to prosecute the cases effectively.

The following chart presents results on the sampled prosecutors' beliefs on the extent of support extended by the DA's office itself, local government, regulatory agencies, local law enforcement, the local judiciary and the community.

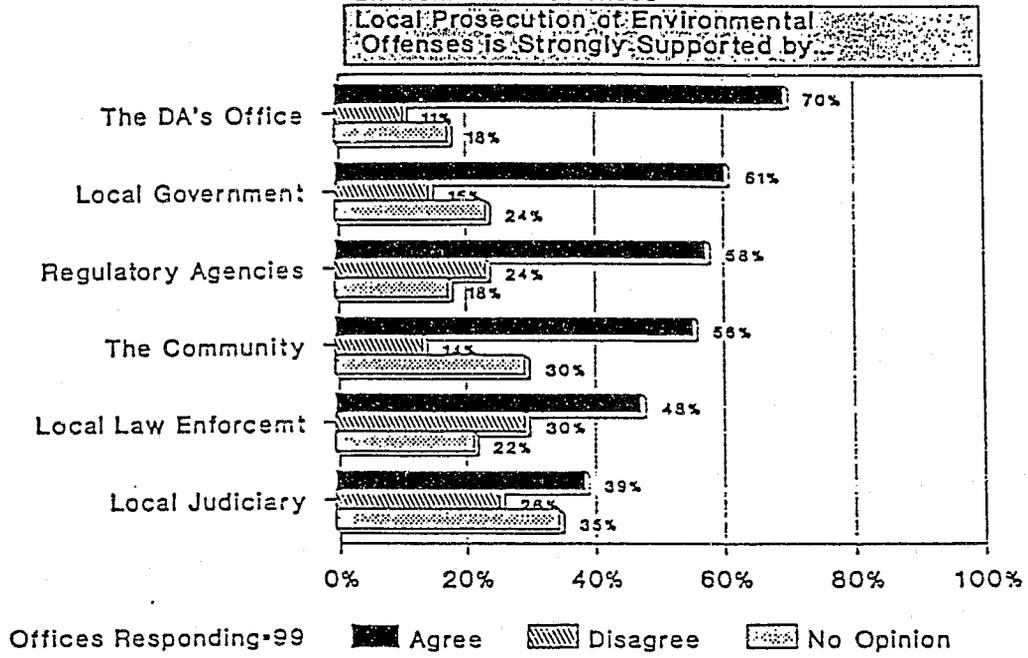
(Insert Chart 16 Here)

As anticipated, the greatest percentage of the sample agreed that sufficient support is received from the DA's office (i.e., 70% agreeing with 31% of that amount strongly agreeing). Levels of agreement to sufficient support supplied by local government, regulatory agencies and the community were fairly equal (i.e., 61%, 58% and 56% respectively). The least amount of agreement to support statements involved the assessment of local law enforcement support and local judiciary support (i.e., 48% and 39% respectively). Of special importance is the large percentage of those who had *no opinion* for support statements regarding the local judiciary (35%) and the community (30%). It is assumed that these responses are a result of a lack of awareness of the level of support from these two sources. For the topic of the local judiciary, this could conceivably be a byproduct of low exposure to criminal trials.

In addition to canvassing the sample on their perceptions of levels of support by criminal justice and regulatory system components, the survey attempted to gauge the extent of resources available to local prosecutors that would enable them to carry out their duties as environmental prosecutors effectively. Many expressed a general need for additional resources to conduct their work satisfactorily. A full 83% of the total sample asserted that more resources are needed for the optimal functioning of their environmental prosecution programs. Fifty-three percent (53%) of the sample agreed with the statement that internal competition for office resources affects the

Chart 16

Support for Local Prosecution of Environmental Offenses



resources for their environmental prosecution programs. A sizeable minority (42%) contended that the investigation/prosecution of environmental crimes, in their jurisdictions, were compromised by competing community economic interests. While a large majority of the sample (89%) felt that laboratory facilities were available for waste sample analysis in environmental crime cases, 48% of the sample added that adequate funds were *not* available for the conducting of these analyses.

To explore the range of alternative sources for local prosecutors to supplement environmental prosecutions, respondents were asked about the *potential for retention of fines/penalties and forfeited assets*. Of the jurisdictions sampled, only 33% were permitted by state law to retain all or a portion of fines/penalties generated by environmental cases. But, 43% answered affirmatively when asked if there were alternatives available by which they could retain such fines/penalties. A majority of the sampled jurisdictions (59%) were found to be authorized under state law to seek asset forfeiture for environmental crimes.

Concluding this section on the ability/willingness of local prosecutors to prosecute environmental offenses, the sample was asked one question on the level of importance attached to *technical assistance/training* for enhancing prosecution office investigators' abilities to investigate environmental crimes effectively. A full 96% of those sampled agreed that technical assistance/training is important to the performance of environmental prosecution unit investigators.

### *Evidentiary Standards/Technical Needs*

Recognizing that the prosecution of environmental offenses on the local level often requires a high level of technical skill in establishing that an environmental crime has, in fact, been committed, questions were posed to the sample concerning adherence to environmental evidentiary standards and the use of expert witnesses.

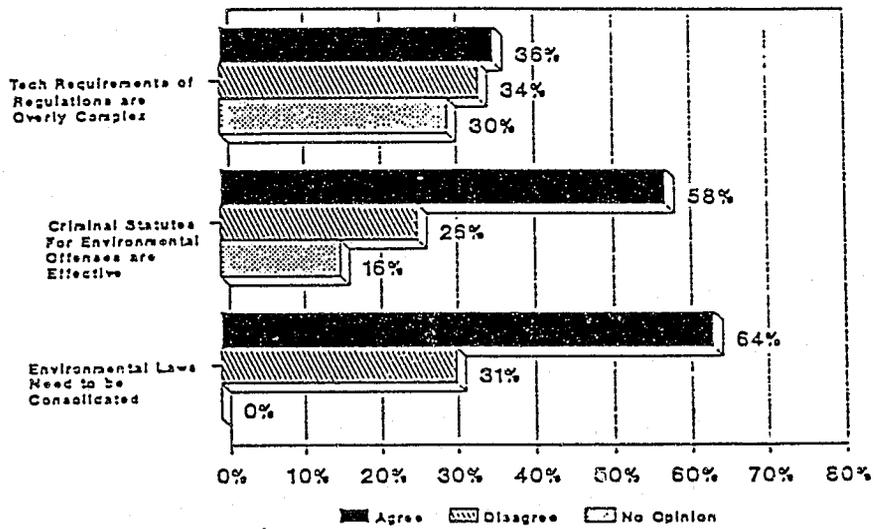
The following chart draws attention to a general assessment of *environmental regulations/laws used* by local prosecutors to prosecute environmental offenses in their jurisdictions. As can be seen, respondents were split on their evaluation of the complexity of environmental regulations (i.e., 36% viewing them as overly complex and 34% considering them adequate in terms of complexity). Notwithstanding this, 58% of the respondents concurred that criminal statutes governing environmental offenses in their respective jurisdictions were effective. Nonetheless, 69% of the sample believed that there was a need for the consolidation of environmental laws into more comprehensive statutory schemes.

(Insert Chart 17 Here)

Confidence was high among local prosecutors concerning the effectiveness of using expert witnesses in environmental prosecutions. Seventy-two percent (72%) indicated that expert witness testimony had affected environmental offense charging decisions. Also, 87% agreed that expert testimony is effective in helping the trier of fact. A large portion of the respondents (70%) contended that their offices are willing to spend the money necessary to hire experts to explain how environmental statutes have been violated and to testify accordingly in

Chart 17

Local Prosecutor Assessment of Environmental Regulations/Laws



Office Responding-93

environmental offense cases. Prosecutors surveyed were also asked if requisite training/education were available for investigators, detectives and other law enforcement personnel, to transform them into "experts" qualified in certain areas of environmental crime prosecution. As the chart demonstrates, presence of such training was reflected as being low with only 39% reporting that such training/education was available for their offices.

(Insert Chart 18 Here)

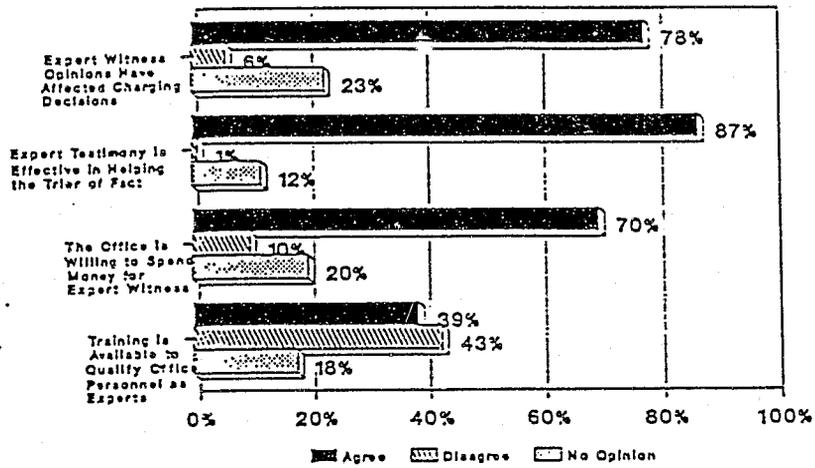
In summarizing this questionnaire section, respondents expressed a critical need for the development of centralized information on available expert witnesses in the environmental crime area. Only 12 respondents (13%) revealed that their offices had created pools of environmental crime experts. Furthermore, 91% of the total sample expressed a need for a national/regional list of experts in a multitude of environmental crime areas.

### *Plea and Trial Issues*

The final section of the questionnaire covered the topic area of plea/trial issues. Of the 69 respondents answering the question - "Are the courts willing to impose custody in these cases?" - only 28% responded affirmatively. A full 85% of the sample believed that the environmental offender's offer to remediate or make restitution has an impact on case disposition. Sixty percent of the respondents also claimed that outside pressures to prosecute environmental offenses (e.g., pressures by environmental interest groups, community groups, media) can result

Chart 18

### Expert Witness/Testimony Utility In the Local Prosecution of Environmental Offenses



Offices Responding-93

in the filing of environmental cases. Only 25% believed that there is significant pressure by business/labor groups to downgrade criminal charges in these cases. Most (68%) had no opinion on whether EPA/state debarment policies have an effect on obtaining environmental pleas. Similarly, most (55%) had no opinion on whether local prosecutions of environmental crime have been more effective than state or federal environmental crime prosecutors.

### SUMMARY

The preceding data, collected and analyzed, from local prosecutors representing large jurisdictions, supplies us with the foundation for profiling characteristics of local prosecutors who prosecute environmental offenses. The information not only uncovers the extent to which local prosecutors proceed with these cases, but it also identifies the types of decisions associated with these extraordinary cases.

Synthesizing the information contained in the preceding narrative, the offices in which the local prosecution of environmental offenses take place can be typified as follows:

- *Approximately half of the large jurisdiction prosecutors' offices operate special environmental prosecution units.*
- *Over half of the offices assign full-time prosecutors to environmental offenses and over three quarters assign part-time prosecutors to these cases.*

- *Only about one-third of the offices assign part-time investigators to environmental crime cases, with the majority relying on outside sources for investigative support.*
- *About half of the offices participate in environmental crime control task forces.*
- *Less than half of the offices have civil jurisdiction in environmental offense cases.*
- *Few of the offices operate formal public awareness programs in environmental crime.*
- *Most of the offices have seen a rise in environmental crime cases over the last 2½ years (offices that had prosecuted no environmental offense cases in 1990 were much more likely to have done so by the first half of 1992).*

For local prosecutors, within large jurisdictions, prosecuting environmental offenses:

- *Most prosecute environmental offense vertically and are active in the sense that they are involved in early stages of the investigations.*
- *The most common environmental offenses prosecuted are those involving illegal disposal.*
- *The most common substances involved in environmental crimes prosecuted are hazardous wastes.*
- *Referrals are as likely to come from local law enforcement as they are to come from environmental regulatory agencies.*
- *The most important factors in deciding to prosecute environmental offenses are, by far, the degree of harm posed by the offense and the criminal intent of the offender.*
- *The most significant factor for rejecting the prosecution of environmental offenses is insufficient evidence or the lack of ability to recognize appropriate evidence. Lack of resources was one of the least likely reasons for rejection.*

A QUALITATIVE ANALYSIS:

Summaries of Site Visits to Exemplary Local  
Environmental Crime Prosecutors' Offices

## SUFFOLK COUNTY, NEW YORK

### ENVIRONMENTAL CRIME PROSECUTION: DEFINING THE OBJECTIVES

The Suffolk County, New York District Attorney's Office has been prosecuting environmental crimes since approximately 1984. Suffolk County is located on the eastern end of Long Island. Excluding the Nassau County border it is surrounded by Long Island Sound and the Atlantic Ocean. Its sole source of drinking water is its ground water, making it a very valuable, guarded commodity. Suffolk's demographics vary from light industry in the western and southern forks of its western region to agricultural in the eastern region. It is also well known for its commercial and sport fishing, as well as its tourism. All of these interests make environmental enforcement one of the most compelling issues in local Suffolk County government. Current District Attorney James M. Catterson, Jr. made environmental enforcement one of the prominent planks of his campaign platform. Most would agree, he has pursued environmental crime prosecution aggressively. This should come as no surprise to those who know Mr. Catterson. As an Assistant United States Attorney in the early 1960's he prosecuted an environmental case under a lesser known federal statutory scheme. This sort of initiative he has brought to the position of District Attorney. Understanding the need to staff his environmental crime unit appropriately, Mr. Catterson appointed Bureau Chief Linda Spahr and Assistant District Attorney Pat Perella to the unit. He also recognized the need for strong investigative support. The lead investigator is Detective Lieutenant Steve Drielak who has been investigating environmental crimes for approximately nine years. Drielak has spent the last twenty years in law enforcement originally with the New York County (Manhattan)

District Attorney's Office and with the Suffolk County District Attorney's Office where he gained extensive "white-collar" and environmental crime investigation experience. John Flynn is employed by the Suffolk County Police Department deployed on a full-time basis as an investigator for the environmental crime unit. He brings a wealth of experience from his law enforcement experience which includes several years in the Emergency Services Section of the Suffolk County Police Department. Richard Ocenacck is also an environmental crime investigator with strong law enforcement experience. He served over twenty years with the New York State Police, retiring as a Commander. Each of these investigators stresses the importance of basic police/investigative techniques in the area of environmental enforcement.

THE INVESTIGATIVE ROLE: COORDINATING REGULATORY  
AND LAW ENFORCEMENT PERSONNEL

Drielak, as the lead investigator, coordinates the investigative aspects of a case in a distinct way. He does not recognize the necessity for monthly meetings of an organized task force effort. Although he relies on regulatory and investigative support from other agencies, he prefers to meet with them only when needed. He uses the example of the execution of a search warrant. Prior to service of the warrant Drielak will gather the representatives of the agencies he expects to participate. At that time he will conduct a briefing and explain to all parties what is expected, i.e., what is the objective of the warrant and how it should be achieved.

Drielak's techniques are supported by the test of time. He has spent the past seventeen years as an investigator in the New York County (Manhattan) and Suffolk County District

Attorneys' offices. Throughout the last nine years he has been entirely devoted to the investigation of environmental crimes. Drielak has also received certification as a result of hazardous material and advanced radiological training.

Drielak recalls some of the problems associated with environmental crime prosecutions during the early years. The first case brought to trial in Suffolk County involved an aircraft paint refinisher whose operation caused toxic waste to be routinely spilled on the ground without any subsequent remedial efforts taken. "The Health Department had taken administrative samples. We had eyewitness testimony. We even had the manufacturer of the chemical come and testify as to its chemical constituents. We had a chain of custody problem with our samples at the laboratory. The judge would not allow these samples as evidence. The case was dismissed pursuant to a motion by the defense. The judge was quoted as saying 'Unless I have a certified lab report that is admissible in evidence, you have nothing to show but chocolate milk, as far as I am concerned.' " Drielak believes that this had a more positive impact on Suffolk County's program than negative. "What it did for us was tighten up our handling of the evidence to the extreme. We also applied those same evidence chain of custody procedures for a criminal case to the administrative process."

Drielak stresses the importance of investigators remaining aware of chain of custody and other potential evidence problems while present at an environmental crime scene. He relies heavily on personal observations. "I will be able to testify that at a crime scene not only was the chain of custody maintained, but I personally witnessed the entire sampling

process. I watch those samples from the time they leave the sampling team to the time they go to the team science officer, until the time they are locked in his drawer in his truck and he leaves the scene. At the scene, we personally keep in contact with those samples so we can testify to it if necessary." Consequently, this early confusion over chain of custody of evidence resulted in strict, well-defined protocols developed and followed by all participants in Suffolk County's environmental crime investigations.

Another initial problem experienced in Suffolk County was the lack of coordination of multi-agency efforts which are almost always required in an environmental crime case. "Nobody knew what anybody was supposed to do. Different agencies were notified at different times. It was a disaster. We at the District Attorney's Office decided to take a leadership role. We met with police department officials, laboratory officials and Health Department officials. We discussed our needs and what we had to do, what we wanted to accomplish. This approach quickly straightened matters out. It is what got the ball rolling."

Drielak further recalls the initial objectives of the Suffolk County environmental crime unit. Primarily, he remembers the need to mobilize a concerted effort to address the growth of uninhibited environmental depredation. One method of achieving this was to lend support to the administrative/regulatory process by reinforcing health sanitarians' efforts with the consideration of criminally prosecuting violators. The following is an example:

We executed a search warrant on a car dealership which was power-washing its new cars' engines, causing hazardous waste run-off to flow into storm drains. The Health Department asked them to cease on several occasions, but they failed to comply. We moved in with a search warrant. We brought a

prosecution against them. Within thirty days there was complete compliance with regulatory and administrative rules on hazardous materials and waste disposal. They were calling for information on how they could make sure that they were following all the rules and regulations. Other car dealers not involved in the incident started calling expressing their desire to comply. Up until that point it had been economically better to ignore the Health Department and simply pay the fines. It has a definite deterrent effect.

Drielak does not see the need for a formal task force approach. Instead, he advocates the formation of what he calls a response group which is capable of going to a crime scene to gather evidence of hazardous waste disposal properly and safely. Although the Suffolk County District Attorney welcomes investigative participation from other environmental agencies, it is often difficult to coordinate because of the unit's strict training and safety requirements. Many other agencies do not meet the levels required by Suffolk County.

Drielak defines the activities that other agencies play in an investigation. He draws the following distinctions: "I am very pragmatic in what I do. Monthly meetings are not going to help me in my day-to-day job, or in getting information gathered so that a prosecutor can have a successful prosecution. I don't believe that kind of approach is necessary." He remarks further "They (other agencies) do not assist in our investigations. They assist us in evidence gathering. These are two separate things. We have investigators and prosecutors who are trained to run long-term criminal investigations with grand juries. Those are the people doing the investigations." Although appreciative of their contribution to the overall environmental enforcement effort, Drielak is quick to acknowledge that regulators generally do not have the law enforcement backgrounds required of investigators. They do

not necessarily understand everything that is needed for appropriate trial preparation. Consequently, not only is it unwise to include regulatory personnel in law enforcement activities, it is also unfair to the regulatory agency involved.

Lieutenant Drielak also emphasizes the need for regulator and investigator training. He and his investigators presented a training conference for regulatory and investigative personnel throughout New York. The conference was well attended and highly evaluated. It consisted of lectures as well as a demonstration of investigating a hazardous materials incident. This sort of training is what Drielak considers to be the most needed.

Assistant District Attorney Linda Spahr is the Bureau Chief in charge of environmental crime prosecutions in the Suffolk County District Attorney's Office. Spahr, a twelve year veteran of the office, with a distinguished career in the Rackets Bureau, has been running the environmental crime unit for the last four years. She credits her predecessors (lawyers and investigators) for creating a strong foundation on which to operate. She also credits District Attorney Catterson, whose campaign focused squarely on environmental issues. Spahr is pleased by the fact that Mr. Catterson has more than lived up to his campaign promises. She recalls that the District Attorney wanted her to be aggressive. He wanted her to move into new areas and make a strong impact because this was such an important issue. Understanding her mandate, Spahr continued with the prosecution of basic environmental violations. With the vision and guidance of Mr. Catterson she also began to experiment with the types of cases they were handling. She sought to exercise more creative

use of the laws. One way in which she did this was to attack the weakness in the laws by more traditional investigative techniques, more traditional types of prosecutions.

TRADITIONAL INVESTIGATIVE AND PROSECUTORIAL TECHNIQUES: DISPELLING THE MYTH THAT ENVIRONMENTAL CRIMES ARE TOO COMPLEX TO PROSECUTE

An example of this approach was the application of an established law enforcement technique known as the sting operation. Reacting to reports that some plating and manufacturing companies were illegally disposing of hazardous materials such as cyanide and acetone, investigators posing as illegal waste haulers negotiated with four Suffolk County companies to remove substantial quantities of hazardous materials. On eight separate occasions, corporate officers, agents or employees of several local companies were alleged to have paid relatively small sums to undercover detectives to remove the hazardous materials, the byproducts of their manufacturing operations. In all \$2,265 was paid to dispose of approximately fifty-five drums of cyanide, acetone, and petroleum products which if disposed of in a lawful manner would have cost some \$32,000.

A Suffolk County grand jury indicted the four companies and six employees for unlawful dealing in hazardous waste. Ultimately these defendants were convicted. Their sentence included custody as well as fines.

Other examples of successful prosecutions in Suffolk County are the following:

Chem Star Inc. abandoned a total of thirty-five 55 gallon drums of hazardous waste on a dirt road on Long Island. One label was traced to the original chemical manufacturer in Virginia whose records showed that it sold that particular chemical to three Suffolk County companies. Two had a record of properly manifested hazardous waste removal; the third (Chem Star) had no such record. A surreptitious entry warrant was obtained to enter Chem Star's facility at night where hazardous waste drums were marked with a special marking tool so as to identify positively the source of any further abandonments. When the corporation's president was ultimately confronted with the evidence of clearly marked barrels which his company had subsequently abandoned, he confessed to the criminal activity. A felony plea was entered and a \$30,000 fine was imposed.

In another case, a tip was received that Marine Pollution Control was dumping hazardous waste from a tanker into the Patchogue River at night. Investigators conducted four nights of surveillance from an open boat and apprehended a suspect in the act. In the ensuing prosecution the tanker was seized. Pursuant to a felony plea of guilty, the corporate defendant paid a \$210,000 fine as well as costs of environmental remediation.

In yet another prosecution, acting upon an eyewitness report that a Ryder rental truck had been observed dumping hundreds of gallons of pesticide into a recharge basin, investigators checked a number of Ryder truck rental establishments examining each truck rented during the time period in question. One such vehicle emitted a strong odor of pesticides. Upon analysis of a portion of the truck floor, a perfect match was made with the

material released in the sump. The renter of the truck was found to be the president of Sunshine Chemical Company which pleaded guilty to four misdemeanors, paid a \$60,000 fine and costs of environmental remediation.

These cases during the early days of Suffolk County's environmental enforcement effort demonstrate aggressive application of traditional techniques in the environmental crime arena. Spahr is clearly a leader of the environmental crime initiative, implementing District Attorney Catterson's thoughtfully developed environmental policies.

A NATIONAL NETWORK OF ENVIRONMENTAL CRIME PROSECUTORS:  
ORGANIZATION WILL YIELD MORE COMPREHENSIVE ENFORCEMENT

Spahr also recognizes the need to develop a national coalition of local environmental crime prosecutors. She cites the National District Attorneys Association's National Environmental Crime Prosecution Center as the most viable means by which to accomplish this. As for her reason for such organization she relies on her experience. She believes that local prosecutors handle more environmental crime cases than anyone else; they generally have more personal interest in the outcome of the case. They also tend to prosecute a broader range of cases than state or federal prosecutors. Consequently she feels that local prosecutors should be responsible for the development of their own programs as well as for their own expertise.

Specifically, Spahr asserts that local environmental crime prosecutors need more training seminars and professional information networks. She rejects the notion that federal and state officials should train local prosecutors citing the fact that her experience probably surpasses those federal or state officials offering the training. When questioned whether or not she has attended training offered by any of the regional enforcement networks she replied that she had not been invited to any. More specifically, she was puzzled by the fact that the Suffolk County District Attorney's Office prosecutes more environmental crimes than any other office in New York State, and yet, the Northeast Environmental Enforcement Project has generally failed to include Suffolk County in its activities. Spahr concludes that this is an example of why local prosecutors need to assess their own needs and represent themselves in providing their own training.

Spahr is also concerned over the status of environmental laws in New York. The manner in which the statutes are codified is very confusing. She understands that other states have similar problems. As a possible solution she looks to the future for model legislation.

My dream is to have the National Environmental Crime Prosecution Center create model legislation. When I was in law school we studied the model penal code. Once I became a lawyer I began to refer to the penal law. It looked like the model penal code. A group of intelligent, experienced people can get together and create a model code. It is going to have an impact. We are struggling right now on the State level. Somehow we have to revise the legislation.

Spahr strongly believes that her success as an environmental crime prosecutor is attributable, in great respect, to the efforts of all the members of the unit. She also believes

that her background is well suited for this type of prosecution. "With the exception of the first two years in the office, I have been in the investigative bureaus. I have tried plenty of cases, but my real area of expertise is investigations. In New York... grand jury is very different. In New York expertise in investigations must translate into an expertise in grand jury investigations. I have always worked with my own police and investigators. I have always worked with investigators from other agencies. I have always had the pleasure of being able to have input at a very early stage of an investigation. The fun that I have had as a prosecutor has been creative investigations – the prosecutions that other people said could not be done, or utilizing the law in a way that others said could not be done.

#### RESPONSE TEAM PERSPECTIVES: ASPIRATIONS AND ACCOMPLISHMENTS

Investigator John Flynn is a Suffolk County Police Detective assigned to the District Attorney's Environmental Crime Unit. Flynn's first involvement with environmental crime occurred when he was assigned to the police department's emergency service section in 1974. He recalls "We were a uniform response unit. Some of our responsibilities were heavy rescue and handling industrial accidents. There were times when we would be involved in an industrial accident where hazardous chemicals were involved. We would have to go in and effect the rescue of people that were trapped inside of factories as a result of chemical fires." In part, due to his background with hazardous materials, Flynn was asked to join the environmental crimes unit in 1985. Since then he describes most of his investigative

experience as on-site industrial discharges of hazardous chemicals as well as off-site abandonments of hazardous wastes.

Detective Flynn is pleased with the progress of the unit. During the past eight years he estimates that the number of cases has tripled. He is equally proud of the fact that only three full-time investigators are capable of managing such a caseload. Flynn also acknowledges that Suffolk's environmental program has been well received by the community.

I think, one, because of some of the media attention that we have gotten. I think, two, people are more aware of environmental issues. People on Long Island are especially aware since we are sitting on top of the water that we drink. We don't have the luxury that New York City has in that if our water becomes contaminated we can tap into mountain reservoirs. People are very aware that we have to protect what we have. People, witnesses, victims, employees of companies that I have interviewed are pretty disturbed when they hear what we are there for and what the alleged perpetrators are doing.

Flynn credits the Suffolk County Department of Health Services with generating most of the criminal cases. Typically, inspectors or sanitarians will observe indications of possible criminal conduct while performing a routine regulatory inspection. In such an instance, the inspector will draft a memo describing the observations of the questionable behavior.

Detective Flynn also believes in applying traditional law enforcement techniques to environmental crime investigations. Given his experience and reputation in the local law enforcement community, he has been able to obtain the cooperation of other agencies with

hardly any notice at all. He recalls how he has been able to gain the assistance of the Suffolk County Police Department Aviation Unit.

Sometimes aerial photos are a tremendous tool where you can actually see the stains better from the air than you can from the ground. An eight-by-ten color photo picture is worth a thousand words, and that is really true. We have utilized the services of the aviation unit and they have been extremely helpful. I can pick up the phone and say I need a helicopter ride, and we are going here or there, and it is here for us. We have a lot of resources at our disposal. I think one of the things that has helped me over the years is that I have spent a lot of time with the County, a lot of years with the police department and I have built up a lot of contacts.

Generally, the environmental crimes unit works with the Suffolk County Police Emergency Service Section, the Health Department Sanitarians and the Health Department Chemists. Flynn describes part of the investigative process as follows

Emergency services are often the first on site. They are the initial phase of the search warrant. To execute our warrants it might take anywhere from one-half to one full day, but no more than that. Emergency Services is a one shot deal. They are in and out after the site is secured. I spend the majority of my time with the laboratory chemists. I look for most assistance from the lab people. They are a wealth of information.

Apparently, the sanitarians play a vital role in their inspection capacity. They "trigger" an investigation. It is not until immediately prior to the grand jury proceeding that the sanitarian re-enters the process. At that point they are re-interviewed and prepared for testimony and trial.

Flynn emphasizes the need to work closely and establish good relations with health personnel. He credits the annual training sessions conducted by District Attorney personnel

for these good relations. As in other successful jurisdictions a premium is placed on effective communication and mutual understanding of agencies' concerns. "It is communication, that is what it is all about. Sensitivity and understanding and also appreciating what the other agency's role is, the problems that they have. It is just being sensitive to everyone's needs."

When discussing procedures in general Flynn emphasizes the need for basic law enforcement techniques.

A crime scene is a crime scene. When you execute a search warrant it is a crime scene, whether it is a homicide scene, a burglary scene, or a narcotics scene. When you have a homicide, burglary, or narcotics scene you are only dealing with police... who have been trained and who can appreciate the importance of a crime scene. When you are doing an environmental crime scene you are probably dealing with seventy percent non law enforcement personnel--regulatory agencies. In the beginning they did not have a very good grasp of how important a crime scene was. They did not understand things like chain of custody. Now they do. As long as you leave avenues of communication open with each other, as long as you are able to communicate with your people and explain to them and have little get-togethers and training seminars from time to time you can overcome these problems.

Flynn values the relationships that have been developed with the other members of the response team. He believes that all parties have learned from each other which has allowed them to develop the appropriate areas of expertise required to make a multi-agency effort successful.

Flynn believes that he and the other members of the environmental crime unit are having a positive impact on the community. As an outdoorsman, he is truly concerned about the environment. He also recognizes the fact that there is a finite period of time in which to

"turn things around." He wishes for his children and grandchildren to have the same enjoyment of nature that he had when he was a child. Commenting on his frustration as an environmental crime investigator, he reveals an interesting perspective.

I get annoyed with the greed of people. You look at a manufacturer, and he is making a product, and he is using some sort of chemical during this process, and that is a cost. All parts of this process are costly, but the manufacturer can pass that on to the consumer. As long as you make a good product people are going to buy it. Why be greedy and screw things up for the other guy down the street. He is trying to do everything by the numbers. He has a high overhead because he has attorneys and engineers, and he is trying to do everything right. That is where I get a little bit frustrated and annoyed.

Perhaps one of the most interesting backgrounds of any environmental crime investigator is that of John Flynn. He was a member of the United States Army's Special Forces during the Vietnam era. He is the most highly decorated police officer in Suffolk County. During his tenure in Emergency Services his duties ranged from routinely engaging in tactical situations to delivering many infants into this world. A modest individual, Flynn does not refer to this distinguished record. Others, however, are quick to describe these accomplishments and recognize Flynn as a prime contributor to the success of Suffolk's program. Throughout his exemplary military and law enforcement career, Flynn has witnessed brutal violence. He considers environmental crime also to be a crime of violence, noting that its effects are rarely restricted to a select few. Instead, environmental crime often affects entire communities.

A unique aspect of the Suffolk County program is the formidable support it is given by the Suffolk County Health Department. More specifically, the District Attorney's

environmental crime unit enjoys the use of the Suffolk County Public and Environmental Health Laboratory. Whereas most jurisdictions throughout the nation must enter into contracts with private laboratories for costly sample analysis, or endure long delays with state laboratories, Suffolk has its own. Through intense interaction and communication this relationship has developed into a superior complement of efforts. The laboratory has been able to offer technical expertise, expedited sample analysis, testimony and other services that are unavailable in all too many counties around the country.

The chief of the laboratory is Kenneth Hill. He has been employed by the Department of Health since 1970. He holds an undergraduate degree in Math and Science, Chemistry and a masters in Environmental Health. Hill is also a member of the New York State Environmental Laboratory Approval Programs Advisory Board.

Hill recalls being involved with the District Attorney's Environmental Crime Unit since 1984. His first duties were to offer services in the analysis of hazardous waste and materials. He has also testified in several environmental crime cases.

In the laboratory the relevant positions are Chemist I, Chemist II, Forensic Scientist I and Forensic Scientist II. Four individuals work full-time in the hazardous and industrial waste section. Three of them have Masters Degrees while the fourth has a Bachelors. Further describing the requisite level of experience, Hill remarks

The one forensic scientist I have now was also an industrial hygienist. He worked as a laboratory director for a private corporation for approximately ten

years before he came to us. He had a wealth of experience before he came in the door. Some of them graduated within the system. You require a minimum of two years experience in doing industrial and hazardous waste analysis before you can even get the job, plus a degree.

Hill states that his staff enjoys working as part of the response team. "I think the people get satisfaction in it. In a way they feel that they are serving a useful purpose in that they are protecting the public from people who are dumping illegally. They feel like there is some gratification in the process." He characterizes the relationship between the District Attorney's Office and his laboratory as one of total cooperation. All participants recognize the common goal in protecting the environment through their individual and collective tasks.

We have the laboratory which has the capability of analyzing a sample and giving them the data they need for prosecution. We also have a trained group of inspectors who are familiar with industries we have to go after at times. So then we are very familiar with the operations, where the problems are, all that kind of data. They are also trained to take samples the proper way. I don't know all the ins and outs of the District Attorney's Office. They have a phenomenal capability of tracking things and searching out information. In one case they found several drums. The investigators were able to trace them back to a delivery man, a license number, and then back to a house. I find that amazing. They are hard working people. They go out in the middle of the night and do surveillance and go through garbage cans. I think that the people involved primarily have an interest in what they are doing and they feel like it is useful to society. There is very little turmoil. We don't see that problem. Everybody respects everybody else's expertise and they listen to the laboratory personnel when we tell them what they can and cannot do.

The Suffolk County Public and Environmental Health Laboratory consists of the three following parts: the Medical Examiner's Office, the Toxicological/Drug Abuse laboratory and the Environmental Laboratory. Hill, as chief of the Environmental Laboratory responds to the

multi-media concerns of all environmental enforcement. The laboratory responds to all sorts of environmental problems including air pollution, public water supplies, bacterial content at local beaches as well as the environmental crime unit requests.

The capabilities that Hill's group provides are very impressive. It is well trained and well equipped. He and his people are on twenty-four hour call, and with the assistance of their fully equipped mobile unit are responsive to the needs of the District Attorney's Office at all times. It is certainly an impressive operation with very dedicated and highly professional people.

Frank Randall is Principal Sanitarian. He is the Chief of Inspection Services of the environmental group within the Department of Health Service of Suffolk County. In effect, he supervises the evidence gathering (by sanitarians or inspectors) the evaluation of industries for illegal discharges and the improper storage of hazardous materials. Other facets of his program are dealing with the storage of toxic and other hazardous materials, the replacement and inspection of storage tanks, as well as their construction. He also oversees the evaluation of approximately one hundred thirty sewage treatment plants throughout Suffolk.

Randall is a thirty year veteran of the county, all of which time has been spent in the health field. He recalls the broad responsibility he had in his early experience. "We did everything from food service, which we no longer do, to inspection of new housing." Before long the department began to specialize. Randall initiated the air pollution program in 1964.

It was the start of the enforcement concept. "Prior to that, enforcement was not a word in the Health Department vocabulary. It was always oriented around education. You try to bring people into line or bring people into the proper line of thinking by dealing with them on a day-to-day basis, educating them.

Randall believes that enforcement of environmental violations has developed substantially. He recalls that during the 1960's he would have to travel to Albany, the State Capitol, to attend enforcement hearings regarding violations which occurred hundreds of miles away in Suffolk County. In contrast, felony violations are now being prosecuted in the local courts.

Randall is pleased with the evolution of the unit. He credits Steve Drielak for his initiative when first assigned to environmental crimes. He also notes that Assistant District Attorney Patrick Perella, one of the attorneys in the unit, had unique experience. Perella, prior to becoming an attorney had worked for Randall as a sanitarian. They both agree that such experience is invaluable. Randall is also quick to indicate that he is aware of no other jurisdiction where a prosecutor has the extensive technical insight that Perella has. Of course, he attributes that to the many years in which Perella served in the Health Department.

Of particular interest is the manner in which Health/Environmental training is conducted.

We at the Health Department and the environmental crimes unit train together. We all train as a unit. We have periodic episodes of working together on the

actual search or inspection warrants. We train in class A suits together. We will create an episode and spend an entire day going through and finding out (our own people) if something should happen as a safety problem. It is important to work together to know what each of the group can do. We never had to sit down and say I am not going to do this. If there was a problem it seemed to work itself out through the lower level alliances that were formed.

Randall is quite satisfied with the overall accomplishments of the program in Suffolk County. He notices a change in corporate mentality.

When we make an inspection they are always looking over our shoulders to see who is going to follow us in the door. They know that in the past we had gone into factories, and needless to say, we had been given a defiant finger. That doesn't happen too much anymore. It makes the job so much easier for a sanitarian knowing that he doesn't have to stand there and stamp his feet two times. They know we will be back. The change in the attitude of the factory owners is significant.

Randall is also very appreciative of District Attorney Catterson's environmental initiative. Without it he believes there would be far more serious depredation.

In his position as Lieutenant, Tom Brandon of the Suffolk County Police Department's Emergency Service Section is responsible for Special Weapons and Tactics (SWAT) Bomb Squad, Technical Rescue and Hazardous Materials Response. Approximately twenty-five percent of his duties involve hazardous materials response. These functions include response to "active incidents," assisting fire agencies already on scene and participation in execution of environmental crime search warrants. He also provides support in the area of decontamination assistance with monitoring and sampling.

Brandon believes in the application of traditional law enforcement techniques to the investigation of environmental crime.

Certain things are basic. The perimeter aspect of the crime scene, the security of the crime scene. We apply basic police work "101" type of stuff that we teach people in the academy. Nobody comes into the crime scene who does not belong there. Basically, similar procedures apply to a murder scene and hazmat scene. Where it becomes different is the danger involved and the technical aspects. When a cop responds to a murder scene, the worst thing has already happened. The incident is already over. Whereas, in a hazmat scene the private contractor gets in there to clean it up while it is an active situation. At a murder scene, the murderer is usually gone and it is basically a clean-up type of operation. You can be there for twelve hours and not have to worry about it. In a hazmat scene you have to have a safety officer, and you must be alert from beginning to end. You can't let your guard down. The basics are required with the added fact that there is danger.

Brandon's training, education and experience are exemplary. Most interestingly, he is a law school graduate and admitted to the State Bar of New York. Although he is not a practicing attorney, he believes that his legal education serves him well in his role as a participant in Suffolk County's response efforts. He has a superior understanding of the legal consequences of his acts. He also believes that he has greater credibility with defense attorneys and as a witness in court.

He attributes much of the response team's success to the fact that all participants communicate well. They understand each other's roles and are considerate. In general, they get along well. Citing the fact that the participants developed this program "from the ground up," Brandon believes that all parties are truly concerned given their personal investments in the effort.

District Attorney Investigator Richard Ocenasek is another key member of the Suffolk County response team. A twenty-three year veteran of the New York State Police, Ocenasek believes that successful environmental crime investigations are the result of the application of traditional law enforcement techniques. He asserts that a strong investigative background is important since one may always rely on experts for the requisite scientific background. Ocenasek has been a District Attorney Investigator for approximately three years. He values the strong investigative background which he gained with the State Police. It is that experience which has permitted him to assimilate with this superior investigative and prosecutorial effort.

#### THE DISTRICT ATTORNEY'S PERSPECTIVE

District Attorney James M. Catterson, Jr. has long been involved in environmental issues. Approximately thirty years ago, as an Assistant United States Attorney, Catterson prosecuted a marine dumping case by charging violations of the little used Rivers and Harbors Act of 1899. This commitment to environmental enforcement has continued to the present day. District Attorney Catterson continues to value the role played by environmental crime personnel. He also understands the threat posed by environmental criminals in Suffolk County.

According to Catterson,

A burglary affects an individual or maybe an entire family. Environmental crimes affect entire communities. Their consequences are not always readily detected, but they are as deadly as any other violent crime.

He also identifies environmental violations as "the crimes whose time is prime." By maintaining an open line of communication with his environmental unit, Catterson remains involved with the investigations and prosecutions of these cases. Always looking for creative ways to gain greater enforcement from New York environmental statutes, Catterson is the driving force behind innovative efforts such as sting operations and sophisticated surveillance programs.

In his first term as District Attorney, Catterson has established one of this country's best local environmental prosecution units. He looks forward to his next term, during which he intends to continue his emphasis on this worthy and exemplary effort.

## LOS ANGELES COUNTY, CALIFORNIA

### EARLY TASK FORCE DEVELOPMENT: MOVING FROM CIVIL TO CRIMINAL PROSECUTION

The Los Angeles County District Attorney's Office established a separate unit for the criminal prosecution of environmental crimes in 1984. With an onslaught of serious environmental violations the then District Attorney, Ira Reiner, realized the need to divide what had previously been the Consumer and Environmental Division into two separate entities. Reiner realized a separate division was necessary in order to address the growing concerns in the environmental arena. Michael Delaney, who has been Head Deputy of the Environmental Crimes Division since 1992, acknowledges that "the initial goal when the department started out was to convey to the business community, in no uncertain terms, that this was a public health issue and a public safety issue". Delaney came to the environmental division after serving approximately four years as Head Deputy of the Consumer Protection Division, which is one of the sister divisions in the District Attorney's Office. Before that time he was a thirteen year veteran of the office and had the usual round of various responsibilities over that term. Delaney finds that Reiner's interpretation of the theory behind the prosecution of environmental crimes initiated the fervor with which the county began to pursue criminal prosecutions.

With such strong support from the beginning, the Los Angeles County District Attorney's Office has grown to be the largest local Environmental Crime Division in the nation. The present division consists of nine attorneys, not including supervisor Delaney, and

eight investigators. Four secretaries also aid in the creation of an adequate support staff that is like a closely knit family.

When first assigned to the environmental division, Deputy District Attorney Tony Patchett was under the impression that his work would revolve around civil prosecution only.

I became aware that this was criminal and that our objectives were to prosecute defendants, whether they be corporations or individuals, for violations of the hazardous waste control laws or for violations related to occupational safety accidents, and that our thrust was environmental prosecutions. It was incumbent on us to not only obtain monetary penalties but to ensure that we prosecute those individuals that we felt were responsible for either disposal, transportation or storage of hazardous wastes.

Previously, a District Attorney Investigator for thirteen years, Patchett became a Deputy District Attorney in 1980 and began work as an environmental prosecutor in 1987. With an unprecedented four environmental crime jury trials, Patchett has aggressively contributed to the success of the Los Angeles County Environmental Crimes Division. Recently, he handled a trial which involved the explosion of the Mobil refinery where one person was killed and two were severely injured. The trial lasted about three and half weeks and just before it went to the jury, the defendants pleaded open before the court.

Under the guidance of present District Attorney Gil Garcetti, Patchett sees the future development of the unit being more in tune to filing civil and criminal cases. Patchett believes "you get far better leverage out of a case when you have the potential for a criminal disposition rather than just a mere civil filing with someone expected to pay monetary damages for the corporation." Delaney, who has had past experience with filing civil

environmental cases due to his time as a deputy with the then Consumer and Environmental Protection Division, finds that, "Gil Garcetti wants to modulate the treatment of environmental offenses to do a mix of criminal and civil actions...[h]e is going to want us to look at the civil sanction in determining if this is really appropriate for criminal treatment and if not to look to civil penalties." Also, innovative penalties are explored.

For one thing we are talking about prohibitory injunctions. They are usually permanent in nature, unlike probation which always expires. I also think [Garcetti] is going to attempt more with the business community too, to convey the message that by no means are we going to be lenient on deliberate or reckless or careless violations.

The approximate ratio of criminal to civil type violations is expected to fall to around sixty to forty percent or even close to fifty-fifty according to Delaney.

Unless you are talking about the demonstrable individual culpability and serious violations that would warrant jail time, in some instances the criminal sanction is a bit of an illusory one. We are dealing with serious public harm. If we are dealing with intentional or reckless conduct, the criminal sanction is going to be the first thing we will turn to. But, as you know, there are a lot of areas in which you will have simple negligence and you have strict liability violations. You have accidents.

This attempt to mix civil and criminal actions would require a level of consistency where similarly situated individuals or violations would be treated the same way. This line of reasoning has created an additional new goal for Delaney and his deputies to accomplish.

WORKING TOWARD DUAL GOALS: COORDINATION WITH OUTSIDE AGENCIES AND DEVELOPMENT OF TASK FORCE CASES

Working in close cooperation with prosecutors Patchett and Delaney, such members of the investigative staff as Lieutenant Fred Leonhardt, Dana Thompson and Patrick Byrne have been able to focus on two main goals when approaching the environmental issues. Dana Thompson, a Senior Environmental Investigator, began his career with the Los Angeles County Sheriff's Office. After investigating fraud cases, he spent over three years as a member of the Special Investigations Division, which investigates the misconduct of public officials. Thompson summarizes the dichotomy of a Los Angeles investigator's goals as "coordinating with the outside agencies and assisting them in their prosecution of people in illegal disposal and/or transportation; and then there is the goal to initiate our own investigations through any informant that we might find." Supervising Investigator Fred Leonhardt agrees that an essential aspect of investigations in the environmental division is cooperation with the regulatory agencies.

A lot of the organization of the unit has been setting up relations with the other agencies and trying to see how you are going to fit in. That is the one unique aspect of this section, as opposed to the other ones where I've worked. It is the amount of dealing with other agencies that you have to do.

Leonhardt has been working with the department as an investigator for twenty years in various areas such as witness assistance, family support, public official misconduct and most recently was in charge of the Welfare Fraud Unit. He has been supervising the Environmental Crimes Division for slightly more than one year.

Investigator Patrick Byrne finds the consistent and well regimented guidelines followed in the Environmental Division compatible with his previous training in the Los Angeles County Marshall. An investigator since 1980, Byrne underscores the notion

There are always new things you have to learn about. It is the kind of field that literally if you got left here for 20 years you wouldn't get bored. There are always new aspects to the case and things you have got to look into to catch the bad guys.

He realizes that due to the technical aspects of environmental investigations and the intricacies of coordinating with regulatory agencies, "it takes a year of working this section before you get your feet on the ground and feel comfortable." As Lieutenant Leonhardt observes,

"The principals are all pretty much the same. It is just learning the different aspects of the law in this area. Of course you are dealing with a lot of other agencies as a team work concept, which is a little different than traditional investigations; however environmental crime investigation is still basic hard core police work.

Thompson also emphasizes that his prior experience, such as his time spent with SID, applies.

Like these cases that we have here, the same with SID or in the street, your basics are the same no matter what the crime or what you are investigating. You want to know the corpus of the crime and you try to put that together with the knowledge and so forth from people you are talking to.

These fundamentals, experience and refined investigative tools, have assisted the investigators in realizing their goals and creating sturdy foundations for the prosecutors to pursue.

## THE IMPORTANCE OF TRIAL EXPERIENCE AND TRAINING

The current structure of the Environmental Crimes Division is much the same as it was in 1984. The nine lawyers who are presently in the division are experienced Deputy District Attorneys who have been through the normal rotation of municipal and juvenile court so that they are comfortable in the courtroom. Similar to other specialized units, the Environmental Division requires deputies who have trial experience. The reason expressed by Delaney is that, "in a number of instances we have had cases with very complex legal and factual issues going to trial and we find the deputies who have tried a lot of cases are more confident and self-assured when they try a complex environmental case." Because of the scientific nature of the cases and basic trial advocacy, deputies coming from such areas as misdemeanor prosecution are successful due to their prior involvement with technical evidence. Delaney concedes that if it were necessary to choose between somebody with a very strong environmental background and little trial experience, or someone with good trial skills and no environmental experience the choice would be difficult.

We get relatively few trials here and they tend to be lengthy trials when they occur. We have a lot of preliminary hearings in the felony area. I can see the point about DUI cases. You do have a mix of factual issues and scientific issues with the breathalizers and sometimes scientific defenses which we will sometimes get in the waste distinction area. You also get the famous "There but for the grace of God go I" concern by jurors. Jurors can picture themselves under the influence and driving and I suppose in some instances they can picture themselves having an accidental discharge at their business and so on. I think because of the availability of environmental training it is very important. In a close case I might want to go for the deputy with the extensive trial experience assuming he or she has demonstrated interest in environmental. Obviously there is a learning curve in this area as I have found in my six or eight months here. I appreciate the fact that you do have to

acquire some scientific knowledge of the nuances of the practice. For these reasons I think I might lean towards the experienced deputy.

The deputies in the Los Angeles Environmental Crimes Division prepare for the complexities of the environmental cases through various training courses and hours of self education.

Training becomes essential to the success of an environmental prosecution unit. Involvement with organizations such as the California District Attorneys Association and California Specialized Training Institute, which has had a strong presence in putting on both basic and advanced environmental seminars, becomes necessary to remain current with the constantly evolving field of environmental law. Many of the attorneys and investigators continually seek outside courses on hazardous waste in order to obtain specialized expertise. Fortunately, the Los Angeles County Bar Association has a very active environmental section with numerous sub committees on air toxics, hazardous materials, and litigation. Many of the deputies in the Environmental Division actively serve as subcommittee members. In-house training, such as mock trials, are found to be effective both for the more junior deputies and for the investigators and regulators. In some cases the regulators are used as witnesses and the department's prosecutors play the part of defense attorneys. This approach enables them to hear the possible rebuttles of a defense attorney in a mock trial rather than in front of a superior court judge and jury. Investigator Byrne has found this approach useful when educating the regulators.

We went out to county sanitation with two of the attorneys from the unit and about five of our investigators and literally put on a whole mock trial. We displayed how the evidence was seized and what a chain of custody is and why it comes up. This gave the regulators an idea of what kind of cross examinations they could be subject to on their methodology or their sampling

techniques and so on. If you are going to bring them on your team you definitely need to educate them.

INVESTIGATOR/PROSECUTOR RELATIONSHIPS: THE IMPORTANCE OF ACCOUNTABILITY, COMMUNICATION AND EDUCATION

One feature considered very important to the Deputy District Attorneys is that the investigators are directly assigned to the unit. Delaney asserts

What is important, and I think you can't stress this too much, is that you have investigators who are assigned to a particular unit. They are not simply coming out of an investigative bullpen and working welfare fraud one day and environmental the next. They need to acquire some expertise and learn what the issues are.

Once the investigators are assigned to the unit, Patchett stresses the desire for investigators who are capable of working on their own.

You need good investigators who know how to ask questions of witnesses and to obtain statements from them and obtain documents to prove it. To me it is real basic, you need a good, well trained investigator who has motivation. I think that is the most important thing, a self-motivator. You need people who look at something and decide what should be done, rather than wait for someone to always drag them around on a leash and say, do that!

All members of the unit emphasize communication between the attorney and the investigator as the key to a successful prosecution. In addition to having investigators directly assigned, they are allocated cases in a team arrangement. Delaney has found it makes more sense to get people involved from the start. "At least in theory, there is a team assignment right away, so that the lawyer can quickly convey his or her expectations to the

investigator." Once this meeting of the minds has taken place, Patchett likes an investigator to pick up a file, and rather than ask what should be done, take the incentive to look at it and decide what needs to be done. "I would like to see him be creative." Being able to work independently helps the investigator to bring his insight of the credibility of witnesses and genuineness of documents to his teamed attorney.

Patchett feels it is important that attorneys in the field work closely with the investigators on cases. He shares the belief that in environmental crime prosecution attorneys take on more of an investigative role than they would in most other forms of prosecution. He also contends that investigators take on a certain amount of attorney-like responsibilities.

I feel that attorneys need to take an active role. Being a former investigator myself, I find myself doing things or doing investigative work that really my investigator should ... I think there are overlaps. I think the most important thing is to have that working relationship with the investigators. That they respect you and you respect them. That is what it's about, it is a mutual respect. I think the problem in the past is that there hasn't been a good working relationship between investigators and attorneys.

Delaney agrees and acknowledges that "some of the deputies here like to get out on the site. As long as it's done in a team fashion you don't have resentment." However, Delaney and Patchett both caution against crossing the line.

One of the problems I have seen in the past is if you have a lawyer who insists on doing his own investigation, you sometimes get resentment from the investigator. By the same token you have investigators that don't think much of the merits of a case on some legal theory and consequently it is less of a priority to them. There is some kind of role confusion and we try to keep that under control.

Due to the training and technical nature of environmental crimes, Leonhardt recognizes the need to educate investigators as quickly as possible, and then retain them for as long as possible.

Usually the department has a rotation every two to three years. If the investigators like the work and they continue to do a good job here, I like to keep them because it is hard to train them and get an adequate replacement on short order. I think it is a unique unit in law enforcement and it is hard to get interest from some investigators in this kind of work. I think that once they get in here, they get to appreciate it and find it is satisfying.

Investigator Byrne acknowledges that the environmental area demands additional time in order to learn the technical aspects of environmental crime. "The cases are complex. They are complicated to the extent that you are dealing with the chemistry of these things which I am not really knowledgeable in, and you need a lot of experts." Once again the investigators stress the importance of working closely with regulatory agencies and receiving training in the area in order to become familiar with the hazardous nature of this type of law enforcement.

TASK FORCE ADMINISTRATION: COORDINATING REGULATORY AND LAW ENFORCEMENT PERSONNEL

In 1984 Los Angeles County became one of the first counties to create an Environmental Crime Task Force. It is now the nation's largest task force with approximately forty-five regulatory and law enforcement agencies as members. Michael Delaney chairs the monthly meeting along with investigator Fred Leonhardt. Delaney believes that the regulatory agencies had in some instances, a compliance mentality and were not law enforcement

oriented. Consequently, the deliberate violators tended to take advantage of them. The idea of the task force was to have a working group consisting of county health, county fire officials, sanitation districts, and public works (in the sewer cases). The underlying intent was to combine the resources and the expertise of the regulators with law enforcement. When the task force was first conceived it consisted of only four or five agencies which were meeting on a weekly basis, or when there was an emergency situation. This original effort succeeded in bringing together traditional regulators who did not have law enforcement backgrounds. Major law enforcement units, such as the Los Angeles County Sheriff's Department and the Los Angeles Police Department eagerly participated along with the regulatory agencies. Slowly, as agencies found out the task force existed and that they had problems that could be resolved by it, participation began to increase. When an emergency arose the units would literally closet themselves in a room and devise a strategy for waste stream sampling, doing undercover surveillance with the help of the bureau investigators, or perform other law enforcement techniques. Then search warrants were executed and arrests were made.

Presently, all forty-five members are still members, but the attendance at the meetings has been restricted so that members attend only if the topic to be discussed is one in which they have interest or would be involved in. Investigator Thompson says of the task force that,

It is basically a monthly meeting to review cases or potential cases, agencies, companies, or individuals that someone may have information on. Perhaps in their regulatory inspections the agency has come across something that may look suspicious. Those companies or people are brought up and discussed.

Delaney asserts the task force has now assumed a different character from that which it had in the beginning.

Number one, the task force serves as an update for all the involved agencies. They would include for example, city and county public works, sanitation districts, county health officers, county fire department officials, and in some cases the business compliance types for business plan violations in the hazardous materials categorization plans. We also have Los Angeles County (city) officials from cities like Pasadena and Long Beach who will sit in. We have the California Highway Patrol along with the Los Angeles Police Department and Long Beach Police Department involved for transportation cases. Fred Leonhardt and I give an update on pending investigations, recent arrests, recent filings, and dispositions on cases that individuals might be interested in. Secondly, we have a round table discussion. This information sharing is probably the most useful and current part of the program. Each participant will identify what cases they are working on, what individuals they are targeting and what stage they are at. In many instances, more often than I can count, a name of a business enterprise will come up and it will turn out that another agency that is attending will have a long history of involvement with them. This information sharing process brings together a number of people who all know each other, but typically don't have time to make fifteen phone calls and find out if anyone else in the environmental regulation or law enforcement community has had contact with the suspect.

The strategies and investigative techniques shared within these roundtable discussions have proven to be valuable to the members of the task force. It is also viewed as a focus for training where members have an opportunity to work jointly in the appropriate areas.

Investigator Thompson found that difficulties present in the investigation of environmental crimes are made easier through the "networking" available in the task force.

Suddenly, to be thrown into something where you have to work with a number of different agencies, a number of different personalities and various backgrounds can be difficult. It's kind of an educational process. Not only for you because you are learning their role to some extent and what they can do, but they are also learning what you can do and how you can help them.

Having these meetings keeps a working relationship with the different agencies. Without this task force, you don't know who you are working with or what their abilities are or their limitations. By having the task force, you have an on-going relationship and it is a coordinated effort. I don't think one agency should do it by themselves.

The nature of environmental regulation and prosecution demands this sophisticated level of coordination. Each investigator and attorney realizes that he or she can not handle an environmental case without calling on the expertise of other task force members. The task force provides the interaction needed to establish efficient and aggressive prosecutorial resources. As Investigator Byrne notes, "What it gave us as investigators is a terrific list of phone numbers so that whenever we come up with a question I can immediately call an expert in that field."

#### TASK FORCE PROBLEM AREAS: OVERLAPPING ROLES AND RIVALRY

Despite the consistency and ease with which the task force generally operates, problems do arise. The most notable problem surfaces in overlapping roles and failures to communicate effectively. Each agency needs to remind itself to adhere to the objective that it needs to accomplish. Patchett best expresses the concern the attorneys have when dealing with agencies.

One of the problems is that in some of the regulatory agencies their people would like to look at themselves as investigators and as cops. I see them in a frustrating role because they want to be the investigators, whereas I like to look at them as the regulators who have a certain function to do. Our investigators are investigators and they have a certain function to do. I think that is where some of the friction develops between the other agencies. You have got to be

diplomatic about it so that you don't step on other people's toes and don't make them feel bad. You do have to have a lot of cooperation.

Thompson believes that coordinating regulatory efforts is essential. "In the past they have seen their role as just a regulatory agency that issues citations. Now they see that by working with us or expanding their horizons with others agencies, they see that it's not just a simple citation."

Rivalry among agencies also becomes an issue. According to Delaney:

There is sometimes a concern over who is the lead agency on a case and who is to make the decisions on the case. Because our focus is developing a case that can be prosecuted and that can be successfully prosecuted to conviction, we try to take the lead in terms of evidentiary requirements, and what we are going to need. Clearly, we have to defer to the regulators when it comes to things like site assessment or to sampling, they are the ones going out there in tyvek suits. Most of my experience comes from my relationship with regulators because 95% of our work deals with them. They are regulators who are basically scientifically trained, for the most part. Once it becomes a criminal matter it is natural for them to bring their investigations for a criminal prosecution. Not having been trained as criminal investigators; however, they see things from a different perspective than we do. I think that the problems that we do have stem from that. It is just a different view of things. We look at things from a criminal investigator's view. I think they come more from a regulator's point of view. There is a difference in how you deal with things and how you talk to suspects or owners of companies or witnesses. They don't have the training and experience in dealing with those types of issues that our investigators do. Some of the agencies have been excellent. Some have been very good and quick to pick up on what is required of them for bringing civil and criminal cases. Others frankly are stuck in the compliance mode; which is fine, if a business is legitimately trying to comply. But, the compliance process can be taken advantage of by unscrupulous operators. We have a number of agencies that have never gotten into the program the way they should, in terms of distinguishing between people who are trying to get into regulatory compliance and those who are trying to pull one over on them. It has been a bit of a frustration to me, even in the short time I have been here, to try and bring some of those people around.

Delaney acknowledges that obviously agencies are concerned with getting the message out to the public; that they are doing their job and effectively pursuing its mandate. Often, when it is the local prosecutors who ultimately file the case, it typically becomes a public event. Agencies then voice concern that they are not getting enough credit for their efforts. Sometimes concerns do arise that an agency might be pursuing its own agenda. Delaney stresses Garcetti's mandate that "there is not to be any grandstanding or grandiose attitudes. For both the deputies and the investigators it is obvious that they depend on the agencies, much like they would in normal criminal cases. The attorneys need to be sensitive to that."

#### CAPITALIZING ON MULTIPLE INTERNAL AND EXTERNAL INFORMATION SOURCES

In addition to monthly task force meetings, in-house meetings are recognized as essential tools in the prosecution process for each division. On a day-to-day basis, Leonhardt comes in contact with all the investigators and discusses the cases that are "hot". In addition, he holds meetings to discuss the topics that are applicable to the whole unit. Quarterly case reviews follow to determine where they are in each case. Although Delaney does have the opportunity to hold staff meetings, he generally finds that direct one-on-one meetings with attorneys are most effective. Patchett finds these meetings helpful to go over each member's philosophies.

Patchett emphasizes that he is definitely in favor of the task force approach.

One of the main benefits of the task force is to find out what other agencies are working on, the particular types of cases they are working on, and whether or not you have different agencies working on a situation where they are going in different directions. The task force is also a good approach if you have a particular defendant and you need the other agencies for surveillance or you need them to put cameras in the sewer and you are going to need someone to take samples.

Several members believe that a nationwide environmental task force would be valuable. To investigator Byrne, some of the larger cases seem to need a national task force.

He recalls a recent situation in Los Angeles:

[We] ended up doing a search warrant where approximately six different agencies between Fish and Game and FBI, ourselves, the police department, fire department plus a lot of regulators were all out there doing the entry and search. That is probably the most complicated search warrant I ever put together - about fifty officers, plus regulators. It would be nice for the State of California to have a statewide level and for the nationals on a few cases such as this one that was interstate, to actually have a national task force where you have one or two investigators that could assign an umbrella for the whole thing. The national task force could then come in and coordinate all the individual efforts against the company. It has got to tie all the various players together.

Regulatory agencies provide the Environmental Crime Division with the bulk of its case referrals. The Los Angeles County Health Department and the Los Angeles County Fire Department hold the general responsibilities regarding hazardous waste control at the county level. Other agencies, such as the South Coast Air Quality Management District, which is responsible for the stationary sources of air pollution, will bring air toxics cases. Other referrals are brought to the Division's attention by disgruntled employees who act as informants against their employers who are possibly disposing of hazardous wastes illegally.

Los Angeles County is exploring the idea of a toll-free tip number similar to those used in other parts of the country. Patchett finds this idea commendable. "I find that people are the eyes and ears of the community. I feel that in some ways we are on the tip of the iceberg as to what happens and there are not enough regulators or people out there to police what is going on. A hotline would be very helpful." Patchett believes that a hotline would be helpful in much the same way speeches to the community are helpful. "One of the reasons we go out to give speeches to the community is to alert businesses and people in general as to what we do and who we are. Also, so that they become aware of what steps can be taken to avoid environmental crime prosecution and environmental crime discharges." Though it is not terribly frequent, sometimes cases do come from companies who are complying with the law and feel disadvantaged, so they inform the department of their suspicions regarding other companies. Also, hazardous waste disposal drums may be found which contain remnants of information that investigators could trace back to the violator. Investigator Byrne recalls the significance of one of these cases:

The case started with just a guy doing some plotting for a real estate development out in the desert. He came to us and told us that there were a lot of containers that had been dumped out in the desert. We went out with the Health Department who did some testing and the material turned out to be buffing off of a metal polishing company. The paper materials in the drums were traced back by receipts and envelopes that had been mailed with too many of them coming back to one address. We went to that address and interviewed the guy who was there. We developed the case and it ended up that the brother had done all the dumping in the desert rather than have it all hauled away. A classic midnight dumper. By the time we did an interview with him he was dying of liver disease and was on dialysis. He was trying to convince me that all this heavy metal he dumped in the desert wouldn't have an effect on anybody - and he is dying from the disease it causes! We filed criminal charges against him and we arrested him. But, by the time it came to trial he had died. We seem to think he faced a higher court than ours.

## CHARGING DECISIONS

Deciding on whether to prosecute an environmental violation as civil or criminal depends upon several factors. According to Patchett and Delaney the overuse of the old cliché "each case is different" does not make it any less significant. Every fact pattern is different. The prosecutors are generally reluctant to put themselves in a position where only certain factors will be weighed to determine the sentencing recommendation to the court. What is most important to Patchett when filing criminal proceedings is the ensuing damage to the environment. Delaney agrees. "We have certain internal criteria that are not written by-and-large, except in the most general terms. The extent of public harm, the degree to which the act was performed intentionally, the history of the company in question, and to what extent it has cooperated in the remediation process are all factored into the decision." Patchett explains the amount of deference that is given to a defendant who actively participates in the remediation process.

Cooperation does mean a lot regarding mitigation on a sentence, because if you have done something wrong and you are willing to remediate your problem, then I would take that into consideration. I have a case going to trial right now where a defendant stored hazardous waste at various locations. He put the hazardous waste on a big truck and took it down to an RV storage place. He transferred some across the street to another location and has yet to remediate the problem. Recently, I went to court on the case and the corporation wanted to plead the case. I said no way! Number one, you have not remediated the wastes and besides, the defendant should serve some time in custody whether it is county jail or whatever. Cooperation makes a big difference. When somebody has taken the effort to remediate the problem and to expend money, I definitely look at that as how serious a charge I am going to file, and what I would expect in regard to a particular sentence.

Culpability, or the degree of intentional behavior behind the offense is another factor in deciding the fate of the defendant. The line is drawn between the intentional disposal of hazardous waste or whether it was simply a negligent act. Prosecutions of corporations are also afforded a separate guideline in this area. Delaney summarized the following:

If we are dealing with a corporation, one of the factors and one of the big break points on criminal versus civil prosecution is whether there are individuals whom we can demonstrate are responsible parties, and whether they are criminally culpable or not. There are some instances where you have a historic pattern that the corporation engages in and it is very hard to attribute it to any individual. Perhaps the only directly involved individual is a low level warehouse worker who actually engaged in the behavior. Generally speaking, we are not interested in targeting those kinds of people. On the other hand, if you have directors and officers or managers of an enterprise who we can demonstrate engaged in intentional or reckless behavior, it then becomes more likely to be a criminal case.

This aspect of the culpability requirement is fundamental in Patchett's approach to criminal proceedings.

If I can prove that somebody was responsible within a corporation I don't see why I should take a plea from a corporation and let the individual defendants off. I know quite frequently attorneys representing corporations and defendants will say, "How about taking a plea from the corporation and let my client walk out of the case?" I just don't feel that serves our community right. It doesn't send the right message. I think that the one message I like to send out is if you are the responsible person and involved in the acts, then you will be prosecuted. I believe that once this message gets out, fewer corporate executives or people in corporations will be inclined to violate hazardous waste control laws.

Individuals are targeted when it is their conduct that causes violations. Having individuals held responsible does not allow corporate officers to hide behind the corporation. It precludes the avoidance of liability resulting from a bankruptcy filing. As Patchett explains,

Quite often when people do a criminal act, they look to the Bankruptcy Court as an escape hatch for them, where they can go in and file for bankruptcy and not have to pay their creditors. However, because of the fact that we expect to extract large penalties, we do obtain a certain priority in Bankruptcy Court for payment. If you fail to go to Bankruptcy Court and get on the list, then you could be shut out if something happens and they pay all the creditors."

Historically, Delaney notes that deputies did not go to Bankruptcy Court in order to get on the list of creditors. There is now a firm resolve within the division to change that. Prosecutors in the office are seeking training and education in this area of law which they find is now being used as a corporate environmental defense. This presents a new challenge for the attorneys, most of whom have never practiced in United States Bankruptcy Court.

Once the degree of harm and culpability of the defendant has been established, the prosecutors look to other factors such as prior history. If they are dealing with a recidivist they are more likely to pursue criminal prosecution. Also, as Investigator Thompson maintains, "What is important is whether they had an environmental compliance program and whether that was, in our view, mere lip service or protective cover, or it was really an effort to identify and remedy the environmental violations where, one just happened to slip past." The prosecutors acknowledge that a certain amount of "triage" must be applied in terms of what cases are going to be prosecuted. Lesser cases must sometimes be rejected or downgraded to office hearings when more serious cases are pending. Not being able to get to every case because of the need to deal with more serious violations is admittedly one of Delaney's frustrations.

As is the case with most offices, a lack of resources becomes an issue when the Division confronts the option of parallel proceedings. Delaney emphasizes that even in Los Angeles County with all the personnel that they have, it is a luxury that they cannot afford.

If they handle a case criminally, the office generally tries to get a result that will deal with the defendant in that situation adequately so that they don't have to file a parallel civil suit which will involve more resources being expended. Secondly, there is a complex discovery problem which the department needs to contend with. LA county follows the Federal Department of Justice model which requires that they deal with the criminal case first before they address the civil, so there is no suggestion of leveraging a civil result with a criminal threat. If they choose to file a criminal case and then a civil case, they must either file them simultaneously and put the civil matter on hold (until the criminal matter is resolved) or in some cases not bring the civil suit (assuming the statute of limitations is not a problem) until the criminal is resolved, but convey to the defendant that it is coming so there is no suggestion of sandbagging.

During plea negotiations with attorneys representing corporations, Patchett frequently hears that the reason that businesses are leaving California is due to excessive environmental regulation.

I don't believe that is the truth at all. I think that most businesses leave for other reasons, mainly wages or worker's compensation issues. I have yet to see our environmental prosecution put a company out of business. I think companies put themselves out of business by their poor business practices.

With his experience, including most environmental crime jury trials behind him, Patchett espouses that preparation is what leads to successful prosecutions.

It comes down to presentation of the case, preparation of witnesses, the opening argument and the final argument. They say that luck is preparation meeting opportunity. I believe that. I prepare my cases when I file them as though they are going to go to jury trial so that I don't have a problem, and feel very comfortable handling the case all the way through. When a defense

attorney threatens me or tells me that if I don't like his deal, he is going to take me to trial, that's fine with me because I am prepared for either one. You can't do these cases by the seat of your pants. If you attempt to do that you are not going to do a good job. I am being paid by the County of Los Angeles to do something and no matter what I think or how much I get paid, I still like to believe that I give a hundred and fifty percent. I don't look at them and say I did the bare minimum. I want to give them the facts and that way I can feel that nobody can ever say, no matter what the results are, that I didn't try hard enough.

### ADVANTAGES TO PROSECUTING ON THE LOCAL LEVEL

Patchett believes, without a doubt, that as a local prosecutor he is better suited to try a case in Los Angeles County than the State Attorney General or the United States Attorney. As a result of the rapport he has established with the courts, judges and defense bar, Patchett is confident that his reputation and presentation in court results in his ability to be more effective. Delaney also acknowledges:

The feds are spread very thin. Both the EPA and DOJ lawyers, although they have criminal authority now, typically have to cover many states out of one of their regional offices, or from Washington. They are not in a position to bring in the volume of cases, or to have the expertise developed, that we do on the local level.

He follows this with the belief that prosecutors, just by sheer volume and their involvement in the community, are in a much better position to bring local environmental cases.

Also at issue when prosecuting an environmental jury trial is the way in which the prosecutor presents the evidence to the judge and jury. The choice between presenting the evidence in a scientific manner as opposed to a circumstantial presentation depends on the ability of the prosecutor to convey the intricacies of environmental evidence. Delaney is surprised at the extent to which juries seem to grasp at least the broad outlines of the science. He acknowledges that, though they may not understand the hydrocarbon rings or the atomic weights involved, they do understand that it might be toxic. Each member of the Division stresses that a happy medium between the two approaches must be met. As investigator Thompson notes:

You have to bring in that technical guy to talk about the elements of the crime, because one of the things that the public wants to know if you go to a jury trial and probably a judge, too, is what harm is this? It is important to bring in the scientific side of this to show that it is harmful. What you want to do is establish that this stuff is a hazardous waste. Whatever it takes to keep it simple for the jury is what you want to do.

Thompson remarks further:

In the preliminary hearing sometimes you get the feeling from a judge that he doesn't want to be bothered. I think some of that might be they don't want to deal with it. I don't think it's from their lack of concern as much as their lack of knowing about the environmental issue. They really don't want to sit in on this case that they don't know a thing about. The thing to do is keep it basic so that the lay person can understand the issue. If the experts come up with too many of the technical terms the judge gets lost and I don't think the judges like to deal with that.

Although Patchett realizes such difficulties, he also believes that a local jury perceives that a local Deputy District Attorney has a greater stake in the community.

I found that there was strong awareness and support of environmental prosecution in the community even though it might be an issue where people say it will be putting business out of operation. People are worried about their own community. When I did the case against Mobil we had to let go of a lot of jurors because they were so adamant and totally against Mobil that they could not have been fair. The biggest thing was finding jurors that could say they would be willing to be fair because it is a larger corporation.

### LOOKING TOWARD THE FUTURE: EMPHASIS ON EDUCATION

The Los Angeles County Environmental Crime Division continues to focus on the future. The prospect of a nationwide networking system which would provide unlimited resources and the capability to interact with other jurisdictions would be considered a worthwhile addition. Yet, the members recognize that one of the greatest needs in environmental prosecution is education. As investigator Byrne notes,

In a sense, environmental crime is the crime of the nineties. People are becoming aware and they don't want to have it in their backyards. They realize the detrimental effect on the kids in the area of hazardous waste plants. Most people only see the tip of the iceberg here and they don't realize how much of it is going on. There is as much of it out there as you want to put investigators on. You could start bringing in investigators and I could start assigning each one a very valid case.

Thompson perceives part of this goal as follows:

Not only to enforce environmental crimes, but also to educate the public that we exist and that there is an answer out there. They want the environment protected and they want to know that there is law enforcement out there that is willing to do something. I think it is not only investigating these crimes and putting people in jail but it is also letting the public know.

As educating the public on the accomplishments of the Division develops, Patchett sees promise in the future.

I would like to believe that our future is based on our leaders. We have a Vice President, Al Gore, who seems to be a person who has strong environmental credentials and is concerned about the environment. I would like to hope that awareness stays the same. I would like to hope also that we get better involvement from the citizens. I think that in all areas of the criminal justice arena, that unless you have the support and cooperation of the citizens you are never going to do a really good job. It is going to be rippling the waters, but you are not going to have a positive effect unless you get the support of everyone.

#### IMPRESSIONS OF THE DISTRICT ATTORNEY

District Attorney Gil Garcetti is optimistic about the future of environmental crime prosecution in Los Angeles County. Newly elected to his position, Garcetti is reassessing the focus of his deputies in this area. Whereas former District Attorney Ira Reiner found it necessary to prosecute environmental violations primarily as crimes, Garcetti believes that there is certainly enough variation in these offenses to allow for some civil enforcement. In fact, Garcetti asserts that it is important to have an environmental prosecutor on staff who has strong civil environmental experience.

Garcetti is also interested in trying to establish a group of individuals who represent the business and legal communities in an effort to assist in the establishment of future guidelines for bringing environmental enforcement actions. Garcetti, a career prosecutor, believes in strong prosecution of environmental criminals who intentionally violate

California's environmental statutes. In a departure from his predecessor's policy, Garcetti also understands the need to work with the businesses of Los Angeles County. He asserts that compliance can also be gained by dealing with an educated and cooperative business community.

## ORANGE COUNTY, CALIFORNIA

### EARLY TASK FORCE DEVELOPMENT: ALTERING PERCEPTIONS OF ENVIRONMENTAL OFFENSES AND SPECIALIZED UNITS

The Orange County California District Attorney's Office has been involved in the prosecution of environmental crimes since 1984. Starting with a one attorney and one investigator unit its staff has grown to four attorneys and two investigators. Supervisor Bob Gannon, Gerald Johnston, Michelle Lyman, David Kirkpatrick, and Investigators Kip Kinnings and Steve Kirsch. Initially, environmental cases came into the Consumer Fraud Unit; however, by 1985 enough cases were generated to cause the formation of a separate division dedicated exclusively to the prosecution of environmental offenses. Although these cases were once viewed as exclusively civil violations, the newly organized personnel, in 1985, decided they would pursue these violations as criminal or civil, depending upon certain filing criteria. Once the process started, Investigator Kip Kinnings (who is an original member of the unit) found the caseload to increase rapidly, if not dramatically. With the formation of the Orange County Environmental Crime Task Force in 1985 the caseload increased to approximately 60 pending cases. The early going was made even tougher by the lack of environmental prosecution training as well as the lack of environmental crime information support networks. Kinnings found it necessary to educate himself regarding the relevant California statutes and the technical/regulatory expertise. During the early days of environmental prosecutions the Deputy District Attorney involved was also responsible for consumer fraud cases. Investigator Kinnings and Deputy District Attorney Gerald Johnston agree that this sort of dual function might very well have impeded the initial success of the

unit. In particular, they believe that it becomes increasingly difficult to learn a specialized form of prosecution such as environmental crime when one must constantly shift his or her thinking into another area. This dual approach does not permit an individual to sustain the appropriate amount of concentration on this new and challenging field of law. Kinnings summarized the following:

I think the faster that an organization can have a separate entity, not to say that they can't be under one roof, but have a distinct separation where you don't have the same personnel working consumer that are working environmental, you are going to have a higher learning curve and a lot more sophisticated cases can be addressed in a much more efficient manner.

Johnston agrees that the two areas should be separate. He acknowledges that "[T]he roots of environmental prosecution in California initially grew out of the civil side and out of the utilization of *California Business and Professions Code Sections 17200 & 17500* that we use in consumer protection cases. Since the mid-eighties there has been a noticeable transition where environmental enforcement has entirely separate authority. We are approaching these cases much more in a criminal context and really don't have as much common ground with consumer protection anymore." Johnston emphasizes:

Environmental crime is a crime of violence. It is not consumer oriented protection. It is serious criminal activity. I believe that philosophy is starting to grow more and more, at least in California offices. I think it is a natural progression for environmental enforcement units to be separate from civil consumer units because they are so specialized and environmental crime needs to be addressed from a separate philosophical standpoint.

Specifically, Johnston believes the *separate philosophical standpoint* is the increased use of criminal prosecution. As time progresses, more cases are evaluated as criminal violations. Johnston also believes that California prosecutors are fortunate to be able to use

the "should have known" standard in an environmental crime case. He also remarks, however, that deputy district attorneys throughout the state must be certain not to abuse this standard.

In retrospect, Kinnings views the unit's development as starting with smaller cases such as stream bed alterations. These are typically misdemeanor violations of the *California Fish and Game Code*. His hope was to be able to ease into this endeavor cautiously. As is the case in many jurisdictions, however, one of Orange County's most significant cases occurred in those early days when hazardous chemicals were dumped along side Ortega Highway, a major thoroughfare in Southern California. Although some injuries were sustained during that investigation, the case ultimately resulted in a successful prosecution. Kinnings perceives this investigation as the commencement of the Orange County Environmental Crime Task Force. As the events unfolded in this case, several law enforcement and regulatory agencies responded to the Ortega Highway site. Without any specific plan all parties involved began to assume the responsibilities that came naturally to them. Unbeknownst to him at the time, Kinnings had engaged in his first task force investigation. Now that he was faced with his first major environmental incident, Kinnings and the other law enforcement personnel decided to apply basic law enforcement protocols and procedures to the investigation. When called for, more advanced forms of technology were introduced to the traditional investigative process. The results were remarkable. Through the use of laser technology the investigators scanned for fingerprints, resulting in the detection of a latent print on one of the containers. That print was instrumental in the arrest

of one of the suspects. Since that incident, Kinnings insists that fundamental law enforcement techniques are the key to his success as an environmental crime investigator. He stresses fundamentals:

You are still using all your fundamentals. You are still protecting the crime scene. You are doing the photo documentation and the interviewing. Add to that the environmental aspects of lab and chemical analysis. These are the constituents of a felony environmental crime investigation. That is how you do it!

BUILDING STRONG CASES THAT ACHIEVE DESIRABLE  
SETTLEMENTS AND TOUGH PENALTIES

At the time of the publication of this report, several environmental crime trials have been held in Orange County. For the most part these involved disposal, transportation, treatment or storage of hazardous waste. The earlier trials resulted in guilty verdicts, but the sentences were often no more severe than probation terms which included nominal fines, but no custody. This led to great frustration on the part of the environmental crime unit. These cases all involved intense levels of investigation and preparation. Various task force members attribute this leniency to a failure by the judiciary to understand the threat to public health and safety, as well as an inability to recognize the criminal nature of these violations.

This trend of lenient sentences ended abruptly in 1992 with the conviction of Bruce Hale, (*California v. Marion Bruce Hale, Calif. Super Ct, Orange County, No. C84385, 7/17/92*), a paint plant executive for Chicago based W.C. Richards Co., operating in Anaheim, California. According to lower level employees, Hale directed them to mix hazardous waste

with sawdust and trash over a five year period. The resulting mixture was hauled to a landfill as ordinary trash over that five year period of time. It was later determined that leachate from that landfill contained some of the hazardous wastes that were mixed. Hale was sentenced to three years in prison. By handing down such a sentence to a defendant who had no prior criminal record, Orange County Superior Court Judge William Bedsworth underscored the severity of Mr. Hale's acts. During Judge Bedsworth's interview, he noted that both prosecution and defense were highly professional in the litigation of this case. More specifically, he commented that both sides were exceedingly well prepared. He compared this sort of case with other more traditional felonies.

I suspect these cases in general require so much more preparation than the average case that the lawyers, by the time they get to trial, are more comparable to civil lawyers...unlike the average felony in which the attorneys have time to prepare, maybe over the weekend before starting on Monday. These cases have been here for a long time. The attorneys have had ideas percolating in their minds, and I think because of the complex nature of it, both sides have obviously spent a lot of time preparing an opening statement that really would give the jury an idea of what was going on in a case and what they were going to have to decide. Opening statements are often done...extemporaneously by the attorney. These were obviously well prepared.

It was apparent to Judge Bedsworth that Deputy District Attorney Johnston worked very hard to simplify or demistify the scientific nature of the evidence of the jury. Johnston believes that this simplified approach led to his success in prosecuting Hale.

Judge Bedsworth also mentioned that the jury instructions in this case were distinguishable from other types of criminal cases. He found the defense and prosecution to be quite helpful in providing him with jury instructions specifically tailored to environmental crimes.

Deputy District Attorney Johnston pursued the Hale cases very aggressively.

I characterized Mr. Hale as a criminal who should be viewed as nothing but a criminal. He had absolutely no regard for the health of his own workers, for the truck drivers and for everybody living in the area. For that he should be given the same consideration by the members of the jury that he gave our community. They agreed. You must also be certain that the judge understands how serious this is. It is a big problem for prosecutors around the nation. In California, we utilize a probation and sentencing report where the defendant has the right and is actually required to have an interview with a probation officer who will evaluate the defendant's character, circumstances and so forth. I think it is absolutely crucial that the prosecutor do everything he or she can to contact the probation officer to make sure that the officer ends up with the same understanding of the case that the judge and jury had.

Johnston attributes his effort of informing the probation officer of the facts of the Hale case as that which influenced the probation officer to recommend of three years in prison.

When discussing the level of success of the Orange County District Attorney's Environmental Crime Unit, Johnston and Kinnings underscore the importance of professionalism. Kinnings believes that in his role as investigator his level of participation is as intense at the moment an incident occurs as it is when a verdict is handed down.

I think it is important from an investigative standpoint that if the investigator goes out there and covers all the bases, and puts together...a nice looking case package that is well documented from both a scientific standpoint and interview standpoint when you sit down across from a defense attorney, or someone representing himself pro per, you are not giving them any maneuvering room. That is when they decide that there is no point in spending more on legal fees. That is when they make the practical and informed decision to go ahead with the settlement of the case.

Johnston agrees that it is "horribly expensive" to defend against these cases because it usually involves attacking the scientific evidence. Consequently, defendants when faced with a well prepared investigation and prosecution must often balance the cost of litigation against the cost of fines, penalties, remediation, custody and especially in the business setting, the damage to reputation.

### BLENDING THE ROLES OF INVESTIGATION AND PROSECUTION

Both Johnston and Kinnings agree that there is a great deal of "overlap" between their responsibilities. Specifically, Kinnings finds himself thinking like a lawyer when conducting investigations. Everything he does is geared toward the ultimate disposition of a case, whether it be a settlement or jury verdict. Illustrative of this attitude is the following explanation:

I think it is imperative that an investigator get out as soon as possible, preferably on the emergency response. Make sure that you do plenty of photography, because when you do those eight-by-tens it would help a jury that was not at the scene get the flavor of it. Also, when these photographs are blown up for court presentation you can't have too many. You are handling a lot of good photographs and you are hitting those interviews as soon as the incident is going down so that people don't have time to come up with stories that counteract their behavior. Everything is fresh. Those things are important...to make the package a nice, cohesive and thorough document that the jury can look at.

Johnston agrees whole-heartedly. He believes that it is important for prosecutors, when possible and in the company of an investigator, to respond to environmental crime scenes. He asserts:

First of all it gives you an opportunity to see first hand. If you have seen it yourself, you are going to have a lot better time in front of the jury making sure that they understand what was happening out there. There are some pitfalls to going out and that is why not all prosecutors are comfortable with doing it. You have the potential of making yourself a witness. My practice is that I never handle anything, I never go anywhere by myself and I always make sure that I don't observe anything that other people don't observe contemporaneously. I have never come across a situation where I have been recused from a case. So, if prosecutors go out they better make sure not to take an active role. Just be there as a passive participant. In this area the lines between lawyer and investigator tend to blend a little bit. I go out more in this assignment with Kip than I would in any other assignment. Also, Kip tends to step more into the legal arena with me in that we don't go into court on this case with him just turning it over to me and me taking off. Kip works with me every step of the way. In the Hale case he sat with me throughout the trial. That's an important part of a successful working relationship in this area. Because it is big and potentially complex, it is nice to have a variety of legal and investigative perspectives.

Kinnings also notes that his enhanced involvement in these cases makes his work more enjoyable. He believes that it makes him a better investigator, a more effective member of the prosecutorial team, if he remains involved in the case up to its disposition.

The Orange County District Attorney's Office originally became involved in prosecuting environmental crimes as a result of increasing case referrals from the Orange County Health Department. These referrals continued to increase as the health agency became more active in the inspection of industries which caused them to find violations that required further investigation and possibly prosecution. Once the caseload had grown to a significant level, the District Attorney recognized the need to establish a separate unit.

Johnston emphasizes that one of the keys to Orange County's success is that District Attorney Michael Capizzi has made a long term commitment to environmental crime prosecution.

You have to be willing to assign an investigator for years. Maybe for his or her entire career. The concept that most offices use of rotating bodies around really doesn't work in the environmental arena. Attorneys and investigators should have enough time to develop the skills that they need in this area.

Normally, three years is the rotation period in such a specialized unit. Given the training and experience required of environmental crime prosecutors and investigators, their rotation period is longer. Kinnings is now in his ninth year as an environmental crime investigator, making him one of the most experienced environmental crime investigators. Currently, the environmental crimes unit is comprised of four attorneys and two investigators. All four attorneys had extensive criminal prosecution experience prior to entering the unit. Both investigators had extensive law enforcement experience prior to becoming environmental crime investigators.

### THE IMPORTANCE OF TRAINING

Once in the unit, environmental crime training is made available to all personnel. This training is usually provided by the California District Attorneys Association. Johnston and Kinnings recognize the need to obtain as much training in environmental crime as possible. They agree that not enough training is available, and often, that which is offered is not always as professionally done as they would like. Consequently, they have sought as much training as they could find. Kinnings, who holds a bachelors degree in criminology has taken courses in sub-chemistry and sub-physics. He also developed some chemistry expertise as a coroner's investigator prior to joining the District Attorney's Office. Kinnings has also

participated in California District Attorneys Association Trainings as a speaker as well as attendee.

Johnston has also attended training seminars presented by the California District Attorneys Association and the University of California at Irvine. Specifically, he enrolled in a nine week hazardous materials management certificate program in order to gain a better understanding of the regulatory concerns of environmental enforcement. Johnston considered that particular experience to be extremely helpful to him in better understanding his particular role of prosecutor as part of the overall environmental enforcement effort in Orange County. It helps him discern between matters which should be prosecuted civilly or criminally. It also clarifies matters which are lesser compliance or regulatory matters, normally better suited for administrative action. At the very least Johnston recommends that environmental crime prosecutors enroll in some sort of introductory hazardous materials management course.

The Orange County Environmental Crime Task Force did not officially come into existence until approximately 1986. During the Task Force's first year, Kinnings and then Deputy District Attorney Diane Kadletz gathered key investigative and regulatory personnel together in order to discuss intelligence information. Initially, these were small, informal meetings usually attended by health department officials and various law enforcement personnel. These were the individuals who were normally present at emergency responses and crime scenes. Kinnings recalls that during the early days of the task force minor problems arose regarding participants who were not accustomed to operating within law enforcement

circles. He remembers the need to be very patient in such a situation. It was essential in those earlier days that he perform "in-house" training sessions for those task force members so that mistakes that might otherwise jeopardize an investigation would not be made. He specifically remembers "It was a slow process, but it was a steady altitude gain. We made progress, but sometimes it was not in leaps and bounds."

Training is something that all of the task force members have grown to appreciate. Typically, each task force meeting will have a training component to it. All participants agree that this is a way to prevent critical errors during task force operations. They feel so strongly about it that they want to have more emphasis on "in-house" training in the future. They see it as a means by which to fill the training void that currently exists for environmental crime task force members in general.

#### TASK FORCE ADMINISTRATION: A TEAM APPROACH

Kinnings and Johnston are proud of the progress of the task force. They consider it to function in an efficient, methodical manner. They are also proud of their administration of the task force. Both individuals attend each monthly meeting, which is also attended by representatives from approximately thirty-five local, state and federal agencies. Kinnings and Johnston jointly run the meetings. Each task force meeting is comprised of the following four parts: *investigative update*, *legal update*, *training* and *round table discussion*. The investigative update is conducted by Investigator Kinnings and involves discussions of active

investigations and coordination of duties and resources between the various agencies involved in the specific investigation. The legal update is presented by Johnston who discusses the status of cases which have been submitted for prosecution. Training involves a presentation by Johnston regarding new developments in environmental laws, case decisions, or policies. Kinnings and members of various strike force agencies will also provide training explaining to the general group about their own agency's resources, special expertise, and jurisdictional authority. The topics can range from search warrant techniques to *Miranda* issues to the best way to covertly monitor sewer connections. The round table discussion consists of each strike force participant sharing information on any new developments since the last meeting. Typically, recent violations or possible investigations are discussed. Throughout the meeting, all task force members are encouraged to ask questions, raise points and participate as a member of a team.

Each task force member interviewed agreed that these meetings are extremely helpful. They leave the meetings informed and with the satisfaction that cases which they have referred are moving through the law enforcement system accordingly.

This is demonstrative of the management theory espoused by Johnston and Kinnings. They emphasize a strong personal approach to the management of the task force. They are concerned with the heavy-handed law enforcement approach witnessed in some jurisdictions. Their attitude is that all participants are integral parts of an investigative team whose efforts are geared toward the successful prosecution of environmental crimes. This should not be

confused, however, with the legal decision making process which clearly remains with Johnston. Instead, one of the goals is to keep each task force member as informed as possible about the progress of investigations.

Kinnings and Johnston also recognize the need to devote personal attention to those who participate in the task force. There appears to be an interpersonal sensitivity among law enforcement and regulatory personnel that creates an air of cooperation and mutual respect among all members. Kinnings remarks:

We avoid personality conflicts. Over the years, as you get to work with these people you become friends. You become a close group. Consequently, it is that personal relationship that you get with your counterparts...that makes us trust each other. As a result we don't run into an ego problem experience when an investigator seizes a regulator's case and the regulator feels that he or she has lost all contact with it. I think from that standpoint the task force has been successful and we have eliminated communication problems with other agencies. This is a very congenial, warm group whose members are honest with each other, informed by each other and above all relaxed with each other.

As they come in, cases are approached in a team manner. Input is sought from various task force members whose technical expertise is appropriate for the type of violation at hand. Recommendations are made and routinely considered by Kinnings and Johnston in their legal decision-making process. If for whatever reason a case referral is rejected, Kinnings and Johnston are very careful in the manner in which the rejection is articulated. Johnston explains "The approach that we worked out.. was to sit down with those people in a non-confrontational atmosphere and explain exactly why we can not proceed. That works well because it does not alienate people." Johnston compares the task force operation to an

orchestra. He credits Kinnings with the successful "conducting" of the various members. He verifies that members call Kinnings on a regular basis. He is on call seven days per week, twenty-four hours per day. He asserts that this sort of accessibility is essential to a proficient operation.

Kinnings is also concerned with keeping up with any remedial actions that need to be taken with task force personnel. One of his problem-solving methods is as follows:

If there is a problem that we see from an agency or an individual, we will go in and suggest a training mode, and involve all the people in the unit to sit down and without singling out one individual, we say we have a problem with "X" situation and we need to correct it. We have been successful in dealing with these situations.

Not only has the number of task force participants increased over the years in Orange County, the breadth of types of violations has increased proportionately. Johnston finds himself prosecuting cases other than basic RCRA (Resource Conservation and Recovery Act) violations. He is very involved in the prosecution of underground storage tank violations resulting in petroleum contamination of ground water, air quality violations, and fish and game violations. Because of this successful approach Johnston and Kinnings recognize the value of forming regional task forces. They believe that inter-county, interstate and perhaps a national task force for local environmental crime prosecutors would help curb the increasing trend of interstate violators of environmental criminal laws. Furthermore, Kinnings believes that these sorts of inter-jurisdictional task forces will necessarily raise the level of awareness, expertise and ultimately the level of prosecution in the weaker jurisdictions. He also believes

that this sort of environmental enforcement network would yield a much stronger deterrent effect.

Finally, Johnston and Kinnings assert that the Orange County Environmental Crime Task Force's efforts are responsible for the decrease in the number of reported illegal disposals of hazardous waste. They caution, however, that this is no time to become complacent. It is only because of their strong enforcement record that these violators have moved their illegal activities elsewhere. They are convinced that the overwhelming majority of environmental crime committed in their county is motivated by economic factors. The moment the enforcement, and resultant deterrent effects disappear, the environmental criminals will return to Orange County exploiting it as a more economically feasible site for illegal disposal.

#### IMPRESSIONS OF OTHER TASK FORCE MEMBERS

All other task force members interviewed agree with the approach taken by the District Attorney personnel. They are particularly pleased with the manner in which Kinnings and Johnston administer the meetings. Generally, they consider themselves to be well-informed of the progress and dispositions of their cases. They are also quite satisfied with the format of the meetings.

Dave Dixon is an environmental health inspector employed by the Orange County Health Department. He is a regular participant in the task force. He cites several situations where the training presented at the meetings was important. Notable among these is the execution of the search warrant during the investigation of Bruce Hale. Dixon recalls how the task force training facilitated the execution of the warrant in that each participant knew exactly what his or her responsibilities were. In particular, he had a better understanding of his responsibilities as they pertained to the evidentiary chain of custody. Most legal personnel might take such an issue for granted, but for many regulatory personnel chain of custody issues are not always recognized. Clearly, Kinnings and Johnston have successfully transcended the gap between regulatory and law enforcement perspectives.

Jamie Hirsch, deputy fire marshal in the environmental protection section of the Anaheim Fire Department agrees. Another regular task force participant, she finds that the task force is extremely well organized. She also believes that one of the keys to Orange County's success is the congenial manner in which the meetings are run. She has grown to trust the judgement of Johnston and Kinnings and consequently speaks highly of their efforts. It is apparent that the regulatory personnel who participate in this effort do so because of the way in which they are treated. Also, they see the types of results that they ultimately perceive as the rewards for their labor.

Mike Resnick is a special agent in the Federal Bureau of Investigation. He concurs that the Orange County approach to environmental crime prosecution is a solid one.

Resnick's participation is important since he serves as a liaison between federal and local interests. He finds that the District Attorney's Office is receptive to his case referrals and he enjoys working with the various task force personnel. He also enjoys the flexibility of being able to select the jurisdiction (local or federal) for his cases based on whose law is better suited to address the particular violation.

Resnick brings valuable experience to the task force. He spent several years as an Assistant District Attorney in Wisconsin. He also served in the Milwaukee City Attorney's Office for one year. After that he practiced criminal defense and civil litigation in Wisconsin. He believes that this experience has served him well during his tenure with the FBI. Specifically, he is better able to assess the quality of evidence and identify the weaknesses of a case. His insight into investigations is such that he looks at the development of a case in the light of how it would appear in a jury trial. When asked if that approach is appreciated by the District Attorney's Office he responds affirmatively "Yes, very much so. The folks here are experienced enough to know what reality is."

As for the future of environmental enforcement, Resnick sees it as a "job that can't be done without local participation." He also acknowledges that it need not be done exclusively by local prosecutors. With the sort of resource sharing exemplified by Resnick's participation, it becomes clear that federal investigative support for local efforts may be very successful.

Another federal representative who participates in the task force in Orange County is Special Agent Valeric Cernosek of the Naval Investigative Service's Procurement Fraud Office in California. Cernosek echoes all of the other task force members' comments. She is very pleased with the administration of the group.

As far as the relationship with them it is give and take. It comes back to the fact that everybody is willing to contribute and help each other out. You can talk to them. You don't have to sit there and call them three times and keep waiting for a phone call back. You leave a message and they call back. I have never had a problem talking to any of them. Kip is really good at getting with you through a problem, as well as Jerry and Dave. All of them have been great.

Cernosek is optimistic about the future of her participation in the task force. She reports that her agency is completely supportive of her participation because of the resources that may be shared between the local and federal levels of investigation. This team effort, she expects, will yield successful prosecutions in the future.

#### IMPRESSIONS OF THE DISTRICT ATTORNEY

District Attorney Michael Capizzi is proud of the success his environmental crime unit has had over the past several years. He views this area as appropriate for criminal prosecution. He also recognizes the need for his personnel to evaluate each case closely prior to making the decision on whether or not to proceed. Mr. Capizzi recalls instances where environmental damage occurred, but prosecution was not warranted. Instead, the unit merely made certain that the appropriate remedial efforts were taken to restore the environment to its

undamaged state. Mr. Capizzi also recognizes the need to pursue environmental violators as a means of protecting business interests within Orange County. Frequently, these violators create unfair business advantages for themselves by avoiding the high cost associated with hazardous waste disposal. He finds that to be repugnant to the interests of the honest members of the local business community. Most importantly, Mr. Capizzi realizes the seriousness of the threat of environmental crime. He agrees that it poses a potentially deadly, long-term threat to the health and safety of Orange County citizens and to the environment. Consistent with the reputation that he has earned over a long and highly distinguished career as a prosecutor, Mr. Capizzi is considered to be fair but tough on environmental criminals.

The District Attorney believes his office is making a positive impact on the environment. He also acknowledges a need to continue to be vigilant in this area. Consequently, he is committed to continuing the environmental crime unit. Although the current economic climate does not necessarily permit expansion of the unit, Mr. Capizzi is determined not to reduce it in any way.

## MONMOUTH COUNTY, NEW JERSEY

In 1983, the Monmouth County Prosecutor's Office, under the direction of County Prosecutor John Kaye, established New Jersey's first county level environmental crimes task force. This task force was— and still is— devoted exclusively to the investigation and prosecution of environmental offenses. Originally concerned only with the illegal storage, transportation, and disposal of hazardous waste, the task force ultimately widened its role to include the investigation/prosecution of the improper disposal of sewage materials and medical waste, the establishment of illegal landfills, and violations of haulers at the county operated reclamation center. The Monmouth County Task Force is staffed primarily by legal and investigative personnel from the prosecutor's office. The director of the Environmental Crimes Task Force in Monmouth County is Assistant Prosecutor Peter Warshaw. Assistant Prosecutor Warshaw, along with three detectives, comprise the professional staff of the Environmental Crimes Unit, (the unit is supported by a legal assistant and a secretary). An essential participating agency in the Environmental Crimes Task Force, is the Monmouth County Health Department. This agency actively engages in all on-site and technical operations and provides invaluable services in notifications, identifications, and response assessments.

### TASK FORCE GOALS/OBJECTIVES: CREATING A PRESENCE

Assistant Prosecutor Warshaw explains that the primary thrust of the task force is to investigate and prosecute environmental crimes throughout the county but is complemented by

efforts to raise the level of consciousness of the public with regard to the seriousness and the criminality of environmental offenses. For the task force, the toughest task is to change the "mind-set" of a general public that has not previously considered environmental offenses as being synonymous with crime. A chief objective of the task force effort in Monmouth County is to positively change the collective mentality to one which is anchored in a sensitivity to the threat of environmental crime. This would extend not only to those who reside near areas where environmental offenses have been committed in the past, but also to areas where environmental crime might be perceived as more of a distant threat. The task force strives to make the community aware that there is a specialized unit operating in the county that will treat these offenses as serious crime and prosecute them accordingly. This presence is stressed not only to educate the general public, but also to deter those who would consider committing these offenses. As Assistant Prosecutor Warshaw explains:

I think, obviously that the goal of the unit is to stop the crime. Some of the underlying goals are also obvious. This unit tries to maintain a very strong public presence and an obvious public presence because that will help you deter the crime-- simply by the fact of people being aware of your existence. People are becoming more aware of the fact this that was once something in which authorities looked the other way, is now something criminal.

Assistant Prosecutor Warshaw believes that an important vehicle for stressing the presence of a task force-- and with it, the potential for criminal prosecution and sanctioning-- is the successful prosecution of a "high profile" case. This type of case, early in the evolution of a task force, will not only highlight the existence of the task force but will go far in building the instant credibility of the unit itself. In Assistant Prosecutor Warshaw's words:

...When these organizations first get started, you look for a "big hit" or something that will draw public attention to it. Now that we've gotten public attention, what we look to do is maintain the awareness level to such

that we can continue to be effective-- sometimes with less resources. ...I would tend to think any special task force needs to have something that will bring attention-- positive attention-- to it. Something to let people know that its worthwhile to have limited resources channeled toward fighting the environmental problem. But, I think it's especially important with the environmental situation because so many people are unaware of the fact that it is criminal. Because of the general unawareness, it's more important to have something go out to the forefront that makes it clear that you're dealing with crimes and that you're trying to treat these things seriously. ...Once you have people aware of the fact that you exist and believe that you can do the job, and that you *will* do the job, then you become almost a part of their consciousness, they know you're out there and they know you're working.

Assistant Prosecutor Warshaw adds, though, that this credibility is accompanied by the responsibility of maintaining the task force's reputation over time as the agency matures. The public comes to treat the task force as more of a cohesive organization rather than a loosely knit unit groping to find its way, and, therefore, holds higher expectations for results. Considering the volatile nature of environmental crime offenses-- and the prosecution of them-- it is important to maintain an effective level of productivity or the credibility that the task force had originally achieved through its "catalyst cases" can be lost as instantly as it was gained.

#### TASK FORCE STRUCTURE AND ADMINISTRATION

As explained by staff interviewed from the Monmouth County Environmental Task Force, the organizational make-up of the task force can be conceptualized as the assembling of two distinct aspects of the county government; the County Prosecutor's Office as one arm, and the County Health Department as the other. An integral part of this task force make-up is William Simmons, Environmental Health Coordinator of the Monmouth County Health Department. Under the Public Health Coordinator, the Monmouth County Health Department is split between public health and environmental components. Mr. Simmons supervises several separate programs

in his capacity as the Environmental Health Coordinator; water, hazardous materials, air, and solid waste. According to Mr. Simmons, the hazardous materials program is the program that takes the lead when a joint investigation is conducted. Mr. Simmons is on an "on-call" basis to the task force and responds to cases that run the gamut from relatively minor regulatory violations to major offenses. Mr. Simmons gave some examples that illustrate how the cooperative effort generated through the task force can be advantageous to public health on a local level. One example is presented as follows:

A task force detective helped us out a couple of weeks ago when we had a leaking underground storage tank in Asbury for nine months. The DEP wanted to process this guy as a routine thing even though there was a potential for ground water contamination... this guy had two underground storage tanks with four feet of water in them. The DEP basically dropped the ball big time, so we asked the task force detective to help us out. The detective went out there with the Health Department and talked with this guy. We got his attention real quick. They pumped the tank out the next day. So, you got that end of the spectrum and the *other* end would be where there is a big area where there is a lot of solid waste and potentially hazardous waste dumping- like an illegal land fill. Here we have to put together maybe ten people to write a health and safety plan, and have to get together sample bottles etcetera- a massive approach.

Although the Prosecutor's Office has considered it, the task force presently does not use "on loan", rotating investigative personnel for its task force program. Currently the task force depends upon importing personnel from outside agencies on an *ad hoc* basis that often includes local police departments and other local enforcement agencies. Assistant Prosecutor Warshaw expressed a great degree of satisfaction with the manner in which the task force is structured in that he feels that it fosters a sense of autonomy to the members who function within the operation, and does not over-burden them with bureaucratic structure. From the perspective of the Health Department participants, the symbiotic relationship within the task force permits them to take advantage of the availability of the criminal investigative expertise of the prosecutor's

personnel. As put by Assistant Prosecutor Warshaw:

They're (Health Department personnel) just as happy when they've got themselves in a situation where they have to confront a bad guy that they usually don't have to confront. If you're talking about something that is criminal, they can turn that over to us. They are usually welcomed to be, and often are, with us when we go do this, at least they've got the protection of being with police officers when they are in a potentially confrontational situation, so, the fact that we each have totally different responsibilities is a good one I think.

### THE IMPORTANCE OF HORIZONTAL AND VERTICAL COMMUNICATION

Task force staff interviewed report that a critical dimension of their task force that is closely associated with organizational effectiveness is the ability to freely communicate with professional colleagues from other disciplines (i.e., the Health Department) and to communicate through the chain of command starting from the appointed DA down to the task force staff. This open communication is considered important in the timely exchange of technical intelligence on the cases and from the standpoint of maintaining high morale in, what may be viewed in some offices as, not a high priority crime area. Assistant Prosecutor Warshaw sees routine intelligence exchange meetings within the task force as being a superior means of keeping all task force personnel well-informed and well-rounded with regard to law enforcement *and* regulatory information. In addition, this exchange is seen as keeping task force personnel sensitized to the unique needs and problems of their colleagues from other disciplines. This periodic exchange can also be beneficial to making personnel more versatile in successfully investigating/prosecuting environmental cases. Assistant Prosecutor Warshaw explains:

We've started to do things where we can try to educate each other on different aspects of our field, so that even if we don't have anything "hot" to talk about, we'll get together. If I recall, one time this year the Health Department taught

some of our people a sampling technique. Even though the Health Department is most often going to be taking the sample, it was kind of a consensus that everybody would benefit from knowing how you were supposed to do it. We spent some time with them talking about courtroom testimony and how to handle cross examination, direct examination, how to write a report with an eye toward the fact that you are going to be cross examined about it. Those are the things which these people will not have special training in. This way, even though it's not ever going to be your full-time job, at least you're awareness is elevated to such a point that you can't help but produce a better product.

The meetings are seen by task force staff as greatly enhancing the rapport between the health and law enforcement sides of the task force. As task force staff explain, this mechanism leads to an "open door policy" between the two disciplines. It is instrumental in reducing the anxiety that can be inherent in a task force in which there are specialists from a number of different disciplines coming together to work as a "team". Task force staff see this as ameliorating some of the "turf battles" that can be typical in enforcement task forces concentrating on any type of crime area. One of the greatest advantages of employing these intelligence exchange meetings, is that it creates a milieu for the open invitation for assistance from other disciplines in determining important factors in environmental cases (e.g., whether or not a particular case should be pursued civilly or criminally). According to Assistant Prosecutor Warshaw:

You've got to go out and figure out how to start developing cases and one of the easiest ways to decide to recognize what could be criminal or what might not be criminal is to deal with the people who understand the science behind it- to try to get them to help you along. That's one of the areas where these guys are truly fantastic. I can get a lab report back and call them to find out what it means and how to deal with it. It is their expertise, combined with our ability to decide what we can prove- to help see if we can put together the elements of the offense.

Complementing the free lines of communication horizontally within the task force, is the intimate contact and clear communication between the appointed District Attorney, John Kaye, and those in the Environmental Task Force. This close, active association with the activities of

the Environmental Task Force, not only affords welcome moral support to the members of the task force, but also serves the purpose of helping to ensure that the Environmental Task Force is pursuing areas that are the appointed prosecutor's priorities. That is, it helps ensure that the Environmental Task Force is consistently executing the overall mission as the appointed prosecutor envisions it. Assistant Prosecutor Warshaw elaborates:

When Prosecutor Kaye came into office in 1983, he stated from the very beginning that he was going to make prosecutors in environmental crime a priority... Prosecutor Kaye is briefed on every case that could be important in one way or the other. He doesn't get a call every *single* time we open a file or every *single* time we close a file, but if there is anything with any significance— and that means anything that could lead to an indictable charge— we let him know right away. And, if we close a case with any significance— against a company or business in the area, or if we get a defendant that for one reason or another is noteworthy— he knows about it right away.

As characterized by members of the Monmouth County Environmental Task Force, the significance of open lines of communication does not end with internal intelligence exchange and the leadership support of the appointed prosecutor. Open lines of communication are also essential for the effective referral of environmental violations to the task force. Task force detectives believe that the chief means of discovering environmental violations is through referrals from the health department. Bill Simmons describes an important secondary source as local police departments. The task force has supported some police department efforts to develop environmental coordinator/liaisons to foster more open lines of communication on offense discovery. In many cases, where police departments are interested in developing these lines of communication, they are often prevented to do so by financial constraints. As put by Assistant Prosecutor Warshaw:

The response that you get from departments is that they don't have enough men to keep enough cars on the road or not enough guys to work narcotics, or they don't even have a forensics unit. So they can't see having someone walking around to see if garbage is being dumped somewhere or if something is leaking

into the ground. ...they might do it if they had the resources. At least that has been a constant refrain during the time that I've been doing this work, and it just happens to be during a time where there has been a bad economy and their town is just getting bad in terms of their budget resources.

Lack of police initiative in this area is not always due to lack of resources. Many times it is a matter of a dearth of information on the seriousness of these offenses and the general lack of knowledge about the criminal law. Once again Prosecutor Warshaw states:

One of the problems we have in New Jersey is that most of the environmental crimes are not contained in the Code of Criminal Justice, they are contained in different places. So, as a result, we found much to our surprise that police officers of considerable experience and skill don't even know that these crimes exist. We've conducted some training sessions to make police aware and we plan to conduct more in the future. The first step is to make them understand that it exists and then to teach them how to recognize it.

#### PROSECUTORIAL DECISION MAKING

Assistant Prosecutor Warshaw believes that there is one decision making factor that rises above the rest when contemplating factors key to prosecuting environmental offenses criminally. That factor is the level of harm and/or the level of threat of harm. He equates this with the severity of the offense. As Assistant Prosecutor Warshaw puts it, "before you can exercise your discretion in any meaningful way, you've got to understand what you're dealing with. We look primarily to what harm was caused." Prosecutors are often compelled to weigh the level of harm or the threat of harm with the potential cost to criminally prosecute environmental offense cases. Therefore, in situations where there is a relatively low level of harm or threat of harm, prosecutors may interpret this balance as a deciding factor in whether to prosecute the case criminally. However, because of the encouraging level of public support that the Monmouth County Task Force receives with regard to environmental prosecutions, members are confident

that the task force would be supported in any case and would not be criticized as being overzealous. On occasion, the task force has found it useful to use civil proceedings in some of their environmental cases. These are cases where criminal intent may not be obvious or may be difficult to prove.

The initial approach to each individual case can reveal the underlying philosophy and subsequent prosecution strategies of the Environmental Task Force. As Monmouth County Task Force members describe it, every case that comes before them for prosecution is treated as though it is going to trial. When plea negotiations are considered by the task force, the assistant prosecutor takes into account the same elements that would be accounted for in *any* plea negotiations for any other type of case; the nature and severity of the offense, the presence of a victim, and police input. For the Monmouth County Task Force, level of criminal intent and the offender's attitude play major roles in the determination of plea negotiations.

Often, if somebody is part of an industrial park or if somebody is part of a neighborhood, we'll talk to people out there to see what's good and what's bad about this particular company. We have found interesting things out by doing that, because some people will say "he's a really nice guy, he's just stupid. He runs a shop and he just doesn't know any better." Those are people who you are more likely to try to give a little more to. In New Jersey one of our big issues is not only jail or non-jail, but it's a question of probation versus the pre-trial intervention program, that's a very big difference because these third and fourth degree offenses have a diversionary program where if you successfully complete a short period of probation all charges against you are dismissed and you don't have a record at the end of it all. People who commit third or fourth degree offenses are likely to be eligible for that program. So, one of the things we look at from the very beginning is how we are going to respond to PTI applications because we know it's coming and there is some cases we know we can stop and some cases we can't stop. The person's attitude and exactly what that person has done play a big role in that and that's why a lot of times we document cases to a great degree just to prove an on-going pattern even though we know we're not going to be able to do anything with it this first time.

Task force members also indicate that the defendants' ability and willingness to clean up a site also plays an influential role in the charging and plea negotiation processes. As put by Bill Simmons, "from the Health Department's stand point, cleanup ultimately is the priority. Once it becomes a criminal case, we like to see the clean up attached to it. That's another advantage of having the Health Department closely involved in the task force."

#### TRIAL ISSUES: JUDGE AND JURY CONCERNS

Monmouth County Task Force members interviewed argue that the degree to which judges and jurors perceive the seriousness of environmental crime as crime is a crucial determinate of the success of environmental crime trials. For judges, part of the problem of accepting a criminal connotation for environmental offenses can be traced to a natural comparison of environmental offenses to other offenses that these judges are routinely exposed to. These other offenses may be ones which entail elements of person-to-person violence and involve individual victims who have incurred injuries from the violent acts. In these cases, the cause and effect of injury will be clearer for the judges and will fall into the type of conventional crime that these judges have been accustomed to over time. Compared to these types of offenses, environmental offenses may pale resulting in an unempathetic position by the judges. Task force members contend that they proceed under the assumption that many judges are going to look at these cases as "major inconveniences".

To neutralize the effects of ambivalent criminal court judges, some of the environmental cases are being fought in municipal courts. Task force members explain that New Jersey has a

very powerfully worded disorderly persons offense related to the disposal of solid waste. Because these are disorderly persons offenses, they are handled in municipal courts instead of the criminal courts. Although these are disorderly persons offenses and technically not criminal, they are described as having "felony-type" punishments attached to them. For instance, penalties can include loss of drivers' licenses for prescribed time periods, mandatory community service, serious fines that can exceed usual disorderly persons offense fines, and the forfeiture of conveyance, if conveyance is instrumental in the offense commission. Frank Cavalieri, detective for the Environmental Crimes Unit, acknowledges that some municipal court judges react favorably to these laws and impose strict penalties on convicted offenders. Detective Cavalieri reports:

It depends on the municipality— some judges are tough with the solid waste enforcement and others write it off. If it's politically correct in that community and there is a push in that community for cleanup, then you will find judges that will "slam the hammer" down on these guys and others who are more lenient. Minimum—mandatory for a first offense under this statute is something like \$2,500 and a six month loss of drivers license with no option by the judge. We're encouraging a lot the local municipalities to pursue this statute. You have to exercise discretion with this too, because if you get some overzealous uniformed officer and some body throws a bag of garbage out, he can technically hit him with this thing and cause a major inconvenience. So they do have some local ordinances they can site them with also. That is a very good tool. We've got a lot of midnight dumpers out there.

Notwithstanding the support they get from municipal judges on disorderly persons offenses, task force members still believe that a formidable obstacle to successful environmental crime trials is one expressed by judges and jurors alike. Once again, the problem is a general lack of appreciation of the danger of environmental offenses coupled with the dispersal of victimization among many individuals. Because of this, a primary objective in environmental trials becomes the ability of task force prosecutors to provide as much information as possible on the gravity of the offenses and to simplify that information so that it clearly represents the

serious threat that it is. Much effort must be spent in graphically portraying the relationships between the offenses, harm caused by them and criminal profits achieved. Assistant Prosecutor Warsaw explains:

If somebody gets hit over the head and is severely injured, you know immediately that you have a crime. The problem that we deal with is that you can go to a judge and say we found— take a paint can waste case— which may look to the judge like littering. And you tell him that there was a significant level that went into the ground. He says well, okay some paint got into the dirt, who cares? ...we have a problem dealing with judges who just don't think it's their top priority and we deal with juries who wonder why you're standing there saying this guy didn't have a permit to do this. You're dealing with things which are not necessarily going to be terribly interesting. I think that's something where we need to develop a strategy to make people aware of the fact that these cases should be tried and if they are tried, they should be treated the same way as any other crime. ... I have to believe that a *local* jury trial with people serving on the jury who live in the community where the event occurred, is something that could have more impact. You are more likely to get a really responsive, really interested jury.

This last point raised by Assistant Prosecutor Warsaw, was something that task force members believe is an essential ingredient for raising the odds that juries will be more receptive to environmental prosecutions. Jurors in *local* trials are characterized by task force members as being better able to identify with these cases than are state or federal jurors. Removing a case from its local environment could result in the case being decided by an understandably detached jury. As put by Assistant Prosecutor Warsaw:

Local jurors might be more concerned about the case because they know where the case comes from. If you take a case which comes from this county and you take it to federal court in Newark or federal court in Camden, you'd be dealing with people who don't even know where Monmouth County is and don't even know it's a waterfront community. They're likely to take the case less seriously.

## TRAINING ISSUES

As with members of other task forces interviewed for this study, Monmouth County Environmental Task Force personnel believe that comprehensive training is a prerequisite for effective task force operations. According to those interviewed, much of this training should center on the scientific aspects of environmental investigation and prosecution that may not ordinarily be part of the world of the conventional investigator and/or prosecutor. Those interviewed in Monmouth County yearn for training programs that are creative in reassessing strictly defined parameters of the law enforcer/prosecutor role to reach beyond the scope of basic investigative and prosecutorial training. To some degree, these trainings should include features devoted to environmental science/protection. As detective Cavaliere states, "one of the most difficult things I have to deal with is the technical end, the science behind the whole investigation. The health and safety is not easy, but it's not hard. You can take a couple of weeks of training and you learn how to put your protective suits on and how to prepare yourself to avoid a situation where you can sustain an injury."

Other members of the task force point out that training is needed to assist investigators in reliably identifying criminal environmental actions. In effect, this training should be designed to enhance the ability of environmental law enforcers to reach educated judgements on what can be a fine line between criminal action and non-criminal action. Distilling it to its lowest common denominator, Assistant Prosecutor Warshaw believes that *risk assessment* education should be a mandatory part of any sound environmental enforcement/prosecution training

program. Assistant Prosecutor Warshaw notes:

The prosecutor's office investigators are very good at investigating crimes and I know how to try a case, but the problem for the task force is that we get into elements of environmental offenses that aren't quite so clear. When trying to prove that somebody purposely and knowingly took the life of another, we understand what the abstracts are and what the inferences are that you have to work with. Here, you might be trying to prove that somebody knowingly created a risk of widespread injury or damage, when you get into the wide spread injury or damage aspect of it, you're getting into some pretty cloudy areas— who could have been hurt by the fact that this was in the ground and why is this something bad? I can read the statutes and understand it, but then they get into the things that require me to understand the science and understand why you can't do something like this. I find myself needing to be able to understand the chemistry or biology of something and that's something where we need special training.

Those interviewed emphasize that no matter how much training is available, or how effective the training is, environmental task force leaders should rise above solely depending upon training for guaranteeing personnel production and devote equal attention to personnel selection. This may mean modifying deep-set beliefs about what constitutes desirable enforcement personnel qualities; beliefs that are based in experiences with non-environmental crime areas. Since environmental offense cases may easily develop into "historical investigations" in which investigative information is collected and analyzed in a protracted fashion, certain personality types oriented to rapidly-paced investigative activities may not be suited to the needs of an environmental task force. For environmental offense cases, it may take an inordinate amount of time— and patience— to comfortably reach closure on the criminal nature of the offenses. According to Assistant Prosecutor Warshaw, this demands individuals with special qualities.

What you really want is a guy who is going to take it seriously and who is going to show some passion for it. Because a lot of what you see in the field is not stuff which necessarily looks, at first, to be criminal. You've got to have people who are willing to spend the time which is necessary to understand, in their *own* mind, why something is a serious offense, and also to have some

body who is dedicated enough to want to figure out what is serious criminally and what is not. That's the same thing across the board with police officers, what you want is people who will take time to learn the proper way to exercise discretion.

#### TASK FORCE MEMBER IMPRESSIONS ON OFFENSE CHARACTERISTICS, STATE AGENCY COOPERATION AND SUBSTANTIVE ENVIRONMENTAL LAW

As part of their interviews, Monmouth County task force members offered their impressions on a host of other subjects central to environmental crime enforcement/prosecutions. The most significant commentary presented focuses on the topics of offense commission trends, improvement in relationships with state regulatory agencies and recommendations for charging substantive environmental law. Interviewee comments help furnish a road map to the types of collaborative efforts and legal changes that merit consideration in efforts to stem emerging variations of environmental crime in Monmouth County.

With regard to environmental offense characteristics, task force members report rising incidence of what they referred to as "bread and butter" cases. These are cases that, by themselves, may not attract the media attention that larger, more catastrophic cases usually capture. They are often situations that entail the illegal disposal of waste by small hauling operations that, multiplied by the vast number of distinct operations and criminal events, pose serious health threats to the community. As detective Frank Cavalieri views it, these "clean-up businesses" are mushrooming into a dreadful problem for the county.

We've got a lot of clean-up businesses in Monmouth County that don't have their NJDEP (New Jersey Department of Environmental Protection) permits which would allow them to haul solid waste. We've got quite a few that do this on a regular basis and they go down to a dirt road and those are the type of people we would like the locals to focus on. We have a lot of them. This year we have seen quite a bit of that and we moved to forfeit the pickup trucks

and a lot of these are pieces of junk anyway. They know the game to the extent that they will buy a junker and play games with the license plates and they don't care if they loose the vehicle. A lot of times the locals will roll up on the vehicle and it is empty. But, It is going on and I guess the economy being what it is, people want to clean out their back yards or their wood shed or they want to clean old paint cans and these guys are hitting these rural areas heavy. Actually, they do it in the back of parking lots. It's amazing what they will do with this stuff.

The types of environmental crimes committed in Monmouth County presently vary by geographic location as a result of criminal opportunities presented to the offenders by the topography of different parts of the County. Task force personnel explain that disposal of aqueous wastes into waterways is most common in eastern Monmouth bordering the Atlantic Ocean and its inlets. The western section, being primarily rural farm land area, is frequently the scene of illegal solid waste disposal. Detective Thomas Wenzel draws attention to a disturbing criminal trend within this latter illegal disposal category.

It's solid waste demolition debris and stuff that's coming in from New York City. It's originally destined for landfills in Delaware or something. It can be dumped in a rural area on a horse farm. It's ground up demolition-shredded demolition.

The perspective of Detective Frank Cavaliere is that the offenses described above are a direct consequence of the high level of demolition debris produced in New York City and the criminal convenience that New Jersey presents for the disposal of this waste. Detective Frank Cavaliere explains:

For a while, with the construction business being what it was in New Jersey, a lot of guys were using these big open bed trailers. Demolition is being generated. New York City is a constant producer of demolition. They fill these big freight trailers up in New York City and they ship it to Ohio or Indiana and they are making a short stop here in New Jersey. We always hear stories about where they go up to in New York State, which is prime area- you have a lot of rural farms- and doing the same thing up there. These guys always have their "feelers" out to find some farmer or person who owns a rural piece of property.

As Detective Frank Cavalieri portrays it, owners of these farmlands become criminal entrepreneurs by engaging in illegal partnerships with the demolition haulers and providing their own property as havens for this dangerous waste. Monmouth County task force members are convinced that these types of offenses will continue to appear in western Monmouth County in the future. While Assistant Prosecutor Warshaw believes that the frequency of these offenses is diminishing in Monmouth County as a result of the work of the task force, he harbors fears about what may be a displacement of crime into other contiguous counties which do not field enforcement weapons as potent as Monmouth County's. To achieve a genuine regional enforcement impact, Assistant Prosecutor Warshaw advocates the adoption of aggressive environmental enforcement/prosecution programs in other New Jersey counties.

Several major recommendations are made by Monmouth County task force members to strengthen the hand of the enforcement/prosecution of environmental crimes in Monmouth County. The most noteworthy pertains to revisions in New Jersey substantive law. The consensus within the group interviewed was that several changes could help crystalize a popular concept of environmental offenses as "crime". This would be seen as a giant step toward transforming preconceived attitudes regarding the nature of environmental offense gravity. The most pivotal change is perceived as being fundamental but having the potential to reap dramatic results. Assistant Prosecutor Warshaw explains:

The change that I'd most like to see would be to have the present environmental offenses in the State Code of Criminal Justice. Make them a part of the Code, so that there is no question that they are crimes. Classify them in the Code instead of still classifying them as misdemeanors, which would tend to raise the notion that they are antiquated. Classify them the same way you classify every other crime which is in the Code of Criminal Justice. Once you get it into the Code, you've got a much better chance of basic responsiveness on the part of police, and on the part of the courts.

Beyond substantive changes in New Jersey's law, task force members contend that procedural changes in how the state regulatory agency responds to local task forces could pave the way for progressive environmental enforcement/prosecution in the future. Even if laws are not substantively revised according to the interviewees' recommendations, interviewees believe they can manage to move forward with reasonable effectiveness. However, a persistent lack of responsiveness at the state regulatory level presents a more insurmountable hurdle. Solving this thorny problem would remove a major barrier that can stand in the way of task force productivity. Assistant Prosecutor Warshaw provides a coda to this thought:

The laws themselves are understandable and things we can work with, but you regularly find yourself in a situation where you can't make a decision until you know what the regulatory agency says. The people who are in control aren't always authorized by law to make a decision. So, you have to wait for the agency and you will get different responses from different arms of the agencies. If we could just find a way to make them more responsive. That's going to be a problem that the law can't solve or the regulatory guidelines can't solve- that's a bureaucracy problem.

## PIMA COUNTY, ARIZONA

A more recent effort to stem the tide of environmental crime is developing in Tucson, Arizona. The Pima County Attorney's Office has assembled a group of individuals to deal with the growing number of environmental violations occurring in this sensitive desert region.

Unlike other district attorney's offices, Pima County Attorney Stephen Neely has divided his office into a criminal and civil division. Deputy Pima County Attorney Harlan Agnew is extremely active in enforcement efforts in the environmental unit of the civil division. Agnew views his mission in the following manner:

The mandate of the environmental unit of the civil division is to give environmental advice to (other) departments and assist in a number of enforcement roles with regard to civil enforcement and investigation of environmental violations of county ordinances, state laws and federal laws.

Agnew brings a wealth of civil environmental enforcement experience to his position. He has served in his current position for approximately five years. Prior to that he worked for the United States Environmental Protection Agency and the State of Arizona Attorney General. In that position he was in charge of all of Arizona's environmental programs.

Although Agnew is extremely proud of the civil enforcement effort in Pima County, he acknowledges the necessity of the corresponding criminal enforcement program which is headed by Deputy Pima County Attorney Michael Lessler.

Misdemeanor prosecutions are very effective because they clean up the sites, and people don't do it again, and the word gets around that you just can't take your pick-up load of trash and throw it in the desert.

Agnew also recognizes the formidable deterrent effect associated with environmental crime prosecutions. His associate Deputy Pima County Attorney Timothy LaMartina emphasizes the importance of misdemeanor investigations since many of them seem to develop into felony prosecutions.

Lessler agrees. Several years ago he approached Agnew with the idea of establishing a criminal complement to Agnew's civil enforcement program. The two attorneys crafted a document which effectively justified the purpose of felony environmental prosecution and County Attorney Neely approved it. Since that time, Lessler has worked with a group of individuals who are members of the Southern Arizona Environmental Crimes Task Force. In particular, Lessler relies primarily on the Pima County Sheriff's Office, the Pima County Flood Plan Management Section of the Pima County Flood Control District, Tucson Police Department, Pima Department of Environmental Quality and Pima County Attorney Investigator, Charles Skuhr.

Skuhr concurs that criminal enforcement is an important component of the overall enforcement initiative in Pima County. He should know. Prior to his tenure with the Pima County Attorney's Office, Skuhr served a full career with the Maryland State Police. His last three years in Maryland saw him as the supervisor of hazardous materials investigations. Skuhr works closely with Lessler in his investigative and supportive capacity.

Also participating in this effort is Terry Hendricks, principal hydrologist with the Pima County Flood Plane Management Section of the Pima County Flood Control Section.

Hendricks' involvement in enforcement actions usually results from some sort of riverbed alteration. In a part of the country where sudden rains often cause life threatening floods, this is of paramount concern. Hendricks has participated in several grand jury investigations of such cases.

Hendricks is generally satisfied with the environmental crime prosecution unit of the Pima County Attorney's Office.

I guess the greatest deal of satisfaction is actually getting the support from the other people involved with the investigation. A lot of my job, I am out solo on a problem. When it gets to the point where there is a criminal charge, the support is very important in terms of documentation, strategy, all sorts of different areas. I would say the biggest thing is the support.

Pima County Sheriff's Detective James Pratt and Sergeant Steven Merrick agree that Lessler's efforts have given the enforcement program more effect. Pratt currently has environmental crime responsibilities as part of his assignment. Merrick is currently the supervisor of the internal affairs department, but prior to his current assignment investigated environmental crimes. Both individuals assert the need to apply basic law enforcement skills. Merrick states the following:

I think you are applying basic law enforcement skills. I think the only specialized area of training that you are looking at is a very different set of laws and regulations governing these crimes and you are looking at state, local and federal regulations. They can be somewhat bewildering and complex at times. For the most part, however, it is my opinion that you are utilizing basic

investigative techniques. Every type of crime is going to have its specialized circumstances.

Pratt continues as follows:

I think that being specialized in arson investigations helped a lot, as far as what I was doing, and moving it over into the area of environmental crime. I believe if you have a confident investigator, that investigator with some training and some knowledge can do an excellent job in environmental crime. Although, I think there is a definite need for more training along the line of what laws apply and where to look for these laws.

Pratt also recognizes the need for further training of law enforcement and regulatory personnel in their efforts to deal effectively with each other. He believes that greater communication is needed between the law enforcement and regulatory communities. With that greater understanding they will gain a greater understanding of one another's priorities and the methods employed to achieve their goals.

Both Pratt and Merrick find great satisfaction in investigating these crimes. Merrick summarizes this feeling in the following manner:

I can see where these crimes can do a tremendous amount of damage, not only to the environment, but to the health and safety of the public. I feel very strongly about this type of violation and feel that compliance is not adequately addressing the problem. There has to be some type of criminal recourse. I felt that there was some obligation on the part of the Sheriff's Department to be active in this area and to take an active role in pursuing these cases criminally. I felt satisfaction in just being able to have some type of role, even if it was a minor role. I found it to be very satisfying in the overall aspect of that type of investigation and that type of enforcement.

Lessler too, agrees that environmental crime is a compelling problem which needs to be addressed by the law enforcement community. His environmental commitment goes well beyond his formidable prosecution experience.

Lessler has been a Deputy Pima County Attorney since 1984. Prior to that his experience included the position of attorney for the Federal Mine Safety and Health Review Commission in Denver, Colorado, as well as attorney for environmental affairs at the Mobil Oil Corporation, Uranium/Minerals Division, also in Denver, Colorado. He is currently an adjunct professor of environmental law at the University of Arizona, College of Law. He has also recently written an article for *Arizona Attorney* entitled "The Scope of Felony Liability Under Arizona's Environmental Laws." Lessler is also a member of the American Bar Association's Sections on Litigation, Natural Resources, Energy and Environmental Law.

Despite this comprehensive environmental background, Lessler maintains that strong investigative and trial skills are of paramount concern to an environmental crime prosecutor. He values the utility of traditional law enforcement and prosecutorial techniques. Instead of prosecutors trying to become experts themselves, Lessler encourages the following approach:

Interview regulatory witnesses in order to understand the fact scenario and applicable regulations. Continually seek and incorporate the advice of experts.

In an attempt to simplify the technical theory of a case, Lessler employed the following definition:

The technical theory of the case is the conceptual link between the pollutant, the act of polluting (disposal or discharge) and the target's knowledge of the pollution.

Lessler says that he relies on experts for evidence and insight. In other words, they provide testimony in court, but they also serve to prepare him to understand the facts of his case. This is nothing more than the traditional use of experts in cases dealing with scientific evidence. That is the type of common sense approach that Lessler uses in his prosecutions. He is known throughout Pima County for his aggressive and highly organized manner in which he pursues environmental crimes.

When asked about the future of environmental crime prosecution, Lessler commented that it was a growing area which will continue to be a priority on the local and the national levels.

## RICHMOND COUNTY, NEW YORK

Richmond County, New York is located in New York City. In fact, it is one of the city's five boroughs. Unlike most other parts of New York City, Richmond County, which is located on Staten Island, has managed to retain much of its suburban, residential character. Nonetheless, it has become the site of many environmental crimes and much environmental depredation over the years.

### SOURCES OF ENVIRONMENTAL CRIME: POTENTIAL VIOLATORS SURROUND STATEN ISLAND

Richmond County District Attorney William L. Murphy places great emphasis on the prosecution of environmental crimes. According to Murphy, Staten Islanders must always be vigilant when dealing with the water pollution caused by negligent or intentional discharges in the New York Harbor, the body of water which separates his jurisdiction from the island of Manhattan. Equally significant a threat lies to the west of Richmond County, in the heavily industrialized area of New Jersey. Such industries are primary sources of air pollution which, of course, drifts over the densely populated areas of Staten Island. Another source of great environmental concern is a former landfill which is now closed, but was until recently the host to more solid waste than any other landfill in New York. Prior to District Attorney Murphy's tenure as elected official he was a high ranking assistant in the Richmond County District Attorney's Office. The following narrative is illustrative of Murphy's involvement in this area of criminal prosecution.

A CASE STUDY: TRANSPORTATION, STORAGE AND  
DISPOSAL OF HAZARDOUS WASTE

In the early 1980's several Connecticut motorists found that their automobiles were becoming pockmarked as they drove along their highways. Consequently, the State Police were assigned to investigate why it was that all of these automobiles were suffering the same sort of damage. What they learned was that a consortium of tank trucks was driving along the highways and opening valves at the bottom of the trucks, disgorging their contents. As these trucks were followed, the State Police determined that waste oil and other waste petroleum products were being picked up and mixed with other hazardous waste from throughout New England. These haulers were charging substantial prices for the disposal of these wastes. Of course, they told the generators from whom they took the waste that they were going to dispose of it according to the law. To the contrary, they simply took the money and disposed of the waste by opening the tank valves as they drove along the highways of Connecticut. Once this activity was detected, the waste was hauled to Pennsylvania where it was illegally disposed of in the underground storage tank of an abandoned service station. This activity, continued for months until the Susquehanna River turned an unusual shade of blue. This discoloration was the result of the underground storage tank leaking directly into the river.

Because this activity was so lucrative (environmental crime is a form of economic crime) the next alternative was to haul this waste to Elizabeth, New Jersey, where it was received and stored by Chemical Control Corporation. One hot summer day the intense heat

caused several fifty-five gallon drums to explode resulting in toxic clouds drifting from New Jersey to parts of New York City. The fire burned for several days causing disaster warnings to be issued and causing injuries to several firefighters. Once the fire was extinguished the issue of clean-up remained. The company that was hired to perform the clean-up duties was the same company that initially hauled the waste to New Jersey. The solution, as they saw it, was to transport the remaining waste to large tanks at the Chelsea terminals in New York. Immediately, these tanks leaked very colorful discharges of hazardous wastes. Finally, the remediation company decided to clean-up that disaster and remove the hazardous waste to an appropriate site. The site was, in fact, the New York City landfill on Staten Island. At the landfill, its supervisor John Cascilliano, received hundreds of dollars per tank truck for the unlawful disposal of hazardous wastes. Apparently, this sort of activity was not unusual at the landfill. People in the construction industry would often mix their construction debris with hazardous waste and pay landfill personnel to accept it. By the time tank trucks started arriving at the landfill (approximately one hundred per night) business would be thriving, only to be made better. Ultimately, District Attorney Murphy prosecuted Cascilliano and convicted him of accepting bribes. The sentencing resulted in a lengthy prison term.

This investigation and subsequent prosecution demonstrates the dedication that Murphy brings to environmental crime prosecution. It goes beyond this, however. Because the laws of New York State were so ill-suited to address environmental crime, Murphy became involved in the effort to introduce and pass legislation that would better equip prosecutors to deal with this sort of crime.

## BUILDING STRONG CASES: A CONSERVATIVE MULTI-AGENCY APPROACH

Since the mid 1980's Murphy has seen fit to assign one of his forty Assistant District Attorneys to environmental prosecutions on a full-time basis. Michael Deodati is the assistant who has consistently met the burden of prosecuting these cases. He works closely with the following agencies: New York State Department of Environmental Conservation Police, New York City Environmental Conservation Investigators, local police and fire departments, Naval Investigative Services, and local health and sanitation departments. Deodati's participation in this area yielded significant dividends several years ago when Exxon Corporation's pipeline leaked substantial amounts of oil into Richmond County waterways. He led a multi-jurisdictional effort, including officials from the State of New Jersey, State of New York and the United States Attorney's Office in reaching a settlement in excess of one million dollars.

Deodati, who is Chairman of the New York State District Attorneys Association Environmental Crime Section, does not convene regular task force meetings, but he agrees that it is important to rely on law enforcement and regulatory agencies in order to prosecute these cases successfully. Deodati does not enjoy the luxury of having a District Attorney Investigator assigned to investigate environmental crimes. Nonetheless he maintains (as do so many others) that this sort of work merely requires the utility of strong investigative/detective techniques.

He also believes that environmental crime prosecution is not merely a trend. He views a clean environment as a "starting point". "Without a clean environment, we have no foundation." Consequently, Deodati, who reflects Murphy's ideology, insists that these crimes will remain a concern of the Richmond County District Attorney's Office for many years.

## SAN DIEGO COUNTY, CALIFORNIA

San Diego County, California is a metropolitan community whose interests range from coastal concerns to agricultural and ranching priorities. This broad spectrum of divergent interests serves as a backdrop for the well focused and efficient environmental crime prosecution program of the San Diego County District Attorney's Office. District Attorney Edwin Miller established the environmental program in 1984. Since then it has grown significantly to the present day where million dollar fines are being levied against environmental violators. The environmental crime prosecution team in the San Diego District Attorney's Office currently consists of Deputy District Attorney James Pitts and Senior Investigators Donna Dulyea and Adrienne Casey.

Donna Dulyea came to the office in 1979 after serving for a period of time with the San Diego Police Department. As part of her assignment to the Fraud Division, she began working environmental crime in 1984. Dulyea recalls "My only marching orders were to provide investigative support for environmental cases coming into the office, which at that time were expected to be only an occasional occurrence." Although she was assigned to environmental investigation as a collateral duty, by the end of her first year it became a full-time responsibility. Dulyea, who is widely known for her environmental crime investigative experience, credits her success, in part, to the fact that she was able to employ basic criminal investigative skills which could be supplemented by the scientific expertise of other members of the investigative team.

DEVELOPMENT OF THE ENVIRONMENTAL CRIME PROGRAM:  
A DISTRICT ATTORNEY RESPONSE

The San Diego District Attorney's Office initially became involved in environmental crime prosecution in the early 1980's when a series of serious hazardous waste disposals, involving hundreds of fifty-five gallon drums, occurred. For the most part the hazardous wastes were generated by plating businesses in Los Angeles, destined for Mexico, but disposed of in San Diego. According to Dulyea, the public pressure which resulted from frustration over poor environmental statutes and the relative unfamiliarity with environmental issues was enough to cause the office to focus on environmental enforcement as a priority. This, combined with the California legislature's comprehensive overhaul of what was widely recognized as ineffective laws, resulted in the commencement of what is now considered to be one of the better programs in the United States.

Looking back over her tenure as environmental crimes investigator Dulyea has noticed the following trend:

The trend has been that we started with cases that were so egregious and so obvious that a novice (as I was) could work them and come to a conclusion. It was like shooting fish in a barrel. It was very easy. These days, I see these crimes becoming a little more sophisticated. The offenders are more sophisticated in both the manner that they commit the crime and in the way that they conceal it. So now I think it requires more sophistication. As time goes on training becomes more and more crucial.

Dulyea attributes this trend of sophistication to the successful enforcement approach of the San Diego District Attorney's Office.

I think that is what happens when you begin to enforce. The criminals in this area do become more attuned to the fact that somebody is going to enforce and they don't want to be caught, and they don't want to be prosecuted. So it does become more difficult.

Dulyea also credits the media as an important element in San Diego's enforcement effort.

I think pretty consistently for us, in this county, there has been a great deal of media interest in these cases. We also do press releases, but we have since day one. We have always had good press. I don't think we have had problems from the press. They seem anxious to provide that type of press coverage and I think that has been pretty consistent.

Deputy District Attorney James Pitts is an innovative prosecutor who tries to serve the needs of his jurisdiction as they present themselves.

I try to serve the needs of the regulatory agencies in the task force. I become knowledgeable in their area of the law and do the cases in which they see a need to be done. Now we are starting to do some underground tank cases and some risk management cases, only because the agencies see a lot of people ignoring their requirements, and unless something is done by way of prosecution they will be ignored. Personally, those cases are not always the most exciting, but I feel that I have an obligation to bring them, and to put out press releases, and to make the public aware that the District Attorney is going to pursue such cases.

Pitts believes that his efforts not only support task force members and further regulatory efforts of task force members, they also protect the public health and safety.

Such an endeavor is not new to Pitts. He graduated from Penn State University, earning his degree in environmental engineering with a specialization in water and waste

water. Shortly thereafter, he attended Western State University College of Law in San Diego where he earned his law degree. From there he went to the San Diego Air Pollution Control District where he spent three years in the enforcement division. It was 1986 when Pitts arrived at the District Attorney's office. After several years of misdemeanor prosecutions, Pitts was elevated to the Fraud Division where he was placed in charge of environmental prosecutions. Since that time Pitts and Dulyea have enjoyed great success. They are a noticeably close pair. They work very closely together. They even commute to and from work together.

Dulyea credits Pitts' attitude regarding environmental prosecutions.

It depends on the aggressiveness of the prosecutor. When Jim came in to do this we had not had as much success with aggressive prosecutors as I would have hoped. Even though he came from a branch (court) it didn't take him very long. Probably a matter of a week or two before the word went out amongst the defense counsel that he was much tougher and we saw a change in negotiations, and of course if you have one prosecutor, one investigator and a whole task force, that prosecutor has to be very efficient.

Pitts also appreciates the great discretion given to him by his supervisor Tony Sampson and, of course, District Attorney Edwin Miller. Dulyea agrees. She believes that any attempt to "micro-manage" an environmental crime prosecution program would quickly bring it to a grinding halt. Instead, she states that any sort of success requires self-starting types of individuals whose supervisors yield great latitude in the decision making process.

Furthermore, Pitts and Dulyea are very appreciative of the encouragement they receive from District Attorney Miller. According to Dulyea, Miller has been extremely supportive. Particularly in the last few years, as the efficiency of the unit has increased dramatically, Miller has become more involved. He enjoys hearing about the environmental cases and clearly enjoys being involved. Pitts notes the same high level of interest. He also believes that District Attorney Miller who is in his sixth term, is a genuine decision maker, immune to business community pressures to avoid or downgrade criminal filings.

We have investigated and prosecuted some very sensitive cases where in other jurisdictions, I could envision pressure being brought by industry or local politicians attempting to influence the charging decisions. Ed Miller has always allowed us to conduct our investigations and to make the charging decisions that need to be made.

Although Pitts has extensive scientific, educational and professional experience, he strongly believes that the primary, foundational component for an environmental crime prosecutor is solid trial skill.

Trial skills are important. You can always learn the substantive law. I do not think environmental law is that difficult. You do not need a technical background to understand it. However, until you have a number of trials under your belt, you are never going to know how to try a case.

#### THE TASK FORCE: A COOPERATIVE EFFORT

Pitts goes on to assert that he relies on the expertise provided by his local regulatory agencies when he lacks the particular technical knowledge required. That is one of the many rewards that Pitts acknowledges in interacting with accomplished task force personnel such as

Mary Avastu of the San Diego County Department of Health. He says that it is a very efficient, convenient relationship that he and Dulyea enjoy with the local task force members. They offer the support required by the District Attorney's office. In return, Pitts and Dulyea, in the prosecutorial and investigative roles, offer their support of the various regulators' efforts. They are the "teeth" of the enforcement efforts.

The San Diego Environmental Crime Task Force is a loosely organized group of regulatory and law enforcement personnel. Dulyea asserts that there is no need for written agreements or memoranda of understanding. Instead, people are welcome to attend with the primary requisite that they be a dedicated environmental investigator or regulator. Participants include representatives from the following agencies: San Diego City Attorney, local city fire departments, Harbor Police, San Diego County Health Department, Air Pollution Control District, State of California Department of Fish and Game, Defense Criminal Investigative Services, Naval Investigative Services, United States Customs Department, Federal Bureau of Investigations, United States Attorney, California Occupational Safety and Health Administration and United States Environmental Protection Agency. Investigator Dulyea or FBI Agent Norman Wight facilitates the meeting and Deputy District Attorney Pitts attends regularly. He describes the process in the following manner:

Everyone attends. There is an agenda with the cases and if it has been assigned to an attorney that attorney gives an update every two weeks. I think it helps to keep the cases moving. You can't sit on a case too long because you know you have a task force meeting coming up and you want to make sure you are continually doing something on the case.

Dulyea continues:

I think it helps the investigators for the same reason. The cases are assigned usually to an investigator-- maybe multiple investigators. The regulators are occasionally assigned to cases, but that is a rare situation. Typically, they bring the cases in and the investigators work the cases. The regulators may continue to work with the assigned investigator.

In describing the task force meetings, Dulyea notes the following:

The meetings are held every two weeks. We try to take about an hour with our meetings. They tend to run closer to an hour and a half and as long as two hours. We work off an agenda. The first item on the agenda for every meeting is to discuss the need for confidentiality. We begin the meeting by talking about it and we remind people during the meeting that what we discuss should be treated confidentially because it involves ongoing investigations and prosecutions. We discuss the physical danger of compromising an investigator. We discuss the danger of compromising sensitive negotiations in the prosecution and maybe sensitive evidence problems. We make a point of reminding everybody that we expect what is discussed there to stay there and go no further than an immediate supervisor. We then begin discussing each case that we have. At the end of the meeting we introduce new cases and then we offer general discussion. Finally, the next meeting date is set.

Dulyea is very positive about the task force concept and specifically about the performance of the San Diego task force. She views its objectives in the following light:

I think the objective of the task force is to provide a forum to bring together everybody investigating and dealing with environmental offenses in San Diego County. When we started the task force we were trying to respond to a need that I had seen because I was investigating environmental crime before anybody else in the task force. When I did this all by myself I spent an incredible amount of time on the telephone trying to get information from agencies and it (the establishment of the task force) eliminated that need. Part of it was to bring everybody together so we could discuss our cases. Another objective that we had was to pool our resources to enable us to work larger cases and maybe do larger search warrants. We wanted to use the manpower pools that we could put together by combining all these agencies to do large

search warrants, massive witness interviews (which we have done on occasion) and to do surveillance.

Dulyea continues:

To that extent I think that we have maintained the same goal. When we started the task force we noticed some areas that were not addressed. Usually, water violations here in San Diego County were totally ignored. We had nobody working on water violations. Our first few cases tended to be water violations. At this time we probably do everything. We do Clean Water Act cases. We do hazardous waste (RCRA). We do (every once in a while) a stream diversion case. We may end up with all kinds of odd little cases.

#### THE TASK FORCE: FEDERAL AND CITY PROSECUTORS

Pitts credits the San Diego United State Attorney's Office for its participation in, and cooperation with, the task force. In particular, Pitts is thankful for the efforts of Assistant United States Attorney Melanie Pearson. He describes Pearson as one who is "extremely aggressive" and "very knowledgeable".

She has taught me a lot, especially in the Clean Water Act. The feds have traditionally done such cases and have developed much of the case law.

Pitts goes further to discuss the success of the task force:

I really do think it is important that the investigators run the task force. There are no egos involved. There are no attorneys' egos involved. I think we treat each other with respect. I think we all have the same goals: to investigate these cases, to prosecute them, and to punish people who violate these laws. We don't let individual differences get in the way. We are unusual in that respect. From the horror stories I hear from other jurisdictions there may be a lot of bickering and egos involved and things just aren't getting done. We don't have that in San Diego.

Another unusual, but innovative, element of this task force is the manner in which Deputy City Attorney Steve Gold is utilized. Gold, an aggressive and intelligent attorney, has been "cross-deputized as a San Diego County Deputy District Attorney in order for him to prosecute felony violations within the city. Felonies are beyond the misdemeanor jurisdiction of most city attorneys. It is through this sort of thoughtful maneuvering that the San Diego task force compounds its enforcement effort without incurring any adverse budget consequences. This concept of "cross-designating" attorneys will more than likely, occur with greater frequency, on all levels of prosecution in the future.

When asked if they are satisfied with their task forces performance, Pitts and Dulyea responded affirmatively. They believe that the task force is doing much more than they ever expected. As far as recommendations for improvements are concerned, Dulyea asserts the need to keep better statistics. She feels that it is important to be able to quantify the environmental enforcement progress in the future. Pitts agrees and goes further to state that the attorneys and other task force members require continuing training in this evolving area of environment crime investigation and prosecution.

### CHARGING DECISIONS

In reviewing his decision-making process when filing an environmental case, Pitts looks first to the intent of the defendant. Although under California law Pitts may charge criminal conduct as a result of negligence, he prefers not to do so. Instead he chooses to rely

on civil remedies for most negligent violations. According to Pitts "the environment is a big issue in this town". Consequently, the public demands results. When for example, an intentional disposal of hazardous waste is committed, Pitts will accept nothing short of a criminal plea. Pitts also considers the following: a defendant's prior criminal and environmental record, whether the defendant was warned by a regulatory agency, damage to the environment, continuing threat to the environment, cooperation of the defendant and the defendant's willingness to remediate.

Pitts and Dulyea look to the future in a way that requires the continued prosecution of environmental crime. They view this as an evolving area of prosecution, but one in which traditional law enforcement/investigative techniques should be used. They characterize these crimes as economic crimes. Pitts states "Compliance costs money. You are always going to have individuals or companies who are going to try to save money by violating the law."

Dulyea continues:

As long as the cases are there we can work them, if we have the resources. As Jim (Pitts) says, it is going to take the support of the District Attorneys and United States Attorneys to support these efforts. The crimes are not going to go away.

When asked if she thought local prosecutors could afford to ignore environmental crime, Dulyea responded "Not if they care to live on this planet for a long time; or if they care about what kind of planet their children live on."

District Attorney Edwin Miller also considers this to be a compelling area of prosecution. It was through his vision that San Diego County began prosecuting environmental crime. He recognizes this as an important area and sees it as one which will continue to grow. He is proud of his staff's accomplishments and expects the exemplary level of investigation and prosecution to continue.

ENVIRONMENTAL CRIME STATUTES:

Matrices and Summaries

AIR POLLUTION STATUTES:

	M	N	N	N	N	N	N	N	N	O	O	O	P	R	S	S	T	T	U	V	V	W	W	W	W
	T	E	V	H	J	M	Y	C	D	H	K	R	A	I	C	D	N	X	T	T	A	A	V	I	Y
knowingly: -violates provisions			M		F		M											M	M						
-fails to report/provide information																									
-fails to take corrective action																									
-violation causes: imminent danger of death or serious bodily injury								F																	
-falsified documents			M					M	M	M					M			M							M
-altered monitoring device/method								M	M						M										M
-operates, sells, leases, rents, or transfers tampered motor vehicle										M															
willfully: -violates provisions			M		F		M		M						M			M	M			M		M	
-violation causes: imminent danger of death or serious bodily injury																									
knowingly and willfully: -violates provisions		M						F									M								M
-tampering with air control equipment on motor vehicles																									
recklessly: -violates provisions					F		M																		
-violation causes: imminent danger of death or serious bodily injury																									
negligently: -violates provisions							M	M							M										
no mens rea cited: -violates provisions	M		M <sup>4</sup>	M <sup>5</sup>		M <sup>6</sup>		M			M	M	M	M					M	M	M	M			
-owner/generator of source that causes injury to health or safety of considerable number of persons/public																									
-alters or fails to install/maintain monitoring devices										M								M							M
-fails to submit plans/specifications or monitoring requirements or information										M															
-sells, exposes, or offers for sale chlorofluorocarbon products										M															
-uses leaded fuel in unleaded fuel motor vehicles										M															
-falsified documents																			M						

F = felony; M = misdemeanor

<sup>4</sup> regarding motor vehicles  
<sup>5</sup> Misdemeanor if natural person; Felony if any other person.  
<sup>6</sup> Felony if regulation regards commercial or industrial incineration.

WATER POLLUTION STATUTES

	M	N	N	N	N	N	N	N	O	O	O	P	R	S	S	T	T	U	V	V	W	W	W	W
	T	E	V	H	J	M	Y	C	D	H	K	R	A	I	C	D	N	X	T	A	A	V	I	Y
knowingly: -violates provisions/permit/contingency plan/authorization/order					F <sup>3</sup>		A	F <sup>4</sup>		M							M			A				M <sup>5</sup>
-fails to monitor/sample/report/pay fees/notify/supply required information/comply				A													M							
-conducts business without permit/license/authorization [discharges without permit]						A																		
-falsified/misrepresented/misstated material facts in documents/reports	M	M	M	A	A <sup>1</sup>			M	M		M			M <sup>5</sup>		A <sup>4</sup>	M	M	M	F			M	M
-altered monitoring device/methods	M	M	M	M	A			M	M		M			M <sup>5</sup>			M	M	M	F			M	M
-discharges/permits/causes to be discharged any sewage/oil/oil products/pollution/ other harmful substance into/onto any waters/shorelines within state [surface or groundwaters]							M	F <sup>4</sup>								F <sup>4</sup>	M			F <sup>4</sup>				
-throws/places/drops/dumps/permits to be dropped on public/private property which is not a lawful dump any litter/destructive material and does not remove it																								
-violation causes/places another in imminent danger of death or serious/great bodily injury/significant environmental effect					F			F									F			F				
-violation manifests extreme indifference for human life																								
-fails to begin clean-up/abatement/removal of spilled oil																								
-violates Federal Water Pollution Control Act <sup>1</sup>							F																	
-Introduces into sewer system/POTW any pollutant/hazardous substance which knew/reasonably should have known could cause personal injury/property damage								F																
-Introduces any pollutant/hazardous substance into sewer system/ POTW, causing it to violate waste discharge requirements								F																
-introduces pollutants into POTW violating pretreatment/toxic effluent standards								F																
-cuts/takes water/ice for domestic purposes from waters polluted with sewage/other substance deleterious/dangerous to life/health, or from condemned waters					A																			
-violates Safe Drinking Water Act/pollutes/threatens to pollute public water system					A																			
-distributes/sells/offers/exposes for sale/uses/introduces/applies in sewage system/surface/groundwater in restricted area any sewage system cleaner containing chemical material in excess of 1 part per 100							M																	
-discharges any radiological/chemical/biological/warfare agent/high-level radiological waste into waters of state							F																	
-makes discharge into waters of state substantially impairing anchorage/navigation							F																	

F = felony; M = misdemeanor; A = alternates between felony and misdemeanor - based on facts

<sup>3</sup> felony if knew at time another placed in imminent danger of death or serious bodily injury

<sup>4</sup> knowingly and willfully

<sup>5</sup> maximum imprisonment = 2 years

**WATER POLLUTION STATUTES**

	M	N	N	N	N	N	N	N	O	C	O	P	R	S	S	T	T	U	V	V	W	W	W	W	
	T	E	V	H	J	M	Y	C	D	H	K	R	A	I	C	D	N	X	T	A	A	V	I	Y	
willfully: -violates provisions/permit/contingency plan/authorization/order	M	M	M	M	F <sup>3</sup>		A <sup>3</sup>	F <sup>3</sup>	M		M	M	M	F	M <sup>3</sup>			M	M		M	M	M	M	M <sup>4</sup>
-fails to monitor/sample/report/pay fees/notify/supply required information/comply		M									M				M		A	M	X						
-conducts business without permit/license/authorization (discharges without permit)		M	M				A <sup>3</sup>																		
-falsified/misrepresented/misstated material facts in documents/reports					F		F								M		A <sup>4</sup>	M			F		M		
-altered monitoring device/method					F		F											M							
-discharges/permits/causes to be discharged any sewage/oil/oil products/pollution/other harmful substance into/onto any waters/shorelines within state (surface or groundwaters)				A			M	F <sup>4</sup>									F <sup>4</sup>	M			F <sup>4</sup>				
-acts/aids/abets in the destruction/injury of any pipe/conductor of water/other property pertaining to water usage/attempts to/threatens to/lampers with public water system															M										
-violation causes/places another in imminent danger of death or significant/great bodily injury/significant environmental effect					F													F							
-introduces pollutants into POTW violating pretreatment/toxic effluent standards							F <sup>3</sup>															X			
-discharges radiological/chemical/biological/warfare agent/high-level radioactive waste of the waters of the state			M				F <sup>3</sup>																		
-cuts/takes water/ice for domestic purposes from any waters which are polluted with sewage/other substance deleterious/dangerous to life/health, or from waters which have been condemned				A																					
-dumps any material into ocean water within state, or into waters outside state which enters the ocean waters in state					F																				
-after notice from environmental protection department, takes/diverts/draws/makes use of waters/boundary waters in which state has proprietary rights							M																		
-violates Safe Drinking Water Act															M										
-violates Federal Water Pollution Control Act							F <sup>3</sup>																		
-alters/changes/obstructs drainage ditch/canal/drain/watercourse																									
-makes discharge into waters of state substantially impairing anchorage/navigation							F <sup>3</sup>																		

F = felony; M = misdemeanor; A = alternates between felony and misdemeanor - based on facts; X = unknown if felony or misdemeanor

### WATER POLLUTION STATUTES

	M	N	N	N	N	N	N	N	N	O	O	O	P	R	S	S	T	T	U	V	V	W	W	W	W
	T	E	V	H	J	M	Y	C	D	H	K	R	A	I	C	D	N	X	T	T	A	A	V	I	Y
<b>recklessly</b> -violates provisions/permit/contingency plan/authorization/order					F		M																		
-fails to monitor/sample/report/pay fees/notify/supply required information/comply				A																					
-conducts business without permit/license/authorization (discharges without permit)							M																		
-discharges/permits/causes to be discharged any sewage/oil/oil products/pollution/other harmful substance into/onto any waters/shorelines within state (surface or groundwaters)							M																		
-violation causes/places another in imminent danger of death or serious/great bodily injury/significant environmental effect					F													A							
-violation manifests extreme indifference for human life																									
-falsified/misrepresented/misstated material facts in documents/reports				A	F																				
-altered monitoring device/method					F																				
-operating/navigating/piloting tank vessel thereby causing release or hazardous substance that causes serious physical injury to another/damage to property of another																									
<b>negligently</b> -violates provisions/permit/contingency plan/authorization/order	M	M	M	M	F		M	M				M	M	F	M <sup>5</sup>				X		M		M	M	
-fails to monitor/sample/report/notify/supply required information/comply		M																	X						
-conducts business without permit/license/authorization (discharges without permit)		M	M				M																		
-discharges/permits/causes to be discharged any sewage/oil/oil products/pollution/ other harmful substance into/onto any waters/shorelines within state (surface or groundwaters)							M														M				
-falsified/misrepresented/misstated material facts in documents/reports					F																				
-altered monitoring device/method					F																				
-operating/navigating/piloting tank vessel thereby causing unjustifiable risk of release of hazardous substance/harm to person/property																									
-violates Federal Water Pollution Control Act							M																		
-introduces into sewer system or POTW any pollutant/hazardous substance which know or reasonably should have known could cause personal injury or property damage							M																		
-introduces any pollutant/hazardous substance into sewer system or POTW, causing treatment works to violate waste discharge requirements							M																		
-discharges any radiological/chemical/biological/warfare agent/high-level radioactive waste into waters of state			M				M																		
-makes discharge into waters of state substantially impairing navigation/anchorage							M																		
-introduces pollutants into POTW violating pretreatment/toxic effluent standards							M												X						

F = felony; M = misdemeanor; A = alternates between felony and misdemeanor - based on facts

WATER POLLUTION STATUTES:

	M	N	N	N	N	N	N	N	N	O	O	O	P	R	S	S	T	T	U	V	V	W	W	W	W
	T	E	V	H	J	M	Y	C	D	H	K	R	A	I	C	D	N	X	T	T	A	A	V	I	Y
NO MENS REA: -violates provisions/permit/contingency plan/authorization/order	M		M	A		M	M			M	M	M	M		M	M	M	M		M	M	M	M		
-fails to monitor/sample/report/pay fees/notify/supply required information/comply				A		M					M						M						M		
-conducts business without permit/license/authorization [discharges without permit]				M		M					M												M		
-discharges/permits/causes to be discharged any sewage/oil/oil products/pollution/other harmful substance into/onto any waters/shorelines within state (surface or groundwaters)			M			M					M					M	M	M					M		
-causes/does construction/enlargement/deepening of a canal/natural stream in such a manner as to permit salt water to move inland of established saltwater barrier line																									
-falsified/misrepresented/misstated material facts in documents/reports											M				M	M									
-altered monitoring device/methods																	M								
-violation causes/places another in imminent danger of death or serious/great bodily injury/significant environmental effect																		M							
-acts/aids/abets in the destruction/injury of any pipe/conductor of water/other property pertaining to water usage/attempts to/threatens to/lampers with public water system															M										
-as owner/operator of vessel which is equipped with marine sanitation device having any type of operational bypass connection, sewage is discharged into waters of state or such device/equipment is inoperable																									
-unlawfully obstructs free passage/use in customary manner of any navigable lake/river/day/stream/canal/basin																									
-introduces into sewer system/POTW any pollutant/hazardous substance which knew/reasonably should have known could cause personal injury/property damage																									
-introduces any pollutant/hazardous substance into sewer system/ POTW, causing it to violate waste discharge requirements																									
-introduces pollutants into POTW violating pretreatment/toxic effluent standards																									
-causes release of oil while navigating tank vessel/piloting a tank vessel/exercising control of tank vessel's motion/direction/speed																								F	
-diverts water from natural watershed/prevents water from following specified course/interferes with/fills up/alters/changes/obstructs drainage ditch/canal/drain/watercourse							M																		
-causes drinking water supply system to fail standards																									
-throws/places/drops/dumps/permits to be dropped on public/private property which is not a lawful dump any litter/destructive material and does not remove it				A																				M	
-deposits/permits/allows deposit in any waters of state any rubbish/silt/poisonous/deteriorous substance liable to affect health of persons/fish/livestock, or place/deposit any such substance in any place where it may be washed/infiltrated into such waters																									

F = felony; M = misdemeanor; A = alternates between felony and misdemeanor - based on facts

HAZARDOUS WASTE STATUTES:

	M	N	N	N	N	N	N	N	N	O	O	O	P	R	S	S	T	T	U	V	V	W	W	W	W
	T	E	V	H	J	M	Y	C	D	H	K	R	A	I	C	D	N	X	T	T	A	A	V	I	Y
knowingly: -authorizes/directs/conspires/solicits/aids/performs/etc a violation of provisions/permit/license/manifest/orders/disclosure requirements	M	F		F	F	M	M	F <sup>2</sup>	M			M	F <sup>3</sup>	F			F	F	F	F	F <sub>p</sub>	F <sub>p</sub>	F		M <sup>2</sup>
-documents/records destroyed/not maintained/not provided/etc	F					M		F									F						M		
-fails to report release																									
-falsifies documents/records or omits material information or conceals disposal	F	F	M	F	F	M		F	M			M	F		F	M		F		F		A		M	
-alters monitoring/testing/pollution control device			M	F																					M
-DTST without permit/interim status/license/authorization	F				F	M	D <sup>4</sup>	F <sup>2</sup>				M	F		F		F	F		F		F			
-transports/receives without manifest/ID/ or with altered/falsified manifest	F					M		F										F							
-allows waste to contaminate groundwater without permit/in violation of permit							D <sup>3</sup>																		
-violation causes/likely to cause imminent danger of harm/serious bodily injury/death					F	D <sup>4</sup>	F										F	F		F <sub>p</sub>	F <sub>p</sub>	F <sub>p</sub>			
-creates unreasonable risk of fire/explosion/human or environmental endangerment/ serious injury/death or manifests extreme indifference to human life						F																	F <sub>p</sub>		
-transports without permit/documents on person/motor vehicle																									
-operates incinerator without permit/in violation of permit																									
willfully: -authorizes/directs/conspires/solicits/aids/performs/etc a violation of provisions/permit/license/manifest/orders/disclosure requirements		F	M		F		D <sup>7</sup>	F <sup>2</sup>				M	F <sup>4</sup>								M		F		M <sup>2</sup>
-documents/records destroyed/not maintained/not provided/etc								F																M	
-falsifies documents/records or omits material information or conceals disposal		F						F																M	
-alters monitoring/testing/pollution control device																		M							
-alters hazardous waste warning signs/site boundary markers																									
-DTST without permit/interim status/license/authorization			M				D	F <sup>2</sup>																F	
-transports/receives without manifest/ID/ or with altered/falsified manifest								F																	
-allows waste to contaminate groundwater without permit/in violation of permit																									
-violation causes/likely to cause imminent danger of harm/serious bodily injury/death							F											F							

F = felony; M = misdemeanor; A = alternate felony/misdemeanor - based on facts; p = paired elements combined to make one crime; C = charged as felony/misdemeanor at discretion of prosecutor; D = ranges from misdemeanor to felony depending on the chemical substance and the quantity involved.

HAZARDOUS WASTE STATUTES:

	M	N	N	N	N	N	N	N	N	O	O	O	P	R	S	S	T	T	U	V	V	W	W	W	W
	T	E	V	H	J	M	Y	C	D	H	K	R	A	I	C	D	N	X	T	T	A	A	V	I	Y
<b>recklessly</b> -authorizes/directs/conspires/solicits/aids/performs/etc a violation of provisions/permits/license/manifestations/orders/disclosure requirements					F		D						F				M			F					
-documents/records destroyed/not maintained/not provided/etc																									
-falsifies documents/records or omits material information or conceals disposal					F																				
-DTST without permit/interim status/license/authorization					F		D			F															
-allows waste to contaminate groundwater without permit/in violation of permit							D <sup>9</sup>																		
-violation causes/likely to cause imminent danger of harm/serious bodily injury/death							D													F					
-creates unreasonable risk of fire/explosion/human or environmental endangerment/serious injury/death or manifests extreme indifference to human life							D <sup>10</sup>																		
-owner/operator causes/permits/allows emission of particulates/dust/fumes/gas/mist/smoke/vapor/odorous substance that unreasonably interferes with life/property of persons living or working in vicinity or is injurious to public health										F															
-fills/grades/excavates/builds/drills/mines on land of an unauthorized facility										F															
<b>negligently:</b> -authorizes/directs/conspires/solicits/aids/performs/etc a violation of provisions/permits/license/manifestations/orders/disclosure requirements			M				M																		
-documents/records destroyed/not maintained/not provided/etc																									
-falsifies documents/records or omits material information or conceals disposal																									
-DTST without permit/interim status/license/authorization			M				M																		
-transports/receives without manifest/ID# or with altered/falsified manifest																									
-allows waste to contaminate groundwater without permit/in violation of permit							M <sup>11</sup>																		

F = felony; M = misdemeanor; A = alternate felony/misdemeanor - based on facts; p = paired elements combine to make one crime; C = charged as felony/misdemeanor at discretion of prosecutor; D = ranges from misdemeanor to felony depending on the chemical substance and the quantity involved

HAZARDOUS WASTE STATUTES:

	M	N	N	N	N	N	N	N	N	O	O	O	P	R	S	S	T	T	U	V	V	W	W	W	W
	T	E	V	H	J	M	Y	C	D	H	K	R	A	I	C	D	N	X	T	T	A	A	V	I	Y
no mens rea cited -authorizes/directs/conspires/solicits/aids/performs/etc a violation of provisions/permit/license/manifest/orders/disclosure requirements		M	M			M	M			F	M	M	A	F	M		M	M		M		M	M		
-documents/records destroyed/not maintained/not provided/etc																									
-fails to report release																		M							
-falsifies documents/records or omits material information or conceals disposal		M	M															F							
-alters monitoring/testing/pollution control device														F											
-DTST without permit/interim status/license/authorization			M																						
-transports/receives without manifest/ID# or with altered/falsified manifest					F									F											
-violation causes/likely to cause imminent danger of harm/serious bodily injury/death									F <sub>p</sub>																
-creates unreasonable risk of fire/explosion/human or environmental endangerment/serious injury/death or manifests extreme indifference to human life									F <sub>p</sub>																
-transports without permit/documents on person/motor vehicle			M																						
-refuses entry to authorized personnel																									
-transports hazardous materials by motor vehicle contrary to approved route designation																									
-adds/mixes/blends with fuel oil or any other residential consumer fuel or sells blended fuel to residential consumers																									
-exports without consent of receiving country/not in conformance with applicable international agreement						M																			
-transporter or treatment, storage, disposal facility accepts waste from generator who has violated any waste rule										F															

F = felony; M = misdemeanor; A = alternate felony/misdemeanor - based on facts; p = paired elements combine to make one crime; C = charged as felony/misdemeanor at discretion of prosecutor

1. If has a substantial likelihood of endangering human health, animal or plant life or property.
2. Knowingly and willfully.
3. Causing pollution, public nuisance or bodily injury.
4. Any involvement of an acutely hazardous waste constitutes a felony.
5. Applicable to any release to the environment, a felony if any hazardous substance enters water.
6. A felony if any quantity of acutely hazardous substances are involved or if a person not participating in the crime is physically injured, regardless of the amount of hazardous materials involved.

7. A misdemeanor for solicitation by the generator, but a felony for solicitation by the disposer or payment by the generator.
3. With reckless disregard or gross careless disregard.
9. Felony if the released hazardous substance enters a primary water supply.
10. Felony requires that an acutely hazardous substance be involved and that a physical injury is suffered by a person not a participant in the crime.
11. Applies to any release of 5 gallons or 50 pounds of a hazardous substance, or any quantity of an acutely hazardous substance into the environment.
12. Included in a pattern of racketeering - real property or enterprise transactions.
13. Tied in with reckless violation of permit/interim status.

*Compilation of State  
Environmental Codifications*

*The following compilation was created to assist prosecutors in identifying the bodies of environmental law for the United States. Citations and interpretations contained herein should be used to begin a study of the actual statutes and not as a substitute for such a study.*

<b>California</b>	
Air Pollution	CAL. HEALTH & SAFETY CODE §§ 39000 et seq., 41500 et seq., 43000 et seq.
Water Pollution	CAL. WATER CODE § 13000 et seq.
Ground Water Pollution	see water pollution
Hazardous Substances/Waste	CAL. HEALTH & SAFETY CODE §§ 25100 et seq., 28740 et seq.
Solid Waste	CAL. PUB. RES. CODE §§ 40000 et seq., 43000 et seq., 46801 et seq.
See also	CAL. HEALTH & SAFETY CODE § 4500 et seq.
Littering	CAL. PENAL CODE § 374 et seq.
See also	CAL. VEH. CODE § 23111 et seq.
<b>Colorado</b>	
Air Pollution	COLO. REV. STAT. § 25-7-101 et seq.
Water Pollution	COLO. REV. STAT. § 25-8-101 et seq.
Ground Water Pollution	see water pollution
Hazardous Substances/Waste	COLO. REV. STAT. § 25-15-101 et seq.
See also	COLO. REV. STAT. §§ 18-13-112, 25-5-501 et seq., 43-6-101 et seq.
Solid Waste	COLO. REV. STAT. § 30-20-100.5 et seq.
Littering	COLO. REV. STAT. §§ 18-4-511, 42-4-1207
See generally Trespass, Tampering & Criminal Mischief	COLO. REV. STAT. § 18-4-501 et seq.
<b>Connecticut</b>	
Air Pollution	CONN. GEN. STAT. §§ 22a-1 et seq., 22a-170 et seq.
Water Pollution	CONN. GEN. STAT. §§ 22a-1 et seq., 22a-416 et seq.
See also	CONN. GEN. STAT. §§ 22a-336 et seq., 22a-383 et seq.
Ground Water Pollution	see water pollution
See also	CONN. GEN. STAT. § 22a-416 et seq.
Hazardous Substances/Waste	CONN. GEN. STAT. § 22a-114 et seq.
See also	CONN. GEN. STAT. § 29-336 et seq.
Solid Waste	CONN. GEN. STAT. § 22a-207 et seq.
See also	CONN. GEN. STAT. § 22a-257 et seq.
Littering	CONN. GEN. STAT. § 22a-247 et seq.
See also	CONN. GEN. STAT. § 19a-335 et seq.
<b>Delaware</b>	
Air Pollution	DEL. CODE ANN. tit. 7, § 6001 et seq.
Water Pollution	DEL. CODE ANN. tit. 7, § 6001 et seq.
See also	DEL. CODE ANN. tit. 16, § 1301 et seq.
Ground Water Pollution	see water pollution
Hazardous Substances/Waste	DEL. CODE ANN. tit. 7, § 6301 et seq.
See also	DEL. CODE ANN. tit. 7, §§ 7701 et seq., 9101 et seq.
Solid Waste	DEL. CODE ANN. tit. 29, § 8225 et seq.
See also Ocean Dumping	DEL. CODE ANN. tit. 7, §§ 6025, 6401 et seq.
	DEL. CODE ANN. tit. 7, § 6070 et seq.

Idaho	
Air Pollution	IDAHO CODE § 39-110 et seq.
Water Pollution	IDAHO CODE § 39-3601 et seq.
Ground Water Pollution	see water pollution
See also	IDAHO CODE § 39-120 et seq.
Hazardous Substances/Waste	IDAHO CODE § 39-4401 et seq.
See also	IDAHO CODE §§ 18-3905, 49-2201 et seq., 67-2929, 67-2930
Solid Waste	IDAHO CODE § 39-7401 et seq.
Littering	IDAHO CODE §§ 18-3906, 18-4301, 18-7031
Illinois	
See generally Environmental Protection Act	
Air Pollution	ILL. REV. STAT. ch. 111 1/2, para. 1001 et seq.
See also	ILL. REV. STAT. ch. 111 1/2, para. 1008 et seq.
Water Pollution	ILL. REV. STAT. ch. 127, para. 721 et seq.
Ground Water Pollution	ILL. REV. STAT. ch. 111 1/2, para. 1011 et seq.
Hazardous Substances/Waste	ILL. REV. STAT. ch. 111 1/2, para. 7451 et seq.
See also	ILL. REV. STAT. ch. 111 1/2, para. 1020 et seq.
	ILL. REV. STAT. ch. 111 1/2, para. 251 et seq.
	ILL. REV. STAT. ch. 95 1/2, para. 700-1 et seq.
Solid Waste	ILL. REV. STAT. ch. 127, para. 1250 et seq.
See also	ILL. REV. STAT. ch. 111 1/2, para. 7051 et seq.
Littering	ILL. REV. STAT. ch. 111 1/2, para. 1020 et seq.
See also	ILL. REV. STAT. ch. 38, para. 86-1 et seq.
	ILL. REV. STAT. ch. 111 1/2, para. 1020 et seq.
	ILL. REV. STAT. ch. 95 1/2, para. 11-1427
Indiana	
Air Pollution	IND. CODE § 13-1-1-1 et seq.
Water Pollution	IND. CODE § 13-1-1-1 et seq.
See also	IND. CODE § 13-1-3-1 et seq.
Ground Water Pollution	IND. CODE § 13-7-26-1 et seq.
Hazardous Substances/Waste	IND. CODE § 13-7-8.5-1 et seq.
Solid Waste	IND. CODE § 13-9.5-1-1 et seq.
See also	IND. CODE § 13-2-22-13.5
Littering	IND. CODE § 35-45-3-1 et seq.
Iowa	
Air Pollution	IOWA CODE §§ 455B.101 et seq., 455B.131 et seq.
Water Pollution	IOWA CODE § 455B.171 et seq.

Solid Waste  
See also  
Littering

#### Maryland

Air Pollution  
See also  
Water Pollution  
See generally  
Ground Water Pollution  
Hazardous Substances/Waste  
See also  
Solid Waste  
See also  
Littering

ME. REV. STAT. ANN. tit. 38, § 1319-O et seq.  
ME. REV. STAT. ANN. tit. 38, § 1301 et seq.  
ME. REV. STAT. ANN. tit. 38, § 1310-C et seq.  
ME. REV. STAT. ANN. tit. 17, § 2261 et seq.

MD. CODE ANN., ENVIR. § 2-101 et seq.  
MD. CODE ANN., ENVIR. § 2-601 et seq.  
MD. CODE ANN., ENVIR. § 4-401 et seq.  
MD. CODE ANN., ENVIR. § 4-101 et seq.  
see water pollution  
MD. CODE ANN., ENVIR. § 7-101 et seq.  
MD. CODE ANN., HEALTH-GEN. § 22-501 et seq.  
MD. CODE ANN., ENVIR. § 9-501 et seq.  
MD. CODE ANN., NAT. RES. § 3-101 et seq.  
MD. ANN. CODE art. 27, § 468

#### Massachusetts

Air Pollution  
Water Pollution  
Ground Water Pollution  
Hazardous Substances/Waste  
See also

Solid Waste  
See also

Littering  
See also

MASS. GEN. L. ch. 111, § 142A et seq.  
MASS. GEN. L. ch. 21, § 26 et seq.  
see water pollution  
MASS. GEN. L. ch. 21C, § 1 et seq.  
MASS. GEN. L. ch. 21E, § 1 et seq.  
MASS. GEN. L. ch. 21I, § 1 et seq.  
MASS. GEN. L. ch. 94B, § 1 et seq.  
MASS. GEN. L. ch. 16, § 18 et seq.  
MASS. GEN. L. ch. 21H, § 1 et seq.  
MASS. GEN. L. ch. 111, § 150A  
MASS. GEN. L. ch. 270, §§ 16, 16A, 17  
MASS. GEN. L. ch. 265, § 35

#### Michigan

Air Pollution  
Water Pollution - see generally  
See also  
Ground Water Pollution  
Hazardous Substances/Waste  
Solid Waste  
Littering  
See also

MICH. COMP. LAWS § 336.11 et seq.  
MICH. COMP. LAWS § 323.1 et seq.  
MICH. COMP. LAWS § 323.331 et seq.  
see water pollution  
MICH. COMP. LAWS § 299.501 et seq.  
MICH. COMP. LAWS § 299.401 et seq.  
MICH. COMP. LAWS § 752.901 et seq.  
MICH. COMP. LAWS §§ 323.331 et seq., 325.311  
et seq.

#### Minnesota

Air Pollution  
Water Pollution  
Ground Water Pollution  
See also  
Hazardous Substances/Waste  
See also

MINN. STAT. § 116.01 et seq.  
MINN. STAT. § 115.01 et seq.  
MINN. STAT. § 103H.001 et seq.  
MINN. STAT. § 115.01 et seq.  
MINN. STAT. § 115A.01 et seq.  
MINN. STAT. § 221.033 et seq.  
MINN. STAT. § 115B.04 et seq.

Hazardous Substances/Waste	NEV. REV. STAT. § 459.001 et seq.
Solid Waste	NEV. REV. STAT. § 444.440 et seq.
Littering	NEV. REV. STAT. §§ 202.185, 444.630
New Hampshire	
Air Pollution	N.H. REV. STAT. ANN. § 125-C:1 et seq.
Water Pollution	N.H. REV. STAT. ANN. § 485-A:1 et seq.
Ground Water Pollution	see water pollution
Hazardous Substances/Waste	N.H. REV. STAT. ANN. §§ 147-A:1 to D:1 et seq.
Solid Waste	N.H. REV. STAT. ANN. § 149-M:1 et seq.
Littering	N.H. REV. STAT. ANN. § 147:21, 163-B:1 et seq., 265:102, 266:72
New Jersey	
Air Pollution	N.J. REV. STAT. § 26:2C-1 et seq.
Water Pollution	N.J. REV. STAT. § 58:10A-1 et seq.
Ground Water Pollution	see water pollution
Hazardous Substances/Waste	N.J. REV. STAT. §§ 13:1E-1 et seq., 13:1K-1 et seq.
Solid Waste	N.J. REV. STAT. §§ 13:1E-1 et seq., 13:1I-1 et seq.
Littering	N.J. REV. STAT. §§ 13:18A-24, 23:7-9
New Mexico	
Air Pollution	N.M. STAT. ANN. § 74-2-1 et seq.
Water Pollution	N.M. STAT. ANN. § 74-6-1 et seq.
Ground Water Pollution	N.M. STAT. ANN. § 74-6B-1 et seq.
Hazardous Substances/Waste	N.M. STAT. ANN. §§ 74-4-1 et seq., 74-4A-E-1 et seq.
Solid Waste	N.M. STAT. ANN. § 74-9-1 et seq.
Littering	N.M. STAT. ANN. § 67-16-1 et seq.
New York	
Air Pollution	N.Y. ENVTL. CONSERV. LAW § 19-0101 et seq.
Water Pollution	N.Y. ENVTL. CONSERV. LAW § 17-0101 et seq.
Ground Water Pollution	see water pollution
Hazardous Substances/Waste	N.Y. ENVTL. CONSERV. LAW §§ 27-0301 et seq., 37-0101 et seq.
Solid Waste	N.Y. ENVTL. CONSERV. LAW § 27-0501 et seq.
Littering	N.Y. VEH. & TRAF. LAW § 1220
See also	N.Y. NAV. LAW § 33 to 33-c
	N.Y. R.R. § 52-e
North Carolina	
Air Pollution	N.C. GEN. STAT. § 143-215.105 et seq.
Water Pollution	N.C. GEN. STAT. § 143-211 et seq.
Ground Water Pollution	see water pollution
Hazardous Substances/Waste	N.C. GEN. STAT. §§ 130B-1 et seq., 143-215.75 et seq.
Solid Waste	N.C. GEN. STAT. § 290 et seq.
Littering	N.C. GEN. STAT. §§ 14-399, 76-40

Rhode Island

Air Pollution  
Water Pollution  
Ground Water Pollution  
Hazardous Substances/Waste  
Solid Waste  
Littering

R.I. GEN. LAWS § 23-23-1 et seq.  
R.I. GEN. LAWS § 46-12-1 et seq.  
R.I. GEN. LAWS § 46-13.1-1 et seq.  
R.I. GEN. LAWS § 23-19.1-1 et seq.  
R.I. GEN. LAWS § 23-19-1 et seq.  
R.I. GEN. LAWS § 57-15-1 et seq.

South Carolina

Air Pollution  
Water Pollution  
Ground Water Pollution  
Hazardous Substances/Waste

S.C. CODE ANN. § 48-1-10 et seq.  
S.C. CODE ANN. § 48-1-10 et seq.  
see water pollution  
S.C. CODE ANN. §§ 23-39-10 et seq., 44-56-10 et seq.  
S.C. CODE ANN. § 44-96-10 et seq.  
S.C. CODE ANN. §§ 16-11-700, 16-11-720, 44-67-10 et seq.

Solid Waste

Littering

South Dakota

Air Pollution  
Water Pollution  
Ground Water Pollution  
Hazardous Substances/Waste

S.D. CODIFIED LAWS § 34-1-1 et seq.  
S.D. CODIFIED LAWS § 34A-2-1 et seq.  
see water pollution  
S.D. CODIFIED LAWS §§ 34A-11-1 et seq., 49-28A-1 et seq.  
S.D. CODIFIED LAWS § 34A-6-1.1 et seq.  
S.D. CODIFIED LAWS §§ 22-34-27, 34A-7-1 et seq.

Solid Waste

Littering

Tennessee

Air Pollution  
Water Pollution  
Ground Water Pollution  
Hazardous Substances/Waste

TENN. CODE ANN. § 68-25-101 et seq.  
TENN. CODE ANN. § 69-3-101 et seq.  
see water pollution  
TENN. CODE ANN. §§ 68-27-101 et seq., 68-46-101 et seq.  
TENN. CODE ANN. § 68-31-101 et seq.  
TENN. CODE ANN. § 39-14-501 et seq.

Solid Waste

Littering

Texas

Air Pollution  
Water Pollution  
Ground Water Pollution  
Hazardous Substances/Waste

TEX. HEALTH & SAFETY CODE ANN. § 382.001 et seq.  
TEX. WATER CODE ANN. § 26.001 et seq.  
TEX. WATER CODE ANN. § 26401 et seq.  
TEX. HEALTH & SAFETY CODE ANN. §§ 361.131 et seq., 501.001 et seq.  
TEX. HEALTH & SAFETY CODE ANN. § 361.001 et seq.  
TEX. HEALTH & SAFETY CODE ANN. § 365.001 et seq.

Solid Waste

Littering

Utah

Air Pollution  
Water Pollution

UTAH CODE ANN. § 19-2-101 et seq.  
UTAH CODE ANN. § 19-5-101 et seq.

Quality Act	WYO. STAT. § 35-11-101 et seq.
Air Pollution	WYO. STAT. § 35-11-201 et seq.
Water Pollution	WYO. STAT. § 35-11-301 et seq.
Ground Water Pollution	see water pollution
Hazardous Substances/Waste	WYO. STAT. § 35-11-1414 et seq.
Solid Waste	WYO. STAT. § 35-11-501 et seq.
Littering	WYO. STAT. § 6-3-204

ENVIRONMENTAL CRIME PROSECUTION:

A Literature Review

## Table of Contents

I.	Introduction .....	1
II.	Substantive Environmental Law .....	3
A.	Issues Common to Federal and Local Environmental Laws .....	3
B.	Federal Criminal Environmental Law .....	4
1.	Crucial Statutes and Issues Common to Them .....	4
2.	Specific Federal Statutes .....	5
a.	The Clean Air Act .....	5
b.	The Clean Water Act and The Rivers and Harbors Act of 1899 .....	6
i.	The Clean Water Act .....	6
ii.	The Rivers and Harbors Act of 1899 .....	7
c.	The Safe Drinking Water Act .....	7
d.	The Resource Conservation and Recovery Act .....	8
e.	The Comprehensive Environmental Response, Compensation .....	9
f.	The Toxic Substances Control Act .....	10
g.	The Federal Insecticide, Fungicide and Rodenticide Act ....	11
3.	Partial Preemption of State Law .....	11
C.	State and Local Criminal Environmental Law .....	12
1.	State Legislative Trends .....	12
2.	Critical Analysis of State Law .....	12
3.	Prosecutors' Views of State Environmental Laws .....	13
D.	Sentencing and Penalties under Environmental Statutes .....	13
1.	The Debate about Criminal Sanctions .....	13
2.	Theoretical Factors in Imposing Sanctions .....	14
3.	Nontraditional Sanctions .....	15
E.	Common Law Actions .....	15
III.	The Extent of Environmental Crime .....	17
A.	Difficulties in Assessing the Extent of Non-compliance .....	17
B.	Studies of Non-compliance Levels and Patterns .....	19
1.	Large Quantity Generators .....	19
2.	Small Quality Generators .....	20
C.	Reports from Prosecutors and Regulatory Inspectors .....	22
IV.	Environmental Crime Factors .....	23

C.	The Role of Investigative and Regulatory Agencies and Laboratories .....	44
1.	Investigative Agencies .....	44
2.	Regulatory Agencies .....	45
3.	The Role of Laboratories .....	45
IX.	Current Environmental Enforcement Practices .....	46
A.	Stages that Environmental Prosecutions Go Through .....	46
B.	Discovery of Possible Offenses .....	47
C.	Building the Case .....	48
1.	The Local Prosecutor's Investigative Methods .....	48
2.	Environmental Experts .....	49
3.	The Decision to Charge Criminally .....	50
D.	Examples of Local Prosecutions .....	51
1.	Three Local Cases .....	51
2.	A Sting Operation .....	52
E.	Local Prosecution Obstacles .....	52
F.	Trends .....	54
X.	Legal Issues Related to Local Enforcement .....	54
A.	Search and Seizure .....	54
1.	General Constitutional Issues .....	54
2.	"Object of Search" in Civil vs. Criminal Inspections .....	56
B.	Criminal vs. Civil Enforcement .....	57
1.	The Need for Criminal Sanctions .....	57
2.	The Decision to Charge Criminally or Civilly .....	57
3.	Constitutional Limits on Using Civil Proceedings and Remedies .....	58
C.	State Mens Rea Requirements .....	59
D.	The Use of Secondary Environmental Statutes .....	60
1.	Forfeiture Statutes .....	60
2.	Cost Recovery Laws .....	60
3.	Consumer Protection and Unfair Competition Laws .....	61
4.	RICO as an Environmental Crime Weapon .....	61
5.	Traditional Criminal Laws as Environmental Crime Weapons .....	62
6.	State and Federal Occupational Safety and Health Laws .....	63
E.	Corporate Tactics and Defenses .....	64
1.	Defense Tactics and Pitfalls .....	64
2.	Corporations as Defendants .....	64
3.	Responsible Corporate Officer Doctrine .....	65

A.	Studies of Environmental Crime Prosecutions .....	23
B.	Industrial Incentives to Illegal Disposal .....	24
1.	Knowledge of Regulations and Technical Expertise .....	24
2.	Disposal Cost Savings .....	25
C.	Industrial Disincentives to Illegal Disposal .....	26
1.	Private-Sector Oversight by Generators .....	26
2.	Private-Sector Oversight by Insurers .....	27
D.	Other Determinants of Corporate Behavior .....	27
1.	Corporate Culture .....	27
2.	Corporate Learning Theory .....	28
3.	Interpreting Legal Requirements .....	28
V.	Profile of the Typical Offender .....	29
A.	The Likely Corporate Profile .....	29
B.	Criminal Maturation System .....	30
C.	Techniques Used to Evade Criminal Prosecution .....	32
VI.	Optimal Deterrence .....	33
A.	Deterrent Theory in Environmental Crime .....	33
B.	Practical Considerations for Deterrence .....	37
C.	Private Enforcement .....	37
VII.	Local versus National Enforcement .....	38
A.	The Federal Enforcement Controversy .....	38
B.	The Role of the Local Prosecutor .....	39
VIII.	Local Environmental Enforcement Structures .....	40
A.	Elements of a Successful Environmental Prosecution Unit .....	40
B.	Inter-agency Cooperation .....	41
1.	The Importance of Inter-agency Cooperation .....	41
2.	Divergent Civil/Criminal Enforcement Agency Cultures .....	42
3.	Forms of Interagency Cooperation .....	42
4.	Task Forces .....	43

F.	Second Party Liability for Contaminated Realty .....	66
G.	Federal Pre-emption and Federal Facilities .....	67
XI.	Conclusion .....	67

## I. Introduction

The local prosecutor's role in the complex and expansive realm of environmental law is well expressed by the Environmental Protection Agency's Earth Day slogan: "think globally, act locally." This slogan captures the importance of perceiving environmental problems in manageable, realistic terms and taking common-sense action to solve them. The District Attorney, as a local elected official, is particularly responsive to pollution in his or her jurisdiction and so is often the most likely player to adopt pragmatic measures to clean it up.

Nonetheless, the breadth and complexity of environmental law can make the problem seem insurmountable. Ascertaining damage done to the environment through chemicals, toxic or radioactive metals, or medical contaminants in the air, soil, and water involves biology, chemistry, physics, geology, and medicine. The range of toxic substances alone includes pesticides, PCBs, asbestos, radon, lead, selenium, cadmium, zinc, arsenic, mercury, and biological<sup>1</sup> contaminants.<sup>2</sup> Further, protecting the environment entails the allotment and regulation of finite natural and human resources. This allotment, in turn, presupposes policy decisions based on ethical<sup>3</sup>, economic<sup>4</sup>, commercial<sup>5</sup>, political<sup>6</sup>, and even

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<sup>1</sup> See generally 42 U.S.C. § 6992(d) (1988) (Medical Waste Tracking Act, although expired as of June 1991, provided criminal penalties for willful violations of regulation of medical and biological wastes).

<sup>2</sup> THE CONSERVATION FOUNDATION, STATE OF THE ENVIRONMENT: A VIEW TOWARD THE NINETIES, 141-155 (1987).

<sup>3</sup> See generally Willard F. Enteman, *Economics, Ethics, and the Environment*, 226 (M. Hoffman, et al. eds., THE CORPORATION, ETHICS, AND THE ENVIRONMENT 1990) (contending that economics is not value free, so that economists should join with ethicists to analyze environmental policy); Brian E. Brown, *From Environment to Biosphere*, 244 (M. Hoffman, et al. eds., THE CORPORATION, ETHICS, AND THE ENVIRONMENT 1990) (arguing that a utilitarian view of environmental policy wherein the goal is the efficient trading of pollution costs fails to account for the irreplaceable interdependence of life on earth).

<sup>4</sup> See generally DAVID W. PEARCE & R. KERRY TURNER, *ECONOMICS OF NATURAL RESOURCES AND THE ENVIRONMENT*, 27-28 (1990) (arguing that utilitarian economic valuations ignore intrinsic value of environment and that current economic models do not account for sustainable ecology); The Conservation Foundation, *supra* note 2, at 11-12 (recording the positive and negative impact of the 1980's recession on the state of the environment in the U.S. and the world).

<sup>5</sup> See generally BLUEPRINT FOR THE ENVIRONMENT, 43-55 (T. Allan Comp ed., 1989) (environmental groups advocating proposals for Commerce Department to adopt); Roger Strelow, *Corporate Compliance with Environmental Regulation: Striking a Balance*, at 7 (American Bar Association Division for Public

international considerations.<sup>7</sup>

The debate over these policy issues also has a federalism component.<sup>8</sup> The state/EPA relationship has been contentious, changing from one administration to the next, and represents an evolving type of federalism.<sup>9</sup> Many prosecutors and private litigators who are experienced in the environmental field believe that state and local regulation and enforcement should have a stronger hand in the federalism scheme.<sup>10</sup>

The recent sting operation by Suffolk County New York District Attorney James Catterson exemplifies a practical, proactive role for the local prosecutor in the federal scheme. There, six men contracted with undercover detectives to dump 58 drums of hazardous wastes, including

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Services Standing Committee on Environmental Law, *Environmental Compliance: Is the System Working?*, 1989) (General Electric executive argues that maintaining and building industrial base in U.S. entails a balancing of environmental costs and priorities).

<sup>6</sup> See generally BLUEPRINT FOR THE ENVIRONMENT, *supra* note 5 (environmental groups advocating specific environmental proposals for national agencies to adopt).

<sup>7</sup> *Id.* at 189 (advocating specific environmental proposals for Department of State and Agency for International Development to adopt).

<sup>8</sup> See Arthur D. Gunther, Comment, *Enforcement in your Backyard: Implementation of California's Hazardous Waste Control Act by Local Prosecutors*, 17 ECOLOGY L.Q. 803 (1990) (survey of local prosecutors revealing their strong belief in importance of local environmental prosecution within federal scheme).

<sup>9</sup> E. Donald Elliott, *Keynote Address: Making the Partnership Work*, 1 (American Bar Association Division for Public Services Standing Committee on Environmental Law, *Federal versus State Environmental Protection Standards: Can a National Policy be Implemented Locally?*, 1990).

<sup>10</sup> See generally Gilbert A. Jensen, *America's New Environmental Populism*, Prosecutor's Brief, 2nd Quarter 4-5 (1991) (urging local prosecutors to prosecute environmental crime aggressively and to participate in state and national associations aimed at federal cooperation); The Environmental Protection Agency, *Enforcement in the 1990's Project: Report and Recommendations of the Local Government's Role in Environmental Enforcement Workgroup* (1990) (recommending that the EPA encourage local prosecutors to enforce environmental laws concerning underground storage tanks, pretreatment of hazardous wastes, small quantity hazardous waste generators (SQGs), and SARA Title III reporting requirements); Phillip F.W. Ahrens, III, *Regulating Solid and Hazardous Wastes*, 31 (American Bar Association Division for Public Services Standing Committee on Environmental Law, *Federal versus State Environmental Protection Standards: Can a national Policy be Implemented Locally?*, 1990) (experienced environmental litigator, contending that states are increasingly doing a better job in regulating hazardous waste).

cyanide and acetone. These chemicals were likely to have contaminated some of the drinking water on Long Island. The inability of the EPA, the Department of Justice, or New York State to prevent pollution of the drinking water on Long Island is evident since the contamination of Long Island drinking water was specifically noted at the EPA House Oversight Hearings back in 1980.<sup>11</sup>

As this sting operation illustrates, sometimes, the local prosecutor is the official best positioned to galvanize public support for concrete solutions that cut through some of the haziness of the environmental problem. Otherwise, considered from a national and global perspective, pollution appears to be an inevitable result of an array of irreconcilable policy goals. Thus, while it is important to see the environmental problem according to the big picture, it is essential that we act in the here and now.

## II. Substantive Environmental Law

### A. Issues Common to Federal and Local Environmental Laws

Environmental crimes fall into one of three broad categories.<sup>12</sup> The first category is comprised of those who are already within the regulatory scope of an environmental law, but who violate regulations such as permit stipulations. A paper manufacturing plant which discharges some waste water directly into a stream instead of processing it as required by the Clean Water Act (CWA) falls into this category. The second category includes those who act totally outside the scope of regulations by committing acts which are *malum prohibitum*. For example, the company operating as a treatment, storage, and disposal (TSD) facility without any Resource, Conservation, and Recovery Act (RCRA) permits violates the law even though it might otherwise have acted legally if it had the required permits. Finally, there are those acts which are *malum in se*. Thus, the activity of the "midnight dumper" is unacceptable regardless of whether or not the actor operated a properly licensed TSD facility.

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<sup>11</sup> *Toxic Chemical Contamination of Ground Water, EPA Oversight: Hearings before a Subcomm. of the Comm. on Government Operations House of Cong., 96th Cong., 2nd Sess. 20 (1980)* (statement of Dr. Robert H. Harris, Member of the President's Council on Environmental Quality).

<sup>12</sup> THEODORE M. HAMMETT & JOEL EPSTEIN, *LOCAL PROSECUTION OF ENVIRONMENTAL CRIME*, 12 (1991).

Federal environmental laws allow states to regulate more stringently than the federal laws, and many states have.<sup>13</sup> Thus, familiarity with federal environmental laws is important, not only because they might be the applicable laws in a local prosecutor's jurisdiction, but also because the framework of many state and municipal laws is based on parallel federal laws.

## **B. Federal Criminal Environmental Law**

### **1. Crucial Statutes and Issues Common to Them**

Federal criminal enforcement relies primarily on eight federal statutes.<sup>14</sup> These are: (1) the Clean Air Act (CAA),<sup>15</sup> (2) the Federal Water Pollution Control Act or "Clean Water Act" (CWA),<sup>16</sup> (3) the Rivers and Harbors Act of 1899 (RHA),<sup>17</sup> (4) the Safe Drinking Water Act (SDWA),<sup>18</sup> (5) the Resource Conservation and Recovery Act (RCRA),<sup>19</sup> (6) the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),<sup>20</sup> (7) the

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<sup>13</sup> See generally R.D. SPEER & GERALD A. BULANOWSKI, SPEER'S DIGEST OF TOXIC SUBSTANCES STATE LAW: 1983-84, (1983) (giving synopses of and trends in state environmental laws). See also Anthony J. Celebrezze, Jr., et al., *Criminal Enforcement of State Environmental Law: The Ohio Solution*, 14 HARV. ENVTL. L. REV. 217 (1990) (analyzing Ohio's change in mens rea standard from knowledge to recklessness and concluding that recklessness standard facilitates enforcement and deterrence in Ohio).

<sup>14</sup> Robin Weiner, et al., *Environmental Crimes*, 28 AM. CRIM. L. REV. 427, 427 (1991). See also National Enforcement Investigations Center, Office of Criminal Investigations, U.S. Environmental Protection Agency, *Summary of Criminal Prosecutions Resulting from Environmental Investigations* (March 1990); Enforcement and Compliance Monitoring, U.S. Environmental Protection Agency, *Enforcement Accomplishments Report: FY 1989* (February 1990) (giving civil and criminal actions, settlements, and court decisions).

<sup>15</sup> 42 U.S.C. §§ 7401-7642 (1988 & Supp. 1990). The CAA was amended and reauthorized by The Clean Air Act Amendments of 1990.

<sup>16</sup> 33 U.S.C. §§ 1251-1387 (1988 & Supp. 1990).

<sup>17</sup> 33 U.S.C. § 407 (1988).

<sup>18</sup> 42 U.S.C. §§ 300f to 300j-26 (1988).

<sup>19</sup> 42 U.S.C. §§ 6901-6992k (1988 & Supp. 1990).

<sup>20</sup> 42 U.S.C. §§ 9601-9675 (1988).

Toxic Substances Control Act (TSCA),<sup>21</sup> and finally, (8) the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).<sup>22</sup>

These laws have several common characteristics. Generally, both corporations and individuals are subject to either criminal or civil liability or both for violating provisions of one of these statutes.<sup>23</sup> Furthermore, federal environmental laws hold corporate officers or employees responsible if they knew or should have known that their acts violated a federal statute.<sup>24</sup> Concerning the degree of knowledge that constitutes a violation, most courts require more than negligence, but less than specific intent.<sup>25</sup> Finally, the constitutionality of environmental laws has been consistently upheld.<sup>26</sup>

## 2. Specific Federal Statutes

### a. The Clean Air Act

The EPA establishes ambient air quality standards and the CAA requires states to develop and implement regulations to bring air quality within the range of these standards. There are different standards for hazardous pollutants and for industrial sources of pollution. The CAA imposes criminal sanctions on those who knowingly tamper with EPA monitoring devices, who violate state requirements, or who knowingly make false statements in documents submitted to the EPA.<sup>27</sup> Finally, the CAA authorizes EPA representatives to require records and relevant compliance information, without probable or reasonable cause.<sup>28</sup>

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<sup>21</sup> 15 U.S.C. §§ 2601–2671 (1988 & Supp. 1990).

<sup>22</sup> 7 U.S.C. § 136–136y (1988 & Supp. 1990).

<sup>23</sup> Weiner et al., *supra* note 14, at 428.

<sup>24</sup> *Id.* at 432.

<sup>25</sup> *Id.* at 433.

<sup>26</sup> *Id.* at 434.

<sup>27</sup> 42 U.S.C. § 7413(c)(2) (1988 & Supp. 1990).

<sup>28</sup> 42 U.S.C. § 7414(a)(1) (1988 & Supp. 1990); Weiner et al., *supra* note 14, at 442–443.

b. The Clean Water Act and The Rivers and Harbors Act of 1899  
i. The Clean Water Act

The purpose of the Federal Water Pollution Control Act (CWA) is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."<sup>29</sup> The EPA sets discharge standards for certain pollution sources,<sup>30</sup> regulates the discharge of hazardous wastes and petroleum,<sup>31</sup> assists and regulates waste treatment and management,<sup>32</sup> and ascertains that all sources of pollution into navigable waters are monitored.<sup>33</sup>

Criminal penalties of up to \$50,000 a day and three years in prison result from knowing violations of permits,<sup>34</sup> and \$25,000 a day and imprisonment up to one year can result from negligent violations of permit conditions.<sup>35</sup> A conviction of "knowing endangerment" subjects a person to a fine up to \$250,000 and up to 15 years in prison.<sup>36</sup> The person in charge of a vessel or an onshore or offshore facility which discharges contaminants into navigable waters and who fails to notify state or federal environmental authorities is subject to a \$10,000 fine and up to one year in prison.<sup>37</sup> The new Oil Pollution Act, passed in response to the Exxon Valdez oil spill, authorizes much higher penalties.<sup>38</sup>

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<sup>29</sup> 33 U.S.C. § 1251(a) (1988).

<sup>30</sup> *Id.* at § 1311.

<sup>31</sup> *Id.* § at 1321.

<sup>32</sup> *Id.* at § 1281.

<sup>33</sup> *Id.* at § 1254.

<sup>34</sup> *Id.* at § 1319(c)(2).

<sup>35</sup> *Id.* at § 1319(c)(1).

<sup>36</sup> *Id.* at § 1319(c)(3).

<sup>37</sup> *Id.* § 1321(b)(5).

<sup>38</sup> 33 U.S.C. §§ 2701-2761 (1990).

## ii. The Rivers and Harbors Act of 1899

The Rivers and Harbors Act of 1899 (RHA) offers the prosecutor two advantages that the CWA does not. First, the RHA regulates nonpoint discharges, which are those not associated with any discrete conveyances.<sup>39</sup> Examples of nonpoint discharges include seepage from underground oil tanks that could reach navigable water or waste deposited on a river bank.<sup>40</sup> Secondly, although the CWA imposes harsher penalties, the RHA has no scienter requirement.<sup>41</sup>

## c. The Safe Drinking Water Act

The Safe Drinking Water Act (SDWA) is designed to ensure healthy drinking water by regulation of public water systems and of underground injection of contaminants into groundwater.<sup>42</sup> Like the CAA, the SDWA authorizes the EPA to set maximum contaminant levels which states are responsible for maintaining by implementing regulations.<sup>43</sup> Further, the EPA mandates a permit regulatory scheme for underground injections, which the states also must implement.<sup>44</sup>

The act has been strengthened by recent amendments. The 1988 amendments prohibit the sale or manufacture of water coolers which do not meet lead content standards for water.<sup>45</sup> Violations of these amendments can result in up to five years in prison<sup>46</sup> as well as a civil fine of \$5000.<sup>47</sup> In 1986 Congress strengthened the EPA's authority to enforce drinking water

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<sup>39</sup> 33 U.S.C. § 407 (1988).

<sup>40</sup> Weiner et al., *supra* note 14, at 465.

<sup>41</sup> *Id.* at 464.

<sup>42</sup> 42 U.S.C. §§ 300f to 300j-26 (1988 & Supp. 1990).

<sup>43</sup> *Id.* at § 300g-2.

<sup>44</sup> *Id.* at § 300h.

<sup>45</sup> *Id.* at § 300j-23(b).

<sup>46</sup> *Id.* at § 300j-23(c).

<sup>47</sup> *Id.* at § 300j-23(d).

standards vis a vis the states.<sup>48</sup> Willful violations of these provisions subject a person to three years in prison and a criminal fine.<sup>49</sup>

**d. The Resource Conservation and Recovery Act**

The Resource Conservation and Recovery Act (RCRA) regulates the generation, transfer, storage, treatment and disposal of all hazardous waste. The object of RCRA is to regulate hazardous waste from the time it is generated until it is legally disposed. To achieve this objective RCRA requires TSD facilities to operate with permits that track all hazardous waste from generation to storage, treatment or disposal. Frequently, this is referred to as cradle to grave liability.

RCRA requires TSD facilities to return a copy of a manifest to the generator after the waste is received. Generators are then required to check them and to report to the state if they do not receive a copy of the manifest from the TSD facility. Thus, even if the state does not identify a RCRA violation, the generator can report to the state instances where its waste did not reach the TSD facility.

RCRA was amended in 1984<sup>50</sup> and now is comprised of nine subchapters. Subchapter III specifies that hazardous waste characteristics identification criteria should "tak[e] into account toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics."<sup>51</sup>

A person or corporation who knowingly violates one of RCRA's provisions may be fined up to \$50,000 a day, and individuals may be imprisoned for up to five years.<sup>52</sup> Felony convictions are possible for knowingly: (1) transporting or causing the transport of any hazardous waste to an unpermitted facility; (2) treating, storing, or disposing of hazardous waste in violation

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<sup>48</sup> *Id.* at § 300h-2.

<sup>49</sup> *Id.* at § 300h-2(b)(2).

<sup>50</sup> Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (codified at §§ 6901-6992k (1988& Supp. 1990)).

<sup>51</sup> 42 U.S.C. § 6921 (1988).

<sup>52</sup> *Id.* at § 6928(d).

of a permit, or without a permit; (3) omitting material information or making a false material statement or representation on required documents; (4) destroying, altering, concealing, failing to file any required documents; and (5) transporting or causing transport without a manifest.<sup>53</sup> Federal courts have interpreted the "knowingly" provision as requiring the government to prove that the defendant knew he or she was violating a provision of RCRA.<sup>54</sup> The government may prove knowledge, however, by demonstrating scienter through circumstantial evidence such as a company's failure to follow regular waste disposal procedures.<sup>55</sup>

Stricter penalties are provided for when a person is convicted of knowing endangerment.<sup>56</sup> Individuals may be fined up to \$250,00 or imprisoned for up to fifteen years, or both, and organizations may be fined up to \$1,000,000.<sup>57</sup> This crime requires the following two elements: (1) the defendant violated one of the provisions of RCRA and (2) the defendant knew at the time of the offense that he was "plac[ing] another person in imminent danger of death or serious bodily injury."<sup>58</sup>

**e. The Comprehensive Environmental Response, Compensation Liability Act**

The purpose of CERCLA is "[t]o provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous disposal sites.<sup>59</sup> The EPA is authorized to take immediate responsive action to actual or threatened releases of hazardous materials and to monitor and investigate

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<sup>53</sup> *Id.*

<sup>54</sup> United States V. Hayes Int'l Corp., 786 F.2d 1499, 1502-04 (1986).

<sup>55</sup> *Id.* at 1504.

<sup>56</sup> 42 U.S.C. § 6928(e) (1988).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> 94 Stat. 2767 (1980).

actual or possible releases.<sup>60</sup> The Act also established the "Superfund" which may be used by the EPA as well as state and local governments to clean up specified hazardous waste sites.<sup>61</sup> Generators and transporters as well as present and past operators and owners of sites, are jointly and severally liable for clean-up costs.<sup>62</sup> Individuals or corporations have no third-party defenses to criminal charges, unless the third party is solely responsible for the problems at the site.<sup>63</sup>

The Act imposes varied penalties for violations of different provisions. First offenses carry three year prison sentences, with subsequent offenses resulting in up to five years in prison and fines<sup>64</sup>. Possible violations include: submitting false reimbursement claims, failing to notify the appropriate authority of the release of hazardous substances, or owning or operating an unlicensed facility.<sup>65</sup> Finally, the Superfund Amendments and Reauthorization Act of 1986, which amended RCRA, includes the Emergency Planning and Community Right-to-Know Act,<sup>66</sup> with information collection and reporting requirements and substantial liability for failing to meet them.<sup>67</sup>

#### f. The Toxic Substances Control Act

The purpose of the TSCA is to "assure that ... innovation and commerce in ... chemical substances and mixtures do not present an unreasonable risk of injury to the health or the environment."<sup>68</sup> The Act provides for criminal fines of up to \$25,000 a day and imprisonment

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<sup>60</sup> *Id.* at § 9604.

<sup>61</sup> *Id.* at § 9611.

<sup>62</sup> *Id.* at § 9607.

<sup>63</sup> *Id.* at § 9607(b)(3).

<sup>64</sup> *Id.* at §§ 9603(b), 9612(b).

<sup>65</sup> *Id.*

<sup>66</sup> 42 U.S.C. §§ 11001-11050 (1988).

<sup>67</sup> *Id.* §§ 11045.

<sup>68</sup> 15 U.S.C. § 2601(b)(3) (1988).

for up to one year, or both, for knowingly or willfully violating the act.<sup>69</sup> The violations include (1) failing or refusing to comply with rules, orders, or requirements; (2) commercially using a chemical substance or mixture which a person knew or had reason to know was manufactured, processed, or distributed in commerce; (3) failing to establish, submit, maintain, permit access to required documents; and (4) failing or refusing to permit entry or inspection.<sup>70</sup>

**g. The Federal Insecticide, Fungicide and Rodenticide Act**

FIFRA regulates pesticides by regulating their registration, transportation, sale, and use.<sup>71</sup> Although both private and commercial users of pesticides are subject to criminal penalties for knowingly violating the act, their penalties differ. Commercial violators are subject to maximum fines of \$25,000 and one year in prison,<sup>72</sup> while private violators, who are not considered registrants, applicants for registration, or producers, are liable for fines up to \$1000 and up to thirty days imprisonment.<sup>73</sup>

**3. Partial Preemption of State Law**

By virtue of the Commerce and Supremacy Clauses of the U.S. Constitution, states are preempted from legislating more lenient environmental standards than those that Congress has mandated through the above-mentioned federal environmental statutes. Thus, for example, if Arizona passed a law imposing more lenient fines or less stringent pollution standards in an area within the scope of a federal statute, the law would be unconstitutional and void. If, however, Arizona legislated more stringent standards, these standards would not be preempted by federal environmental statutes. Many states have imposed stricter laws, which are binding. Several other states, such as Arizona, have simply adopted federal standards as state law to be enforced by state and local prosecutors.

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<sup>69</sup> *Id.* at § 2615(b).

<sup>70</sup> *Id.* § 2614.

<sup>71</sup> 7 U.S.C. § 136-136y (1988 & Supp. 1990).

<sup>72</sup> *Id.* at § 136l(b)(1)(B).

<sup>73</sup> *Id.* at § 136l(b)(2).

## C. State and Local Criminal Environmental Law

### 1. State Legislative Trends

Along with the general resurgence of state legislatures since 1970, there has been a dramatic increase in the amount of state environmental legislation.<sup>74</sup> Between 1967 and 1983 the number of state environmental laws or amendments grew from 375 to 1425.<sup>75</sup> The diversity of laws has also grown dramatically during this time.<sup>76</sup> Provisions of state laws regulating the environment include administrative, tort, labeling, business confidentiality, liability, statute of limitations, and right-to-know provisions.

### 2. Critical Analysis of State Law

John DeCicco and Edward Bonnano conducted a comparative study of the environmental laws of all fifty states and concluded that the lack of state law uniformity hinders the enforcement of existing environmental laws.<sup>77</sup> DeCicco and Bonnano note several characteristics and shortcomings commonly found in state laws. Neither the states nor the federal government regulate the disposal of industrial wastes, therefore firms commonly mix hazardous wastes into this type of waste to avoid detection. Most states have weak air pollution laws, and most have adopted water pollution statutes that criminalize false statements.<sup>78</sup>

There is, perhaps, more variance among state laws than consistency. A person could be sentenced to several years in prison for a hazardous waste violation in one state, but could be exonerated in another state.<sup>79</sup> One result of this disparate treatment of similar conduct is

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<sup>74</sup> Speer & Buianowski, *supra* note 13, at 1-2.

<sup>75</sup> *Id.* at 3.

<sup>76</sup> *Id.* at 6.

<sup>77</sup> John DeCicco & Edward Bonnano, *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*, 5 J. LAND USE & ENVTL. L. 1 (1989).

<sup>78</sup> HAMMETT & EPSTEIN, *supra* note 12, at 75.

<sup>79</sup> *Id.* at 74.

that businesses will move to the more lenient jurisdictions, and the problem is displaced and the solution deferred.<sup>80</sup>

### 3. Prosecutors' Views of State Environmental Laws

Hammett and Epstein report several beliefs held by local enforcement officials. Most prosecutors believed that criminal fines were too low to deter future environmental crime.<sup>81</sup> Further, the relative lack of technical and drafting expertise of local legislators is reflected in inefficient or ineffective environmental laws and ordinances.<sup>82</sup> Local prosecutors who constantly contend with changes in environmental criminal practices often advocate innovative laws to forestall criminal developments. For example, Monmouth County prosecutors have discovered an increase in the commingling of hazardous waste with shredded construction and demolition waste believed to originate in New York City. To solve the problem they urged the New Jersey legislature to pass laws regulating the disposal of shredded construction and demolition waste after the model of the New York State law regulating such wastes.<sup>83</sup>

#### D. Sentencing and Penalties under Environmental Statutes

##### 1. The Debate about Criminal Sanctions

With criminal sanctions becoming more commonplace for environmental offenses, some contend that environmental regulation is becoming "overcriminalized." One corporate analyst contends that criminal law fails to distinguish between willful misdeeds for personal gain and inadvertent or negligent violations for which there is strict or vicarious liability.<sup>84</sup> Before the advent of federal sentencing guidelines, judges and juries frequently would give lenient fines instead of punitive penalties for such strict liability crimes.<sup>85</sup> Some believe that the application

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<sup>80</sup> DeCicco & Bonnano, *supra* note 77, at 5.

<sup>81</sup> HAMMETT & EPSTEIN, *supra* note 12, at 77.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 78.

<sup>84</sup> Mark A. Cohen, *Environmental Crime and Punishment: Legal/Economic Theory and Empirical Evidence on Enforcement of Federal Environmental Statutes*, 82 J. CRIM. L. & CRIMINOLOGY 1054, 1103 (1992).

<sup>85</sup> *Id.*

of sentencing guidelines to environmental crime closes this loophole and results in overdeterrence.<sup>86</sup>

There are several other criticisms of this trend. Cohen believes that criminalizing public welfare laws diminishes the moral stigma of criminalization by making the criminal label commonplace.<sup>87</sup> Secondly, by focusing on criminal sanctions for corporate polluters, the law unfairly and inefficiently places the burden of a clean environment on business while technological constraints and consumer behavior play a larger role in pollution.<sup>88</sup> Furthermore, according to the economic school of jurisprudence, the law should impose criminal sanctions only when tort law is inadequate to prevent people from bypassing the assignment of cost and liability via a voluntary market system.<sup>89</sup> Another economic consideration is that criminal sanctions cost society more than administrative ones since criminal trials and incarceration are more costly than administrative penalties.<sup>90</sup>

## 2. Theoretical Factors in Imposing Sanctions

Cohen argues that environmental crime sanctions should be based on harm, rather than on the gains illegally received.<sup>91</sup> This would help prevent overdeterrence. There are several difficulties with this approach, however. One potential drawback is that it will be more difficult and expensive to prosecute environmental crime since prosecutors will then have the burden

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1104.

<sup>88</sup> *Id.*

<sup>89</sup> Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195, 1204 (1985).

<sup>90</sup> TOM TIETENBERG, *INNOVATION IN ENVIRONMENTAL POLICY* 68 (1992).

<sup>91</sup> Cohen, *supra* note 84, 230, at 1105. *But see infra* note 281 and accompanying text (discussing the Department of Justice's policy of charging criminally based on economic benefits, not on harm).

of proving the level of harm.<sup>92</sup> Another related problem is that some harms are inherently difficult to measure according to monetary values.<sup>93</sup>

Cohen also believes that the most effective deterrence results when sentences are inversely proportional to the probability of detection.<sup>94</sup> Offenses that are difficult to discover should receive the highest penalties. The rationale for this sentencing policy is that those offenses that are likely to be detected (such as oil spills) are also those which are most likely to be subject to private remedies.<sup>95</sup>

### 3. Nontraditional Sanctions

RCRA provides for disbarment sanctions prohibiting violators from applying for any future government contracts, and states have followed suit. Other sanctions require offenders to perform community service and even require them to publicize statements about their wrongdoing in local newspapers.

#### E. Common Law Actions

There are the following five traditional causes of action having an origin in either property or tort law: private nuisance, public nuisance, trespass, riparian rights, and negligence. Although these doctrines do not play as large a role in environmental enforcement as environmental statutes, their role is significant and often overlapping.<sup>96</sup>

Both private and public nuisance doctrines protect owners or users of land from unreasonable interference with the use and enjoyment of land. While private nuisance suits can be brought by owners or tenants, public nuisance suits must be brought by the state or by citizens whose special injuries give them standing to sue. Remedies for nuisance suits are damages and injunctive relief. One limitation of private nuisance suits is that damages usually

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<sup>92</sup> John C. Coffee, Jr., *Crime and Punishment in the Boardrooms: Let's Not Shield Corporations From Criminal Penalties*, LEGAL TIMES, Feb. 13, 1989, at 19.

<sup>93</sup> Cohen, *supra* note 84, 230, at 1106.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> TIETENBERG, *supra* note 90, at 163.

are barred when the individual "comes to the nuisance," which could be pollution from a local factory that has been there for many years.

Civil courts struggle with theoretical difficulties in deciding where to impose the liability for the pollution. Notwithstanding the "Coase Theorem,"<sup>97</sup> issues of fairness and economic efficiency sometimes conflict when the local factory is the source of jobs to many in the community, but also a source of pollution, lowered property values, and reduced quality of life to those living nearby.

Marketable pollution permits are a recent variation of common law nuisance liability rules.<sup>98</sup> The following illustrates their operation: when company A pollutes less than it is allowed under relevant federal statutes, it is issued a voucher assigning a dollar value to the difference. This voucher can then be sold to company B, which exceeds pollution standards. Thus, the permits result in a self-operating regulatory system by rewarding company A and penalizing company B.

The common law trespass doctrine protects property from physical invasion. This doctrine has been extended to encompass environmental issues since the settling of dust particles and vapors is actionable.<sup>99</sup>

Riparian rights give shoreline property owners a degree of protection against diminished flow, water level, purity, or use of bodies of water. The extent of these protections varies by region. By a related doctrine, states hold all land under water in public trust, allowing them to regulate pollution affecting the navigation, swimming, fishing, and other uses of these waters.<sup>100</sup>

Finally, tort action is available for negligence when four elements are present: a duty protecting others from unreasonable risk, a breach of that duty, legal cause, and actual

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<sup>97</sup> R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

<sup>98</sup> PEARCE & TURNER, *supra* note 4, at 110.

<sup>99</sup> TIETENBERG, *supra* note 90, at 144.

<sup>100</sup> *Id.*

damages.<sup>101</sup> Where the cost of taking precautions would have been less than the probability and gravity of the accident, the risk is likely to be seen as unreasonable. Also, violation of statutes designed to protect the public from personal injury can give rise to negligence per se. The amount of environmental litigation relying on negligence theories has not been great.<sup>102</sup>

### III. The Extent of Environmental Crime

#### A. Difficulties in Assessing the Extent of Non-compliance

In a 1988 study for the Environmental Protection Agency, James K. Hammitt and Peter Reuter found that the shortage of available data makes it difficult to estimate the extent of illegal disposal in the United States.<sup>103</sup> One proposed method is the "residual method," which estimates total quantities of waste generated and legally disposed and deduces the quantity illegally disposed from the difference between these figures. According to the authors, however, the residual method is unlikely to yield a reliable estimate since it presupposes an accurate estimate of the quantity of hazardous waste generated and legally disposed, and this is currently unavailable.

The best estimate seems to place the total amount of hazardous waste generated between 247 million and 1 billion metric tons per year.<sup>104</sup> In 1990 the EPA listed 211,000 hazardous waste generators in the United States within the scope of RCRA regulations.<sup>105</sup> This is nine times more than the amount regulated in 1980 mostly because in 1985 the scope

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<sup>101</sup> *Id.* at 145.

<sup>102</sup> *Id.* at 146.

<sup>103</sup> James K. Hammitt & Peter Reuter, *Measuring and Deterring Illegal Disposal of Hazardous Waste*, 39 (Rand Corporation, October 1988). The report is based on a review of existing literature and on interviews with 40 local enforcement personnel and industry representatives in Los Angeles County, Massachusetts, and Pennsylvania.

<sup>104</sup> J.E. McCarthy & M.E.A. Reisch, *Hazardous Waste Fact Book*, Congressional Research Service, 5-7 (1987).

<sup>105</sup> United States Environmental Protection Agency, Office of Solid Waste and Emergency Response, *The Nation's Hazardous Waste Management Program at a Crossroads: The RCRA Implementation Study*, 7 (1990).

of RCRA had been broadened to include an additional 118,000 small quantity generators (SQGs).

Hammitt and Reuter give four main reasons why no accurate estimate of total waste generated exists.<sup>106</sup> First, hazardous waste is an extremely diverse set of substances, including liquids and solids of varied chemical composition. Furthermore, when nonhazardous substances such as water are used to dilute certain hazardous chemicals, the mixture creates a greater volume of hazardous material. Second, definitions of hazardous waste have fluctuated over time and across jurisdictional boundaries. Third, because the universe of hazardous waste generators is diverse, it is difficult to define. Finally, conceptual distinctions are often blurred when reported through the registration system. Some data systems account for illegal disposal in estimates or denominate on-site disposal as generation, while others do not use these measurement procedures.

Another possible means of measuring the extent of environmental crime is simply to tabulate the number of criminal indictments and cases won. For example, at the federal level, according to former Attorney General, Richard Thornburgh, the Department of Justice achieved 761 indictments and 549 convictions since founding its Environmental Crimes Section, with a majority of the indictments coming between 1989 and 1990.<sup>107</sup> Similarly, Donald Rebovich analyzed all 71 criminal hazardous waste cases charged by the attorney general offices of Maine, Maryland, New Jersey, and Pennsylvania between 1977 and 1985.<sup>108</sup>

Hammitt and Reuter contend, however, that an analysis relying on data from prosecuted cases in several states may not accurately represent the universe of hazardous waste crime.<sup>109</sup> The estimates might have been colored by the intensity of prosecution since aggressive enforcement is likely to uncover a higher percentage of violations than lax enforcement. Similarly, they believe that surveys of generators are likely to result in skewed

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<sup>106</sup> *Id.* at 47-48.

<sup>107</sup> Richard Thornburgh, *Our Blue Planet: A Law Enforcement Challenge*, Keynote Address for the 1991 Environmental Law Enforcement Conference, (Jan. 1991).

<sup>108</sup> DONALD J. REBOVICH, *DAANGEROUS GROUND: THE WORLD OF HAZARDOUS WASTE CRIME* (1992).

<sup>109</sup> Hammitt & Reuter, *supra* note 103, at 41.

estimates since the number of generators is not known with substantial certainty and respondents are likely to under-report.<sup>110</sup>

Hammitt and Reuter believe that a "random audit method" would give the best estimates.<sup>111</sup> It would use direct observation of sample firms to determine their compliance levels. If representative samples have been chosen, the data gathered through observation can be extrapolated to determine compliance in all firms.

## **B. Studies of Non-compliance Levels and Patterns**

### **1. Large Quantity Generators**

There are no definitive studies documenting the extent of illegal hazardous waste disposal.<sup>112</sup> The one available study of illegal disposal rates by Large Quantity Generators (LQG) is the 1983 study by Savant Associates.<sup>113</sup> Since enforcement during the two year period of that study was considerably weaker than it is today, their estimate that 10-15 percent of LQGs illegally disposed some hazardous wastes is probably too low.<sup>114</sup>

Notwithstanding the lack of systematic empirical evidence, there are compelling reasons to believe that the rate of illegal disposal is high.<sup>115</sup> Compliance costs can be very high, and regulations are often technical and complex. Furthermore, the number of affected firms is in the hundreds of thousands, so that the risk of being caught in many jurisdictions is minimal.

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<sup>110</sup> *Id.* at 42.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 39.

<sup>113</sup> Savant Associates, Inc. & Response Analysis Corp., *Experiences of Hazardous Waste Generators with EPA's Phase I RCRA C Program: A Survey and Assessment*, prepared for EPA, Wash. D.C., (1983).

<sup>114</sup> Hammitt & Reuter, *supra* note 103, at 39.

<sup>115</sup> *Id.* at 47.

## 2. Small Quantity Generators

According to Hammitt and Reuter, there is insufficient systematic data on the rate of non-compliance among Small Quantity Generators (SQG) to give a reliable estimate.<sup>116</sup> SQGs are believed to be more likely than LQGs to violate environmental laws.<sup>117</sup> Although SQGs are believed to generate less than 1 percent of all hazardous waste<sup>118</sup>, their share of illegal disposal is likely to be substantial due to their high rate of non-compliance. Since SQGs are more frequently located in populous areas, there is a likelihood that they will cause significant health hazards.

There are several factors contributing to high non-compliance among small generators.<sup>119</sup> Although SQGs are not always small businesses, typically they face disproportionately high business costs for legal disposal. Due to the smaller amounts, SQG businessmen often perceive their pollution to be too insignificant to warrant the regulations and know that they can easily avoid detection in dumping their small amounts of hazardous wastes. Even when these businessmen are willing to comply, they are unlikely to have in-house counsel to interpret the regulations.

According to Hammitt and Reuter, some within industries observe differences in compliance levels between commercial and industrial SQGs.<sup>120</sup> Commercial firms, such as dry cleaners, painters and automobile repair shops, deal directly with the public. Industrial firms deal primarily with other businesses. Commercial firms are more likely than industrial firms to

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<sup>116</sup> *Id.* See generally, B.L. Bozeman et al., *New Jersey Small Quantity Generator Survey and Analysis, prepared for the New Jersey Hazardous Waste Facilities Siting Commission, Project X-067*, (1986); Lorene J. Russell & Emy C. Meriorin, *The Disposal of Hazardous Waste by Small Quantity Generators: Magnitude of the Problem*, Association of Bay Area Governments, Oakland, California (June 1985); Seymour I. Schwartz et al., *Managing Hazardous Wastes Produced by Small Quantity Generators*, University of California, Davis, Division of Environmental Studies and State of California, Senate Office of Research, (April 1987).

<sup>117</sup> Bozeman et al., *supra* note 116.

<sup>118</sup> Hammitt & Reuter, *supra* note 103, at 16.

<sup>119</sup> *Id.* at 17.

<sup>120</sup> *Id.*

dispose of wastes illegally. Unlike industrial companies which perceive waste as a necessary byproduct of their industrial processes, commercial firms are likely to see their waste as incidental to their commercial activities, and hence as less of a legitimate business cost.

Hammitt and Reuter discovered two typical non-compliance patterns among SQGs.<sup>121</sup> In Massachusetts SQGs evaded compliance by legally disposing of only part of their hazardous waste and showing documentation to regulators to mask their illegal disposal of the remaining portion.<sup>122</sup> Similarly, when hazardous waste haulers increase their prices or change billing from a flat rate to a per unit rate, SQGs sometimes begin to dispose of only part of their waste through permitted haulers and simply discard the remaining hazardous waste illegally. When one hazardous waste hauler servicing automobile repair shops raised its rates, it lost 50 of its 500 customers.<sup>123</sup>

A survey of North Hollywood, California generators found that between 5 and 28 percent of SQG waste is illegally discarded.<sup>124</sup> Most was dumped in sewers, improper landfills, vaporized or buried on site. Another survey indicated that 57 percent of SQGs in San Francisco dispose of waste illegally.<sup>125</sup> Half of the firms stated that they would be unwilling to pay anything for legal disposal. The Santa Clara County District Attorney estimated that half of the haulers and automobile shops dumped their wastes down storm drains or sewers.<sup>126</sup> Approximately 30-50 percent of SQGs in New Jersey do not use required manifests.<sup>127</sup>

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 18.

<sup>123</sup> Schwartz et al., *supra* note 116.

<sup>124</sup> SCS Engineers, Long Beach, California, *Hazardous Waste Management Plan for Small-Quantity Generators: North Hollywood Pilot Study*, prepared for Southern California Association of Governments, Los Angeles, (May, 1985).

<sup>125</sup> Russell & Meriorin, *supra* note 116.

<sup>126</sup> Schwartz et al., *supra* note 116.

<sup>127</sup> Bozeman et al., *supra* note 116.

Forty-two Florida counties surveyed their SQGs who reported that they legally disposed of only half of their waste.<sup>128</sup>

### C. Reports from Prosecutors and Regulatory Inspectors

In their 1991 study for the National Institute of Justice, Local Prosecution of Environmental Crime, Hammett and Epstein discovered an increased sophistication among environmental crime prosecutors and defense attorneys representing those accused of perpetrating these crimes.<sup>129</sup> The District Attorney offices studied were believed to prosecute environmental crime in an exemplary way because they had established special environmental crime units or designated experienced groups of attorneys to handle environmental cases.<sup>130</sup> Also, each aimed to develop cooperative enforcement efforts with environmental regulatory agencies and police and had a substantial record of successful criminal prosecutions.

State and local prosecutors have reported an increasing number of businesses who knowingly violate environmental laws to increase profit margins or to stay in business.<sup>131</sup> For example, District Attorney James M. Catterson, Jr. believes that small businesses in his jurisdiction, Suffolk County, New York, are illegally disposing deadly chemicals at alarmingly high rates in order to avoid paying higher legal disposal costs.<sup>132</sup> During a sting operation known as the "toxic avenger case" his investigators actually had to lower their offered prices several times to match the black market dumping rate. In fact, one company made inquiries whether the undercover officers would consider payment plans. The overall illegal rate was fourteen and a half times lower than the legal market rate. The differential was even greater to dispose of cyanide alone— \$450 as compared to \$10,400 for the legal rate.

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<sup>128</sup> Schwartz et al., *supra* note 116.

<sup>129</sup> HAMMETT & EPSTEIN, *supra* note 12, at 2. (The authors interviewed prosecutors, investigators, and regulatory agency personnel in five district attorney offices believed to be leaders in the local prosecution of environmental crime: Alameda County and Los Angeles County, California; Cook County, Illinois; Jefferson and Gilpin Counties, Colorado; and Monmouth County, New Jersey.)

<sup>130</sup> *Id.*

<sup>131</sup> DeCicco & Bonnanno, *supra* note 77, at 2.

<sup>132</sup> Josh Barbanel, *Elaborate Sting Operation Brings Arrests in Illegal Dumping of Toxic Wastes by Businesses*, N.Y. TIMES, May 13, 1992, (Long Island Metro Section) at 1.

#### IV. Environmental Crime Factors

##### A. Studies of Environmental Crime Prosecutions

Through his 1985 study of hazardous waste crime in ten Northeastern states, Rebovich shed light on a hidden world of hazardous waste crime.<sup>133</sup> His 1988 follow-up survey of law enforcement personnel from these and ten other Northeastern states enlarges the picture of environmental crime portrayed in Dangerous Ground and reveals probable future trends for state and local prosecutors.

Rebovich found seven factors in the commission of environmental crime within a given jurisdiction:<sup>134</sup> (1) the extent and duration of industrial growth, (2) the availability of legal and illegal disposal outlets, (3) law enforcement response, (4) the level of cooperation between regulators and those responsible for criminal prosecution, (5) the visibility of the types of offenses, (6) the maturity level of the workplace criminal group, and (7) syndicate crime complicity.

For instance, during the late 1970's and early 1980's Pennsylvania and Maryland industries generated more medical waste than the few state landfills and strict regulations would accommodate.<sup>135</sup> According to Rebovich, this allowed New Jersey TSD operators to name exorbitant prices, and many made enormous illegal profits by dumping the waste illegally. Furthermore, Rebovich found that task forces operating in conjunction with the expertise of prosecutors were crucial factors in successful prosecution and deterrence.<sup>136</sup> Rebovich's study also discovered that criminal conduct tends to pervade the workplace in these TSD facilities that operate illegally. As a consequence, prosecution of only a few offenders is unlikely to halt illegal dumping by the facility.<sup>137</sup>

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<sup>133</sup> REBOVICH, *supra* note 108.

<sup>134</sup> *Id.* at 92.

<sup>135</sup> *Id.* at 94.

<sup>136</sup> *Id.* at 95.

<sup>137</sup> *Id.* at 100-02.

Since Rebovich's first 1986 study, certain changes occurred affecting the commission of environmental crime. Companies in the final stages of bankruptcy began stockpiling wastes on generator land.<sup>138</sup> Amendments to RCRA broadened the scope of the act.<sup>139</sup> For example, underground storage tanks, like those in gasoline stations, are now regulated for leakage. Most significantly, RCRA brings more small-quantity generators into the coverage of the act.<sup>140</sup> Because the costs of compliance will be prohibitive, many small hazardous waste handlers are likely to commit more crimes in the future.<sup>141</sup>

## B. Industrial Incentives to Illegal Disposal

Hammitt and Reuter identify several factors that make illegal disposal an enticing option for firms.<sup>142</sup> There are only a few possible ways to avoid the higher costs associated with legal disposal: (1) reducing quantities generated, (2) recycling wastes, (3) treating or disposing of wastes in legal on-site facilities, and (4) disposing of wastes illegally. Prohibitive costs or lack of knowledge among firms may make illegal disposal appear to be the most attractive option.

### 1. Knowledge of Regulations and Technical Expertise

According to Hammitt and Reuter, knowledge of regulations relates to compliance levels in several ways.<sup>143</sup> Since hazardous waste disposal frequently is viewed as peripheral to a firm's operations, it often does not receive adequate attention by senior managers, who are in the best position to formulate compliance decisions. Furthermore, personnel tend to misunderstand or discount the hazardous nature of the material they handle. Nonetheless, given the EPA campaign in 1985 and 1986 to educate SQGs about the new RCRA rules affecting them, fewer can realistically claim ignorance to escape culpability. Also, waste haulers who offer

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<sup>138</sup> *Id.* at 108.

<sup>139</sup> Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (codified at 42 U.S.C. §§6901-6992k (1998 & Supp. 1990)).

<sup>140</sup> HAMMETT & EPSTEIN, *supra* note 12, at 111.

<sup>141</sup> *Id.* at 113.

<sup>142</sup> Hammitt & Reuter, *supra* note 103, at 7.

<sup>143</sup> *Id.* at 7-8.

regular collection services recruit generators aggressively to build their customer list and tend to inform generators of their legal liability for illegal disposal. Finally, one survey indicated that compliance was more related to a firm's legal and environmental expertise than to cost factors.<sup>144</sup>

## 2. Disposal Cost Savings

The degree of savings from illegal disposal is a function of the toxicity and quantity of wastes and the cost and availability of legal disposal.<sup>145</sup> The price of illegal disposal has dramatically increased in response to tighter regulation of treatment and disposal facilities. For example, the Massachusetts Department of Environmental Management reported that the disposal price per ton of waste oil rose from \$52 in 1978 to \$600 in 1987. Dry cleaning disposal costs have risen from nearly nothing to between \$8000 and \$13,000 a year in 1987.<sup>146</sup>

Generators must pay other costs associated with legal disposal.<sup>147</sup> For instance, legal disposal is often taxed by state governments. In 1988 the California tax ranged between \$2 and \$150 a ton, depending on the type of waste. Legitimate hauling costs depend on the type of waste, the volume, form, and the distance between the point of origin and the treatment, storage and disposal (TSD) facility. According to the EPA, in 1987 the cost to ship one ton one mile was \$.23. With average intrastate and interstate hauling distances of 250 and 500 miles respectively, the average costs of shipping one ton of hazardous waste in 1987 were \$58 intrastate and \$115 interstate. Finally, TSD facilities typically charged lab fees of \$250 in 1988 to test waste in order to classify it for legal purposes prior to accepting it. Thus, in 1987 a garage had to pay approximately \$708 per ton to dispose of hazardous waste oil legally at an intrastate TSD facility.

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<sup>144</sup> Bozeman et al., *supra* note 116.

<sup>145</sup> Hammitt & Reuter, *supra* note 103, at 9.

<sup>146</sup> Kathleen Wolf & Frank Camm, *Policies for Chlorinated Solvent Waste--An Exploratory Application of a Model of Chemical Life Cycles and Interactions*, The RAND Corp., R-3506-JMO/RC (June, 1987).

<sup>147</sup> Hammitt & Reuter, *supra* note 103, at 9-10.

Compliance for firms with slim profit margins may be prohibitive.<sup>148</sup> For example, firms may gain a competitive business advantage by using illegal disposal methods, compounding the costs of compliance for other firms. In industries with small profit margins, this disadvantage may result in bankruptcy for legal disposers. Thus, in a given region for the dry cleaning industry, all dry cleaners must comply with environmental regulations or the resulting unfair economic advantage gained by non-compliers may very well drive others to financial ruin. Similarly, many small businesses cannot afford the capital outlays required for on-site treatment or recycling equipment.

### C. Industrial Disincentives to Illegal Disposal

Disincentives include either government imposed civil and criminal penalties or private civil suit damage awards.<sup>149</sup> Government imposed penalties might include imprisonment, fines, loss of permits or injunctions. Generally, private civil suits are too infrequent to provide significant deterrence. Government penalties can deter indirectly as well. For example, hazardous waste generators and insurance companies can influence others in the hazardous waste disposal industry.

#### 1. Private-Sector Oversight by Generators

Generators are liable under both RCRA and Superfund for cleanup costs of sites where their wastes have been deposited. Just one firm can be liable for the entire cleanup cost of a disposal site, and often large firms, with "deep pockets" are particularly wary of such liability. Hammitt and Reuter believe that for this reason, large firms often actively investigate haulers and TSDs to ensure their reliability for legal disposal.<sup>150</sup> Haulers and TSDs with bad reputations will lose business.

The type of contract between the generator and hauler can determine the degree of influence the generator has over a hauler.<sup>151</sup> If the contract is only for transport to a TSD

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<sup>148</sup> *Id.* at 11-12.

<sup>149</sup> *Id.* at 12.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 14.

facility, the hauler's incentive for illegal disposal is much less than if the contract includes disposal as well as transportation. Then, the hauler can retain the entire disposal fee by dumping the waste illegally himself. To avoid detection, the hauler would have to forge the manifest to give the appearance of legal disposal. Hammitt and Reuter believe that the probability of detection of such forgeries makes it unlikely that haulers will forge manifests.<sup>152</sup>

## 2. Private-Sector Oversight by Insurers

Hammitt and Reuter believe that liability insurers, in turn, may influence generators by imposing varied insurance costs depending on the perceived risk of non-compliance by the generator.<sup>153</sup> There are several significant limits on this influence. There is a long delay between any illegal activity by generators and the imposition of penalties. Further, since coverage extends only through a set period of the policy term, insurers have little incentive to oversee current activity. Also, insurers have failed to develop the technical expertise required to evaluate generator practices to assign risks accurately. Finally, insurers' attempts to ensure compliance by writing termination of coverage provisions into policies are often futile, given the inclination of courts to impose liability on them anyway.

### D. Other Determinants of Corporate Behavior

#### 1. Corporate Culture

Corporate culture is a significant factor in compliance. Some criminologists have argued that criminal stigmatization means little to an impersonal business entity.<sup>154</sup> However, at least one study indicates otherwise. According to a study of large firms by Fisse and Braithwaite (1983), while responses to legal sanctions varied among corporations, all the firms responded in some way.<sup>155</sup> It is impossible to relate this finding to small firms, however, since they are often much less likely to be influenced by adverse publicity.

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 13.

<sup>154</sup> *Id.* at 15.

<sup>155</sup> *Id.*

There is evidence that business schools have recognized the lack of awareness of environmental responsibilities among corporate leaders. As a result, these schools are rising to the challenge. One Boston University professor reported that most management students in his environmental course were unfamiliar with the facts and dimension of environmental problems in industry.<sup>156</sup> A compendium of articles from the Eighth National Conference on Business Ethics indicates increasing interest and activity in environmental education.

## 2. Corporate Learning Theory

In four industrial case studies, Manik Roy studied the effect of federal regulations on corporate learning in the environmental area.<sup>157</sup> Roy found that corporate action may be explained in terms of organizational structures, symbolic languages, subgroup conflicts, and social network influence. An organization's values may differ sharply from the norms held by individuals and subgroups within the organization and from the surrounding society. These values are transmitted through corporate symbolic languages created by managers and subordinates purposely and inadvertently. The author concludes, however, that the EPA's regulation and enforcement policies are partially ineffective because they fail to take into account organizational learning processes.

## 3. Interpreting Legal Requirements

The complexity of environmental law may cause some firms to violate environmental regulations inadvertently.<sup>158</sup> For example, the status of certain wastes may be ambiguous under other legislative schemes. California law may consider infectious wastes discharged into waterways as hazardous, while this may be permissible under other legislative schemes. Furthermore, RCRA regulations are very complex, and it is difficult for firms to keep abreast of regulatory changes and technical requirements.

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<sup>156</sup> James E. Post, *Environment into the Business School*, in *THE CORPORATION, ETHICS AND THE ENVIRONMENT* 263 (M. Hoffman et al. eds., 1990).

<sup>157</sup> Manik Roy, *Integrated Pollution Control: A symposium on Pollution Prevention, Organizational Culture, and Social Learning*, 22 *ENVTL. L.* 189 (1992).

<sup>158</sup> Hammitt & Reuter, *supra* note 103, at 28-29.

## V. Profile of the Typical Offender

### A. The Likely Corporate Profile

There have been no works specifically focused on the offender himself.<sup>159</sup> However, some of the offender's likely characteristics can be gleaned from various studies. Rebovich studied 71 cases prosecuted criminally.<sup>160</sup> Of these, 121 individual offenders were charged and 70 business firms were charged. His study revealed that typically the criminal dumper is an ordinary, profit-motivated businessman who operates a legitimate business uninfluenced by syndicate crime.<sup>161</sup> Offending firms tended to be small with simple organizational structures, usually occupying fewer than 50 employees.<sup>162</sup> According to Rebovich, however, larger firms may be under-represented since they are more likely to engage in less detectable behavior, such as illegal disposal on site, than to rely on other haulers or TSD facilities as small generators must.<sup>163</sup> While in Maine, Maryland, and Pennsylvania the largest category of offenders was generators, in New Jersey it was TSD facilities.<sup>164</sup> Rebovich found that the sources of waste tended to parallel the dominant industries in that jurisdiction.<sup>165</sup> The top five most frequent sources of illegally disposed hazardous waste were: paint dye, electroplating or metal treatment, petrochemical byproducts, chemical production or manufacture, and transformer/capacitors.<sup>166</sup>

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<sup>159</sup> REBOVICH, *supra* note 108, at 15.

<sup>160</sup> *Id.* at 30.

<sup>161</sup> *Id.* at 18.

<sup>162</sup> *Id.* at 31.

<sup>163</sup> *Id.* at 32.

<sup>164</sup> *Id.* at 30.

<sup>165</sup> *Id.* at 33.

<sup>166</sup> *Id.* at 34.

Rebovich also found certain correlations between occupation and disposal methods.<sup>167</sup> In 12 instances of 13 it was generators who discharged hazardous wastes into sewers or bodies of water in Maine, Maryland, and Pennsylvania. By contrast, six of seven New Jersey sewer-discharge and water-discharge cases were conducted by treaters or haulers.<sup>168</sup> In all the nine water discharge cases, the offender was located near the body of water.<sup>169</sup> Although landfill operators were rarely charged, this may reflect enforcement difficulties rather than a lack of culpability.<sup>170</sup>

Hammit and Reuter's analysis of incentives for and deterrents to illegal disposal offers the following profile of a firm likely to perpetrate environmental crime.<sup>171</sup> Costs of legal disposal will be high relative to otherwise legal profits. Small firms are more likely to break the law, but large firms, when in non-compliance, tend to do the most environmental damage. The generator will tend to contract with haulers both to transport and to dispose of the material. A large percentage of the offending firm's assets will be salvageable at a foreclosure resulting from non-compliance penalties. Thus, if most of the illegal hauler's assets are liquid, he will lose little if he is forced to close because of illegal activity. By contrast, TSD facilities' assets typically cannot be transferred cheaply or readily, making their potential violations more readily deterred.

#### B. Criminal Maturation System

The typical TSD operator does not set out to become a sophisticated racketeer planning to reap windfall profits through a criminal career.<sup>172</sup> Rather, the environmental field requires expensive technology which exerts pressure on him to cut corners. Eventually, he fully converts his business into a criminal enterprise. Gradually, he becomes increasingly sophisticated and

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<sup>167</sup> *Id.* at 47.

<sup>168</sup> *Id.* at 49.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Hammit & Reuter, *supra* note 103.

<sup>172</sup> REBOVICH, *supra* note 108, at 40.

develops criminal resourcefulness to maintain the criminal enterprise.<sup>173</sup> Hammitt and Epstein report that more and more firms have learned to shield their illegal activities through intermediaries and "front" corporations.<sup>174</sup>

Rebovich found that, in employing these techniques, the hazardous waste offender followed two tracks of criminal development through set stages.<sup>175</sup> The upper-stratum offender is an owner or operator, and the lower-stratum offender is a yard worker or truck driver. As financial costs rise, the upper-stratum offender gradually moves from the initial, total treatment stage through the intermediate, partial treatment stage to the final stage where no wastes are treated.<sup>176</sup> For the lower-stratum track, management deliberately hires drivers and yard workers with criminal backgrounds under the belief that these employees will be more compliant. Managers direct these employees to commit marginal regulatory daytime violations, which if done without complaint will result in reassignment to the night shift where overtly illegal disposal activities occur.<sup>177</sup> Employees who refuse to engage in illegal acts are fired; those who comply can graduate into the criminal core work group which actively attempts to elude detection.<sup>178</sup>

The hazardous waste offender also often cooperated with or co-opted others to assist in his deception. Offenders who had particularly good locations for concealing hazardous waste would accept wastes from other offenders as a "savior facility" in a network of facilities.<sup>179</sup> Also, the low pay and lack of advancement potential of state regulatory officials and attorneys

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<sup>173</sup> *Id.*

<sup>174</sup> HAMMETT & EPSTEIN, *supra* note 12, at 3.

<sup>175</sup> REBOVICH, *supra* note 108, at 51.

<sup>176</sup> *Id.* at 52-53.

<sup>177</sup> *Id.* at 53-54.

<sup>178</sup> *Id.* at 54-55.

<sup>179</sup> *Id.* at 50.

made them easy targets for businesses to co-opt or recruit to aid in avoiding compliance with state regulations.<sup>180</sup> Surprisingly, only three cases of bribery were charged.<sup>181</sup>

The perpetrator of environmental crime also recruited rogue chemists and laboratories to certify substances falsely as nonhazardous and thus avoid mens rea proof requirements.<sup>182</sup> Such facility chemists were also instrumental in placating employee suspicions and in enabling TSD facilities to recruit business from waste generators by convincing them that their waste would be legitimately handled.<sup>183</sup>

### C. Techniques Used to Evade Criminal Prosecution

Rebovich discovered cunning techniques that hazardous waste offenders mastered in order to elude prosecution. To avoid detection, one TSD company simply removed the deeper of two sets of waste separation blades from a clarifier tank.<sup>184</sup> Although this rendered the treatment process useless, the top blades still moved the waste material so that state inspectors were deceived. Other subterfuge included flushing water through pipes before inspectors came or dumping chlorine into sewers at just the right times to foil regularly operating municipal water purity monitoring devices.<sup>185</sup> Often, offenders relied on the regularity of state inspections to employ their detection avoidance tactics at "inspection" times.<sup>186</sup>

The offender will survey the physical characteristics of his region to determine where he can conceal his acts.<sup>187</sup> Sewers and other bodies of water were often used as well as

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<sup>180</sup> *Id.* at 38.

<sup>181</sup> *Id.* at 39.

<sup>182</sup> *Id.* at 40.

<sup>183</sup> *Id.* at 41.

<sup>184</sup> *Id.* at 36.

<sup>185</sup> *Id.* at 37.

<sup>186</sup> *Id.* at 36-37.

<sup>187</sup> *Id.* at 45.

relatively secluded areas.<sup>188</sup> These ranged from remote woods, railroad tracks, and farmlands to blighted urban areas and beneath overpasses. In Maryland and Pennsylvania, offenders used illegal landfills and abandoned mines for dumping.<sup>189</sup>

According to Rebovich, even if the offender is convicted, he is likely to utilize his criminal contacts to become a waste management broker for criminal haulers who undercut the prices of legitimate haulers.<sup>190</sup> Then he is shielded from prosecution since brokers are exempt from government licensing prohibitions against hazardous waste haulers and TSD operators who have prior criminal convictions.

Hammett and Epstein also uncovered some criminal evasion techniques.<sup>191</sup> For example, the Monmouth County Prosecutor uncovered a sophisticated waste management scheme wherein construction debris from New York City was shredded and laced with toxic chemicals. The indictment described a plan to mix the waste with top soil and sell it to people throughout the state for use on their lawns.

## VI. Optimal Deterrence

### A. Deterrent Theory in Environmental Crime

Hammett and Reuter suggest that prosecutors can achieve a maximum level of environmental law enforcement efficiency by strategically targeting potential environmental criminals.<sup>192</sup> Prosecutors should aim to deter those whose violations represent the highest ratio of social damage measured against the cost of averting future violations. If one considers the probability of detection as a cost factor for averting future crime, the Hammett and Reuter ratio can be reconciled with the basic conclusions of Gary Becker's seminal study of the economics of crime and punishment.<sup>193</sup>

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<sup>188</sup> *Id.* at 46.

<sup>189</sup> *Id.* at 47.

<sup>190</sup> *Id.* at 42.

<sup>191</sup> HAMMETT & EPSTEIN, *supra* note 12, at 11.

<sup>192</sup> Hammett & Reuter, *supra* note 103, at 31.

<sup>193</sup> Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

Three factors determine this ratio: (1) the class of potential violators, (2) the social costs of different types of violations, and (3) the cost of deterring these violations.<sup>194</sup> Several factors, in turn, determine the social costs of violations: the toxicity of the chemicals used or generated, the duration of their toxicity, and their effect on health or the environment.<sup>195</sup>

According to Hammitt and Reuter, the nature of these factors is largely unknown; therefore, it is impossible to know with scientific certainty what levels of prosecution are optimal.<sup>196</sup> They theorize that the optimal level is achieved when prosecutors consistently impose sanctions on the highest social cost violators.<sup>197</sup> Then, as the state sanctions those who cause the greatest harm to society, the social harm from illegal disposal will decrease until reaching a level of equilibrium with the social costs of enforcement. The level of resources necessary to reach this equilibrium is the optimal level that society should allocate to environmental enforcement. Current illegal disposal levels appear to exceed those which would result from optimal enforcement.<sup>198</sup>

Optimal efficiency occurs as enforcement officials prosecute their way down the pyramid of offenders, with the most egregious ones concentrated at the top and the less harmful ones spread out at the bottom. Initially, it is most cost effective for prosecutors to catch the worst polluters concentrated at the top. Gradually, as prosecutors in a jurisdiction work their way down the pyramid, they uncover cases involving pollutants that are less dangerous and/or offenders who generate lower volumes of hazardous waste. At the same time, the word circulates among potential violators that others have been punished, causing the rate of compliance to increase in the industry. As compliance rates increase, so do the costs of catching the remaining offenders.

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<sup>194</sup> Hammitt & Reuter, *supra* note 103, at 32.

<sup>195</sup> *Id.* at 33.

<sup>196</sup> *Id.* at 32.

<sup>197</sup> *Id.* at 33.

<sup>198</sup> *Id.* at 32.

According to Hammitt and Reuter's model of optimal enforcement, "at some level, the marginal cost of enforcement is almost sure to exceed the damage from illegal disposal."<sup>199</sup>

Hammitt and Reuter's model, however, fails to account for some important factors. First, dramatic increases in legal disposal costs present powerful incentives to dispose of hazardous material in a criminal manner, and legal disposal costs can operate independently of the level of deterrence resulting from enforcement.<sup>200</sup> Secondly, their prosecution/compliance cost equilibrium disregards non-financial costs such as the possible social and economic effects of enforcement on communities within a jurisdiction. For example, in a "company town" if strict enforcement would most likely force the plant to close, the community would probably regard such enforcement as socially prohibitive, even if the pollution were severe.<sup>201</sup>

Other economic analysts have theorized that the current trend to criminalize environmental violations poses a real danger of overdeterrence.<sup>202</sup> Overdeterrence is more apt to occur when legal standards are vague or when strict liability is imposed. Then, overdeterrence leads to excessive efforts and expenditures by companies, which result in unnecessarily high costs for consumers.

Regardless of whether a given prosecution/compliance equilibrium is desirable as a public policy matter, one of two stable ratios of enforcement to compliance is likely to result from any enforcement strategy.<sup>203</sup> On the one hand, if overall compliance in the industry is low, prosecutors will have to expend a substantial level of resources to maintain even that low compliance level. On the other hand, if the overall level of compliance is high, prosecutors should be able to maintain that high level with the same expenditure of resources and effort.

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<sup>199</sup> *Id.* at 33.

<sup>200</sup> REBOVICH, *supra* note 108, at 94.

<sup>201</sup> See Michael L. Benson et al., *District Attorneys and Corporate Crime: Surveying the Prosecutorial Gatekeepers*, 26 CRIMINOLOGY 505, 507-10 (1988) (survey of California District Attorneys revealing that prosecutors in small district are more constrained by the potential impact that corporate prosecution might have on the local economy than their counterparts in large districts).

<sup>202</sup> Cohen, *supra* note 84, 230, at 1066.

<sup>203</sup> Hammitt & Reuter, *supra* note 103, at 34.

Hammitt and Reuter theorize several causes for this dual pattern.<sup>204</sup> If compliance is high, offenses will be conspicuous and will tend to be unacceptable to those within an industrial culture. Those aware of violations will tend to report them and cooperate with law enforcement personnel, making prosecution relatively easy. Conversely, if the level of compliance in an industry is low in a jurisdiction, it is unlikely that violations will be reported since the activity does not seem abnormal. As a result, the prosecutor must expend greater resources to effect compliance. These reporting trends are reinforced by competition among firms in industries. Hammitt and Reuter believe that, due to the relative recency of environmental regulation, the current equilibrium is likely to be a low-compliance one.<sup>205</sup> This pattern of high and low stable prosecution/compliance equilibria suggests that prosecutors could intensify prosecution for a certain period of time as a type of legal shock therapy to their industrial community to prompt it to a higher compliance level.<sup>206</sup> High-visibility enforcement which includes prison terms for officers of offending firms is likely to jolt the industry in a jurisdiction into a high-compliance equilibrium.<sup>207</sup>

As an academic or intellectual exercise this notion of a prosecution/compliance cost equilibrium is quite interesting. It, however, presumes that there are enough regulators, investigators and prosecutors available in our local jurisdictions to achieve a high compliance level. Unfortunately, most local jurisdictions' environmental crime units are understaffed. Consequently, prosecutors rarely have the luxury of targeting types or levels of offenders. In fact they generally have all they can do to keep up with the flow of referred cases.

Assuming that prosecutors were able to impose sanctions consistently on the "highest social cost violators" another very serious problem might arise. With the environmental crime unit's attention focused on this one "stratum" of violator others might recognize the resulting void

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<sup>204</sup> *Id.* at 35.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

of enforcement in other areas. This could quite possibly yield increases in environmental crime among those violators who are not the focus of the "highest social cost violators" investigations.

According to classic deterrent theory, maximal deterrence for minimal cost occurs when sanctions are sufficiently severe to deter potential offenders despite a low probability of prosecution. In fact, most studies of environmental-regulatory enforcement<sup>208</sup> and of criminal behavior more generally<sup>209</sup> indicate that a firm will violate only if the expected illegal disposal cost savings exceed the expected severity and certainty of legal sanctions. However, bankruptcy protections and equitable limits on penalties can hinder full implementation of this deterrence theory, making high visibility prosecutions even more important.<sup>210</sup>

### **B. Practical Considerations for Deterrence**

Hammitt and Reuter also point out that appropriate allocation of enforcement resources will vary depending on the number, size, and industry of hazardous waste generators.<sup>211</sup> Population distribution and the soil and water conditions in the jurisdiction are other factors. Compliance data gleaned from systematic regulatory inspections should be utilized to target certain types of firms. One way to determine whether enforcement rates are high enough in a jurisdiction is to monitor sewers and storm drains to determine types of wastes, timing and approximate location of the pollutants.<sup>212</sup>

### **C. Private Enforcement**

Another factor in determining optimal criminal deterrence is the degree to which private groups in the jurisdiction use courts to secure compliance with environmental laws. There are three ways that private groups can use the law to bring about a cleaner environment: (1) by suing polluters to recover monetary damages caused by pollution, (2) by suing public officials responsible for implementing environmental laws, and (3) by suing polluters to force them into

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 37.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 44.

<sup>212</sup> *Id.* at 45.

compliance with laws.<sup>213</sup> Citizen suits are more frequently used now than in the past, but use varies a great deal by region and state. Pennsylvania and New York had the highest percentages of these suits, and the following states ranked in descending order: New Jersey, Connecticut, Indiana, Texas, Massachusetts, Michigan, Louisiana, and California.<sup>214</sup>

## VII. Local versus National Enforcement

### A. The Federal Enforcement Controversy

In the opinion of many state and local prosecutors, federal enforcement during the Reagan and Bush administrations has been inadequate at best, and obstructionist at worst. Between 1986 and 1990 the EPA referred only 318 cases to the Justice Department for prosecution resulting in convictions of 351 defendants.<sup>215</sup> Of the 240 allegations that the EPA's National Enforcement Investigations Center received between 1982 and 1984, it could investigate only 70 cases due to an inadequate budget.<sup>216</sup> While the number of investigations has increased in the past few years, it still does not meet the need.<sup>217</sup> Only after Congress criticized the enforcement efforts of the EPA and the Justice Department was federal criminal enforcement emphasized.<sup>218</sup>

More recently, the Department of Justice has come under fire for bungling environmental cases by making sweetheart plea agreements sometimes behind the backs of state and local prosecutors who were pursuing criminal sanctions.<sup>219</sup> A prime example is the PureGro case where the pesticide manufacturer's alleged illegal storage, transportation and disposal of hazardous waste was widely believed to result in a serious injury and the death of one local

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<sup>213</sup> TIETENBERG, *supra* note 90, at 110.

<sup>214</sup> *Id.* at 120.

<sup>215</sup> United States Environmental Protection Agency, *Enforcement Four-Year Strategic Plan: Enhanced Environmental Enforcement for the 1990's*, September 1990, at 3.

<sup>216</sup> Hammitt & Reuter, *supra* note 103, at 23.

<sup>217</sup> HAMMETT & EPSTEIN, *supra* note 12, at 19.

<sup>218</sup> DeCicco & Bonnano, *supra* note 77, at 9.

<sup>219</sup> Linda Himelstein, *DOJ's Environmental Mess*, LEGAL TIMES, July 20, 1992, at 1.

resident. In this case the Justice Department settled the case for a \$15,000 fine even though the company had agreed to plead guilty to a felony. The number of cases where the Justice Department has done "end runs" around state and local prosecutors has prompted Representative John Dingell, Chair of the House Energy and Commerce Subcommittee on Oversight and Investigations, to complain to Attorney General Barr. According to Dingell, the Justice Department policy was "seriously undermin[ing] and disrupt[ing] the effectiveness of the EPA's enforcement program."<sup>220</sup>

#### B. The Role of the Local Prosecutor

Local prosecutors have a crucial role to play in enforcing environmental laws.<sup>221</sup> Since they are the most visible law enforcement officials at the local level, they are best positioned to mobilize public support for the detection of environmental crime and to orchestrate an effective response to it via coordination of local agencies. The local prosecutor is the one most capable of utilizing the often formidable combined experiences and expertise of city police, county sheriffs, fire department personnel, and state highway patrol officers.

Local police, in particular, are well placed to act as the "eyes and ears" of the community.<sup>222</sup> A methamphetamine laboratory "bust" illustrates how local police can be instrumental in environmental crime prosecution. Aware of the environmental aspects of the situation, local police can avoid health risks to themselves and later notify the local environmental regulatory agency to test the site for clean-up.

The EPA now considers local prosecution vital for punishing and deterring environmental crime. In its Enforcement Four-Year Strategic Plan for the 1990s, the EPA advocates greater local involvement for local district attorneys.<sup>223</sup> This position is a logical outgrowth of the EPA's recognition that criminal penalties as well as civil fines are required to deter environmental crime.

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<sup>220</sup> *Id.* at 23.

<sup>221</sup> HAMMETT & EPSTEIN, *supra* note 12, at 21-22; See also Gunther, *supra* note 8.

<sup>222</sup> HAMMETT & EPSTEIN, *supra* note 12, at 22.

<sup>223</sup> United States Environmental Protection Agency, *supra* note 215, at 6.

It is yet to be determined if the EPA will actively support the role of local prosecutors in their efforts to stem the increasing volume of environmental violations. EPA claims to be supportive through its four regional associations. Realistically, however, these groups (Northeast Environmental Enforcement Project, Midwest Environmental Enforcement Association, Southeast Environmental Enforcement Network and Western States Hazardous Waste Project) concern themselves more with those Attorneys General offices active in environmental crime prosecution. Since local prosecutors have seized this crucial role in prosecuting environmental violations they are far more deserving of greater assistance from the EPA than the scant, token recognition they have received heretofore from these regional associations.

### VIII. Local Environmental Enforcement Structures

#### A. Elements of a Successful Environmental Prosecution Unit

Hammett and Epstein identified several elements that local prosecutors reported were crucial for the establishment of a successful environmental crime prosecution unit. One vital factor is the active support of the unit by the District Attorney.<sup>224</sup> Another is the recruitment of good, experienced attorneys.<sup>225</sup> Recruiters should emphasize that selected prosecutors will defend the community from dangerous pollution while working on complex criminal and civil cases.<sup>226</sup>

The decision of where to place a unit and how to structure it is also very important. If there are heavy caseloads involving environmental crime, a specialized unit can be sustained and should be implemented. For example, since Alameda County has an active caseload of 200 environmental cases, it has established a unit specializing in environmental crime.<sup>227</sup> Other jurisdictions with lighter caseloads will designate environmental prosecution along with the prosecution of similar crimes. For example, in Cook County, the environmental unit is part of the Public Interest Bureau which also enforces paternity, child support, public utilities, mental

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<sup>224</sup> HAMMETT & EPSTEIN, *supra* note 12, at 28.

<sup>225</sup> *Id.* at 31.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 33.

health and nursing home regulatory cases.<sup>228</sup> Typically, more experienced attorneys are assigned to more complex cases. Finally, vertical prosecution is the rule in most environmental prosecutions. This entails having one prosecutor involved early in the case and working it closely throughout its development.<sup>229</sup>

## B. Inter-agency Cooperation

### 1. The Importance of Inter-agency Cooperation

Communication among agencies is crucial to ensure efficient criminal enforcement. Rebovich found that coordination between regulators and prosecutors was necessary for prosecutors to exercise discretion effectively so as to concentrate their resources on winning the most important cases.<sup>230</sup> Nonetheless, the level of cooperation varies greatly by jurisdiction.<sup>231</sup>

There are several ways that agencies can assist prosecutors. Regulatory agencies can provide the data necessary for targeting most likely offenders. Similarly, police, fire, and sanitation department personnel can provide vital tips. For example, the Los Angeles County strike force established spotters at all county landfills to report the dumping of suspicious materials to the California Highway Patrol (CHP). CHP would intercept the drivers and question them.<sup>232</sup> Hammett and Epstein reported an instance where effective coordination actually caused the Shell Oil Corporation to agree to a stipulated settlement on the day it was filed.<sup>233</sup> They also believe that regulators can be very effective witnesses due to their extended, systematic inspections of a defendant's facility.

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<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 34.

<sup>230</sup> REBOVICH, *supra* note 108, at 96-97.

<sup>231</sup> Hammett & Reuter, *supra* note 103, at 26-27.

<sup>232</sup> *Id.* at 65.

<sup>233</sup> HAMMETT & EPSTEIN, *supra* note 12, at 37.

## 2. Divergent Civil/Criminal Enforcement Agency Cultures

The difference between regulatory cultures and criminal enforcement cultures often makes it difficult for prosecutors to utilize regulatory expertise and investigative information to further successful criminal prosecutions. Regulators are often more interested in obtaining compliance than penalties and are more sensitive to business pressures. They tend to focus forward on compliance, rather than tracing chains of evidence backwards as criminal law enforcement personnel tend to do.<sup>234</sup> For example, in one California case, the D.A. wanted to bring criminal charges for improper storage and transport of sodium cyanide, while the state Occupational Safety and Health Administration (OSHA) wanted to levy only administrative penalties.<sup>235</sup>

The two cultures frequently differ in their levels of scientific backgrounds.<sup>236</sup> Criminal enforcement agencies might feel daunted by the complex laboratory analyses required to distinguish legal and illegal pollution levels, whereas regulators often have more training in chemistry and other technical backgrounds. Unfortunately, after being trained by the government, these regulators are often hired away by industries which offer higher salaries.

## 3. Forms of Interagency Cooperation

In their study of local prosecution of environmental crime, Hammett and Epstein discovered three forms of cooperation among the relevant local agencies, such as police and fire departments, state police, health departments, state and municipal environmental protection departments, and water and sewer utilities.<sup>237</sup> The first model is based on a written agreement. The second model is a temporary task force, and the third is a permanent task force.

As an example of the first model, Alameda County has written agreements between various departments. These departments operate independently but meet regularly to coordinate

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<sup>234</sup> Hammett & Reuter, *supra* note 103, at 27-28.

<sup>235</sup> HAMMETT & EPSTEIN, *supra* note 12, at 37-38.

<sup>236</sup> *Id.* at 28.

<sup>237</sup> *Id.* at 35.

environmental cases.<sup>238</sup> The "Guidance Document on Hazardous Materials Incident Investigation" provides for an "Incident Commander" and "Lead Investigator." The document details procedures for the follow-up of investigations, filling out incident reports, quarantining materials, site access and sample and evidence collection.

A second example of the first model is the Minnesota Environmental Crimes Team.<sup>239</sup> This investigative team is a state-wide organization that can call upon the entire resources of the state to conduct an investigation. However, in practice, composition of the team varies from case to case. County attorneys have primary jurisdiction over felonies, but may request assistance from the Minnesota Attorney General's Office. A coordinating committee is comprised of representatives from county attorney offices and agencies, various state agencies, the FBI and U.S. Attorney's Office.<sup>240</sup>

The next model, the temporary task force, was adopted in Florida. There, various agencies met for initial training and coordination of efforts. After the project was launched, the meetings became less frequent until they occurred only as required.<sup>241</sup>

#### 4. Task Forces

Many local prosecutors have adopted the task force model to combat environmental crime. For example, Los Angeles County established an Environmental Crimes Strike Force headed by the County Prosecutor and comprised of representatives permanently assigned from over twenty local and state agencies.<sup>242</sup> The most active participation comes from the L.A. Police Department, the California Highway Patrol and the County Department of Health Services.

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<sup>238</sup> *Id.*

<sup>239</sup> Alan R. Mitchell, *The Minnesota Environmental Crimes Team*, NAT'L ENVTL. ENFORCEMENT J., July 1991, at 3-8.

<sup>240</sup> *Id.* at 7-8.

<sup>241</sup> HAMMETT & EPSTEIN, *supra* note 12, at 36.

<sup>242</sup> *Id.* at 35; see also Paul Harris, *Toxic Waste SWAT teams: Enforcement's Front Lines*, ENV'T TODAY, May 1991, at 3.

The Cook County District Attorney participates on a variation of the L.A. task force approach.<sup>243</sup> The Cook County environmental prosecution unit is part of a more expansive task force, CHEMHIT, comprised of the Illinois Environmental Protection Agency, the Metropolitan Water Reclamation District of Greater Chicago and the Illinois Attorney General's Office. This task force coordinates prosecutions for the greater Chicago metropolitan area and is directed by the head of the State's Attorney's environmental unit.<sup>244</sup>

### C. The Role of Investigative and Regulatory Agencies and Laboratories

#### 1. Investigative Agencies

Most prosecutors believe that it is better to have in-house investigators than to have to rely on external agencies.<sup>245</sup> Monmouth County, for example, has found that police and other agencies are sometimes reluctant to investigate non-traditional, environmental crimes.<sup>246</sup>

Many who are unfamiliar with environmental crime believe that environmental cases require special investigative expertise. Those involved in local prosecution, however, maintain that what is required is a firm grasp of investigative basics: witness interviewing, warrant preparation and execution, gathering and analyzing documents, collecting evidence and maintaining chain of custody of all evidence.<sup>247</sup> There is no greater need for the environmental investigator to have a chemistry background than there is for the homicide detective to have a medical degree. The environmental investigator, like the homicide detective, will rely on specialized laboratory analysis of samples or other evidence.<sup>248</sup>

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<sup>243</sup> HAMMETT & EPSTEIN, *supra* note 12, at 36.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 38.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

## 2. Regulatory Agencies

Regulatory structures differ widely from state to state.<sup>249</sup> Typically, local environmental agencies are delegated authority by the U.S. EPA or by the state EPA to investigate local violations of federal or state environmental laws.<sup>250</sup> Usually, the state EPA has authority over the implementation of all environmental regulation.

In many jurisdictions, such as Alameda and Los Angeles Counties, the county health department is the regulatory agency with whom prosecutors work most closely.<sup>251</sup> The Alameda County Health Department forwards violation notices directly to the District Attorney. After three notices and continued noncompliance, the prosecutor initiates civil or criminal action.<sup>252</sup>

Prosecutors from Cook County receive case referrals via the Chicago area task force from the Illinois EPA Environmental Response Unit and the Metropolitan Water Reclamation District of Greater Chicago.<sup>253</sup> The Monmouth County Prosecutor is attempting to monitor regulatory compliance records and hazardous waste manifests to have a proactive investigative capacity.<sup>254</sup> Hammitt and Epstein report that all five D.A. offices studied believed that this proactive approach was needed.<sup>255</sup>

## 3. The Role of Laboratories

Most local laboratories lack the expertise to perform the analysis required for environmental criminal cases.<sup>256</sup> To provide for expertise that will be admissible in courts,

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<sup>249</sup> Hammitt & Reuter, *supra* note 103, at 26-27.

<sup>250</sup> HAMMETT & EPSTEIN, *supra* note 12, at 40.

<sup>251</sup> *Id.* at 41.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 42.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 47.

many states have established special environmental labs. This function, however, is often assigned to health departments which tend to be unfamiliar with forensic principles such as chain of custody.<sup>257</sup> Other sources of forensic analysis are local police labs as well as the FBI and the EPA National Investigative Unit laboratories.<sup>258</sup>

Local prosecutors have expressed dissatisfaction with several areas of environmental laboratory analysis. Laboratories sometimes lose samples or complete the lab work slowly.<sup>259</sup> In one Colorado case, the analysis was so slow that the statute of limitations ran before the evidence could be presented in court.<sup>260</sup> Furthermore, laboratory analysis may be very expensive. The laboratory analysis for one Cook County case was \$138,000.<sup>261</sup>

## IX. Current Environmental Enforcement Practices

### A. Stages that Environmental Prosecutions Go Through

In their 1991 study of five local prosecutor's offices, Hammett and Epstein found eight stages that the typical criminal environmental case proceeds through.<sup>262</sup> The first five stages center around the collection and analysis of evidence. The first stage is the detection of potential offenses. The second involves the gathering of background evidence on the suspect or firm. In stage three there is a preliminary surveillance of the suspect in the hopes of discovering direct evidence of criminal activity. At the next stage, the prosecutor directs the collection of further evidence to establish probable cause for obtaining a search warrant. The evidence usually consists of water or soil samples, documents such as manifests, and statements from witnesses. Stage five involves laboratory analysis of the materials and researching the chain of custody of these substances.

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<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 48.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 23.

Stages six through eight center around legal actions. The indictment or information is the central part of stage six. The prosecutor may decide at this point that the evidence does not support any further action or that civil action would be better. Only some local prosecutors are empowered to bring civil actions as well as criminal. In that case, the prosecutor might have to turn over the case to the State Attorney General for civil litigation. In stage seven, the case is adjudicated or settled pursuant to a plea bargain. The prosecutor might also be involved in the final stage of the environmental crime case, the monitoring of compliance or other probationary orders associated with the judgement or settlement.

#### B. Discovery of Possible Offenses

Rebovich's study revealed four main ways that prosecutors discovered possible offenses.<sup>263</sup> Approximately a third of the tips came from citizens who complained to regulatory or law enforcement officials.<sup>264</sup> Several of these citizens' complaints were from business competitors of the targeted firms. One investigator cautioned against indiscriminate use of anonymous tips since they are sometimes made by offending firms to distract investigators. The second most common source of discovery was from state regulatory field inspections or document reviews.<sup>265</sup> Regulators reported that reviewing records and manifests was a fruitful proactive investigative approach. Routine investigations by local law enforcement or regulatory personnel produced the next highest number of tips.<sup>266</sup> Finally, one sixth of the remaining tips were equally likely to come from employees as from former employees.<sup>267</sup> These insider tips have become even more valuable since offenders increasingly dump hazardous waste inside warehouses and other enclosures in order to avoid detection.

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<sup>263</sup> REBOVICH, *supra* note 108, at 77-80.

<sup>264</sup> *Id.* at 77.

<sup>265</sup> *Id.* at 79.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 79-80.

Employees were found to be vital postdiscovery information sources in 43 of 71 cases.<sup>268</sup> Twenty-six of these cases involved current employees whom regulators had observed acting illegally. These employees were granted immunity in exchange for cooperation in five instances.

Monmouth County Prosecutor, John A. Kaye, reports several ways that local prosecutors can obtain environmental cases.<sup>269</sup> According to Kaye, the prosecutor should visit state and regional federal EPA offices to persuade them to give tips on cases suited for local prosecution. The prosecutor should also establish an emergency response team in order to have immediate access to local sites where hazardous substances have created an emergency. Furthermore, the prosecutor should build liaisons with environmental groups within his or her jurisdiction and establish tip lines.<sup>270</sup>

### C. Building the Case

#### 1. The Local Prosecutor's Investigative Methods

Rebovich found that investigators and prosecutors used an array of surveillance and investigative methods.<sup>271</sup> Visual surveillance ranged from observing and following trucks to helicopter observation and the use of infrared photography. Undercover investigations, sting operations, document inspections, the tracing of drum markings, and chemical matching were other techniques that prosecutors relied on.

An FBI report outlined several other factors in successful investigations.<sup>272</sup> The report adds four methods to those mentioned above: (1) remote monitoring devices, (2) closed-circuit television or videotaping, (3) use of on-site informants, and (4) subpoenas issued by grand

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<sup>268</sup> *Id.* at 80.

<sup>269</sup> John A. Kaye, *Criminal Enforcement of Environmental Laws*, C496 ALI-ABA 51 (1990).

<sup>270</sup> *Id.* at 55.

<sup>271</sup> REBOVICH, *supra* note 108, at 81.

<sup>272</sup> William Imfeld & Martin Wright, *Environmental Crimes: Investigative Basics*, FBI LAW ENFORCEMENT BULLETIN, (April 1991).

juries to elicit compelled testimony and other evidence.<sup>273</sup> The report also emphasizes the importance, during the search, of relying on the assistance of the following: (1) a technical team comprised of scientists and lawyers to help analyze evidence on site, (2) back-up security personnel, and (3) fire and medical personnel.<sup>274</sup> Finally, to facilitate the exchange of investigative techniques and other information related to the prosecution of environmental crime, the FBI has established the "Environmental Protection Forum."<sup>275</sup>

## 2. Environmental Experts

Even when the most sophisticated technology is used, it must be interpreted by an expert witness to prove beyond a reasonable doubt that the chemical concentration or constitution of the substance makes it illegal. The role of environmental experts can be crucial in analyzing technical evidence and in presenting a favorable interpretation of evidence to juries.<sup>276</sup> The following are generally considered experts suitable for environmental testimony in the courtroom: (1) geologists, (2) physicists, (3) environmental engineers, (4) chemists, (5) forensic pathologists, and (6) medical doctors.<sup>277</sup> Their testimony should be prepared in anticipation of cross-examination to include the following: (1) background and training, (2) present knowledge and experience in the area, (3) possible biases, (4) any books or journals written, and (5) overall credibility.<sup>278</sup>

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<sup>273</sup> *Id.* at 4-5.

<sup>274</sup> *Id.*

<sup>275</sup> Michael O'Brien, *The Environmental Protection Forum*, FBI LAW ENFORCEMENT BULLETIN, 9-13 (April 1991).

<sup>276</sup> See generally, Grover C. Wrenn, *Criminal Enforcement of Environmental Laws: The Role of Environmental Consultants in Criminal Environmental Enforcement Matters*, C496 ALI-ABA 159 (1990).

<sup>277</sup> Michael M. Mustokoff, *Hazardous Waste Violations: A Guide to Their Detection, Investigation, and Prosecution*, at 71 (1981) (U.S. Department of Justice's manual instructing how to prosecute hazardous waste crimes).

<sup>278</sup> *Id.* at 68.

### 3. The Decision to Charge Criminally

The only study of the factors actually taken into account by local prosecutors is a mail survey of California environmental prosecutors.<sup>279</sup> The following were factors reportedly considered in deciding to charge criminally: (1) sufficiency of the evidence, (2) the gravity of the violation, (3) the type of waste, (4) the structural relationship of the business entity to the illegal activity (5) covertness (6) probable effect of prosecution on industrial compliance, and (7) available prosecutorial resources.

The following are other possible factors that local prosecutors might take into account in the decision to charge criminally: (1) the complexity of the case, (2) the potential degree of harm involved, (3) the proximity of the pollutant to people, (4) the probability of detecting the violation, (5) the economic benefit received as a result of the wrongdoing and (6) the individual's or firm's history of non-compliance or recidivism.

The following federal charging factors have also been reported.<sup>280</sup> Currently, the Department of Justice considers the following factors in deciding to charge criminally: (1) deterrent effect, (2) the willfulness of the act, (3) evidence of attempts to conceal violations, (4) the likelihood of conviction, and (5) whether or not there was economic benefit as a result of the acts.<sup>281</sup> Similarly, the EPA considers three factors in its decisions to charge criminally: (1) the level of contamination, (2) the degree of harm to the EPA's regulatory scheme, and (3) the firm's history of non-compliance.<sup>282</sup>

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<sup>279</sup> Gunther, *supra* note 8, at 818.

<sup>280</sup> Seymour, *Civil and Criminal Liability of Corporate Officers Under Environmental Laws*, 4 TOXICS L. REP. (BNA) 337 (1989); see also Martin J. Littlefield, *Environmental Crimes: A Prosecutor's Perspective*, NAT'L ENVTL. ENFORCEMENT J., 1991, at 5 (discussing the prosecutor's methods and means of charging and prosecuting environmental crime).

<sup>281</sup> Seymour, *supra* note 280, at 343.

<sup>282</sup> *Id.*

## D. Examples of Local Prosecutions

### 1. Three Local Cases

Hammett and Epstein reported that a big environmental case often was an important milestone which induced the D.A. to intensify environmental prosecution.<sup>283</sup> They gave three examples of this phenomenon.

*People v. Film Recovery Systems, Inc.*, represented the first verdict of corporate homicide in history.<sup>284</sup> Jay Magnuson, the Assistant State's Attorney who prosecuted the case compared the danger of cyanide poisoning in the company's "gas chamber" used for film processing to recklessly firing a weapon into a crowd.<sup>285</sup> Although a retrial was ordered, this homicide conviction for corporate recklessness represents a striking precedent.

Similarly, *Colorado Chemical* prompted the Jefferson County and Gilpin County D.A.'s office to institute improvements in its environmental prosecution program. From that case, a specialized case management approach for complex cases was developed.<sup>286</sup> It was the first Colorado felony conviction for an environmental crime.

Finally, in Monmouth County, New Jersey, the *International Flavors and Fragrances* case helped to heighten public awareness of the importance of criminal prosecution of environmental offenses.<sup>287</sup> After environmental groups reported that fish in the nearby stream smelled and tasted like blueberries and oranges, the Monmouth County Prosecutor executed a search warrant, seized documents and took soil samples. After three years, the case was settled for the cost of cleanup and a \$75,000.00 fine.

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<sup>283</sup> HAMMETT & EPSTEIN, *supra* note 12, at 30.

<sup>284</sup> *People v. Film Recovery Systems, Inc.*, 84 C. 5064, 84 C. 11091 (Cook Cnty. Cir. 1985).

<sup>285</sup> HAMMETT & EPSTEIN, *supra* note 12, at 30.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

## 2. A Sting Operation

In May of 1992, Suffolk County District Attorney, James Catterson, set up an elaborate sting known as "toxic avenger," which is widely believed to be among the first of its kind.<sup>288</sup> It took four detectives five months to set up the transaction to transport or dispose of hazardous waste illegally. The six men did not realize that when detectives picked up 58 drums of hazardous waste in exchange for \$2,265 from the four companies, the transactions were being videotaped. Investigators made sure that the businessmen knew that they were operating without the required waste-disposal permits, telling the men that the barrels of hazardous waste would go "on a long trip."<sup>289</sup>

Catterson eventually snared six individuals representing four small companies who were involved in the plating industry, silicon transistor manufacturing and gasoline sales. As a result of the elaborate operation, which was one of the first of its kind, Catterson secured indictments for the six men for violating New York environmental laws by illegally attempting to dispose of lethal chemicals, including cyanide and acetone. The poisonous substances otherwise probably would have been abandoned on county highways or vacant lots to seep into the water table, the sole source of drinking water on Long Island.

### E. Local Prosecution Obstacles

Even when employing the best investigative techniques, prosecutors face significant obstacles to successful prosecution. Prosecutors were forced to contend with greater defense resources in the use of expensive visual aids and experts to present scientific evidence of regulatory violations.<sup>290</sup> In fact, local prosecutors report that their lack of resources sometimes curtails their level of prosecution.<sup>291</sup> Perhaps most dismaying, prosecutors also

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<sup>288</sup> Barbanel, *supra* note 132, at 1.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 85-86; *see also* Benson et al., *supra* note 201, at 510-19 (mail survey of California district attorneys revealing that the substantial disparity between the legal resources of corporations and local prosecutors presents a formidable obstacle to the prosecution of corporate crime).

<sup>291</sup> Gunther, *supra* note 8, at 826.

find that many of their own former colleagues have turned to defending corporations and consequently, the prosecutorial training has led to the frustration of later prosecutions.<sup>292</sup>

Other problems compound this disparity in resources. One additional difficulty is the inconsistency between state and municipal regulations and the granting of municipal exemptions to criminally targeted TSD facilities. One judge dismissed charges on the ground that there had not been sufficient notification of changes in the regulations.<sup>293</sup> Prosecutors also confront the lack of interstate coordination and regulatory oversight of the manifest system.<sup>294</sup> Furthermore, many District Attorneys must contend with federal prosecutors who sometimes cut deals while they seek to prosecute cases for local harms.<sup>295</sup>

Environmental cases also pose inherent difficulties for the prosecutor. While illegally disposed hazardous waste may seriously threaten the lives of many individuals via the ground water, air pollution, fires, explosions, the food chain, or direct human contact, these health hazards are latent, and usually not apparent at the time of prosecution.<sup>296</sup> The ensuing harms—whether explosions, birth defects, cancer or other injuries—will occur later, making proof of actual harm and causation very difficult.

Also, juries and judges are often reluctant to convict individuals of environmental crimes. For many jurors, the crimes appear to be too technically obscure to warrant criminal sanctions. Jurors also tend to sympathize with business executives who are major employers in the community.<sup>297</sup>

Hammett and Epstein cataloged seven serious obstacles that local prosecutors reported to them: (1) pressures from business leaders not to prosecute, (2) technical problems in

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<sup>292</sup> HAMMETT & EPSTEIN, *supra* note 12, at 3.

<sup>293</sup> REBOVICH, *supra* note 108, at 88.

<sup>294</sup> *Id.* at 89.

<sup>295</sup> Himelstein, *supra* note 219, at 1.

<sup>296</sup> Donald 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," at 2 (November 15, 1989).

<sup>297</sup> HAMMETT & EPSTEIN, *supra* note 12, at 10; *see also* Kaye, *supra* note 269, at 55.

establishing the danger of disposed wastes, (3) limited resources with which to compete against corporate defense attorneys, (4) inconsistent standards regarding sewer discharge, (5) deficiencies in the manifest tracking system, (6) the failure of environmental regulators to collect evidence useful for criminal prosecutions, and (7) public pressure to bring hasty conclusions to criminal cases.<sup>298</sup>

Finally, the local prosecutor must contend with defendants whose operations extend into other jurisdictions outside his own. To prosecute this type of defendant successfully, cooperation with other prosecutors is important. Attempting to solve this problem, the EPA established four regional environmental enforcement groups to facilitate communication and cooperation. The National District Attorney's Association also established the National Environmental Crime Center to provide communication, training and other forms of technical support for local prosecutors.

#### **F. Trends**

According to Rebovich, successful prosecution in the future will require a progressive response to developments in environmental law and the criminal responses to them. Law enforcement must keep abreast of the hazardous waste disposal/treatment industry to predict future crime areas and forestall their development. For instance, by monitoring economic trends affecting the industry, the prosecutor might be able to prevent financially faltering facilities from committing crimes.<sup>299</sup> Similarly, keeping statistics on the commission of these crimes and perceiving trends will allow law enforcement officials to stay a step ahead of offenders.

### **X. Legal Issues Related to Local Enforcement**

#### **A. Search and Seizure**

##### **1. General Constitutional Issues**

In many environmental cases, evidence may be obtained without search warrants by consensual inspections, subpoena, statutorily mandated inspections, or by inspections conducted from outside the premises.<sup>300</sup> Although it is possible for prosecutors to obtain subpoenas from

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<sup>298</sup> HAMMETT & EPSTEIN, *supra* note 12, at 9-10.

<sup>299</sup> REBOVICH, *supra* note 108, at 115.

<sup>300</sup> HAMMETT & EPSTEIN, *supra* note 12, at 63.

a grand jury, a search warrant is easier to obtain and, therefore, usually preferred.<sup>301</sup> Examples of statutory inspections would be routine inspections for fire, sanitary, or building code violations.<sup>302</sup> Evidence obtained in the normal course of these inspections would be admissible to establish an environmental crime. Further, visual inspections conducted from outside the property pass muster under the Fourth Amendment only when there is not a reasonable expectation of privacy. Consequently, evidence obtained by photographing areas open to public view is admissible. Some states have even allowed evidence obtained by trespassing onto the property which is in public view.<sup>303</sup> Finally, sufficient evidence may be available off the property where the targeted facility is located.

In most cases, however, it is necessary to search a facility and to take samples, documents or other evidence. Then, it is crucial that prosecutors comply with constitutional search and seizure provisions in order to obtain evidence that will be admissible in court.

Search warrants are issued only when probable cause is shown by a supporting affidavit. The affidavit must name and describe, with reasonable specificity, the person or place and location to be searched. The U.S. Supreme Court held in *Zucker v. Stanford* that "probable cause" exists when the facts are sufficient to establish a reasonable and prudent belief that evidence related to criminal activity will be discovered on the property when searched.<sup>304</sup> The prosecutor must show that there is probable and reasonable cause to believe that the property is (1) stolen or embezzled, (2) a means of committing a felony, (3) property in the possession of a person who intended it as a means for committing a public offense, or (4) evidence that tends to establish that a felony has been committed.<sup>305</sup>

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<sup>301</sup> See Littlefield, *supra* note 280, at 10-11.

<sup>302</sup> HAMMETT & EPSTEIN, *supra* note 12, at 63.

<sup>303</sup> *Id.* at 63.

<sup>304</sup> *Zucker v. Stanford*, 436 U.S. 547 (1978).

<sup>305</sup> *Id.*

## 2. "Object of Search" in Civil vs. Criminal Inspections

The U.S. Supreme Court drew a distinction between administrative inspection warrants and search warrants in *Camera v. Municipal Court*.<sup>306</sup> While an administrative inspection warrant may be granted by showing less than criminal probable cause, the ensuing search is more circumscribed in scope than that available through a search warrant. A search warrant authorizes the search and seizure of items anywhere on the suspect's property where there is probable cause to believe the evidence named in the warrant is located.<sup>307</sup>

The U.S. Supreme Court clarified the showing required for administrative inspections in *Marshall v. Barlow's, Inc.*<sup>308</sup> The Court established a two-pronged test for administrative probable cause: first, whether there is specific evidence of a violation, and secondly, whether the evidence was gained based on a neutral inspection scheme.<sup>309</sup> It is unclear exactly what quantum of evidence will satisfy the first prong of the test.<sup>310</sup>

Further, when the industry is so pervasively regulated that frequent, unannounced inspections and reduced privacy expectations justify warrantless inspections, these need not be based on a neutral inspection scheme but can be based on specific evidence of a violation.<sup>311</sup> When evidence is gained through the pervasively regulated industry exception, however, the courts must decide whether to apply criminal or administrative probable cause standards.<sup>312</sup> One commentator has suggested that criminal probable cause should be limited to instances where the inspected facility is a target of a criminal investigation.<sup>313</sup>

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<sup>306</sup> *Camera v. Municipal Court*, 387 U.S. 523 (1966).

<sup>307</sup> HAMMETT & EPSTEIN, *supra* note 12, at 67.

<sup>308</sup> *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

<sup>309</sup> Donna Mussio, *Drawing the Line Between Administrative and Criminal Searches: Defining the "Object of the Search" in Environmental Inspections*, 18 B.C. ENVTL. AFF. L. REV. 185, 187 (1990).

<sup>310</sup> *Id.*

<sup>311</sup> *Id.* at 188.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 191.

## B. Criminal vs. Civil Enforcement

### 1. The Need for Criminal Sanctions

Until recently, federal enforcement of environmental laws was based mostly on administrative procedures and civil actions such as injunctions. This would appear to be the most effective method of enforcement. The burden of proof was usually established by a preponderance of the evidence, rather than the beyond a reasonable doubt standard. Also, injunctions can be obtained quickly so that pollution could be halted more readily. These benefits, however, are illusory. The injunctions often are only temporary, and civil trials can be delayed for several years by companies with considerable resources. Further, any penalty awards may simply be absorbed as business costs passed on to the consumer without the company or any of its officers being hurt in a significant way.<sup>314</sup> For these reasons, most environmental regulators now believe that criminal sanctions are essential to bring about compliance with environmental regulations.<sup>315</sup>

### 2. The Decision to Charge Criminally or Civilly

Many prosecutors have the authority to pursue either criminal or civil action, or both simultaneously. The U.S. Supreme Court's ruling in *United States v. Halper*<sup>316</sup> places a limit on prosecutorial discretion in this area. According to that ruling, the double jeopardy doctrine barred a civil suit after an offense had already been prosecuted criminally. Parallel prosecutions, however, are permissible.

Local prosecutors reported several factors that influenced their decisions to bring criminal or civil actions.<sup>317</sup> According to Gunther, since most local prosecutors surveyed preferred criminal prosecution, the decision to charge in a civil suit usually turned on practical considerations.<sup>318</sup> For example, if evidence is not strong, the lighter burden of proof for civil

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<sup>314</sup> HAMMETT & EPSTEIN, *supra* note 12, at 16.

<sup>315</sup> *Id.*

<sup>316</sup> *United States v. Halper*, 109 U.S. 1892 (1989).

<sup>317</sup> Gunther, *supra* note 8, at 819-20.

<sup>318</sup> *Id.* at 819.

action is more likely to be met than the criminal standard of beyond a reasonable doubt. Sometimes the speed of bringing actions is the determining factor. Other times the need to effectuate site remediation is more important than traditional criminal sanctions.

Local prosecutors use varying decision-making rules to decide whether to bring civil or criminal action. Cook County will pursue criminal sanctions only if the defendant is unwilling to cooperate to rectify the pollution.<sup>319</sup> Alameda County, on the other hand, prepares all cases for criminal prosecutions, usually pursuing civil actions when evidence is too weak to meet criminal burdens of proof.<sup>320</sup> Similarly, the Los Angeles D.A. has ordered his prosecutors to turn down all civil settlement offers from defense attorneys.<sup>321</sup>

### 3. Constitutional Limits on Using Civil Proceedings and Remedies

The Constitution, common law and statutory law draw a fundamental distinction between civil and criminal proceedings by using different rules of procedure, burdens of proof, discovery rules, investigatory practices and types of punishment.<sup>322</sup> Nonetheless, environmental crime prosecutors often have concurrent civil and criminal jurisdiction over regulatory offenses and so are faced with a blurred line between the civil and criminal realms of law. This is part of an overall trend in which the government punishes antisocial behavior with civil remedies.<sup>323</sup>

While it is unclear how the civil/criminal line should be drawn, there certainly are instances in which the use of civil remedies and proceedings for antisocial behavior is unconstitutional.<sup>324</sup> The drafters of the constitution did not intend for the lighter burden of proof, lack of jury trial, absence of right to appointed counsel, and less stringent discovery rules associated with civil proceedings to be grafted to criminal culpability and criminal penalties.

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<sup>319</sup> HAMMETT & EPSTEIN, *supra* note 12, at 56.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991).

<sup>323</sup> *Id.*

<sup>324</sup> *Id.* at 1449.

Concurrent civil and criminal actions can raise these constitutional issues. For example, if a defendant is forced to admit ownership of contaminated realty in order to resist forfeiture in a civil proceeding, he may thereby waive his constitutional right against self-incrimination in a concurrent criminal environmental action.<sup>325</sup> To prevent the government from obtaining civil discovery for use in criminal proceedings courts frequently issue protective orders.<sup>326</sup>

### C. State Mens Rea Requirements

State environmental laws will specify one of three possible mens rea requirements: knowingly, recklessly or negligently. Mens rea requirements vary by state and by the categories of pollutants proscribed.

The *Colorado Chemical* case illustrates some of the local prosecutor's difficulties in proving a "knowledge" mens rea element of an environmental crime. Because the adjacent Coors plant was being accused by some of polluting, the Coors company conducted a study which showed that Colorado Chemical was the polluter, rather than itself.<sup>327</sup> The D.A. introduced the report as evidence that Colorado Chemical knowingly violated environmental laws by continuing its impermissible practices after it had received the report from Coors.<sup>328</sup> Colorado, along with many other states, adopts the Model Penal Code approach that knowledge is established when it is shown that the defendant's conduct was practically certain to cause the result proscribed by the substantive offense.

While many prosecutors view a knowledge mens rea requirement as too rigorous a standard, not surprisingly, some defense attorneys view it as too easy.<sup>329</sup> Some believe that the "willful blindness" doctrine unfairly allows a defendant to be convicted of an environmental crime when the prosecutor shows that the defendant deliberately shut his eyes to the offense

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<sup>325</sup> *Id.*

<sup>326</sup> Daniel Riesel, *The Impact of Environmental Criminal Prosecution Upon Civil Litigation*, C427 ALI-ABA 877, 890 (1989).

<sup>327</sup> HAMMETT & EPSTEIN, *supra* note 12, at 65.

<sup>328</sup> *Id.*

<sup>329</sup> Ty Cobb, *Criminal Enforcement of Environmental Statutes: Strict Criminal Liability for Reporting Violations?*, 36-37.

in order not to know. Similarly, prosecutors can establish corporate guilt through the "collective knowledge" doctrine. Relying on this doctrine, the prosecutor can achieve a conviction by establishing aggregate or collective knowledge by a group of employees, rather than actual knowledge by one individual.<sup>330</sup>

Many states stipulate recklessness as the mens rea requirement for environmental crimes, while a few have a negligence standard. At the request of the Ohio Attorney General, the Ohio General Assembly reduced the mens rea standard from "knowingly" to "recklessly" in Ohio in 1984.<sup>331</sup> Also in 1984, California lowered its knowledge mens rea requirement to negligence.<sup>332</sup>

#### D. The Use of Secondary Environmental Statutes

##### 1. Forfeiture Statutes

Since fines are typically too low to provide either specific or general deterrence, many local prosecutors have begun to use forfeiture laws to bring about a more punitive economic loss for the offending firm. An environmental case in Jefferson and Gilpin Counties provides an illustration of how the local prosecutor can use a forfeiture statute.<sup>333</sup> There, the prosecutor was authorized to seize the truck used to dump pesticides into a stream after showing video tape which proved that the pesticide had been stored in the truck. Thus, because the vehicle had been the instrumentality of a crime, the defendant suffered the loss of his truck as well as a \$10,000 misdemeanor fine.<sup>334</sup>

##### 2. Cost Recovery Laws

Cost recovery statutes are under-utilized by many local prosecutors because they frequently fail to recognize that the laws impose strict liability for clean-up on companies both

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<sup>330</sup> HAMMETT & EPSTEIN, *supra* note 12, at 67.

<sup>331</sup> *Id.* at 66; *see also* Celebrezze et al., *supra* note 13. (analyzing Ohio's change in mens rea standard from knowledge to recklessness).

<sup>332</sup> HAMMETT & EPSTEIN, *supra* note 12, at 66.

<sup>333</sup> *Id.* at 79.

<sup>334</sup> *Id.*

individually and severally.<sup>335</sup> The Monmouth County Prosecutor reported that he routinely utilized New Jersey cost recovery laws.<sup>336</sup> By making payment of cleanup costs a condition of probation, the Monmouth County Prosecutor is able to supervise remediation of the site.<sup>337</sup>

### 3. Consumer Protection and Unfair Competition Laws

Of the local prosecutors that Hammett and Epstein studied, only Alameda County relied on consumer protection laws.<sup>338</sup> California has two laws that Alameda County prosecutors can rely on. Prosecutors have used the first, an "unfair competition" law, to prosecute individuals or companies that repeatedly violate environmental laws.<sup>339</sup> The second law aims to protect consumers and the public generally from carcinogens. Alameda prosecutors, however, dislike this "consumer protection" law because it creates the impression that the office is soft on environmental crime when it does not have enough evidence to charge under this law.<sup>340</sup> The reason for this is that the law authorizes private environmental groups to pursue civil actions only after the D.A. has decided not to prosecute.

### 4. RICO as an Environmental Crime Weapon

Although local prosecutors have not reported using federal or state Racketeer Influenced and Corrupt Organizations Acts (RICO) to pursue environmental crime,<sup>341</sup> federal prosecutors have used the federal RICO act to prosecute environmental offenders.<sup>342</sup> Although

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<sup>335</sup> *Id.* at 81.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.* at 80.

<sup>342</sup> See generally Elizabeth E. Mack, *Another Weapon: The RICO Statute and the Prosecution of Environmental Offenses* 45 Sw. L.J. 1145, 1249 (1991) (analyzing the federal RICO act and its application in specific cases brought civilly or criminally); Alfred L. Buchanan, *Evolving RICO Issues for the Environmental/Natural Resources Practitioner*, 6 J. MIN. L. & POL'Y 185 (1991) (tracking increased use of RICO for civil litigation and criminal prosecution).

environmental crime does not constitute one of the predicate acts required for prosecution under the federal RICO act, prosecutors and civil litigants have used mail and fraud statutes to serve as the requisite predicate acts.<sup>343</sup> For example, a federal judge for the Southern District of New York held that Congress, by excluding environmental offenses from the list of predicate acts, had not intended to preclude the use of RICO for environmental crime prosecution.<sup>344</sup> Similarly, the court rejected the defendant's argument that RCRA preempted the use of RICO.<sup>345</sup>

Despite its complications, RICO offers considerable practical advantages to the prosecutor. The disadvantage of a RICO prosecution is that it requires the prosecutor to prove an "offense within an offense" by proving that two or more criminal acts occurred.<sup>346</sup> This disadvantage can be offset by the enhanced punishment value under RICO. Not only does the offender risk being labeled a "racketeer," but he risks treble damages which are almost certain to be higher than what he faces under environmental statutes.<sup>347</sup>

#### 5. Traditional Criminal Laws as Environmental Crime Weapons

The local prosecutor has several traditional criminal statutes to use against environmental crime. As *Film Recovery* illustrates, corporate defendants can be charged with negligent homicide, manslaughter or murder for egregious violations of environmental regulations in the workplace that result in the death of a worker. Even if there is no death that results, prosecutors can charge defendants with reckless endangerment, as they did in Cook County.<sup>348</sup> In some instances, prosecutors might be able to prove assault charges.

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<sup>343</sup> See, e.g., *United States v. Paccione*, 738 F. Supp. 691, 699 (S.D.N.Y. 1990); *Standard Equipment, Inc. v. Boeing Co.*, 23 Env't Rep. Cas. (BNA) 2112 (W.D. Wash. 1985).

<sup>344</sup> *Paccione*, 738 F. Supp. at 699.

<sup>345</sup> *Id.*

<sup>346</sup> Mack, *supra* note 342, at 1241.

<sup>347</sup> *Id.* at 1240-1241.

<sup>348</sup> HAMMETT & EPSTEIN, *supra* note 12, at 80.

Other possible traditional criminal charges are theft by deception, false documentation, conspiracy, complicity, and solicitation. Monmouth County prosecutors use false documentation charges when environmental charges cannot be proven.<sup>349</sup> They also reported that they occasionally use conspiracy and theft-by-deception statutes. The latter law is typically used when waste haulers charge generators for legal disposal, but subsequently dump the waste illegally.<sup>350</sup>

## 6. State and Federal Occupational Safety and Health Laws

Congress passed the Occupational Safety and Health Act<sup>351</sup> and created the Occupational Safety and Health Agency in 1970. The basic structure of the act is regulatory, and its penalties are civil.<sup>352</sup> For willful violations, only misdemeanor penalties are available.<sup>353</sup> The key issue for the local prosecutor is whether or not the act preempts criminal prosecution for gross violations resulting in serious injury or death. Although the law is by no means settled concerning this question, the following rule seems to have gained some acceptance: where the breach of an OSHA standard is not the only evidence against the defendant, but rather is one link in a chain of other evidence proving a reckless disregard of a threatening situation, then local criminal prosecution is not preempted.<sup>354</sup>

In an environmental criminal prosecution of a workplace incident, RCRA's "knowing endangerment" provision is likely to be the basis of the criminal charge against the employer.<sup>355</sup> Clearly, Congress intended the use of the "knowing endangerment" provision

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<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> 29 U.S.C. § 652 (1988 & Supp. 1990).

<sup>352</sup> Clive I. Morrisk, *The Prosecutor in the Workplace: Killing two Birds with One Stone*, C452 ALI-ABA 151, 154 (1989) (member of N.Y. State Environmental Crimes Unit discussing historical development of OSHA law and criminal prosecution for workplace injuries and deaths).

<sup>353</sup> *Id.*

<sup>354</sup> *Id.* at 156.

<sup>355</sup> *Id.* at 157.

of RCRA for criminal prosecution of workplace incidents.<sup>356</sup> Otherwise, it would have expressly exempted endangerment of all workers from the scope of RCRA's "knowing endangerment" provision.

## **E. Corporate Tactics and Defenses**

### **1. Defense Tactics and Pitfalls**

One experienced defense attorney discussed several tactics he used to defend corporations targeted or prosecuted for environmental offenses.<sup>357</sup> He attempted to thwart both civil discovery and criminal investigation concerning prior regulatory offenses by claiming that attorney-client privilege and the related work product doctrine precluded the surrender of information surrounding prior regulatory non-compliance. However, the law generally construes these doctrines too narrowly for these defenses to be ultimately successful.<sup>358</sup>

Furthermore, prosecutors have been successful in securing the disqualification of defense counsel in certain instances. For example, prosecutors have been able to show a conflict of interest when defense counsel represented targeted employees and non-targeted employees simultaneously.<sup>359</sup> Similarly, prosecutors have successfully argued that a company's practice of paying for the defense of its employees represents a conflict of interest under the theory that counsel will represent the company's interests over the targeted employee.<sup>360</sup>

### **2. Corporations as Defendants**

The common law doctrine that corporations were ephemeral entities that could not be held liable for wrongdoing was abolished long ago.<sup>361</sup> The decision to charge a corporation is most appropriate when the statute in question requires no criminal intent but rather specifies

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<sup>356</sup> *Id.* at 158.

<sup>357</sup> Riesel, *supra* note 326.

<sup>358</sup> *Id.* at 888.

<sup>359</sup> *Id.* at 889.

<sup>360</sup> *Id.* at 890.

<sup>361</sup> *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481 (1909) (holding that corporations had criminal liability).

recklessness, negligence or strict liability. Nonetheless, corporations now may incur criminal liability even for knowing violations of environmental laws.<sup>362</sup>

The Model Penal Code's corporate provision holds corporations criminally liable for omissions where there is a specific duty to act and for the conduct of agents working on its behalf.<sup>363</sup> To convict a corporation of environmental crime, the prosecutor must prove: (1) that an individual violated an environmental law, (2) while acting as an agent for the corporation, and (3) while intending the violation to benefit the corporation.

Two of the possible defenses that corporations can put forward are a "due diligence" defense and a "corporate veil" defense. Agency is established when the corporate manager having supervisory responsibility over the subject matter of the offense fails to exercise due diligence to prevent its commission.<sup>364</sup> When a corporation merges with another or is a subsidiary of another, the corporate veil of the first corporation which committed an environmental crime must be pierced before the larger corporation can be held liable for it. Prosecutors are increasingly successful in their attempts to pierce corporate veils in environmental crime cases.<sup>365</sup>

### 3. Responsible Corporate Officer Doctrine

Environmental statutes are hybrid public welfare statutes.<sup>366</sup> The law has recently developed more stringent, vicarious liability for corporate officers who violate public welfare laws than what they had under traditional corporate liability principles. Thus, corporations are likely to face greater liability for environmental offenses under recent precedents establishing corporate officer liability for violations of public welfare laws.

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<sup>362</sup> See, e.g., *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1504 (11th Cir. 1986).

<sup>363</sup> See MODEL PENAL CODE § 2.07.

<sup>364</sup> *Id.* at § 2.07(5).

<sup>365</sup> See, e.g., *Mobay Corp. v. Allied-Signal Inc.*, 761 F. Supp. 345 (D.N.J. 1991); *United States v. Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990); *City of New York v. Exxon Corp.*, 20 Chem. Waste Lit. Rep. 62 (S.D.N.Y. March 30, 1990).

<sup>366</sup> James E. Calve, *Environmental Crimes: Upping the Ante for Noncompliance with Environmental Laws*, 133 MIL. L. REV. 279, 287 (1991).

Traditionally, corporate officers were not liable under the doctrine of *respondeat superior* even when the organization could be liable.<sup>367</sup> To be liable, the officers must have either personally directed or performed the criminal activity.<sup>368</sup>

Public welfare statutes, however, extend liability to corporate officers who, even if unaware of the violation, are considered vicariously responsible due to their high degree of authority and responsibility over that class of behavior.<sup>369</sup> In *United States v. Dotterweich* the Supreme Court limited liability to those employees who have a "responsible share in the furtherance of the transaction which the statute outlaws."<sup>370</sup> The Court elaborated that "responsible share" was present when the employee had the responsibility and authority to prevent violations of public welfare statutes.<sup>371</sup> Although *United States v. Park* did not involve a hybrid public welfare statute such as an environmental law, its holding probably extends to environmental crime prosecution.<sup>372</sup>

#### F. Second Party Liability for Contaminated Realty

Environmental laws have increased the liability of those associated with contaminated realty to include "second parties." These "second parties" fall into three classes: (1) investors, fiduciaries and employees of potentially liable parties, (2) successors-in-interest after property is contaminated, and (3) professionals who render services during real estate transactions or during hazardous waste site clean-up.<sup>373</sup> Both federal and state legislation and case law increasingly hold these second parties liable for environmental offenses.<sup>374</sup> The following

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<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

<sup>370</sup> *United States v. Dotterweich*, 320 U.S. 277 (1943).

<sup>371</sup> *United States v. Park*, 421 U.S. 658, 660 (1975).

<sup>372</sup> Calve, *supra* note 366, at 288.

<sup>373</sup> J. Bruce Ehrenhaft, *Caught in the Web - As Hazardous Waste Liability Expands, "Second Parties" Face Liability in Association with Contaminated Realty*, FLA. B.J., April 1989, at 21.

<sup>374</sup> *Id.* at 22.

factors can determine the second party's liability: (1) the second party's ability to obtain accurate information, (2) the scope of its duties to employers or clients, (3) its ability to control environmental policy concerning the property, (4) its size and financial condition, and (5) the extent of its contractually allocated risk.<sup>375</sup>

Perhaps of most interest currently to the local prosecutor is the development of second party liability for those successors-in-interest who take title as a result of bankruptcy or foreclosure. For example, the Supreme Court held in *United States v. Mirabile* that when an officer of a lending institution becomes involved in managing a facility, the lender incurs liability for clean-up costs.<sup>376</sup> Thus, if officers of banks, loan companies, pension funds, and real estate trusts exercise significant control over the property, these institutions become liable. Similarly, in *United States v. Maryland Bank & Trust Co.*, the bank was held liable after it foreclosed and took title to the property.<sup>377</sup>

#### **G. Federal Pre-emption and Federal Facilities**

The local prosecutor may confront pollution on or from a federal facility within its jurisdiction. Recently, the Supreme Court effectively precluded the local prosecutor from taking any criminal action against the facility by holding that the federal government has a valid sovereign immunity defense against any punitive actions by state or county prosecutors or regulators.<sup>378</sup> The Court interpreted RCRA's and CWA's federal facilities sections as authorizing injunctive relief and sanctions to enforce future compliance, but not to authorize punitive sanctions for past violations.<sup>379</sup>

#### **XI. Conclusion**

District attorneys have an essential role in an emerging federal scheme of environmental crime enforcement as a result of their unique accountability to their constituency for local

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<sup>375</sup> *Id.* at 28.

<sup>376</sup> *United States v. Mirabile*, 15 *Env'tl. L. Rep.* (*Env'tl. L. Inst.*) 20,992 (E.D. Pa. Sept. 4, 1985).

<sup>377</sup> *United States v. Maryland Bank & Trust Co.*, 632 *F. Supp.* 573 (D. Md. 1986).

<sup>378</sup> *United States Dept. of Energy v. Ohio*, 112 *S. Ct.* 1627 (1992).

<sup>379</sup> *Id.*

pollution. State and local environmental laws tend to parallel federal environmental statutes, which allow more stringent, concurrent regulation at the local level. Also, with the public calling for stricter pollution control, federal and local law enforcement officials are prosecuting more criminal cases each year. While this emphasis on criminal enforcement is relatively new, it can be seen as a development of common law nuisance and negligence doctrines that originated in preindustrial English and American societies. Unfortunately, to meet the public's demand for a cleaner environment today, more cooperation between local and federal prosecutors is needed to achieve optimal deterrence of environmental crime.

Actually, the public often has conflicting feelings about the enforcement of environmental laws. At a global and even a national level, pollution can seem to be an unsolvable problem. At a local level, however, problems seem more manageable. Thus, the local prosecutor may have the strongest public mandate and motive to prosecute environmental offenders. However, when jobs are seriously threatened, this mandate often vanishes. The public's sometimes conflicting desires to have a strong economy and a cleaner environment play out at the national level as well.

As the picture of environmental crime becomes clearer, perhaps many of these counterproductive political conflicts will recede and a more cooperative and effective federal scheme will emerge. Current research reveals only part of the picture. Ongoing study is required to track changes in local and national enforcement and their interrelation and to remain abreast of non-compliance patterns and evasive criminal techniques. Further study is necessary to achieve optimal deterrence. For example, currently, there are no accurate estimates of the volumes of hazardous wastes generated. By contrast, studies of local environmental units and task forces revealed the vital importance of inter-agency cooperation for effective prosecution.

Similarly, there is a need to facilitate communication among prosecutors and to disseminate information about state of the art prosecution techniques and uses of legal doctrines. Information should be shared on the following issues: the means of discovering possible offenses, investigative methods, the use of environmental experts, the decision to charge criminally, new prosecution obstacles, and criminal trends. Training should cover legal topics such as: search and seizure, the use of criminal versus civil sanctions, constitutional limits, the use of secondary environmental statutes, and the various corporate tactics and defenses used

to defend against prosecution. Due to their diversity and lack of central coordination, local prosecutors in particular will benefit from on-going collection and dissemination of this information.

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