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Chapter 6

AVOIDANCE OF CRIMINAL LIABILITY FOR VIOLATIONS OF FEDERAL ENVIRONMENTAL LAWS

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» ◆All around the country you can find little polluters being hit over the head, while right around the corner a big polluter goes free.◆*

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» AVOIDANCE OF CRIMINAL LIABILITY FOR VIOLATIONS OF FEDERAL ENVIRONMENTAL LAWS

A. KNOWLEDGE□THE MISSING ELEMENT IN ENVIRONMENTAL CRIME

» It has often been said that a little knowledge is a dangerous thing. However, in the area of environmental crime it is becoming increasingly apparent that no knowledge at all is even more dangerous.

» Long a fundamental precept of criminal law is that an actor must be shown to have exhibited criminal intent in order to be found guilty of a crime. In Morrisette v. United States,[1] the United States Supreme Court reversed the conviction of a man who had taken shell casings from a government target range. Morrisette, charged with theft, claimed that he believed the casings had been abandoned. In refusing to impose strict liability, the court noted that:

» A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.[2]

» Slowly but surely this legal axiom has eroded in areas concerning the public welfare. In such areas, rather than requiring proof that a defendant intended to do an illegal act or knew that he was engaged in an illegal act, courts have increasingly tended to imposed strict liability. Well-known concepts of intent and knowledge are thus becoming more and

more irrelevant, and the usual judicial abhorrence of strict liability has waned substantially in what is known as "public welfare" legislation.

» In United States v. Dotterweich[3], the president of a pharmaceutical company was convicted of violating the Food, Drug, and Cosmetic Act by shipping misbranded and adulterated drugs:

» [The Act] dispenses with the conventional requirement of criminal conduct-awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but **[6-2]** standing in responsible relation to a public danger.[4]

» Similarly, in United States v. Park,[5] a chief executive officer of a corporation was convicted under the same statute. Park was held responsible, by virtue of his corporate position, for the rodent contamination of food in the corporation's storehouse. The conviction was upheld by the United States Supreme Court, which found that Park was ultimately responsible for corporate policy and hence accountable for the charges leveled against him.[6]

» The rationale behind these cases"that public welfare demands accountability without proof of wrongful intent"has been extended to the area of environmental crime. In 1976 the Resource Conservation Recovery Act[7] ("RCRA") created an arsenal for government prosecutors to use in prosecuting environmental crime.[8] Section 6928(d) of Title 42, United States Code, provides for a fine of $50,000 per day, two-to-five years imprisonment, or both (all of which can be doubled if there is a prior conviction under the statute) for knowingly engaging in the improper transportation, storage or disposal of hazardous waste.[9]

» Although there is a mens rea requirement of "knowing" in the statute, the government's position in prosecutions under " 6928(d) is that the statute only requires proving general intent. The federal government takes the position that proof that one acted with the specific intent to break the law is not required, **[6-3]** and ignorance of the law is no defense. All that is required is that the defendant had knowledge of his actions.[10]

» The irony of this position is not lost upon attorneys defending companies and corporate officers accused of criminal conduct. Any businessman who deals with or handles hazardous waste knows that this area is fraught with regulation.[11] However, it is one thing to "know" that regulations exist, it is quite another to "know" what the regulations mean. Attempting to decipher and follow this regulatory maze, particularly those regulations regarding the disposal, storage, and treatment of hazardous waste, can be and often is confusing and frustrating. This is especially true in light of the fact that these regulations are subject to constant change.

» Given these facts, it seems inconceivable that courts could uniformly hold that an inability to decipher this regulatory maze is not a valid defense; however, cases have continually reiterated that "ignorance of the law" is no excuse. Understanding these constantly changing regulations is no easy task, but is nevertheless a duty unilaterally imposed by the courts on corporations and corporate officers. Again, it can not be overemphasized that lack of knowledge concerning applicable regulations may not be a defense to criminal prosecution. A look at the following cases amply illustrates this trend in the law.

» In United States v. Johnson & Towers, Inc.,[12] the government appealed the dismissal of

a three-count indictment charging two individuals with illegal disposal of hazardous wastes under 42 U.S.C. § 6928(d). Johnson & Towers was a company that repaired large motor vehicles. In the process, it used industrial chemicals containing hazardous wastes as defined under RCRA. The waste chemicals produced from operating the plant were placed in a trench which flowed into a creek. This was done without a permit from the EPA as required by § 6928(d)(2)(A).[13]

» On appeal the Court of Appeals for the Third Circuit reinstated the indictment, holding that individual defendants are **[6-4]** §persons§ within the meaning of § 6928(d)(2). In dicta, the court discussed the meaning of the word §knowingly§ as used in § 6928(d)(2)(A). The court noted that it could, if it chose, read the statute without any mens rea requirement:

» Since we have already concluded that this is a regulatory statute which can be classified as a §public welfare statute,§ there would be a reasonable basis for reading the statute without any mens rea requirement [at all].[14]

» The court concluded, however, that such an interpretation §would be arbitrary and nonsensical when applied to this statute.§[15] Section 6928(d) contains the word §knowing§ at the beginning of subsection (2), and again in subsection (B). The court thus held, contrary to the government's interpretation, that the word §knowingly§ should be read into subsection (2)(A) so that the government had to prove that the defendants knew they were acting without a permit when disposing of hazardous waste.

» This ostensibly generous interpretation was significantly curtailed by the court's subsequent discussion regarding proof of knowledge:

» [O]ur conclusion that §knowingly§ applies to all elements of the offense in section 6928(d)(2)(A) does not impose on the govenent as difficult a burden as it fears.... [U]nder certain regulatory statutes requiring §knowing§ conduct the government need prove only knowledge of the actions taken and not of the statute forbidding them.[16]

» Turning to a United States Supreme Court case, United States v. International Minerals & Chemical Corp.,[17] the Johnson & Towers court quoted approvingly:

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» [P]rosecution of regular shippers for violations of the regulations could hardly be impeded by the §knowingly§ requirement for triers of fact would have no difficulty whatever in inferring knowledge on the part of those whose business it is to know, despite their protestations to the contrary.[18]

» In sum, knowledge could be inferred §as to those individuals who hold the requisite responsible positions with the corporate defendant.§[19]

» In a subsequent case, United States v. Hayes International Corp.,[20] the Eleventh Circuit Court of Appeals held that lack of knowledge that the waste involved was hazardous, or that a permit was required, were invalid defenses in a prosecution under § 6928(d)(1).[21] Hayes International operated an airplane refurbishing plant that generated waste fuel from the drainage of airplane fuel tanks. The company also generated waste from the use of paints and solvents. L. H. Beasley was the Hayes International employee in charge of hazardous waste disposal. Beasley agreed with another company, Performance Advantage, that he would sell it the waste airplane fuel, which it could recycle and sell if it

would also dispose of Hayes International's other waste. Performance Advantage agreed to do so at little cost. Government officials subsequently discovered that Performance Advantage had illegally disposed of over 600 drums of waste. Beasley and Hayes International were convicted of eight counts of violations of § 6928(d)(2). The district court set aside the guilty verdicts. The court of appeals reinstated the verdicts, holding that the evidence was sufficient to support a finding that the defendants knew of the existing regulatory scheme and that it was not being followed.[22]

» The court then discussed whether the defendants would have to "know" the permit status of the place where hazardous waste **[6-6]** was transported under § 6928(d)(2)(A). As in Johnson & Towers, the Hayes International court concluded that knowledge of permit status was required but could be easily proven with circumstantial evidence:

» The government does not face an unacceptable burden of proof in proving that the defendant acted with knowledge of the permit status. Knowledge does not require certainty; a defendant acts knowingly if he is aware that the result is practically certain to follow from his conduct, whatever his desire may be as to that result.[23]

» Thus, the Hayes International court concluded:

» [T]he jurors must find that the defendant knew what the waste was (here, a mixture of paint and solvent), and that the defendant knew the disposal site had no permit. Knowledge does not require certainty, and the jurors may draw inferences from all of the circumstances, including the existence of the regulatory scheme.[24]

» In Hayes International, the court found that the low price for which Performance Advantage agreed to dispose of the solvent waste was sufficient for the jury to infer knowledge that Hayes International knew that the waste was disposed of improperly.

» In Johnson & Towers and Hayes International, § 6928(d)(2)(A) was interpreted so that knowledge was an element of the offense. A defendant charged under this statute must have been aware of the lack of a permit. However, both courts concluded that, since the statute constituted public welfare legislation, knowledge of the regulatory scheme could be presumed and knowledge regarding lack of a permit could be inferred and proved by circumstantial evidence. Unfortunately, at least one court has dispensed entirely with the meager mens rea requirements imposed under Johnson & Towers and Hayes International.

» In United States v. Hoflin,[25] the Ninth Circuit Court of Appeals specifically declined to follow the Johnson & Towers **[6-7]** analysis.[26] The Hoflin court squarely held that under § 6928(d)(2)(A) knowledge of the lack of a permit was not an element of the offense:

» Had Congress intended knowledge of the lack of a permit to be an element under subsection (A) it easily could have said so. It specifically inserted a knowledge element in subsection (B) and did so notwithstanding the "knowingly" modifier which introduces subsection (2). In the face of such obvious congressional action we will not write something into the statute which Congress so plainly left out.[27]

» The Johnson & Towers, Hayes International, and Hoflin cases illustrate the increasing judicial willingness to imply guilty knowledge either by reducing the government's burden of proof on the issue of knowledge (as in Johnson & Towers and Hayes International) or by an outright finding that knowledge is not an element of the offense (as in Hoflin). The lesson to laypersons remains the same—eternal vigilance is truly the price of liberty.[28]

» United States v. Protex[29] represents the first criminal conviction[30] under the "knowing endangerment" portion of RCRA, 42 [6-8] U.S.C. § 6928(e).[31] Subsection (e) imposes criminal liability on persons who "knowingly" expose others to hazardous waste and "know" that such exposure will result in imminent danger of death or serious bodily harm. The companion law of § 6928(e), set forth at 6928(f),[32] specifically defines the degree of mens rea required under § 6928(e).

» Protex operated a drum recycling facility which would purchase used drums, clean them, and reuse them to ship products Protex manufactured. Some drums were stored on site. In a nineteen-count indictment Protex was charged with placing three of its employees in imminent danger of death or serious injury (knowing endangerment) because of inadequate safety provisions and exposure to the risk of solvent poisoning.[33] Protex was convicted of knowingly endangering these employees.

» On appeal, Protex argued that the trial court erred in instructing the jury that "imminent danger" as used in § 6928(e) meant "the existence of a condition or combination of conditions which could reasonably be expected to cause death or serious bodily injury unless the condition is remedied."[34]

» Protex contended that the definition of "imminent danger" required a finding by the jury that there was a "substantial certainty" that conditions existed which could cause harm, rather than a mere "reasonable expectation" that conditions existed which could cause harm.[35] Protex's argument was based on the definition of "knowing" as contained in § 6928(f)(1)(C), which [6-9] specifically uses the term "substantial certainty." The court rejected this argument and upheld the constitutionality of § 6928(e):

» [T]he "substantially certain" standard appears to define the mens rea necessary for the commission of the crime, rather than the degree to which defendant's conduct must be likely to cause death or serious bodily injury.[36]

» This analysis ignores the fact that, under the knowing endangerment statute, the two are one and the same. Section 6928(e) provides that it is a felony for any person to "knowingly" engage in the predicate offenses of § 6928(d) when such person "knows" that by engaging in these specific acts he is placing someone in imminent danger. The substantial certainty standard of § 6928(f) must apply to the "degree to which the defendant's conduct must be likely to cause death" because the defendant must know, as an element of the offense, that his conduct will result in imminent danger. In short, it is an element of the crime that the defendant know that his conduct be likely (substantially certain) to cause harm. Thus, the defendant charged with knowing endangerment must be entitled to an instruction that he knew his conduct was substantially certain to cause death or serious bodily injury.

» This interpretation is supported not only by the clear terms of §§ 6928(e) and (f) but by legislative history as well. However, the Tenth Circuit Court of Appeals refused to consider legislative history surrounding §§ 6928(e) and (f), holding that such an analysis was unnecessary. This disregard of legislative intent is all the more confusing given the fact that Congress enacted § 6928(f) specifically to be read in conjunction with § 6928 (e). The legislative history surrounding subsection (f) makes it clear that the level of scienter required is generally greater than that required under § 6928(d), at least insofar as concerns the "knowing endangerment" count.[37]

» The failure to instruct the jury that Protex had to know that its conduct was substantially certain to cause serious harm was severely prejudicial because the trial court's general instruction on mens rea followed the Hayes International and [6-10] Hoflin general intent

language.[38] The fact that the trial Court gave an instruction parroting § 6928(f) did not ameliorate the damage done by its instruction on imminent danger. The level of knowledge required to convict was reduced because the jury had only to find that Protex knew its conduct could reasonably be expected to cause imminent danger. Knowledge under § 6928(f)(1)(C) is not mere reasonable expectation§it is substantial certainty. The interpretation (or perhaps, more aptly, lack of interpretation) of the term §knowing§ by the court in Protex is yet another instance of an increasing judicial willingness to lessen the government's burden of proof on the issue of knowledge.

» In sum, government prosecution under RCRA has been made substantially easier by an increasing judicial leniency regarding the government's burden of proof on the issue of knowledge. Knowledge of existing regulatory schemes is either presumed, inferred or, worse yet, dispensed with as an element of a criminal offense.

» A businessperson's best defense is to comply with existing regulations. Unfortunately, understanding the regulations is neither easy nor inexpensive. Indeed, many companies with full-time environmental compliance officers are still unable to comply with the labyrinth of requirements imposed by EPA and local governmental authorities. Nevertheless, as criminal liability for environmental damage expands, environmental businesspersons involved in affecting the environment must be cognizant of all regulations which may in any way affect their businesses.

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B. SPLIT SAMPLES□OWNER'S OR OPERATOR'S RIGHT TO RETAIN PORTION OF WASTE SAMPLES SEIZED BY EPA INVESTIGATORS

» Section 6927(a) of Title 42, United States Code,[39] requires any person who §generates, stores, treats, transports, disposes of, or otherwise handles or has handled hazardous wastes§ to: furnish hazardous waste information upon request to a representative of the EPA or other designated officer; and, permit such officer or representative at all reasonable times to have access to and to copy all records relating to such wastes. Such officers and representatives are specifically authorized:

» (1)to enter at reasonable times any establishment or other place where hazardous wastes are or have been generated, stored, treated, disposed of, or transported from;

» (2)to inspect and obtain samples from any person of any such wastes and samples of any containers or labeling for such wastes.[40]

» In conducting such inspections[41] the statute imposes a standard of §reasonable promptness§ and further requires:

» If the officer, employee or representative obtains any samples prior to leaving the premises, he shall [42] give to the owner, operator, or agent in charge a receipt **[6-12]** describing the sample obtained and if requested a portion of such sample equal in volume or weight to the portion retained. If any analysis is made of such samples, a copy of the results of such analysis shall be furnished promptly to the owner, operator, or agent in charge.[43]

» Although sparse, legislative history involving the above-highlighted split-sample requirement indicates that it was adopted in contemplation of litigation. As noted by Congressional committee:[44]

» If an inspector removes a sample of such waste from the premises, then part of such sample, equal in weight and volume shall be left with the operator. The purpose of this requirement is so that in case of litigation, both parties have equal access to the evidence.[45]

» Does the statute's use of the presumably mandatory "shall" regarding split samples entitle a defendant charged with criminal conduct under RCRA, as amended by the Solid Waste Disposal Act (SWDA),[46] to a split sample in preparation of his defense? This issue is important because the samples of waste seized: (1) may be subject to destruction by the investigating agency in conducting its analyses; (2) may consist of compounds that are subject to continual chemical alteration; or, (3) may require specific means of preservation. Under these circumstances, critical evidence helpful to the defense could be lost unless a split sample is obtained at or near the time the EPA makes its seizure. It is therefore important to consider whether, having **[6-13]** been denied a split sample, a defendant may pursue sanctions or defenses in a federal prosecution.

1. Discovery and Preservation of Evidence in Criminal Prosecutions.

» In federal prosecutions, the government's discovery obligations are governed by F.R.Crim.P. Rule 16, the Jenck's Act,[47] and the Supreme Court's opinion in Brady v. Maryland[48] and its progeny. In contrast to discovery in civil cases, the Supreme Court has held that discovery in criminal cases has a constitutional foundation in the due process clause.[49] Referred to as the Brady "fairness" doctrine, the government is required, upon request, to make disclosure of evidence favorable to a defendant.[50] Brady material includes information that may be material to guilt or punishment as well as information that may be used to impeach a government witness' credibility.[51] Required compliance with Brady extends throughout the proceedings"from indictment through final judgment"and must be timely.[52]

» Reversal of a conviction for failure to disclose Brady material is required where the evidence suppressed by the prosecution is "material in the sense that its suppression **[6-14]** undermines confidence" in the outcome.[53] The good or bad faith of the prosecutor in suppressing Brady material is not normally at issue[54] because the focus is on "materiality."[55] However, where the materiality of the suppressed evidence is not conclusively shown, a prosecutor's bad faith should be considered[56] in the court's exercise of discretion in fashioning a remedy.[57]

» In conjunction with the traditional Brady analysis, the government also has a constitutional obligation to preserve evidence that "might be expected to play a significant role in the suspect's defense."[58] This duty to preserve falls into "what might loosely be called the area of constitutionally guaranteed access to evidence."[59]

» In California v. Trombetta,[60] the Supreme Court recognized the obligation of the government to preserve evidence in a case where the defendant claimed a denial of due process in the failure of the police to preserve breath samples in his drunk-driving prosecution. The Trombetta court rejected the defendant's due process claim but set forth guidelines applicable to the due process analysis where evidence is lost or destroyed: first, the destroyed evidence must be shown to have had an **[6-15]** apparent exculpatory value;[61] second, the exculpatory value of the evidence must have been apparent before the evidence was destroyed;[62] third, the destruction of the evidence must have been in bad faith;[63] and, fourth, the evidence must be of such a unique character that the defendant is effectively deprived of the means to establish his innocence.[64] Thus, unlike

the traditional Brady analysis, bad faith is a critical element in establishing a due process violation relating to the government's failure to preserve exculpatory evidence.

» The importance of showing bad faith in this context was made apparent by the Supreme Court in Trombetta:

» Whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.[65]

» This recognized difficulty in determining the import of lost evidence triggered the court's bad faith requirement. Thus, a showing of bad faith on the part of the government will presumably establish that the destroyed or lost evidence could have formed a basis for exonerating the defendant.[66]

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2. Entitlement to a Split Sample Where Seizure is Pursuant to the Execution of a Criminal Search Warrant.

» The EPA has taken the position that the split-sample requirement of § 6927(a) is not applicable when a site search is conducted pursuant to a criminal search warrant.[67] Nonetheless, the EPA has stated that its policy is to provide such samples:

» [O]ffering samples at the time of the execution of the warrant is an expeditious method of assuring the defense access to the samples while not burdening the Agency with storage problems.[68]

» The EPA has suggested guidelines for its criminal investigators in implementing the split-sample policy. For example, investigators are advised: to take large enough samples so that, if requested, a portion of the sample can be provided to the defense or to a defense-designated laboratory; to advise the magistrate issuing the search warrant when the EPA plans to offer split samples at the site for the purpose of obtaining judicial authorization (although unnecessary); to retain an extra portion of the sample if a split sample has been refused or no one is available to accept it; and, to note on the "return" on the search warrant whether a split sample was "accepted, refused or not offered because no one was available to accept" the split.[69]

» Notwithstanding the EPA's policy to split samples as part of a criminal investigation which may or may not be followed the investigatory target's entitlement to a split sample must derive from law if she hopes to seek any remedy for EPA's decision not to follow its policy in a given case. Although contrary to the EPA's interpretation,[70] § 6927(a) provides the criminal target with the necessary entitlement to a split sample if one is requested. In making this entitlement argument, the following propositions are important:

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» First, although § 6927(a) addresses agency inspections, Congress' intent to limit its application solely to "administrative" rather than "criminal" inspections is not apparent from the statute. Hence, the statute should be read in the light least detrimental to the defendant.[71]

» Second, a "rose is...a rose." An "inspection" under the statute is a "search" within the meaning of the Fourth Amendment's proscription against unreasonable searches and seizures.[72] Hence, whether the search is characterized as [6-18] administrative or criminal in nature is irrelevant. If a sample of hazardous waste is seized either criminally or administratively, a split of the sample must be tendered on request to the owner, operator, or agent of the facility. Thus, § 6927(a) must at a minimum be read in pari materia with the procedural[73] requirements of F.R.Crim.P. 41 when samples of suspected hazardous waste are seized pursuant to warrant.

» Third, in a constitutional sense the government may be obligated to provide a split sample when one is requested and the sample seized is subject to destruction or alteration as a result of testing. Failure to provide a split sample in the face of a request and the apparent mandatory language of compliance in § 6927(a) leads to a presumption of bad faith on the part of the government. The due process requisites of Trombetta [74] may be satisfied by showing: that a split sample was requested pursuant to statute and denied and that the sample seized was unique, effectively depriving the defendant of the "constitutionally guaranteed access to evidence."[75] If a defendant can meet these threshold considerations, it takes little to credit a claim that the evidence lost or destroyed through testing or natural alteration was exculpatory.

» Fourth, in the legislative history to § 6927(a), Congress indicated that the purpose of the split sample requirement was "so that in case of litigation, both parties [will] have equal access to the evidence."[76] In this statement is congressional recognition of the unique character of the evidence seized and the need for equal access in a constitutional sense.

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» Considering a similar split-sample statutory requirement[77] under the Federal Food, Drug and Cosmetic Act, the court in Triangle Candy Co. v. United States[78] held that the government's failure to comply with a split sample request barred criminal prosecution.[79] In substantial but pertinent part the court held:

» If those accused under the Act are not given a portion of the sample, their power to make a complete defense is substantially curtailed. Intent is no part of the crime with which they are charged. If they have introduced the food into interstate commerce, and if it is adulterated, they are guilty, regardless of their intent or lack of knowledge as to adulteration. It may frequently happen that the single factual issue is that of adulteration. Without access to a portion of the sample, they are confronted by a government analysis of that sample which they cannot refute but at best, and with difficulty, impeach by challenging the government's method of sampling and testing.

» Section 372(b) [21 U.S.C.], then, must have been intended to provide defendants with an opportunity for independent analysis; and it is clear that the results of such analysis may be among the most important pieces of evidence defendants can offer in their own behalf. Deprival of the chance to make this test...prejudices defendants' substantial rights. This consideration, added to the statute's mandatory wording, and the analogy of cases under other acts, lead us to the conclusion that provision of a portion of the [6-20] sample, save in properly excepted cases, is a condition precedent to prosecution.[80]

3. Possible Remedies Where Request for Split Sample Pursuant to 42 U.S.C. § 6927(a) is Denied.

» A defendant who has failed to make a request for a split sample at or near the time the

seizure of suspected hazardous waste is made is in the worst position possible to assert a remedy for EPA's failure to provide a split sample.[81] But where a defendant has made a timely request for a split sample, which is denied, the remedial scope may be suppression of the government's evidence related to the sample or dismissal of the prosecution.[82] The remedy applied will undoubtedly be determined by (1) whether a request was made, (2) the facts and circumstances indicating the unique nature of the sample seized, and (3) whether, for all practical purposes, the sample seized has been destroyed. Undoubtedly, any remedy the court invokes will be based upon these due process factors balanced against public health and welfare considerations. The bottom-line answer is that any company subject to sampling by a governmental entity should exercise its rights under § 6927(a) and request both a split sample and the government's report on its sampling results.

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C. PITFALLS ENCOUNTERED WHEN APPROACHED BY GOVERNMENT AGENTS

» It has been said that in recent years the following statement has made its way onto the Top Ten list of the world's biggest lies:

» "I'm from the government, and I'm here to help you."[83]

» Persons not accustomed to dealing with the employees of highly regulated governmental agencies like the Environmental Protection Agency often assume that because a government agent comes to the door sporting a government identification card the agent must be given whatever information he or she is seeking. Particularly in an area like the treatment, storage, and disposal of hazardous waste, where the public's fear for safety is overtaking basic civil rights in terms of perceived social importance, the natural tendency of the average citizen or businessperson is to do whatever he can to help. However, in light of the fact that a culpable mental state is not an essential element of proof in the prosecution of an alleged RCRA, Clean Water Act, or Clean Air Act violation,[84] it is important to ensure that, in trying to "do the right thing," you do not incriminate or implicate yourself or your company in criminal wrongdoing.

» When an agent comes to your door, she might not tell you exactly why she is there. Conversely, the agent might honestly tell you where her investigation is focused only to change that focus based upon the incriminating information you unwittingly impart. When you are confronted by a government agent, you are entitled to certain rights which the agent may not and is not **[6-22]** obligated to tell you.[85] This section addresses pitfalls which may be encountered when you are approached by a government agent.

1. Although You Have the Absolute Right Not to Say Anything that Might Incriminate You and to have an Attorney Present During Questioning, the Government Agent is Probably Not Obligated to Tell You That.

» Many persons unfamiliar with the criminal justice system have a basic misunderstanding about the so-called Miranda rule,[86] believing that the advisement must be given whenever a suspect in a criminal case is questioned by a law enforcement officer. There is also a misperception that if the Miranda advisement is not given the statements made cannot be used against the maker. The Miranda rule applies only in limited circumstances—circumstances not generally applicable to potential targets of hazardous waste violations.

» Although we all have the right under the Fifth Amendment of the United States

Constitution not to make statements which may incriminate ourselves,[87] government agents are only required to inform criminal suspects of their rights under Miranda if the suspect is (1) in custody and (2) undergoing interrogation.[88] **[6-23]** Therefore, unless you are undergoing custodial interrogation,[89] the agent is not likely inform you of your right not to answer questions or your right to have an attorney present during questioning.[90] In determining whether you should answered the questions posed by a government agent, you should first ask yourself the questions set forth in footnote 85 above. If there is even a remote possibility that your statements could be used against you at a later time, you should firmly tell the agent that you must speak with your attorney prior to answering any questions. Be careful not to let the agent talk you into answering "just a couple of questions." Rather, immediately contact an attorney knowledgeable about the right against self-incrimination in connection with alleged white collar crime.

2. Just Because the Agent with Whom You Are Speaking Is Not Conducting a Criminal Investigation and Just Because You Are Told That You Are Not the Target of a Criminal Investigation Does Not Mean That Your Statements Cannot and Will Not Be Used Against You.

» Confusion about these basic rights, and knowing when to invoke them, are compounded by the fact that not all government agents are criminal investigators. That does not mean, however, that information given to a non-criminal investigator cannot and will not be used against you in a criminal proceeding. In a highly regulated area such as the treatment, storage, and disposal of hazardous waste, an agency like the EPA has employees who monitor civil and administrative compliance as well as agents who investigate potential criminal violations. Often times, criminal investigations result from information discovered through civil or administrative action, such as civil discovery **[6-24]** or administrative subpoenas. Just because the EPA employee who approaches you is not conducting an "official" criminal investigation does not mean that statements and information gathered by that person cannot be used in a criminal proceeding. The EPA employee may not even be aware that a particular act or omission is criminal in nature. Although federal regulations require strict compliance with EPA regulations by businesses which treat, handle, or store hazardous waste,[91] that requirement does not and cannot be made to usurp your constitutional rights in connection with possible criminal liability.

» Moreover, you cannot assume that the agency representative will advise you of either the nature of the investigation or your rights under the law. Governmental agencies teach their employees to be extremely careful in answering questions about criminal or potentially criminal targets and investigations. For example, the Land and Natural Resources Division of the U.S. Department of Justice directs its civil attorneys to use caution when asked by deponents about potential criminal liability:

» 1.General Rule: A civil attorney, if asked about the possibility of criminal liability by a witness during a deposition, shall respond that "the United States is free to choose civil, criminal or administrative enforcement and any decision to take one type of action does not preclude another type of action."

» 2.Where a witness in a deposition or interview raises concerns about the right to counsel, self-incrimination or other rights, the civil attorney shall inform the witness that it is inappropriate for a government attorney to offer advice on such matters and shall advise the witness that he is free to consult his own attorney on these matters.[92]

» This advisement shows that the government will not make any promises about the nature of its investigation or the use to which it will put the information it gathers. Similarly, while a criminal investigator should not be allowed to coerce a suspect into making incriminating statements by lying about the nature of **[6-25]** her investigation,[93]

she is not obligated to give you any more information about the nature and scope of her investigation than is absolutely necessary. Don't be afraid to ask a straightforward question, like "Is this a criminal investigation" or "Am I the target of a criminal investigation?" If the agent responds affirmatively, you know immediately that you should consult counsel before answering questions. However, that does not mean that a negative response by the agent ensures that you will not be prosecuted; do not assume that you have immunity from prosecution just because the agent tells you that you are not a target.

» Government investigators, like everyone else, have selective memories when it comes to recalling specifics about their previous conversations. If an agent coerces or tricks you into providing incriminating information, and you are subsequently charged with a crime on the basis of that information, you and your attorney will probably want to move to suppress the statements you made. When it comes time for the suppression hearing, the agent will probably not recall making misleading or threatening statements to you during the interview. If you must talk with a government agent without an attorney present, do not be afraid to record the conversation. You can legally record your conversation with the agent even if she does not know you are doing so.[94]

3. The Government May be Conducting Simultaneous Civil, Administrative, and Criminal Proceedings, and You Should Be Aware of the Possibility of Such Parallel Proceedings.

» In dealing with a government agent, inquire of the agent the purpose of his or her investigation or questions. In some cases **[6-26]** it will be clear that the investigation is civil, administrative, or criminal based upon the type of paperwork the agent provides.[95] However, just because you are involved in a civil or administrative proceeding, do not assume that the information gathered therein cannot also be used to build a criminal case. For example, if you receive a set of written interrogatories in connection with a civil proceeding, you can be relatively confident that the attorney propounding the interrogatories is probably not directly involved in a criminal investigation because it is improper for a single Justice Department lawyer to conduct simultaneous civil and criminal proceedings.[96] That is not to say, however, that the answers to the civil discovery cannot be used in a criminal prosecution at a later time.

» As long as the government has a legitimate purpose for pursuing its civil or administrative investigation, the information obtained therefrom can be used in that proceeding as well as in a criminal investigation which is occurring simultaneously. On the other hand, if it is established that the government has no real reason for pursuing the civil or administrative action, and it can be shown that the government is involved in a bad-faith use of the discovery techniques available in such proceedings for the purpose of building a criminal case, the courts should either stay the civil or administrative proceedings or exclude the information discovered therein from the criminal proceeding.[97]

» The United States Supreme Court has addressed this issue on several occasions. In United States v. Kordel,[98] the Food and Drug Administration served interrogatories on a company. A simultaneous criminal investigation was being conducted by the Department of Justice. Company officials answered the interrogatories and later were criminally charged and convicted. On appeal the defendants argued that the civil discovery process was used to subvert their privilege against self-incrimination. The Supreme Court found that the defendants had waived their Fifth Amendment privilege by not asserting the privilege as an **[6-27]** objection to the interrogatories.[99] Further, the Supreme Court specifically stated that the company should have moved for a protective order under F.R.Civ.P. 30(b),[100] postponing civil discovery until termination of the criminal action.

» A similar issue was raised in Donaldson v. United States.[101] In that case a taxpayer claimed that the IRS was improperly using its administrative summonses to prepare a criminal tax case. Further, the taxpayer alleged that the IRS was acting in bad faith. The Supreme Court held that there are two limits on the use of the civil summons; it must be issued in good faith and prior to a recommendation for criminal prosecution.[102] The court found that the government had not acted in bad faith and that no recommendation had been made for the taxpayer's prosecution at the time the summonses were issued.[103]

» In United States v. LaSalle National Bank,[104] the court considered the issue of whether the district court correctly refused to enforce IRS civil summonses after the lower court found that the special agent who issued them was conducting his investigation solely for the purpose of unearthing evidence of criminal conduct.[105] The Supreme Court held that an administrative summons issued after the agency has abandoned a civil or administrative determination in favor of criminal prosecution is necessarily issued in bad faith and therefore [6-28] cannot be enforced.[106] However, the court noted that the district court failed to consider whether the IRS had abandoned its civil proceedings, and remanded the case.[107]

» It is important to note that attacks on the government's use of the civil process for purely criminal purposes has not been extremely successful. The Supreme Court found in each of the above cases, Kordel, Donaldson, and LaSalle National Bank, that the appellant failed to establish that the government was using the civil proceeding solely for criminal purposes. As long as the government has a legitimate interest in the civil or administrative proceeding which provides the basis of its inquiry, the courts are unlikely to rule that the use of the discovery technique was improper. Nevertheless, Kordel shows that it is important to protect your rights during proceedings which are simultaneously civil or administrative and criminal in nature. Moreover, you should make a concerted effort to establish whether the government is acting in bad faith with regard to the simultaneous proceedings. Donaldson and LaSalle National Bank hinge on the question of bad faith.

» Even though the Supreme Court in Kordel, Donaldson, and LaSalle National Bank refused to reverse the criminal convictions or give any real relief to putative defendants, the court did establish a right to request a stay of the civil proceedings pending the outcome of any criminal case. Federal courts traditionally defer civil proceedings pending the completion of parallel criminal prosecutions. On occasion even the government has requested a stay order.[108]

» It is important to note that civil discovery procedures can be used to your advantage when a simultaneous criminal investigation exists. Such procedures allow a criminal target to learn the names of potential government witnesses and even depose [6-29] them in connection with the civil proceeding. At the same time, the target in the criminal case may be able effectively to block civil discovery by invoking the Fifth Amendment privilege against self-incrimination. Don't be lulled into a false sense of security just because the official investigation being conducted is not said to be criminal in nature. Just because it seems unfair for the government to use information gleaned from civil or administrative proceedings in a criminal prosecution does not mean that it is improper in the eyes of the court. Unless you can establish that the government has used the civil or administrative discovery techniques in bad faith in order to gain an advantage in the criminal investigation, you will probably not be able to exclude that information from the criminal proceeding.

4. If You Are Being Investigated by a Federal Grand Jury, You Should Seek a Stay of Civil and Administrative Proceedings.

» The Fifth Amendment of the U.S. Constitution[109] entitles a person[110] accused of a felony[111] to be indicted by a federal grand [6-30] jury.[112] Grand juries operate under a general rule of secrecy. Grand jurors, stenographers who record the proceedings, and government attorneys and agents who participate therein generally cannot disclose matters which have occurred in front of the grand jury.[113] Disclosure can be made among government agents, but only to other agents who have been named on a list provided to the court.[114]

» Because of the secrecy rules, civil and administrative action must often be ended or stayed following the commencement of grand jury proceedings. While a grand jury investigation is being conducted, the government is not entitled to use the grand jury process to further civil or administrative goals. Several recent United States Supreme Court opinions have addressed grand jury disclosure in connection with parallel proceedings.[115] In United States v. Sells,[116] the government tried to persuade the court that Department of Justice attorneys are entitled to equal access to grand jury materials regardless of whether they work for the civil or criminal division.[117] Justice Brennan, writing for the majority, clearly rejected that position stating:

» None of these considerations, however, provides any support for breaching grand jury secrecy in favor of Government attorneys other than prosecutors—either by allowing them into the grand jury room, or by granting them uncontrolled access to grand jury materials. An attorney with only civil duties lacks both the prosecutor's special role in supporting the grand jury, and the [6-31] prosecutor's own crucial need to know what occurs before the grand jury.[118]

» Justice Brennan went on to explain why it is inappropriate for civil attorneys to have access to information gathered by the grand jury in a criminal investigation.

» Some agencies have been granted special statutory powers to obtain information and require testimony in pursuance of their duties. Others (including the Civil Division) are relegated to the usual course of discovery under the Federal Rules of Civil Procedure. In either case, the limitations imposed on investigation and discovery exist for sound reasons—ranging from fundamental fairness to concern about burdensomeness and intrusiveness. If Government litigators or investigators in civil matters enjoyed unlimited access to grand jury material, though, there would be little reason for them to resort to their usual, more limited avenues of investigation. To allow these agencies to circumvent their usual methods of discovery also would not only subvert the limitations and procedural requirements built into those methods, but would grant to the Government a virtual ex parte form of discovery, from which its civil litigation opponents are excluded unless they make a strong showing of particularized need.

» ****

» In short, if grand juries are to be granted extraordinary powers of investigation because of the difficulty and importance of their task, the use of those powers ought to be limited as far as reasonably possible to the accomplishment of the task.[119]

» The Department of Justice represented to the Supreme Court in Sells that it had an established policy not to seek civil use of grand jury materials (transcripts of witness testimony, documents produced in response to subpoena, etc.) until the [6-32] criminal matter is closed.[120] The ABA Grand Jury Policy and Model Act also provides that the grand jury should not be used in any way by a civil attorney.[121] Moreover, Supreme Court decisions have historically required some showing of particularized need before grand jury

materials can be disclosed.[122]

» If it can be established that a civil attorney or administrative employee not properly disclosed on the "6(e) list"[123] has participated in a formal grand jury investigation, it can be claimed that Department of Justice policy, the Sells holding, and F.R.Crim.P. 6(e) have all been violated. However, that is not to say that grand jury material can never be disclosed to the Justice Department's civil attorneys. United States v. John Doe, Inc. I[124] stands for the proposition that information can be legitimately exchanged between Justice Department civil attorneys and criminal prosecutors. The decision has a fairly limited and narrow holding that a government attorney may use knowledge obtained in a grand jury to plan a civil case as long as there is no inadvertent or purposeful disclosure of grand jury information. Unfortunately, the trend of the decisions indicates that the Supreme Court is unwilling to restrain the activities of Department of Justice attorneys in either a civil or criminal context.

» Although the government cannot use the grand jury to collect evidence to be used solely for civil purposes,[125] as long as the grand jury is pursuing an investigation that could result in a criminal prosecution there is no prohibition against ultimately using the fruits of the investigation for civil purposes. The law requires only that the disclosure of the grand jury materials for civil purposes be authorized by statutes or rules governing [6-33] disclosure of grand jury materials.[126] Disclosure to the civil division will not be prohibited unless it can be shown that the government clearly abused the grand jury process, such as using the process as a pretext for obtaining civil discovery.

5. Employees and Company Officials Should Be Informed of Their Rights in Connection With Government Investigations, and Plans Should Be Instituted to Arrange for Legal Counsel if Criminal Prosecution Appears Possible.

» While it is prudent to assume, in responding to inquiries by civil and administrative agents, that the information you provide may be used in simultaneous or future criminal proceedings, there may come a time when it is apparent that a criminal investigation is underway. You may be contacted by a criminal investigator, such as a special agent of the Federal Bureau of Investigation or the EPA. You may receive a subpoena to testify in front of the grand jury. Or you may be served with a subpoena to produce documents to the grand jury. In connection with the occurrence of any of these events, it is important to be prepared with the appropriate response.

» As is suggested above, any time you are approached by a government agent it is important to ascertain for whom the agent works. Always ask to see the agent's credentials, and always ask the purpose of the questions. If the agent is conducting a criminal investigation, do not assume that you are not a target or potential target of the investigation, even if the agent tells you that you are not. And, most important, contact your attorney before answering any questions.

» Criminal investigations of corporate and other business entities generally focus upon company owners and/or managers as well as upon the business entity itself. If a criminal investigation is underway, or appears imminent, you must prepare for the possibility that one or more individuals, in addition to the company, will be subject to criminal prosecution. The biggest problem encountered in this situation is legal representation of the potential targets. Conflict-of-interest concerns generally prohibit a single attorney or law firm from representing more than one subject of a criminal investigation. Your company will certainly want to hire competent criminal defense counsel for itself. In addition, because the criminal investigation of individuals within the company often results from acts performed within the scope of the individuals' employment, many companies

feel obligated to provide their employees with competent counsel as well.

[6-34]

» There are a number of advantages to the company being involved in coordinating the hiring of criminal defense attorneys for its employees,[127] the most obvious of which is the ability to share information learned during the investigation. For example, a company employee may be called in front of the grand jury to testify about his or her knowledge of the subject investigation. If the employee is represented by an attorney who is part of a defense team, the company and other employees who are potential targets of the investigation may be able to monitor what has occurred in front of the grand jury, at least with respect to that particular witness.[128]

» Another advantage of formulating a defense team is the ability to share defense costs and resources. Prosecutions of highly technical statutes like RCRA and its corresponding regulations will require expert testimony. In all likelihood, employees are going to be at the mercy of the company when it comes to providing expert witness fees for the necessary defense experts. Sharing of monetary resources will not only be cost effective it will allow for consistency in the presentation of your defense.

» Finally, it is important to seek cooperation among your codefendants so as to pool your strategic resources. Environmental crime strikes a high profile in the federal administration, particularly in the Department of Justice, and the enthusiasm with which criminal environmental cases are being pursued is unlikely to wane in the near future. As a result of this enthusiasm, the government is willing to spend vast amounts in investigative man-hours and prosecutorial resources to pursue your case. The investigation will be conducted by highly trained investigators who enjoy virtually unlimited resources, depending upon the particular case. It is crucial for you to work with the other targets of your investigation so you may explore every possible avenue of defense.

[6-35]

D. CRIMINAL PENALTIES

» Criminal penalties for violations of the environment statutes may include probation, fines, imprisonment, or a combination thereof. The statute alleged or proven to have been violated will inform the defendant of the statutory minimum and maximum penalties for specified criminal conduct.

» The penalty ranges provided by statute have been more specifically delineated by the Federal Sentencing Guidelines.[129] The Sentencing Guidelines[130] are not statutes. Rather they are guidelines setting limits on the sentencing court's discretion and thereby provide more specific information regarding potential penalties applicable under the facts of any given case.

» Chapter Two, Part Q of the Sentencing Guidelines sets forth the guidelines generally applicable to environmental offenses. In Part Q are the factors to be considered in determining the defendant's base offense level for specified conduct. Other factors may be considered by the sentencing court in adjusting the offense level either upward or downward.[131] The resulting figure is often referred to as the total offense level and establishes the number to be used in the vertical column of the sentencing matrix.[132]

» The defendant's criminal history calculation is determined pursuant to the guidelines

included in Chapter Four. Computation [6-36] of criminal history points determines the proper criminal history category—the horizontal number used on the sentencing matrix. The applicable sentencing guidelines range is then determined by joining the proper offense level number under the appropriate criminal history category. A partial sentencing matrix is shown in the table in Appendix E. The numerical ranges reflect months of imprisonment.

» Once the range is established, the sentencing court imposes a definite sentence of imprisonment within the range[133] unless a departure outside the range is warranted by the facts of the case.[134] Fines and restitution are similarly computed in Chapter Five, Part E of the Guidelines.[135] However, as a practical matter, the environmental defendant falls outside the Guidelines where the statute provides for the computation of a fine on a daily-violation basis. Forfeitures and other assessments are governed by applicable statute.[136]

» For environmental crimes, base offense levels[137] range from level 6 (i.e. record-keeping violations) to level 24 (i.e. knowing endangerment).[138] Where the statute itself specifies a minimum mandatory penalty for violations of its provisions, that minimum penalty forms the bottom of the guideline range regardless of an otherwise lower range suggested by your guideline computations.

» Probation is an authorized alternative to imprisonment under certain circumstances.[139] As a general rule, probation in lieu of incarceration is authorized if the minimum term of imprisonment [6-37] in the range specified by the Sentencing Table is zero months.[140] Probation with conditions—i.e., intermittent confinement or community or home detention—may be granted if the minimum term of imprisonment in the applicable sentencing range is at least one but not more than six months.[141] Generally, the term of probation permitted by the Guidelines is not less than one year and not more than five years.[142]

» As a practical matter, anyone who is charged with an environmental offense should have his or her attorney compute the applicable guideline penalty ranges at the earliest possible time. By so doing, you will have information with which to better evaluate your case.

E. PRACTICAL METHODS FOR AVOIDING CRIMINAL PROSECUTION

» Assuring environmental compliance in today's highly regulated world requires procedures that go well beyond normal inspections. You cannot rely on the fact that your company was inspected by the EPA or a local governmental entity, which took no action against the company.

» To assure compliance an assessment of both individual and corporate criminal exposure is required. Many companies are establishing broad-ranging compliance programs which go far beyond traditional environmental inspections. There are at least five steps a company can take when involved in the treatment, storage, or disposal of hazardous waste. Those steps are as follows:

1. Conduct an Internal Review or Audit of the Company's Compliance History.

» Every criminal prosecution brought by the government centers around the company's history of environmental compliance. The company should conduct an internal audit or review just as the government agents might conduct a review. Frequently, it is helpful to bring in outside counsel or a professional environmental consulting firm to do the review or audit. Making changes or corrections which are self-initiating are very helpful in

convincing government prosecutors to decline prosecution. In addition, such action demonstrates obvious good faith.

[6-38]

2. Require Mandatory Training.

» The District of Columbia Circuit Court of Appeals in American Mining Congress v. EPA, described a review of the requirements under RCRA as a ♦mind-numbing journey.♦[143] Frequently it is in a company's best interest to hire an environmental compliance officer or an entire environmental compliance department. Once an environmental compliance program is in place, management should require routine training for all managers and employees involved in the treatment, storage, and disposal of hazardous waste.

3. Insist on Mandatory Corrective Programs.

» No matter how effective an internal environmental compliance program is, it can actually work to a company's detriment if its findings are ignored. Therefore, follow-up mechanisms must be instituted to ensure that disclosed problems are rectified. Government prosecutors like nothing better than to demonstrate how, in addition to violations of the law, an indicted corporate official did not even follow the company's own written practices and procedures. Steps must be taken, therefore, to insure compliance with policies and procedures.

» A response team should be established to determine both fault and individual responsibility. This team should include personnel with law enforcement backgrounds and should operate at the direction of the general counsel. When small violations do occur, trying to conceal them can lead to greater problems. Most all of the environmental statutes require companies to report spills or other ♦releases♦ into the environment.

4. Adopt an Incentive Program.

» An environmental compliance program should both foster respect for environmental laws and provide incentives for compliance efforts. Operational problems cannot be allowed to override environmental problems. Incentive programs which incorporate bonuses, promotions, and salary increases based on an employee's demonstrable record of environmental compliance efforts, and which parallel existing incentive programs on the operational side, are recommended. A system which gives parity to environmental and operational performance will encourage compliance and will be favorably regarded by state and federal regulators.

[6-39]

5. Institute an Employee Reporting System.

» An environmental compliance program should also include an employee reporting system. Employees are the government's primary source of leads in initiating criminal investigations. Absent an internal system which encourages employees to voice their concerns and which acts on those concerns, employees may become frustrated and go to the government. Turning to the government is usually a last resort; it is therefore essential that a company provide its employees with a viable alternative.

F. CONCLUSION

» It has frequently been said by environmental criminal defense attorneys that if the government looks hard enough at any company some type of criminal felony violation can be established. Unfortunately, the current criminal environmental statutes are so rigid that such statements are probably true.

» It is even more unfortunate that the government operates under a double standard when it comes to complying with hazardous waste regulations. Although the EPA is making inroads towards securing regulatory compliance by private companies, the government itself has for years ignored its own failures to comply. One knowledgeable commentator has stated, "The U.S. government, which many Americans assume is faithfully working to safeguard their environment, instead has been the nation's single worst polluter for the last forty years."[144] In reading the quote set forth on the cover sheet of this article, one might think that the reference is to some large corporate polluter. The quote reads in full as follows: "All around the country you can find little polluters being hit over the head, while right around the corner a big polluter goes free. And the big polluter is the federal government. It's more than ironic: It's completely unfair."[145]

» Even though you are faced with the possibility of prosecution by a government that does not comply with its own regulations, that is not to say that you or your company likewise have immunity from the arduous regulatory scheme. The government will pursue you whether it is complying itself or not. Hopefully, the independence of our federal judiciary and the collective common sense of juries will prevent the miscarriage of **[6-40]** justice that can be occasioned by misguided or selective enforcement of our current criminal environmental statutes.

» Avoidance of a criminal environmental conviction under today's laws will be difficult but not impossible for many individuals and companies. Follow the law if you can understand it and seek good legal advice if you can find it. Reliance on advice of counsel may not be an absolute defense, but isn't it preferable to be able to say, "Our lawyers assured us the company's conduct was legal"?[146]

[6-41]

APPENDIX A

» Index to Environmental Criminal Statutes Other Than RCRA

I. Hazardous Waste: (CERCLA) (Federal)

» Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9657. (CERCLA)

» 42 U.S.C. § 9603(b)(2)

» Failure to immediately report to National Response Center the release of a hazardous substance. Fines up to $10,000, imprisonment up to three years, or both (five years for repeat offenders).

» 42 U.S.C. § 9603(c)

» Failure to notify EPA of the existence of a treatment storage or disposal facility. Fines up to $10,000 and up to one year imprisonment (apparently this section was not increased by October 17, 1986 amendments making the other CERCLA violations felony offenses).

» 42 U.S.C. § 9603(d)(2)

» Prohibits destroying various records. Fines up to $20,000 and imprisonment up to three years with five years for repeat offense.

II. Medical Waste: (Federal)

» 42 U.S.C. § 6992 d(b)

» Knowingly generating, storing, treating disposing of medical waste; knowingly destroying concealing altering or failing to file records; knowingly omitting material information or making false statement in any label record or report. Fines up to $50,000 each day and imprisonment of two years or five years for repeat offenses.

III. Clean Air: Federal (CAA)

» Clean Air Act, 42 U.S.C. §§ 7401-7462. (CAA)

» 42 U.S.C. § 7413(c)(1).

» Knowing violation of emission limitations without a permit may subject the violator to daily penalties of $25,000, up to one year in prison, or both (repeat convictions may result in double penalties).

[6-42]

» 42 U.S.C. § 7413(c)(2).

» Knowingly making false statements or representations in reports required under the Clean Air Act, or tampering with air monitoring equipment, subjects the violator to penalties up to $10,000, or imprisonment up to six months, or both.

IV. Clean Water: (CWA)

» Clean Water Act, 33 U.S.C. §§ 1251-1376. (CWA)

» 33 U.S.C. § 1319(c)(1).

» Negligently discharging a pollutant from a point source into the navigable waters of the United States without a permit, or in violation of the effluent limitations in a permit, subjects the defendant to a daily minimum penalty of $2,500 or a daily maximum penalty of $25,000 per violation, imprisonment up to one year, or both (doubled for repeat offenders).

» 33 U.S.C. § 1319(c)(2).

» Knowingly discharging pollutants in violation of CWA subjects the defendant to a daily minimum penalty of $5,000 per violation, a daily maximum penalty of $50,000, imprisonment up to three years, or both (doubled for repeat offenders).

» 33 U.S.C. § 1319(c)(3).

» A CWA violation, coupled with knowing endangerment of another person (imminent

danger of death or serious bodily injury), subjects the violator to a penalty up to $250,000, imprisonment up to fifteen years, or both. Corporations may be fined up to $1,000,000 (doubled for repeat offenders).

» 33 U.S.C. § 1319(c)(4).

» Knowingly making false statements or representations in documents or reports required under CWA, or tampering with monitoring equipment, fines up to $10,000, imprisonment up to two years, or both.

[6-43]

V. Clean Water: Oil Discharge

» 33 U.S.C. § 1321(b)(5), 43 U.S.C. § 1822 and 33 U.S.C. § 1517

» Failing to report any discharge of oil or other hazardous substance, fine of up to $10,000, imprisonment up to one year or both.

VI. Clean Water: Ocean Dumping

» 33 U.S.C. 1415.

» Dumping or discharge of hazardous wastes into the ocean without a permit, fines of up to $50,000 and imprisonment of up to one year or both.

VII. Clean Water: River Dumping

» 33 U.S.C. § 411.

» Depositing refuse into navigable waters of the United States, fines up to $2,500 and imprisonment not less than 30 days or more than one year.

VIII. Clean Water: Pollution From Ships

» 33 U.S.C. § 1908

» Discharge of a harmful substance in violation of the MARPOL Protocol, fines up to $50,000 and imprisonment up to five years or both.

IX. Clean Water: Submerged Lands

» 43 U.S.C. § 1350

» Violation of any provision relating to a lease, license or permit relating to off-shore oil and gas leasing activities including false statements, fines up to $100,000 and imprisonment up to ten years or both.

X. Toxics Substances Control Act (□TOSCA□)

» 15 U.S.C. §§ 2601-2671

» TOSCA Regulates the Disposal of PCBs.

» 15 U.S.C. ◆ 2605(e)

» Requires EPA to promulgate regulations for the disposal and marking of PCBs. These regulations are published at 40 C.F.R. Part 761. (The PCB regulations include [6-44] detailed requirements for marking, storing, transporting and disposing of PCBs and PCB materials, such as transformers and capacities. The regulations also include extensive record keeping regulations.)

» 15 U.S.C. ◆ 2615

» Imposes civil penalties for failure to comply with the PCB regulations or knowingly or wilfully violating the PCB regulations.

XI. Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)

» 7 U.S.C. ◆◆ 136a-136w.

» Knowingly violating FIFRA may result in a fine up to $1,000, imprisonment for 30 days, or both, for a ◆private applicator.◆ A commercial dealer, salesman or applicator may be subject to up to a $50,000 fine, up to one year imprisonment, or both. 7 U.S.C. ◆◆ 1361 (b)(1)-(2).

XII. Alternative Fine Act

» 18 U.S.C. ◆ 3571

» This section of the Criminal Code allows the court to increase any felony fine to $250,000 and any misdemeanor fine to $100,000. The statute also provides for an additional fine of the violator derives pecuniary gain or the offense results in a loss to the victim.

XIII. Clean Water: Colorado

» 25-8-609 Colorado Revised Statute

» Misdemeanor offense for willful or negligent discharge without a permit. Fines up to $12,500.

XIV. Hazardous Waste: State of Colorado

» 25-15-310 (2)(a)(b) ◆ 310(2)

» 25-15-310 (1)(c)(d) ◆ 310(2)

» These are misdemeanor offenses for improper disposal of hazardous substances. Fines range from $25,000 to $50,000. Imprisonment for not more than six months or one year.

[6-45]

APPENDIX B

» 42 U.S.C. ◆ 6928(d).

» Any person who

» (1)knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter or pursuant to title I of the Marine Protection, Research and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. 1411 et seq.],

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

» (A)without a permit under this subchapter or pursuant to title I of the Marine Protection, Research and Sanctuaries Act (86 Stat. 1052) [38 U.S.C. 1411 et seq.]; or

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

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

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

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

[6-46]

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

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

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

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

» (B)in knowing violation of any material condition or requirement of any applicable regulations or standards under this chapter

» shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment.

[6-47]

APPENDIX C

» 42 U.S.C. § 6928(e)

» Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subchapter or used oil not identified or listed as a hazardous waste under this subchapter in violation of paragraph (1), (2), (3), (4), (5), (6), or (7) of subsection (d) of this section who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment for not more than fifteen years, or both. A defendant that is an organization shall, upon conviction of violating this subsection, be subject to a fine of not more than $1,000,000. (Emphasis added.)

[6-48]

APPENDIX D

» 42 U.S.C. § 6928(f)

» For the purposes of subsection (e) of this section§

» (1)A person's state of mind is knowing with respect to§

» (A)his conduct, if he is aware of the nature of his conduct;

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

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

» (2)In determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury§

» (A)the person is responsible only for actual awareness or actual belief that he possessed; and

» (B)knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

» Provided, That in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information.

» ****

» (Emphasis added except for word ⊡provided⊡, which appears with emphasis in original.)

[6-49]

APPENDIX E

» SENTENCING TABLE

OFFENSE LEVEL	CRIMINAL HISTORY CATEGORY I	II	III	IV	V	VI
[1 through 5 omitted]						
6	0-6	1-7	2-8	6-12	9-15	12-18
7	1-7	2-8	4-10	8-14	12-18	15-21
8	2-8	4-10	6-12	10-16	15-21	18-24
[9 through 21 omitted]						
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
[25 through 43 omitted]						

» [Example: If a defendant's total offense level is 8 and his criminal history category is V, the applicable sentence range is 15 to 21 months.]

[7-i]