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Criminal Enforcement of Federal Water Pollution Laws in an Era of Deregulation

Mark W. Schneider

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CRIMINAL ENFORCEMENT OF FEDERAL WATER POLLUTION LAWS IN AN ERA OF DEREGULATION

The passage of the Federal Water Pollution Control Act of 1972 (FWPCA)[1] signalled the start of the federal commitment to the problem of water pollution. Since then, the government has pursued the goal of cleaner water through the creation of agencies, implementation of pollution control programs, and prosecution of polluters. This approach has led to some improvements in water quality, but nationwide water quality has not significantly improved.[2] With more Americans suffering from the effects of increased exposure to dangerous chemicals in our waterways, water pollution remains a serious problem.[3]

The Reagan Administration has dramatically altered the federal water pollution control effort. Pursuing economic recovery through deregulation,[4] the Reagan Administration in its first six months has taken strong measures to reduce the burdens of pollution control regulations

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[1] 33 U.S.C. §§ 1251-376 (1976).

[2] In its Eleventh Annual Report, the Council on Environmental Quality analyzed water quality trends from 1970 to 1980, concluding that "water quality in rivers and streams . . . seems to have changed little nationwide." COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY 1980: THE ELEVENTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 108 (1981) [hereinafter cited as ENVIRONMENTAL QUALITY]. The report, which compiled data from the United States Geological Survey and from the Environmental Protection Agency, cited several locations where water quality had improved. *Id.* However, the report noted that there had been no decrease in the level of traditional pollution indicators—fecal coliform bacteria, total phosphorus, lead and mercury. Additionally, the manufacture of new toxic chemical compounds was deemed likely to lead to further water quality deterioration. *Id.* at 190.

[3] Both old and new sources of water pollution have caused health problems. The CEQ report discussed the effects of low levels of exposure to dangerous chemicals, outlining the incidence of sterility, poisoning, and skin discomforts. The report states, "Cancer is the only major cause of death whose incidence has continued to rise since 1900. Smoking is undoubtedly part of the cause, but there is evidence that other facts, perhaps including increased public exposure to synthetic organic chemicals, may also be contributing." *Id.*

Moreover, some scientists claim that the average American's contact with toxic industrial chemicals and other water pollutants will double within the next ten years. WASH. MONTHLY, Dec. 1981, at 30.

[4] President Reagan regards excessive regulation of industry as a major cause of the faltering economy. Shortly after taking office, he said, "Government regulations impose an enormous burden on large and small business in America, discourage productivity, and contribute substantially to our current economic woes . . . . It is my intention to curb the size and influence of the federal establishment." BUS. WK., Mar. 9, 1981, at 62.

on the economy. With decreased environmental regulation, it is unclear whether the new federal effort can prevent significant deterioration of the nation's waters.

This Comment will discuss recent legal and political developments concerning water pollution control. It will analyze, in light of the diminished federal effort, how the courts' treatment of different issues will affect the pollution abatement effort. Additionally, its aim is to suggest how an intelligent enforcement approach may prevent the degradation of our waterways.

I. THE DECREASING FEDERAL EFFORT TO ABATE WATER POLLUTION

A. EXECUTIVE ORDERS

The Reagan Administration in its first six months acted to diminish the federal government's role in the abatement of water pollution. The President's actions will reduce resources available to the Environmental Protection Agency (EPA), which oversees most pollution abatement programs. Shortly after taking office, President Reagan postponed the implementation of the "Midnight Regulations" promulgated by executive agencies during the last days of former President Carter's term but which had not yet become effective.[5] Additionally, agencies were ordered not to issue new regulations for at least sixty days.[6] President Reagan also announced the formation of a Task Force on Regulatory Relief to review the efficiency of the "Midnight Regulations."[7] The Task Force has already postponed two major water pollution regulations.[8]

President Reagan then issued an Executive Order designed "to reduce the burdens of existing and future regulations, [and to] increase agency accountability for regulatory actions. . . ."[9] This order gave the increasingly important Office of Management and Budget (OMB) the power to review and order revisions of regulations thought to be particularly burdensome. OMB has already singled out for extensive review more than forty major EPA regulations. Nine regulations, sev-

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[5] President Reagan's Memorandum to Agencies Ordering Postponement of Pending Regulations (Jan. 29, 1981), *cited in* [1981] 11 ENV'T. REP. (BNA) 1939.

[6] White House Fact Sheet on Memorandum Ordering Agencies to Postpone Pending Regulations (Jan. 29, 1981), *cited in* [1981] 11 ENV'T. REP. (BNA) 1940.

[7] [1981] 11 ENV'T REP. (BNA) 1853.

[8] [1981] 11 ENV'T REP. (BNA) 2131. One of the regulations, 46 Fed. Reg. 8260, concerned effluent guidelines for the timber products industry. The other, 46 Fed. Reg. 9404, concerned general pre-treatment standards for controlling industrial discharges into municipal sewage systems.

[9] Exec. Order No. 12291, 46 Fed. Reg. 13193 (1981).

eral of which are critical to the water pollution abatement program, have been listed as "high-priority targets" for OMB review.[10] Further, the Executive Order required the agencies to prepare a Regulatory Impact Analysis to ensure that "the potential benefits to society for the regulation outweigh the potential costs to society. . . ."[11]

B. EPA BUDGET REDUCTIONS

EPA's ability to abate water pollution will also be substantially reduced by recent budget cutbacks. Responding to President Reagan's call for reduced federal spending, Congress slashed EPA funds in the Omnibus Budget Reconciliation Act of 1981.[12] EPA's sewage treatment construction grants program, granting funds to qualifying municipalities, was hardest hit by the Reconciliation Act's cutbacks. The fiscal year 1981 budget had originally allocated $3.6 billion to this program. The Reconciliation Act revised this allocation to approximately $2.5 billion, a thirty-two percent decrease in funding.[13] The Reconciliation Act also reduced EPA funds for research and for pollution abatement, control and compliance activities.[14] EPA, then, will operate without much of the funding previously directed toward the enforcement of water pollution regulations through monitoring of pollution sources, issuance of compliance orders and initiation of legal proceedings.

The effects of this funding reduction will be magnified by an Executive Order imposing a hiring freeze on all civilian government employees.[15] Moreover, EPA Administrator Anne M. Gorsuch will further trim EPA spending by dismissing, in the 1982 and 1983 fiscal years,

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[10] The OMB will review regulations concerning "best conventional control technology effluent guidelines" for several industries, electroplating pre-treatment standards, and the hazardous waste disposal program. [1981] 11 ENV'T REP. (BNA) 1852.

[11] Exec. Order No. 12290 § 2(b), 46 Fed. Reg. 13193 (1981). *See also* OMB Interim Guidance to Federal Agencies on Preparing Cost-Benefit Analysis of Regulations (June 13, 1981), *reprinted in* [1981] 12 ENV'T REP. (BNA) 258.

[12] Pub. L. No. 97-35, § 1801, 95 Stat. 764 (1981).

[13] [1981] 39 CONG. Q. WEEKLY REP. (CONG. Q.) 1475. More importantly, the program will receive no funds for fiscal year 1982 unless legislation is enacted reforming the municipal sewage treatment construction grant program, in which case authorization shall not exceed $2.4 billion. *Id.* at 1476. Although the sewage program, a major part of the pollution abatement effort, has long been criticized as inefficient, the dramatic funding cutbacks and possible moratorium mark a sharp break with past pollution control efforts. Since 1972, the government has spent over $33 billion on the program, "the largest civilian construction program other than federal highways." *Id.* at 1475. The Reagan Administration, however, plans to curtail this spending; President Reagan plans to reduce the government's projected $90 billion obligation under the program to $23 billion by the year 2000. *Id.* at 1043. This cutback will ultimately result in a long overdue revamping of the sewage treatment program, but it comes at a time when municipalities have little money to construct needed sewage treatment plants.

[14] [1981] 12 ENV'T. REP. (BNA) 461.

[15] [1981] 39 CONG. Q. WEEKLY REP. (CONG. Q.) 163.

3,200 of the 10,381 full-time employees, a 31% reduction in agency manpower from 1981.[16]

C. EPA REORGANIZATION

The federal pollution control effort has also been reduced by the recent EPA reorganization. The Office of Enforcement, committed solely to the prosecution of violators of environmental laws, was eliminated in 1981.[17] The individual enforcement divisions of different offices, including the new Office of Water, will now enforce environmental laws.[18] Although EPA Administrator Gorsuch claimed that the reorganization was effected to "streamline" operations, the elimination may substantially decrease the enforcement program, a critical aspect of EPA's abatement effort.[19] The elimination of the Office of Enforcement and the placement of enforcement coordination in an office formerly devoted only to defensive litigation could lead to a less active enforcement approach. Further, the dispersal of enforcement responsibility in the various offices will doubtlessly detract from a coherent, unified enforcement effort. As former EPA Administrator Douglas Costle said, "[I]t [the reorganization] may paralyze the EPA."[20]

Moreover, EPA officials recently declared that all criminal enforcement actions must be reported and cleared through EPA headquarters prior to prosecution.[21] This new requirement of a "Case Opening Report" and a "Monthly Investigation Report" will delay and impede the enforcement effort because of the time required to review each action.[22] Further, it will diminish the federal enforcement effort by giving greater control over the enforcement program to top EPA officials who were appointed because of their commitment to the Reagan Administration's

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16 N.Y. Times, Sept. 29, 1981, at A20, col. 1. This decrease will be accentuated by EPA's projected annual loss of six percent of its members due to attrition. Reacting to the decreases in spending and planned employee reductions, former EPA Administrator Douglas Costle said, "This is not a question of saving money for the budget, this is a wrecking crew at work." *Id.*

17 EPA Reorganization Memorandum (June 12, 1981).

18 The office of Legal Counsel and Enforcement—formerly the Office of Regional Counsel, which participated only in defensive litigation—will now oversee agency-wide enforcement activities. *Id.*

19 INSIDE E.P.A., WEEKLY REP., June 19, 1981, at 1.

20 NEWSWEEK, Oct. 19, 1981, at 67. Concerning the paucity of enforcement actions, Newsweek said, "EPA's enforcement of Federal air-and water-pollution laws has slowed to a crawl. . . ." *Id.*

21 Memorandum from Acting Director, Office of Criminal Enforcement, re: "Role of Regional Administrators in Criminal Enforcement" (Apr. 27, 1981).

22 "The introduction of a two tiered review process in Headquarters . . . will only serve to add time to the process and complicate the coordination of the referral." Memorandum from Director, Enforcement Division, EPA Region V, to Acting Director, Office of Criminal Enforcement, in response to proposal of a new review system for criminal cases (Apr. 13, 1981).

philosophy of reducing agency interference with industry.[23] The number of prosecutions, then, will be determined by the top officials' decision to approve or refuse to allow prosecution.[24]

The reorganization and reporting requirements have already led to a significantly decreased enforcement effort. In 1980, EPA referred 230 cases for prosecution. In the eight months since Gorsuch has been in command, EPA has referred only forty-two.[25]

D. ADDITIONAL CONSTRAINTS ON EPA

Although EPA's pollution abatement program has been diminished primarily by actions taken by the Reagan Administration, prior measures, including the Equal Access to Justice Act, may also impede the enforcement effort.[26] Passed in 1980 and taking effect on October 1, 1981, the Act requires government agencies to pay attorneys' fees and related costs to individuals and small businesses in regulatory cases when the proceeding was not "substantially justified."[27] The Act, which

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[23] Although Gorsuch explains her actions in terms of "streamlining" and reducing inefficiency, her actions have demonstrated that environmental protection is not a high priority. Since taking office, Gorsuch has cut spending on every major program, including the one that she says deserves top funding priority—the "superfund" to clean up abandoned toxic dump sites. "She has also urged major retrenchments in the Clean Air Act; . . . she proposed a three-year delay and substantial weakening of impending carbon monoxide emission standards. . . ." TIME, Jan. 18, 1982, at 16.

Gorsuch's critics do not believe that efficiency has been her only motive. "William Carney, . . . ranking minority member of the Science and Technology Committee's subcommittee on natural resources . . . complained of 'disturbing signs of late' emanating from the EPA that its commitment to environmental protection 'may be wavering' . . . . Carney said the reorganization and appointments [to top EPA positions] indicated a reduced emphasis on enforcement and 'a more pro-industry stance than has been taken in the past.' " [1981] 39 CONG. Q. WEEKLY REP. (CONG. Q.) 1398.

Moreover, Representative James J. Florio, Chairman of the House Energy and Commerce Subcommittee on Commerce, Transportation, and Tourism, which oversees several EPA programs, has demanded Gorsuch's resignation because the "massive program reductions, severe personnel cuts, and gutting of regulations demonstrate that she has no intention whatsoever of carrying out her obligations under the law." [1981] 12 ENV'T REP. (BNA) 811.

[24] Most lower level staff members appear more firmly committed to environmental protection than Gorsuch. Interview with EPA Attorney (Jan. 31, 1982). Since she began restructuring EPA and dismantling EPA programs, over 10% of EPA staff members have resigned. Moreover, Time magazine reports of "dismal morale" among staff members, and that some unhappy employees are leaking controversial memorandums to the press revealing Gorsuch's crippling actions. TIME, Jan. 18, 1982, at 16. *See also* WASH. MONTHLY, Dec. 1981, at 36, which notes the tension between a deregulation-minded Gorsuch and staff members seeking a continued strong pollution control effort.

[25] TIME, Jan. 18, 1982, at 16.

[26] 5 U.S.C. § 504 (1980).

[27] 5 U.S.C. § 504(a)(1) (1980). "The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and fact, no award will be made." H.R. NO. 1418, 96th Cong., 2d Sess. 10 (1980).

was designed to be "an instrument for curbing excessive regulation and the unreasonable exercise of Government authority,"[28] may cause regulatory agencies to initiate fewer proceedings.

Section 504(d)(1)(A) of the Act authorizes the appropriation to each agency of funds to cover fees and costs awarded to plaintiffs, but Congress has not yet allocated any funds for this purpose. Without appropriated funds, agencies such as EPA would have to pay awards out of their own operating funds. EPA may therefore be reluctant to risk its dwindling resources for the payment of fees, and thus may refrain from prosecuting due to the possibility that the action might be deemed "substantially unjustified."[29]

Faced with reductions in funds, postponement of major regulations, elimination of the Office of Enforcement, and a deregulation-minded Administrator, EPA may be unable to control water pollution. While funds and regulations are disappearing, water pollution problems are not.[30] To prevent significant deterioration of the nation's waters, EPA must utilize its diminished resources in an efficient enforcement scheme. Equally important, the courts' treatment of environmental issues will have a large impact on the enforcement effort. The following sections of this Comment will present a brief overview of major water pollution laws, discuss how the courts' treatment of issues affect enforcement, and suggest how EPA may attempt to prevent further degradation of our waterways.

II. OVERVIEW OF WATER POLLUTION STATUTES

Two federal statutes have been used in water pollution enforcement actions. One statute, the Rivers and Harbors Act of 1899 (Refuse Act),[31] prohibits the discharge or deposit of "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom . . . into any navigable waters."[32] Although initially used to prosecute creators of obstructions to navigation, in the late 1960's the Refuse Act was applied to proscribe industrial pollution. Section 411 provides for a fine of not less than $500 nor more than $2,500 and/or imprisonment for one year or less, for any person or corporation violating or aiding and abetting a violation of the Act.[33]

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28 H.R. No. 96-1418, 96th Cong., 2d Sess. 12 (1980).

29 Chi. Tribune, Sept. 14, 1981, § 1, at 3, col. 1.

30 *See supra* notes 2-3 and accompanying text.

31 33 U.S.C. §§ 401-67 (1976).

32 *Id.* at § 407.

33 33 U.S.C. § 411 (1976). The minimal fines have not been revised since the passage of the Refuse Act. For a detailed discussion of the history and application of the Refuse Act, *see* Glenn, *The Crime of "Pollution": The Role of Federal Water Pollution Criminal Sanctions*, 11 AM. CRIM. L. REV. 835, 839-59 (1973) [hereinafter cited as *Crime of Pollution*]; Note, *Federal Enforce-*

The other statute, the Federal Water Pollution Control Act of 1972,[34] which provides both for civil and criminal penalties, is most frequently applied in enforcement actions. The Act prohibits the discharge of all pollutants unless the discharge complies with a National Pollution Discharge Elimination System (NPDES) permit granted by EPA or by a state with an approved program.[35] Section 1319(d) states that any person violating a permit condition is subject to civil penalties not to exceed $10,000 per day of violation.[36] The FWPCA also provides for criminal penalties. Section 1319(c)(2) states that the falsification of documents filed under the permit system is punishable by a maximum fine of $10,000 for each violation, and/or maximum imprisonment of six months.[37] Section 1319(c)(1) provides penalties for the willful or negligent violation of "any permit condition or limitation . . . issued under section 1342. . . ."[38] Convictions under section 1319(c)(1) are punishable by fines of not less than $2,500 nor more than $25,000 per day of violation and/or imprisonment of one year or less.[39] Previous enforcement efforts have applied almost exclusively the civil sanctions of the FWPCA, but prosecutors are now utilizing its criminal provisions as well.[40]

III. EPA'S ROLE IN ENFORCEMENT ACTIONS

A. THE ADMINISTRATOR'S DUTY TO ACT PURSUANT TO A FINDING OF A VIOLATION: MANDATORY OR DISCRETIONARY?

Although the courts have recently construed the criminal provisions of the FWPCA, varying interpretations have led to continued liti-

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ment of Individual and Corporate Criminal Liability for Water Pollution, 10 MEM. ST. U.L. REV. 576, 583-85 (1980) [hereinafter cited as *Federal Enforcement*].

34 33 U.S.C. §§ 1251-376 (1976).

35 33 U.S.C. § 1342 (1976).

36 33 U.S.C. § 1319(d) (1976).

37 33 U.S.C. § 1319(c)(2) (1976).

38 33 U.S.C. § 1319(c)(1) (1976).

39 *Id.* Repeat violators of § 1319(c)(1) are subject to punishment of not more than $50,000 per day of violation and/or not more than two years imprisonment. *Id.*

40 "Traditionally . . . EPA has relied on administrative actions and civil litigation to enforce environmental standards. The third enforcement option, criminal prosecution, has rarely been used by the Agency. With the maturity of the air and water enforcement programs . . . it is clear that the deterrent effect of criminal sanctions has become a more appropriate enforcement response to many situations." FY 1981 Criminal Enforcement Strategy Memorandum, U.S.E.P.A. Region V, at 1 [hereinafter cited as Enforcement Strategy].

Several commentaries discuss the history of the FWPCA and focus on recent applications of the criminal provisions. *See* Olds, Unkovic, & Lewin, *Thoughts on the Role of Penalties in the Enforcement of the Clean Air and Clean Water Acts*, 17 DUQ. L. REV. 1 (1979) [hereinafter cited as *Thoughts*]; *White-Collar Crime: A Survey of Law*, 18 AM. CRIM. L. REV. 169, 345-70 (1980) [hereinafter cited as *White Collar Crime*]; Note, *Criminal Prosecution Under the Federal Water Pollution Control Act*, 56 CHI. KENT L. REV. 983 (1980) [hereinafter cited as *Criminal Prosecution*].

gation on several issues. Consistent treatment of issues regarding the criminal provisions will partially determine the nature and effectiveness of the enforcement effort. 33 U.S.C. § 1319(a)(3) reads:

> Whenever on the basis of any information available to him the Administrator [of EPA] finds that any person is in violation of . . . [the discharge permit provisions of the FWPCA], he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

One issue, of particular importance in light of the decrease in EPA resources,[41] is whether the EPA Administrator has a mandatory or a discretionary duty to take action against a violator after finding a violation of a FWPCA provision. The few courts addressing the issue have not consistently interpreted section 1319. If future courts construe the duty imposed as mandatory, then the Administrator would be required to take action pursuant to a finding of a violation. This requirement would limit the attempt by EPA headquarters to reduce the number of enforcement actions.

In *Sierra Club v. Train*,[42] a citizen's suit brought to compel the EPA Administrator to issue pollution abatement orders, the Fifth Circuit held that section 1319(a)(3) imposes only a discretionary duty to issue an abatement order. The court discussed the voluminous legislative history of the FWPCA, finding that the Conference Committee had accepted a House amendment which provided that the Administrator was *authorized* to initiate civil and criminal proceedings, whereas the Senate bill had provided that section 1319(a)(3) *required* him to take action.[43]

The court failed, however, to consider all of the pertinent legislative history. During the Senate's discussion of the Conference Committee Report, Senator Muskie, the Chairman of the Senate Committee on Public Works, stated that although the change in language made civil enforcement discretionary, it did not affect the Administrator's mandatory duty to issue an abatement order:

> It is important to note, however, that the provisions requiring the Administrator to issue an abatement order whenever there is a violation were mandatory in both the Senate bill and House amendment and the Conference agreement contemplates that the Administrator's duty to issue an abatement order remains a mandatory one.[44]

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41 *See supra* notes 4-30 and accompanying text.

42 557 F.2d 485 (5th Cir. 1977).

43 *Id.* at 489.

44 ENV'TL. POLICY DIV., CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS 93RD CONG., 1ST SESS., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 174 (Comm. Print 1973) [hereinafter cited as LEGISLATIVE HISTORY] (remarks of Senator Muskie). *See* South Carolina Wildlife Federation v. Alexander, 457 F. Supp. 118, 131 (D.S.C. 1978), which rejected *Train* on these grounds.

Three district courts have held that the Administrator has a mandatory duty to act under section 1319(a)(3). Two years before *Train*, the court in *United States v. Phelps Dodge Corp.*,[45] found that the Administrator was required to act after learning of a violation. Although *Phelps* concerned the initiation of criminal charges, the court said that the mandatory duty to act requires the Administrator to take some action—either by the issuance of an abatement order, by a notification to the violator to cease his illegal activity, by civil proceedings, or by criminal proceedings.[46]

Two years later, in *Illinois ex. rel. Scott v. Hoffman*,[47] an action to compel the Administrator to act pursuant to the FWPCA, another district court relied on *Phelps* to hold that the Administrator, upon finding a violation, has a mandatory duty either to issue an abatement order or to institute other proceedings to ensure compliance with the FWPCA.[48]

One year after *Train* a district court held in *South Carolina Wildlife Federation v. Alexander*[49] that the duty to issue an abatement order was mandatory. The court first discussed whether the word "shall" imposed a mandatory or discretionary duty. Citing *Escoe v. Zerbst*[50] for the proposition that " 'shall' is the language of command," the court concluded that "shall" usually imposes a mandatory duty.[51] Although this rule of construction is not absolute,[52] "where the statute's purpose is the protection of public or private rights, as opposed to merely providing guidance for government officials, courts usually interpret 'shall' as imposing mandatory rather than directory [sic] duties."[53] The court stated that since Congress granted the Administrator enforcement authority under the FWPCA to protect the public's interest in unpolluted waterways, section 1319(a)(3) imposes a mandatory duty.[54]

By comparing analogous provisions of the Clean Air Act and the FWPCA, the court found further support for imposing a mandatory

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45 391 F. Supp. 1181, 1184 (D. Ariz. 1975).

46 *Id.*

47 425 F. Supp. 71 (S.D. Ill. 1977).

48 *Id.* at 77.

49 457 F. Supp. 118, 134 (D.S.C. 1978).

50 295 U.S. 490, 493 (1935).

51 457 F. Supp. at 130.

52 *Id.*

53 *Id.*

54 *Id.* at 131. The court presented additional policy considerations to support its holding. It stated that in light of the FWPCA's declared goal that "the discharge of pollutants into the navigable waterways be eliminated by 1985 . . . ." 33 U.S.C. § 1251(a)(1), "it would be inconsistent with this broad remedial purpose for this Court to hold, less than seven years from this target date, that the Administrator can ignore a violation once it is called to his attention." 457 F. Supp. at 133.

duty.[55] Whereas 42 U.S.C. § 7413(a)(3) of the Clean Air Act states that the Administrator "may" take action upon finding a violation, section 1319(a)(3), the corresponding provision of the FWPCA, provides that the Administrator "shall" take enforcement action. The court concluded that this different wording showed that "Congress very deliberately intended to impose more under the FWPCA than just the discretionary duty which the Clean Air Act imposes on the Administrator. The duty intended to be imposed is a *mandatory* one."[56] Further, the court rejected the analysis of the *Train* opinion because it failed to consider Senator Muskie's comments.[57]

In light of EPA's less active enforcement of environmental regulations, consistent treatment of this issue could substantially affect EPA's role in the pollution control effort. If the Administrator has a discretionary duty to issue abatement orders or take other action, as *Train* holds, and if the Administrator's policy is to reduce agency interference in business decision-making, then EPA could minimize the number of enforcement actions merely by electing not to act upon findings of violations.

The *South Carolina* opinion, however, is more compelling than *Train*; it accurately relies on the legislative history, persuasively construes the provisions of the FWPCA, and presents important policy considerations for imposing a mandatory duty on the Administrator. Courts therefore should follow *South Carolina* and require that the Administrator act upon finding a violation.

This result would encourage prosecution of violations under the FWPCA. It is not EPA headquarters, but rather the regional offices which authorize the investigations of possible violations.[58] Since the staff members in the regional offices appear committed to the pollution abatement effort,[59] they will probably continue to investigate violations.[60] Once a finding of a violation is made,[61] EPA would then be required to act against the violator, either by the issuance of an abate-

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55 In drafting the enforcement provisions of the FWPCA, the Senate Committee "drew extensively" on the Clean Air Act. *Id.* at 131, citing LEGISLATIVE HISTORY, *supra* note 44, vol. 1 at 1481.

56 *Id.* at 132.

57 *Id. See supra* notes 42-44 and accompanying text.

58 Interview with EPA Attorney (Jan. 31, 1982).

59 *See supra* note 24 and accompanying text.

60 Interview with EPA Attorney (Jan. 31, 1982). However, because EPA will have less manpower and money to investigate potential violations, EPA will doubtlessly discover fewer violations than it has in the past.

61 Neither section 1319(a)(3) nor EPA regulations define a "finding." Rather, a finding is a judgment made at the regional level that a discharger has violated the FWPCA. Because EPA does not have the resources to act on all violations, EPA will find a violation in the "high priority" cases where the polluter has discharged substantially or consistently more than his

ment order or by the institution of civil or criminal proceedings. Thus, despite the reduction in resources and the anti-regulatory philosophy of top EPA officials, EPA could still enforce the permit requirements of the FWPCA.

B. WHETHER THE ADMINISTRATOR MUST, BEFORE INITIATING CRIMINAL PROCEEDINGS, ISSUE AN ABATEMENT ORDER?

A related issue is whether, after finding a violation of a permit condition, the EPA Administrator must first issue an abatement order or take civil action before pursuing a criminal remedy. The courts' treatment of this issue takes on added significance when considered in conjunction with the present decreases in funding and EPA manpower.[62]

33 U.S.C. § 1319(c)(1) provides: "Any person who willfully or negligently violates . . . [the discharge permit provisions of the FWPCA] shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both." The Act does not specify whether an abatement order or civil proceeding must precede the initiation of criminal charges.

The three courts that have directly addressed the issue have held that the Administrator need not take prior action before initiating criminal proceedings. In *United States v. Phelps Dodge Corp.*,[63] the district court discussed the conflicting legislative history and concluded that the Administrator could initiate criminal proceedings without first issuing an abatement order or taking civil action. The court noted that in the House debate on this provision, one Congressman stated that a criminal action could not be brought unless the Administrator first issues an

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permit condition allows. Thus, a finding results from a balancing of different factors such as availability of resources and egregiousness of the violation.

A related issue, briefly discussed in *South Carolina*, is whether the Administrator himself must find a violation or whether the Administrator may be deemed to have made a finding from the receipt of information from outside sources such as public interest groups, other agencies or citizens. The Administrator had not made an express finding, but rather had learned of the violation from plaintiff South Carolina Wildlife Federation. The court skirted the issue, stating that for the purposes of the motion to dismiss, it could not, as a matter of law, hold that no finding had been made. 457 F. Supp. at 130.

South Carolina and *Hoffman* illustrate that an outside party may compel the Administrator to act against a violator if a finding has been made. More often, however, public interest groups or citizens merely alert EPA to investigate a potential violation. Because these outside parties do not have the authority to enter a plant to determine whether the corporation complies with its permit, and because they lack the expertise to analyze effluent discharges, outside parties rarely can accurately determine that a discharger is violating a permit condition. Instead, the outside parties notify EPA about potential violations. Because investigations are performed by regional staff members, rather than by top EPA officials, the complaints will probably be acted upon. Interview with EPA Attorney (Jan. 31, 1982).

62 *See supra* notes 12-16 and accompanying text.

63 391 F. Supp. at 1184.

abatement order which, if not heeded, could be followed by criminal proceedings.[64] However, the court found more persuasive the House Committee Report which provided:

> [H]e [the Administrator] may take any of the following enforcement actions: (1) he shall issue an order requiring compliance; (2) he shall notify the person in alleged violation . . . of such finding. If beyond the 30th day after the Administrator's notification, the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with a permit or a condition or limitation of a permit; or (3) he shall bring a civil action; or (4) he shall cause to be instituted criminal proceedings.[65]

Because this report contained other language which later became part of section 1319(c), the court found that the Committee's Report was controlling and therefore held that Congress did not intend to require that the Administrator issue an abatement order before initiating criminal proceedings.[66]

In *United States v. Hudson Farms*,[67] another district court approved the result in *Phelps*, but cautioned that because the statute is "silent" and the legislative history "in conflict," it would be difficult to clear up "these comparatively murky waters."[68] The court ruled nonetheless that because section 1319(c)(1) made no mention of a civil prerequisite for criminal actions, Congress did not intend to impose such a prerequisite.[69]

The Third Circuit in *United States v. Frezzo Bros.*,[70] relied on *Phelps* and *Hudson* in holding that the Administrator was not required to issue an abatement order before filing a criminal action. The court cited much of the legislative history considered in *Phelps*, acknowledging that it was conflicting, but said that the prerequisites would unduly hamper the government's efforts to impose criminal sanctions on violators.[71]

Thus, the courts that have directly addressed the issue have held that the Administrator may commence criminal proceedings without having to take prior action once a violation is found.[72] Neither the statute's language nor the legislative history compels this conclusion, but

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[64] *Id.* at 1183 (citing Representative Harsha's remarks, LEGISLATIVE HISTORY, *supra* note 44, at 530).

[65] LEGISLATIVE HISTORY, *supra* note 44, at 114.

[66] 391 F. Supp. at 1184.

[67] 12 ENV'T. REP. CAS. 1444 (E.D. Pa. 1978).

[68] *Id.* at 1445.

[69] *Id.* at 1446.

[70] 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

[71] *Id.* at 1126.

[72] *But see* Illinois *ex. rel.* Scott v. Hoffman, 425 F. Supp. at 77, in which the court said, but only in dictum, that the FWPCA requires the Administrator to take prior action before instituting criminal proceedings.

the decisions are supported by the courts' stated policy of refusing to impede the criminal enforcement effort. If courts follow these precedents, EPA could seek criminal sanctions without first having to issue an abatement order or take civil action. This streamlining of enforcement procedure will facilitate prompt criminal prosecutions, essential both to preserve evidence of the violation and to ensure the greatest amount of deterrence.[73] Moreover, if EPA is not required to engage in a two-step enforcement procedure—first issuing an order and then deciding whether to prosecute—it can quickly bring charges against a violator. This streamlined process would lead to greater deterrence of potential violators who would not have the benefit of first receiving an abatement order before having to comply with discharge regulations.[74]

These decisions are of particular importance in light of the dwindling EPA resources. The threat of immediate criminal prosecution will deter a greater number of potential violators. Such additional deterrence is necessary to prevent dischargers, aware of EPA's inability to prosecute all violators, from disregarding permit requirements.

C. THE ROLES OF THE DEPARTMENT OF JUSTICE AND THE ENVIRONMENTAL PROTECTION AGENCY

Because of diminished EPA resources and enforcement efforts,[75] the pollution abatement program will be weakened unless other government agencies and departments enforce water pollution laws. A recent decision[76] approving a criminal prosecution initiated by the Department of Justice (DOJ) may lead to greater DOJ participation in the enforcement effort. Such DOJ assistance could mitigate the effects of EPA's retreat from an active prosecutorial role.

In most FWPCA criminal cases, EPA investigates the alleged violation and makes the initial decision to prosecute the violator. Prior to the reorganization of EPA and elimination of the Enforcement Division, the Legal Section Chief of the regional office would confer with a litigation screening committee to decide whether criminal proceedings were ap-

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[73] The deterrent effect is reduced when there is a great delay between time of violation and time of conviction. ENFORCEMENT STRATEGY, *supra* note 40, at 1.

[74] This strategy is essential for the deterrence of single-incident, "Midnight Dumping" violations of the FWPCA, where the detection of the violation and identification of the dumper may be difficult or impossible. "Midnight dumping" occurs, for example, when a chemical disposal company unlawfully discharges toxic chemicals into a waterway. If EPA first had to issue an abatement order, then the company could possibly clean up the discharge before criminal charges could be brought. This would not deter the next company, which could discharge subject only to the risk of receiving an abatement order. If EPA prosecutes the discharger immediately upon discovery of the discharge, however, companies would be less likely to pollute.

[75] *See supra* notes 12-25 and accompanying text.

[76] United States v. Oxford Royal Mushroom Products, 487 F. Supp. 852 (E.D. Pa. 1980).

propriate for the case in question.[77] If the committee decided to commence criminal proceedings, it would prepare a Prosecution Referral Package and transmit it to the Office of the U.S. Attorney. If the Office of the U.S. Attorney decided to prosecute, it would commence the action, relying on EPA for assistance.[78]

The details of the post-reorganization procedure have not yet been resolved, but EPA will continue to refer cases to the Office of the U.S. Attorney after it has decided that criminal proceedings are warranted.[79] Thus, EPA will still investigate violations and decide initially whether the violator should be prosecuted.

EPA efforts may be supplemented by increased participation in the criminal enforcement effort by DOJ. The Department of Justice Appropriation Authorization Act, Fiscal Year 1980 (Appropriation Act) provides that "The Attorney General may, with the concurrence of any agency or Department with primary enforcement responsibility for an environmental or natural resource law, investigate any violation, of an environmental or natural resource law of the United States, and bring such actions as are necessary to enforce such laws."[80]

The court in *United States v. Oxford Royal Mushroom Products*,[81] relied on the Appropriation Act to uphold a criminal enforcement action initiated by DOJ, notwithstanding the fact that the FWPCA authorizes only EPA to act after finding a violation. In *Oxford*, the defendants were charged with, *inter alia*, violating section 1311(a) of the FWPCA. The U.S. Attorney had investigated the violation and had decided to prosecute, relying on assistance from EPA's Surveillance and Analysis Division.[82]

The defendants contended that this prosecution violated their substantive due process rights because the U.S. Attorney, not EPA, started the investigation and decided to prosecute. Rejecting this argument, the

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77 ENFORCEMENT STRATEGY, *supra* note 40, at 7-9.

78 *Id.* (In EPA memorandums and in *Oxford*, the agency and the court refer to the Office of the U.S. Attorney and DOJ as the same entity. Although it is confusing, this Comment refers to the different departments as they are referred to in the memorandums and in *Oxford*).

79 Memorandum from Acting Assistant EPA Administrator for Enforcement re: "Reporting Procedures for Investigations into Potential Criminal Violations of Environmental Statutes" at 2 (May 5, 1981).

80 Pub. L. No. 96-132 § 12, 93 Stat. 1040, 1048 (1979). The legislative history reveals that Congress intended that DOJ take a greater role in the prosecution of violators of environmental laws: "This section is meant to clarify that the Land and Natural Resources Division, under the supervision of the Attorney General, has the affirmative duty to protect the environment and to enforce environmental and natural resource laws when evidence of their violation comes to his attention from any source." S. REP. NO. 173, 96th Cong., 1st Sess. 15.

81 487 F. Supp. 852.

82 Traditionally, the Enforcement Division would assist in the prosecution. The defendants' claim was based on the fact that the Enforcement Division played an insignificant role in the investigation and prosecution. *Id.* at 856.

court stated: "While it is generally the Director of the Enforcement Division [of EPA] . . . who makes enforcement decisions for Region Three, the mere fact that the enforcement decision was made by the U.S. Attorney in this case does not render the decision constitutionally defective."[83]

In approving DOJ's decision to prosecute, the court emphasized that EPA was substantially involved in the investigative stages, the Surveillance and Analysis Division contributed heavily to the data gathering process, and the Regional Administrator of EPA acknowledged and permitted this assistance.[84] The court noted that because of "the support that the EPA provided and the concurrence in the enforcement division," it could not conclude that EPA would have proceeded in a different manner had the case been handled in accordance with the usual procedures.[85] In the absence of evidence that the Administrator's discretion was deliberately bypassed, the court held that the unusual procedure did not render the prosecution invalid.[86]

Oxford, however, does not allow DOJ to investigate and prosecute violations in total disregard of EPA's enforcement role. The Appropriation Act authorizes DOJ to act "with the *concurrence* of any agency or Department with primary enforcement responsibility for an environmental . . . law. . . ."[87] The court did not define "concurrence" but implied that initiation of proceedings by DOJ would be permissible when there was substantial cooperation between DOJ and EPA. Subsequent judicial constructions of the word "concurrence" will determine, in part, how much independence DOJ will have in the initiation of criminal proceedings. If courts hold that EPA must participate significantly in prosecutions, then DOJ's role could be minimized by EPA's current passive enforcement effort.[88] If, however, courts allow prosecutions where EPA has played an insignificant role, then DOJ could more readily prosecute violators.

By prosecuting environmental violators, DOJ could help reduce the water quality deterioration resulting from EPA's substantially diminished pollution abatement effort. DOJ has traditionally been well equipped to investigate criminal violations,[89] and, unlike EPA, has not

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83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.*

87 Pub. L. No. 96-132 § 12, 93 Stat. 1040, 1048 (1979) (emphasis added).

88 *See supra* note 17-25 and accompanying text.

89 DOJ, unlike EPA, may use the FBI to assist in the investigation of criminal violations. Interview with EPA Attorney (Jan. 31, 1982).

experienced budget cutbacks reducing its ability to prosecute.[90] It is not clear, however, what role DOJ will play in the pollution control effort. During the Carter Administration, DOJ actively prosecuted violators of the FWPCA.[91] The Attorney General, William French Smith, has demonstrated his commitment to preventing street crimes, but has not indicated whether DOJ will continue to prosecute environmental violators.[92] Because water pollution remains a serious problem, and because EPA is neither able nor willing to adequately confront it, it is imperative that DOJ investigate and prosecute violations of the FWPCA.

IV. ENFORCEMENT STRATEGIES: THE MOST EFFICIENT APPROACH

While the courts' treatment of the issues discussed above will partially determine the effectiveness of the pollution control program, another important factor is the efficiency of the enforcement approach. This section of the Comment discusses the most efficient means of inducing compliance from municipalities and corporations.

A. MUNICIPAL VIOLATORS

Municipalities affect water quality through the operation of sewage and water treatment plants. Because these facilities serve large portions of the population, they have a great impact on human health. Many municipalities do not have adequate plants. EPA estimated that sixty-three percent of major municipal treatment facilities were not yet in compliance with 1977 statutory deadlines requiring secondary treatment or more stringent treatment necessary to meet water quality stan-

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90 DOJ's funding was relatively untouched by the cutbacks in the Omnibus Reconciliation Act of 1981. [1981] 39 CONG. Q. WEEKLY REP. (CONG. Q.) 1474.

91 DOJ mounted a committed enforcement effort to deter corporate violations of the FWPCA. In 1978, it added 20 attorneys to the pollution enforcement section and streamlined enforcement procedures to allow for more effective prosecution of dischargers. *See Federal Enforcement, supra* note 33, at 597-99.

92 The Attorney General's public statements have been directed "almost exclusively toward drug traffic and violent crime." Wall St. J., Sept. 28, 1981, at 29, col. 3. Moreover, the Attorney General's Task Force on Violent Crime recently recommended that the federal government devote more resources to law enforcement at a time when most other domestic programs are being cut back. N.Y. Times, Aug. 18, 1981, at A14, col. 1.

DOJ appears less committed, however, to the prosecution of white-collar criminals. Although the Reagan Administration has not publicly announced the decreased emphasis on white-collar crime, critics in law enforcement believe resources are being diverted elsewhere. Wall St. J., Sept. 28, 1981, at 29, col. 3. DOJ plans to dismiss 50% of the "economic-crime specialists" currently responsible for investigating white-collar crime. *Id.*

Regarding the Clean Air Act, Stephen Ramsey, DOJ chief of environmental enforcement, stated that while the number of cases litigated—civil and criminal—would decrease, use of criminal sanctions would increase. [1981] 12 ENV'T REP. (BNA) 895. DOJ has not said, however, whether it will continue to prosecute violators of the FWPCA.

dards.[93] Further, over twenty percent of the community water supply systems violated the maximum levels of microbiological contaminants, turbidity, and chemical-radiological contaminants allowed under EPA's Interim Primary Drinking Water Regulations.[94] Because contaminated water supplies have been shown to cause human illness and disease,[95] it is essential that municipalities comply with pollution regulations.

Municipalities and their subdivisions are subject to civil and criminal liability under the FWPCA and the Refuse Act, but courts have rarely held them criminally liable.[96] In *United States v. Dexter Corp.*,[97] the court reversed the criminal conviction of the North Shore Sanitary District, an Illinois municipal corporation. Co-defendant Dexter Corporation discharged refuse into the municipal sewer system after a heavy rainfall had flooded the sewage system, causing the untreated refuse to enter Lake Michigan. The Sanitary District was convicted under section 407 of the Refuse Act and fined $500. The Seventh Circuit reversed the conviction on the ground that the statute exempted from liability dischargers of refuse matter "flowing from the streets and sewers and passing therefrom in a liquid state."[98]

In *United States v. City of New Albany*,[99] the former superintendent of a municipal treatment plant pleaded guilty to charges of filing false dis-

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93 *Environmental Quality, supra* note 2, at 131.

94 *Id.* at 116.

95 *Id.* at 86. The CEQ report studied the impact on health of dangerous chemicals, such as carbon tetrachloride, found in drinking water supplies, concluding that "medical and scientific evidence suggests that there are no safe levels of exposure." *Id.* The report further stated that different synthetic compounds, if ingested in small quantities in water, could cause dizziness, nausea, and sometimes blindness. The report then discussed such factors as level of exposure, toxicity of the chemicals and other factors which affect the severity of the illnesses.

96 Indeed, there has been little enforcement—civil or criminal—against municipalities. Stephen Schroeder, former EPA enforcement attorney, testified at the EPA enforcement program hearing held by a subcommittee of the Senate Committee on Environmental and Public Works, stating that in light of the fact that municipal facilities significantly affect water quality, EPA has unwisely failed to enforce the FWPCA against municipalities and other government agencies. Schroeder stated, "there has been virtually no formal enforcement" against government facilities. [1979] 10 ENV'T REP. (BNA) 146.

97 507 F.2d 1038 (7th Cir. 1974).

98 *Id.* at 1040. The Refuse Act provided this exception because the Act was originally aimed at preventing the discharge of any refuse which impaired navigation, not abating industrial water pollution. *See supra* notes 31-33 and accompanying text. In 1960, however, the Supreme Court interpreted this language of the Act to prohibit discharges of pollutants not within the traditional category of hindrances to navigation. United States v. Republic Steel Corp., 362 U.S. 482 (1960). *Republic Steel* did not resolve the construction of the exception; the Court held that the exception applied to domestic sewage or other liquids in suspension but did not include liquids in solution. Several courts have since limited the exception to sewage. *See White Collar Crime, supra* note 40, at 355. Still other courts, such as the Seventh Circuit in *Dexter*, have held that the exception included untreated industrial wastes. *See generally, Federal Enforcement, supra* note 33, at 578.

99 *Summarized in* [1978] 9 ENV'T REP. (BNA) 485.

charge reports to EPA, while the city pleaded *nolo contendere* to similar charges. The discharge reports, signed by both the former superintendent and the mayor, stated that the city was discharging effluents in compliance with its permit condition. The former superintendent was fined $1,500, while the city was ordered to pay only $20 in court costs.[100] Despite the fact that the mayor signed the reports, the court refused to fine the city, stating that the mayor did not know that the reports were false.[101]

In *United States v. Little Rock Sewer Committee*,[102] the court upheld the conviction of the Sewer Committee for knowingly filing a falsified discharge report. The Plant Superintendent who had falsified the reports was convicted under section 1319(c)(2) and sentenced to one year of probation.[103] Although no committee member knew that the reports were falsified, the Committee was placed on probation for two years, subject to the maximum fine if it failed to bring the sewage system into compliance within a reasonable time.[104]

Dexter, New Albany, and *Little Rock* illustrate that criminal sanctions have not been successfully invoked against municipalities and their employees. First, few prosecutions have been brought. Second, municipalities can avoid liability under the Refuse Act's exemption. Third, courts have imposed insignificant penalties for criminal violations.[105] It is not clear, however, why courts have been reluctant to impose substantial criminal sanctions on municipalities. Perhaps it is unrealistic to expect one government official—a judge—to imprison another government official—a municipal officer—for a violation of a water pollution regulation. Finally, "[I]t is difficult to force a city to pay a fine to the federal treasury, and without an effective and credible sanction, EPA is in a poor bargaining position with errant municipalities."[106]

There are fewer barriers to the imposition of civil sanctions against municipalities. Recent decisions have rejected arguments that 33 U.S.C. § 1321(b), imposing liability on "any owner, operator, or person" in charge of a facility from which oil is discharged, does not apply to

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100 *Id.*

101 *Id.*

102 460 F. Supp. 6 (E.D. Ark. 1978).

103 United States v. Ouelette, 11 ENV'T REP. CAS. 1350 (E.D. Ark. 1977).

104 Judgment and Commitment Order, United States v. Little Rock Sewer Committee, 460 F. Supp. 6 (E.D. Ark. 1978). After the conviction, the Sewer Committee implemented new procedures and authorized the construction of additional facilities which doubled the plant's capacity. With these improvements, the plant's performance was in compliance with EPA standards, and probation was terminated twenty months after the conviction.

105 *See supra* notes 99-104 and accompanying text.

106 ENVIRONMENTAL QUALITY, *supra* note 2, at 123. Although there are no legal barriers to collection, the enforcement effort against municipalities is impeded by the fact that the government has few viable means of requiring municipalities to pay fines.

municipalities. In *United States v. Massachusetts Bay Transportation Authority*,[107] the First Circuit held that municipalities and their subdivisions are not exempt from civil liability, although section 1321 does not expressly mention "municipalities." Additionally, in *United States v. City of New York*,[108] an action to recover civil penalties imposed for the unlawful discharge of oil, the district court analyzed section 1321 and its legislative history, finding that Congress "clearly intended" that municipalities be subject to civil liability.[109]

Courts have also imposed substantial fines on municipalities. In *California v. San Francisco*,[110] the city of San Francisco was held liable for polluting state waters under a California law modeled after the FWPCA. Several unions had struck, prompting the city to close its sewage treatment plants out of fear of the danger posed by unskilled operators running the plants. In six days, the city discharged 426,470,000 gallons of untreated sewage into the bay and ocean. The surrounding waters accumulated dangerously high levels of pollutants, damaging marine life and harming several citizens. The state sued for civil penalities pursuant to the California Water Pollution Code,[111] which "implements the Federal Water Pollution Control Act."[112] At trial, the court ruled that once the State proved a violation, "it became defendant's burden to establish . . . that the amount of penalty imposed should be less than the maximum."[113] The state was awarded the maximum civil penalties of $500,000, which the trial court remitted to $350,000. The Court of Appeals found that the trial court had incorrectly interpreted

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107 614 F.2d 27 (1st Cir. 1980).

108 481 F. Supp. 4 (S.D.N.Y. 1979), *aff'd mem.*, 614 F.2d 1292 (2d Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

109 481 F. Supp. at 7. The court assessed the city fines amounting to $1,200 for five separate discharges of oil into navigable waters.

In other cases involving municipal violators, courts have construed the FWPCA in a manner which facilitates civil enforcement. In City of Baton Rouge v. United States Envtl. Protection Agency, 620 F.2d 478 (5th Cir. 1980), the city sought court review of an EPA abatement order requiring the city to submit a program to prevent the continued violation of its discharge permit condition. The court dismissed the city's petition stating that orders were reviewable only where section 1369(b)(1) of the Act specifically authorized review. *Baton Rouge*, then, allows EPA to issue abatement orders without judicial interference.

In United States v. City of Colorado Springs, Colorado, 455 F. Supp. 1364 (D. Colo. 1978), the prosecution sought to permanently enjoin the city from violating its permit condition. The city claimed that since EPA had delegated to Colorado authority over the permit system, the federal government was required to notify the state of the city's violation before bringing suit. In dismissing this claim, the court said that the "compelling public policy behind the Act" required a liberal interpretation of the FWPCA and held that the government could either notify the state or proceed directly by suing the city. *Id.* at 1366.

110 94 Cal. App. 3d 522, 156 Cal. Rptr. 542 (Ct. App. 1979).

111 CAL. WATER CODE §§ 13370, 13373, 13376, 13385 (West 1972).

112 94 Cal. App. 3d at 528, 156 Cal. Rptr. at 545.

113 *Id.* at 531, 156 Cal. Rptr. at 546.

the FWPCA and held that the maximum possible penalty was $60,000, which the court then imposed.[114]

Although the court construed the FWPCA in favor of the city by reducing the fine, the court upheld the trial court's unusual ruling on the proof of damages.[115] The court said that the alteration of the burden of proof was justified "in exceptional cases where the effectuation of public policy requires it. This is clearly such a case."[116]

Finally, the court reversed the trial court's decision that the striking unions would be liable for all of the damages under a theory of indemnity. The court held that the damages would be apportioned between the city and the unions on the basis of respective fault.

Although the effectiveness of the civil enforcement scheme will largely depend on the severity of fines imposed, the municipality's ability to pay fines, and the government's ability to collect them, civil enforcement may be the most efficient means of inducing municipal compliance. *Massachusetts Bay, City of New York*, and *California v. San Francisco* facilitate civil enforcement of pollution regulations and suggest that courts are not reluctant to impose civil penalties. In addition, civil enforcement presents fewer obstacles than does criminal enforcement since the burden of proof for civil violations of the FWPCA is "preponderance of the evidence," rather than "proof beyond a reasonable doubt."[117] Furthermore, the prosecutor does not need to prove negligence or intent since neither are elements of civil offenses under the FWPCA.[118] As one commentator noted, "Thus, pleading is simplified and the application of a civil penalty becomes a more streamlined and efficient process."[119] With fewer legal barriers and a greater likelihood of civil fines,[120] EPA should maximize its limited resources in civil actions in order to induce the greatest compliance among municipalities.

B. CORPORATE VIOLATORS

An efficient enforcement program must also ensure compliance

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114 *Id.* at 530, 156 Cal. Rptr. at 546.

115 *See supra* note 113 and accompanying text.

116 94 Cal. App. at 531, 156 Cal. Rptr. at 546.

117 O'Brien, *The Use of Civil Penalties in Enforcing the Clean Water Act Amendments of 1977*, 12 U.S.F.L. Rev. 437, 448 (1978) [hereinafter cited as *Civil Penalties*].

118 *Id.*

119 *Id.*

120 *See* United States v. Ward, 448 U.S. 242 (1980), which discusses the difference between civil and criminal fines. To determine whether a penalty is civil or criminal, courts inquire whether Congress intended to establish a civil penalty. Where Congress has so indicated, courts next inquire "whether the statutory scheme was so punitive either in purpose or effect as to negate that intention." *Id.* at 249. The Court in *Ward* found that section 1321(b)(6) of the FWPCA—which imposed penalties for discharges of oil or other hazardous substances from any vessel, onshore facility, or offshore facility—was civil in nature. *Id.* at 255.

from corporate dischargers. If potential violators perceive that EPA is unable or unwilling to enforce pollution regulations, a total degradation of water quality might result. This outcome could be avoided through an intelligent use of criminal sanctions, even if EPA prosecutes fewer cases.[121]

Courts have occasionally held corporations criminally liable for violations of the Refuse Act.[122] Although the FWPCA has provided for criminal sanctions since its passage in 1972, courts have only recently imposed liability. In *Apex Oil Co. v. United States*,[123] the Eighth Circuit broadly construed section 1321(b)(5) of the FWPCA to hold a corporation liable for its failure to notify the government about oil spills from the corporation's loading facility. While section 1321(b)(5) provides that the "person in charge" may be subject to criminal sanctions, the court said that Congress intended liability under the Act to extend to corporations.[124] Further, although only the supervisor of the loading facility witnessed the spill and no directors or officers learned of the spill until notified by the Coast Guard, the court held the corporation liable for its failure to notify the government on the ground that "the knowledge of the employee is the knowledge of the corporation."[125] While this is a basic rule of agency law,[126] its application here is significant because *Apex* marks the first time that vicarious corporate criminal liability has been imposed under the FWPCA.[127]

The broad language of *Apex*, coupled with the court's willingness to impute the knowledge of a loading facility supervisor to the corporation, suggests that other corporations may be held liable for the acts of lower level employees. Extending liability here creates "an important incentive for a corporation to train and supervise its employees on the reporting requirements of the Act."[128]

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121 *See supra* notes 19-25 and accompanying text.

122 *See The Crime of Pollution, supra* note 33, at 839-59 and *Federal Enforcement, supra* note 33, at 583-85 for an overview of criminal enforcement under the Refuse Act.

123 530 F.2d 1291 (8th Cir. 1976).

124 *Id.* at 1294.

125 *Id.* at 1295 (footnote omitted).

126 *See* RESTATEMENT (SECOND) OF AGENCY § 9(3) (1958): "A person has notice of a fact if his agent has knowledge of the fact . . . under circumstances coming within the rules applying to the liability of a principal because of notice to his agent."

127 Vicarious corporate criminal liability imposes liability on the corporation for the conduct of the employee. It did not exist at common law, but is now expressly and impliedly imposed by statute. Vicarious liability "represent[s] a use of the machinery of criminal justice to impose strict standards of performance on certain business activities which, if improperly conducted, pose a danger to the public." W. LAFAVE & A. SCOTT, CRIMINAL LAW § 32 (1972).

128 530 F.2d at 1293. One commentator argues, however, that imposing liability on corporations will not ensure corporate compliance with government regulations. The large corporation is divided into many departments and the board of directors is insulated from the daily

In *United States v. Little Rock Sewer Committee*,[129] the Sewer Committee was held liable for violations of section 1319(c)(2) under a theory of *respondeat superior*,[130] but the district court did not rely on the broad language of *Apex*. In *Little Rock*, the Superintendent of the Little Rock Sewage Treatment Plant knowingly falsified statements in his Monthly Discharge Monitoring Reports to EPA. Noting that the Sewer Committee had no knowledge of the falsification, the court nevertheless held that because the Superintendent was a high level employee, his knowledge could be imputed to the Sewer Committee under the rules of agency.[131] The court said that the public interest protected by the FWPCA was so important that the criminal provisions "should be construed and applied with a view toward achieving . . . 'maximum adherence.' "[132]

While *Apex* "could arguably be cited as authority for the broad proposition that the knowledge of even a low echelon employee may be imputed to the corporation,"[133] *Little Rock* extends liability to the corporation because the individual falsifying the reports was a high level employee.[134] Though imposing vicarious liability on different grounds, *Apex* and *Little Rock* provide support for decisions holding corporations

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operations of each department. The board can not ensure that each department complies with regulations; rather, it concerns itself with whether each department is meeting production targets and objectives. The employees, in turn, do not attempt to comply with regulations; "It is these 'immediate' goals and objectives that determine the horizons and interests of the workers there [of each department]; it is their fulfillment of them that will determine their progress up the corporate ladder." C. STONE, WHERE THE LAW ENDS 44 (1975).

Moreover, the insulation of the board prevents it from learning that violations have occurred. "[T]here is a natural tendency for 'bad news' of any sort not to rise to the top in an organization." *Id.* at 45. This problem is exacerbated by the fact that, in large corporations, it is difficult to locate the source of a violation. Thus, the board can not train employees to comply with regulations where it is unaware of violations or cannot locate their source.

129 460 F. Supp. 6 (E.D. Ark. 1978).

130 Although *respondeat superior* is ordinarily applied in civil cases only, it is a form of vicarious liability whereby "the crimes of any employee . . . become the crimes of the corporation." W. LAFAVE & A. SCOTT, CRIMINAL LAW § 33 (1972).

131 460 F. Supp. at 9.

132 *Id.* at 8. In United States v. Hilton, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), the court held the defendant corporation criminally liable for violations of the Sherman Act under a theory of *respondeat superior*. The Ninth Circuit emphasized that the Sherman Act protected such an important public interest that the application of vicarious liability to the employer was essential to "assure adherence by such [defendant's] agents to the requirements of the Act." *Id.* at 1005.

133 460 F. Supp. at 9.

134 "This Court would have trouble with such a broad proposition [stated in *Apex*]. Defendant Ouelette was a high-level employee . . . and, as such, was in charge of supervising the operation of the entire plant. Thus, imputation of his knowledge to the Sewer Committee, his employer, is consistent with normal agency rules and does not require reliance upon the principle enunciated in *Apex*." *Id.* at 9.

criminally liable for the environmental misdeeds of both low and high level employees.

1. Effectiveness of Criminal Sanctions

A crucial issue is whether the imposition of criminal liability will induce compliance through increased deterrence. If it does not, the application of *Apex* and *Little Rock* will not aid the pollution control effort.

The Apex Corporation was placed on probation for three years and fined $20,000, $15,000 of which was stayed on the condition that the corporation comply with all pollution regulations during that period. The Little Rock Sewer Committee was placed on probation for two years.[135] These sanctions induced compliance in the instant cases,[136] but an effective criminal enforcement scheme must also deter other corporations from violating the FWPCA.

Imposing criminal sanctions on corporations may not induce sufficient compliance. One theory posits that criminal sanctions are ineffective because the traditional deterrents to crime cannot be applied to a corporation. First, society can not imprison a corporation. Second, the moral stigma of the label of "criminal" is not applicable to polluting corporations; pollution has been traditionally regarded not as morally wrong, but rather as a crime merely because it has been declared illegal.[137] Moreover, because an entity, not an identifiable individual, is breaking the law, concepts of moral blame do not attach.[138] Whereas society views murderers as criminals, it has traditionally viewed a polluting corporation as merely a profit-maximizing organization which has decided either that expenditures on costly pollution control devices are simply not profitable, or that they may force the termination of the business.[139]

While this argument may be compelling for most corporate crime, it is less convincing when applied to environmental crimes. In light of the diseases, human misery, and severe damage resulting from the Love

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135 *See supra* note 104 and accompanying text.

136 *See supra* note 104.

137 Marshall, *Environmental Protection and the Role of the Civil Money Penalty: Some Practical and Legal Considerations*, 4 ENVTL. AFF. 323, 329 (1975). [hereinafter cited as *Environmental Protection*].

138 *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1366 (1979) [hereinafter cited as *Corporate Crime*]. *See also*, Coffee, *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 389-90 (1981) [hereinafter cited as *Corporate Punishment*]: ". . . the stigmatization of a criminal conviction constitutes an additional and severe penalty for the white-collar defendant. But this loss of social status is a less significant consideration for the corporate entity. . . ." (footnote omitted).

139 *Environmental Protection, supra* note 137, at 330. *See also Civil Penalties, supra* note 117, at 444.

Canal incident, for example, society should no longer view these corporations merely as organizations which made the economic decision not to take precautionary pollution control measures.[140] Pollution is a serious offense, and the stigma of criminality can be applied to organizations whose behavior endangers public health. Public concern for environmental quality has not disappeared since the advent of the Reagan Administration.[141] Moreover, corporations have demonstrated concern regarding their public image with respect to environmental issues.[142] Concern for a positive public image and the possibility that the stigma of criminality may tarnish this image may induce corporations to comply with pollution regulations.

However, because so few corporations have been convicted of water pollution violations, and because violations have rarely been as widely publicized as Love Canal, the fear of public outcry may not as yet be a sufficient deterrent to corporate violations of pollution regulations.[143]

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140 In the well publicized Love Canal incident, the Hooker Chemical Company buried toxic wastes in the Love Canal and had dumped mirex and other carcinogens into the nearby Niagara River. Because Hooker failed to take adequate precautions, these chemicals seeped into the groundwater and contaminated local water supplies. Calling the contamination a "great and imminent peril," in 1978 the New York State Health Commissioner recommended that pregnant women and young children evacuate their homes near the Love Canal. N.Y. Times, Aug. 5, 1978, at A18, col. 1. Scientists have already linked the disposal of the dangerous wastes to miscarriages and birth defects, and it is expected that additional health problems will ensue. *Id.*

141 A recent New York Times/CBS poll found that 67% of those polled wanted to maintain the present environmental laws even at the cost of impeding economic growth. "The poll suggests that the policies of the Reagan Administration, which would relax environmental laws . . . are out of tune with the sentiments of most Americans." N.Y. Times, Oct. 4, 1981, § 1, at 30, col. 3.

Moreover, contributions to public interest environmental groups have increased significantly since President Reagan's election. By June, 1981, the Sierra Club's membership increased 10% since the 1980 elections. During the previous corresponding period, membership increased only three percent. The executive director claims, "People are scared to death. We are getting money hand over fist." The National Resources Defense Council, with 45,000 members, raised $90,000 from contribution requests since the election, doubling that which it received from two mailings the previous year. [1981] 12 ENV'T REP. (BNA) 203.

142 Mobil Oil, the Chemical Manufacturers of America and other corporations have launched multimillion dollar advertisement campaigns to demonstrate their ostensible concern for a cleaner environment. The Chemical Manufacturers of America ran the following advertisement, quoting an engineer of a chemical corporation, in TIME, Dec. 21, 1981, at 1:

> [M]y company makes chemicals used by municipalities and industries to purify drinking water and treat waste-water. And that's satisfying work—helping people solve their pollution problems.
>
> Second, we're concerned with our *own* manufacturing methods. Like other chemical companies, we want to make sure that the water we discharge is safe for our rivers.
>
> Ours is. . . . And the job we're doing is improving the environment for all of us.

143 Another factor reducing the deterrent value of prosecuting corporations is the low rate of detection of violations. Typically, corporations can conceal pollution violations through the falsification of reports; it is only where the corporation grossly exceeds its permit condition that the violation will become apparent. *Corporate Punishment, supra* note 138, at 390-91.

2. *Imposition of Fines Against Corporations*

The Chicago School[144] posits that punishing the corporation, rather than the corporate official, will effectively deter corporate crime. This approach requires the establishment of fines at a level where it is more economical for the corporation to implement abatement measures than to pollute and risk incurring fines. The imposition of fines allegedly deters white-collar crime at the lowest cost to society since society expends capital to imprison an individual, while it increases its revenue through the collection of corporate fines.[145]

One commentator criticizes this approach because it punishes the innocent while sparing the culpable.[146] A large fine, which may induce the corporation to remedy its violations, would have adverse effects on others; the fine could lead to "reduced corporate solvency, and increased risk of bankruptcy, possible layoffs and closings of marginal plants, and injury to stockholders and creditors."[147] Thus, this commentator concludes:

> The Chicago School position may therefore show mercy to the corporate executive (who is saved from the possibility of incarceration by the recommendation of a corporate focus), but it imposes a harsh penalty on the less privileged classes (such as employees, consumers, and others dependent on the corporation) who bear the indirect burden of corporate penalties.[148]

More importantly, the Chicago School position, despite its conceptual validity, presents an unrealistic solution to the real problem of water pollution. Fines will not be high enough to effectuate the deter-

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144 Coffee refers to the "Chicago School" as the approach offered by Richard Posner, Gary Becker, and other commentators employing an economic analysis of crime and punishment. *Corporate Punishment, supra* note 138, at 407.

145 R. POSNER, ECONOMIC ANALYSIS OF THE LAW 236 (2d ed. 1977). *See also* Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 410 (1980). Because volumes have already been written about the Chicago School, this Comment will only briefly discuss its approach to deterring white-collar crime.

146 *Corporate Punishment, supra* note 138, at 408.

147 *Id.*

148 *Id.* However, costs are passed on to the "less privileged classes" where a corporation voluntarily alters its operations to comply with existing regulations. Any enforcement scheme which causes a firm to incur compliance costs will result in added costs being passed on to employees, consumers, and other dependents.

Nevertheless, fines and compliance expenditures result in larger costs and thus impose a greater burden on the "less privileged classes" than would be imposed for voluntary compliance expenditures alone. *See* Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 AM. CRIM. L. REV. 501, 516 (1980) [hereinafter cited as *Reflections*].

Coffee also argues that an enforcement scheme based on fines is inherently unworkable because it is impossible to establish fines at a level high enough to match the effective threat of incarceration. Thus, the deterrence level will not be as high as it would be in a scheme in which the threat of incarceration would deter corporate crime. Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419, 436-37 (1980) [hereinafter cited as *Crime and Punishment*].

rence level outlined by the Chicago School. Although large fines could reduce the number of violations,[149] they have rarely been imposed. Moreover, in light of current federal policies, it is unlikely that Congress will increase the penalties under the FWPCA and the Refuse Act.[150]

Courts imposed minimal fines, if any, on those corporations first convicted under the FWPCA.[151] Small fines may not deter corporations from violating the FWPCA because it would cost more to implement pollution control devices than to pay the fines resulting from criminal convictions.[152]

Recently, however, several courts have imposed larger fines on corporations. In *Frezzo Bros.*,[153] the corporation was fined $50,000 and the owners were fined and jailed. In *Hudson Farms*,[154] the court fined the corporation $50,000, and one official $5,000. In *Oxford*,[155] the corporation pleaded guilty and was fined $100,000, while the president was fined $100,000 and placed on probation for five years. These convictions and fines may signal a beginning of the imposition of stiffer penalties for violations of pollution laws.[156] Where the possibility of a stiffer fine may outweigh the potential profits saved from failure to comply with federal regulations, these larger fines may deter small corporations.

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149 *Corporate Crime*, *supra* note 138, at 1366.

150 The proposed federal criminal code seeks to substantially increase penalties for violations of water pollution regulations. Willful or negligent violations of discharge permit conditions, 33 U.S.C. § 1319(c)(1) (1976), would be a class E felony, punishable by fines of $50,000 per day of violation. The maximum fines would be $250,000 for individual violators and $1 million where the defendant is a corporation. The maximum imprisonment would be two years. S. 1722, 96th Cong., 2d Sess. § 1853 (1980).

Section 1617 also creates a new offense of "Endangerment": placing "another person in imminent danger of death or bodily injury, and (1) his [the violator's] conduct . . . manifests an extreme indifference to human life, or (2) his conduct . . . manifests an unjustified disregard for human life." 33 U.S.C. § 1617 (1976). For a discussion of this proposed offense, *see* Spurgeon & Fagan, *Criminal Liability for Life-Endangering Corporate Conduct*, 72 J. CRIM. L. & C. 400 (1981).

It appears unlikely, however, that Congress will pass the code, originally proposed to it in 1973. Although Attorney General William French Smith supports the proposed code, groups ranging from the Moral Majority to the A.C.L.U. have voiced serious concerns over its contents, and the Senate and House are currently divided over several key aspects of the code. CALIFORNIA LAWYER, Jan. 1982, at 17.

151 *See supra* note 135 and accompanying text.

152 *Corporate Crime*, *supra* note 138, at 1366-67.

153 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

154 12 ENV'T REP. CAS. (BNA) 1445 (E.D. Pa. 1980).

155 487 F. Supp. 852 (E.D. Pa. 1980).

156 The foregoing does not imply that all fines in recent cases have been substantial. In United States v. Hamel, 551 F.2d 107 (6th Cir. 1977), the defendant was fined the minimum of $2,500 for discharging approximately 300 gallons of gasoline onto a frozen lake. In United States v. Syncon Resins, Inc., Crim. No. 81-00138-02 (D.N.J. 1981), *summarized in* [1981] 12 ENV'T REP. (BNA) 231, the court fined the defendant corporation a total of $7,500 for three counts of unauthorized discharge of wastes into a nearby river.

Fines of this magnitude will probably have little effect on large corporations which find it more economical to risk fines than to spend substantial sums of money to comply with existing regulations. Olin Corporation provides a good example.[157] Since 1965, Olin has been convicted three times for filing false statements with the government. In 1965, Olin was convicted and fined $30,000 for filing false statements regarding kickbacks paid for drug sales.[158] In 1978, Olin was convicted and fined $40,000 for filing false documents regarding transhipments of arms.[159] These "modest" fines did not deter Olin from violating the FWPCA; in 1979, the corporation was fined $70,000, $10,000 for each of seven counts, for knowing falsification of discharge reports filed with EPA.[160] Olin's recurring violations illustrate the practical weakness of an enforcement scheme emphasizing fines; the small penalties imposed have not, and most likely will not, induce compliance from large corporations.[161]

3. Imprisonment of Corporate Officials

Theoretically, the imprisonment of corporate officials is the most effective deterrent to FWPCA violations. The threat of a prison sentence may induce corporate officials of both struggling and profitable firms to forego substantial profits in order to comply with pollution regulations.[162] While the moral stigma of a criminal conviction may not attach to corporations, businessmen, who value their standing in the community, "are likely to be especially sensitive to the stigma associated with the criminal conviction."[163]

Some commentators claim, however, that business management is not deterred by the threat of imprisonment because judges rarely incarcerate white-collar criminals. One study outlined reasons for this phenomenon.[164] When sentencing white-collar criminals, judges are

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157 *See Reflections, supra* note 148, at 517-18.

158 *Id.* at 518.

159 *Id.*

160 United States v. Olin Corp., 465 F. Supp. 1120 (W.D.N.Y. 1979).

161 One commentator states: "[J]udges are frequently reluctant to impose massive fines on culpable corporations for fear of injuring innocent stockholders." *Reflections, supra* note 148, at 516 (footnote omitted). *See infra* notes 164-70 and accompanying text.

162 *Corporate Crime, supra* note 138, at 1245.

163 H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 356 (1968). *Accord, Corporate Crime, supra* note 138, at 1245-46.

Furthermore, where the corporation's actions subject a substantial portion of the community to health dangers, the community will be even more likely to regard the perpetrator as a culpable individual.

164 Mann, Wheeler & Sarat, *Sentencing the White-Collar Offender*, 17 AM. CRIM. L. REV. 479 (1980), summarized the results of interviews with 51 federal district judges on their perception of the role and purposes of sentencing white-collar criminals.

concerned primarily with preventing others in a similar situation from committing the same act.[165] Despite this avowed concern, judges refrain from imprisoning white-collar defendants for several reasons. "Most judges share a widespread belief that the suffering experienced by the white-collar person as a result of apprehension, public indictment and conviction, and the collateral disabilities incident to conviction—loss of job, professional licenses, and status in the community—completely satisfies the need to punish the individual."[166] In addition, judges may feel that a businessman will react more adversely to prison conditions than would other criminals.[167] Judges may also be reluctant to imprison a white-collar criminal because imprisonment would cause hardship to innocent parties, particularly the defendant's family.[168]

Finally, the study cited ease of restitution as a factor reducing the liklihood of incarceration.[169] Because white-collar defendants typically enjoy a comfortable financial position or have significant earning potential, the defendant could compensate victims of white-collar crimes. Incarcerating the defendant, however, would greatly reduce his ability to compensate the victims. Thus, the study concludes, these factors "bring the judge to a lesser sanction [fines and probation] than would be called for by the deterrence rationale [imprisonment]. . . ."[170]

Environmental crimes, however, present additional considerations which should make judges less reluctant to imprison polluters. Whereas most white-collar crimes, such as securities fraud cases, cause financial damage, illegal discharges can also lead to public health hazards. When a corporate official authorizes the dumping of chemicals which leads to increased cancer rates, miscarriages and other health problems, the "need to punish the individual" has not been satisfied merely by an indictment and conviction.

Moreover, the role of restitution is quite different for environmental

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165 *Id.* at 482.

166 *Id.* at 483-84.

167 *Id.* at 487. One judge said: "[T]he type of existence that jail provides is more hard [sic] on people who are accustomed to the better existence than it is on people who may not be fed as well in their homes as they are in jail. . . . [T]he judge empathizes more with a white-collar person whose hardships you can understand, because a lifestyle is more like his or her own, than someone whose lifestyle you really can't understand." *Id.*

168 *Id.* This discriminatory approach of sentencing white-collar criminals assumes that the white-collar criminal is more likely to have a family which would suffer from his imprisonment than would other criminals.

169 *Id.* at 489.

170 *Id.* at 486. Although not explicitly stated, the study implies that these lesser sanctions reduce the level of general deterrence because potential violators know that it is not likely that they will be imprisoned for violations.

crimes than for most white-collar crimes.[171] An individual convicted of securities fraud may make full restitution to victims by paying them the amount they were defrauded. An individual who becomes terminally ill as a result of a chemical company's violations, however, will never be fully compensated no matter how much money he receives from the violator.

Finally, because of the possibility of serious illness and the difficulty of reparation, there is a greater need to prevent pollution violations from occurring. Since the damage caused by water pollution often cannot be remedied, judges should imprison corporate officials to ensure deterrence of potential violators.

Indeed, several courts have taken steps in this direction. In *United States v. DeRewal*,[172] the president of a waste disposal company was convicted of authorizing the pouring of liquid wastes into a storm sewer which emptied into the Delaware River near a Philadelphia water plant. The court sentenced DeRewal to six months in jail, placed him on probation for four and one-half years, and fined him $20,000.[173] In another case involving extreme health dangers, *United States v. Distler*,[174] the president of a disposal company was convicted of authorizing the dumping of toxic chemicals into the Louisville sewage system. As a result of the discharge, 161 citizens had to be treated for exposure to the toxic chemicals.[175] Upon conviction, the court sentenced Distler to a two year term and fined him $50,000. In a case posing less severe health dangers, *United States v. Frezzo Bros.*,[176] the owners of a mushroom growing and manure composting company were convicted for the discharge of manure-rich water into a nearby stream. The court sentenced the defendant owners to thirty days imprisonment.[177]

Cognizant of the dangers of water pollution, these judges were apparently convinced that the violators had not been sufficiently punished by an indictment and conviction alone. Judge Allen, in his sentencing of Distler, said, "No defendant to come before the court has exhibited a more callous and flagrant disregard for the safety and lives of vast numbers of citizens of this area than the defendant."[178] The judges recog-

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171 One of the judges interviewed cited a securities fraud case as an example of the ease of restitution in the white-collar context. *Id.* at 491.

172 Crim. No. 77-287 (E.D. Pa. 1978), *summarized in* [1979] 9 ENV'T REP. (BNA) 405.

173 *Id.*

174 Crim. No. 77-00108-01 L (W.D. Ky. 1979), *summarized in* [1979] 9 ENV'T REP. (BNA) 1649, *aff'd*, No. 79-5339 (6th Cir. Feb. 12, 1981).

175 Transcript of Sentencing at 9 (W.D. Ky. 1979).

176 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

177 For further discussion of *Frezzo Bros., see Criminal Prosecution, supra* note 40, at 983.

178 Transcript of Sentencing at 9 (W.D. Ky. 1979), reported in *Federal Enforcement, supra* note 33, at 607.

nized that more severe sanctions were necessary to deter the criminal behavior.

C. AN EFFICIENT CRIMINAL ENFORCEMENT APPROACH

The water pollution enforcement scheme must maximize the utility of water pollution laws, particularly since EPA now has fewer resources to expend on the costly and time consuming process of prosecuting violators.[179] EPA has begun to formulate an efficient enforcement program. One enforcement memorandum outlines the factors to be considered when deciding whether to commence criminal proceedings.[180] Two important factors are harm to public health and harm to the environment.[181] The memorandum stresses that where environmental harm is minimal, criminal proceedings should not be commenced although there has been a violation.[182] However, where the violations subject the public to serious health dangers, then criminal proceedings are warranted. The prosecution of Distler and DeRewal appears consistent with this efficient approach.[183]

Significant economic damage is another factor supporting the initiation of criminal proceedings.[184] In *Distler*, the government spent over $1,500,000 cleaning up the discharged chemicals and the polluted sewage system.[185] This type of costly violation could be deterred if potential violators were made aware of the possibility of imprisonment for such violations.

The memorandum also emphasizes the deterrent effect of criminal proceedings: "[L]ong histories of non-compliance or unwillingness to comply with administrative action should be considered for criminal

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179 "The cost of trial in pollution cases is often burdensome on the government. In the *Distler* case the trial began on November 9, 1978 and lasted through December 26, 1978. There were over six thousand pages of transcript with five volumes of pretrial proceedings (footnote omitted). *Federal Enforcement, supra* note 33, at 609. Although unable to give a precise figure, one EPA staff member said that the cost of investigating and prosecuting violators can range from "a couple thousand dollars to hundreds of thousands of dollars." Interview with EPA Attorney (Jan. 31, 1982). Some violations require only minimal investigation and short trials. "Midnight dumping" violations, however, might require considerable investigation and technical analysis to identify the violator, and a lengthy trial might follow. The major costs in criminal prosecutions are expenditures for attorney time, sampling and analysis costs, paper and administrative costs, and costs in hiring experts. *Id.*

180 *Enforcement Strategy, supra* note 40.

181 *Id.* at 3, 4.

182 *Id.* at 4, 5.

183 Although some might question the "efficiency" of ignoring minor criminal violations, such an approach is essential where the number of actions brought is limited. Ideally, EPA should prosecute all violators, but such an approach is impossible within budgetary constraints.

184 *Enforcement Strategy, supra* note 40, at 3.

185 Transcript of Sentencing, at 9 (W.D. Ky. 1979).

prosecution to deter other members of the regulated community from adopting similar courses of action. . . ."[186] It is imperative that the "regulated community" realize that significant violations of FWPCA will be prosecuted and that civil sanctions are not EPA's exclusive remedy.

Thus, the memorandum realistically assesses the limits to EPA's enforcement effort. Because all violators cannot be prosecuted, EPA must prosecute in those cases in which it can minimize the water deterioration likely to ensue from the relaxed water pollution control program.

V. THE USE OF STIFFER CRIMINAL PENALTIES: EXPANDING CRIMINAL ENFORCEMENT POSSIBILITIES

Although criminal enforcement of water pollution regulations has been based almost exclusively on the FWPCA and the Refuse Act, EPA is now starting to rely on other laws which impose stiffer penalties. The imposition of severe sanctions could induce compliance through increased deterrence, even if the number of prosecutions decreases.

EPA can apply several felony provisions to monitor the discharge of pollutants. 18 U.S.C. § 1001 provides:

> Whoever . . . knowingly and willfully falsifies . . . a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.[187]

Section 1001, a general prohibition against fraud, can be applied to prosecute knowing and willful falsification of discharge reports. Although 33 U.S.C. § 1319(c)(2) of the FWPCA also prohibits knowing falsification of discharge reports, prosecutions pursuant to section 1001 have the advantage of a stiffer penalty—a maximum fine of $10,000 and/or five years imprisonment—than that provided for under section 1319(c)(2).[188]

EPA can also prosecute under 18 U.S.C. § 371, a conspiracy provision:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States . . . and any one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. . . .[189]

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[186] *Enforcement Strategy, supra* note 40, at 6. The memorandum also states that the "Motive and Intent" of the violator is a factor in deciding whether to criminally charge the offender.

[187] 18 U.S.C. § 1001 (1976).

[188] *See supra* note 37 and accompanying text.

[189] 18 U.S.C. § 371 (1976).

Section 371 can be used to deter pollution violations; when a discharger has violated its discharge permit conditions, EPA may claim that the violation was part of a conspiracy to defraud EPA of its lawful regulatory function.

EPA has begun to prosecute dischargers under these stiffer laws for alleged violations of various permit regulations. In *United States v. Olin Corp.*,[190] the corporation and three corporate officers were charged with making false statements regarding the reporting of discharges. The corporation was authorized under its permit to discharge small quantities of mercury into the Niagara River. The reports submitted to EPA stated that the corporation was discharging only permitted amounts of mercury, when it was actually discharging more than the permit allowed. The corporation and the officials were charged with violations of 18 U.S.C. § 1001, 18 U.S.C. § 357 and 33 U.S.C. § 1319(c)(2). Although the defendants were found guilty under 33 U.S.C. § 1319(c)(2), they were acquitted of the felony charges.[191]

In *In re Grand Jury Proceedings: FMC Corp.*,[192] the corporation, its legal counsel, and an environmental manager were charged with violations of 18 U.S.C. § 371, 18 U.S.C. § 1001 and 18 U.S.C. § 1505 (obstruction of agency proceedings),[193] for misrepresentation and withholding information about tetrachloride discharges into a nearby river. The corporation pleaded guilty to the charges while the prosecution dropped charges against the two employees.[194] The corporation was fined $35,000 and ordered to create an escrow account of $1 million, which was to be used to study water pollution and its effects on human health.[195]

Dropping charges against employees is contrary to the goal of deterring violators, but the $1 million escrow account may have been a sufficient penalty in this case. Because the maximum fine under the felony provisions is no larger than that allowed under section 1319 of the FWPCA, felony charges are employed primarily for the possibility of imposing longer prison sentences. This benefit, however, cannot be realized with corporations, which can be fined but not imprisoned.[196]

EPA can also initiate criminal proceedings for violations of 18

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190 465 F. Supp. 1120 (W.D.N.Y. 1979).

191 *Id.*

192 Crim. No. 79-1481 (E.D. Pa. filed Feb. 26, 1980), *summarized in* [1980] 11 ENV'T REP. (BNA) 1021.

193 18 U.S.C. § 1505 (1976).

194 Crim. No. 19-1481.

195 As an alternative or supplement to fines, EPA may settle a case by having the violator create an escrow account. This practical approach ensures that money is paid not to the United States Treasury, but rather is used to study water pollution.

196 As the FMC case demonstrates, however, EPA may employ the felony provisions

U.S.C. § 401(3), a criminal contempt provision.[197] In *United States v. Corning Fibers*,[198] the corporation and its vice-president pleaded guilty to charges of unauthorized discharges (33 U.S.C. § 1319(c)(1)), knowing falsification of reports (33 U.S.C. § 1319(c)(2), 18 U.S.C. §§ 1001, 1002) and the willful violation of a civil consent decree (18 U.S.C. § 401(3)). The defendant corporation had signed a consent decree four years earlier requiring modifications in the operation of its paper mill. The corporation, however, continued operating the mill without installing the required equipment, thereby violating the consent decree, which led to the contempt charges.[199]

Thus, the felony provisions may provide severe sanctions for violations previously deemed misdemeanors under the FWPCA. It is unclear, however, whether this approach will deter discharges. Of critical concern are the issues of whether the courts will apply the felony provisions and whether they will impose substantial penalties. If courts do impose stiffer sentences, EPA would be able to deter potential violators through the threat of severe sanctions.

VI. CONCLUSION

Budget cutbacks, deregulation, and an unconcerned EPA Administrator have substantially undermined the federal water pollution control effort. The dismantling of pollution abatement programs comes at a time when society is producing and discharging more toxic chemicals than ever before. Unless EPA maximizes its diminished resources in an effective enforcement scheme, the Reagan Administration's rejection of a strong environmental effort will likely lead to significant degradation of the nation's waterways.

MARK W. SCHNEIDER

against corporations as an inducement for violators to settle cases by the creation of large escrow accounts.

197 18 U.S.C. § 401(3) (1976), provides that a court may "Punish by fine or imprisonment, at its discretion" for contempt.

198 Crim. No. 81-00055-1 (D. Vt. July 29, 1981).

199 The court has not yet sentenced the defendants.