Environmental Liability: From Pinstripes to "Pen" Stripes

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"I thought it was okay! Hell, it's the way we... the company...had been doing it for years."

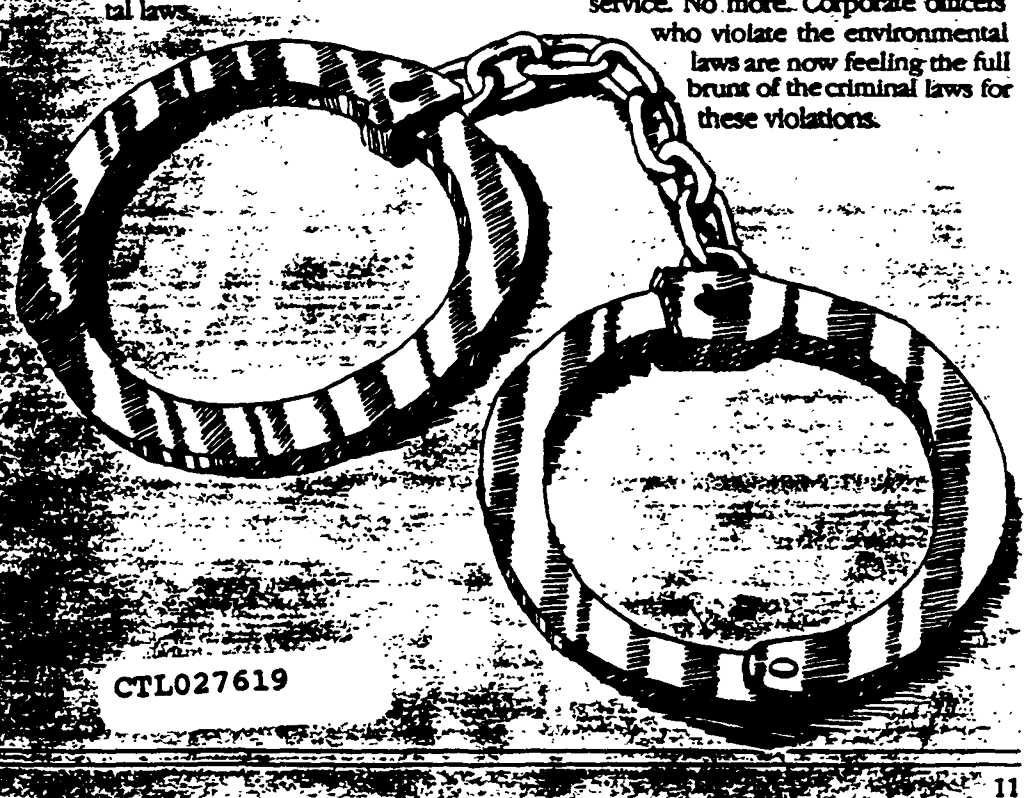
(Plant Manager)

Sure, I'd heard about the practices and problems of the facility. I told the facility manager to fix it to follow the company's environmental policy. [illegible]

The casual attitude toward environmental compliance illustrated by the two representative statements above indicates a potentially costly mistake--a mistake which could be avoided. Astute corporate officers are now coming to realize that they can and will be held accountable for environmental violations in which they directly or indirectly participate or which occur in the business areas for which they are directly responsible. Ignorance of the law and regulations or willful blindness to the activities which resulted in the violations is no excuse. Adoption of corporate environmental policies and delegation of compliance duties to subordinates will probably not suffice to protect senior management from potential liability for noncompliance. There must also be control, oversight and follow-through. Environmental audits are increasingly the approach taken by corporations to protect themselves and their management against the harsh liabilities that can be imposed under the environmental laws.

Increased Enforcement Activity

The Department of Justice (DOJ) and Environmental Protection Agency (EPA) have substantively and significantly increased both their civil and criminal enforcement activities. With the help of the FBI and its own agents in the National Enforcement and Investigation Center (NEIC), EPA has each year set new records for assessing penalties and gaining indictments for violations of the environmental laws. On the civil side, since 1984, EPA has imposed more than $110 million in penalties...$35 million of which have been assessed only in the last year or so. As significant as this growth in civil penalties is, it pales in comparison to the rapid run-up in criminal prosecutions. Traditionally, courts have been reluctant to sentence first-time white collar offenders to criminal penalties for environmental offenses. If not acquitted, such defendants were typically sentenced to probation or community service. No more. Corporate officers who violate the environmental laws are now feeling the full brunt of the criminal laws for these violations.



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As was recently reported, since 1983, 520 indictments for violations of the environmental laws have been obtained, resulting in more than 400 convictions.

EPA and DOJ have increasingly focused on pursuing the "highest senior corporate officials responsible" for the specific activity which resulted in the violations. During fiscal 1988, defendants, most of whom were corporate officers, were sentenced to a total of 39 years of imprisonment and fined $7 million. During the first half of fiscal 1989, that conviction and penalty rate increased to 31 years and $9 million, respectively. This trend is very likely to continue. DOJ's announced policy is "...to conduct environmental criminal investigations with an eye toward identifying, prosecuting, and convicting the highest ranking truly responsible corporate officers." This policy is in line with recent congressional policy which has been to increase the severity of statutory penalties imposed under the environmental laws.

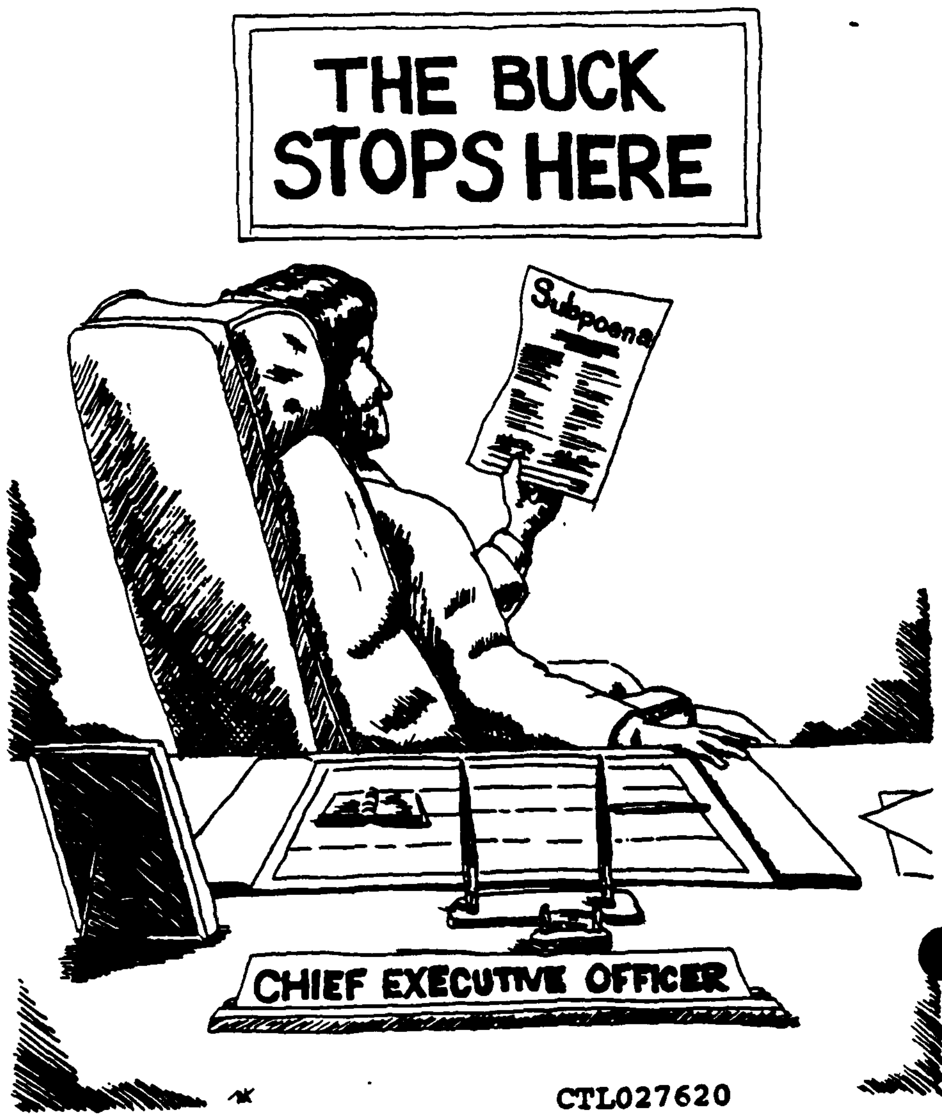
Clearly the expectation of Congress and the executive branch is that stiff criminal penalties against corporate officers will act as a major deterrent to others and lead to more voluntary compliance with the country's environmental laws. Coupled with DOJ's increased enforcement activity and the Congress' willingness to legislate stiffer criminal and civil penalties for violations of the environmental laws, there have been a number of cases in which the government has chosen to prosecute corporate officers criminally instead of civilly. Moreover, the courts, with respect to the "knowing" element of criminal offenses, have permitted juries to infer such "knowledge" as to those individuals who hold the requisite responsible position with the corporate defendant.

Civil Liability

As a general rule, any person who violates the environmental laws or regulations can be held strictly liable to pay civil penalties of up to $25,000 per day. "Strict liability" means that you can be penalized for a violation even if you exercised due care and made a good faith effort to comply. In addition, the statutes usually specify that responsible persons are liable for all costs of hazardous waste site clean-ups, regardless of the fact that the person complied with all environmental laws. These penalties and cleanup costs can be very expensive civil liabilities.

Since the laws impose civil liability on the "person who violates" the law, or the "person who arranges" for the disposal of the hazardous substance, the liable "persons" can include either the corporation (which is viewed as a legal person) or the human beings who were actually involved in the relevant action. Usually, the agency sues the corporation, because it is the corporation which owns and operates the business, which benefited by the activity in question, and which has the assets to pay the penalties, clean up the site and otherwise correct the problem. However, in appropriate circumstances, it is clear that the government can and will attempt to hold corporate officers and managers personally liable. The agencies have found that this is a very effective way of encouraging corporate compliance with environmental laws. Corporate officers, directors and environmental managers have been held liable in cases which include some or all of the following circumstances:

1. The individual actively participated in the activity in question;
2. The person had the ability or



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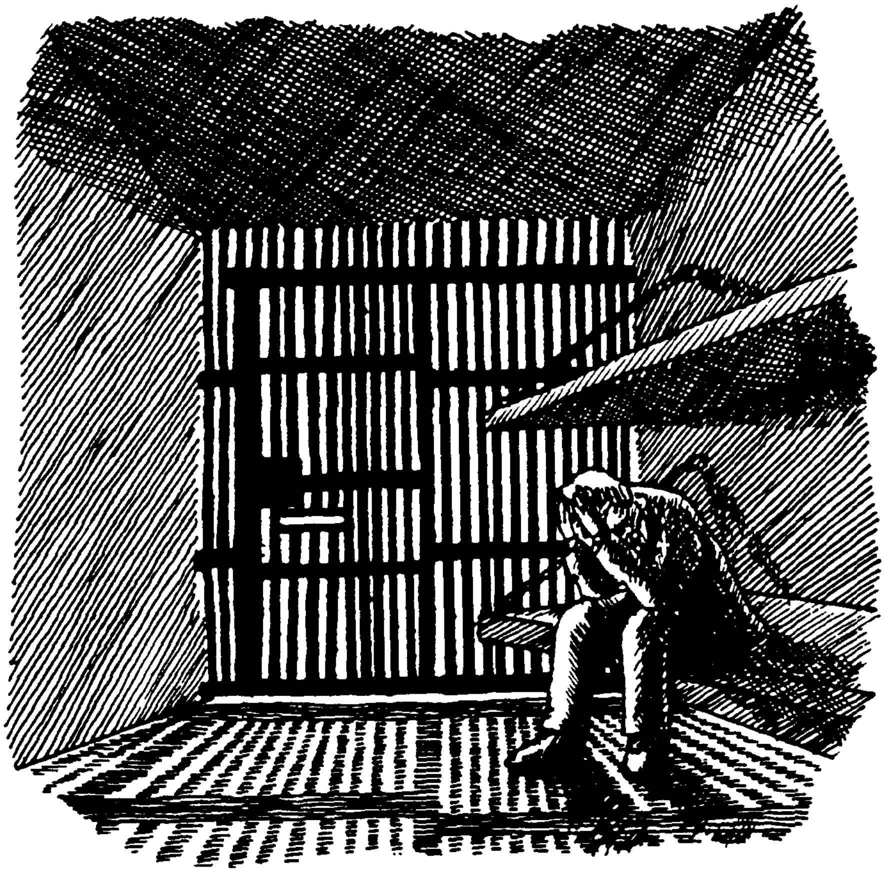

power to control the affairs of the corporation;

3. The person had the responsibility for the "day-to-day" operations of the corporation; or
4. The person had the power to correct or prevent a problem or threat and he or she failed to do so.

The cases in which senior corporate management have been held individually and personally liable have generally involved smaller and more closely held corporations in which it is more likely that the top management would be aware of, and would have participated in, the corporation's day-to-day activities. Nevertheless, the same principles apply to larger corporations. In addition, it is clear that the courts can rely on circumstantial evidence, such as the fact that an officer was "copied" on key reports and memoranda, in order to prove that the officer was involved in, or participated in, the activity.

Criminal Liability

Criminal liability under environmental statutes usually requires the government to show that the person (corporate or individual) who violated the law did so "knowingly." Unfortunately, recent criminal cases in the hazardous waste area seem to make it quite easy for the government to convict a person of a "knowing" violation. The government's position is quite simple. First, ignorance of the law and regulations is no excuse. Second, when you are dealing with chemicals or wastes "the probability of regulation is so great that anyone who is aware that he is in possession of [such materials] or dealing with them must be presumed to be aware of the regulation." This is true even though environmental regulations are extremely complex and are changing rapidly. Third, the government needs only to prove that the person had knowledge of the actions taken, and need not have actual knowledge of the law, regulations, or the possibility that the action constituted a violation.

Under the government's approach, it is entirely possible that a corporate officer or director could be held criminally accountable for activities (violations) directly under his responsibility and control which he knew of and acquiesced in. Participation, authorization and acquiescence can be given (and proven) in many subtle ways. As has been shown in some recent cases, overt statements are not necessary if less specific statements are made in compromising circumstances. For example, when a facility has been found to have disposed of free liquids, the jury was correct in finding that statements to "keep the drum count down" by the facility owner, who actively participated in the business, were sufficient to support a finding that the owner, while not clearly ordering the dumping of the liquids, had indirectly done so by insisting that "the waste be disposed of quickly and inexpensively and without regard to the legal niceties."

Acquiescence, as opposed to tacit authorization, is another way corporate officers can be held liable. A corporate officer "acquiesces" in a crime when he is aware of the criminal activity by his associates or subordinates and willfully fails to take action to stop them. The difference between authorizing a criminal act and acquiescing in one is the difference between "approval" and willful blindness. Generally a corporate officer will not be held liable for "acquiescence" unless he had the control and authority over the subordinate committing the violation. Obviously, as an officer ascends in the corporate hierarchy, it becomes increasingly difficult to defend oneself on an allegation of acquiescence by saying he didn't possess the "requisite authority to stop the proscribed conduct." Finally, in a few but nonetheless troubling cases involving public welfare-type statutes, corporate officers have been held criminally liable notwithstanding that they did not directly "participate or acquiesce in the criminal activity of their subordinates." The Supreme Court said it this way: "The Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason

"...recent criminal cases in the hazardous waste area seem to make it quite easy for the government to convict a person of a "knowing" violation."

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of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so." United States v. Park 421 U.S. 673-674 (1975)

Generally, the criminal convictions in this area have come under federal health and safety statutes which do not require as an element of the offense a state of mind or intent on the part of the defendant. In this area there is available to the defendant the delegation of authority defense. However, to be effective, the defendant must show the proper degree of control and oversight over the subordinates' activities. Casual "follow-ups" of known environmental problems will not generally be sufficient.

Management Response - Audits

As has been noted above, EPA and DOJ are increasingly bringing criminal charges against the highest ranking responsible corporate officers. This is not to say that the government looks upon all violations equally. DOJ policy cites violations which involve 1) the discharge or dumping of hazardous waste without a permit, or 2) the misuse of the environmental regulatory apparatus through the filing of misleading or false reports, as the violations most likely to lead to criminal prosecution. According to a former DOJ prosecutor: "The biggest mistakes made by executives who have cut corners or discovered environmental violations occur when the executive... takes action to conceal the violation. Actions to conceal or to mislead the government along with substantive violations of the pollution laws, will virtually guarantee felony indictments and convictions." (emphasis supplied)

To protect their senior officers against unwitting participation in either criminal or civil violations, many corporations have undertaken periodic environmental audits of their facilities and operations. These systematic, documented, objective reviews of a corporation's operations can go a long way toward keeping senior management advised of compliance activities as well as demonstrating to the EPA that management is committed observance of the environmental la Moreover, a company's statement of policy on environmental conduct is of little value unless it is accompanied by a systematic audit program which demonstrates the company's commitment. That commitment by the company is demonstrated not only by conducting the audits in the first place, but by correcting the problems, if any, that are identified in the audit. As one mature practitioner in the area of environmental law has often stated: "An audit report which tells the corporate president that his facility is in violation is like a loaded gun, waiting to be discovered and used against him, perhaps years later. It is critical that the audit report result in action which corrects the problem and which is clearly documented. Only in this way can the gun be 'unloaded' and the audit program serve as proof of the company's commitment to environmental compliance."