The criminal enforcement of environmental laws quickly is becoming a bitter reality for corporate officers. The federal government no longer accepts burdensome costs as an excuse for corporate non-compliance with environmental laws. Indeed, that argument serves only to lengthen criminal sanctions a corporate officer faces because it shows a lack of remorse on her part. For nearly fifteen years, the United States Department of Justice concentrated its attention on civil fines and penalties to deter corporations and corporate officers from violating environmental statutes. This strategy failed, in part, because corporations often factored the fines and penalties into their cost of doing business. This made the consumer, not the corporation, bear the cost of the fines. Thus, the federal government was compelled to use criminal sanctions to ensure compliance with environmental laws.

In the mid-1980s many of the criminal sanctions in environmental laws were upgraded from misdemeanors to felonies. These

† Associate, Squire, Sanders, and Dempsey, Cleveland, Ohio. Member, Virginia State Bar; B.A. Howard University (Magna Cum Laude) 1983; University of Virginia 1986. The views expressed are solely those of the author and are not intended to be interpreted as the views of Squire, Sanders, and Dempsey. Special thanks goes to Wayne Halbleib of Mays & Valentine, Richmond, Virginia, for all of his help and to my wife, Susan, for her support and patience while I was preparing this article.

1. See UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 3E1.1 (1992). A court may reduce a sentence "[i]f the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." Id.


3. See Resource Conservation and Recovery Act, 42 U.S.C.A. § 6928(d) (West Supp. 1991). That section states that anyone criminally liable under the Resource Conservation and Recovery Act ("RCRA") shall be [s]ubject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and punishment.

Id. See Clear Water Act, 33 U.S.C.A. § 1318(c) (West Supp. 1991). This section provides that anyone criminally liable for violations of the Clean Water Act ("CWA")
changes caused a dramatic increase in the conviction rate. Most of the convictions were brought under the Resource Conservation and Recovery Act ("RCRA") and the Clean Water Act ("CWA"). These convictions have generated serious discussion regarding the criminal sanctions. More importantly, corporate America now emphasizes compliance with RCRA, CWA, and the Clean Air Act ("CAA") to avoid criminal liability.

The felony sanctions under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), however, provide for severe criminal environmental sanctions. Scholars, like corporations, often have ignored addressing the criminal sanctions under CERCLA. However, prosecutors are beginning to recognize that the felony sanctions under CERCLA are one of the most effective tools to ensure that corporations make every effort to comply with environmental laws. The purpose of this Article is to outline exactly what corporations must do to avoid criminal liability under CERCLA. This Article also seeks to outline how the felony sanctions under CERCLA developed and what a corporate officer may expect if he or she is indicted for failing to comply with the requirements of CERCLA.

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 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than two years, or by both.

Id.

4. Donald A. Carr, "Environmental Prosecution: A New World Order," Address to the American Bar Association, August, 1991. From 1983 to 1986, about 40 environmental indictments were handed down annually. In 1987, that rate increased to 127, and the number of indictments has remained at about 130 annually. Id.

5. See supra note 3 and accompanying text.

6. See, e.g., Christopher Harris et al., 23 WAKE FOREST L. REV. at 205 (stating that the federal effort to prosecute environmental crimes began with the public perception that waste problems were uncontrollable); Robert I. McMurry & Stephen D. Ramsey, Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws, 19 Loy. L.A. L. Rev. 1133, 1137 (stating that the government felt a need for criminal sanctions for environmental crimes and therefore responded with stronger sanctions).

7. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, § 103, 94 Stat. 2767, 2772 (1980), 42 U.S.C.A. § 9603(b)(3) (West Supp. 1991). This section states that any person criminally liable under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") shall, upon conviction, be fined in accordance with the applicable provisions of Title 18 or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both.

Id.

8. See supra note 6. Most of the articles written only briefly mention the sanctions under CERCLA § 103.
UNDERSTANDING THE COMPLEX NOTIFICATION SCHEME UNDER CERCLA SECTION 103

Section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") requires any "person in charge" of a facility to give notice of a hazardous substance release if she has knowledge of such a release in an amount equal to or exceeding the reportable quantity established under CERCLA section 102. After notification, the government determines the appropriate response action. CERCLA section 103 also requires immediate noti-

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Any person —

(1) in charge of a vessel from which a hazardous substance is released, other than a federally permitted release, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or

(2) in charge of a vessel from which a hazardous substance is released, other than a federally permitted release, which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]), and who is otherwise subject to the jurisdiction of the United States at the time of the release, or

(3) in charge of a facility from which a hazardous substance is released, other than a federally permitted release, in a quantity equal to or greater than that determined pursuant to section 9602 of this title who fails to notify immediately the appropriate agency of the United States Government as soon as he has knowledge of such release or who submits in such a notification any information which he knows to be false or misleading shall, upon conviction, be fined in accordance with the applicable provisions of Title 18 or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both. Notification received pursuant to this subsection or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

Id.


(a) Removal and other remedial action by President; applicability of national contingency plan; response by potentially responsible parties; public health threats; limitations on response: exception

(1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. When the President determines that such action will be done properly and promptly by the owner or operator of the facility or vessel or by any other responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section 9622 of this title. No
fication of state and local emergency response officials of highly toxic substances releases. In most instances, notification must occur within fifteen minutes after the release is discovered; "immediate notification" requires shorter delays whenever practicable.\textsuperscript{11}

The administrative requirements under CERCLA section 103 are extremely complex. A person must give notice under section 103 of any hazardous substance release of one pound or less, or of any other hazardous substance in quantities exceeding that determined by the President by regulation which may require emergency responses.\textsuperscript{12} Substances with reportable quantities established under the Clean Water Act also are subject to section 103 notification requirements.\textsuperscript{13}

There are two types of hazardous substances that are subject to reporting — listed and unlisted hazardous substances. Listed hazardous substances are substances that have the reportable quantities based on chemical toxicity and units of curies based on radiation hazard.\textsuperscript{14} If the chemical toxicity reportable quantity and the radiation hazard number differ, the lowest amount applies.\textsuperscript{15} There also are unlisted hazardous substances that must be reported. The reportable quantity for unlisted hazardous waste is 100 pounds, unless the waste exhibits extraction procedure toxicity.\textsuperscript{16} With unlisted wastes, the reportable quantity applies not only to the toxic contaminant, but

\textsuperscript{11} 40 C.F.R. § 302.1 (1991). This regulation provides that under [section 102(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("the Act") those substances in the statutes referred to in section 101(14) of the Act, identifies reportable quantities for these substances, and sets forth the notification requirements for releases of these substances. This regulation also sets forth reportable quantities for hazardous substances designated under section 311(b)(2)(A) of the Clean Water Act.

\textsuperscript{12} Id.

\textsuperscript{13} Id. § 302.4 apps. A & B.

\textsuperscript{14} Id. § 302.5.

\textsuperscript{15} Id.

\textsuperscript{16} Id.
also to the waste itself.\textsuperscript{17}

In order for a release to be subject to section 103 notification, the substance must be released into the environment.\textsuperscript{18} A release is by definition "into the environment" even if the release remains on the plant or installation grounds.\textsuperscript{19} For example, a spill from valves or tanks onto concrete pads or lined ditches that are open to the atmosphere must be reported under CERCLA.\textsuperscript{20} However, if a hazardous substance spills onto a floor of an enclosed manufacturing facility, the spill would have to be reported only if it contaminated an area outside of the facility.\textsuperscript{21}

The reporting requirements turn on the knowledge a responsible person has of the release. If all the hazardous constituents are known, notification is required where the reportable quantity of any hazardous constituent is released.\textsuperscript{22} If the constituents are unknown,
notification is required where the total amount of the mixture or solution released exceeds the lowest reportable quantity for any of the hazardous constituents.\(^{23}\) In certain circumstances, radionuclides also must be reported.\(^{24}\) The release of radionuclides that occur naturally in land holdings such as parks, golf courses, or other large tracts of land, releases that come from agricultural or construction activities, and some releases of coal and coal ash are exempt from CERCLA notification requirements.\(^{25}\)

On July 24, 1990, the reporting requirements under the Superfund Amendments and Reauthorization Act ("SARA") were extended to include not only sudden and accidental releases, but also continuous releases that are "stable in quantity and rate."\(^{26}\) The reporting under this section is "reduced reporting" requiring an initial telephone notification to the National Response Center ("NRC"), the State Emergency Response Commission ("SERC"), and the Local Emergency Planning Committee ("LEPC").\(^{27}\) The initial telephone requirements are those in which the total quantity (in curies) released is equal to or greater than either one curie or the lowest RQ of any known individual radionuclide in the mixture or solution, whichever is lower.

(c) The following categories of releases are exempt from the notification requirements of this section: (1) Releases of those radionuclides that occur naturally in the soil from land holdings such as parks, golf courses, or other large tracts of land; (2) releases of radionuclides occurring naturally from the disturbance of land for purposes other than mining, such as for agricultural or construction activities; (3) releases of radionuclides from the dumping of coal and coal ash at utility and industrial facilities with coal-fired boilers; and (4) releases of radionuclides from coal and coal ash piles at utility and industrial facilities with coal-fire boilers.

(d) Except for releases of radionuclides, notification of the release of an RQ of solid particles of antimony, arsenic, beryllium, cadmium, chromium, copper, lead, nickel, selenium, silver, thallium, or zinc is not required if the mean diameter of the particles released is larger than 100 micrometers (0.004 inches).

Id.  
23. Id.  
24. Id. § 302.6(b)(2).  
25. Id.  
26. 55 Fed. Reg. 30,185 (1990). See 42 U.S.C.A. § 9601 et seq. (1988 & West Supp. 1992). The amendment defines a "continuous release" as "a release that occurs without interruption or abatement or that is routine, anticipated, or intermittent and incidental to normal operations or treatment process." 55 Fed. Reg. at 30,185. Similarly, a release that is stable in quantity and rate is "a release that is predictable and regular in amount and rate of emission." Id.  
27. Id. The reporting requirement consists of:  
(1) Initial telephone notification;  
(2) Initial written notification within 30 days of the initial telephone notification;  
(3) Follow-up notification within 30 days of the first anniversary date of the initial written notification;  
(4) Notification of a change in the composition or source(s) of the release or in the other information submitted in the initial written notification of the release under paragraph (c)(2) of this section or the follow-up notification under paragraph (c)(3) of this section; and  
(5) Notification when a "statistically significant increase" in the quantity of
call, which is made by the person in charge of a facility or vessel, must establish a sound basis for reduced reporting as outlined by CERCLA. The informer then must identify the notification as an initial continuous release notification report. The person in charge also must provide the name and location of the vessel and the name and identity of the released material.

The initial written notification of a continuous release is to be made to the appropriate regional office of the Environmental Protection Agency ("EPA") where the facility or vessel is located, to the SERC, and to the LEPC. A follow-up notification also must occur

- the hazardous substance released over a 24-hour period represents a statistically significant increase as defined in [the definitions section].

28. Id. at 30,186. The basis must include either:
   (1) Using release data, engineering estimates, knowledge of operating procedures, or best professional judgment to establish the continuity and stability of the release; or
   (2) Reporting the release to the National Response Center for a period sufficient to establish the continuity and stability of the release.

Id.

29. Id. The regulations provide:

(1) Initial written notification to the appropriate EPA Regional Office shall occur within 30 days of the initial telephone notification to the National Response Center, and shall include, for each release for which reduced reporting as a continuous release is claimed the following information:

   (i) The name of the facility or vessel; the location, including the latitude and longitude; the case number assigned by the National Response Center or the Environmental Protection Agency; the Dun and Bradstreet number of the facility, if available; the port of registration of the vessel; the name and telephone number of the person in charge of the facility or vessel.

   (ii) The population density within a one-mile radius of the facility or vessel, described in terms of the following ranges: 0-50 persons, 51-100 persons, 101-500 persons, 501-1,000 persons, more than 1,000 persons.

   (iii) The identity and location of sensitive populations and ecosystems within a one-mile radius of the facility or vessel (e.g., elementary schools, hospitals, retirement communities, or wetlands).

   (iv) For each hazardous substance release claimed to qualify for reporting under CERCLA section 103(f)(2), the following information must be supplied:

      (A) The name/identity of the hazardous substance; the Chemical Abstracts Service Registry Number for the substance (if available); and if the substance being released is a mixture, the components of the mixture and their approximate concentrations and quantities, by weight.

      (B) The upper and lower bounds of the normal range of the release (in pounds or kilograms) over the previous year.

      (C) The source(s) of the release (e.g., valves, pump seals, storage tank vents, stacks). If the release is from a stack, the stack height (in feet or meters).

      (D) The frequency of the release and the fraction of the release from each release source and the specific period over which it occurs.

      (E) A brief statement describing the basis for stating that the release is continuous and stable in quantity and rate.

      (F) An estimate of the total annual amount that was released in the previous year (in pounds or kilograms).

      (G) The environmental medium affected by the release:

         (1) If surface water, the name of the surface water body;
within thirty days of the first date of the initial written notification.\textsuperscript{30}

If there is any change in the information submitted in the initial written or follow-up notification other than a change in the source, composition, or quantity of the release, the person in charge must provide written notification of the change to the EPA regional office in the geographical area where the facility or vessel is located within thirty days of determining the initially reported information is no longer valid. The notification should state the reason for the change and the basis for stating that the release is continuous and stable under the changed conditions.

Each year, continuous hazardous substance releases must be evaluated and documented for any changes. No report is required unless there is a change in the information previously submitted.\textsuperscript{31}

(2) If a stream, the stream order or average flow rate (in cubic feet/second) and designated use;
(3) If a lake, the surface area (in acres) and average depth (in feet or meters);
(4) If on or under ground, the location of public water supply wells within two miles.

(H) A signed statement that the hazardous substance release(s) described is (are) continuous and stable in quantity and rate under the definitions in paragraph (a) of this section and that all reported information is accurate and current to the best knowledge of the person in charge.

\textit{Id.}

30. \textit{Id.} Follow-up notification requires:
Within 30 days of the first anniversary date of the initial written notification, the person in charge of the facility or vessel shall evaluate each hazardous substance release reported to verify and update the information submitted in the initial written notification.

\textit{Id.}

If there is a change in the release, notification also must be given. If, for example, the change is in the source or composition, the source is treated as a new release and the procedures for an initial continuous source release must be followed. On the other hand, if the change is a change in the amount released and the amount exceeds the upper bound of the reported normal range, the release will be treated as a statistically significant increase in the release. If the change results in a number of releases that exceed the upper bound of the normal range, the person in charge may modify the normal range.

Modification of the normal range occurs by
(1) Reporting at least one statistically significant increase report . . . and, at the same time, informing the National Response Center of the change in the normal range; and
(2) Submitting, within 30 days of the telephone notification, written notification to the appropriate EPA Regional Office describing the new normal range, the reason for the change, and the basis for stating that the release in the increased amount is continuous and stable in quantity and rate.

\textit{Id.} at 30,187.

31. \textit{Id.} This requirement provides:
In lieu of an initial written report or a follow-up report, owners or operators of facilities subject to the requirements of SARA Title III section 313 may submit to the appropriate EPA Regional Office . . . a copy of the Toxic Release Inventory form submitted under SARA Title III section 13 the previous July 1, provided that [additional information is provided].

\textit{Id.} The additional information required includes all documents that support notifica-
Section 103 provides felony penalties for failing to notify the NRC of a hazardous substance release. 32 Under the same section, it is a felony to destroy and conceal records required by CERCLA. 33 Section 103 establishes when notice of a hazardous substance release must be made to the government. 34 In issuing regulations to enforce section 103, the President was given the power to exempt certain persons, substances, or vessels and facilities from section 103 requirements when the exempted party was required to file under a different statute, or when reporting would create an administrative burden on the NRC or another federal or state agency. 35

33. 42 U.S.C.A. § 9603(d) (West Supp. 1991). This section provides:
(1) The Administrator of the Environmental Protection Agency is authorized to promulgate rules and regulations specifying, with respect to —
(A) the location, title, or condition of a facility, and
(B) the identity, characteristics, quantity, origin, or condition (including containerization and previous treatment) of any hazardous substances contained or deposited in a facility; the records which shall be retained by any person required to provide the notification of a facility set out in subsection (c) of this section. Such specification shall be in accordance with the provisions of this subsection. 
(2) Beginning with December 11, 1980, for fifty years thereafter or for fifty years after the date of establishment of a record (whichever is later), or at any such earlier time as a waiver if obtained under paragraph (3) of this subsection, it shall be unlawful for any such person knowingly to destroy, mutilate, erase, dispose of, conceal, or otherwise render unavailable or unreadable or falsify any records identified in paragraph (1) of this subsection. Any person who violates this paragraph shall, upon conviction, be fined in accordance with the applicable provisions of Title 18 or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both.
(3) At any time prior to the date which occurs fifty years after December 11, 1980, any person identified under paragraph (1) of this subsection may apply to the Administrator of the Environmental Protection Agency for a waiver of the provisions of the first sentence of paragraph (2) of this subsection. The Administrator is authorized to grant such waiver if, in his direction, such waiver would not unreasonably interfere with the attainment of the purposes and provisions of this chapter. The Administrator shall promulgate rules and regulations regarding such a waiver so as to inform parties of the proper application procedure and conditions for approval of such a waiver.
(4) Notwithstanding the provisions of this subsection, the Administrator of the Environmental Protection Agency may in his discretion require any such person to retain any record identified pursuant to paragraph (1) of this subsection for such a time period in excess of the period specified in paragraph (2) of this subsection as the Administrator determines to be necessary to protect the public health or welfare.

34. 126 CONG. REC. 30,933 (1980).
35. Id.
Section 112 makes it a felony to knowingly provide false statements and claims against the fund established under CERCLA (also known as "Superfund"). Many times, a section 112 indictment is combined with an 18 U.S.C. § 1001 indictment which prohibits individuals from knowingly and willingly making a false statement regarding a material fact that is within the jurisdiction of a federal agency. A false statement under section 112 of Title 42 and Section 1001 of Title 18 is material if it "has a natural tendency to influence, or [is] capable of influencing, the decision of a tribunal in making a determination required to be made." By enacting CERCLA section 112, Congress recognized that accurate reporting is essential to making a notification scheme operate effectively. As noted by Congress in enacting section 311 of the Clean Water Act:

One purpose of these new requirements [self-reporting requirements] is to avoid the necessity of lengthy fact finding, investigation, and negotiations at the time of enforcement. Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay.

CERCLA section 112 provides felonies as the classification of the crime for violations thereto because false statements undermine the integrity of the self-monitoring and notification scheme. With felony convictions under sections 103 and 112, Congress's intent was clear: "[T]he time has come to declare war on toxic waste; to sign this conference report into law, and unleash a bold, new attack on the hazardous waste sites that threaten the environment of our people."
BACKGROUND TO THE PASSAGE OF SECTION 103 OF CERCLA

In 1980, Congress recognized the hazardous waste problem in the United States as a serious threat to public health. Members of Congress knew that their constituents were aware of the threat. Two polls were conducted to determine public perception of the hazardous waste problem. The first survey, prepared by Cambridge Reports for the Chemical Manufacturers Association ("CMA"), polled politically active individuals, chemical industry neighbors, and opinion leaders in government, education, and the media on the attitudes toward the industry. Their largest concern with the chemical industry was chemical waste disposal. Ninety-three percent of the individuals identified as politically active stated that they were either "extremely concerned" or "very concerned" about the disposal of hazardous waste by chemical plants. Most of the people surveyed did not think that industry was properly concerned with toxic waste. Many people thought that disposal of toxic waste was industry's least concern.

A second poll conducted for Union Carbide revealed that a substantial majority of Americans supported strengthening laws that protected workers and consumers by establishing more rigorous control over water and air pollution. The Union Carbide poll results were seen as important by Congress because nine out of ten Americans thought that the average product cost more because of regulation. However, although these statistics were important to Congress, the most compelling reason for the passage of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") was the testimony of ordinary citizens. A woman who lived near Love Canal for more than thirteen years testified:

My name is Ann Hillis. I am a wife, a mother, I live in Niagara Falls, New York. I also live close to a "dump." A dump called Love Canal. I don't want to live there anymore. I hate Love Canal. I hate my life at Love Canal. It's a strange life that I lead now, it is filled with disruption, frustrations, sleepless nights and a grip of fear that only those in similar situations can understand. We've lived in the home for 13 1/2 years. We lost a child there.

I want to tell you about my son. He's 10, he's a bright boy, he has a 91 average in school. As a baby he never required much sleep. He was put on a sedative at about age 7

42. 123 Cong. Rec. 30,940 (1980).
43. Id.
44. Id.
45. Id.
months to about 18 months. He developed rashes, frequent bouts of diarrhea and respiratory problems — always respiratory problems.

His first year at 99th Street School, built over a part of Love Canal, he was admitted to the hospital very ill. The diagnosis was acute gastroenteritis, cause unknown. After that, more respiratory infections and tonsillitis. At age 6 the tonsils and adenoids were removed but the respiratory problems did not improve and he developed asthma.

He started school last September, 7 miles across town. His school was closed due to chemicals, chemicals in the air and chemicals on the playground where he and all the children played. He started the school year off with an abscess in his nose and he was on antibiotics. He had repeated respiratory infections and bouts of asthma. By this time we the people were well aware of Love Canal as were our children. My son went into a depression, withdrawing from school, from his mother and his father, and he begged to leave. I promised that we would soon. One night last winter I got up and I looked in on him and his bed was empty. I looked all over and it was 2 a.m. I heard a cry from under the couch. My son was under there with his knees drawn up to his chin. I asked him to come out and tell me what was wrong, and his reply was "I want to die. I don't want to live here any more. I know you will be sick again and I will be sick again."46

The witness continued her testimony, noting:

They produce the chemicals. Surely they have some idea of what chemicals can do. The people of Love Canal now know what they have done. They have produced children with extra fingers, extra toes, double rows of teeth, cleft palate, enlarged hearts, vision and hearing impairment and retardation.47

Congress recognized that better legislation was required to stop the illegal transportation and disposal of hazardous waste, particularly for those individuals labeled "midnight dumpers" who dispose of toxic and hazardous chemicals in quarries, streams, forests, or spread them on open roads.48 Congress also recognized that they needed to deter individuals from filling drums with hazardous materials and dumping the drums on vacant property.49 The "midnight dumping" practice was prevalent in Massachusetts, New York, New Jersey, and Louisiana, and it appeared that the dumping practice was

46. Id. at 30,942.
47. Id.
48. Id. at 30,941.
49. Id.
likely to spread.\textsuperscript{50} Congress found it necessary to enact legislation that required notification whenever a spill or leakage occurred.\textsuperscript{51} They also found it necessary to make the failure to follow the notification procedures a crime.\textsuperscript{52}

Unfortunately, the need to enact hazardous waste legislation relatively quickly hurt the criminal aspects of CERCLA. The reporting requirements established by section 103 were an important part of CERCLA. Congress drafted section 103 to eliminate situations like those mentioned earlier in the testimony by ensuring that once the government was timely notified, they would be able to react quickly to stop the spread of a hazardous substance release.\textsuperscript{53} Congress saw such notice as a vital first step in enabling the government to respond quickly to the more significant release if the responsible parties failed to do so.\textsuperscript{54}

Supporters of the Senate version of section 103 thought, however, that there was little hope of upgrading the crime to felony status when Republican congressmen, such as Representative David Stockman, R-Mich., thought that a bigger threat than hazardous waste would be the cost to businesses of unnecessarily having to clean up a contaminated site or facility. Stockman predicted that within a year after the passage of CERCLA, congressmen would receive a letter from a company in their district that has just received a $5 million or $10 million liability suit that was triggered by nothing more than a decision of a GS-14 that some landfill, some disposal site, somewhere, needed to be cleaned up and, as a result of an investigation that [the GS-14's] office did, he found out that company contributed a few hundred pounds of waste to that site 3 years ago.\textsuperscript{55}

It was even expressed by then-Congressman Stockman that the problems at Love Canal were not that serious:

The whole rush for the superfund, of course, was triggered by the controversy at Love Canal, which itself has turned out to be far more ambiguous than first reports suggested. Even state-sponsored experts have concluded that so far there is no hard scientific evidence of health damage from the wastes.\textsuperscript{56}

In an effort to salvage the bill before a lame duck Congress, sup-

\textsuperscript{50} Id.
\textsuperscript{51} See supra note 10 and accompanying text.
\textsuperscript{53} United States v. Carr, 880 F.2d 1550, 1552 (2d Cir. 1989).
\textsuperscript{54} 126 CONG. REC. 30,933 (1980).
\textsuperscript{55} Id. at 30,947.
\textsuperscript{56} Id.
porters wanted to generate Senate action in a substitute proposal.\textsuperscript{57} The proposal sought to bridge the gap between a House-passed bill and a broader Senate version that was too controversial for passage by the Ninety-sixth Congress.\textsuperscript{58} Senators Jennings Randolph, D-W.Va., Chair of the Senate Committee on the Environment ("Committee"), and Robert Stafford, R-Vt., the Committee's ranking minority member, offered the substitute bill. Senator Stafford, who was at the time expected to be the new Committee Chair, also was the sponsor of the original Senate bill. He thought that the threat to the public from toxic waste was so urgent that a bill needed to be passed immediately.\textsuperscript{59} The other supporters thought that a new Congress and a Republican administration might be more sympathetic to industry positions on toxic wastes, thereby diminishing the chances of an effective law.\textsuperscript{60}

The difference between the original Senate bill and the House version was so great that members of Congress were concerned that a proposed compromise would cause more problems of administration and equity than the law would resolve.\textsuperscript{61} The hard-core supporters of the original bill argued that the proposed compromise gave away too much in an effort to placate the House of Representatives — which preferred its own legislation to control the toxic waste problem. Despite these problems, the compromised bill became law on December 11, 1980.\textsuperscript{62}

The compromise provided that violating reporting requirements or filing false section 103 records were only misdemeanors. The net effect of such a compromise was that the reporting requirements under CERCLA had very little or no deterrent value.

\textbf{CHANGE IN ATTITUDE FOR CRIMINAL LIABILITY UNDER SECTION 103 OF CERCLA}

On the whole, the threat of misdemeanor sanctions alone did very little to deter individuals from violating section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Moreover, the hands-off approach by the Reagan Administration's first chair of the Environmental Protection Agency ("EPA") seemed to stifle any potential development of criminal sanc-

\textsuperscript{57} See id. at 30,946.
\textsuperscript{58} See id.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} 42 U.S.C.A. § 9601 et seq. (West 1983).
isions under CERCLA. On October 29, 1982, EPA staff officials refused to give the House Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation ("Subcommittee") enforcement files on three hazardous waste sites. Consequently, the Subcommitte was compelled to subpoena the EPA Administrator and pertinent enforcement-related documents on all of the Superfund sites.

The chances of being prosecuted under CERCLA were quite slim. For example, with only the threat of a misdemeanor conviction, the Federal Bureau of Investigation ("FBI") was extremely reluctant to involve itself. Without FBI assistance, the United States Department of Justice lacked the resources to indict violators. Furthermore, the EPA lacked the criminal investigators needed to review potential CERCLA violations, and the Department of Justice lacked the attorneys necessary to prosecute CERCLA violations.

However, in the mid-1980s, attitudes began to change. The Environmental Crimes Unit in the Department of Justice was expanded, and additional EPA criminal investigators were hired. In addition, members of Congress began to realize that the hazardous waste problem in America was much larger than first thought. Initially, CERCLA was passed with a four-year life expectancy. In 1986, Congress reauthorized CERCLA through the Superfund Amendment Reauthorization Act ("SARA"). A significant part of the revision concentrated on the notification and the potential criminal penalties that could result for failure to comply with the notification scheme. Failure to notify authorities of a hazardous substance release became a felony and violators could be subjected to a three-year prison sentence. Subsequent violations could bring up to five years in prison.

64. Id. at 1336.
65. Id. at 1336-37.
66. 126 CONG. REC. 3668 (1980).
67. Id.
71. See supra note 8 and accompanying text.
72. See supra note 8 and accompanying text.
CERCLA. The penalties under this section also include a sentence of up to three years imprisonment for the first offense and five years for subsequent convictions.

Congress also enacted an entirely new regulatory scheme because of the methyl isocyanate spill from the Union Carbide plant in Bhopal, India, where thousands of people died from inhalation of fumes. The scheme was a free-standing provision of SARA and became known as the Emergency Planning and Community Right-to-Know Act ("Title III"). Title III also established felony provisions for failing to notify state and local authorities of a release.

The reasoning for increasing the penalties under section 103 is contained in the 1980 Resource Conservation and Recovery Act ("RCRA") amendments. In recommending that the penalties for violating RCRA be increased to felonies, then-Representative Barbara Mikulski, D-Md., noted that the 1980 RCRA amendments were recommended by the Department of Justice because it thought that felony sanctions would provide for more efficient use of resources. Moreover, by making such a crime a felony, Representative Mikulski thought that a corporate chief executive officer would behave more reasonably and deter violations.

The same logic apparently was at work when Congress increased CERCLA penalties. This is evident from a comparison of the testimony of Anne Hills and the testimony of Representative Toby Moffett, D-Conn., in support of enhancing the RCRA sanctions:

Mr. Chairman, I rise in strong support of the Mikulski amendment.

Hazardous waste is the biggest environmental problem of the 1980's. We are just beginning to realize the incredible magnitude of the problem when toxic wastes are disposed of in an environmentally unsound manner. For years, we have

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(1) Prescribing forms and procedures
The President shall prescribe appropriate forms and procedures for claims filed hereunder, which shall include a provision requiring the claimant to make a sworn verification of the claim to the best of his knowledge. Any person who knowingly gives or causes to be given any false information as a part of any such claim shall, upon conviction, be fined in accordance with the applicable provisions of Title 18 of the United States Code or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both.

Id.
74. Id.
77. Id. § 11045(b)(4).
78. 126 CONG. REC. § 3368 (1980).
79. Id.
ignored the disposal problem and concentrated on cleaning up the environment from pollution that is generated during actual operation. . . .

Healthwise, it is worthy of noting that the kinds of effects that one finds from human exposure to toxic chemicals, especially at low levels, are things like cancer and birth defects which are not quickly discernible. But the danger is no less great. It is important to prevent these kinds of devastating effects to befall our citizens before the danger becomes more real.80

In 1986, Congress further demonstrated its commitment to criminal sanctions under CERCLA by authorizing the President to pay an award of up to $10,000 to any individual for information leading to the successful prosecution of any person under the Act.81 The statute was considered necessary because the environmental and public health dangers associated with the illegal disposal of hazardous materials had emerged as a matter of national concern.82 To provide incentives for individuals to come forward with information concerning such illegal practices, Congress authorized the EPA to establish a program to reward citizens for providing information useful in prosecuting those involved in illegal hazardous waste activities.83 In implementing Congress's mandate, the EPA also recognized that, frequently, informants are available only when they are given the assurance that their identity will remain confidential.84 In other words, informants needed assurances to protect their privacy interest and/or employee status.85 Therefore, the EPA agreed to keep confidential any information revealed to it.

The initial determination of who is eligible for an award and the award amount are matters charged by statute to the exclusive discretion of the EPA.86 Although the EPA's determination is somewhat subjective, the EPA is to base its determination on the sound admin-

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80. Id. at 3367-68.
81. 42 U.S.C.A. § 9609(d) (West Supp. 1992). That section provides:
(d) Awards
The President may pay an award of up to $10,000 to any individual who provides information leading to the arrest and conviction of any person for a violation subject to a criminal penalty under this chapter, including any violation of section 9603 of this title and any other violation referred to in this section. The President shall, by regulation, prescribe criteria for such an award and may pay any award under this subsection from the Fund, as provided in section 9611 of this title.

Id.
83. Id.
84. Id.
85. Id.
86. Id.
istration of justice and the informant's cooperation with EPA investigators and Department of Justice prosecutors.\textsuperscript{87} 

EPA's determination is final and not subject to administrative challenges.\textsuperscript{88} In considering whether an award is appropriate, the EPA considers:

(a) Whether the claimant's information constituted the initial, unsolicited notice to the Government of the violation;
(b) Whether the Government would readily have obtained knowledge of the violation in a timely manner absent claimant's information;
(c) Importance of the case, egregiousness of the violation, potential for or existence of environmental harm;
(d) Concealment of a person criminally culpable or existence of an organized criminal conspiracy to conceal the offense(s) committed by the named defendant(s);
(e) Willingness of the claimant to assist the Government's prosecution of the offense(s), which assistance includes providing further information and grand jury testimony, participating in trial preparation, and trial testimony if consistent with the limits on claimant identity disclosure as set forth in § 303.31.
(f) Value of the claimant's assistance in comparison to that given by all other sources of information and evidence which led to arrest and conviction.\textsuperscript{89}

A claim must be filed within forty-five days after a conviction and must provide the date, name, and the title of the person to whom the information was provided.\textsuperscript{90}

\textsuperscript{87} Id.
\textsuperscript{88} 40 C.F.R. § 303.21 (1991). The Environmental Protection Agency thinks that its determination is not subject to judicial challenge, but the regulations do not state whether this interpretation is correct.
\textsuperscript{89} Id. § 303.30.
\textsuperscript{90} Id. § 303.33. This section provides:
(a) Any individual seeking an award under this regulation is required to file a claim for such an award with the Deputy Assistant Administrator for Criminal Enforcement not later than 45 days after the conviction of the person(s) involved in the prosecution in which the information was provided.
(b) The claim submission must provide, at a minimum, a summary of the information provided, the date the information was provided, and the name and title of the person to whom the information was provided.
(c) All claim submissions must be submitted to the Office of Criminal Enforcement Counsel (LE-134X), United States Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. The claim envelope should also specify whether the information was submitted under a request for anonymity and whether such request is still in effect. All such externally identified claims shall be handled in accordance with the Agency procedures for maintaining informant confidentiality, as referenced in § 303.31 of this subpart.

\textit{Id.}
WHY FELONY CONVICTIONS UNDER CERCLA SECTION 103 HAVE INCREASED

Felony convictions under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") have increased dramatically in the last two years. The reasoning for the increase is two-fold. First, convictions have increased because of the government's commitment to cleaning up the environment. In fiscal year 1990, there were thirty-three percent more indictments in all environmental areas than in 1989.\(^1\) Equally important was the fact that there was a ninety-five percent conviction rate with fifty-five percent of the individuals convicted of environmental crimes imprisoned.\(^2\) The second reason for the increase is that felony prosecutions under CERCLA for failing to notify authorities in a timely manner are combined with other criminal environmental statutes, thereby making it easier for convictions to materialize. The federal government has obtained convictions in cases involving CERCLA section 103 and the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act.\(^3\) From 1983 to 1992, the number of indictments and convictions were:

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<th>Year</th>
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\(^2\) Id.

\(^3\) See United States v. Baytank, Inc., 934 F.2d 599, 603 (5th Cir. 1991) (holding corporate defendants guilty of violating the Clean Water Act); United States v. Buckley, 934 F.2d 84, 89 (6th Cir. 1991) (holding that asbestos release violated the Clean Air Act); United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 47-48 (1st Cir. 1991) (holding that defendants violated RCRA by improperly transporting and disposing toluene waste); United States v. Laughlin, 768 F. Supp. 957, 967 (N.D.N.Y. 1991) (stating that improper storage of hazardous materials violated RCRA).

\(^4\) Memorandum from Peggy Hutchins to Neil S. Cartusciello, Chief, Environmental Crimes Section, Environmental Criminal Statistics FY 1983-91 (May 27, 1992) [hereinafter Memorandum from Peggy Hutchins].
Similarly, the statutes in which the entities were indicted under included:

**MEDIA ACTIVITY FY83-FY91**
**ENTITIES AND INDIVIDUALS INDICTED**

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95. Id.
For prosecutors, the power of combining felony sanctions under CERCLA with other environmental statutes is similar to the power they have under the felony criminal sanctions of the Internal Revenue Code ("IRC"). Like the CERCLA notification scheme, the tax system is a voluntary reporting system, and failing to report taxes accurately could subject an individual to felony sanctions. To enhance criminal sanctions against individuals that are involved in insider trading, drug trafficking, money laundering, and other areas where individuals have profited financially from their illegal behavior, prosecutors have brought tax evasion charges.

Criminal sanctions under CERCLA section 103 also are used to obtain additional convictions with other statutes. Generally, if someone knowingly releases hazardous waste without a permit, many times they also will fail to notify the proper authorities of the discharge. The reason: if they notify the authorities of the release, they would still be subjected to fines, penalties, and other enforcement actions under CERCLA. CERCLA provides that proper reporting of a release in accordance with sections 103[a] and [b] does not preclude liability for cleanup costs. The fact that a release of a hazardous substance is properly reported or that is not subject to the notification requirements of sections 103[a] and [b] will not prevent EPA or other governmental agencies from taking response actions under section 104, seeking reimbursement from responsible parties under section 107, or pursuing an enforcement action against responsible parties.

The releases often are the result of trying to avoid administrative procedures like the procedures outlined in section 103 or the costs associated with fines, penalties, and response costs. To continue to cover up the illegal release, the violator will refuse to make the CERCLA section 103 notification. Thus, like the criminal tax evasion section of the IRC, CERCLA section 103 also is used to punish deliberate violators of other environmental laws.

If the signs of being convicted under the felony provisions of CERCLA appear ominous, CERCLA violators need to take note that the chances of being convicted should increase at an unbelievable rate. The reason is that, in 1990, Congress passed the Pollution Prosecution Act ("PPA"). The PPA will increase the number of EPA

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97. Sansone v. United States, 380 U.S. 343, 348 (1965) (holding that the difference between misdemeanor offenses of willful failure to pay taxes when due and felony offense of willful attempt to evade or defeat taxes is that the felony offense involves the commission of an act in addition to the willful omission).
criminal investigators from under fifty in 1990 to more than two hundred by 1995.\textsuperscript{100} The need for such investigators was stressed by Attorney General Richard Thornburgh, who saw criminal prosecution as a way of deterring deliberate non-compliance with the environmental laws. As former Attorney General Thornburgh noted,

\begin{quote}
With callous disregard for our actions and an almost hostile view toward the environment, for nearly 200 years we seemed not to care and America took a very long journey down the road of indiscriminate pollution.\textsuperscript{101}
\end{quote}

The PPA also was enacted because the Deputy Administrator, the Inspector General of the EPA, and the Chairman of the Environmental Protection Committee of the National District Attorneys Association emphasized the need to improve training for inspections, investigators, lawyers, and technical staff.\textsuperscript{102} Consequently, the PPA also established the National Enforcement Training Institute ("Institute") within the Office of Enforcement.\textsuperscript{103} The Institute will be responsible for training federal, state, and local lawyers, civil and criminal investigators, inspectors, and technical experts in the nation's environmental law enforcement agencies.\textsuperscript{104} To carry out the functions of the PPA, Congress will increase the budget of the EPA from $13 million in fiscal year 1991 to $33 million by fiscal year 1995.\textsuperscript{105} In short, Congress and the Executive Branch have made a commitment to the nation that violations of environmental laws will not be tolerated.

THE CERCLA SECTION 103 TRIAL STAGE

Once a section 103 case reaches the courts, two critical issues must be determined before a defendant can be convicted of a felony; (1) was the defendant the person in charge of notifying the government and (2) did he or she have the necessary knowledge to be convicted? Unfortunately, insofar as the "person in charge" element is concerned, the statute and the regulations fail to define exactly who is responsible for notifying the government of a discharge that exceeds the reportable quantity.\textsuperscript{106} To understand fully who qualifies for the "person in charge" element, the same language from the Clean Water Act ("CWA") offers a great deal of assistance.\textsuperscript{107}

\begin{flushleft}
100. \textit{Id.}
101. \textit{Id.}
102. \textit{Id.}
104. \textit{Id.}
105. \textit{Id.}
106. \textit{Id.}
108. 126 CONG. REC. 98,884 (1980). As noted in the legislative history of CERCLA:
\end{flushleft}
Criminal liability under CWA section 311 goes to the status of the person as an employee, and it does not matter whether the person in charge is an owner of or an operator at the facility.\textsuperscript{108} More specifically, the term "person in charge" covers only supervisory personnel responsible for the particular vessel or facility.\textsuperscript{109} The term does not extend to lower level personnel, regardless of their knowledge. The "person in charge" must have the authority to make a timely discovery of the discharge, the authority to control the mechanisms causing the pollution, and the authority to prevent and abate damage.\textsuperscript{110} In short, the term "person in charge" applies to persons who occupy positions of power.\textsuperscript{111}

If the prosecution establishes that the defendant was the person in charge of notifying the National Response Center, the prosecution then must establish that the defendant had knowledge of the discharge.\textsuperscript{112} Establishing knowledge for convicting someone under section 103 is not too difficult. The element "knowledge" means one knows she is engaging in the statutorily proscribed acts, "not knowledge that the statutes or potential health hazards exist."\textsuperscript{113} Because handling most substances under section 103 puts "persons in charge" on notice that criminal statutes probably regulate the handling and release of the substance, knowledge may be presumed.\textsuperscript{114} In other words, all that prosecutors need to prove is the presence of the substance; they need not prove the legal status of the substance.\textsuperscript{115} The government does not have to show that there was wrongful intent or conscious wrongdoing. Moreover, the violator can even be convicted if he acted in good faith or did not have actual knowledge of the release but closed his eyes to obvious facts or failed to investigate when

\textsuperscript{108} Mr. Cannon. Section 103(a)(1) requires immediate notification to the National Response Center which was established under the Clean Water Act and has been administered by the U.S. Coast Guard. It is my understanding that the National Response Center will continue to be administered in the same fashion.

\textsuperscript{109} Also, this section requires that the notification be made by "any person in charge." It is my understanding that the term means any responsible person and will be construed in accordance with the designations presently made under the national contingency plan. Is my understanding of this section correct?

\textsuperscript{110} Mr. Randolph. Yes, it is.

\textsuperscript{111} Id.

\textsuperscript{112} Carr, 880 F.2d at 1553.

\textsuperscript{113} Id. at 1554.

\textsuperscript{114} Id. at 1554.

\textsuperscript{115} Id. at 88-89.

\textsuperscript{116} Id. at 88-89.

\textsuperscript{117} Id. at 89-90.

\textsuperscript{118} Id. at 89.
aware of facts that demanded investigation.\textsuperscript{116} However, if the person in charge thought that there was no hazardous substance, she cannot be convicted of violating section 103.\textsuperscript{117}

While convictions under section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") are relatively easy to obtain, they are even easier to obtain when combined with other environmental statutes. For example, if all of the elements to convict under either the CWA or the Resource Conservation and Recovery Act ("RCRA") are established, the government need not prove again that the violator was the "person in charge" or had "knowledge" of the release.\textsuperscript{118} All that the government needs to prove is that the amount of the hazardous substance released exceeds the reportable quantity and that the violator failed to notify the National Response Center.\textsuperscript{119} The amount of hazardous substances released can be established easily using records kept by the violator as evidence.\textsuperscript{120} Similarly, the failure to notify the National Response Center can be established easily by testimony or affidavit by the Coast Guard that no report was ever filed.\textsuperscript{121}

If a person is convicted of violating section 103, he or she will be subjected to the Federal Sentencing Guidelines.\textsuperscript{122} The federal government traditionally has used a system of indeterminate sentencing in criminal cases.\textsuperscript{123} The sentencing system was aided by parole, where an offender was returned to society under the supervision of a parole officer.\textsuperscript{124} This was especially true in the environmental area where persons convicted of violating such laws rarely served jail time.\textsuperscript{125}

The purpose of indeterminate jail sentences was to rehabilitate violators.\textsuperscript{126} However, Congress recognized that inconsistent jail sentences had two unjustified and shameful consequences.\textsuperscript{127} The first was the varying degree of sentences by different judges for the same crime. The second was the uncertainty as to how much time

\begin{itemize}
  \item \textsuperscript{116} Id. at 88.
  \item \textsuperscript{117} Id. at 88-89.
  \item \textsuperscript{118} Greer, 850 F.2d at 1452-53.
  \item \textsuperscript{119} Id. at 1453.
  \item \textsuperscript{120} United States v. Baytank, 934 F.2d 599, 614 (5th Cir. 1991).
  \item \textsuperscript{121} Greer, 850 F.2d at 1453.
  \item \textsuperscript{122} UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 2Q1.2 (1992) [hereinafter GUIDELINES].
  \item \textsuperscript{123} Mistretta v. United States, 488 U.S. 361, 363 (1989).
  \item \textsuperscript{124} Id.
  \item \textsuperscript{126} Mistretta, 488 U.S. at 363.
  \item \textsuperscript{127} Id. at 364
\end{itemize}
the offender would actually spend in jail. Congress resolved the discrepancies in sentencing by enacting a mandatory guideline system known as the Federal Sentencing Guidelines. However, before settling on mandatory guidelines, Congress also considered a strict determinate sentencing system and an advisory guideline system. Both proposals were rejected.

The new Federal Sentencing Guidelines ("Guidelines") serve five functions:

1. The guidelines now see imprisonment as punishment that should serve retributive, deterrent, educational and incapacitative goals;
2. The discretion exercised by the sentencing judge and Parole Commission is consolidated;
3. All sentences basically become determinate. A prisoner will only be released at the end of his sentence minus any credit earned by good behavior while in custody;
4. The Sentencing Commission's guidelines are binding on the court. The judge can only depart from the range set in the guidelines if there are aggravating or mitigating factors that the United States Sentencing Commission did not adequately consider when formulating the guidelines; and
5. Appellate Courts have limited appellate review of the sentence. It only permits a defendant to appeal a sentence that is above the defined range, or the government to appeal a sentence below the range. Both parties can appeal an incorrect application of the guidelines.

Section 2Q1.2 of the Guidelines covers felony convictions for violations of CERCLA section 103. Specifically, the section governs "the Mishandling of Hazardous or Toxic Substances or Pesticides: Recordkeeping, Tampering and Falsification." A recordkeeping and reporting offense under section 103 is construed broadly to include the failure to report discharges, releases, or emissions where required. Also covered under this section are (1) the failure to file required reports; (2) the failure to provide the necessary information; (3) the failure to prepare, maintain, or provide records as prescribed by law; and (4) filing false information.

The Guidelines provide that a conviction under CERCLA section 103 has a base level of eight. The base level can be increased under the following circumstances:

128. Id. at 365.
129. Id. at 366.
130. Id. at 367.
131. GUIDELINES, supra note 122, § 2Q1.3.
132. Id.
133. Id. § 2Q1.2.
(1) (A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a hazardous or toxic substance or pesticide into the environment, increase by 6 levels; or

(B) if the offense otherwise involved a discharge, release, or emission of a hazardous or toxic substance or pesticide, increase by 4 levels.

(2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 9 levels.

(3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.

(4) If the offense involved transportation, treatment, storage, or disposal without a permit or in violation of a permit, increase by 4 levels.

(5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

(6) If the offense involved a simple recordkeeping or reporting violation only, decrease by 2 levels.\textsuperscript{134}

The harsh CERCLA sentences were exemplified in \textit{United States v. Bogas}.\textsuperscript{135} In \textit{Bogas}, the defendant pleaded guilty to failing to notify the National Response Center of a hazardous substance release in violation of section 103.\textsuperscript{136} The defendant also pleaded guilty to providing false statements to federal officials.\textsuperscript{137} Although the CERCLA conviction carried a base level of eight, all other factors considered by the trial court increased the offense level to twenty-four. Thus, although the defendant had no criminal record, he faced a prison term of fifty-one to sixty-three months.\textsuperscript{138} The United States Court of Appeals for the Sixth Circuit remanded the case but noted that the most serious offense was the CERCLA violation. Furthermore, the court stated that the base level of eight was properly increased by four levels because the Guidelines draw no distinction between a defendant who causes a release and a defendant who fails to report one.\textsuperscript{139} Finally, the court affirmed the lower court's ruling that the extreme cost of the cleanup warranted increasing the level by two levels. The case was remanded to determine the cost of the cleanup.\textsuperscript{140}

On resentencing, the defendant faced up to three years in prison

\textsuperscript{134} Id. § 2Q1.3.
\textsuperscript{135} 920 F.2d 363 (6th Cir. 1990).
\textsuperscript{136} United States v. Bogas, 920 F.2d 363, 366 (6th Cir. 1990).
\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{139} Id. at 367.
\textsuperscript{140} Id. at 369.
and a $250,000 fine for CERCLA violations. For his false statement to the Environmental Protection Agency ("EPA"), the defendant faced up to five years imprisonment and a $250,000 fine.\(^4\)

The breakdown in terms of fines, sentences imposed, and actual jail time served in all environmental matters from 1983 to May, 1992, was:

<table>
<thead>
<tr>
<th>FY</th>
<th>Fed. Penalties Imposed</th>
<th>Prison Terms</th>
<th>Actual Confinement</th>
</tr>
</thead>
<tbody>
<tr>
<td>83</td>
<td>$341,100</td>
<td>11 yrs.</td>
<td>5 yrs.</td>
</tr>
<tr>
<td>84</td>
<td>384,290</td>
<td>5 yrs. 3 mos.</td>
<td>1 yr. 7 mos.</td>
</tr>
<tr>
<td>85</td>
<td>565,850</td>
<td>5 yrs. 5 mos.</td>
<td>2 yrs. 11 mos.</td>
</tr>
<tr>
<td>86</td>
<td>1,917,602</td>
<td>124 yrs. 2 mos. 2 days</td>
<td>31 yrs. 4 mos. 12 days</td>
</tr>
<tr>
<td>87</td>
<td>3,046,060</td>
<td>32 yrs. 4 mos. 7 days</td>
<td>14 yrs. 9 mos. 22 days</td>
</tr>
<tr>
<td>88</td>
<td>7,091,876</td>
<td>39 yrs. 3 mos. 1 day</td>
<td>8 yrs. 3 mos. 7 days</td>
</tr>
<tr>
<td>89</td>
<td>12,750,330</td>
<td>51 yrs. 25 mos.</td>
<td>36 yrs. 14 mos.</td>
</tr>
<tr>
<td>90</td>
<td>29,977,508</td>
<td>71 yrs. 11 mos. 3 days</td>
<td>47 yrs. 13 mos. 1 day</td>
</tr>
<tr>
<td>91</td>
<td>18,508,732</td>
<td>24 yrs. 8 mos.</td>
<td>22 yrs. 8 mos.</td>
</tr>
<tr>
<td>92</td>
<td>$137,825,555</td>
<td>21 yrs. 5 mos.</td>
<td>17 yrs. 10 mos.</td>
</tr>
</tbody>
</table>

TOTAL $212,408,903 383 yrs. 66 mos. 13 days 184 yrs. 79 mos. 42 days
(388 yrs. 6 mos. 13 days) (190 yrs. 8 mos. 11 days)\(^4\)

If these penalties are not seen as a deterrent, corporate officers also should be aware that Congress now is considering a bill that would create a knowing endangerment statute under CERCLA.\(^4\)

Similar to the knowing endangerment statute in RCRA\(^1\) and the CWA,\(^1\) the bill provides that anyone who knowingly creates an en-

\(^{141}\) Starr & Kelly, 20 ENVTL. L. REP. at 10101.
\(^{142}\) Memorandum from Peggy Hutchins, supra note 94.
\(^{144}\) 42 U.S.C.A. § 6928(e) (West Supp. 1991). That section provides:

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


(A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of
environmental hazard that can injure or kill will be subject to up to fifteen years in jail and a $250,000 fine under CERCLA.\textsuperscript{146} Furthermore, any person convicted under the “knowing endangerment” section would be forbidden from contracting with the federal government. Fines for organizations could go as high as one million dollars. For both individuals and organizations, the potential jail time and fines can double for subsequent violations.\textsuperscript{147} In short, all three branches of the federal government are determined to do whatever it takes to ensure that CERCLA section 103 and all other environmental laws are followed.

CONCLUSION

As evidenced by the longer sentences and the larger fines, the federal government is closely examining corporations and individuals who violate the felony provision of section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Corporations and corporate officers should consider reevaluating their own internal procedures to make sure that the person in charge is familiar with his duty to report under section 103. Such an evaluation should consist of either an internal or external audit, which outlines all the holes of a corporation’s reporting scheme. Similarly, if a person thinks that he would be considered a “person in charge” under the statute, she should request in writing that an audit be conducted. If the request is denied or goes unanswered, the person should consider making the request to people higher in the corporation. The potential for fines, penalties, and even imprisonment should be outlined in the memorandum. If these requests are still denied or unanswered, the person should state in writing that any CERCLA section 103 requirement of which she becomes aware will be sent to her boss. The significance here is that a “person in charge” needs to make every effort to become educated on what she needs to do to make a timely and accurate report. If she does not obtain the cooperation of her superiors or the corporation, the “person in charge” needs to make every effort to make sure that the responsibility belongs to someone in a higher position.

No longer can a person who may be responsible for reporting

\textsuperscript{146} \textit{Id.}, 23 EnvTL. L. Rep. at 670.

\textsuperscript{147} \textit{Id.}
under CERCLA section 103 ignore her responsibilities. For violating CERCLA, the potential for jail time is real. Prosecutors, more than ever, are seeking significant jail time under the statute. More importantly, the courts are now giving long sentences, even to persons with no criminal history, for violating CERCLA. In short, the sleeping giant of environmental crimes, CERCLA section 103, indeed has awakened.