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ENFORCEMENT UNDER THE RESOURCE
CONSERVATION AND RECOVERY ACT OF 1976

Robert A. Weiland*

I. INTRODUCTION

The tragedy evidenced at the Love Canal in Niagara Falls, New York has served to alert the public to what has been referred to as the hazardous waste crisis. The situation, however, has been long in developing, and, because of the dimensions of the problem, will require great time, effort and expense to solve.

The General Accounting Office has estimated that industry will generate 56 millions tons of hazardous waste annually by 1980. The Environmental Protection Agency (EPA) has adopted findings that there are 32,000 to 50,000 waste disposal sites which may contain hazardous waste. Of these, 1,200 to 2,000 may contain significant quantities of hazardous waste and, as such, may pose an immediate threat to the environment and the public. The estimated cost of cleanup is staggering: $3.6 to $6.1 billion for emergency site cleanup and damage mitigation and $26.2 to $44.1 billion to develop and implement safe disposal practices.

Partially in response to the hazardous waste problem, late in

* Staff member, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW
1 Comment, The Hazardous Waste Crisis, 9 ENVIR. L. REP. (ELI) 10060, April 1979.
2 COMPTROLLER GENERAL, HAZARDOUS WASTE MANAGEMENT PROGRAMS WILL NOT BE EFFECTIVE; GREATER EFFORTS NEEDED 1 GAO, No. CED-79-14 (Jan. 23, 1979).
3 HART ASSOCIATES, INC., PRELIMINARY ASSESSMENT OF CLEANUP COSTS FOR NATIONAL HAZARDOUS WASTE PROBLEMS, 10-16 (February, 1979) cited in TOXIC SUBSTANCES STRATEGY COMM. REPORT TO THE PRESIDENT, ch.v, at 3, CEQ-EHTS-03 (August, 1979).
1976 Congress passed the Resource Conservation and Recovery Act of 1976 (RCRA). The Act’s overall objective is “to promote the protection of health and the environment and to conserve valuable material and energy resources...” by advancing a comprehensive program to handle the problem of safe disposal of, and resource recovery from, solid waste. RCRA commences with statements of Congressional findings and objectives and contains several provisions addressing the general solid waste disposal problem. Because of the exceptional problems associated with hazardous waste, Congress enacted special provisions in RCRA containing detailed procedures regarding their management. These are found in Subtitle C, the Hazardous Waste Manage-

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11 “Hazardous waste” is defined in §1002 of the Act as:

- a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—
  - cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness; or
  - pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.


Subtitle C sets up a scheme for EPA to issue regulations for the identification and listing of hazardous wastes;\textsuperscript{13} standards applicable to generators, transporters, and owners and operators of hazardous waste treatment, storage, and disposal facilities;\textsuperscript{14} permits for hazardous waste facilities;\textsuperscript{15} and regulations for state hazardous waste programs.\textsuperscript{16} The Subtitle also sets up a tagging system to keep track of all hazardous wastes, i.e., a "cradle to grave" regulatory system.\textsuperscript{17} Enforcement of the requirements of the Subtitle are provided for in the Federal Enforcement section.\textsuperscript{18}

The EPA has, considerably behind schedule,\textsuperscript{19} proposed regulations to implement Subtitle C\textsuperscript{20} but, as comments are still being solicited, the final form of the regulations is uncertain. The regulations will mandate the lawful procedures for permit acquisition and hazardous waste disposal. The enforcement mechanisms

\[\text{§ 1004(27)}\text{ of the Act as:} \]

\[\text{[A]ny garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of Title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923).} \]

\[42\text{ U.S.C.A. § 6903(27) (1978).}\]

\[\text{\textsuperscript{13} 42 U.S.C.A. § 6921 (1978).}\]

\[\text{\textsuperscript{14} Id. §§ 6222-6224.}\]

\[\text{\textsuperscript{15} Id. § 6225.}\]

\[\text{\textsuperscript{16} Id.: § 6226.}\]

\[\text{\textsuperscript{17} Id. § 6227.}\]

\[\text{\textsuperscript{18} Id. § 6228.}\]

\[\text{\textsuperscript{19} The Act directed the Administrator to promulgate, by April 21, 1978, regulations: (a) for the identification and listing of hazardous wastes, 42 U.S.C.A. § 6921 (1978); (b) establishing standards applicable to generators of hazardous wastes, id. § 6922; (c) establishing standards applicable to transportation of hazardous wastes, id. § 6923; (d) establishing standards applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities, id. § 6924; (e) requiring and establishing requirements for permits for treatment, storage, or disposal of hazardous wastes, id. § 6925.}\]

In Illinois v. Costle, 9 ELR 20243 (D.D.C. 1979), the court ordered EPA to promulgate in final form the regulations to implement Subtitle C by December 31, 1979. In a report to the court on October 12, 1979, EPA said it would not be able to meet the deadline. The earliest that the regulations would be finalized, said EPA, would be April, 1980. See, generally, EPA Will Not Meet December Deadline for Hazardous Rules, Sets April Target, 10 ENVIR. REP. (BNA) 1423 (Oct. 19, 1979) for a full discussion of the report to the court.

RCRA further mandates that the regulations will take effect six months after their promulgation. 42 U.S.C.A. § 6930 (1978).

\[\text{\textsuperscript{20} 42 U.S.C.A. §§ 6921-6931 (1978).}\]
made available to the government in the Hazardous Waste Management Subtitle serve only to compel adherence to the regulations. Consequently, until the regulations are promulgated the federal enforcement section of Subtitle C (Section 3008) will lie dormant. Furthermore, when the regulations for the rest of Subtitle C are promulgated, no specific enforcement regulations will be required, nor have any been proposed, to make Section 3008 operational. Consequently, barring amendment, the provisions of Section 3008 will remain as they are regardless of the substantive content of the regulations for the rest of Subtitle C.

In addition to those provisions for federal enforcement found in Section 3008, the Imminent Hazard section of RCRA, Section 7003, establishes remedies to deal with those situations when "hazardous waste is presenting an imminent or substantial endangerment to health or the environment." The Imminent Hazard section is the enforcement provision available to the government until the Subtitle C regulations are promulgated.

This article will analyze the enforcement mechanisms made available to the federal government by RCRA to control the disposal of hazardous wastes. Because no cases have been reported in which the government has used Section 7003 and none have been brought using Section 3008 the analysis will be based on the language of RCRA, its sparse legislative history, and on analogies to administrative interpretation and judicial construction of other, principally environmental, statutes. First, the Imminent Hazard provision will be explored. The discussion will include examinations of the meaning of the term "imminent or substan-

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21 Id.
22 Id. § 6928; on February 26, 1978, the EPA issued final hazardous waste regulations under RCRA for generators of hazardous wastes (40 CFR 262), for transporters of hazardous wastes (40 CFR 263), and for notification of hazardous waste activities. See 45 FR 12722, 12746. EPA plans to issue regulations under Section 3001 of the Act defining hazardous wastes and under Section 3004 of the Act setting operating standards for treatment, storage, and disposal facilities in April, 1980. As of April 15, 1980 these latter regulations have not been issued.
23 Id. § 6973.
24 Id.
tial endangerment," the special requisites for obtaining an injunction in light of the fact that the power to bring suit for equitable relief is granted in the statute, and finally, with regard to Section 7003, the relief that may be granted. The Federal enforcement section of Subtitle C will then be discussed. The article next will turn to the administrative and judicial enforcement options available to the government including compliance orders, civil penalties, and other civil actions. Finally, the criminal penalties provision will be examined including a discussion of against whom criminal sanctions may be sought and of the mens rea requirements for finding criminal liability.

II. THE IMMINENT HAZARD PROVISION

Until six months after the regulations for Subtitle C are promulgated, the only mechanism made available to the government by RCRA to control the hazardous waste problem is the imminent hazard provision (RCRA Section 7003). Section 7003 provides a vehicle for gaining court ordered remedies to deal with the imminent hazards created by mis-handling, storage, treatment or disposal of any solid or hazardous waste. The government has been able to institute suits utilizing Section 7003 because Section 7003, unlike the remedies provided in Subtitle C, is self-enforcing and does not need any regulations to come "online." In addition to Section 7003 being currently of extreme importance because of its present utility, it will remain a valuable tool after Subtitle C is in force because of its capacity for reaching immediate hazardous waste problems. Section 7003 provides in pertinent part:

Notwithstanding any other provision of this chapter, upon receipt of evidence that the handling, storage, treatment, transportation, or disposal of any solid waste or hazardous waste is presenting an imminent and substantial endangerment to health or the environment,

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27 Id.
28 Id. § 6928.
29 Id. §§ 6921-6931.
30 Id. § 6928(d).
31 Subtitle C's regulations do not take effect until six months after they are promulgated. 42 U.S.C.A. § 6930(b) (1978). See note 19, supra, for a discussion of the delays in issuing the Subtitle C regulations.
the Administrator [of EPA] may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person contributing to the alleged disposal to stop such handling, storage, treatment, transportation, or disposal or to take such other action as may be necessary.\textsuperscript{34}

As with all of RCRA, the legislative history on Section 7003 is sparse\textsuperscript{35} and no cases have gone to judgment utilizing the provision. As a result, two of the traditional tools used in construing statutes, case law and specific legislative history identifying congressional intent, are not available for interpreting RCRA. An examination of the language of Section 7003 and analogies to other (principally environmental and health and safety) statutes containing language similar to that found in Section 7003, presently provide the means, then, of construing the provision.

\textbf{A. The Meaning of the Imminent and Substantial Endangerment Standard}

The key to the interpretation of Section 7003 is an understanding of the phrase “imminent and substantial endangerment,” and, in particular, whether relief is available before harm occurs or merely to stop actual harm. An accepted definition of the word “imminent” is a suitable point of departure for an understanding of what will be the administrative and judicial attitudes toward the use of Section 7003. “Imminent” has, according to the Seventh Circuit, “been the subject of considerable judicial attention,”\textsuperscript{36} and finding it unnecessary to cite individual cases to buttress its assertion, the Court concluded that “it is clear that ‘imminent’ refers to something which is threatening to happen at once, something close at hand, something to happen upon the instant, close although not yet touching, and on the point of happening.”\textsuperscript{37}

Imminent, then, means close in point of time, but closeness is a term of many degrees, according to the circumstances. The expressed purpose of RCRA partially defines the circumstances under which Section 7003 is to be utilized. As stated in the House

\textsuperscript{34} 42 U.S.C.A. § 6973 (1978) (emphasis added).
\textsuperscript{35} See note 25, \textit{supra}.
\textsuperscript{37} 504 F.2d 586, 591 (7th Cir. 1974).
Report on the Act, "it is the purpose of this legislation to . . . provide nationwide protection against the dangers of improper hazardous waste disposal." The Report stated further, "[u]nless neutralized or otherwise properly managed in their disposal, hazardous wastes present a clear danger to the health and safety of the population and the quality of the environment."

Since RCRA was passed in part as a health and safety statute, a compelling argument can be made that judicial interpretation of phrases similar to "imminent endangerment" in other safety statutes reflect on the administrative and judicial construction that will be made of Section 7003. In construing the Federal Coal Mine Health and Safety Act of 1969, the Seventh Circuit in *Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals*, after identifying the Act as a "remedial and safety statute," cited with approval the Fourth Circuit's interpretation of the term "imminent danger" as it appeared in the Act. The Fourth Circuit had stated: "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." The Seventh Circuit expanded upon the Fourth Circuit's definition by stating, "[a]n imminent threat is one which does not necessarily come to fruition but the reasonable likelihood that it may, particularly when the

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39 HOUSE REPORT at 3, 1976 U.S. CODE at 6241.
40 Id. See also RCRA § 1003(4) which states that one of the objectives of the Act is: "regulating the treatment, storage, transportation, and disposal of hazardous wastes which have adverse effects on the health and the environment." 42 U.S.C.A. § 6902(4) (1978).
42 504 F.2d 741 (7th Cir. 1974).
43 Id. at 744.
44 Id. at 745.
45 30 U.S.C.A. § 814(a) stated:
If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger no longer exists.
result could well be disastrous, is sufficient to make the impending threat virtually an immediate one." 47

While there is no RCRA legislative history on point, an analogous provision of the Safe Drinking Water Act (SDWA) 48 and its legislative history shed further light on congressional intent in using the word imminent. The legislative history of SDWA Section 300i(a), 49 a provision authorizing actions for injunctive relief against "imminent and substantial endangerment to health" that closely parallels Section 7003, states: "[a]dministrative and judicial implementation of this authority must occur early enough to prevent the potential hazard from materializing. . . . \[W]hile the risk of harm must be 'imminent' for the Administrator to act, the harm need not be." 50

This risk analysis is supported by an important decision construing an environmental statute. In Reserve Mining Co. v. EPA, 51 the Eighth Circuit addressed the meaning of the phrase "endangering the health and welfare of persons" found in the Clean Water Act: 52 "[i]n the context of this environmental legislation, we believe that Congress used the term 'endangering' in a precautionary or preventive sense, and, therefore, evidence of potential harm as well as actual harm comes within the purview of

47 Freeman Coal Mining Co. v. Interior Bd. of Mine Operations Appeals, 504 F.2d 741, 745 (7th Cir. 1974).
49 This section provides:
Notwithstanding any other provision of this title [42 U.S.C. §§ 300(f)-300(j)], the Administrator, upon receipt of information that a contaminant which is present in or is likely to enter a public water system may present an imminent and substantial endangerment to the health of persons, and that appropriate State and local authorities have not acted to protect the health of such persons, may take such actions as he may deem necessary in order to protect the health of such persons. To the extent he determines it to be practicable in light of such imminent endangerment, he shall consult with the State and local authorities in order to confirm the correctness of the information on which action proposed to be taken under this sub-section is based and to ascertain the action which such authorities are or will be taking. The action which the Administrator may take may include (but shall not be limited to) (1) issuing such orders as may be necessary to protect the health of persons who are or may be users of such system (including travelers), and (2) commencing a civil action for appropriate relief, including a restraining order or permanent or temporary injunction.
51 514 F.2d 492 (8th Cir. 1975) (en banc).
the term."\textsuperscript{53}

The Court in \textit{Reserve Mining} went on to adopt the interpretation of the word "endanger" made by Judge Wright in a dissenting opinion in \textit{Ethyl Corp. v. EPA}\textsuperscript{54} in the context of a provision of the Clean Air Act.\textsuperscript{55}

The meaning of "endanger" is, I hope, beyond dispute. Case law and dictionary definition agree that endanger means something less than actual harm. When one is endangered, harm is threatened; no actual injury need ever occur . . . "Endanger," . . . is not a standard prone to actual proof alone. Danger is a risk, and so can only be decided by assessment of risks . . . [A] risk may be assessed from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, or from probative preliminary data not yet certifiable as "fact."\textsuperscript{56}

Judge Wright's interpretation was also subsequently adopted by the D.C. Circuit Court of Appeals in a later case.\textsuperscript{57} The Court in the latter decision concluded, "that the 'will endanger' standard is precautionary in nature and does not require proof of actual harm before regulation is appropriate."\textsuperscript{58}

Imminent means close in time. An imminent danger is one where there is a reasonable likelihood that the feared accident or disaster will come to fruition. As seen through reference to the Safe Drinking Water Act and the Clean Water Act, imminent hazard provisions are inserted in environmental statutes as a precaution against potential harm. Thus, the imminent and substantial provision of RCRA is designed to prevent harm before it occurs.

\textbf{B. Application of the Imminent and Substantial Endangerment Standard}

Since "imminent and substantial endangerment" is a risk stan-
standard, the potential for harm satisfies the usual prerequisite of injunctive relief that there is a reasonable cause to believe the defendant is in violation of the statute.

The second usual requirement for injunctive relief is that of irreparable injury. However, in an action where the public interest is reflected in a statute, proof of irreparable injury is unnecessary; "[I]rreparable injury need not be shown, since if harm is shown (in a violation of an environmental statute case), the danger to the public's health and welfare has already been established by Congress."69

The third principle factor used by courts in determining the propriety of enjoining a violation of a federal statute is whether an injunction is called for in the public interest. Passage of Section 7003 was an expression of the public interest so that granting of injunctive relief, when there is an imminent and substantial danger as discussed above, would be in the public interest. A balancing of the equities is not necessary to grant an injunction in order to give effect to a declared policy of Congress.60

It is clear, then, that where it is shown that violations of Section 7003 exist, regardless of whether the harm is potential or actual, and regardless of whether irreparable injury is shown, injunctive relief should be granted. As stated by the Seventh Circuit with regard to the Fair Labor Standards Act of 1938,61 "the question boils down to whether the practices are illegal, for if they are, since the standards of the public interest, not the requirements of private litigation, measure the need for injunctive relief, an injunction should be issued."62

United States v. West Penn Power Co., 11 ERC 2203, 2215 (W.D. Penn. 1978). In this case the United States sought a preliminary injunction to restrain violations of regulations issued under the Clean Air Act. See also, United States v. Hayes Int'l Corp., 415 F.2d 1038 (5th Cir. 1969). In the Hayes case, the court granted a preliminary injunction to restrain violations of the Civil Rights Act of 1964 and stated:

Where, as here, . . . an injunction is authorized by statute and the conditions are satisfied as in the facts presented here, the usual prerequisite of irreparable injury need not be established and the agency to whom the enforcement . . . has been entrusted is not required to show injury before obtaining an injunction. 415 F.2d at 1045.


Walling v. Panther Creek Mines, 148 F.2d 604, 605 (7th Cir. 1945).
C. Relief Available Under Section 7003

If an injunction is issued, the question arises as to what may be ordered. Certainly, as stated in RCRA, any illegal handling, storage, treatment, transportation or disposal of wastes may be ordered to cease. In addition, however, the court may order a violator to take such other action as may be necessary.

In United States v. Kin-Bue, Inc., a case in which an injunction was recently demanded, the government is invoking Section 7003 in an attempt to halt operations at a hazardous waste landfill. After alleging a cause of action under Section 7003, the government demanded, in part, the following relief:

a) A preliminary and permanent injunction... from allowing suffering, or causing the discharge of any refuse or pollutants from the Landfill;
b) An order mandating Defendants to prepare and implement a plan, for closure of the Landfill;
c) An order mandating Defendants to prepare and implement a plan for post-closure care of the Landfill;
d) An order mandating Defendants to fulfill all continuing obligations imposed by the terms of the above plans for a period of at least twenty years;
e) An order mandating Defendants to post a performance bond in the amount of $25,000,000 to be held by the court for twenty years for the purpose of securing compliance with the provisions of each of the above.

Whether the courts will grant the kinds of relief demanded in Kin-Bue remains to be seen. Basically, the government is demanding closure, pollution control and a performance bond to ensure such control. These demands are not out of line with the objectives of RCRA which include promoting "the protection of health and the environment... by... prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health." The imminent and substantial danger, if found to exist, would last, of course, until there is little chance of

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64 Id.
66 Id. at 25-28.
67 Id.
a waste dump polluting the environment. The government is well within the guidelines of the statute, therefore, in demanding closure and insurance against pollution originating from the dump.

III. SUBTITLE C: ADMINISTRATIVE AND CIVIL ENFORCEMENT

While the Imminent Hazard provision of RCRA\textsuperscript{69} may be utilized at present,\textsuperscript{70} the enforcement mechanisms available to the government through Subtitle C\textsuperscript{71} of RCRA do not become effective until six months after the Hazardous Waste Management regulations are promulgated.\textsuperscript{72} Regardless of the substantive content of the regulations, however, the procedural and substantive aspects of the administrative and civil enforcement provisions\textsuperscript{73} will remain, barring amendment, as enacted.\textsuperscript{74} This section of the article will analyze the administrative and civil enforcement provisions found in Subtitle C.\textsuperscript{75} Because no cases have (or could have) been brought utilizing the provisions and, further, because of the paucity of legislative history,\textsuperscript{76} the bulk of the analysis will proceed by construing the language of the Act and by analogising to existing enforcement provisions found in other environmental statutes.

The administrative and civil federal enforcement provisions of Subtitle C are found in Section 3008.\textsuperscript{77} The pertinent\textsuperscript{78} provisions

\textsuperscript{69} Id. § 6973.
\textsuperscript{70} See text at notes 32-33, supra.
\textsuperscript{71} 42 U.S.C.A. §§ 6921-6931 (1978) (also referred to as the Hazardous Waste Management Subtitle).
\textsuperscript{72} See note 31, supra.
\textsuperscript{74} See text at notes 21-22, supra.
\textsuperscript{75} See text at notes 31-69, supra, for a discussion of the Imminent Hazard provision and see text at notes 193-239, infra, for a discussion of the Subtitle C criminal enforcement provision.
\textsuperscript{76} See note 25, supra.
\textsuperscript{78} Section 3008(a)(2) directs the Administrator to give affected States notice of violation:

(2) In the case of a violation of any requirement of this subchapter where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 6926 of this title, the Administrator shall give notice to the State in which such violation has occurred thirty days prior to issuing an order or commencing a civil action under this section.

\textsuperscript{42} U.S.C.A. § 6928(a)(2) (1978). Section 3008(b) provides for public hearings under some circumstances:

(b) Public hearing—Any order of any suspension or revocation of a permit shall become final unless no later than thirty days after the order or notice of the suspension
of Section 3008 are:

(a) Compliance orders—(1) Except as provided in paragraph (2), whenever on the basis of any information the Administrator [of EPA] determines that any person is in violation of any requirement of this subchapter, the Administrator shall give notice to the violator of his failure to comply with such requirement. If such violation extends beyond the thirtieth day after the Administrator's notification, the Administrator may issue an order requiring compliance within a specified time period or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction. (3) If such violator fails to take corrective action within the time specified in the order, he shall be liable for a civil penalty of not more than $25,000 for each day of continued noncompliance and the Administrator may suspend or revoke any permit issued to the violator (whether issued by the Administrator or the State). (c) Requirements of compliance orders—Any order issued under this section shall state with reasonable specificity the nature of the violation and specify a time for compliance and assess a penalty, if any, which the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.79

Simply stated, the administrative and civil enforcement procedure commences with a notice of violation from the Administrator of EPA to a violator. If, thirty days after notice, the violation continues, the Administrator may refrain from taking action,80 may issue a compliance order81 buttressed, if necessary, by a civil penalty,82 or may commence a civil action for relief.83

Notice of violation, then, is the threshold action that must be taken by the Administrator to pursue administrative and civil enforcement.84 As such a notice has not yet been issued under the authority of RCRA, a discussion of what such a notice will proba-
bly entail must focus on the Act itself and on the general requirements for notice as found in other statutes.

When the Administrator\(^ {88} \) determines that any person\(^ {86} \) is in violation of any requirement of the Subchapter, he must give notice to the violator of his failure to comply with such requirement.\(^ {87} \) As the EPA ordinarily issues an official notice of violation in cases concerning violations of the Clean Water Act (CWA),\(^ {88} \) it is possible that the same procedure will be followed as to notices of violations of RCRA. In any case, the notice must be adequate and effective or it is not considered notice.\(^ {89} \) To meet this test the notice must contain information concerning the fact of violation and it must actually be communicated to an authorized person by the Administrator.

There is a discrepancy between the legislative history concerning notice and the intent of Congress as found in Section 3008 as enacted. The House Report specifies certain items of information that the notice should contain: "the Administrator, when he finds that there is a violation of the provisions relating to hazardous wastes, shall issue a notice to the violator which contains, with reasonable specificity, the nature of the violation, the time for compliance, and the penalty for noncompliance."\(^ {90} \) The above language, found in RCRA's legislative history, was not inserted into the statute as defining the requirements for notice. Almost identical language, as to time for compliance and a penalty for

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\(^ {86} \) The term "administrator" is defined in the Act at RCRA § 1004(1) as: "the Administrator of the Environmental Protection Agency." As the Administrator has subdelegated his enforcement authority under the Clean Water Act to the Administrators of EPA's regional offices [EPA Order No. 1260.6, Sep. 14, 1973], it is probable that he will do the same as regards enforcement of RCRA, so that subsequent references in this article to the term "Administrator" are meant to include Regional Administrators as well as the National Administrator.


\(^ {88} \) The term "person" is defined in the Act at RCRA §1004(15) as "an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body."


\(^ {87} \) Id. § 6928(a)(1).

\(^ {88} \) The official name is the Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1251-1376 (1978). The Act is commonly referred to as the Clean Water Act (CWA) and will be referred to as such in this article. See P.F.Z. Properties, Inc. v. Train, 393 F. Supp. 1370, 1373 (D.D.C. 1975), for an example of the EPA issuing an official notice.


noncompliance is, however, found later in Section 3008 concerning the requirements for compliance orders. Although it would be possible to insert the time for compliance and the penalty for noncompliance in the notice, it would be counterproductive. Besides the fact that RCRA mandates that such information be in the compliance order, the Act also instructs the Administrator to take into account any good faith efforts to comply with the applicable requirement in assessing a penalty. Any curative action taken by the violator during the thirty day grace period mandated between notice and compliance order should be included in the Administrator's calculations of good faith effort and, therefore, the penalty should not be assessed in the notice. The congressional requirement that the nature of the violation be included in the notice should, of course, be adhered to.

There need not be personal service as "adequate notice is notice reasonably calculated, under all of the circumstances surrounding a given proceeding, to apprise all interested parties of the action." Furthermore, once an entity is given notice of a violation, the entire entity is held to have received that notice as "the breakdown of internal communication procedure in even the largest organizations will not justify lack of information."

The statute affords a violator a thirty day grace period in which to bring his actions into compliance with the noted requirements of the Subtitle. At the conclusion of the thirty days, the Administrator may decide to take no action. Enforcement under Subtitle C is discretionary, as the statute merely proposes that "the Administrator may issue an order requiring compliance within a specified time period."

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81 42 U.S.C.A. § 6928(c) (1978). For a discussion of the use of compliance orders, see text at notes 107-130, infra.
82 Id.
83 Id.
85 Id.
88 Id. Some environmental legislation purports to make enforcement mandatory by us-
Some action at the conclusion of the thirty day grace period is preferable, however, both from the standpoint of congressional intent and internal EPA enforcement strategy. Congress’ intent in enacting the penalties in Subtitle C was to “permit a broad variety of mechanisms so as to stop the illegal disposal of hazardous wastes.”\textsuperscript{100} Thus, should the Administrator choose not to pursue some form of enforcement, congressional intent, as expressed in the legislative history would be frustrated. Further, Douglas Costle, EPA Administrator, recently stated, “I think EPA’s credibility turns in large measure on the people whom we regulate knowing that we mean business.”\textsuperscript{101} Yet Congress has determined that discretion is preferable in Subtitle C enforcement.\textsuperscript{102} Only upon a future examination of EPA Subtitle C enforcement policies may a conclusion be drawn as to whether Congress’ determination was correct. As the penalty that may be assessed in any compliance order is discretionary, it would seem the compliance order is where the Administrator should show his flexibility. Nothing is gained by communicating to a person the fact of his noncompliance with the statute, and then doing nothing about it when his noncompliance continues. If there are special mitigating circumstances, these should be taken account of in the flexible civil penalty provision discussed below.\textsuperscript{103}

If the violation continues through the termination of the grace period the Administrator, should he choose to take further action, has two options. 1) He may issue a compliance order stating the nature of the violation, specifying a time for compliance and assessing a penalty, if any;\textsuperscript{104} and, if the violator fails to rectify the violation within the time alloted, the Administrator may initiate court action for a fine of not more than $25,000 per day of contin-

\textsuperscript{100} House Report, supra note 38, at 31, 1976 U.S. Code at 6269.\textsuperscript{101} 9 St. Mary’s L. J. 661, 662 (1978).\textsuperscript{102} See note 99, supra. A possible reason for the discretionary nature of the enforcement provisions is the limited extent of EPA’s resources.\textsuperscript{103} 42 U.S.C.A. § 6928(a)(3) (1978). For a discussion of this provision see text at notes 131-168, infra.\textsuperscript{104} 42 U.S.C.A. § 6928(a)(1), (c) (1978).
ued violation;\textsuperscript{108} or 2) the Administrator may initiate civil proceed­
ings for appropriate relief, including an injunction.\textsuperscript{108}

A. Option One: Compliance Order and Civil Penalty

Option One may be summarized as an administratively issued compliance order mandating a violator’s adherence to the require­
ments of RCRA. The compliance order may, in addition, impose an administrative penalty. Should the violator not take the requi­
site action within the time allotted in the compliance order, he will be liable for a civil penalty of not more than $25,000 per day of violation.

1. Compliance Order and Administrative Penalty

The Administrator's first option, should a violation continue thirty days after notice has been given to the violator, is to issue a compliance order\textsuperscript{107} and, if the Administrator chooses this option, he must follow the procedure set out in Section 3008(c).\textsuperscript{108} The order must “state with reasonable specificity the nature of the vi­
olation”\textsuperscript{109} and must require compliance within a specified period. It would be, therefore, efficacious to indicate what actions will be required of the violator to satisfy the order. Both the actions mandated by the order and the time period given for compliance should be reasonable;\textsuperscript{110} however, administrative agencies have wide discretion in formulating remedies and time limitations ade­
quate to ensure compliance with statutes.\textsuperscript{111}

\textsuperscript{108} Id. § 6928(a)(3).
\textsuperscript{106} Id. § 6928(a)(1).
\textsuperscript{107} A compliance order mandates that particular action be taken by persons subject to the Administrator's jurisdiction so that, upon compliance with the order, an acceptable level of attainment will have been reached. A compliance order commands a violator to, in fact, adhere to the requisites of the Act. See House Report, supra note 38, at 59, 1976 U.S. Code at 6297.
\textsuperscript{108} RCRA § 3008(c) states:
Any order issued under this section shall state with reasonable specificity the nature of the violation and specify a time for compliance and assess a penalty, if any, which the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} “Administrative officers and agencies may be, and, where not expressly or impliedly restrained by law, generally are, vested with discretion in the exercise of their power and the performance of their duties.” 73 C.J.S. Public and Administrative Bodies and Proce­
As there are no cases construing Section 3008 and there is no legislative history on point,112 other statutes and cases must be examined in order to determine what may be a reasonable time for compliance. Federal courts have generally held that what may be a reasonable time for compliance in a particular case is a matter of fact in that case.113

The Clean Water Act (CWA) contains language, very similar to that in RCRA, mandating the reasonable time standard for compliance with administrative orders.114 In Reserve Mining Co. v. EPA,115 a decision interpreting the CWA, the Eighth Circuit added, in addition to seriousness of violation and good faith efforts to correct the situation, further factors to be weighed in determining what is a reasonable time.116 In a situation that evidences an absence of imminent danger,117 these additional factors are the degree of economic displacement that would be triggered by too short a time given for compliance and the harm that would accrue to the country from the loss of a source of necessary goods.118

Neither the statute nor the legislative history of RCRA alludes to either economic displacement or jeopardizing sources of goods as factors to be taken into account in determining the reasonableness of the Administrator's timetable for compliance. Reserve Mining suggests, however, that, in the environmental sphere, an administrative agency's latitude in ordering compliance with the law in a decision reviewing and approving a Federal Trade Commission cease-and-desist order against a food broker who had violated 15 U.S.C.A. § 13(c) (1978). See also, City of Chicago v. Federal Power Comm'n, 385 F.2d 629 (D.C. Cir. 1967), which stated: "when an agency is exercising powers entrusted to it by Congress, it may have recourse to equitable conceptions in striving for the reasonableness that broadly identifies the ambit of sound discretion." 385 F.2d at 642.

112 See note 25, supra.
113 "It is perfectly apparent that the words 'reasonable time' have no set limits and no precise definition, and it is well settled that what is a reasonable time depends entirely upon the facts and circumstances of each particular case . . . ." In Re Sternberg, 300 F. 881, 884 (D. Conn. 1924). See also Salmon v. Helena Box Co., 147 F. 408, 410ur 8th Cir. 1906).
114 The CWA provides in pertinent part:
Any order issued under this subsection . . . shall specify a time for compliance . . . not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.
115 514 F.2d 492 (8th Cir. 1975).
116 Id. at 537-38.
117 Imminent dangers are addressed in RCRA at 42 U.S.C.A. § 6973 (1978). For a discussion of this section, see text at notes 31-68, supra.
118 Reserve Mining Co. v. EPA, 514 F.2d 492, 537-38 (8th Cir. 1975).
these are factors to be considered. The court in Reserve Mining alluded to a suggestion that unemployment might have been more harmful to the health of a family than the continuation of the environmental violation that was the source of the complaint in the case. It may be appropriate, then, to include consideration of economic displacement and the potential loss of sources of goods in the determination of the seriousness of a violation of RCRA. As the perceived danger to human health and the environment grows, however, the economic factors delineated in Reserve Mining lose their importance. Only when the “risk of harm to the public is potential, not imminent or certain,” should the court supplied economic factors be considered when the Administrator, or the court, is determining what is a reasonable time for compliance.

The compliance order must, in addition to stating the nature of the violation and the time for compliance, “assess a penalty, if any, which the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.” Thus the statute gives the Administrator, when issuing a compliance order, the option, at that time, of informing the violator of a penalty. There is little guidance in determining how much the penalty should be, other than that the Administrator should consider “the seriousness of the violation and any good faith efforts to comply. . . .” The legislative history is silent on the point. In conformity with the policy found in other environmental statutes, however, an administrative penalty under RCRA equat-

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119 Id.
120 Id.
122 Id.
123 See note 25, supra.
124 The Clean Air Act, for instance, requires the EPA to impose mandatory noncompliance penalties after August 7, 1979. 42 U.S.C.A. § 7420 (1978). The thrust of this section is to remove from polluters the economic benefits of delayed compliance. The section states, in pertinent part:

(2) The amount of the penalty which shall be assessed and collected with respect to any source under this section shall be equal to—

(A) the amount determined in accordance with regulations promulgated by the Administrator under subsection (a) of this section, which is no less than the economic value which a delay in compliance beyond July 1, 1979, may have for the owner of such source, including the quarterly equivalent of the capital costs of compliance and debt service over a normal amortization period, not to exceed ten years, operation and maintenance costs foregone as a result of noncompliance, and any additional economic

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ing, at the least, the cost of noncompliance with the economic value of delay in compliance, would further the purpose of the legislation to protect human health and the environment without, at this stage of the proceedings, causing too severe an economic displacement. The fact, however, that an administrative penalty may be sufficient to put an entity out of business is not enough, absent more, to act as a defense to the penalty. A fair statement of the law is, "the authority conferred upon an agency may be broad in scope, and may embrace the taking of measures which will put the polluter out of business." This assertion may have been somewhat mitigated by the court in Reserve Mining which modified an injunction that had ordered the immediate closing of a major industrial plant. The court stated, "A remedy should be fashioned which will serve the ultimate public weal by insuring clean air, clean water, and continued jobs in an industry vital to the nation's welfare." Although this was a decision regarding equitable relief, it is reasonable to assume that the same reasoning will apply to administrative penalties. If so, a penalty in the amount that a company saved by not adhering to the stat-

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value, which such a delay may have for the owner or operator of such source minus (B) the amount of any expenditure made by the owner or operator of that source during any such quarter for the purpose of bringing that source into, and maintaining compliance with, such requirement, to the extent that such expenditures have not been taken into account in the calculation of the penalty under subparagraph (A).


127 61 Am. Jur. 2d Pollution Control § 116. See Bortz Coal Co. v. Air Pollution Comm., 2 Pa. Cmwlth. 441, 279 A.2d 388 (1971) holding that the taking of measures which would require one who was in business since 1898 to shut down did not confiscate property without due process of law. The Bortz court analyzed the question as one of obedience to police power. See, C.B. & Q. Railway v. Drainage Comm'r's, 200 U.S. 561 (1905), where the Court stated: "It has always been held that the legislature may make police regulations, although they may interfere with full enjoyment of private property and though no compensation is given." Id. at 594. See also New Orleans Gas Light Co. v. Drainage Comm'n'r's, 197 U.S. 453 (1903) in which the Court held that "uncompensated obedience to a regulation enacted for the public safety under the police power of the State ... [is] not taking property without due compensation." Id. at 462.

128 Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975).

129 Id. at 537.

128 Although a request for equity ordinarily involves a balancing of the equities, such is not the case when a court is requested to grant an injunction to give effect to a declared policy of Congress. See text and notes at note 60, supra. Thus, the standards applied to a review of an administrative penalty and those applied to the granting of an injunction in an action in which the public interest is reflected in a statute will not vary significantly. In any case, courts, as in Reserve Mining, have shown a sensitivity to the problem of entities being forced out of business.
ute, if enough to put the company out of business, may be construed by the courts to be unreasonable. On the other hand, as the legislative history of RCRA points out, "It is the purpose of this legislation to assist the cities, counties, and states in the solution of the discarded materials problem and to provide nationwide protection against the dangers of improper hazardous waste disposal."\(^{130}\) There is no indication whether Congress adopted the Eighth Circuit's *Reserve Mining* reasoning when it subsequently enacted RCRA, but it is clear that neither on its face, nor in its legislative history, does the statute call for a balancing of environmental protection with economic loss. The test of the Administrator's reasonableness in assessing a penalty in the compliance order should be whether he took into account the seriousness of the violation and any good faith efforts at compliance, as it was the clear intent of Congress to stop unregulated hazardous waste disposal.

2. Penalties for Not Adhering to a Compliance Order

The compliance order mandated in RCRA, and its concomitant administrative penalty, are designed to force a violator to take corrective action. If the violator has failed to take the proper corrective action within the time specified in the compliance order, he shall be liable for a civil penalty\(^ {131}\) of not more than $25,000 per day and the Administrator may suspend or revoke the violator's permit.\(^ {132}\)

The principle question with regard to the civil penalty provision is what penalty will EPA consider appropriate, and thus seek, in any particular case. There is sparse legislative history on point,\(^ {133}\) and no cases have been brought under Section 3008, so

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\(^{131}\) A civil penalty is one imposed to ensure the performance of duties or conduct required by the State in carrying out its various sovereign functions. The Supreme Court has affirmed the constitutionality of the imposition of a civil penalty by stating, "the power of the State to impose . . . penalties for a violation of its statutory requirements is coequal with government. . . ." *St. Louis, Iron Mountain & So. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919), quoting *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 523 (1885). The court had previously held that, "there is no inhibition upon a State to impose such [civil] penalties for disregard of its police regulations as will ensure prompt obedience to their requirements." *Minneapolis & St. Louis Railway v. Emmons*, 149 U.S. 364, 367 (1892).  
\(^{133}\) See note 25, *supra*. 
that sources farther afield must be examined to construct an analysis of the Section 3008 penalty provision. As Section 1319(d) of the Clean Water Act and Section 7413(b)(1) of the Clean Air Act contain civil penalty provisions similar to those found in Section 3008 of RCRA, an examination of enforcement policies under the Clean Water Act and the Clean Air Act will help to define the probable parameters of enforcement under RCRA. The Clean Water Act and Clean Air Act enforcement policies were announced on April 11, 1978 when EPA published its Civil Penalty Policy—Clean Water Act Violators and Stationary Source Violators of the Clean Air Act. This policy provides guidance to the Agency's regional enforcement personnel in determining how much of the statutory maximum should be sought in a particular action. As an aid, then, in determining how RCRA will be enforced, a short examination of the Civil Penalty Policy follows.

B. Clean Air Act and Clean Water Act Civil Penalty Policy

The announced purpose of the Policy "is to assist in accomplishing the goals of environmental laws by deterring violations

136 Section 309(d) of the CWA provides:
Any person who violates section 1311, 1312, 1316, 1317, 1318, 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, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

33 U.S.C. Section 1319(d). The parallel provisions of the CAA provide:
The Administrator shall, in the case of any person which is the owner or operator of a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day of violation, or both, whenever such person—(1) violates or fails or refuses to comply with any order issued under subsection (a) of this section.

42 U.S.C. § 7413(b)(1). RCRA § 3008(a)(3) states in pertinent part: "If such violator fails to take corrective action within the time specified in the order, he shall be liable for a civil penalty of not more than $25,000 for each day of continued noncompliance. . . ." 42 U.S.C.A. § 6928(a)(3) (1978).

137 As reported at 41 Envir. Rep. Federal Laws (BNA) 1101 [hereinafter referred to in the text as the "Civil Penalty Policy" or "Policy"].
138 It should be clear that what follows are EPA's considerations in determining maximum and minimum amounts to be sought under various circumstances, but that in any case that goes to judgment, the exact amount of the penalty will be determined by the court.
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and encouraging voluntary compliance."\textsuperscript{139} The EPA believes that most citizens and public and private entities will voluntarily comply with environmental statutes and regulations, but that a minority will not.\textsuperscript{140} It is to "keep faith" with those who comply and to promote compliance that the penalty policy was promulgated.\textsuperscript{141}

In addition to deterrence, EPA delineates four further justifications for the Policy. First is to deprive violators of any economic advantage that may be gained through noncompliance, and thus to help ensure fair economic competition;\textsuperscript{142} second is the claim that by internalizing pollution costs the market economy will better function by including in costs the price of pollution cleanup instead of having the public absorb the costs;\textsuperscript{143} third is that of compensating the public for harm done to the environment or to public health;\textsuperscript{144} fourth is to aid in the efficient use of government resources by ensuring high voluntary compliance rates.\textsuperscript{145}

Four primary considerations are used in deciding upon the appropriate penalty, up to the statutory maximum, that will be sought in each case. These are: "the harm done to public health or the environment; the economic benefit gained by the violator; the degree of recalcitrance of the violator; and any unusual or extraordinary enforcement costs thrust upon the public. The policy (also) recognizes appropriate mitigating circumstances or factors."\textsuperscript{146}

The civil penalty provision is to be used only in enforcement actions involving noncompliance with an order.\textsuperscript{147} As such, the Policy applies to situations where the violator's failure to comply with the order is a result of its' "failure to make capital or operation and maintenance expenditures necessary to bring itself into . . . compliance with the requirements [of the the order] (e.g., failure to install equipment, . . . carry out a process change,

\textsuperscript{139} Penalty Policy, supra note 137, at 1102.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} For a discussion of the civil action authorized in RCRA § 3008(a)(1), see text at notes 169-192, infra.
The Policy does not apply to penalties for criminal violations, for violations of court orders, or for penalties assessed under the Imminent Hazard section of RCRA.

The Civil Penalty Policy makes it clear that penalties are not substitutes for compliance. "Compliance with the law is mandatory," and there may be no trade-off of penalties and noncompliance. Those charged with enforcement may not bargain for compliance by offering a reduction in penalties because the penalty policy already contains economic incentives for rapid compliance; that is, lower penalties. Furthermore, the Policy makes it clear that penalties are not fees and that payment of a penalty does not give an entity any right to continue in violation of the order or to slow down compliance.

The Civil Penalty Policy sets forth a methodology for determining the minimum civil penalty that should be "presented to the court as an appropriate penalty to be imposed." The methodology is also used to "determine a lower 'minimum civil penalty acceptable for settlement' to be used in settlement negotiations." Following is a summary of the methodology.

1. Determining The Minimum Civil Penalty

The minimum civil penalty may not, of course, end up to be more than the statutory maximum. To determine the amount of the minimum civil penalty the Policy puts forth the following steps:

Step 1—Factors Comprising Penalty

"Determine and add together the appropriate sums for each of the four elements of this policy, namely:

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148 Penalty Policy, supra note 137, at 1103.
149 For a discussion of the criminal penalties authorized in RCRA § 3008(d), see text at notes 193-239, infra.
150 42 U.S.C.A. § 6973 (1978); RCRA § 7003. For a discussion of this section, see text at notes 31-68, supra.
151 Penalty Policy, supra note 137, at 1103.
152 Id.
153 Id.
154 Id.
155 Id.
156 Id. The Policy also states that where settlement is not achieved, the ordinary course will be to claim the maximum statutory penalty in the complaint.
157 Penalty Policy, supra note 137, at 1104-1105.
A. "[T]he sum appropriate to redress the harm or risk of harm to public health or the environment."168 The dollar amount will be difficult to calculate and will have to be determined on a case by case basis. Costs of environmental restoration and traditional personal injury damage concepts may be used.

B. "[T]he sum appropriate to remove the economic benefit gained or to be gained from delayed compliance."168 This includes benefits gained from delaying capital expenditures (and the opportunity to invest these funds alternatively) and the avoidance of operation and maintenance expenses.

C. "[T]he sum appropriate as a penalty for the violator's degree of recalcitrance, definance, or indifference to requirements of law."169 Non-frivolous challenges to EPA or Court determinations should not be penalized, but any deadline missed during a challenge is a violation.

D. "[T]he sum appropriate to recover unusual or extraordinary enforcement costs thrust upon the public."161 This does not include attorney's fees or court costs but is intended to reimburse the government for non-routine detection of violations.

Step 2—Reductions For Mitigating Factors

"Determine and add together sums appropriate as reductions for mitigating factors . . . (typically):

A. "[T]he sum, if any, appropriate to reflect any part of the noncompliance attributable to the government itself."163 This applies if, for instance, the government delays in holding a public hearing requested by the violator.163

B. "[T]he sum appropriate to reflect any part of the noncompliance caused by factors completely beyond the violator's con-

168 Id. at 1104.
169 Id.
168 Id.
161 Id.
163 Id.

169 See RCRA § 3008(b) which states:
(b) Public Hearing—Any order or any suspension or revocation of a permit shall become final unless, no later than thirty days after the order or notice of the suspension or revocation is served, the person or persons named therein request a public hearing. Upon such request the Administrator shall promptly conduct a public hearing. In connection with any proceeding under this section the Administrator may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and may promulgate rules for discovery procedures. 42 U.S.C.A. § 6928(b) (1978).
This would include for example, fire or flood.

Step 3—The Result

Subtract the Step 2 total from the Step 1 total and the result is the minimum civil penalty.

2. Determining The Minimum Penalty Acceptable For Settlement

The prospect of settlement does not obviate the objectives of an enforcement action; i.e., compliance and penalties. To encourage settlement, officials may reduce the penalty below the minimum civil penalty. The reduction may not be greater than the chance, in percentage terms, of losing the action in court. This figure should not be more than 25%.165

3. Penalty Postponement Or Forgiveness Based Upon Inability To Pay

If a violator can establish its inability to pay a penalty, the penalty may be forgiven or postponed if its imposition would cause the violator very serious economic hardship. This provision of the Policy deals with the oft stated complaint that environmental enforcement too often causes severe economic displacement. The EPA, while making the above concession as regards a penalty, makes it clear that there can be “no such concession . . . with respect to the cost of coming into compliance.”166 Thus, it is clear that if the cost of compliance is beyond the financial resources of an entity, the operation causing the pollution must cease.167

Finally, the Civil Penalty Policy mandates that the civil penalty and the administratively imposed penalty should not duplicate each other as regards penalties based upon the economic benefit of delayed compliance during the same time period.168

In summary, Option One is a compliance order mandating adherence to the law coupled with an administrative penalty, followed, if necessary, by a court action for a civil penalty not to

164 Penalty Policy, supra note 137, at 1104.
165 Id.
166 Id. at 1107.
167 See text at notes 126-130, supra, for a discussion of the possibility of EPA administrative action putting a firm out of business.
168 Penalty Policy, supra note 137, at 1103.
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exceed $25,000 per day of continued violation.

C. Option Two: Civil Action

1. Liability in General

The second option open to the Administrator, should a violation extend beyond the thirtieth day after the Administrator's notice, is for the Administrator to bring a civil action "for appropriate relief, including a temporary or permanent injunction."168 This action may be taken without the Administrator having issued a compliance order. Allowing the EPA to seek immediate relief in this situation conforms to the internal logic of the Act. If the perceived violation does not rise to the level of an imminent hazard, which would be covered by Section 7003,170 this option allows the Administrator to seek a quick cessation of a violation of Subtitle C regulations. It would be inconsistent, however, if the only remedy available to EPA under Option Two was an injunction. Should the Administrator choose to move quickly under this option, instead of using the compliance order-civil penalty route described above as Option One, a violator would escape without a monetary penalty unless the words "appropriate relief" encompasses such a penalty. The question, then, is when Congress explicitly instructs the Administrator to seek injunctive relief, do compensatory and/or punitive damages come within the statutory term "appropriate relief?"

As there is not legislative history defining what Congress intended by the use of the term "appropriate relief" in RCRA,171 cases construing the term, as it is used in other statutes, must be utilized to explain its meaning. The general rule is that the government, as plaintiff in a civil injunctive proceeding to enforce a public interest statute, is entitled to remedies that ensure "the full effectiveness of the Act."172 As a consequence, compensatory damages are available.173 The statute gives the district court the

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170 Id. § 6973. For a discussion of this proviso, see text at notes 31-68, supra.
171 See note 25, supra.
power to grant injunctive relief.\textsuperscript{174} The decision whether to imply the remedy at law of compensatory damages into the term “appropriate relief” must take into account the intent of Congress in the area. Among the stated objectives of the Act is “promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of the air, water, and land resources.”\textsuperscript{175} This language supports a policy of nondegradation of these resources,\textsuperscript{176} and, as such, RCRA should be enforced so as not to allow hazardous wastes to significantly pollute the environment.

If a violator does not clean up identified hazardous wastes, after being ordered to do so by either the Administrator or the courts, the government may feel compelled to rectify the situation itself. If this occurs, the government should be able to recover its costs.\textsuperscript{177} Should the courts not construe RCRA so as to give the government the opportunity to collect compensatory damages for cleaning up hazardous wastes, one of two anomalies would occur. The government may either choose not to expend the money necessary to prevent the deterioration of the environment, and thus the intent of Congress to preserve the environment would be frustrated, or the government could choose to clean up the waste,\textsuperscript{178} but would be subject to a financial penalty for carrying out the will of Congress.

Judge Friendly, in a decision interpreting the Rivers and Harbors Act,\textsuperscript{179} gave an additional reason why compensatory damages must be available to the government:

The remedy of damages is less burdensome to the defendant since it

\textsuperscript{175} Id. § 6902(7).
\textsuperscript{176} For a discussion of similar language appearing in the Clean Air Act, see Hines, \textit{A Decade of Nondegradation Policy in Congress and the Courts: The Erratic Pursuit of Clean Air and Clean Water}, 62 \textit{IOWA L. REV.} 643 (1977).
\textsuperscript{177} Wyandotte Transp. Co. v. United States, 389 U.S. 191, 204 (1967). \textit{See also} United States v. Underwood, 344 F.Supp. 486 (M.D. Fla. 1972) (interpreting the Rivers and Harbors Act of 1899) which states: “\textit{Where the party causing the injury to navigable waters refused to remedy the situation or for some other reason the United States is compelled to perform the remedy, the government is entitled to the equivalent cost in damages}.” 344 F.Supp. at 494.
\textsuperscript{178} The government could either contract with a private firm, or have the Corps of Engineers do the job.
\textsuperscript{179} United States v. Perma Paving Co., 332 F.2d 754 (2d Cir. 1964).
relieves him of having to undertake a task which he may have neither the knowledge nor the skill to perform or supervise. More important, it assures the United States the speedy and competent removal of an obstruction to navigation which may be vital to the avoidance of accidents imperiling life, limb or property, to the interests of commerce, or even to the national defense. We can think of no sensible reason why Congress should have desired that if the executive branch chooses to effect immediate removal of an obstruction, through the services of the Corps of Engineers or otherwise, rather than resort to the slower injunctive process of the courts, the offender should thereby escape his due.186

If, then, compensatory damages are available, may the government also demand punitive damages? Punitive, or exemplary, damages may generally be awarded when a defendant acts with reckless disregard of the law,181 to punish him for outrageous conduct182 and to deter its future occurrence.183

Punitive damages would punish violators of the statute and would, doubtless, help deter other violators. Mitigating against the use of punitive damages is the fact that the statute contains "a broad variety of mechanisms to stop the illegal disposal of hazardous wastes."184 One of these mechanisms, providing penalties for certain knowing violations of the Act, is criminal sanction. Whether, however, criminal sanctions will serve their normal functions of retribution and deterrence is questionable. The government is hesitant to bring criminal charges for environmental infractions185 and, in any case, will only be successful where violation is willful.186 Consequently, the situation where the violator exhibits overt intransigence, where the violator has acted with marked indifference to the quality of the environment and to the rights of the public, may be the appropriate occasion for punitive damages.187

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186 Id. at 758.
188 For a discussion of the criminal penalties section of RCRA, see text at notes 193-239, infra.
189 The question has arisen, however, whether the constitutional prohibition against double jeopardy forbids the imposition of punitive damages for conduct that is criminally
2. Civil Liability Of Corporate Entities And Corporate Employees

The compensatory civil penalty discussed above imposes strict liability for breach of the Act in that, although good faith can mitigate the amount of the penalty, neither knowledge nor negligence need be proven to find a violation and assess a penalty. As such, there is no bar to finding civil liability in a corporate entity.

The civil penalty provision of the Act is directed at violations by any person. As a consequence, individuals as well as entities are liable. Both the Clean Air Act and the Clean Water Act (but not RCRA) specify that the word “person” includes any “responsible corporate officer.” This phrase was added, it would seem, merely to add congressional emphasis to the provision, because there is no doubt that the word “person” includes individuals as well as corporate entities.

It is, of course, up to the EPA to decide whom to pursue when assessing civil penalties. If a corporate officer is responsible, for instance, for decisions which result in the illegal dumping of hazardous wastes in a town’s water supply, the EPA must determine if there would be a salutory effect in fining the officer as well as the corporation. Ultimately these are policy decisions for the Administrator to make.

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Although the legislative history of RCRA is silent on this point, the legislative history of the Clean Air Act, in discussing civil penalties, makes it clear that such penalties may be imposed without regard to the actor’s knowledge or negligence. See, H.R. Rep. No. 294, 95th Cong., 1st Sess. 70-71, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1077, 1148-1149.

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2. Civil Liability Of Corporate Entities And Corporate Employees

The compensatory civil penalty discussed above imposes strict liability for breach of the Act in that, although good faith can mitigate the amount of the penalty, neither knowledge nor negligence need be proven to find a violation and assess a penalty. As such, there is no bar to finding civil liability in a corporate entity.

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IV. CRIMINAL PENALTIES IN SUBTITLE C

Because "many times when there is a willful violation of a statute which seriously harms human health, criminal penalties may be appropriate," Congress included in Subtitle C a criminal penalty provision to supplement the Imminent Hazard provision of Section 7003 and the administrative, civil and equitable remedies discussed above. Criminal sanctions will be imposed for knowingly transporting hazardous wastes to a facility without a permit, for failure to have a permit allowing treatment, storage or disposal, and for false statements with regard to compliance with the statute. First conviction carries maximum penalties of $25,000 for each day of violation or imprisonment for one year, or both. Subsequent convictions double the maximum penalties. Unlike the Clean Water Act, which mandates a minimum fine of $2,500 per day of violation upon conviction, no minimum fine is specified in RCRA.

On its face, the statute contains criminal penalties only for failure to have a permit (and for making certain false statements),

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not for mere unsafe hazardous waste disposal. As a result, a person who safely disposes of hazardous wastes but who failed to obtain a permit, is liable for criminal prosecution. On the other hand, a person who disposes of hazardous wastes unsafely, but who has a permit, is only liable for civil penalties or must abide by an equitable order.

Although the House Report concluded "that criminal penalties might have been appropriate for willful violations of the Act" it is clear that criminal penalties may not be imposed if a permit has been obtained. The House Report states:

The use of criminal penalties are sufficiently narrow in that they only apply to those who knowingly transport hazardous waste to a facility which does not have a permit, the actual disposal of hazardous wastes without a permit, or the falsification of documents, all of which are more serious offenses than the other provisions of the hazardous waste title.

It follows, then, that a person who illegally disposes of waste, but who has a permit, is safe from criminal prosecution.

Interestingly, both the Clean Water Act and the Clean Air Act provide criminal sanctions for either "willful or negligent" or "knowing" violations of substantive sections of the respective Act, as well as for violations of permit requirements. For example, the Clean Water Act provides, "Any person who willfully or negligently violates section 1311 . . . of this title . . . shall be punished [by criminal sanctions]." Section 1311 makes certain discharges of pollutants unlawful. As a result, the willful discharge of pollutants under circumstances not in compliance with the Clean Water Act is a criminal act. This is not the case with substantive violations of RCRA. It may be possible to obviate this anomaly by reasoning that a permit, once issued, is merely a permit for legal disposal. Any disposal that is done outside the terms of the permit or the relevant regulations, may be considered to be done without a permit. In this way, a person who has obtained a permit for legal disposal, but who, nevertheless, engages in illegal

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305 Id. at 6269.
disposal, has acted without a permit with regard to the illegal dis­
posal and should therefore be subject to criminal prosecution
under the statute. Congress has not stated any reasons why know­
ing violations of RCRA, other than a lack of a permit or falsifica­
tion of records, are not criminal acts. Perhaps the circumstances
did not occur to the collective congressional mind when the Act
passed. In any case, it seems to be an oversight easily remedied
by amendment.

RCRA provides criminal sanctions only for those persons who
“knowingly” violate the permit or false reporting paragraphs. 209
(Like the other provisions of Section 3008, the criminal penalties
do not become effective until the substantive regulations of Subti­
tle C are promulgated). The degree of conscious culpability con­
tained in the word “knowingly” must be explored in order to un­
derstand the circumstances under which criminal prosecutions
will be successful under RCRA.

Any person who, with actual knowledge, transports, treats,
stores or disposes of hazardous wastes without a permit or who,
with actual knowledge, makes a false statement is, of course,
criminally liable. 210 As there are no cases construing Section
3008(d), an examination of how the word “knowingly” is generally
judicially defined will be helpful in delineating the parameters of
the word beyond actual knowledge. Certainly the “knowingly”
standard eliminates any actions done by mistake or accident. 211
Further, this is not a negligence standard, where the “actor
should have been aware of certain facts if reasonable care had
been taken. . . .” 212

“Knowledge,” however, does not mean merely actual
knowledge. Most circuits agree that the use of the word “know-

210 Id.
which the court, in construing the word “knowingly” as it is found in the Clean Air Act, 42
'knowingly to remove or render inoperative' certain emission control devices or elements of
design from a vehicle. It is well-settled that an act is done knowingly when it is done
voluntarily and intentionally, and not be mistake or accident.” 371 F.Supp. at 384. See
also Sewell v. United States, 406 F.2d 1289 (8th Cir. 1969), in which the court quoted with
approval the trial court’s jury instruction which stated: “[a]n act or a failure to act is
knowingly done if done voluntarily and intentionally, and not because of mistake or acci­
dent or some other innocent reason.” 406 F.2d at 1294 n.3.
212 Olds, Unkovic, & Lewin, Thoughts on the Role of Penalties In the Clean Air and
ingly in criminal statutes is not limited to positive knowledge, but includes the state of mind of one who does not possess positive knowledge only because he consciously avoided it.”

By construing “knowledge” in this way, persons may not escape criminal liability under the Act by closing their eyes to the possibility of noncompliance. As the Second Circuit has summarily stated, “[c]onstruing ‘knowingly’ in a criminal statute to include willful blindness to the existence of a fact is no radical concept in the law.”

A. Corporate Criminal Liability Under RCRA

As there are no cases that have utilized the criminal provisions of RCRA, an examination of judicial decisions construing other criminal statutes is necessary to understand the extent of corporate liability for knowing violations of the Act. Unlike the ease with which corporate civil liability may be found, an additional factor must be considered when dealing with corporate criminal liability. The statute bases all criminal enforcement on a person knowingly violating certain provisions of the Act. As a corporate entity cannot, as such, have knowledge, corporate criminal liability must be based on imputed knowledge. The courts have formulated a rule for deciding whose knowledge will be imputed to a corporation, and under what circumstances.

It is the knowledge of any employee, acting within the scope of his employment, that is the knowledge of the corporation. Congress may constitutionally impose criminal liability upon a business entity for acts or omissions of its agents within the scope of their employment. . . . Such liability may attach without proof that the conduct was within the agent’s actual authority, and even though it may have been contrary to express instruc-

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813 United States v. Jewell, 532 F.2d 697, 702 (9th Cir. 1976) (and cases cited therein).
815 See text at note 188, supra.
817 See Apex Oil Co. v. United States, 530 F.2d 1291 (8th Cir. 1976).
818 Id.
819 Id.
Further, it matters not what level of responsibility the particular employee with knowledge has. In a case in which a corporation was held criminally liable for an act of a salesman, the court stated, "to deny the possibility of corporate responsibility for the acts of minor employees is to immunize the offender who really benefits, and open wide the door for evasion."

Commentators have argued, with regard to the Clean Air and Clean Water Acts, that imputing the knowledge of a nonmanagerial employee to the corporation for the purpose of finding criminal liability, "leads to harsh, and perhaps unjustifiable results." Such a policy, it is argued, subjects the corporation to strict criminal liability, as the corporation could be found guilty of an act by an employee which was both unknown to the management and against corporate policy.

This argument is not valid with regard to RCRA. Section 3008(d)(1) and (2) subjects a violating corporation to penalties for failure to obtain a permit. Regardless of at what level such a decision was made, Congress has determined that such conduct is a serious offense and that the justification for a full panoply of penalties is to "stop the illegal disposal of hazardous waste." At some point, a corporation must be responsible for unsafely dumping hazardous wastes: Congress has determined that the point is that of failing to obtain a permit. It is not, as is often argued in the literature, non- or counter-productive to label a corporation a criminal violator. Rather, when advertising by many large potential hazardous waste dumpers runs considerably more heavily to image than product, the spectre of being labeled criminal would have a salutory effect.

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220 United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972) (and cases cited therein).
221 United States v. George F. Fish, Inc., 154 F.2d 798, 801 (2d Cir. 1946) (and cases cited therein).
223 Id.
226 Id.
228 See Comment, The Criminal Responsibility of Corporate Officials for Pollution of the Environment, 37 Alb. L. Rev. 61 (1972), for a good discussion of this concept.
B. Criminal Liability Of Corporate Employees Under RCRA

The courts have long determined that corporate officers could be subject to criminal penalties for certain acts of their corporations.\textsuperscript{229} Certainly, if an executive directed that his corporation dump hazardous wastes without a permit, or knowingly acquiesced in such a violation, he would come within the ambit of the criminal section of the Act.\textsuperscript{231}

A more difficult question is whether, and to what degree, knowledge may be imputed to an individual corporate employee at the executive level. It is clear that if an employee purposefully closes his eyes to what is going on, knowledge will be imputed to him under a criminal statute.\textsuperscript{233} The question remains, however, whether knowledge may be charged to a corporate executive merely because of his high supervisory position. The answer is uncertain.

Although an executive need not be present at or personally supervise the commission of an illegal act to be held criminally liable,\textsuperscript{233} "the general rule is that where the crime charged involves guilty knowledge or criminal intent, it is essential to the criminal liability of an officer of a corporation that he actually and personally did the acts which constitute the offense, or that they were done under his direction or with his permission."\textsuperscript{234} The illegal act must be expressly authorized as the authority to do a criminal act will not ordinarily be presumed.

\textsuperscript{229} The material in this section of the article is included to elucidate the extent of criminal liability under RCRA. For a full discussion of the subject of criminal liability of corporate employees pre-\textsuperscript{United States v. Park, see Comment, The Criminal Responsibility of Corporate Officials for Pollution of the Environment, 37 ALB. L. REV. 61 (1972-73). For a more current treatment of the subject, as it obtains in the environmental field, 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 (1978-79).


\textsuperscript{231} See, State v. Lunz, 86 Wis.2d 695, 273 N.W.2d 767 (Wis. S.Ct. 1979); United States v. Amrep Corp., 560 F.2d 539 (2d Cir. 1977).

\textsuperscript{233} For a discussion of this concept see text at note 215, supra.

\textsuperscript{234} Caroline Products Co. v. United States, 140 F.2d 61 (4th Cir. 1944) (and cases cited at 66).

\textsuperscript{234} Bourgeois v. Commonwealth, 227 S.E.2d 714, 718 (S. Ct. Va. 1976). See also 19 C.J.S. Corporations § 931 (essentially same language as Bourgeois); United States v. Dilliard, 101 F.2d 829 (2d Cir. 1938) (corporate officers have to be conscious promoters of a "scheme" to be found guilty).
There is some authority in support of a broader standard of imputing knowledge of illegal acts by a corporation to its executives. A court in the District of Columbia has stated, "[t]he president of a corporation is generally its chief executive officer and it is a fair inference that he is acquainted with the conduct of the business of the corporation." In addition, the Supreme Court has stated, with regard to criminal violations of the Federal Food, Drug, and Cosmetic Act, that:

[In providing sanctions which reach and touch the individuals who execute the corporate mission—and this is by no means necessarily confined to a single corporate agent or employee—the Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur. The requirements of foresight and vigilence imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.]

Similar reasoning may be applied with regard to prosecution of corporate officers under RCRA and certainly, as a matter of law, a corporate officer is not shielded by his position from liability for the criminal acts of the corporation. On the other hand, it is matter of fact whether, in a given case, an officer had the knowledge necessary for criminal charges to be successfully brought.

V. CONCLUSION

This article has discussed the potential for enforcement under the Resource Conservation and Recovery Act. The crucial question is whether the enforcement provisions of the Act will aid in furthering the congressional objectives of prohibiting future open dumping and upgrading existing dumps, and to regulate all

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Footnotes:

4. See text at notes 231-233, supra.
phases of hazardous wastes.\textsuperscript{240}

Section 3008 will not take effect until regulations are promulgated. Without the regulations, it cannot be predicted how far enforcement will go in dealing with the hazardous waste emergency. But, regardless of the substance of the regulations, some shortcomings in the Act are evident.

The statute, on its face, applies only to future and present disposal sites\textsuperscript{241} or to past disposal sites presenting an imminent hazard.\textsuperscript{242} As such, there is no provision for many abandoned waste sites. As to those abandoned waste sites, even if imminently hazardous, for which no deep enough pocket can be found to pay for safety measures, the Act speaks not at all. Various superfunds have been proposed, but as of this writing the immense problem of abandoned hazardous waste sites has not been adequately addressed. A superfund should be established and RCRA should be amended to establish requirements for inactive hazardous waste disposal sites.

Finally, the criminal sanction section of the Act\textsuperscript{243} is weak. A new report by the House Subcommittee on Oversight and Investigation recommends strengthening the criminal penalties section of RCRA to allow imprisonment up to five years for the first violation and up to ten years for the second violation and to hold the responsible corporate officials who knew of illegal activities liable for their actions and the actions of their employees.\textsuperscript{244}

Safe disposal of hazardous wastes must be accomplished. The enforcement mechanisms of RCRA, if amended, expanded and vigorously enforced should be instrumental in reaching this goal. The key, it must be emphasized, will be vigorous enforcement and, when Subtitle C becomes effective, the EPA and the Justice Department must quickly assert strong enforcement policies.

\textsuperscript{240} Id. § 6902(3)(4).
\textsuperscript{241} Id. §§ 6921-6931.
\textsuperscript{242} Id. § 6973.
\textsuperscript{243} Id. § 6928(d).
\textsuperscript{244} HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATION, HAZARDOUS WASTE DISPOSAL (Comm. Print 96-IFC 31).