Source: Friedman, Frank B. 2000.
Practical Guide to Environmental Management 8th E
Environmental Law Institute. Washington D.

Chapter 2: Historical Perspectives on Environmental Management

It may appear to be the prejudice of a legally trained manager to begin a book on environmental management with a discussion of the historical development of the laws and regulations that drive the field. Regardless of whether a manager's training is technical or legal, however, basic environmental management requires an understanding of the development of these laws and regulations, together with a perspective on the phenomena driving that development.[1] Indeed, I hope that this historical perspective will help relieve the frustration of the technically trained manager who would like to be free of some of the legal and regulatory constraints to developing technical solutions to problems. These constraints grow out of yesterday's legal and technical compromises. I may be the bearer of bad tidings by focusing on the legal basis for constraints on managers, but these constraints are reality.

Few corporate activities have been influenced by law as much as those in the environmental, health, and safety area. As managers, we try to avoid legal issues by finding technical solutions to problems. We focus on eliminating an effluent or hazardous waste, for example, to avoid the requirement of obtaining a permit. We cannot, however, ignore that it is the legal issues that drive corporate programs in this area. And, as discussed below, environmental law is essentially social legislation. Social issues as opposed to legal issues, exemplified by growing "environmental justice" concerns, may increasingly influence corporate decisions.

The Development of Environmental Law

Until the early 1970s, there was virtually no significant role for lawyers in environmental management. Most state and local laws imposed limited environmental, health, and safety requirements, such as mandatory air and water sampling and permitting, which technicians could handle. For the most part, these issues did not require senior management attention. They were considered very limited parts of operating activities, and responsibil-

> or approval and even if management has specifically prohibited the offensive conduct and taken reasonable steps to prevent it.[77]

Sentencing

The *U.S. Sentencing Commission Guidelines Manual* includes a specific "environmental offenses" category.[78] "In what used to be a highly subjective process, the rules remove nearly all discretion that judges have traditionally enjoyed at the sentencing stage. Now sentencing is more a matter of making mathematical computations."[79] The U.S. Sentencing Commission has apparently recognized that environmental crimes are more complex than other crimes and is undertaking a thorough review before applying them to corporations and before instituting new sentencing guidelines for individuals. On November 16, 1993, the Commission released draft sentencing guidelines for corporate violators of environmental laws that proved very controversial.[80] The Commission apparently agreed that there was some concern and decided on December 12, 1995, to impose a moratorium on guideline amendment while it does a guideline assessment and simplification study.[81]

Audits

Criminal law is critical in the context of environmental assessments or audits. As noted by George Van Cleve, former Deputy Assistant Attorney General for the DOJ's Environment and Natural Resources Division:

> The United States has used audit results to good effect in criminal prosecutions to prove that corporate management was aware of the existence of environmental violations and did not act to correct them when it could have done so. The United States has consistently refused to limit access to audit results for criminal enforcement purposes.[82]

Van Cleve also notes that "[i]n deciding whether to voluntarily adopt an audit program, a company will likely take a series of factors into account. Among them certainly should be whether the liability resulting from uncorrected violations is likely to be manageable."[83] While he notes that there may be a benefit in performing an audit rather than running "the risk of prosecution without knowing in any detail what the risk actually looks like,"[84] he cautions that the DOJ will look closely at claims of attorney-client privilege. Of course, the threat of criminal prosecution, which has to be made indirectly and artfully, also can be used as leverage to "facilitate" civil settlements. With the increasing realities of potential civil and criminal penalties, there is a tendency up and down the line—particularly if there is a perception that management does not care or will not back the employee—to document alleged problems so that the next person up the line will also have liability exposure, and to limit the exposure of the person lower down. Management programs that do not have the safety valve of a corporate commitment to dealing with significant issues will find many of these memoranda in their files when there is a civil or criminal prosecution.

EPA and the DOJ recognize the value of environmental audits, but ordinarily reserve the right to obtain such material.[85] Indeed, the agencies desire to encourage these programs by holding out the carrot of possible—though not assured—limits on criminal prosecution, if the audit and entire management program are sufficiently comprehensive. DOJ policy limits the use of information developed in environmental audits for criminal prosecutions under environmental statutes. The excerpt in Figure 2-1 indicates, however, that the audit and compliance program must be very comprehensive to secure any form of consideration. (For a more detailed analysis of environmental auditing, as well as its implications for enforcement, see Chapter 6.)

Figure 2-1
Excerpt from *Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator*

> The attorney for the Department should consider the existence and scope of any regularized, intensive, and comprehensive environmental compliance program; such a program may include an environmental compliance or management audit. Particular consideration should be given to whether the compliance or audit program includes sufficient measures to identify and prevent future noncompliance, and whether the program was adopted in good faith in a timely manner.[86]