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Enforcement in Your Backyard: Implementation of California’s Hazardous Waste Control Act by Local Prosecutors

Arthur D. Gunther*

INTRODUCTION

A dry cleaner has been charged with six felony counts for allegedly improperly cleaning out his West Oakland plant. . . . [The cleaner] allegedly emptied and removed two huge underground storage tanks . . . without complying with proper procedures for their removal. . . . [P]olice believe [he] pumped out the cleaning solvents in the tanks and sold them to other cleaners. . . . [He] also improperly removed other hazardous wastes, including flammable materials and asbestos from the plant, and had them taken to the junkyard with . . . instructions to keep them concealed. [The cleaner’s] attorney . . . said . . . , ‘I don’t think he was deliberately trying to break the law or pollute the environment. He’s not a monster.’ . . . [According to Oakland police, this] investigation is the biggest hazardous materials case ever handled by police. — The Oakland Tribune, Oakland, California, September 8, 1989, at B-5, col. 1.

News items like this one, which are becoming more common, raise several questions: under what laws can California prosecute someone for the improper management of hazardous wastes? Which level of government should or will prosecute this case? Is this violation worthy of prosecution? Can, and should, offenders be prosecuted criminally? What kind of penalties can be imposed? Must an offender be a culpable “monster” in order to be convicted? Are police and fire personnel qualified to uncover violations like this? Can the actions of a convicted offender be supervised in the future?

A great deal of research has focused on federal efforts to control the pervasive problem of hazardous waste through criminal enforcement.1

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* J.D. 1990, School of Law (Boalt Hall), University of California at Berkeley; B.S. in Accountancy 1985, University of Illinois, Champagne; C.P.A. 1985. The author thanks the deputy district attorneys who set aside their time to assist in the preparation of this Comment.

Even though federal laws emphasize that the primary responsibility for hazardous waste control remains with local governments, little has been done to evaluate the effectiveness of local efforts. Because of the limited number of published cases dealing with state hazardous waste laws and the fragmentation inherent in any decentralized system, local enforcement does not easily lend itself to legal analysis.

This Comment discusses the characteristics, effectiveness of, and problems associated with the local enforcement of California's hazardous waste laws. The state's hazardous waste regulatory program is embodied primarily in the Hazardous Waste Control Act (HWCA or the Act). This Comment presents a basic understanding of how deputy district attorneys (DA's) in the state's fifty-eight counties enforce the Act. It represents a survey of issues surrounding the Act itself, as well as issues concerning day-to-day implementation of the Act by DA's. It attempts to provide the reader with a better overall understanding of California's localized hazardous waste enforcement scheme, rather than an in-depth analysis of the many facets of hazardous waste regulation in the state.

Most of the discussion which follows is based on interviews with deputy district attorneys primarily located in the San Francisco Bay Area counties of Northern California. This Comment uses interviews with local prosecutors as its primary research tool for several reasons. First, the local prosecutor is the party most familiar with and knowledgeable about the local enforcement of HWCA. California's deputy district attorneys are responsible for and have much discretion over the Act's enforcement. It is the local prosecutor who has dealt firsthand with the successes and the failures of the Act's implementation.

Second, interviews provide information about this topic which does not exist in published sources. There is a paucity of "hard" data by which to study local enforcement of HWCA: no publicly accessible data compilation exists that would provide a basis for evaluating local enforcement efforts. Moreover, very few HWCA cases have gone to trial, and, to date, only one has reached the appellate level. The production of hard data is necessary for further analysis of the enforcement of hazardous waste laws.

2. See infra note 20 and accompanying text.
4. This Comment primarily examines local hazardous waste enforcement in Alameda, Contra Costa, San Francisco, San Joaquin, Santa Clara, Siskiyou, Solano, and Ventura Counties.
5. See infra notes 175-238 and accompanying text.
6. See infra notes 159-161 and accompanying text.
7. See infra note 208 and accompanying text.
Part I of this Comment places California's hazardous waste laws in the larger context of the federal framework for hazardous waste management. Part II examines HWCA and its statutory enforcement scheme. Part III explores the strengths and weaknesses of the Act from the point of view of local prosecutors and examines the courts' construction of its provisions. Part IV examines the attitudes and approaches of DA's to the use of HWCA in enforcement proceedings. Finally, Part V concludes that several strategies can be pursued to improve enforcement of the Act.

I

THE FEDERAL REGULATORY FRAMEWORK

The Resource Conservation and Recovery Act (RCRA)\(^9\) is the federal statutory authorization for the regulation of the transportation, storage, treatment, and disposal of hazardous waste.\(^10\) Regulations that the Environmental Protection Agency (EPA) has issued under the authority of RCRA identify hazardous waste in two ways. First, regulations contain four lists of solid wastes considered hazardous.\(^11\) Second, EPA regulates all other wastes having certain characteristics of ignitability,\(^12\) corrosivity,\(^13\) reactivity,\(^14\) and toxicity.\(^15\)

Once a substance is defined as "hazardous", detailed and complex controls are placed on its management from "cradle to grave." The regulations impose obligations on generators,\(^16\) transporters,\(^17\) and owners and operators of facilities that treat, store, or dispose of hazardous waste.\(^18\) These obligations include completion of permitting procedures, compliance with a manifest system of tracking hazardous waste, and maintenance of extensive records.\(^19\)

In enacting RCRA's program for hazardous waste regulation, Congress realized that the federal government alone could not handle the problems associated with hazardous waste activities.\(^20\) RCRA therefore allows states to exercise a great deal of regulatory authority over the


\(^{10}\) See id. § 6902.

\(^{11}\) 40 C.F.R. § 261.31, 261.32, 261.33(e)-(f) (1989).

\(^{12}\) Id. § 261.21.

\(^{13}\) Id. § 261.22.

\(^{14}\) Id. § 261.23.

\(^{15}\) Id. § 261.24.

\(^{16}\) Id. § 262.

\(^{17}\) Id. § 263.

\(^{18}\) Id. § 264.

\(^{19}\) C. SCHRAFF & R. STEINBERG, 1 RCRA AND SUPERFUND §§ 4.03-.07 (1989).

RCRA program. If properly authorized, RCRA permits the implementation of state plans in lieu of the federal program. Moreover, even if the state program has not replaced RCRA, states may impose additional, more stringent requirements than those found in RCRA.

HWCA comprises a large part of California’s response to the challenge set out by the federal government for the states through RCRA. The state legislature intends that HWCA be implemented in lieu of RCRA, although EPA has not yet authorized California to do so. Therefore, a federal RCRA enforcement program currently operates alongside the state HWCA enforcement program. The regulated community must comply with federal as well as state regulations, or else risk both federal and state enforcement actions.

The California Department of Health Services (DHS) has been working for at least five years to present EPA with a statutory and regulatory scheme that satisfies the RCRA requirements for authorization. The greatest obstacle has been the arduous task for both state and federal officials of comparing the two programs to ensure that the state program is as stringent as the federal one. Since HWCA predates RCRA, the language of the two programs is dissimilar. Thus it is difficult to evaluate California’s scheme using standards set forth in RCRA. Nevertheless, authorization to implement HWCA in lieu of the federal plan is finally expected by early 1991.

21. See, e.g., 42 U.S.C. § 6941 (1982 & Supp. V 1987) ("[This subchapter's] objectives are to be accomplished through Federal technical and financial assistance to States or regional authorities for comprehensive planning pursuant to Federal guidelines designed to foster cooperation among Federal, State, and local governments and private industry.").


23. Id. § 6929. No state may impose requirements that are less stringent than those of RCRA, however. Id.

24. CAL. HEALTH & SAFETY CODE § 25101(d) (West 1984 & Supp. 1990) ("It is in the best interest of the health and safety of the people of the State of California for the state to obtain and maintain authorization to administer a state hazardous waste program in lieu of . . . [RCRA]. Therefore, it is the intent of the Legislature that the [Department of Health Services] shall have those powers necessary to . . . implement such [state hazardous waste] program in lieu of the federal program.").


28. Id.

29. Id.

30. Id. The irony of this situation is that states with little, if any, hazardous waste legislation prior to RCRA can easily obtain authorization by simply adopting the language of RCRA and its regulations into their state plans. States such as California, however, which had their own mature hazardous waste regulatory schemes on the books prior to the enactment of RCRA must face the time-consuming process of amending their laws to satisfy the requirements of RCRA.
II

THE CALIFORNIA REGULATORY SCHEME

California’s hazardous waste regulatory scheme is complex. Many different statutes and sets of regulations address the management of hazardous waste, including HWCA,\(^\text{31}\) the Safe Drinking Water and Toxic Enforcement Act (Proposition 65),\(^\text{32}\) and the Underground Storage of Hazardous Substances Act.\(^\text{33}\)

California’s already complex program of hazardous waste control is further complicated by the decentralized nature of its administrative enforcement. The State Department of Health Services, the State Water Resources Control Board, various Regional Water Quality Control Boards, and local agencies share administrative enforcement responsibilities.\(^\text{34}\)

Administrative enforcement of HWCA is no exception to the pattern of decentralized enforcement of California’s hazardous waste laws. The stated purpose of the Act is to “ensure . . . the safe handling, treatment, recycling, and destruction of . . . hazardous wastes prior to disposal.”\(^\text{35}\) Under the Act, requirements “shall be enforced by [DHS] or any local health officer or any local public officer as designated by the [DHS] director.”\(^\text{36}\) Memoranda of Understanding (MOU’s) between the state agency and some counties or cities are the primary means of delegating DHS’s administrative authority to local officers.\(^\text{37}\) Among other things, MOU’s allow local health departments to conduct generator inspections.\(^\text{38}\) These inspections have become a fruitful source of referrals of hazardous waste violations to district attorneys.\(^\text{39}\)

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34. L. STEWART, supra note 26, at 12.
37. L. STEWART, supra note 26, at 16-17.
38. See CAL. ADMIN. CODE tit. 26, § 22-66078 (defining “generator”), 22-66328 (1990) (authorizing health departments to enter sites, inspect premises, obtain samples, conduct tests, and inspect records).
39. Steven Castleman, Assistant District Attorney and Chief of the Environmental Crimes Unit for the City and County of San Francisco, downplays the importance of an MOU between DHS and the local health department. In general, a referral from DHS is required in order to give the district attorney authority to file a civil suit. The significance of an MOU to the DA is that it allows the local health department, which provides many more referrals on average to local prosecutors than DHS, to give the DA authority to file civil actions. Since San Francisco County does not yet have an MOU, Castleman, when desiring to file a civil suit which was not referred to him by DHS, calls DHS and explains the circumstances of the case. DHS then sends him a written “referral” permitting civil prosecution. Interview with Steven J. Castleman, in San Francisco, California (Oct. 23, 1989).
Administrative enforcement of HWCA includes the filing of disclosure statements by anyone who generates, treats, stores, or disposes of hazardous waste, as well as the issuance of permits or other grants of authorization for hazardous waste facilities and transporters. DHS may revoke, suspend, or deny permits. Furthermore, DHS may issue five types of compliance orders to anyone who has violated, is violating, or threatens to violate any HWCA requirement. Amendments to HWCA in 1984 provided DHS with the power to impose significant administrative civil penalties for violations of the Act. Finally, DHS may undertake corrective cleanup action if not performed in a timely manner by an offender, and then sue the offender for its reasonable actual costs.

Judicial enforcement of California’s hazardous waste laws is also decentralized, with responsibilities shared by the Attorney General, the fifty-eight district attorneys, and city and local prosecutors. Historically, the Attorney General’s office has chiefly brought cleanup and cost recovery cases. District attorneys, on the other hand, have been extremely active in penalty cases, bringing almost all of the criminal hazardous waste actions, in addition to playing a major role in civil enforcement.

Judicial authorities can subject hazardous waste offenders to injunctions, civil penalties, and criminal sanctions. DHS may request a city attorney, DA, or the AG to seek an injunction or compliance order if it finds that anyone has violated or is about to violate HWCA or any of its regulations. HWCA does not require the state to allege or prove irreparable damage or inadequate remedy at law in order to obtain injunctions or compliance orders.

Substantial civil penalties (up to $25,000 for each violation or for each day of a continuing violation) may be imposed on anyone who

41. Id. § 25201.
42. Id. § 25163.
44. These include a quarantine order prohibiting removal, transfer, or disposal of hazardous material, Cal. Health & Safety Code § 25187.6 (West 1984 & Supp. 1990), an order to ascertain the nature of a potential health or environmental hazard, id. § 25187.1, an order to cease discharging hazardous materials into an injection well, id. § 25159.16, and an order to cease the operation of a land treatment unit. Id. § 25209.4. Also, DHS has occasionally issued orders that implement its general authority to enforce the hazardous waste laws. See id. § 25180.
47. Id. §§ 25181-25182.
49. Id.
51. Id. § 25184.
intentionally or negligently violates any provision of HWCA or any permit, regulation, standard, or requirement under the Act.\textsuperscript{52} Any person who intentionally or negligently makes a false statement in any document used for purposes of compliance with HWCA faces the same civil penalty.\textsuperscript{53}

HWCA also contains strict liability provisions. Specifically, anyone who violates the Act, or any permit, regulation, standard, or requirement under it, is liable for a civil penalty of up to $25,000 for each violation or for each day of a continuing violation.\textsuperscript{54} Each day that a deposit of hazardous waste remains at an unauthorized disposal point constitutes a separate additional violation.\textsuperscript{55} The number of violations thus grows until the offender files a report of the disposal with DHS and complies with any cleanup order issued by DHS, a hearing officer, or a court.\textsuperscript{56} Failure to follow a compliance schedule may likewise result in civil fines of up to $25,000 per day.\textsuperscript{57} Civil penalties may also be assessed against anyone who fails to submit required information or submits false information.\textsuperscript{58}

In addition to administrative and civil enforcement mechanisms, HWCA subjects offenders to various criminal sanctions. In many states, criminal hazardous waste provisions lie dormant, but in California such provisions are often invoked.\textsuperscript{59} The primary criminal provision of HWCA provides that anyone who knows or reasonably should know that he or she is disposing (or transporting) or causing the disposal (or transportation) of hazardous waste to an unpermitted facility or unauthorized point is liable, upon conviction, for a fine of $5,000 to $100,000 for each day of violation.\textsuperscript{60} The offender may be imprisoned in county jail for up to one year or in state prison for 16, 24, or 36 months.\textsuperscript{61}

If the violation causes great bodily injury or creates a substantial probability of death, the offender can be imprisoned for an additional thirty-six months, and the maximum daily fine can be increased to $250,000.\textsuperscript{62} The same penalties apply to anyone who knows or reasonably should know that he or she is burning, incinerating, or causing the burning or incineration of hazardous waste in an unpermitted facility.\textsuperscript{63}

\textsuperscript{52} Id. § 25189(b).
\textsuperscript{53} Id. § 25189(a).
\textsuperscript{54} Id. § 25189.2(b).
\textsuperscript{55} Id. § 25189.2(c).
\textsuperscript{56} Id.
\textsuperscript{57} Id. § 25188.
\textsuperscript{58} See, e.g., id. §§ 25158, 25159.13, 25208.9.
\textsuperscript{59} See L. STEWART, supra note 26, at 85. This was confirmed almost unanimously by the DA's interviewed for this Comment.
\textsuperscript{60} CAL. HEALTH & SAFETY CODE § 25189.5 (West 1984 & Supp. 1990).
\textsuperscript{61} Id.
\textsuperscript{62} Id. § 25189(e).
\textsuperscript{63} Id. § 25189.7.
Criminal provisions also apply to anyone who knowingly makes false statements in documents used for HWCA compliance purposes. Moreover, these provisions apply to anyone who destroys, alters, or conceals any record required by HWCA, or withholds information regarding real and substantial danger to the public health or safety when such information has been requested by DHS and is required for HWCA purposes. Violators of these provisions are either subject to fines of $2,000 to $25,000 per day, or imprisonment in a county jail up to one year, or both. Second or subsequent violations invoke greater penalties.

Anyone who violates any provision of HWCA, or any permit, regulation, standard, or requirement under the Act, is guilty of a misdemeanor, unless otherwise provided in the Act. Penalties include a fine of up to $1000, imprisonment in a county jail for up to six months, or both. If the conviction is for a second or subsequent violation, the maximum fine increases to $25,000, and prison terms increase to up to one year in a county jail or 16, 20, or 24 months in state prison.

HWCA sets out a scheme for the apportionment of all civil and criminal penalties collected under the Act. Half of such monies goes to the state Hazardous Substance Account, twenty-five percent goes to DHS to fund the local health officer's HWCA enforcement efforts, and twenty-five percent goes to whichever office brought the action, be it the city attorney, city prosecutor, district attorney, or Attorney General. The apportionment schedule provides an incentive to the various prosecutors to invest their resources in investigating hazardous waste violations and bringing actions under HWCA. This is especially true for the district and city attorneys, since any apportionment from a penalty would have a greater impact on their smaller financial operations than that of the Attorney General. As discussed later, the current apportionment rates do not, in fact, generate significant revenues for DA offices, and, therefore, have become the topic of much debate among local prosecutors.

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64. Id. § 25191(a)(1).
65. Id. § 25191(a)(3).
66. Id. § 25191(a)(4).
67. Id. § 25191.
68. Id.
69. Id. § 25190.
70. Because the Health & Safety Code does not specify penalties for these violations, the general misdemeanor penalties of CAL. PENAL CODE § 19 (West 1988 & Supp. 1990) apply.
72. Id. § 25192.
73. See id. §§ 25330-25335.
74. Id. § 25192.
75. See infra text accompanying notes 262-75.
III

THE UTILITY OF THE HAZARDOUS WASTE CONTROL ACT AS AN ENFORCEMENT TOOL

Several wholly or partially unresolved issues surround HWCA, the resolution of which will impact the future effectiveness of California's program of controlling hazardous waste activities. These issues involve the level of intent required for a criminal violation, the instability of the Act, the untested nature of the Act, the Act's daily penalties provisions, and the regulatory nature of the Act.

A. The Standard of Care

In 1984, an amendment to HWCA changed the standard of care provision of the Act's central criminal provisions. The amended disposal provision states that "[a]ny person who is convicted of knowingly disposing... of any hazardous waste, or who reasonably should have known that he or she was disposing... of any hazardous waste" is guilty of a crime. The amendment thus changed the scienter requirement for this criminal provision from one of actual knowledge to one of actual or constructive knowledge. The constructive knowledge standard is significantly lower than the traditional standard of criminal negligence, which requires gross indifference to the consequences of one's acts or a culpable departure from the ordinary standard of care.

This standard has caused uncertainty for prosecutors and defendants alike. Until recently, prosecutors were skeptical about whether they could obtain a criminal conviction (especially for a felony) for conduct that was merely negligent, and which did not meet the higher standard of criminal negligence. San Francisco District Attorney Steven Castleman was very cautious when first confronted with the new standard: "I was probably the DA that had the most problems with it." He continued to litigate relying solely on actual knowledge, cautiously avoiding being the first to prosecute relying on the "should have known" basis because he believed such a standard would not survive judicial scrutiny.

Castleman's fears were alleviated when a deputy DA in Ventura County, Gregory Brose, obtained a conviction using the constructive

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77. Id. § 25189.5(b) (West Supp. 1990) (emphasis added).
78. Id. § 25189.5(c).
79. The prior version of HWCA required actual knowledge: "Any person who is convicted of knowingly disposing of any hazardous waste" is guilty of a crime. Id. § 25189.5(b) (emphasis added).
80. Regarding the standard for criminal negligence, see infra text accompanying note 88.
81. Interview with Steven J. Castleman, supra note 39.
knowledge standard that was upheld on appeal in People v. Martin. As the sole indicator of how appellate courts interpret HWCA, it is helpful to examine how the Martin court came to approve the Act’s imposition of criminal penalties based on a civil negligence standard.

Defendant Martin, the president of a chemical blending plant, was charged with knowingly disposing of and transporting hazardous waste. He was convicted under Health & Safety Code section 25189.5(b)-(c). On appeal Martin claimed that section 25189.5 may not be constitutionally construed as providing a criminal penalty for conduct that merely meets the civil negligence standard of care. Instead, he asserted that the “reasonably should have known” language must be construed as imposing a criminal negligence standard of care (i.e., “a gross indifference to the consequences of his acts with a reckless, gross, or culpable departure from the ordinary standard of care, or with gross or reckless disregard for the consequences of his acts.”).

In order to approve criminal sanctions for merely negligent behavior, the Martin court characterized hazardous waste violations as public welfare crimes, defining such crimes as “violations of statutes purely regulatory in nature and involving widespread injury to the public.” The public welfare nature of the offense permits the legislature to establish any standard of knowledge it sees fit: “we find that although the legislature chose not to do so, it could have made section 25189.5 a strict liabil-

83. As of the time of printing, Martin remains the only case litigating HWCA that a California Court of Appeal has decided. There is no more definitive case interpreting the provisions of the Hazardous Waste Control Act. Telephone interview with Mark S. Pollock, Solano County Deputy District Attorney (Sept. 25, 1990).
84. Martin, 211 Cal. App. 3d at 711-13, 259 Cal. Rptr. at 776.
85. Id. at 704, 259 Cal. Rptr. at 771.
86. Id., 259 Cal. Rptr. at 772.
87. Id. at 710, 259 Cal. Rptr. at 775.
88. Id. at 711, 259 Cal. Rptr. at 776.
89. Id. at 713, 259 Cal. Rptr. at 777-78.
ity offense." The court then unequivocally upheld the challenged standard.

Furthermore, the court held that strict liability penalties for public welfare offenses need not be minimal. The court cited several federal decisions upholding strict liability statutes with harsh sentences. By upholding the imposition of strict liability with severe penalties, the court recognized the legislature's almost unbridled discretion to provide for potent criminal penalties in its hazardous waste regulatory scheme.

Once the court upheld the imposition of criminal liability based on violations of the standard of ordinary care when furthering a public welfare regulatory scheme, it turned to the legislative intent of the challenged provision. The Martin court deferred to what it believed was the clear intent of the legislature, stating that "[l]awmakers have wide latitude to declare an offense and to exclude, or include, elements of knowledge and diligence." The court expressed "no doubt that in enacting section 25189.5, the legislature intended to impose criminal liability . . . without requiring gross negligence or recklessness." The court's primary support for this conclusion was a belief that when lawmakers intend a criminal standard, they know how to impose one, as they did in adjacent section 25189.6 (requiring acts to be done "knowingly, or with reckless disregard for the risk").

90. Id. at 713, 259 Cal. Rptr. at 778. To justify the ordinary negligence standard of Health & Safety Code § 25189.5, the court relied upon a tradition of classifying environmental crimes as public welfare offenses, and a belief that such status permits criminal sanctions even under a strict liability standard. Riesel, supra note 1, at 10,067. This theory has not always been undisputed. The culpability requirements of federal environmental protection statutes enacted by Congress in the 1970's imposed criminal penalties only when the conduct was knowing. One commentator suggests that Congress may have been stating that the public health, safety, and welfare concerns of these statutes do not outweigh the common law tradition and due process concerns that criminal sanctions be imposed only when conduct is motivated by evil intent. Id.; Webber, Element Analysis Applied to Environmental Crimes: What Did They Know and When Did They Know It?, 16 B.C. ENVTL. AFF. L. REV. 53, 61 (1988).

However, the imposition of strict criminal liability for public welfare statutes was upheld by the U.S. Supreme Court in 1985. In Liparota v. United States, 471 U.S. 419 (1985), the Court distinguished standard regulatory statutes from those regulatory statutes that qualify as public welfare statutes. The latter were defined as statutes that render criminal a type of conduct that: (1) a reasonable person should know is subject to stringent public regulation, and (2) may seriously threaten the community's health and safety. Id. at 433. This decision thus alleviated any doubt about the public welfare status of environmental protection statutes. The Court then clarified its position on the culpability required to impose criminal penalties pursuant to public welfare laws. It stated that since public welfare statutes regulate such serious threats to public health and safety, their related criminal offenses may properly "depend on no mental element but consist only of forbidden acts or omissions." Id. at 432 (quoting a case relied upon by the Martin court, Morissette v. United States, 342 U.S. 246, 252-53 (1951)).
District attorneys were pleased with the Martin court's holding. Castleman, expressing the sentiment of many environmental prosecutors, said he was "delighted" with the court's holding. Since he is now "totally comfortable" with the standard, he would file a "should have known" case "without any problem."97

Mark Pollock, a Deputy District Attorney in Solano County, routinely uses the ordinary negligence standard for criminal filings.98 Even before Martin upheld the lesser standard, he did not fear the uncertainty surrounding it. As he explained, "I didn't feel that I needed to wait for an appellate court to tell me that it was legal."99

Pollock relies on the constructive knowledge standard when prosecuting manufacturers of consumer goods that contain unsafe levels of various substances. For example, Pollock filed criminal charges under Health & Safety Code section 25189.5, relying on the "reasonably should have known" standard, against the manufacturer of a driveway degreaser that consisted of one hundred percent lime.100 He alleged that consumers would purchase the product, which instructs the user to pour the degreaser onto one's driveway and then to hose the substance off.101 Since it is foreseeable that the degreaser would end up in the street or in storm drains, thereby becoming a hazardous waste,102 the manufacturer "reasonably should have known" that it was "causing the disposal of... [a] hazardous waste."103 Pollock successfully obtained a conviction based on this theory. He also has six additional criminal cases pending which also involve allegations that the manufacturer should have known that use of its product would ultimately result in the disposal of a hazardous waste.104 Pollock filed all six cases prior to the Martin decision.105

Thus Pollock has succeeded in using the constructive knowledge standard to impose criminal liability on those who are only indirectly associated with a disposal of hazardous waste; the disposal need only have been a foreseeable result of the violator's conduct. If required to prosecute under an actual knowledge standard, Pollock and other deputies would have to prove that the defendant knowingly disposed of or knowingly caused the disposal of hazardous waste. This would immunize from prosecution manufacturers who supply the market with unsafe

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97. Interview with Steven J. Castleman, supra note 39.
98. Interview with Mark S. Pollock, Deputy District Attorney of Solano County, in Fairfield, California (Sept. 27, 1989).
99. Id.
100. Id.
101. Id.
103. Id. § 25189.5(b).
104. Interview with Mark S. Pollock, supra note 98.
105. Id.
products without any actual knowledge of their future disposal, transportation, or storage, even though these manufacturers may be among those most responsible for the violations.

Despite the holding in *Martin*, several deputies have not placed greater reliance on the "should have known" language in criminal cases. As discussed below, the views of these deputies stand in sharp contrast to Pollock's aggressive use of the standard.

Overall, this California appellate court viewed HWCA as necessary public welfare legislation which must be given the breadth and potency intended by the legislature. It remains to be seen whether other state appellate courts, or the state supreme court, will come to a similar conclusion. Several of the deputy DA's commented that additional appellate cases should be decided in the near future. This would create the body of law around HWCA (including its standard of care provisions) that is currently lacking.

**B. The Untested Nature of the Act**

As the *Martin* case reflects, HWCA is open to a multitude of constitutional challenges. "Up until *People v. Martin*, which just came out [in June 1989], we didn't have a single appellate-level case interpreting the law in any way, shape, or form," stated Steven Castleman. As a result, he explained, "whenever anybody filed [a case], especially a criminal case, they had to litigate the constitutionality of this law, and that increased the complexity and the cost" of bringing it. In addition to interpreting the standard of care provision, *Martin* also decided several other important issues concerning HWCA. The court rejected the claim that Health & Safety Code section 25189.5 is "vague, ambiguous, and not susceptible to any definition that would have meaning to the average person." The court also held that HWCA is not an unlawful delegation

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106. See infra text accompanying notes 210-15.
107. Interview with Steven J. Castleman, supra note 39.
108. *People v. Martin*, 211 Cal. App. 3d 699, 705, 259 Cal. Rptr. 770, 772 (1989). The court acknowledged the practical limitations inherent in any attempt to statutorily define a scientific concept. It felt that the definition in section 25117, accompanied by the guidelines in the regulations which provide mathematical formulas and scientific standards by which hazardous materials may be identified, see CAL. ADMIN. CODE tit. 26, §§ 22-66680 to 22-66723 (1990), were "definite enough to provide... a standard of conduct for those whose activities are proscribed..." *Martin*, 211 Cal. App. 3d at 705, 259 Cal. Rptr. at 772.

The Court relied primarily on the latter clause, "those whose activities are proscribed," in rejecting the vagueness claim. The Court first referred to the rule that regulatory statutes governing a narrow category of business activities are to be given greater leeway than are statutes applicable to the general public. *Id.* Further, any business involved with dangerous substances should know that the probability of regulation is great. *Id.* at 706, 259 Cal. Rptr. at 773. Thus, businesses handling hazardous wastes should consult relevant legislation in advance of any action, and they should attempt to clarify any statutory vagueness. *Id.* Finally, the Court noted that the regulations promulgated by the DHS contain a list of hundreds of potentially hazardous materials as well as four criteria for hazardousness. *Id.* at 706-07, 259
of legislative authority. Finally, the court held that the Act was not superceded by federal law which exempts certain hazardous waste containers from regulation.

Nevertheless, the status of the law remains uncertain. In a case Castleman is currently litigating, the defendants in their demurrer raised preemption and Commerce Clause claims. As Castleman pointed out, "virtually every item in this law is subject to challenge." Despite the probability that other constitutional issues may be raised in future cases, or that other appellate courts may find the law unconstitutional, the Martin holding "is a lot better than nothing," said Castleman.

The dearth of hazardous waste case law will probably not persist. As Castleman noted, defendants generally are more likely to go to trial and appeal criminal charges than civil ones because of the greater implications of the former. Since the number of criminal cases brought

Cal. Rptr. at 773.

Given this basis for the Court's opinion, it remains to be determined whether a defendant who has violated the Act in a noncommercial setting (for example, an individual who dumps used motor oil from his car into a storm drain) can be presumed to have regulatory knowledge similar to the business which deals with hazardous waste on a daily basis. Can the oil-changing offender reasonably be "expected to consult relevant legislation in advance of action," thereby ensuring adequate notice of the regulations?

Furthermore, according to Steven Castleman, there is a trend towards establishing more objective thresholds for the determination of what constitutes a hazardous waste. He believes that threshold standards are necessary for enforcement personnel as well as the regulated community, since this would diminish the need for DA's to develop expertise in chemistry. Interview with Steven J. Castleman, supra note 39. However, as James Sepulveda, Deputy District Attorney for Contra Costa County, points out, any attempt to specify hazardous materials to the exclusion of less definite standards will limit the number of potentially successful prosecutions. Telephone interview with James L. Sepulveda (Jan. 12, 1990). In other words, vagueness generally tends to work in favor of prosecutors since it leaves room for various acts or, in this case, materials to be covered by the law's provisions. It follows from Sepulveda's observations that as the list of potentially hazardous wastes becomes more comprehensive, courts will tend to give less weight to the general guidelines, which, by their very nature, are indefinite. This problem should not be overemphasized, however. General descriptive standards remain necessary since not every type of potentially hazardous waste can be determined and listed.

109. Martin, 211 Cal. App. 3d at 710, 259 Cal. Rptr. at 775-76. Martin contended that the legislature, by directing DHS to prepare a list designating wastes which are hazardous and to adopt guidelines for the identification of hazardous wastes, made an unconstitutional delegation of legislative power. Rejecting that argument, the court held that the legislature properly made the fundamental policy decision regarding the Act ("to protect public health and environmental quality by establishing regulations for the handling, treatment, recycling, and disposing of hazardous wastes"), while properly authorizing the administrator to adopt rules and regulations to promote the legislative goals (by preparing lists and guidelines for the identification of hazardous wastes). The court concluded that this was a "reasonable grant of power to an administrative agency, providing adequate standards for administrative application of the statutory scheme." Id.

110. Id. at 708, 259 Cal. Rptr. at 774.
111. Interview with Steven J. Castleman, supra note 39.
112. Id.
113. Id.
114. Id.
under the Act is on the rise,\textsuperscript{115} the body of law surrounding the Act surely will develop over the next couple of years.

\textbf{C. The Imposition of Daily Penalties Under the Act}

The most significant HWCA interpretation issue currently being disputed in the courts is the basis on which penalties are imposed.\textsuperscript{116} The two most commonly invoked provisions of the law call for the imposition of fines for "each day of violation,"\textsuperscript{117} and "for each day that violation continues."\textsuperscript{118}

Defining a "day of violation" has become a central issue in Steven Castleman's pending litigation.\textsuperscript{119} The prosecution argues that, in addition to the day or days during which actual physical disposal occurs, a "day of violation" includes the day or days during which the waste remains at the illegal site.\textsuperscript{120} Only upon notification of the appropriate state agency and the commencement of cleanup would the period of violation terminate. In other words, argues Castleman, there are both passive and active days of violation.\textsuperscript{121} The defense, on the other hand, argues that only days of actual disposal are days of violation.\textsuperscript{122} The magnitude of the fines, and therefore the severity of the deterrence effect, will, of course, be greatly affected by the definition of a "day of violation." As Castleman summed up, "If we are right about this, that would be really powerful."\textsuperscript{123}

\textbf{D. The Act's Instability}

None of the participating deputies had any major complaints about HWCA. Jeff Marschner called HWCA "an effective tool."\textsuperscript{124} Mark Pollock believes that "the HWCA definitions and regulations have created the capability for some of the best hazardous waste enforcement in the country."\textsuperscript{125} Similarly, James Sepulveda said that "the HWCA is one of the best drafted enforcement statutes in any area of law."\textsuperscript{126}

\begin{itemize}
\item \textsuperscript{115} L. STEWART, supra note 26, at 85.
\item \textsuperscript{116} Interview with Steven J. Castleman, supra note 39.
\item \textsuperscript{117} CAL. HEALTH & SAFETY CODE § 25189.5 (West 1984 & Supp. 1990) (for criminal enforcement).
\item \textsuperscript{118} Id. § 25189 (for civil enforcement).
\item \textsuperscript{119} People v. Triple A Machine Shop, Inc., Crim. No. 1146057 (San Francisco Mun. Ct. filed Feb. 9, 1989).
\item \textsuperscript{120} Interview with Steven J. Castleman, supra note 39.
\item \textsuperscript{121} Id.
\item \textsuperscript{122} Id.
\item \textsuperscript{123} Id.
\item \textsuperscript{124} Letter from Jeff B. Marschner, former Deputy District Attorney for Siskiyou County, current Deputy District Director for the California Department of Consumer Affairs, to author (Dec. 8, 1989).
\item \textsuperscript{125} Letter from Mark S. Pollock to author (Nov. 14, 1989).
\item \textsuperscript{126} Letter from James L. Sepulveda to author (Nov. 17, 1989).
\end{itemize}
Deputy DA's nevertheless feel overwhelmed by the endless flurry of statutory changes coming out of Sacramento. While legislators appear to believe that it is politically appropriate to pass environmental laws, several of the prosecutors expressed frustration with the legislature's constant need to "improve" the hazardous waste laws and their regulations. "It hasn't been a very stable law," said Castleman.127 Lisa Brown, deputy DA in San Joaquin County, stated, "I feel local agencies are deluged by new statutes. . . . To enforce the ones we have now, we need a five-year moratorium on new environmental enforcement legislation."128 James Sepulveda, Deputy District Attorney in Contra Costa County, added, "We have the statutes to do an effective job of environmental enforcement and protection. . . . We almost literally have more statutes than we know what to do with."129

Naturally, the environmental DA must keep up to date with the abundance of laws coming out of the legislature and develop an overall understanding of this area of law. Steven Castleman explained, "It's hard to take . . . a basic law which has been amended a large number of times and . . . construct a coherent, comprehensive, understandable, defensible analysis of [it]."130 While the myriad statutory changes add to the complexity and cost of prosecuting environmental cases, they also discourage DA's who do not specialize in environmental law from getting involved in these cases. Jeff Marschner, former deputy District Attorney in Siskiyou County, explained that "the typical 'security-conscious' prosecutor is reluctant to take on these [HWCA] cases unless he has the opportunity to develop [an] expertise [in the field]."131 As discussed later,132 this problem is particularly acute in small counties where the DA's office cannot afford to have even one person become a specialist in the environmental statutes.

E. The Regulatory Nature of the Act

Deputies consistently expressed frustration at the fact that the Act's regulatory nature lessened its utility as an enforcement tool.133 Steven

127. Interview with Steven J. Castleman, supra note 39.
129. Telephone interview with James L. Sepulveda, supra note 108.
130. Interview with Steven J. Castleman, supra note 39.
131. Letter from Jeff B. Marschner, supra note 124.
132. See infra notes 239-52 and accompanying text.
133. To illustrate, the applicability of the criminal sanction provisions of Health & Safety Code § 25189.5(a)-(d) depends upon whether or not the disposal facility has a permit or is authorized for such disposal. For example, section 25189.5(b) reads as follows:

Any person who is convicted of knowingly disposing or causing the disposal of any hazardous waste, or who reasonably should have known that he or she was disposing or causing the disposal of any hazardous waste, at a facility which does not have a permit from the department issued pursuant to this chapter, or at any point which is not authorized according to this chapter shall, upon conviction, be punished

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Castleman admitted that "the first time I looked at [the Act] I thought it was a licensing statute." When approached to file his initial HWCA case, his first question was, "Is the guy [who was to be charged] licensed or not?" This complaint was echoed by Jeff Marschner, who "criticize[s] the regulatory mindset evident in the authorship of the Act, which can get in the way of criminal prosecution." Since Martin, however, it does not appear that courts will allow the regulatory language to present an obstacle to criminal enforcement of the Act. The statutory language, however, may impede a clear understanding of HWCA's provisions by the public as well as by those prosecutors who are unfamiliar with the Act.

IV
PATTERNS OF ENFORCEMENT OF THE HAZARDOUS WASTE CONTROL ACT

Although they recognize the problems with the Act itself, district attorneys characterize most of them as resolvable or as not presenting a substantial impediment to enforcement efforts. The future effectiveness of California's hazardous waste enforcement efforts is significantly more dependent on issues concerning the day-to-day implementation of the Act's provisions by local prosecutors. This section first puts enforcement issues in context by discussing the background of environmental prosecutors and the rationale behind local enforcement. It then specifically addresses the involvement of DA's in outreach and education of the community and local agencies, the implications of prosecutorial discretion, the difficulty of rural enforcement of HWCA, and the availability of resources to enforce the Act.

A. The Environmental District Attorney

Given the significant discretion available to prosecutors under HWCA and the discretion that characterizes public prosecutors in general in the United States, the motivation, background, and approach each DA brings to the job has a significant impact on how the environmental laws are enforced. This is especially true if one believes that deputy DA's are essentially autonomous in the performance of their jobs, as many of them claim to be.

by imprisonment in the county jail for not more than one year or by imprisonment in the state prison for 16, 24, or 36 months.

CAl. HEALTH & SAFETY CODE § 25189.5(b) (West 1984 & Supp. 1990) (emphasis added).

134. Interview with Steven J. Castleman, supra note 39.

135. Letter from Jeff B. Marschner, supra note 124.


137. See infra notes 175-238 and accompanying text.
The most striking aspect of an analysis of the deputy DA's is how differently they view their professional positions. Several deputy environmental DA's, as I shall call them, see themselves as deputy DA's who happen to work on environmental prosecutions; others view themselves as environmentalists who happen to be deputy DA's. Where the deputy views herself between these two poles may affect the approach she takes as a prosecutor of hazardous waste law violators.

Lisa Brown of San Joaquin County and Mark Pollock of Solano County exemplify those deputies who made their way into the DA's office precisely to effectuate change in the environmental field. Feeling that she was not making a significant impact in her position regulating pesticide use at the California Department of Food and Agriculture, Brown created the Environmental Prosecutions Unit in the San Joaquin County DA's office. She is motivated to serve as a deputy DA because she believes that local prosecutors are best equipped to combat environmental injustices.

Similarly, Mark Pollock has found his current career to be a very effective vehicle for him to protect the rights of the environment. Following several years in Los Angeles as litigation counsel for the Nuclear Law Center and Directing Attorney for the Native American Law Center, Pollock created the environmental crime unit in Napa County before moving on to create a similar unit in Solano County.

Not coincidentally, both of these prosecutors strongly prefer to charge criminally when presented with a case that has the potential to be brought either civilly or criminally. Most environmental DA's who do not perceive themselves as environmentalists do not exhibit the same vigor to prosecute criminally. As Lisa Brown stated, "[Criminal sanctions] are the only way to get an offender's attention!" One cannot help believing that the moral outrage felt by these environmentalists at the acts of polluters is manifested in a desire to prosecute criminally whenever feasible within the law.

In contrast, James Sepulveda, environmental deputy district attorney for Contra Costa County, does not claim to be an ardent environmentalist. In 1981, after having spent three years prosecuting traditional street crimes, he joined his office's Special Operations Unit. This unit currently prosecutes environmental, consumer, white collar,

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139. Id.
140. Telephone interview with Mark S. Pollock (Jan. 12, 1990).
141. Id.; Telephone interview with Lisa F. Brown, supra note 138; see also infra notes 193-238 and accompanying text (discussion of decisionmaking regarding whether to prosecute civilly or criminally under HWCA).
143. Telephone interview with James L. Sepulveda, supra note 108.
144. Id.
and political offenses.\textsuperscript{145} Since the Special Operations Unit did not include environmental prosecutions in 1981, his transfer was not motivated by a desire to protect the environment. Before his transfer, Sepulveda had no specific background or unusual interest in environmental affairs.\textsuperscript{146} However, his interest and expertise in the field have increased significantly since he joined the Special Operations Unit.\textsuperscript{147} Sepulveda plainly views himself as a district attorney who happens to prosecute environmental crimes, a perspective implicit in his statement that he "sees no difference between environmental [cases] and other cases."\textsuperscript{148} He thus expresses less readiness than Lisa Brown or Mark Pollock to prosecute criminally whenever such a route is feasible.

As Mark Pollock pointed out, it is not enough to be just an environmentalist, or, on the other hand, simply a good trial lawyer, in order to be a successful environmental prosecutor.\textsuperscript{149} An environmentalist without an adequate ability to try cases will be overwhelmed by the high quality defense attorneys who frequently represent wealthy defendants in white collar cases.\textsuperscript{150} On the other hand, a capable prosecutor who does not have or who does not develop a special interest in protecting the environment will lack the motivation needed to learn about and to grapple with this complex area of law, the prosecution of which differs in several respects from the more traditional violent crimes other deputies prosecute.\textsuperscript{151}

Both breeds of environmental DA's can successfully enforce hazardous waste laws, as long as each is aware of the possible shortcomings of her approach. For example, the "environmentalist" prosecutor must be careful to control her moral outrage in order to exercise her discretion in the best possible manner, especially while making the often complex and critical decision of whether to charge criminally or civilly. Similarly, the "nonenvironmentalist" DA must appreciate the gravity of an environmental violation as well as the peculiarities of such nontraditional prosecutions.

Environmental deputies are similar to other deputies in several ways. For example, most went to law school in California, which may be relevant to the tie that they feel to the jurisdiction in which they work. Furthermore, most of the environmental deputies gained experience prosecuting traditional misdemeanors and felonies during their initiation as DA's before prosecuting their first environmental case. For example,

\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Telephone interview with Mark S. Pollock, supra note 140.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
Mark Pollock tried 155 jury trials during his initial tour of the Napa County DA's office.  

Many of the deputies interviewed helped establish their offices' environmental units. Several of the deputies came to the county specifically to create the unit, as did Mark Pollock in both Napa (in 1983) and Solano Counties (in 1987), and Lisa Brown in San Joaquin County (in 1986). Others, like James Sepulveda in Contra Costa County, were involved in related areas of practice when their offices decided to create an environmental unit. At that point, they soon took over the reins, usually as the only environmental prosecutor in the unit.

Only recently have several deputies who were not involved in the creation of their units become active in their offices' environmental prosecutions. For example, Sepulveda is currently training a deputy DA to assume responsibility for the environmental cases in the Contra Costa County office, while Robin Wakshull of Santa Clara County has recently begun training two deputies to handle environmental cases.

This shift in control signals a critical stage in the development of local hazardous waste enforcement. These units must rely for their continued effectiveness upon educating a new generation of DA's on the complexities of this practice area. The average turnover rate in the district attorneys' offices of two to five years exacerbates this problem. The California District Attorneys Association (CDAA) has attempted to bridge this generation gap through annual and semiannual training programs. Without comprehensive and frequent training, the ability of the newer deputies to increase or even maintain the enforcement level of the prior generation of environmental prosecutors is in doubt.

B. The Importance of Local Enforcement

District attorneys are unequivocal about the need for local enforcement as a part of any successful hazardous waste program. Although they may be biased due to the role they play within California's enforcement plan, deputy DA's have no problem supporting their prodecentralization posture. Steven Castleman, for example, argues that:

This trend [toward delegating enforcement authority to the local level] flows from a common sense recognition that local environmental

152. Id.
153. Telephone interview with Lisa F. Brown, supra note 138; Telephone interview with Mark S. Pollock, supra note 140.
154. Telephone interview with James L. Sepulveda, supra note 108.
155. Id.
156. Interview with Robin Wakshull, Deputy District Attorney for Santa Clara County, in San Jose, California (Oct. 25, 1989).
158. Telephone interview with Jill M. Brusco, Program Consultant for the California District Attorneys Association (Dec. 8, 1989).
problems can best be solved locally. . . . The more centralized the governmental bureaucracy, the more sites it handles, and the less likely it is that any individual site will stand out. . . . [L]ess notorious sites [than Love Canal, Times Beach, etc.] are likely to sit unaddressed for a long time before centralized state and federal authorities have the resources to attend to them. . . . In contrast, local officials — particularly elected officials — cannot ignore their constituents’ fears when a hazardous materials incident occurs. This supports the theory that as much enforcement activity as possible should be handled by local authorities sensitive to local impacts. . . . In a manner analogous to Congress’ authorization of state programs under RCRA, California has recognized the advisability of delegating many hazardous materials responsibilities to county government.159

James Sepulveda favors localized enforcement because “[n]obody cares as much about Contra Costa [County] as I do. The United States [prosecutors] look at the United States. The state [prosecutors] look at the state. No [state or federal] prosecutor is going to be more interested in what is going on in my county than me.” When a hazardous waste problem arises in Contra Costa County, “I’ll care more; I’ll be more interested; and I will do more work quantitatively [than state and federal officials]. They don’t have [even] one person to devote to Contra Costa County. [Contra Costa County] at least has me to devote to Contra Costa County.”160

Mark Pollock believes that local government is the most effective level of enforcement because local government is closest to those who are actually coming into contact with hazardous waste problems on a daily basis, whether it be at the workplace, in the agricultural fields, or at recreational sites. “The closer you get to the problem, the closer you get to the potential solutions, the closer you get to the cases themselves.” The local prosecutor is in a better position than state or federal officials to be in constant contact with the primary source of hazardous waste referrals: the people. “The local prosecutor should be looking . . . to build contacts with the community and with those agencies that contact the community.”161

C. Community and Local Agency Outreach

A prevalent problem characterizing environmental offenses is the lack of awareness by the public and local agencies of the nature and gravity of violations of environmental laws. Educating the public has been a gradual process. People are slowly learning that these offenses can have potentially devastating consequences for human life and the environ-

160. Telephone interview with James L. Sepulveda, supra note 108.
161. Telephone interview with Mark S. Pollock, supra note 140.
ment, although such effects may not manifest themselves until months or years after the actual violation. The perception of environmental crimes as being "victimless" has dissipated, according to prosecutors, but continued education of the public is necessary before the gravity of these crimes is equated with that of more traditional violent crimes.

Because of insufficient public awareness about environmental crimes, Mark Pollock believes that an environmental deputy DA must take a proactive approach to his job, rather than a more traditional reactive one. "At this stage of the development of [environmental crimes prosecutions], it's incorrect to view an environmental prosecutor like you would any other prosecutor. [People] don't understand yet the gravity of the current environmental condition of the planet, . . . and that it is crime on a grand scale. Until that occurs, we have to be more than prosecutors." Education of the public and local agencies is a vital responsibility that would probably never be fulfilled if left to state and federal bodies.\footnote{162}{Id.}\footnote{163}{Id.\footnote{164}{Id.}\footnote{165}{Id.}}

Pollock, therefore, has worn the hat of an educator as well as a prosecutor. Like all educators, he often is creative in getting the message across. For example, Pollock has persuaded his county to use penalty money received in a recent HWCA settlement to paint a city's storm-drain lids with a blue fish and a black oil can with a red "No" symbol to tell people that these drains are not a place in which to dump waste. This seemingly insignificant step was necessary, said Pollock, to reach the community's large multilingual population.\footnote{163}{Id.}

Pollock realizes that the vast majority of hazardous waste referrals to his office come from the local bodies, including the public, who are the closest to and the most affected by the violations. He believes that the local DA is in the best position to "go to the Chamber of Commerce meetings and the Rotary meetings" to tell business people how to comply with the laws and why they should report businesses that are unfairly competing by not spending the money to comply with environmental regulations.\footnote{164}{Id.} In making presentations to civic groups, he tries to "motivate people [to get involved in the enforcement process] . . . by convincing people that 'hazard' is not an abstract word; that hazard equates 'death,' 'serious bodily injury,' 'explosion,' 'dismemberment,' 'disfigurement,' [and] 'malformed children.' It means bringing in graphic examples to the committee meetings and showing these people what this stuff does."\footnote{165}{Id.}

Pollock also uses the media to get the message out. When a violation occurs, he immediately involves the local media so that the public becomes aware of and educated about environmental crimes. The deter-
rent effect of criminal prosecutions is, of course, greatly enhanced when the public is knowledgeable about the existence of laws defining a criminal act, the reasons behind the law, and the acts that constitute the crime.166

Robin Wakshull has increased the accessibility of the local prosecutor to Santa Clara County residents by creating a telephone hotline directly to her office. The line, which Wakshull often answers herself, is publicized in media reports of hazardous waste incidents, listed in phone books, and mentioned by DA’s at public speaking events. Many of the tips that come in through the hotline are so unsubstantiated or vague that it is difficult to even begin an investigation. However, the unit is currently working on several cases that were referred through the hotline.167

Employees of local agencies, such as fire, police, and sanitation departments, also must be educated about environmental offenses because their participation is necessary for a successful enforcement process. Most importantly, these people must be made aware of what constitutes an environmental crime. If these crimes are going to be prosecuted, it is essential that, for example, local police learn to be alert for “unmarked 55-gallon drums, noxious-looking liquids running out onto the ground, [and] yellow spots in a green field,” and that fire inspectors look for “leaking containers, inadequate drainage, and bad smells.”168

To educate local officials, Pollock tries to videotape every environmental incident. He then plays the videotapes at monthly meetings which are attended by all the “players” (i.e., employees of local law enforcement and regulatory agencies) on the environmental crime “team.” During these meetings they discuss the incident and how each player should properly respond to such a situation in the future. Pollock also brings players along when he executes search warrants, whether these people are needed or not, so that they can observe situations firsthand.169

As a training device, Pollock recently created a mock environmental incident in which a jeep carrying radioactive material ran into a train car. Pollock then called 911 and videotaped the event as various local agency people responded to the “emergency.” They identified people who, had it been an actual incident, would have died or become contaminated due to the manner in which they responded. Once again, the videotape was played at the monthly players meeting and critiqued. “It’s all part of developing a raised awareness,” said Pollock.170

166. Id.
167. Interview with Robin Wakshull, supra note 156.
168. Telephone interview with Mark S. Pollock, supra note 140.
169. Id.
170. Id.
Santa Clara County holds monthly “enforcement group” meetings for local agencies involved in activities related to hazardous materials and waste. The group’s primary purposes are to provide training programs and technical assistance, exchange information about problems in various communities, and discuss particular offenders who may be operating in several communities. Organization of the meetings comes primarily out of the DA’s office.

At the meetings, Robin Wakshull encourages agencies to work with each other, trying to promote interagency communications and reduce the number of times that agency personnel will walk by an environmental incident and say, “That’s not my job.” Enforcement group meetings also promote coordination of enforcement efforts, the lack of which DA’s often criticize. Wakshull emphasizes to the group that more effective enforcement would result if there were a coordinated enforcement effort instead of offenders simply receiving several minor citations from various agencies.

According to Mark Thomson, Alameda County has successfully involved several police departments in the environmental crimes enforcement process. As in most counties, police and fire personnel were not aware of their department’s responsibility to investigate the situation upon discovery of a potential hazardous waste violation. To correct this misperception, the police departments in four Alameda County cities have assigned one officer environmental enforcement duties after training from the local DA. With centralized responsibility within the department, officers become aware that these violations do fall within their jurisdiction. The designated environmental crimes officer makes sure that any environmental incident to which his department responds is communicated to the district attorney’s office and handled in a manner consistent with effective prosecution.

D. Prosecutorial Discretion

1. Discretion Whether to File Charges

Government prosecutors in the United States have broad, although not unbridled, discretion in carrying out their responsibilities. Most

171. These agencies include various city hazardous materials units and fire departments, water pollution control plants, the California Highway Patrol, county and state health departments, the Department of Agriculture, the Department of Transportation, the FBI, police agencies, OSHA California, the Regional Water Quality Control Board, the Santa Clara Valley Water District, and the Department of Fish and Game. Interview with Robin Wakshull, supra note 156.

172. Id.

173. Id.

174. Interview with Mark N. Thomson, Jr., Assistant District Attorney for Alameda County, in Hayward, California (Sept. 15, 1989).

175. See J. KNAPP, E. MARGOLIN, N. ARGUIMBAU & J. BISHOP, PROSECUTORIAL DIS-
environmental deputies claim to be free from any office policies meant to
direct prosecutors on such matters as whether to file charges and, when
charges are filed, whether to proceed criminally or civilly. The auton-
omy of environmental DA’s, and their immunity from these pressures,
may be a result of their status as specialists. Since the environmental
deputy DA is often the only person in the office (including the elected
county district attorney) with any knowledge of environmental law, her
discretion is not as restricted as it may be for nonenvironmental deputy
DA’s.

The most important exercise of discretion involves deciding whether
to file charges. Deputies consider different factors in determining how
to use their discretion in this matter. Most DA’s consider certain com-
mon factors when deciding whether to prosecute an apparent hazardous
waste violation, but deputies differ about the reason a common factor is
important and the weight to be given such a factor in the exercise of
discretion. There are also factors unique to particular prosecutors.
What follows is a survey of these considerations, both common and
personal.

The sufficiency of the evidence of the illegal act is the most funda-
mental criteria for filing charges. Jeff Marschner of Siskiyou County de-
scribed this factor as the “[q]uantity and quality of evidence supporting
proof of violation.” James Sepulveda stated that one of “the most sig-
nificant factors [is] the provability of the case.”

As an example of the importance of the sufficiency of the evidence,
Steven Castleman cited his investigation of a public storage warehouse.
The warehouse allegedly contained hazardous wastes that were contami-
nating household goods stored at the site by the warehouse’s customers.
After “months and months and months” of investigation, “we were
never able to prove that there was a credible threat of contamination, so
we declined to prosecute.”

The gravity of the violation is another factor deputies commonly
consider when exercising their discretion to file charges. Castleman de-
termines whether the violation is “a significant enough problem.” In
other words, he asks, “What is the nature of the threat to the public

176. J. KNAPP, E. MARGOLIN, N. ARGUIMBAU & J. BISHOP, supra note 175, at 5 (“The
power to charge is the most important power possessed by the district attorney . . . because it
gives the district attorney the power to select not only who will be charged with a particular
crime, but also who will not be charged.”).
177. Letter from Jeff B. Marschner, supra note 124.
178. Letter from James L. Sepulveda, supra note 126.
179. Interview with Steven J. Castleman, supra note 39.
health or to the public safety or to the environment?" Moreover, "[i]f it's an isolated individual incident, we are less likely to prosecute than if it's a widespread threat or [if] a lot of people might . . . [be] affected [by the incident]."¹⁸⁰

The nature of the waste involved is, of course, relevant to this inquiry. "I suppose I could spend all my time doing waste oil cases, but the toxic[ity] of waste oil isn't really that bad compared to other things like highly concentrated acids, . . . PCB's, [and] asbestos," explains Castleman. If he finds out about a gas station dumping waste oil into a sewer, "we're unlikely to even investigate that" unless the alleged conduct involves large quantities or is happening frequently.¹⁸¹ Lisa Brown also considers the nature of the waste involved. She asks: what chemical is it? What hazards are present? Are the dangers of these hazards agreed upon by the scientific community?¹⁸²

On the other hand, Mark Pollock does not make a filing decision based upon the gravity or size of the violation. He feels that "it is as important to bring small cases as large ones," primarily to let the offender and others know that such activity is illegal. Unlike Castleman, Pollock would file charges against a resident caught dumping waste oil down the street sewer. Pollock believes that since the law does not distinguish between large and small offenders, neither should he.¹⁸³

Pollock considers the structural relationship of a business entity to the illegal activity when deciding whether to file charges against that entity. If the business is an alter ego of those responsible for the illegal act, Pollock is more likely to charge the company in addition to the individual violators. He distinguishes this from a situation where the business is "removed from the situs" of the violation. An example of this would be an illegal disposal by two employees in a warehouse owned by a subsidiary of the potential defendant corporation. Here, he would charge the individuals and not seek to hold the company itself liable.¹⁸⁴

Several factors guide Lisa Brown's exercise of discretion: the nature of the act (e.g., was the act overt or covert; how many times did the prohibited act occur); the nature of the defendant (e.g., did the defendant act alone; was the defendant under pressure from someone else to commit the act; how sophisticated is the defendant; what is the attitude of the defendant); the intent of the defendant (e.g., did the defendant have the ability to comply; was the act intended to increase profits or compete with others who comply); and the potential harm.¹⁸⁵ She also considers

¹⁸⁰. Id.
¹⁸¹. Id.
¹⁸². Letter from Lisa F. Brown, supra note 128.
¹⁸⁴. Id.
¹⁸⁵. Letter from Lisa F. Brown, supra note 128.
these points during settlement negotiations. On a more general policy level, Brown considers the importance of each case to the entire hazardous waste regulatory scheme. She asks herself: how critical is the violation to the regulatory program? Stated somewhat differently, how seriously does the relevant regulatory agency treat violations of this type? For example, improper disposal is considered the most serious violation of the hazardous waste laws, while neglecting to apply for a permit (which most likely would have been granted if applied for) is not as serious a violation.

Castleman considers another type of policy factor: whether the case will have any impact on the defendant’s industry as a whole. Since he can bring only a limited number of cases, the ones he selects should send a message to entities similarly situated. “The other shipyards in town are going to sit up and take notice” of the Triple A case Castleman is currently litigating. He often will pinpoint an industry practice that has been a source of hazardous waste problems. For example, he plans to prosecute some plating shops and auto dismantlers in order to set an example that certain prevalent practices in those industries will not be tolerated.

Although most DA’s cited the lack of sufficient resources as a problem, only Jeff Marschner in Siskiyou County stated that this is a major consideration when deciding whether to file charges against a hazardous waste offender. Marschner, like deputies in larger counties, considers the willfullness of the violation and the extent of the harm to the environment when deciding whether to file a case. However, Marschner also must consider the cost of the prosecution and its impact on the office’s caseload. “Like most small counties, Siskiyou County’s financial resources are spread very thin,” says Marschner. “Due to scarce resources, prosecution is usually limited to mainstream criminal prosecution [like] murder, mayhem, and marijuana plantations.”

The limitation on prosecutorial resources is not a significant factor in many larger counties. Robin Wakshull from Santa Clara County stated, “I am not aware of any case that has been turned down [by our office] because it would be too costly to pursue.” Mark Pollock claims that he does not reject cases because he is “overworked or [does] not have enough money.” He tries to be financially self-sufficient by funding current cases from penalties imposed in previous litigation.

186. Id.
187. Id.
188. Interview with Steven J. Castleman, supra note 39; see supra text accompanying notes 119-23 (discussing People v. Triple A Machine Shop, Inc.).
189. Interview with Steven J. Castleman, supra note 39.
190. Letter from Jeff B. Marschner, supra note 124.
192. Telephone interview with Mark S. Pollock, supra note 183.
2. Discretion to Prosecute Civilly or Criminally

HWCA generally provides prosecutors with a choice of filing criminal or civil charges. As James Sepulveda stated, "I can't think of one violation of [HWCA] or any of the regulations thereunder where I don't have a choice to go either civilly or criminally." This section explores how environmental DA's use this discretion.

The majority of cases brought under HWCA are civil suits. Steve Castleman points out that "although a lot of people, including myself, would prefer to go criminal[ly] in the ideal world, when it comes down to practical day-to-day enforcement, we do more civil work than criminal work. That is true everywhere but Los Angeles." However, criminal prosecutions for hazardous waste violations are a growing trend in California.

Surveying deputy DA's about their reasons for proceeding either criminally or civilly, it becomes evident that prosecutors make such decisions on the basis of very different considerations. While much has been written about the theoretical justifications for prosecuting criminally or civilly in the environmental field, practical factors play an integral role in the exercise of the prosecutor's broad discretion. Not only do different deputies often consider different factors, but common factors are given different weight in the deputies' decisionmaking. Only by asking prosecutors to spell out the factors they consider important can we begin to understand how they exercise their discretion on this important issue.

Deputies most commonly mention their ability to meet the different burdens of proof required for civil and criminal convictions as a factor in deciding which type of charges to file. "First and foremost, we have an ethical duty not to bring criminal cases that we don't think we can prove beyond a reasonable doubt," explains Castleman. Prosecutors "are sometimes reluctant to file criminal charges where there is really any substantial doubt in their mind. The civil provisions are relatively harsh, and they are a lot easier to prove." Castleman decides whether to file criminally or civilly "on a case-by-case basis, [with] no two cases [being] the same." His primary concern is the sufficiency of the evidence with respect to the burden of proof requirements.

194. Telephone interview with James L. Sepulveda, supra note 108.
195. Interview with Steven J. Castleman, supra note 39.
196. L. STEWART, supra note 26, at 85.
198. Interview with Steven J. Castleman, supra note 39.
199. Id.
Besides the greater burden of proof, discovery rights are greatly limited in criminal cases. James Sepulveda, who advocates civil prosecution in most cases under HWCA because "the deterrent effect civilly is as much as it is criminally and it's easier to prove," points out that the lack of the right to discovery in criminal cases hampers the accumulation of evidence necessary to meet the criminal standard. In debating recently whether to file civilly or criminally in a particular case in which he did not have "hard physical evidence," Sepulveda decided to file civilly. He explained, "If I had to go criminally in this case, I'd be in big trouble because I know that I might not be able to prove it beyond a reasonable doubt." In a civil action, he could depose employees and demand that the business produce its records, while only being required to prove his case by a preponderance of the evidence. Thus, the higher standard of proof and the absence of discovery rights in a criminal case may be determinative as to whether to bring civil or criminal charges.

Certain practical considerations have forced Sepulveda to view the burden of proof for an environmental crime as being even more difficult to overcome than "beyond a reasonable doubt." One consideration is the expectations of the jury in a criminal case. "Your defendant is not your typical bad guy. Jurors . . . want to look across . . . and see a bad guy over there that should go to jail. It's very difficult when they see a business person, especially if they are in business. Even though you may have all the facts and the law on your side, you still have to deal with that element of a criminal jury." Lisa Brown in San Joaquin County also evaluates the difficulty of convincing a jury that the defendant should be treated as a criminal. Additionally, Sepulveda considers the impression each environmental prosecution may have on a judge. "The judges look at you like you're crazy: 'Why are you doing this? I've got rapists and robbers and murderers. . . . Why are you taking up my time with this stuff?'" Sepulveda does not believe that such judicial disposition should be ignored. "If the judge isn't going to send [the defendant] to jail, why even go criminal? Why even bother? Why not just go civil?"

Mark Pollock points to the defendant's status in the community as a factor in deciding whether to prosecute criminally or civilly. The criminal justice system traditionally has not punished individuals who are pillars of the community and lack a prior criminal record. This is particularly true in small counties, where the defendant may likely be the

201. Id.
202. Id.
203. Letter from Lisa F. Brown, supra note 128.
204. Telephone interview with James L. Sepulveda, supra note 108.
205. Telephone interview with Mark S. Pollock, supra note 183.
largest employer within the court’s jurisdiction. Some prosecutors have tried to avoid locally biased judges by bringing suit in another county if they are able to establish “significant contacts” between the violation and that county (for example, file charges in a county that is downstream from the site of the dumping, instead of the county in which the dumping occurred).\footnote{206}

While Sepulveda seriously considers these factors, most deputies admit that the reluctance of judges and juries to criminally sanction offenders of hazardous waste laws has diminished over time. For example, Robin Wakshull of Santa Clara County found the jury in the county’s one HWCA jury trial to be “extremely receptive [and] extremely concerned [with the case]. [They] were very dedicated to their job of listening to the evidence and reaching a judgment.” Wakshull does not think that judges generally view environmental crimes any differently than other crimes. She observes that “judges vary as they do in any other type of crime. Some judges see this as a horrendous crime which should be severely punished, and others see it... as something just to be taken care of” by cleaning the waste up or paying cleanup costs to do so.\footnote{207} Our ability to generalize on the perception of juries and judges is limited, however, by the small number of HWCA cases that have gone to trial.\footnote{208}

Unlike most other deputies, Sepulveda has formulated guidelines for his decisions whether to file civil or criminal charges. For negligent violations or strict liability violations done out of ignorance, he files civilly. For intentional violations, he files criminally. If these latter violations are “paperwork” offenses, he charges a misdemeanor. He also charges a misdemeanor for a disposal or transportation violation, where the threat of harm to people or the environment posed by the violation is not substantial. He reserves felonies for those cases where the violation was intentional and the threat posed is substantial.\footnote{209}

Two points should be made about Sepulveda’s guidelines. First, these are only guidelines, and do no more than give Sepulveda the structure he feels he needs to properly exercise his discretion. There is much room for discretion within these standards, such as what are negligent as opposed to intentional violations, and what is “substantial” harm. Thus, the use of guidelines may not differ substantially from the seemingly less structured approach taken by other deputies in which they weigh the importance of various factors.

Second, given these standards, Sepulveda is unlikely to use ordinary negligence, or even criminal negligence, as a basis for alleging a criminal

\footnote{206}{\textit{Id.}} \footnote{207}{Interview with Robin Wakshull, \textit{supra} note 156.} \footnote{208}{According to Steven Castleman, there have only been about a dozen HWCA cases that have gone to trial in the state. Interview with Steven J. Castleman, \textit{supra} note 39.} \footnote{209}{Telephone interview with James L. Sepulveda, \textit{supra} note 108.}
act, as the Martin case permits. The primary reason for this is his belief that judges and juries do not take environmental offenses seriously enough to make him confident that he would get a criminal conviction without proving actual knowledge. 210 Apparently, the full potency of Martin will not be achieved until prosecutors are confident that judges and juries appreciate that environmental violations are so grave as to deserve criminal sanctions.

Mark Thomson of Alameda County is also unlikely to rely on the Martin court's holding concerning the ordinary negligence standard. However, he does not base this on his observations of judges and juries, like Sepulveda, but rather on the culpability of the defendant. Thomson states that "[i]f indeed it was an intentional disposal . . . , then in all probability we are going to charge him criminally as opposed to civilly. If it is negligent conduct, then we are going to have to, in all probability, make a civil filing decision." 211 In other words, he draws the criminal/civil line primarily based on culpability, without consideration of the defendant's constructive knowledge of the illegal act.

Steven Castleman of San Francisco City and County also uses a culpability factor when deciding whether to file criminally or civilly, although he descriptively calls it the "piss off" factor. When deciding how to file, he asks, "Was [the behavior] so outrageous that you really think it deserves criminal punishment?" 212 Or was the defendant merely negligent or guilty of malfeasance? 213 Similarly, Sepulveda, whose Contra Costa County jail is already overcrowded, asks himself whether this is someone who really deserves to be incarcerated. "If [the HWCA defendant] is in jail, somebody else can't be. That's the reality of the system." 214

These reflections demonstrate a reluctance by local deputies to rely on Martin's holding that a violation of the standard of ordinary care is sufficient to find criminal liability. 215 This hesitation persists despite favorable comments by prosecutors concerning the ordinary negligence holding in Martin. For example, as noted earlier, Castleman stated that since Martin he is "totally comfortable" using the constructive knowledge standard. 216 Therefore, while prosecutors would like a lower standard of care requirement, they apparently need a longer track record of criminal sanctions being imposed for ordinary negligence before many prosecutors will take the Martin holding seriously. Of course, such a

210. See supra text accompanying notes 204, 206.
211. Interview with Mark N. Thomson, Jr., supra note 174.
212. Interview with Steven J. Castleman, supra note 39.
213. Id.
214. Telephone interview with James L. Sepulveda, supra note 108.
216. Interview with Steven J. Castleman, supra note 39.
track record can only follow from bringing criminal cases in which the prosecution has relied upon that standard.

Sepulveda discounts the significance of the penalty aspect of civil and criminal sanctions. Although criminal penalties can go up to $100,000 per day\textsuperscript{217} and civil penalties are limited to $25,000 per day,\textsuperscript{218} Sepulveda believes that as a practical matter most convicted violators, whether they are prosecuted criminally or civilly, pay approximately the same amount of money. He states that “civil penalties are just as tough as criminal ones.” Since most hazardous waste offenders are not multi-million dollar corporations, “I don’t think I have ever seen a case where I couldn’t add the [civil] penalties up . . . that it isn’t worth more almost than the price of the business.”\textsuperscript{219}

According to Sepulveda, the imposition of huge cleanup and compliance costs decreases the importance of civil and criminal penalties. “My main thrust is cleanup and compliance: I want them to clean up any mess they have made. I want them to comply with the law now and in the future.” The cost of cleanup “is a penalty in and of itself because it’s so financially draining. . . . The reality is that in most of these cases you don’t get many penalties because [the defendants] simply don’t have the money.” For example, Sepulveda described a company against which a cleanup order had been issued. The owner of the company walked into Sepulveda’s office, dropped the keys to his business on the deputy’s desk, and said, “The business is yours.”\textsuperscript{220}

Although restoring the environment is Sepulveda’s primary concern in all cases, he also decides whether to pursue substantial criminal penalties by evaluating the size of the offender’s assets. HWCA does not treat small businesses differently than large ones, such as the major Chevron oil refinery in Sepulveda’s county. He points out that simply ordering a small, privately owned company to comply with hazardous waste laws can be an enormous penalty, while the millions of dollars that Chevron spends each year on environmental compliance may be an ordinary business expense for them. “If [the violator] ha[s] the ability to pay penalties, then we impose penalties also.”\textsuperscript{221}

Mark Pollock, an ardent advocate for greater use of the Act’s criminal provisions, agrees with Sepulveda about the secondary importance of penalties to the most important remedy, cleanup. Pollock will not seek penalties if the defendant only has enough funds to pay for cleanup.\textsuperscript{222}

\textsuperscript{217} CAL. HEALTH \& SAFETY CODE § 25189.5 (West 1984 \& Supp. 1990). Under HWCA, imprisonment also is a potential criminal penalty. \textit{Id.}

\textsuperscript{218} \textit{Id}. § 25189.

\textsuperscript{219} Telephone interview with James L. Sepulveda, \textit{supra} note 108.

\textsuperscript{220} \textit{Id.}

\textsuperscript{221} \textit{Id.}

\textsuperscript{222} Telephone interview with Mark S. Pollock, \textit{supra} note 140.
In other words, Pollock does not allow his desire to impose severe criminal penalties interfere with his obligation to protect the environment. The need for injunctive relief is an important factor across the board in deciding whether to file a criminal or civil suit, since equitable relief is only available in civil cases. In fact, the need for injunctive relief is the only certain reason that Mark Pollock will file a civil suit; even then he may file it in conjunction with a criminal suit. Said Pollock, “Generally speaking, a civil case will not be filed unless there is a need for injunctive relief.”

Sepulveda favors bringing civil cases because of the advantages of injunctive relief over criminal probation. "If you've got a business that is going to remain viable, I like civil because ... [an injunction] enables you forever-more to have a handle on that business and control what they do." Sepulveda says that probation in a criminal case does not provide the prosecutor the same ability to oversee the violator's future behavior. First, no person has to accept probation, but can instead choose to accept a sentence, which usually entails paying a fine. If this happens, "you've got no control over them anymore."

Second, according to Sepulveda, even if the defendant is put on probation, “what does my probation officer, who has a degree in sociology probably, know about environmental matters and how to supervise ABC Plating Company? They're not going to know beans about that. Whereas if I get an injunction, I essentially serve as the probation officer. I know what I'm doing. I can make them submit reports to me. I can make them hire independent consultants. I can send out the county health department to monitor or to do generator inspections. There are a whole lot of things I can do.” Overall, says Sepulveda, “You get a better tail on the person.”

Robin Wakshull agreed that seeking injunctive relief in a civil prosecution is optimal if control over the defendant’s future conduct is desired. She pointed out that while an injunction is permanent, California law limits probation for a misdemeanor and felony to three and five years respectively. She echoed Sepulveda’s observation that injunctions allow much broader relief than probation, such as requiring submis-

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223. Letter from Mark S. Pollock, supra note 125.
224. There are cases in which Sepulveda finds it appropriate to file criminally. For example, if the defendant is a “fly by night” company that is unlikely to continue operations in the county, a civil judgment will likely never be paid, and an injunction would be futile because the business will leave the jurisdiction. Also, he believes criminal charges are proper when there is a willful, knowing violation, especially if it involves dumping. He would also consider criminal charges if the violation is a repeat offense. Telephone interview with James L. Sepulveda, supra note 108.
225. Id.
226. Id.
228. Id. § 1203.1.
sion of reports and health department inspections, and continuous monitoring of business operations by DA’s for compliance with regulatory standards.229

Lisa Brown, who strongly prefers to bring criminal rather than civil charges, also considers the need for injunctive relief either to stop illegal activity or to maintain control over a defendant if it is a business that will continue to operate.230 However, even when Brown does not seek injunctive relief, she is often forced to file civilly because of inadequate investigations. While she believes that the facts necessary to prove guilt beyond a reasonable doubt exist in many situations, investigations frequently fail to provide the prosecutor with sufficient evidence to meet this burden of proof. The problem is twofold: there are not enough investigators, and many investigators are not well trained to work on environmental cases, often resulting in damaged evidence (e.g., dropped samples).231

The deputies often file civil charges against a corporation even if they have decided to file criminal charges against individuals in the same case. The reason given is that corporations cannot be thrown in jail. According to Castleman, “you just get fines out of the corporation, [whether you file] criminally [or] civilly, so you might as well prosecute corporations civilly because there is a lower burden of proof.” The exception to this general rule, says Castleman, is “where the conduct is so egregious that it really is criminal-like.”232 Other deputies, like Lisa Brown and Mark Pollock, are less reluctant to file criminally against a corporation. They feel that the harm to reputation suffered by a business convicted of a criminal offense compensates for the inability to incarcerate the defendant. Because of the stigma, the management of a corporate defendant is more likely to sit up and take notice of a criminal charge than a civil one.233

Politics also play a role in the criminal/civil decision. Steven Castleman is the only prosecutor who discussed factors that could be characterized as political. However, it is unlikely that his office is the only one

229. Telephone interview with Robin Wakshull, supra note 191. Wakshull, however, has been successful at getting more “meaningful” probation terms. She has worked with courts to get probation which is tailored to the specific facts of individual cases. She also points out that, although probation is limited to five years, a permanent injunction can be dissolved by a motion to the court. Finally, she has lessened the problem of unqualified probation officers by getting a local agency, such as the fire department, to do the oversight. She has also tried to get the probation department to designate one or two people who will oversee all of the probation problems. Interview with Robin Wakshull, supra note 156.


232. Interview with Steven J. Castleman, supra note 39.

233. Letter from Lisa F. Brown, supra note 128; Telephone interview with Mark S. Pollock, supra note 140.
affected by such factors. One such factor is the need to demonstrate to the county that your unit generates significant revenue in order to persuade the county to allocate more resources to your unit. This situation, which may encourage civil filings and discourage criminal ones, is discussed below.

The other political factor depends upon the priorities mandated by the elected district attorney in the office. Since "we all work for elected public officials,"236 their policies concerning environmental prosecution are very influential. For example, Castleman points to Ira Reiner, District Attorney of Los Angeles County, who made the protection of the environment one of his primary platforms when he ran for office. Reiner thus is particularly motivated to put substantial resources into the enforcement of hazardous waste laws and to bring many criminal actions.

Several deputies who prefer to file criminally may file a collateral civil suit in addition to a criminal charge in order to obtain injunctive relief. Mark Pollock, who strongly favors prosecuting criminally under HWCA, will file a collateral civil charge "when the remedy [he is] seeking is immediate action on a dangerous site . . . [because a] criminal proceeding might drag on for months or even years before it results in a probation order." Pollock has successfully argued that such a strategy does not result in a duplicative remedy when the civil action is filed only for injunctive relief and not for penalties. "The criminal case is being brought to punish prior conduct; the civil case is being brought to bear a prospective remedy [of cleanup]."

E. Enforcement in Rural Counties

Small counties comprise a significant portion of California.239 These counties usually cannot support a prosecuting office of more than five attorneys.240 With so few attorneys, a small office is unable to assign even a fraction of one attorney's time to the prosecution of environmental crimes.

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234. Interview with Steven J. Castleman, supra note 39.
235. See infra notes 253-75 and accompanying text for a discussion concerning resources.
236. Interview with Steven J. Castleman, supra note 39.
237. According to Castleman, the Los Angeles office has eleven DA's prosecuting environmental crimes, seven of them enforcing hazardous waste laws. Id. Furthermore, while the majority of environmental actions brought by DA's statewide have been civil cases, the Los Angeles DA's office brings more criminal than civil actions in the hazardous waste area. L. Stewart, supra note 26, at 19, 26 n.74.
238. Telephone interview with Mark S. Pollock, supra note 140.
239. Eighteen of the state's 58 counties (31%) have under 50,000 residents. Demographic Research Unit, Cal. Dep't of Finance, Rep. No. 89 E-1, Population Estimates of California Cities and Counties (1989) [hereinafter Demographic Research Unit Report].
240. Letter from Jeff B. Marschner, supra note 124.
As a former deputy district attorney in small Siskiyou County, Jeff Marschner became acutely aware of the problems prosecutors in sparsely populated counties face when confronted with hazardous waste violations. Since small counties suffer most of the same criminal activities that larger counties do, albeit less often, "violent crimes and narcotics become political priorities." Environmental crimes cannot receive much enforcement attention from the county prosecutors because they must concentrate their efforts on burglaries, assaults, and drugs. "Unless somebody on the staff is familiar with the HWCA, there simply isn't the luxury of personnel time available to develop expertise in an area which is used relatively infrequently."  

Local prosecuting bodies are not likely to take on hazardous waste cases unless somebody in the office has experience with the relevant law. Marschner does not believe that it is necessary for a prosecutor to have any scientific background before using HWCA. He characterizes most prosecutors as being "security conscious," however, in that they are reluctant to take on a HWCA case before they have had the opportunity to develop an expertise in the area of law. "In large counties, this typically results in the establishment of specialized units to handle environmental cases," explains Marschner. In small counties, prosecutors "lack the time (or desire) necessary to learn the fundamentals" to prosecute environmental cases. Since most deputies in small counties never have an opportunity to gain hazardous waste experience, these offices do not enforce hazardous waste laws. This results in "a large geographic percentage of the state [being] left 'unprotected' in the sense that the prosecution capability is inadequate."  

Marschner is one of the few deputies in California to have taken a HWCA case to trial, which he did while in the Siskiyou County DA's office. He admits that "but for my previous exposure to hazardous waste cases as head of the Sacramento County District Attorneys' Consumer & Business Affairs Division [from] 1982-85, Siskiyou County likely would have deferred prosecution to the Attorney General's Office." Unfortunately the Attorney General's office simply cannot devote as much attention to local problems as the individual county's district attorney's office can.  

Marschner says that three solutions have been suggested in order to correct the inadequate enforcement of environmental crimes in small counties. The first solution, which has already been implemented, in-
volves the use of training programs developed by the California District Attorneys Association. These courses are currently being held on an annual or semiannual basis, and teach the basics of environmental science to local DA’s. The courses are taught by fellow DA’s, not scientists. They cover specialized problems of evidence and search and seizure as they apply to environmental law.

One problem with the training approach is that it is “an impossibility for an office of one to five attorneys” to spare a prosecutor for the several days required to attend one of these programs. Even if this problem could be overcome, the substantial turnover in small counties does not make it worthwhile for a small office to train a deputy. “[H]ence the time investment to create an in-house expert may ultimately bear little fruit and leave the county unprotected.”

Another potential solution is to create a unit within the Attorney General’s office capable of local environmental criminal prosecutions. The problem with this idea is that no progress would be made in training local prosecutors in these small counties so that they could pursue the nonprosecutorial functions of their positions. In other words, the proactive posture assumed by several local environmental prosecutors to educate the public, the regulated community, and other government agencies will remain solely a feature of larger DA offices, since prosecutors in small counties will not have the experience necessary to take such an active role in their communities.

A final potential solution to small counties’ insufficient environmental prosecution capability is “to train a cadre of prosecutorial types at the Department of Health Services who [w]ould be prepared to assist counties as ‘special prosecutors.’ ” Assuming local DA’s remain a part of the prosecutorial team rather than turning the cases over to this cadre of experts, this solution, unlike formal training programs, would allow deputies to develop experience with environmental litigation without taking them away from their daily office responsibilities. However, according to Marschner, “the chances of such a proposal surviving the political process are slim.”

Mark Pollock, who spends much time putting together training programs and prosecutorial assistance for environmental deputies through the California District Attorneys Association, has distributed a contact sheet to all DA offices. The “List of Players” gives the names, addresses,

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246. The CDAA course was standardized in 1989. Interview with Steven J. Castleman, supra note 39.
247. Id.
248. Letter from Jeff B. Marschner, supra note 124.
249. Id.
250. Id.
251. Id.
and phone numbers of fifteen deputy or assistant DA's and two deputy attorneys general who have some environmental prosecution responsibility in their offices. Pollock said that several deputies in small counties have contacted these prosecutors when in need of expertise and encouragement in litigating an environmental case.252

F. Prosecutorial Resources

1. The Lack of Resources

When asked whether he and his colleagues are doing an effective job of enforcing HWCA, Steven Castleman of San Francisco City and County flatly responds, “No.” He explains, “We can only bring a small number of actions. There are a lot more violations out there than we can prosecute or investigate.”253 Most large counties can afford only one environmental prosecutor, while many small and medium-sized counties cannot afford even one. The need for additional environmental deputies is exacerbated by the demands that nonprosecutorial functions (e.g., training and public outreach) impose on the local environmental prosecutor.254

Besides needing funds for hiring environmental deputy district attorneys, investigators, and support staff, effective enforcement requires resources for hiring consultants, private contractors, and experts, as well as lab fees. Investigations are extremely time-consuming and expensive. On a recent search warrant, Castleman took forty-five people, including fifteen people to take samples and thirty people to search for documents. In one week, only eighty-eight samples were produced because of the many precautions that had to be taken during the complicated sampling procedure. This was followed by two days of looking for buried hazardous waste, which was done by a private contractor at a cost of $35,000. Private labs often must analyze samples because of the four- to six-month turnaround at overworked state labs. Castleman estimates the cost of each privately-tested sample is $1000.255

Mark Pollock calls the lack of an adequate investigative staff “[t]he greatest obstacle to a zealous prosecutor [who] wish[es] to enforce the HWCA on the local level.” He points out that there are many counties with deputy DA’s who are “willing and able” to prosecute HWCA cases by investigating the cases themselves, but they are unable to do so because this turns the deputy into a witness. “In the absence of a truly

252. Telephone interview with Mark S. Pollock, supra note 183.
253. Interview with Steven J. Castleman, supra note 39.
254. For example, Robin Wakshull estimates that she spends approximately 25% of her professional time doing work that is not specific to any case, such as giving training programs and presenting talks to civic groups. Telephone interview with Robin Wakshull, supra note 191.
255. Interview with Steven J. Castleman, supra note 39.
trained and sophisticated investigative capability on the local level, these prosecutors, no matter how well-meaning, will not have cases to pursue."\textsuperscript{256}

Furthermore, litigation costs are immense because these cases are very heavily litigated, unlike most traditional street crimes.\textsuperscript{257} Since HWCA remains largely unsettled law, defense attorneys line up a myriad of challenges to the Act, all of which the prosecution must respond to and the courts must decide.\textsuperscript{258} Moreover, the wealthier defendants can afford representation by high-quality defense firms with abundant resources to put behind a case. The prosecution of HWCA violations thus requires significantly more resources than most other prosecutions.

2. Revenue-Making Pressure

Ironically, several of the deputies stated that despite the financial needs for environmental enforcement, county boards will only respond with additional resources if the environmental units can show that they are a profit-making body. The ability to make a profit is at least theoretically possible, because DA offices can generate revenue under HWCA. As discussed above,\textsuperscript{259} Health and Safety Code § 25192 apports twenty-five percent of any civil and criminal penalty money to the office of the prosecutor who brought the action (with another twenty-five percent going to the local health department, and fifty percent to the state's Hazardous Substance Account).\textsuperscript{260} The revenue available under HWCA is insufficient, however, to allow vigorous enforcement efforts.

Some deputies admit that there are pressures on them to allow revenue-generating demands to influence their enforcement efforts. As Steven Castleman pointed out, "Although we don't like to be judged by the amount of money we bring in, it's a fact of life that we are judged that way by our offices and by the funding agencies."\textsuperscript{261} For this reason, a DA might decide to file several small civil cases rather than one criminal case. Because almost all civil cases settle and, therefore, are not as time-consuming as criminal cases, the DA has time to handle a greater volume of cases and earn more money for the unit. Since most of the uncertainty surrounding HWCA centers around its criminal provisions, the effect of this revenue-enhancing approach is to hinder the development of a body of criminal law around the Act.\textsuperscript{262} Lisa Brown of San Joaquin County points out that only the penalties actually collected are subject to appor-

\textsuperscript{256} Letter from Mark S. Pollock, supra note 125.
\textsuperscript{257} See supra notes 150-51 and accompanying text.
\textsuperscript{258} See supra text accompanying notes 111-12.
\textsuperscript{259} See supra text accompanying notes 72-74.
\textsuperscript{261} Interview with Steven J. Castleman, supra note 39.
\textsuperscript{262} Id.
tionment. She estimated that her office has received an average of only $20,000 to $25,000 in revenues from section 25192 in each of the last two years. This is not enough to support an additional attorney or impress the county board with the unit’s revenue-generating abilities.263

While Mark Pollock understands the pressure on prosecutors to generate revenue in order to gain the attention of county boards and fund future prosecutions, he says that the current allocation under HWCA is deterring criminal enforcement. Rather than taking advantage of the potent criminal provisions of the Act, several deputies admitted that it has become a practice among colleagues to prosecute hazardous waste violations in a civil proceeding as an unfair business practice in order to generate greater revenue for the office.264 While HWCA section 25192 apportions twenty-five percent of penalties actually collected to the DA’s office,265 the unfair competition statutes allocate one hundred percent to the local prosecutor.266 Thus, the HWCA allocation provision is deterring deputies from bringing criminal cases, which “is exactly the opposite effect that the [provision] was intended to have.”267

To Pollock, the current allocation under HWCA is “a horrible miscarriage,” since the amount going to the state “does not even fund the paperwork of [the] state [cleanup program], while the same amount in small or medium-sized counties could fund prosecutorial positions.” Furthermore, “while the state usually contributes nothing” to a hazardous waste case, it is “robbing [small and medium-sized counties] of the ability to do the job” of prosecuting these violations. For example, Pollock noted that although fifty percent of all revenue generated by HWCA cases in Napa County goes to the state, there are no state cleanup sites in Napa County. Thus, revenues earned by Napa prosecutors and needed by them to continue their enforcement efforts are going primarily to fund state cleanup efforts in other counties.268

264. See CAL. BUS. & PROF. CODE §§ 17200-17208 (West 1987 & Supp. 1990). District attorneys are authorized under California’s unfair competition statute to seek injunctive relief from any unlawful, unfair, or fraudulent business practice. Id. § 17204. Civil penalties, not exceeding $2500 for each violation, are paid to the county treasurer. Id. § 17206(a)-(b). Anyone violating an injunction may be assessed a penalty of up to $6000 for each day of a continuing violation. Id. § 17207.
265. See supra text accompanying note 260.
267. According to Pollock, deputies are not charging violations of both HWCA’s criminal provisions and the civil provisions of the unfair competition laws because of the holding in United States v. Halper, 490 U.S. 435 (1989). In that case, the Supreme Court held under the Double Jeopardy Clause of the Fifth Amendment “that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole.” Id. at 504; see Telephone interview with Mark S. Pollock, supra note 183.
268. Telephone interview with Mark S. Pollock, supra note 183.
An amendment to section 25192 proposed in the 1989-90 legislative session would have altered the current apportionment schedule for penalties. The California Senate bill sponsored by Senator Art Torres, Chair of the Senate Toxics Committee, called for fifty percent of all civil and criminal penalties collected under HWCA to be paid to the state or local agency which investigated the action and fifty percent to be paid to the prosecuting office which brought the action. According to Robert Fredenburg, a consultant for the Toxics Committee who helped draft the bill, the purpose behind the legislation was to allocate the penalty funds to those agencies that participate in the investigation and prosecution of a particular case, and not to allocate the funds based on the "status of the agency, regardless of what they did" for the case. The proposed amendment also would have required that $200 of each penalty collected be deposited in the Hazardous Waste Enforcement Training Fund to have been created by the bill. Currently, hazardous waste enforcement training is supported out of the state's general fund. According to Fredenburg, the effect of the new fund would have been to earmark money specifically for training, thereby avoiding the need to compete with other programs for the limited money in the state's general fund. The proposed amendment failed to pass, however, resulting in a missed opportunity to address the lack of resources for enforcing HWCA.

CONCLUSION

California's Hazardous Waste Control Act is an important component of the state's hazardous waste regulatory scheme. The Act's inherent flexibility and potency reflect the legislature's appreciation of the gravity of hazardous waste violations. The Martin decision signals judicial receptivity to a broad interpretation of the Act. Deputy district attorneys agree that HWCA is an effective enforcement tool: prosecutors have discretion to choose between criminal and civil charges, and they can seek substantial fines and jail sentences as well as injunctions against ongoing violations. HWCA has great regulatory potential.

This Comment's study of district attorneys' approaches toward the enforcement of HWCA reveals that the Act has not lived up to its regula-

270. Id.
271. Telephone interview with Robert Fredenburg, Consultant with the California Senate Toxics Committee (Feb. 1, 1990).
272. See S. 415, supra note 269.
274. Id.
tory potential. A variety of factors, including resource constraints and the absence of a body of appellate court decisions construing the Act, have combined to inhibit the full use of HWCA's provisions by DA's in enforcement proceedings. This study suggests several strategies which could lead to more effective enforcement of HWCA by local prosecutors.

First, the legislature should stabilize the substantive content of the Act. DA's believe that if the legislature stopped making substantive amendments to HWCA, they would be better able to formulate a stable and coherent attack on wrongdoers. Prosecutors, many of whom are reluctant to bring environmental cases, would be more willing to utilize the Act if they did not constantly need to relearn the intricacies of its amended provisions. The legislature should allow any uncertainties surrounding the Act to be resolved, like any other law, through continued enforcement by local prosecutors and adjudication in the courts.

Local prosecutors must be willing to play a preeminent role in defining the content of the Act. Deputies should take chances litigating HWCA cases. If the Martin case is any indication, the courts will support aggressive prosecution under the Act. However, deputies can undermine their own victories by not incorporating into future litigation those positions upheld in successfully prosecuted cases, such as the ordinary negligence standard in Martin. Deputy DA's have a unique opportunity to determine the strength and future effectiveness of HWCA.

Second, the community must be better educated about critical hazardous waste issues. The lack of awareness among the general public and local government agencies about the dangers of hazardous waste inhibits the effective enforcement of HWCA. DA's will receive many more referrals for investigation and prosecution if the public and local agencies are aware of the seriousness of hazardous waste violations and acquire the ability to recognize these crimes. Furthermore, the public is more likely to comply with hazardous waste laws when they understand the consequences, both environmental and legal, of these offenses.

California's environmental deputy DA's should be commended for their efforts to educate the people of their communities, especially since the role of educator is one not often expected from local prosecutors. This increased educational burden necessarily leaves prosecutors less time to enforce the laws, however. Local health departments should be encouraged to assume a greater role in educating the public about environmental violations, a role consistent with their mission.

Third, prosecutorial discretion should remain in the hands of the local deputies. It would be anomalous for the state Attorney General to provide standards (beyond general guidelines that already exist) in order to limit, or standardize, the discretion of the local deputies who know

more about the enforcement of this law than most elected DA's. Deciding when to file, and deciding whether to file civilly or criminally, are best left to the deputy who has experience and expertise in the field.

Fourth, DA's need more resources with which to enforce HWCA. This is especially true in the state's smaller rural counties, which lack the experience and expertise of more urban counties. Much of the state is left without the manpower to prosecute under HWCA, severely limiting any of the statute's potential success. The Act's penalty apportionment provision will not generate revenue for these counties until cases are brought and won under the Act. Larger counties, under the leadership of the California District Attorneys Association, should consider allocating a portion of their HWCA revenue to a fund which would assist small counties in getting started with environmental enforcement. Larger counties must also maintain educational programs and prosecutorial assistance in order to encourage the rural counties to bring hazardous waste cases.

Even a well functioning hazardous waste enforcement program in a large county is seriously limited in its ability to materially impact the county's hazardous waste problems due to limited fiscal and human resources. Some of the largest and most industrialized counties in the state have only one prosecutor spending part or all of her time on environmental matters. Meanwhile, these deputies may handle as few as two complex hazardous waste cases at a time, whereas deputies prosecuting more traditional street crimes often carry ten or twenty times that number. The result is an enforcement scheme which is unable to reach and affect a vast majority of a county's hazardous waste violations.

Two options are available to address resource constraints in large urban counties. Fiscal resources required to create or expand environmental units can be generated under the Act in order to diminish reliance on legislative bodies for additional funds. The CDAA should lobby extensively for passage of legislation that would allocate more penalty money to those who bring HWCA actions and who require the funds to continue enforcement efforts. Environmental deputies must persuade their offices' elected DA's to lobby their state legislators for the passage of such a bill. The legislators should realize that the current revenue-generating discrepancy between HWCA and unfair competition statutes is providing a disincentive for prosecutors to bring actions under the more potent HWCA.

The second option for increasing enforcement involves the CDAA taking an active leadership role within its own ranks to encourage the sharing of expertise on HWCA actions. The Association is a particularly important unifying body because the offices that comprise it operate with

277. See supra text accompanying notes 269-75.
great autonomy. The CDAA can provide more than educational programs for these offices. It can establish a comprehensive support system whereby any one of the state's deputy DA's will feel confident that the best resources, including consultation with those more experienced with the Act, will be available throughout her first HWCA cases. Although such support presently exists to a limited extent, a more proactive approach is needed to encourage deputies to take these cases. In other words, a form of outreach is necessary, similar to that which experienced deputies are providing the public, but instead directed at the deputies themselves. Only when statewide coverage has been achieved will the district attorneys be able to significantly improve the enforcement of HWCA and play a more effective role in the management of California's growing hazardous waste problems.

Although this Comment discusses the enforcement of California's HWCA through “soft,” nonstatistical data, it nevertheless provides data that has not previously existed. Interviews of environmental DA's contain an obvious prosecutorial bias which must ultimately be considered alongside the views of defense attorneys. Even within the ranks of government prosecutors, widely varying perspectives exist among deputy DA's, deputy Attorneys General, and Assistant U.S. Attorneys. Great differences in opinion exist between the environmental DA's themselves, most of whom were not consulted for this Comment. Thus, the survey presented here is simply a beginning of our understanding of the enforcement issues of HWCA.

Of course, the best cure for “soft” data is “hard” data. Currently, statistical data about environmental prosecutions in California is not publicly available. The Attorney General's office refuses to make public data which has been collected from the state's fifty-eight DA offices concerning the number of civil and criminal cases, the charges involved, and the outcomes. Furthermore, only some counties routinely submit this information. The Attorney General's office or the CDAA must increase efforts to collect statistics about local environmental prosecutions and make them available for public study. While this data should not supplant the indispensable views of individual DA's, it would provide valuable insights into the administration of HWCA which currently do not exist.