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Lesser Included Offense Analysis of Environmental Crimes

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LESSER INCLUDED OFFENSE ANALYSIS OF ENVIRONMENTAL CRIMES

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Section 1.20(37) of the New York Criminal Procedure Law ("CPL") defines a lesser included offense as follows:

> When it is impossible to commit a particular crime without concomitantly committing, by the same conduct, another offense of lesser grade or degree, the latter is, with respect to the former, a "lesser included offense." In any case in which it is legally possible to attempt to commit a crime, an attempt to commit such crime constitutes a lesser included offense with respect thereto.[1]

Judges and practitioners must apply this definition in several situations during criminal proceedings. Identification of lesser included offenses is critical to: (a) the prosecutor's decision concerning the charges to bring against one or more defendants, (b) plea bargaining, (c) motions to reduce or dismiss an indictment, (d) motions for a trial order of dismissal, and (e) the judge's final charge to the jury.

Because of the relative infancy of environmental criminal prosecution, members of the New York legal community have had limited opportunities to apply lesser included offense analysis to

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1. N. Y. CRIM. PROC. LAW § 1.20(37) (McKinney 1996) ("CPL").

environmental crimes.[2] This Article provides a reference guide for judges and practitioners to use in identifying the lesser included environmental offenses. Part I briefly examines the scope of New York's lesser included offense doctrine. Part II surveys the contexts in which identification of lesser included offenses is critical. Finally, Part III, by applying the lesser included offense analysis to each criminal statute in the New York Environmental Conservation Law, identifies the environmental lesser included offenses and compiles these offenses into a series of useful charts and tables.

I. DEFINING THE SCOPE OF THE LESSER INCLUDED OFFENSE DOCTRINE

The lesser included offense doctrine set forth in section 1.20(37) of the New York Criminal Procedure Law mandates that a putative lesser included offense ("LIO") satisfy two requirements with respect to a "greater offense."[3]

First, the alleged LIO must be of a lesser grade or degree than the greater offense. This requirement is fulfilled if the criminal penalty under the purported LIO is less severe than the penalty under the greater offense. Thus, a class E felony can be a LIO of a class D felony because the penalty under the former is less severe than under the latter.

It should be noted that the "lesser grade" requirement represents an expansion of the scope of the LIO doctrine.[4] The former New York CPL required a LIO to be a lesser *degree* ("O") of another offense, as, for example, Fourth Degree Burglary is a lesser degree than Third Degree Burglary. In contrast, under the present CPL, a LIO may be a lesser degree of *or grade than* a greater

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2. In the early 1970s there were few reported criminal prosecutions of environmental crimes. Since a 1972 recodification of the Environmental Conservation Law, the number of environmental criminal sanctions has increased significantly. *See* Rocky Piaggione, *State Statutory Provisions*, in ENVIRONMENTAL CRIMES, 121-144 (New York State Bar Association 1995).

3. A lesser included offense is defined, pursuant to CPL § 1.20(37), in relation to another offense, referred to as a "greater offense" or "charged offense."

4. *See generally*, Bernard E. Gegan, *Lesser Included Crimes Under Felony Murder Indictments in New York: The Past Speaks to the Present*, 66 ST. JOHN'S L. REV. 329, § V (1992).

offense. This liberalizing modification enables an offense, such as Third Degree Criminal Trespass (a B misdemeanor) to be a LIO of Third Degree Burglary (a D felony), though the offenses are not different degrees of the same crime.[5]

If the putative LIO meets the lesser grade requirement with respect to another offense, it then must pass the "impossibility test." The test is satisfied when, according to section 1.20(37) of the CPL, it is *theoretically* "impossible to commit the greater offense without concomitantly committing" the purported LIO.[6] For practical purposes, the test can be considered as follows: if any hypothetical scenario exists that would establish the greater offense but not the purported LIO, then the latter fails the impossibility test.

Consider, for example, whether under the impossibility test, Second Degree Unlawful Possession of Hazardous Wastes, Subdivision One ("Possession 2o(1)") is a LIO of the greater offense of Possession 1o(1). A defendant is guilty of the putative LIO, a class E felony, when he "knowingly possess[es] more than one-hundred gallons . . . of an aggregate weight or volume of hazardous wastes at a place other than the site of generation."[7] A defendant is guilty of the greater offense, a class D felony, when he "knowingly possess[es] acute hazardous wastes at a place other than the site of generation."[8]

A hypothetical defendant is guilty of the greater offense, Possession 1o(1), if we assume he knowingly possesses *ten* gallons of an acute hazardous waste at a place other than the site of generation.[9] However, such a defendant is not guilty of the putative LIO, Possession 2o(1), because the defendant does not possess "greater than 100 gallons" of the waste. Because a hypothetical situation exists whereby a defendant can commit the greater crime without concomitantly committing the lesser, the putative

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5. *See* People v. Henderson, 359 N.E.2d 1357, 1359 (N.Y. 1976) (third degree criminal trespass is a lesser included offense of third degree burglary).

6. N.Y. CRIM. PROC. LAW § 1.20(37); *see also* People v. Green, 437 N.E.2d 1146, 1148 (N.Y. 1982).

7. N.Y. ENVTL. CONSERV. LAW § 71-2707(1) (McKinney 1996).

8. *Id.* § 71-2709(1).

9. By definition, every acute hazardous waste is also a hazardous waste. *See id.* § 27-0908(1)(c).

LIO fails the impossibility test.

As shown by the foregoing analysis, the impossibility test requires a comparison of the *statutory elements* of the purported LIO and the greater offense.[10] An "offense" is prohibited conduct, defined by a section of a criminal code.[11] Therefore, to perform the impossibility test, it is necessary to compare the elements of the criminal sections that define the putative LIO and

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10. *See* People v. Glover, 439 N.E.2d 376, 377 (N.Y. 1982) (theoretical impossibility is determined "by a comparative examination of the statutes defining the two crimes, in the abstract") *rev'g* People v. Hayes, 43 A.D.2d 99, 101 (1973) (word impossible means "an impossibility under the facts of the case on trial, not under some hypothetical alternative variety of crime charged"). *See generally*, Janis L. Ettinger, *In Search of a Reasoned Approach to the Lesser Included Offense*, 50 BROOK. L. REV. 191 (1984), § 1A (defining the statutory-comparison standard), § 1C (defining the factual-based standard). *See* Gegan, *supra* note 4, § IV. The United States Supreme Court applies the current New York impossibility standard. *See* Schmuck v. United States, 489 U.S. 705, 714-20 (1989) (rejecting the factual-based impossibility standard in favor of the statutory-comparison standard).

11. *See* N.Y. PENAL LAW § 10.00(1) (McKinney 1996). As in the Penal Law almost all offenses under the Environmental Conservation Law ("ECL") are defined by subdivisions of statutes. However, certain statutory subdivisions, such as ECL § 71-1933(3) and (4), are themselves subdivided. For these subdivisions, it appears that LIO analysis should apply at the statutory level that most narrowly defines the offenses in question. For example, the offense defined by § 71-1933(3)(a)(i), committed when a person with criminal negligence violates any provision of title 7 or 8 of article 17, is a LIO of the offense defined by § 71-1933(4)(a)(i), committed when a person knowingly performs the same conduct. *See infra* part III (c).

More ambiguous are subdivisions that are not themselves divided further, as each subdivision of ECL § 71-1933 is divided, yet *appear* to define multiple offenses. For example, Subdivisions One and Two of First Degree Endangering Public Health, Safety or the Environment (ECL § 71-2714), and Subdivision Two of Second Degree Endangering Public Health, Safety or the Environment (ECL § 71-2713) appear to define multiple offenses, but are not separately enumerated or denoted by letter. However, close scrutiny reveals that each subdivision actually defines only a single offense. The subdivisions simply contain two separate definitions for "acutely hazardous substances." While statutory amendment to clear up any ambiguity would be welcome, for LIO purposes, it is clear that Subdivision Two of Second Degree Endangering Public Health, Safety or the Environment is a LIO of both Subdivisions One and Two of First Degree Endangering. *See infra* part III (A)(3).

the greater offense.[12]

If the elements of the purported LIO are a subset of elements of the greater offense, then any hypothetical conduct that constitutes the greater offense will also constitute the LIO; thus, the putative LIO will pass the impossibility test. If, however, one or more elements of the putative LIO are not identical to an element of the greater offense, then the impossibility test will be satisfied only if an element of the greater offense subsumes the element unique to the putative LIO.[13]

Consider, for example, the impossibility test applied to Second Degree Unlawful Possession of Medical Waste, Subdivision Two ("Possession of Medical Waste 2o(2)") as a potential LIO of Possession of Medical Waste 1o(1). A defendant is guilty of the putative LIO, a class A misdemeanor, when he "[1] recklessly [2] possess[es] [3] more than forty gallons . . . of an aggregate weight or volume of [4] regulated medical waste [5] at a place other than the facility at which such waste was generated."[14] A defendant is guilty of the greater offense, a class E felony, when he "[1] knowingly and intentionally [2] possess[es] [3] more than three hundred gallons . . . of an aggregate weight or volume of [4] regulated medical waste [5] at a place other than the facility at which such waste was generated."[15] As can readily be seen, the first and third elements of the putative LIO are not elements of the greater offense.

To apply the impossibility test, first consider the mens rea element of the putative LIO with respect to the greater offense. Any element that embodies a culpable mental state is necessarily subsumed by an offense involving a higher culpable mental

12. *See* People v. Green, 437 N.E.2d 1146, 1148 (N.Y. 1982).

13. *See* People v. Van Norstrand, 647 N.E.2d 1275, 1278 (N.Y. 1984). When an element that is unique to the lesser offense passes the impossibility test with respect to the greater offense, the greater offense has "subsumed" the unique element of the lesser offense. *See also* People v. Deitsch, 97 A.D.2d 327, 328-29 (N.Y. 1983) (when only one element of a purported LIO is not an element of a greater offense and that element is subsumed by the greater offense, the putative LIO passes the impossibility test).

14. N.Y. ENVTL. CONSERV. LAW § 71-4403(2).

15. *Id.* § 71-4404(2).

state.[16] Section 15.05 of the New York Penal Law defines the degrees of culpability as follows, from highest to lowest: intentionally, knowingly, recklessly, and with criminal negligence. The New York Courts have adopted a practical, rather than theoretical, approach to applying the impossibility test to the mens rea elements of putative LIOs, thereby rejecting the argument that the culpable mental states are mutually exclusive. The courts perceive the mental states of section 15.00 as "fine gradations along but a single spectrum of culpability."[17] For example, acting with criminal negligence (failing to perceive a risk) may appear, theoretically, to preclude acting recklessly (perceiving a risk and ignoring it). Utilizing a practical approach, however, the courts dictate that the mental states are "but a shade apart on a scale of criminal culpability . . . if one acts with criminal recklessness, he is at least criminally negligent."[18]

In the medical waste example above, the element of "recklessness" represents a less culpable mental state than that of "knowingly or intentionally." Thus, the latter, an element of the greater offense, subsumes the former, an element of the purported LIO.

The next step in the medical waste example is to determine whether the third element of the putative LIO — the element representing the *40 gallons* of medical waste possessed — is subsumed by the greater offense which requires that greater than 300 gallons of waste be possessed. Clearly, if a defendant possesses 300 gallons of medical waste, such a defendant must possess 40 gallons of medical waste as well.

Accordingly, a comparison of the elements of the medical waste possession example establishes that no hypothetical conduct exists that would constitute the greater offense, but not the putative LIO. As such, Possession of Medical Waste 2o(2) is a LIO of Possession of Medical Waste 1o(1).

16. *See* People v. Green, 437 N.E.2d 1146, 1149 (N.Y. 1982).
17. People v. Stanfield, 330 N.E.2d 75, 78 (N.Y. 1975).
18. *Id.* at 77.

II. CONTEXTS IN WHICH IDENTIFICATION OF LESSER INCLUDED OFFENSES ARE CRITICAL

A. *Charging Decisions*

When determining the particular crimes with which a criminal defendant should be charged, whether by indictment or information, prosecutors must be cognizant of the LIO framework behind the crimes under consideration. If the evidence supports an offense and one or more of its LIOs, prosecutors have tremendous discretion in choosing the specific charges to bring. This choice can often dramatically impact the course of the case. Prosecutors must base their decisions on numerous factors, including the strength of their case and the likelihood that the defendant will evoke sympathy from a jury. Before a prosecutor can consider the nuances of these strategic charging decisions, however, the prosecutor must know with certainty which crimes are LIOs of other crimes.

B. *Plea Bargaining*

Identifying LIOs is also an essential part of the plea bargaining process. A defendant can plead guilty to either a charged offense or a LIO of the charged offense.[19] Such restriction on plea bargaining protects the defendant's constitutional right to answer only to charges made against him by a grand jury in an indictment.[20] However, the definition of a LIO in the plea bargaining context involves an expanded definition of section 1.20(37) of the CPL.[21] An LIO is defined under section 220.20 of the CPL as follows:

> (1) a lesser included offense . . . relating to the entry of a plea of guilty to an offense of lesser grade than one charged in a count of an indictment means not only a "lesser included offense" as that term is defined in subdivision 37 of section 1.20, but also one which is deemed to be pursuant to the following rules:

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19. *See* People v. Martin, 57 N.E.2d 53, 54 (N.Y. 1944).

20. *See* N.Y. CONST. art. I, § 6.

21. *See* N.Y. CRIM. PROC. LAW § 220.20 (meaning of lesser included offense for plea purposes).

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(j) where the offense charged is unlawful disposal of hazardous wastes in violation of section 27-0914 of the Environmental Conservation Law, any offense of unlawful disposal or possession of hazardous wastes as set forth in sections 71-2707, 71-2709, 71-2711, and 71-2713 of such law, in any degree, is deemed to constitute a lesser included offense;

(k) where the offense charged is unlawful possession of hazardous wastes in violation of section 27-0914 of the Environmental Conservation Law, any offense of unlawful possession of hazardous wastes as set forth in sections 71-2707 and 71-2709 of such law, in any degree, is deemed to constitute a lesser included offense.[22]

This expansion[23] is permissible in the context of plea bargaining because a guilty plea is bargained for as a benefit to the defendant after negotiation between the prosecution and defense.[24] Indeed, a defendant's guilty plea may be valid even though the offense pleaded to is neither a charged offense nor a lesser included offense of the charged offense.[25] Where the defendant has entered into a plea agreement voluntarily and knowingly, and where no jurisdictional defects exist, accepting a plea to an uncharged offense that is not a lesser included offense constitutes a harmless error.[26]

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22. Subdivisions (a) through (k) expand the lesser included offense doctrine of § 1.20(37) as it pertains to particular offenses. Only subdivisions (j) and (k) involve expansion of the doctrine with respect to environmental offenses. Clearly subdivisions (j) and (k), effective September 1, 1981, were intended to apply to ECL sections prior to several amendments of those sections. Such amendments render this CPL section meaningless as the section relates to the current versions of these article 71 crimes.

23. In any other context, this expansion would infringe upon the defendant's right to be convicted only of a charged offense or a lesser included offense of the charged offense pursuant to CPL § 1.20(37).

24. *See* Peter Preiser, Practice Commentary, N.Y. CRIM. PROC. LAW § 220.20 (McKinney 1993); *see also* People v. Johnson, 636 N.Y.S.2d 282 (N.Y.A.D. 1st Dept. 1995).

25. People v. Mathie, 599 N.Y.S.2d 43 (N.Y.A.D. 2d Dept. 1993).

26. *Id.* at 44.

C. *Motion to Dismiss or Reduce After Arraignment*

Identification of lesser included offenses is critical when a defendant moves to dismiss or reduce an indictment pursuant to section 210.20 of the CPL:

> (1) After arraignment upon an indictment, the superior court may, upon motion of the defendant, dismiss such indictment or any count thereof upon the ground that:
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> (b) The evidence before the grand jury was not legally sufficient to establish the offense charged *or any lesser included offense*;
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> (1-a) After arraignment and upon indictment, if the superior court, upon motion of the defendant . . . challenging the legal sufficiency of the evidence before the grand jury, finds that the evidence before the grand jury was not legally sufficient to establish the commission by the defendant of the offense charged in any count contained within the indictment, *but was legally sufficient to establish the commission of a lesser included offense, it shall order the count or counts of the indictment with respect to which the finding is made reduced to allege the most serious lesser included offense with respect to which the evidence before the grand jury was sufficient.*[27]

When a defendant moves to dismiss or reduce an indictment, the court conducts a three-part inquiry.[28] First, the court determines whether the evidence before the grand jury is legally sufficient to support the offenses charged in the indictment.[29] Unless the defendant can establish a "clear showing of insufficiency" of the evidence, the court will not dismiss or reduce the indictment.[30]

Second, if the evidence is not legally sufficient to support the

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27. N.Y. CRIM. PROC. LAW § 210.20(1)(b), (1-a) (emphasis added).

28. *Id.* § 210.20. *See generally*, George M. Heymann, *Motions to Reduce Indictments: An Analysis*, N.Y. L.J., Sept. 27, 1990 at 1, col. 1.

29. N.Y. CRIM. PROC. LAW § 210.20(1)(b). Evidence before the grand jury is legally sufficient to support the charged offense if, when viewed in the light most favorable to the prosecution, the evidence establishes every element of the charged offense. Such evidence may be legally sufficient even if it does not provide "reasonable cause" to believe that the defendant committed the charged offense. People v. Deitsch, 97 A.D.2d 327, 329 (N.Y. 1983).

30. *Id.*

charged offense, then the court must determine whether a LIO of the charged offense exists.[31] The LIO must satisfy the two requirements of section 1.20(37): (1) the offense must be of lesser grade or degree than the charged offense and (2) must satisfy the impossibility test.[32]

Third, if one or more LIOs exist, the court must determine whether the evidence is legally sufficient to support a LIO.[33] If the evidence does not support the charged offense, but does support one or more LIOs, the court must grant a motion to reduce the indictment to the highest LIO.[34]

Prior to a 1990 amendment adding subdivision 1-a to section 210.20, a court could only grant or deny a motion to dismiss an indictment. As long as the evidence against a defendant was sufficient to support either the charged offense or any LIO of the charged offense, a motion to dismiss was denied. The court could not *reduce* the charge against a defendant. Pursuant to the amendment, however, a court can reduce a charge — when the evidence is not sufficient to support it — to the most serious LIO that the evidence establishes.[35]

Following an order of a court reducing an indictment, the prosecution can, within thirty days, (a) file a reduced indictment, (b) resubmit the charged offense to the Grand Jury, or (c) appeal the order.[36]

Identification of LIOs in the context of motions to dismiss or

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31. N.Y. CRIM. PROC. LAW § 210.20 (1)(b).

32. *See supra*, part I.

33. N.Y. CRIM. PROC. LAW § 210.20(1-a); *see also* CPL § 210.20(1)(b) (standard for legal sufficiency).

34. N.Y. CRIM. PROC. LAW § 210.20 (1-a).

35. *Id. Compare* People v. Maier, 72 A.D.2d 754 (N.Y. 1979) (prior to amendment, § 210.20 "does not authorize a reduction of a charged contained in the indictment to a lesser included offense") *with* People v. Zodda, 580 N.Y.S. 2d 971, 972 (N.Y.A.D. 1st Dept. 1991) (after amendment, § 210.20 "permits the court to reduce any count contained within the indictment where the evidence is legally insufficient to establish the crime charged but legally sufficient to establish the commission of a lesser included offense). *See generally*, Heymann, *supra* note 28.

36. N.Y. CRIM. PROC. LAW § 210.20(6); *see* People v. Ferguson, 602 N.Y.S.2d 785 (N.Y. Sup. 1993) (failure of prosecution to act pursuant to § 210.20(6) results in dismissal of reduced count).

reduce is essential to both the prosecution and the defense.[37] Subdivision 1(b) of CPL section 210.20 protects the prosecution's case from dismissal when the evidence fails to establish the charged offense, but does establish a LIO.[38] Subdivision 1-a protects a defendant from being overcharged in an indictment.[39] This protection benefits the defendant in plea negotiations and at trial.[40] The reduction of charges in an indictment also functions to reduce the minimum degree of charges to which a defendant can plead guilty.[41] Additionally, at trial, the reduction of an indictment ensures that the defendant will be convicted only of an offense that was established during the grand jury proceeding.[42]

Both subdivisions 1(b) and 1-a provide the court with the "flexibility to do justice" by denying dismissal when the adduced evidence supports a LIO, and by reducing an indictment to reflect the offense that the evidence actually establishes.[43]

D. *Trial Order of Dismissal*

At the close of the prosecution's case or at the conclusion of all the evidence, a defendant may move to dismiss one or more of the charges against him. Pursuant to CPL section 290.10, the court may "issue a "trial order of dismissal," dismissing any count of an indictment upon the ground that the trial evidence is not legally sufficient to establish the offense charged therein or any lesser included offense."[44] In this context, the court conducts a similar three-part inquiry to that used under section 210.20: (1) determine if the evidence is legally sufficient to support the charged offense, (2) if not, identify any LIOs of the charged offense, and (3) determine if the evidence is legally

37. *See generally*, Heymann, *supra* note 28.

38. *See* People v. Adorno, 112 A.D.2d 308, 309 (N.Y. 1985).

39. *See* Preiser, *supra* note 24.

40. *See* People v. Jackson, 588 N.Y.S.2d 88 (N.Y. Sup. 1992).

41. *See* Heyman, *supra* note 28.

42. *See* Preiser, *supra* note 24.

43. *See* Heymann, *supra* note 28, at 1 (quoting Legislative Statement in support of Chapter 209, McKinney's Session Law News of New York No. 5, Aug. 1990, p.A-387).

44. N.Y. CRIM. PROC. LAW § 290.10(A).

sufficient to support at least one such LIO.[45] If the evidence supports any LIO, then the charged offense cannot be dismissed or reduced. Therefore, unlike the current section 210.20, which permits the court to reduce a charge to a LIO under these circumstances, section 290.10 is identical to the pre-1990 version of section 210.20.

E. *Charging the Jury*

Lesser included offense analysis plays a significant role when a judge charges the jury. Section 300.50 of the CPL authorizes submission of a LIO of a charged crime to a jury under limited circumstances:

> (1) In submitting a count of an indictment to the jury, the court in its discretion may, in addition to submitting the greatest offense which it is required to submit, submit in the alternative any lesser included offense if there is a reasonable view of the evidence which would support a finding that the defendant committed such lesser offense, but did not commit the greater...
> (2) If the court is authorized by subdivision one to submit a lesser included offense and is requested by either party to do so, it must do so. In the absence of such a request, the court's failure to submit such offense does not constitute error.[46]

Upon request of either party, the court must submit to the jury any LIO in addition to the charged offense, if the LIO satisfies two requirements.[47] First, the LIO must conform to the LIO definition of section 1.20(37).[48] Second, a *reasonable view* of the evidence must exist that would permit a finding that the defendant committed the LIO, but did not commit the charged offense.[49]

While the first requirement mandates the abstract analysis of the criminal statutes described in part I of this Article, the second involves evaluation of the evidence before the court. For this

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45. *See supra*, part II (C).
46. N.Y. CRIM. PROC. LAW § 300.50(1), (2).
47. People v. Norstrand, 647 N.E.2d 1275, 1278 (N.Y. 1984).
48. N.Y. CRIM. PROC. LAW § 300.50, § 1.20(37); *see supra* part I.
49. N.Y. CRIM. PROC. LAW § 300.50; People v. Green, 437 N.E.2d 1148, 1150-51 (N.Y. 1982).

exercise, the evidence must be considered in the light most favorable to the defendant.[50] The court does not weigh the persuasiveness of the evidence.[51] The requirement is satisfied when the evidence supports "on a rational basis" a theory under which the defendant committed the LIO and not the greater offense.[52] The LIO fails the evidentiary requirement only if the "evidence excludes every possible hypothesis but the greater offense."[53]

In practice, before the jury is permitted to consider the LIO, it must decide whether the defendant is guilty of the greater, charged offense.[54] Only if the jury acquits the defendant of the greater offense can it consider whether the defendant is guilty of the LIO.[55] This "acquittal first" rule stems from the principle that the jury should not reach a verdict based on compromise between jurors.[56] Without the acquittal first rule, jurors might be tempted to convict a defendant of a LIO if opinions of the jury differ about the defendant's guilt of the charged offense.[57] Because a conviction of the LIO is an implied acquittal of the greater offense, the prosecution cannot retry the defendant for the greater offense under principles of double jeopardy.[58]

The submission of a LIO to the jury may benefit the defense or the prosecution depending on the facts and circumstances of the particular case. A LIO charge is advantageous to the prosecution when the evidence at trial fails to satisfy pretrial expectations.[59]

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50. *See* People v. Henderson, 359 N.E.2d 1357, 1360 (N.Y. 1976).

51. People v. Green, 437 N.E.2d 1148, 1150-51 (N.Y. 1982).

52. *Henderson*, 359 N.E.2d at 1360 ("the [evidentiary] test is not that it is probable that the [lesser included offense] was actually committed or even that there is substantial evidence to support such a view").

53. People v. Logan, 198 A.D.2d 439, 440 (N.Y. 1993).

54. People v. Boettcher, 505 N.E.2d 594, 597-98 (N.Y. 1987).

55. *Id.*

56. As noted by the Court of Appeals in *Boettcher*, such compromise might result from sympathy for the defendant or to appease those who do not agree with the majority. *Id.*

57. *Id.*

58. *See* N.Y. CRIM. PROC. LAW § 40.20, § 300.50(4).

59. *See* People v. Green, 437 N.E.2d 1148, 1150 (N.Y. 1982). Originally, only the prosecution had the power to request a lesser included offense charge because the rule was designed to benefit the prosecution. Since 1978, both the defendant and prosecution are permitted to "request and obtain the benefit from a lesser

Unexpectedly weak testimony or evidence that does not establish an element of the charged offense necessitates an acquittal unless the court presents the jury with a LIO.[60]

A LIO charge may benefit the defense as well, because it affords the jury a "less drastic alternative than the choice between acquittal and conviction of the offense charged."[61] In theory, the jury must acquit the defendant if all of the elements of the charged offense are not proved beyond a reasonable doubt. However, without a LIO for the jury to consider, the defendant might

> be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.[62]

When the court submits a lesser included offense to the jury pursuant to section 300.50, such submission "prevents polarized distortion of the fact-finding process and allows verdicts that reflect the appropriate degree of guilt established by the proof."[63]

III. APPLYING THE LESSER INCLUDED OFFENSE DOCTRINE TO NEW YORK'S ENVIRONMENTAL CRIMINAL STATUTES

Article 71 of the New York Environmental Conservation Law ("ECL") is divided into 44 titles that contain New York State's environmental enforcement statutes.[64] These statutes impose a variety of criminal penalties on environmental offenders. The statutes are categorized by title according to the type of environmental offense that they criminalize.[65] Because the determination

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included offense charge." *See* Laura Anne Cooper, *Should Juries Be Able to Agree to Disagree?*, 54 BROOK. L. REV. 1027, 1039 (1988).

60. *See Green*, 437 N.E.2d at 1150.

61. *Id.*

62. Keeble v. United States, 412 U.S. 205, 212-13 (1973).

63. *See generally*, Gegan *supra* note 4.

64. *See* N.Y. ENVTL. CONSERV. LAW, article 71.

65. The statutes of each title of article 71 enforce the regulatory and prohibitive statutes of particular articles of the ECL. For example, title 29 of article 71 enforces the statutes of article 33 of the ECL, entitled, "Pesticides." *See* N.Y. ENVTL. CONSERV. LAW, title 29, article 71.

of the LIOs of environmental offenses requires theoretical comparison of the statutory definitions, lesser included offense analysis may be performed on these article 71 statutes in the abstract.

Of the 44 titles in article 71, only titles 19 (enforcing penalties for water pollution offenses), 27 (criminalizing acts involving hazardous wastes and substances), and 44 (prohibiting unlawful possession and release of medical wastes) contain LIOs.[66] The tables below identify the LIOs of these three titles. The offenses set forth in the other titles of article 71 do not fulfill the requirements demanded by LIO analysis.

Part A of the following discussion provides a step-by-step demonstration of LIO analysis, using Unlawful Possession of Hazardous Waste to exemplify the process.[67] After showing the relevant LIO analysis, part A identifies the results of the analysis and presents the findings in tables. Additionally, part A identifies[68] the hazardous *substance* LIOs, organizing these offenses in tabular form as well. Parts B and C present tables reflecting the medical waste and water pollution LIOs, respectively.[69]

A. *Application of Lesser Included Offense Analysis to Hazardous Waste and Substance Offenses*

Title 27 of article 71 of the ECL contains the criminal statutes penalizing unlawful conduct involving hazardous wastes and substances. The LIOs in this title are identified by performing LIO analysis on (1) First and Second Degree Unlawful Possession of Hazardous Wastes,[70] (2) the sections criminalizing violations of hazardous and solid waste regulations,[71] and (3) First, Second, Third, Fourth, and Fifth Degree Endangering Public

66. *See infra.*

67. Hazardous waste offenses are criminalized in title 27 of the ECL.

68. After applying LIO analysis to the hazardous waste possession offenses in part III(A)(1)(a),(b),(c), and (d) of this discussion, LIO analysis *results*, rather than *demonstrations of the process*, will be displayed for the other environmental offenses that pass LIO analysis muster.

69. Medical waste offenses are criminalized in title 44; water pollution in title 19.

70. ECL §§ 71-2707(1), (2), (3) and 71-2709(1), (2), (3).

71. ECL §§ 71-2705(2), 71-2703(2)(a), 71-2703(2)(b), and 71-2703(2)(c) (these titles regulate waste transmitter permits and solid waste management).

Health, Safety or the Environment. The remaining offenses of title 27 do not satisfy the standards of the LIO doctrine.[72]

1. Offenses Involving Unlawful Possession

Sections 71-2707 and 71-2709 penalize Unlawful Possession of

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72. The Unlawful Dealing in Hazardous Wastes offenses are the possible exception. *See infra* Appendix A. The putative lesser included offense, Unlawful Dealing in Hazardous Wastes in the Second Degree has two subdivisions: the gravamen of the conduct prohibited by the first is that the actor seeks to cause another person to possess or dispose of hazardous wastes without authorization; the gravamen of the second subdivision is that the actor provides someone who intends to possess or dispose of hazardous wastes with the means or opportunity to do so which, in fact, aids that person to commit such act. N.Y. ENVTL. CONSERV. LAW § 71-2715. The second subdivision is virtually identical to the crime of criminal facilitation. *See* N.Y. CRIM. PROC. LAW, art. 115. Unlawful Dealing in Hazardous Wastes in the First Degree has three subdivisions: the gravamen of the first is that the actor "remove, assist in the removal, or make available for removal" over 100 gallons or 1,000 pounds of hazardous wastes; the second subdivision requires that the actor "solicit, agree to receive, or receive a benefit" for possession or disposal of hazardous wastes without authorization; the third requires that the actor, either himself or though someone else, "offer, agree to confer, or confer upon another a benefit" for possession of hazardous wastes without authorization. N.Y. ENVTL. CONSERV. LAW § 2717. The second subdivision of the lesser offense appears to require an element not required by any of the three subdivisions of the greater offense, namely that the person aided by the actor consummate the crime of possession or disposal. Therefore, this subdivision cannot be a lesser included offense of any of the First Degree Unlawful Dealing crimes. The first subdivision of the lesser offense may be analyzed as: it *seems unlikely* that it is a lesser included offense of the first subdivision of First Degree Unlawful Dealing in that the lesser offense requires that the actor attempt to cause someone else to possess or dispose of wastes, whereas the greater offense could be interpreted to allow the actor to commit the crime himself (if the requirement that the actor intend that wastes be possessed or disposed of by "a person who does not have authorization" is construed to include possession or disposal by the actor himself), it is *not* a lesser included offense of the second subdivision of First Degree Unlawful Dealing because the lesser offense requires that the actor attempt to cause someone else to possess or dispose of wastes, which is not an element of the greater crime; and it *is* a lesser included offense of the third subdivision of First Degree Unlawful Dealing because by offering, agreeing to confer, or conferring a benefit upon someone to possess or dispose of wastes, the actor necessarily has "attempt[ed] to cause such person to engage in such conduct."

Hazardous Wastes. The following three examples demonstrate lesser included offense analysis of Second Degree Unlawful Possession of Hazardous Waste, Subdivision One ("Possession 2o(1)"), as a potential LIO of the three subdivisions of Possession 1o.

a. *Example One*

This example demonstrates LIO analysis applied to Possession 2o(1) (section 71-2707(1) of the ECL). The "greater offense" used in this analysis is Possession 1o(1) (section 71-2709(1) of the ECL).

STEP 1: List the elements of the purported LIO and of the greater offense.

Lesser Offense[73]	*Greater Offense*[74]
2nd Degree Possession of Hazardous Wastes,	1st Degree Unlawful Possession of Hazardous Wastes,
subdivision 1	subdivision 1
Class E Felony	Class D Felony
71-2707(1)	71-2709(1)
knowingly	knowingly
possess	possess
greater than 100 gallons of hazardous wastes	acute hazardous wastes
at place other than generation site	at place other than generation site

73. A person violates ECL § 71-2707(1) when he "knowingly possess[es] more than one hundred gallons . . . of an aggregate weight or volume of hazardous wastes at a place other than the site of generation."

74. A person violates ECL § 71-2709(1) when he "knowingly possess[es] acute hazardous wastes at a place other than the site of generation."

STEP 2: Identify elements of the lesser offense that are also elements of the greater offense and disregard those elements.[75]

Lesser Offense	*Greater Offense*
71-2707(1)	71-2709(1)
~~knowingly~~	~~knowingly~~
~~possess~~	~~possess~~
greater than 100 gallons of hazardous wastes	acute hazardous wastes
~~at place other than generation site~~	~~at place other than generation site~~

STEP 3: Apply the impossibility test to those elements of the lesser offense that differ from the elements of the greater offense.

The putative LIO (Possession 2o(1)) requires possession of *hazardous wastes*; whereas, the greater offense (Possession 1o(1)) requires possession of *acute hazardous wastes*. The impossibility test, as applied to the "hazardous waste" element of Possession 2o(1), with respect to Possession 1o(1) poses the question: is it theoretically impossible to possess an acute hazardous waste without simultaneously possessing a hazardous waste? By definition, an acute hazardous waste is a hazardous waste.[76] Accordingly, no hypothetical circumstances exist in which an acute hazardous waste is possessed without concomitant possession of a hazardous waste. Thus, the element representing the type of waste required by the putative LIO is subsumed by the greater offense, and this hazardous waste element passes the impossibility test with respect to the greater offense.

However, in addition to the difference in *type* of waste required by the sections above, a difference exists with regard to the *amount* of waste necessary. The putative LIO specifies that a quantity greater than 100 gallons of hazardous waste be possessed; the greater offense does not specify a requisite quantity of

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75. Elements of the lesser offense that are identical to elements of the greater offense satisfy the impossibility test with respect to the greater offense. *See supra* part I.

76. *See* N.Y. ENVTL. CONSERV. LAW § 27-0908(1)(c).

the waste.

Under the impossibility test, the relevant inquiry is whether, in the abstract, it is impossible to possess any quantity of waste, required by the greater offense, without concomitantly possessing 100 gallons of waste, required by the putative LIO.

Clearly, it is theoretically possible to possess an unspecified amount of waste without possessing *greater than 100 gallons.* Because this hypothetical situation exists, the quantity element of the putative LIO is not subsumed by the greater offense and the purported LIO fails the impossibility test. For this reason, Possession 2o(1) is not a LIO of Possession 1o(1).

b. *Example Two*

As in the example set forth above, this example applies LIO analysis to Possession 2o(1) (section 71-2707(1)of the ECL). However, the greater offense involved in this evaluation is Possession 1o(2) (section 71-2709(2) of the ECL), as opposed to Subdivision *One* of Possession 1o in the preceding example.

STEP 1: List the elements of the putative LIO and of the greater offense.

Lesser Offense	*Greater Offense*[77]
2nd Degree Unlawful Possession of Hazardous Wastes, Wastes, subdivision 1	1st Degree Unlawful Possession of Hazardous Wastes, subdivision 2
Class E Felony	Class D Felony
71-2707(1)	71-2709(2)
knowingly	knowingly
possess	possess
greater than 100 gallons of hazardous wastes	greater than 1,500 gallons of hazardous wastes
at place other than generation site	at place other than generation site

77. A person violates ECL § 71-2709(2) when he "knowingly possess[es] more than fifteen hundred gallons . . . of an aggregate weight or volume of hazardous wastes at a place other than the site of generation."

STEP 2: Identify elements of the lesser offense that are also elements of the greater offense and disregard those elements.

Lesser Offense	*Greater Offense*
71-2707(1)	71-2709(2)
~~knowingly~~	~~knowingly~~
~~possess~~	~~possess~~
greater than 100 gallons	greater than 1,500 gallons
~~of hazardous wastes~~	~~of hazardous wastes~~
~~at place other than generation site~~	~~at place other than generation site~~

STEP 3: Apply the impossibility test to those elements of the lesser offense that differ from the elements of the greater offense.

The putative LIO (Possession 2o(1)) requires possession of more than *100 gallons* of hazardous wastes; whereas the greater offense (Possession 1o (2)) involves possession of more than *1,500 gallons.*

Under the impossibility test as applied to the quantity element of Possession 2o(1), with respect to Possession 1o(2), the relevant question is whether it is impossible to possess greater than 1,500 gallons of a substance, required by the greater offense without necessarily possessing greater than 100 gallons of the same substance, required by the putative LIO. Clearly, it is impossible to possess more than 1,500 gallons of a substance without possessing more 100 gallons of the same substance. Because every other element of the putative LIO is an element of the greater offense, and because the element unique to the putative LIO satisfies the impossibility test, Possession 2o(1) is a lesser included offense of Possession 1o(2).

c. *Example Three*

This example modifies the above analysis by evaluating the purported LIO, Possession 2o(1) (section 71-2702(1) of ECL), with respect to Possession 1o(3) (section 71-2709(3) of ECL).

STEP 1: List the elements of the purported LIO and of the greater offense.

Lesser Offense	*Greater Offense*[78]
2nd Degree Unlawful Possession of Wastes, subdivision 1	1st Degree Unlawful Possession of Hazardous Wastes, subdivision 3
Class E Felony	Class D Felony
71-2707(1)	71-2709(3)
knowingly	recklessly
possess	possess
greater than 100 gallons of hazardous wastes at place other than generation site	greater than 2,500 gallons of hazardous wastes at place other than generation site

STEP 2: Identify elements of the lesser offense that are identical to elements of the greater offense and disregard those elements.

Lesser Offense	*Greater Offense*
71-2707(1)	71-2709(3)
knowingly	recklessly
~~possess~~	~~possess~~
greater than 100 gallons ~~of hazardous wastes at place other than generation site~~	greater than 2,500 gallons ~~of hazardous wastes at place other than generation site~~

STEP 3: Apply the impossibility test to those elements of the lesser offense that differ from the elements of the greater offense.

The quantity and mens rea elements of the putative LIO are different from the corresponding elements of the greater offense.

For the quantity element, the relevant inquiry concerns whether

78. A person violates ECL § 71-2709(3) when he "recklessly possess[es] more than twenty-five hundred gallons . . . of an aggregate weight or volume of hazardous wastes at a place other than the site of generation."

it is impossible to possess greater than 2,500 gallons of a substance, required by the greater offense without concomitantly possessing greater than 100 gallons of the same substance, required by the putative LIO. Because it is impossible to possess greater than 2,500 gallons of a substance without simultaneously possessing 100 gallons of the same substance, the volume element unique to the putative LIO satisfies the impossibility test with respect to the greater offense.

As to the requisite mental state of the two crimes, the question is whether it is theoretically impossible to "recklessly" possess a substance, required by the greater offense, without "knowingly" possessing the same substance, required by the putative LIO. "Knowingly" involves a higher degree of culpability than the mental state "recklessly." Putative LIOs with more culpable mental states do not satisfy the impossibility test with respect to greater offenses requiring lower mental states.[79] The impossibility test fails when applied to the mens rea element of Possession 2o(1) with respect to Possession 1o(3). Therefore, Possession 2o(1) is not a lesser included offense of Possession 1o(3).

d. *Summary of Analysis Applied to Possession 2o(2)*

The detailed demonstration of LIO analysis performed above on Possession 2o(1) with respect to the three subdivisions of Possession 1o is now repeated but applied to the *Second* Subdivision of Possession 2o[80] for the three subdivisions of Possession 1o. Rather than demonstrating each step individually, as in the example above, the analysis is summarized below.

The left column represents LIO analysis applied to Possession 2o(2) (ECL section 71-2707(2)) for Possession 1o(1) (ECL section 71-2709(1)); the center column for Possession 1o(2) (ECL section 71-2709(2)); the right column, for Possession 1o (3) (ECL section 71-2709(3)).

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79. *See supra* part I.

80. A person violates ECL § 71-2707(2) when he "recklessly possess[es] more than two hundred gallons . . . of an aggregate weight or volume of hazardous wastes at a place other than the site of generation."

STEP 1	
Lesser	Greater
71-2707(2)	71-2709(1)
recklessly possess > than 200 gal of HW	knowingly possess acute HW
at place other than generation site	

STEP 2	
Lesser	Greater
71-2707(2)	71-2709(1)
recklessly ~~possess~~ > than 200 gal of HW	knowingly ~~possess~~ acute HW
~~at place other than generation site~~	

STEP 3

It is IMPOSSIBLE to possess knowingly without possessing recklessly.

It is POSSIBLE to possess any amount of a substance without possessing greater than 200 gallons of the substance. One could possess, for example, 10 or 30 gallons of the substance.

STEP 1	
Lesser	Greater
71-2707(2)	71-2709(2)
recklessly possess > than 200 gal of HW	knowingly possess >than 1,500 gal of HW
at place other than generation site	

STEP 2	
Lesser	Greater
71-2707(2)	71-2709(2)
recklessly ~~possess~~ > than 200 gal ~~of HW~~	knowingly ~~possess~~ > than 1,500 gal ~~of HW~~
~~at place other than generation site~~	

STEP 3

It is IMPOSSIBLE to possess knowingly without possessing recklessly.

It is IMPOSSIBLE to possess 1,500 gallons of a substance without concomitantly possessing 200 gallons of the substance.

STEP 1	
Lesser	Greater
71-2707(2)	71-2709(3)
recklessly possess > than 200 gal of HW	recklessly possess > than 2,500 gal of HW
at place other than generation site	

STEP 2	
Lesser	Greater
71-2707(2)	71-2709(3)
~~recklessly~~ ~~possess~~ > than 200 gal ~~of HW~~	~~recklessly~~ ~~possess~~ > than 2,500 gal ~~of HW~~
~~at place other than generation site~~	

STEP 3

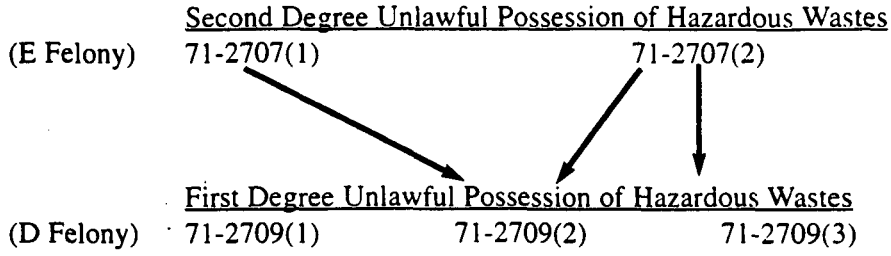
It is IMPOSSIBLE to posses 2,500 gallons of a substance without concomitantly possessing 200 gallons of the substance.

It is IMPOSSIBLE to possess acute HW without concomitantly possessing HW. All acute HWs are HWs.

CONCLUSION	CONCLUSION	CONCLUSION
71-2707(2) is not a lesser included offense of 71-2709(1) because the lesser fails the Impossibility test with respect to the greater.	71-2707(2) is a lesser included offense of 71-2709(2) because the lesser meets the Impossibility test with respect to the greater.	71-2707(2) is a lesser included offense of 71-2709(3) because the lesser meets the Impossibility test with respect to the greater.

e. *Table Representing Possession of Hazardous Waste LIOs*

Table I represents the results of LIO analysis demonstrated in the analysis above. The arrows connect the LIOs to their greater offenses.



2. Offenses Involving Waste Transmitter Permits and Solid Waste Management

Table II represents results derived from applying LIO analysis to offenses involving waste transmitter permits (regulated by title 3 of article 27 in the ECL) and solid waste management (regulated by title 7 of article 27 of the ECL). The statute defining the offense of violating title 3 or 7 of article 27 is section 71-2703 of the ECL.[81]

As in the table above, the arrows connect the LIOs to their greater offenses. Additionally, it is important to note that by a principle similar to the commutative property of mathematics, any LIO of a greater offense is a LIO of every offense connected to that greater offense, as long as those offense are of higher grade than the original LIO.

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81. Section 71-2703 was amended, effective January 1, 1996, to provide for increased sanctions for those who (a) release certain quantities of solid waste into the environment and/or (b) have prior convictions under the statute. (L. 1995, ch 508, eff Jan 1, 1996) N.Y. ENVTL. CONSERV. LAW § 71-2703. The analysis that follows in the text of this Article involves the new statute and interprets the aggravating quantity factor as an element of the different crimes while the prior conviction factor is considered to be an increased sentencing provision. If, however, the prior conviction factor is considered to be an element of the different crimes as well, then the lesser included relationship of the various crimes under the statute would be as follows, with each offense being a necessarily lesser included offense of every other offense appearing above it:

Class E felony:
§71-2703(c)(ii) [over 70 yds./prior conviction]
Class A misdemeanor:
§ 71-2703(c)(i) [over 70 yds.] and § 71-2703(b)(ii) [over 10 yds./prior conviction]
Class B misdemeanor:
§ 71-2703(b)(i) [over 10 yds.]
Violation:
§ 71-2703(a)

Thus, for example, either of the class A misdemeanor crimes, §§ 71-2703(c)(i) and 71-2703(b)(ii), would be lesser included offenses of the class E felony crime, § 71-2703(c)(ii), and would have the class B misdemeanor crime, § 71-2703(b)(i), and violation, § 71-2703(a), as their lesser included offenses, but would not be lesser included offenses of each another.

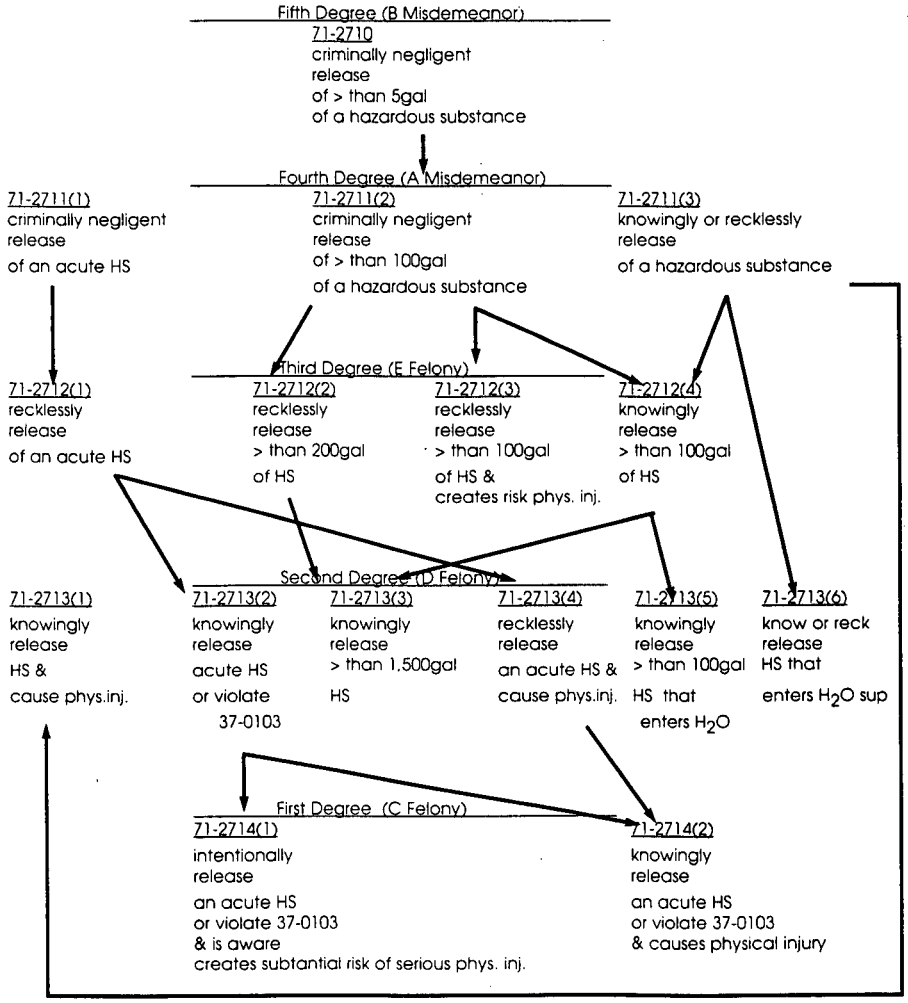
Lesser Offense
71-2703(2)(a) (Violation)
culpable mental state
violates title 3 and 7 of article 27
or any rules, regulations, final determinations

Lesser Offense with respect to the above offense
Greater Offense with respect to the following offense
71-2703(2)(b)(i) (B Misdemeanor)
violates 71-2703(2)(a)
causes or attempts to cause release
of greater than 10 cubic yards of solid wastes

Greater Offense
71-2703(2)(c)(i) (A Misdemeanor)
violates 71-2703(2)(a)
causes or attempts to cause release
of greater than 70 cubic yards of solid wastes

3. Offenses Involving Release of Hazardous Substances

Table III displays the results of LIO analysis applied to the First through Fifth Degrees of Endangering the Public Health, Safety or the Environment.[82]



82. *See infra* Appendix A.

4. The Catch-All Lesser Included Offense of the Hazardous Waste Felonies

A person is guilty of a misdemeanor offense under section 71-2705(2) of the ECL when, having a culpable mental state, he violates any provision of titles 9, 11, or 13 of article 27 or any rule or regulation promulgated thereunder. Because these three titles of article 27 exclusively concern hazardous *wastes*, section 71-2705(2) is not a lesser included offense of any of the hazardous *substance* felonies.[83] Within title 9 of article 27, however, section 27-0914 prohibits unauthorized possession, disposal, or dealing in hazardous wastes. Because a person could not commit any of the hazardous waste felonies -- Unlawful Possession of Hazardous Wastes in the First and Second Degrees[84] and Unlawful Dealing in Hazardous Wastes in the First Degree[85] -- without concomitantly violating § 27-0914, § 71-2705(2) is a lesser included offense of the hazardous waste felonies in article 71.

B. *Application of Lesser Included Offense Doctrine to Medical Waste Offenses*

The following tables identify the medical waste lesser included offenses. The medical waste LIOs are identified by applying the LIO analysis to the criminal enforcement statutes of title 44 of article 71 of the ECL. Section 71-4402(2)(a), a violation, is a LIO of every greater medical waste offense. Section 71-4402(2)(b), a B misdemeanor, is a catchall lesser included offense of every greater medical waste offense that requires at least a reckless mental state. Section 71-4402(2)(a) is a lesser included offense of section 71-4402(2)(b).[86]

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83. While every hazardous waste is, by definition, a hazardous substance (*See* N.Y. ENVTL. CONSERV. LAW § 71-2702(10)(a)), the converse is not true. Thus, it is *always* theoretically possible to commit a hazardous substance crime without concomitantly committing, by the same conduct, a hazardous waste crime.

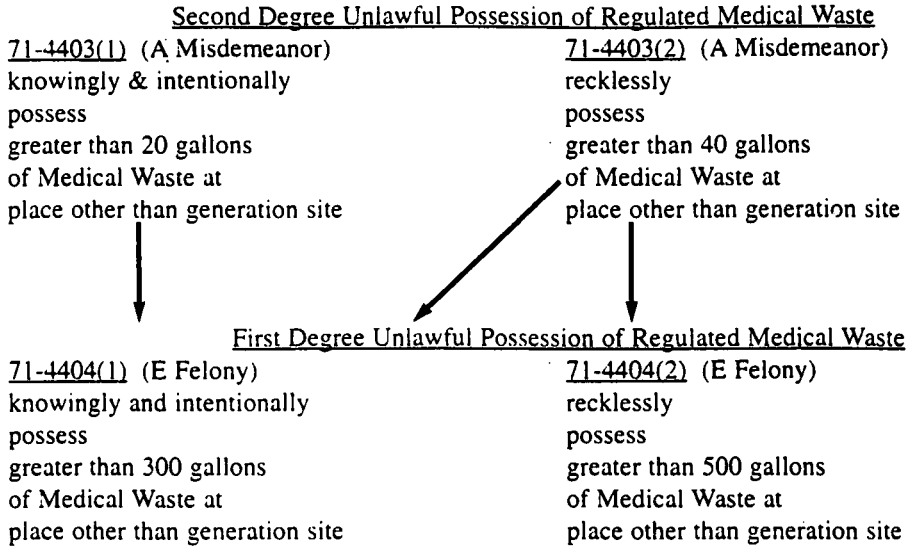
84. N.Y. ENVTL. CONSERV. LAW §§71-2709 and 71-2707.

85. N.Y. ENVTL. CONSERV. LAW § 71-2717.

86. Because each medical waste felony or class A misdemeanor set forth in title 44 of article 71 requires at least a reckless mental state and is virtually cer-

1. LIO Analysis Performed on Medical Waste Possession Offenses

Table IV represents the results of applying LIO analysis to the subdivisions of First and Second Degree Unlawful Possession of Medical Wastes.



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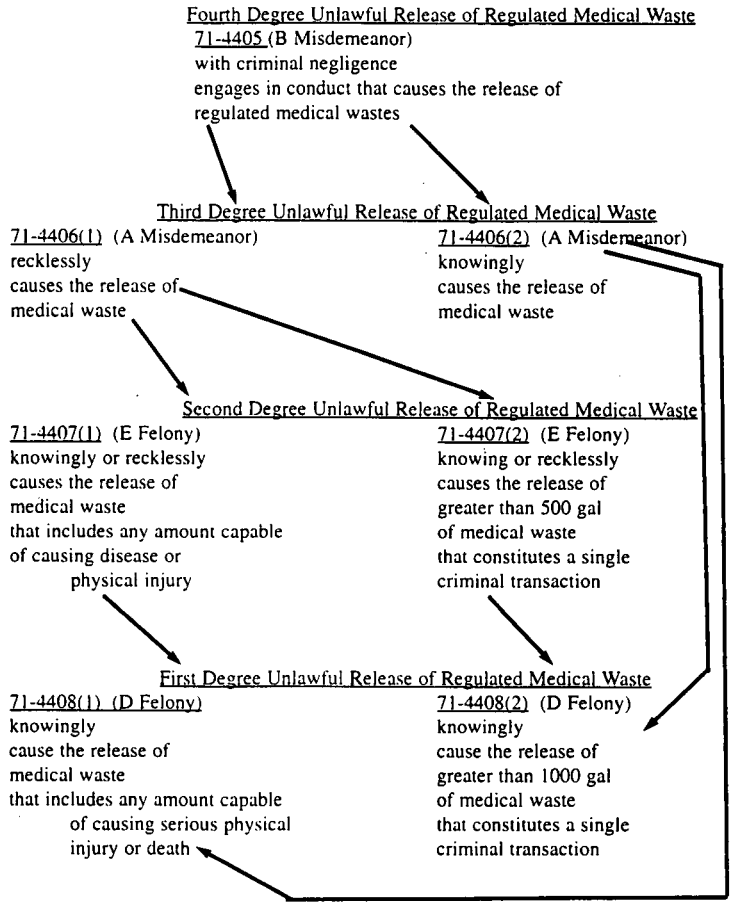
tain to proscribe conduct that would violate *some* provision or regulation of title 15 of article 27, the conclusion that § 71-4402(2)(b), a class B misdemeanor, is a lesser included offense of every higher grade medical waste crime is based on intuition as opposed to empirical analysis. On this basis, § 71-4402(2)(a), a violation requiring no culpable mental state, is a lesser included offense of every medical waste crime, including § 71-4402(2)(b). Similar reasoning dictates that § 71-1933(1) is a catchall lesser included offense for the water pollution felonies set forth in § 71-1933(4) and (5). *See infra* part III (C). Nonetheless, for these catchall crimes, practioners are urged to find a specific provision or regulation subsumed by the putative greater crime in order to verify that the catchall crime is, in fact, a lesser included offense of such crime.

2. LIO Analysis Performed on Medical Waste Release Offenses

Table V represents the results of LIO analysis of Unlawful Releases of Medical Wastes.



C. *Application of Lesser Included Offense Doctrine to Water Pollution Offenses*

The Water Pollution lesser included offenses are identified by applying LIO analysis to the criminal enforcement statutes of title 19 of article 71.[87] Section 71-1933(1) is a catchall lesser included offense of every greater water pollution offense. Section 71-1933(1) imposes a misdemeanor penalty on a defendant who violates, with a culpable mental state, the provisions of titles 1-5, 9-11, and 19 of article 17 of the ECL.[88]

Lesser Offense
71-1933(3) (A Misdemeanor)
with **criminal negligence**
violates titles 7 and 8 of article 17
or introduces hazardous substance
knew likely to cause personal injury or **property damage**
or causes treatment works
violate permit, rules, regulations

↓

Lesser Offense with respect to the above offense
Greater Offense with respect to the following offense
71-1933(4) (E Felony)
knowingly
violates titles 7 and 8 of article 17
or introduces hazardous substance
knew was likely to cause personal injury
or causes treatment works
violate, permit, rules, regulations

↓

Greater Offense
71-1933(5) (C Felony)
intentionally
violates title 7 or 8 of article 17
and
knows places another
in imminent danger of death or serious injury

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87. *See* Appendix B.

88. ECL § 71-1933(1) is the general criminal sanction statute of water pollution analogous to the general criminal sanction statute, § 71-4402(2), of medical waste offenses; *see supra* part III(B).

IV. CONCLUSION

As in all criminal prosecutions, criminal cases brought under the New York Environmental Conservation Law require a working knowledge of lesser included offenses. In order to perform their duties effectively, judges, prosecutors, and the defense bar need to know with certainty which crimes are — or are not — lesser included offenses. Yet, given that most judges, prosecutors, and defense attorneys encounter Environmental Conservation Law prosecutions so infrequently, they may not fully explore the potential lesser included offenses involved in their cases.

In New York, lesser included offense analysis is performed as a purely theoretical exercise, without reference to the particular facts of a given case. Because of this, the crimes set forth in the Environmental Conservation Law can be evaluated in the abstract to determine the underlying lesser included offense relationships. Having conducted such evaluation in this Article, we hope that it serves as a useful reference guide to facilitate simpler understanding of the myriad of lesser included offense issues lurking within environmental prosecutions.

Appendix A
New York Environmental Conservation Law

§ 71-2710. Endangering public health, safety or the environment in the fifth degree.

A person is guilty of endangering public health, safety, or the environment in the fifth degree when with criminal negligence he engages in conduct which causes the release to the environment of more than five gallons or fifty pounds, whichever is less, of an aggregate weight or volume of a substance hazardous to the public health, safety or the environment. Endangering public health, safety or the environment is a class B misdemeanor.

§ 71-2711. Endangering public health, safety or the environment in the fourth degree.

A person is guilty of endangering public health, safety or the environment in the fourth degree when: (1) With criminal negligence, he engages in conduct which causes the release to the environment of a substance acutely hazardous to public health, safety or the environment; or (2) With criminal negligence, he engages in conduct which causes the release to the environment of more than one hundred gallons or one thousand pounds, whichever is less, of an aggregate weigh or volume of a substance hazardous to public health, safety or the environment; or (3) He knowingly or recklessly engages in conduct which causes the release to the environment of a substance hazardous to public health, safety or the environment. Endangering public health, safety or the environment in the fourth degree is a class A misdemeanor.

§ 71-2712. Endangering public health, safety or the environment in the third degree.

A person is guilty of endangering public health, safety or the environment in the third degree when: (1) He recklessly engages in conduct which causes the release to the environment of a substance acutely hazardous to public health, safety or the environment; or (2) recklessly engages in conduct which causes the release to the environment of more than two hundred gallons or two thousand pounds, whichever is less, of an aggregate weight

or volume of a substance hazardous to public health, safety or the environment; or (3) He recklessly engages in conduct which causes the release to the environment of more than one hundred gallons, or one thousand pounds, whichever is less, of an aggregate weight or volume of a substance hazardous to the public health, safety or the environment and such a release creates a substantial risk of physical injury to a person who is not a participant in the crime; or (4) He knowingly engages in conduct which causes the release to the environment of more than one hundred gallons or one thousand pounds, whichever is less, of an aggregate weight or volume of a substance hazardous to public safety or the environment. Endangering public health, safety or the environment in the third degree is a class E felony.

§ 71-2713. Endangering public health, safety or the environment in the second degree.

A person is guilty of endangering public health, safety or the environment in the second degree when: (1) He knowingly engages in conduct which causes the release to the environment of a substance hazardous to the public health, safety or the environment and such release causes physical injury to any person who is not a participant in the crime; or (2) He knowingly engages in conduct which causes the release to the environment of a substance acutely hazardous to the public health, safety or the environment or the release of a substance which at the time of the conduct he knows to meet any of the criteria set forth in paragraph (b) of subdivision one of section 37-0103 of this chapter; or (3) He knowingly engages in conduct which causes the release to the environment of more than one thousand five hundred gallons or 15 [sic.] pounds, whichever is less of an aggregate weight or volume of a substance hazardous to the public health, safety or the environment; or (4) He recklessly engages in conduct which causes the release to the environment of a substance acutely hazardous to the public health, safety or the environment and such release causes physical injury to any person who is not a participant in the crime; or (5) He knowingly engages in conduct which causes the release to the environment of more than one hundred gallons or one thousand pounds, whichever is less, of an aggregate weight or volume of a substance hazardous to the public

health, safety or the environment and such substance enters water; or (6) He knowingly or recklessly engages in conduct which causes the release to the environment of a substance hazardous to the public health, safety or the environment and such substance enters a primary water supply. Endangering public health, safety or the environment in the second degree is a class D felony.

§ 71-2714. Endangering public health, safety or the environment in the first degree.

A person is guilty of endangering public health, safety or the environment in the first degree when: (1) He intentionally engages in conduct which causes the release to the environment of a substance acutely hazardous to public health, safety or the environment or the release of a substance which at the time of the conduct he knows to meet any of the criteria set forth in paragraph (b) of subdivision one of section 37-0103 of this chapter when he is aware that such conduct creates a substantial risk of serious physical injury to anyone who is not a participant in the crime; or (5) He knowingly engages in conduct which causes the release to the environment of a substance acutely hazardous to the public health, safety or the environment or the release of a substance which at the time of the conduct he knows to meet any of the criteria set forth in paragraph (b) of subdivision one of section 37-0103 of this chapter and such release causes physical injury to any person who is not a participant in the crime. Endangering public health, safety or the environment in the first degree is a class C felony.

§ 71-2715. Unlawful dealing in hazardous wastes in the second degree.

No person shall:

1. With intent that another person possess or dispose of hazardous wastes without authorization, solicit, request, command, importune or otherwise attempt to cause such other person to engage in such conduct;

or

2. Believing it probable that he is rendering aid to a person who intends to possess or dispose of hazardous wastes without authorization, engage in conduct which provided such person with

the means or opportunity for the commission thereof and which in fact aids such person to commit such act.

Unlawful dealing in hazardous waste in the second degree is a class A misdemeanor.

§ 71-2717. Unlawful dealing in hazardous wastes in the first degree.

No person shall:

1. Remove, assist in the removal, or make available for removal, more than one hundred gallons or one thousand pounds, whichever is less, of an aggregate weight or volume of hazardous wastes intending that such wastes are to be possessed or disposed of by a person who does not have authorization; or

2. Solicit, agree to receive or receive a benefit for possession or disposal of hazardous wastes intending that the possession or disposal is to be done without authorization; or

3. Offer, agree to confer, confer upon another a benefit for possession or disposal of hazardous wastes intending that the person who is to perform such possession or disposal does not have authorization.

Unlawful dealing in hazardous waste in the first degree is a class E felony.

Appendix B
New York Environmental Conservation Law

§ 71-1933 Violations; criminal liability.
* * *
(3) Any person who with criminal negligence as defined in section 15.05 of the penal law,
(a) violates
(i) any provision of title 7 or 8 of article 17 of this chapter, or
(ii) the rules or regulations promulgated thereunder, or
(iii) any term of any permit issued thereunder, or
(iv) any requirement imposed in a pretreatment program approved pursuant to section 402(a)(3) or 402(b)(8) of the Federal Water Pollution Control Act (33 U.S.C. § 1342(a)(3) or § 1342(b)(8)) or approved pursuant to title 7 or 8 of article 17 of this chapter, or
(v) any final administrative order issued pursuant to this article where an opportunity for a hearing is provided, or
(b) introduces into a sewer system or publicly owned treatment works any pollutant or hazardous substance
(i) when such person knew that such introduction was likely to cause personal injury or property damage, except if that introduction was in compliance with all applicable federal, state or local requirements or permits, or
(ii) which causes the treatment works to violate any term of any permit issued under title 7 or 8 of article 17 of this chapter or the rules or regulations promulgated thereunder except if that introduction was in compliance with all applicable federal, state or local requirements or permits; shall be guilty of a class A misdemeanor.
(4) Any person who knowingly as defined by section 15.05 of the penal law,
(a) violates
(i) any provision of title 7 or 8 of article 17 of this chapter, or
(ii) the rules or regulations promulgated thereunder, or
(iii) any term of any permit issued thereunder, or
(iv) any requirement imposed in a pretreatment program approved pursuant to section 402(a)(3) or 402(b)(8) of the Federal Water Pollution Control Act (33 USC S 1342(a)(3) or S 1342(b)(8)) or

approved pursuant to title 7 or 8 of article 17 of this chapter, or
(v) any final administrative order issued pursuant to this article where an opportunity for a hearing was provided, or
(b) introduces into a sewer system or publicly owned treatment works any pollutant or hazardous substance
(i) when such person knew that such introduction was likely to cause personal injury, except if that introduction was in compliance with all applicable federal, state or local requirements or permits, or
(ii) which causes the treatment works to violate any term of any permit issued under title 7 or 8 of article 17 of this chapter or the rules or regulations promulgated thereunder except if that introduction was in compliance with all applicable federal, state or local requirements or permits; shall be guilty of a class E felony.
(5) Any person who intentionally as defined in section 15.05 of the penal law,
(a) violates
(i) any provision of title 7 or 8 of article 17 of this chapter, or
(ii) the rules or regulations promulgated thereunder, or
(iii) any term of any permit issued thereunder, or
(iv) any final administrative orders issued pursuant to this article where an opportunity for a hearing was provided, and
(b) knows at the time that he thereby places another person who is not a participant in the crime in imminent danger of death or serious bodily injury shall be guilty of a class C felony.