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Role of Public and Private Litigants in Promoting Environmental Corporate Social Responsibility

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THE ROLE OF PUBLIC AND PRIVATE LITIGANTS IN PROMOTING ENVIRONMENTAL CORPORATE SOCIAL RESPONSIBILITY

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I. INTRODUCTION

Societal norms and expectations with regard to pollution control and conservation of resources have evolved rapidly over the last four decades. Practices with respect to disposition of wastes, consumption of energy, and use of land and raw materials that were commonplace just a few years ago would be unthinkable today. Indeed, now more than ever, environmentalism has become part of our American popular culture.[1] These drastic changes in societal norms and expectations have, not surprisingly, driven substantial changes in law.

The last forty years have seen radical changes to environmental law in the United States.[2] Prior to the dawn of modern environmental

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1. Companies of all sorts, from breweries to hotel chains, strive to capitalize on Americans' growing environmentalism by branding themselves as "green." *See* Betsy McKay & Suzanne Vranica, *Firms Use Earth Day to Show Their Green Side: Eco-Friendly Messages Fill the Air, but are They Being Heard in the Din?*, WALL ST. J., Apr. 22, 2008, at B7, *available at* http://online.wsj.com/article/SB120882594222933291.html.

2. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 1-2 (5th ed. 2006) ("Since the late 1960s . . . U.S. environmental law has grown from a sparse set of common law precedents and local ordinances to encompass a vast body of national legislation.").

regulation in the late 1960s, the common law—under doctrines such as nuisance and trespass—and a few limited local pollution control and land use ordinances provided the only legal limits on how industry could impact the environment.[3] Four decades later, things have changed dramatically. Today, industry faces a massive and complex web of federal, state, and local environmental statutes, ordinances, and regulations.[4]

Corporations have adapted and continue to adapt, usually reactively, to new legal and societal realities. When the law says they must, corporations change their practices to comply with new minimum legal requirements. Sometimes, however, corporations are more proactive. Sometimes corporations go beyond merely complying with the minimum environmental standards required by the law. Commentators have referred to this practice or concept of doing more to protect or preserve the environment than simply meeting the baseline mandated by applicable law as environmental "corporate social responsibility" ("CSR").[5]

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3. *See id.* at 1-2, 62-84.

4. Since 1970, the United States Congress has enacted numerous major environmental statutes including, but not limited to, the National Environmental Policy Act; the Clean Air Act; the Federal Water Pollution Control Act (Clean Water Act); the Federal Insecticide, Fungicide, and Rodenticide Act; the Marine Protection, Research, and Sanctuaries Act (Ocean Dumping Act); the Endangered Species Act; the Safe Drinking Water Act; the Toxic Substances Control Act; the Resource Conservation and Recovery Act; the Comprehensive Environmental Response, Compensation, and Liability Act; and the Emergency Planning and Community Right-to-Know Act. *Id.* at 91-92. Each of these federal statutory programs has its own set of implementing regulations, and many have corresponding or similar state laws and regulations.

5. CSR has been defined in a number of ways. Indeed, as one commentator has explained, there is no single "commonly accepted definition" and, thus, "the term is still largely ambiguous." Janet E. Kerr, *The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens*, 81 TEMP. L. REV. 831, 848-49 (2008). Kerr asserts that CSR should be defined broadly as "a company's policies and programs that consider both the financial and social impacts of decisions." *Id.* at 834. Kerr agrees with us, however, that only when a company "chooses to go beyond merely operating within the law" can it "truthfully claim to be socially responsible." *Id.* at 857; *see also* Paul R. Portney, *Corporate Social Responsibility: An Economic and Public Policy Perspective*, in ENVIRONMENTAL PROTECTION AND THE SOCIAL RESPONSIBILITY OF FIRMS: PERSPECTIVES FROM LAW, ECONOMICS, AND BUSINESS 107, 108 (Bruce L. Hay et al. eds., 2005) (defining CSR as "a consistent pattern, at the very least, of private

Companies that engage in CSR most often assert two arguments as justifications for doing more than legally required.[6] First, corporate decision makers often contend that they have a moral obligation to go beyond what the law requires.[7] Bill Gates, for example, has asserted that companies have a moral obligation not to focus solely on making a profit, but also to "improv[e] [the] lives of those who don't fully benefit from today's market forces."[8] Second, companies often profess that non-regulatory market forces motivate implementation of CSR initiatives.[9] For example, companies engaging in environmental CSR may reason that consumers will be more loyal and pay more for so-called "green" products, thus making the entity more profitable and increasing shareholder value; that they will be better able to hire and retain highly skilled employees; and/or that they will be able to obtain capital at lower costs.[10]

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firms doing more than they are required to do under applicable laws and regulations governing the environment, worker safety and health, and investments in the communities in which they operate").

6. *See* Portney, *supra* note 5, at 112 (asserting that proponents of CSR offer two primary justifications: (1) "moral obligation," and (2) non-regulatory market forces, such that "perhaps a great deal of environmental protection . . . would be forthcoming even in the absence of regulation"); Forest L. Reinhardt, *Environmental Protection and the Social Responsibility of Firms: Perspectives from the Business Literature*, in ENVIRONMENTAL PROTECTION AND THE SOCIAL RESPONSIBILITY OF FIRMS: PERSPECTIVES FROM LAW ECONOMICS, AND BUSINESS 151, 151 (Bruce L. Hay, et al. eds., 2005) (explaining that company decision makers most often justify environmental CSR by asserting that "such investments enhance shareholder value ('it pays to be green')," and by invoking "ethical arguments").

7. *See* Reinhardt, *supra* note 6; *see also* JunJie Wu, *Environmental Compliance: The Good, the Bad, and the Super Green*, 90 J. ENVTL. MGMT. 3363, 3371 (2009) (concluding, through an empirical survey, that "personal environmental values and beliefs [of upper management individuals] are the most significant factors affecting overcompliance").

8. Bill Gates, Chairman, Microsoft Corp., Remarks at the World Economic Forum 2008: A New Approach to Capitalism in the 21st Century (Jan. 24, 2008) (transcript available at http://www.microsoft.com/Presspass/exec/billg/speeches/2008/01-24WEFDavos.mspx).

9. *See* Portney, *supra* note 5, at 112; Reinhardt, *supra* note 6, at 151.

10. Portney, *supra* note 5, at 113; *see also* Kerr, *supra* note 5, at 850 (reporting the results of a survey in which consumers "identified 'being socially responsible' as the factor most likely to influence 'brand loyalty'" (citing GOLDMAN SACHS, INTRODUCING GS SUSTAIN 22 (2007), *available at*

While moral obligation and non-regulatory market forces may indeed drive environmental CSR, a look at recent history strongly suggests that another force is at work—a force that companies may not openly acknowledge. That force is environmental litigation.[11]

This Article asserts that public and private litigants, through both criminal and civil litigation, have pushed business entities to engage in environmental CSR. In support of this thesis, the Article analyzes several discrete examples from the last few decades and shows how certain types of litigation have motivated companies to go beyond mere compliance into the realm of environmental CSR. Furthermore, the Article concludes that litigation will continue to be an important driver for environmental CSR for the foreseeable future, ultimately resulting in reduced pollution and more sustainable practices.

Part II considers how "Superfund" litigation under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") encouraged companies to minimize waste generation to avoid potential future liability rather than merely dispose of waste streams in conformance with current law. Part III describes how a dramatic increase, beginning in the 1980s, in criminal prosecutions of individual corporate officials for alleged violations of environmental laws encouraged corporate decision makers to reevaluate routine practices and implement proactive programs that go beyond compliance. Part III also explores how the United States Sentencing Guidelines and agency guidance on the exercise of prosecutorial discretion encouraged companies to implement new programs—beyond anything required by any

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http://www.unglobalcompact.org/docs/summit2007/gs_esg_embargoed_until030707pdf.pdf)). Other reasons given by companies for over-compliance include (1) obtaining favorable treatment from regulators, such as less time required for permitting, or less stringent enforcement; (2) preempting more stringent regulation; and (3) encouraging more stringent regulation to impose higher costs on competitors. *See* Portney, *supra* note 5, at 113; Wu, *supra* note 7, at 3364; Christopher S. Decker & Christopher R. Pope, *Adherence to Environmental Law: The Strategic Complementarities of Compliance Decisions*, 45 Q. REV. ECON. & FIN. 641, 642-43 (2005).

11. For example, one empirical study showed that enforcement—which often involves litigation—"can significantly increase the degree of statutory *over*-compliance with environmental regulations . . . ." Jay P. Shimshack & Michael B. Ward, *Enforcement and Over-Compliance*, 55 J. ENVTL. ECON. & MGMT. 90, 90 (2008). We argue that more than just enforcement litigation pushes companies to over-comply with applicable environmental regulations.

applicable regulatory scheme—for detecting, reporting, and correcting environmental violations. Part IV evaluates how citizen suits have driven environmental CSR through the implementation of creative settlement agreements that require companies to make changes that do more than simply bring them into compliance with applicable law. Lastly, Part V looks at other environmental suits initiated by private parties, including challenges to agency permitting actions and tort suits, and shows how these types of litigation have encouraged environmental CSR by establishing new models for environmental protection and serving as reliable indicators of evolving societal expectations. The Article concludes by predicting that litigation will continue to push companies to do more than the law requires to protect the environment.

II. SUPERFUND LITIGATION

Litigation associated with the evolution of laws controlling waste disposal has been a significant driver of corporate behavior change over the past quarter century. Most importantly, an explosion in Superfund litigation and the huge potential liabilities associated with it caused many companies to change their waste disposal practices beyond legal requirements.[12] Faced with the potential of civil judgments in the tens to hundreds of millions of dollars and strict, retroactive application of new standards for liability, many corporations developed new methods for the minimizing, handling, treatment, and disposal of hazardous wastes. This section briefly describes the evolution of waste regulation under the Resource Conservation and Recovery Act ("RCRA") and CERCLA and how the liabilities imposed under these Acts shaped corporate waste disposal practices beyond the requirements of the law.

Through the 1960s and 70s land disposal was the primary means of handling wastes. Even after the passage of RCRA in 1976, land disposal remained common. In fact, a 1983 report by the Office of Technology Assessment found that "[l]and disposal is used for as

12. *See* JAN PAUL ACTON, UNDERSTANDING SUPERFUND 19 (1989) (finding that CERCLA's strict, retroactive liability for past waste handling practices "should lead to more conservative waste-handling practices both today and in the future and may lead business to reduce its use of toxic materials.").

much as 80 percent of regulated hazardous wastes."[13] As initially enacted, RCRA granted broad regulatory authority to the Environmental Protection Agency ("EPA"), which it was reluctant to exercise.[14] Due to growing concerns about the increasing hazardous waste problem, Congress substantially amended RCRA in 1984 through the passage of the Hazardous and Solid Waste Amendments ("HSWA").[15] The most significant portions of these amendments limited the scope of EPA's discretion,[16] imposed waste minimization requirements,[17] and imposed a "land ban" on the disposal of hazardous waste.[18]

While RCRA established a comprehensive regulatory system to deal with hazardous wastes currently being generated by corporate activities, it did nothing about the large quantities of hazardous wastes that were already in the environment and threatening human health.[19] Because corporations that modified their waste disposal practices to comply with RCRA's requirements faced little threat of litigation, RCRA was not on its own a significant litigation-based driver of CSR.

In contrast, because of its retroactive, strict, joint and several, liability, CERCLA has been a significant driver of changes in

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13. OFFICE OF TECHNOLOGY ASSESSMENT, TECHNOLOGIES AND MANAGEMENT STRATEGIES FOR HAZARDOUS WASTE CONTROL 3 (1983). The Office of Technology Assessment was an office of Congress created in 1972 to provide members of Congress with objective analysis of complex science and technological issues. The Office was closed in 1995.

14. *See* Erik H. Corwin, Note, *Congressional Limits on Agency Discretion: A Case Study of the Hazardous and Solid Waste Amendments of 1984*, 29 HARV. J. LEGIS. 517, 533-34 (1992).

15. Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, §§ 101, 201-202.

16. Corwin, *supra* note 14, at 534.

17. 42 U.S.C. § 6922(b) (2009). RCRA creates a "cradle to grave" system of waste regulation. Part of this system requires that all hazardous waste generators produce a manifest to track all hazardous wastes from the time of generation until disposal. *Id.* § 6922(a)(5). The HSWA imposed the additional requirements that all manifests contain a certification stating (1) that the generator had a plan in place to reduce the volume, quantity or toxicity of the waste and (2) the proposed method of currently available treatment minimizes the present and future harm to human health. *Id.* § 6922(b).

18. 42 U.S.C. § 6294(c)-(d) (2009) (prohibiting the disposal of liquid hazardous wastes in landfills).

19. *See* 42 U.S.C. § 6922.

corporate waste disposal practices. After seeing the litigation arising from historical disposal practices that frequently met industry or societal standards at the time and the consequences of CERCLA liability, many companies began to put substantial efforts into evaluating the practices used at potential disposal sites as well as the companies who operate those sites.[20] This added scrutiny by hazardous waste generators has improved waste management practices, reduced the volume of hazardous waste generated, and reduced the potential for release of hazardous substances from disposal sites.[21]

Congress passed CERCLA in 1980 to ensure the clean up of abandoned hazardous waste sites that pose a threat to human health and the environment.[22] CERCLA's statutory design is intended to ensure that hazardous waste sites are promptly cleaned up and that the government is reimbursed for any costs incurred in cleaning up hazardous waste sites.[23] CERCLA provides the EPA with two mechanisms by which it may clean up a site. First, the EPA can conduct site cleanup on its own and then seek to recover costs of the cleanup from any potentially responsible party ("PRP"),[24] which the act broadly defines to include nearly every person in the chain of waste generation and disposal.[25] Second, the EPA may order a PRP to clean up the site,[26] who may in turn seek contribution from other PRPs.[27] CERCLA also allows a private party to voluntarily clean up a site and seek contribution from PRPs.[28]

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20. *See* ACTON, *supra* note 12, at 19.

21. *See* John C. Buckley, *Reducing the Environmental Impact of CERCLA*, 41 S.C. L. REV. 765, 789-93 (1990).

22. *See* 42 U.S.C. § 9605 (2009); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, § 101; *see also* President James Carter, Remarks on Signing Public Law 96-510, 16 WEEKLY COMP. PRES. DOC. 2797, 2798 (Dec. 11, 1980).

23. *See* United States v. Alcan Aluminum Corp., 964 F.2d 252, 263-64 (3d Cir. 1992); *see also* Acushnet Co. v. Mohasco Co., 191 F.3d 69, 77 (1st Cir. 1999).

24. 42 U.S.C. § 9604 (2009).

25. 42 U.S.C. § 9607(a) (2009). PRPs include the following persons: (1) current owners or operators of facilities; (2) owners or operators of facilities at the time of disposal; (3) anyone who "arranged for" disposal or treatment of hazardous wastes; and (4) anyone who transported hazardous wastes. *Id.*

26. 42 U.S.C. § 9606. (2009)

27. *See* 42 U.S.C. § 9607; 42 U.S.C. § 9613 (2009).

28. *See* 42 U.S.C. §§ 9607(a)(4)(B), 9613(f)(1).

PRPs are liable for, among other things, all costs of environmental remediation incurred by EPA or the state government as well as any other necessary response costs incurred by any other person.[29] Liability under CERCLA is strict—meaning that all the EPA must demonstrate is that a PRP sent wastes to or owned a site that is now contaminated.[30] In fact, as long as the government can demonstrate that a PRP contributed a "waste" to the site, it does not even have to demonstrate that the particular waste sent by the PRP is the source of the current threat before imposing liability.[31] Furthermore, although not required, CERCLA permits the imposition of joint and several liability on PRPs.[32] Joint and several liability can result in a party paying to remediate more harm than it actually caused, and if the other contributors to the site are insolvent or protected by consent decree settlements, the PRP will not be able to recover the amounts it has paid that exceed the harm it actually caused.[33] Consequently, CERCLA liability raises the possibility that even relatively small contributors will face large financial liabilities in the event that a contaminated site needs to be cleaned up.[34]

Even in the early days of CERLCA cleanups, corporations quickly became aware that proper waste disposal at the time of generation was significantly less expensive than CERCLA liability to clean up

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29. 42 U.S.C. § 9607(a).

30. *See* United States v. Alcan Aluminum Corp., 964 F.2d 252, 263-64 (3d Cir. 1992); *see also* Acushnet Co. v. Mohasco Co., 191 F.3d 69, 77 (1st Cir. 1999).

31. *See* United States v. Alcan Aluminum Corp., 990 F.2d 711, 721 (2d Cir. 1993).

32. The leading case establishing this principle is United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983).

33. *See* 42 U.S.C. § 9613(f)(2); United States v. Cannons Eng'g Corp., 899 F.2d 79, 92 (1st Cir. 1990) (finding that CERCLA grants a measure of finality to those PRPs willing to settle with the government by protecting them from subsequent contribution claims); United States v. New Castle County, 642 F. Supp. 1258 (D. Del. 1986) (finding that protecting settlings parties from future litigation is an important part of the process); United States v. Conservation Chemical Co., 628 F. Supp. 391 (W.D. Mo. 1985) (same); *see also* United States v. Kramer, 953 F. Supp. 592, 594 (D.N.J. 1997) (finding that equitable allocation of orphan shares is permissible); Charter Township v. Am. Cyanamid, 898 F. Supp. 506 (W.D. Mich. 1995) (finding that orphan shares should be equitably apportioned to all parties in a CERCLA contribution action).

34. Note that the current trend in CERCLA litigation appears to be towards assessing the divisibility of harms, even at sites where wastes are mixed. *See* Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870 (2009).

improperly disposed wastes. For example, in 1983 the Office of Technology Assessment found that the proper disposal of all of the wastes at Love Canal would have cost approximately $2 million at the time of generation rather than the projected $100 million in clean up costs.[35] At the time that the initial disposals at Love Canal occurred, they were within the bounds of what was legally and societally permissible. However, because of changing legal regimes and societal expectations, the ultimate costs of these disposal practices was more than an order of magnitude greater than what over-compliance (meeting not-yet enacted RCRA standards) would have cost.[36]

Moreover, even if PRPs are ultimately able to escape the imposition of strict liability, costs associated with lawsuits to recover costs or seek contributions from other PRPs can be significant.[37] In order to limit initial assessment of financial liability and the need to pursue subsequent contribution actions,[38] PRPs have significant incentives to join as many other PRPs as possible to the initial cost recovery action. Consequently, CERCLA claims often become complex, multi-party litigations that continue for years.[39] Such litigation is both time consuming and expensive,[40] and furthers CERCLA's efficacy as a driver of environmental CSR.

Because land disposal of hazardous materials in ponds or pits had been standard practice until the mid 1980s, many corporations were faced with potentially significant financial liabilities under CERCLA for their past disposal practices. As CERCLA litigation increased

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35. OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 13, at 6.

36. *See id.*

37. For the provisions enabling cost recovery and contribution actions by private parties see 42 U.S.C. §§ 9606, 9613.

38. *See* 42 U.S.C. § 9613(f) (giving PRPs the right to seek financial contributions from other PRPs).

39. *See, e.g.*, United States v. Vertac Chemical Corp., 453 F.3d 1031 (8th Cir. 2006).

40. *See Superfund: Litigation Costs of Liability Scheme Prevent, Delay Cleanups, Speakers Say*, [1991] Envt. Rep. (BNA) (Nov. 15, 1991) (finding that nearly 20% of Superfund costs are transaction costs associated with litigation and enforcement); *Superfund: Cleanup Fund Wasted on Transaction Costs, CERCLA Needs Complete Overhaul, ABA Panel Says*, [1990] Envt. Rep. (BNA) (Aug. 10, 1990) (stating that EPA estimates that $14.6 billion would be spent on the cleanup of 1,800 NPL sites and that an additional $8 billion in litigation costs will be incurred by the government and private litigants).

and the costs of clean up became apparent, companies became more aware of the need to ensure that their current waste handling practices not only complied with RCRA regulations, but went further to ensure that disposal would stand the test of time, avoiding potential CERCLA liability and minimizing exposure to future evolution of standards and the law.[41]

III. CRIMINAL ENFORCEMENT

Criminal enforcement is a potentially important source of CSR because of the associated deterrent effect. That is, when the government initiates criminal proceedings against a corporation, other corporations are likely to evaluate and change their own behavior in order to avoid similar prosecutions in the future. This effect should be particularly significant because of the negative spillover effects of criminal prosecution, including social stigma, denial of access to federal contracts and assistance, and the potential for related civil litigation.[42] This section considers the impact that enforcement through direct criminal prosecution, as well as government enforcement policies and sentencing guidelines, have on environmental CSR.

A. Criminal Enforcement

Criminal sanctions in environmental statutes date back to the Rivers and Harbors Act of 1899, but were not widespread until the 1970s.[43] Even after criminal provisions were widely enacted, enforcement throughout the 1970s was limited, with only twenty-five criminal environmental prosecutions at the federal level for the whole

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41. *See* Buckley, *supra* note 21, at 789-90; *see also* Andrew J. Hoffman, The Hazardous Waste Remediation Market: Innovative Technological Development and the Growing Involvement of the Construction Industry 4-5 (Aug. 15, 1991) (unpublished M.S. thesis, Massachusetts Institute of Technology) (on file with authors) ("Superfund has served to change the behavior of almost every sector of society, making all aware of the effects and penalties (both environmental and financial) of careless disregard for our environment.").

42. Carol E. Dinkins, *Collateral Consequences of Conviction*, *in* ENVIRONMENTAL CRIMINAL LIABILITY 318, 318 (Donald A. Carr et al. eds., 1995).

43. *See* Carol E. Dinkins, *Criminal Enforcement of Environmental Regulations: The Genesis of Environmental Enforcement Through Criminal Sanctions*, *in* ENVIRONMENTAL CRIMINAL LIABILITY 1, 3-4 (Donald A. Carr et al., eds., 1995).

decade.[44] Criminal environmental litigation in the United States has increased dramatically since the 1980s.[45] This increase in criminal prosecution and more vigorous government enforcement policies have prompted many companies to implement environmental management programs that go well beyond the minimum that is required to comply with the law.[46] Furthermore, empirical research suggests that increasing enforcement activities increases pollution reduction activities even from those companies that are already in compliance with environmental standards.[47]

Prior to 1982, criminal prosecutions for violations of environmental laws were rare.[48] In the early 1980s, the Federal Bureau of Investigation, Department of Justice ("DOJ"), and EPA launched a joint effort to vigorously investigate and prosecute environmental crimes.[49] Part of this effort included the establishment of the environmental crimes unit within DOJ in 1981.[50] At the same time, EPA established its own Office of Criminal Enforcement and hired professional criminal investigators.[51] Between 1982 and 1986, DOJ's environmental crimes unit was so successful that it was elevated to become the Environmental Crimes Section in 1985.[52] The resources for environmental prosecutions were further increased by the Pollution Prosecution Act of 1990, which authorized the appointment of a new director of the Office of Criminal Investigations within EPA and mandated that the office hire 200 new criminal investigators by 1996.[53]

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44. *Id.* at 5.

45. *See* Roger G. Marzulla & Brett G. Kappel, *Nowhere to Run, Nowhere to Hide: Criminal Liability for Violations of Environmental Statutes in the 1990s*, 16 COLUM. J. ENVTL. L. 201, 202 (1991).

46. *See* Allison F. Gardner, *Beyond Compliance: Regulatory Incentives to Implement Environmental Management Systems*, 11 N.Y.U. ENVTL. L.J. 662, 667 (2003) (finding that continued, rigorous enforcement, including criminal penalties, is necessary to encourage the adoption of and adherence to environmental management systems that go beyond compliance).

47. Shimshack & Ward, *supra* note 11, at 91.

48. *See* Marzulla & Kappel, *supra* note 45, at 204-08.

49. *Id.* at 206.

50. Dinkins, *supra* note 43, at 7.

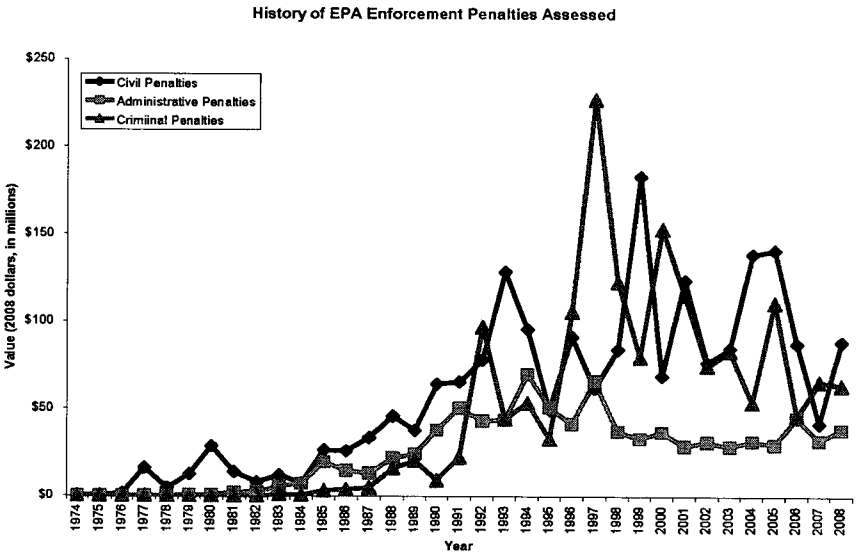
51. *Id.*; Marzulla & Kappel, *supra* note 50, at 207.

52. Dinkins, *supra* note 43, at 9.

53. 42 U.S.C. § 13103 (2009).

Because of this large increase in resources, criminal enforcement under the United States' environmental laws has increased dramatically. As recently as 1985, 40 defendants were charged with environmental crimes, and total sentences obtained for these crimes were 78 months.[54] By 2001, 372 defendants were charged with environmental crimes, and they received total sentences of 256 years and $95 million in fines.[55] The dramatic increase in financial penalties and sentences in both criminal and civil cases since the 1980s is illustrated in Figures 1 and 2 below.

Figure 1: Trends in Enforcement Penalties[56]

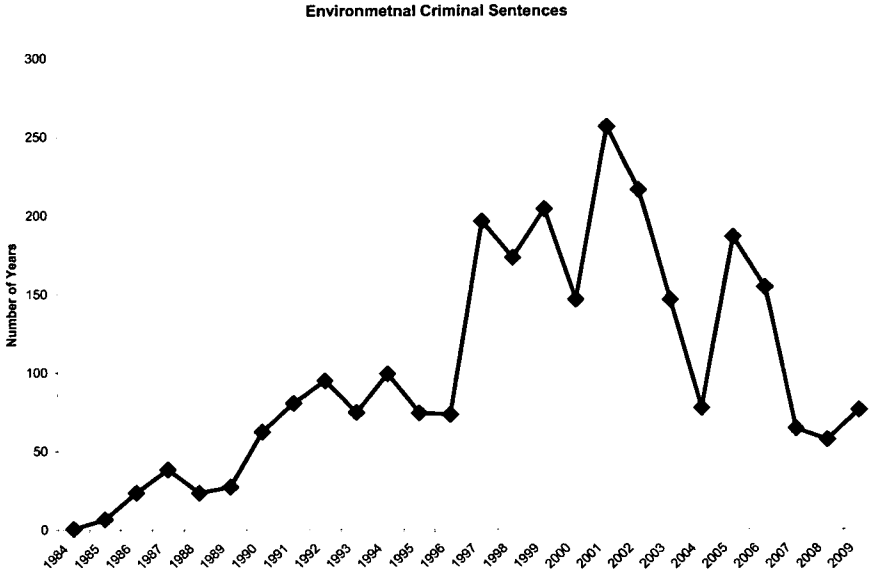


54. ENVIRONMENTAL PROTECTION AGENCY, ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT: FY 1997, at 94 (1998).

55. ENVIRONMENTAL PROTECTION AGENCY ENFORCEMENT AND COMPLIANCE PROGRAM, NUMBERS AT A GLANCE FISCAL YEARS 2002-1998 (2003).

56. Source data is drawn from Environmental Protection Agency, National Enforcement Trends, http://www.epa.gov/compliance/data/results/nets.html#numbers (last visited Sept. 12, 2010).

Figure 2: Trends in Criminal Sentences in Environmental Cases[57]



This dramatic increase in enforcement activity shaped evolution of corporations' proactive prevention of criminal exposure for environmental harms. It was not only the sheer volume of cases pursued but also the types of prosecutions that influenced corporate decision making with respect to criminal environmental exposure. That is, in addition to high profile cases, there were many cases where the alleged criminal conduct looked very much like the ordinary course of business for many corporations. This proliferation of prosecutions for seemingly routine events prompted companies and their environmental managers to view prosecution as a real risk even when engaged in routine job functions.[58]

An example of one of such a prosecution is the 1999 criminal prosecution of Michael Peters and Jeffery Jackson of Huntsman

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57. Source data is drawn from ENVIRONMENTAL PROTECTION AGENCY, NATIONAL ENFORCEMENT TRENDS FY2004 – FY 2008 CRIMINAL ENFORCEMENT PROGRAM ACTIVITIES at C-4 (2009) (data from 2004-2009); ENVIRONMENTAL PROTECTION AGENCY, ENFORCEMENT AND COMPLIANCE PROGRAM NUMBERS AT A GLANCE FISCAL YEARS 2002-1998 (data from 1998 to 2002); ENVIRONMENTAL PROTECTION AGENCY, ANNUAL REPORT ON ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS IN 1999 at B-5 (2000) (data from 1984 to 1999).

58. *See infra* notes 59–72 and accompanying text.

Chemical Corporation for violations of the Clean Air Act. The Huntsman Chemical Corporation owns and operates a plant in Port Arthur, Texas that produces a number of aromatics and olefins including ethylene, propylene, and cyclohexalene.[59] The case against Jackson and Peters involved alleged releases of benzene from the plant's cooling tower and an improperly sealed storage tank.[60] At the time of the alleged releases, Peters was the environmental manager of the plant and Jackson was the plant manager.[61]

Huntsman discovered that benzene was leaking into the plant's cooling tower and Peters drafted a letter to state regulators indicating that the benzene release was a "major upset" (an unusual event where emissions are much higher than they would be during normal operations).[62] Several weeks later, Peters drafted and Jackson signed a notice of continuous release for the same benzene emissions that was sent to both the EPA and state regulators.[63] The government alleged that this second notice improperly contradicted the earlier letter.[64] Further, the government alleged that Peters' letter used benzene emission samples from a different location to give a lower, false representation of actual emissions.[65]

With regard to the benzene storage tank, the government alleged that Jackson and Peters knowingly failed to disclose that the level in the tank was low, and thus the floating roof of the tank was not in contact with the liquid in the tank, when the tank was struck by lightening in November of 1995.[66] Moreover, the government charged Jackson and Peters for a violation of the Clean Air Act for the unauthorized emissions from the tank that resulted from the roof not remaining in contact with the liquid in the tank.[67]

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59. United States v. Peters, 349 F.3d 842, 844 (5th Cir. 2003).

60. *Peters*, 349 F.3d at 844. Because benzene is a potentially toxic chemical, its releases must be managed in accordance with standards promulgated under the National Emissions Standards for Hazardous Air Pollutants ("NESHAP"). 42 U.S.C. § 7412(d) (2009). Under the NESHAPs, the EPA has promulgated specific regulations for the storage and transfer of benzene in industrial processes. *See* 40 C.F.R. §§ 61.270-61.306 (2010).

61. *Peters*, 349 F.3d at 844

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. United States v. Peters, 349 F.3d 842, 844 (5th Cir. 2003).

Upon discovering these violations, the EPA referred the case to the Department of Justice to pursue criminal enforcement against Peters and Jackson as responsible officials. A federal grand jury indicted them for attempting to prevent the United States from discovering the unauthorized release of a volatile organic compound and operating the benzene storage tank in violation of the Clean Air Act.[68] The case proceeded to jury trial in the Eastern District of Texas. Peters and Jackson were found guilty of knowingly operating a defective tank in violation of the Clean Air Act, making a false writing to the EPA, and conspiracy to make a false writing.[69]

The conviction was overturned by the Fifth Circuit Court of Appeals due to an ex parte meeting between the judge and the foreperson of the jury during deliberations.[70] While the case was awaiting retrial on remand, Peters and Jackson reached an agreement with the government under which they would plead guilty to certain charges. On May 24, 2004, the District Court accepted their pleas and sentenced each man to six months of home confinement, five years of probation, and a civil fine of $20,000.[71]

The Peters/Jackson case highlights the concerns that corporate officials may have regarding the potential for criminal enforcement for environmental violations. Although Peters and Jackson argued that they acted in good faith and attempted to comply with the law, both were ultimately found guilty. This case reinforced a broad perception in the corporate community that an ordinary plant or environmental manager may be criminally liable for actions taken in

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68. *Id.* at 846.

69. *Id.* at 844. Federal regulations require that benzene storage vessels be equipped with a fixed, sealed roof or an internal floating roof to prevent air emissions of benzene through evaporation. 40 C.F.R. § 61.271. For vessels with floating roofs, the roof must be in contact with the liquid's surface at all times. *Id.* The jury found that Huntsman did not comply with these regulations and the process by which they reported upset emissions amounted to making a false writing.

70. *Peters*, 349 F.3d at 849-50.

71. Press Release, Office of the United States Attorney for the Eastern District of Texas, Former Huntsman Plant Managers Guilty, Personally Responsible for Polluting Environment (May 26, 2004), *available at* http://www.justice.gov/usao/txe/news_release/news/huntsman_batte_carraway.pdf.

the ordinary course of business.[72] In turn, this perception has driven environmental CSR initiatives.

B. The Role of Sentencing Guidelines and Prosecutorial Discretion

As described above, the dramatic increase in criminal environmental enforcement coupled with the prosecution of seemingly routine practices that led to statutory violations should drive changes in corporate environmental behavior. Namely, the threat of severe criminal sanctions, and the reputation damage that accompanies them should lead companies to be more cautious in their environmental compliance. For companies that are risk averse, we would expect that they would not ensure only minimal compliance, but rather would go beyond what is required to reduce the likelihood of criminal prosecution. This is precisely what we see in the adoption of corporate environmental programs, which while not statutorily required, are likely to come into consideration when prosecutors decide whether to press charges and would certainly be considered under sentencing guidelines.

The United States Sentencing Guidelines, while no longer mandatory,[73] provide an important basis from which courts begin when determining criminal penalties to be imposed upon a guilty party.[74] The Guidelines prescribe factors for courts to apply when

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72. Another important lesson from this case is that the pollution statutes are strict with respect to the emissions and operations standards. That is, any exceedance of a stated emission limitation can potentially give rise to liability. Furthermore, most criminal sections of the major environmental laws require only that the defendant knows of the actions leading to the pollution event. *See, e.g.* 33 U.S.C. § 1319(c) (2010); 42 U.S.C. § 6928(d) (2009); 42 U.S.C. § 7413(c) (2009); *see also* Kevin A. Gaynor, Jodi C. Remer, & Thomas R. Bartman, *Environmental Criminal Prosecutions: Simple Fixes for a Flawed System*, 3 VILL. ENVTL. L.J. 1, 4 (1992) (arguing that the mens rea for environmental crimes should be elevated). Consequently, as in the Peters/Jackson case, it is possible that knowledge of the actions of subordinates on the part of senior corporate officials may result in criminal liability.

73. *See* United States v. Booker, 543 U.S. 220, 227 (2005) (holding that mandatory sentencing guidelines that do not allow judges to consider additional circumstances violate the Sixth Amendment).

74. *See id* at 259 (explaining that although the Sentencing Guidelines are not mandatory, judges must still "take account of the Guidelines together with other sentencing goals").

assessing the severity of criminal harms for sentencing. The compliance factors from the Sentencing Guidelines are frequently used as important guidance for corporate entities who wish to reduce their exposure to potential liabilities.[75] Published in 1991, the section of the Sentencing Guidelines that addresses organizational liability provides factors that will be used to determine a corporation's liability for the purposes of both issuing fines and determining organizational probation.[76] Because of concerns about the complex and unique nature of environmental crimes, the Sentencing Commission decided to exclude environmental crimes from the corporate section of the Guidelines.[77] In 1993, the Sentencing Commission proposed an additional chapter to cover corporate environmental crimes that was never enacted.[78] However, both the corporate Sentencing Guidelines and the proposed guidelines for corporate environmental harms have been significant drivers of the adoption of environmental compliance programs and CSR.[79]

The Guidelines "offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program."[80] According to the Guidelines, the two most important factors in mitigating the punishment of an organization are (1) the existence of an effective compliance and ethics program and (2) self-reporting of violations, cooperation with authorities, and acceptance of responsibility.[81]

With respect to corporate compliance programs, the Guidelines provide a detailed description of what is required to minimize organizational liability.[82] The two most important features of an effective corporate compliance program are the exercise of due diligence to prevent criminal behavior and promotion of "an

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75. U.S. SENTENCING COMM'M, GUIDELINES MANUAL § 8B2.1(a) (2009).

76. *Id.*

77. Dinkins, *supra* note 43, at 14.

78. *Id.*; Carol E. Dinkins & Sean A. Lonnquist, *The Belt and Suspenders Approach: The Advantages of a Formalized Environmental Compliance Program*, UTAH L. REV. 1129, 1142 (2009).

79. U.S. SENTENCING COMM'M, GUIDELINES MANUAL intro. cmt.

80. *Id.*

81. *Id.*

82. *See id.* § 8B2.1.

organizational culture that encourages ethical conduct and commitment to compliance with the law."[83] The Guidelines go on to list a number of specific factors for which courts will look in determining whether the corporation has an effective compliance and ethics program. First, the organization must establish standards to prevent and detect criminal conduct.[84] Both the corporation's governing body and all high level personnel within the organization are responsible for knowing the contents of the program and ensuring adherence to it.[85] To ensure adequate knowledge of the corporation's compliance program, periodic training of high level officials regarding the standards and procedures of the compliance program is required.[86] The organization must also conduct appropriate training and monitoring to make sure that the program is followed at all levels.[87] If these monitoring efforts lead to the detection of criminal conduct, the organization must take reasonable steps to respond, including making necessary modifications to the compliance program.[88]

If an organization meets all of these standards and is found to have an effective compliance program, the existence of the compliance program will reduce the organization's culpability score, used for determining the ultimate penalty.[89] Such reductions in potential culpability may be particularly significant in the environmental context because the Guidelines state that criminal offenses presenting a threat to the environment may justify an upward departure from the sentence recommended by the Guidelines.[90] Furthermore, the Guidelines provide substantial incentives for organizations to adopt compliance programs proactively. The Guidelines counsel that upward departure from the suggested penalties is warranted to offset a reduction in an entity's culpability score due to the existence of an effective compliance program when that program was initiated in response to a court order or an administrative order.[91] Consequently,

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83. *Id.* § 8B2.1(a).
84. *Id.* § 8B2.1(b)(1).
85. *Id.* § 8B2.1(b)(2).
86. *Id.* § 8B2.1(b)(4).
87. *Id.* § 8B2.1(b)(5).
88. *Id.* § 8B2.1(b)(7).
89. *Id.* § 8BC2.5(f).
90. *Id.* § 8C4.4.
91. *Id.* § 8C4.10.

the standards in the Guidelines have driven the development of corporate environmental compliance programs that are proactive in nature and seek to prevent criminal violations.[92]

Similarly, the proposed guidelines for corporate environmental crimes emphasize the importance of proactive compliance programs and management involvement in compliance.[93] Going beyond the corporate sentencing guidelines, the proposed environmental crimes guidelines would actually penalize a corporation for failing to have a compliance program.[94] If an organization did not have a compliance program in place prior to the environmental offense, the guidelines direct that the culpability of the offense should be increased by four levels.[95] In order to avoid this culpability increase, an organization "must document the existence of some form of program or other organized effort to achieve and maintain compliance."[96]

On the other hand, an organization's commitment to environmental compliance, as demonstrated by the commitment of sufficient resources and management processes to maintain compliance, can be a mitigating factor at the time of sentencing.[97] In order to be eligible for the mitigation benefits of a compliance program, the guidelines state minimum factors that demonstrate a commitment to environmental compliance.[98] The factors listed in the guidelines are (1) attention to compliance from those involved in daily management of operations; (2) integration of environmental policies, standards, and procedures; (3) auditing, monitoring, reporting, and tracking to ensure environmental compliance; (4) regulatory expertise, training, and evaluation; (5) incentives for compliance; (6) disciplinary procedures to correct non-compliance; (7) continuing evaluation of compliance systems to encourage improvement; and (8) additional innovative approaches to compliance.[99] Thus, the proposed

92. Dinkins & Lonnquist, *supra* note 78.

93. Memorandum from Phyliss J. Newton, Staff Director, U.S. Sentencing Commission, Advisory Working Group on Environmental Offenses, Draft Proposal for Sanctions for Organizations Convicted of Environmental Offenses (Dec. 6, 1993), *available at* http://www.ussc.gov/publicat/ENVIRON.pdf.

94. *Id.* § 9C1.1(f).

95. *Id.*

96. *Id.* § 9C1.1(f), cmt. 1.

97. *Id.* § 9C1.2.

98. *Id.* § 9D1.1.

99. *Id.* § 9D1.1(a).

guidelines follow upon the corporate sentencing guidelines and state a clear preference for rigorous environmental management systems that promote CSR.

The implementation of an effective environmental management system is also encouraged by the Department of Justice Environment and Natural Resources Division's ("ENRD") current guidelines for the exercise of prosecutorial discretion.[100] In a 1991 guidance memo, the ENRD stated that its established policy is to "encourage self-auditing, self-policing and voluntary disclosure of environmental violations by the regulated community."[101] Consequently, it is ENRD's policy to view such efforts as mitigating factors in deciding whether to bring criminal charges.[102] According to ENRD's guidelines, the three main mitigating factors that prosecutors are to consider are timely voluntary disclosure, cooperation of the organization with government investigators, and the existence of preventative measures and compliance programs.[103] In evaluating an organization's compliance program, the prosecutor is directed to look for a "strong institutional policy to comply with all environmental requirements" and safeguards that go beyond those that are required by the law.[104]

In a guidance memorandum applicable to the entire Department of Justice, the above principles were reaffirmed and expanded upon in the context of corporate prosecutions in a 2003 guidance memo by Deputy Attorney General Larry Thompson.[105] The Thompson memo instructs prosecutors, in making their charging decisions, to carefully scrutinize the cooperation of corporations. The memo cautions that corporations may appear to cooperate, but conduct internal activities that actually frustrate the purposes of the investigation.[106] As with the 1991 ENRD guidance memo, the Thompson memo lists both

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100. *See* Department of Justice, Factors in Decisions on Criminal Prosecutions for Environmental Violation in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator (July 1, 1991), http://www.justice.gov/enrd/Factors_in_decisions.html.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. Memorandum from Larry D. Thompson to United States Attorneys (Jan. 20, 2003), *available at* http://www.justice.gov/dag/cftf/corporate_guidelines.htm.

106. *Id.*

existence and adequacy of a corporate compliance program and timely and voluntary disclosure of violations as factors that can mitigate potential charges.[107] Therefore, current guidance on the exercise of prosecutorial discretion further encourages environmental CSR and the development of programs that go beyond compliance.

IV. CITIZEN SUITS

To the extent that actual or threatened environmental litigation shapes corporate behavior, citizen suits play a significant role. Reportedly, seventy-five percent of all civil environmental decisions issued between 1973 and 2002 were in citizen suits.[108] Consequently, citizen suits have played a central role in shaping environmental jurisprudence.[109] In the context of corporate stewardship of the environment, citizen suits can be significant for at least two reasons. First, citizen suits provide an additional means for enforcement of environmental statutes and regulations, and as discussed above, increased enforcement activity tends to drive environmental CSR.[110] Second, settlements in citizen suit cases can, and often do, produce outcomes that require the defendant to go beyond compliance.[111] This section describes the basics of environmental citizen suits, provides examples of their use, and evaluates how they may encourage environmental CSR.

Nearly all of the major environmental laws in the United States have citizen suit provisions.[112] In general, citizen suit provisions permit private citizens to enforce the rights of the public under environmental laws by allowing citizens to play the role of "public attorneys general."[113] Congress enacted citizen suit provisions

107. *Id.*

108. James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 8 (2003).

109. *Id.*

110. *See supra* note 46 and accompanying text.

111. *See infra* notes 122–143 and accompanying text.

112. *See, e.g.*, Toxic Substance Control Act, 15 U.S.C. § 2619 (2010); Endangered Species Act, 16 U.S.C. § 1540(g) (2010); Clean Water Act, 33 U.S.C. § 1365 (2010); RCRA, 42 U.S.C. § 6972 (2009); Clean Air Act, 42 U.S.C. § 7604 (2009); CERCLA, 42 U.S.C. § 9659 (2009).

113. Andrew J. Currie, *The Use of Environmentally Beneficial Expenditures in Lieu of Penalties as Settlement of Lawsuits: A "Win-Win" Solution?* 1996 DET. C.L. REV. 653, 654.

beginning with the Clean Air Act in 1970, in part, due to a frustration with the lack of enforcement of a spate of new environmental laws.[114] In essence, the idea of a citizen suit is that private citizens may supplement agency enforcement where agency resources are too limited to prosecute all violators of environmental laws.[115]

Two primary types of citizen suits are used by the public to enforce environmental laws. In the first type of citizen suit, citizen plaintiffs may sue the Administrator of the EPA for failure to perform a non-discretionary duty under the statute.[116] In the second type of citizen suit, citizens may sue anyone who violates the relevant statutes.[117]

Although suits against the Administrator may ultimately lead to more rigorous regulatory schemes, they are unlikely to directly encourage corporations to go beyond compliance. Therefore, the second type of citizen suit tends to be more significant in directly encouraging corporate environmental CSR.

When a citizen plaintiff prevails in an environmental lawsuit, it may be awarded injunctive relief to halt the statutory violations and civil penalties that go into the U.S. Treasury.[118] While citizen suit plaintiffs are not entitled to damages awards, they often receive financial payments from liable defendants because prevailing

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114. *Id.* at 661; Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 TEMPLE ENVTL. L. & TECH. J. 55, 56 (1989).

115. Currie, *supra* note 113, at 655.

116. *See, e.g.*, 33 U.S.C. § 1365(a)(2) ("[A]ny citizen may commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator."); 42 U.S.C. § 7604(a)(2) ("[A]ny person may commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator . . . .").

117. *See, e.g.*, 33 U.S.C. § 1365(a)(1) ("[A]ny citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . . ."); 42 U.S.C. § 7404(a)(1) ("[A]ny person may commence a civil action on his own behalf . . . against any person . . . who is alleged to have violated . . . or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . . .").

118. *See* 33 U.S.C. § 1319(d) (2010).

plaintiffs are permitted to recover their attorney's fees.[119] Further, civil penalties paid to the Treasury may be reduced if the defendant agrees to fund supplemental environmental projects that improve environmental quality in or near the affected area.[120]

Historically, the majority of citizen suits have been filed under the Clean Water Act because the law's structure provides relatively straightforward cases for public interest groups pursuing environmental enforcement. This is because the reporting requirements of the Clean Water Act provide clear records of permit violations and the Act's citizen suit provision makes it easy to prosecute permit exceedance cases.[121] In recent years, citizen enforcement action has increased under the Clean Air Act, as shown by two recent examples—the cases of Murphy Oil and Shell Deer Park. Both cases illustrate ways that citizen suits can drive environmental CSR.

In *Concerned Citizens Around Murphy v. Murphy Oil USA*, a local citizens group brought suit against Murphy Oil for alleged violations of Clean Air Act standards at its Louisiana refinery.[122] The plaintiffs alleged that Murphy Oil violated applicable emission limits and impaired their health and quality of life.[123] As with many citizen suits, the plaintiffs' evidence of Murphy's violations of its Clean Air Act permits consisted of Murphy's own reports to the Louisiana Department of Environmental Quality.[124] As a result, Murphy conceded some of the alleged violations. On February 4, 2010, the District Court for the Eastern District of Louisiana granted partial summary judgment in favor of the plaintiffs on liability grounds for both the violations conceded by Murphy and a few of the contested violations.[125]

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119. *See* 15 U.S.C. §2619(a)(2) (2010); 33 U.S.C. § 1365(d) (2010); 42 U.S.C. § 6972(e) (2009); 42 U.S.C. § 7604(d) (2009).

120. Mark Seidenfield & Janna Satz Nugent, *"The Friendship of the People": Citizen Participation in Environmental Enforcement*, 73 GEO. WASH. L. REV. 269, 278 (2005).

121. Jonathan H. Adler, *Stand* or *Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39, 45 (2003).

122. Concerned Citizens Around Murphy v. Murphy Oil USA, Inc., No. 08-4986, 2010 WL 487405 (E.D. La. Feb. 4, 2010).

123. *Id.* at *1.

124. *Id.* at *14-15.

125. *Id.* at *17-18.

On September 28, 2010, the United States, through EPA and DOJ, and the states of Louisiana and Wisconsin announced that they had agreed to a consent decree with Murphy to settle their claims against Murphy for alleged violations of various Clean Air Act provisions at its Wisconsin and Louisiana refineries.[126] In consideration for the injunctive relief and supplemental environmental projects required under the consent decree, Concerned Citizens Around Murphy agreed to dismiss its remaining claims pending against Murphy in its citizen suit.[127] If the proposed consent decree is entered, Murphy Oil will be required to install emission reduction technologies to reduce nitrogen oxide emissions and incorporate lower operating limits into its permits.[128] The consent decree will also require Murphy Oil to comply with more stringent particulate matter and carbon monoxide limitations.[129] Murphy Oil will also agree to undertake a $1.5 million supplemental environmental project to reduce emissions of volatile organic compounds from its Louisiana refinery.[130] In addition, the consent decree will require Murphy Oil to construct a community air monitoring station near its Louisiana refinery.[131] Furthermore, Murphy Oil will consent to the inclusion of more stringent standards for new facilities that may be constructed at its Louisiana refinery in the future, including onsite coking facilities, in subsequent permits issued by the State of Louisiana.[132] These consent decree provisions, going far beyond the minimal requirements of the Clean Air Act, are important examples of how citizen suits can drive environmental CSR.

In January 2008, the Sierra Club and Environment Texas filed a lawsuit against Shell Oil for violations of the Clean Air Act at its

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126. Press Release, Environmental Protection Agency, Murphy Oil USA to Pay $1.25 Million Penalty to Resolve Clean Air Act Violations / Company to spend additional $142 million in pollution controls at refineries in Louisiana and Wisconsin (September 28, 2010), http://yosemite.epa.gov/opa/admpress.nsf/e77fdd4f5afd88a3852576b3005a604f/773b49028e6a990a852577ac0056880a!OpenDocument.

127. Proposed Consent Decree at 3-4, United States v. Murphy Oil USA, Inc., No. 3:10-CV-00563-BBC (W.D. Wisc. Sept. 28, 2010), *available at* http://www.epa.gov/compliance/resources/decrees/civil/caa/murphyoil-cd.pdf.

128. *Id.* at 14.

129. *Id.* at 21-24.

130. *Id.* at 92.

131. *Id.* at 97.

132. *Id.* at 94-96.

Deer Park facility in Houston.[133] The suit alleged that Shell Deer Park committed more than one thousand violations of the Clean Air Act during flaring and upset emission events.[134] Plaintiff's allegations arose from emission events that Shell Deer Pak self-reported to the Texas Commission on Environmental Quality.[135] On June 16, 2009, the District Court approved a consent decree between the parties.[136] Under the consent decree, Shell agreed to make improvements at the refinery that were designed to minimize emission events and agreed on enforceable emissions limits for upset events.[137] Shell also agreed to pay $5.8 million to fund three environmentally beneficial projects.[138] The majority of this funding was used to purchase a new fleet of low-emission school buses to serve the local community.[139]

As in the cases described above, citizen suit settlement agreements often require the defendant to make contributions to the plaintiff group, other environmental groups, or to pursue supplemental environmental projects.[140] Supplemental environmental projects can involve any range of activities aimed at improving environmental quality. Because they arise in the context of settlement, supplemental environmental projects can take on nearly any form that is agreeable to the parties, subject only to government objection and court approval.[141] Supplemental environmental projects are attractive to corporations for two reasons. First, unlike civil penalties paid to the Treasury, contributions made pursuant to settlement agreements may

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133. Cindy George, *Shell Sued Over Deer Park Refinery Emissions*, HOUSTON CHRON., Jan. 8, 2008, *available at* http://www.chron.com/disp/story.mpl/front/5433848.html.

134. Jad Mouawad, *Shell Settles Air Pollution Actions*, N.Y. TIMES, Apr. 23, 2009, *available at* http://www.nytimes.com/2009/04/24/business/energy-environment/24shell.html.

135. George, *supra* note 133.

136. *See* Env't Tex. Citizen Lobby, Inc. v. Shell Oil Co., Case No. 4:08-CV-00070 (S.D. Tex. June 16, 2008) (Docket Entry No. 33) (on file with authors).

137. NATIONAL ENVIRONMENTAL LAW CENTER, FACT SHEET: PROPOSED SETTLEMENT AGREEMENT BETWEEN ENVIRONMENT TEXAS, SIERRA CLUB, AND SHELL OIL COMPANY 1, *available at* http://www.nelconline.org/shell_fact_sheet.doc.

138. Mouwad, *supra* note 134.

139. NATIONAL ENVIRONMENTAL LAW CENTER, *supra* note 137, at 2.

140. Currie, *supra* note 113, at 663-64.

141. *Id.*

be tax deductible.[142] Second, investment in environmentally beneficial projects unrelated to the violation may provide the corporation with a mechanism to rehabilitate its image.[143]

Citizen suits, therefore, play an important role in shaping corporate environmental behavior. First, by providing increased enforcement activity, they encourage both compliance and over-compliance with the law. Second, citizen-suit settlements may require the development of new corporate environmental programs and investment in supplemental environmental projects.

V. OTHER PRIVATE PARTY LITIGATION

In addition to classic citizen suits enforcing violations of permit conditions, other forms of private party litigation also may shape corporate environmental behavior. This section examines two types of private party litigation that tend to encourage environmental CSR: permitting actions and tort law claims. While many tort law claims are more focused on recovering damages, some claims reflect evolving societal expectations about acceptable behavior. Similarly, the recent rise in permit issuance challenges reflects a new attitude about the acceptability of certain types of pollution.

A. Permit Challenges

Three recent cases involving challenges to permits or other similar authorizations include the challenges to Conoco Phillips Wood River Refinery's PSD permit, the air permit renewal of the LyondellBassell facility in Houston, and the challenge of local approvals for new Wal-Mart stores in Perris and Yucca Valley, California. These cases demonstrate that societal expectations about socially acceptable environmental behavior may evolve and exceed what is minimally required by environmental regulations. These cases, however, demonstrate that the impact of such permit challenges on environmental CSR will depend upon the corporation's assessment of its ability to survive the challenge and obtain the requested permit in an expedient fashion and the actions the corporation has proactively taken to reduce its environmental impact.

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142. Seidenfield & Nugent, *supra* note 120, at 278.
143. *Id.*

1. Conoco Phillips Wood River Refinery

Conoco Phillips owns and operates the Wood River Refinery in Illinois. To support its growing tar sands operations in Canada, Conoco Phillips sought a permit to expand the Wood River Refinery.[144] In order to undertake the expansion, Conoco Phillips required a prevention of significant deterioration ("PSD") permit under the Clean Air Act. Concerned about the environmental impacts of the proposed expansion, the Sierra Club, the American Bottoms Conservancy, the Environmental Integrity Project, and the Natural Resources Defense Council all opposed the issuance of the permit. The Illinois Environmental Protection Agency ("IEPA") issued the permit on July 19, 2007, and the American Bottoms Conservancy and Sierra Club then filed a challenge to the permit with the United States EPA's Environmental Appeals Board.[145]

On June 2, 2008, the Environmental Appeals Board remanded the permit to the IEPA for further consideration of issues related to the control of carbon monoxide and the need for emissions controls for flaring activities.[146] Under a September 2008 settlement agreement, Conoco Phillips agreed to adopt numeric limitations for emissions from flares. The most significant aspect of these limitations is that they will be applicable even during maintenance, startup, and shutdown activities, which historically have been exempted from permitting requirements. When faced with the prospect of additional delays due to permit reconsideration, Conoco Phillips opted for a greater level of environmental protection than what was required by the law.

2. Wal-Mart Stores in Perris and Yucca Valley, California

Similarly, Wal-Mart recently entered into an agreement settling challenges to local approvals authorizing it to construct two new "Supercenters" in Perris and Yucca Valley, California.[147] The Center for Biological Diversity and other environmental groups

144. ConocoPhillips Co., 13 E.A.D. 768, 769 (2008).

145. *Id.*

146. *Id.*

147. *See* Tiffany Hsu, *Wal-Mart Settles Two Environmental Lawsuits Over Planned Perris and Yucca Valley Stores*, L.A. TIMES, Mar. 8, 2010, *available at* http://latimesblogs.latimes.com/money_co/2010/03/walmart-settles-two-environmental-lawsuits-over-planned-perris-and-yucca-valley-stores.html.

challenged the local approvals of the two proposed Wal-Mart stores under the California Environmental Quality Act ("CEQA").[148] CEQA requires local governments to prepare an environmental impact report for any project that they approve that "may have a significant effect on the environment."[149] The plaintiffs alleged that the environmental reviews conducted by the local government agencies that approved the construction of the proposed Perris and Yucca Valley stores failed to adequately assess the climate change impact of the proposed stores and failed to consider potential measures that could reduce the greenhouse gas emissions associated with the new stores.[150]

To settle these challenges, Wal-Mart agreed, among other things, to install three roof-top solar facilities of at least 250 kilowatts at locations in California, incorporate certain high efficiency measures into the design of the Yucca Valley and Perris stores, implement an "enhanced refrigeration audit and improvement program to maximize efficiencies related to the use of refrigerants at existing Wal-Mart stores in California," and make a $120,000 contribution to the Mojave Desert Land Trust.[151] Wal-Mart, like Conoco Phillips, decided it would prefer to implement non-mandatory measures to mitigate the potential environmental impact of its new stores rather than continue to litigate challenges to required government approvals.

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148. Press Release, Center for Biological Diversity, Settlement Reached to Reduce Global Warming Impacts of Walmart Supercenters in Southern California (March 8, 2010), http://www.biologicaldiversity.org/news/press_releases/2010/walmart-03-08-2010.html.

149. CAL. PUB. RES. CODE § 21151(a) (West 2009).

150. Press Release, *supra* note 148; Press Release, California Court Blocks Wal-Mart Supercenter: Wal-Mart Violated California Law by Ignoring Climate Change (May 14, 2009), http://www.biologicaldiversity.org/news/press_releases/2009/wal-mart-05-14-2009.html.

151. *See* Letter from Matthew Vespa, Authorized Representative, Center for Biological Diversity, et al., to Hon. Mayor Chad Mayes and Town Council, Town of Yucca Valley (March 4, 2010), *available at* http://www.biologicaldiversity.org/campaigns/ceqa/pdfs/walmart-settlement-letter-yucca-valley.pdf (disclosing major terms of settlement); Letter from Matthew Vespa, Authorized Representative, Center for Biological Diversity, et al., to Hon. Daryl Busch and City Councilmembers, City of Perris (March 4, 2010), *available at* http://www.biologicaldiversity.org/campaigns/ceqa/pdfs/walmart-settlement-letter-perris.pdf (disclosing major terms of settlement).

Notably, many of the measures in the settlement agreement apply to Wal-Mart's larger operations in California, not just to the proposed stores at issue in the permit challenges.

3. LyondellBasell Refinery in Houston, Texas

In contrast, the permitting challenge to the LyondellBasell facility in Houston is an example of a case where the challenge does not appear to have altered corporate behavior because it did not affect the issuance of the required permit. LynodellBasell operates a large refinery located along the Houston Ship Channel, and is reportedly one of the largest benzene emitters in the country.[152] In 2008, the plant applied for a renewal of its ten year operating permit under the Clean Air Act.[153]

LyondellBasell's application for renewal emphasized that not only was the company in compliance with its permit but also that it planned to significantly reduce future benzene emissions.[154] Nevertheless, asserting a concern about the potential health impacts of proposed levels of benzene emissions, the City of Houston petitioned the Texas Commission on Environmental Quality ("TCEQ") to hold a hearing on the permit before granting it.[155] On February 24, 2010, TCEQ denied the City's request for a hearing, finding that it was not permitted to grant a hearing when the permit application was not seeking to increase allowable emissions.[156] The LyondellBassell example thus demonstrates that, due to constraints in state permitting processes, not all permit challenges will directly result in environmental CSR initiatives.

B. Tort Litigation

Tort suits are perhaps the most important indicator of evolving societal expectations with respect to environmental performance. Because tort claims are grounded in the common law, they can evolve at the same pace as public expectations. Unlike statutory or

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152. Matthew Tresaugue, *State to Reject Hearing on Air Permit at LyondellBassell Refinery*, HOUSTON CHRON., Feb, 24, 2010, *available at* http://www.chron.com/disp/story.mpl/hotstories/6882100.html.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

regulatory limitations, which should be static until amended by the relevant authority, common law adapts with the expectations of society. That is, if plaintiffs are able to convince juries and courts that conduct is socially unacceptable and demand compensation, tort suits will regulate environmental conduct that is not addressed in statutory law. Even in areas where there is an environmental statutory scheme, common law tort claims may still be permitted if they address harms not covered by the statute.[157]

One significant area of tort litigation reflecting changing public expectations is the rise of common law claims for climate change damages.[158] While these cases have yet to proceed to the merits, they have attempted to establish that common law tort plaintiffs have standing to bring claims for climate change harms.[159]

The significant climate change tort cases that have been litigated to date have reached different conclusions with respect to plaintiff's standing. The Northern District of California has twice held that plaintiff's standing is precluded by the political question doctrine.[160] The Southern District of Mississippi also concluded that common law climate change plaintiffs lacked standing on the grounds that their claims presented a political question.[161] While this holding was initially overturned by a 5th Circuit panel,[162] a procedural issue in the granted *en banc* rehearing resulted in the panel decision being vacated, leaving the District Court's dismissal as the final decision in the case.[163] In contrast, the Second Circuit has held that plaintiffs have standing to bring climate change tort claims.[164]

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157. Typically, environmental statutes will be found to preempt a broad range of common law claims, and may in fact lead to field preemption. *See* Milwaukee v. Ill., 451 U.S. 304 (1981). However, most statutes have express savings clauses that preserve the rights of parties to bring common law claims for matters not covered by the regulatory scheme. *See, e.g.*, 42 U.S.C.A. § 7604(e) (2009).

158. *See, e.g.*, Comer v. Murphy Oil Co., 585 F.3d 855 (5th Cir. 2009); Conn. v. Am. Elec. Power, 582 F.3d 309 (2d Cir. 2009); Native Village of Kivalina v. ExxonMobil, 633 F. Supp. 2d 863 (N.D. Cal. 2009).

159. *See* cases cited *supra* note 158.

160. Kivalina v. ExxonMobil, 663 F. Supp. 2d 863, 883 (N.D. Cal. 2009); Cal. v. General Motors, 2007 U.S. Dist. LEXIS 68547, at *58 (N.D. Cal. 2007).

161. Comer v. Murphy Oil USA, Inc., 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007).

162. *Comer*, 585 F.3d 855, at 860.

163. Comer v. Murphy Oil USA, 607 F.3d 1049 (5th Cir. 2010).

164. *Am. Elec. Power*, 582 F.3d 309, at 315.

Although the determination that a plaintiff has standing requires a much lower showing of causality than that required to establish tort causation,[165] gaining initial recognition of standing for climate change plaintiffs is still significant because it means that these plaintiffs have persuaded judges that they may have suffered injuries due to global warming that are "fairly traceable to" the emissions of defendants.[166] Even if the harms for climate change damages are subject to divisibility analysis, the scale of projected harms is so large that a verdict in favor of a climate change plaintiff could give rise to significant financial liability.[167] Therefore, because of the potential for substantial liability, the fact that several climate change tort claims have survived standing challenges may spur corporations to proactively reduce their greenhouse gas emissions.

Furthermore, in addition to their potential to impose substantial liability on the defendants, these cases often involve sympathetic plaintiffs, and therefore are likely to capture public attention. For example, in *Native Village of Kivalina v. ExxonMobil*, the plaintiff is an Inupiat Eskimo Village.[168] The Village claims the defendant energy and power companies' greenhouse gas emissions caused the melting of sea ice in front of the Village.[169] According to the plaintiffs, this sea ice formed a protective barrier, and without it, summer storms have dramatically increased coastal erosion and rendered the town uninhabitable.[170] Plaintiffs consequently seek damages to cover the costs of relocating the town.[171] Similarly, the plaintiffs in *Comer v. Murphy Oil Co.* are victims of Hurricane Katrina who allege that defendant's emissions increased the severity of the storm, and thereby contributed to the storm damage they sustained.[172] Accordingly, these cases have the potential to significantly alter public perception of the defendant companies and

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165. *See* Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976).

166. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

167. For an explanation of the application of divisibility to climate change tort claims see Kevin A. Gaynor, Benjamin S. Lippard, & Margaret E. Peloso, *Challenges Plaintiffs Face in Litigating Federal Common-Law Climate Change Claims*, 40 ENVTL. L. REP. 10845, 10854-56 (2010).

168. Kivalina v. ExxonMobil, 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009).

169. *Id.* at 869.

170. *Id.*

171. *Id.*

172. Comer v. Murphy Oil Co., 585 F.3d 855, 859 (5th Cir. 2009).

on the issue of global climate change in general, which could result in further pressure being exerted on industry to voluntarily reduce greenhouse gas emissions.[173]

These examples illustrate how two types of private litigation—permit challenges and common law tort litigation—may serve as drivers of environmental CSR. These cases, however, are distinct from statutory enforcement by the government and citizens discussed in sections II to IV. Unlike statutory enforcement cases, which have a direct deterrent effect due to the potential for similar prosecutions and certain penalties in the future, the cases discussed in this section mainly subject corporations to delays in project development, litigation expenses, and potentially unwanted publicity. Indeed, these latter cases are likely as important for their outcomes in the court of public opinion. Consequently, how much these cases will affect the behavior of a given corporation will depend upon its tolerance for litigation and project delays and the value that it places upon its environmental reputation.

VI. CONCLUSION

As corporations learned from CERCLA litigation, sometimes compliance with the law in the present may not suffice to prevent substantial liability in the future. Therefore, corporations have an incentive to look ahead and plan for the long term by proactively identifying ways to decrease their impact on the environment, even if not required to do so by any applicable law or regulation.

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173. It should be noted that, in addition to the tort uncertainly associated with climate change tort litigation, large greenhouse gas emitters are also faced with regulatory uncertainty due to the EPA's plans to regulate greenhouse gases under the Clean Air Act. EPA recently issued a finding that greenhouse gases endanger human health and welfare, which is the first step to regulation under the Clean Air Act. 74 Fed. Reg. 66, 496 (Dec. 15, 2009). The EPA has also announced a vehicle GHG rule and a "tailoring rule" to apply the Clean Air Act's PSD provisions to major emitters of greenhouse gases. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25324 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, & 600); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule 75 Fed. Reg. 31514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, & 71) This dual potential for regulation and common law tort litigation will likely lead some business entities to take proactive steps to minimize their greenhouse gas emissions.

Criminal liability under most of the major environmental statutes can be premised upon as little as a single knowing violation of an emission limit set in a permit. Therefore, given the possibility that emissions will be variable, even corporations that are in compliance most of the time may still be exposed to criminal enforcement litigation for occasional permit violations. Given these low thresholds, corporations that wish to avoid environmental prosecution will have incentives to go beyond the bare minimum that is required for compliance. Furthermore, the federal Sentencing Guidelines and DOJ guidance on the exercise of prosecutorial discretion offer the potential of greater leniency for companies that proactively manage environmental issues and go beyond minimal compliance. Accordingly, concerns over the threat of criminal enforcement litigation can be a major driver of environmental CSR.

Citizen suits and other types of environmental civil litigation can similarly result in substantial liability, delay, and/or litigation expenses. Therefore, they too encourage companies to proactively seek to avoid the grey area and do more than the minimum required to avoid the direct consequences of litigation.

Moreover, environmental litigation can have more indirect consequences that may also drive environmental CSR. For example, environmental lawsuits can be damaging to brand image and impact the overall value of a corporation. Corporate stock prices may also be negatively affected by the mere announcement of a major law suit. In addition, corporations that are subject to criminal environmental prosecutions may face a number of undesirable collateral consequences, including social stigma and the inability to be awarded government contracts.[174] When combined with the relatively strict thresholds that can trigger environmental liability, these non-legal factors provide important incentives to avoid environmental litigation.

Because much environmental CSR is likely driven by concerns over brand value and public image, the most important benchmarks are likely to be those set by public expectations and policies that guide decisions about enforcement and sentencing. These factors allow corporations to conform to societal expectations in an attempt to avoid both statutory and common law liability for environmental harms. Given the significant financial and reputation damage that

174. *See* Dinkins, *supra* note 42, at 318.

corporations may sustain in environmental litigation, it appears likely that litigation will continue to be a significant driver of CSR in the future.