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Criminal and Civil Remedies for Transboundary Water Pollution

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* J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2002; B.A., Communications with an emphasis in Journalism, University of Washington, 1998. This Comment is dedicated to Professor Stephen McCaffrey at McGeorge School of Law and those who helped me from the California District Attorney's Association. Gracias to the TTL staff and especially to Andrew Nelson who taught me how to think about the law. Thanks to Dad for entertaining me with his animated reading of Albert Einstein's expert witness testimony in a water pollution case. Thanks to Mom who kept reminding me I had a paper to write. Thanks to Ace, wonderdog extraordinare, who kept me company on New Year's Eve 2000 while I typed. This Comment shows one more way the law can further the words of the great naturalist of my generation, Woodsy Owl: "Give a hoot. Don't pollute."

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I. INTRODUCTION

Clutching plastic bags with dry clothes in one hand and the sides of an innertube with the other hand, illegal immigrants float from Mexico into the United States via the New River, a river the Environmental Protection Agency (EPA) lists as one of the most polluted rivers in North America.[1] The New River is so polluted that a worker at a clinic for migrant workers in Imperial Valley commented that illegal immigrants joke that if you go in the New River, "you come out glowing."[2] The New River originates just south of Mexicali and picks up so much waste as it flows north that by the time it reaches the border town of Calexico, California, it "violates water quality standards by several hundred-fold."[3] Although much of the pollution

1. OFFICE OF WATER, U.S. ENVTL. PROTECTION AGENCY, PUB. NO. 832-R-00-001, STATUS REPORT ON WATER-WASTEWATER INFRASTRUCTURE PROGRAM FOR THE U.S.-MEXICO BORDERLANDS 23 (2001), *available at* http://www.epa.gov/OW-OWM.html/usmexrpt/chapter3.pdf (copy on file with *The Transnational Lawyer*); *see also* Ben Fox, *Vile River Fails to Deter Illegal Immigrants*, SACRAMENTO BEE, Jan. 29, 2000, at A4 (describing the New River as "an oily, foul-smelling stew of raw sewage, industrial waste, agricultural runoff and trash").

2. *Id.*

3. Eric Niller, *Border River is Also Sewage Drain, at* http://www.msnbc.com/news/413973.asp (last visited Oct. 7, 2000) (copy on file with *The Transnational Lawyer*) (reporting that there are more than 30 viruses, including hepatitis A and polio carried in California's New River). Pollution in the river is known to be an ongoing problem among environmental circles. *See id.*; *see also* Stephanie Pullen Brown, et al., *Recent Developments in Environmental Law*, 30 URB. LAW. 945, 969 (1998) (discussing possible solutions to the pollution levels in the New

is blamed on farm run-off and sewage problems,[4] a troubling amount of the contamination in the water originates from Maquiladoras, foreign-owned businesses located in Mexico.[5]

Similar pollution problems affect the Tijuana River, which also flows into California.[6] This Comment proposes that companies located in Mexico contributing to the pollution of the New River and Tijuana River should be held criminally liable under California Water Code section 25189.5(c) for "causing the transportation of any hazardous waste . . . to a facility which does not have a permit."[7] Part I illustrates and examines the problem of river pollution in California which originates from industries in Mexico. Part II elaborates further on the problem with general background information concerning the causes of this situation. Part III discusses what actions Mexican authorities are taking to combat this problem. Part IV considers the private and public remedies available to stop transboundary pollution. Part V examines the possibility of obtaining jurisdiction over a foreign organization in California state courts. Part VI proposes specific remedies to attack transboundary pollution under U.S. law. Part VII addresses the causation problem inherent in any suit alleging river pollution. Finally, part VIII concludes with the possible impact such a lawsuit would have on existing efforts to remedy this problem by the United States and Mexico.

River).

4. *See* Fox, *supra* note 1 (reporting that the river "contains 15 million gallons of untreated or partially treated sewage" from Mexicali, Mexico). The U.S. government is contributing 55 percent of a US$50 million sewer expansion program to curb the sewage problem. *Id.*; *see also* Niller, *supra* note 3.

5. *See* Martha M. Neville, Note, *Who's Singing the Mexicali Blues: How Far Can the EPA Travel Under the Toxic Substances Act?*, 50 WASH. U.J. URB. & CONTEMP. L. 265, 267 n.8 (1996) (explaining that Maquiladora manufacturing plants are a major part of Mexico's industry and economy and are located at the United States-Mexico border); *see also* COMMISSION FOR ENVIRONMENTAL COOPERATION, TRACKING AND ENFORCEMENT OF TRANSBORDER HAZARDOUS WASTE SHIPMENTS IN NORTH AMERICA, A NEEDS ASSESSMENT 17 (1999) [hereinafter CEC] (describing the waste flow tracking system between the United States, Canada and Mexico as very unorganized). Information on transported hazardous waste is based only on "legal shipments." *Id.* "One can only guess about the size of illegal shipments across international boundaries." *Id.*

6. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION IX AND INTERNATIONAL BOUNDARY AND WATER COMMISSION, U.S. SECTION, SUPPLEMENT TO THE FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE INTERNATIONAL BOUNDARY AND WATER COMMISSION INTERNATIONAL WASTEWATER TREATMENT PLANT—INTERIM OPERATION 10 (October 1998), *available at* http://www.epa.gov/Region9/water/iwtp/suppsupp.pdf (copy on file with *The Transnational Lawyer*) (discussing a terrible sewage problem affecting the Tijuana river, and also contains evidence that hazardous urban-created materials are polluting the river). Such toxic chemicals include sulfides, arsenic, lead, nickel, zinc, copper, chromium, silver, phenol, mercury and cadmium, among others. *Id.* at 12.

7. CAL. HEALTH & SAFETY CODE § 25189.5(c) (West 1992).

II. BACKGROUND

A. *Toxic Waste of Mexican Companies Arrives in the United States*

The pollution problem plaguing the New River is a side-effect of political decisions affecting the border region between the United States and Mexico.[8] Pollution problems first surfaced in the border region in the 1960s after the Mexican government implemented the Maquiladora Program to cure economic problems.[9] The Maquiladora Program encouraged foreign-owned businesses to establish manufacturing plants in Mexico for the purpose of producing exports.[10] The program allows corporations located in Mexico to import component parts without trade tariffs.[11] When the Maquiladora produces a final product, the goods are shipped for sale in the United States and other markets, subject only to a duty on the costs of Mexican labor used to assemble or to process the goods.[12] Many border industries import chemicals from the United States that are needed to produce products, with the requirement that the toxic waste created must be legally exported back to the United States for disposal.[13] However, instead of shipping hazardous waste back across the border for proper disposal, many Maquiladoras refuse to comply with the law and instead, choose to dump the toxic substances into nearby rivers and ditches.[14]

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8. *See* Neville, *supra* note 5, at 265 (noting that the border is 2,000 miles long).

9. *See* Elizabeth A. Ellis, Note, *Bordering on Disaster: A New Attempt to Control the Transboundary Effects of Maquiladora Pollution*, 30 VAL. U. L. REV. 621, 632 (1996) (noting that Mexico's economic problems hit in 1964 after the United States terminated the Bracero Program, an agreement between the two nations permitting Mexican laborers to work in the United States). As a response to economic problems, the Mexican government established the Mexican Border Industrialization Program (BIP) to entice foreign investment in Mexico. *Id.*; *see also*, Neville, *supra* note 5, at 265 (stating that the goals of the BIP include the following: "(1) create new jobs, increase incomes, and improve the standard of living for border-area workers, (2) increase labor skills, and (3) decrease Mexico's trade deficit"). When the bracero program ended, the United States deported 185,000 Mexican workers, most of whom settled at the border. *See id.* This resulted "in an unemployment rate exceeding 70 percent in some Mexican border cities." *Id.*

10. *See* Neville, *supra* note 5, at 271 (noting that Maquiladora exports are Mexico's "second largest source of hard currency").

11. *See id.*

12. *See id.* at 265-66 (listing other advantages of Maquiladoras, including "few restrictions on items produced for export, low minimum wage paid to Mexican workers and exemption from Mexican corporate taxes"); *see also* Ellis, *supra* note 9, at 622 (explaining that the free-trade zone at the border allows Mexico to utilize its low-cost labor force to entice foreign investment in Mexico).

13. *See* The Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, Aug. 14, 1983, U.S.-Mex., T.I.A.S. No. 11269, at Annex III [hereinafter The La Paz Agreement] (governing general obligations between the United States and Mexico on transboundary shipments of hazardous waste). The Agreement sets forth strict rules governing how the exporting country must notify the importing country of hazardous waste shipments. *See id. See also* Stephanie Pullen Brown, et al., *supra* note 2, at 970 n.124 (naming the La Paz Agreement as authority for this point).

14. *See* Ellis, *supra* note 9, at 632 (describing a long list of health problems diagnosed on children living near the border). Doctors attribute blame to "careless dumping" by Maquiladora companies. *Id.*; *see also* Lillian M. Pinzon, *Criminalization of the Transboundary Movement of Hazardous Waste and the Effect on Corporations,*

B. Current Conditions

While the corporations illegally dumping hazardous wastes into local rivers are not solely responsible for the unhealthy conditions in border rivers, these corporations significantly contribute to the problem.[15] The U.S. Environmental Protection Agency recognizes that the "border region is confronted with a number of serious public health problems that are or may be associated with toxic environmental exposure."[16] For example, the New River is known to carry nearly thirty viruses ranging from hepatitis A to polio, as well as chemicals such as mercury.[17] The Maquiladoras are blamed for dumping toxins that are known to cause lupus, cancer, and ancencephaly.[18] Although by international agreement the hazardous waste created by Maquiladora plants must be returned to the foreign company's country of origin,[19] "much of the hazardous waste generated by Maquiladoras is not properly returned to the United States."[20]

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7 DEPAUL BUS. L.J. 173, 183 (1994) (describing illegal dumping as "midnight dumping").

> Midnight dumping occurs where a hauler, disguised as a legitimate disposal firm, is paid several thousand dollars a truck load to take the generator's waste for proper treatment and disposal. Then, without treating it he would get rid of the dangerous material, at virtually no cost, by flushing it into sewers or ditches, dropping it off ships at sea, etc.

Id.; *see also* John Byrne Barry, *Data Deficit*, 5 THE PLANET 10 (Dec. 1998), *available at* http://www.sieraclub.org/planet/199810/bord4.html (last visited Feb. 11, 2001) (copy on file *The Transnational Lawyer*) (explaining that although scientists know that Maquiladoras are causing the pollution, "we don't know how much they're putting out individually or as a whole").

15. *See* Neville, *supra* note 5, at 272 (explaining that aside from toxic waste pollution, the sewage systems around the border cities are overburdened); *see also id.* at 273 (naming three types of risks caused by those Maquiladoras that inadequately control toxic waste, including: 1) increased environmental risks, 2) increased health risks to the general public, and 3) harmful exposure to employees); *see also* U.S.-Mexico Border XXI Program, *U.S. Mexico Border Environmental Indicators 1997*, *available at* http://www.epa.gov/usmexicoborder/indica97/chap7.htm (last visited on Sept. 3, 2000) (copy on file with *The Transnational Lawyer*) (describing a testing plan using chemical indicators to distinguish Maquiladora and non-Maquiladora waste found in water at the border region); *see also* Ellis, *supra* note 9, at 631 (describing how illegal dumping near the town of Pirvada Unions, Mexico raised the levels of xylene to 52,700 times higher than the safe drinking water standard required in the United States).

16. U.S.-Mexico Border XXI Program, *U.S. Mexico Border Environmental Indicators 1997*, *available at* http://www.epa.gov/usmexicoborder/indica97/chap5.htm (copy on file with *The Transnational Lawyer*) (noting that diseases along the border "include asthma and tuberculosis; elevated blood lead levels in children; multiple myeloma, a form of bone-marrow cancer; systemic lupus erythematosus, an autoimmune disorder; hepatitis A; infectious gastrointestinal diseases such as shigellosis and amebiosis; and pesticide poisonings").

17. *See* Niller, *supra* note 3, at ¶ 9 (reporting that the pollution is a mixture of "agricultural pesticides, industrial wastes, and human waste").

18. *See* Ellis, *supra* note 9, at 632 (listing just some of many adverse health conditions caused by Maquiladora-generated pollution). Five years ago, in the border cities of Brownsville, Texas and Matamoros, Mexico, medical researchers documented 42 cases of anacephalic babies, and 30 cases of babies born without fully developed brains. *See id.* at 621. Ancencephaly is a condition that "causes a fetus to develop without a brain." *Id.*

19. *See* The La Paz Agreement, *supra* note 13 (setting forth strict guidelines on how the country of export must notify the importing country of hazardous waste shipments).

20. Elia V. Pirozzi, *Compliance through Alliance: Regulatory Reform and the Application of Market-Based Incentives to the United States-Mexico Border Region Hazardous Waste Problem*, 12 J. ENTL. L. LIT. 337, 345 (1997); *see also supra* note 14 and accompanying text (describing illegal dumping); *see also* The La Paz Agreement, *supra* note 13, at Art. XII. (including provisions requiring notification by the importing country of transborder

> [O]nly thirty of the 164 tons of hazardous waste per day from approximately five percent of the Maquiladora industrial plants is properly disposed of in Mexico. By contrast, an estimated forty-four tons per day of hazardous waste generated by Maquiladora plants is disposed of by unknown devices . . . [p]articularly, transitional waterways carry many health risks believed to be caused by improper industrial waste disposal from Maquiladora plants to North American communities.[21]

Although not all border pollution is purposefully caused or even directly attributable to illegal dumping, authorities widely recognize that public health on both sides of the border is in danger due to the pollution caused, at least indirectly, by the Maquiladora plants.[22]

All of these pollution problems blamed on Maquiladoras raise the logical question: how can these polluters get away with it? The following section discusses why existing enforcement measures are ineffective.

III. ENFORCEMENT IN MEXICO

Hazardous waste flow between the United States and Mexico is governed by provisions of the North American Free Trade Agreement, the United States/Mexico Bilateral Agreement, and other various multilateral and bilateral agreements.[23] Domestic laws enacted in each country establish the regulatory and enforcement arms that carry out the goals of those agreements.[24] In Mexico, transborder movement of hazardous waste is governed by the provisions of Mexico's General Ecological Equilibrium and Environmental Protection Law (LGEEPA).[25] Mexico's LGEEPA creates a framework for transborder movement of hazardous waste, and

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shipments of hazardous waste). The La Paz Agreement also includes consent and objection provisions available to the importing country, as well as strict regulations requiring the return of all waste to the country of origin. *See* The La Paz Agreement, *supra* note 13, at Art. XII. The handling of this waste is heavily regulated by this agreement, in combination with federal and state laws. *See id.*; *see also* 40 C.F.R. § 262.60 (2000).

21. Pirozzi, *supra* note 20.

22. *See* Steven M. Lerner, Comment, *The Maquiladoras and Hazardous Waste: The Effects Under NAFTA*, 6 TRANSNAT'L LAW. 255, 256 (1993) (stating that "extraordinary attention" has been focused on Maquiladora pollution caused both by improper handling or accidental spills).

23. *See* CEC *supra* note 5, at vii (containing information in a report that surveys current government policies and programs for tracking and enforcing hazardous waste laws between the United States, Mexico, and Canada).

24. *See id.*; *see also* Lisa T. Belenky, *Cradle to Border: U.S. Hazardous Waste Export Regulations and International Law*, 17 BERK. J. INT'L L. 95, 99 (noting that the U.S. Environmental Protection Agency is the enforcement branch in the United States).

25. *See* CEC, *supra* note 5, at vii (explaining that the United States and Mexico created rules and regulations to enforce a variety of International and domestic laws). The LGEEPA was enacted on January 28, 1988 and amended on December 13, 1996. *See id.*

includes a provision that hazardous waste may be exported only upon consent of the receiving country.[26]

The Mexican federal government handles law enforcement and tracking of hazardous waste generation and management.[27] The Secretariate de Medio Ambiente Recursos Naturales y Pesca (Semarnap), the federal agency responsible for national and transborder transport of hazardous waste, acts through the policy-making and the enforcement authorities.[28] The Instituto Nacional de Ecologia (INE) is the policy-making organization, while the Procuraduria Federal de Proteccion al Ambiente (Profepa) is the enforcement entity.[29]

However, despite this political structure, "the crux of the problem" in Mexico is enforcement.[30] Critics say that Mexico's enforcement problems stem from a variety of factors.[31] For instance, proper management of hazardous waste requires the use of expensive technology that many Mexican companies cannot afford.[32] Furthermore, Mexico lacks proper treatment, storage, and disposal facilities.[33] As a consequence of barriers to compliance caused by the relative unavailability of treatment, storage and disposal facilities by some companies, and the outright refusal to comply with existing environmental law by others, hazardous waste is dumped improperly in Mexico.[34] This results in health and related environmental problems.[35]

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26. *See id.* at 14 (noting that "[t]itle 4, Chapter V, Articles 150-153 presents the general requirements regarding hazardous wastes, including imports, exports and returns"). "Article 153, Chapter V of LGEEPA establishes a general framework for transborder movement of hazardous wastes." *Id.*

27. *See id.*; *see also* Lerner, *supra* note 22, at 258 (noting that maquiladoras "are subject to the jurisdiction of the Secretaria de Desarollo Social (DEDESOL), the Mexican counterpart to the U.S. Environmental Protection Agency").

28. *See* CEC *supra* note 5, at 14 (describing the framework of Mexico's hazardous waste laws).

29. *See id.* (explaining that these are all federal agencies within Mexico, which have exclusive authority over management and enforcement of Mexico's hazardous waste).

30. *See* Pirozzi, *supra* note 20, at 346 (naming economic and infrastructure problems, as well as general willingness to enforce laws); *see also* Lori Saldana, *Perspective on the Environment: The Downside of the Border Program*, L.A. TIMES, Aug. 22, 1996 (suggesting that one way to improve the border pollution problem is for Mexico to enforce its existing environmental and hazardous waste laws).

31. *See* Pirozzi, *supra* note 20, at 347 (explaining that the low value of the Mexican peso attracts industry to the border area, a region too poor to handle the waste production associated with Maquiladora plants).

32. *See id.* (blaming the lack of waste treatment technology in Mexican-owned factories on the devaluation of the Mexican peso); *see also* Saldana, *supra* note 30 (noting that Maquiladoras often dump raw toxic chemicals into general sewage systems, mixing with residential sewage system). These plants often "do little" to remove industrial toxics. *Id.*

33. *See* Pirozzi, *supra* note 20, at 347 (stating that "Mexico currently lacks the necessary funds to construct and operate an increased number of disposal sites").

34. *See id.* at 347-48 (estimating that only five percent of Maquiladora plants properly dispose of hazardous waste); *see also* Greg M. Block, *One Step Away from Environmental Citizen Suits in Mexico*, 23 ENVTL. L. REP. 10347, 10350 n.25 (noting that in the early 1990s, a Mexican report approximated that only "4,000 of 30,000 industries operating in and around Mexico City" did not abide by environmental regulations).

35. *See id.* (emphasizing the that Mexico is not the only country affected by illegal dumping). Health risks associated with improper dumping is also felt on the United States' side of the border. *See id.*

Although "Mexico appears to have a good faith intention to address environmental concerns," the current depressed economy in Mexico causes Mexican officials to view the Maquiladora industry "as a necessary evil intended to aid the expansion of the Mexican economy."[36] The result is that enforcement provisions in relevant agreements are "widely ignored and unenforced."[37] This lack of enforcement on the Mexican side is leading those concerned by the problem to turn to U.S. law to solve the problem.[38]

IV. ENFORCEMENT BY U.S. COURTS: POSSIBLE LEGAL THEORIES TO BRING MEXICO INTO COMPLIANCE

As the preceding section discussed, current enforcement techniques to prevent the illegal dumping of hazardous waste into shared rivers from Mexico into California are not working. This section examines what remedies are available in the United States that will encourage Mexico to either enforce its own laws, or in the alternative, to encourage private Maquiladora owners to come into compliance with existing laws.

A. Traditional Relief

Mexico does not have the resources to enforce its own anti-pollution laws. Therefore, the question becomes whether California can take legal action against acts of pollution originating in Mexico that have adverse effects in this state. There are many potential theories under which a state prosecutor may attempt to bring a transboundary pollution case.[39] Traditionally, compensation for water pollution injury involves causes of action under nuisance, trespass, interference with riparian rights, negligence, and strict liability.[40] However, as will be discussed in depth in a following section, the major obstacle for recovery under these theories in a water

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36. Pirozzi, *supra* note 20, at 348-49 (commenting that in a nation where many individuals worry about eating from day to day, costly environmental compliance procedures are viewed as unaffordable luxuries).

37. *Id.* at 351.

38. *See* Pinzon, *supra* note 14, at 347 (discussing a petition filed recently by the EPA under the Toxic Substance Control Act against certain Maquiladora plants in the border region to bring them into compliance with hazardous waste management laws); *see also infra* notes 51-53 and accompanying text (discussing statutory relief available).

39. *See* STEPHEN C. MCCAFFREY, PRIVATE REMEDIES FOR TRANSFRONTIER ENVIRONMENTAL DISTURBANCES 46 (1975) (discussing nuisance, trespass, interference with riparian rights, negligence and strict liability). *See generally* James Pizzirusso, *Increased Risk, Fear of Disease and Medical Monitoring: Are Novel Damage Claims Enough to Overcome Causation Difficulties in Toxic Torts?*, 7 ENVTL. LAW. 183 (examining remedies in toxic tort situations).

40. *See* McCaffrey, *supra* note 39, at 46 (discussing substantive bases to recover damages for pollution under Anglo-American law).

pollution context is proving that the defendant's activity actually caused the plaintiff's injury.[41]

For instance, one may wonder if bringing a negligence cause of action against the perpetrator of transboundary water pollution is a viable solution. The main criticism of this approach is that the ordinary standard of care is too weak.[42] This theory places liability on the transporter of hazardous waste, yet hazardous waste is transported between the generator, the transporter and the disposal facility.[43] Liability therefore is often elusive because the substances pass between several possibly culpable parties.[44] When several companies are contributing to waste, liability becomes a slippery topic.[45]

Other traditional causes of action and defenses appear to be similarly problematic.[46] For example, nuisance, trespass, and riparian rights claims invite a prescriptive rights defense because the plaintiff allowed the defendant's activities to go for a sufficient amount of time to ripen into a prescriptive right.[47] In addition, in nuisance actions, a defendant may argue that his conduct is typical of the type of activity carried on in the locality.[48]

Additionally, courts are often reluctant to impose injunctions or orders that other nations may view as an interference with sovereignty.[49] The law is not definitive on whether U.S. Courts have jurisdiction over environmental matters occurring wholly

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41. *See id.*; *see also* Pinzon, *supra* note 14, at 205 (commenting that the harmful effects of hazardous waste released into the environment can go undetected for years, therefore making causation a difficult element to prove).

42. *See* Pinzon, *supra* note 14, at 206 (discussing the single party focus of the negligence standard). A single party focus is not very helpful to determine liability among several possible culpable parties because as several parties may deal with one shipment of waste, liability is difficult to pinpoint. *See id.* The author argues for a more stringent standard because if a major environmental accident occurs and no negligence is found, significant harms can go unpunished. *See id.*

43. *See* Pinzon, *supra* note 14, at 205-06 (arguing for more stringent enforcement of existing criminal laws to deter those who violate hazardous waste laws around the globe).

44. *See id.*

45. *See id.* (discussing the difficulties of determining liability when an accident occurs). By inference to this idea, determining liability would also be difficult when several plants are dumping toxic waste into a river. *See id.* Once it is in the river and the waste mixes with other waste, determining which plant dumped how much becomes very tenuous. *See id.*; *see also infra* Part VII (discussing issues in proving causation).

46. *See* McCaffrey, *supra* note 39, at 50 (discussing obstacles to recovering in international pollution actions).

47. *See id.* at 50-51 (discussing how a polluter could obtain a prescriptive right to pollute if the she fails to bring the cause of action within the delineated statutory period, and the defendant's use of plaintiff's property during that time was continuous). In addition, to establish a prescriptive right, the polluter's adverse use of plaintiff's property was "open and notorious, under a claim of right, constant in quantity and quality." *Id.*

48. *See id.* at 51 (explaining that "[i]n this case, the fact that the vicinity is devoted to a particular use may make defendant's conduct reasonable for that area").

49. *See id.* at 52. "This consideration alone has often been the express or implied rationale for refusals to grant injunctive relief on jurisdictional or choice-of-law grounds." *Id.*

within a foreign jurisdiction.[50] A better solution may be prosecution under a specific environmental statute.

B. Statutory Relief

One route to imposition of liability is through California Health and Safety Code section 25189.5(c). Prosecutors in California are successfully using that code section in administrative law courts to stop transboundary transportation of hazardous waste in motor vehicles.[51] While this statute has not yet been applied to transboundary water pollution, the statute is arguably written to include such application.[52]

The California law is based on the federal Resource Conservation and Recovery Act (RCRA).[53] By enacting the RCRA, Congress encourages states to "administer and enforce" hazardous waste programs that carry out the intent of the Federal Program as long as such programs are "substantially equivalent" and "consistent" with the federal program.[54] California acted under this authority to establish section 25189.5(c) of the Health and Safety Code. This provision allows proper authorities to seek criminal penalties from "[a]ny person who knowingly transports or causes the transportation of hazardous waste, or who reasonably should have known that he or she was causing the transportation of any hazardous waste, to a facility which does not have a permit from the department[55] issued pursuant to this chapter."[56] Civil penalties are also provided for in the relevant chapter of the Health and Safety

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50. *See* Pinzon, supra note 14, at 218 (discussing a debate over whether extraterritoriality applies); *see also infra* notes 110-53 and accompanying text (discussing this issue in the context of jurisdiction and enforcement of actions against a foreign environmental defendant located in Mexico).

51. *See* Gale Filter & Jim McCarthy, *International Smuggling of Hazardous Waste into California for Disposal*, Vol. VII, Issue 2, WESTERN STATE NEWS, July 1996, at 1, 5 (listing administrative cases). The administrative cases include the following: Cornell-Dubilier Electronic's plea of nolo contendere on Dec. 8, 1995 to one misdemeanor count of violation of Cal. Health and Safety Code § 25189.5(c); the American Optical Company's stipulation to a civil judgment in Superior Court, San Diego County, Calif., in 1995 for illegally importing 12,000 pounds of uncured resin into the United States from Mexico; three felony convictions prosecuted by an investigator for the Los Angeles County District Attorney against the president of Western Summit Manufacturing for illegally exporting flammable ink waste to Mexico from California in 1996; and a civil fine against Maersk Pacific Limited in Superior Court, San Diego County, for the transportation of hazardous waste without a permit. *See id.*

52. *See infra* notes 142-96 and accompanying text (discussing the application of Cal. Health & Safety Code § 25189.5(c)).

53. *See* CAL. HEATH & SAFETY CODE § 25101(d) (West 1983) (implementing a state program to carry out federal goals). "It is in the best interest of the health and safety of the people of the State of California for the state to obtain and maintain authorization to administer a state hazardous waste program in lieu of the federal program pursuant to Section 3006 of Public Law 94-580, as amended, the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6926)." *Id.*; *see also* Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6926 (1995) (authorizing states to "administer and enforce" hazardous waste programs "in lieu of the Federal Program").

54. 42 U.S.C. § 6926 (1995).

55. *See* CAL. HEATH & SAFETY CODE § 25101(b) (West 1983). The Hazardous Waste Management Council helps hazardous waste producers to responsibly manage toxic waste by issuing the permits referred to in section 25189.5(c). *Id.*

56. CAL. HEALTH & SAFETY CODE § 25189.5(c) (West 1983).

Code.[57] California prosecutors continue to litigate under this statute,[58] and arguably the statute should apply to prevent the illegal transportation of pollution in rivers flowing north into California from Mexico.

V. JURISDICTION

Before any California prosecutor can try a company located in Mexico for pollution in California's waterways, jurisdiction must be established. The analysis for establishing jurisdiction over a foreign defendant involves the application of the international law of jurisdiction.[59] First, California courts need jurisdiction to prescribe in order to have the authority to apply the state's hazardous waste laws to polluters based in Mexico.[60] Second, California prosecutors must establish jurisdiction to adjudicate, authority to subject those persons to judicial process.[61] Finally, the court needs jurisdiction to enforce compliance with the law.[62] Discussion of these bases of jurisdiction applies to both an analysis of civil jurisdiction and criminal jurisdiction,[63] both of which are available under the California Health and Safety Code.[64]

A. Jurisdiction to Prescribe and Adjudicate

In order to apply California Health and Safety Code Section 25189(c) to a Mexican company polluting California waters, a California prosecutor needs jurisdictional reasons why another country should be subject to this law. These reasons, typically called bases to prescribe, allow states, like California, to apply their laws abroad.[65] Finally, jurisdiction to prescribe must be followed by showing

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57. *See id.* at § 25189.1 (discussing the application of civil penalties).

58. *See supra* note 51 (listing several administrative cases already brought).

59. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. k (Supp. 2000) (commenting that exercise of jurisdiction by a United States state involves a federal question under the Constitution of the United States).

60. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, pt. IV, subch. A, introductory note (1987) (defining jurisdiction to prescribe is as a term that authorizes a court of one country to exercise its authority on an international playing field). This authority is "limited in circumstances affecting the interests of other states."*Id.*

61. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987) (explaining the background behind the development of jurisdiction to adjudicate and why it is now considered as a customary requirement under international law).

62. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 431(1987) (explaining that any steps taken to enforce on state's law on an international level are exercises of jurisdiction).

63. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 cmt. f (1987).

64. *See* CAL. HEALTH & SAFETY CODE § 25189.5(c) (West 1999) (providing both civil and criminal enforcement measures).

65. *See infra* notes 66-83 and accompanying text (expanding on the topic of jurisdiction to prescribe).

it is reasonable to apply state law abroad.[66] This is known as jurisdiction to adjudicate.[67]

1. Prescription

Acts of pollution in Mexico, which cause harm to California rivers, are not beyond the jurisdiction of California's courts. The Restatement (Third) of Foreign Relations Law enumerates several bases of jurisdiction to prescribe that are applicable to a transnational pollution problem, including jurisdiction to prescribe based on the principles of effects and nationality.[68] These generally recognized principles of jurisdiction to prescribe are limited by a requirement of reasonableness.[69]

One basis for applying California law to corporations that do not have links to a U.S. national corporation is to apply the effects principle to conduct in Mexico causing pollution that crosses the border from Mexico into California. The effects principle allows a state to apply its law to "conduct outside its territory that has or is intended to have substantial effect within its territory."[70] Internationally, this principle is well-accepted with respect to acts such as the classic situation where a person fires a gun in one state killing a person in another state.[71] States also extend this principle to jurisdiction involving transboundary defamation cases.[72]

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66. *See infra* notes 84-106 and accompanying text (discussing jurisdiction to adjudicate).

67. *See infra* note 86 and accompanying text (discussing the reasonableness principle).

68. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 (1987) (listing different bases to prescribe laws on an international level, and the circumstances justifying application of those bases). The effects test is adopted by the court in Imperial Chem. Indus. v. Commission, 48/49, [1972] E.C.R. 619 (the Dreyfuss case), 11 Common Mket. L.R. 557 (Ct. of Justice 1972); *see also* Chandler v. United States, 171 F.2d 921, 929-30 (1st Cir. 1948) (describing application of the nationality test); United States v. Noriega, 746 F. Supp. 1506, 1508-13 (S.D. Fla. 1990) (authorizing application of international law as a basis to establish jurisdiction to prescribe). The author lists the effects principle and the nationality principle as mere examples of how a court can establish jurisdiction. *See id.*

69. *See Noriega*, 746 F. Supp. at 1513 (laying out a framework and analysis of reasonableness); *see also* United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945) (interpreting words in United States statutes so as to respect "the limitations customarily observed by nations upon the exercise of powers"); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 rep. n.3 (1987) (requiring the limitation of reasonableness so as to avoid overstepping another state's sovereignty).

70. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402(2)(c) (1987); *see also* U.S. v. Evans, 667 F. Supp. 974, 980 (S.D.N.Y.1987) (upholding jurisdiction to acts that cause adverse effects in the United States even though they did not occur in United States territory).

71. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403 cmt. d (1987) (listing cases where the effects test has been applied); *see also* Rivard v. United States, 375 F.2d 882, 887 (5th Cir. 1967) (applying the effects principle to defendants involved in a conspiracy to smuggle Heroin into the United States); *see also* United States v. Wright Barker, 784 F.2d 161, 168 (3d Cir. 1986) (applying the effects principle to convict defendants for possession of narcotics on the high seas with intent to import into the United States).

72. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403 cmt. d (1987) (stating that there is no controversy in applying the effects principle to sending libelous publications across an international boundary, an act where no *physical* harm is done).

The principle of nationality is the simplest way to establish jurisdiction over polluters in Mexico when the polluting Mexican corporations are owned or controlled by United States nationals.[73] The nationality principle allows a state to apply its law to the "activities, interests, status, or relations of its nationals outside as well as within its territory."[74] For example, California prosecutors often rely on the principle of nationality to obtain settlements from Mexican corporations that are subsidiaries of U.S. parent companies.[75] California prosecutors, in a joint effort with the Environmental Protection Agency, imposed civil fines and criminal convictions in several administrative cases involving defendants in Mexico where prosecutors proved affiliation with United States parent companies.[76]

However, the problem with this principle is that Mexican defendants craft ways around nationality so no legal U.S. parent company exists, rendering adjudication impossible under the nationality principle.[77] For instance, recently the EPA brought administrative cases against several defendants located in Mexico, and in doing so, realized one corporation protected itself by taking legal steps to avoid a relationship with a U.S. entity.[78] Although the defendant, Chambers de Mexico, admitted a close affiliation with a U.S. parent company incorporated under the laws of the United States, it maintained its separate identity by incorporating separately under Mexican laws and operating under the direction of Mexican management.[79] The case settled almost immediately, and the issue of jurisdiction never appeared before the court.[80]

The federal prosecutor commented that if the Mexican corporation chose to fight jurisdiction, he planned to argue that because the corporation sold products in California, courts should be able to treat it like a domestic company.[81] If the Maquiladora acts like a domestic company, then the application of California's long arm statute would establish minimum contacts to subject the corporation to

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73. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 cmt. g (1987) (noting that this principle has not generally been applied to ordinary torts, but silent, therefore perhaps not precluding situations involving a particularly harmful toxic tort that affects many people and the environment); *see also* Telephone Interview with John Rothman, Attorney at the Office of Regional Counsel IX for the United States Environmental Protection Agency (Feb. 6, 2001) (discussing jurisdiction based on his own opinions and work experience).

74. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402(2) (1987); *see also* Chandler v. United States, 171 F.2d 921, 929-30 (1st Cir. 1948) (applying a United States treason law to a national living abroad).

75. *See* Filter, *supra* note 51, at 5 (reporting that prosecutors obtained a judgment against American Optical Company of Southbridge, Mass., for conduct at the entity's plant in Tijuana, Mexico). In December 1994, Donald Clark, President of a Los Angeles-based corporation, pled guilty to three felony counts relating to illegal exportation and disposal of hazardous waste. *Id.* Cornell-Dubilier Electronics entered a no-contest plea to a misdemeanor violation of a California hazardous waste statute on Friday, December 8, 1995. *Id.*

76. *See id.*

77. *See* Rothman, *supra* note 73 (explaining how he has seen Mexican companies escape jurisdiction in actions brought by the EPA).

78. *See id.* (explaining that this statement refers to a subsidiary relationship).

79. *See id.* (showing that Mexican corporations take these measures because they fear that a court may find it reasonable for a U.S. court to prescribe their illegal dumping).

80. *See* Rothman, *supra* note 73 (noting that he wished he had gotten the chance to litigate the issue on the record, and that it was the Maquiladora official who wanted the settlement).

81. *Id.*

jurisdiction.[82] This case is important because the Mexican corporation settled in order to either avoid stringent U.S. regulatory actions or because its legal counsel did not believe it could prevail if the EPA filed a default action to show jurisdiction.[83]

2. *Adjudication*

In addition to establishing a court's power to reach polluters in Mexico that cause harm in California, a court needs authority to adjudicate.[84] According to the Restatement of Foreign Relations Law, a state may assert jurisdiction to adjudicate when it is reasonable for it to do so.[85] One determinative factor of reasonableness exists when "the person, whether natural or juridical, had carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state, but only in respect of such activity."[86] Therefore, under these principles it is logical for a California court to adjudicate when a Mexican defendant pollutes Mexican waters that flow north causing harm to California waters.

Principles of jurisdiction to adjudicate international controversies "are similar to those developed under the Due Process Clause of the United States Constitution."[87] The Supreme Court allows limited personal jurisdiction over a foreign defendant when there is notice to the defendant, when there are minimum contacts satisfying the requirements of the Due Process Clause, and when service is authorized by a specific or a state long arm statute.[88] The minimum contacts

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82. *Id.*; *see also* World-Wide Volkswagon v. Woodson, 444 U.S. 286 (1980) (explaining the minimum contacts test used for determining personal jurisdiction). The defendant's contacts with the forum state must "not offend traditional notions of fair play and substantial justice." *Id.* Further, the defendant's relationship with the forum state must render it "reasonable . . . to require the corporation to defend the particular suit which is brought there." *Id.*

83. *See* Rothman, *supra* note 73 (interpreting the case from Rothman's perspective).

84. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421 (1987) (explaining that adjudication is a customary element of jurisdiction under international law); *see also* Gray v. Am. Radiator & Standard Corp., 176 N.E.2d 761, 763 (1961) (requiring a showing of reasonableness even between states in the United States); *see also* Missouri on Mainland, Inc. v. Dalton, 230 F.3d 1367, 1367 (9th Cir. 2000) (requiring the plaintiff to establish standing). The court in *Missouri* stated that "[i]n order for a federal court to have jurisdiction to adjudicate a plaintiff's claim, the plaintiff must have standing." *See Missouri*, 230 F. 2d at 1367.

85. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421 (1987); *see also* Singh v. Ilckert, 784 F. Supp. 759, 765 (N.D. Cal. 1992) (discussing whether a delay in adjudication is reasonable).

86. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421(2)(j) (1987); *see* International Shoe v. Washington, 326 U.S. 310, 320 (1945) (finding that the defendant shoe company had sufficient contacts with the forum state to make it reasonable to adjudicate there); *see also* Shaffer v. Heitner, 433 U.S. 186, 205 (1977) (accepting the majority rule of requiring traditional notions of fair play and substantial justice to determine reasonableness of adjudication); *see also* World Wide Volkswagen Corp., 444 U.S. at 292 (noting that "the burden of the defendant . . . will . . . be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute").

87. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421, rep. n.1 (1987); *see also supra* note 86.

88. *See* Omni Capital Int'l Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 97-98 (1987) (explaining that these requirements are consistent with the Fifth Amendment to the United States Constitution); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 421, rep. n.7 (adding that in federal courts the defendant's contacts can be

requirement is satisfied by obligations arising out of requirements imposed by international agreement to export hazardous waste to the country of origin.[89] It is also satisfied when the defendant does business in the state.[90] A defendant who pollutes California waters from Mexico is amenable to service under California's long arm statute, which provides that a California court may "exercise jurisdiction on any basis not inconsistent with the Constitution of this state or the United States."[91]

Under the United States Constitution's due process standard, defendants can be sued in foreign forums if their conduct invokes the benefits and protections of the law in that state.[92] Many Maquiladora defendants conduct business in California, including shipping products or waste disposal.[93] This is the type of activity which meets the constitutional standard.[94] Under *Ohio v. Wyandotte*, the Supreme Court encourages complex environmental pollution cases involving foreign defendants to be heard in the forum state.[95] The Supreme Court stated that due to the complex issues and the large number of official bodies involved in issues surrounding the pollution of Lake Erie by a Canadian company, Ohio courts were the most logical forum to hear the case.[96] Similar to the complex web in *Wyandotte*, the pollution problem at the U.S-Mexico border is similarly integrated.[97] Therefore, it is reasonable for a U.S. court to hear such a case.[98]

Moreover, a Mexican defendant's contacts are established by the fact that by law, companies that export hazardous waste must export that waste to the country

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aggregated with the United States as a whole, even without an express federal statute); *see also* CAL. CIV. PROC. CODE § 410.10 (West 2000) (stating that California's long arm statute authorizes a California Court to "exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States").

89. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421, rep. n.5 (1987) (citing cases where nonresidents create liability while only transitorily present in the United States); *see also* The La Paz Agreement, *supra* note 13.

90. *See* Rothman, *supra* note 73 (making sense because many Maquiladoras do business in California).

91. CAL. CIV. PROC. CODE § 410.10 (West 2000).

92. *See* Gray v. Am. Radiator, 176 N.E.2d 761, 765-66 (1961) (noting that the defendant's benefit is not required to be direct, instead, indirect will do, depending on the facts and circumstances of each case).

93. *See id.*

94. *See id.*

95. *See* Ohio v. Wyandotte Chems. Corp., et al., 401 U.S. 493, 495 (1971) (citing the U.S. Constitution Art. III, Section 2, cl. 1 which states "The judicial Power shall extend . . . to Controversies . . . between a State and citizens of another State . . . and between a State . . . and foreign . . . citizens or Subjects").

96. *See id.* (summarizing that "this Court has found even the simplest sort of interstate pollution case an extremely awkward vehicle to manage"). "And this case is an extra-ordinarily complex one both because of the novel scientific issues of fact ordinarily complex one both because of the novel scientific issues of fact inherent in it and the multiplicity of governmental agencies already involved." *Id.* at 504-05. The Court continued that "[r]eversing the increasing contamination of our environment is manifestly a matter of fundamental import and utmost urgency," and that Ohio, not the Supreme Court, should handle the controversy. *Id.* at 505.

97. *See* U.S. Environmental Protection Agency, *U.S.-Mexico Border XXI Frontera XXI, Cooperative Enforcement and Compliance, Issues and Problems, available at* http://www.epa.gov/usmexicoborder/ef-about.htm (last visited Oct. 21, 2000) [hereinafter *U.S.-Mexico Border*] (copy on file with *The Transnational Lawyer*) (listing the many binational work groups and coalitions working to improve conditions in the border region).

98. *See* CAL. CIV. PROC. CODE § 410.10 (West 2000).

of origin in conformance with governing law.[99] Therefore, when a Mexican company imports hazardous waste for manufacturing purposes, it is required to have contacts with officials in the United States when it exports the waste out for disposal purposes.[100]

Another reason to apply U.S. law to foreign defendants in transboundary water pollution cases is that comity exists to do so.[101] It is accepted among environmental law enforcers that the application of U.S. law does not create an issue of comity when the particular conduct in litigation is against the foreign nation's policy.[102] For example, an agreement exists between the United States EPA and Mexico's environmental enforcement agency PROFEPA, to "enhance both countries' capacity to enforce and promote compliance with their respective environmental laws and to resolve mutual environmental problems caused by noncompliance."[103]

Past practice indicates that Mexican environmental authorities support assertion of jurisdiction by the United States against a Mexican defendant for violation of federal hazardous waste laws.[104] In August, 1999, the PROFEPA "supported" and "helped" the EPA establish facts, when the EPA filed and served a complaint against a Mexican corporation for violation of the federal RCRA statute.[105] According to the EPA, the "law is sufficiently clear to allow U.S. judges to enter judgments against Mexican and other foreign entities for conduct that takes place in Mexico."[106]

One drawback of adjudicating in this way is that it involves sending witnesses and experts across the border to testify in U.S. courts and some worry that this may upset the delicate balance of international cooperation that both parties are working to achieve.[107] However, if adjudication is focused solely on punishing the most

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99. *See* La Paz Agreement, *supra* note 13, at Art. XI (stating that "[h]azardous waste generated in the process of economic production, manufacturing, processing or repair, for which raw materials were utilized and temporarily admitted, shall continue to be readmitted by the country of origin of the raw materials in accordance with applicable national policies, laws and regulations").

100. *See id.* (requiring contacts because waste must be readmitted by the country of origin). Arguably, just because the defendant illegally avoids readmission, he should not be rewarded for this behavior by claiming he does not have the minimum contacts. *See id.* (inferring this argument from the La Paz provision quoted in the previous note).

101. *See* Jota v. Texaco Inc., 157 F.3d 153,160 (2d Cir. 1998) (explaining that U.S. courts tend to respect the judgments of foreign courts, respecting their validity"). "International comity is 'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.'" *Id.* at 159.

102. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987).

103. *See U.S.-Mexico Border*, *supra* note 97.

104. *See* John Rothman, et al., Draft for Comment, *U.S.-Mexico Workshop on Transboundary Environmental Enforcement, Using Courts and Enforcing Remedies: Overcoming the Border as a Barrier to Environmental Enforcement*, ENVT'L. L. INST. 1, 6-7 (2000) (discussing cooperation between the U.S. EPA and the Mexican PROFEPAa in dealing with an administrative complaint the U.S. EPA served against a maquiladora for alleged hazardous waste violations).

105. *Id.*

106. *Id.*

107. *See* Rothman, *supra* note 73 (questioning whether exercising jurisdiction is a good idea, regardless of whether it is available). Rothman warns that court actions should not be placed in a political vacuum. *Id.* He says that enforcement is the goal of both nations, but that bringing a court action may upset political alliances between groups at the border. *Id.* Such a reaction could adversely effect enforcement. *Id.*

egregious polluters in the border region, California courts of justice can provide further assistance without harming existing beneficial relationships between the United States and Mexico.[108]

Assuming a California court has jurisdiction to prescribe and to adjudicate, the next issue is how these factors would be used to apply an environmental statute abroad in a civil action.

B. Jurisdiction of Foreign Defendants in Civil Actions

In the civil context, California case law already exists which permits jurisdiction to prescribe anti-environmental conduct originating in Mexico that causes harm in California.[109] Courts as far back as 1909 applied the effects doctrine to hold foreign polluters civilly liable, as seen in *California Development Co. v. New Liverpool Salt Co.*[110] In *California Development*, the court found a New Jersey company liable for improperly constructing head gates along the Mexican portion of the Colorado River resulting in the flooding of lands owned by a private property owner in California.[111] In fashioning a remedy that required acts to be performed beyond the jurisdiction of the court, the court rested its authority to adjudicate tortious acts on the effects principle:[112]

> We are of the opinion . . . that the court had jurisdiction . . . to protect property within its jurisdiction, and to restrain the defendant from diverting the waters of the Colorado river to the damage of such property, notwithstanding the defendant may find it necessary in complying with the decree of the court to perform acts beyond the jurisdiction of the court.[113]

In another case consistent with the effects principle, the Supreme Court of California enjoined a U.S. parent company for the acts of its Mexican agent company when the agent pumped water from the Tia Juana River[114] in Mexico

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108. *See* Pinzon, *supra* note 14, at 216 (arguing that criminal prosecutions of environmental lawbreakers are needed because existing efforts are inadequate). Evidence also tends to show that an overwhelming number of Americans tend to view environmental pollution as a "serious crime." *See id.* at 217.

109. Cal. Dev. Co. v. New Liverpool Salt Co.,172 F. 792 (9th. Cir. 1909) (describing an action for an injunction and damages for harm to California land, where the tort occurred in Mexico).

110. *See id.* at 799, 820 (affirming the trial court's injunction to prevent defendant from diverting the waters of the Colorado river, and affirming the order of US$456,746.23 in damages caused to plaintiff's land by the improper diversion of water).

111. *See id.* at 794, 816 (considering whether the court could protect California property from water diversion that took place outside of the forum).

112. *See id.* at 816 (applying the effects test to a nuisance cause of action).

113. *Id.*

114. *See* Allen v. Cal. Water & Tel. Co. et al., 29 Cal.2d. 466, 482 (1946) (describing the Tia Juana River as rising in Mexico and emptying into the Pacific Ocean).

leaving too little water to flow upstream to plaintiff's land in California.[115] The court held that Mexican waters "are not . . . mere 'waste' or 'foreign' waters."[116] Instead, they are subject to California law "[u]pon entering the United States."[117] While private nuisance created the cause of action,[118] the policy behind the opinion is applicable to any legal theory because it is based on a fundamental state water law policy.[119] "[T]he general welfare requires that the water resources of the state be put to beneficial use to the fullest extent to which they are capable, and that the waste or unreasonable use of water must be prevented."[120]

Significant precedent exists to authorize California civil courts to exercise jurisdiction over foreign defendants whose actions result in environmental damage to California land.[121] Both the effects principle and the public interest doctrine allow a California court to take adequate measures to protect state resources.[122] Thus illustrating that California has jurisdiction to apply its environmental laws to foreign defendants in civil actions.

C. *Jurisdiction of Foreign Defendants in Criminal Actions*

Typically, when the United States applies its criminal laws against a foreign defendant, the defense will challenge the extraterritorial effect of the statute by raising a motion to dismiss.[123] A prosecutor who brings an environmental case against a defendant in Mexico should anticipate this defense because there is somewhat of a consensus that the federal RCRA statute, which prompted the California Legislature to enact its own hazardous waste laws in lieu of the federal program does not apply extraterritorially.[124] Furthermore, criminal penalties for

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115. *See id.* (considering whether the cause of action was barred by the doctrine of waste).

116. *Id.*

117. *Id.*

118. *See id.* at 488 (discussing the reasonableness of the defendant's behavior regarding internationally shared water).

119. *See id.* ("[C]arrying out the policy inherent in the water law of this state to utilize all water available").

120. *See* People v. Weaver, 147 Cal. App. 3d 23, 28 (1983) (citing CAL. CONST., art. X, § 2 and CAL. WATER CODE §§ 102, 1201 (West 2001)); *see also* Nat'l Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 441-43 (1983).

121. *See supra,* notes 105-15 and accompanying text (describing the effects principle and the public interest doctrine against the background of environmental case law).

122. *See supra* notes 113-17 and accompanying text (discussing both these concepts where state resources are being protected).

123. *See* United States v. Noriega, 746 F. Supp. 1506, 1512 (S.D. Fla. 1990) (holding that Noriega's motion to dismiss is without merit); *see also* United States v. Wright-Barker, 784 F.2d 161, 165 (3rd Cir. 1996) (raising a motion to dismiss); *see also* United States v. Evans, 667 F. Supp. 974, 977 (S.D.N.Y. 1987) (raising a motion to dismiss); *see also* United States v. Vasquez-Velasco, 15 F.3d 833, 839 (9th Cir. 1994) (claiming the suit should be dismissed for lack of intent to apply the statute abroad).

124. *See* Belenky, *supra* note 24, at 112 (discussing an environmental case, Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668 (S.D.N.Y 1991), where the presumption against extraterritoriality was applied); *see also,* Amlon Metals, Ltd. v. FMC Corporation, 775 F. Supp. 688, 761 (S.D.N.Y 1991) (holding in a case where the plaintiff was a foreign corporation and the defendant was a United States agent, that the Resource Conservation and Recovery Act does not apply abroad).

environmental harm are not often imposed under principles of international law, which demand that application of one nation's laws to another sovereign be applied on a basis of reasonableness.[125] Despite these hurdles, jurisdiction is still obtainable for several reasons.

First, the federal government, in authorizing states to enact their own programs in lieu of the federal RCRA statute, essentially granted states the authority to apply more strict hazardous waste laws than those written into the federal program.[126] This California hazardous waste statute deals with environmental concerns similar to those in *Ohio v. Wyandotte*, where the Supreme Court held that Ohio was the most appropriate forum to adjudicate considering the complexity of the controversies.[127]

Second, while there are no appellate court cases involving prosecutions of foreign defendants under the RCRA, the EPA is gradually compiling an impressive track record on enforcement of the RCRA to conduct committed abroad.[128] In EPA actions, extraterritoriality is typically a non-issue because enforcement efforts are directed at subsidiaries of U.S. parent companies.[129]

However, in at least one case, the EPA obtained a full settlement against a wholly Mexican entity.[130] Although the settlement occurred before jurisdiction was litigated, this suggests that the defendants did not feel confident challenging the EPA on jurisdictional grounds.[131] This is an indication that at least some in the legal field think that courts are willing to view transborder environmental crimes as serious offenses worthy of legal protection.[132] The California statute should apply

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125. *See* Envtl. Def. Fund, Inc. v. Massey, 986 F.2d 528, 532 (D.C. Cir. 1983) (determining reasonableness by a fact-based balancing approach); *see also* Jota v. Texaco, Inc., 157 F.3d 153, 160 (1998) (remanding to reconsider the merits based on a changed fact that may make litigation more reasonable); *see also* Beanal v. Freeport-McMorRan, Inc., 969 F. Supp. 362, 371 (E.D. La.1997) (refusing to grant jurisdiction absent proof that international law was violated).

126. *See* 42 U.S.C. § 6929 (2000) ("Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations"); *see also* CAL. HEALTH & SAFETY CODE § 25189.5(c) (West 1999) (requiring that a defendant "shall, upon conviction, be punished by imprisonment in the county jail for not more than one year, or by imprisonment in state prison for 16, 24, or 26 months). Civil penalties are discussed in § 25189(b). *See* CAL. HEALTH & SAFETY CODE at § 25189(b).

127. *See* Ohio v. Wyandotte Chems. Corp. et al., 401 U.S. 493, 504 (1971) (applying Ohio's nuisance laws to correct environmental harm committed in Canada that also produced disastrous effects in Ohio).

128. *See* Filter, *supra* note 51, at 5 (listing cases concerning "international smuggling of hazardous waste into California for disposal").

129. *See id.* (listing cases involving subsidiary relationships).

130. *See* Rothman, *supra* note 73, at 5 (naming the defendant in the unreported administrative case as Chambers de Mexico, a maquiladora with no United States parent company).

131. *See id.* (pointing out that this is his own personal opinion and not necessarily that of the EPA).

132. *See id.* (distinguishing Rothman's views from those of the author of this Comment). Rothman does not necessarily share these views, although the cases he shared in the interview establish authority for this conclusion. *See id.* Rothman said that any application of U.S. laws to a situation in Mexico should be done with an ear towards political consequences of those actions in Mexico. *See id.*

to conduct in Mexico that causes harm in the United States, because of the analogous extraterritorial analysis applied under the RCRA.[133]

A textual analysis of the words in the California statute indicate that the California legislature intended to apply the statute abroad.[134] When engaging in a textual analysis, there is a rebutable presumption against extraterritoriality where a statute is silent on the issue and the California statute is silent as to its extraterritorial reach.[135] However, if the nature of the law permits extraterrioriality and Congress intends it, the presumption does not apply to all criminal statutes.[136] "The exercise of that power may be inferred from the nature of the offenses and Congress' other legislative efforts to eliminate the type of crime involved."[137] If the purpose of the law is to protect the United States against certain conduct, regardless of where the conduct occurs, courts generally infer intent to apply the law to acts committed abroad.[138] Where regulatory statutes expose foreign defendants to both civil and criminal liability, courts tend to require that the defendant have some minimal connections with the forum state or, alternatively an express or clear intent to apply the statute extraterritorially.[139]

In addition to showing that the California statute includes extraterritorial reach, the prosecution must also prove that application of the California law is not unreasonable. Courts will not apply a statute to criminal acts committed abroad if doing so is unreasonable under established principles of international law.[140] International law recognizes the application of U.S. law abroad where the conduct to be prescribed has substantial and harmful effects in another state, the defendant is a national of the victim state, the conduct is universally condemned, and in some instances, where the victim is a national of the prosecuting state.[141] The most frequently used international law principle is the effects test, which was introduced

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133. *See* United States v. Vasquez-Velasco, 15 F.3d. 833, 839 (9th Cir. 1994) (quoting the RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 (1987)).

134. *See supra* notes 130-33 and accompanying text (discussing the rules and application of extraterritoriality to foreign defendants within the context of CAL. HEALTH & SAFETY CODE § 25189.5(c) (West 2001)); *see also infra* notes 136-53 and accompanying text.

135. *See supra* note 69 (requiring the proponent to show that application is reasonable); *see also* CAL. HEALTH AND SAFETY CODE § 25189.5(c) (lacking any express reference to applicability abroad).

136. United States v. Evans, 667 F. Supp. 974, 979 (S.D.N.Y. 1987).

137. *Vasquez-Velasco*, 15 F.3d. at 839.

138. *Id.*; United States v. Noriega, 746 F. Supp. 1506, 1515 (S.D. Fla. 1990).

139. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 cmt. f (1987) (elaborating on the reasonableness requirement on limiting jurisdiction to prescribe acts by foreign defendants).

140. *See Noriega*, 746 F. Supp. at 1514 (applying this analysis to hold that ex-foreign leader Manuel Noriega failed to show that the principle of extraterritoriality is a bar to recovery); *see also Evans*, 667 F. Supp. at 980 (quoting the RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 cmt. d (1987)).

141. *See Vasquez-Velasco*, 15 F.3d at 839 (referring to the effects test as it the territorial principle).

earlier.[142] When the effects doctrine applies, the "United States would unquestionably have authority to prosecute."[143]

In *United States v. Noriega*, the district court applied a Congressional intent analysis to determine whether Manuel Noriega's conduct was subject to U.S. law.[144] Noriega moved to dismiss for lack of jurisdiction after a federal grand jury charged him with international conspiracy to import and export cocaine in the United States.[145] The court reasoned that because the federal statute banned importation of narcotics, use of the word "importation" in the statute naturally implied an extraterritorial effect.[146]

Likewise, the California Health and Safety Code statute in question prohibits any transportation of hazardous waste without a permit.[147] Since a permit is required before any transboundary movement of hazardous waste,[148] the logical inference is that the statute is meant to apply to individuals on both sides of the border.[149] Moreover, intent to apply this statute across the border is reflected in the La Paz Agreement,[150] which is signed by both the United States and Mexico.[151] The very fact that there is such an agreement regarding transboundary hazardous waste, which imposes penalties for violations, supports a finding that California's legislature intended to apply its hazardous waste statutes to companies in Mexico.[152] According

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142. *See id.* (allowing the extraterritorial application of a United States statute to punish a foreign defendant for the murder of a United States citizen); *see also supra* notes 67-74 and accompanying text (discussing the effects test in relation to the pollution problem at the U.S.-Mexico border).

143. *Noriega*, 746 F. Supp. at 1512-13.

144. *See id.* at 1511 (stating that the former Panamanian leader surrendered to U.S. troops after an eleven-day standoff at a church in Panama where the American troops blasted the papal nunicature with "loud rock-and roll music"). After being flown to the United States by military officials to face drug charges, Noriega argued that application of criminal law did not apply to conduct that took place entirely outside U.S. borders. *Id.*

145. *See id.* at 1514 (noting that Noriega used a Lear jet to smuggle over 2,000 pounds of cocaine into the United States).

146. *Id.* at 1517.

147. CAL. HEALTH & SAFETY CODE § 25189.5(c) (West 1983).

148. *See* The La Paz Agreement, *supra* note 13, at art. III, (1) (requiring the exporting country to obtain consent and provide detailed notification before shipping hazardous waste to the importing nation).

149. *See supra* notes 148-49 (discussing permit requirements in transporting hazardous waste across international boundaries).

150. *See* The La Paz Agreement, *supra* note 13, Preamble (recognizing that there are risks associated with improper handling of hazardous wastes and calling on both Parties to "cooperate" to "reduce or prevent the risks to public health, property and environmental quality").

151. *See id.* (warning in the Preamble to Annex III of the La Paz Agreement that illegal transboundary shipments of hazardous waste "could endanger the public health, property and environment in the United States/Mexico border area"). It also reaffirms "Principle 21 to the 1972 Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm" and says that states have "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." *Id.*

152. *See id.* at art. XIV (requiring both the countries of import and export to "carry out" and "cooperate" with all legal actions in accordance with each countries' national laws and regulations regarding hazardous waste). This damages section of the treaty also states that the hazardous waste portion "shall not be deemed to abridge or prejudge the Parties' national laws coercing transboundary shipments, or liability or compensation for damages resulting from activities associated with hazardous waste and hazardous substances." *Id.*

to the agreement, both the United States and Mexico "shall ensure, to the extent practicable, that its domestic laws and regulations are enforced . . . as the Parties may mutually agree through appendices to this Annex, that pose dangers to public health, property and the environment."[153] This clause requires states to write domestic laws in compliance with the La Paz Agreement.[154] Therefore, California must have intended to apply its hazardous waste laws abroad in order to satisfy the policy of The La Paz Agreement.[155]

The *Noriega* case also helps illustrate why jurisdiction over conduct in Mexico does not violate principles of international law. The court rejected Noriega's claim that under international law, the facts of his case made it unreasonable for the court to exercise jurisdiction over him.[156] The court reasoned that it obtained proper jurisdiction over Noriega because of his use of a Lear jet, to smuggle drugs into this country, "produced effects within this country as deleterious as the hypothetical bullet fired across the border."[157] Likewise, when a Mexican corporation dumps hazardous waste into a watercourse that flows into the United States, the river flowing north is no different than the Lear jet used by Noriega to smuggle drugs. In both situations, the defendant's conduct furthers the transborder movement of harmful substances, which are highly regulated for health and safety purposes.

The higher burden that is usually applied to the prosecution in criminal cases to show reasonableness under international law is met in the environmental context.[158] Criminal cases are often limited to "serious and universally condemned offenses, such as treason or traffic in narcotics, and to offenses by or against the military."[159] While environmental crimes do not involve narcotics, the conduct in question does involve a "serious offense" recognized more frequently by courts.[160] In fact, dumping hazardous waste into an international river is arguably more serious than conspiring to import cocaine. Instead of wilful and controlled ingestion by drug

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153. The La Paz Agreement, *supra* note 13, at art. III(2).

154. *See id.* at art. II(1) (mandating that "[t]ransboundary shipments of hazardous waste and hazardous substances across the common border of the Parties shall be governed by the terms of this Annex and their domestic laws and regulations").

155. *See id.*; *see also id.* art. XIV(2) (requiring the country of export to "seek in its courts" the return of the environment to the condition it was in before any violation that occurs, and to "repair, through compensation, the damages caused to persons, property or the environment").

156. *See* United States v. Noriega, 746 F. Supp. 1506, 1513 (S.D. Fla. 1990) (ruling that although Noriega cites the principle of reasonableness as a limit to jurisdiction, he "fails to say how extending jurisdiction over his conduct would be unreasonable").

157. *Id.*

158. *See id.* at 1514 (discussing the prosecution's burden).

159. *Id.* (discussing rules set out in the RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403, rep. n. 8); *see also supra* note 120.

160. *See U.S.-Mexico Border*, *supra* note 97; *see also* Jota v. Texaco, Inc., 157 F.3d 153, 160 (1998) (involving a suit by Ecuadorian residents against the Texaco oil company for environmental injuries). The court remanded the case, ruling that an earlier dismissal of comity was error. *See Jota*, 157 F. 3d at 160. The court held that on remand, the district court should reconsider comity in light of Ecuador's change in position to favor litigation in a United States forum. *See id.* Ecuador changed position due to an election and "subsequent change of administration." *Id.* at 158.

users, those directly affected by water pollution are unwilling consumers who are unable to control their exposure. Toxic substances are especially harmful to anyone who drinks the water, and to any person, plant or animal that comes in contact with it.[161] Therefore, California's strong interest in protecting its water and its people clearly satisfies the reasonableness standard which is required to apply this statute abroad. The seriousness of dumping hazardous waste into internationally shared rivers makes applying California's criminal laws to this activity consistent with the requirements and customs of international law.

D. Enforcement

1. Enforcement in Civil Actions

In addition to obtaining jurisdiction, the problem of enforcement of a judgment over a Mexican defendant is also an issue because a judgment without any enforcement may leave the environment in no better place than it was before the litigation began. Generally, a state has jurisdiction to enforce law only if it has jurisdiction to prescribe. Assuming a court has jurisdiction to prescribe,[162] as discussed above, California would also seem to have jurisdiction to enforce in these cases. An enforcement measure can either be judicial or non-judicial, however "it must be reasonably related to the law" or regulation and the punishment imposed by the measure must be proportional to the gravity of the violation.[163] Additionally, a law can be enforced against a foreign defendant if the person is given notice, or the charges against him are reasonable; if the person is given an opportunity to be heard; and if the state has jurisdiction to adjudicate.

2. Enforcement in Criminal Actions

There are several ways the Mexican government may enforce a California court's judgment against a Maquiladora in the criminal context. One issue is whether Mexico will consent to jurisdiction.[164] However, under rules of comity,

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161. *See* Geoffrey C. Hazard, Jr., *The Futures Problem*, 148 U. PA. L. REV. 1901, 1902 (2000) (discussing the infinite harms associated with toxic torts).

162. *See* discussion *infra* Part IV.B (analyzing and concluding that jurisdiction to prescribe does exist).

163. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 431(2) (1987); *see generally* Calcutta East Coast of India and East Pakistan/U.S.A. Conference v. Federal Maritime Commission, 399 F.2d 994, 999 (D.C. Cir. 1968) (instructing that the case to be remanded so as to find a sanction proportional with the seriousness of the offense). The court of appeals in *Calcutta* instructed the district court to take into account all the circumstances and competing interests. *See Calcutta*, 399 F. 2d at 999.

164. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 432(2) (1987) (raising the issue that "[a] state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state given by duly authorized officials of that state").

Mexico may consent to such jurisdiction.[165] Alternatively, if the defendant is present in California or owns property in California, enforcement is not problematic.[166] Enforcement is generally is not a pressing concern because most Maquiladoras either do business in California or frequently transport goods within the state.[167]

VI. APPLICATION OF UNITED STATES LAW

Assuming a California court can obtain jurisdiction over a Maquiladora, there are still substantive issues. Application of California Health and Safety Code section 25189.5(c) involves an analysis of choice of law and a close consideration of the substantive law involved.

A. *Choice of Law*

Once the court has jurisdiction over a polluting Mexican defendant, the question of choice of law arises. For this analysis, California follows the "governmental interests" approach to assess choice of law.[168] This approach determines whether the substantive laws of California and the foreign jurisdiction differ on the issue, and if so, the court then examines what interests, if any, the foreign court has in adjudicating the case.[169] Finally, the court examines the strength of each jurisdiction's interest.[170] This is the same analysis used by the *Noriega* court.[171]

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165. *See* Pennoyer v. Neff, 95 U.S. 714, 733 (1877) (stating that a defendant can consent to personal jurisdiction by "voluntary appearance").

166. *See* Insurance Corp. of Ir. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 702-09 (1982) (declaring that the Due Process Clause requirement of personal jurisdiction can be waived if the defendant has business contacts within the forum).

167. *See* Rothman, *supra* note 73.

168. *See* Bernhard v. Harrah's Club, 16 Cal.3d 313, 316-17 (1976) (determining whether California or Nevada had a stronger interest in litigating a personal injury lawsuit); *see also* Offshore Rental Co. v. Continental Oil Co., 22 Cal. 3d 157, 161 (1978) (affirming plaintiff's contention that California follows the "governmental interest analysis"); *see also* Hurtado v. Superior Court, 11 Cal. 3d 574, 581 (1974) (applying the governmental interests test to determine in a wrongful death suit that California's interests outweighed those of Mexico).

169. *See* Grant v. McAuliffe, 41 Cal. 2d 859, 862 (1953) (stating that in actions for torts occurring abroad, the courts of this state determine the substantive matters inherent in the cause of action by adopting as their own the law of the place where the tortious acts occurred, unless it is contrary to the public policy of this state).

170. *See Bernhard*, 16 Cal. 3d at 322 (applying California law because the policy of California would be "more significantly impaired if such rule were not applied").

171. 746 F. Supp. 1506 (S.D. Fla. 1990) (finding jurisdiction over Manuel Noriega in a case where the ex-Panamanian leader attempted to smuggle cocaine into the United States).

B. Application of California Health and Safety Code Section 25189.5(c)

California's Health and Safety Code section 25189.5(c) is a specific state statute dealing with hazardous waste transportation. It provides:

> Any person who knowingly transports or causes the transportation of hazardous waste, or who reasonably should have known that he or she was causing the transportation of any hazardous waste, to a facility which should have known that he or she was causing the transportation of any hazardous waste, to a facility which does not have a permit from the department issued pursuant to this chapter, or at any point which is not authorized according to this chapter, shall, upon conviction, be punished by imprisonment in a county jail for not more than one year or by imprisonment in the state prison.[172]

While there are no reported cases involving prosecutions under California Health and Safety Code section 29189.5(c) for illegally transporting hazardous waste in a river, several non-reported administrative cases exist that resulted in the successful pursuit of criminal and civil penalties under the statute.[173] These cases involve situations where defendants illegally drove hazardous substances into California using motor vehicles.[174]

Therefore, when applying section 25189.5(c) in a water pollution context, several statutory interpretation issues arise. First, the discussion involves an analysis of whether the statute is intended to apply to transportation of hazardous waste by way of river instead of motor vehicles, or some other more conventional mode of transportation.[175] Next, the question is whether the second clause of the statute applies to waste originating in Mexico and entering California as a free flowing substance in a river.[176]

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172. CAL. HEALTH & SAFETY CODE § 25189.5(c) (West 1983).

173. *See* Filter, *supra* note 51 (referring to administrative cases listed in that note).

174. *See id.* (listing the most noteworthy case involved Cornell-Dubilier Electronics (CDE), in which the defendant entered a plea of nolo contendere to one count of a violation of CAL. HEALTH & SAFETY CODE § 25189.5(c) (West 1983)). CDE was caught sending a truck across the border into California and confiscated a wooden crate full of chemicals that qualified as hazardous waste under the state's toxic waste regulations. *See id.* CDE agreed to make a total of $300,000 in contributions, fines and penalties to further environmental prosecution in California. *See id.* The plea was entered Dec. 8, 1995. *See id.*

175. *See* CAL. HEALTH & SAFETY CODE § 25189.5(c) (West 1983) (raising questions because this Comment applies the statute to illegal dumping, which has never been done before).

176. *See id.* (stating that the destination must be "to a facility which does not have a permit from the department issued pursuant to this chapter, or at any point which is not authorized according to this chapter").

1. Defining Transportation

The issue of whether section 25189.5(c) is applicable to transportation of hazardous waste by river, depends upon an analysis of the meaning of the word "transportation" as used by the California legislature.[177] In resolving matters of statutory interpretation, courts consider the plain meaning of the statutory text.[178] An analysis of the plain meaning takes into account the usual and ordinary meaning of words used, and it respects the overall purpose of the statute.[179] If two reasonable interpretations seem appropriate, courts usually resolve such matters by consulting the legislative history and background of the statute and by comparing words to other sections of the code.[180] If a term exists in one area but is absent in another, courts do not imply the presence of absent terms.[181] Courts pay special attention to the overall purpose of the statute and to the evil intended to be prevented.[182]

A plain textual analysis reveals that the word "transportation" means simply "[t]o carry or convey (a thing) from one place to another."[183] This definition does not exclude a river as a means of transportation of hazardous waste. For example, the widespread occurrence of silt buildup in river deltas results from transportation of sediment in a riverbed.[184] Therefore, it is common sense to assume that if sediment can be transported in a river bed, so can hazardous waste.[185] It is a common rule of statutory interpretation that courts will not interpret a statute in a way that defies common sense or leads to absurd results.[186]

Moreover, in other sections of the California hazardous waste code, the legislature listed authorized methods of hazardous waste transportation. This indicates that California lawmakers assumed that penalties would apply to any methods of transportation not authorized.[187] For example, section 25160 requires completion of shipping documents for any waste that "will be transported by vehicle . . . rail or vessel."[188] Those modes of transportation appear again in section 25162, as well as in other code sections.[189] The fact that the legislature specified "vehicle,

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177. *See id.*

178. *See* People v. Superior Court (Zamudio), 23 Cal. 4th 183, 192 (2000).

179. *See id.*; *see also* Snukal v. Flightways Mfg., Inc., 23 Cal. 4th 754, 756-67 (2000).

180. *See Snukal*, 23 Cal. 4th at 754.

181. *See* Metropolitan Water Dist. of S. Cal. v. Imperial Irrigation Dist., 80 Cal. App. 4th 314, 329 (2000).

182. *See* People v. Superior Court (Zamudio), 23 Cal. 4th 183, 185 (2000); *see also* Horwich v. Superior Court, 21 Cal. 4th 272, 276 (1999).

183. BLACKS LAW DICTIONARY 1505 (7th ed. 1999).

184. Telephone Interview with Jim Setmire, U.S. Geological Survey (Feb. 27, 2001) (copy on file with *The Transnational Lawyer*).

185. *Id.* (adding that sometimes hazardous waste does not stay in the water, and instead remains in the sediment).

186. *See* Black v. Dept of Mental Health, 83 Cal. App. 4th 739, 741 (2000).

187. *See generally* Chapter 6.5 of the CAL HEALTH & SAFETY CODE (listing only three authorized method, and countless unauthorized methods exist).

188. CAL. HEALTH & SAFETY CODE § 25160(b)(1) (West 1983).

189. *See id.*; *see also* CAL. HEALTH & SAFETY CODE § 25189.5(c) (West 1983).

rail and vessel" means that those methods of transportation, if accompanied by proper documentation, are approved.[190] The legislature did not need to specify the many modes of transportation that are not approved, because the same result can be accomplished by enumerating only the authorized methods of transportation and by implication, those not listed must be illegitimate.

However, the legislature did recognize that improper transportation is a problem that should be regulated.[191] Only this conclusion could explain the clear intent of the legislature to apply the statute as broadly as possible.[192] The statute imposes liability on anyone who "*knowingly* transports or causes the transportation of hazardous waste, or who *reasonably should have known* that he or she was causing the transportation of hazardous waste."[193] Since the burden of proof for the prosecution is much lower under this statute than in most criminal statutes, this mere negligence standard indicates that the California legislature intended to apply the statute as broadly as possible in order to protect the environment.[194] "We have no doubt that in enacting section 25819.5(c), the Legislature intended to impose criminal liability upon those who reasonably should have known they were disposing of hazardous waste at an unpermitted facility, without requiring gross negligence or recklessness."[195] Clearly then, anyone who dumps waste into a river reasonably should know that the river will ultimately carry the waste downstream because it is common knowledge that water flows downstream. Thus, a defendant in Mexico should be on notice of illegal transportation if waste is dumped in a river that flows downstream to California.

In addition to a plain textual analysis, the legislative history and purpose of the law also favor interpretation of the statute to include river streams as a mode of transportation of hazardous waste.[196] The possibility of transporting pollutants in a river is not inconsistent with the overall purpose of enacting the statute.[197] California enacted this statute in response to a federal program that encouraged states to enact their own equivalent programs in lieu of relying on federal programs.[198] Congress

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190. *See id.*; *see also* CAL. HEALTH & SAFETY CODE § 25162(c) (West 1992); *see also* CAL. HEALTH & SAFETY CODE § 25187.6 (West 1992) (allowing tagging of suspicious "containers" and the "vehicles transporting, the hazardous waste"). Since the statute specifies that hazardous waste be kept confined, then unconfined waste dumped in a river is clearly a violation. *See id.*

191. *See* CAL. HEALTH & SAFETY CODE § 25110.1(a) (West 1983) (explaining that the "proper . . . transportation . . . of hazardous waste is critical to maintaining the health, environmental soundness, and economic prosperity of the state").

192. *See id.* at § 25100 (listing broad legislative findings in regard to the danger of mishandled hazardous waste).

193. *See id.* at § 25189.5(c) (emphasis added).

194. *See* People v. Martin, 211 Cal. App. 3d 699, 702 (1989) (noting that the Court of Appeal for the Second District in California already interpreted section 29189.5(c) to apply as a public welfare offense, therefore, violations are subject to the lower standard of ordinary care).

195. *See id.*

196. *See* CAL. HEALTH & SAFETY CODE § 25101(d) (West 1983); *see also* 42 U.S.C. § 6941 (1995).

197. *See id.*

198. CAL. HEALTH & SAFETY CODE § 25101(d) (West 1983).

explicitly stated its objectives are to encourage "methods for the disposal of solid waste which are environmentally sound."[199] With this understanding, it makes no sense to distinguish between movement of hazardous waste by vehicles, railroads and vessels, and movement of hazardous waste in a river. Regulation of proper and improper transportation of hazardous waste encourages environmentally sound methods of waste disposal.[200] If Mexican polluters are allowed to continue sending toxic waste to California because of a statutory interpretation that finds that transportation of hazardous waste is possible only in vehicles, railcars, and vessels, but not in rivers, such an interpretation would be inconsistent with Congress' intent to encourage environmentally sound waste disposal methods.[201]

Furthermore, California and other states recognize that it is possible to transport pollution via a river stream.[202] California has laws criminalizing the dumping of "trash, garbage or construction material" into creeks and streams; laws prohibiting the installation of a septic tank upon the borders of any stream which is used to supply water to the public; and laws granting the ability to enjoin the maintenance of a hogpen and manure pile adjacent to a river bank.[203] All of these laws are aimed at preventing the carrying of pollutants in a riverbed.[204] Other states, such as New Hampshire, also recognize that motor vehicles are not necessary for transportation of pollutants.[205] Therefore, it is reasonable to conclude that someone who improperly deposits hazardous waste into a riverbed is causing the transportation of hazardous waste that this statute is designed to prevent.

2. *Defining a Facility Which Does Not Have a Permit*

The second major issue in applying this statute to water pollution is whether the hazardous wastes transported in rivers end up at "a facility which does not have a

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199. 42 U.S.C. § 6941 (West 1995).

200. *See id.* (saying that the goals of the program are "to assist in developing and encouraging methods for disposal of solid waste which are environmentally sound").

201. *See* CAL. HEALTH & SAFETY CODE § 25101(d); *see also* 42 U.S.C. § 6941 (1995).

202. *See generally* Urie v. Franconia Paper Corp., 218 A.2d 360, 360-362 (N.H. 1966) (holding that even if a statute permitted the transportation of a certain amount of sewage or industrial waste in a river, the statute "was not intended to sanction the continuance of a private nuisance"); *see also* Ainsworth Irrigation Dist. v. Bejot, 102 N.W.2d 416, 427 (Neb. 1960). The court held that sanction an "appropriation of water which would in effect remove the waters of a river or stream from its natural basin or watershed and thereby cause it to be transported to another basin." *Id.*; *see also* City of Corpus Christi v. City of Pleasanton, 276 S.W.2d 798, 799 (Tex. 1955) (deciding "whether it is waste to transport water produced from artesiona wells by flowing it down a natural stream bed and through lakes with consequent loss of water by evaporation, transpiration, and seepage").

203. *See* People v. Weaver, 147 Cal. App.3d 23, 29 (1983) (citing People v. Elk River M. &L. Co., 107 Cal. 214 (1895)).

204. *See supra* notes 202-03 (giving examples of cases where courts acted to protect the environment where pollution flowed in a riverbed).

205. *See supra* note 202 (listing cases of various causes of action that dealt with water's ability to transport itself and things carried in it by natural means).

permit . . . or at any point which is not authorized according to this chapter." The statutory text and case law provide an answer to this question.

First, a general reading of the text excludes an interpretation that classifies a river as a "facility."[206] Therefore, if the statute is applied in the context of river pollution, a plaintiff must show that natural modes of movement, such as streams, lakes, acquifers and the sea where tides and currents provide the motion for transportation, can be categorized as "any point which is not authorized according to this chapter."[207] Although nothing in the chapter specifically defines "any point which is not authorized,"[208] the legislature clearly did not intend for California rivers to qualify as an authorized point for hazardous waste disposal.[209] The legislature specifically found that long-term threats to public health and to water quality result from inappropriate handling, storage, use, and disposal of hazardous wastes.[210] Additionally, the historical notes of the statute state that "proper collection, transportation, treatment, recycling, storage, and disposal of hazardous waste is critical to maintaining the health, environmental soundness, and economic prosperity of the state."[211] This intent is also reflected by Congress when it enacted the federal legislation that prompted California to develop its own legislation.[212]

The federal legislation includes Congressional findings explaining the purpose of enacting a hazardous waste policy.[213] Congress implied that the statute applies to dumping hazardous waste in rivers.[214] Congress found that "open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land."[215] Therefore, according to the purpose of this legislation, the disposal of untreated hazardous waste, directly into rivers of the United States, could not possibly qualify as an authorized disposal point.

California case law is not contrary to this position.[216] In *People v. Taylor*, the defendant abandoned hazardous waste on property on which it was stored.[217] In his defense, he argued that abandonment is an "approved" method of disposal so as to

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206. *See* CAL. HEALTH & SAFETY CODE § 25189.5(c) (West 1983).

207. *Id.*

208. *Id.*

209. *See supra* notes 187-95 (discussing lawful and unlawful means of transporting hazardous waste). Unlawful transportation of toxic waste in rivers turns rivers into unauthorized points of hazardous waste disposal. *See id.*

210. CAL. HEALTH & SAFETY CODE § 25101 (b) (West 1983).

211. CAL. HEALTH & SAFETY CODE § 251101.1, and accompanying historical and Statutory Notes.

212. *See supra* notes 196-200 and accompanying text (discussing an intent to further broad environmental goals).

213. *See* 42 U.S.C. § 6901 (2000).

214. *See id.*

215. *Id.*

216. *See* People v. Taylor, 7 Cal. App. 4th 677, 689 (1992) (applying CAL. HEALTH &SAFETY CODE § 25819.5(c) to defendant who abandons waste).

217. *See id.*

bar his conviction.[218] However, the court held that the government never suggested that abandonment of hazardous waste qualified as authorized disposal.[219] Similar to abandonment on land, disposal of hazardous waste into water poses the same, if not more serious consequences.[220] As mentioned earlier, both the California Legislature and Congress specifically addressed the harms resulting from such conduct.[221] When hazardous waste is handled in so careless a manner as to travel unprotected in California's riverbeds, this is a situation the California legislature expressly denounced as against public policy.[222] In summary, this California statute does apply to preclude the unlawful transportation of hazardous materials in California rivers originating in Mexico.[223] California rivers were never contemplated to act as authorized facilities for the final destination of hazardous waste.[224]

VII. PREVAILING CALIFORNIA INTERESTS

The California statute substantively applies to prevent the unlawful transportation of hazardous waste at an unauthorized facility,[225] however the question remains whether California has a prevailing interest.[226] As discussed earlier, the presence of toxic wastes in rivers poses substantial short and long-term threats to the environment and the health of the general population.[227] California has an interest in protecting both its natural resources and the public health.[228]

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218. *See id.*

219. *See id.*

220. *See supra* notes 162-63 (discussing the potential harm to the environment and the public of hazardous waste flowing in California rivers).

221. *See id.*

222. *See id.*

223. *See supra* notes 175-207 and accompanying text (discussing the definition of transportation intended by the California legislature as used in CAL. HEALTH & SAFETY CODE § 25189.5(c) (West 1983).

224. *See supra* notes 208-40 (discussing whether hazardous wastes that are transported in rivers are ending up at an unauthorized facilities).

225. *See supra* notes 175-240 (discussing the substantive application of CAL. HEALTH & SAFETY CODE § 25189.5(c) to curb transboundary water pollution in California rivers).

226. *See supra* notes 168-69 (defining the analysis courts apply under choice of law).

227. *See* Hazard, *supra* note 161 (discussing the problems with toxic torts). Most toxic torts involve biological interference between the toxic waste and the victim harmed, be it plant, animal or human. *See id.* at 1902. Symptoms may lie dormant for months or years. *See id.*; *see also* Pinzon, *supra* note 14 (stating that improper handling of hazardous waste creates a string of deleterious consequences). "Hazardous wastes can cause 'death, injuries, illnesses, contamination of groundwater and well closings, soil contaminations, fish kills, livestock losses, municipal waste treatment plant outages, crop losses and habitat destruction . . . loss of livelihood and loss or devaluation of property.'" *Id.* at 187.

228. *See id.* (considering California's interests in preventing the harmful effects that are mentioned in the previous footnote); *see also* supra note 120 (discussing a the state's interest in protecting its water supply and preventing unreasonable uses of water).

By contrast, Mexico's concerns are more economic.[229] Mexico has an interest in polluting its own waterways.[230] The pollution generating Maquiladoras provide low-cost labor to many foreign companies which may chose to take their business elsewhere if required to comply with costly environmental laws.[231] Hence, Mexico's interest in polluting hails from an indirect interest in providing jobs and ultimately stimulating the economy.[232]

However, it is not clear whether Mexico would lose business if its interest to pollute became judicially diminished. But it is clear that if pollution continues, California will suffer extensive long-term injury to its environment and to the well-being of the general population.[233] These types of injuries clearly outweigh the speculative harms Mexico would suffer if required to clean-up its factories.

VIII. CAUSATION

Establishing that the defendant's activity was the actual cause of the injury is the "major obstacle to recovery of damages for pollution injuries."[234] This is particularly true in the Maquiladora context. When multiple manufacturers in Mexico illegally dump the same hazardous wastes into a river flowing into California, the prosecution faces a heavy burden to determine which company is actually responsible for causing the transportation of that waste.[235] In order to establish causation, hazardous waste leaving a plant in Mexico must be detectable in the river once it crosses the California border.[236] Often hazardous substances are impossible to detect because the toxics drop out of the water, and instead, lie in river sediment.[237] Additionally, when waste is tracked at the border, it is difficult to

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229. *See supra* note 36 (noting that Mexico does not enforce already existing law because it is not economically feasible to do so).

230. *See id.* (stating that polluting saves money because no investment is made into expensive anti-pollution technology). *See also* McCaffrey, *supra* note 39 (discussing problems with imposing domestic laws on the actions of other sovereigns). "[C]ourts have been extremely chary of shutting down foreign economic enterprises." *See id.*

231. *See* Pirozzi, *supra* note 20, at 348-49 (discussing the feeling of some in Mexico that pollution is required to stay in economically viable). "As a consequence, despite its negative environmental effects, the Maquiladora industry is an integral part of the Mexican economy and is protected accordingly." *See id.*

232. *See id.*

233. *See supra* note 227 and accompanying text (discussing the harms of toxic waste pollution).

234. *See* McCaffrey, *supra* note 39, at 49 (discussing the near impossibility of proving to what extent that the defendant is liable, or if multiple sources are involved, the issue may be whether the defendant is liable at all).

235. *See id.*; *see also* Pizzirusso, *supra* note 39, at 183 (noting that this has lead some "to argue for a lower causation standard or a legislative remedy in toxic tort cases"); *see also* Interview with John Rothman, Attorney at the Office of Regional Counsel IX for the United States Environmental Protection Agency (Oct. 2, 2000) (copy on file with *The Transnational Lawyer*) (commenting that "the (New) river is such a complete mess" that it is very difficult to track waste to one specific company).

236. *See* CAL. HEALTH & SAFETY CODE § 25189.5(c) (West 1983) (requiring that the defendant "transports" or "causes the transportation of hazardous waste").

237. *See* Setmire, *supra* note 184, at 41.

establish which plant produced the waste.[238] However, there are several methods to deal with the issue of causation.

A. *Science as a Solution*

Terry Rees, a geochemist at the U.S. Geological Survey, stated that modern science is useful in determining causation.[239] Causation can be established by comparing samples of toxic waste in the river upon entry to California with samples taken as the waste leaves Maquiladora plants in Mexico.[240] The samples are relatively affordable.[241] The problem is obtaining the samples as they leave the Maquiladora plants.[242] Mexico does not look favorably on allowing U.S. sampling teams.[243] The "main problem" is that Mexico will only recognize the results of tests performed under the "auspices" of the Treaty of 1944 and the Minutes associated with that treaty.[244] Although Mexico's approval of data collection is not necessarily needed to obtain a judgment in a U.S. court, this may create problems where prosecutors expect Mexico's help in enforcing the judgment in Mexico. However, if the defendant has money, land, or some other interest in the United States that would be affected by a judgment in a United States court, this would not be a problem.[245] In this situation, samples can be obtained in Mexico as long as federal agents are not involved because Federal prosecutors do not have authority to sample plants located in Mexico.[246] However, a non-federal agent may find loopholes in order to obtain samples.[247]

B. *The Problem of Identifying the Defendant*

Even if a prosecutor can obtain permission to take samples at the plants, the next problem that arises is catching those who are dumping. Those who dump illegally

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238. *See* Telephone Interview with Terry Rees, Geochemist at the U.S. Geological Survey (Feb. 27, 2001) (copy on file with *The Transnational Lawyer*) (stating that illegal dumping may be episodic, and once toxics are dumped into waterways, it is hard to distinguish one plant's waste from another's).

239. *See id.* (giving advice gleaned from 24 years of experience with the U.S. Geological Survey).

240. *See id.*

241. *See id.* (estimating that industrial waste samples average $1,000 for a complete analysis).

242. *See id.*

243. *See id.*

244. *See id.*; *see also* Treaty Between the United States of America and Mexico, Treaty & Protocol, Feb. 3, 1944-Nov. 14, 1944, *available at* http://www.ibwc.state.gov/FORAFFAI/treaties.HTM (governing the Colorado river).

245. *See* Shaffer v. Heitner, 433 U.S. 186, 197 (1977) (explaining traditional ways courts recognize judgments from other jurisdictions).

246. *See* Interview with Terry Rees, Nevada District Chief Geochemist, U.S. Geological Survey (Apr. 3, 2001) (explaining that this is because such actions would violate Mexican sovereignty).

247. *See id.* (inferring that non-state agents do not have to worry about violations of sovereignty because they are private parties).

tend not to do so "when they know people are looking."[248] When sampling occurs, illegal dumping tends to be "episodic" and not "continuous."[249] This creates problems for those collecting samples at the border because during episodic dumping, waste dilutes in the river more rapidly.[250] In that situation, while everyone knows dumping occurs, naming exactly who did it is a problem. The following sections discuss joint and several liability, market-share liability, enterprise liability, and increased risk of harm as possible ways to show causation in a Maquiladora polluting case.

1. Joint and Several Liability

Several techniques exist to avoid the unfairness in multiple causation situations.[251] The most common approach is to use burden shifting, called alternative liability, a procedure first recognized in 1948 in *Summers v. Tice*.[252] In this case, the court found that it was equally likely that a bullet that hit the plaintiff fired from the weapons of either of two defendants, therefore the court shifted the burden of proof from the plaintiff to the defendant.[253] In the Maquiladora context, this approach would place the burden of proof on the defendant to show non causation.[254]

This concept is also illustrated by *United States v. Republic Steel Corporation*.[255] In this case, the situation resembled the causation problem at the border because the government sought to enjoin several defendants for dumping pollution in a river in violation of a federal statute.[256] The government argued that "a statutory violator should not be permitted to escape the effects of his violations because they are mingled with the effects of other violations in the same area."[257] The court stated that the government's argument, if accepted, sounded like joint and several liability, meaning that the government could have sued any of the defendants for all the damage to the river.[258] However, the court did not find that any one defendant caused the pollution.[259]

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248. *Id.*

249. *Id.*

250. *See id.* (offering a conclusion based on his own experience).

251. *See* McCaffrey, *supra* note 39, at 12 (discussing various ways to establish causation when dealing with environmental problems).

252. 33 Cal.2d 80 (1948) (en banc); *see also* Pizzirusso, *supra* note 39 (noting that this method can be used where the "indeterminate-defendant problem" arises). The issue is seen when "there are several manufacturers who produce and dispose of the same toxic substance." *See id.*

253. *Summers*, 33 Cal. 2d at 87.

254. *See* Pizzirusso, *supra* note 39 (approving of this approach because defendants should not escape liability just because they are able to hide their unlawful conduct).

255. 286 F.2d 875 (7th Cir. 1961) (holding the defendant not liable for lack of causation).

256. *See id.* at 890.

257. *Id.*

258. *See id.*

259. *See id.*

However, the *Republic Steel* case is forty years old. With improved technology and new theories of causation, joint and several liability could apply to prove causation under a statute.[260] Joint and several liability seems especially useful in a prosecution involving the California hazardous waste statute. In *People v. Martin*,[261] the court interpreted the statute as imposing criminal liability without requiring gross negligence or recklessness.[262] Instead, mere negligence is the standard.[263] If mere negligence is applied, applying joint and several liability should be effective, as it was in *Summers v. Tice* where it was used to determine which defendant negligently caused the shooting.[264]

2. Market-Share Liability

An expansion of *Summers v. Tice* led to the development of market-share liability, which also may apply to prove causation in a lawsuit against polluters operating in Mexico. It is traditionally used when "a mass produced product that cannot be traced to a specific manufacturer causes injury to a consumer or third party."[265] This places the burden on all the manufacturers of the product to prove that their product did not cause the injury.[266] This theory is based on the premise that all manufacturers benefitted from the sale of the allegedly defective product.[267] The only problem with this theory is that few courts have imposed such liability outside of the DES cases.[268]

Several plaintiffs unsuccessfully attempted to apply this theory in environmental lawsuits.[269] However, these failures do not foreclose the possibility of it being applied in the right situation. In one instance, the court suggested that the theory might have been applicable had the prosecution's investigation showed more diligence in attempting to establish a link between the defendants and the polluted

260. CAL. HEATH & SAFETY CODE § 25819.5. That statute was applied to penalize a United States defendant for dumping toxic waste down a city sewer. *See id.*

261. *See* People v. Martin, 211 Cal. App. 3d 712-13 (1989) (involving the mishandling of hazardous waste barrels).

262. *See id.* at 712-13 (saying that negligence standards for criminal conduct are imposed in other situations where the defendant abuses the state's water resources).

263. *See id.*

264. *See* Summers v. Tice, 33 Cal. 2d 80, 87 (1948) (en banc).

265. Pizzirusso, *supra* note 39.

266. *See id.*

267. *See id.*

268. *See id.*; *see also* Sindell v. Abbott Labs., 26 Cal.3d 588 (1980) (adopting a rule where "each manufacturer's liability for an injury would be approximately equivalent to the damage caused by the DES it manufactured"). DES cases involve plaintiffs who are injured by drugs taken by their mothers during pregnancy. *Id.* at 593. The drug causing the injury is known, but the manufacturer is not. *Id.*

269. *See infra* notes 275-80 (discussing situations where market-share liability was alleged).

site.[270] Similarly, a Florida Court refused to apply the theory to seven defendants who had made deliveries to a facility where a spill had occurred.[271] The evidence indicated that one of the trucks caused the spill, but the Court held that in order to apply *Summers*, evidence showing that each trucking company had a spill must exist.[272] The court reasoned that in *Summers*, "the other six hunters were carrying weapons," but in the case at hand, there was no evidence "that any of them fired his weapon." [273]

The Florida case suggests that if a prosecutor can trace amounts of a certain chemical to several Maquiladoras, and if there is proof of dumping, then market share liability could apply.[274] However, establishing those characteristics is not easy. Such proof would require testing at a point where the river enters California, as well as some sort of evidence that the chemicals originated at one of several plants where dumping occurred. That inquiry logically requires some sort of monitoring or surveillance to take place in Mexico, or some other evidence such as a confession of such activity from a factory worker.

However, at the least, one court has said that "failure to equate perfectly with DES does not absolutely preclude the use of the market share alternative theory of liability."[275] Furthermore, the recent push to expand the market-share envelope signals that this area of law is all but final.[276]

3. *Enterprise Liability*

Enterprise liability is also a possibility when an industry has "joint or group control of the risk" of causing injury.[277] The problem with this theory is that courts are unwilling to apply it outside of blasting cap injuries, and are unlikely to use it to solve toxic tort causation problems.[278] It seems unlikely that it could apply to the Maquiladora industry because there are many industries involved, and each industry manufactures a variety of products. However, a court might still apply enterprise liability if it excluded those companies that showed efforts to comply with environmental regulations, and the lawsuit involved pollution containing a chemical used by a small number of manufacturers.

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270. *See Superfund: Third circuit Rejects Alternative Liability, Burden-Shifting Theory in CERCLA Case,* DAILY ENVIRONMENT REPORT, 1999, at 227 (indicating also that waiting nine years to bring the lawsuit severely hindered the defendants' chance of winning).

271. *Fl. Ct. Affirms Denial of Market Share Liability Theory,* ANDREWS DES LITIG. REP. (Mar. 1998).

272. *See id.*

273. *See id.*

274. *See id.*

275. *Market Share Suit Remanded to Examine Uniform Risk of Harm,* 10 ANDREWS LATEX ALLERGY LITIG. REP. 12 (April 1998).

276. *See supra* notes 270-75 and accompanying text (discussing market share liability).

277. *See* Pizzirusso, *supra* note 39 (citing Hall v. E.I. Du Pont de Nemours & Co., 345 F. Supp 353, 376 (E.D.N.Y. 1972)).

278. *See id.*

4. Increased Risk of Harm

Alternatively, courts allow toxic tort plaintiffs to claim damages based on an increased risk of harm due to exposure to the hazardous substance.[279] In order to limit such claims courts usually require some showing of reasonableness, meaning the plaintiff must show an "actual increased risk of disease" or actual injury in addition to having experienced fear.[280] One way to prove increased risk is through medical monitoring, typically used in class actions when a number of people have been exposed to a hazardous substance.[281] In general, a plaintiff must prove that the defendant proximately caused the plaintiff to suffer an increased risk of harm.[282] Courts also require that plaintiffs prove that their chances of contracting a disease is within reasonable medical probability, usually shown through expert testimony.[283] Although this method takes extra care, scientific monitoring and testing procedures exist which make early detection and treatment of disease both possible and beneficial.[284]

Finally, in a situation where the EPA issued subpoenas to United States based companies in Mexico, the EPA intended to determine the types and quantities of chemicals polluting the New River in Mexico.[285] This type of information could be used to show what was an "unreasonable risk to the population and environment across the border in California."[286] Therefore, this is encouraging precedent for California prosecutors to use in gathering information from Maquiladoras regarding what kinds of chemicals are used in each plant. In some cases, where only a small group of Maquiladoras use a certain chemical, this discovery method could help establish market share or joint and several liability.

VIII. LEGAL ACTION AS ONE OF MANY VIABLE SOLUTIONS

From a regulatory standpoint, even if a lawsuit is enforceable in the United States against a polluter in Mexico, is it a good idea? It is clear that jurisdiction is obtainable on both sides of the border,[287] and in the long run, the only way to solve

279. *See id.*

280. *See id.*

281. *See id.* (allowing for damages that cover for costs of extra medical care that results to plaintiffs as a result of exposure).

282. *See id.*

283. *See id.*

284. *See In re* Paoli, 916 F.2d 829, 852 (3rd Cir. 1990) (reversing a summary judgment for the defendants on a claim for medical monitory because the court did not properly consider the existing evidence).

285. *See* Rothman, *supra* note 104 (investigating harm to Californians in an action directed at United States defendants).

286. *Id.*

287. *See supra* notes 59-61 and accompanying text (discussing the various issues raised when California tries to obtain criminal and civil jurisdiction over polluter in Mexico).

the problem is with strong enforcement on both sides.[288] However, it is important to step away from the idea of bringing a lawsuit and recognize that the problem does not exist inside a "political vacuum."[289] It is possible that a lawsuit might make things worse in the long run.[290] For instance, many independent and governmental groups are working towards solutions at the United States-Mexico border.[291] Some may view a lawsuit by a California district attorney as an unwanted intrusion by an outsider.[292] The fear is that such a suit could upset the political balance at the border.

Another way to look at the consequences of an enforcement against a Mexican polluter in California is that Mexico might view it as an intrusion on national sovereignty.[293] The ramifications of this view could lead to resentment against the environmental effort by Mexican authorities. Since enforcement in Mexico is already lacking, this could further erode enforcement of environmental laws.

However, an opposite view is that a lawsuit might "shame" Mexico into increasing enforcement of environmental laws on their side of the border.[294] Despite the teamwork and international cooperation that may or may not be working at the border, at this point, most reports conclude that Mexico's environmental enforcement is virtually non-existent.[295] Therefore, there is no indication that Mexico will voluntarily clean up its rampant dumping without an enforcement action brought against a Maquiladora.

One person who could bring such a suit to stop the transboundary flow of pollution is the City Attorney for San Diego, Steven Golden. Golden is also a special deputy for San Diego County and on the Border Environmental Counsel. He is someone who might prosecute such suits and he is heavily involved and aware of efforts at the border between both countries to achieve increased environmental undertakings.[296] Golden said that he has "no problem" with bringing a lawsuit in the United States to force a Maquiladora plant to comply with existing environmental laws.[297] His concern is that if a lawsuit is going to be brought, the prosecutor should

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288. *See* Rothman, *supra* note 73 (stating that in the long run, the only way to solve transboundary water pollution is through enforcement on both sides of the border).

289. *See id.* (opining that the question should be asked whether bringing a lawsuit might actually undermine enforcement).

290. *See id.*; *see also* U.S.-Mexico Border, *supra* note 97 (discussing the need to realize that other groups and agencies are working at the border to bring Mexico into compliance). These relationships with Mexican groups may be fragile, and most likely took a long time to establish. *See id.*

291. *See* Mexico Border XXI Frontera XXI, *available at* http://yosemite.epa.gov/oia/MexUSA.nsf/e92co 76dfcf68d 1882563cb0060dbdf/80291448c6 (last visited Oct. 10, 2000) (copy on file with *The Transnational Lawyer*) (listing groups involved in border issues).

292. *See* Rothman, *supra* note 73.

293. *See id.*

294. *See* Rothman, *supra* note 73.

295. *See* McCaffrey, *supra* note 39 (noting that enforcement problems stem at least in part from a troubled Mexican economy).

296. *See* Telephone Interview with Steve Golden, San Diego City Attorney and Special Deputy for San Diego County (Apr. 3, 2001).

297. *Id.*

have a "good-faith basis" for suing the particular defendant.[298] "Facts may arise in a case where we want to sue," he said.[299] "We are perfectly within our legal rights" to bring a lawsuit against a polluter based in Mexico.[300] Golden said that he does not think that such a lawsuit would upset existing enforcement efforts in Mexico.[301] "That's one of the reasons why I'm for the border task force," he said.[302] The task force works to ensure that legal action taken in California to prevent waste from Mexico from crossing the border does not "fly in the face of any other agency. The idea is that we are all on the same team. We make sure to prevent detriment to polices of another office."[303]

IX. CONCLUSION

The dangerous toxic waste pollution problem plaguing shared rivers between the United States and Mexico warrants the intervention of California Courts of law, even if that means applying domestic law to foreign individuals and corporations. The health threats posed by the situation are heavily documented and pose long term threats to California's environment and its people.

Mexico, for various reasons including lack of resources, has not put a stop to widespread dumping of hazardous chemicals into the rivers shared with California. It is time for the California court system to wake up to this realization, and apply existing law to clean up its shared rivers. The California Health and Safety Code section 25189.5(c) is a state regulatory statute which ought to be applied to stop further pollution of its rivers. Jurisdiction is obtainable under the statute, and polluters will be subject to both criminal and civil remedies. The threat of both jail time and large fines can make foreign corporations think twice before dumping hazardous contaminants into shared international waterways.

Courts must be willing to see illegal dumping into shared rivers for what it is: an illegal transportation of hazardous waste. It does not take a lawyer to figure out that hazardous chemicals, once placed in a river, will end up downstream via the river's current. California Health and Safety Code section 25189.5(c) stands as a vehicle the courts may use to fight back. The provisions of that statute contemplate civil and criminal remedies to those who illegally transport hazardous waste to an unauthorized facility. Courts in California have the opportunity to tell foreigners who pollute shared waterways that the rivers of California are not authorized as international toxic waste dumps.

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298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.*