

Criminal Liability Concerns to the Environmental Professional –

I Should Have Known Better

by

Edwin J. Tomko and Peter K. Wahl
Akin, Gump, Strauss, Hauer & Feld, L.L.P.

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Introduction

When corporations and the people working for them fail to comply with environmental laws, they are not only vulnerable to civil and administrative penalties, but increasingly to criminal sanctions as well. Criminal liability for environmental crimes was rare prior to 1970, and other than the Environmental Protection Agency (“EPA”), many federal law enforcement agents were not even aware that environmental crimes existed. A different reality exists today. Currently, a broad range of federal agencies employ criminal investigators with environmental expertise. These agencies include the EPA Criminal Investigation Division, the Federal Bureau of Investigation, the U.S. Department of Defense Criminal Investigative Service, the Naval Criminal Investigative Service, the United States Coast Guard, the United States Department of Transportation and the United States Custom Service. Criminal enforcement of environmental laws appears to be here to stay. While the most recently proposed presidential budget proposes to drastically reduce funding of federal civil enforcement, funding for criminal enforcement is expected to increase.

This paper provides an overview of environmental criminal liability. It discusses the history of environmental crimes, environmental statutes comprising most criminal charges, and some recent examples of criminal enforcement of environmental laws in Texas that demonstrate the realities of environmental crimes and prosecution. Hopefully, after digesting this material you will know better.

Historical Overview

Criminal enforcement of environmental laws is a phenomena developed primarily in the last three decades. With the passage of the Clean Air Act Amendments in 1970 and the Clean Water Act in 1972, Congress established steeper criminal penalties for environmental crimes and provided federal prosecutors with real power to enforce environmental laws criminally.¹ In 1982, the Environmental Crimes Section was added to the Lands Division of the Department of Justice. This Section continues its separation from the rest of the Department of Justice’s Criminal Division as a branch of the Environmental and Natural Resources Division.

¹ See Jane F. Barrett, *Criminal Enforcement of Federal Environmental Laws* at 1, citing Pub. L. No. 91-604, 84 Stat. 1676 (1970); see also *Coalition for Clean Air v. Edison Co.*, 971 F.2d 219, 221 (9th Cir. 1992).

The government's efforts to enforce criminal liability provisions of environmental laws increased dramatically again when Congress passed the Pollution Prosecution Act of 1990. Prior to this Act, the EPA had only 47 criminal investigators. The Pollution Prosecution Act required the EPA to hire 200 additional investigators to focus solely on environmental criminal investigations.² Not surprisingly, EPA referrals of criminal cases to the Justice Department have substantially increased from 20 in 1982 to 107 in 1992 and to 278 in 1997.

The theoretical objectives in prosecuting crimes is both punishment and deterrence. To achieve these goals, the government commonly relies upon fines and other economic sanctions. Environmental crimes appear to be handled somewhat differently than other crimes, in large part because they are so commonly tied to business interests. Many courts have reasoned that fines in this context have lost their deterrent effect because such penalties could simply be considered a cost of doing business. Joseph Block, former Chief of the Department of Justice Environmental Crimes Section, has notably stated that “[i]ncarceration is the one cost of doing business that you can’t pass on to the consumer.” Thus, the trend in penalizing environmental wrongdoing has shifted to include both fines and imprisonment.

The threat of imprisonment is a hollow threat to the corporation but not to the people working for it. As the noted legal scholar, John Coffee, notes, corporate punishment is a challenge because artificial business entities have “no soul to damn or no body to kick.” The souls and bodies most commonly used to fill this void are those of corporate directors, officers, managers, and employees. In 1990, 80% of the government's prosecution was focused on companies in violation of environmental standards, and only 20% focused on individuals. By 1998, the statistics virtually flip-flopped. Approximately 74% of the government's prosecution was focused on individuals in the course of employment, and only 26% focused on offending companies. Penalties associated with environmental crimes currently appear broadly distributed between fines and imprisonment to both individuals and companies. In 1997, fines for environmental crimes in one year reached \$169.3 million, and 221 defendants were sentenced to 1,116 months in prison.³

Congress remains serious about prosecuting criminal acts against the environment and imposing stiff penalties on corporations and individual employees. The last amendments to each major environmental statute have included new criminal provisions and strengthened existing ones. For example, in 1987, Congress amended the criminal provision of the Clean Water Act, increasing the potential period of imprisonment for violations from 1 year to 3 years. Congress has also added a provision in the Resource Conservation and Recovery Act (“RCRA”), the Clean Water Act, and the Clean Air Act for “knowing endangerment” imposing a maximum penalty of 15 years imprisonment

² See 42 U.S.C. §§ 4321-4370(d).

³ See Kevin A. Gaynor & Thomas R. Bartman, *Criminal Enforcement of Environmental Laws*, 10 COLO. J. INT'L. ENVTL. L. & POL'Y. 39, 40 (citing Environmental Protection Agency, Press Release, EPA Set the Records for Enforcement While Expanding Program for Industry to Disclose and Correct Violations (Dec. 22, 1997) and Environmental Protection Agency, Enforcement & Compliance Assurance Accomplishments Reports FY 1996, at A4 (May 1997)).

and one million dollars in fines for organizations who knowingly endanger lives. The November 1990 amendments upgraded penalties for existing offenses by giving felony status to offenses currently treated as misdemeanors. Amendments to the Clean Water Act and Clean Air Act have also largely eliminated the *mens rea* requirement generally characteristic of criminal conduct by adding a new provision imposing criminal liability for “negligent endangerment.”⁴

In addition to substantive statutory changes, the Federal Sentencing Guidelines have changed greatly the landscape of environmental criminal cases. The Sentencing Guidelines establish a predetermined range of penalties that are applicable to federal crimes, as applied to entities, in its “Organizational Guidelines” and as applied to natural persons in its “Individual Guidelines.” The Sentencing Guidelines operate by assigning a “base offense level” to crimes accompanied by specific grounds for upward or downward departure in the formulation of a range of penalty. The establishment of such predetermined sentencing has decreased the discretion previously afforded to federal judges in sentencing of individual defendants. The Sentencing Guidelines also have the potential for stringent results since once an environmental crime has been determined to have occurred, a fairly rigid penalty will result, even in cases involving no environmental injury.⁵

Conspicuously absent from the Sentencing Guidelines for Organizations is any reference to environmental statutes. Thus far, the U.S. Sentencing Commission has only been able to promulgate rules relating to organizations and environmental crimes that address restitution, probation, and fines.⁶ Several commentators have concluded that this void in the Sentencing Guidelines is not an indication that such guidelines are not needed, but rather, cite “the Commission’s concern regarding the complexity of the issues raised, in the environmental arena and its unwillingness to make specific pronouncements without further deliberation.”⁷ It is apparent that some Commission Members and commentators feel the need to include financial penalties in the Organizational Guidelines for environmental crimes and that these penalties should be particularly harsh. Unsuccessful efforts made in 1993 and 1994 to draft sentencing guidelines for companies guilty of environmental crimes included a concerted effort to punish environmental offenses more severely than many other crimes.⁸ In an apparent effort to balance the scales, the government has offered some relief from the environmental criminal regime in instituting voluntary disclosure programs to encourage full and open disclosures of departures from environmental standards at the same time offering penalty mitigation. We will address this program later in this paper.

⁴ See 33 U.S.C. § 1319(c); 42 U.S.C. § 7413(c)(4).

⁵ Attachment A is a recitation of the application of the Federal Sentencing Guidelines.

⁶ See U.S. Sentencing Commission, Guidelines Manual 2 (West ed. 1993).

⁷ See DONALD A. CARR, *ET AL.*, ENVIRONMENTAL CRIMINAL LIABILITY 329 (1995) (citing Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 WASH. U. L.Q. 205, 256 (1993)).

⁸ See Kevin A. Gaynor & Thomas R. Bartman, *Criminal Enforcement of Environmental Laws*, 10 COLO. J. INT’L. ENVTL. L. & POL’Y. 39, 40 (citing Kevin A. Gaynor & Thomas R. Bartman, *Here’s the Stick, But Where’s the Carrot: The Draft Environmental Sentencing Guidelines*, 8 TOXICS L. REP. (BNA) 898-902 (Jan. 5, 1994)).

Statutory Overview

Seven federal environmental statutes have the potential to form the basis of environmental criminal prosecutions. Of these seven, prosecutions under RCRA, the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), the Clean Water Act, and the Clean Air Act are the most common.

The Resource Conservation and Recovery Act

The largest number of prosecutions under the environmental statutes involve the illegal transportation, storage, or disposal of hazardous waste.⁹ RCRA was first passed by Congress in 1976, and later amended in 1980, 1984, and 1988. It is the primary statute regulating the handling and management of hazardous waste and requires the tracking of hazardous waste from generation to disposal (i.e., “cradle to grave”). Tracking is accomplished through a system of manifests and permits. The generator of hazardous waste must notify the EPA of the generated waste, obtain an identification number, and arrange for proper disposal of the waste. The transporter follows a similar manifest system, accounting for the hazardous waste from the time it is taken from the generator until it is delivered to the disposal site. The RCRA disposal site (defined as any facility that treats, stores, or disposes of hazardous waste) is required to obtain a permit documenting that it abides by RCRA’s precise standards for the handling of hazardous wastes.¹⁰

Failure to comply with RCRA can result in administrative, civil, or criminal penalties.¹¹ Knowingly transporting hazardous waste to a facility that does not have a permit, knowingly treating, storing, or disposing of hazardous waste without having a permit, or knowingly disposing of hazardous waste in violation of a permit, condition, or applicable regulation, constitutes a crime under RCRA. Any of these violations are felonies subject to penalties up to a maximum of five years imprisonment per count and \$50,000 in fines per day of violation. The penalties are doubled for second convictions.¹²

Additionally, persons regulated under RCRA who knowingly file documents containing materially false statements, knowingly destroy, alter, or conceal reports required under the law, knowingly transport hazardous waste without a manifest, or who knowingly treat, store, or dispose of used oil without having obtained a permit or in violation of a permit or applicable regulation, are subject to an additional two years imprisonment and an additional \$50,000 fine per day of violation. In cases of second convictions, these penalties are also doubled.¹³

A violation of any RCRA provision by a person who knowingly places another person in imminent danger of death or serious bodily injury can subject the violator to a

⁹ *See id.* at 42.

¹⁰ *See* 42 U.S.C. § 6928(d)(4)-(7).

¹¹ *See id.* § 9628(g).

¹² *See id.* § 9628 (d).

¹³ *See id.*

maximum of fifteen years imprisonment and \$250,000 in fines. Organizations may be fined a maximum of one million dollars for knowingly endangering another person.¹⁴

The Comprehensive Environmental Response, Compensation and Liability Act

CERCLA was enacted in 1980 and, like RCRA, focuses on hazardous and toxic waste. CERCLA allows the EPA to respond to releases or threatened releases of hazardous waste. The statute allows the EPA, and also third parties, to pay for the cleanup of hazardous waste sites and later recover cleanup costs from the responsible agencies.¹⁵

CERCLA imposes sanctions for the failure to notify the government of releases of hazardous substances above a certain threshold (a “reportable quantity”). A person in charge of a vessel or facility who does not notify the government of release faces up to a three-year prison sentence and significant fines. These sanctions are commonly applied in situations where a disposal of hazardous wastes in violation of RCRA has occurred. A CERCLA violation may also accompany a RCRA violation when the individual or corporation fails to notify the EPA of a release that falls under CERCLA. CERCLA violations also include the failure of a facility owner or operator to notify the government of its existence and the failure of facility owners and operators to keep accurate records.¹⁶

The Clean Water Act

The Clean Water Act requires a permit for the discharge of any pollutant into U.S. waters. Those who knowingly discharge pollutants without a permit or in violation of a permit may face misdemeanor penalties, normally up to a one-year prison sentence and/or a \$25,000 fine for each day of violation.¹⁷ The Clean Water Act also provides for felony penalties of three years imprisonment and fines from \$5,000 to \$50,000 per day of violation. Violations involving “knowing endangerment” can result in fines up to \$250,000 and fifteen-year prison sentences. Moreover, like RCRA, the penalties double for second convictions. Like CERCLA, the Clean Water Act requires a person in charge of a vessel or facility from which a hazardous substance is released to report the release.¹⁸

¹⁴ See *id.* § 9628(e).

¹⁵ See *id.* § 9607.

¹⁶ See *id.* § 9603.

¹⁷ A rather peculiar aspect of the Clean Water Act is one court’s holding related to criminal enforcement provisions as applied to individuals. The defendant in *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643 (2d Cir. 1993), was prosecuted for his disposal into the Hudson River of blood vials, some containing Hepatitis C, that he had removed from the company he owned. The defendant was found guilty of placing others in “imminent danger of death or serious bodily injury” in violation of 33 U.S.C. § 1319(c)(3) and of knowingly discharging pollutants from a point source without a permit in violation of 33 U.S.C. §§ 1311(a) and 1319(c)(2). The counts of “knowing endangerment” were dismissed by the trial court due to a faulty jury instruction. Interestingly, the Second Circuit also reversed the defendant’s conviction related to the discharge in violation of the Clean Water Act because “[t]he Clean Water Act targets industrial and municipal production of pollutants. Its criminal provisions do not reach actions such as those done by [the defendant], despite their heinous character.” *Plaza Health Laboratories*, 3 F.3d at 650.

¹⁸ See *id.* § 1319(c).

Failure to report a release can result in a maximum five-year prison sentence and \$10,000 per day fine for each day the release is not reported.¹⁹

The Clean Air Act

The Clean Air Act was designed by Congress to reduce air pollution by regulating toxic and automobile emissions. The Act was passed in 1970 and significantly amended in 1990 to enhance enforcement and compliance. The statute now includes a maximum felony penalty of five years imprisonment and significant fines for knowing violations of requirements, prohibitions, and orders specified in the act. A violator may face up to a two-year prison sentence and significant fines for filing false material statements or for tampering with monitoring devices. The penalties for knowing endangerment include up to fifteen years imprisonment and fines up to one million dollars. In addition, the Clean Air Act incorporates the offense of negligent endangerment. Those who violate the negligent endangerment provision are subject to a substantial fine and up to one year in prison.²⁰

Application of Fraud Statutes to Environmental Violations

Generic fraud statutes have been prosecution mainstays for over a century. Since many companies that provide environmental services do so for a fee, and most industries that create chemical by-products have reporting responsibility, two specific fraud statutes have been used or alleged in what are identified as environmental investigations and prosecutions.

Mail Fraud [18 U.S.C. § 1341]

Fraud statutes do not come any more open-ended than the Mail Fraud Statute. In order to win a conviction the prosecution must prove, beyond a reasonable doubt, that the defendants devised or intended to devise a scheme or artifice to defraud and used the United States Postal Service or a private or commercial interstate carrier to receive and/or deliver a document in furtherance of the scheme. The purpose of the scheme can be anything as long as these elements can be proven. The gravamen of a mail fraud allegation is the attempt to deprive someone of property through misrepresentation of facts and/or the omission of facts. The purpose of the scheme is to get money or property by trickery or deceit.

The government has used mail fraud in situations where it alleges that the proper protocol, method, or procedure was not followed by an individual or company engaged in environmental testing or related areas, and that the customer was billed for the service that was not provided. This is an important distinction from the environmental statutes that at least require some activity that can have an environmental impact. The mail fraud allegations tend to focus on much more technical aspects of EPA, state or private industry rules, regulations, procedures, methods, protocols, and certifications.

¹⁹ See *id.* § 1321.

²⁰ See *id.*

The standard of proof for mail fraud appears to be high. The government must technically prove both that each defendant was a knowing and willful participant in the scheme and prove that the misrepresentation or concealment was a material fact. There is significant case law, however, upon which the prosecution may rely to allow evidence that substantially lowers the bar to conviction.

First, intent to defraud may be inferred from the totality of the circumstances and need not be based upon direct evidence. Conviction can be based exclusively on circumstantial evidence.

Second, impression testimony of the victim is admissible to show how the victims perceive they were misled by the defendants.

Third, where the false representations are directed to the quality, adequacy or price of the goods themselves, the fraudulent intent is deemed to be apparent because the victim is placed into a position to bargain without all of the essential facts.

And finally, factors admissible to prove specific intent include excessive profits and repetitive actions.

The dangers here are clearer—anything fits—and if you do something well, consistently, and profitably, you have done half of the prosecutor’s job.

False Statements [18 U.S.C. § 1001]

The False Statement statute covers almost every statement, whether oral or written, made to the federal government. The elements of the offense that must be proven beyond a reasonable doubt are:

- (1) the speaker falsifies, conceals or covers up by any trick, scheme or device a material fact;
- (2) the speaker makes any materially false, fictitious or fraudulent statement or representation; or
- (3) the speaker makes use of any false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement.

The statement need not be made directly to a department or agency of the federal government. It is sufficient to prove that the statement was made:

- (1) to a federal agency in almost any form, whether the statement is required or not;
- (2) to a private person or institution that implements federal programs such as the TNRC; or

- (3) in business records that may be subject to federal government inspection.

There are several factors that the prosecution is not required to prove in order to win a conviction.

First, there is no requirement that the Federal government suffer any financial or property loss or take any action favorable to the defendant. The mere capability or natural tendency to influence governmental action is sufficient.

Second, there is no requirement that the government actually relied upon the information.

Third, the prosecution doesn't need to prove the defendant's actual knowledge of federal agency jurisdiction over the subject matter for which the statement is made.

Fourth, the statement need not be written, signed or sworn.

Finally, the defendant need not have the intent to defraud, that is to deprive someone of something by means of deceit; proof of intent to mislead is sufficient.

All reports or invoices to federal agencies, or private or state agencies managing programs and paying with federal dollars, as well as all records subject to examination by similar agencies must be prepared and maintained with these guidelines in mind.

Environmental Criminal Liability

Criminal liability for environmental offenses is similar to that of other white collar crimes. The legal rule that a corporation may be generally held vicariously liable for the acts of its agents applies in the environmental context if the acts are completed on behalf of the corporation and are within the scope of the employee's authority.²¹ In some instances, liability may be attributed to the corporation even when it has an express policy against an action deemed illegal.²²

Not surprisingly, federal prosecutors will rarely be satisfied with only a corporate defendant on the hook by virtue of its vicarious liability for its employees. About as clearly as can be stated, Earl Devaney, the Director of the EPA Office of Criminal Enforcement, Forensics, and Training, has quite openly admitted "I'm not satisfied with charging the company." Prosecutors are wary of wholly in-house corporate discipline to adequately vindicate any public interest in the punishment of wrongdoers, environmental or otherwise. Thus, an environmental criminal investigation is likely to target responsible individuals *and* the company for the same nucleus of conduct. Managers are common

²¹ See *United States v. Basic Const. Co.*, 711 F.2d 570 (4th Cir. 1983); *United States v. Sun-Diamond Growers*, 964 F. Supp. 486, 490 (D.D.C. 1997).

²² See Kevin A. Gaynor & Thomas R. Bartman, *Criminal Enforcement of Environmental Laws*, 10 COLO. J. INT'L. ENVTL. L. & POL'Y. 39, 47 (citing Kathleen F. Brickley, *Corporate Counsel Liability: A Primer for Corporate Counsel*, 40 BUS. LAW. 129 (Nov. 1984) (discussing liability of corporations for the conduct of their officers, employees, and subsidiaries)).

targets of criminal investigations and prosecutions when individual conduct is difficult to ascertain. However, non-managerial employees may also be subject to environmental criminal liability. Courts have also imposed criminal liability on even low-level employees, even when the statute expressly holds only the persons in charge of a facility liable.²³

The vast majority of environmental criminal provisions require knowledge of the criminal conduct. The Fifth Circuit in *United States v. Ahmad*²⁴ addressed this issue related to environmental crimes as applicable in Texas. The court in *Ahmad* considered the Clean Water Act conviction of a convenience store operator who was prosecuted for his role in the discharge of 5,220 gallons of fluid from a leaky underground storage tank into both the storm sewer and sanitary sewer systems of Conroe, Texas. Mr. Ahmad was charged with and convicted of “knowingly discharging a pollutant from a point source into a navigable water of the United States without a permit” in violation of 33 U.S.C. §§ 1311(a) and 1319(c)(2)(A) and “knowingly operating a source in violation of a pretreatment standard” in violation of 33 U.S.C. §§ 1317(d) and 1319(c)(2)(A). With respect to the first count, the trial court instructed the jury that “[f]or you to find Mr. Ahmad guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt: (1) [t]hat on or about the date set forth in the indictment (2) the defendant knowingly discharged (3) a pollutant (4) from a point source (5) into the navigable waters of the United States (6) without a permit to do so.”²⁵ With regard to the second count, the trial court instructed the jury that “[i]n order to prove the defendant guilty of the offense charged in Count 2 of the indictment, the government must prove beyond a reasonable doubt each of the following elements: (1) [t]hat on or about the date set forth in the indictment (2) the defendant, (3) who was the owner or operator of a source, (4) knowingly operated that source by discharging into a public sewer system or publicly owned treatment works (5) a pollutant that created a fire or explosion hazard in that public sewer system or publicly owned treatment works.”²⁶

The primary issue upon appeal in *Ahmad* was whether Mr. Ahmad was required to have knowledge of every aspect of his conduct or whether only his knowledge related to the discharge of the fluid was sufficient for conviction. At trial, Mr. Ahmad did not dispute the allegations that he had discharged the fluid at issue or whether this fluid found its way to the municipal sewer system. Rather, although 4,690 gallons of the 5,220 gallons of the discharged fluid at issue was found to have been gasoline, Mr. Ahmad contended throughout trial that he could not be convicted because he did not know the discharged fluid was gasoline – he thought it was water. The Fifth Circuit ultimately reversed the conviction in *Ahmad* and appears to have recognized a “mistake of fact” defense in environmental criminal law in holding that the trial court had given an improper jury instruction related to the requisite knowledge required for conviction. The court reasoned that “statutory crimes carrying severe penalties are presumed to require

²³ See *United States v. Carr*, 880 F.2d 1550 (2d Cir. 1989) (upholding criminal liability of a defendant “even of relatively low rank—who, because he was in charge of a facility, was in a position to detect, prevent, and abate a release of hazardous substances”).

²⁴ 101 F.3d 386 (5th Cir. 1996).

²⁵ *United States v. Ahmad*, 101 F.3d at 389.

²⁶ *Id.*

that a defendant know the facts that make his conduct illegal.”²⁷ The court ultimately held that a proper jury instruction should have included that Mr. Ahmad could only be convicted if the jury found, among other things, both that (1) Mr. Ahmad knowingly discharged (2) a substance he knew to be a pollutant.²⁸

Corporate officers may also be prosecuted under environmental criminal laws through a different theory that greatly complicates the issue of “requisite knowledge.” The “responsible corporate officer doctrine” permits criminal sanctions to be levied against a corporate officer for violating a public welfare statute, regardless of the officer’s direct participation, as long as the officer was in a position to exercise the power to prevent or correct the violation.²⁹ There is no requirement that the officer actually exercises this authority or that the corporation expressly vested a duty in the officer to oversee the activity—the mere authority to control is enough.³⁰

The responsible corporate officer doctrine is based on the principle that the public can expect those who deal with threatening or potentially dangerous products or activities to act when the law requires it. The courts have described the strict (and seemingly inequitable) standard noting that the public has a right to expect no less than strict adherence to the law from those who voluntarily assume positions of authority in business enterprises affecting human lives.³¹ Thus far, the responsible corporate officer doctrine has only been applied to officers who are in public welfare or businesses subject to environmental regulation.³²

Criminal Environmental Prosecution Today

Today’s criminal environmental prosecution is much different from that of the early 1970s and 80s. Early efforts to prosecute environmental crimes generally occurred after substantial accidents or extensive and intentional violations of environmental statutes. This led to early accusations leveled against federal prosecutors that there was a “failure to prosecute environmental crimes vigorously.”³³ Modern environmental criminals are decreasingly midnight dumpers or reckless industrialists viewing profit as paramount to the environment. Today, criminal environmental prosecution occurs just as often for the failure to properly comply with procedural aspects of environmental statutes

²⁷ *Id.* at 390.

²⁸ *See id.* at 391.

²⁹ *See* Kevin A. Gaynor & Thomas R. Bartman, *Criminal Enforcement of Environmental Laws*, 10 COLO. J. INT’L. ENVTL. L. & POL’Y. 39, 54 (citing Stanley A. Twardy Jr. & Michael G. Considine, *What Must One “Know” to be Convicted under the Environmental Laws?*, 11 SPG. NAT. RESOURCES & ENV’T. 48 (1997); Turner T. Smith, et al., *The Responsible Corporate Officer*, 2 CORP. CRIM LIABILITY REP. 12 (1988).

³⁰ *See United States v. Iverson*, 162 F.3d 1015 (9th Cir. 1998); *United States v. Hanousek*, No. 97-30185, 1999 WL 147359 (9th Cir. Mar. 19, 1999).

³¹ *See United States v. Park*, 421 U.S. 658, 672 (1975).

³² *See United States v. Torigan Lab., Inc.*, 577 F. Supp. 1514 (E.D.N.Y. 1984), *aff’d*, 751 F.2d 373 (2d Cir. 1984); *United States v. ACRI Wholesale Grocery Co.*, 409 F. Supp. 529 (S. D. Iowa 1976); *United States v. New England Grocers Supply Co.*, 488 F. Supp. 230 (D. Mass. 1980); *United States v. Gel Spice Co.*, 773 F.2d 427 (2d Cir. 1985); *United States v. Greer*, 850 F.2d 1447, 1453 (11th Cir. 1988).

³³ Remark of Rep. Charles Shumer, BNA, ENVIRONMENT REPORTER, at 1710 (Nov. 6, 1992).

as for tangible crimes against the environment. Accordingly, criticism against federal regulators appears to have largely shifted to that of accusations of “overuse and abuse.”³⁴

Prosecutions currently appear to take one of three forms. The first type of environmental prosecution may be categorized as a “reporting crime.” Reporting crimes are typified by false reports or other statements being submitted to environmental regulators. The second type of environmental prosecution, the “fraud crime,” is similar to a reporting crime but is usually alleged in furtherance of pecuniary gain. The last is the “environmental injury crime” that is prosecuted by virtue of identifiable harm to the environment.

An additional hallmark of modern criminal enforcement of environmental laws is that of inconsistency in prosecutorial decisions and prosecutions. The Department of Justice has attempted to establish six “factors” that are to be used in determining whether criminal prosecution is warranted for environmental offenses. These factors include:

- (1) whether such an offense was brought to the attention of regulators by the offender and may be considered a “timely and complete disclosure;”
- (2) whether the offender was cooperative with regulators;
- (3) whether a “regularized, intensive, and comprehensive” environmental compliance program” existed;
- (4) the pervasiveness of noncompliance;
- (5) the effectiveness of internal disciplinary action; and
- (6) any post-violation compliance efforts.³⁵

The EPA has promulgated substantially similar guidelines in its 1997 “Implementation of the EPA’s Self-Policing Policy for Disclosures Involving Potential Criminal Violations.” While providing guidelines for federal prosecutors, these policy memoranda appear to have fallen short of their stated goals. Little has been done in altering the premises put forth by the U.S. Supreme Court in *Bordenkircher v. Hayes*³⁶ that “[t]he decision to prosecute generally rests entirely in the prosecutor’s discretion” and that “[t]his discretion is especially firmly held by the criminal prosecutor.”

As discussed, an environmental enforcement may be sought administratively, civilly, or criminally. This enforcement decision is often very difficult to predict due to

³⁴ Letter from Daniel Popeo and R. Shawn Gunnarson of the Washington Legal Foundation to Attorney General John Ashcroft, June 28, 2001 (citing in BNA, 129 DAILY ENVIRONMENT REPORT, at A1 (July 6, 2001)).

³⁵ See U.S. Department of Justice, *Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator* (July 1, 1991) (reprinted in DONALD A. CARR, ET AL., ENVIRONMENTAL CRIMINAL LIABILITY at 473 (Appendix I) (1995)).

³⁶ 434 U.S. 357, 364 (1978).

the large number of government agencies responsible for the investigation of environmental violations and because prosecutorial discretion in such cases resting unpredictably in either the Justice Department or in regional U.S. Attorney Offices. A 1993 announcement by Vickie O'Meara, the Assistant Attorney General for the Justice Department's Environment and Natural Resources Division, suggested that greater coordination was sought between Washington D.C. and U.S. Attorney Offices. These amendments to Chapter 11 of Title 5 of the U.S. Attorney's Manual were purported to "emphasize the departmental goal of cooperative efforts between U.S. Attorney's offices and the [Justice Department] in all cases."³⁷ This has been followed by development of intra-agency task forces specifically formed to investigate specifically identified areas of environmental compliance. An example of such a task force is the Underground Storage Tank Task Force that is currently active in Texas and throughout the country.

The power granted to federal prosecutors is enhanced by the narrowed role of the judiciary in sentencing components of the Sentencing Guidelines. This coupling allows federal prosecutors and agents to determine, on an individual and unreviewable basis, which cases will be prosecuted and which specific statutes will be charged. This selection capability predestines the potential penalties companies and individual employees might face.

Three Recent Real Life Examples

The United States Justice Department has instituted an environmental voluntary disclosure program. The purpose of the program is to encourage regulated entities that discover irregularities during internal audits to disclose the information to the appropriate agency. As an incentive to disclosure, participation in voluntary disclosure programs may act as a mitigating factor in the Justice Department's exercise of criminal environmental proceedings and also affords some leniency under the Sentencing Guidelines.

The environmental voluntary disclosure program, however, has proven to have serious drawbacks. Though the Justice Department issued internal guidelines for those who voluntarily participate in disclosure efforts, the Department maintains that the voluntary disclosure program is not a "formal program for voluntary disclosure." Rather, the Department, through the sole discretion of the prosecutor monitoring the particular disclosure, is free to make unpredictable prosecutorial decisions after internal information is voluntarily provided to the government by the company in the Program. Thus, the information voluntarily disclosed, possibly including information subject to the attorney-client privilege or the attorney work product doctrine, are not privileged and may very well come back to haunt program participants. Consequently, companies seeking to discourage government prosecution by participating in the voluntary disclosure program may actually be acting to the company's detriment.

A recent Texas prosecution against employees of Huntsman Chemical Company in Beaumont, Texas, is characteristic of a reporting crime. Two employees, the plant manager and the environmental manager, were indicted for making false, fictitious, or

³⁷ American Bar Association Newsletter, April 1993 (Reid H. Weingarten, ed.).

fraudulent claims and for conspiracy to present false, fictitious, or fraudulent claims in violation of 18 U.S.C. § 1001 and 371, respectively. The charges centered around the Huntsman plant's emission of regulated, volatile, organic compounds into the ambient air. Both employees were indicted in September 1998, after a four-year investigation, and were charged with the failure to report releases of volatile organic compounds and with falsely claiming on a required report that the Huntsman plant was within the controlled emissions limit. Huntsman Chemical Company, as an entity, was not indicted, but agreed to make a significant payment into an environmental project for the Beaumont region.

The Huntsman false claim charge involved a 500-page form, the Emissions Inventory, that required an estimate of the annual emissions from the Huntsman site. The form required the signature of a plant manager as a method of certifying the form's accuracy. Like most environmental regulatory requirements, the Emission Inventory included scant guidance in making calculations and was prone to various interpretations. Each employee who faced fraud charges signed the form. Of important note, neither defendant was involved first-hand in preparation of the Inventory.

The conspiracy charge against both Huntsman defendants involved conspiracy to obstruct the government in the lawful prevention of air pollution by falsifying forms. This type of conspiracy requires proving that some lawful government function was impaired.

The original Huntsman Indictment only made allegations arising from two years' Emissions Inventories and an associated conspiracy. After several months of trial preparation and additional investigation, the government dropped the counts related to the Emissions Inventories and reindicted the case based upon other instances of alleged misreporting. Both defendants were convicted after a lengthy trial in Beaumont and are currently awaiting sentencing.

An example of a Texas environmental case of the "fraud crime" type involves 13 employees from Intertek Testing Services Environmental Labs ("Environmental Labs"), formerly of Dallas. Environmental Labs conducted environmental sample analysis as a general subcontractor for environmental consulting firms, engineering firms, private enterprises, and federal, state, and local government entities. Similar to the Huntsman case, the government's indictment focused solely upon Environmental Lab's employees. The employees included the former Vice President for North American operations, supervisors, all the way down to laboratory chemists. The defendants were indicted on individual counts of mail fraud and presenting false, fictitious, and fraudulent claims against the federal government. Many of the defendants also faced conspiracy charges for an alleged agreement between the defendants related to the substantive counts of fraud.

The government's theory appeared to be that the employees conspired to fraudulently present reports of analyses on environmental samples by representing that the analysis had been preformed in accordance with specific quality control measures and that the procedure used to obtain the analyses was within the quality assurance criteria

established as guidance by the EPA. The government believed the laboratory chemists and managers undertook the conspiracy to save the time and money it would have taken to repeat the tests after they realized the analyses were not within the EPA's specified range of measured reliability. As a result of the charges listed in the Indictment, many of the Environmental Lab employees faced maximum sentences in excess of twenty years and potential fines exceeding one million dollars. The case is currently set for trial beginning on October 1, 2001.

A U.S. Justice Department press release stated, "Regulatory agencies and private companies must be able to rely on analyses performed by independent testing laboratories. When a laboratory fails to follow basic scientific protocol, this can undermine the integrity of environmental protection efforts." The United States Attorney for the Northern District of Texas followed in stating, "Those who would gamble with our environment will face the full force of the law. The most dangerous contaminant to our environment is greed." These statements reiterate the government's intent to prosecute individual employees for violation of environmental laws regardless of whether there has been proven harm to the environment. Environmental Lab has not yet been charged with any violations. No company or agency who employed Environmental Lab for data analysis was charged with violating an environmental law.

The case of Environmental Lab is a study in the failure of the Voluntary Disclosure Program. Environmental Lab immediately notified regulators upon the discovery of problems at the lab and applied to enter the Program. Only after reviewing and copying company documents and extensively interviewing company employees did EPA decide not to approve Environmental Lab's participation. Much of the information gathered in the program was used to indict the 13 company employees.

Procedural violations charges do occasionally accompany charges for violation of environmental statutes in "environmental injury crimes" and *U.S. v. Koch Petroleum Group* is an example of such a case. Koch Petroleum Group and its Vice President and Refinery Manager, corporate counsel, plant manager, and an environmental engineer were all indicted on charges related to the continued failure to employ pollution reduction measures required by the EPA and the Clean Air Act. All of the defendants were indicted for conspiracy to conceal Koch's non-compliance through the underlying charges of making false statements and by aiding and abetting continued false statements. The defendants were also indicted for their failure to report releases of hazardous substances and for failure to install emission control equipment to prevent emission of hazardous air pollutant as required by the Clean Air Act.

The Clean Air Act requires facilities that release hazardous air pollutants to use measures to control such release. The Act also requires that annual releases of hazardous pollutants not exceed six tons per year. The Koch plant allegedly did not install pollution control devices, but represented on quarterly reports that the devices were installed and were working to keep the Koch plant well within the maximum amount for benzene emissions. Koch employees continued to complete these quarterly reports for 1995 and 1996. Koch emissions for 1995 were alleged to have been at least 91 tons, though Koch represented that it was within the six-ton annual requirement under the Clean Air Act.

Also during the 1995-96 timeframe, the Koch plant had allegedly experienced a hazardous pollutant spill that went unreported. CERCLA requires managers to report a benzene spill of ten pounds or more within a 24-hour period to the National Response Center and other local authorities. In October 1995, the Koch plant had allegedly experienced a spill where at least 24 pounds of benzene per hour was dumped into the main vent stream. The Koch spill was never reported.

The case dragged on for a substantial period of time after indictment during which the lead government attorney changed. Surprisingly, Koch eventually plead guilty and was consensually sentenced to pay a \$10 million fine and \$10 million in community service. As part of the agreement, Koch plead guilty to only one count; knowingly and willfully falsifying, concealing, and covering up material facts from the Texas Natural Resource Conservation Commission and the EPA. The government dropped the additional charges against the company and against all the individual defendants.

Prosecution for procedural violations of environmental laws has created liability concerns for many employees. The Huntsman and Koch cases placed genuine fear in plant managers and other management-level employees whose signatures are routinely required on documents sent to regulating agencies. With good reason, employees are reluctant to attach their names to official documents for fear the government will indict them for procedural violations when it (the government) cannot substantiate an environmental violations claim against the company.

Recent Developments in Environmental Criminal Prosecution

In January of 2001, the United States Supreme Court issued a surprise 5-4 decision apparently narrowing the reach of the Clean Water Act and federal enforcement of environmental law.³⁸ The decision held that the phrase “navigable water” as construed by a federal agency with regard to “non-navigable, isolated, intrastate waters” was overly broad and unsupported by the statute. The decision is thought by many to have profound implications for federal wetland investigations and prosecutions. Now, in any federal prosecution involving a wetland, there will be a threshold question of whether the wetland is covered by the Clean Water Act and whether the government has jurisdiction. Some commentators also posit that the government must also now prove that a defendant knew that a wetland in question was adjacent to actually navigable waters.³⁹

Very recently, the government was slapped very heavily on the wrist in a manner that may be increasingly commonplace. The government in *United States v. Knott*⁴⁰ conducted an unannounced inspection of a steel mesh manufacturer after receiving an anonymous tip. The tip by a company employee alleged that the company was impermissibly releasing overly-acidic wastewater to the public sewer. The company owner consented to an accompanied search, and EPA investigators proceeded to

³⁸ *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

³⁹ See Neil Cartusciello, *The Supreme Court Narrows the Reach of the Clean Water Act: Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, No. 99-1178 (Supreme Court, decided January 9, 2001), in *White Collar Crime 2001*, American Bar Association.

⁴⁰ 106 F. Supp. 174 (D. Mass. 2000).

investigate by sampling wastewater streams. Investigators took samples both on-site and off-site and reported illegal levels of acidity in numerous samples taken on-site (if they would have been discharged) and one off-site sample. Investigators investigated twice more pursuant to search warrants (one involving 21 armed agents) that were based partially upon illegally seized evidence from the first search. These subsequent investigations revealed high acidity levels while on-site that had decreased to permissible levels upon discharging off-site.

The government, after an indictment and a colorful press release detailing the defendant's wrongdoing dismissed its charges. The district court in *Knott* ultimately granted the defendant's post-dismissal motion for an award of attorneys' fees and costs because the court found the government's claim, "although not provably frivolous or in bad faith, [to be] clearly vexatious."⁴¹ Of additional note is that the court found credible evidence presented by the defendant that the government had altered the results of the only potentially incriminating evidence, which related to the acidic off-site sample found pursuant to the first search. On August 8, 2000, the former defendant filed a still-pending civil complaint against the federal government alleging malicious prosecution.

Any impact by the United States District Court for the District of Massachusetts in *Knott* appears to have been substantially undermined by an appeal decided by the First Circuit on July 12, 2001.⁴² The First Circuit appears to have effectively insulated federal prosecutors from any adverse consequence associated with prosecuting groundless criminal charges in acting as "zealous advocates." In reversing the district court in *Knott*, the First Circuit stated a different legal standard for the awarding of fees and costs to a defendant, stating that "'vexatious[ness]' . . . requires *both* a showing that the criminal case was objectively deficient, in that it lacked either legal merit or factual foundation, *and* a showing that the government's conduct when viewed objectively, manifests maliciousness or an intent to harass or annoy."⁴³ The First Circuit found the lower court *Knott* decision to be insufficient because it only rested upon the groundlessness of the charges prosecuted by the government and not upon malice or intentional harassment and/or annoyance. The First Circuit further dismissed the import of several allegations made against the government related to malice. Most notably, the court found insufficient evidence related to (1) improper EPA conduct and the subsequent suppression of evidence by the district court; (2) alleged EPA tampering of incriminating sample results (such evidence deemed "credible evidence" by the district court); (3) repeated (and allegedly irrelevant) on-site testing; (4) the issuance of press releases; (5) the delayed production of exculpatory evidence; (6) alleged undue delay in dismissal of the case; and (5) the unnecessary and "humiliating" use of "'a virtual SWAT team'" in conducting searches.⁴⁴

⁴¹ *Id.* at 180. The Hyde Amendment, found at 18 U.S.C. § 3006A, states that "the court, in a criminal case . . . may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstance make such an award unjust."

⁴² See *United States v. Knott*, Nos. 00-2238, 00-2239 (1st Cir. July 12, 2001).

⁴³ *Id.* (emphasis added).

⁴⁴ *Id.*

The challenges posed by the present criminal enforcement of environmental laws appears to have recently raised the ire of some nongovernmental organizations. For example, in May 2001, the Washington Legal Foundation filed a petition with the EPA requesting the adoption of a statement of rights for targets of EPA investigations. The petition charged EPA agents with using abusive practices while conducting searches and obtaining information. The petition also accused the EPA of pursuing trivial environmental infractions with criminal enforcement resources. Though adoption of the petition is unlikely, the EPA reportedly has been working toward improving training and investigations.⁴⁵ More recently, on June 28, 2001, the Washington Legal Foundation sent a letter to Attorney General John Ashcroft regarding many of its accusations against EPA.

Conclusion

Problems in the present prosecution of environmental crimes are becomingly increasingly well-defined. The biggest challenge in moving forward in the years to come appears to be in how these defined problems will be addressed and rectified.

The picture painted above can seem pretty bleak, but that is so only if an employer and its employees operate with their collective heads in the sand. The major factor in protecting against a lengthy criminal investigation, or possibly an indictment or worse, is a viable corporate compliance program. Whatever it is called in your particular industry, a program that monitors the people and systems involved in the daily business of the company, identifies problem areas, and actively works to rectify the problems is essential for operating in a regulated industry.⁴⁶ One important component of such a program is an internal Hot Line that encourages each individual employee to inquire about or report potential problems and to assume responsibility for compliance.

While a compliance program is always a cost center rather than a profit center, it is a cost that you and your company cannot afford to forego. The alternative is significantly worse.

Now you know better.

⁴⁵ See Peyton M. Sturges, *Petition Asks EPA to Adopt Proposal to Protect Rights of Investigation Suspects*, DAILY ENVIRONMENTAL REPORT (May 24, 2001) ISSN 1521-9402.

⁴⁶ Attachment B includes the minimum standards for an internal compliance program as set out in the Federal Sentencing Guidelines for Organizations.

ATTACHMENT A

Offenses Involving the Environment

§ 2 Q of the Federal Sentencing Guidelines

- § 2Q1.1 Knowing endangerment resulting from mishandling hazardous or toxic substances, pesticides or other pollutants is a base 24 [51 to 63 months to serve for a first offender]. If serious bodily injury or death resulted, there may be an upward departure.
- § 2Q1.2 Covers three separate types of offenses: (1) mishandling of hazardous or toxic substances or pesticides; (2) recordkeeping, tampering and falsification; and (3) unlawfully transporting hazardous materials in commerce. All have a base level of 8 [0 to 6 months with the possibility of probation in lieu of incarceration]. The Guideline then lists seven situations that would add between 2 levels [total of level 10 or 6 to 12 months with incarceration likely] and 9 levels [total of 17 levels or 24 to 30 months to serve].
- § 2Q1.3 Deals with lesser offenses of the same general nature as above, beginning at a base 6 [0-6 months with the possibility of probation in lieu of incarceration] with possible increases between 4 levels [total of 10 levels or 6 to 12 months] and 11 levels [total of 17 levels or 24 to 30 months to serve].

ATTACHMENT B

Minimum Standards for an Internal Compliance Program as set out in the Federal Sentencing Guidelines for Organizations § 8A1.2 Commentary

- (k) An “effective program to prevent and detect violations of law” means a program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct. Failure to prevent or detect the instant offense, by itself, does not mean that the program was not effective. The hallmark of an effective program to prevent and detect violations of law is that the organization exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents. Due diligence requires at a minimum that the organization must have taken the following types of steps:
- (1) The organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal conduct.
 - (2) Specific individual(s) within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures.
 - (3) The organization must have used due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of due diligence, had a propensity to engage in illegal activities.
 - (4) The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, *e.g.*, by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required.
 - (5) The organization must have taken reasonable steps to achieve compliance with its standards, *e.g.*, by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution.
 - (6) The standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an

offense. Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.

- (7) After an offense has been detected, the organization must have taken all reasonable steps to respond appropriately to the offense and to prevent further similar offenses — including any necessary modifications to its program to prevent and detect violations of law.

The precise actions necessary for an effective program to prevent and detect violations of law will depend upon a number of factors. Among the relevant factors are:

- (i) Size of the organization — The requisite degree of formality of a program to prevent and detect violations of law will vary with the size of the organization: the larger the organization, the more formal the program typically should be. A larger organization generally should have established written policies defining the standards and procedures to be followed by its employees and other agents.
- (ii) Likelihood that certain offenses may occur because of the nature of its business — If because of the nature of an organization's business there is a substantial risk that certain types of offenses may occur, management must have taken steps to prevent and detect those types of offenses. For example, if an organization handles toxic substances, it must have established standards and procedures designed to ensure that those substances are properly handled at all times. If an organization employs sales personnel who have flexibility in setting prices, it must have established standards and procedures designed to prevent and detect price-fixing. If an organization employs sales personnel who have flexibility to represent the material characteristics of a product, it must have established standards and procedures designed to prevent fraud.
- (iii) Prior history of the organization — An organization's prior history may indicate types of offenses that it should have taken actions to prevent. Recurrence of misconduct similar to that which an organization has previously committed casts doubt on whether it took all reasonable steps to prevent such misconduct.

An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective program apt to prevent and detect violations of law.