Environmental Crimes: Prosecutions Beyond the Midnight Dumper

By Jeff Wolf

Discretionary decisions about the types of crimes to be prosecuted, and the vigor by which they will be prosecuted, depend largely upon the scope of statutory authority vested in the prosecuting agency and public validation expressed in the voting booth and jury box. With regard to environmental regulations, the statutory authority is broad and public acceptance for criminal enforcement of environmental regulations is gaining momentum. More than ever, the public is inundated with news stories focusing on the detrimental impact human activity has had on the environment. The conservation movement has trickled down so far as to focus now on the activities of each citizen. All this is likely to mean greater criminal enforcement activity. Corporate authorities from officers down to department supervisors should be alert to the responsibilities and scope of accountability associated with regulatory activities occurring in the workplace.

Prosecuting Authorities

The criminal provisions of the statutes are enforced by the Environmental Protection Agency (EPA) in conjunction with the Department of Justice (DOJ) and Environmental Crimes Section (ECS). The EPA Criminal Investigation Division (CID) investigates in cooperation and coordination with other federal agencies and refers for prosecution violations of environmental laws that pose a threat to human health or the environment. CID Special Agents are federal law enforcement officers with authority to conduct investigations, carry firearms, serve and execute warrants and make arrests.

The EPA may pursue both criminal and civil remedies under the statutes, in what is

known as parallel proceedings. The most recent policy regarding the use of parallel proceedings is set out in an enforcement memo dated September 24, 2007. The EPA may institute parallel proceedings in instances where "the violations merit the deterrent and retributive effects of criminal enforcement, yet a civil action is also necessary to obtain an appropriate remedial result, and where the magnitude or range of the environmental violations and the available sanctions make both criminal and civil enforcement appropriate." Because of the significant differences in investigative authority and potential sanctions associated with criminal and civil actions, parallel proceedings often raise issues involving Fourth and Fifth Amendments as well as attorney client and work product privileges.

The prosecution of individuals, in addition to corporations, is an integral part of the EPA's enforcement process. In a memo issued January 12, 1994, Earl Devaney, then Director of the EPA's Office of Criminal Enforcement, stated that criminal prosecution is the most powerful enforcement tools available to the EPA. He indicated that case selection will be guided by two general principles, significant environmental harm and culpable conduct. According to Mr. Devaney, significant environmental harm is measured by: actual harm, the threat of significant harm, failure to report, and whether the act demonstrates a trend or attitude within the regulated community. Culpable conduct is measured by such factors as: history of violations, deliberate misconduct, concealment or falsification of records, tampering with control equipment, and working with hazardous materials without permits or other required documentation. This policy, as described in the Devaney Memo, is one of only two EPA guidance documents covering criminal prosecution.

While criminal prosecution is a powerful enforcement tool, the EPA ultimately refers criminal cases to DOJ for prosecution. DOJ has discretion to determine if and what types of

crimes to charge. Because of the deference afforded to an individual DOJ prosecutor, enforcement and prosecution can vary between jurisdictions, leading some observers to criticize the environmental laws as particularly susceptible to arbitrary and politicized enforcement. To address such criticisms, DOJ utilizes the following criteria in evaluating a potential environmental crime: voluntary disclosure, cooperation, preventative measures and compliance programs, pervasiveness and non compliance, internal disciplinary action, and subsequent compliance efforts.

Overview of Federal Crimes

Many of the enforcement tools to prosecute environmental crimes have existed for decades, though amendments to the pertinent statutes have occurred over the years. Conviction of an environmental criminal offense generally requires a *mens rea* of "knowing." *See, e.g.*, 33 U.S.C. §§ 1319(c)(2)-(3). However, some statutes include provisions authorizing criminal convictions for merely negligent violations. *See, e.g.*, 33 U.S.C. § 1319(c)(1). Specific *mens rea* requirements are discussed in more detail below. Federal authorities rely largely upon eight statutes as the basis of environmental criminal prosecutions. These statues are as follows:

1. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §9601 *et seq*.
2. The Clean Water Act (CWA), 33 U.S.C. §1251 *et seq*.
3. The Clean Air Act (CAA), 42 U.S.C. §7401 *et seq*.
4. Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6901 *et seq*.
5. The Rivers and Harbors Act of 1899 (RHA), 33 U.S.C. §401 *et seq*.
6. The Safe Drinking Water Act (SDWA), 42 U.S.C. §300f *et seq*.
7. Solid Waste Disposal Act (SWDA), 42 U.S.C. §6901 *et seq*.
8. The Toxic Substances Control Act (TSCA), 15 U.S.C §2601 *et seq*.

In addition, prosecutors have utilized statutes criminalizing mail fraud and making false official statements. A review of the commonly cited statutes is below.

1. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

CERCLA deals with threatened releases of hazardous wastes. It imposes sanctions for failure to notify the government of unauthorized releases of pollutants. Failure to report a release or submitting information which is false or misleading is a felony and is punishable by fines according to the applicable provisions of Title 18 or up to three years of imprisonment, or both. 42 U.S.C. § 9603(b)(3). CERCLA provisions also require that individuals maintain accurate records and make it a violation for individuals to destroy or otherwise render unavailable or unreadable or falsify or misreport information to a governmental agency. Such acts are punishable by fines in accordance with the applicable provisions of Title 18 or imprisoned for not more than three years or both. 42 U.S.C. § 9603(c)(2).

2. The Clean Water Act

Similar to CERCLA, the Clean Water Act, ("CWA") requires individuals in charge of a facility or vessel to report a release of a hazardous substance. The Act makes it a crime for an individual or entity to release any pollutants into U.S. Waters. Those who negligently discharge pollutants in violation or without the applicable permit are subject to misdemeanor penalties of up to one year in prison and/or no less than $2,500 and no more than $25,000 per day for each violation. 33 U.S.C. § 1319(c)(1)(B). The Act also makes it a felony to knowingly release pollutants into U.S. waters in violation of the Act or in violation of a permit issued under the Act. Violations call for fines from $5,000 to $50,000 per day and three years of imprisonment. 33 U.S.C. § 1319(c)(2)(A). Penalties double for second violations. 33 U.S.C. § 1319(c)(2)(A).

3. The Clean Air Act

The Clean Air Act ("CAA"), similar to the CWA, provides for criminal sanctions for violations of the discharge of pollutants. Violators may face up to five years imprisonment and

fines. 42 U.S.C. § 7413(c)(1). Similar to the CWA, and RCRA, the CAA provides for felony sanctions for failure to keep accurate records or to falsify records reported to the government that include imprisonment for up to two years. 42 U.S.C. § 7413(c)(2)(C). The CWA includes provisions for negligent endangerment which are of a misdemeanor nature and may be punished by imprisonment of up to one year. 42 U.S.C. § 7413(c)(4).

4. Resource Conservation and Recovery Act (RCRA)

The EPA administers RCRA under CFR Title 40. The goals are to 1) to promote human health and the environment; 2) to reduce waste and conserve natural resources and 3) to reduce or eliminate the generation of hazardous waste as expeditiously as possible. The major concepts: 1) Establish a natural waste policy; 2) establish liability and 3) proper management from cradle to grave.

The largest number of criminal prosecutions is based upon RCRA violations. RCRA violations involve the illegal transportation, storage, or disposal of hazardous wastes. The tracking of hazardous wastes is done through a system of manifests and permits. The generator of hazardous waste has the obligation to notify the EPA and arrange for the appropriate disposal of the waste. Similar requirements apply to the transporter of waste, who must obtain manifests permitting the transportation of the waste until it reaches the disposal site.

It is a felony to knowingly transport a hazardous waste to a facility that does not have a permit or to knowingly treat, store or dispose of hazardous waste without the appropriate permit, or to knowingly dispose of waste in violation of a permit. 42 U.S.C. § 6928(d)(2). Penalties for second convictions are doubled. 42 U.S.C. § 6928(d)(7)(B). CERCLA criminal violations are frequently filed in conjunction with and in the same information as RCRA charges for unpermitted releases of hazardous materials.

In addition, RCRA contains provisions which make it a felony to provide false information, alter, conceal or destroy record documents required by law. 42 U.S.C. § 6928(d)(3). Such violations are also a felony and second convictions require that penalties be doubled.

The underlying legislative history of the RCRA suggests that the prosecuting authority's discretion is to be exercised conservatively.

> "[The criminal provision of RCRA were] intended to prevent abuses of the permit system by those who obtain and then knowingly disregard them. It [RCRA sec. 3008(d)] is not aimed at punishing minor or technical variations from permit regulations or conditions if the facility operator is acting responsibly. The Department of Justice has exercised it prosecutorial discretion responsibly under similar provision in other statutes and the conferees assume that, in light of the upgrading of the penalties from misdemeanor to felony, similar care will be used in declining when a particular permit violation may warrant criminal prosecution under the Act.

H.R. Conf. Rep. No. 1444, 96th Cong. 2d Sess. 37. The legislator did not intend the law to make felons of individuals who take reasonably adequate precautions to comply with the law.

5. Other Relevant Statutes

a. Mail Fraud

Mail fraud is codified by statute under 18 U.S.C. §1341. An additional crime which is often charged in tandem, is conspiracy to engage in mail fraud (18 U.S.C. §371). An individual commits mail fraud when making a representation without any belief in its truth by means of the U.S. Postal Service or any other mail carrier for the purpose of financial gain by seeking to have the recipient act to his or her detriment. To convict, the government must prove that the individual devised or intended to devise a scheme to defraud, and used an interstate carrier to deliver a document in furtherance of the scheme. For example, the government has used mail

fraud to prosecute companies when the proper procedures were not followed for environmental testing and a customer was billed for the service. While the burden of proof in a mail fraud case is high, there is no requirement to show that the environment was detrimentally impacted by the defendant's actions. The government must prove that a defendant acted with knowledge, willfully participated in the scheme, and prove that the misrepresentation or concealment was a material fact.

b. False Statements

Title 18 U.S.C. §1001 prohibits an individual from making a false statement. The prosecuting authority needs to prove the following: that an individual knowingly and willfully:

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.

The statement need not be made under oath and can be made in any form to any Government agency or a third party responsible for implementing a federal program. The government need not establish that a person relied upon the false statement or that the false statement resulted in a financial or other hardship.

For example, the Southern District of Florida denied a cruise line's motion to dismiss a criminal charge under 18 U.S.C. §1001, holding that the United States had jurisdiction to prosecute a false statement charge if the statement occurred in a domestic port. United States v. Royal Caribbean Cruises Ltd., 11 F. Supp.2d 1358 (S.D. Fla. 1998). Coast Guard officials observed the cruise ship discharge oil off the coast of the Bahamas Islands. When the ship docked in Miami, the Coast Guard conducted a document and safety inspection and learned that

the vessel failed to disclose the discharge in its Oil Record Book, as required by the Act to Prevent Pollution from Ships, 33 U.S.C. §1901 *et seq*. While the government did not have jurisdiction to prosecute the cruise line for the illegal discharge, it could prosecute the omission from the Oil Record Book as a false statement under §1001. Similar prosecutions were filed against other shipping lines resulting in felony plea agreements.

More recently, this years the government prosecuted a false statements charge against a fuel distributor alleging that it falsified its annual report to the Bay Area Air Quality Management District and the EPA regarding its compliance with the CAA. The allegations involved with the government's claim arose from mechanical problems the company experienced with its truck loading vapor recovery unit that malfunction and shut down. While inoperable, the government claimed that the employees continued to load ethanol using the truck loading rack by bypassing the vapor recovery's automatic shut off safeguard. Without the vapor recovery unit, the truck loading operation released volatile organic compounds in violation of the Clean Air Act. The government pursued a criminal prosecution of the company by attacking the company's reporting documents, which failed to disclose this mechanical problem and the associated discharge.

Prosecuting Corporations and Individuals

1. Corporate Liability

Under federal law, a corporation is a legal person who may be prosecuted for violations of environmental laws. Corporate liability for environmental crimes is imputed based upon action of its agent under the doctrine of *respondeat superior*. Corporations may be criminally liable for acts committed by an employee acting within the scope of his employment and for the benefit of the corporation. Sun-Diamond Growers, 138 F.3d 961 (D.C. Cir. 1998). However,

whether the corporation actually received a benefit from the employee's action is not dispositive. United States v. Automated Med. Lab., 770 F.2d 399 (4th Cir. 1985). Additionally, liability can occur even if the corporation has a policy against such act.

Criminal liability under the CWA against a corporation flows upon establishing that a pollutant, as indicated under the regulations, was released into the environment and that it can be traced to a corporate facility where the sentient corporate employee took a step which proximately caused the release. 33 U.S.C. §1362(6); United States v. Technic Servs., Inc., 314 F.3d 1031, 1043 (9th Cir. 2002); United States v. Plaza Health Labs, Inc. 3 F.3d 643, 645-46 (2nd Cir. 1993).

A corporation could also be prosecuted under the collective knowledge theory. Here the corporation is considered to have acquired the collective knowledge of its employees and is responsible for their failure to act accordingly. United States v. T.I.M.E.-D.C., Inc., 381 F.Supp. 730, 738 (W.D. Va. 1974).

2. Individual Liability

In some circumstances, upper management need not be personally involved in the alleged criminal activity to be subject to criminal prosecution. Corporate officers may be criminally prosecuted through the Responsible Corporate Officer Doctrine ("RCOD"). RCOD permits criminal sanctions for allegedly 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. The officer is not required to actually exercise this authority, nor is it required that the corporation expressly vest a duty in the officer to oversee the regulated activity.

Under such conditions the mere authority to control is sufficient. Congress expressly incorporated the RCOD in the CWA and CAA. At least one circuit has applied the RCOD to a

RCRA charge. United States v. Johnson & Towers, Inc. 741 F.2d 662, 667 (3rd Cir. 1984). The Johnson Court noted that it would "undercut the purpose of the legislation to limit the class of potential defendants to owners and operators when others also bear responsibility for handling regulated materials." Subsequent to the Johnson decision, the Second Circuit extended individual liability under the CERCLA to relatively low level supervisors. United States v. Carr, 880 F.2d 1550 (2nd Cir. 1989). The Carr Court wrote "we believe Congress intended the reporting requirements of CERCLA's Section 103 to reach a person even if 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." Thus, individual liability can attach to various company employees: officers, directors, and those with supervisory responsibility.

Judicial Review of Requisite Mens Rea

1. Knowledge

As in the case in most criminal prosecutions, ignorance of the law is not a defense to an environmental crime. United States v. International Minerals & Chemical Corp., 402 U.S. 558 (1971); United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1994) (*rev'd denied*) establishes that a defendant need not have actual knowledge that a statute is being violated, but merely need to be shown to have a general awareness of the wrongfulness of an act or a likelihood illegality. The Court's decision has been cited in numerous subsequent decisions in other Circuits addressing the *mens rea* issue.

In Weitzenhoff, the defendants Michael H. Weitzenhoff and Thomas W. Mariani were managers at East Honolulu Community Services sewage treatment plant in Hawaii. They were indicated on 31 counts of conspiracy and violating the CWA. At trial, prosecutors introduced evidence demonstrating that non-biodegradable waste from the treatment plant was released into

the ocean on numerous occasions between 1988 and 1989. Employees testified that Weitzenhoff and Mariani ordered that the waste be dumped in the middle of the night. The dumped material bypassed the facility's tracking system. Both defendants were convicted and on appeal argued that the judge erred in instructing the jury that no proof was required to show that they knew their act was unlawful. In affirming the decision, the Ninth Circuit found that the government was not required to prove that Weitzenhoff and Mariani knew that their acts violated the treatment plant's NPDES permit. The court relied upon United States v. International Minerals & Chem. Corp., 402 U.S. 558, (1971) in which the Supreme Court held that one who handles wastes and dangerous materials is presumed to know the regulations.

With regard to the specific elements of an offense, some jurisdictions have held that if the specific statute references a knowledge requirement, the government must prove that each element was knowingly violated. Section 1319(c)(2) of the CWA makes it a felony for a person to knowingly discharge a pollutant into the navigable waters of the United States without a permit. In United States v. Ahmad, 101 F.3d 386 (5th Cir. 1996), a jury convicted Attique Ahmad of knowingly violating Section 1319(c)(2). Mr. Ahmad discharged over 4,500 gallons of gasoline into a Texas sewer system, but claimed at trial that he believed it was water, not gasoline, that he was pumping into the sewer. The trial court's instruction to the jury only required a determination that Mr. Ahmad had knowledge that he made a discharge. The Fifth Circuit reversed his conviction holding that the jury should have been instructed that Mr. Ahmad needed to know he made a discharge and that he knew that the discharged substance was a pollutant.

However, the Seventh Circuit reached a different conclusion in United States v. Kelly, 167 F.3d 1176 (7th Cir. 1999). Here, the Court of Appeals determined that the jury only needed

to find that the defendant knew he illegally disposed of waste. The jury did not have to determine whether the defendant knew the waste was "hazardous waste" as defined by Congress.

2. Negligence

As discussed above, some of the environmental statutes contain provisions for criminally negligent violations. For example, 33 U.S.C. §1319(c)(1) provides that criminal liability exists for anyone who negligently violates the CWA. As prosecutions continue to expand well beyond the most culpable and most public examples, prosecutions for negligent conduct may become more common.

When prosecuting a case as a negligent violation, the government no longer bears the burden of establishing that the defendant knowingly committed an act. The 10th Circuit reached this conclusion in United States v. Ortiz, 427 F.3d 1278 (10th Cir. 2005). Ortiz continuously discharged a pollutant through the toilet at his company. Unbeknownst to him, the city had failed to properly connect his toilet to the city sewer system, and instead had connected it to the storm water system which led directly into a local river. The trial judge acquitted Ortiz, arguing that he had no knowledge of the connection error and thus could not be convicted of negligently discharging a pollutant into the river. The Court of Appeals overturned the acquittal, stating that knowledge of the misconnection was not required; a jury need only find that Ortiz acted negligently.

In another negligence case, a company transporting petroleum products recently pled guilty to one count of criminally negligent discharge of a harmful substance into U.S. waters. The plea agreement required the company to pay $6.1 million dollars and agree to three years of probation. The charge stemmed from an accidental discharge of approximately 15,000 gallons of low sulfur diesel and kerosene into the Mystic River in Massachusetts. The terminal at issue

includes three berths where barges and ships offload petroleum products that are piped to and stored in tanks at the terminal. As alleged by the government, a ship, under the control of the transporting company, experienced a leak while pumping the products to a nearby storage tank. As alleged, the diesel and kerosene escaped through a 10-inch seal valve which was not adequately maintained and showed signs of corrosion. The $6.1 million payment includes the maximum possible fine, $359,018 (twice the cost of clean-up), payment of the costs of clean-up, $179,634, a $1,000,000 community service payment to the Massachusetts Environmental Trust, and a $4,640,982 community service payment to the North American Wetlands Conservation Act.

Penalties

The environmental statutes provide strong penalties for all forms of violations. In certain cases the statutes also provide penalty enhancements that can result in years of jail time or large fines.

1. Sentencing Guidelines

The Sentencing Guidelines establish a predetermined range of penalties that are applicable to federal crimes as applied to business entities in its "Organizational Guidelines" and as applied to natural persons in its "Individual Guidelines." The Guidelines operate by providing a base offense level to specific crimes and grounds for upward or downward departures from the standard penalty range. The Guidelines reduce the amount of discretion afforded to federal judges in sentencing organizations or individuals. However, a judge retains the right to depart from the sentencing guidelines.

As expected, the penalties for knowing violations are more than for negligent violations. A knowing violation of the CWA can result in a penalty of not less than $5,000 nor more than

$50,000 per day of violation, or by imprisonment for not more than 3 years, or by both while a negligent violation of the CWA is only subject to a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. 33 U.S.C. § 1319(c)(1)(B). Penalties under the CAA and CERCLA are similar, ranging from not less than $2,500 per day to not more than $50,000 per day of violation. 42 U.S.C. § 7413(c).

2. Enhancements

Many of the specific environmental statutes contain enhanced penalties for more egregious violations. For example, the RCRA includes enhancement penalties for persons who knowingly place another individual in danger of imminent death or serious bodily injury. 42 U.S.C. §6928(e). Likewise, violations of the CWA which knowingly endanger a person may result in fines up to $250,000 and 15 years in prison. 33 U.S.C. §1319(c)(3)(A). The CAA provides penalties for knowing endangerment, which include up to 15 years imprisonment and fines up to one million dollars for each violation. 42 U.S.C. §7413(c)(5)(A).

In addition to the environmental statutes, the United States penal code contains an "alternative fine" provision. 18 U.S.C. § 3571(d). The alternative fine provision allows the government to increase the maximum fine in cases where there is pecuniary gain or loss. The increase can be up to twice the total amount of gain or loss. In environmental crimes cases, the normally results in the total fine becoming twice the cost of any clean-up performed as a result of the underlying violation.

The US Sentencing guidelines 2Q1.3(b)(1)(A) provide a sentence enhancement by six levels for "ongoing, continuous, or repetitive discharge, release or emission of a pollutant into the environment." A lesser enhancement of four levels is provided by 2Q1.3(b)(1)(A) for offenses otherwise involving a discharge, release, or emission of a pollutant that actually resulted

in environmental contamination. These guidelines have some limited flexibility, however, as Application Note 4 of the Commentary to 2Q1.3 adds that "depending on the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, a departure of up to two levels in either direction from that prescribed in these specific offense characteristics may be appropriate."

Conclusion

The environmental criminal statues vest broad discretion in the prosecuting agency to pursue corporations and individuals. Sweeping statutory provisions provide government prosecutors with many tools to pursue criminal targets at the corporate and individual levels. Sentencing guidelines impose severe consequences for first time offenders. Growing acceptance from the public to use these tools is likely to increase government's efforts. There is no time like the present to reexamine current practices and reinforce the importance of individual responsibility and accountability required by all employees up the chain.