Legal Backgrounder

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PROSECUTORS AND COURTS EXPAND CRIMINALIZATION OF ENVIRONMENTAL LAW

by

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Criminal prosecution continues to play an expanding role in the U.S. Environmental Protection Agency's (EPA) enforcement and compliance agenda. In recent years, the EPA has made increasing use of sophisticated investigative techniques, including aerial surveillance, wiretaps, and search warrants, which were once reserved for more traditional areas of law enforcement. The agency has its own Criminal Investigation Division, coordinates investigations with prosecutors in U.S. Attorney's Offices around the country, and routinely enlists the aid of the Department of Justice Environmental Crimes Section and other federal agencies, such as the FBI, Coast Guard, and Department of Transportation.

The results of this increased enforcement activity have been significant. In 1995, for instance, EPA criminal enforcement netted a total of 74 years of prison time and $23.2 million in penalties. In 2000, the agency initiated 477 criminal cases and referred 236 cases for prosecution. These prosecutions resulted in 146 years of prison sentences and a staggering $122 million in criminal fines.

While there is general agreement that criminal enforcement can play an important role in environmental protection, Justice Department and EPA managers must ensure that the criminal liability standards are fairly and consistently applied. Recently, there have been warning signs that the criminal liability standards, particularly in the area of clean water and hazardous waste enforcement, are being applied in a manner more consistent with strict liability than well-established notions of deliberate wrongdoing or clear criminal negligence.

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The criminal provisions of the Clean Water Act, 33 U.S.C. § 1319(c), limit prosecutions to instances involving "negligent" or "knowing" violations of the statute. Specifically, the statute prohibits, among other things, negligent or knowing violations of any permit condition, pretreatment requirement, or other section of the Act; the negligent or knowing introduction of any pollutant or hazardous substance; knowingly made false statements, representations, or certifications; or the knowing falsification or tampering with any pollution monitoring equipment. The vast majority of such prosecutions involve allegations against defendants for one or more of the following:

1. Dumping or discharging wastewater without treatment and/or a permit;

2. Falsifying pretreatment inspection reports or other records;

3. Tampering with witnesses and/or obstructing a criminal investigation;

4. Company management ordering employees to discharge wastewater illegally; and

5. Bypassing wastewater treatment systems through use of "secret pipes" or otherwise diverting wastewater from a required treatment process.

In February 2001, for instance, the former operator of a California electroplating business was convicted of seven felony violations between July 1995 and May 1997. In addition to violating a CWA permit by discharging excessive levels of cyanide, nickel and corrosives into the municipal sewer system, the operator attempted to conceal these criminal activities by circumventing a monitoring device placed in the sewer by the city. Additionally, witnesses testified that the operator and his employees routinely used a metal rod to probe through a hole in a manhole cover to determine when the sampling equipment was in place, and employees were instructed to dump wastewater into the sewer only when the equipment was not present.

In contrast, in *United States v. Hong*, 242 F.3d 328 (4th Cir. 2001), the U.S. Court of Appeals for the Fourth Circuit recently affirmed an expansive application of the responsible corporate officer doctrine. This case involved a company called Avion Environmental Group, which had discharged untreated wastewater into the City of Richmond sewer system. James Hong, the sole shareholder of Avion Environmental, was convicted on 13 counts of negligently violating pretreatment requirements under the CWA. Each criminal count alleged that Hong committed the violations "as a responsible corporate officer," and the court found Hong guilty on all counts.

On appeal, the Fourth Circuit upheld the convictions even though Hong was not identified as a company officer, finding that the government was not required to prove that the defendant is "a formally designated corporate officer." The court explained that "[t]he gravamen of liability as a responsible corporate officer is not one's corporate title or lack thereof; rather, the pertinent question is whether the defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable for *failing to prevent* the charged violations of the CWA."

Without question, the particular facts of the case made Hong an unsympathetic defendant: he allegedly controlled the company's finances, helped select and purchase the wastewater treatment system at issue despite knowing that it was inadequate for its intended use, and inspected the treatment system after it became inoperable. He also allegedly refused to authorize

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payment for a new treatment system despite knowing of untreated discharges into the city sewer and was present when illegal discharges occurred. Given these allegations, the government's interest in pursuing criminal charges is easily understandable; from a broader perspective, however, the case may inadvertently establish precedent for charging criminal negligence where a company official, or even a shareholder, had no actual knowledge or control over the activities in question.

The government's prosecution in *United States v. Hanousek*, 176 F.3d 1116 (9th Cir.), *cert denied*, 528 U.S, 1102 (2000) raised similar concerns. In that case, a roadmaster for a railroad company was convicted of a negligent discharge under the CWA after a backhoe operator accidentally ruptured an oil pipeline. On appeal, the Ninth Circuit held that the misdemeanor provisions of the CWA allow for the imposition of criminal liability based on simple or ordinary negligence. The Court noted that "[i]t is well-established that a public welfare statute may subject a person to criminal liability for his or her ordinary negligence without violating due process."

This case appears to be an extreme example of prosecutors seeking the imposition of criminal liability for negligence where the defendant manager was wholly unaware of the underlying activities giving rise to the criminal charges. As Supreme Court Justices Thomas and O'Connor noted in a dissenting opinion in the Court's subsequent denial of *certiorari* in the *Hanousek* case, the defendant was *off duty and at home* when the accident occurred. The opinion went on to say that "[t]his case illustrates [the imposition of criminal liability] for persons using standard equipment to engage in a broad range of ordinary industrial and commercial activities . . . we should be hesitant to expose countless numbers of construction workers and contractors to heightened criminal liability for using ordinary devices to engage in normal industrial operations."

The Justice Department and the EPA also have aggressively applied the knowing endangerment provisions of the Resource Conservation and Recovery Act (RCRA), which imposes criminal liability upon any person who "knowingly transports, treats, stores, disposes of, or exports any hazardous waste" and "knows at that time that he thereby places another person in imminent danger of death or serious bodily injury." 42 U.S.C. § 6921(e). In *United States v. Christian A. Hansen et al*., three former corporate officers of LCP Chemicals and Plastics (LCP) – a founder and CEO, an acting CEO, and a plant manager – were tried on 42 counts alleging multiple violations of the CWA, RCRA, the Endangered Species Act, and CERCLA. The jury found each of the three officers guilty of between 34 to 41 counts.

In the oral argument before the Eleventh Circuit, counsel for defendants Christian Hansen and Randall Hansen challenged the conviction of their clients on the RCRA knowing endangerment charge, which involved LCP's Brunswick, Georgia, facility. Neither defendant, counsel pointed out, was even physically present at the plant during the period when the endangerment allegedly occurred. Instead, both worked at LCP's corporate headquarters in New Jersey, overseeing the operations of no fewer than six chlor-alkali plants located across the eastern half of the United States.

In response, the government argued that although both defendants may have been out of the state at the time, they were aware of the environmental problems at the Georgia facility, and that their failure to correct them was tantamount to placing LCP's workers in "imminent danger." Ironically, the government's chief evidence on this point included correspondence from the Brunswick plant advising the Georgia Environmental Protection Division of various on-site environmental problems, including its exceeding permitted discharge limits. Both defendants received copies of this correspondence.

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While the Eleventh Circuit has not yet issued a ruling in this case, the prosecution nonetheless raises concerns about whether criminal intent can, and should, be properly established in the absence of specific knowledge of the underlying environmental violations.

In extreme instances, the "watering-down" of the *mens rea* standards for the imposition of criminal liability has progressed to the point that some prosecutorial decisions may even conflict with the Justice Department's own guidelines. For example, the 1999 version of the "Justice Department Guidelines on Prosecution of Corporations," drafted by former Deputy Attorney General Eric Holder, include the general principle that "charging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive and undertaken by a large number of employees or by all the employees in a particular role within the corporation ... or was condoned by upper management. *On the other hand ... it may not be appropriate to impose liability on the entire corporation ... for the single isolated act[s] of one or more rogue employees."*

There are obviously many different factors that prosecutors should consider when determining whether to bring criminal charges in a particular case. Examples such as those cited above, however, suggest that Justice Department and EPA managers should consider whether attempts to impose criminal liability on defendants who do not have actual knowledge of the underlying illegal activities amounts to a *de facto* replacement of traditional notions of criminal knowledge with something more akin to strict liability.

As priorities are set by the Justice Department and in the various U.S. Attorney's Offices under the new Bush administration, we invite decision-makers to be mindful of any departure from traditional legal standards for criminal liability in the environmental context. Such a move would not only be contrary to the clear intent of statutory environmental provisions, such as the Clean Water Act and RCRA, but also could undermine initiatives designed to foster compliance assistance, pollution prevention, and self-policing by the regulated community. While in specific situations, criminal enforcement of environmental laws may be desirable, the misuse of such sanctions may force otherwise cooperative companies to assume adversarial positions and deprive society of the potential environmental benefits that can come from a positive, cooperative relationship between the government and corporate America.

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