



GLOBALIZING SERIOUS ENVIRONMENTAL OFFENSES: NOW IT'S A CRIME, TOO

by

Judson W. Starr and Amy J. McMaster

Roughly 25 years after the U.S. began prosecuting environmental regulatory violations by imposing traditional criminal sanctions, the European Union (EU) appears ready to embark on a similar course, complete with the same indigenous problems. It's not the laws; it's how they are imposed. The European Commission, the European Union's executive body empowered to initiate legislation, recently proposed that all EU member states criminalize major environmental violations and impose minimum sanctions for offenses. (COM (2007) 51 final).

The proposal, which takes the form of a Directive, requires member states to treat offenses that seriously harm the environment as "green crimes," if committed intentionally or with gross negligence. Listed offenses under the proposal run the usual gamut, and include trade in endangered species or ozone-depleting substances, illegal shipment of waste, illegal discharge of hazardous substances, and the illegal operation of facilities where dangerous substances are used or stored. The proposal imposes fines of up to 750,000 euros (\$1,070,000) and a maximum of 10 years in jail for certain offenses.

By taking the form of a Directive, the proposal still has to go through the Council¹ and European Parliament as part of the Community's co-decision making process. However, if adopted, member states will be required to implement national laws that give effect to the requirements of the Directive within 18 months. While the laws may not be more lenient, the member states may adopt more stringent measures than foreseen in the Directive. Should a member state fail to implement the Directive, however, the Commission must take appropriate action, including seeking relief in the European Court of Justice.

The European Community's 15 member states have moved with impressive alacrity in the environmental regulatory arena. However, the prominence of disparities in environmental enforcement by member states remains a challenge, if uniformity is the goal. While Dutch authorities may criminally prosecute the intentional discharge of toxic waste, for instance, Greece and Spain have not categorized this as a criminal offense. The factor between the lowest and the highest defined maximum fine for illegal trade in endangered species is 1 to 348. The list goes on. Some members are moving to reconcile the current discrepancies, however.

¹Established in 1974, the European Council, also sometimes called the European Summit, is a meeting of the heads of state or government of the European Union, and the President of the European Commission. On average, four European Councils are held each year to discuss key issues and the direction of the EU.

Judson W. Starr heads the Environmental Practice Group at the law firm Venable LLP. He was the Justice Department's first Director and Chief of its Environmental Crimes Section. **Amy J. McMaster** is an associate in the Environmental Practice Group.

In April 2007, the Italian government adopted a draft law that would criminalize a wide range of environmental activities, including illegal dumping, polluting, damaging environmental resources, and causing environmental catastrophes. Fines could reach 250,000 euros (\$357,000) and violators could spend up to 10 years in jail. If approved by the full Italian parliament, Italy would align with other EU countries that criminalize environmental crimes, such as Belgium, the Czech Republic, Denmark, Germany and The Netherlands. The Commission's proposal requires the alignment of *all* EU member states.

Although the Commission's proposal has the potential to increase uniformity, it has not been met with uniform approval by the member states. Critics fear that the proposal will ensnare unsuspecting wrongdoers and erode national sovereignty by transferring power to the Commission. Supporters, however, believe such fears are based on a misunderstanding or misinterpretation of the proposed regulations. They argue that the proposal will not create new environmental offenses, but will unify the criminalization of existing ones – a laudable goal. Similarly, any transfer of power would take place through a democratic process, and the imposition of criminal sanctions would remain at the national level. In support of its proposal, the Commission points to evidence that current sanctions do not adequately implement the Community's existing policy on environmental protection. The increased deterrence of uniform criminal sanctions and higher fines is therefore believed necessary in order to fulfill the policy.

Neighboring nations have long recognized the potential for trans-boundary impacts of environmental violations, and the need for international treaties (or otherwise) to address such situations accordingly. Countries with lenient environmental policies risk exploitation by businesses, and may allow for an unfair competitive advantage to the detriment of environmentally responsible businesses. The need for increased protection of common resources, most particularly focusing on the world's oceans, is prompting nations in addition to the EU to reevaluate or reinvigorate their common environmental enforcement programs.

On July 1, 2007, the Canadian Shipping Act, 2001 (CSA 2001) came into effect as the principle legislation governing the protection of Canada's marine environment. In discussions for two years, the new regulations increase the maximum fine from C\$170,000 (\$176,000) to C\$1M (\$1,035,000) and impose jail terms of up to 18 months. Potentially criminal acts under the new regulations include, the "destruction of documents, fraud, obstruction, [providing] false or misleading information or statement, [and the] movement of detained vessels." CSA 2001, ¶¶ 23 & 37. Citing to difficulties in deterring large corporations with monetary fines alone, the Canadian government believes the new initiatives will better protect its nation's waters and the marine environment. The new regulations are also consistent with the requirements of the International Convention for the Prevention of Pollution from Ships (MARPOL), which will allow Canada to ratify the convention.

In coming years, environmental regulations will likely be increasingly aimed toward the uniform protection of common resources, and criminalizing environmental violations is obviously going to play an important role in the process. While U.S. businesses and those based in countries that allow for the criminal prosecution of environmental violators likely will see some benefit from proposals such as the European Commission's, which would result in a more uniform environmental playing field, the U.S. experience demonstrates that the problem is not necessarily inherent in the laws themselves, but rather in the more subjective decision of their application.

Governments who seek to benefit from increased deterrence of environmental violations must remain attuned to the dangers of over-criminalization, including prosecutors using the threat of excessive punishment to extract information or guilty pleas. Criminal sanctions must be reserved for acts so wrongful or harmful as to justify the condemnation of the perpetrator and the denial of freedom that result from a guilty verdict. While many environmental violations qualify for such punishment, criminal sanctions should not be imposed upon behavior that is harmless, unworthy of prohibition, or adequately redressed through civil remedies.