Environmental Criminal Liability: Core Concepts and Pitfalls

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• “Who”: Culpable Parties to an Environmental Crime
  – Individuals and Corporate Officials
  – Corporations

• “Why”: Criminal Intent
  – Mens Rea
  – Strict Liability
  – Negligence
  – “Knowing”

• Defenses
• “Who” -- Individuals

- Flip in priority for enforcement
- 80% of individuals prosecuted for environmental crimes = corporate officers and managers
- Key factor: direct action as individual, regardless of corporate role or authority to compel compliance (U.S. v. Johnson & Towers)
- Definitions of “person”, “any person in charge”
• “Who” -- Corporate officers
  – Lack of action may still lead to personal liability
  – “Responsible Corporate Officer” doctrine (*U.S. v. Dotterweich*)
  – CWA and CAA specifically reference “responsible corporate officer” in definition of “person”
  – Include federal government officers?
• “Who” -- Corporations as liable parties
  – Squarely within definition of “person”

  – Liable for rogue employees? “Scope of employment” vs. “contrary to corporate policy”

  – “Constructive knowledge” from multiple employees
• Corporations as liable parties (cont’d)
  – Parents can be held criminally liable for acts of subsidiaries if (i) acting as agent, or (ii) veil can be pierced.

  – *U.S. v. Exxon Valdez*
• “Why” – Criminal Intent and Mens Rea

  – Common law requirement

  – Long since superseded – look to the statute
• Criminal Intent and Strict liability for environmental crimes
  – Federal: Rivers & Harbors Act, the Migratory Bird Treaty Act, the Endangered Species Act and other natural resource statutes

  – States: Texas Water Code, California

  – Congressional silence? See if the statute imposes misdemeanor liability for a public welfare offense.

  – Is it a public welfare violation of an environmental statute? (Three-wheelers v. frogs)
• Criminal intent -- Negligence
  – Usually a matter for civil enforcement
  – Can be criminally prosecuted when:
    • Section 309(c)(1) of CWA: “negligently violates”
    • Section 113(c)(4) of CAA: “negligently releases” a hazardous air pollutant and “negligently places” another person in imminent danger
  – **U.S. v. Hanousek**
    • Ninth Circuit’s analysis
    • U.S. certiorari
  – **U.S. v. Pruett** (5\textsuperscript{th} Circuit)
• Criminal intent -- “Knowing” violations
  – Separate doctrine from RCOD, public welfare and mens rea doctrines
  – Again, creature of statute
    • RCRA requires “knowing” violation
    • Courts have interpreted “knowing” to mean aware of general nature of act, not status of regulatory requirement or of protected animal (Baytank, McKittrick)
The usual battleground: does “knowing” in one statutory clause carry through to the rest of the statutory section?

*U.S. v. Ahmad*

Inferring knowledge from circumstances:
- Corporate position and responsibility
- Information provided in earlier circumstances
- Willful blindness
• Defenses to Environmental Crimes

  – Overlap between civil and criminal prosecution: “lying, cheating, stealing”; cover-up crimes

  – Defenses to environmental crimes:
    • Proof of elements of crime: highly technical, and support needed from experts
    • Affirmative defenses – rooted in statutes
      – CAA and CWA – “consent” defense
      – CWA – bypass defense
      – CERCLA – federally permitted release defense to 103(a)
      – ESA – “good-faith belief” to protect self or others from bodily harm
In Texas,
  – Intentional or Knowing Violations “with respect to conduct”
Texas Strict Liability Offenses
  – Water Pollution (Chapter 7.147, Water Code)
  – Illegal Dumping (Chapter 365, H&S Code)
Reckless Violations (Endangerment)
Criminal Negligence
§ 7.202. Proof of Knowledge

In determining whether a defendant who is an individual knew that the violation placed another person in imminent danger of death or serious bodily injury under Section 7.168, 7.169, 7.170, or 7.171, the defendant is responsible only for the defendant’s actual awareness or actual belief possessed.
§7.202:

• Knowledge possessed by a person other than the defendant may not be attributed to the defendant.

• To prove a defendant’s actual knowledge, however, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to be shielded from relevant information.
Questions?