

Environmental Criminal Liability: Core Concepts and Pitfalls

Tracy Hester

Environmental Practicum

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Do we really need environmental crimes?

- Imagine criminal prosecution of any environmental spill or noncompliance
- What charges are possible?
- What barriers would make it difficult?
- What remedies and options would you achieve?





What's the Crime?

- Never forget – general crimes can apply in environmental contexts
 - Assault, battery
 - False statements, destruction of evidence (*Yates v. U.S.*)
 - Misprision



STATE OF TEXAS

§

IN THE 339th DISTRICT

VS.

§

COURT OF HARRIS

ARKEMA, INC

§

COUNTY, TEXAS

FIRST AMENDED MOTION TO AMEND INDICTMENT

TO THE HONORABLE JUDGE BELINDA HILL:

COMES NOW THE STATE OF TEXAS, by and through the undersigned Assistant District Attorney, and respectfully requests that the Court consider, pursuant to Article 28.10, V.A.C.C.P., this *Motion to Amend Indictment* in the above-styled and numbered cause.

I.

The indictment in the above-styled case and cause number currently reads as follows:

The duly organized Grand Jury of Harris County, Texas, presents in the District Court of Harris County, Texas, that in Harris County, Texas, **ARKEMA INC.**, hereafter styled the Defendant, heretofore on or about **AUGUST 31, 2017**, did then and there unlawfully, recklessly, by misrepresenting the danger of a chemical release associated with trailers storing temperature sensitive organic peroxides, cause bodily injury to **DAVID KLOZIK**, hereinafter called the Complainant, a person the Defendant knew was a public servant while the Complainant was lawfully discharging an official duty, to-wit: by providing security and assistance during hurricane Harvey.

It is further presented that in Harris County, Texas **ARKEMA INC.**, hereafter styled the Defendant, heretofore on or about **AUGUST 31, 2017**, did then and there unlawfully, recklessly, by misrepresenting the danger of a chemical release associated with trailers storing temperature sensitive organic peroxides, cause bodily injury to **BRYAN SWEETMAN**, hereinafter called the Complainant, a person the Defendant knew was a public servant while the Complainant was lawfully discharging an official duty, to-wit: by providing security and assistance during hurricane Harvey.



Key Questions for Criminal Liability Arising from Environmental Violations

- “What” – what crimes, specifically??
- “Who”: Culpable Parties to an Environmental Crime
 - Individuals and Corporate Officials
 - Corporations
- “Why”: Criminal Intent
 - Mens Rea
 - Strict Liability
 - Negligence
 - “Knowing”
- Defenses



“What” – Defining Environmental crimes

- Defined by statutory terms, typically geared to state of knowledge or expected standard of care
- Categories of liability
 - Unpermitted or unauthorized releases into the environment
 - Violation of terms of permits or authorizations
 - Failure to report
 - False reports
 - Lying, cheating, stealing
- The Big Question: when is a regulatory violation potentially a crime?





“Who” committed the crime - 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 governmental 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 Criminally 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.





“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 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.
- Note – skirmishing over criminal liability under the Migratory Bird Treaty Act

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. Pruet* (5th 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*)



Criminal Intent – “Knowing Violations” (cont’d)

- 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: experts
 - Affirmative defenses – see statutes
 - CAA and CWA – “consent” defense
 - CWA – bypass defense
 - CERCLA – federally permitted releases - 103(a)
 - ESA – “good-faith belief” to protect self or others from bodily harm





MEMORANDUM

**PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION
ATTORNEY WORK PRODUCT**

TO: Client Counsel
XXXXXX Corporation

FROM: Tracy Hester
University of Houston Law Center Environmental Practicum

DATE: April XX, 2020

RE: Key Points re Early Preparations for Criminal Searches

This memorandum outlines some steps that a company can take before the agents show up at the gate with a search warrant. While they cannot protect against the trauma of a search under a broad warrant, these prior steps can help minimize damage to business operations and firewall the company's defenses against inadvertent disclosures or betrayal of confidences.

1. Have a lawyer present. To do so, you should know in advance who you would want to call. Preferably, you should have the information needed to contact them 24 hours a day (i.e., home number and cell).
2. Designate a team of key players. Keep this team as small and high-level as possible. When you select the team members, remember that frequently one of your employees may have already talked with the state. The team should include the company's attorney to assure protection of the company's attorney-client privilege claims.

Back to our
original
question....





Thoughts, comments,
or questions?