Environmental Criminal Liability: Core Concepts and Pitfalls

Professor Tracy Hester
Environmental Enforcement
Spring 2010
• Culpable Parties to an Environmental Crime
  – Individuals and Corporate Officials
  – Corporations

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

• Defenses
• Individuals as targets
  – 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”
• Corporate officers
  – Lack of action may still lead to personal liability
  – “Responsible Corporate Officer” doctrine (U.S. v. Dotterweich)
  – Applied to public welfare offenses
  – CWA and CAA specifically reference “responsible corporate officer” in definition of “person”
  – Include federal government officers?
• 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
  – 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*
• Mens Rea

  – Common law requirement

  – Long since superseded – **look to the statute**
• Strict liability 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)
• 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 analysis
  – U.S. certiorari
• “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
• Overlap between civil and criminal prosecution: “lying, cheating, stealing”
• 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
Web-based Courses
Web-based Courses
Web-based Courses
Web-based Courses
Web-based Courses
Web-based Courses
Web-based Courses
Web-based Courses
Web-based Courses
Web-based Courses
Web-based Courses
Web-based Courses
Web-based Courses
Web-based Courses