Environmental Criminal Liability: Core Concepts and Pitfalls

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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’s the Crime?

- Never forget – general crimes can apply in environmental contexts
  - Assault, battery
  - False statements, destruction of evidence (Yates v. U.S.)
  - Misprision
“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- Long since superseded – look to the statute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 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.
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* (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
Thoughts, comments, or questions?