

Weighing Intent in Environmental Prosecutions

Criminal prosecution is absolutely warranted when corporations or individuals intentionally commit environmental crimes. However, federal and state environmental statutes impose criminal liability for wrongful environmental acts absent a strict *mens rea* requirement demonstrating intent or willfulness to commit alleged criminal acts. Accordingly, criminal prosecution by the government can sometimes occur on a negligence or strict liability basis.

According to the Justice Department, from 1998 through 2014 it concluded criminal cases against more than 1,083 individuals and 404 corporate defendants for environmental violations, resulting in a total of 774 years of incarceration and \$825 million in criminal fines and restitution. EPA adds that in 2015, federal environmental prosecutions resulted in 129 years of incarceration for sentenced defendants and generated \$404 million in combined federal administrative, civil judicial penalties, and criminal fines plus \$4 billion in court-ordered environmental projects.

Yet different results ensue when the government or its agents engage in conduct that arguably would result in prosecution if private sector actors did the same thing. Consider these two recent examples.

On August 5, 2015, EPA contractors working to pump and treat contaminated water at the Gold King Mine near Durango, Colorado, inappropriately used heavy equipment and failed to correctly gauge water pressure within the abandoned mine, resulting in a discharge of more than 3 million gallons of contaminated wastewater into the Animas River. Lead levels rose to 12,000 times in excess of applicable standards. Colorado declared a state of emergency as the Animas

turned an eerie fluorescent yellow. Local residents expressed concerns about their health and businesses were shut down.

EPA waited more than 24 hours before providing state and local officials with specific information about the incident and its potential health effects. It was later learned through a Freedom of Information Act request that, prior to the spill, the government “knew of a blowout risk for tainted water at the mine.” EPA Administrator Gina McCarthy accepted responsibility for the accident on behalf of the agency, stating she was “absolutely, deeply sorry that this ever happened.”

Under the Safe Drinking Water Act, EPA regulates lead in drinking water through the Lead and Copper Rule, which includes use of corrosion control to prevent lead from leaching into water. In a cost-cutting move in 2014, the city of Flint, Michigan, stopped purchasing treated water from the city of Detroit and began using the Flint River as its water source without providing corrosion control treatment. Several months later, following a number of boil-water advisories for the residents of Flint, tests confirmed the presence of unacceptable amounts of lead in its drinking water.

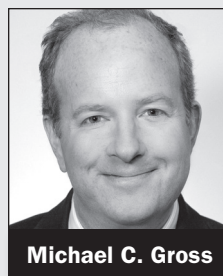
Residents began to complain to EPA about these concerns. A June 2015 internal EPA memo called the lack of corrosion control “a major concern.” Yet the agency took no immediate action and elected not to release the memo for more than four months so it could be “revised and fully vetted by EPA management.” By September, high levels of lead were confirmed through blood tests of children, and a month later, Flint was switched back to Detroit’s water system.

While EPA persists in arguing that fault lies with the Michigan Department of Environmental Quality, the EPA regional administrator was ultimately fired. McCarthy has since said, “We know Flint is a situation that never should have happened.” A member of Congress told McCarthy, “You had authority under the law and you didn’t do it.”

The environmental tragedies of the Animas and Flint appear to be accidents and not intentional bad acts. Both incidents demonstrate that EPA, charged with enforcing federal environmental laws and recommending civil matters for potential criminal enforcement to the Department of Justice, is not infallible. But unlike the regulated community, EPA enjoys sovereign immunity for these highly publicized environmental disasters.

Yet consider how private actors would have been treated in these circumstances. Under some current federal and state environmental laws, criminal prosecution and substantial civil penalties can be sought against private companies and individuals absent willful behavior for accidents which adversely impact the environment. These same players are also susceptible to follow-on civil lawsuits by private parties seeking restitution for resulting damages.

Criminal referrals and environmental prosecution should be limited to clear cases of intentional misconduct. In so doing, we can restore the public’s faith in the ability of environmental regulators to protect the environment and treat the regulated community fairly.



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