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IN THE STATUTES - By J. Daniel Hull, J.D.

This marks the first appearance of a new column by attorney Dan Hull on the legal, regulatory and legislative side of clean water issues. It will also appear in the next 5 issues of Water and Wastewater Products Magazine.

A Very Short History of Environmental Crime

“After becoming licensed,” he said, “your first duty to your clients is really this: not to let them go to jail.” In a candid moment, delivering the words slowly and soberly, my contracts law professor said this to my first year contracts class nearly 30 years ago. A few students seemed to quietly gasp for air. That was in the fall of 1975--shortly after Watergate peaked and a U.S. president himself narrowly escaped jail.

It was chilling. After all, this was just a contracts class (not ethics or criminal law)--he made the remark gratuitously. He was deadly serious, very engaged in the process of warning each one of us. Years would pass before his pronouncement had any import or gravity for me. At the time, I could not even imagine that a company officer, manager, lawyer, consultant, accountant or any other “white collar” could face criminal prosecution because he or she had merely done his or her job badly. To go to jail, you had to be very bad: commit fraud, do insider-trading, embezzle. The conduct had to be evil and extreme.

Pollution Becomes a Crime

A year before, in 1974, I had cheerfully labored in the office of a Wisconsin U.S. Senator who, in April 1970, had been successful in establishing the first Earth Day.¹ Part of my job as an intern was to help a “real” legislative assistant to the Senator develop and advise on health and environmental legislation. At the time, modern environmental law statutes like the Federal Water Pollution Control Act of 1972 (or “Clean Water Act”) were either brand new (Endangered Species Act, Coastal Zone Management Act) or still developing in the House and Senate committees (RCRA, SMCRA). Nearly all of the new legislation had criminal provisions--but no one really took the penalties that seriously. Sure, it was logical to criminalize some pollution and some companies should pay fines. But few people thought individuals would be prosecuted--much less jailed. By the late 1980's, all that changed.

With the exception of the National Environmental Policy Act of 1969, every federal pollution control law contains some criminal liability provision.² Criminalizing pollution is really not that new. The still-used Refuse Act of 1899, although primarily intended to protect navigation, made it unlawful “to throw, discharge, or deposit... [any refuse]... from or out of any ship, barge or other floating craft of any kind, or from the shore, wharf, manufacturing establishment or mill of any kind” into any navigable water of the United States.³ The Refuse Act, and its 1890 predecessor, also referred such violations for prosecution to the Justice Department.⁴ Subsequent laws included similar provisions. The Ocean Dumping Act of 1972, passed the same year as the Clean Water Act, criminalized non-emergency dumping of materials into the sea and punished dumpers with jail and fines.⁵ Even the Safe Drinking Water Act of 1974 contains a pre-9/11 prohibition against tampering with water supplies, and criminalizes

intentional pollution.⁶

Negligence Becomes a Crime, Too

For a criminal conviction, most U.S. environmental statutes require the government to prove that the defendant acted “willfully” or “knowingly” and not due to accident or mistake of fact. To prosecute, the government must charge that the violations were voluntary and intentional. However, the Federal Water Pollution Control Act, 33 U.S.C. §§1251-1376 (1972),

the first modern clean water legislation, rejected that principle, and changed the terrain forever. The new clean water program (1) set industry-by-industry effluent limitations for discharges, (2) set water quality requirements for receiving waters and (3) established a permitting program, the National Pollution Discharge Elimination System, or NPDES. It was much-needed legislation accompanied by strong media attention (in part because Congress in 1972 passed it over a presidential veto). What really grabbed the attention of everyone was that not just “bad faith” or deliberate (“willfully,” “knowingly”) acts or omissions would trigger criminal sanctions--under the 1972 Act, the Environmental Protection Agency (“EPA”) could ask the Justice Department to prosecute anyone who “willfully or negligently” violated the Act. CWA Section 309(c), 33 U.S.C. §1319(c) (1972). In short, the government need not even prove that the defendant--either corporation or individual--knew that the conduct was unlawful or intended for the conduct to occur. Negligence was enough.

The 1987 Clean Water Act Amendments

During the 1980's, environmental negligence flashed across our television screens: Love Canal (part of the impetus for CERCLA or Superfund), medical waste washing up on the nation's beaches, the Ashland oil spill in Pittsburgh, and an Exxon tanker called the Valdez

spilled 10 million gallons of petroleum into the Prince William Sound in the Gulf of Alaska. But for most people involved in water and wastewater issues it was business as usual. After passage in 1980, Superfund got off to an enthusiastic start. Congress began work on oil pollution prevention and community right-to-know legislation.

1987 was the year that Congress began to regulate stormwater discharges. The EPA was required to make a schedule (culminating in 1994) to promulgate regulations on stormwater discharges and to issue stormwater permits under the NPDES program. But the most remarkable aspect of the Water Quality Act of 1987 (“the CWA amendments”) was the creation of separate criminal negligence and felony provisions--in subsections 309(c)(1) and 309(c)(2), respectively. The categorization underscored Congress’ stated resolve to strengthen the enforcement provisions and make crystal clear its intention that negligence could be a crime.⁷ In the 1987 law, with respect to intentional crimes, the mens rea element of “willfully” in the 1972 Act was changed to “knowingly”--an arguably lesser mental state for the Justice Department to prove.

Under the Clean Water Act, negligent violations can now result in fines of \$2,500 to \$25,000 per day and imprisonment for one year. “Knowing” discharges resulted in twice these fines (\$5,000 to \$50,000) and up to 3 years imprisonment. In either case, moreover, the maximum penalties were doubled in a second conviction. Further, a person who “knowingly” violates a permit or other provision of the CWA and knows that he is placing “another person” in imminent danger of death or serious bodily injury is subject to fines of \$250,000 and imprisonment of up to 15 years. CWA Section 309(c)(3), 33 U.S.C. §1319(c)(3). Examples of “knowing endangerment” are knowingly contaminating a water supply or dumping hazardous waste into sewers or streams. Further, “false statement” penalties are imposed on persons who

make a false statement, representation or certification to government authorities. Tampering with a monitoring device is another crime. Section 309(c)(4), 33 U.S.C. §1319(c)(4). Finally, the penalties, including jail times, can now be imposed on just about anyone including “responsible corporate officers.” Section 309(c)(6), 33 U.S.C. §1319(c)(6).

Later Prosecutions Under the Clean Water Act

According to U.S. Department of Justice statistics, between 1987 and 1997, the total number of criminal cases brought under all U.S. environmental statutes was about 1350 (86 cases in 1987; 178 by 1997). Even though only about 90 cases were Clean Water Act negligence-based cases, and the number of negligence cases each year ranged from 2 to 14, the overall gradual increase for all prosecutions to 178 in 1997 was staggering. Also between 1987 and 2000, the government lodged a total of 117 CWA negligence-based cases--23 against individuals, 38 against corporations and 56 against both (of these cases, 104 were resolved with pleas, 7 with trials and 6 with both pleas and trials involved).⁸

While the Justice Department does not have completely accurate updated statistics on environmental prosecutions for the periods 1998 through 2004,⁹ there are substantial indications that (1) criminal prosecutions of environmental crimes generally against individuals will continue and (2) negligence-based CWA cases are not likely to wane--and may even increase. In United States v. Hanousek,¹⁰ a 1999 9th Circuit U.S. Court of Appeals decision, defendant Hanousek was a roadmaster and supervisor for an Alaskan railroad with a contract making him generally responsible for construction and maintenance of railroad track performed by contractors and subcontractors. Even though Hanousek was off duty at the time, and did not immediately learn of the spill, an employee of a contractor on the project accidentally struck an oil pipeline with a

backhoe, spilling up to 5,000 gallons of oil into the Skagway River. After a 20 day trial, Hanousek was convicted under the Clean Water Act's criminal negligence provisions for negligently discharging oil into a navigable waterway. He was sentenced to six months in jail, six months in a halfway house, six months of supervised release and a \$5,000 fine.

Hanousek was convicted even though he was neither directly involved in nor had any actual knowledge of the spill. In effect, what prosecutors did in Hanousek was prove (1) a violation occurred and (2) the supervisor failed to exercise reasonable care under the circumstances. Similarly, in the 2001 4th Circuit case United States v. Hong,¹¹ Hong was sentenced to 36 months in prison for multiple violations of the CWA (discharge of untreated wastewater into the Richmond, Virginia sewer system) as a "responsible corporate officer" even though Hong had no formal corporate position with the company which employed him. Like the 9th Circuit in Hanousek, the federal appeals court, in upholding the conviction, used an ordinary care negligence standard.

2005

So far in 2005, the Justice Department has been busy with Clean Water Act prosecutions against individuals on both intentional act and negligence-based theories. In January, a former official in the Delaware Department of Natural Resources pled guilty to CWA violations based on directing another state employee to discharge oil-contaminated water from a 350 gallon sump pit into wetlands (the sentence is pending; the maximum penalty is 3 years in jail and a \$250,000 fine). In March, a dairy farmer in Maury County, Tennessee pled guilty to negligent discharge of contaminated wastewater and milk wastewater into a local creek (3 years probation and \$35,000 fine). Also in March, an officer of a Detroit hazardous waste firm was sentenced to 27 months

imprisonment and fined \$60,000 after pleading guilty to felony violations of both CWA and RCRA. In April, the CEO of a Pennsylvania company which buys, distributes and sells photo processing machines was sentenced to 6 months house arrest, 36 months of supervised release and 160 hours of environmentally-related community service for discharging contaminants from the refurbishing process (silver, lead and chrome) into sewers. In that case, the defendant and the company were jointly ordered to pay \$750,000 in fines and additional monies for wetlands projects. Other indictments for CWA crimes have been issued in 2005.

Conclusion

It's true that negligence-based counts are often included along with intentional act counts in federal CWA prosecutions. And the facts of the cases briefly summarized above suggest that the Justice Department has utilized its discretion prudently by addressing the more egregious and alarming cases of "knowing" or "negligent" water pollution.

But a trend has emerged which few people thought was likely in the 1970's, when modern environmental law was in its gestation stage. First, the federal government has increased and maintained steady prosecutions of environmental crimes generally. Second, it has also shown a particular willingness to prosecute Clean Water Act violations under either "knowing" or "negligent" theories against individuals--and not merely against corporations.

The prosecutions have not varied in nature or numbers with Republican or Democratic administrations. They are here to stay--going to jail for negligent environmental acts is a distinct possibility even "good" or conscientious managers and employees must now face. Oddly, few industries have both established and complied with preventive and training programs which could make criminal indictments as rare as they once were. Given the stakes for companies and

well-meaning employees, that failure may be the oddest development of all.

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REFERENCES

1. Senator Gaylord Nelson (D-Wis) served in the U.S. Senate from 1963 to 1981.
2. E.g., Clean Water Act, 33 U.S.C. §1319(c), Safe Drinking Water Act, 42 U.S.C. §§300h-2(b); 300h-3(c); 300i-1; Clean Air Act, 42 U.S.C. §7413(c); Comprehensive Environmental Response, Compensation and Liability Act (“Superfund”), 42 U.S.C. §9603(b); Resource Conservation and Recovery Act, 42 U.S.C. §6928(d)-(f). Surface Mining Control and Reclamation Act, 30 U.S.C. §1268(e).
3. Rivers and Harbors Act of 1899 (or Refuse Act), 33 U.S.C. §407.
4. Id. §§411, 413.
5. Marine Protection, Research and Sanctuaries Act of 1972 (Ocean Dumping Act), 33 U.S.C. §1415(b).
6. 42 U.S.C. §§300h-2, 300i-1.
7. See, S. Rep. No. 50, 99th Cong., 1st Sess. 30 (1985); H.R. Conf. Rep. No. 1004, 99th Cong., 2d Sess. 178 (1986).
8. See S. Solow & R. Sarachan, “Criminal Negligence Prosecutions under the Clean Water Act”; ELR News and Analysis, 32 ELR 11153, 11155 - 11157 (Environmental Law Institute, 2002).
9. Part of the difficulty of maintaining accurate, updated statistics is that the Justice Department prosecutes environmental criminal cases out of both the Environmental Crimes section in Washington, D.C. and over 90 United States Attorneys’ offices nationwide. Moreover, neither the Department or EPA has a central reporting system for environmental crime proceedings. By far the best collection to date (through 2000) is contained in the Solow & Sarachan article cited above.
10. United States v. Hanousek, 176 F.3d 116 (9th Cir. 1999), cert denied, 528 U.S. 1102 (2000).
11. United States v. Hong, 242 F.3d 528 (4th Cir. 2001), cert denied, 534 U.S. 823 (2001).