



ENVIRONMENTAL CRIMINAL LIABILITY

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AGENDA

- Risk of environmental criminal liability
- Corporate and individual criminal liability
- Environmental criminal liability
- Prosecutorial discretion
- Prosecutorial tools
- Examples of environmental prosecutions
- Tips to reduce the risk of criminal liability



RISK

Assessing the Risk of Criminal Liability Statistics and Recent Developments

U.S. SENTENCING COMMISSION

Most common federal offense prosecuted against organizational offenders in 2015?

- 1st Environmental offenses (33.2%)
- 2nd Fraud (21%)
- 3rd Food and drug offenses (12.2%)



U.S. SENTENCING COMMISSION

Types of environmental pollution that were most commonly prosecuted in 2015?

- 1st Water (70%)
- 2nd Wildlife (16.7%)
- 3rd Hazardous materials (8.3%)
- 4th Air (5%)



WESTERN DISTRICT OF PENNSYLVANIA

- U.S. Attorney's Office for Western District of Pennsylvania began a "critical assessment" of environmental law enforcement in 2015
- Assembled team from EPA, FBI, DEP, and PA Attorney General's Office Env. Crime Section
- Examples of the kind of incidents underlying "critical assessment" (wastewater spills) suggested a focus on oil/gas development

PA ATTORNEY GENERAL'S OFFICE

- PA Attorney General Josh Shapiro appointed Steve Santarsiero as new Chief Deputy AG for Environmental Protection in May 4, 2017
- Makes good on Shapiro's campaign promise of "Getting Tough On Frackers"
- Campaign platform included "elevating" and "empowering" environmental crime section



PA ATTORNEY GENERAL'S OFFICE

- Shapiro also pledged increased coordination between DEP and the AG's Office
- To establish a task force of district attorneys to share information about environmental crime
- Tougher penalties for repeat offenders and violations close to schools and hospitals
- Shapiro endorsed by environmental groups

PA ATTORNEY GENERAL'S OFFICE

- Santarsiero has no experience as a prosecutor
- His authority also extends to civil and public protection divisions (not just criminal division)
- Former state representative, Bucks County
- Unsuccessful run for Congress (2016)
- Credited with persuading then-Gov Rendell to halt further leasing of state lands for drilling

PA ATTORNEY GENERAL'S OFFICE

- Santarsiero also sponsored environmental legislation while in the PA General Assembly
- P. Sponsor of HB 2030 (PA Climate Change Act)
- Sponsored HB 1918 (amending PA Safe Drinking Water Act); HB 100 (amending Alt. Energy Portfolio Standards Act); HB 1292 (fracking disclosure requirements); HB 500 (severance tax). Plus law enforcement bills

CRIMINAL LIABILITY

General Principles of Corporate and Individual Criminal Liability

FEDERAL CORPORATE CRIMINAL LIABILITY GENERALLY

- Term “person” often includes “corporations”
- Corporation is liable for the criminal acts of its employees done within scope of their employment with intent to benefit corporation
- “Scope of employment” has been defined to include all those acts falling within the employee's or agent's general line of work, when they are motivated—at least in part—by an intent to benefit the corporate employer

STATE CORPORATE CRIMINAL LIABILITY GENERALLY

- At state level, a corp. can be found criminally liable:
 1. Criminal acts of agents/employees on behalf of corp. within scope of employment & offense is summary offense/non-Title 18 offense applicable to corps
 2. Offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations
 3. Commission of offense authorized, requested, commanded, performed or recklessly tolerated by board/high managerial agent acting on behalf of corp. within scope of office/employment. 18 Pa.C.S. § 307(a)

STATE CORPORATE CRIMINAL LIABILITY GENERALLY

- Under state law, defense to criminal liability under 18 Pa.C.S. 307(a) (except in cases of strict liability) if corporation proves by preponderance of evidence that high managerial agent having supervisory authority over the subject matter of the offense employed due diligence to prevent its commission.
- 18 Pa.C.S. § 307(d)



STATE ENVIRONMENTAL CORPORATE CRIMINAL LIABILITY

- PA Clean Streams Law provides: “With respect to the offenses specified in this section, it is the legislative purpose to impose liability on corporations as set forth in 18 Pa.C.S. § 307 (relating to liability of organizations and certain related persons).” 35 P.S. 691.602(f).
- PA Solid Waste Management Act provides: “With respect to the offenses specified in subsections (a), (b), (c), (d), (e), (f) and (g), it is the legislative purpose to impose liability on corporations.” 35 P.S. 6018.606(j).

STATE ENVIRONMENTAL CORPORATE CRIMINAL LIABILITY

- Imposing absolute vicarious liability under Solid Waste Management Act on corporation, which operated a hazardous and residual waste treatment, storage and disposal facility, for criminal conduct of truck driver, who was engaged by trucking company hired to transport processed waste, was constitutional. *Waste Conversion Inc. v. Commonwealth*, 568 A.2d 738 (Pa.Cmwth. 1990).



INDIVIDUAL ACCOUNTABILITY CORPORATE WRONGDOING

- Under federal law, individuals who commit federal crimes on behalf of a corporate entity are not absolved from criminal liability.
- Individual who causes a corporation to commit a crime is criminally liable for the corporation's criminal conduct as an aider and abettor even if the corporation does not act with a knowing mental state. *U.S. v. Sain*, 141 F.3d 463 (3d. Cir. 1998).

INDIVIDUAL ACCOUNTABILITY CORPORATE WRONGDOING

- Under federal “responsible corporate officer doctrine,” a corporate officer who stands in a “responsible relation to a public danger” can be convicted for criminal acts of corporation when the officer had the responsibility and authority to prevent or promptly correct the unlawful conduct but failed to do so. *U.S. v. Park*, 421 U.S. 658 (1975).



INDIVIDUAL ACCOUNTABILITY CORPORATE WRONGDOING

- Federal responsible corporate officer doctrine applies to highly-regulated industries
- Doctrine created and applied most frequently in the context of the Federal Food Drug & Cosmetic Act (“*Park Doctrine*”)
- Also has been applied in the context of the RCRA. *U.S. v. Conservation Chemical Co. of Illinois*, 733 F.Supp. 1213 (N.D. Indiana 1989)

INDIVIDUAL ACCOUNTABILITY CORPORATE WRONGDOING

- According to U.S. Sentencing Commission, nearly 60% of all organizational prosecutions involved at least one employee or agent who was also prosecuted
- Likely to rise under new policy issued by U.S. Justice Department on September 9, 2015
- Policy issued to AAG's & U.S. Attorneys, including AAG Environment/Natural Resources



INDIVIDUAL ACCOUNTABILITY CORPORATE WRONGDOING

- Commonly referred to as the “Yates Memo”
- Policy places greater emphasis on individual accountability for corporate wrongdoing
- Was this a response to negative press?
- **FIRMS GET PENALIZED, BUT MANY WORKERS DON'T** (*Some Criticize Government As Firms, Not Employees, Take the Hit*). Wall Street Journal, January 16, 2014.

INDIVIDUAL ACCOUNTABILITY CORPORATE WRONGDOING

- “One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.”
- “Fundamentally, this memo is designed to ensure that all attorneys across the Department are consistent in our best efforts to hold to account the individuals responsible for illegal corporate conduct.”

INDIVIDUAL ACCOUNTABILITY CORPORATE WRONGDOING

- Policy includes six steps to increase individual accountability for corporate wrongdoing:
 1. In order to qualify for any cooperation credit, corporations must provide USDOJ with all relevant facts relating to the individuals responsible for the misconduct
 2. Criminal/civil corporate investigations must focus on individuals from start of investigation
 3. Criminal and civil attorneys handling corporate investigations must communicate

INDIVIDUAL ACCOUNTABILITY CORPORATE WRONGDOING

4. Absent extraordinary circumstances or approved department policy, USDOJ will not release culpable individuals from liability when resolving a matter with a corporation
5. USDOJ attorneys should not resolve matters with a corporation without a clear plan to resolve individual cases
6. Civil attorneys should focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond ability to pay

INDIVIDUAL ACCOUNTABILITY CORPORATE WRONGDOING

- Under PA statute, individual legal accountable for acts of corp. if:
 1. Individual performs act in the name of corp.
 - or*
 2. Individual has primary responsibility for discharge of duty imposed on corp. by law and recklessly fails to perform duty. 18 Pa.C.S. § 307(e).
- Under PA case law, individuals subject to criminal prosecution for acts of corporation where individual personally so dominated and controlled corporation as to immediately direct its action. *Com v. Wood*, 637 A.2d 1335 (Pa.Super. 1994).

INDIVIDUAL ACCOUNTABILITY CORPORATE WRONGDOING

- Definition of “person” under Solid Waste Management Act states: “In any provisions of this act prescribing a fine, imprisonment or penalty, or any combination of the foregoing, the term ‘person’ shall include the officers and directors of any corporation or other legal entity having officers and directors.” 35 P.S. § 6018.103.
- Definition of “person” under Clean Streams Law states: “Whenever used in any clause prescribing and imposing a penalty, or imposing a fine or imprisonment, or both, the term “person” shall not exclude the members of an association and the directors, officers or agents of a corporation.” 35 P.S. § 691.1.

ENVIRONMENTAL CRIMES

Federal and State Environmental Crimes



FEDERAL POLLUTION CRIMES

- Act to Prevent Pollution from Ships (APPS), 33 U.S.C. § 1908
- Atomic Energy Act, 42 U.S.C. § 2271 et seq.
- Clean Air Act (CAA), 42 U.S.C. § § 7401-7671
- Comprehensive Environmental Response, Compensation & Liability Act (CERCLA), 42 U.S.C. § § 9601-9675
- Deepwater Port Act, 33 U.S.C. § § 1501-1524
- Emergency Planning and Community Right to Know Act (EPCRA) (also known as SARA Title III), 42 U.S.C. § § 11001-11050
- Energy Supply and Environmental Coordination Act, 15 U.S.C. § § 791-798
- Federal Hazardous Material Transportation Law, 49 U.S.C. § § 5101-5127
- Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § § 136-136y
- Federal Water Pollution Control Act (FWPCA)(also known as the Clean Water Act (CWA)), 33 U.S.C. § § 1251-1387



FEDERAL POLLUTION CRIMES

- Noise Control Act, 42 U.S.C. § § 4901-4918
- Ocean Dumping Act (ODA), 33 U.S.C. § § 1401-1445
- Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § § 1331-1356
- Ports and Waterways Safety Act, 33 U.S.C. § § 1221-1236
- Rivers and Harbors Appropriations Act, 33 U.S.C. § § 401-467
- Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § § 6901- 6992k
- Safe Drinking Water Act (SDWA), 42 U.S.C. § § 300f-300j-26
- Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § § 1201-1328
- Toxic Substances Control Act (TSCA), 15 U.S.C. § § 2601-2692



FEDERAL WILDLIFE CRIMES

- Endangered Species Act, 16 U.S.C. § 1531
- Bald and Golden Eagle Protection Act (BGEPA), 16 U.S.C. § 668
- Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 707
- The Lacey Act, 16 U.S.C. § 3372



STATE ENVIRONMENTAL CRIMES

- Solid Waste Management Act, 35 P. S. § 6018.606
- Clean Streams Law, 35 P.S. § 691.602
- Air Pollution Control Act, 35 P.S. § 4009
- Oil and Gas Act, 58 Pa.C.S. § 3255
- Propane & Liquefied Petroleum Gas Act, 35 P.S. § 1329.17
- Dam Safety and Encroachments Act, 32 P.S. § 693.22
- Safe Drinking Water Act, 35 P.S. § 721.13
- Storage Tank & Spill Prevention Act, 35 P.S. § 6021.1306
- Bituminous Coal Mine Safety Act, 52 P.S. 690-505
- Hazardous Sites Cleanup Act, 35 P.S. § 6020.1105



STATE ENVIRONMENTAL CRIMES

- Hazardous Material Emergency Planning and Response Act, 35 P.S. § 6022.302
- Land Recycling and Environmental Remediation Standards Act, 35 P.S. § 6026.905
- Waste Tire Recycling Act, 35 P.S. § 6029.108
- Low-Level Radioactive Waste Disposal Act, 35 P.S. § 7130.504
- Worker and Community Right-To-Know Act, 35 P.S. § 7316
- Carbon Monoxide Alarm Standards Act, 35 P.S. § 7226
- Environmental Laboratory Accreditation, 27 Pa.C.S. § 4110
- Clinical Laboratory Act, 35 P.S. § 2164
- Infectious and Chemotherapeutic Disposal, 35 P.S. § 6019.6

ENVIRONMENTAL CRIMES

- Common formula for criminal liability
- Violation of act, rules/regulations, order, permit conditions often a summary or low-level misdemeanor (sometimes on a strict liability theory)
- Grading may increase to serious misdemeanor or felony if: intentional, knowing, reckless, gross negligence; false statements; repeated violations; and/or hazardous waste or substance

PROSECUTORIAL DISCRETION

How Do Prosecutors Decide Whether to Prosecute Environmental Violators

PROSECUTORIAL DISCRETION CORPORATIONS

U.S. Attorney's Manual, 9-28.300



- Nature and seriousness of offense
- Pervasiveness of wrongdoing within the corporation
- The corporation's history of similar misconduct, including prior criminal, civil and regulatory enforcement actions
- Timely disclosure and cooperation
- Effectiveness of corporation's pre-existing compliance program

PROSECUTORIAL DISCRETION CORPORATIONS

- The corporation's remedial actions, including any efforts to implement an effective corporate compliance program and/or replace responsible management
- Collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others
- The adequacy of the prosecution of individuals responsible for the malfeasance
- The adequacy of remedies such as civil or regulatory enforcement actions

PROSECUTORIAL DISCRETION INDIVIDUALS

- U.S. Attorney's Manual, 9-27.230
 - Federal law enforcement priorities
 - Nature and seriousness of offense
 - Person's culpability for offense
 - Criminal history
 - Willingness to cooperate
 - Interest of victims
 - Probable sentence if convicted



CRIMINAL INVESTIGATIVE TOOLS

This is **NOT** Civil Litigation

CRIMINAL INVESTIGATIVE TOOLS

- Grand Jury subpoena for testimony
- Grand Jury subpoena for physical evidence
- Search warrants
- Electronic surveillance
- Forensic examinations



CONSTITUTIONAL RIGHTS OF CORPORATIONS

- *Ex Post Facto*
- First Amendment
- Fourth Amendment
- Due Process
- Double Jeopardy
- Right to Counsel
- No Right Against Self Incrimination



ENVIRONMENTAL PROSECUTIONS

Recent Examples of Federal and State Prosecutions

VOLKSWAGEN AG

- On April 21, 2017, VW was sentenced in federal court to a fine of \$2.8 billion after pleading guilty to:
 1. Conspiracy to defraud the United States, engage in wire fraud, and violate the Clean Air Act
 2. Obstruction of justice
 3. Importation of merchandise by means of false statements
- Charges stemmed from the company's decade-long scheme to sell "clean diesel" vehicles containing software designed to cheat on U.S. emissions tests
- VW also agreed to pay \$1.5 billion in civil penalties and \$14.7 billion in restitution to consumers

VOLKSWAGEN AG

- Six VW corporate executives also charged with conspiracy to defraud the United States, defraud VW's U.S. customers and violate the Clean Air Act by making false representations to regulators and the public regarding "clean diesel" vehicles
 1. Heinz-Jakob Neusser – Development, board member
 2. Jens Hadler – Engine Development
 3. Richard Dorenkamp – Engine Dev. After-Treatment Dept.
 4. Bernd Gottweis – Quality Mgmt. and Product Safety
 5. Oliver Schmidt – Environmental and Engineering Office
 6. Jürgen Peter – Quality Mgmt. and Product Safety, regulatory

XTO ENERGY

- XTO Energy charged with criminal violations of the Pennsylvania Solid Waste Management Act and Pennsylvania Clean Streams Law.
- Charges predicated on the alleged discharge of over 50,000 gallons of waste water.
- Discharge alleged to have occurred from a group of storage tanks located in Penn Township, Lycoming County, Pennsylvania.

XTO ENERGY

- Valves located on the front and rear of the storage tank could be opened to allow water to be pumped into and out of the tank.
- Valve on rear of tanks was fitted with a four-inch threaded plug.
- To empty storage tank using rear valve, would need to remove the plug and open the valve.

XTO ENERGY

- XTO Energy hired Clark Trucking to transport waste water to the storage tanks.
- XTO Energy hired Bosque Disposal Systems to recycle the waste water until XTO could construct a processing facility.
- XTO Energy began to store waste water at the Marquardt site in October 2010.
- Bosque was on site recycling waste water from November 4-11, 2010.

XTO ENERGY

- When Bosque left effective November 12, 2010, Tank 18174 was approximately $\frac{3}{4}$ full.
- Tank 18174 was attached to five other tanks that were connected by a manifold system.
- XTO Energy continued to accept deliveries and store waste water at the Marquardt site.
- Records indicated approximately 93,750 gallons of waste water were delivered from November 12-16, 2010.

XTO ENERGY

- On November 16, 2010, DEP conducted an unannounced inspection at the site.
- Although it was raining steadily, the DEP official heard the sound of running water coming from the rear of a storage tank.
- The DEP official noted that the drain plug had been removed from the rear of Tank 18174 and the rear valve was partially open.
- Water was flowing out of the valve and onto the ground behind the tank and into a local tributary.

XTO ENERGY

- The DEP official noticed that the drain plugs of many other tanks were laying on the ground below the tanks or missing altogether.
- The DEP official also noticed that while the rear valves of the other tanks were closed, liquid and sand were present in several valves.
- The DEP official also noticed sand and displaced gravel on the ground underneath one of the tanks with a missing rear valve.

XTO ENERGY

- The DEP official returned to the site the following day on November 17, 2010.
- He noticed dead vegetation behind Tank 18174 that had been leaking the day before.
- He also noticed sand and displaced gravel on the ground underneath the rear valve of another tank connected to Tank 18174.
- Only a few inches of water remained in tank.

XTO ENERGY

- Samples of the water on the ground at the site revealed elevated levels of chlorides, barium, strontium, and total dissolved solids.
- Samples from the tributary revealed elevated levels of chlorides, aluminum, barium, and total dissolved solids.
- In total, 57,000 gallons of waste water were unaccounted for at the site.

XTO ENERGY

- In July 2013, DOJ/EPA reached an agreement with XTO Energy over the incident (Clean Water Act). Imposed \$100,000 fine and comprehensive plan to improve wastewater management practices.
- Consent Decree “expressly does not resolve any enforcement action of the Commonwealth of Pennsylvania under any federal and state law and any such claims are not precluded or limited in any way by resolution of this matter.”
- State Attorney General filed charges in Sept 2013.
- After costly legal battle, XTO Energy admitted to ARD program.

THE CASE AGAINST XTO ENERGY LIKELY PROSECUTORIAL FACTORS

- Tank leaking when it's raining out.
- Valve partially open.
- Valve plugs removed.
- XTO Operations Supervisor told DEP it was vandalism. No report.
- XTO later stated it was a mistake. Conflicting explanations.

THE CASE AGAINST XTO ENERGY

KEY PROSECUTORIAL FACTORS

- No locks on tanks
- No secondary containment
- Site not secured, no personnel, fences, or security cameras



WHAT COMPANIES SHOULD DO?

- Strong pre-existing compliance program
- Recognize danger signs (major incident causing widespread harm or serious bodily injury/death; false statements; poor compliance history; criminal investigators involved; grand jury subpoenas)
- Prevent/mitigate harm to public

WHAT SHOULD COMPANIES DO?

- Communications discipline
- Involve criminal defense counsel early
- Conduct internal investigation to determine what happened & who was involved
- Spot conflicts, assign individual counsel
- Establish rapport with investigators
- Hold persons responsible accountable

QUESTIONS?



THANK YOU!

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