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Increased Risk of State Prosecution for Environmental Crimes

by Andrew S. Levine and Michael J. Engle

Typically, new presidential administrations make loud proclamations about new environmental enforcement initiatives, including a focus on certain environmental crimes. While their vigor in environmental enforcement has differed, no team in recent memory has taken over at the U.S. Environmental Protection Agency (EPA) with so little information about prosecutorial priorities. Frankly, the Trump team has been more invested in rolling back regulatory initiatives of prior administrations and restoring the illusion of a robust coal economy, than it has been about forewarning regulated parties about new avenues of investigation. Prosecutions continue to be sure, as documented on DOJ's website (https://www.justice.gov/enrd/selected-publications/environmental-crimes-monthly-bulletins-2015-2006), with the typical focus on improper waste disposal, chemical sampling and endangered species trading.

However, in the absence of enforcement activity at the federal level, which seems likely, Pennsylvania Attorney General Josh Shapiro has made it clear that his office will react. In particular, Shapiro's office intends to pursue a heightened review of companies and practices related to the unconventional extraction of natural gas (https://www.joshshapiro.org/agenda/getting-tough-on-frackers/), which involves not only new well pad sites, but also substantial, related pipeline developments. As a consequence, we believe it is worth exploring two distinct areas of criminal exposure to determine if there are factors that favor of criminal rather than civil enforcement of a violation: construction activities within exceptionally valued waterways (including wetlands) and upon or near the habitats of endangered species.

Valued Waterways

Construction of fracking wells for the extraction of natural gas and pipeline networks often put workers into remote areas. Surprisingly, a state-by-state analysis (http://klabergroup.com/insights/?Considering-Water-A-state-by-state-analysis-of-our-relationship-with-waterways-2) determined that Pennsylvania has the highest stream density in the country with a relatively low incidence of steam proximity. This implies that many important waterways in isolated areas with valuable wildlife habitat for endangered species may be located in proximity to fracking wells and pipelines.

Environmental criminal cases brought exclusively within Pennsylvania have been infrequent as compared to cooperative prosecutions with federal authorities. Federal efforts, with which the Commonwealth routinely cooperates, have predominated. For example, in 2017 a wastewater trucking driver who caused significant environmental harm by dumping surfactant-laden wastewater into Ohio rivers was sentenced to prison for several Clean Water Act felonies. A significant fine and lengthy probation were also imposed upon a wastewater sampler that manipulated data to conceal analytical exceedances. And in 2016, another wastewater operator was sentenced to more than two years' incarceration for illegally discharging fracking water.

The Trump administration has not prioritized such prosecutions, paving the way for more aggressive state-based actions and raising the question as to whether existing statutes, such as the Clean Streams Law (CSL), are adequate.

In the highest profile environmental criminal case recently brought by a Pennsylvania attorney general, XTO Energy allegedly dumped toxic wastewater from a Marcellus Shale well site. The state filed criminal charges against XTO under the CSL and the Solid Waste Management Act. This case was one of the first instances in which a shale company was charged with criminal offenses. Although this case came on like a lion, it was resolved using the state's accelerated rehabilitative disposition program (ARD) – a process generally applied to drunk drivers with no prior record who are seeking to avoid trial. Nevertheless, industry executives expressed concern over the prosecution since the company had previously settled with the EPA and Justice Department over the same incident. Further, substantial criticism was leveled against then-Attorney General Kane for bringing criminal charges because there did not appear to be specific intent to circumvent the law or to cause egregious harm to the environment.

However, criminal conduct under the CSL has no intent requirement or any need for a prosecutor to demonstrate egregious harm – it is a strict liability standard under 35 P.S. § 691.602(a). The Superior Court made it clear that specific intent was not a required criminal element in *Commonwealth v. Sonneborn*. In this 1949 Superior Court case, the defendants filled two lagoons on their property with acidic sludge that they drained into Bear Creek. The concept of intent was addressed again in *Commonwealth v. Peggs Run Coal Co.*, in which the Commonwealth charged the defendant with discharging debris- and silt-laden water from its impounding lagoons into Peggs Run in violation of its mining permit. The court held the defendant violated the CSL, despite the defendant's contention that it had no intent to discharge the material.

Although the CSL dictates strict liability for a violating individual or entity, courts do require proof beyond a reasonable doubt that the individual or entity is responsible for the violation before the Commonwealth can impose criminal liability. For example, in *Commonwealth v. Baumgardner Oil Co.*, the trial court dismissed a case against an oil company because the Commonwealth did not present sufficient evidence to link a discharge of oil to the defendant. However, as long as the Commonwealth can provide the requisite evidence of causation, criminal liability can be in the offing.

Under CSL § 602(b), a finding of negligence is all that is necessary to elevate the criminality from a summary offense to a second degree misdemeanor. In the 2000 case of *Westinghouse Electric Corporation v. Pennsylvania Department of Environmental Protection*, the Environmental Hearing Board upheld a significant penalty based on the duration and severity of the violations, which amounted to negligence, and rejected the defendant's argument that a severe penalty is only appropriate where the Commonwealth establishes intentional or reckless conduct. While not a criminal case, the opinion articulates the principle that no finding of egregious conduct is needed to aggressively prosecute a negligent violation of the CSL, whether civilly or criminally. In the event there is a finding of intent, then a third degree felony charge could result, carrying up to a seven-year prison sentence. Moreover, Pennsylvania law makes it clear that these statutory provisions apply to business entities, not only individuals, per 18 Pa.C.S. § 307.

Given the documented density of Pennsylvania's waterways – especially in undeveloped regions attractive to midstream development and gas extraction because of their distance from dense population centers that may complicate siting – the potential for a release of sediments, chemicals or fuels militates in favor of careful practices to avoid enforcement actions. More to the point, accepting the principle that statistically some excursions are likely, companies would be well advised to promptly investigate and remedy spills, and provide the requisite notice to governmental authorities quickly. While the face of the CSL provides a low threshold for criminal exposure, as a practical matter the Commonwealth tends to focus on uncooperative or clandestine conduct.

Matters such as the XTO prosecution also bring into question whether prosecutors politically benefit from taking highly aggressive stances in asserting criminal liability (even if the matter ends in a whimper). Where an ambitious state prosecutor notes a lack of federal enforcement initiative, state officials may seek to expand the parameters of their own environmental criminal statutes. The intersection of the CSL, exceptional value wetlands and waterways, and state wildlife protection acts could prove to be a strong prosecutorial cocktail.

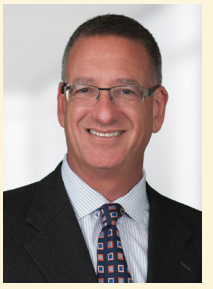
Endangered Species Habitats

As noted above, while the CSL allows for mere negligence to constitute a misdemeanor, certain additional factors may make the tilt toward criminal charges more manifest. An exceptional value wetland in Pennsylvania typically contains one or more threatened or endangered species or is closely connected to another wetland with such characteristics. A small release of fuel or contaminated sediment into, or the careless operation of a vehicle upon such a body of water could provide the components necessary for criminal prosecution. Many midstream developers seek to avoid such liability by directionally drilling beneath such sites, but that does not eliminate the potential for upwellings or inadvertent returns. Prosecution is a risk if bentonite and other sediments in the return foul or destroy endangered species habitat, or outright kill such organisms. However, unlike any number of pollution control statutes – such as the Clean Air Act, Solid Waste Management Act and the Clean Water Act – there is no specific means by which a state can demonstrate equivalency to the Endangered Species Act to undertake enforcement.

States have traditionally cooperated in federal prosecutions. However, it is unclear how states will respond if the federal government vastly reduces their commitment, or fails to undertake such initiatives. Most enforcement cases involving endangered or threatened species prosecuted under Pennsylvania law center around illegal hunting or the use of illicit hunting tactics. Most references to endangered species within the Commonwealth pertain to exclusionary criteria or permitting limitations, as recently seen in *Friends of Lackawanna v. DEP and Keystone Sanitary Landfill*. There are no recent state-only endangered species criminal enforcement matters publicly reported concerning midstream or well pad development, but Section 925 of the Commonwealth Game and Wildlife Code clearly spells out criminal offenses that carry up to three years' imprisonment. The taking of an endangered species as a result of a spill or careless construction techniques associated with pipeline or well pad development could be considered an unlicensed or permitted hunt and result in a stand-alone prosecution of the Game and Wildlife Code. In the alternative, or perhaps as an additional count, such a cull could constitute the type of conduct that exacerbates the severity of a CSL prosecution as well.

Conclusion

In light of the perception that the federal government is abandoning its role as guardian of the environment, regulated parties should still consider maintaining robust internal control systems to detect and remedy any environmental violations. Ambitious state attorneys general many yet step in to fill the void that may be created by the receding of federal initiatives. Parties involved in rectifying environmental violations should carefully consider the potential for criminal sanctions, and customize their approach to resolving violations by consulting with counsel well-versed in both civil and criminal liability implications.



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