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STAYING OUT OF HOT WATER: How to Avoid Criminal Liability

WHAT IS AN ENVIRONMENTAL CRIME?

Any illegal act that directly harms the environment.

Criminal enforcement is often used against the most serious environmental violations as well as those which involve egregious negligence or conduct involving intentional, willful or knowing disregard of the law.



Pollution Crimes

- Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671
- Comprehensive Environmental Response, Compensation & Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675
- Resource Conservation and Recovery Act (RCRA)), 42 U.S.C. §§ 6901- 6992k
- Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2692
- Emergency Planning and Community Right to Know Act (EPCRA or SARA Title III), 42 U.S.C. §§ 11001-11050
- Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f-300j-26
- Federal Water Pollution Control Act (FWPCA or CWA)), 33 U.S.C. §§ 1251-1387
- (and several others)

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

**As well as,
corresponding state
environmental statutes.**

AGENCIES WITH INVESTIGATORY CAPABILITIES

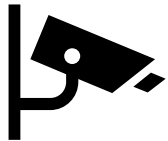
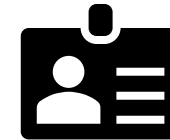
Federal:

- EPA Criminal Investigation Division [CID]
 - National Enforcement Investigation Center in Denver
 - Regional Offices throughout the country
- Department of Justice



State:

- Louisiana DEQ Criminal Division; Louisiana State Police; Louisiana Department of Natural Resources, Louisiana Fish & Wildlife
- TCEQ Environmental Crimes Unit



Other agencies:

- US Coast Guard; FBI and Secret Service; U.S. Dept. of Defense Criminal Investigative Service; Naval Criminal Investigative Service; U.S. Custom Service; U.S. Dept. of Homeland Security; U.S. Dept. of Transportation



STATUTORY ELEMENTS

- Actus Rea:
 - A violation of the statute, regulatory, or permit requirements.
 - False reporting
 - Tampering
- Mens Rea:
 - Knowing or intentional
 - Criminally negligent
- Some of these statutes have enhanced penalties for knowing endangerment of human lives

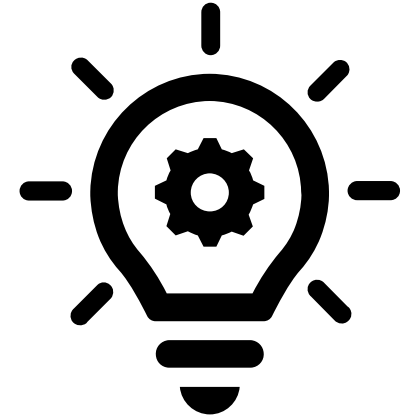


TO ACT KNOWINGLY, INTENTIONALLY, OR WILLFULLY

- **Knowingly**: requires proof of knowledge of the facts that constitute the offense
- **Intentionally**: requires desire to engage in the conduct or cause the results.
- ***You do **not** need to know that the conduct is illegal.***
- **Willfully**: requires that the person knowingly acted with intentional disregard or indifference to the requirements.

CRIMINAL NEGLIGENCE

- Some statutes have criminal negligence provisions
- Clean Air Act criminal negligence provision allows prosecution of any negligent release of a pollutant into the air, negligently placing another person in imminent danger of death or serious bodily injury
 - Seems narrow on its face
 - But the release itself does not have to be a violation of any other requirement of the CAA, so it might apply in more situations
- Clean Water Act criminal negligence provision allows prosecution of any negligent violation of any substantive requirement of the CWA



There is **no need to intend a violation** – can be criminally liable by accident

ENVIRONMENTAL CRIMINAL STATUTES

LOUISIANA ENVIRONMENTAL QUALITY ACT: LA. R.S. 30:2025(F)

- **Felony** (up to \$1 million or 10 years imprisonment)
 - willfully or knowingly discharge, emit, or dispose of any **substance that could endanger human life or health** in contravention of any the LEQA, regulations, or permit shall be guilty of a felony
 - **Misdemeanor** (up to \$25,000 or 1 year imprisonment)
 - willfully or knowingly discharge, emit, or dispose of **any substance that does not endanger human life or health** in contravention of any the LEQA, regulations, or permit shall be guilty of a felony, be fined up to \$1 million, or be imprisoned up to 10 years.
 - Willfully or knowingly violates fee or filing requirements
 - Willfully or knowingly makes any false statement, representation, or certification on any document filed or required to be maintained under this Subtitle
 - Willfully or knowingly falsifies or tampers with any monitoring device
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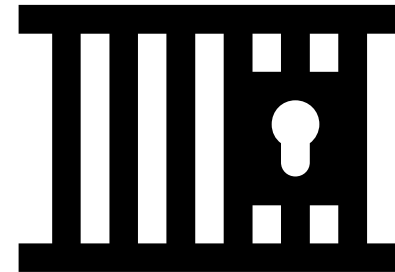
CLEAN AIR ACT

- Violation of NESHAP, NSPS, SIP, Stratospheric Ozone Protection Provisions
- False Statements in CAA Documents
- Tampering with Monitor Device or Method
- Knowing Failure to Notify or Report
- Knowing/ Negligent Endangerment
- Violation of Operating Permits Provisions
- Violation of an Emergency Order



CERCLA/EPCRA: NEGLIGENT ENDANGERMENT

- Negligent endangerment -
1-year imprisonment and fines
- Knowing endangerment
15-year imprisonment and fines
- Both negligent and knowing endangerment apply only to actual releases of hazardous and extremely hazardous pollutants regulated under CERCLA/EPCRA



- Gov. only needs to show actions created **a risk** of harm, not that the actions created actual harm

FALSE STATEMENTS ACT – 18 USC 1001

- Applicable to any statement made to the federal government, either oral or written
- Given the significant electronic filings and paperwork, companies and personnel face a significant risk for false statements
- Nearly all environmental rules and permits require a responsible party to certify that the information being reported is true, accurate, and based upon reasonable inquiry.
- 18 U.S.C. 2(b) makes it an offense to cause another person to perform an act that would violate federal criminal law
 - Sometimes used in conjunction with 18 U.S.C. 1001 so that **making a false statement or report to another person who will then report that information to the federal government may also be a criminal act.**

MAIL FRAUD – 18 USC 1341

- Elements
 - Use of the United States Postal Service or a private commercial interstate carrier
 - To receive or deliver a document
 - To further a scheme or artifice intended to defraud (i.e. misrepresentation or concealment of a material fact)
 - In order to obtain money or property
- Increasingly used against laboratories and contractors who falsify environmental documents and then charge company for work not done
- There is a similar statute for “wire” fraud

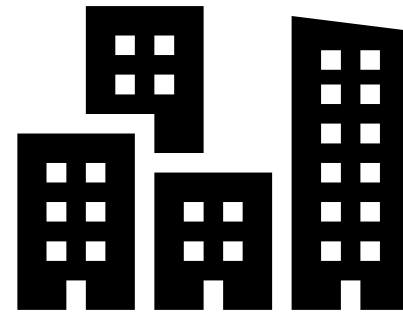
WHO FACES LIABILITY?

WHO IS LIABLE FOR ENVIRONMENTAL CRIMES?

- All statutes refer to a **“person”**
- “Person” can be an individual, partnership, corporation or other legal entity

CORPORATE AND INDIVIDUAL LIABILITY

- Business entities have long been subject to criminal prosecution for an unlawful act of one or more of their employees where:
 - the crime was committed within the scope of the employee's employment and
 - with the intent to benefit the corporation.
- A corporation may be held criminally liable for unlawful acts of both high-level **and low-level** employees.
- Corporate officers are no longer immune from criminal prosecutions.



RESPONSIBLE CORPORATE OFFICIAL

- The “**responsible corporate official**” doctrine holds that corporate officers and upper management employees may be held criminally liable where:



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- corporate officer or supervisor knowingly authorizes or directly participates in the unlawful activity
- corporate officer or supervisor indirectly participates in such activity as a conspirator or aider-abettor
- corporate officer or supervisor has purposely sheltered himself from illegal acts which occur within the scope of his authority (the “willful blindness” theory of criminal liability).

CONSCIOUS AVOIDANCE

- Supervisors who have a duty to ensure environmental compliance cannot **consciously avoid** information that would indicate their employee is committing a crime. This could lead to criminal liability
- Indications of conscious avoidance
 - History of violations, including prior criminal activity on part of employees
 - **Failure to audit or review employees to whom environmental compliance is delegated**
 - Strong circumstantial evidence of knowledge of violation and failure to correct



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PERSONAL INVOLVEMENT

- Facts indicating “personal involvement” include:
 - **Responsibility** for the day-to-day operation at issue
 - **Knowledge** of the environmental requirements
 - Participation in the environmental permitting and recordkeeping or reporting at issue
 - Setting requirements or goals for subordinates that can be achieved only illegally [overburdened employee cannot possibly comply]
 - Encouraging cutting corners [or encouraging underreporting]
 - Delegating significant and unsupervised responsibility to persons with a propensity to engage in illegal activities
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BEST PRACTICES

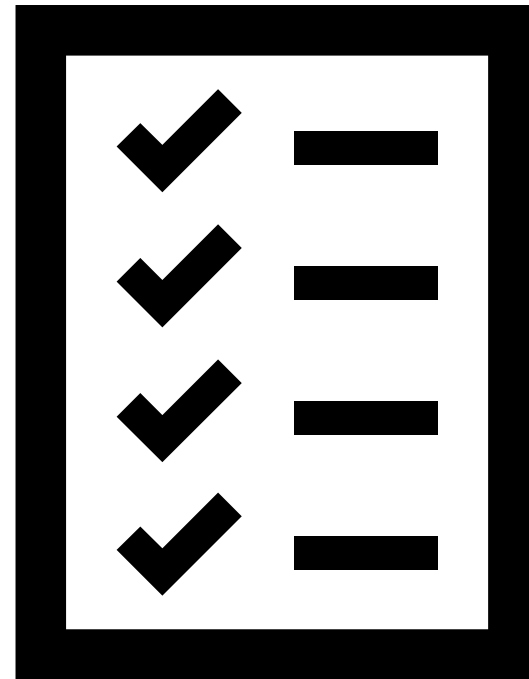
**DO NOT LIE
TO THE
AGENCY**

BEST PRACTICES

- ALWAYS TELL THE TRUTH!
- Follow the statutory, regulatory, and permit requirements.
- Read what you sign to ensure accuracy.
- Review work that others complete.
- If you are questioning whether a practice is allowable, consider an internal investigation.
- If you realize that something was done wrong, fix it.
 - Some of these are minor changes.
 - If it's a bigger item, you may want help bringing it to the agency.
- DO NOT LIE TO THE AGENCY!

MORE BEST PRACTICES

- Identify potential areas for government focus in advance to ensure that compliance is targeted in those areas
- Conduct internal audits regularly and carefully to develop a record of compliance
- Emphasize monitoring and sampling techniques in your compliance programs
- Respond quickly and effectively to potential problems and document the response
- Properly maintain and update record-keeping systems to avoid potential errors that can be used as evidence in false statement prosecutions



EXAMPLES OF CRIMINAL LIABILITY

MORTON INTERNATIONAL, INC.

- Moss Point Mississippi facility produces plasticizers, synthetic rubber, rocket polymers, and other chemicals and adhesives
 - In 1996, an EPA inspector conducting an evaluation of the facility discovered what appeared to be falsified DMRs submitted to the MDEQ.
 - In February 2000, Morton's former environmental manager admitted that he falsified the reports and pleaded guilty to a felony Clean Water Act charge.
 - The criminal investigation led to a civil multimedia settlement requiring payment of **\$20 million** plus a requirement to **conduct audits** at 23 facilities.
 - disposing of hazardous waste at on-site landfill without permit under RCRA
 - disposing of deep injection wells (violation of underground injection facilities permit)
 - failure to report releases from disposals to NRC
 - RQ releases without reporting
 - built and operated new boiler without obtaining a permit (SIP violation)
 - chronically discharging pollutants into local river
 - At the time, it was the largest penalty ever collected from one facility
-

INDUSTRIAL WASTEWATER COMPANY OWNER SENTENCED FOR VIOLATING THE CWA IN CONNECTION WITH DISCHARGES OF LANDFILL LEACHATE TO FLINT, MICHIGAN SEWER SYSTEM (EPA, 2021)

- Oil Chem's permit prohibited the discharge of landfill leachate waste.
- Massey signed and certified Oil Chem's 2008 permit application and did not disclose:
 - company had been and planned to continue to receive landfill leachate, which it discharged to the sewers untreated
 - When Oil Chem started to discharge this new waste stream (required under the permit)
- Robert J. Massey, the president and owner of Oil Chem, Inc., was sentenced to serve 12 months in jail and pay a \$5,100 fine.
- Discharged 47 million gallon into the sanitary sewer system in the City of Flint, MI, over an eight and one-half year period

U.S. V. SINCLAIR TULSA REFINERY, NO. 4:06-CR-00214 (ND OKLAHOMA 2006/2007)

- Two managers and company pled guilty to knowingly manipulating wastewater stream to obtain nonrepresentative samples
- During biomonitoring events over at least a 2-year period (2003-2004), they directed employees to divert part of typical flow to holding basins to ensure that biomonitoring tests would pass
- Company - **\$5 million fine**, \$500,000 community project
- Managers
 - 6 mos. Home detention, \$160,000 fine and 100 hrs community service
 - 6 mos home detention, \$80,000 fine and 50 hrs community service

TEXAS BASED OIL COMPANY (2012)

- Federal Court (Joint investigation: EPA, LDEQ and USCG)
- Facilities were poorly maintained and operated without plans and permits required by LDEQ regulations
- Company's negligent operation and poor maintenance of three of its facilities in Jefferson Parish led to harmful discharges of oil into the navigable waters of the United States
- Company pleaded guilty to three counts of violating the Clean Water Act for negligently discharging harmful quantities of oil into navigable waters of the United States.
- \$557,000 criminal fine
- Company agreed to cease all operations in Louisiana and divest itself of its hydrocarbon business interests in the state.

UNITED STATES V. ORTIZ, 427 F.3D 1278, 1279 (10TH CIR. 2005)

- Chemical Specialties, Inc. operates a propylene glycol distillation facility in Grand Junction, Colorado where David Ortiz served as the Grand Junction facility's operations manager and sole employee.
- Sufficient evidence established that Ortiz acted negligently by discharging wastewater from his chemical distillation facility into toilet at facility, as required to support conviction of negligently discharging pollutant into river in violation of Clean Water Act
- Although Ortiz claimed he did not know toilet was connected to storm drain which led to river, investigators told defendant that they had traced a black discharge with strong onion odor from river up storm drain to his facility and questioned defendant about how he disposed of wastewater, and after encounter with investigators, Ortiz again discharged wastewater into toilet.



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