

# **PREFACE**

The term “environmental crime” is a relatively recent addition to the criminal law lexicon. Until the mid-1980s, environmental enforcement was synonymous with civil enforcement. But the advent of modern environmental legislation in the 1970s and ‘80s ushered in an era of increased public and congressional support for sending polluters to jail. As Congress began transforming the environmental law landscape by importing criminal law principles into the mix, the Justice Department established a full blown Environmental Crimes Section whose exclusive domain was criminal enforcement of environmental laws; the Environmental Protection Agency (EPA) acquired criminal investigatory tools and created an Office of Criminal Enforcement; and violations of hazardous waste regulations and air and water quality standards became subject to prosecution as felonies. As might have been expected, this succession of events heralded a sea change in environmental enforcement.

This book, which bridges the historical divide between two discrete, specialized fields of law, is the first law school text devoted exclusively to the study of environmental crime. Chapter 1 provides an overview of the environmental regulatory framework and explores key points of contention that are at the core of the criminal enforcement debate. Did Congress overlook dangers inherent in elevating violations of existing environmental standards — originally set at levels designed for *civil* enforcement — into serious crimes? Are the goals of environmental law and criminal law compatible under the current regulatory regime? These are among several recurring conceptual themes that run throughout the book.

Chapters 2 and 3 provide the foundation for integrating fundamental criminal law principles with environmental law concepts in later chapters of the book. Chapter 2 examines the mental states — principally knowledge and negligence — that distinguish criminal violations from their civil

counterparts. Are these threshold levels of culpability set too low? Do they unfairly put innocents at risk of criminal prosecution? These, too, are questions that are central to the criminal enforcement debate. Chapter 3 examines principles governing individual and organizational responsibility for criminal conduct. Can corporate officers be held responsible for crimes they did not personally commit? Are subordinate employees criminally liable for environmental violations that occur on the job? When can a corporation or other legal entity be held criminally accountable for environmental crimes, and why? Since most environmental crime prosecutions are based on violations that occur in a business or workplace setting, familiarity with the underlying principles of personal and organizational liability is essential.

Chapters 4 through 7 focus, respectively, on the principal criminal provisions in the Clean Water Act, Clean Air Act, Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Each chapter provides a basic grounding in key environmental law concepts embedded in the relevant criminal enforcement scheme and examines how the applicable environmental and criminal law concepts intersect. Satellite issues such as jurisdiction, double jeopardy, preemption, and immunity are considered in the contexts in which they are most likely to arise.

Although the principal goal of many environmental laws and regulations is prevention of harm to the environment, Chapters 4, 5, and 6 provide insights into environmental laws that have a distinctly different focus. Knowing endangerment provisions in the Clean Water Act, Clean Air Act, and RCRA criminalize environmental violations that cause — or create an unacceptably high risk of causing — death or serious bodily injury. The pending prosecution of W.R. Grace for releasing tons of asbestos into the ambient air in Libby, Montana serves as a focal point for considering the Clean Air Act's knowing endangerment statute.

In Chapter 7, Consolidated Edison's conviction for violating CERCLA's notification requirements after a 1989 steam pipe explosion provides a vehicle for exploring a "worst case scenario" response to an environmental emergency. Although Con Ed knew the explosion had spewed more than 200 pounds of asbestos-contaminated debris into Manhattan's Gramercy Park, Con Ed officials did not notify regulators that the explosion had released asbestos into the environment. Not surprisingly, Con Ed's failure to give the required notice was motivated in part by a desire to avoid the cost of legally required clean-up procedures. The utility's dramatically different

response to a similar explosion in 2007 provides a useful object lesson on sentencing and corporate culture.

Chapter 8 turns to conventional criminal statutes — principally conspiracy, mail fraud, false statements, and obstruction of justice — that are often invoked in environmental crime prosecutions. The discussion of liability under the federal false statements statute revisits the Con Ed case to illustrate the interaction between environmental crimes (e.g., failure to notify regulatory authorities of the asbestos release as required by CERCLA) and conventional white collar crimes (e.g., violating the false statements statute by lying to regulators and concealing knowledge of the asbestos release). W.R. Grace also briefly reappears in this chapter. A guilty plea the company entered in connection with the contamination of drinking water wells in Woburn, Massachusetts illustrates how laws like the false statements statute have been used as gap-fillers to augment the coverage of environmental laws. Later, in the obstruction of justice discussion, W.R. Grace makes a second brief appearance in connection with pending cover-up charges in the Libby, Montana prosecution.

And last, Chapter 9 focuses on enforcement issues. How is criminal enforcement authority allocated between environmental regulators and criminal prosecutors? What case selection criteria do EPA and the Justice Department use to determine which violations should be treated as crimes? Are environmental prosecutors “loose cannons,” as some critics suggest? Or is the current system of centralized decision making and multi-level review an effective check on prosecutorial discretion? What do we actually know about charging practices in environmental crime prosecutions? While some of these issues were previewed in earlier sections of the book, Chapter 9 explores them more fully in the broader context of the government’s criminal enforcement program.

Throughout the book I have tried to make the material accessible to students regardless of their technical or legal background. To further advance that goal, a glossary of acronyms is provided at the end of the book.

For the sake of brevity and clarity, I have omitted a number of footnotes, citations, and parallel citations without specifically flagging their deletion. Remaining footnotes have been renumbered consecutively within each chapter, and explanatory footnotes that I have added to cases and other excerpted material are identified by the legend “— ED.”

As of the date of publication, the principal criminal provisions in the Clean Water Act, the Clean Air Act, RCRA, and CERCLA are posted on the website for the book, as are the conventional white collar crime statutes considered in Chapter 8. Several government documents that appear as

excerpts in the book have also been posted in full. The website can be accessed at [www.aspenlawschool.com/brickey\\_environment](http://www.aspenlawschool.com/brickey_environment).

There are few occasions for faculty to publicly acknowledge their Dean's positive impact on their productivity. Happily, this is one of them. I am deeply indebted to Kent Syverud for his generous support of my scholarly pursuits. Kent's support has been pivotal in bringing this project to fruition in a relatively short period of time. I am also indebted to the exceptionally talented research assistants who worked on the book. Seth Heller and Edward Lush ably assisted me during the early research phase of the project. Dania Becker and Sharon Palmer, who joined the project at a much later phase, contributed invaluable critiques and superb editorial suggestions. My faculty assistant, Beverly Owens, is a perfectionist's perfectionist. The camera ready manuscript she produced is a testament to her extraordinary skill, patience, and dedication. The book has also benefitted from the assistance of Shelly Henderson, whose eagle eye can spot a typo at 100 paces; from Jane Box's meticulous attention to organization and detail; and from an excellent working relationship with John Devins at Aspen Publishers. I am especially grateful to Annie Smith Piffel for her unique contribution to the book. Annie produced a series of delightful beta sketches, one of which ("Fish F") appears as a watermark on the dedication page. Last but not least, a special word of thanks to my husband, Jim, who so admirably filled the indispensable roles of adviser and confidante, head chef, and remodeler-in-chief. I am grateful for his steadfast support, encouragement, and TLC.

*Kathleen F. Brickey*

April 2008