

Legislative Skullduggery: More Laws to Enforce, Fewer Resources to Do It

by John Spinello

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There has, indeed, been a marked evolution in the investigation and prosecution of environmental crimes in New Jersey and around the United States since the inception 30 years ago of environmental law as we know it today. Just as criminal schemes that adversely impact public health and natural resources have become more sophisticated, so have the strategies and technologies employed by investigators to track down such criminal activity. Forensic tools have advanced remarkably across disciplines,¹ and the cross-agency sharing of intelligence and analysis has improved in the post-9/11 era,² facilitated by rapid advances in information technology capabilities ever since former Vice President Al Gore invented the Internet. Prosecutorial tools have also improved as laws have evolved to, among other things, afford more time to charge a defendant,³ and establish lower mens rea requirements necessary to achieve a conviction.⁴

In general, these are welcome changes. The Environmental Crimes Bureau in the Division of Criminal Justice is the principal law enforcement agency responsible for investigating and prosecuting violations of environmental laws in New Jersey, and enjoys a long-standing reputation for its fairness in charging decisions, independence from political influence, and effectiveness in ensuring justice.

At the same time, much remains the same. We still prosecute numerous cases involving midnight dumping by relatively small enterprises, which nevertheless have the potential to cause serious harm and often intend to break the law for profit, making their actions especially egregious.⁵ Many of these cases are still developed the old-fashioned way, by team-

ing with local law enforcement and regulatory agencies to follow up on tips and run down leads.

Recent years, however, are marked by a notable legislative expansion of environmental crimes law. In 2007, the New Jersey Legislature completely eliminated the statute of limitations (SOL) for all environmental crimes,⁶ established new crimes for violations of seven existing regulatory statutes,⁷ and is now actively considering legislation to make it a crime for one person to unlawfully expose another to a toxic pollutant.⁸ Juxtaposed against this trend in legislative expansion is the gradual erosion of funds to support the investigation and prosecution of environmental crimes in New Jersey, reflecting shifting priorities and the dire fiscal condition of the state in recent years.⁹ This Article briefly outlines these trends and how they might affect environmental crimes enforcement activities and priorities in 2009.

I. The Environmental Enforcement Enhancement Act

On January 4, 2008, New Jersey Gov. Jon Corzine signed into law the Environmental Enforcement Enhancement Act (the Act),¹⁰ giving the New Jersey Department of Environmental Protection (NJDEP) sweeping new enforcement authority under the following 10 existing environmental statutes:

- Coastal Area Facility Review Act¹¹
- Waterfront Development Act¹²
- Flood Hazard Area Control Act¹³

1. See David A. Taylor, *Environmental Forensic Files*, ENVTL. HEALTH PERSPECTIVES, Feb. 2004, at A88; RONALD G. BURNS & MICHAEL J. LYNCH, ENVIRONMENTAL CRIME: A SOURCEBOOK (2004).

2. See CTR. FOR POLICING TERRORISM, MANHATTAN INST., NEW JERSEY STATE POLICE PRACTICAL GUIDE TO INTELLIGENCE-LED POLICING (2006), available at <http://www.cpt-mi.org/pdf/NJPoliceGuide.pdf>.

3. See 2007 N.J. Laws ch. 131, §1 (codified at N.J. STAT. ANN. §2C:1-6(a)(2) (West 2009)).

4. See Susan F. Mandiberg, *What Does an Environmental Criminal Know*, NAT. RESOURCES & ENV'T, Winter 2009, at 24; see also Ruth Ann Weidel et al., *The Erosion of Mens Rea in Environmental Criminal Prosecutions*, 21 SETON HALL L. REV. 1100 (1991).

5. See New Jersey Division of Criminal Justice, Environmental Crimes Bureau, Annual Reports, <http://www.njdj.org/ecb/ecb-annual-rpt.htm> (last visited Mar. 30, 2009).

6. 2007 N.J. Laws ch. 131, §1.

7. 2007 N.J. Laws ch. 246.

8. S. 2389, 213th Leg., 2008 Sess. (N.J. 2008); A. 2951, 213th Leg., 2008 Sess. (N.J. 2008).

9. For further information on the fiscal situation of the state, see New Jersey state budgets for years 2002-2008, available at Office of Management and Budget, New Jersey Department of the Treasury, <http://www.state.nj.us/treasury/omb/publications/archives.shtml> (last visited Mar. 30, 2009).

10. 2007 N.J. Laws ch. 246.

11. N.J.S.A. 13:19-1 et seq.

12. N.J.S.A. 12:5-3 et seq.

13. N.J.S.A. 58:16A-50 et seq.

- Freshwater Wetlands Protection Act¹⁴
- Coastal Wetlands Protection Act of 1970¹⁵
- Safe Dam Act¹⁶
- Water Supply Management Act¹⁷
- Safe Drinking Water Act¹⁸
- Pesticide Control Act of 1971¹⁹
- Endangered and Nongame Species Conservation Act²⁰

The enforcement provisions of many of these statutes had not been revised by the legislature in several decades and, as a result, NJDEP's ability to enforce these laws was limited. For example, the Freshwater Wetlands Protection Act, adopted in 1987, authorized maximum civil penalties of \$10,000 per day for each violation; in contrast, the Coastal Wetlands Protection Act, adopted in 1970, permitted civil penalties of only \$1,000. In addition, seven of these 10 statutes did not provide any authority to commence a criminal prosecution for intentional or other egregious violations.²¹ The NJDEP argued that these and other limitations on its enforcement authority failed to provide an adequate deterrent to noncompliance or foster the timely resolution of violations. The legislature agreed and enacted sweeping changes in 2008.

In addition to substantially increasing the maximum civil penalties NJDEP may seek to impose to \$50,000 per day, and supplementing its authority to seek other remedies, including natural resource damages and legal costs, the Act established new third-degree crimes for violations of these statutes. Specifically, the Act amended each of the 10 statutes to provide as follows:

A person who purposely, knowingly or recklessly violates any provision of the (Act), or any rule or regulation, adopted, or permit or order issued pursuant thereto, ... (or) who purposely knowingly, or recklessly makes a false statement, representation or certification, in any application, record or other document filed or required to be maintained (the Act) or any rule or regulation, adopted, or permit or order issued pursuant thereto, or who falsifies, tampers with or purposely, knowingly or recklessly renders inaccurate any monitoring device or method required to be maintained (by law) shall, upon conviction, be guilty of the third degree.²²

Under the New Jersey Criminal Code, a third-degree crime is punishable by a term of imprisonment between three and

five years.²³ In addition to possible imprisonment, the Act establishes special monetary penalties of between \$5,000 and \$50,000 per day of violation.

Historically, in identifying cases that are most appropriate for criminal prosecution, particularly given finite resources, prosecutors have focused on the most egregious violations that result in significant harm, create substantial risks to human health or natural resources, result in significant economic benefit to criminal actors, reflect a pattern of enterprisewide noncompliance, or involve fraudulent representations to regulators, consumers, and others.²⁴ Significantly, while we expect prosecutors to pursue criminal charges for the most egregious violations, we note with some apprehension that the crimes established under the Act, like most other environmental statutes, encompass violations of any regulatory requirement, regardless of its significance, the risk of injury created, or the degree of actual injury caused by the violation. There are no thresholds or standards to distinguish those violations that should be prosecuted as civil infractions from those that warrant criminal prosecution. In this respect, we must rely uneasily on the prudence of prosecutors to make reasoned charging decisions grounded in objective standards that can be transparently evaluated.

Although these crimes are “new,” they are imbued with all of the principles of criminal liability that have developed around other environmental statutes over the years. For instance, prosecutors may charge “responsible corporate officers” for their role in allowing criminal activity to occur unabated within their areas of responsibility under principles of liability previously established by courts.²⁵ Moreover, ordinarily a prosecutor must prove only that the person charged intended the act that caused the violation, and does not need to prove that the person knew the act was a violation of the law.²⁶

The new crimes established by the Act will have the most pronounced effect on development activities subject to the land use statutes administered by NJDEP, extending to economic activities not previously reached by environmental crimes laws.²⁷ These land use statutes place regulatory requirements and limitations on most any type of development proposed in or near wetlands, beaches, dunes, bays, open waters, historically significant areas, threatened or endangered species habitat, and other designated areas. These statutes also strictly control the withdrawal and consumption of surface and groundwater for residential, commercial, and industrial

14. N.J.S.A. 13:9B-1 et seq.

15. N.J.S.A. 13:9A-1 et seq.

16. N.J.S.A. 58:4-1 et seq.

17. N.J.S.A. 58:1A-1 et seq.

18. N.J.S.A. 58:12A-1 et seq.

19. N.J.S.A. 13:1F-1 et seq.

20. N.J.S.A. 23:2A-1 et seq.

21. Previously, only the Dam Safety Act, Safe Drinking Water Act, and Freshwater Wetlands Protection Act provided criminal penalties for violations.

22. 2007 N.J. Laws ch. 246. Then-existing provisions in the Dam Safety Act, Freshwater Wetlands Protection Act, and Safe Drinking Water Act were modified to conform to the new language added to the seven other statutes, as referenced above.

23. N.J. STAT. ANN. §2C:43-6(a)(3) (West 2009).

24. See Ed Neafsey & Edward Bonanno, *Environmental Crimes: Considerations in Prosecutions*, N.J. LAW., Feb./Mar. 1994, at 37.

25. *Id.* at 40-41. See *United States v. Park*, 421 U.S. 658 (1975); *United States v. Dotterweich*, 320 U.S. 277 (1943).

26. N.J. STAT. ANN. §2C:2-2(d) (West 2009).

27. The following statutes generally regulate land use and development in New Jersey: Waterfront Development Act, N.J. STAT. ANN. §§12:5-1 to -11 (West 2009); Coastal Wetlands Protection Act, N.J. STAT. ANN. §§13:9A-1 to -10 (West 2009); Freshwater Wetlands Protection Act, N.J. STAT. ANN. §§13:9B-1 to -30 (West 2009); Coastal Area Facility Review Act, N.J. STAT. ANN. §§13:19-1 to -21 (West 2009); Endangered and Nongame Species Conservation Act, N.J. STAT. ANN. §§23:2A-1 to -13 (West 2009); Water Supply Management Act, N.J. STAT. ANN. §§58:1A-1 to -17 (West 2009); and Flood Hazard Area Control Act, N.J. STAT. ANN. §§58:16A-50 to -101 (West 2009).

uses. In the coming years, we are likely to see investigations and prosecutions for violations of these land use laws as complaints from neighbors, referrals from NJDEP, and other tips begin to flow into the offices of prosecutors. As a result, entire segments of economic activity will for the first time be subject to potential criminal punishment for violating regulatory requirements. Whether such prosecutions achieve greater general deterrence of illegal activity in the development community, or chill economic investment in New Jersey or both, remains uncertain.

II. The Statute of No Limitations

In 2007, the New Jersey Legislature enacted a measure eliminating the SOL for all environmental crimes.²⁸ This plainly extreme measure was prompted by a problem encountered in prosecuting W.R. Grace & Co. (Grace) for allegedly concealing the presence of asbestos-tainted materials that contaminated soil and may have endangered workers at a processing plant in Hamilton, New Jersey.

For 40 years, Grace operated a Zonolite plant in Hamilton, which manufactured fireproofing and insulation products by processing vermiculite ore from Grace's mine in Libby, Montana. It later became clear the vermiculite was laced with asbestos. When Grace closed the plant in 1995, it did not acknowledge the presence of asbestos in the vermiculite it processed, and NJDEP therefore did not require Grace to evaluate the soil at the site for potential asbestos contamination.

Concerns about the site surfaced in 2000 after disclosures of widespread lung disease among the Libby, Montana, workers who mined the ore that was processed at the plant. Eventually, in 2005, the U.S. Environmental Protection Agency hauled away about 9,000 tons of asbestos-contaminated soil from the site. However, by the time prosecutors became aware of what it believed was Grace's concealment of the asbestos-tainted materials, the 10-year limitation then in effect had expired. Even applying the discovery rule to the limitations period, it appeared the state's awareness of the contamination more than 10 years prior, though not the details surrounding it, may have precluded a criminal prosecution.

This may be another case of bad facts making bad law, insofar as the complete elimination of the SOL now threatens to significantly prejudice a defendant's ability to mount a legal defense to alleged violations of environmental laws. The SOL exists, "to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time," as memories fade and witnesses and records become unavailable.²⁹ The SOL is grounded in the desirability of requiring that prosecutions be based upon reasonably fresh evidence so as to lessen the possibility of an erroneous conviction. The enactment of this measure, unfortunately, leaves defendants with little more than a prosecutor's sense of justice and fair play, which could wither under intense public and political pressure to punish a perceived wrongdoer.

III. Causing Exposure to a Toxic Pollutant

Legislation currently pending in the New Jersey Legislature would establish a second-degree crime³⁰ for knowingly, and a third-degree crime for recklessly, unlawfully causing another person to be "exposed" to a "toxic pollutant"³¹ by inhalation, ingestion, or absorption.³² This legislation was prompted by a case involving children exposed to mercury at a day care facility in New Jersey that was converted from a former industrial building in 2004, without the proper evaluation of the site and removal of mercury-tainted interior structures. In 2006, state officials alleged the person who purchased and converted the use of the site may not have been forthcoming in representations to state and local agencies regarding the condition of the site and its prior use. Under the circumstances of this case, prosecutors concluded that the mercury exposure suffered by children attending the day care facility did not satisfy the law's requirement for serious injury to multiple people.³³

This legislation is troubling to those who manufacture, distribute, or store in New Jersey any product, ingredient, or material that may fit the broad category of "toxic pollutants," because it does not establish any threshold concentration, amount, or duration of exposure, does not require that the person know the exposure is unlawful, and does not require that the person exposed manifest any actual injury. Any release, discharge, or abandonment of a toxic pollutant beyond the amount or concentration allowed in a permit, regulation, or other legal requirement, whether in the work place or in the ambient environment, will almost inevitably result in the incidental exposure to someone in the most densely populated state in the country, and could be grounds for prosecution.

Exposure to a toxic pollutant at unlawful levels could result in serious harm or no harm at all, depending upon a range of factors, including the concentration and amount of the pollutant to which a person is exposed, the duration of the exposure, the genetic susceptibility and current health condition of the person exposed, and other factors. Under existing environmental and worker protection statutes, the amount or concentration of a toxic pollutant that may be lawfully released, and to which individuals may be lawfully exposed, is determined based upon different exposure scenarios depending upon the purpose and context for which the standard is set; many standards or lawful limits are set based upon long-term, repeated

30. Under the New Jersey Criminal Code, a second-degree crime is punishable by a term of imprisonment between five and 10 years. N.J. STAT. ANN. §2C:43-6(a)(2) (West 2009).

31. S. 2389 defines the term toxic pollutant as "any substance, whether discharged or released into water, air, or soil, included in the definition of 'toxic pollutant' in [the New Jersey Water Pollution Control Act]," which includes
any pollutant or combination of pollutants, including disease causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly or indirectly by ingestion through food chains, will . . . cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions, including malfunctions in reproduction, or physical deformation, in such organisms or their offspring.

N.J. STAT. ANN. §58:10A-3(r) (West 2009); S. 2389, 213th Leg., 2008 Sess. (N.J. 2008).

32. S. 2389, 213th Leg., 2008 Sess. (N.J. 2008); A. 2951, 213th Leg., 2008 Sess. (N.J. 2008).

33. N.J. STAT. ANN. §2C:17-2(e) (West 2009).

28. 2007 N.J. Laws ch. 246.

29. United States v. Marion, 404 U.S. 307, 323 (quoting Toussie v. United States, 397 U.S. 112, 114 (1971)).

exposure to the toxic pollutant. Under the bill, exposure to any concentration or amount of a toxic pollutant above a regulatory standard, for even brief duration, could be unlawful and would constitute a second- or third-degree crime, regardless of whether the exposure results or is reasonably likely to result in any actual harm.

Moreover, the bill does not distinguish between those who intentionally release a toxic pollutant intending to cause exposure, and those who knowingly release a toxic pollutant, but do not intend to cause exposure. In this way, the bill is incongruous. A person who intentionally exposes dozens of people to a toxic pollutant that results in serious injury to those exposed would, upon conviction, be guilty of crime of the second degree. At the same time, a person who releases a toxic pollutant mistakenly believing it is authorized by a permit, and which results in no harm at all, is also guilty, upon conviction, of the same crime.

In a densely populated, urban, and industrialized environment, many things toxic are prevalent—diesel exhaust is ubiquitous in the air on urban streets, legacy contamination fouls sediment in urban rivers, pesticide residues may be found in the soil on our farms. In such an environment, a measure making exposure the central element of a serious crime raises important questions about overbreadth, and the ability to isolate sources, articulate injury, and make fair and just charging decisions in all but the most straightforward of cases.

IV. Managing Priorities in a Resource-Constrained Environment

“As it is axiomatic that the stigma of conviction and criminal sanctions, including fines and/or incarceration, is the most effective deterrent, criminal charges are appropriate in the most egregious cases.”³⁴ Given the axiom, it is important that the agencies tasked with investigating and prosecuting environmental crimes have the resources necessary to do so; even in fiscally challenging times as now, environmental crimes investigations and prosecutions must remain a priority when resources are allocated. Unfortunately, this effort in New Jersey has suffered a gradual but sustained erosion of resources for more than a decade, spanning five gubernatorial administrations. State resources dedicated to solving environmental crimes have decreased by more than 75% over the last 15 years. As a result, the ability to pursue more complex cases and organized criminal enterprises has diminished.

Worse, like many other states, but more so, New Jersey is in the midst of a financial meltdown, mainly the result of spending beyond its means for a long time, exacerbated by the recent crisis in credit markets and our banking system. These calamitous economic and fiscal conditions now make it especially difficult to replenish depleted resources. Thus, the ability of environmental law enforcement agencies to sustain adequate resources in the coming years may be a far greater challenge to prosecutors than catching and punishing those who pollute for profit, threaten our health, and destroy our resources.

34. Neafsey & Bonanno, *supra* note 24, at 37.