The Rare Specter of Strict Liability in Federal Criminal Environmental Prosecutions

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Despite claims that some critics have raised, the effort to establish a "default" *mens rea* that would apply to faulty criminal law-making is not a deliberate attempt to enable illegal pollution by corporate monoliths. Perhaps the misconception is based in part on a misunderstanding of criminal enforcement of our nation's environmental laws. Most criminal prosecutions for environmental crimes do not rely on the concept of strict liability. In fact, according to the Department of Justice's own webpage, "[m]ost environmental crimes require proof of a pollution event . . . *and proof of criminal intent*" (emphasis added).[1]

According to the Department of Justice, there are currently almost 20 federal laws that can be used to criminally prosecute[2] environmental pollution. As the table below establishes, almost all of them require some level of intent on behalf of the accused.

Table of Federal Statutory Environmental Crimes

Federal Statute	**Criminal Intent[3]**
Act to Prevent Pollution from Ships (APPS)	33 U.S.C. §1908(a) ("knowingly")
Atomic Energy Act	42 U.S.C. §2272(a) ("willfully" or "unlawfully" interfering with wartime or emergency recapture of nuclear material) 42 U.S.C. §2272(b) ("knowing participation" in development of atomic weapon) 42 U.S.C. §2273(a) ("willfully") 42 U.S.C. §2273(c) ("knowing and willfully")
Clean Air Act (CAA)	42 U.S.C. §7413(c)(1), (c)(2), (c)(3) and (c)(5): ("knowingly") 42 U.S.C. §7413(c)(4) ("negligently")

[1] https://www.justice.gov/enrd/prosecution-federal-pollution-crimes

[2] This memorandum does not include a review of the mental state requirements of federal laws used to pursue **civil** actions for violations.

[3] The "criminal intent" or "mens rea" standard provided in the chart relies solely on statutory text and does not include any additional information that could be gleaned from case law analysis or other sources. It could be the case that, despite the inclusion of a strict liability offense in the statute, existing case law would require the application of some level of intent in order to prosecute an offender.

Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)	42 U.S.C. §9603(b) (strict liability for one limited type of offense[4]) 42 U.S.C. §9603(c) ("knowingly") 42 U.S.C. §9603(d) ("knowingly")
Deepwater Port Act	33 U.S.C. §1514(a) ("willfully")
Emergency Planning and Community Right to Know Act (EPCRA)--also known as SARA Title III)	42 U.S.C. §11045(b)(4) ("knowingly and willfully")
Energy Supply and Environmental Coordination Act	15 U.S.C. §797(b)(3) (criminal penalty only for "knowingly and willfully" committing a violation again *after* a civil penalty has been issued)
Federal Hazardous Material Transportation Law	49 U.S.C. §5124(a) ("knowingly" and "willfully or recklessly")
Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)	7 U.S.C. §136L(a)(1)(a), (b)(1)(b), and (b)(2) ("knowingly") 7 U.S.C. §136L(b)(3)("with intent to defraud")
Federal Water Pollution Control Act (FWPCA)--also known as the Clean Water Act (CWA)	33 U.S.C. §1319 (criminal violations are divided between those who act "negligently" and those who act "knowingly")
Noise Control Act	42 U.S.C. §4910(a)(1) ("willfully or knowingly")
Ocean Dumping Act (ODA)	33 U.S.C. §1415(b)(1) ("knowingly")
Outer Continental Shelf Lands Act (OCSLA)	43 U.S.C. §1350(c) ("knowingly and willfully")

[4] This statute uses a strict liability standard for the prosecution of any person in charge of a vessel or a facility from which a hazardous substance is released (other than a federally permitted release) who "fails to notify immediately the appropriate agency of the United States Government as soon as he has knowledge of such release or who submits in such a notification any information which he knows to be false or misleading…."

Ports and Waterways Safety Act	33 U.S.C. §1232(b)(1) and (2) ("willful and knowing")
Resource Conservation and Recovery Act (RCRA)	42 U.S.C. §6928(d) and (e) ("knowingly") 42 U.S.C. §6992d(b) ("knowingly")
Rivers and Harbors Appropriations Act	33 U.S.C. §§406-09, 411, 414-15 (strict liability) 33 U.S.C. §411 (*also contains* "knowingly")
Safe Drinking Water Act (SDWA)	42 U.S.C. §300h-2(b)(2) ("willful")
Surface Mining Control and Reclamation Act (SMCRA)	30 U.S.C. §1268(e) and (f) ("willfully and knowingly") 30 U.S.C. §1268(g)("knowingly")
Toxic Substances Control Act (TSCA)	15 U.S.C. §2615(b)(1)("knowingly or willfully") 15 U.S.C. §2615(b)(2)(A)("knowingly and willfully") 15 U.S.C. §2615(b)(2) (B)("knowing")

The fact that almost all federal criminal pollution violations contain a criminal intent standard is buttressed by the government's enforcement actions in this arena. In recent years, the U.S. Environmental Protection Agency has kept track of all major criminal enforcement actions. In 2016 alone, it pursued criminal charges that it claims resulted in a total of 93 years of incarceration for individual defendants, plus fines of $14 million for individual and corporate defendants, with an additional $775,000 in court-ordered environmental projects and another $193 million in restitution. A review of the publicly available documents of those cases indicates that only <u>one</u> case involved any charges based on a strict lability statute—although notably, those same defendants *also* pled guilty to criminal statutes that did, in fact, contain criminal intent protections so even that case supports the contention that federal environmental prosecutions are not relying on the concept of strict liability. (See prosecution of Freedom Industries and related individuals).[5] A review of other years bears out similar results.

The reality is, overwhelmingly, the federal government does *not* rely on the concept of strict liability to prosecute environmental offenders. Specifically, according to the Environmental Protection Agency's *Summary of Criminal Prosecutions*, over the last 5 years, the vast majority of environmental crimes have been prosecuted under one of two statutes (either the Clean Air

[5] https://www.epa.gov/enforcement/2016-major-criminal-cases

Act or the Clean Water Act)—neither of which is a strict liability statute.[6] Couple this data with the fact that environmental crimes are also frequently pursued under the federal conspiracy statute or the federal false statement statute, and the claim that a "default" *mens rea* type reform is specifically attempting to prevent pollution prosecutions is demonstrably untrue.

[6] https://cfpub.epa.gov/compliance/criminal_prosecution/