Businesses Beware: Personal Liability Looms for Environmental Offenses

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Published in *The Hennepin Lawyer*, Nov.-Dec. 1992

There is a growing concern among Minnesota businesses about potential environmental liability, especially personal liability imposed on individuals.

During the early 1980s, there was intense public debate about the appropriateness of Superfund laws on both the state and federal level. In 1983, the Minnesota legislature enacted the Minnesota Environmental Response and Liability Act (MERLA) or Superfund law to clean up sites where Minnesota companies had disposed of their hazardous wastes in the past.[1] MERLA imposes strict, joint and several liability on businesses for their past disposal practices. During the past ten years Minnesota companies collectively spent millions of dollars paying for the clean-up of these old sites.[2]

In recent years, legislation and judicial decisions have strengthened laws relating to environmental enforcement, including the imposition of personal liability upon environmental offenders. Minnesota has followed the lead of some other states and the federal government. Consequently, both businesses and individuals subject to environmental regulation may now face stiff fines and jail time for failure to comply with these laws. Prosecutors may now file felony level charges against persons who knowingly violate certain environmental laws.[3] The Commissioner of the Minnesota Pollution Control Agency (MPCA) has been given broad new authority to impose administrative penalties for violations of environmental rules.[4] These laws, and how they have been applied to both businesses and individuals, have propelled Minnesota near the forefront of stiff environmental enforcement.

Criminal Culpability

Last April Minnesota collected a $2 million dollar penalty from a company for claimed violations of state environmental laws.[5] The penalty, which was the largest ever levied by the state in an environmental case, attracted considerable public and political attention. The case concerned Marvin Windows, the largest employer in northwestern Minnesota. The company pled guilty to one count of illegally dumping hazardous waste and paid a $15,000 fine. The company's former safety director pled guilty to an additional felony count.[6] After Marvin Windows threatened to take new jobs from Minnesota to Tennessee, Governor Arne Carlson and Attorney General Hubert H. Humphrey III engaged in a war of words over the treatment of the company, with the governor questioning what he perceived to be unduly harsh treatment by the attorney general's office, and the attorney general firing back that the governor's charges were politically motivated.

The trend toward criminal prosecution began in the mid-1980s when the legislature enacted more stringent laws regarding environmental crimes.[7] In Minnesota persons who knowingly dump

hazardous waste, fail to report a release of a hazardous substance or knowingly endanger someone can now be jailed for up to ten years and fined up to $1 million.[8] Persons *who* knowingly violate laws relating to water quality, air quality and solid waste also may face criminal charges and stiff penalties.[9]

Last year the legislature allocated $1.2 million to form an Environmental Investigations Division within the attorney general's office.[10] Two prosecutors and two investigators now work full-time investigating and prosecuting environmental crime cases around the state. Staff from several state agencies, including the Departments of Natural Resources, Agriculture and Transportation along with the Minnesota Pollution Control Agency (MPCA); have been assigned to an Environmental Crimes Investigation Team and charged with aiding in the enforcement of the state's environmental laws.

Since the mid-1980s, the attorney general's office has assisted outstate county attorneys in prosecuting environmental cases. County attorneys, who have original jurisdiction to file criminal complaints, have often requested the assistance of the attorney general.[11]

County attorneys in the seven-county metropolitan area have also prosecuted a number of environmental cases. Under state law the metropolitan counties have the authority to administer hazardous waste ordinances.[12] Violations of county ordinances may be prosecuted as misdemeanors.[13]

The federal authorities in Minnesota also are directing more resources to prosecution of environmental crimes. Violations of state environmental laws are generally also violations of related federal laws.[14] Under federal law, fines can be higher and jail sentences longer. Last year, Congress quadrupled the number of environmental crimes investigators to 200 by 1995.[15] In September 1991, two prosecutors in the U.S. Attorney's office in Minnesota were assigned to pursue and prosecute environmental cases. The FBI has offered to assist this effort. State and federal authorities are now cooperating in their investigations.[16]

In order to successfully prosecute felony-level crimes under state and federal law, the prosecution generally must prove that the offender "knowingly" violated the law.[17]

Prior to 1991 the scienter element in Minn. Stat. § 609.671, the state law relating to felony level environmental crimes, was "knowingly, or with reason to know." However, during the 1991 legislative session, largely in response to the Marvin Windows case, the scienter element was raised by deleting the constructive knowledge phrase "reason to know" from the standard. In addition, a "due diligence" defense was added to the definition.[18] Individuals and entities now are subject to liability under both state and federal law for "knowingly" violating environmental laws.[19]

Although over thousands of Minnesota companies are subject to environmental regulation, federal, state and local authorities will likely resort to criminal charges in a relatively small number of cases. As a practical matter, prosecutors probably will exercise their discretion to file felony-level criminal charges if they believe there is substantial deception, coupled with conduct directly impacting the environment. For example, in the Marvin Windows case the state maintained in documents filed with the court that the company had similar violations involving

the mismanagement of hundreds of drums of hazardous waste in 1983.[20] The state also alleged that the business and its employees concealed hundreds of drums of waste from inspectors, falsified shipping papers and burned wastes in boilers which were not equipped with the required pollution control equipment.

In addition, although the authorities are now armed with an arsenal of new laws to fight environmental crimes, the actual number of prosecutions will be limited because of the time and expense involved in pursuing cases. Prior to filing charges, the prosecution must often obtain search warrant's, secure statements from witnesses, test and analyze wastes, and conduct extensive background research. In light of the complexities involved with these cases, the authorities will likely focus their attention on the most egregious cases. Nevertheless, the impact of a criminal prosecution can be substantial. In addition to facing the prospect of stiff fines and jail time, an individual or business charged with such a crime must pay for its legal defense, deal with adverse publicity and, in some cases, fund an expensive clean-up.

Individual Issues

Despite the availability of criminal sanctions, state and local authorities probably will continue to rely on civil and administrative tools to enforce violations of environmental laws. A recent decision of the Minnesota Court of Appeals, *Matter of Dougherty,* 482 N.W. 485 (Minn. Ct. App. 1992), *pet. for review denied***,** 1992, should intensify concern about individual liability. The court held that the chief shareholder and president of a Minneapolis company could be held personally liable for hazardous waste violations under the "responsible corporate officer" doctrine.

The MPCA has had the authority for more than 20 years to penalize companies for violating state environmental laws.[21] The MPCA and hundreds of firms subject to environmental regulation have entered into stipulation agreements, essentially out-of-court settlements, if the companies agreed to correct the violations and pay penalties for past noncompliance. In certain instances, the MPCA has brought litigation to force companies to complete clean-ups and to collect court ordered penalties of up to $25,000 per day of violation.[22] In the late 1980s, state legislation established streamlined authority for the MPCA to impose administrative penalties. The MPCA sought the legislation because it felt it took too long to negotiate settlements or pursue litigation.

The *Dougherty* case arose after the commissioner of the MPCA issued an administrative penalty order to a company that the MPCA claimed was the fifth-largest producer of hazardous waste in Hennepin County, generating nearly 100 tons of sulfuric acid wastes.

Early in 1990, MPCA staff conducted an inspection and found problems with hazardous waste management. Most notably, pools of acid wastes had eaten away at concrete floors and the base of the building's metal siding. Employees routinely walked through the pools and tracked the liquid outside. The inspectors met with the principal shareholder, who was president of the company, who told them that the problem would be corrected when a new ventilation system was installed. In June 1990, the inspectors returned and found the conditions unchanged.

The commissioner then issued the administrative penalty order to the president and the company.[23] Both contested the order and requested an administrative hearing. An

administrative law judge concurred with the commissioner's findings, but recommended a recalculation of the penalty. The president and the company appealed the final order, which included a penalty of $7,075. They maintained that in order to penalize the individual shareholder/officer, the MPCA was required to pierce the corporate veil.

The Court of Appeals disagreed and upheld the MPCA. It ruled that the individual was personally liable for the environmental violations even though he had not personally participated in the violations. The court found that the "responsible corporate officer" doctrine applies to environmental laws because they are public welfare statutes which impose strict liability. The chief executive officer was held individually liable because he occupied a position of responsibility within the corporation, his position was reasonably related to the violations, and his action or inaction facilitated the violations. The court rejected the argument that the MPCA must pierce the corporate veil by noting that the MPCA did not seek to impose liability on Dougherty solely because of his status as a stockholder or corporate officer. The MPCA also has named individuals or responsible corporate officers in other enforcement actions.

But the problems relating to environmental issues are far from over for his company and its officers. In October 1992, the Hennepin County attorney's office filed felony charges against both the President and foreman.[24] According to the criminal complaint, for a three-year period beginning in 1988 Metal Coating's employees routinely allowed sulfuric acid to pour into sewers. The acids allegedly ate through the concrete sewer lines and zinc, chromium and lead entered the soil and groundwater. Although Metal Coatings has closed its doors, the site remains contaminated.

Limiting liability

Businesses in Minnesota are required to comply with numerous federal, state and local environmental regulations. Because the rules are constantly changing, maintaining a perfect compliance record is a difficult, if not impossible, task.

Environmental audits are valuable as a compliance assurance and risk assessment tool and, at the same time, potentially very risky.[25] Audits are valuable because they can give managers and officers an independent, and concentrated expert evaluation of compliance status. However, audits are sometimes viewed as risky because they result in a written record of compliance problems which can be used against the company and its employees if it is not protected. Whether environmental audits can be protected from disclosure by the attorney-client privilege, the work product doctrine or the self-evaluation privilege is uncertain under present law.

There are a number of risks associated with undertaking an environmental audit. The audit may uncover problems which must be reported to the authorities, thereby triggering a potentially damaging sequence of enforcement proceedings, clean-up activities, demands for civil penalties, adverse publicity and possible civil litigation.[26] If the audit findings are ignored, the adverse consequences may be even more severe. A company's past transgressions may eventually be discovered and the business and its responsible corporate officers could face criminal sanctions for knowing of the violations.

In 1986 the U.S. Environmental Protection Agency issued an audit policy encouraging audits but did not furnish any assurance that the information would not be used against the company.[27] In 1991, the U.S. Department of Justice issued a guidance document which recognized that prosecutions should not create a disincentive for audits and other self-policing activities.[28] The state has not issued similar policies. Unless prosecutors exercise their considerable discretion and give substantial credit to firms that undertake audits, there is nothing short of compliance perfection that will assure that a business manager will not be subject to prosecution. Many attorneys believe that the risk of criminal prosecution created by environmental auditing is outweighed by the risk of getting caught out of compliance by regulators.

Although the potential exists for the government to use audit-generated information as a basis for a criminal prosecution, it is important for companies and their officers to consider the likelihood that criminal prosecutions will be vigorously pursued in such cases. Generally, felony-level criminal sanctions will be reserved for the most flagrant cases where a target has a history of noncompliance or engaged in wanton conduct which has caused great harm to the environment. Limitations on government resources dictate that most noncompliance will continue to be resolved through the administrative process. Moreover, prosecutors must recognize the beneficial aspects of auditing and other self-policing activity. If prosecutors begin to routinely use audits to support criminal cases, this practice will only serve to undermine the government's overall objective of achieving compliance with environmental laws.

Despite risks associated with audits, a number of major corporations, including several major oil companies, have chosen to devote significant resources to broad environmental compliance efforts.[29] The Chemical Manufacturers Association requires its members to have auditing programs in place. Many businesses have weighed the risks associated with audits and decided that a strong compliance record coupled with a sincere commitment to correcting the problems that do arise will help them build trust and confidence with government agencies.

A Minnesota company that undertakes an environmental audit may be able to invoke the "due diligence" defense to a criminal prosecution under state law. Nevertheless, a company and its officials who are considering an audit need to carefully consider their actions. An audit can be designed so that portions of the program receive confidentiality protection. An audit should be designed to shield "responsible corporate officers" and provide adequate defense against "knowing" violations.

ENDNOTES

[1] The Minnesota Environmental Response and Liability Act is codified at Minn. Stat. Ch. 115B (1990).

[2] The MPCA has identified 179 hazardous waste sites where investigation and cleanup are needed, activities leading to cleanup are needed, activities leading to cleanup are underway, or cleanup actions have been completed and long-term monitoring or maintenance continues.

[3] Minn. Stat. § 609.671 (1990).

[4] Minn. Stat. § 116.072 (1990).

[5] *State of Minnesota v. Marvin Lumber and Cedar Co.,* Roseau County District Court, Crim. Ct. File No. K4-90-715, Civ. Ct. File No. C3-90-768. At Marvin Windows' request, the state and the company entered into a "global settlement" where the company's civil and criminal liability for all alleged violations was resolved. A Consent Decree providing for clean-up of the site has been filed with the court.

[6] *State of Minnesota v. Harold Theissen,* Roseau County District Court, Crim. Ct. File No. K6-90-716.

[7] In 1983 the legislature first enacted laws providing felony-level criminal sanctions for environmental crimes. In 1987, the environmental crimes were recodified from Minn. Stat. § 115.071 (1986), the statute governing the state's authority to bring enforcement actions in response to violations of Minnesota Pollution Control Agency (MPCA) rules, permits and environmental laws, to the criminal code, Minn. Stat. § 609.671(1987 Supp.). During the period from 1988 through 1991 the legislature amended Minn. Stat. § 609.671(1991 Supp.).

[8] Minn. Stat. § 609.671, subds. 3, 4 and 10.

[9] Minn. Stat. § 609.671, subds. 8, 12 and 13.

[10] 1991 Minn. Laws ch. 347, Art 3, Sec. 4.

[11] Minn. Stat. §§ 388.051 and 487.25, subd. 10 (1990).

[12] Minn. Stat. § 473.811, subds. 5b and 5c.

[13] Minn. Stat. §§ 375.53 and 375.54 (1990). In April, 1992 Dakota County filed a criminal complaint against Carl Marhaver, vice president of Koch Refining Company, for repeated violations of the Dakota County ordinance. County authorities maintained that Koch had improperly stored and managed hazardous waste at its permitted facility in Hastings, Minnesota. Marhaver pled guilty, admitted the violations, and Koch paid over $1,600 in fines to Dakota County. *State of Minnesota v. Carl Marhauer, on behalf of Koch Refining Company,* Dakota County District Court, Crim. Ct. File No. T6-92-3032.

[14] Criminal penalties are provided under the Clean Air Act, Section 113(c)(l), 42 U.S.C. § 7403 (1988); the Resource Conservation Recovery Act, Section 3008(d), 42 U.S.C. § 6928 (1988); and the Clean Water Act, Section 309(c)(1), 33 U.S.C. § 1319 (1988).

[15] The Pollution and Prosecution Act of 1990, 42 U.S.C. § 4321.

[16] Earlier this year a federal grand jury indicted the former superintendent of the sewage treatment plant in Park Rapids, Minnesota, for filing false reports with the MPCA. The seven-count indictment charged that by not reporting .and treating wastewater, the superintendent allowed raw sewage to flow into the Fishhook River. The defendant pled guilty to one count, and Judge David S. Doty sentenced him to one year probation with two months' electronic monitoring at home and 25 hours of community service. *United States v. Guy Eugene Anderson,* U.S. District Court, Crim. Ct. No. 4-92-60 (3/26/92).

[17] Minn. Stat. § 609.671, subd. 2 (1990).

[18] In order to show "knowing" conduct, the State need only prove that the defendant committed the acts voluntarily and that the conduct was not the result of negligence, mistake, accident or circumstances beyond the control of the defendant. Corporate officials can be charged if they had direct control of or supervisory responsibility for the activities that caused the pollution even though they had information that would lead a prudent person in that position to learn the actual facts. A "due diligence" defense is available to corporations if a high managerial person with direct supervisory authority over an agent demonstrates due diligence to prevent the commission of the crime.

[19] The U.S. Supreme Court has considered the extent of knowledge required to maintain a conviction under federal environmental laws. See *United States v. International Minerals and Chem. Corp.,* 402 U.S. 558, 562-64 (1971)

("knowing" in environmental prosecutions means only intentionally and voluntarily and not specific knowledge of existing law or an intent to break that law"); *United States v. Hayes Int.'l Corp.,* 786 F.2d 1499, 1503 (11th Cir. 1986) (in proving "knowing" violation, government need not prove defendant had knowledge of statute forbidding conduct.)

[20] *State of Minnesota v. Marvin Lumber and Cedar Co.,* Roseau County District Court, Crim. Ct. File No. K4-90-715.

[21] Minn. Stat. § 115.03, subd. 1(e) (1990), provides that the MPCA may enter into stipulation agreements to prevent, control or abate pollution. Minn. Stat. § 115.071, subd. 1 (1990), provides that Minnesota's environmental laws may be enforced by anyone or any combination of the following. criminal prosecution; action to recover civil penalties; injunction; action to compel performance; or other appropriate action. Violations of environmental laws in the civil context are generally strict liability offenses. The state may seek penalties without providing that the defendant knew or intended to violate the law. Willful violations of these laws may be prosecuted as misdemeanors under Minn. Stat. § 115.071, subd. 2 (1990).

[22] Minn. Stat. § 115.071, subd. 3 (1990), provides that any person who violates the provisions of Minn. Stat. Chs. 115 and 116 for any permit, rule, stipulation agreement, variance, schedule of compliance or order issued by the agency shall pay a penalty of up to $10,000 per day per violation in an amount to be determined by a court. In the case of violations relating to hazardous waste, a court may impose a penalty of not more than $25,000 per day of violation. The state also has the authority to seek recovery of its expenses and natural resource damages. Under Minn. Stat. § 115.072 (1990) the state can recover litigation costs and expenses in cases where the state proves the violation was willful.

[23] Minn. Stat. § 116.072 (1990) provides that the MPCA Commissioner may issue orders requiring correction of environmental violations and administratively assessing penalties of up to $10,000 for repeated or serious violations. Under the law, a person subject to an order may request an expedited administrative hearing before an administrative law judge or seek review in district court. Minn. Stat. § 116.072, subds. 6 and 7 (1990). Violations are considered strict liability offenses. Under Minn. Stat. § 116.072, subd. 2(b) (1990), the commissioner may consider the willfulness of the violation in assessing a penalty. The legislature amended Minn. Stat. § 116.072 in the 1991 session and provided that such administrative orders could be issued for other violations of Minn. Stat. Chs. 116, 115, 115A, 115D, 115E, any rules adopted under those chapters, any violations of the terms or conditions established in a MPCA permit and for failure to respond to a request for information under Minn. Stat. § 115B.17, subd. 3 (1990). 1991 Minn. Laws, Ch. 347, Art. 1, Sec. 9.

[24] *State of Minnesota v. Paul Sheppard Dougherty, Leon Edward Smith and MCM Industries, Inc.,* Hennepin County District Court, Crim. Ct. File No. 92072775.

[25] J. Doyle, "Audits Are Their Own Reward," Environmental Forum, p. 38, Jan/Feb. 1992; F. Friedman, "Environmental Management for the Future: Environmental Auditing Is Not Enough," 12 Cardozo L. Rev. 1315-1332 (1990).

[26] For example, Minn. Stat. § 115.061 (1990) provides that persons responsible for discharge of materials or substances which may cause pollution of the waters of the state must immediately notify the agency of the discharge and recover it as rapidly and as thoroughly as possible and take immediately such other action as maybe reasonably possible to minimize or abate pollution of the waters of this state.

[27] 51 F.R. 25004 (July 9, 1986).

[28] Department of Justice Guidance Document entitled "Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator," dated July 1, 1991.

[29] F. Friedman, "Environmental Auditing Is Not Enough," 12 Cardozo L. Rev. 1315-1332 (1990).