



ADVOCACY MEMORANDUM

ARGUMENTS FOR PROSECUTORS OF ENVIRONMENTAL CRIMES

INTERPOL POLLUTION CRIMES WORKING GROUP

Penalties Project

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Table of Contents

Introduction 2

1 Some General Consideration..... 3

2 The Offence 4

2.1 General Arguments 4

2.2 Benefit to the Defendant 6

2.3 Harm Resulting from the Offence 7

2.3.1 Harm to the Environment 7

2.3.2 Harm to Human Health 7

2.3.3 Economic Harm..... 9

2.3.4 Other Public Harms 9

2.3.5 Threat of Harm..... 9

3 The Defendant 10

3.1 General Characteristics 10

3.1.1 Individual Defendant 10

3.1.2 Organizational Defendant 11

3.2 Defendant’s Conduct..... 12

3.2.1 Conduct Prior to Violation:..... 12

3.2.2 Defendant’s Conduct during Violation 12

3.2.3 Defendant’s Conduct after Violation: 12

INTRODUCTION

International environmental crime is big business. According to the United States government, environmental crime is one of the most profitable and fastest growing new areas of international criminal activity, as crime syndicates worldwide reap an estimated \$22-31 billion each year from illegal dumping of hazardous waste, smuggling of hazardous materials and abuse of scarce natural resources.¹ Serious environmental crimes are also committed for financial motives on a regular basis by otherwise legitimate business organizations. These crimes not only damage the natural environment, but also harm public health, impair economic growth, and undermine domestic and international rule of law.

The far-reaching impacts of environmental crime underscore the importance of adequate sentencing for such crimes. In order to deter environmental crime effectively, sentences, including incarceration and monetary penalties, must exceed the economic advantage gained by the defendant as a result of its non-compliance. Sentences must also be high enough to at least cover the costs of mitigating the damage inflicted. This memo is intended to assist prosecutors around the world to advocate for adequate sentences for environmental offences. The memo focuses on knowing, rather than negligent offenses. Part 1 lays out some general features of environmental crime cases. Part 2 provides a list of factors related to the offence that should be considered in sentencing proceedings. Part 3 provides a similar list of considerations regarding the individual defendant.

¹ International Crime Threat Assessment, *available at* <http://clinton4.nara.gov/WH/EOP/NSC/html/documents/pub45270/pub45270chap2.html#6>

1 SOME GENERAL CONSIDERATION

- Environmental statutes are public welfare statutes designed to protect the public at large from the potentially dire consequences of pollution and the degradation of natural resources.
- Even where the illegal conduct in a particular case is local in nature, environmental crime often involves harm to natural resources that can extend beyond national borders and endure over time. Thus, international cooperation in the investigation of environmental crime and consistent enforcement policies in all countries are necessary to combat environmental crime effectively.
- Although environmental crimes differ from traditional crimes in certain respects (for example, it is sometimes difficult to quantify readily the harm caused or to identify specific individual victims) in most instances environmental crimes are fundamentally similar to other fraud-based crimes in that they are committed for financial motive and routinely involve lying, cheating and stealing.
- The effects of a single environmental offence may not appear to be significant, but the assessment of the actual environmental effects of environmental crime must include the cumulative environmental consequences of repeated violations over time. The businesses and individuals who typically violate the environmental laws tend to do so as a part of routine business practices, producing chronic environmental degradation. Thus, failure to enforce the law even as to violations that may, in and of themselves, appear somewhat minor in scope, will allow for a continual and worsening environmental damage.
- Infringement of environmental laws undermines not only domestic rule of law, but also international treaties, such as the Convention on International Trade in Endangered

Species of Wild Fauna and Flora (CITES), MARPOL 73/78 and the Basel Convention, which national authorities are responsible for enforcing.

2 THE OFFENCE

2.1 General Arguments

- Environmental regulatory regimes depend upon the voluntary cooperation and truthful reporting by members of the regulated community. These regulatory regimes possess a variety of tools to secure compliance, including compliance assistance, administrative sanctions, civil penalties and criminal prosecution. Knowing, intentional violations of the environmental laws or intentional efforts to conceal violations from environmental regulators undermine the credibility and integrity of the overall regulatory regime and warrant the most serious enforcement response.
- Criminal prosecution of organizational defendants and responsible corporate officials provides greater benefits than administrative or civil enforcement alone. In addition to creating stronger specific deterrence, criminal prosecution helps to maintain a level playing field for all members of the regulated community, promotes individual accountability, helps to protect the integrity of the regulatory process, and can provide restitution to the injured parties.
- General deterrence is particularly important in environmental criminal cases. Such conduct is generally not motivated by passing emotions, but rather is based on a careful cost-benefit analysis. Prior to violating a law, an environmental defendant typically weighs his or her potential gain from the violation against the possibility of detection and the severity of the consequences, if prosecuted. Intentional violations of the environmental statutes are a serious and growing law enforcement problem. This situation

demonstrates a need to send the clear message to the regulated community that future violations will be detected, investigated and prosecuted.

- Environmental prosecutions must target responsible organizational defendants but also the most senior individuals within such organizations who were responsible for causing or directing the violations. The penalties resulting from environmental prosecutions should not be permitted to become just another cost of doing business. The prosecution and incarceration of responsible corporate officers is the one enforcement cost that cannot be treated as just another business expense.
- The risk of detection is generally low for environmental crimes. Thus the consequences of detection, *i.e.*, penalties for violations, must be set high in order to achieve an appropriate level of deterrence.
- In environmental crime cases, most defendants who are given appropriate sentences are specifically deterred from committing such offences in the future.

2.2 Benefit to the Defendant

- The economic benefit derived by an organizational defendant from an environmental offence is essential information because the fine (or combined fine and confiscation) must be set high enough to deter potential polluters in the future. In countries where fines are allowed by law to be deducted as a business expense from tax payable to the government, the allowed deduction can be a complicating factor in recommending a fine high enough to deter the convicted polluter and polluters in the future.
- One economic benefit is the competitive advantage that a corporation gains by not investing the necessary resources in personnel, training, technology, maintenance, internal auditing and compliance monitoring, as well as the costs associated with the proper storage, treatment and disposal of waste materials or other pollutants.
- The determination of economic benefit should not be limited to a simple calculation of avoided costs. If allowed by legislation, it may also be appropriate to include the gross revenues of the business enterprise throughout the period of non-compliance, on the theory that the company would not have been permitted to continue in operation if the regulators had known that it was intentionally operating in a manner that was not in compliance with the environmental regulations.
- Economic models employed by enforcement personnel may be useful in determining an organizational defendant's profit from environmental crimes.
- Many forms of environmental non-compliance involve fraud or theft from customers. For example, when customers pay for the proper disposal of waste, the improper disposal of these wastes constitutes theft by the disposal company.

2.3 Harm Resulting from the Offence

2.3.1 Harm to the Environment

- In some cases, it may be difficult to quantify the harm to the environment with scientific precision. However, the disposal prohibitions, discharge limitations and concentration parameters established by environmental regulations are predicated upon the regulatory determination that disposals or discharges in violation of the applicable regulations are presumptively harmful to the environment.
- Where possible, it can be useful to determine the extent of environmental and natural resource damage resulting from the violation. Relevant considerations include:
 - whether the violation was a one-time offence or part of a continuous, repetitive discharge or disposal;
 - the nature, extent and sensitivity of the environment impacted;
 - the nature and hazardousness of the pollutant or waste involved;
 - the types of wildlife impacted, and their degree of abundance;
 - the estimated time for the impacted environment to recover; and
 - the costs of remediation.
- An on-site visit may be useful to give the judge a more complete understanding of the harm done. However, this may not be feasible in many cases, such as when a site has been altered since the incident or is inaccessible. In such cases, it is preferable to photograph and/or videotape the area immediately after the incident and present those records as evidence.

2.3.2 Harm to Human Health

- If the offence created a significant risk of death or serious bodily injury, *e.g.*, asbestos exposure, the penalty should be increased. Certain environmental exposures may

not manifest immediate adverse health effects, but epidemiological data may be available to provide the court a basis for assessing the likelihood of future adverse health effects of the violation.

- Sentences should also account for adverse impacts on public health more generally. For example, impacts on drinking water sources and air quality should be considered.

2.3.3 Economic Harm

- Non-compliance allows an offender to supply its services or goods for less than its competitors, thus undermining lawful businesses and leading to economic distortions. Though difficult to quantify, such distortions should enhance the penalty.
- Indirect economic impacts of the crime should also be taken into consideration. For example, where animals have been killed or cultural heritage destroyed, the impact on tourism should be considered.

2.3.4 Other Public Harms

- A defendant's actions to conceal violations or to obstruct the investigative process should be considered as aggravating factors at sentencing because such conduct tends to exacerbate the harm caused by the underlying offence.
- Public disruptions resulting from the violation, *e.g.*, evacuations, blackouts, interferences with water supply, should be considered as aggravating factors at sentencing.
- The costs of investigating and prosecuting environmental crimes, including costs of scientific testing and analysis, should also be born by offending parties, where authorized by applicable laws.

2.3.5 Threat of Harm

- In cases where fortuity and/or regulatory intervention have limited the consequences of the defendant's actions, evidence of potential damage should also be considered.
- Consideration of potential damage is also important in cases where the extent of damage may not manifest itself for many years, *e.g.*, in asbestos exposure cases, and where the impact of a single violation is not readily discernible, *e.g.*, exceeding an effluent guideline.

- Proving potential damage often presents an evidentiary challenge. Prosecutors may wish to draw upon:
 - documentation that addresses the costs of restoration in similar cases;
 - evidence of the scientific basis of the law at issue, *e.g.*, health-based water quality standards;
 - documentary or testimonial evidence to establish a defendant's knowledge of the general hazardousness or potential environmental impact of the violation to demonstrate the extent of the environmental risk the defendant was knowingly creating;
 - evidence of the potential cumulative impact of multiple violations; and
 - studies, models and reports provided by international organizations or reputable national authorities.

3 THE DEFENDANT

3.1 General Characteristics

3.1.1 Individual Defendant

- Sentencing should account for an individual defendant's position in relation to the offence. For example, it may be relevant to consider the defendant's:
 - rank or position within the company;
 - role in the offence, *i.e.*, whether the defendant was a leader or organizer or a mere participant in the crime;
 - knowledge of the illegality of the conduct; and
 - knowledge about likely damage, harm or consequence caused by the offence.

- If the offence conduct involved an abuse of public trust due to the position, training or licensing possessed by the defendant, it should be considered as an aggravating factor at sentencing.
- Depending on the nature of the crime, sentences might also take into account general characteristics of the defendant, such as his or her experience and education.

3.1.2 Organizational Defendant

- The existence and adequacy of a corporation's pre-existing environmental compliance program should be considered in fashioning an appropriate sentence. If no such program existed or if the program was not sufficiently funded or adequately integrated into the overall business plan of the organization, it should be considered an aggravating factor at sentencing.
- In determining the sentence of an organizational defendant, a court should consider the pervasiveness of the wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management.
- A court should require an organizational defendant to implement a comprehensive environmental compliance plan ("ECP") during the probationary period, if legislation permits. The ECP should be designed to ensure overall environmental compliance by the organization and should specifically address the conditions that led to the offense of conviction. The ECP should also include provisions for outside environmental auditing. The organizational defendant's implementation of and performance under the ECP should be monitored by the court throughout the period of probation.
- If the environmental crime was committed by a corrupt organization or criminal syndicate that has engaged in a pattern of illegal environmental practices, the court should consider imposing a financial penalty sufficiently severe to prevent the organization from continuing to do business.

3.2 Defendant's Conduct

3.2.1 Conduct Prior to Violation:

- If the individual defendant or corporation has previously been convicted for environmental crimes, the penalty should be increased. A prior history of administrative or civil enforcement actions for the same or similar violations should also be considered as an aggravating factor at sentencing.
- Most countries have a registry of prior environmental convictions, which should be checked. In ship pollution cases, where companies may be structured to avoid multiple convictions, Lloyd's Register-Fairplay, which lists the individual IMO (International Marine Organization) identification number for ships across the world, should be checked.

3.2.2 Defendant's Conduct during Violation

- Relevant aspects of the defendant's conduct may include:
 - whether the defendant purposefully concealed the violation, *e.g.*, making false entries into logbooks or environmental reports;
 - whether the violation was the result of on-going behaviour or an isolated act; and
 - whether the defendant knew that the conduct at issue was a violation of the law.

3.2.3 Defendant's Conduct after Violation:

- The voluntary disclosure of information regarding environmental violations to regulatory authorities in a timely manner and prior to the initiation of any governmental investigation into the violation may be considered a mitigating factor at sentencing.
- Cooperative behaviour by the defendant, *e.g.*, cooperating with the investigation through the timely production of records or making employees available to investigators,

taking responsibility for the offence, remediation the damage, and/or efforts to avoid future violations, might be considered mitigating factors at sentencing.

- Where a defendant attempts to impede the investigation into the offence of conviction by concealing or destroying evidence, lying to authorities, threatening witnesses or otherwise obstructing justice, it should be considered an aggravating factor for sentencing under the environmental crime. Such conduct may also constitute a separate, substantive criminal offence.