The State of Environmental Crimes Prosecutions in New York

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Most discussions about environmental crimes prosecution focus on environmental criminal enforcement in major, high-impact cases that receive publicity. But there are certain types of environmental crimes that for a long time lent themselves much more to state and local, rather than federal, investigatory and prosecutorial resources. Such crimes include illegal solid waste transfer stations; red-bagged medical waste or chemically smelling, oily wastes found in a dumpster abandoned in a hamlet; and dry cleaners or furniture strippers, where surreptitious discharges of perchloroethylene or other heavy, solvent-induced paint wastes into sewers. In such matters, a passerby, an employee or ex-employee, or nearby resident might consider informing the state's Department of Environmental Conservation (or Environmental Protection) before calling the U.S. Environmental Protection Agency (EPA).

This article traces the development of environmental crimes litigation in New York State in the 1980s and analyzes the state of affairs in environmental crimes prosecutions at the state and local levels in New York State during the past few years. It demonstrates that although New York continues to be aggressive in prosecuting cases at the federal level (see, e.g., *U.S. v. Salvagno*, 502 cr 051 2006 WL 2546477 (N.D. N.Y. Aug. 28, 2006)), there is a noticeable reduction in the number of environmental crime prosecutions, with jail or prison time imposed rarely at the state level and in the majority of counties. This article discusses manifestations and causes of the decline in prosecutions at the state level and in the majority of New York's counties from the political, administrative, and judicial perspectives.

New York has a long history of environmental crimes prosecutions. New York State law has long protected its air, water, and natural resources, including wild birds, animals, and flowers, dating back to the 1890s with the statutory and constitutional "forever wild" protections given to the 6 million acre Adirondack Park, to the turn of the twentieth century with Teddy Roosevelt's stewardship as governor (even before he declared, as president, "conservation of our [natural] resources [to be] the fundamental question before this Nation.") *See* Theodore Roosevelt, *Seventh Annual Address to Congress: The Conservation of Natural Resources* (Dec. 3, 1907). The Storm King cases in the 1960s were the first modern environmental litigation, where a special regard for the beauty and majesty of the Hudson River Valley had an extraordinary impact on the development of environmental law. These cases (see, e.g., *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1985)) arose from the Consolidated Edison Company's (Con Edison's) plans to build a pumped storage hydroelectric plant, which was to be the largest of its kind in the world, at Storm King Mountain near Cornwall, New York, in the Hudson River Valley. This seventeen-year legal dispute (1963–1981), resulting in the defeat of Con Edison's plans, led to groundbreaking federal rulings about the importance of integrating environmental concerns into major federal decision making and led to the long-lasting legal protection of the National Environmental Policy Act. Practitioners will also not have forgotten that the discovery in the late 1970s of the devastation of Love Canal near Buffalo in western New York led to development of a New York superfund act in 1979 and a year later to the passage of the federal Superfund Act (CERCLA).

Given this background, it is not surprising that New York has long had a well-developed network of state and local investigatory and prosecutorial resources, as well as ever-improving tools to prosecute environmental crimes. By the late 1970s, New York had begun to develop a state criminal environmental statutory scheme for more "modern" environmental crimes—illegal possession, transportation, and disposal of hazardous materials. New York has a long history of traditional conservation regulation, with minor criminal penalties attached to violations of fish and wildlife laws or laws proscribing clear-cutting of forests. *See* ECL §§ 9-1105, 71-0924. By the mid-1980s, in fact, New York had developed a full-fledged environmental criminal enforcement apparatus, including a healthy competition between the state's attorney general and local district attorneys.

New York's statutes, including prohibitions of, and criminal sanctions for, hazardous waste violations, for example, are found in articles 27 and 71 of the Environmental Conservation Law (ECL). The definitions of hazardous waste in New York are analogous, though not identical, to those defined in the Resource Conservation and Recovery Act (RCRA). Successful criminal prosecutions of defendants whose discharges have exceeded numerical standards, as in the violation of hazardous waste laws, can be difficult, given the requirement as in all criminal prosecutions of proof "beyond a reasonable

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doubt." Any violation of article 27, title 9 ("Industrial Hazardous Waste Management") of the ECL that is committed intentionally, knowingly, recklessly, or with criminal negligence is a misdemeanor crime. Additional relevant provisions describe the dealing and possessions of hazardous waste, in varying degrees, depending on quantity of weight, as felonies.

A second generation of statutory tools was developed in 1986 to remedy the inadequacies of the earlier statutes that had been limited mostly to RCRA "hazardous waste." These statutes proscribed endangerment of the public health, safety, or the environment by mishandling a far broader set of "hazardous substances," parallel to CERCLA's broad definition, but also eventually including petroleum.

EPA does not require states to follow its procedures in defining hazardous substances. Therefore, the New York State Department of Environmental Conservation (NYSDEC) was free to develop a list of these substances on its own, and it did. New York's hazardous substance regulations are set forth in the New York Compilation of Codes, Rules and Regulations (N.Y.C.R.R.) at 6 N.Y.C.R.R. Part 371 and by the list of hazardous substances enacted pursuant to ECL § 37-0103 set forth at 6 N.Y.C.R.R. Part 597.2. Prosecutions for violations of these statutes are less complicated than those in the hazardous waste area, as a substance's presence on the list, coupled with its mismanagement by an individual with the requisite criminal intent, provides a strong foundation for proving the elements of the crime. The required levels of culpability for violations of the hazardous substance statutes (ECL §§ 71-2710 - 71-2714) for endangering the public health, safety, or the environment in the fifth to the first degrees, respectively, are when a person acts with criminal negligence (more than the lesser of 5 gallons or 50 pounds of a hazardous substance), with criminal negligence, with recklessness, with knowledge and with intent, involving any amount of a substance acutely hazardous to public health, safety, or the environment.

Under the ECL, the "waters of the State" have a broader definition than the surface and underground waters of the United States, as defined under the federal Clean Water Act. The ECL expands New York's "waters of the State" to include both surface and underground waters. *See* ECL § 17-0105(2). The effect of this definition is significant in the area of prosecutions for criminal water violations. Illegal discharges of hazardous substances and conventional pollutants into water systems that do not discharge directly into surface or navigable waters, such as sewer systems and cesspools, may be prosecuted.

In New York State, the violation of air statutes and resulting prosecutions are distinguishable from most other environmental crime prosecutions in that such air violations are misdemeanors. The prohibitions and sanctions for New York's air pollution control are located in ECL §§ 71-2105 and 71-2113(2). The vagueness of the definitions under the air pollution statutes has been proposed as a theory explaining the relatively low criminal enforcement in this area.

Prosecutions for medical waste violations have a unique background in New York State. In the late 1980s, medical wastes, including hypodermic needles, washed up on New York beaches, prompting beach closures during the summer months. The resulting statute, ECL article 27, title 15, passed in 1987 creates guidelines on the management of such infectious waste. New York's regulatory sections on medical waste establish guidelines on permitted types of containers and mandated coloring of waste disposal bags.

The sale, distribution, and use of pesticides can naturally have a significant effect on the environment, if not handled properly. Criminal sanctions for pesticide violations, found at ECL § 71-2907, are stated as misdemeanor offenses. However, because some pesticides are also considered hazardous substances or hazardous waste under the ECL, certain violations involving pesticides can in fact lead to felony charges.

Satisfaction of the requisite proven level of intent is an important factor in prosecuting violations of environmental criminal provisions in New York State. The majority of environmental crimes in New York State are crimes of general intent. However, a recent trial-level decision addressing water pollution violations, discussed below, held otherwise. *See People v. M&H Used Auto Parts & Cars, Inc.* 22 A.D.3d 135 (N.Y. App. Div. 2d Dep't 2005).

Current Level of Environmental Crimes Prosecutions in New York State

A review of amendments over the years to the New York statutes at prosecutors' disposal would suggest finer tools with which to criminally prosecute the worst environmental offenders. However, it appears that New York state and local prosecutors' efforts to prosecute environmental crimes have in some cases held steady but not grown. In fact, at least in some cases, they have even declined in recent years. The surest sign of a decline is the difficulty in obtaining at either a state or local level (with the exception of Westchester and Suffolk Counties) comprehensive statistics on the numbers and types of environmental crimes prosecutions of recent years. This stands in stark contrast to the message of years past, when the number of prosecutions, the amount of fines, and the average prison sentences were measured in months rather than years and were touted by officials.

Perhaps the single best index of the level of environmental criminal prosecutions is the number of professionals assigned to such matters. In New York, the state attorney general is authorized to bring environmental criminal cases statewide, without usurping the authority of local district attorneys to bring cases within the county's jurisdiction. ECL § 71-0403. However, at present, there appears to be only one assistant attorney general for the entire state. His role is mostly to give advice to police officers in NYSDEC's Law Enforcement Division's plainclothes Bureau of Environmental Conservation Investigators (BECIs) or uniformed Environmental Conservation Officers (ECOs) on how to make out a case. This advice also extends to local district attorneys' offices, in most of which there are no dedicated assistant district attorneys to prosecute environmental crimes; there, the attorney gen-

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eral's office provides advice on how to put cases in the grand jury. While this work is essential in ensuring that successful prosecutions are brought, and under consistent application of available prosecutorial tools, it represents something of a retreat from earlier decades when certain grand juries in New York County (Manhattan) were specifically educated in the evaluation of potential environmental crimes, and several assistant attorneys general in the Environmental Protection Bureau or Criminal Prosecutions Bureau were dedicated to obtaining felony indictments and pursuing such cases to plea or trial.

As a practical matter, most decisions about referrals—whether to the attorney general's office, the local district attorney, or, as we shall see, the U.S. Attorney's Office—are now made by NYSDEC Law Enforcement Division police officers instead of attorneys at that agency or its outside attorneys in the attorney general's office as had been the early practice. BECI investigators, who were for many years assigned to work with and, to some extent, under attorneys in NYSDEC's Division of Environmental Enforcement, now work for and report to police personnel in the Law Enforcement Division. Much more so than in the early period of enforcement that began about 1980, the Law Enforcement Division now refers matters for prosecution typically not to the agency's outside counsel, the attorney general, but rather to the local district attorneys in those counties in the New York City metropolitan area where the district attorney has dedicated resources for the prosecution of environmental crimes; Suffolk, Nassau, and Westchester are three such counties.

Other state agencies, notably the Department of Labor (its Asbestos Control Bureau) and the Department of Health (which ferrets out falsified training records of asbestos workers), also develop information that has led to a number of environmental crimes prosecutions in New York over the last ten or more years. Beginning with regulatory inspections, those agencies provide information to the U.S. attorney in one district (the Northern District of New York), which that office then uses to apply for and obtain a search warrant.

In one case in particular, previously full-time, local environmental prosecutors (i.e., district attorney's offices) now spend no more than a small fraction of their time on environmental crimes, with fewer investigative resources at their disposal than five, ten, or twenty years ago. State police efforts within the NYSDEC seem directed almost exclusively at traditional, pre-RCRA and prehazardous substance law fish and wildlife enforcement, tree-cutting, or other, tangentially environmental crimes. Some of that change of direction probably results from the more "business friendly" administration of former Republican Governor George Pataki throughout his twelve-year term (1995–2006). After the resignation of Democratic Governor Eliot Spitzer, the new policies of Democratic Governor David Paterson have not had time to coalesce. While the Pataki-era milder enforcement helps explain the decline in aggressive enforcement by the NYSDEC, it does not explain the decline in prosecutions by the attorney general, who in New York is elected separately from the governor. Here, the terms of former Attorney General Spitzer's aggressive environmental enforcement coincides with Governor Pataki's terms. What used to be a healthy rivalry between the attorney general's office and local prosecutors is now mostly a training effort (a well-regarded and thoughtful one) by the attorney general's office for those local prosecutors—that is, in all but a half dozen of New York's sixty-two counties that have little experience in and no dedicated resources for environmental crimes prosecutions.

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On the other hand, two of New York City's suburban counties still have active programs. The environmental crimes prosecutorial staff in Suffolk County, in the East End of Long Island, where there are many special state law protections (as well as EPA's designation) of the Island's drinking water from a "sole-source aquifer" is still very active. The one assistant district attorney and two police detectives who staff the unit are "incredibly busy." In the last five years, Suffolk has achieved between twenty and thirty convictions, half of them for felonies, all by pleas (cases that begin as misdemeanors are handled through the D.A.'s district court bureau; virtually all misdemeanor trials have led to convictions). But there have been "no jail sentences on a straight environmental case." Though corporations are indicted, it appears that corporate officers are rarely, if ever, indicted. The assistant district attorney in charge believes it to be "unlikely" that a judge would impose jail time.

However, substantial fines have been levied, and, in at least one matter, a significant benefit to the environment achieved. In *People v. Sawaya Holding Corp.* (Suffolk Co. Ind. No. 3026-07), a combination of an administrative fine of $200,000 for Altaire Pharmaceuticals, Inc. (with another $175,000 fine amount suspended pending cleanup of its contaminated site) plus asset forfeiture of $1.2 million for the related holding company, Sawaya, totaled $1.5 million, as a result of the corporation pleading guilty to an E felony of Endangering the

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Public Health, Safety or Environment in the Third degree, in violation of ECL § 71-2712(4). Altogether over the last few years, the environmental crimes unit has gathered several millions of dollars in fines. Referrals come from NYSDEC, the County's Health Department, village environmental quality bureaus, and private citizens.

Many of the unit's cases are based on Offering a False Instrument for Filing, N.Y. Penal Law § 175.35 *et seq.*, a general penal law crime long found to be useful in prosecuting permit applicants or holders who obtained the benefit of a permit through supplying false information.

In Westchester County, 590 environmental crimes cases were brought between 2003 and 2007, resulting in nine felony prosecutions and misdemeanors for the remainder. A very capable assistant district attorney with twenty-nine years of experience has two experienced investigators to assist her in developing cases. Some cases come by referrals from the New York City Department of Environmental Protection, which has extraterritorial power to prevent and punish discharges into the City's suburban (i.e., Westchester County) and upstate watersheds, which provide drinking water for more than 50 percent of the state's population. Industrial pretreatment violations detected by County agencies contribute to the workload. "Slugs" of contaminated waste water alert investigators to surreptitious dumping. About 20 percent of this county's criminal cases arise from solid waste violations. In Westchester, as in Suffolk, care is taken to carefully segregate administrative violation investigations from criminal investigations to avoid defenses of warrantless searches. Still, even in these very active counties, jail time is rarely, if ever, imposed. Westchester has had only two jail cases, one with a sentence of six months and one of four months. As noted, there have been no jail cases in Suffolk County in recent years.

The assistant district attorneys in both Suffolk and Westchester see no slowdown in the amount of environmental crimes committed that are prosecutable under state law. The district attorneys' offices in both Suffolk and Westchester appear to have the political will, as seen through the giving of the resources and encouragement, necessary to investigate and prosecute environmental crimes.

Case Law Developments in New York State

At the same time, there have been case law developments in the last few years that have, in some measure, continued to resolve some of New York's environmental crimes prosecutions issues that are not unlike those probably faced elsewhere.

In 2005, a New York intermediate appeals court tackled a case involving proof of the culpable mental states required in two environmental criminal statutes. The court affirmed the conviction of defendant operators of a vehicle-dismantling junkyard for the discharge of industrial waste into New York State waters without a permit. The case turned on whether the prosecutor must prove that the defendants had the requisite intent with respect to every element of the crime. The appellate court held that the term "knowingly" applied to "each and every" element of the environmental criminal statutes at issue and thus the crime was a specific intent, not general intent, crime. But the court held the People had met that burden, reasoning that the defendants knew that the industrial fluids would eventually reach state waters. The court stated that while knowledge must be established for every element of the offense, the prosecutor need not prove that defendants knew the conduct to be illegal. See *People v. M &H Used Auto Parts & Cars, Inc.* 22 A.D.3d 135 (N.Y. App. Div. 2d Dep't 2005).

The important issue of parallel jurisdiction between state and local prosecutors has not been well settled in environmental criminal prosecutions, but it may now be, by virtue of a recent appellate decision. In 2006, a Brooklyn trial court threw out the indictment of a cement manufacturer for discharging industrial waste and pollutants into Newtown Creek (the waterway that serves as the border between Queens and Brooklyn and is part of the Hudson River watershed) without a NYSDEC permit because the District Attorney's Office prosecuted the case without express authorization or referral from the NYSDEC. In *People v. Quadrozzi*, __ N.Y.S.2d __, 2008 WL 3853551, 2008 N.Y. slip op. 06653 (N.Y. App. Div. 2nd Dep't, Aug. 19, 2008), however, an appeals court reversed the decision of a trial court, (13 Misc.3d 261, 272-273, 818 N.Y.S.2d 726 (2006), and held that the district attorney did not need to have obtained authorization from NYSDEC before prosecuting the cement manufacturer. The appeals court agreed with the district attorney in its interpretation of ECL § 71-0403, enacted in 1980 specifically to overturn a decision by New York's highest court (the Court of Appeals), *People v. Long Island Lighting Co.*, 41 N.Y.2d 1049 (1977), a case that affirmed dismissal of an ECL air-pollution prosecution initiated by a local D.A. without referral.

The district attorney argued that ECL § 71-0403 authorized that office broadly to initiate a prosecution of any environmental crime, without referral from the NYSDEC (or the attorney general). 2008 N.Y. slip op. at *5-*6. The court held that the reach of ECL § 71-0403 should be "consistent with its legislative rationale," namely, to overturn a judicial decision, and that district attorneys have long had "'plenary prosecutorial power in the counties where they are elected, [and in contrast] the Attorney-General has no such general authority and is *without any prosecutorial power* except when specifically authorized by statute [citation omitted]." *Id.*, N.Y. slip op. at *6.

This decision was a victory not only for the Kings County district attorney, but for all district attorneys, and should act as an encouragement to more self-initiated environmental crimes investigations and prosecutions. The *Quadrozzi* prosecution also illustrates that even in the absence of a dedicated bureau or unit for environmental crimes (as determined by an extensive Web site for the Kings County district attorney that makes no reference to environmental crimes), good and persistent lawyering can improve the state of the law.

In 2006, a Westchester County court made an interest-

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ing ruling regarding a repeat violator of the provisions of the ECL and a constitutional defense of "vagueness." In *People v. Adinolfi*, 823 N.Y.S.2d 662 (Westch. Co. Sup. Ct. 2006), the court ruled that since the defendant, president of a company supplying NYSDEC-approved "clean fill" to school athletic fields, had previously been convicted of a misdemeanor for violating Article § 71 of the ECL, he was properly charged with a felony under the same section of that statute. Charges were brought against the defendant for the intentional dumping of solid waste at a high school without a permit to operate a solid waste management facility, despite the fact that the contractor did so under contract. The court rejected the defendant's argument that ECL § 71-2703(2)(c)(ii) was unconstitutionally vague in that it failed to provide "'sufficient notice of what conduct is prohibited' [citation omitted]," holding that the prohibition of a "release," defined to include dumping, of solid waste "at any spot not licensed to receive it" was clear enough for the defendant to know what conduct was prohibited. *Id.*, 823 N.Y.S.2d at 669.

While it is true that several cases with interesting issues have been decided in the last few years at the trial and appellate levels, this is more a trickle than a full-fledged body of case law. It is clear that with a decline in the prosecution of environmental crimes at the state level and in the majority of counties in New York State goes a decline in the number of litigated issues and decisional law.

Reasons for the Decline in State- and Local-Level Environmental Crimes Prosecutions

One of the reasons for this decline in environmental crimes prosecutions at the state and local levels was George Pataki's business-friendly governing for twelve years before the short-lived term of Governor Eliot Spitzer. But perhaps the signal refrain one hears upon inquiry at the state and local levels for the reasons for the decline in the use of environmental crimes tools is that judges and juries are reluctant to impose jail time for environmental crimes.

For example, as noted, one of the district attorney's offices discussed here—probably the most active in the state—prosecuted nearly 600 cases between 2003 and 2007. Though it is not clear how many of these cases resulted in convictions, there were only two convictions during those years in which the defendant was incarcerated (one for a felony and the other for a misdemeanor); as noted, the sentences were for four months and six months. And in the other very active county, there were no jail sentences at all. Most cases end in plea bargains, another possible reason why environmental violations are less likely to result in jail time. Some cases end with a "conditional discharge," even in those less-frequent cases where a corporate official or principal of the business is also charged with the crime.

Without a real threat of incarceration, based on prior examples, it would seem that much of the incentive to comply goes out of criminal prosecution. Civil enforcement is often able to obtain both larger fines in dollars and, perhaps more important, the goal of environmental compliance, which requires continued monitoring and vigilance that is more amenable to continuing civil and administrative agency oversight than it is to oversight by a criminal justice system that lacks any such apparatus, much less a scientific staff.

Ultimately, the reluctance of judges and juries to impose jail time that seems an integral part of the decline may be traceable to a public that continues to feel more threatened by traditional street crime, as well as threats from terrorists, and simply sees a far broader variety of sources of discontent in American society than environmental degradation. It is often pointed out that the reading of books and newspapers, or the playing of card games in American families, has far more "competition" for family leisure time and attention in the twenty-first century from the Internet, video games, and rented movies. So, too, it may be that environmental crimes may have more "competition" than they once had for the attention and indignation of the American public, which has, after all, watched its entire financial system fall from grace in a way that was once unthinkable, supersized executive salaries concurrent with the decline of the almighty American dollar, America's role as leader of the free world threatened, and a fear of terrorists and a loss of confidence after September 11, 2001.

The decline in environmental prosecutions and in meting out jail sentences in New York State cases is, to be sure, not uniform, but it is nearly so. A more optimistic reason for these declines, suggested by one seasoned prosecutor in another county that has suffered the most serious decline in such prosecutions, is that the deterrent effect of earlier such prosecutions has worked over the years. The well-publicized criminal prosecutions of small businessmen most susceptible to such crimes in small-town or in suburban America—dry cleaners, furniture strippers, transporters of solid waste of all types—has led to a decline in the number and severity of such violations, and thus a decline in prosecutions, according to this veteran environmental crimes prosecutor.

Similarly, one assistant district attorney in one of the two suburban New York counties with active programs cited an overall change in the conduct of a class of would-be violators brought on by a 1998 amendment to one of the hazardous waste provisions of the ECL. In § 71-2710 of the ECL, the words "to the environment" (previously modifying "release") were deleted in that amendment, resulting in a lower burden of proof, in which the prosecutor would no longer have to show that the defendant's release of hazardous substances was "to the environment," but only that such hazardous materials had been abandoned; an example is drums that were not leaking but that were left in an abandoned truck. Once the potential violators realized that hazardous waste violations would be easier to prove, this assistant district attorney believes would-be law breakers have been less willing to abandon even secure drums of hazardous materials. Similarly, the fear of criminal prosecutions is useful where debarment from further government contracts can result from a felony conviction, sometimes leading to quick misdemeanor pleas.

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