

ANIMAS RIVER IS A CLEAN WATER ACT CRIME SCENE

Thu Aug 20th, 2015 | Categories: *Environmental Law* | By *Bick Law LLP*

Residents along the Animas River in Colorado, New Mexico, and Utah, have deemed their river a "crime scene." EPA and its contractors could be criminally responsible for violating the Clean Water Act as a result of the recent toxic spill in Colorado to the Animas River caused by EPA workers.

CWA is the primary Federal statute governing the restoration and maintenance of the "chemical, physical, and biological integrity of the Nation's waters." (CWA §101). One of its principal objectives is to prohibit the discharge of pollutants into waters of the U.S., except in compliance with a permit. The Clean Water Act exempts federal agencies and their contractors from legal liability; however, such exemption is voided if the agencies or contractors are negligent, or if they trigger a new release of contaminants.

Under the Clean Water Act (33 U.S.C. §1319(c)(1) & (2)), a person who negligently or knowingly discharges a pollutant from a point source into a water of the United States without a permit or in violation of a permit can be criminally prosecuted. Negligent violations could result in a conviction of 1-year imprisonment and/or up to \$25,000 per day in penalties.

While the definition of "person" (§502(5)) does not include the United States, pursuant to §313, federal agencies, including EPA, are required to comply with all Federal and State requirements respecting the control and abatement of water pollution. Specifically, each department, agency, or instrumentality of the Federal Government possessing the right and/or authority to engage "in any activity resulting, or which may result, in the discharge or runoff of pollutants shall be subject to, and comply with, all Federal, State, interstate, and local requirements and administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner as any nongovernmental entity." (33 U.S.C. §1313).

In the Animas River spill, EPA and its contractors could be found criminally negligent. Normally, criminal negligence is a 'misfeasance or nonfeasance' where the fault lies in the failure to foresee and avoid an avoidable harm. However, the Clean Water Act's criminal provisions do not require misfeasance or nonfeasance, or willful blindness. Instead, under the CWA, the standard is whether a "reasonable person" would have foreseen the injury and taken preventive measures, as laid out in *Hanousek v. United States*. (176 F.3d 1116 (9th Cir. 1999)).

In *Hanousek*, the Ninth Circuit upheld the conviction of a defendant for negligently discharging a harmful quantity of oil into navigable waters of the United States in violation of sections 309(c)(2)(A) and 311(b)(3) of the Clean Water Act. As roadmaster of the White Pass & Yukon Railroad, the defendant was responsible "for every detail of the safe and efficient maintenance and construction of track, structures and marine facilities of the entire railroad" and [was to] assume similar duties with special projects," including a rock-quarrying project near the Skagway River, a navigable waterway of the United States. A high-pressure petroleum pipeline ran parallel to the railroad. While clearing fallen rocks in the vicinity of the pipeline, a backhoe operator struck the pipeline, causing a rupture and a discharge of oil into the Skagway River. On appeal, the defendant contended that the government had to prove he acted with criminal negligence rather than ordinary negligence. The court disagreed, concluding that "Congress intended that a person who acts with ordinary negligence" may be subject to criminal penalties." The court classified the violation of section 309(c)(1)(A) as a public welfare offense, holding that the doctrine also supported assessment of criminal penalties against the defendant for ordinary negligence.

The Hanousek case bears a strong similarity to the Gold King mine fiasco, with one important exception – EPA is the perpetrator. Both cases involve a negligent use of a backhoe causing a rupture and discharge of pollutants into a river. Because this is a Clean Water Act violation, there is no requirement that the harm be avoidable in order to find criminal negligence. Even though not necessary to prove criminal negligence, there is a strong argument – for optics sake – that the harm caused by the backhoe was, in fact, avoidable.

It is also possible that a grand jury could find EPA (or its contractor) to have the necessary mens rea for a felony indictment, if a prosecutor can show that EPA had knowingly engaged in the harmful conduct. Instead of requiring proof of specific knowledge or intent, Congress lowered the standard of "knowing" under the Clean Water Act to general knowledge. (33 U.S.C. §1319(c) (1994)). The Ninth Circuit in *United States v. Weitzenhoff* (35 F.3d 1275 (9th Cir.1993)) held that "the criminal provisions of the Clean Water Act are clearly designed to protect the public at large from the potentially dire consequences of water pollution, and as such fall within the category of public welfare legislation." The Supreme Court refused to grant certiorari in *United States v. Weitzenhoff*. The Second Circuit in *United States v. Hopkins* (53 F.3d 533 (2nd Cir. 1995)), also addressed the "knowingly violates" language of the Clean Water Act's section 1319(c)(2)(A), holding that "the government need prove only that the defendant knew the operative facts which make his action illegal." The *Hopkins* Court went on to infer that when Congress amended the Clean Water Act in 1987 and reduced the mens rea requirement from "willfully" to "knowingly," that "Congress intended not to require proof that the defendant knew his conduct violated the law." There is a split in the circuits, between the Ninth and the Second Circuits on the one hand with a lower general knowledge requirement, and the Fifth Circuit on the other hand holding that specific intent is required. The Tenth Circuit has not addressed this issue.

The facts don't look good for EPA or its contractor. EPA knew that the work it was conducting at or near the Gold King mine area could result in the accumulation of water behind bulkheads, filling connected voids and fractures and abandoned shafts and building head pressure. It was foreseeable that water with built up pressure behind the bulkhead would eventually escape. If it can be shown that EPA was aware of the possibility that the water could escape uncontrollably, and did not act in a manner to prevent that from occurring, then there is an argument that there is an intentional criminal act here.

EPA's workers and contractors could also be criminally liable under the Rivers and Harbors Act of 1899. (33 U.S.C. §401). Under that law, a person or corporation who obstructs, builds, fills, alters the course, condition, or capacity of any traditionally navigable water of the United States without a permit could be subject to up to 1 year imprisonment and/or fines up to \$100,000 for individuals and \$200,000 for corporations.

Under the Unitary Executive Theory, the U.S. Attorney cannot sue EPA (the theory argues that the President's constitutionally allocated executive responsibilities may not be restricted by Congressional or Judicial action, in other words – the Federal Government can not sue itself.). However, this calls the question – who can sue EPA for violating the CWA?

State Attorneys General can issue administrative compliance orders or take civil judicial action against the EPA for violating the CWA. States can also file a criminal action against a Federal employee that may result in significant fines and/or prison sentences. The only thing that can't be done, it seems, is seek criminal sanctions against EPA as an entity. If EPA were a corporation (rather than a federal agency), it could be found criminally liable of violating CWA. EPA is not a corporation, and therefore, EPA, as an entity, will not be held accountable for any crime it may have committed under the CWA at the Animas River.

Already, the New Mexico Environment Department has filed a lawsuit against the federal EPA for its actions. In addition, the attorneys general of Colorado, New Mexico and Utah are contemplating filing a lawsuit against EPA. Such lawsuit would likely involve natural resource damages, remediation costs, and economic damages to the state. For example, New Mexico has suffered hay shortages and water shortages for livestock. Natural resource damages may be difficult to assess for several years due to delayed impact on fish and wildlife because the heavy metals sink to the bottom of the river and could impact the habitat over the long term.

In addition, CWA §518 provides that Federally-recognized Indian Tribes can act in the same manner as States with respect to several CWA provisions, including §309. The Navajo Nation and other tribes have already stated that they will sue EPA for significant NRD claims, as

well as remediation and economic damages claims.

Additionally, the Federal Government may be sued under the Federal Torts Claim Act. 28 US Code Section 1442. A civil action or criminal prosecution may be brought against the "United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue." Under the FTCA, EPA could be subject to damages for negligent acts. A case of ordinary negligence requires the plaintiff to prove four elements in order to recover compensation for his or her injuries: the duty of care, breach of duty, causation and damages. Ordinary citizens may sue EPA under the FTCA for personal injury and property damages. To sue under the FTCA, one must first file an "administrative claim" with the federal agency responsible for the alleged misconduct (EPA), within two years of the time the claim arises. EPA then has six months to respond. Then, a claimant has six months to file a lawsuit in U.S. District Court. No federal agency can settle for more than \$25,000 without the written approval of the Attorney General with an upper limit to \$1 million that can be recouped in damages.

CWA §505(a) allows citizens to file a civil action against any Federal agency that is alleged to be in violation of an effluent standard or limitation. In addition, CWA §505(a) allows citizens to file a civil action against the EPA Administrator for alleged failure to perform any non-discretionary act or duty. This is another avenue for non-government organizations and concerned citizens to pursue to hold EPA accountable for its actions, although this section of the CWA will not produce damages or penalties. State attorneys general and tribal entities, and even citizens, have sued EPA before for failure to enforce the Clean Water Act, or for other regulatory nondiscretionary requirements. However, this may be a case of first impression if EPA is sued as a responsible party itself causing contamination of a river because of its own negligent (or even criminal) acts.