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Expert Analysis

The W.R. Grace Prosecution and the Need for Amendment of the Clean Air Act's 'Knowing Endangerment' Provision

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When the federal government unveiled its February 2005 indictment of W.R. Grace and seven of the company's former employees, it touted the case as one of the most significant prosecutions for environmental crime in the nation's history. Yet the trial of the case, which began last February, ended after 11 weeks with the government's moving to dismiss the indictment with prejudice as to two defendants and the jury's exonerating the others on all counts.

The indictment alleged that W.R. Grace violated the "knowing endangerment" provision by causing asbestos-containing vermiculite fibers to be released in Libby, Mont.

The results of the prosecution may have surprised some observers. However, in bringing the charges, the government relied on several novel legal theories, including an unprecedented application of the "knowing endangerment" provision of the Clean Air Act, 42 U.S.C. § 7413(c)(5)(A). Unlike other environmental statutes, the CAA does not explicitly require that "knowing endangerment" result from a defendant's violation of a statutory provision, emissions standard or permit.

In the W.R. Grace case, the government used the CAA's ambiguity to its advantage, prosecuting several defendants for knowing endangerment without identifying an underlying violation. Although that decision allowed the government to avoid the dismissal of the charges and to argue its case to a jury, it also masked serious deficiencies in the government's proof that ultimately contributed to a costly and unsuccessful result. This article examines some of the problems that arose from the government's charging decisions and proposes

amending the CAA as a remedy to prevent those problems from recurring in future prosecutions.

The charges in the W.R. Grace case involve the company's prior operation of a vermiculite mine near Libby, Mont. Although vermiculite itself is not harmful, the vermiculite near Libby is contaminated with toxic mineral fibers including tremolite, one of six minerals the federal government regulates as asbestos.¹

The indictment alleged in part that the defendants conspired to defraud the United States by withholding information regarding the hazards of the vermiculite and its contaminant fibers and to violate the CAA's knowing-endangerment provision by causing those fibers to be released in Libby.

The court noted simply that the statute "exempted from criminal liability any release of a hazardous air pollutant that is made in accordance with an emissions standard for that pollutant."

The indictment also alleged that certain defendants substantively violated the knowing-endangerment provision by consciously causing releases of asbestos into the ambient air, thereby putting others in imminent danger of death or serious bodily injury. According to the indictment, the defendants accomplished that endangerment by allowing mine workers to bring vermiculite and its contaminant fibers home on their clothing and by transferring properties in Libby where vermiculite materials had been left behind.

The knowing-endangerment provision of the CAA, which became law Nov. 15, 1990, provides criminal penalties for "[a]ny person who knowingly releases into the ambient air any hazardous air pollutant ... and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury."²

Although the statute does not require in explicit terms that a violation of law cause the endangerment, it goes on to state, "For any air pollutant for which the [Environmental Protection Agency] administrator has set an emissions standard or for any source for which a permit has been issued ..., a release of such pollutant

in accordance with that standard or permit shall not constitute a violation."

Thus, the statute makes clear that it is not criminal to release hazardous air pollutants in accordance with an existing emissions standard or permit. It does not make clear whether the government must prove an underlying violation of an emissions standard or permit as an element of the crime or whether a defendant may show that his or her actions complied with an emissions standard or permit as an affirmative defense.

The CAA's knowing-endangerment provision is the only such provision structured in that manner. Its analogs under the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(e), which became law in 1980, and the Clean Water Act, 33 U.S.C. § 1319(c)(3)(A), enacted in 1987, both require the government to demonstrate that an underlying violation "thereby" caused the charged endangerment.

The current RCRA knowing-endangerment provision provides criminal penalties for "[a]ny person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subchapter ... in violation of paragraph (1), (2), (3), (4), (5), (6), or (7) of subsection (d) of this section who knows at that time *that he thereby places* another person in imminent danger of death or serious bodily injury" (emphasis added).

Similarly, the current Clean Water Act knowing-endangerment provision provides criminal penalties for "[a]ny person who knowingly violates Section 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections ..., and who knows at that time *that he thereby places* another person in imminent danger of death or serious bodily injury" (emphasis added).

Given the clear language of RCRA and the Clean Water Act, the government has alleged in all prior reported knowing-endangerment prosecutions under those statutes that the defendant also committed an underlying violation of law. Similarly, although the Clean Air Act is vague as to whether an underlying violation is required, with the exception of the W.R. Grace case, the federal government has nonetheless alleged such a violation in all prior reported CAA knowing-endangerment prosecutions. The W.R. Grace case represents the *only* reported prosecution in which the government charged

a defendant with knowing endangerment absent an underlying violation.

In the W.R. Grace case the defendants raised early on the unprecedented nature of their prosecution. In a pre-trial motion to dismiss the CAA charges, they argued that the breach of an emissions standard or permit is an element of the knowing-endangerment offense and that the government's failure to identify such a breach should result in dismissal of the CAA charges.

The government responded that the knowing-endangerment provision merely permits a defendant to demonstrate as an affirmative defense that he or she complied with an emissions standard or permit. The court sided with the government, agreeing that compliance with an emissions standard or permit is an affirmative defense and does not relate to an element of the crime. *United States v. W.R. Grace*, 429 F. Supp. 2d 1207, 1229-36 (D. Mont. 2006).

Basing its ruling on the "text and structure of the statute," the court reasoned that the phrase "for which the administrator has set an emission standard" implies that "Congress contemplated that there may be some air pollutants covered by Section 7413(c)(5)(A) for which the EPA administrator has not set an emissions standard," and that it was "impossible in such a case for the knowing-endangerment offense to include, as the defendants argue, an element requiring the government to show that the knowing release was done in violation of an EPA emissions standard." *Id.* at 1231. Ultimately, the court found it unnecessary to examine the legislative history of the CAA's knowing-endangerment provision "because the plain meaning of the statute resolves the question." *Id.* at 1234.

Although the court's reasoning was logical given the plain language of the statute, a closer examination of the legislative history of the CAA knowing-endangerment provision suggests that Congress in fact may have intended a contrary result. The Senate's report on the 1990 CAA amendments states that a knowing release of a hazardous air pollutant will not constitute knowing endangerment "if the release does not violate an emission standard that has been set for that pollutant."

A subsequent report by the House and Senate conferees agreed that the criminal provisions of the CAA amendments are "largely modeled upon those contained in the CWA and RCRA," with the expectation that they would "operate in the same fashion as those have operated."

Moreover, other provisions in the Clean Air Act suggest that Congress intended violation of a standard or permit as a prerequisite for knowing endangerment. For example, Section 7413(c)(5)(B) of the CAA, which sets forth the *mens rea* required for knowing endangerment, addresses whether a defendant knew that his or her "violation" placed another person in imminent danger of death or serious bodily injury. And Sections 7413(c)(5)(C) and (D), which set forth the "affirmative defenses" to knowing endangerment, do not make reference to compliance with an emissions standard or permit, suggesting that breach of a standard or permit was intended as an element of the crime.

Regardless of Congress' intent, however, there is no question that the CAA as drafted creates far more ambiguity than is present under the analogous provisions of RCRA and the CWA. Although that ambiguity may not be of significance in cases involving a clearly applicable emissions standard or permit, it becomes problematic when there is *no* applicable standard or permit to which a potential defendant may conform his or her conduct. That, in fact, was precisely the situation in the W.R. Grace case, with the government charging the company and other defendants with knowingly endangering others through releases of unregulated, contaminant asbestos.³

The "knowing endangerment" provision actually makes it easier for the government to prosecute releases of hazardous air pollutants from unregulated sources than from regulated sources.

Following the court's earlier ruling that compliance with an emissions standard or permit was an affirmative defense, the defendants filed a motion arguing that they could establish that affirmative defense by showing compliance with the "no visible emissions" standard that the EPA establishes for certain releases of commercial asbestos. The government responded that the defendants should not be permitted to avail themselves of an affirmative defense predicated on compliance with an inapplicable standard.

The court sided with the defendants, ruling that they would be entitled to a jury instruction on the affirmative defense if they succeeded in establishing that the charged

releases were made in accordance with the “no visible emissions” standard for certain regulated releases. See *United States v. W.R. Grace*, 455 F. Supp. 2d 1133 (D. Mont. 2006). The court noted simply that the statute “exempted from criminal liability any release of a hazardous air pollutant that is made in accordance with an emissions standard for that pollutant.” *Id.* at 1138.

In 2006, on the eve of trial, the government appealed several of the court’s orders, including its ruling that compliance with the “no visible emissions” standard was a defense to the knowing-endangerment charges. The 9th U.S. Circuit Court of Appeals reversed the court’s ruling, noting that, for asbestos, the EPA had set “several emissions standards, each of which is source-dependent,” and that some of those standards “make no reference at all to ‘visible emissions,’” while others “include additional procedural requirements, above and beyond the ‘no visible emissions’ requirement.” *United States v. W.R. Grace*, 504 F.3d 745, 757-58 (9th Cir. 2007).

The 9th Circuit concluded that because “there is simply no trans-categorical emissions standard for asbestos,” and “neither is there an emissions standard for asbestos releases from mining operations,” it is “inconceivable that the alleged Grace releases were ‘in accordance with that standard.’” *Id.* at 758.

The outcome of the appeal put into stark relief the problems inherent in the structure of the CAA knowing-endangerment provision. Under the CAA, 42 U.S.C. §§ 7412(c) and (d), the EPA must establish emissions standards for “major sources” of hazardous air pollutants, as well as those smaller sources that pose a threat of adverse effects to human health or the environment.

Moreover, when such regulations do not reduce lifetime excess cancer risks to the most-exposed individual to less than one in 1 million, the EPA must promulgate standards that will provide “an ample margin of safety to protect public health ... or to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect.” 42 U.S.C. § 7412(f)(2)(A).

The fact that the EPA still has not established emissions standards for contaminant asbestos suggests that it does not consider such releases to pose such a threat, or at least that it considers them a lower priority than those releases that it already has regulated. Yet the ambiguity in the CAA knowing-endangerment provision

permitted the government to charge W.R. Grace and certain other defendants with putting others in imminent danger of death or serious bodily injury by causing such releases. As currently drafted, the knowing-endangerment provision actually makes it easier for the government to prosecute releases of hazardous air pollutants from unregulated sources than from regulated sources.

That anomalous result is particularly worrisome, given that knowing endangerment is such a serious offense. It is punishable by up to 15 years in prison and, under the sentencing guidelines, has a base offense level of 24. Yet the crime is complete not when another person suffers tangible harm, but when that person is put *at risk* of such harm.

As the Senate report accompanying the RCRA knowing-endangerment legislation noted, “it is necessary to make the offense as precise and carefully drawn as possible” because “no concrete harm need actually result for a person to be prosecuted under this section.” For many hazardous air pollutants, particularly carcinogens, there is no demonstrably safe level of exposure.

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Accordingly, when violation of an underlying regulatory standard is an element of the knowing-endangerment offense, it can serve as an important signal to courts and juries that a defendant has created risk at a level the federal government *ex ante* has deemed inappropriate. Such a requirement comports with basic notions of fairness and avoids the need for courts and juries to retrospectively assess whether a given level of risk should be considered acceptable.

A requirement that the government prove breach of an underlying standard also is important because, as the W.R. Grace case demonstrated, the government may elect to prosecute knowing endangerment based on highly attenuated proof of risk. In the W.R. Grace case the government argued that the risk of harm created by the defendants need not be quantified, or even quantifiable. It predicated its theory of endangerment

on the notion that the charged releases added to an undefined pre-existing level of risk attributable to prior exposures. And it objected to a proposed jury instruction that would have required the government to show the degree of risk to each person allegedly endangered.

Moreover, the government encouraged the jury to compare what internal government correspondence acknowledged were “cherry-picked” air sampling results based on isolated instances of activity in Libby to permissible government exposure levels predicated on ongoing, lifetime exposures.

Ultimately, the defendants exposed the tenuous nature of the government’s endangerment case on cross-examination. However, had the CAA more clearly required that the government prove an underlying violation of an emissions standard or permit, it might have raised more timely concerns within the Justice Department regarding the questionable merits of its case and helped it avoid four years of costly and unsuccessful litigation.

The experience of the W.R. Grace case suggests that Congress should give serious consideration to amending the CAA to make clear that knowing endangerment must result from the breach of an emissions standard or permit. Such an amendment would bring the CAA knowing-endangerment provision into harmony with the corresponding RCRA and CWA provisions. It would be consistent with Congress’ apparent initial intent in drafting the statute.

It would also aid in avoiding in future prosecutions a repeat of the mischief seen in the W.R. Grace case. The various knowing-endangerment provisions are vital tools for the government to use in deterring and punishing wrongful conduct. However, they also have the potential to expose defendants to severe criminal liability based on *ad hoc*, hindsight assessments of risk by courts and juries. Without a change in the statute, the most vaguely defined criminal conduct may result in exposure to the most draconian sanctions, a result Congress likely never intended.

Notes

- ¹ W.R. Grace mined and processed the Libby vermiculite to remove the vast majority of those contaminants before shipping it to plants for further processing and use in finished products. W.R. Grace closed the Libby mine in 1990 and ceased shipments of vermiculite from Libby two years later.
- ² The CAA identifies asbestos as one of 189 hazardous air pollutants to be regulated by the EPA. 42 U.S.C. § 7412(b)(1).

- ³ The EPA first promulgated a National Emission Standard for Hazardous Air Pollutants for asbestos in 1973. It largely consisted of prohibitions of “visible emissions” of asbestos from various sources, defining visible emissions to mean those emissions “visually detectable without the aid of instruments and which contain particulate asbestos material.” 38 Fed. Reg. 8829. The EPA said it had “considered the possibility of banning ... all emissions of asbestos into the atmosphere” but rejected that approach, in part because “the available evidence relating to the health hazards of asbestos does not suggest that such prohibition is necessary to protect the public health.” 38 Fed. Reg. 8820. The following year, the EPA amended the asbestos NESHAP to distinguish between “commercial asbestos,” that is “any variety of asbestos which is produced by extracting asbestos from asbestos ore,” and “asbestos that occurs as a contaminant ingredient in other materials,” and to “make it clear that materials that contain asbestos as a contaminant only are not covered” by the NESHAP. 39 Fed. Reg. 15,397-15,398. The EPA noted that while “[q]uestions were raised concerning the applicability of the standard to manufacturing operations that use talc and vermiculite,” both of which can be contaminated by asbestos, “the information available to the agency at the time of promulgation (April 6, 1973) did not demonstrate that the mining and milling of such materials or manufacturing operations using such materials were major sources of asbestos emissions.” 39 Fed. Reg. 15,397. Accordingly, the EPA subjected certain releases of “commercial asbestos” to a “no visible emissions” standard, but left releases of contaminant asbestos, like those from W.R. Grace’s vermiculite, unregulated.

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