

THE ART OF KILLING A CASE

By Gary S. Lincenberg

The first steps a client takes after learning of a criminal investigation are the most important steps in determining the outcome of the case. Our firm has represented dozens of companies and individuals in environmental crime cases. Our strategy of dealing with problems before they mushroom out of control can be measured by our record of success:

In numerous cases, on both the state and federal level, we have persuaded prosecutors *not* to file criminal charges! For example:

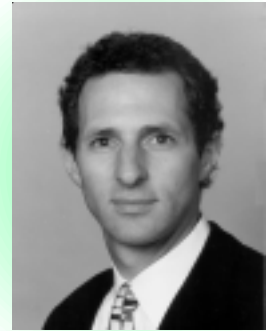
- We represented the president of a demolition company in an investigation being conducted jointly by the Department of Justice Environmental Crimes Section in Washington, D.C. and the San Diego United States Attorney's Office. After being advised that the President would be charged, we persuaded prosecutors not to charge him. We settled the case on a corporate-only basis.
- We persuaded federal prosecutors in Tennessee not to charge a tire company and its management for dumping oily waste water.
- We represented an environmental lawyer and his law firm targeted by the United States Attorney's Office for the Eastern District of California, and successfully fended off charges from being filed.
- We represented an animal farm being targeted by the Los Angeles District Attorney's Office's Environmental Crimes Section for alleged criminal

OSHA-related violations, and brought in another firm to represent the witnesses. After the prosecutor brought over a dozen employees into the grand jury and repeatedly threatened indictment, we *killed the case* with no charges filed. (We have represented numerous companies and individuals in CAL-OSHA cases, avoiding criminal charges every time.)

- Over the past eight years, we have represented a publicly-traded retail chain in numerous cases investigated by district attorneys throughout California—**always avoiding criminal charges.**

Not one of our clients in environmental cases has spent a day in prison! For example:

- We obtained a *dismissal* of an asbestos prosecution on the eve of the preliminary hearing based on improper testing methods.
- We represented a company, and brought in another firm to represent an individual, in a case filed against a company operating underground pipelines. We persuaded the prosecutor to *dismiss* all charges.
- After an appeal, we were hired to handle a resentencing in federal court in Fresno of the owner of an environmental waste company. The federal sentencing guidelines arguably required a one year prison sentence, and the prosecutor was pushing hard to get it. We persuaded the Court to *depart downward* from the guideline



sentence, and our client walked out of the courthouse a free man.

- We have successfully defended numerous clients ranging in size from small operators to Fortune 100 companies.

How do we achieve these results? We do it:

- through careful preparation and hard work.
- through understanding that environmental crime cases are prosecuted by criminal prosecutors, not regulatory lawyers, and need to be defended by criminal defense attorneys, not environmental compliance lawyers.

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Gary S. Lincenberg

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- Prosecuted Environmental Crimes Cases at the United States Attorney's Office, Central District of California
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- Editor, American Bar Association Treatise *Environmental Crimes: From Pretrial Proceedings to Sentencing*
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RECENT DECISION ADDRESSES FOUR ISSUES IN RCRA PROSECUTIONS:

(1) FEDERAL/STATE JURISDICTION (2) "REPRESENTATIVE SAMPLE" (3) VAGUENESS AND (4) RESTITUTION

By Gary S. Lincenberg and David D. Leshner

The recent Ninth Circuit decision in *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001), is significant for its consideration of several issues dealing with prosecutions under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901, *et seq.* These issues include (1) RCRA's federal/state enforcement interplay, that is, the federal government's statutory authority to prosecute RCRA violations in "authorized" states; (2) the necessity of establishing that a government-tested waste is a "representative sample" of the disposed-of waste; (3) vagueness challenges to the RCRA regulations' definition of hazardous waste; and (4) restitution for offenses under Title 42. The Ninth Circuit ruled against the defendant on all but the last of these issues, and its opinion will impact heavily upon future challenges in these areas.

THE FACTS OF *ELIAS*

The federal government's prosecution of Elias arose from his efforts to clean out cyanide-laced sludge from a storage tank. Despite knowing that the tank contained cyanide, Elias ordered four employees to clean it. None of the employees wore safety equipment. After spending approximately fifteen minutes in the tank, the employees emerged and complained to Elias of sore throats and nasal passages. The next morning, Elias sent the employees back in the tank without safety equipment. Forty-five minutes into the job, one of the employees collapsed from severe respiratory distress. Tests later revealed toxic levels of cyanide in the injured employee's body.

A jury convicted Elias of three counts of RCRA violations under 42 U.S.C. § 6928(d) (improper disposal of hazardous waste without a permit) and § 6928(e) (disposal of hazardous waste knowing that such disposal "places another person in imminent danger of death

or serious bodily injury") and one count of violating 18 U.S.C. § 1001 for misstatements to federal investigators concerning his possession of a confined space entry permit.

FEDERAL CRIMINAL ENFORCEMENT OF RCRA IN "AUTHORIZED" STATES

RCRA "confers on the Administrator of the EPA broad powers to regulate the storage, treatment, transportation and disposal of potentially hazardous materials." *Wyckoff Co. v. EPA*, 796 F.2d 1197, 1198 (9th Cir. 1986). RCRA also provides that the EPA may "authorize" states to administer and enforce their own hazardous waste programs. *See* 42 U.S.C. § 6926. When the EPA approves a state program, "[s]uch State is authorized to carry out such program *in lieu of the Federal program* under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste. . . ." *Id.* at § 6926(b) (emphasis added).

In 1990, the EPA promulgated a rule authorizing Idaho's hazardous waste program. Elias contended that because Idaho's program operated "in lieu of the Federal program" under Section 6926(b), the United States lacked authority to prosecute him for RCRA violations. Rather, he argued, the State of Idaho possessed the exclusive authority to enforce violations of hazardous waste permits under its own program.

The Ninth Circuit rejected this argument, concluding that "under RCRA, the federal government retains both its criminal and its civil enforcement powers" in authorized states and that "the federal prescription against transporting hazardous waste without a permit remains, as does the federal penalty for it." *Elias*, 269 F.3d at 1012.

The Ninth Circuit was unpersuaded by Elias' reliance on *Harmon Indus., Inc.*

v. Browner, 191 F.3d 894 (8th Cir. 1999). In *Harmon*, the Eighth Circuit held that the EPA lacks statutory authority to file a RCRA civil enforcement action in an authorized state where the state has undertaken its own enforcement action based on the same conduct. Elias' argument rested on the Eighth Circuit's statement that "[t]he plain 'in lieu of' language contained in the RCRA reveals a congressional intent for an authorized state program to supplant the federal hazardous waste program in all respects, including enforcement." *Harmon*, 191 F.3d at 898. Although the Ninth Circuit agreed that this statement, viewed in isolation, supported Elias' position, the Court concluded that *Harmon* "is not about if, but about when, the United States can bring a civil enforcement action in federal court after it has authorized a state program," and therefore "does not support Elias' contention that federal law is supplanted or that the United States lacks the power to try him." *Elias*, 269 F.3d at 1010 (citing *Flanagan*, 126 F. Supp. 2d at 1289).

Elias' holding that the federal government may prosecute RCRA violations in authorized states aligns the Ninth Circuit with the First Circuit, which previously reached the same conclusion in *MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 45 (1st Cir. 1991). While these holdings are arguably at odds with the Eighth Circuit's comment in *Harmon* that authorized state programs "supplant the federal hazardous waste program in all respects, including enforcement," counsel relying on *Harmon* looking to argue that Section 6926(b) precludes federal criminal enforcement of RCRA violations in authorized states likely will face an uphill battle. Because *Harmon* involved a civil enforcement action, its sweeping statement, at least in the context of criminal enforcement actions, is *dicta*. Moreover, *Harmon*'s holding was based on 42

U.S.C. § 6928(a)(2), which requires that the federal government give notice to an authorized state before instituting a civil enforcement action. *Harmon* read Section 6928(a)(2) as authorizing the EPA “to initiate an enforcement action after providing written notice to the state when the authorized state fails to initiate any enforcement action.” *Harmon*, 191 F.3d at 901. However, 42 U.S.C. § 6928 (d) and (e), the criminal provisions that *Elias* was convicted of violating, contain no analogous notice provision.

Elias represents a major setback for criminal defendants seeking relief under *Harmon*.

REPRESENTATIVE SAMPLE

An essential element of a RCRA prosecution is proof that the defendant treated, stored, transported or disposed of a RCRA-regulated “hazardous waste.” Under EPA regulations, hazardous wastes include “reactive” solids containing cyanide:

A solid waste exhibits the characteristic of reactivity if a *representative sample* of the waste . . . (5) is a cyanide or sulfide bearing waste which, when exposed to pH conditions between 2 and 12.5, can generate toxic gases, vapors or fumes in a quantity sufficient to present a danger to human health or the environment.

40 C.F.R. § 261.23(a) (emphasis added). The regulations, in turn, define “representative sample” as “a sample of a universe or whole (e.g., waste pile, lagoon, ground water) which can be expected to exhibit the average properties of the universe or whole.” *Elias*, 269 F.3d at 1013 (citing 40 C.F.R. § 260.10).

Elias argued that the government had not obtained a representative sample of the waste in his tank, and therefore failed to prove that the disposed-of waste was hazardous. The Ninth Circuit disagreed. The Court held that a single sample taken outside the tank that tested positive for cyanide and

was reactive sufficed to prove that *Elias* had disposed of hazardous waste— “[n]o further evidence is necessary.” *Elias*, 269 F.3d at 1014.

This holding likely will ease the prosecution’s burden in future cases of proving the hazardous nature of the waste. Despite Section 261.23(a)’s reference to a representative sample, under the court’s reasoning, the government need not prove that the disposed waste is a representative sample of the entire waste. Rather, the government must establish only that a single “grab sample” from the disposed waste is hazardous. For example, suppose that a business conducts valid statistical sampling of a particular waste and determines that the waste is not hazardous under the governing regulations. Could the government prosecute the business based on a single grab sample of the subsequently disposed waste? *Elias* appears to answer that question in the affirmative.

VAGUENESS

Courts sometimes sympathize with the plight of criminal defendants because even though the environmental field is highly specialized, persons can be convicted of felonies even if they did not specifically intend to violate the law. Several courts have upheld defense challenges based upon a lack of fair notice. *See, e.g., United States v. Self*, 2 F.3d 1071 (10th Cir. 1993) (reversing RCRA conviction where government’s prosecution theory contradicted prior EPA regulatory comment); *United States v. Heuer*, 4 F.3d 723 (9th Cir. 1993) (no RCRA violation where permit did not incorporate condition alleged to have been violated).

“The general rule is that a criminal statute is not vague if it provides adequate notice in terms that a reasonable person of ordinary intelligence would understand that his conduct is prohibited.” *Elias*, 269 F.3d at 1014 (citation omitted). *Elias* argued that 40 C.F.R. § 261.23(a), the regulation defining reactive (*i.e.*, hazardous) waste, is unconstitutionally vague because (1) the regulation utilizes a narrative “danger to human health or the envi-

ronment” standard; and (2) during the relevant period, the EPA utilized a numerical concentration threshold for determining whether a particular cyanide-bearing material is reactive, and the concentration of cyanide in *Elias*’ tank was less than 1% of this threshold.

As noted above, 40 C.F.R. § 261.23(a) provides, in relevant part:

A solid waste exhibits the characteristic of reactivity if a representative sample of the waste . . . (5) is a cyanide or sulfide bearing waste which, when exposed to pH conditions between 2 and 12.5, can generate toxic gases, vapors or fumes in a quantity sufficient to present a danger to human health or the environment. (emphasis added).

An essential element of *Elias*’ RCRA convictions was the government’s ability to prove that the cyanide-laced sludge was reactive and therefore constituted a hazardous waste. *Elias* contended that Section 261.23(a)’s narrative definition of reactivity as a cyanide bearing waste that produces gases, vapors or fumes which “present a danger to human health or the environment” did not provide him with constitutionally adequate notice that the waste in his tank was hazardous.

The Ninth Circuit disagreed. First, the Court noted that Section 261.23(a)’s reactivity definition tracks the definition used by the Chemical Manufacturers Association, and “[i]f the people who make cyanide define reactivity (and thus hazardousness) this way, people who use it may be expected to do so also.” *Elias*, 269 F.3d at 1015.

Second, the Court found that it had “sanctioned similar language” concerning discharges of oil in “harmful quantities” in *United States v. Kennecott Copper Corp.*, 523 F.2d 821 (9th Cir. 1975). This reliance on *Kennecott* is troubling, however, because the “harmful quantities” phrase at issue in that case was defined by regulation, thus distinguishing it from Section 261.23(a)’s undefined “danger to

human health or the environment” standard.

Elias further contended that, during the relevant time period, the EPA had, in fact, published and relied upon a numeric threshold for determining whether a cyanide bearing solid waste is hazardous. Between 1985–1998, the EPA’s “Test Methods for Evaluating Solid Waste, Physical/Chemical Methods,” EPA Publication SW–486 (“SW–486”) recommended that solids with a cyanide concentration of 250 ppm and above be regulated as hazardous waste. (In 1998, the EPA removed the cyanide concentration threshold from the SW–486 manual. *Elias*, 269 F.3d at 1016 n. 55.) Elias argued that because his conduct in question occurred in 1996, and because the concentration of cyanide in his tank was less than 2 ppm (*i.e.*, less than 1% of the SW–486 threshold), he lacked fair notice that the cyanide–laced solids constituted a hazardous waste.

It was undisputed that Elias did not know of SW–486 when he directed his employees to clean out the tank. However, because the “fair notice” standard looks to the knowledge of a “reasonable person in the industry,” *Id.* at 1015, the Ninth Circuit still considered Elias’ argument. The Court then rejected it on the merits:

Even if we presume that, unlike Elias, a reasonable person in the industry would have known of the interim testing protocol, it does not follow that he or she would have been so confused by the interplay between the regulation and the SW486 test as to lack fair notice of what is hazardous. As the district court concluded, the interim threshold did not provide a “safe harbor” for waste that emitted toxic gas below the threshold level. It did not purport to tell waste generators a level below which their substances were nonhazardous; it

simply told them a level above which they definitely were. . . .

Id. at 1017 (emphasis added) (citation omitted).

The Ninth Circuit’s rejection of Elias’ vagueness challenge almost certainly turned on the particularly egregious facts of that case: Elias knew that his tank contained cyanide–laced sludge and, after his employees complained of health problems from working in the tank, he proceeded to send them back into the tank without safety equipment. But *Elias* should not be read to foreclose future vagueness challenges to regulations that arguably fail to provide fair notice of potential violations. For example, what if Elias had not known that the tank contained cyanide? Alternatively, suppose that the injury had occurred during the first occasion that he sent the workers into the tank? Either of these scenarios may well have changed the result, and such factual distinctions may allow counsel in future cases to effectively distinguish *Elias*. Moreover, *Elias* appears to implicitly recognize that a vagueness problem can arise from confusing interplay between a general standard, a regulation, and/or an EPA test protocol or threshold requirement.

RESTITUTION

Elias’ sole victory came on the issue of restitution. The district court ordered him to pay \$6.3 million in restitution to the injured employee under 18 U.S.C. § 3663. However, the Ninth Circuit set aside the restitution portion of Elias’ sentence because Section 3663 does not apply to violations of Title 42. *Elias*, 269 F.3d at 1021. Many defense counsel have settled cases where a condition of settlement includes payment to a clean-up or health fund. Although the Court expressed its desire for Congress to broaden the scope of Section 3663, until Congress does so defense counsel may rely on *Elias* in resisting future attempts by the government to obtain restitution for RCRA violations and other Title 42 offenses.

CONCLUSION

Those hoping to raise federal/state, representative sample and vagueness challenges in RCRA cases will have a tougher time doing so in the wake of *Elias*. At least as to the latter two challenges, defendants may attempt to distinguish *Elias* by pointing to the egregious facts of that case and the arguable flaws in the Ninth Circuit’s reasoning.

Killing a Case

Continued from page 1

- through keeping current on prosecutorial policies and practices in environmental crimes cases and in other white collar cases.
- through accurate representations and good–faith dialogue with prosecutors.
- through our years of experience in understanding the nuances of how prosecutors make charging decisions. In this regard, our firm has *six former prosecutors* upon which to draw experience.

Killing a case often is more of an art than a science. It involves understanding your audience, and the environment in which they work. But in almost every case, one rule of thumb applies: the first steps a client takes upon learning of an investigation are generally the most important steps in obtaining a favorable outcome.

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