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“Sauce for the Goose Should Be Sauce for the Gander”: Should EPA Officials Be Criminally Liable for the Negligent Discharge of Toxic Waste into the Animas River?

Paul J. Larkin, Jr., and John-Michael Seibler

Abstract

Early in August 2015, officials from the EPA “grievously polluted” the Animas River in Colorado, a source of drinking water for the 17,000 residents of Durango, Colorado, as well as people downstream. Initial EPA test results “showed ‘scary’ levels of toxicity in the water.” Because the EPA has admitted responsibility for the spill, the principal legal issue is what the EPA and the Department of Justice will do next. EPA Administrator Gina McCarthy and Regional Director Shaun McGrath have said that the agency has initiated some type of inquiry. The question is whether that inquiry will involve a criminal investigation. The government should be put to a choice: Either abandon criminal liability based on negligence, respondeat superior, and collective responsibility theories in the case of private parties or bring charges against the EPA officials at the scene and up through the responsible chain of command.

Favoritism is acceptable—even welcome—in sports. Not everyone, for example, must be a New York Yankees fan (although some might argue that everyone should). But favoritism becomes illegitimate cronyism when it is found in the law, particularly the criminal law. The government should not be free to use cronyism when making investigatory or charging decisions, prosecuting some while letting others off the hook for the same conduct, let alone conduct that is even more damaging or more heinous. Unless the government can establish a persuasive case, resting entirely on legitimate grounds, for treating like cases differently, selective investigation or prosecution legally transforms unsavory favoritism into unlawful discrimination.

This paper, in its entirety, can be found at <http://report.heritage.org/lm162>

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

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KEY POINTS

- The Environmental Protection Agency has admitted that its officials were responsible for polluting the Animas River with toxic metals from an abandoned mine.
- If the individuals responsible for the spill had been private parties, the EPA probably would have opened a criminal investigation to determine whether they had violated the criminal provisions of the Clean Water Act.
- But if private parties are to be held criminally liable for negligent violations of the federal environmental laws, why not EPA employees? The same rules should apply whether the responsible party works in the private sector or the public sector.
- The EPA should prosecute the subordinate and supervisory EPA officials in this case or stop bringing similar charges against private parties for their negligence. Somebody who is merely negligent has not acted with a “guilty mind,” and any harm he or she causes can and should be addressed through the civil or administrative justice system.

Ironically, that problem has recently arisen with a vengeance. The Environmental Protection Agency (EPA) has admitted that its officials were responsible for polluting the Animas River with toxic metals from an abandoned mine. This Colorado state river serves as a source of drinking water for thousands of local individuals and feeds into the Colorado River, which provides the water supply for millions of people in New Mexico, Utah, Southern California, and elsewhere. The spill has contaminated water used for irrigation, drinking supplies, and recreation with heavy metals and other pollutants at levels far exceeding what is considered safe. It also poses a serious public policy conundrum for the EPA and the Department of Justice (DOJ).

EPA Officials' August 2015 Pollution of the Animas River

Early in August 2015, officials from the EPA “grievously polluted” the Animas River in Colorado, one of the many upstream tributaries of the Colorado River.¹ The Animas River is a source of drinking water for the 17,000 residents of Durango, Colorado, as well as people downstream, because the Animas River feeds into the Colorado River.² The spill may contaminate nearby wells.³ The pollutant, which turned the river into a “mustard-colored muck,”⁴ consisted of 3 million gallons of water containing the toxic heavy metals arsenic, lead, cadmium, aluminum, and mercury, as well as other toxic and non-toxic chemicals. The chemical-laden water came from the Gold King Mine, one of the thousands of abandoned mines sprinkled across the West.⁵ Initial EPA test results “showed ‘scary’ levels of toxicity in the water”⁶—arsenic peaked at 300 times the normal level;⁷ lead was 12,000 times higher than normal;⁸ mercury and beryllium, respectively, reached nearly 10 times and 33 times the EPA’s acceptable levels.⁹ The potential long-term environmental effects of the spill are unknown.¹⁰

The mine apparently had been leaking toxic waste-filled water for some time.¹¹ The EPA workers were on the site to identify the source of the leak and, ultimately, to stanch it. They were using a backhoe “to hack at loose material”¹² when a “plug blew out releasing contaminated water behind the backfill” and “a surprise deluge of orange water ripped through.”¹³ The water spilled into Cement Creek, a tributary of the Animas River, and then into the Animas itself.¹⁴

The EPA has admitted responsibility for the spill, “saying it accidentally breached a store of chemical-laced water.”¹⁵ “‘This is a huge tragedy,’ Dave Ostrander, EPA regional director of emergency preparedness, told residents. ‘We typically respond to emergencies; we don’t cause them.’”¹⁶ EPA Administrator Gina McCarthy echoed those comments:¹⁷ “‘We want to reassure everyone that the EPA does take full responsibility for the spill,’ which took place at the long-closed mine north of Durango, she said. ‘No agency could be more upset about this incident and more dedicated to doing our job and doing it right.’”¹⁸

Because the EPA has admitted responsibility for the spill, the principal legal issue is what the EPA and the Department of Justice will do next. EPA Administrator McCarthy and Regional Director Shaun McGrath have said that the agency has initiated some type of inquiry.¹⁹ The question is whether that inquiry will involve a criminal investigation.

That question is important because if the individuals responsible for the spill had been private parties, it is likely that the EPA would have opened a criminal investigation to determine whether they had violated the criminal provisions of the Clean Water Act (CWA). Among other things, the CWA, the principal federal statute addressing water pollution,²⁰ requires a party to obtain a permit to discharge a “pollutant” into the “waters of the United States”²¹ and makes a permitless discharge a crime.²² The heavy metals that spilled into the Animas River—despite the EPA’s claim that they travelled “too fast to be an immediate health threat” and its “expect[ation]” that they will “dilute...before they pose a longer-term threat”²³—are pollutants, and the river itself is a “water of the United States.”²⁴ The result is that both the government workers at the EPA who are responsible for the spill and their supervisory officials could be principals to a crime.²⁵

The federal government often seeks to apply principles of direct and vicarious individual and corporate criminal liability without ever stopping to ask this question: “Should the same rules that the government wants to apply to private parties also apply equally to government officials when *they* engage in misconduct?” If the government stops to answer that question fairly in this case, we would likely see one of two results: fewer, if any, criminal prosecutions brought against private parties, which

traditionally have occurred, or more, perhaps many, similar criminal prosecutions against government officials, which have occurred only rarely.

Expansion of Federal Criminal Liability for Private Parties

The CWA provides for criminal enforcement, and the Justice Department has successfully prosecuted white-collar cases for negligent violations of federal law, which is seemingly what happened with respect to the Animas River spill. Consider the remarkably similar case of *United States v. Hanousek*.²⁶

Edward Hanousek, Jr., was an employee of the Pacific and Arctic Railway and Navigation Company, working as roadmaster of the White Pass and Yukon Railroad. He supervised a rock quarry project at a site on an embankment 200 feet above the Skagway River in Alaska. One day during rock removal operations—while Hanousek was off-duty and at home—a backhoe operator employed by an independent contractor retained before Hanousek was hired accidentally struck a petroleum pipeline near the railroad tracks. The operator’s error ruptured the pipeline and spilled 1,000 to 5,000 gallons of oil into the river. Hanousek was convicted under the CWA for negligently discharging oil into a navigable water of the United States.²⁷ The district court and court of appeals rejected Hanousek’s argument that the CWA did not permit a party to be convicted for simple negligence and that the Due Process Clause of the Constitution prohibited him from being convicted for only simple negligence.²⁸

Given the facts of the *Hanousek* case, the facts of the Animas River spill, as reported in the media, would seem to justify opening a criminal investigation into what happened in Colorado. Moreover, *Hanousek* does not stand alone. In other cases, the government has persuaded the courts to adopt two different expansive interpretations of the criminal law.

First, the government has argued successfully that corporations, as well as corporate officers and managers, should be held liable not only for their own wrongdoing, but also for the misdeeds of personnel they supervise or others below them in the organizational chart even if those officers and managers had no hand in the illegal conduct.²⁹ Corporations were artificial entities under the common law³⁰ and could not be charged with a crime, although corporate directors, officers, and employees could be prosecuted as individuals for their own conduct.³¹

Over time, the Justice Department persuaded the courts to expand the reach of criminal liability to include the doctrine of *respondeat superior*—“let the master answer” for the acts of his employees.³² In the food and drug area, for instance, a senior corporate officer can now be held criminally responsible for violations of the federal Food, Drug, and Cosmetic Act committed by line personnel working at one of the company’s facilities.³³ As a result, the criminal liability of some corporations and senior corporate officials can effectively parallel their tort liability.

Second, the government has persuaded courts to expand the criminal law even further via the “collective knowledge” doctrine. That doctrine attributes to a corporation the sum of the knowledge of its employees when they act within the scope of their responsibilities.³⁴ The rule applies even when no one person knew all of the necessary facts.³⁵

The Government’s Unjustifiable Failure to Hold Its Officials to the Same Standard That It Requires of Private Parties

It appears that the Justice Department ordinarily does not stop to determine whether the same rules that it wants the federal courts to apply to private parties should also apply to government officials. The public is entitled to ask, “Why not?” If private parties are to be held criminally liable for negligent violations of the federal environmental laws, why not EPA employees? If a company president is to be held liable for the misdeeds of the firm’s low-level personnel, why not the EPA Administrator? The same rules should apply whether the responsible party works in the private sector or the public sector.

Even the EPA recognizes that it and its officials should be held to the same standards that the government applies to private parties. “We’re going to continue to work until this is cleaned up,” Regional Director Shaun McGrath told a local gathering of Colorado residents, “and hold ourselves to the same standards that we would anyone that would have created this situation.”³⁶

There are several possible arguments for treating government officials favorably when it comes to the application of the criminal provisions of the federal environmental laws. None of those arguments, however, is persuasive.

Argument 1: It is fundamentally unfair to hold the on-site EPA officials criminally liable for negligently doing their job. Any liability for negligence should be civil, not criminal.

That claim is true as a matter of policy but wrong as a matter of law. The Justice Department prosecuted Edward Hanousek, Jr., for negligently doing his job, and he was not even at the site when the spill occurred. Unless there is something special about being a federal employee—something that provides the responsible EPA workers or their supervisors with immunity for their actions—they should be no less subject to criminal prosecution than Hanousek was.

Argument 2: Federal officials should not be held criminally liable for carrying out their duties under federal law.

There is nothing special about being a federal official or employee that renders the officeholder immune from criminal liability. Said another way, a person's status as a federal officer is not itself a general license to break the law. Even the President is subject to the criminal law.³⁷ The Constitution grants members of the Senate and House of Representatives a limited immunity from criminal prosecution or civil liability—immunity that exists only for statements made on the floor of each chamber³⁸—and offers no other federal official in Articles I, II, or III any comparable amnesty.

Of course, here, as elsewhere in the criminal law, there are some additional, complicating factors. For example, lower-level government employees are entitled to rely on facially reasonable directions from senior officials without fear of incurring liability even if it turns out after the fact that what they have been ordered to do is in fact illegal. But that doctrine is not a special rule for federal officers. Any member of the public may rely on the legal opinion of federal officials that their particular conduct is lawful.³⁹ Besides, no senior EPA officials ordered the site workers to be negligent.

Moreover, it is no argument that it is impossible for federal employees to change the conditions under which they must carry out orders from the supervisors because they cannot, for example, appropriate additional funds to complete a task, since that is a prerogative of Congress.⁴⁰ The same is true of people in the private sector. They too must work within the parameters and financial limitations that their supervisors define. In any event, the criminal law authorizes a defendant to raise an impossibility defense,⁴¹ so there is no need to exempt all federal officials from any prosecution for their actions on the ground that it would have been impossible for a few of them to do their jobs within the law.

Argument 3: The government should not prosecute *de minimis* violations of the law, and the Animas River spill was a small-scale violation.

That argument is half right. Yes, the government should not use the criminal law for trivial violations. The doctrine *de minimis non curat lex*—"the law does not care for trifles"—should be as relevant in the criminal law as it is in the civil law. But this spill was not trivial. To date, the Animas River spill, according to the EPA's own revised estimate, has resulted in 2,995,000 gallons of pollution *greater* than the amount spilled in the *Hanousek* case, and the government prosecuted Hanousek for negligence. The Animas River spill is not the first instance of pollution for which the federal government is or may be responsible.⁴² Accordingly, the EPA and DOJ should either begin criminal investigations into the Animas River spill or cease criminal investigations into negligent spills by private parties.

Argument 4: Senior federal officials should not be held criminally liable for crimes committed by their subordinates or agents.

This is a demand for special treatment that the federal government would never grant to senior corporate officials in the private sector. Accordingly, it should be no defense that senior EPA federal officials could not carry out the duties of their offices if they were forced to manage the day-to-day work of every subordinate EPA employee. The same is true of the president of a large corporation, and the federal government has been unwilling to excuse senior-level business officials on the theory that they cannot hold upper-level positions while doing a company's lower-level work.

Even if proximate cause principles might render the EPA Administrator too remote from an actual violation to be held responsible,⁴³ that conclusion would not apply to the director of the region because he or she has only one region to manage, not the entire nation. After all, a plant manager does not receive immunity from prosecution for the misdeeds of his employees even though he cannot monitor everything going on in his plant. If so, why should senior federal officials in a parallel position get off scot-free?

Conclusion

On a Sunday night after the EPA's spill, EPA Regional Director Shaun McGrath held a public

comment session in a local high school auditorium.⁴⁴ David Moler, owner of a river-rafting company, asked McGrath “when can my business be open again?”⁴⁵ and “what should I tell my employees?”⁴⁶ It is an open question whether the public can rely on McGrath’s reply: The EPA will “hold [itself] to the same standards that [it] would anyone that would have created this situation.”⁴⁷

The point is not that the courts should be eager to hold senior federal officials vicariously liable for the criminal actions of subordinates; they shouldn’t. No one, whether a senior-level or lower-level private party or the EPA Administrator or an EPA Regional Director, should be held criminally liable for the crimes of their agents that they had no role in committing. The point is that private parties should receive the same treatment. The EPA should prosecute the subordinate and supervisory EPA officials

in this case or stop bringing similar charges against private parties for their negligence. The latter scenario is preferable as a matter of fundamental fairness because somebody who is merely negligent has not acted with a “guilty mind,” and any harm he or she causes can and should be addressed through the civil or administrative justice system.

Accordingly, the government should be put to a choice: Either abandon criminal liability based on negligence, *respondeat superior*, and collective responsibility theories in the case of private parties or bring charges against the EPA officials at the scene and up through the responsible chain of command. Sauce for the goose ought to be sauce for the gander.

—*Paul J. Larkin, Jr.*, is Senior Legal Research Fellow and *John-Michael Seibler* is a Visiting Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.

Endnotes

1. Julie Turkewitz, *Environmental Agency Uncorks Its Own Toxic Water Spill at Colorado Mine*, N.Y. TIMES, Aug. 11, 2015, http://www.nytimes.com/2015/08/11/us/durango-colorado-mine-spill-environmental-protection-agency.html?_r=0; see also, e.g., Susan Montoya Bryan & Ellen Knickmeyer, *Residents Demand Health Answers as Mine Spill Fouls Rivers*, WASH. POST, Aug. 10, 2015, http://www.washingtonpost.com/national/energy-environment/epa-colorado-mine-waste-spill-larger-than-first-reported/2015/08/10/cb83552e-3f39-11e5-b2c4-af4c6183b8b4_story.html; Daniel Costa-Roberts, *EPA Accidentally Spills Wastewater from Colorado Mine into Nearby River*, PBS NEWSHOUR, Aug. 8, 2015, <http://www.pbs.org/newshour/rundown/epa-mine-spill/>; Jacob Gershman, *Colorado Spill Impact Widens*, WALL. ST. J., Aug. 9, 2015, <http://www.wsj.com/articles/colorado-spill-impact-widens-1439163937>; Zoe Schlanger, *EPA Causes Massive Spill of Mining Waste Water in Colorado, Turns Animas River Bright Orange*, NBC NEWS, Aug. 7, 2015, <http://www.newsweek.com/epa-causes-massive-colorado-spill-1-million-gallons-mining-waste-turns-river-361019>.
2. Bryan & Knickmeyer, *supra* note 1 (“The EPA said stretches of the rivers would be closed for drinking water, recreation and other uses at least through Aug. 17.”); Tony Dokoupil, *Toxic Colorado Mine Spill a Black Eye for EPA*, NBC NEWS, Aug. 11, 2015 (“Seven water systems in New Mexico and Colorado have been affected, officials said, and the Animas River ultimately connects with the Colorado River—a source of drinking water for much of the West.”), <http://www.nbcnews.com/news/us-news/toxic-colorado-mine-spill-black-eye-epa-n407746>; Schlanger, *supra* note 1; Turkewitz, *supra* note 1.
3. Gershman, *supra* note 1.
4. Daniel Elliott & Coleen Slevin, *EPA: No Word Yet on Health Risk from Colorado Mine Spill*, AP, Aug. 7, 2015, <http://bigstory.ap.org/article/e01d7fbc82a744e1907a2ebada1593fe/orange-waste-colorado-mine-creeps-toward-new-mexico>.
5. Gershman, *supra* note 1; Turkewitz, *supra* note 1.
6. Gershman, *supra* note 1. Ultimately, “the potential danger hinges on how long it takes for [those levels] to return to normal.” *Id.*
7. Dokoupil, *supra* note 2.
8. Ben Brumfield, *By the Numbers: The Massive Toll of the Animas River Spill*, CNN, Aug. 13, 2015, <http://www.cnn.com/2015/08/13/us/animas-river-spill-by-the-numbers/>.
9. Mariano Castillo, *Pollution Flowing Faster than Facts in EPA Spill*, CNN, Aug. 10, 2015, http://www.cnn.com/2015/08/10/us/colorado-epa-mine-river-spill/index.html?eref=rss_topstories.
10. “Aaron Kimple, a program director at the institute, said the sludge could leave behind lower levels of contaminants that could disrupt wildlife in years to come. [¶] ‘One of the big questions is how long does it linger,’ he said.” Gershman, *supra* note 1; see Costa-Roberts, *supra* note 1 (“Even after the water has cleared, heavy metals may remain on the river bottom and may linger on beaches.”).
11. Dokoupil, *supra* note 2.
12. Turkewitz, *supra* note 1.
13. Gershman, *supra* note 1; Turkewitz, *supra* note 1.
14. *Id.* “‘We were up in this area doing what’s called site investigation. This is work that we do in Superfund to understand the extent of the contamination...to understand how to work to stop that flow,’ [Shaun] McGrath [EPA Regional Administrator] said. ‘In doing our work up there, we hit a spot where water started coming out that we hadn’t expected. We come to find out there was quite a bit more mine waste water up there than we had expected, for sure. In fact the dam that had been holding that water back was just soils and loose materials instead of solid rocks. That started to flow out, and [the wastewater] quickly broke through and drained out.’” Schlanger, *supra* note 1.
15. Turkewitz, *supra* note 1.
16. Gershman, *supra* note 1. Those admissions should aid Navajo Nation President Russell Begaye’s efforts “to make sure the Navajo Nation recovers every dollar it spends cleaning up this mess and every dollar it loses as a result of injuries to our precious Navajo natural resources.” Castillo, *supra* note 9. Tribal governments, states, citizens, and regulated entities all enjoy certain roles in the enforcement of federal environmental laws. See ROBERT ESWORTHY, CONG. RESEARCH SERV., RL34384, FEDERAL POLLUTION CONTROL LAWS: HOW ARE THEY ENFORCED? 10-15 (Oct. 7, 2014).
17. See Kate Sheppard, *EPA Chief Apologizes for Huge Colorado Mine Spill*, HUFFINGTON POST, Aug. 11, 2015 (“The head of the Environmental Protection Agency was remorseful Tuesday after an EPA safety team accidentally caused 3 million gallons of wastewater to spill from an abandoned mine in Colorado, turning a major waterway a bilious yellow hue. [¶] ‘This is a tragic and unfortunate incident, and EPA is taking responsibility to ensure that it is cleaned up,’ said EPA Administrator Gina McCarthy. ‘The most important thing throughout this is ensuring the health and safety of the residents and visitors near the river.’ [¶] ‘EPA is an agency whose core mission is ensuring a clean environment and protecting public health, so it pains me to see this happening,’ she continued. ‘... The EPA was at the site investigating ongoing water releases from mines in the area and assessing whether it could take additional remediation measures. The agency said the team at the site misjudged the pressure that had built up at the entrance of the mine.... [¶] McCarthy said Tuesday that the incident occurred ‘when one of our contracting teams was using heavy equipment to enter the Gold King Mine...to begin the process of pumping and treating the contaminated water inside.’”), http://www.huffingtonpost.com/entry/epa-colorado-mine_55ca70c9e4b0f73b20bb08a3.
18. John M. Glionna, *EPA Chief Says Polluted Animas River “Seems to Be Restoring Itself,”* L.A. TIMES, Aug. 13, 2015, <http://www.latimes.com/nation/la-na-river-spill-epa-20150812-story.html>.

19. *Id.* (“McCarthy said 100 EPA experts were on the ground in Colorado and there were hundreds more in Washington on the case, adding that the agency would conduct its own investigation of the spill as well as solicit a review from an outside agency.”); Dokoupil, *supra* note 2 (“‘We’ve launched an independent investigation to see what happened, and we’ll be taking steps to ensure that something like this doesn’t happen again,’ Shaun McGrath, the EPA administrator in charge of the region, told reporters on Monday.”).
20. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified in scattered sections of 33 U.S.C. (2012)); Duke K. McCall III, *Clean Water Act*, in ENVIRONMENTAL LAW HANDBOOK 319–28 (Thomas F. P. Sullivan ed., 21st ed. 2011). The Clean Water Act can be enforced civilly or criminally. See *infra* notes 25–27 and accompanying text.
21. See 33 U.S.C. § 1362(6) (2012) (“The term ‘pollutant’ means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) ‘sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces’ within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well is used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.”); 33 U.S.C. § 1362(7) (“The term ‘navigable waters’ means the waters of the United States, including the territorial seas.”); see McCall, *supra* note 20, § 5.2, at 320, § 5.4, at 321–23.
22. See, e.g., Dep’t of Justice, *Dairy Company Owner Sentenced to Six Months of Home Detention and Ordered to Pay \$15,000 Fine for Discharging 11,000 Gallons of Cow Feces into the French Broad River* (Apr. 30, 2015), <http://www.justice.gov/usao-wdnc/pr/dairy-company-owner-sentenced-six-months-home-detention-and-ordered-pay-15000-fine>; EPA OFFICE OF CRIM. ENFORCEMENT, FORENSICS, AND TRAINING, *Environmental Crimes Case Bulletin*, 3 (Apr. 2015), http://www2.epa.gov/sites/production/files/2015-05/documents/april_2015_environmental_crimes_case_bulletin.pdf (on April 22, 2015, an oil and gas exploration company was sentenced to two years of probation and ordered to pay fines totaling \$600,000 for discharging “rock, sand, soil and stone into streams;” the company also pled guilty in October 2014 to three counts of “Negligent Discharge of Pollutants without a Permit.”); EPA OFFICE OF CRIM. ENFORCEMENT, FORENSICS, AND TRAINING, *Environmental Crimes Case Bulletin* 10 (Mar. 2015), http://www2.epa.gov/sites/production/files/2015-04/documents/march_2015_environmental_crimes_case_bulletin.pdf (two men “pleaded guilty to causing the unlawful discharge of MCHM into the Elk River without a permit” and to negligent discharge of a pollutant into navigable water in another incident.).
23. Bryan & Knickmeyer, *supra* note 1.
24. The mercury, lead, arsenic, cadmium, and beryllium released into the Animas River are all EPA-regulated “priority pollutants” under 40 C.F.R. pt. 423 app. A; *Priority Pollutants*, EPA, <http://water.epa.gov/scitech/methods/cwa/pollutants.cfm> (last visited Aug. 12, 2015). The Animas River is also one of the “waters of the United States” under the Supreme Court’s decision in *Rapanos v. United States*, 547 U.S. 715 (2006). There, a homeowner was convicted of two felonies for filling wetlands under the Clean Water Act even though “the nearest body of navigable water was 11 to 20 miles away.” *Id.* at 720 (plurality opinion). A plurality of the Court narrowly defined the phrase “the waters of the United States” to include “only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes.” *Id.* at 739 (plurality opinion) (internal punctuation omitted). See also Memorandum of the EPA and Army Corps of Engineers to Regional and District Offices, *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008), http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf.
25. For the argument that federal officials should be subject to criminal prosecution for violation of the federal and state environmental laws, see Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715, 786–90 (2013); Paul J. Larkin, Jr., “*Sauce for the Goose Is Sauce for the Gander*”: *Treating Private Parties and Government Officials Alike Under the Criminal Law*, THE HERITAGE FOUNDATION, LEGAL MEMORANDUM No. 99 (June 12, 2013), http://thf_media.s3.amazonaws.com/2013/pdf/lm99.pdf; Margaret K. Minister, *Federal Facilities and the Deterrence Failure of Environmental Laws: The Case for Criminal Prosecution of Federal Employees*, 18 HARV. ENVTL. L. REV. 137 (1994). For an example of liability after the fact, while there is currently no criminal investigation into the Animas River spill, some individuals have faced criminal prosecution for fraud under the Clean Water Act for withholding relevant information or manipulating disclosures to the EPA or DOJ. See, e.g., FBI, *McDowell County Woman Pleads Guilty in Federal Court to Filing Fraudulent Water Quality Reports* (Nov. 13, 2014), <https://www.fbi.gov/pittsburgh/press-releases/2014/mcdowell-county-woman-pleads-guilty-in-federal-court-to-filing-fraudulent-water-quality-reports>; EPA, *Two Companies, Five Individuals Sentenced for Dumping Thousands of Tons of Asbestos in Violation of the Clean Water Act (CWA/CERCLA, New York)*, in 2013 MAJOR CRIMINAL CASES, <http://www2.epa.gov/enforcement/2013-major-criminal-cases> (last accessed Aug 18, 2015).
26. 176 F.3d 1116 (9th Cir. 1999); see Paul Rosenzweig, *The History of Criminal Law*, in ONE NATION UNDER ARREST 127–29, 131, 145–48 (Paul Rosenzweig ed., 2010). Hanousek sought review in the Supreme Court, but the Court denied his certiorari petition over dissents by Justices Thomas and O’Connor. 528 U.S. 1102 (2000).
27. See 33 U.S.C. § 1319(c)(1)(A) (2006).
28. See *Hanousek*, 176 F.3d at 1120–22.

29. Examples are available at the EPA and DOJ websites. See, e.g., EPA, *Tanknology-NDE, International, Inc. Criminal Plea* (Oct. 30, 2002), <http://www2.epa.gov/enforcement/tanknology-nde-international-inc-criminal-plea> (Tanknology-NDE, International, Inc., sentenced in Texas federal district court to serve five years' probation, pay a \$1 million criminal fine, and pay a \$1.29 million restitution assessment "for potential retesting of underground storage tanks that the company had falsely tested."); DEP'T OF JUSTICE, *Gulfport Energy Employee Pleads Guilty, Sentenced for Negligently Discharging Pollutants into West Cote Blanche Bay* (July 20, 2015), <http://www.justice.gov/usao-wdla/pr/gulfport-energy-employee-pleads-guilty-sentenced-negligently-discharging-pollutants-0> (Lafayette, La., resident pleaded guilty to one count of negligent discharge of pollutants. His employer, Gulfport Energy, previously "pleaded guilty and was sentenced on one count of negligent discharge of pollutants on October 27, 2014. The company was ordered to pay \$1.5 million...for violating the Clean Water Act.").
30. See, e.g., *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.").
31. See, e.g., *Anonymous Case* (No. 935), 88 Eng. Rep. 1518, 1518 (K.B. 1701) ("A corporation is not indictable, but the particular members of it are."); *State v. Great Works Milling & Mfg. Corp.*, 20 Me. 41, 44 (1841) ("It is a doctrine then, in conformity with the demands of justice, and a proper distinction between the innocent and the guilty, that when a crime or misdemeanor is committed under color of corporate authority, the individuals acting in the business, and not the corporation should be indicted."). In 1909, however, the law changed dramatically when the Supreme Court ruled that a corporation be held vicariously liable under the criminal law for its employee's misconduct. See *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481 (1909). For an excellent discussion of the legal and policy issues raised by the prosecution of corporations, see JAMES R. COPLAND, *REGULATION BY PROSECUTION: THE PROBLEMS WITH TREATING CORPORATIONS AS CRIMINALS*, MANHATTAN INSTITUTE FOR POLICY RESEARCH No. 13 (Dec. 2010), http://www.manhattan-institute.org/html/cjr_13.htm.
32. Some argue that this undermines transparency and the separation of powers because "[i]n practice, the standard of unlimited vicarious corporate criminal liability transfers powers from federal judges operating publicly to federal prosecutors operating via private agreements.... The use of private settlements prior to the government instituting a criminal court proceeding has grown immensely and is subject to far less public scrutiny and no judicial oversight." Andrew Weissmann, Richard Ziegler, Luke McLoughlin & Joseph McFadden, *Reforming Corporate Criminal Liability to Promote Responsible Corporate Behavior*, U.S. CHAMBER INST. FOR LEGAL REFORM (Oct. 2008), <http://www.instituteforlegalreform.com/uploads/sites/1/WeissmannPaper.pdf>.
33. See, e.g., *Federal Food, Drug, and Cosmetic Act*, ch. 675, 52 Stat. 1040 (1938) (codified, as amended, at 21 U.S.C. § 301 et seq. (2012)); *United States v. Park*, 421 U.S. 658 (1975) (company president can be held liable for presence of rodent droppings at a company warehouse); Richard A. Samp & Corey L. Andrews, *Restraining Park Doctrine Prosecutions Against Corporate Officials Under the FDCA*, 13 ENGAGE 19 (Oct. 2012).
34. "Under the collective knowledge doctrine, corporations are liable for the collective knowledge of all employees and agents within and acting on behalf of the corporation." *United States v. Sci. Applications Int'l Corp.*, 555 F. Supp. 2d 40, 55 (D.D.C. 2008) (internal quotations omitted) (citing *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 893-94 (D.D.C. 2006); *Defer LP v. Raymond James Fin., Inc.*, 654 F. Supp. 2d 204, 218 (S.D.N.Y. 2009) (discussing "good reasons for imputing the collective knowledge of employees or agents to their corporate principal" but declining "to aggregate the knowledge of two or more separate corporate entities on the basis that they share the same parent and nothing more."); *U.S. ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 918 (4th Cir. 2003) (where a charge only requires proof that one employee individually satisfies a scienter requirement (as in this case under the False Claims Act), the Court "need not adopt the 'collective knowledge' doctrine...because [it is] not cobbling together pieces of 'innocent' knowledge to find the requisite scienter.").
35. See, e.g., *United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987); KATHLEEN B. BRICKEY, *ENVIRONMENTAL CRIME* 25 (2008); Larkin, *supra* note 25, at 786-90.
36. Turkewitz, *supra* note 1.
37. See, e.g., *United States v. Nixon*, 418 U.S. 683, 692-97 (1974). Of course, in some instances there is. Ambulances may run stop signs en route to a hospital with a patient in critical condition; DEA agents may buy drugs in an undercover operation; police officers may use force that otherwise would constitute battery in order to make an arrest; and so forth. See, e.g., WAYNE R. LAFAYE, *CRIMINAL LAW* § 10.7, at 590-600 (5th ed. 2010) (discussing defenses available to law enforcement officers).
38. See Speech or Debate Clause, U.S. Const. art I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [members of Congress] shall not be questioned in any other Place.").
39. The Due Process Clause prohibits the government from holding a party criminally responsible for engaging in facially reasonable conduct that a government official has expressly authorized him to perform. See, e.g., *United States v. Pennsylvania Indus. Chemical Corp.*, 411 U.S. 655, 670-75 (1973); *Cox v. Louisiana*, 379 U.S. 559, 568-74 (1965); *Raley v. Ohio*, 360 U.S. 423, 425-26 (1959).
40. See the Origination Clause, U.S. Const. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.").
41. See *United States v. Park*, 421 U.S. 658, 673 (1975) ("The theory upon which responsible corporate agents are held criminally accountable for 'causing' violations of the Act permits a claim that a defendant was 'powerless' to prevent or correct the violation to 'be raised defensively at a trial on the merits.' *United States v. Wiesenfeld Warehouse Co.*, 376 U.S. 86, 91 (1964). If such a claim is made, the defendant has the burden of coming forward with evidence, but this does not alter the Government's ultimate burden of proving beyond a reasonable doubt the defendant's guilt, including his power, in light of the duty imposed by the Act, to prevent or correct the prohibited condition."); *id.* at 676 (suggesting that the government may be required to prove that a defendant had "the power or capacity" to commit the acts charged in the indictment).

42. As one commentator noted in 1994: "The federal government's failure to prosecute alleged environmental crimes committed at federal facilities seriously undermines U.S. environmental laws. The federal government owns almost one-third of the land in the United States and operates 27,000 installations and 387,000 facilities. Over 20,000 federal installations across the country have reported environmental contamination. Extensive mining, oil and gas exploration, and residual ores and chemicals used in various extraction processes have polluted many public lands under the jurisdiction of the Department of the Interior, including national parks, national forests and land managed by the Bureau of Land Management.... The U.S. military is indisputably the largest contributor to contamination at federal facilities. Decades of weapons testing have contaminated Army grounds, and nearly every Air Force base in the country is polluted with solvents used to 'wash' aircraft and machinery. Of over 17,000 potentially contaminated military sites, 100 are at the beginning of the National Priorities List, the Superfund program's inventory of the nation's worst contaminated sites. The Navy has released unknown quantities of paint and paint strippers into shipyard grounds and coastal waters." Minister, *supra* note 25, at 138-39 (footnotes omitted).
43. *Cf., e.g., Connick v. Thompson*, 131 S. Ct. 1350 (2011) (district attorney cannot be held civilly liable under the Civil Rights Act of 1871, ch. 31, 17 Stat. 13 (codified, as amended, at 42 U.S.C. 1983 (2012))), for a prosecutor's failure to disclose exculpatory evidence absent proof that he knew or should have known of the failure and the need for training).
44. Turkewitz, *supra* note 1.
45. *Id.*
46. *Id.* Another rafter estimates \$10,000 in losses since the spill, amidst other increasing losses: There are no watersports on the river, no fishing, and no nearby agriculture because farmers must stop irrigating crops. Bryan & Knickmeyer, *supra* note 1.
47. Turkewitz, *supra* note 1.