

# Lawyer Insights

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## Salvaging a Lesson From the Animas River Spill

*The EPA employees at fault won't face criminal charges. Neither should companies that make similar mistakes.*

*by William L Wehrum*

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The Animas River disaster in Colorado is looking worse and worse for the Environmental Protection Agency. On Wednesday, EPA officials faced grilling from a congressional committee for the agency's Aug. 5 spill of three million gallons of toxic wastewater into a tributary of the Animas during the cleanup of an abandoned mine near Silverton, Colo. On Aug. 24, the agency released the findings of an internal investigation that found its staff had failed to accurately gauge the water pressure within the mine, thus increasing the chances for a "blowout" like the one that occurred.

All this came after reports that the EPA had known for more than a year that cleaning up the mine was highly risky. As Rep. Lamar Smith (R., Texas), chairman of the House Committee on Science, Space and Technology, asked in Wednesday's hearing: "Why did the EPA ignore these obvious warnings?"

Such revelations have intensified criticism of the EPA's handling of the spill. High-profile politicians, including former Speaker of the House Newt Gingrich, have even called for criminal charges against the agency and the employees at fault. Yet federal law protects them from any such action. America will have to settle for EPA Administrator Gina McCarthy's statement that she is "absolutely, deeply sorry this ever happened."

As a former EPA official, I believe the agency and the individuals responsible shouldn't be prosecuted for the accident. But I also believe this episode brings needed attention to a serious problem with how the EPA conducts business: The agency often criminalizes actions that are nothing more than accidents, many far less damaging to the environment than the Animas River disaster. Such treatment is unjust.

There are many examples. Consider last year's Elk River chemical spill. In January 2014, a Freedom Industries Inc. facility in Charleston, W. Va., accidentally spilled roughly 7,500 gallons of toxic chemicals into the local waterway. The EPA's recent discharge of toxic water in Colorado was many times larger. Yet the agency went after the company with everything it had.

The EPA quickly dispatched an agent from its Criminal Investigation Division to West Virginia. Working with the FBI and a local U.S. attorney, the EPA built a case that resulted in criminal indictments for Freedom Industries and six of its employees. All pleaded guilty in connection with negligent discharge under the Clean Water Act and currently await sentencing, which could involve varying prison sentences.

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Companies and employees who willfully commit a crime should be prosecuted. But criminal liability for negligence isn't appropriate because, by definition, a negligent act isn't done with intent. That doesn't mean that negligent acts should go unpunished. There is ample authority for fines and other appropriate relief to be imposed under civil law. Criminal liability should be reserved for those who intend to break the law.

Yet under the Clean Water Act and numerous other laws enforced by the EPA, accidents like the Elk River chemical spill are criminally punishable. In that sense many environmental laws and regulations with criminal penalties suffer from a problem common in the rest of criminal code—a lack of intent requirement.

There is no indication that any of Freedom Industries' employees intended to cause the spill. The company declared bankruptcy within days of the accident, 11 months before the federal government announced its criminal prosecution. (One employee is being criminally prosecuted for bankruptcy fraud, which isn't related to the spill.) The company also suffered from civil lawsuits from area residents, the costs associated with the post-spill cleanup, and the inevitable public-relations disaster that accompanies such debacles.

In other words, the criminal charges related to the spill added insult to an already debilitating injury. They satisfied calls for vengeance but failed to serve the cause of justice.

Criminal prosecutions aren't restricted to major, headline-grabbing disasters. Take the 1999 prosecution of Edward Hanousek. He oversaw a quarrying project for Pacific & Arctic Railway and Navigation Company in Alaska where a backhoe accidentally struck a pipeline, sending up to 1,500 gallons of oil gushing into nearby Skagway River. Though Hanousek was off-duty and wasn't operating the backhoe, he was criminally charged and sentenced to six months in prison because his contract said he was responsible for safety at the site.

There is also the 2011 prosecution of Lawrence Lewis. Upon finding sewage flooding a military retirement home in the Washington, D.C., metro area, he diverted the flow into a storm drain that—unbeknown to him—discharged into the Potomac River. He was charged and pleaded guilty to a crime under the Clean Water Act.

The list goes on. The lesson is clear: People can have their lives ruined for something that, in Gina McCarthy's words, they are "absolutely, deeply sorry" for and never meant to do.

The EPA accidentally released three million gallons of toxic water into one of America's most scenic river systems. Thanks to federal law, the employees at fault will never face criminal prosecution or jail time for their mistake—nor should they. But neither should the companies and individuals who make similar mistakes during their work. What's just for the EPA surely is just for those it regulates.

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