

Prosecutors Will Turn to Crime Victim Laws in Environmental Justice Cases

By Simone Jones

June 9, 2021, 3:01 AM

With renewed White House focus on environmental justice, federal prosecutors will be encouraged to use existing statutory tools to provide members of affected communities with crime victim status while fighting environmental crimes, says Sidley Austin's Simone Jones. The regulated community should anticipate increased use of these statutes, she says.

Owing to the watershed moment that George Floyd's death created and the election of President Joseph Biden, we are witnessing—nearly three decades after President Bill Clinton signed Executive Order 12898—a renewed focus on environmental justice. Biden has stated unequivocally that environmental justice is a priority, but many have questioned how these principles will be reflected in his administration's policies.

The Department of Justice recently provided clarity in one area, signaling that environmental justice will feature prominently in prosecution of environmental crimes. This intersection of environmental justice and environmental crimes creates an opportunity for prosecutors to use crime victim statutes to seek restitution for neighbors of facilities where environmental crimes have occurred.

Acting Associate Attorney General Matthew Colangelo recently announced the DOJ's and the Environmental Protection Agency's Environmental Crime Victim Assistance Program. Recognizing that communities of color and low-income communities bear an unequal share of harm resulting from pollution and climate change, Colangelo stated that the "first-of-its-kind" program "will help achieve environmental justice by ensuring crime victims in communities disproportionately burdened by environmental harm are able to equally participate in the criminal justice system."

The program will accomplish its goal by ensuring that victims of environmental crimes are properly identified, have their rights protected, including those prescribed by the Victims' Rights and Restitution Act and Crime Victims' Rights Act, and receive services from the start of investigations through case adjudication.

A logical extension of the DOJ's desire to more meaningfully involve environmental justice communities in criminal cases is that prosecutors will invoke crime victim statutes to obtain compensation for environmental crime victims.

Mandatory Victim's Restitution Act, 18 U.S.C. § 3663A

The Mandatory Victim's Restitution Act (MVRA) applies where the defendant is convicted of offenses against property, among others. Although the statute does not define "offenses against property," the Sixth Circuit has found that an "offense of conviction, which resulted in the asbestos contamination of nearly 300 acres of land, certainly qualifies as an 'offense against property' within the meaning of § 3663A."

Stated differently, "it is clear that offenses that result in the contamination of property with a dangerous or an apparently dangerous substance typically qualify for restitution under § 3663A." Not all circuits have addressed this topic, however.

The MVRA directs courts to order defendants to pay restitution to "identifiable victims" suffering pecuniary losses or physical injuries as a result of the defendants' commission of enumerated offenses. The statute provides for a broad range of restitution, including lost income and medical and rehabilitation service costs.

Additionally, it requires defendants to reimburse victims for "lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense."

Defendants also must pay funeral and related service costs, as appropriate. Notably, restitution under the MVRA is mandatory and divorced from a defendant's ability to pay.

Victim and Witness Protection Act of 1982, 18 U.S.C. § 3663

The Victim and Witness Protection Act (VWPA) allows courts to order defendants convicted of Title 18 offenses or certain other offenses to make restitution to victims of the offense. The statute also permits courts to order restitution where the parties agreed to restitution in a plea agreement.

The forms of restitution under the VWPA are the same as those provided by the MVRA but the statutes differ in two material respects: First, the VWPA is subject to the court's discretion.

Second, the VWPA allows a court, when exercising its authority, to consider the amount of loss to the victim that results from the offense, as well as "the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate."

It similarly is left to courts to decline to order restitution where the "complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution...outweighs the need to provide restitution to any victims."

Probation Act, 18 U.S.C. § 3563

The Probation Act provides another avenue for courts to impose restitution. It specifically states, pursuant to 18 U.S.C. § 3556, that organizations, as a condition of probation, may be required to pay restitution to victims of an offense, subject to limitations.

Some courts have interpreted this provision as lifting any limitation on the scope of restitution to the offenses specified in the MVRA and VWPA, giving courts license to “order restitution as a condition of probation to the victim of any criminal offense....”

Relatedly, 18 U.S.C. § 3556, provides the “court, in imposing a sentence on a defendant who has been found guilty of an offense shall order restitution in accordance with section 3663A, and may order restitution in accordance with Section 3663.”

In essentially all cases involving probation, courts arguably have discretion to impose restitution, even where an organization is not convicted of a VWPA or MVRA offense.

Prosecutors will be encouraged to use tools that have existed for years to provide members of environmental justice communities with crime victim status in environmental cases. The regulated community should anticipate increased use of these statutes.

This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.

Write for Us: Author Guidelines

Author Information

Simone Jones is a senior associate in Sidley's Environmental practice, specializing in complex environmental litigation and internal investigations, particularly in the automotive, chemical, and refining sectors. As one of the leaders of Sidley's Environmental Justice group, Simone advises and defends leading companies on environmental justice and other social justice issues.

Topics

victims of crime
restitution
environmental crime
climate change
environmental justice