University of Baltimore Law Review

Volume 37
Issue 3 *Spring 2008*

Article 7

2008

Comments: Tightening the Reins on Pollution of Maryland Waters: Enforcing Maryland's Criminal Environmental Statutes against out-of-State Polluters

Eric Massof
University of Baltimore School of Law

TIGHTENING THE REINS ON POLLUTION OF MARYLAND WATERS: ENFORCING MARYLAND'S CRIMINAL ENVIRONMENTAL STATUTES AGAINST OUT-OF-STATE POLLUTERS

I. INTRODUCTION

To date, the overall efforts to restore the Chesapeake Bay (the Bay) through civil and administrative penalties, agricultural incentives, and other measures designed to promote compliance with Maryland's water quality standards have been an overall failure.[1] In 1983, the Bay was categorized as "dangerously out of balance," receiving an overall score of twenty-three,[2] which equates to a D- on the State of the Bay Report.[3] As of 2006, the Bay has a score of twenty-nine, a D.[4] This slight rise is due to an increase in the quality of certain aspects of habitat and fisheries.[5] The Bay, however, continues to score a D for phosphorus and toxic pollutant levels and an F for water clarity and nitrogen and dissolved oxygen levels.[6] Despite ongoing efforts to improve the quality of the Bay, the state of the Bay remains

1. David A. Fahrenthold, *A Revitalized Chesapeake May Be Decades Away*, WASH. POST, Jan. 5, 2007, at A1.
2. The health of the Bay is an overall score out of one hundred possible points (one hundred points is the healthiest state of the Bay as currently known through the narratives of Bay Captain John Smith in the early 1600s). The current score is based on the average of numerical scores in three categories—pollution, habitat, and fisheries—which are also based on a one-hundred-point scale. The numerical scores correlate to a letter grade with a score of seventy or more points equaling an A+ and a score below twenty equaling an F. CHESAPEAKE BAY FOUNDATION, STATE OF THE BAY 2006 11 (2006), http://www.cbf.org/site/PageServer?pagename=exp_sub_resources_publications_sotb06 [hereinafter CHESAPEAKE BAY FOUNDATION 2006].
3. *Id.* at 10–11.
4. *Id.*
5. *Id.* at 3. Under the habitat category, the Bay has an F for underwater grasses and a D for resource lands, while both oyster and shad populations continue to receive an F, scoring four and ten, respectively. *Id.*
6. *Id.* The Bay has a raw score of seventeen for nitrogen levels and a raw score of twenty-seven for toxics, which is a three point decrease from 1999, when toxics scored at thirty; the change correlates to a letter grade decrease from D+ to D. *Id*; CHESAPEAKE BAY FOUNDATION, STATE OF THE BAY 2000 3 (2000), http://www.cbf.org/site/DocServer/SOTB2000.pdf?docID=6367.

"dangerously out of balance."[7] The initial goal for improving the score of the Bay was a score of forty by 2010,[8] three years from now. This goal has become nothing more than a pipe dream. In fact, we will "miss that deadline by a wide margin."[9] According to Richard Batiuk, associate director of the Environmental Protection Agency (EPA) Chesapeake Bay Program, the current rate of progress the Bay has exhibited in response to the efforts to date indicates that "we're talking about restoring the Chesapeake decades from now, a generation or two."[10]

Despite the vast amount of effort and resources poured into saving the Bay, the results have been far from positive, and the health of the Bay has only seen minimal improvement over the past twenty-four years.[11] This lack of progress is indicative of the need to add new types of regulations as well as tighten down those already in place.[12] This means Maryland must re-evaluate its current efforts and develop an overall strategy that will increase the pace of Bay restoration.[13] "This lack of progress in more than [thirty] years is especially staggering in the context of the public resources and attention focused on Bay health . . . . Clearly, what public officials have done to date is far from enough."[14]

Recognizing that the Bay faces several problems, including pollution from sources within Maryland, this Comment proposes a mechanism that can be a useful tool in curtailing the continued pollution of the Bay from out-of-state sources. Extraterritorial enforcement of Maryland's criminal environmental statutes, particularly those pertaining to water pollution, will provide a strong incentive for out-of-state polluters to comply with Maryland's environmental standards.[15] This is because extraterritorial enforcement of Maryland's criminal environmental statutes would serve as an effective deterrent against discharging or emitting

---

7. CHESAPEAKE BAY FOUNDATION 2006, *supra* note 2, at 10.
8. *Id.* A score of forty would indicate that the overall quality of the Bay is "fair" and that the Bay is showing signs of steady improvement. *Id.*
9. Fahrenthold, *supra* note 1,.
10. *Id.*
11. CHESAPEAKE BAY FOUNDATION 2006, *supra* note 2, at 10. The Bay's score on the State of the Bay Report has improved only six points over the past twenty-four years.
12. *Id.*
13. *Id.* at 1–2.
14. *Id.* at 10.
15. *See infra* Part II.A.

pollutants that can migrate into the waters of the Bay, as well as hold those who pollute the Bay with impunity publicly responsible.[16]

While in-state pollution is also a major contributing factor to the lack of progress in the health of the Bay, the unique position of the Bay makes it equally susceptible to out-of-state sources of pollution. Interstate waters, such as the Susquehanna River (the Susquehanna), carry pollutants that eventually empty into the Bay.[17] The Susquehanna itself is responsible for approximately fifty percent of all fresh water that flows into the Bay.[18] Upstream discharges of pollutants that occur in Pennsylvania and beyond not only affect those states, but also ultimately affect Maryland when those pollutants are finally deposited in the Bay.[19] The Susquehanna is just one example of the many interstate waters that empty into the Bay and consequently deposit harmful pollutants that contribute to the lack of progress in the health of the Bay.[20]

This Comment seeks to draw on existing criminal law doctrines to illustrate a conceivable way in which Maryland, or any other affected state, could exercise criminal jurisdiction over an out-of-state polluter whose pollutants reach Maryland's waters. Part II of this Comment addresses the basic problems in the current regulatory scheme that extraterritorial enforcement can help to remedy.[21] Part III begins by demonstrating that environmental criminal law functions in the context of traditional criminal law.[22] With this in mind, Part III then sets forth the elements that must be satisfied in order for a state to successfully prosecute an out-of-state polluter.[23] This includes discussion of the requisite culpable mental state, the basic jurisdictional requirements that must be met, and the due process

16. *See infra* Part II.B.

17. CHESAPEAKE BAY FOUNDATION, WATERS AT RISK: POLLUTION IN THE SUSQUEHANNA WATERSHED—SOURCES AND SOLUTIONS 1 (2006), http://www.cbf.org/site/PageServer?pagename=exp_sub_expeditions_susquehanna_investigate_riskreport [hereinafter WATERS AT RISK].

18. *Id.*

19. The Susquehanna is in fact responsible for "about [forty] percent of the nitrogen pollution, [twenty] percent of the phosphorus pollution, and a heavy load of the sediment pollution" in the Bay. *Id.* (citations omitted).

20. "Fifty major tributaries pour water into the Chesapeake every day. [Eighty] to [ninety] percent of the freshwater entering the Bay comes from the northern and western sides." Chesapeake Bay Foundation—Save the Bay: Geography, http://www.cbf.org/site/PageServer?pagename=exp_sub_watershed_geography (last visited Jan. 27, 2008).

21. *See infra* Part II.

22. *See infra* Part III.A.

23. *See infra* Part III.

concerns associated therewith.[24] Part IV addresses Maryland's future needs and discusses how to bring agricultural activities into the regulatory fold.[25] Part IV also sets out the basic groundwork for proposed new legislation that will allow Maryland to effectively protect its interest in the health of the Bay and other state waters.[26]

II. EXTRATERRITORIAL ENFORCEMENT IS NECESSARY DUE TO A LACK OF COMPLIANCE THAT IS DIRECTLY ATTRIBUTABLE TO A LACK OF CONSISTENT ENFORCEMENT AND UNIFORMITY IN THE CURRENT REGULATORY SCHEME

Criminal environmental laws are necessary tools in environmental regulation, because "criminal enforcement of environmental laws is needed to protect the integrity of the regulatory scheme, to prevent harm to the environment, to protect the public health and welfare, and to punish culpable violations."[27] Not only do criminal laws remove the economic disincentive of regulatory compliance,[28] they also reflect the widely held moral belief that these violations are wrong.[29] Essentially, criminal environmental laws act to fill in the gap left by the shortcomings of civil and administrative remedies in bringing about widespread compliance.

A. Consistent Enforcement of Criminal Environmental Sanctions Is Essential to the Success of Any Environmental Regulatory Scheme

Compliance is the goal of any environmental regulatory program.[30] In fact, a successful environmental regulatory program must have widespread compliance in order to be effective.[31] Since compliance

---

24. *See infra* Part III.B–C.
25. *See infra* Part IV.
26. *See infra* Part IV.B.
27. Kathleen F. Brickey, *Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory*, 71 TUL. L. REV. 487, 509–10 (1996).
28. *Id.* at 508–09.
29. *Id.* at 488–89.
30. David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1603 (1995).
31. *Id.* "Compliance is essential to the success of any environmental regulatory program because it 'is critical to realizing the benefits envisioned by environmental policy, statutes, regulations, standards, and permits.'" *Id.* (quoting Cheryl E. Wasserman, *Federal Enforcement: Theory and Practice*, *in* INNOVATION IN ENVIRONMENTAL POLICY 21, 22 (T.H. Tietenberg ed., 1992)).

determines the true success of a regulatory program,[32] there must be effective enforcement measures in place to guarantee compliance.[33]

States and agencies have sought to bring about compliance by the use of incentives and deterrent measures.[34] Deterrent measures include civil and administrative fines as well as criminal sanctions.[35] Traditionally, civil and administrative fines have been used in favor of criminal sanctions.[36] While the use of fines has its place in regulation, the continued reliance on such measures has illustrated their shortcomings.

The major shortcoming of both civil and administrative sanctions is that companies can easily absorb them as a cost of doing business.[37] This problem is due to the fact that "polluters have no economic incentive to comply with environmental laws because noncompliance results in economic benefits . . . while compliance exacts an economic cost."[38] For an operation to become compliant, it must essentially overhaul its existing treatment and disposal methods and install expensive technology designed to control the levels of pollutants discharged from a particular source.[39] However, "[w]hen the price of installing pollution-abatement equipment exceeds the fines imposed, businesses have a powerful economic incentive" to forgo installation, and thus compliance.[40]

Because of this noticeable lack of incentive to comply with regulatory requirements, criminal sanctions will serve as a strong deterrent to noncompliance if effectively used.[41] This is primarily because criminal liability increases the exposure of the individual

32. *Id.* "The vast regulatory apparatus we have put in place to protect public health and the environment amounts to empty words and deeds without compliance." *Id.* (quoting Wasserman, *supra* note 31).

33. *Id.* at 1604.

34. Nancy K. Kubasek et al., *The Role of Criminal Enforcement in Attaining Environmental Compliance in the United States and Abroad*, 7 U. BALT. J. ENVTL. L. 122, 143–44 (2000). While incentives play an important role in regulation, this Comment is primarily concerned with deterrent measures.

35. *Id.*

36. Charles R. Toy & A. Michael Leffler, *Criminal Enforcement of Environmental Law*, 80 MICH. BAR J. 21, 21 (2001).

37. Brickey, *supra* note 27, at 508.

38. Hodas, *supra* note 30, at 1553.

39. Brickey, *supra* note 27, at 509; *see also* Ann M. Burkhart, *Lenders and Land*, 64 MO. L. REV. 249, 306 (1999).

40. Brickey, *supra* note 27, at 509.

41. *Id.* at 508. "Without the threat of criminal sanctions, the business community could treat civil and administrative fines as a cost of doing business." *Id.*

over the operation itself.[42] This increased exposure for the individual not only exposes her to monetary fines but also to the prospect of incarceration, because criminal sanctions often carry potential jail time.[43]

Incarceration itself is a substantial deterrent because of the deprivation of an individual's freedom for any period of time is not quantifiable in dollars.[44] Additionally, incarceration has the "unique capacity . . . to condemn and shame those who violate society's increasingly strict norms of environmental protection."[45] Thus, criminal prosecution carries a significant stigma that not only affects an individual in future business dealings but socially as well.[46] An individual's increased exposure to financial liability and the threat of incarceration give criminal environmental sanctions their high deterrent value. Furthermore, the use of these sanctions will be factored into the overall decision-making process and encourage widespread compliance, for they will be perceived as a real consequence.[47]

While criminal enforcement of environmental laws is an essential regulatory tool that can serve to guarantee the compliance of the regulated community, it will only do so if it is properly applied. The problem remains that the deterrent function of criminal environmental sanctions only works through proper, uniform, and consistent enforcement.[48] If sanctions are sporadically enforced, or not enforced at all, then they will never be considered in any decision made by a polluter; sanctions would thus fail in their role to bring

42. Andrew S. Hogeland, *Criminal Enforcement of Environmental Laws*, 75 MASS. L. REV. 112, 119 (1990).

43. *See, e.g.*, MD. CODE ANN., ENVIR. § 5-1107 (LexisNexis 2007) ("Any person who violates any provision of this subtitle is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $5,000, or imprisonment not exceeding [one] year, or both, for each violation.").

44. Brickey, *supra* note 27, at 506 (asserting that "jail time is one cost of business that cannot be passed on to the consumer").

45. Susan Hedman, *Expressive Functions of Criminal Sanctions in Environmental Law*, 59 GEO. WASH. L. REV. 889, 896 (1991).

46. Brickey, *supra* note 27, at 506. ("[C]orporate officials . . . belong to 'a social group that is exquisitely sensitive to status deprivation and censure.'") *Id.* (quoting Hedman, *supra* note 45, at 895); *see also* Jeremy Firestone, *Enforcement of Pollution Laws and Regulations: An Analysis of Forum Choice*, 27 HARV. ENVTL. L. REV. 105, 112–13 (2003) (stating that criminal sanctions, especially in the white-collar world of the corporate officer, carry a stigma that can haunt a person socially and professionally for the remainder of her career).

47. Hodas, *supra* note 30, at 1604.

48. *Id.* at 1600.

about compliance. The next section of this Comment will discuss the problems of consistent enforcement and lack of uniformity within the regulatory scheme in general and then demonstrate how extraterritorial enforcement of criminal environmental sanctions may help a downstream state protect its own interests.

B. The Origins of the Current Lack of Uniformity and Consistent Enforcement

Due to the apparent shortcomings of civil and administrative remedies, criminal environmental laws must be applied consistently to achieve the environmental and public welfare policies and goals that are the basis of environmental regulation.[49] Furthermore, criminal sanctions require consistent and effective enforcement to overcome the disincentives for full compliance and deter the regulated community from engaging in continued violations. While criminal sanctions serve as part of an effective enforcement system, their deterrent value will disappear if they are poorly enforced. Thus, their role in bringing about compliance will be reduced to nil:

> To achieve compliance, an effective enforcement system must exist. Enforcement is the use of legal tools, formal and informal, to compel compliance by imposing legal sanctions or penalties. Effective enforcement is based on the theory of deterrence, which holds that a strong enforcement program deters the regulated community from violating in the first place, deters specific violators from further violations, and deters the public from violating other laws. Effective enforcement accomplishes these goals by providing "visible examples to encourage others in the regulated population to maintain desired behavior to avoid a similar fate."[50]

The major impediment to effective enforcement is the lack of uniformity of standards and enforcement between states.[51] A state could have a strict standard that is rarely enforced or a weak standard that is enforced regularly with little effect.[52] This lack of uniform standards and enforcement can be directly attributed to the economic

---

49. *Id.* at 1604.
50. *Id.* (quoting Clifford Russell, *Monitoring and Enforcement*, in 5R 243, 243 (Paul Portney ed., 1990)).
51. *Id.* at 1574.
52. *Id.*

or business concerns of the state as well as the political concerns of its elected officials.[53]

States generally feel economic effects immediately, while environmental harms occur over time. Thus, "[s]tate officials seeking to keep existing industry and to lure new business into their state are acutely aware of the political danger of creating a hostile business atmosphere through vigorous enforcement" of environmental standards.[54] The result is that states "feel intense local political pressure to slacken enforcement" in order to promote economic development.[55] Essentially, economic concerns shape the environmental policy-making decisions of officials concerned with re-election because "[n]o politician wants to open herself up to the charge of opposing, or not vigorously promoting, statewide business development."[56] Although a state may look good on paper by having strict environmental standards, this is just for appearances if the state is unwilling to enforce them.

This problem is furthered by the lack of federal involvement in the matter. Due to the lack of an adequate enforcement strategy against states that fail to assess sufficient penalties, the Environmental Protection Agency (EPA) will not step in and force a state's hand.[57] The result is that "no effective check exists for states that assess little or no penalties on [Clean Water Act] violators."[58] Because of this lack of checks, a state can continue to assess minimal fines, fostering an economic advantage at the cost of its own and neighboring states' environments without interference from the federal government.[59]

These problems combine to leave a downstream state, such as Maryland, vulnerable to the acts of upstream polluters. The following hypothetical illustrates the vulnerability of states, like Maryland, to the political or business climate of a neighboring state.[60]

Imagine a polluter in a neighboring state that is a large corporation or facility. This polluter has determined that it would rather pay the civil fines for noncompliance and incorporate them into the cost of business, rather than implement the necessary treatment procedures that would limit the adverse effects of its emissions or discharges.

---

53. *Id.*
54. *Id.* at 1575.
55. *Id.*
56. *Id.*
57. *Id.* at 1588.
58. *Id.*
59. *See id.* at 1589, 1603.
60. *See generally id.* at 1615–16.

Furthermore, this facility is located in an area whose local economy is dependent upon it—perhaps it is a major employer. Because of the role it plays in the community, the state in which it is located is unwilling to impose stricter penalties for noncompliance with environmental regulations. Essentially, the facility is now permitted to adversely affect Maryland's waters because of the migratory nature of its pollutants and do so with impunity.[61]

In such an instance, what recourse does Maryland have? A state may not force another state to prosecute its own citizens if it chooses not to. How then can an affected state truly protect its own environmental interests if there are no effective deterrents to prevent the out-of-state discharge of pollutants that reach its waters?

The above hypothetical situation demonstrates that Maryland cannot rely on the policies of neighboring states to effectively protect it from pollution emanating from within those states. While the Office of the Maryland Attorney General has successfully prosecuted environmental crimes that occur within state borders,[62] Maryland still faces the severe problem of out-of-state pollution contaminating its water resources via interstate waterways.[63] Maryland has a legitimate state interest in curbing the pollution that enters state waters from out of state sources,[64] and that state can no longer rely on either neighboring states or the federal government to implement pollution control standards that meet state needs.

Although the states of the Chesapeake Bay watershed, including Maryland, have entered into several interstate compacts with intentions of setting uniform standards to address such problems,[65]

---

61. This hypothetical may be applied equally to the agricultural industry of a state. In the case of agricultural regulation, a state may be reluctant to impose regulations on the industry because of its role in the state's economy or because a politician does not want to lose popularity by being perceived as attacking farmers. *See* Douglas R. Williams, *When Voluntary, Incentive-Based Controls Fail: Structuring a Regulatory Response to Agricultural Nonpoint Source Water Pollution*, 9 WASH. U. J.L. & POL'Y 21, 25 (2002).

62. *See, e.g.*, Neuron Prods., Inc. v. Dep't of the Env't, 166 Md. App. 549, 553, 561–62, 890 A.2d 858, 860, 865 (2006).

63. WATERS AT RISK, *supra* note 17, at 1.

64. MD. CODE ANN., ENVIR. § 9-302 (LexisNexis 2007) (stating that "the quality of the waters of this State is vital to the interests of the citizens of this State"); *see also infra* Part III.B.3.a.iii.

65. *See, e.g.*, MD. CODE ANN., ENVIR. § 5-301 (LexisNexis 2007); *see also* James M. McElfish, Jr. & Lyle M. Varnell, *Designing Environmental Indicator Systems for Public Decisions*, 31 COLUM. J. ENVTL. L. 45, 73 & n.107 (2006) (describing the multi-state Chesapeake Bay Program as a "commitment" by Maryland, several neighboring states, the EPA, and the Chesapeake Bay Commission to reduce

they are far from successful.[66] These compacts take the unrealistic approach that economic competition between the member states as well as the individual economic concerns of each state will not undermine the uniform enforcement of these standards in each state.[67] If the aims of these compacts were truly adhered to, a state like Pennsylvania would take more drastic measures to curtail the levels of nitrogen and phosphorus deposited in the Susquehanna River by agricultural activities.[68] One major factor that has prevented Pennsylvania from imposing stricter regulations on such farms[69] is the immediate economic impact that translates directly to a state official's political concerns.[70] Thus, the quality of not only Pennsylvania's environment, but Maryland's as well, is placed in the backseat for economic vitality.

The lack of effective enforcement of environmental laws leaves downstream states like Maryland vulnerable. Pollution is migratory in nature and is carried by whatever medium it enters. Thus, its effects are felt not only where the pollution is discharged, but also where it comes to rest.[71] Because these discharges often violate more than just the laws of the polluter's state,[72] affected neighboring states

---

sedimentation in the Bay and acknowledging that the project had failed to reach its goals as of 2006).

66. *See, e.g.*, Jonathan Cannon, *Checking in on the Chesapeake: Some Questions of Design*, 40 U. RICH. L. REV. 1131, 1133–35 (2006).

67. *Id.* at 1146.

68. Stricter regulation of these farms would have a profound effect on the overall levels of nitrogen pollution in the Bay. *See generally* WATERS AT RISK, *supra* note 17, at 2–4.

69. Stricter regulations, such as classifying these farms as "concentrated feeding operations," would qualify the farms' operations as point sources of pollution and consequently subject them to effluent permit regulations. *See* Concerned Area Residents for the Env't v. Southview Farms, 34 F.3d 114, 117–18 (2d Cir. 1994).

70. *See* David Zaring, Note, *Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act's Bleak Present and Future*, 20 HARV. ENVTL. L. REV. 515, 527–28 (1996).

71. Mark S. Pollock, *Local Prosecution of Environmental Crime*, 22 ENVT'L L. 1405, 1405 (1992).

72. *Id.*

> Violations of federal and state environmental laws vary in the seriousness of their impact, and often cross jurisdictional boundaries. Pollutants discharged unlawfully by responsible parties tend to migrate in the environment from one medium to another—soil to water, water to air, city to county, state to state, and nation to nation. As a result of the geographical migration of pollutants, a given pollution discharge may violate not only federal law, but state law, and local ordinances as well.

must be able to protect their own interests against the shortcomings of another state's enforcement structure. A state exercising its criminal jurisdiction extraterritorially for environmental crimes is not only permissible,[73] but is also necessary for a state to protect its own citizens and environment from the external threat created by another's lax regulation or enforcement.

III. BY APPLYING TRADITIONAL CRIMINAL LAW DOCTRINES, MARYLAND CAN SUCCESSFULLY PROSECUTE OUT-OF-STATE CRIMINAL POLLUTERS

While the justification exists for a downstream state to criminally prosecute out-of-state polluters, a mechanism to facilitate this goal has yet to be discussed. This section sets forth the basic legal premises upon which the criminal prosecution of out-of-state polluters may function. Before discussing the actual legal mechanisms, this section will first place environmental criminal laws in the context of traditional criminal law.[74] Next, this section will explore how to satisfy the requirements of scienter as well as how a state may satisfy the various jurisdictional requirements necessary to hold an out-of-state polluter criminally liable.[75]

A. Traditional Criminal Law Doctrines May Be Used in Prosecuting Environmental Crimes Because Criminal Environmental Laws Function in the Context of Traditional Criminal Law

Environmental criminal law, although relatively new in comparison, should be applied the same as traditional criminal laws, because both focus on the prevention of social harm through deterrence.[76] Truly, the

> [M]ajor goal of the prosecutor in prosecuting any crime is deterrence. The hope and goal of any prosecutor in obtaining a murder conviction, and the execution of the resulting sentence, is to deter homicide in the state or county where the prosecution occurred.

Id.

73. A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 647 (2006).

74. *See infra* Part III.A.

75. *See infra* Part III.B.

76. Brickey, *supra* note 27, at 507–08 ("[E]nvironmental crimes fit comfortably within the criminal law's concern for the prevention of social harm.").

> The prosecution of environmental violations is no different.[77]

While the social harm that traditional criminal law is meant to prevent is generally broad in scope, environmental criminal law is merely a more specific type of criminal law in that it seeks to prevent a widespread and continuous harm to the physical environment and public welfare.[78]

Criminal sanctions also act as a manifestation of society's determination that certain activities are wrong and the violation of certain standards will not be tolerated.[79] Criminal sanctions for environmental violations are no different; they reflect the societal values that degradation of the environment for capital gain is unacceptable, and violators should be made an example to others.[80]

For environmental criminal sanctions to operate they must satisfy the normal requirements for any legitimate criminal charge. First, the elements of the crime must be satisfied.[81] Furthermore, and most important to extraterritorial enforcement, jurisdiction must be established.[82] Not only must the court have proper subject matter jurisdiction, but it must also demonstrate that it has territorial jurisdiction over the claim as well as personal jurisdiction over the defendant.[83]

---

77. Pollock, *supra* note 71, at 1411.

78. Brickey, *supra* note 27, at 507 ("Environmental crimes have the potential to cause catastrophic harm to the environment, public health, and local economies and ways of life.").

79. *Id.* at 488–89.

80. Hedman, *supra* note 45, at 889. "Over seventy percent of the American public favors the use of jail terms 'when companies are found guilty of deliberately violating pollution laws.'" *Id.* (quoting ENVIRONMENTAL OPINOIN STUDY, INC., A SURVEY OF AMERICAN VOTERS: ATTITUDES TOWARD THE ENIVRONMENT 14 (1990)).

81. Christoffel v. United States, 338 U.S. 84, 89 (1949) ("An essential part of a procedure which can be said fairly to inflict such a punishment is that all the element[s] of the crime charged shall be proved . . . .").

82. Spencer, *supra* note 73, at 625.

83. *Id.*

> A court (state or federal) may not enter a binding judgment in resolution of a matter unless it has jurisdiction to adjudicate the dispute. Adjudicatory jurisdiction is traditionally thought to have two dimensions: first, a subject matter component that identifies the types of cases that a court may hear; and second, a personal component that refers to the ability of a court to bind a particular individual or entity as a defendant to the judgment rendered.

Id. at 617–18.

Before delving into the various jurisdictional requirements, it is first appropriate to investigate the requisite culpable mental state to hold a polluter criminally liable and in particular, whether there need be any level of scienter at all.

B. The Requisite Level of Scienter for Environmental Criminal Sanctions Arising from Water Pollution

Maryland's criminal environmental statutes pertaining to water pollution do not state a requisite scienter requirement such as "knowingly," except for those dealing with fraud or falsification.[84] The lack of a specified level of intent, coupled with the language used in Maryland's criminal water statutes such as "[a]ny person who violates any provision of this subtitle is guilty of a misdemeanor,"[85] normally would suggest a standard of strict liability.[86] The Supreme Court, however, expressed contempt for the general use of strict liability in the interpretation of statutes that are silent on the requisite level of scienter and whose penalties result in incarceration.[87] Yet, the Supreme Court did not rule that such statutes are unconstitutional.[88]

Despite being constitutional as drafted, most courts interpret the lack of a specific level of scienter to require a level of general intent.[89] This level of general intent is akin to a general awareness of the conduct itself, that is, the defendant must know that the pollution is being discharged and that the substance is in fact a pollutant.[90] This level of intent, however, does not require any awareness on the part of the defendant that the conduct is in violation of any laws.[91] Essentially, the prosecutor must demonstrate that the offender knew of the act or omission but not whether he knew it violated the law.[92]

---

84. While Maryland's criminal water pollution statutes do not include a requisite level of scienter, the criminal statutes under the air pollution subtitles do include "knowingly" as the requisite level of scienter. *See, e.g.*, MD. CODE ANN., ENVIR. § 2-609.1(b)(1)(i) (LexisNexis 2007).

85. *See id.* at § 4-116(a).

86. DANIEL RIESEL, ENVIRONMENTAL ENFORCEMENT: CIVIL AND CRIMINAL § 6.03[1], 6-43 (2007).

87. Morissette v. United States, 34 U.S. 246, 251–52 (1952).

88. *See* RIESEL, *supra* note 86 (citing United States v. U.S. Gypsum Co., 438 U.S. 422, 437 (1978)).

89. *Id.* (citing United States v. Weitzenhoff, 1 F.3d 1523 (9th Cir. 1993), *amended by* 35 F.3d 1275 (9th Cir. 1994)).

90. *Id.*

91. *Id.*

92. *Id.*

The basic premise in this type of analysis is that "ignorance of the law is no excuse."[93]

One of the initial problems of requiring a knowingly level of scienter was the fact that corporate officials would repeatedly and purposely insulate themselves from any exposure that would cause them to know what their facilities were doing.[94] Thus, prosecutors were faced with the difficulty of holding corporate officers liable for the actions of a corporation, because they could not show that these individuals actually knew of the activity that was occurring.[95] Several doctrines were developed to respond to this problem. In particular, the "responsible corporate officer" doctrine was developed, and has since become a major prosecutorial tool for holding corporate officers liable.[96] The responsible officer doctrine essentially holds a corporate officer accountable whether due to her position she knew or should have known, either through a supervisory role or through giving directives to subordinates, about the activity that resulted in the violation.[97] Thus, under a typical interpretation of a general intent requirement, corporate officials may be held individually liable for the acts or omissions of the corporation if a finder of fact can infer that they knew or should have known.[98]

A more general approach to the requisite level of intent for statutes that are silent on the necessary level of scienter is the "public welfare statute" doctrine.[99] The public welfare statute doctrine allows for the suspension of any mens rea requirement when a prohibited activity is criminalized under a statute that is aimed at protecting the public welfare, health, and safety.[100] The Supreme Court has held that application of the doctrine does not violate a defendant's due process rights.[101] The Supreme Court reached its decision by inferring that "Congressional silence [signifies] that Congress did not intend to require the prosecution to prove mens rea to establish the offense, imposing a form of strict criminal liability."[102]

---

93. *Id.* at § 6.03[1], 6-47.
94. Anthony J. Celebrezze, Jr., et al., *Criminal Enforcement of State Environmental Laws: The Ohio Solution*, 14 HARV. ENVTL. L. REV. 217, 227 (1990).
95. *Id.*
96. Hogeland, *supra* note 42, at 119.
97. *Id.*
98. *Id.*
99. RIESEL, *supra* note 86, at § 6.03[1], 6-49 (citing Staples v. United States, 511 U.S. 600 (1994)).
100. *Id.* at § 6.03[4], 6-65 (citing United States v. Balint, 258 U.S. 250, 252 (1922)).
101. United States v. Dotterweich, 320 U.S. 277, 280–81 (1943).
102. Firestone, *supra* note 46, at 114 n.53; *see also Staples*, 511 U.S. 600.

While typically, proof of scienter is required for criminal prosecutions,[103] the Court approved the suspension of mens rea for prosecution based on legislation whose "penalties serve as effective means of regulation."[104] Since environmental crimes are intended as a means of enhancing regulation as opposed to being purely punitive, they properly fall under the public welfare statute doctrine.[105] Furthermore, because the Maryland General Assembly characterized water pollution as a "menace to public health and welfare,"[106] Maryland's water pollution criminal environmental statutes are within the class of statutes that fall under the public welfare statute doctrine.[107] Accordingly, "criminal prosecution can dispense with the necessity to show scienter in the enforcement of statutes aimed at promoting public welfare,"[108] and the application of the doctrine to violations of Maryland's water pollution criminal environmental statutes is appropriate.

Additionally, environmental crimes are exactly the types of crimes for which the public welfare statute doctrine was created. The doctrine evolved from increasing industrialization and the dangers that this increase presented to the public at large.[109] As industrialization increased, so did the number of "regulations which heighten[ed] the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare."[110] The Supreme Court officially applied the doctrine to environmental crime in *United States v. International Mineral & Chemical Corp.*[111] In that decision, the Supreme Court held that suspension of the element of mens rea was proper for the prosecution of criminal violations of environmental laws.[112] The Supreme Court held that members of the regulated community could not escape culpability by claiming ignorance of a regulation because when "dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that

103. RIESEL, *supra* note 86, at § 6.03[1], 6-42.
104. *Dotterweich*, 320 U.S. at 281–82.
105. *See supra* text accompanying note 27.
106. MD. CODE ANN., ENVIR. §§ 4-402, 9-302(b) (LexisNexis 2007).
107. *See* United States v. Balint, 258 U.S. 250, 252 (1922) (recognizing that the public welfare doctrine applies to statutes aimed at achieving social betterment).
108. RIESEL, *supra* note 86, at § 6.03[4], 6-65 (citing *Balint*, 258 U.S. at 252).
109. *See* Dawkins v. State, 313 Md. 638, 644, 547 A.2d 1041, 1043–44 (1988); *see also* Morissette v. United States, 342 U.S. 246, 254 (1952).
110. *Id.* at 1043–44, 547 A.2d at 1044 (quoting *Morissette*, 342 U.S. at 254).
111. 402 U.S. 558 (1971).
112. *Id.* at 564–65.

anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation."[113]

Maryland courts recognize and apply the public welfare statute doctrine in criminal cases.[114] The doctrine, however, has been applied with varying results.[115] In *McCallum v. State*,[116] for instance, the Court of Appeals of Maryland held that the suspension of proving mens rea in the criminal prosecution of a driver caught driving with a suspended license was only acceptable for those charges that carried with them monetary fines; the court failed to extend the mens rea suspension to the portions of the statute that imposed a sentence of incarceration.[117] Whereas in *Owens v. State*,[118] the Court of Appeals of Maryland held that it did not violate a defendant's due process rights to suspend the scienter requirement under Maryland's statutory rape statute despite the penalty of incarceration for eighteen months.[119] Thus, the Court or Appeals of Maryland seems reluctant to apply the doctrine if a resulting penalty is incarceration and the infraction is minimal.

The Court of Appeals of Maryland has noted, however, that ultimately, it is a case of statutory construction as to whether the Maryland General Assembly intended for the suspension of a scienter requirement in applying the public welfare statute doctrine.[120] The statutory scheme of Maryland's environmental criminal statutes show that the Maryland General Assembly specifically intended to remove any scienter requirement for the water pollution criminal provisions. The criminal statutes pertaining to air pollution and disposal of toxic wastes state that the defendant must act knowingly.[121] Whereas, the water pollution criminal statutes reflect a conscious removal of any requisite mens rea by the Maryland General Assembly for violations

113. *Id.* at 565.

114. *See* Owens v. State, 352 Md. 663, 724 A.2d 43 (1999); McCallum v. State, 321 Md. 451, 583 A.2d 250 (1991); *Dawkins*, 313 Md. 638, 547 A.2d 1041.

115. *See, e.g.*, *Owens*, 352 Md. at 690, 724 A.2d at 56 (holding that the public welfare statute doctrine served to protect "children from the potentially devastating effects of sexual abuse and exploitation"); *McCallum*, 321 Md. at 456, 583 A.2d at 25, 252–53 (holding that driving on a suspended license was "not one of those 'public welfare' offenses"); *Dawkins*, 313 Md. at 651, 547 A.2d at 1047 (holding that possession of a dangerous controlled substance is a crime against the public welfare).

116. 321 Md. 451, 583 A.2d 250 (1991).

117. *See McCallum*, 321 Md. at 456–57, 583 A.2d at 252–53.

118. 352 Md. 663, 724 A.2d 43 (1999).

119. *Id.* at 679, 724 A.2d at 51.

120. *See McCallum*, 321 Md. at 456, 583 A.2d at 252.

121. *See, e.g.*, MD. CODE ANN., ENVIR. §§ 2-609.1(b)(1)(i)–(iii) (LexisNexis 2007).

of Maryland's water pollution laws.[122] Coupling this statutory scheme with the express declaration of water pollution as a menace to public health and safety, the application of the public welfare statute doctrine to environmental criminal water pollution violations is proper.

C. *Extraterritorial Enforcement of Maryland's Criminal Environmental Statutes Requires that Maryland Courts have Proper Subject Matter, Territorial, and Personal Jurisdiction*

In order to properly pass a binding judgment on a defendant, courts must have proper subject matter jurisdiction to hear a criminal case,[123] along with proper territorial jurisdiction over the criminal act,[124] and personal jurisdiction over the defendant.[125] In the case of extraterritorial enforcement of criminal environmental laws, Maryland's courts have proper subject matter jurisdiction to try a case against an out-of-state polluter.[126] Additionally, because Maryland has concurrent jurisdiction over the tidewater portions of tributaries of the Bay, Maryland has territorial jurisdiction over those out-of-state acts that cause pollution to enter the Bay via interstate waterways.[127] Finally, Maryland may clearly gain personal jurisdiction over defendants who have established minimum contacts with the state.[128] In the cases where minimum contacts are lacking, however, personal jurisdiction is not as clear.[129]

1. The Clean Water Act and Maryland's Own Statutory Scheme Confer Proper Subject Matter Jurisdiction on Maryland Courts

A Maryland court has proper subject matter jurisdiction to try criminal defendants who are charged with violating Maryland's criminal water pollution statutes by out-of-state activities. The subject matter jurisdiction of Maryland's courts to hear such cases is found within the Clean Water Act itself, as well as within Maryland's own statutory scheme.

---

122. *See, e.g., id.* § 9-343.
123. Spencer, *supra* note 73, at 625.
124. State v. Luv Pharm., Inc., 388 A.2d 190, 195 (N.H. 1978).
125. Spencer, *supra* note 73, at 625.
126. MD. CODE ANN., ENVIR. § 9-313(c) (LexisNexis 2007).
127. *See* State v. Butler, 353 Md. 67, 78, 724 A.2d 657, 663 (1999).
128. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
129. *See, e.g.*, Calder v. Jones, 465 U.S. 783, 788 (1984).

a. Maryland's courts have proper subject matter jurisdiction under the Clean Water Act

The Clean Water Act places the "primary responsibility to 'prevent, reduce, and eliminate pollution'" upon the states themselves.[130] Furthermore, states are free to adopt and enforce "any standard or limitation respecting discharges of pollutants" as well as "any requirement respecting control or abatement of pollution."[131] Thus, under the Clean Water Act, a state, such as Maryland, is free to adopt any regulation it deems fit to control pollution of its waters and to enforce proper sanctions for violations of these regulations.

The only limitation imposed upon the states by the Clean Water Act is that a state may not implement any regulation or effluent limitation that is less stringent than federal requirements.[132] States are therefore free to adopt regulations and effluent limitations that are more stringent than federal standards.[133] Essentially, the federal standards serve as a minimum or base level which individual states may increase at their discretion.[134] Not only may a state create and implement regulations that are more stringent than the federal minimums, but a state may also enforce those limitations against an upstream state.[135]

A state's ability to assess violations of its water quality standards against an out-of-state source is not affected by the Clean Water Act. The Clean Water Act plainly states that it does not remove or curtail the jurisdiction of any state over its waters or those waters shared with other states.[136] Thus, it is sound practice under the Clean Water Act for a state to exercise its jurisdictional powers beyond state borders along shared waters.

Oregon, for example, has extended its jurisdiction over water pollution control to "all . . . bodies of surface or underground waters, natural or artificial, inland or coastal, . . . which are wholly or

130. Hodas, *supra* note 30, at 1555; (quoting Clean Water Act, 33 U.S.C. § 1251(b) (West 2006)).

131. Clean Water Act §§ 1370(1)(A)–(B).

132. *Id.* § 1370(2).

133. *See* Hodas, *supra* note 30, at 1556.

134. *Id.*

135. *See* Arkansas v. Oklahoma, 503 U.S. 91, 106 (1992) (stating the EPA may require a point source located in an upstream state to comply with the water quality standards of a neighboring downstream state).

136. Clean Water Act § 1370(2). The Clean Water Act states that "nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." *Id.*

partially within or bordering the state or within its jurisdiction."[137] Additionally, it is a statutory violation to "[c]ause pollution of any waters of the state or place or cause to be placed any wastes in a location where such wastes are likely to escape or be carried into the waters of the state by any means."[138] By defining "the waters of the state" to include those waters "partially within or bordering the state,"[139] and using the language that "no person shall . . . [c]ause pollution of any waters of the state,"[140] Oregon has established a statutory scheme that allows for it to exercise jurisdiction over out-of-state activities that cause pollution within state waters. Oregon's statutory scheme is an example of how a state may work within the Clean Water Act and gain jurisdiction over out-of-state activity that has adverse effects on its environment.

Maryland has adopted its own statutory scheme to extend its jurisdiction to interstate waters that enter the state.[141] The language of the statute, however, is not as clearly defined as in Oregon's statute.[142] Nonetheless, it is sufficient to gain subject matter jurisdiction over out-of-state activities that pollute Maryland's waters.

b. Maryland's current statutory scheme also confers proper subject matter jurisdiction on its courts

Maryland's statutory scheme provides an additional basis for the subject matter jurisdiction of its courts over out-of-state activities that pollute Maryland's waters. The Maryland General Assembly brought the interstate waterways that empty into the Bay within Maryland courts' jurisdiction by defining them as "Waters of the State."[143] Specifically, the Maryland General Assembly defined Waters of the State to include "[t]he Chesapeake Bay and its tributaries."[144] The Chesapeake Bay watershed incorporates six states and includes fifty major tributaries, including the Susquehanna and Potomac Rivers.[145] By including the tributaries of the Chesapeake Bay in this definition,

137. OR. REV. STAT. § 468B.005(10) (2005).
138. *Id.* § 468B.025.
139. *Id.* § 468B.005.
140. *Id.* § 468B.025.
141. For a discussion of how Maryland's statutory scheme extends the state's jurisdiction to interstate waters, *see infra* Part III.C.1.b.
142. The benefits of Oregon's statutory scheme and the ways in which it may serve as a model for Maryland are expanded upon later in this Comment. *See infra* Part IV.B.
143. MD. CODE ANN., ENVIR. §5-101(l) (LexisNexis 2007 & Supp. 2007).
144. *Id.* §5-501(l)(3).
145. *See* Chesapeake Bay Foundation, *supra* note 20.

the Maryland General Assembly has asserted that Maryland's jurisdiction extends to those interstate waters that flow into the Chesapeake Bay.

Maryland has other legislation in place reflecting this jurisdictional claim. The Maryland Department of the Environment (the Department) may adopt a regulation or rule regarding water pollution that "[a]ppl[ies] to sources located outside [the] State that cause, contribute to, or threaten environmental damage in [the] State."[146] Additionally, Maryland's statutory scheme carries criminal sanctions for anyone who, through either act or omission, violates any water pollution rule enacted by the Department.[147] By empowering the Department to set rules that regulate out-of-state sources, the Maryland General Assembly has asserted that Maryland's jurisdiction extends beyond state borders. Not only may the Department promulgate regulations that affect out-of-state sources of pollution, but the Attorney General of Maryland or State's Attorneys of counties bordering the Bay may also bring actions against polluters beyond state borders.[148] Thus, by virtue of Maryland's statutory scheme, the Maryland General Assembly has demonstrated its desire for Maryland courts to hear criminal cases against those out-of-state polluters who have violated Maryland's environmental laws.

Even though Maryland's courts have subject matter jurisdiction, the court must have territorial jurisdiction over the claim before it may proceed as a court may not act on subject matter jurisdiction alone.[149]

2. Maryland Can Exercise Territorial Jurisdiction Over Acts Which Have Effects That Are Felt Within Its Borders

Maryland uses the common law rule of territorial jurisdiction to determine whether a Maryland court may properly exercise its criminal jurisdiction over a defendant.[150] Generally, for a state to have territorial jurisdiction over a defendant, the crime itself must

146. MD. CODE ANN., ENVIR. § 9-313(c)(2) (LexisNexis 2007).

147. *See id.* § 9-343(a).

148. *Id.* § 5-1106 (noting that the Attorney General of Maryland may initiate an action against an alleged polluter who is operating "anywhere in the area of the Chesapeake Bay and the tidewater portions of the Chesapeake Bay's tributaries").

149. *See supra* text accompanying notes 81 and 82.

150. *See* State v. Butler, 353 Md. 67, 73, 724 A.2d 657, 660 (1999). "[I]t is well-settled in Maryland that a court must have territorial jurisdiction over a criminal defendant to exercise its jurisdiction, or power, over that defendant." *Id.* at 78, 724 A.2d at 662.

have been committed in that state.[151] Therefore, territorial jurisdiction usually means that a person cannot be convicted of a crime in Maryland unless the crime itself was committed within Maryland's borders.[152] This rule, however, is subject to exceptions that allow states to criminally prosecute individuals for acts committed outside of a state's territory.[153] One exception comes into play when an essential element of a crime occurs within one state while the other elements occur out-of-state.[154] Another exception applies when a defendant's intended act performed outside of a state's territory causes detrimental effects within that state (the effects exception).[155]

Maryland courts have used these exceptions to gain jurisdiction over criminal defendants whose out-of-state actions had consequential effects within Maryland.[156] The Court of Appeals of Maryland set forth the reasoning behind the application of this exception in *State v. Butler*.[157] The Court held that:

> [I]f a person, while in one state sets into motion a force which operates in another state, the actual presence of the offender in the other state is not necessary to make him amenable to its laws for the crime committed there, if an offense is an immediate result of his action.[158]

Based on the rationale of the effects exception, a state has the authority to exercise territorial jurisdiction over an out-of-state polluter whose actions affect that state. This is because an out-of-state polluter, by expelling pollutants into interstate waterways that flow into the Bay, in fact "sets in motion a force which operates in

151. Khalifa v. State, 382 Md. 400, 421, 855 A.2d 1175, 1187 (2004).

152. *See id.* at 421, 855 A.2d at 1187.

153. *See Butler*, 353 Md. at 74, 724 A.2d at 660.

154. *See* West v. State, 369 Md. 150, 158–59, 797 A.2d 1278, 1283 (2001) ("[T]he common law rule generally focuses on one element, which is deemed 'essential' or 'key' or 'vital' or the 'graveman' of the offense, and the offense may be prosecuted only in a jurisdiction where that essential or key element takes place.").

155. *See Butler*, 353 Md. at 78, 724 A.2d at 662–63 (quoting Urciolo v. State, 272 Md. 607, 631, 325 A.2d 878, 892 (1974)). This jurisdiction, however, is limited to causes of action arising from the acts and its effects. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971 & Supp. I 1988). For instance, Maryland could not claim jurisdiction over an individual for out-of-state pollution that reached Maryland waters, and then charge that individual with an unrelated breach of contract claim.

156. *See, e.g.*, *Khalifa*, 382 Md. at 422–24, 855 A.2d at 1188; Trindle v. State, 326 Md. 25, 31–32, 602 A.2d 1232, 1235 (1992).

157. 353 Md. 67, 724 A.2d 657 (1999).

158. *Id.* at 78, 724 A.2d at 663 (citing 21 AM. JUR. 2d *Criminal Law* § 386 (1965)).

another state."[159] Waterborne pollution, by nature, is migratory and will travel downstream into the waters of neighboring states.[160] The polluter commits the initial act and gravity takes care of the rest. In Maryland, if a polluter discharges into the Susquehanna River, he is acting in a manner that has direct and ultimate effects within this state since the water carrying the pollutants ultimately mixes with Maryland's waters.

The application of the effects exception is not this simple, however, and is subject to several limitations. The rationale described above is merely a basic foundation to a court's analysis of the existence of territorial jurisdiction. First, for a court to have territorial jurisdiction over a defendant, the defendant's conduct must be illegal in both states.[161] Additionally, there must be some level of scienter displayed by the defendant that shows his actions were "intended" to affect another state.[162] Finally, the basic tenets of personal jurisdiction must be satisfied for an out-of-state defendant to be tried in a foreign court.[163]

a. The acts must be illegal in both states

A person may not be held criminally liable in one state for acts committed in another state that are not prohibited in that other state.[164] In *Nielsen v. Oregon*,[165] for example, Nielsen, a citizen of Washington, was charged with violating Oregon's criminal statute prohibiting the use of a purse net to fish in the Columbia River.[166] However, Washington permitted the use of purse nets in the Columbia River and had granted Nielsen a license to use such a net.[167] Oregon claimed that it could exercise its territorial jurisdiction over Nielsen because it had concurrent jurisdiction over the river with Washington and thus, was within its rights to criminally prosecute him.[168] The Supreme Court held otherwise.[169] In essence, the Court felt that to uphold his conviction would allow "Oregon, by virtue of

159. *Id.*
160. *See* WATERS AT RISK, *supra* note 17, at 1–2.
161. Nielsen v. Oregon, 212 U.S. 315, 320–21 (1909).
162. *See, e.g.*, Khalifa v. State, 382 Md. 400, 422, 855 A.2d 1175, 1187 (2004).
163. Spencer, *supra* note 73, at 617.
164. *See, e.g.*, *Nielsen*, 212 U.S. at 320.
165. 212 U.S. 315 (1909).
166. *Id.* at 315–16.
167. *Id.* at 316.
168. *See id.* at 321.
169. *Id.*

its concurrent jurisdiction, [to] disregard [Washington's] authority . . . and punish a man for doing within the territorial limits of Washington an act which that state had specially authorized him to do."[170] While the Supreme Court held that Oregon could not sustain a conviction in this instance, had Washington also prohibited the use of such nets, Oregon would be within its rights to exercise criminal jurisdiction over the defendant.[171]

The New Hampshire Supreme Court on the other hand, in *State v. Luv Pharmacy, Inc.*,[172] upheld a conviction of an out-of-state defendant, finding that the laws of both the forum state and New York criminalized the activity involved.[173] Specifically, the court found that the trial court had a proper basis to exercise territorial jurisdiction over the co-defendant, Penthouse Magazine, because the publication violated both New Hampshire's and New York's obscenity laws.[174] Jurisdiction was affirmed despite the fact that all of Penthouse's activities occurred within New York.[175]

Applying this rule to the extraterritorial enforcement of Maryland's criminal environmental laws presents a challenge. While Maryland may be adversely affected by the acts of an upstream polluter,[176] under this rule, it may only gain territorial jurisdiction if the conduct is illegal in the state where the actual act of pollution occurs.[177] However, Maryland can still exercise territorial jurisdiction over those defendants who pollute in violation of their own state's laws and, accordingly, Maryland's.[178] Also, through the various interstate compacts to which Maryland is a party, a push can be made for the uniformity of the laws of the party states. Increased uniformity of the law will enable Maryland to gain territorial jurisdiction over out-of-state polluters. It is not important whether neighboring states decide to prosecute their citizens; what truly matters is that the conduct of those citizens is a violation of both states' laws.

Although an act of pollution may violate both Maryland's and another state's laws, the effects exception requires that the effects of

170. *Id.*
171. *Id.* at 320–21.
172. 388 A.2d 190 (N.H. 1978).
173. *Id.* at 199.
174. *Id.* at 196.
175. *Id.* at 195–96.
176. *See supra* text accompanying notes 17–20 for a discussion of how Maryland's waters are affected by the acts of upstream polluters.
177. Nielsen v. Oregon, 212 U.S. 315, 321 (1909).
178. *See id.* at 320.

the act are "intended" to be felt in Maryland.[179] This suggests that there must be a specific level of scienter that the actor is in some sense targeting Maryland. The next section explores this idea and shows that, as interpreted, this level of scienter is akin to whether it is reasonably foreseeable that the effects will be felt in Maryland.

b. Requisite level of scienter for the effects exception to territorial jurisdiction

The requirement that the effects of an out-of-state criminal act are intended to lay within Maryland seems to be a formidable obstacle to territorial jurisdiction at first blush. It would be next to impossible to demonstrate that a particular polluter specifically targeted Maryland waters by discharging pollutants into interstate waterways. However, this intent is equivalent to whether it is reasonably foreseeable that the effects will be felt in Maryland. *Trindle v. State*[180] is a good example of how "intended effects" is more or less equivalent to a "reasonably foreseeable" standard.[181]

In *Trindle*, the Court of Appeals of Maryland held that it had territorial jurisdiction over a criminal defendant when the intended effects of the criminal action were in Maryland, despite the fact that all elements of the crime were committed in another jurisdiction.[182] *Trindle* is a criminal case involving the abduction of a child by his father, the defendant, in Delaware, who then left Delaware for Jordan with the child.[183] After being denied entry to Jordan, the defendant returned to the United States with the child.[184] The defendant challenged the Maryland court's jurisdiction over him on the grounds that all of the actual elements of the crime occurred in Delaware.[185] The Court of Appeals of Maryland held that the trial court was correct to exercise jurisdiction over him since the intended effect of the abduction was to deprive the mother of custody over the child,

179. Khalifa v. State, 388 Md. 400, 422, 855 A.2d 1175, 1187 (2004) (quoting State v. Butler, 353 Md. 67, 74, 724 A.2d 657, 660 (1999)).

180. 326 Md. 25, 602 A.2d 1232 (1992).

181. *Compare id.* at 32, 602 A.2d at 1235 (asserting that jurisdiction will be upheld even though acts took place outside the state if the intended result has its effects in the state), *with* Calder v. Jones, 465 U.S. 783, 789 (1984) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (holding jurisdiction is proper if one can "reasonably anticipate being haled into court there")).

182. *Trindle*, 326 Md. at 32, 602 A.2d at 1235.

183. *Id.* at 28–29, 602 A.2d at 1233–34.

184. *Id.* at 30, 602 A.2d at 1234.

185. *Id.*

and the mother was a Maryland resident.[186] Because the intended effect of the abduction rested in Maryland with the mother, the Court of Appeals of Maryland held that Maryland had sufficient basis to exercise territorial jurisdiction over the defendant despite the fact that all of the acts necessary to complete the crime occurred outside of Maryland.[187] The intent to deprive the mother of the child was inferred by the Court of Appeals of Maryland and arose from his intent to take possession of the child.[188] While it was his intent to take custody of the child, the immediately foreseeable consequence of his actions would simultaneously deprive the mother of her child.[189]

In *Commonwealth v. Fafone*,[190] the Supreme Judicial Court of Massachusetts found that the proper basis for territorial jurisdiction was lacking since there was no circumstantial evidence demonstrating that the defendant could have reasonably foreseen his actions having effects in Massachusetts.[191] *Fafone* was a drug trafficking case involving the sale of a distributable amount of cocaine by a Florida resident, Fafone, to a Massachusetts resident, Campiti, in Florida.[192] The Supreme Judicial Court of Massachusetts held there was insufficient evidence to support the exercise of territorial jurisdiction over Fafone.[193] The denial of jurisdiction was based on the fact that although Campiti sold the drugs in Massachusetts, there was no evidence that Fafone was aware of Campiti's plan at the time of the sale.[194] The court found evidence was lacking that Fafone knew Campiti lived in Massachusetts.[195] This suggests that had Fafone known of Campiti's residence, he would have been aware that the drugs would be sold in Massachusetts, and territorial jurisdiction would have been proper because the ultimate effects were intended to lie in Massachusetts.[196]

The Supreme Court of the United States recognized that jurisdiction over out-of-state defendants for acts committed entirely in another state is proper if it is reasonably foreseeable that the effects

186. *Id.* at 32, 602 A.2d at 1235.
187. *Id.*
188. *See id.* at 29, 32, 602 A.2d at 1234–35.
189. *See id.* at 29, 602 A.2d at 1234–35.
190. 621 N.E.2d 1178 (Mass. 1993).
191. *Id.* at 1179.
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*

of their actions will be felt in the forum state.[197] In *Calder v. Jones*,[198] the Supreme Court held that California had jurisdiction over two Florida newspapermen whose slanderous story about Shirley Jones was published in the National Enquirer.[199] Jurisdiction arose out of the fact that the ultimate effects of the newspapermen's deliberate acts rested in California where Shirley Jones resided.[200] Even though their article was aimed at Shirley Jones, the Court found that the ultimate effect occurred in California.[201] The propriety of jurisdiction was based on the fact that it was reasonably foreseeable to the defendants that they may have to answer for their actions in California; because they knew where Jones lived, they knew where the effects of their actions would be felt.[202]

The reasoning set forth in these cases demonstrates that the determination of whether a particular effect of an act is intended to be felt in another state is based upon whether it is reasonably foreseeable that the effect will lie in another state.[203] These cases demonstrate that whether it is reasonably foreseeable that the effects of an act will be felt in another state depends on the knowledge of the defendant at the time the act was committed.[204] The defendant's knowledge can be inferred from circumstantial evidence and is a question of fact.[205] However, this knowledge must be proved beyond a reasonable doubt.[206]

In the case of out-of-state pollution, knowledge could be inferred from such factors as proximity to an interstate waterway, known hydrological connections, as well as proximity to the state border.[207] These factors can be used to show that based on the knowledge held by the polluter at the time of the discharge, it was reasonably

197. Calder v. Jones, 465 U.S. 783, 787 (1984).
198. 465 U.S. 783.
199. *Id.* at 783, 787.
200. *Id.* at 791.
201. *Id.* at 789.
202. *Id.* at 790 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)) (stating that "[u]nder the circumstances, petitioners must 'reasonably anticipate being haled into court [in California]' to answer for the truth of the statements made in their article").
203. *See id.* at 783–84; *World-Wide Volkswagen Corp.*, 444 U.S. at 297; Commonwealth v. Fafone, 621 N.E.2d 1178, 1179 (1993); Trindle v. State, 326 Md. 25, 32, 602 A.2d 1232, 1235 (1992).
204. *See World-Wide Volkswagen Corp.*, 444 U.S. at 315; *Fafone*, 621 N.E.2d at 1179.
205. State v. Butler, 353 Md. 67, 79, 724 A.2d 657, 663 (1999).
206. *Id.* at 83–84, 724 A.2d at 665.
207. Note, *To Form a More Perfect Union?: Federalism and Informal Interstate Cooperation*, 102 HARV. L. REV. 842, 845 (1989).

foreseeable that the effects of his actions would be felt in Maryland.[208] This, in turn, would subject the polluter to Maryland's territorial jurisdiction.

While Maryland can conceivably gain territorial jurisdiction over out-of-state polluters, this exercise is necessarily limited by the rules of personal jurisdiction.[209] It is the exercise of personal jurisdiction, along with its accompanying due process concerns, that acts as the largest obstacle for the extraterritorial enforcement of Maryland's criminal environmental laws.

3. For Maryland Courts to Exercise Personal Jurisdiction Over Out-of-State Polluters, Several Due Process Concerns Must Be Overcome

A court must have personal jurisdiction over a defendant to bind her by its judgment.[210] Thus, without the proper basis for personal jurisdiction, a cause of action against an out-of-state polluter will fail.[211] It is widely recognized that it is constitutional for a court to hold personal jurisdiction over a defendant in any state.[212] However, while a court may exercise personal jurisdiction over a defendant in any state, due process requires that the defendant have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[213] In addition to discussing the requirement of minimum contacts, this section will also address other relevant substantive due process concerns as well as procedural due process concerns relating to personal jurisdiction.

a. Due process requires that the defendant has minimum contacts with the forum state for the state to exercise personal jurisdiction

The concept of minimum contacts arose as a "surrogate[] of presence" for the defendant in the forum state.[214] Whether a defendant has sufficient minimum contacts with the forum state such

208. *C.f. World-Wide Volkswagen Corp.*, 444 U.S. at 297.
209. State v. Luv Pharmacy, Inc., 388 A.2d 190, 195 (N.H. 1978).
210. Spencer, *supra* note 73, at 617–18.
211. Robert L. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121, 207 n.452 (1985).
212. Calder v. Jones, 465 U.S. 783, 788 (1984).
213. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
214. Spencer, *supra* note 73, at 622. Prior to minimum contacts, the actual presence of the defendant or an authorized agent of the defendant in the forum state was required for proper service of process and, thus, proper personal jurisdiction. *Id.*

that an exercise of personal jurisdiction does not violate due process is a concern that cannot be ignored, especially with the course of action that this Comment has thus far proposed. There is no magic number of contacts, nor is there a certain type of contact, that automatically satisfies a due process analysis. Instead, the contacts must be judged on a case-by-case basis by the court to determine whether they are sufficient for personal jurisdiction.[215] When a court attempts to determine whether sufficient contacts exist, the court must evaluate "the relationship among the defendant, the forum, and the litigation."[216] This analysis largely turns on a balancing of the type of litigation involved, the type of defendant, and the interest of the forum state.[217] Any inconvenience to the defendant is also considered.[218]

i. Considerations of the type of litigation involved when analyzing minimum contacts

The requirement of minimum contacts is a product of the civil judicial system and has not been explicitly applied to criminal personal jurisdiction.[219] This opens up the question of whether there is a distinction between civil and criminal actions as to whether minimum contacts with the forum state are even required. The Supreme Court of New Hampshire, decided that such a distinction does, in fact, exist.[220] The court stated:

> Nor are we convinced that the minimum contacts analysis could or should be applied to all criminal proceedings. Application of this standard to natural persons charged with criminal offenses might mean that a criminal judgment could be rendered against a natural person even if he were absent from the jurisdiction. Such a result might render nugatory, for example, . . . our extradition statute. It might also raise serious constitutional questions.[221]

Although the reasoning behind the Supreme Court of New Hampshire's analysis is logical, it is by no means the majority

215. *See* Shaffer v. Heitner, 433 U.S. 186, 204 (1977).
216. *Calder*, 465 U.S. at 788 (quoting *Shaffer*, 433 U.S. at 204).
217. Spencer, *supra* note 73, at 623.
218. *Id.*
219. State v. Luv Pharmacy, Inc., 388 A.2d 190, 193–94 (N.H. 1978).
220. *Id.*
221. *Id.* at 194.

view.[222] Since there is still no clear authority that states such a distinction exists, it is important to evaluate how extraterritorial enforcement of environmental crimes can satisfy the minimum contacts requirement.

ii. Considerations of the type of defendant involved when analyzing minimum contacts

It is often easier to gain personal jurisdiction over a corporation than a single defendant when analyzing minimum contacts with the state.[223] A corporation's contacts with a state may be established through its place of business, its place of incorporation, its business dealings, and through agency relationships.[224] An individual, on the other hand, often does not have such contacts with the forum state, thus it is often much more difficult to demonstrate that sufficient minimum contacts exist.[225] However, the holding of the Supreme Court in *Calder* demonstrates that the effects of a single act can satisfy the requirement of minimum contacts with the forum state.[226]

In *Calder*, the Supreme Court found that California properly exercised personal jurisdiction over two defendants based solely on the effects of their conduct within California and not on any other contacts.[227] It follows that a determination as to whether the individual defendant has sufficient minimum contacts with the forum state can be evaluated solely on the effects of the alleged act and not on other factors. Maryland may thus exercise personal jurisdiction over an out-of-state polluter based on the effects of her actions within Maryland without offending due process.

There is a limitation on determining that this type of effects-based contact satisfies the minimum contacts requirement. The action must be limited to the effects of the act itself,[228] and the act, by its effects,

222. Only one other state, Wyoming, has adopted the Supreme Court of New Hampshire's view. *See* Rios v. State, 733 P.2d 242, 244 (Wyo. 1987).

223. A defendant for the purpose of this paper includes both individuals as well as corporations.

224. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–18, 324 (1945).

225. *See, e.g.*, Krambeer v. Eisenberg, 923 F. Supp. 1170, 1174–76 (D. Minn. 1996) (minimum contacts were not established through a single letter sent to the forum state); Dixon v. Ashley, 640 F. Supp. 1310, 1312 (E.D.Pa. 1986) (individual could not establish minimum contacts due to the fact he never visited the forum state).

226. Calder v. Jones, 465 U.S. 783, 788–90 (1984).

227. *Id.* at 788–89.

228. Spencer, *supra* note 73, at 622 (citing *Int'l Shoe Co.*, 326 U.S. at 317) (stating that "single and isolated contacts would support jurisdiction only where they were related to the action").

must implicate a legitimate state interest.[229] Because her actions implicated a legitimate state interest, the defendant has created the necessary "link that makes it fair and non-arbitrary for that state" to properly exercise personal jurisdiction over her.[230] Rather than asking whether or not the defendant has established minimum contacts, "the question becomes whether the defendant acted in a way that implicates a state's interests such that it may adjudicate any resultant dispute."[231]

iii. Considerations of a state's interest involved when analyzing minimum contacts

Requiring that a legitimate state interest be implicated to satisfy minimum contacts sufficiently protects the defendant from unfair and arbitrary actions.[232] The Supreme Court has recognized that triggering a legitimate state interest can satisfy, or in fact supplant, the minimum contacts requirement.[233] In *Keeton v. Hustler Magazine, Inc.*,[234] the Supreme Court expressly stated that personal jurisdiction based upon the triggering of a state interest is not fundamentally unfair and thus not a violation of due process.[235] "[T]he 'fairness' of haling respondent into a New Hampshire court depends to some extent on whether respondent's activities relating to New Hampshire are such as to give that State a legitimate interest in holding respondent answerable on a claim related to those activities."[236]

Based on the line of reasoning set forth by the Supreme Court in the above cases, Maryland may successfully exercise personal jurisdiction over out-of-state polluters, so long as their actions trigger a significant state interest. The analysis must then shift to whether the effects of out-of-state pollution trigger a legitimate state interest

229. *Id.* at 644–45.
230. *Id.* at 645.
231. *Id.*
232. *Id.* at 646.
233. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (stating that "the interest of each state in providing means to close trusts . . . is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident"); Calder v. Jones, 465 U.S. 783, 788–89 (1984) (holding that the effects of defendant's actions were sufficient to establish personal jurisdiction based on California's interest in protecting its citizens).
234. 465 U.S. 770 (1984).
235. *Id.* at 775–76.
236. *Id.*

that would permit Maryland to exercise personal jurisdiction over such a defendant.

Maryland's state interest in preventing the pollution of its waters by out-of-state sources of pollutants is legitimate, for "[a] state has a natural interest in the effects of an act within its territory even though the act itself was done elsewhere."[237] However, jurisdiction based on state interest is not found at common law, but has been accepted when the state interest is expressly protected by statute.[238]

Maryland expresses its legitimate state interest in preventing the pollution of its waters from both in-state and out-of-state sources through statute.[239] Specifically, the Maryland General Assembly declared that water "pollution constitutes a menace to public health and welfare" and that "the problem of water pollution in [Maryland] is closely related to the problem of water pollution in adjoining states."[240] Through its declaration that pollution of state waters is a "menace" and by recognizing that pollution can enter Maryland's waters from out-of-state sources, Maryland has created a statutory interest in preventing the effects of out-of-state pollution within its borders.

Although the effects of out-of-state pollution trigger Maryland's interest, a minimum contacts analysis still requires balancing this interest with the potential inconvenience to the defendant.[241] As the following section demonstrates, however, any inconvenience that a defendant may incur is minimal in comparison to Maryland's interest in this matter.

iv. Considerations of any inconvenience to the defendant when analyzing minimum contacts

Due process is concerned with notions of fundamental fairness, therefore a determination of whether personal jurisdiction is proper looks at the inconvenience posed to the defendant by litigating in a foreign state.[242] As Professor Benjamin Spencer has noted, "it is hard to imagine any remaining vitality to notions of inconvenience and burden to travel within the United States that can rise to levels of constitutional concern" given the advancements in technology and

237. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 cmt. a (1971).
238. *Id.* at § 37 cmt. b.
239. *See, e.g.*, MD. CODE ANN., ENVIR. § 4-405(c) (LexisNexis 2007).
240. *Id.* § 4-402.
241. Spencer, *supra* note 73, at 627.
242. *Id.*

transportation.[243] Nonetheless, inconvenience is still a concern that courts will take into account.[244]

To deal with this concern in the context of out-of-state polluters, the location of the defendant in relation to Maryland should be taken into account. Inconvenience logically diminishes the closer the defendant is to the state line. Furthermore, defendants within the states surrounding Maryland should place little faith in inconvenience as a reasonable challenge to personal jurisdiction. This is primarily because inconvenience is viewed as the cost and burden of traveling long distances to the forum state,[245] but as *Calder* demonstrates, traveling the expanse of the United States was not an inconvenience.[246]

The Supreme Court has demonstrated that the issue of inconvenience to the defendant has taken a backseat to whether the defendant's acts have triggered a legitimate state interest.[247] The exercise of personal jurisdiction, however, must still include the necessary procedures to satisfy due process, namely proper notice and an opportunity to be heard.[248]

b. Procedural due process concerns with personal jurisdiction

Procedural due process requires that the defendant be afforded proper notice and an opportunity to be heard.[249] Notice is of primary importance.[250] Notice is essential because "personal jurisdiction . . . depends upon the presence of reasonable notice to the defendant that an action has been brought."[251] Notice is accomplished through effective service of process, which can be achieved in several ways. A corporation that operates within the state must have an agent in the state whose duties include receiving the service of process.[252] It

243. *Id.* at 632 (stating that the common use of airplanes, faxes, and the Internet has greatly reduced any legitimate burden of a defendant having to travel to the forum state).

244. *Id.* at 627.

245. *Id.* at 628 (citing Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1132 (1981)).

246. *See* Calder v. Jones, 465 U.S. 783, 791 (1984) (holding that it was proper for California to exercise jurisdiction over two Florida newspapermen even though they had to travel from Florida to California).

247. *See id.* at 788–89, 791.

248. Spencer, *supra* note 73, at 643.

249. *Id.* at 626.

250. *Id.*

251. *Id.* (quoting Kulko v. Superior Court, 436 U.S. 84, 91 (1978)).

252. MD. CODE ANN., CORPS. & ASS'NS § 1-401(a) (LexisNexis 2007).

becomes more difficult to obtain jurisdiction over the individual who is out-of-state and has no agent in state who can be served.[253] Many states use long-arm statutes to gain personal jurisdiction over an out-of-state defendant who has no agent to receive service.[254]

Maryland can easily satisfy the notice requirement with regard to those corporations that operate within the state, for they must have a local agent within Maryland who receives service of process.[255] The problem arises when Maryland attempts to satisfy the notice requirement to gain personal jurisdiction over out-of-state individuals who have no agent. Maryland has statutes in place stating that Maryland may impose regulations on out-of-state sources of pollution that damage Maryland's environment, and the provisions within these statutes also contain criminal penalties for violations.[256] Maryland, however, lacks a clearly defined criminal sanction for out-of-state pollution and a specially-designed long-arm statute to reach such individuals.[257] The Maryland General Assembly can directly address this problem by passing a long-arm statute particular to out-of-state polluters whose discharge reaches Maryland's waters. Enacting such a statute would enable Maryland to give sufficient notice to those out-of-state polluters it seeks to prosecute and simultaneously solidify the state's personal jurisdiction over such defendants.

IV. FUTURE STEPS THAT CAN SERVE TO ENHANCE THE EFFECTIVENESS OF EXTRATERRITORIAL PROSECUTION OF ENVIRONMENTAL CRIMES

Extraterritorial enforcement of criminal sanctions will only be as effective as the law will allow. Currently, there are several gaps in legislation that stand as direct impediments to the effective use of this enforcement method. The first problem is that one of the largest sources of pollution in the Bay, nitrogen pollution from agricultural livestock activities, has gone largely unregulated.[258] Farms are faced with the same economic disincentive as corporations to amend their

253. Jeffrey J. Utermohle, *Maryland's Diminished Long-Arm Jurisdiction in the Wake of* Zavian v. Foudy, 31 U. BALT. L. REV. 1, 6 (2001) (explaining that the *International Shoe* Court recognized the difficulty of conditioning jurisdiction on physical presence in the forum state).

254. *See id.*

255. MD. CODE ANN., CORPS. & ASS'NS § 1-401(b).

256. For a discussion of the relevant portions of Maryland's statutory scheme, *see supra* Part III.C.1.b.

257. *See infra* Part IV.B.

258. WATERS AT RISK, *supra* note 17, at 2–3.

practices to a manner that is more environmentally friendly.[259] Thus, new legislation must be adopted that will bring these farms into the regulatory fold and subject them to the various sanctions, including criminal liability, that serve as strong deterrents to practices that damage the environment.

The second problem that faces extraterritorial environmental criminal jurisdiction relates to ambiguities within the statutory scheme and the absence of a sufficient long-arm statute for these matters. In particular, by amending Maryland's definition of state waters, modifying the language of Maryland's criminal water pollution statutes, and establishing a sufficient long-arm statute, the Maryland General Assembly can ensure that measures to protect the Bay are greatly enhanced. This Comment will next discuss what must be done on the agricultural front before turning to the specific legislative changes that must occur.

A. Bringing Agricultural Activities into the Regulatory Fold Will Provide a Strong Incentive for These Farms to Come into Compliance Because Criminal Liability Will Attach

One of the most pressing issues facing the restoration of the Bay is the need for more stringent regulation of agricultural activity along the tributaries that empty into the Bay.[260] The deterrence factor of extending criminal liability to out-of-state agricultural activities can have an immediate and profound effect on compliance.[261]

The effects of the agricultural livestock industry have a tremendous and well-documented negative effect on the health of the Bay.[262] The farming industry is a leading cause of nitrogen pollution in the Bay,[263] yet efforts to date have placed the priorities of these farms on

259. Tom Pelton, *Suit Threat Frustrates Hog Farmers*, BALT. SUN, Jan. 22, 2007, at 1A (indicating that farmers that they cannot afford the changes required by the regulations).

260. *Id.* These farms corral large amounts of livestock in a single area (i.e., 3,000 pigs on one farm). *Id.* The farms collect their manure in large storage tanks which are later connected to irrigation lines. *Id.* The irrigation lines then spread the manure over the fields, fertilizing crops. *Id.*

261. *See supra* text accompanying notes 41–47.

262. WATERS AT RISK, *supra* note 17, at 3–4. Manure and fertilizer run-off from agricultural activities are a leading cause of nitrogen and phosphate pollution in the Bay. *Id.* at 2.

263. "About [forty] percent of the nitrogen pollution that causes low-oxygen 'dead-zones' in the [B]ay comes from farm pollution, and about half of this is from animal manure . . . ." Tom Pelton, *Pollution Lawsuits Threatened*, BALT. SUN, Jan. 9, 2007, at 5B.

the same level as the health of the Bay.[264] The lack of strict regulation surrounding the agricultural industry directly contributes to the lack of improvement in the health of the Bay.[265]

The main problem facing the eventual regulation of the agricultural industry is the perception of driving the family owned farms out of business due to the costs that accompany the change—which to say the least, is an unpopular suggestion.[266] No politician wants to be viewed by his or her constituents as favoring the extinction of the American family farm.[267] It would seem that any regulation aimed at minimizing the adverse effects of livestock on the Bay could be spun in a manner to appear as a direct attack on the farmer.[268] The majority of Americans have little problem with strict regulations and criminal penalties for large corporate polluters but view farming operations in an entirely different light.[269]

Even though farmers may not be on the same public level as a faceless corporate polluter, they are nonetheless polluters, and major ones at that.[270] Efforts to enforce changes through various federal and state grants have failed to bring about the desired result; a new approach is therefore needed.[271] Recently, two Pennsylvania environmental groups (Penn Future and the Pennsylvania Riverkeepers) decided that more drastic measures were needed; so the groups began to threaten the hog farmers along the Susquehanna with lawsuits if they continued to refuse to comply with the permitting requirements.[272] Their actions have been met with a mixed response; some have applauded the efforts, while others have expressed displeasure over the threats.[273] One scholar, Howard

264. Instead of engaging farmers in litigation, the Chesapeake Bay Foundation's "Save the Farm, Save the Bay" campaign advocates for increased government funding to assist and encourage farmers to make the necessary changes to comply with regulations. Pelton, *supra* note 259.

265. William C. Baker, *Let's Truly Treasure the Chesapeake*, BALT. SUN, Jan. 23, 2007, at 11A ("There is broad consensus that the most cost-effective plan to reduce pollution is to implement the agricultural conservation practices outlined in the tributary strategies. However, implementation has been woefully inadequate. That must change.").

266. *See generally* Pelton, *supra* note 259, at 1A.

267. *See supra* text accompanying notes 67–70.

268. Pelton, *supra* note 259.

269. *Id.*

270. *Id.*

271. Baker, *supra* note 265.

272. Pelton, *supra* note 259.

273. *Id.*

Ernst,[274] explained that the use of litigation is long overdue; it fills in the necessary void in the current scheme.[275]

In the end, whether through litigation or through government funding, agricultural livestock operations must be brought within the regulatory fold. Once inside the regulatory system, they will be subject to the same penalties as the rest of the regulated community, including criminal liability.

As stated earlier, attacking the farmer will adversely affect a politician's career, thus, enforcement problems will continue to be a problem. This can be overcome by Maryland enforcing its criminal laws against out-of-state farming operations that continue to ignore the regulations of their own state and consistently contribute to the substantial level of nitrogen pollution in the Bay.

Agricultural activities can best be brought into the regulatory fold through the passage of new legislation mandating specific practices limiting the nitrogen output of such operations. By successfully passing such legislation along with a specially-designed long-arm statute to reach continued violations, Maryland can effectively enforce its criminal environmental sanctions against these upstream agricultural sites.

B. Future Legislation Is Required to Enable Effective Extraterritorial Enforcement of Maryland's Criminal Environmental Statutes

Oregon's statutory scheme can serve as a model by which the Maryland General Assembly may draft its own statutory scheme that would effectively accommodate extraterritorial enforcement of Maryland's criminal environmental sanctions. Three areas in particular should be redrafted based on the language in the Oregon statutes. First, Oregon's definition of "waters of the state" is more expansive than Maryland's; it clearly extends jurisdiction to the waters that enter the state.[276] Next, the Maryland General Assembly should follow Oregon's lead by clearly defining a criminal act that will place liability on an out-of-state polluter.[277] Finally, the

274. Howard Ernst is a political science professor who studies Bay restoration at the Naval Academy in Annapolis, Maryland. *Id.*

275. *Id.* Ernst described the funding efforts used by the Chesapeake Bay Foundation as "carrots" where litigation acted as a "stick" to force compliance. He concluded that both approaches must be included in an effective regulatory plan to curb pollution stemming from agricultural activities. *Id.*

276. *See infra* Part IV.B.1.

277. *See infra* Part IV.B.2.

Maryland General Assembly should adopt a long arm statute similar to Oregon's statute, which asserts jurisdiction over out-of-state defendants whose actions, by their effects, implicate Oregon's state interest.[278]

1. How the Statutory Definition of "State Waters" Must Be Amended

Oregon's definition of "waters of the state" can serve as a model by which the Maryland General Assembly may amend the definition of Maryland's state waters. Oregon has included in its definition of "waters of the state" those bodies of water that are "wholly or partially within or bordering the state."[279] If Maryland were to adopt similar language, the Maryland General Assembly would be asserting that any discharge into any river that reaches Maryland is a potential violation. In particular, it will allow Maryland to more effectively assert claims against polluters along the Potomac and Susquehanna Rivers. Under the new statutory scheme, jurisdiction would be proper because the illegal discharge found its way into Maryland state waters. The general territorial jurisdiction analysis would follow because the illegal acts would occur within Maryland territory; thus, any concerns about the propriety of jurisdiction would be remedied.[280]

2. Amending the Statutory Language Will Clearly Define the Criminal Act

An additional area in which Oregon may serve as a model is through its definition of a criminal water pollution violation. Oregon bases criminal liability for water pollution on whether an individual knowingly or negligently[281] acts in a manner that pollutes Oregon's waters.[282] By stating that "[n]o person shall . . . [c]ause pollution of any waters of the state,"[283] Oregon has clearly defined the criminal act. By including a general causation requirement, this statute

278. *See infra* Part IV.B.3.

279. OR. REV. STAT. ANN. § 468B.005 (2005). It should be noted that New York defines state waters similarly, including all interstate waters that enter its territory. N.Y. ENVTL. CONSERV. L. § 17-0105 (McKinney 2006).

280. *See supra* text accompanying notes 150–60.

281. *See* OR. REV. STAT. §§ 468.943–.946 (2005).

282. *Id.* § 468B.025.

283. *Id.*

squarely places liability on anyone, whether in-state or out-of-state, who acts in a manner that causes the pollution of state waters.[284]

If Maryland adopts the same language, the effects exception to territorial jurisdiction comes into play.[285] Since the crime itself would require only that a defendant cause pollution of Maryland waters, this pollution could come from out-of-state defendants who polluted interstate waterways flowing into the Bay.[286] Additionally, if it was reasonably foreseeable that the defendant's pollution would enter Maryland waters, the effects could be considered intended as well, thus meeting the necessary level of scienter.[287]

By redrafting the statutory definition of "waters of the state" as well as adopting a statute that clearly defines the criminal act, Maryland will exercise territorial jurisdiction over out-of-state polluters who affect Maryland's waters. Maryland, however, currently lacks an effective long-arm statute that will overcome the procedural due process concerns associated with personal jurisdiction in this type of action.[288] This is yet another area where the Oregon statute can serve as a model for the Maryland General Assembly.

3. Maryland Must Have an Effective Long-Arm Statute to Assert Jurisdiction Over Out-of-State Polluters

Oregon's long-arm statute expressly asserts jurisdiction if "[t]he offense violates a statute of this state that expressly prohibits conduct outside this state affecting a legislatively protected interest of or within this state and the actor has reason to know that the conduct of the actor is likely to affect that interest."[289] The language of this statute sufficiently addresses the substantive due process concerns of personal jurisdiction, which require that a legitimate state interest be implicated to satisfy minimum contacts.[290] The implementation of similar language would also satisfy the notice requirement of procedural due process.[291]

In creating an effective long-arm statute, the Maryland General Assembly must ensure that the statute can reach all defendants who could reasonably foresee that the effects of their pollution would be

284. *See id.*
285. For a discussion of the effects exception, *see supra* Part III.C.2.
286. *See supra* text accompanying notes 155–56.
287. *See supra* Part III.C.2.b.
288. *See supra* Part III.C.3.
289. OR. REV. STAT. ANN. § 131.215 (2005).
290. *See supra* Part III.C.3.a.iii.
291. *See supra* Part III.C.3.b.

felt in Maryland.[292] The reach of the statute can be justified by citing Maryland's significant state interest in preventing the pollution of its waters, particularly the Bay.[293] The Maryland General Assembly may then declare that anyone who pollutes the Chesapeake Bay or its tributaries which discharge into these waters, whether in-state or out-of-state, is acting in a manner that implicates Maryland's legislatively protected interest in the quality of her state waters. This in turn can serve to create the necessary minimum contacts for personal jurisdiction.

Such a statute will provide the much needed mechanism that Maryland needs to exercise personal jurisdiction over out-of-state defendants and finally hold them accountable for the damage they continue to cause to Maryland's waters.

V. CONCLUSION

Current regulatory efforts to revitalize the Bay are stagnant and ineffective, and thus, a new mechanism is needed to help solve the Bay's severe pollution problems.[294] While the Bay is polluted through various mediums, including air pollution,[295] waterborne contaminants continue to threaten the Bay.[296] Much of these pollutants flow downstream from out-of-state sources due to a lack of effective regulation and enforcement.[297] Effective enforcement must be regular and uniform; it must carry sanctions with sufficient penalties so as to serve as a truly effective deterrent.[298] The extraterritorial enforcement of Maryland's criminal environmental sanctions is the type of strong deterrent needed to encourage rapid compliance with existing regulations.

The fact that extraterritorial enforcement of criminal environmental laws functions within the context of traditional criminal law allows states to use several common law doctrines to gain criminal jurisdiction over an out-of-state polluter.[299] Through doctrines like the effects exception to territorial jurisdiction, Maryland can

292. *See supra* Part III.C.2.b.
293. *See supra* Part III.C.3.a.iii.
294. *See supra* Part I.
295. CHESAPEAKE BAY FOUNDATION 2006, *supra* note 2, at 5.
296. *Id.* (stating that evidence of hermaphrodite bass in the Bay is a clear indication of the continued presence of waterborne toxic pollution).
297. *See supra* Part II.
298. *See supra* Part II.
299. *See supra* Part III.A.

successfully extend and enforce its criminal environmental statutes against out-of-state polluters.[300]

Maryland already has several criminal environmental statutes in place that could effectively deter pollution if consistently enforced.[301] What Maryland lacks, however, is a statutory scheme that is designed to hold out-of-state polluters criminally liable to the state while not violating the due process requirements of personal jurisdiction.[302]

Specifically, the current statutory scheme lacks a sufficient long-arm statute and is open to varying interpretations, which places the current scheme in danger of being ambiguously construed. In the immediate future, the Maryland General Assembly must re-evaluate the statutory language, as well as pass new legislation, looking to other states like Oregon for guidance.[303] Only through statutory changes will Maryland effectively extend its jurisdiction over individual out-of-state polluters without violating due process. The legislature must give Maryland the tools it so desperately needs to truly protect its substantial state interest in preserving the quality of the Chesapeake Bay.

Eric Massof

300. *See supra* Part III.C.2.
301. *See supra* Part III.C.1.b.
302. *See supra* Part III.C.3.
303. *See supra* Part IV.B.