
ENVIRONMENTAL LAW & PROPERTY RIGHTS

LENITY: AN ESSENTIAL RULE FOR INTERPRETING ENVIRONMENTAL CRIMES STATUTES

By Roger J. Marzulla*

Unclear environmental laws and vague regulations defeat their stated purpose—environmental protection. The success of our framework of environmental laws and regulations depends on how well people follow the regulations’ mandates and prohibitions. But if no one can understand them, and no one knows what is required or prohibited, these laws will not achieve their intended result. The more complex the regulatory regime, the less clear the laws and regulations, and the more difficult it is for the most well-intentioned individual to comply because he or she cannot ascertain what is expected. Imprisoning people for unintentional violation of ambiguous laws and regulations undermines the principles of fairness, due process, and respect for the law—all of which underlie the legal rule called “lenity.”

The Rule of Lenity

The rule of lenity is a judicial doctrine that requires ambiguous criminal laws to be interpreted in favor of persons subjected to them.

This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress’s stead.¹

Reasons for the Rule of Lenity

- Due process: It is unfair to convict a person who cannot determine what the law requires.
- Deterrence: A person cannot act in accordance with a statute that is unclear; therefore, the statute will not have the desired deterrent effect.
- Separation of powers: Congress, and not the courts, must decide what conduct is criminal under our constitutional system.

The Rule of Lenity and Environmental Crimes

Some aspects of important environmental statutes are ambiguous. Consider, for example, the statutory definitions of “wetlands,” “take” (of endangered species), or “hazardous waste,” all of which have been repeatedly defined by regulations, agency interpretative memoranda, as well as often-conflicting court decisions. Consider the example given by leading environmental criminal attorney, Judson Starr:

If [a] solvent is poured first on the machinery and then wiped with a clean rag, the rag is a hazardous waste. However, if the solvent is poured first on the rag and

then is used to wipe the machinery clean, the rag is not a hazardous waste. Go figure.²

According to Don R. Clay, former Assistant Administrator for the EPA Office of Solid Waste and Emergency Response, only about five people in the agency actually know what a hazardous waste is.³

Environmental issues, which are often contentious in Congress, result in a compromise statute that is less than clear. For example, the Supreme Court has twice re-defined “navigable waters” in the Clean Water Act,⁴ yet Congress has not yet mustered the support to adopt a definition.

Environmental law is often aspirational. The Clean Water Act, for example, prohibits discharge of all pollutants (even water that is cleaner than the stream it is discharged into) and required the cessation of all discharges by 1985.⁵ But as of the date of this article, discharges are still occurring. This physical inability of entities to comply with certain environmental statutes and regulations breeds a level of disregard and even disrespect for environmental regulatory regimes.

Environmental protection, which requires clarity in prescribing conduct, is lost when regulated companies and individuals are convicted of acts that they could not know were criminal—or even against the law. As one federal judge stated:

In a reversal of terms that is worthy of *Alice in Wonderland*, the regulatory hydra which emerged from the Clean Water Act mandates in this case that a land owner who places clean fill dirt on a plot of subdivided dry land may be imprisoned for the statutory felony offense of “discharging pollutants into the navigable waters of the United States.”⁶

The Prosecution of Ambiguity

In the 1980s Congress passed laws making violation of many environmental statutes and regulations felonies, punishable by hard prison time. These crimes do not require any damage to people or the environment. In turn, EPA created its Office of Criminal Enforcement and the Justice Department created its Environmental Crimes Section, both dedicated exclusively to prosecuting such felonies. The success of these environmental crimes programs is generally measured by the number of convictions, the years in jail, and the fines that they collect.

Those who intentionally violate environmental statutes and endanger others or destroy valuable natural resources should be criminally prosecuted. But some proportion of environmental criminal prosecutions are for paperwork violations of ambiguous regulations. Although these prosecutions give the illusion of protecting the environment, they violate the rule of lenity while fostering disrespect for

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environmental protection. As one federal judge who wrestled with EPA's hazardous waste regulations finally stated: "The people who wrote this ought to go to jail. They ought not to be indicted, that's not enough."⁷

Conclusion

The rule of lenity is violated when people go to prison for breaking ambiguous laws and regulations. The imposition of fines and penalties upon those who are unable to comply with unclear regulations undermines the legitimacy of the very program it is intended to advance. This problem is particularly acute in the environmental realm.

Such prosecutions of ambiguous laws and regulations undermine the clarity and due process requirements of the rule of lenity and actually discourage citizens from complying by making it virtually impossible for them to do so.

Endnotes

1 United States v. Santos, 128 S. Ct. 2020, 2025 (2008).

2 Judson W. Starr, Joseph G. Block & John F. Cooney, *Prosecuting Pollution*, LEGAL TIMES, May 31, 1993, at 8-10.

3 Timothy Lynch, *Polluting Our Principles: Environmental Prosecutions and the Bill of Rights*, Cato Institute, Policy Analysis #223, Apr. 20, 1995, n.31.

4 SWANCC v. Army Corps of Engineers, 531 U.S. 159 (2001); Rapanos v. United States, 547 U.S. 715 (2006).

5 33 U.S.C. 1251 (a)(1).

6 United States v. Mills, No.89-3325, slip op. at 1 (11th Cir. May 15, 1990).

7 Judge Adrian Duplantier, quoted in a press release from Marine Shale Processors Inc., itself quoted in Judge Critical of Both Parties in Marine Shale Case, PESTICIDE & TOXIC CHEMICAL NEWS, Sept. 7, 1994, at 20.

The Rule of Lenity by Jurisdiction

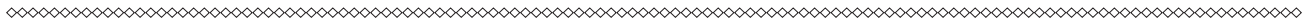
| Jurisdiction | Status of Rule of Lenity in the Courts | Sample Case | Relevant Statutory Provisions |
|--------------------|--|--|---|
| Alabama | Followed | <i>Ex parte</i> Bertram, 884 So.2d 889 (Ala. 2003) (applying rule of lenity). | ALA. CODE § 13A-1-6: "All provisions of this title shall be construed according to the fair import of their terms to promote justice and to effect the objects of the law" |
| Alaska | Followed | State v. Parker, 147 P.3d 690 (Alaska 2006) (declining to apply rule of lenity). | None |
| Arizona | Followed | State v. Munoz, 228 P.3d 138 (Ariz. Ct. App. 2010) (declining to apply rule of lenity). | ARIZ. REV. STAT. ANN. § 13-104: "The general rule that a penal statute is to be strictly construed does not apply to this title, but the provisions herein must be construed according to the fair meaning of their terms to promote justice and effect the objects of the law" |
| Arkansas | Followed | Rickenbacker v. Norris, 206 S.W.3d 220 (Ark. 2005) (declining to apply rule of lenity). | None |
| California | Followed | People v. Manzo, 270 P.3d 711 (Cal. 2012) (declining to apply rule of lenity). | CAL. PENAL CODE § 2-24(4): "The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." |
| Colorado | Followed | People v. Simon, No. 09SC665 (Colo., Dec. 19, 2011) (declining to apply rule of lenity). | COLO. REV. STAT. ANN. § 18-1-102: "This code shall be construed in such manner as to promote maximum fulfillment of its general purposes, namely: (a) To define offenses . . ."; (b) To forbid commission of offenses, deter them, and provide for rehabilitation; (c) Distinguish between "serious and minor offenses" and prescribe proportionate sentences; (d) Prevent arbitrariness and "oppressive treatment" of accused. |
| Connecticut | Followed | Castonguay v. Comm'r of Corr., 16 A.3d 676 (Conn. 2011) (declining to apply rule of lenity). | None |
| Delaware | Not followed | Dixon v. State, 673 A.2d 1220 (Del. 1996) (noting legislative prohibition of application of rule of lenity). | DEL. CODE ANN. tit. 11, § 203: "The general rule that a penal statute is to be strictly construed does not apply to this Criminal Code" |
| Florida | Followed | Clines v. State, 912 So.2d 550 (Fla. 2005) (applying rule of lenity). | FLA. STAT. § 775.021(1): "The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." |
| Georgia | Followed | Woods v. State, 608 S.E.2d 631 (Ga. 2005) (declining to apply rule of lenity). | None |

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| Hawaii | Followed | State v. Wheeler, 219 P.3d 1170 (Haw. 2009) (applying rule of lenity). | HAW. REV. STAT. § 701-104: “[I]n order to promote justice and effect the objects of the law, all of [this Code’s] provisions shall be given a genuine construction, according to the fair import of the words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision.” |
| Idaho | Followed | State v. Anderson, 175 P.3d 788 (Idaho 2008) (declining to apply rule of lenity). | IDAHO CODE ANN. § 73-102(1): “The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to these compiled laws. The compiled laws establish the law of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed, with a view to effect their objects and to promote justice.” |
| Illinois | Followed | People v. Gutman, 959 N.E.2d 621 (Ill. 2011) (declining to apply rule of lenity). | 720 ILL. COMP. STAT. 5/1-2: “The provisions of this Code shall be construed in accordance with the general purposes hereof, to: (a) Forbid and prevent the commission of offenses; (b) Define adequately the act and mental state which constitute each offense, and limit the condemnation of conduct as criminal when it is without fault; (c) Prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders; (d) Prevent arbitrary or oppressive treatment of persons accused or convicted of offenses.” |
| Indiana | Followed | George v. Nat’l Collegiate Athletic Ass’n, 945 N.E.2d 150 (Ind. 2011) (applying rule of lenity). | IND. CODE § 35-32-1-1: “This title shall be construed in accordance with its general purposes, to: . . . (5) preserve the public welfare and secure the fundamental rights of individuals.”). |
| Iowa | Followed | State v. Hearn, 797 N.W.2d 577 (Iowa 2011) (declining to apply rule of lenity). | None |
| Kansas | Followed | State v. Chavez, 254 P.3d 539 (Kan. 2011) (declining to apply rule of lenity). | None |
| Kentucky | Followed | Crouch v. Commonwealth, 323 S.W.3d 668 (Ky. 2010) (declining to apply rule of lenity). | KY. REV. STAT. ANN. § 500.030: “All provisions of this code shall be liberally construed according to the fair import of their terms, to promote justice, and to effect the objects of the law.” |
| Louisiana | Followed | State v. Brown, 879 So.2d 1276 (La. 2004) (declining to apply rule of lenity). | LA. REV. STAT. ANN. § 14:3: “[I]n order to promote justice and to effect the objects of the law, all of [this Code’s] provisions shall be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision.” |
| Maine | Followed | State v. Harrell, 2012 ME 82, 45 A.3d 732 (applying rule of lenity). | None |
| Maryland | Followed | McCloud v. Dep’t of State, Police Handgun Permit Review Bd., No. 101 (Md., May 21, 2012) (declining to apply rule of lenity). | None |

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| Michigan | Followed | Commonwealth v. Hamilton, 945 N.E.2d 877 (Mass. 2011) (applying rule of lenity). People v. Fulton, No. 296114 (Mich. Ct. App., Mar. 10, 2011) (after acknowledging legislative prohibition of application of rule of lenity, stating that the rule applies to ambiguous statutes and therefore declining to apply it). | None |
| Minnesota | Followed | State v. Maurstad, 733 N.W.2d 141 (Minn. 2007) (applying rule of lenity). | MICH. COMP. LAWS § 750.2: “The rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof. All provisions of this act shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law.” MINN. STAT. § 609.01: “[This chapter’s] provisions shall be construed according to the fair import of its terms, to promote justice, and too effect its purposes which are declared to be: (1) to protect the public safety and welfare by preventing the commission of crime through the deterring effect of the sentences authorized, the rehabilitation of those convicted, and their confinement when the public safety and interest requires; and (2) to protect the individual against the misuse of the criminal law by fairly defining the acts and omissions prohibited, authorizing sentences reasonably related to the conduct and character of the convicted person, and prescribing fair and reasonable postconviction procedures.” |
| Mississippi | Followed | Tipton v. State, 41 So.3d 679 (Miss. 2010) (applying rule of lenity). | None |
| Missouri | Followed | State v. Liberty, No. SC91821 (Mo., May 29, 2012) (applying rule of lenity). | None |
| Montana | Followed | State v. Pirello, No. DA 11-0480 (Mont., July 20, 2012) (declining to apply rule of lenity). | MONT. CODE ANN. § 45-1-102(2): “The rule of the common law that penal statutes are to be strictly construed has no application to this code.” |
| Nebraska | Followed | State v. Dinslage, 789 N.W.2d 29 (Neb. 2010) (declining to apply rule of lenity). | NEB. REV. STAT. § 28-102: “The general purposes of the provisions governing the definition of offenses are: (1) To forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests; (2) To subject to public control persons whose conduct indicates that they are disposed to commit crimes; (3) To safeguard conduct that is without fault and which is essentially victimless in its effect from condemnation as criminal; (4) To give fair warning of the nature of the conduct declared to constitute an offense; and (5) To differentiate on reasonable grounds between serious and minor offenses.” |
| Nevada | Followed | State v. Lucero, 249 P.3d 1226 (Nev. 2011) (applying rule of lenity). | NEV. REV. STAT. § 193.030: “Every provision of this title shall be construed according to the fair import of its terms.” |

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| New Hampshire | Followed | State v. Dansereau, 956 A.2d 310 (N.H. 2008) (applying rule of lenity). | N.H. REV. STAT. ANN. § 625:3: “The rule that penal statutes are to be strictly construed does not apply to this code. All provisions of this code shall be construed according to the fair import of their terms and to promote justice.” |
| New Jersey | Followed | State v. Regis, 32 A.3d 1109 (N.J. 2011) (declining to apply rule of lenity). | N.J. STAT. ANN. § 2C:1-2c: “The provisions of the code shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this section and the special purposes of the particular provision involved.” |
| New Mexico | Followed | State v. Tafoya, 237 P.3d 693 (N.M. 2010) (declining to apply rule of lenity). | None |
| New York | Followed | People v. Green, 497 N.E.2d 665 (N.Y. 1986) (declining to apply rule of lenity). | N.Y. PENAL LAW § 5.00: “The general rule that a penal statute is to be strictly construed does not apply to this chapter, but the provisions herein must be construed according to the fair import of their terms to promote justice and effect the objects of the law.” |
| North Carolina | Followed | State v. Hinton, 639 S.E.2d 437 (N.C. 2007) (applying rule of lenity). | None |
| North Dakota | Followed | State v. Geiser, 763 N.W.2d 469 (N.D. 2009) (applying rule of lenity). | N.D. CENT. CODE § 12.1-01-02: “[T]he provisions of this title are intended, and shall be construed, to achieve the following objectives: 1. To ensure the public safety through: a. vindication of public norms by the imposition of merited punishment; b. the deterrent influence of the penalties hereinafter provided; c. the rehabilitation of those convicted of violations of this title; and d. such confinement as may be necessary to prevent likely recurrence of serious criminal behavior. 2. By definition and grading of offenses, to define the limits and systematize the exercise of discretion in punishment and to give fair warning of what is prohibited and of the consequences of violation. 3. To prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders. 4. To safeguard conduct that is without guilt from condemnation as criminal and to condemn conduct that is with guilt as criminal. 5. To prevent arbitrary or oppressive treatment of persons accused or convicted of offenses. 6. To define the scope of state interest in law enforcement against specific offenses and to systematize the exercise of state criminal jurisdiction.” |
| Ohio | Followed | State v. Elmore, 122 Ohio St. 3d 472, 2009-Ohio-3478 (declining to apply rule of lenity). | OHIO REV. CODE ANN. § 2901.04: “[S]ections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.” |
| Oklahoma | Followed | Walters v. JC Penney Co., 82 P.3d 578 (Okla. 2003) (applying rule of lenity). | None |
| Oregon | Not followed | State v. Partain, 239 P.3d 232 (Or. 2010) (noting legislative prohibition of application of rule of lenity). | OR. REV. STAT. § 161.025(2): “The rule that a penal statute is to be strictly construed shall not apply to [the criminal code] or any of its provisions. [The criminal code] shall be construed according to the fair import of its terms” |

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| Pennsylvania | Followed | Commonwealth v. Jarowcki, 985 A.2d 955 (Pa. 2009) (applying rule of lenity). | 18 PA. STAT. ANN. § 105: “The provisions of this title shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this title and the special purposes of the particular provision involved.” |
| Rhode Island | Followed | Such v. State, 950 A.2d 1150 (R.I. 2008) (declining to apply rule of lenity). | None |
| South Carolina | Followed | Berry v. State, 675 S.E.2d 425 (S.C. 2009) (applying rule of lenity). | None |
| South Dakota | Followed | State v. Dillon, 632 N.W.2d 37 (S.D. 2001) (applying rule of lenity). | S.D. CODIFIED LAWS § 22-1-1: “The rule of the common law that penal statutes are to be strictly construed has no application to this title. All its criminal and penal provisions and all penal statutes shall be construed according to the fair import of their terms, with a view to effect their objects and promote justice.” |
| Tennessee | Followed | State v. Marshall, 319 S.W.3d 558 (Tenn. 2010) (applying rule of lenity). | TENN. CODE ANN. § 39-11-104: “The provisions of this title shall be construed according to the fair import of their terms, including reference to judicial decisions and common law interpretations, to promote justice, and effect the objectives of the criminal code.” |
| Texas | Followed | State v. Johnson, 219 S.W.3d 386 (Tex. Crim. App. 2007) (declining to apply rule of lenity). | TEX. PENAL CODE ANN. § 1.05(a): “The rule that a penal statute is to be strictly construed does not apply to this code. The provisions of this code shall be construed according to the fair import of their terms, to promote justice and effect the objectives of the code.” |
| Utah | Followed | State v. Bradshaw, 152 P.3d 288 (Utah 2006) (declining to apply rule of lenity). | UTAH CODE ANN. § 76-1-106: “The rule that a penal statute is to be strictly construed shall not apply to this code, any of its provisions, or any offense defined by the laws of this state. All provisions of this code and offenses defined by the laws of this state shall be construed according to the fair import of their terms to promote justice and to effect the objects of the law and general purposes of Section 76-1-104.” |
| Vermont | Followed | State v. LaBounty, 892 A.2d 203 (Vt. 2005) (noting but not explicitly applying rule of lenity). | None |
| Virginia | Followed | Commonwealth v. Amerson, 706 S.E.2d 879 (Va. 2011) (declining to apply rule of lenity). | None |
| Washington | Followed | State v. Mandanas, 228 P.3d 13 (Wash. 2010) (declining to apply rule of lenity). | WASH. REV. CODE § 9A.04.020(2): “The provisions of this title shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this title.” |



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|-----------------------------|--|--|-------------------------------|
| West Virginia | Followed | State v. Stone, No. 11-0519 (W. Va., June 21, 2012) (applying rule of lenity). | None |
| Wisconsin | Followed | State v. Long, 2009 WI 36, 317 Wis. 2d 92, 765 N.W.2d 557 (declining to apply rule of lenity). | None |
| Wyoming | Followed | Jones v. State, 256 P.3d 536 (Wyo. 2011) (declining to apply rule of lenity). | None |
| District of Columbia | Followed | <i>In re</i> C.L.D., 739 A.2d 353 (D.C. 1999) (applying rule of lenity). | None |
| United States | Followed | Skilling v. United States, 130 S. Ct. 2896 (2010) (applying rule of lenity). | None |

