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# CURB YOUR ECOTERRORISM: IDENTIFYING THE NEXUS BETWEEN STATE CRIMINALIZATION OF ECOTERROR AND ENVIRONMENTAL PROTECTION POLICY

PAUL J. KARASICK\*

## INTRODUCTION

If you find yourself unhappy with the environmental state of affairs in your state, how do you respond? Write to your local congressman? Picket with some signs? Commit acts of destruction to coerce others to cease acting on the environment? The rising prevalence of the latter choice of action<sup>1</sup> by extremist environmental groups has contributed to their being classified as one of the most serious domestic threats to the United States.<sup>2</sup> While most environmental groups are no stranger to activism like dissemination of information and protest, extremist groups, often called “ecoterrorists,” in the name of environmental activism, may resort to violence or, more often, destruction of property.<sup>3</sup> To combat this, legislators have increasingly focused on legislation specifically targeted at the so-called “ecoterrorist.”<sup>4</sup> In June of 2006, Pennsylvania enacted just such an ecoterror statute.<sup>5</sup> The statute makes it a crime to commit certain offenses against property with the intent to either intimidate, coerce, prevent, or obstruct individuals engaged in plant or natural resource activities or facilities.<sup>6</sup>

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<sup>1</sup> Acts of destruction attributed to ecoterror have occurred as recently as March of 2008. William Yardley, *Ecoterrorism Suspected in House Fires in Seattle Suburb*, N.Y. TIMES, Mar. 4, 2008, available at <http://www.nytimes.com/2008/03/04/us/04homes.html?scp=1&sq=ecoterrorism&st=nyt>.

<sup>2</sup> *Oversight on Eco-terrorism Specifically Examining the Earth Liberation Front (“ELF”) and the Animal Liberation Front (“ALF”) Before the U.S. Senate Committee on Environment & Public Works*, 109th Cong. 1 (2005) (statement of John Lewis, Deputy Assistant Director, Federal Bureau of Investigation), available at [http://epw.senate.gov/hearing\\_statement.cfm?id=237817](http://epw.senate.gov/hearing_statement.cfm?id=237817).

<sup>3</sup> Joshua K. Marquis & Danielle M. Weiss, *Eco-Terror: Special Interest Terrorism*, PROSECUTOR, Jan.-Feb. 2005, at 30.

<sup>4</sup> See, e.g., Alyson B. Walker, *A Field of Failed Dreams: Problems Passing Effective Ecoterrorism Legislation*, 18 VILL. ENVTL. L.J. 99 (2007).

<sup>5</sup> 18 PA. CONS. STAT. § 3311 (Supp. 2008).

<sup>6</sup> *Id.*

Ecoterror could largely be seen as the extreme opposite end of the environmentalist perspective from environmental legislation. Environmental law forces those acting on the environment to conform their actions to a governmentally dictated pattern of behavior.<sup>7</sup> Ecoterror seeks to do the same, but instead of using the legitimate avenue of legislative change, it seeks to coerce through the illegitimate means of fear and destruction.<sup>8</sup> Because ecoterror legislation seeks to differentiate between those using coercive means to accomplish anything else and those using coercive means to target the same groups who would be bound by environmental law,<sup>9</sup> ecoterror legislation and environmental law must naturally intertwine. Ideally, ecoterror legislation that accomplishes what it sets out to do, namely deter eco-terrorist activity, should then consequently encourage activists to seek legitimate means for their environmental ends.<sup>10</sup> Similarly, if environmental law accomplishes what it sets out to do, namely protect the environment from those who would affect it, this too should encourage activists to seek legitimate means for their environmental ends. Successful ecoterror legislation should take into account environmental law, and the potential in environmental law.

This Note will first look broadly at what ecoterror is, including how it is defined by both academia and the laws that seek to fight it. Next, the Note will look at ecoterror activity from the perspective of the ecoterrorist and the ideology and motivation behind ecoterror activity. The Note will then look at the various ways in which state and federal laws choose to fight ecoterror activity, including a specific in-depth look at the

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<sup>7</sup> See, e.g., Clean Air Act, 42 U.S.C. § 7401(c) ("A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.").

<sup>8</sup> Marquis & Weiss, *supra* note 3, at 31.

<sup>9</sup> See Dara Lovitz, *Animal Lovers and Tree Huggers are the New Cold-Blooded Criminals?: Examining the Flaws of Ecoterrorism Bills*, 3 J. ANIMAL L. 79, 95-96 (2007). The author discusses ecoterror legislation from the similar animal activist perspective, saying, "It is the viewpoint of the animal rights activist that is being punished . . . . What is otherwise considered a simple theft rises to the level of terrorist activity when the alleged perpetrator is furthering an animal rights cause." *Id.*; see also Ben Saul, *Three Reasons for Defining and Criminalizing Terrorism*, Florence Founding Conference Paper, European Society of International Law 1 (2004), available at [http://www.esil-sedi.eu/fichiers/en/Saul\\_625.pdf](http://www.esil-sedi.eu/fichiers/en/Saul_625.pdf) (recognizing in the broader context of international terrorism, that because most acts of terror consist of acts already punishable as criminal offenses, there should be a specific rationale for criminalizing terrorism specifically or it should serve some further interest).

<sup>10</sup> See Saul, *supra* note 9, at 8-9 (arguing that one reason for criminalizing terrorism is that terrorism undermines democratic values like political participation, as it "replaces politics with violence, and dialogue with terror").

Pennsylvania and Colorado examples. Then, this Note will discuss the ways in which state ecoterror law should be informed by state environmental protection policy. The Note will finally look at the appropriateness of Pennsylvania's and Colorado's ecoterror policies in light of their respective environmental protection policies.

## I. WHAT IS ECOTERROR?

### A. *Defining Ecoterror*

Ecoterror is a concept that is hard to define concretely, as it has as many definitions as there are parties with an interest in the concept.<sup>11</sup> Defining ecoterror has deep implications for individual states and the public at large, particularly when it comes to combating ecoterror. For example, states wishing to combat ecoterror may try to define ecoterror as drawing in as wide a range of activity as possible.<sup>12</sup> The proposed Stop Terrorism Property Act of 2003, for example, defined the crime of ecoterror as implicating anyone who "intentionally damages the property of another with the intent to influence the public with regard to conduct the offender considers harmful to the environment."<sup>13</sup> The FBI defines ecoterror as "the use or threatened use of violence against innocent victims or property for environmental-political reasons often aimed at an audience beyond the target, often of a symbolic nature."<sup>14</sup>

Some disagree with a broad definition of ecoterror, fearing that broadly defining ecoterror may include legitimate activity and attach to that activity the stigma of being labeled "terrorism."<sup>15</sup> Labeling legitimate

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<sup>11</sup> Lovitz, *supra* note 9, at 80; Walker, *supra* note 4, at 102-03; *see also* Marquis & Weiss, *supra* note 3, at 30 (providing an example of ecoterror being defined by one such party—prosecutors).

<sup>12</sup> Chrystal Mancuso-Smith, *From Monkeywrenching to Mass Destruction: Eco-Sabotage and the American West*, 26 J. LAND RESOURCES & ENVTL. L. 319, 320 (2006) ("[R]ather than providing specific guidance, lawmakers seem to prefer overly broad generalizations that would encompass a wide range of activities.").

<sup>13</sup> *See* Stop Terrorism Property Act of 2003, *quoted in* Walker, *supra* note 4, at 100-01. It is interesting to note how similar this definition is to the stated objective of the Earth Liberation Front ("ELF"), an organization commonly referred to as an ecoterrorist organization, which is to "inflict economic damage on those profiting [sic] from the destruction and exploitation of the natural environment . . . ." Denise R. Case, *The USA Patriot Act: Adding Bite to the Fight Against Animal Rights Terrorism?*, 34 RUTGERS L.J. 187 (2002) (quoting ELF website).

<sup>14</sup> Marquis & Weiss, *supra* note 3, at 30; Lovitz, *supra* note 9, at 80.

<sup>15</sup> 18 PA. GEN. ASSEMBLY LEG. J. 341, 382 (Mar. 16, 2005) (statement of Rep. Leach) ("[W]e do not call peaceful protestors terrorists . . . I think we are insulting the people

activity as "terrorism" could have the unfortunate consequence of chilling free speech, as many would choose not to engage in free speech activity, rather than risk being labeled a terrorist.<sup>16</sup> Others also take issue with the unduly inflammatory connotation of the word "terrorist," especially in light of the contemporary political landscape.<sup>17</sup> Generally speaking, "ecoterror" involves the use of fear-inducing coercive tactics to the end of either protecting the environment or influencing those who may be affecting the environment to protect the environment (or at least cease affecting the environment).<sup>18</sup>

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who have been victims of terrorism by calling this terrorism."); see also *Testimony in Opposition to HB 213 Before the Pennsylvania State Judiciary Committee* (June 6, 2005) (statement by the American Civil Liberties Union of Pennsylvania) ("Classifying people who trespass or engage in disorderly conduct as terrorists is unwarranted. . . . It is a coercive tactic that one would not expect in a society that not only considers itself free but also holds itself out as a model for other societies."), available at <http://www.aclupa.org/legislation/pastsessions/ecoterrorismbillhb213testi.htm>.

<sup>16</sup> See Lovitz, *supra* note 9, at 91-93 (citing a Supreme Court case on the First Amendment for the principle that "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.") (citation omitted); Pennsylvania Sierra Club, *Legislation Criminalizes Environmental Activism in "Ecoterrorism" Bill*, <http://pennsylvania.sierraclub.org/PACChapter.old/Issues/Ecoterrorism.htm> (last visited Oct. 18, 2008); Patti Bednarik, *What the General Practitioner Needs to Know About Pennsylvania Animal Law: The Evolving Field of Animal Law*, 77 PA. B. ASS'N. Q. 88, 92 (2006).

The potential for the chilling of free speech activity is one aspect of ecoterror legislation that has received criticism for raising First Amendment concerns. Walker, *supra* note 4, at 112. Other First Amendment concerns have been raised as a result of ecoterror law that focuses on an offender's intent to influence, and viewpoint-based discrimination. For examples of such criticism see *id.* at 109-12; Lovitz, *supra* note 9, at 94-96. See also Jared S. Goodman, *Shielding Corporate Interests From Public Dissent: An Examination of the Undesirability and Unconstitutionality of "Eco-Terrorism" Legislation*, 16 J.L. & POL'Y 823, 825-26 (2008) (arguing "animal terrorism legislation" may undesirably draw in nonviolent activism and encroaches on free speech rights).

<sup>17</sup> Lovitz, *supra* note 9, at 88; see also Rebecca K. Smith, "Ecoterrorism"? A Critical Analysis of the Vilification of Radical Environmental Activists as Terrorists, 38 ENVTL. L. 537, 537 (2008) (arguing that the use of the term "ecoterrorism" to describe radical environmentalists "diminishes the true meaning of the word terrorism, stifles political dissent," and pretextually protects private economic gains at the expense of environmental protection). But see Mancuso-Smith, *supra* note 12, at 323 (arguing that labeling such activity as "terror" gives it more attention and actually enhances its effectiveness and prevalence).

While recognizing the arguments for and against use of the term "ecoterror," and while recognizing proposed substitutions, see *id.*, this Note will use the term "ecoterror" for the sake of consistency and to maintain continuity with most of the existing literature.

<sup>18</sup> Walker *supra* note 4, at 104 (quoting the National Conference of State Legislatures, defining ecoterrorism as "any crime committed in the name of saving nature' . . . [using] fear as the primary motivator to change public policy and/or people's behavior").

B. *Ecoterror's Goals*

Laws that punish or prevent ecoterror activity specifically draw a distinction between activity done for "ecoterror" purposes, namely to coerce actors on the environment, and the same activity done for any other purpose.<sup>19</sup> It stands to reason, then, that the ideology of ecoterror has important ramifications for defining what ecoterror is, and thus how to combat it.<sup>20</sup> Ecoterror's foremost goal is the preservation of the environment.<sup>21</sup> What makes ecoterror distinctive from normal environmentalism is the belief in doing "whatever they consider necessary to disrupt any activity or project that they determine is detrimental or a threat to the environment."<sup>22</sup> More specifically, ecoterror intends that through fear and economic damage, environmental "violators" will cease their behavior.<sup>23</sup>

This is most salient in the ELF example. The Earth Liberation Front began as a splinter group of members of the environmental organization Earth First!, who became disillusioned with Earth First!'s refusal to resort to criminal tactics for environmental preservation.<sup>24</sup> At first, the radical splinter group aimed to somehow give the mainstream environmental organizations more leverage in negotiating environmental protectionism with the government.<sup>25</sup> Over time, they have abandoned such a

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<sup>19</sup> Lovitz, *supra* note 9, at 95-96. As mentioned briefly *supra* note 16, this distinction has raised some First Amendment concerns.

<sup>20</sup> See Saul, *supra* note 9, at 1 (arguing that successful criminalization of terrorism requires formulating a concrete definition).

<sup>21</sup> Walker, *supra* note 4, at 100 ("[E]xtremist environmental groups . . . want to free Earth of human interference—interference that any civilian could cause.").

<sup>22</sup> Marquis & Weiss, *supra* note 3, at 32.

<sup>23</sup> Mancuso-Smith, *supra* note 12, at 322.

<sup>24</sup> Marquis & Weiss, *supra* note 3, at 31. The ELF is considered one of the more, if not most, pronounced ecoterror organizations, and discussions of ecoterror ideology often look to the ELF as exemplary. The Marquis & Weiss article treats the ELF and "environmental extremists" as nearly interchangeable. The ELF's noted goals are "to inflict economic damage on those profiting from the destruction and exploitation of the natural environment . . . to reveal and educate the public on the atrocities committed against the Earth and all species that populate it . . . [and] to take all necessary precautions against harming any animal, human, and non-human." *Id.* (citation omitted). Because these noted goals coalesce with the common definitions of ecoterror organizations, their goals will be similarly treated as exemplary of the ultimate goals of ecoterror more generally.

It should also be noted that the ELF has no official membership, treating itself more as a "philosophy" than an organization, and considers anyone committing ecoterror who espouses themselves as a member of ELF to be a member. See Xavier Beltran, *Applying RICO to Eco-Activism: Fanning the Radical Flames of Eco-Terror*, 29 B.C. ENVTL. AFF. L. REV. 281, 302-03 (2002).

<sup>25</sup> Beltran, *supra* note 24, at 302.

goal, instead acting "as though the mainstream no longer exists and they, the eco-activists, are the only ones left to carry on the struggle."<sup>26</sup>

Some argue, that beyond disruption of environment-affecting activity, ecoterror serves, in an extreme form, to bring attention and publicity to the environmental cause.<sup>27</sup>

Thus, while ecoterrorists have the ultimate goal of environmental protection, their means have deliberately rejected legitimate political or social action, going so far as to resort to criminal activity to bring attention to their cause.<sup>28</sup> This has important consequences for states' environmental protection policies. Because ecoterrorists are ultimately seeking to protect the environment, if a state offers a high degree of environmental protection, it makes ecoterror activity that much more illegitimate, and would further justify the state's decision to have criminal statutes that specifically seek to counter ecoterror activity.<sup>29</sup>

## II. RESPONSES TO ECOTERROR

### A. *Fighting Ecoterror*

There are numerous approaches to fighting ecoterror.<sup>30</sup> Because ecoterror is a relatively new phenomenon and ecoterrorists have remained elusive, there is not much hard data suggesting that any one particular method appropriately curbs ecoterror activity.

Often, states will treat what is considered "ecoterror" the same as any other crime, seeking prosecution under existing criminal statutes like arson and destruction of property.<sup>31</sup> This approach avoids the First

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<sup>26</sup> *Id.* at 302, 304.

<sup>27</sup> Marquis & Weiss, *supra* note 3, at 32 (referencing the ELF attack on a Vail, Colorado, ski resort, which attracted a lot of attention for many reasons, not the least of which was the \$12 million in damages caused by the attack, but was unsuccessful in any of its environmental goals). *See also* Yardley, *supra* note 1 (reporting recent fires set to a Seattle housing development marketed as "green," but receiving criticism for its impact on local wetlands, prompting one observer to comment that the fires were "releasing more carbon into the air than they ever would have by building the houses"); Mancuso-Smith, *supra* note 12, at 322 (arguing that attaining the "terror" label actually aids in the goal of bringing attention to its cause).

<sup>28</sup> *See supra* Part I.B.

<sup>29</sup> *See infra* Part III.

<sup>30</sup> *See* Mancuso-Smith, *supra* note 12, at 325-36.

<sup>31</sup> Marquis & Weiss, *supra* note 3, at 35 ("Eco-terrorists need to know that when the line between a legitimate protest and criminal act is crossed, even if only a misdemeanor, the prosecutors of America will react. You do not need an exotic anti-terror law to charge a

Amendment issues raised by the potential for ecoterror legislation to focus on intent, and also avoids both the inflammatory "terror" label and the risk of giving ecoterrorists empowering attention.<sup>32</sup>

Some acts of ecoterror have been prosecuted under federal criminal law,<sup>33</sup> sometimes using the organizational aspect of ecoterror groups to fold prosecution under RICO laws.<sup>34</sup> Without concern for environmental extremists having an economic motive,<sup>35</sup> RICO could be applied to ecoterror in any situation where an organization is shown to have engaged in some enterprise affecting interstate commerce.<sup>36</sup> While this approach would provide both criminal penalties and payment of damages to entities affected by ecoterror, concerns have been lodged that organizational liability will, instead of discouraging ecoterror, act to encourage it.<sup>37</sup> Because ecoterror groups, such as ELF, exist organizationally only loosely, open environmental groups may face organizational liability, driving protesters to seek the less risky, underground extremist environmental groups as the only effective means of environmental protest.<sup>38</sup>

Some have also advocated expanding use of Patriot Act paradigms in use against ecoterror.<sup>39</sup> Recently, this has taken the form of the model Animal and Ecological Terrorism Act ("AETA").<sup>40</sup> The model AETA parallels

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terrorist; eco-terrorists can be punished within the parameters of any existing laws, such as arson or destruction of property.").

<sup>32</sup> See Mancuso-Smith, *supra* note 12, at 322.

<sup>33</sup> Walker, *supra* note 4, at 113-15; see also *infra* Part II.C. (discussing one high profile act of ecoterror that was prosecuted under federal criminal law). See generally Walker, *supra* note 4, at 105-07 (discussing two proposed federal ecoterror laws, the Stop Terrorism Property Act of 2003, and the Ecoterrorism Prevention Act of 2004 which sought to modify the Animal Enterprise Protection Act of 1992 by including protection for plant enterprises in addition to the already protected animal enterprises).

<sup>34</sup> See Beltran, *supra* note 24; Donna E. Correll, *No Peace for the Greens: The Criminal Prosecution of Environmental Activists and the Threat of Organizational Liability*, 24 RUTGERS L.J. 773, 802-04 (1993).

<sup>35</sup> Beltran, *supra* note 24, at 285.

<sup>36</sup> See Correll, *supra* note 34, at 802-04.

<sup>37</sup> See Beltran, *supra* note 24, at 308 ("Triple monetary damages mean little or nothing to an individual or small group of individuals who decide to set fire to a \$12 million ski lodge. It is safe to presume that such individuals are largely aware they risk everything for their extreme actions and, accordingly, will hedge liability by going deeper underground. The threat of RICO, however, places a choke-hold on an open, above ground, and otherwise legal protest organization.").

<sup>38</sup> *Id.* at 307-09.

<sup>39</sup> See, e.g., Case, *supra* note 13; Ethan Carson Eddy, *Privatizing the Patriot Act: The Criminalization of Environmental and Animal Protectionists as Terrorists*, 22 PACE ENVTL. L. REV. 261 (2005).

<sup>40</sup> Eddy, *supra* note 39, at 262.



the Patriot Act's format for organizational liability by proscribing the provision of "material support" to so-called terror organizations.<sup>41</sup> Criticism of the model AETA has focused on its criminalization of both destructive acts deterring, obstructing, coercing, influencing, or impeding the business activities of environmental actors, as well as acts more closely thought of as protected speech activity doing the same.<sup>42</sup> Because organizational liability for providing material support does not require intent or specific knowledge to contribute to ecoterror activity, some may choose not to support any environmental organizations at all, rather than risk being tied to an ecoterror organization.<sup>43</sup> Despite these potential misgivings, several states have proposed adopting the model AETA in whole or in altered form,<sup>44</sup> while addressing some of the concerns to varying degrees.<sup>45</sup>

State ecoterror laws have taken various other forms.<sup>46</sup> Some states proscribe particular activity fitting statutory definitions of "ecoterror" activity. Subtly different, other states may provide penalty enhancements for crimes committed with statutorily-defined ecoterror purposes. Some states also enhance civil penalties for ecoterror actors, which include giving ecoterror victims liability recourse or removing statutes of limitations on recovery.

*B. Pennsylvania's Ecoterror Statute*

1. 18 Pa.C.S. 3311

One salient ecoterror measure is that of Pennsylvania, which was signed into law April 14, 2006.<sup>47</sup> While some states combat ecoterror activity without actually invoking the term "ecoterror," Pennsylvania's statute is notable because it provides for the specific offense of "ecoterrorism."<sup>48</sup> The Pennsylvania statute is specifically a property destruction statute, proscribing the committing of certain enumerated offenses against property for specific purposes. These purposes include an intent to "intimidate or coerce an individual lawfully" engaged in an activity involving animals,

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<sup>41</sup> *Id.* at 272.

<sup>42</sup> *Id.* at 263-64.

<sup>43</sup> *Id.* at 272.

<sup>44</sup> *Id.* at 262.

<sup>45</sup> *Id.* at 270-72.

<sup>46</sup> Lovitz, *supra* note 9, at 84.

<sup>47</sup> Press Release, Commonwealth of Pennsylvania, Governor Signs Ecoterrorism Bill into Law (April 14, 2006).

<sup>48</sup> 18 PA. CONS. STAT. § 3311 (Supp. 2008).

plants, or natural resources or using an animal, plant, or natural resource facility or “prevent or obstruct an individual from lawfully” engaging in such activities.<sup>49</sup>

Under the statute, those enumerated offenses against property include the following: arson, causing or risking catastrophe, criminal mischief, institutional or agricultural vandalism, agricultural crop destruction, burglary (only if committed for the purpose of committing another of the enumerated offenses), criminal trespass (only if committed “for the purpose of threatening or terrorizing the owner or occupant of the premises,” starting or causing a fire on the premises, or defacing or damaging the premises), theft, forgery, and identity theft.<sup>50</sup>

A person convicted under the Pennsylvania statute faces a one degree increase in penalty for that enumerated offense committed, and those committing first degree felonies face up to forty years imprisonment and a potential fine of up to \$100,000.<sup>51</sup> Further, if convicted, a person can face civil liability for the extent of the damage caused, in an amount up to triple the value of the damaged property, including damages for research, replacement, and development costs.<sup>52</sup>

One notable feature of the Pennsylvania statute is that it includes immunity from both criminal and civil liability for peaceful demonstration or peaceable pursuance of free speech rights on public property or with permission of the landowner,<sup>53</sup> which could be seen as the Pennsylvania legislature’s attempt to address some of the First Amendment concerns that have been lodged at legislation specifically aimed at ecoterror.<sup>54</sup>

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<sup>49</sup> *Id.* § 3311(a).

<sup>50</sup> *Id.* § 3311(d).

<sup>51</sup> *Id.* § 3311(b).

<sup>52</sup> *Id.* § 3311(c).

<sup>53</sup> *Id.* § 3311(c.1) (“A person who exercises the right of petition or free speech under the United States Constitution or the Constitution of Pennsylvania on public property or with the permission of the landowner where the person is peaceably demonstrating or peaceably pursuing his constitutional rights shall be immune from prosecution for these actions under this section . . .”). See also Mancuso-Smith, *supra* note 12, at 334; Lovitz, *supra* note 9, at 86; Bednarik, *supra* note 16, at 92. Despite this carve-out for free speech concerns, some criticized the statute as still being too broad, allowing for arbitrary enforcement. For an example of such criticism, see *Testimony in Opposition to HB 213*, *supra* note 15 (statement by the American Civil Liberties Union of Pennsylvania).

<sup>54</sup> See Press Release, Commonwealth of Pennsylvania, *supra* note 47 (quoting Governor Edward G. Rendell) (“This bill strikes the appropriate balance between protecting the safety of our citizens and their property with one of the most important American freedoms—the right to protest.”).

## 2. Pennsylvania's Purpose in Creating an Ecoterror Statute

The Pennsylvania legislature must have recognized a particular need for having a criminal statute aimed specifically at ecoterror.<sup>55</sup> When proposed, Pennsylvania legislators cited concerns with the growing threat of ecoterror.<sup>56</sup> Upon signing the bill into the law, the governor of Pennsylvania expressed similar sentiments.<sup>57</sup> Representative Godshall and Governor Rendell's statements looked prospectively at the threat of ecoterror to the state, and take on special significance in light of destruction attributed to ecoterror which had already occurred in the state.<sup>58</sup> Prior to the proposal of the ecoterror statute, the ELF took responsibility for an estimated \$500,000 worth of damage inflicted on a highway project in March of 2002,<sup>59</sup> an estimated \$700,000 worth of damage inflicted on a Forest Service laboratory, which included the loss of over seventy years of research related to forest ecosystem maintenance in the Allegheny region,<sup>60</sup> and the destruction of \$96,000 worth of sport-utility vehicles in January of 2003.<sup>61</sup> The governor and legislators both expressed concern that this widespread destruction could discourage industry actors, resulting in tolls on the state's economy and hindering important scientific research.<sup>62</sup>

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<sup>55</sup> *Id.*

<sup>56</sup> Government Watch, *HB 213 Passes PA House: Now in the Senate Judiciary Committee*, PENNSYLVANIA BIO WATCH, May 5, 2005, available at <http://www.pennsylvaniabio.org/BIOWATCH/April2005/govwatch.htm> (quoting Representative Robert Godshall, who proposed the original bill) ("The Federal Bureau of Investigation has identified domestic terrorism as a growing threat nationwide, and ecoterrorism is a big part of that threat' . . . This law will help us fight back by giving our law enforcement officers the tools they need [to] prosecute these types of terrorists.'").

<sup>57</sup> Press Release, Commonwealth of Pennsylvania, *supra* note 47 (quoting Governor Edward G. Rendell as saying the "increasing number of costly and dangerous acts of destruction of property . . . in the name of animal rights or environmental protection" puts "the lives of innocent law-abiding citizens at risk").

<sup>58</sup> Audrey Hudson, *ELF Admits to Arson*, WASH. TIMES, Sept. 10, 2002; Julian Walker, *Ecoterrorists hit Northeast Philly*, NORTHEAST TIMES, Jan. 15, 2003; Intelligence Report, *Eco-Violence: The Record*, SOUTHERN POVERTY LAW CENTER (2002), <http://www.splcenter.org/intel/intelreport/article.jsp?sid=29>.

<sup>59</sup> Intelligence Report, *supra* note 58.

<sup>60</sup> Hudson, *supra* note 58. This incident was specifically cited by Representative Godshall as inspiring support for the statute. Robert B. Swift, *Unusual Coalition Backs Ecoterrorism Legislation*, POCONO RECORD, Apr. 12, 2006.

<sup>61</sup> Walker, *supra* note 58.

<sup>62</sup> Government Watch, *supra* note 56 (quoting Representative Robert Godshall) ("My bill will go a long way toward providing some much-needed protection for farms and research facilities, which are important economic assets for our Commonwealth . . . . With more than 34,600 workers employed in the pharmaceutical and bio tech fields statewide, it's high time we get a law on the books to deal with ecoterrorism."); Press Release, Commonwealth of

While the general idea remained the same, the Pennsylvania statute is strikingly different from its proposed form in 2005.<sup>63</sup> The proposed bill specifically defined ecoterrorism,<sup>64</sup> instead of criminalizing enumerated offenses done for enumerated purposes, as is the case in the final, codified statute.<sup>65</sup> The shift to using Pennsylvania's existing criminal framework was clearly contemplated.<sup>66</sup> When signing the bill into law, the governor recognized a particular need for an ecoterror criminalization beyond that offered by existing criminal statutes, saying, "The specified offenses against property are already crimes in Pennsylvania. The purpose of this legislation, however, is to deter politically motivated property destruction with the intent of intimidation."<sup>67</sup> Because House Bill 213 set forth the elements of the ecoterror crime without reference to other offenses, it also provided its own penalty grading,<sup>68</sup> rather than acting as a sentencing enhancement as in the final statutory form.<sup>69</sup> From a theoretical point of view, Pennsylvania's shift from a defined ecoterror offense to enumerated offenses for enumerated purposes could be seen as shifting the focus from the illegitimacy of the specific act involved to the illegitimacy of the motivation behind the act.<sup>70</sup> This will have important consequences later relating to the decision to proscribe ecoterror activity to the state's environmental policy.<sup>71</sup>

### C. *The Colorado Example*

Colorado is one state which lacks a specific ecoterror statute.<sup>72</sup> While Colorado has a specific statute aimed at curbing damage to agricultural products, it does not extend to the property of all agricultural actors, nor does it discuss the degree to which any tampering or damage is done for a specific purpose.<sup>73</sup> The statute makes anyone who, without consent of

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Pennsylvania, *supra* note 47 ("Most of these protests are lodged against pharmaceutical and other companies that are in the business of developing new medicines to provide treatments and cures for deadly diseases."); Swift, *supra* note 60 (quoting Representative Tina Pickett) ("The bill is necessary to protect the economic livelihood of Pennsylvania's farm industry").

<sup>63</sup> H.B. 213, 2005 Gen. Assem., Reg. Sess. (Pa. 2005).

<sup>64</sup> *Id.*

<sup>65</sup> 18 PA. CONS. STAT. § 3311(a) (Supp. 2008).

<sup>66</sup> Press Release, Commonwealth of Pennsylvania, *supra* note 47.

<sup>67</sup> *Id.*

<sup>68</sup> H.B. 213, 2005 Gen. Assem., Reg. Sess. (Pa. 2005).

<sup>69</sup> 18 PA. CONS. STAT. § 3311(b).

<sup>70</sup> See *supra* note 9.

<sup>71</sup> See *infra* Part III.

<sup>72</sup> Lovitz, *supra* note 9, at 84.

<sup>73</sup> COLO. REV. STAT. 35-31-201 (2002).

the owner of the agricultural product, exercises control with an intent to deprive or maliciously damage or destroy the agricultural product liable for damages.<sup>74</sup> Liability also extends to one who encourages or conspires with another to do so.<sup>75</sup> To be sure, the Colorado statute provides for civil damages, but does not extend *criminal* liability to one who acts against the proscribed conduct in the statute.

Colorado's lack of a specific criminal ecoterror statute is remarkable in light of acts of destruction committed in Colorado attributed to ecoterror.<sup>76</sup> In October of 1998, the ELF claimed responsibility for over \$12 million worth of damage inflicted on a Vail, Colorado, ski resort.<sup>77</sup> Eleven people were indicted under federal criminal law in Oregon for ecoterror acts including those on the Vail ski resort in January of 2006.<sup>78</sup> In May of 2006, four more sets of federal indictments were brought by the Colorado United States Attorney in connection with the Vail fires.<sup>79</sup> The ELF also claimed responsibility for more than two million dollars worth of damage inflicted on a mansion in Boulder, Colorado, in November 2000.<sup>80</sup>

As demonstrated by the indictments against the ELF members for the destruction of the Vail ski resort, federal prosecution is always an option.<sup>81</sup> For the purposes of this Note, however, those laws proscribing activity by the state are most relevant because they represent that activity which the state has chosen as being illegitimate.<sup>82</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Press Release, Federal Bureau of Investigations, Eco-Terror Indictments: 'Operation Backfire' Nets 11 (Jan. 20, 2006), available at <http://www.fbi.gov/page2/jan06/elf012006.htm>.

<sup>77</sup> Intelligence Report, *supra* note 58.

<sup>78</sup> Press Release, Federal Bureau of Investigations, *supra* note 76. Convictions stemming from the indictments saw nine, thirteen, and twelve month prison sentences for those who cooperated, but a potential for up to thirty years imprisonment, because of a "terrorism enhancement" in the sentencing guidelines. William Yardley, *Radical Environmentalist Gets 9-Year Term*, N.Y. TIMES, May 26, 2007, available at <http://www.nytimes.com/2007/05/26/us/26sentence.html?fta=y>.

<sup>79</sup> Kirk Johnson, *4 Are Indicted on Arson Charges in 1998 Fires at a Resort in Vail*, N.Y. TIMES, May 20, 2006, available at <http://www.nytimes.com/2006/05/20/us/20vail.html>. Two of the four indicted in Colorado had previously also been indicted, convicted and sentenced in Oregon. See *id.*

<sup>80</sup> Monte Whaley, *'Eco-terrorists' Say They Torched Mansion*, DENVER POST, Dec. 8 2000, available at <http://forests.org/archive/america/ecsaylor.htm> (last visited Oct. 21, 2008); Intelligence Report, *supra* note 58.

<sup>81</sup> Press Release, Federal Bureau of Investigations, *supra* note 76.

<sup>82</sup> See *infra* Part III for further discussion of why this is relevant.

To be sure, then, although Colorado is without criminal statutes aimed specifically at ecoterror, the state has criminalized actions similar to those offenses enumerated in Pennsylvania's ecoterror statute, including arson,<sup>83</sup> criminal mischief,<sup>84</sup> burglary,<sup>85</sup> criminal trespass,<sup>86</sup> theft,<sup>87</sup> forgery,<sup>88</sup> and identity theft.<sup>89</sup> In addition to the civil remedy for the protection of agricultural products, Colorado also makes the destruction of food product a misdemeanor crime, which appears to be the closest proscribed activity to agricultural vandalism and agricultural crop destruction as enumerated in Pennsylvania's ecoterror statute.<sup>90</sup>

### III. RELATING ENVIRONMENTAL PROTECTION POLICY TO ECOTERROR

Generally speaking, states have numerous justifications for criminalizing certain behavior.<sup>91</sup> Criminalizing behavior allows the state to punish those people committing acts it deems harmful or, at the very least, in opposition to the interests of the state.<sup>92</sup> In so doing, the state also seeks to deter people from committing those acts in the first place.<sup>93</sup> The decision to criminalize ecoterror is no different from the criminalization of any other act. Obviously, a state such as Colorado, which has not specifically proscribed ecoterror, is not condoning ecoterror activity, especially considering the wide berth of options it has to otherwise combat it.<sup>94</sup> But, a state which does specifically proscribe ecoterror, as described above, has recognized a specific need to criminalize that behavior.<sup>95</sup>

This is all the more telling in the Pennsylvania example where the state has proscribed, in criminalizing "ecoterror," not the acts alone, which had already been proscribed by the state, but the acts done for a

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<sup>83</sup> COLO. REV. STAT. 18-4-101 to 18-4-105 (2002).

<sup>84</sup> *Id.* 18-4-501.

<sup>85</sup> *Id.* 18-4-201 to 18-4-205.

<sup>86</sup> *Id.* 18-4-502 to 18-4-504.

<sup>87</sup> *Id.* 18-4-401 to 18-4-419.

<sup>88</sup> *Id.* 18-5-102, 18-5-104.

<sup>89</sup> COLO. REV. STAT. 18-5-902 (2002).

<sup>90</sup> *Id.* 35-31-101.

<sup>91</sup> See MARVIN E. FRANKEL, CRIMINAL SENTENCES (1973), reprinted in WAYNE R. LAFAYE, MODERN CRIMINAL LAW, at 1, 2 (1978) (discussing the main goals of criminal law, including retribution, deterrence, denunciation, incapacitation, and rehabilitation).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> See, e.g., *supra* Parts II.A. & II.C.

<sup>95</sup> See, e.g., *supra* Part II.B.2 (Pennsylvania example).

specific purpose. In this case, this is tantamount to the state's declaring those identified purposes enumerated in the statute as illegitimate.<sup>96</sup>

Just as each state tailors its ecoterror criminal policy to its own particularized interests, each state tailors its environmental policy in the same way, also accounting for other factors such as cost and need. If criminalization could be seen as representing the state's face as to what it deems illegitimate activity, its environmental policy could be seen as representing its face as to what it deems important in the environmental realm. To that end, while federal environmental standards may nonetheless benefit the state and dictate environmental policy within the state (just as federal criminal law may nonetheless be used to attack ecoterror activity within a state), the environmental policy of the state is most important in determining how the state represents itself environmentally.<sup>97</sup>

While environmental protection policy has not been seen to factor explicitly into a state's ecoterror policy, the two are necessarily interrelated. Some have advocated that one way of fighting ecoterror is to focus on environmental protection, taking the "wind out of their sails," as it were.<sup>98</sup> This makes intuitive sense from the perspective that having higher levels of environmental protection makes the legitimate legislative channels of environmental protection seem more successful.<sup>99</sup> In an ideal situation, this would deter ecoterror actors, many of whom have chosen decidedly criminal courses to protect the environment because they view lawful environmental advocacy as not doing enough.<sup>100</sup>

<sup>96</sup> See Ben Saul, *Three Reasons for Defining and Criminalizing Terrorism*, Florence Founding Conference Paper, European Society of International Law, 2005, at 1. The article discusses criminalizing general terrorism in the international context, saying, "treating terrorism as a separate category of unlawful activity expresses a deliberate desire by the international community to morally condemn and stigmatize terrorism as an especially egregious crime, beyond its ordinary criminal characteristics." *Id.*

<sup>97</sup> See, e.g., Pa. Dept. Env'tl Protection: Mission Statement, <http://www.depweb.state.pa.us/dep/cwp/view.asp?a=3&q=461254> (last visited Oct. 21, 2008) ("We are responsible for the protection of the air, land and water of the Commonwealth. We carry out our jobs in ways that will promote measurable environmental improvement, cooperation, innovation and sustainable development so future generations may share our wealth.").

<sup>98</sup> See Mancuso-Smith, *supra* note 12, at 337-38. In the general terrorism context this has been referred to as "mainstreaming." Dean G. Pruitt, *Negotiating with Terrorists* 5 (Int'l Ass'n for Conflict Mgmt., 2007 Meeting Paper, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1031668](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1031668) ("The aim of mainstreaming is to persuade the terrorists and their supporters to give up violence and pursue their goals through the existing political system . . . . For mainstreaming to be successful, it is essential for the terrorists to believe that they can achieve power by coming in from the cold, that they will be more effective by participating in legitimate politics than by fighting the authorities.").

<sup>99</sup> See Pruitt, *supra* note 98, at 5.

<sup>100</sup> *Id.*

From a more theoretical perspective, a state's environmental protection and its policy combating ecoterror are intertwined. The central tenet behind ecoterror is that the environmental protection available is not enough, and thus those acting against the environment must be coerced in some other way to cease harming the environment.<sup>101</sup> If we think of state environmental protection policy on a continuum, with absolutely no environmental protection offered by the state on one end and some kind of perfectly preservationist environmental protectionist policy on the other, the closer a state moves towards having this ideal environmental protection, that is, the more environmental protection the state offers, the less reasonable the ecoterrorist's rationale for acts of destruction appears.<sup>102</sup> From the state's perspective, then, the more environmental protection offered, the less legitimate ecoterror activity becomes.<sup>103</sup> In other words, this means that if a state has criminalized ecoterror activity by signifying that it finds the activity to be illegitimate, the state should also promulgate an environmental policy that justifies its position, one that offers

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<sup>101</sup> See *supra* Part I.B.

<sup>102</sup> See Mancuso-Smith, *supra* note 12, at 338 ("Just because we may as a society disagree with the tactics employed by the eco-saboteur, their underlying concerns over environmental violations of abuse may indeed be valid."). While not identical scenarios, this is a similar argument for the moral justification of vigilantism. See Kelly D. Hine, *Vigilantism Revisited: An Economic Analysis of the Law of Extra-Judicial Self-Help or Why Can't Dick Shoot Henry for Stealing Jane's Truck*, 47 AM. U. L. REV. 1221, 1243 (1998) ("A scenario in which established law enforcement does not exist presents the easiest case for understanding the rationale underlying social justification and acceptance of extra-judicial self-help. When an established governmental system for enforcing the criminal law does not exist, the only means available to protect Becarria's 'repository of the public well being' is private action.").

For one article relating modern ecoterrorism to vigilantism, see American Law and Legal Information, American Law Encyclopedia Vol. 10, *Vigilantism*, <http://law.jrank.org/pages/11129/Vigilantism.html> (last visited Oct. 21, 2008), listing "environmental activists inflict[ing] economic losses on companies by obstructing lawful business activities that they think will cause harm to the air, water, or land" as one form of modern vigilantism. *Id.* See also Avi Brisman, *Crime-Environment Relationships and Environmental Justice*, 6 SEATTLE J. FOR SOC. JUST. 727, 754-60 (2008) (discussing ecoterror as a response to "legal harms" to the environment, in the broader social context of "environmental justice").

<sup>103</sup> See A.P. Simester & Andrew von Hirsch, *Rethinking the Offense Principle*, 8 LEGAL THEORY 269, 271 (2002) (referencing Feinberg's argument for "offense as affront to sensibility," the authors discuss the principle that "the more independent general usefulness the supposedly offending conduct has, the less the claim to prohibition").

Applying this principle to the ecoterror example, a state that offers a high level of environmental protection has made ecoterror less "useful"; to the degree that ecoterror's end is environmental protection, the state has preempted any need (if we accept that ecoterror hypothetically *ever* has a need) for such extreme environmental protectionism.



a higher level of environmental protection. Utilizing the Pennsylvania and Colorado examples, this means that, at the very least, Pennsylvania, which has statutorily declared ecoterror activity illegitimate, should not offer less environmental protection than Colorado, which has statutorily remained silent on the issue of ecoterror.

#### IV. COMPARING PENNSYLVANIA'S LEVEL OF ENVIRONMENTAL PROTECTION WITH COLORADO'S LEVEL OF ENVIRONMENTAL PROTECTION

Because we are looking at the environmental policy each state has taken upon itself to administer, perhaps the most telling indication of the environmental protection afforded by a state is its administration of federally dictated environmental standards. To that end, the Environmental Council of the States provides a comparative look at which federal environmental programs have been delegated to the states to provide funding and oversight.<sup>104</sup> In delegating responsibility for federal environmental policy, the federal government is recognizing that the states have expended resources to bring their environmental protection up to federal standards.<sup>105</sup> All states have only finite resources to deal with environmental protection,<sup>106</sup> so a state preempting the need for federal resources should adequately represent a state adopting a goal of environmental protection in the same way a state criminalizing ecoterror is demonstrating that it finds a specific activity to be illegitimate.

##### A. *Clean Air Act*

The states of Pennsylvania and Colorado both entirely run their respective *New Source Performance Standards* and *National Emission Standards for Hazardous Air Pollutants* programs.<sup>107</sup> Both states also have approved programs for meeting national standards for their

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<sup>104</sup> The Environmental Council of the States, *Delegation by Environmental Act*, [http://www.ecos.org/section/states/enviro\\_actlist](http://www.ecos.org/section/states/enviro_actlist) (last visited Oct. 21, 2008).

<sup>105</sup> *Id.* The Environmental Council of the State's report provides a thorough account of which federal programs have been delegated to each state. This report will be utilized in providing a comparative look at the environmental protection programs in place in Pennsylvania and Colorado.

<sup>106</sup> *Id.*

<sup>107</sup> The Environmental Council of the States, *State Delegations—Clean Air Act*, [http://www.ecos.org/section/states/enviro\\_actlist/states\\_enviro\\_actlist\\_caa](http://www.ecos.org/section/states/enviro_actlist/states_enviro_actlist_caa) (last visited Oct. 21, 2008).

*Prevention of Significant Deterioration* and *New Source Review* programs.<sup>108</sup> Pennsylvania entirely runs its *Operating Permit* program,<sup>109</sup> while Colorado has an interim program, pending final EPA authorization.<sup>110</sup>

### B. *Clean Water Act*

Pennsylvania maintains its program for *Construction Grants*,<sup>111</sup> as does Colorado, with the caveat that the EPA still maintains responsibility for audit resolution in the Colorado program.<sup>112</sup> Both Pennsylvania and Colorado maintain their *Nation Pollution Discharge Elimination System* programs.<sup>113</sup> Pennsylvania has not delegated or approved *Pre-treatment* program, that is, it is entirely run by the EPA,<sup>114</sup> while Colorado has a program still pending delegation or approval.<sup>115</sup> Pennsylvania maintains its *Sludge Management* program,<sup>116</sup> while Colorado, again, has a program still pending delegation or approval.<sup>117</sup> Pennsylvania maintains its own *State Revolving Fund*, independent of EPA approval,<sup>118</sup> while Colorado maintains its own program as delegated by the EPA.<sup>119</sup> Pennsylvania has no delegated or approved *Wetlands* program,<sup>120</sup> while Colorado may have a program not subject to federal delegation.<sup>121</sup>

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<sup>108</sup> *Id.*; The Environmental Council of the States, *Environmental Programs Delegated to the State—Pennsylvania* [hereinafter *Pennsylvania Environmental Programs*], <http://www.ecos.org/section/states?id=PA> (last visited Oct. 21, 2008); The Environmental Council of the States, *Environmental Programs Delegated to the State—Colorado* [hereinafter *Colorado Environmental Programs*], <http://www.ecos.org/section/states/?id=CO> (last visited Oct. 21, 2008).

<sup>109</sup> *Pennsylvania Environmental Programs*, *supra* note 108.

<sup>110</sup> *Colorado Environmental Programs*, *supra* note 108.

<sup>111</sup> The Environmental Council of the States, *State Delegations—Clean Water Act*, [http://www.ecos.org/section/states/enviro\\_actlist/states\\_enviro\\_actlist\\_cwa](http://www.ecos.org/section/states/enviro_actlist/states_enviro_actlist_cwa) (last visited Feb. 28, 2009); *Pennsylvania Environmental Programs*, *supra* note 108.

<sup>112</sup> *Colorado Environmental Programs*, *supra* note 108.

<sup>113</sup> *Pennsylvania Environmental Programs*, *supra* note 108; *Colorado Environmental Programs*, *supra* note 108.

<sup>114</sup> *Pennsylvania Environmental Programs*, *supra* note 108.

<sup>115</sup> *Colorado Environmental Programs*, *supra* note 108.

<sup>116</sup> *Pennsylvania Environmental Programs*, *supra* note 108.

<sup>117</sup> *Colorado Environmental Programs*, *supra* note 108.

<sup>118</sup> *Pennsylvania Environmental Programs*, *supra* note 108.

<sup>119</sup> *Colorado Environmental Programs*, *supra* note 108.

<sup>120</sup> *Pennsylvania Environmental Programs*, *supra* note 108.

<sup>121</sup> *Colorado Environmental Programs*, *supra* note 108.

C. *Federal Insecticide, Fungicide and Rodenticide Act*

Pennsylvania maintains delegated control over all aspects of the Federal Insecticide, Fungicide, and Rodenticide Act, including the *State Cooperation, Aid and Training; Worker Protection; Endangered Species Protection; and Groundwater Protection* programs.<sup>122</sup> Colorado maintains partial delegation for commercial applicators only for its *State Cooperation, Aid and Training* program, as well as its *Worker Protection* program.<sup>123</sup> There has been no applicable delegation for Colorado's *Endangered Species Protection* or *Groundwater Protection* programs.<sup>124</sup>

D. *Resource Conservation and Recovery Act*

As to the parts of the Resource Conservation and Recovery Act, Pennsylvania maintains delegated control over the RCRA's *Base and Solid Waste* programs.<sup>125</sup> Pennsylvania has left federal control over the *Corrective Action; Mixed Waste; Burning of Hazardous Wastes in Boilers and Industrial Furnaces; Toxicity Characteristic; Land Disposal Restrictions; and Underground Storage Tank* programs.<sup>126</sup> Colorado has been given control over all aspects of the RCRA, except the *Burning of Hazardous Wastes in Boilers and Industrial Furnaces* and the *Underground Storage Tank* programs, the latter of which is in the process of being delegated to the state.<sup>127</sup>

E. *Safe Drinking Water Act*

Both Pennsylvania and Colorado have been delegated maintenance of their *Public Water System Supervision / Drinking Water* program.<sup>128</sup> Both Pennsylvania and Colorado have also approved *Wellhead Protection*

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<sup>122</sup> The Environmental Council of the States, State Delegations—FIFRA, [http://www.ecos.org/section/states/enviro\\_actlist/fifra](http://www.ecos.org/section/states/enviro_actlist/fifra) (last visited Feb. 28, 2009); Pennsylvania Environmental Programs, *supra* note 108.

<sup>123</sup> Colorado Environmental Programs, *supra* note 108.

<sup>124</sup> *Id.*

<sup>125</sup> The Environmental Council of the States, State Delegations—RCRA, [http://www.ecos.org/section/states/enviro\\_actlist/rcra](http://www.ecos.org/section/states/enviro_actlist/rcra) (last visited Feb. 28, 2009); Pennsylvania Environmental Programs, *supra* note 108.

<sup>126</sup> Pennsylvania Environmental Programs, *supra* note 108.

<sup>127</sup> Colorado Environmental Programs, *supra* note 108.

<sup>128</sup> The Environmental Council of the States, State Delegations—SDWA, [http://www.ecos.org/section/states/enviro\\_actlist/sdwa](http://www.ecos.org/section/states/enviro_actlist/sdwa) (last visited Feb. 28, 2009); Pennsylvania Environmental Programs, *supra* note 108; Colorado Environmental Programs, *supra* note 108.

programs that are yet to be implemented.<sup>129</sup> Neither state has a delegated or approved *Underground Injection Control* program.<sup>130</sup> The Safe Drinking Water Act also has provisions for an optional demonstration program that oil or natural resources meet the requirements of the *Underground Injection Control* program.<sup>131</sup> Pennsylvania has no such program in place,<sup>132</sup> while Colorado has been delegated maintenance of such a program.<sup>133</sup>

#### F. *Toxic Substances Control Act*

Pennsylvania's programs under the Toxic Substances Control Act are not subject to delegation.<sup>134</sup> Colorado maintains delegated control over the *Model Accreditation Plan* program for training workers to remove asbestos from schools, as well as a delegated waiver in place under the *Asbestos Hazard Emergency Response Act*.<sup>135</sup> Colorado also maintains no program subject to delegation with regards to the TSCA *Indoor Radon* grant assistance program.<sup>136</sup>

#### G. *How Do They Compare?*

Comparing Pennsylvania and Colorado's adoption of federally dictated environmental standards, the states are roughly equivalent, with the exception of delegation of the Resource Conservation and Recovery Act, which Pennsylvania has left largely up to federal control.<sup>137</sup> As discussed earlier, Pennsylvania's ecoterror statute can be viewed as most appropriate when their level of environmental protection does not fall below that of Colorado, which does not specifically criminalize ecoterror.<sup>138</sup>

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<sup>129</sup> Pennsylvania Environmental Programs, *supra* note 108; Colorado Environmental Programs, *supra* note 108.

<sup>130</sup> Pennsylvania Environmental Programs, *supra* note 108; Colorado Environmental Programs, *supra* note 108.

<sup>131</sup> The Environmental Council of the States, State Delegations—SDWA, *supra* note 128.

<sup>132</sup> Pennsylvania Environmental Programs, *supra* note 108.

<sup>133</sup> Colorado Environmental Programs, *supra* note 108.

<sup>134</sup> The Environmental Council of the States, State Delegations—TSCA, [http://www.ecos.org/section/states/enviro\\_actlist/tsca](http://www.ecos.org/section/states/enviro_actlist/tsca) (last visited Feb. 28, 2009); Pennsylvania, Environmental Programs, *supra* note 108.

<sup>135</sup> Colorado Environmental Programs, *supra* note 108.

<sup>136</sup> *Id.*

<sup>137</sup> See *supra* Parts IV.A.-IV.F. (particularly Part IV.D.).

<sup>138</sup> *Id.*

Therefore, the states' control over federal environmental standards in this light would generally tend to justify Pennsylvania's ecoterror statute.<sup>139</sup>

V. COMPARING PENNSYLVANIA'S ENVIRONMENTAL STATE OF AFFAIRS WITH COLORADO'S ENVIRONMENTAL STATE OF AFFAIRS

As has been discussed previously, from a theoretical legal policy point of view, a state's decision to criminalize ecoterror should relate to the resources it sets forth to environmental protectionism, as both could be seen to indicate how a state chooses to represent itself in the criminal and environmental realms.<sup>140</sup> For similar reasons, it also makes sense to look briefly at indicators of the environmental conditions of the respective states. Although the environmental protection laws in place may dictate the front end of environmental protectionism, it is also relevant to look at how that plays out at the back end. If a state's environmental state of affairs is poor, it may dictate that more protection should be offered by the state to further justify its criminalization of ecoterror.

A recent state-by-state analysis placed Pennsylvania as the third highest state in carbon dioxide emissions, with 279 million tons of carbon dioxide emissions per year,<sup>141</sup> while Colorado ranked twenty-third, with 140 million tons of carbon dioxide emissions per year.<sup>142</sup> The wide gap is largely explained by Pennsylvania's larger population. With the sixth highest resident population in the country, Pennsylvania was responsible for 22.1 tons of carbon dioxide emissions per person, ranking as the twenty-third highest state per capita.<sup>143</sup> Colorado, with the twenty-fourth highest resident population, was responsible for the slightly less 20.86 tons of carbon dioxide emissions per person, ranking as the twenty-fourth highest state per capita.<sup>144</sup> Despite being on approximately equal footing

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<sup>139</sup> *Id.*

<sup>140</sup> See *supra* Part IV.

<sup>141</sup> Pennsylvania Energy Consumption Information, [http://www.eredux.com/states/state\\_detail.php?id=1116](http://www.eredux.com/states/state_detail.php?id=1116) (last visited Oct. 24, 2008).

<sup>142</sup> Colorado Energy Consumption Information, [http://www.eredux.com/states/state\\_detail.php?id=1134#eis](http://www.eredux.com/states/state_detail.php?id=1134#eis) (last visited Oct. 24, 2008).

<sup>143</sup> Pennsylvania Energy Consumption Information, *supra* note 141. Pennsylvania also hosts heavy energy-consuming industry "including aluminum, chemical manufacturing, forest products, glass making, petroleum refining, and steel" which accounts for its high carbon output. *Id.* This is in contrast with Colorado, where much of the energy consumption is from the transportation and residential sectors, rather than its economy. Colorado Energy Consumption Information, *supra* note 142.

<sup>144</sup> Colorado Energy Consumption Information, *supra* note 142.

in terms of per capita carbon emissions, Pennsylvania's "carbon footprint" is still double that of Colorado,<sup>145</sup> and an argument could be made that, as a result, Pennsylvania has a higher duty to environmental protectionism. Pennsylvania's carbon dioxide output is especially notable in light of the renewable energy alternative potential within the state, including hydropower from the Susquehanna River and the high wind power potential off its mountain ranges and on the Lake Erie shoreline.<sup>146</sup>

#### VI. HOW SHOULD EACH STATE'S RESPECTIVE LEVEL OF ENVIRONMENTAL PROTECTION INFORM ITS ECOTERROR POLICY?

Harsher ecoterror laws that specifically target ecoterror seem most appropriate when they coincide with a high level of state environmental protection.<sup>147</sup> This sends the message that the state seeks environmental protection, and appreciates its role as environmental protector, thus advocating a legitimate means towards that end. Although a state has every interest in curbing what it deems criminal activity, when it carves out a special rule against criminal actors seeking to protect the environment without offering much in the way of environmental protection itself, there is a degree to which this can be seen as the state safeguarding environmental actors, rather than safeguarding environmental concerns and its own role as a legitimate environmental protector.

The lawmakers who aided in getting Pennsylvania's ecoterror statute passed into law cited a concern for discouragement of industry that would have an effect on the state's economic interests,<sup>148</sup> which have been shown to contribute heavily to Pennsylvania's stature as having some of the highest carbon dioxide emissions in the country.<sup>149</sup> Although Pennsylvania's environmental protection laws are on the same approximate level with those of Colorado, there still appears to be much more the state could be doing.<sup>150</sup> Of course, these are rough estimates, produced

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<sup>145</sup> Pennsylvania Energy Consumption Information, *supra* note 141.

<sup>146</sup> *Id.*

<sup>147</sup> See *supra* Part III.

<sup>148</sup> See *supra* Part II.B.2.

<sup>149</sup> See *supra* note 141.

<sup>150</sup> See Brian Wingfield & Miriam Marcus, *America's Greenest States*, FORBES.COM, Oct. 17, 2007, available at [http://www.forbes.com/business/2007/10/16/environment-energy-vermont-biz-beltway-cx\\_bw\\_mm\\_1017greenstates.html](http://www.forbes.com/business/2007/10/16/environment-energy-vermont-biz-beltway-cx_bw_mm_1017greenstates.html) (ranking Pennsylvania thirty-second on a list of "greenest" states, which included analysis of factors like policy initiatives and energy consumption). Colorado ranked thirteenth on the list. *Id.*

from a cursory look at the environmental protection each state offers, and surely a more in depth look might yield different results. But in specifically deciding to criminalize ecoterror, Pennsylvania has made a bold statement: intimidation of those interests having an impact on the environment is not to be tolerated within the state.<sup>151</sup> This statement might have even more resonance if the state was doing more itself in the name of environmental protection.

## CONCLUSION

The contemporary global landscape has made terrorism a central focus of discussion, for better or worse, and if anything has become clear, it is that there are no easy answers for dealing with it. Regardless of how one feels about the labeling of extremist environmental activity as "ecoterror," it seems clear there are no easy answers for dealing with it as well. The recent fires set to a so-called "green" development provide one particularly salient example of the frustration in combating ecoterror.<sup>152</sup> Developers were doing what they thought was right for the environment, but nevertheless found themselves the victims of what appeared to be an ecoterror attack by members of the ELF.<sup>153</sup> As has been discussed, those who commit acts of ecoterror ultimately do so because they are unhappy with the mainstream environmental movement.<sup>154</sup> It stands to reason that ecoterror's demands—the total elimination of human impact on the environment<sup>155</sup>—are unreasonable. Thus, they will not be happy with any environmental progress. This says that, ultimately, it is not entirely clear if states providing greater environmental protection will eliminate the threat of ecoterror. But the fact that "mainstreaming" will not work in every case does not mean it is completely ineffective.<sup>156</sup> Creating an

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<sup>151</sup> For a similar conclusion with regards to international terrorism, see Saul, *supra* note 9, at 12 ("Criminalization is a powerful symbolic mechanism for delineating internationally unacceptable behaviour, irrespective of whether deterrence of ideologically motivated offenders is feasible.").

<sup>152</sup> Yardley, *supra* note 1.

<sup>153</sup> *Id.* Although the article describes the hesitation of authorities to attribute the attack definitively to the ELF, as was discussed above, the ELF is not hesitant to take responsibility for any acts of destruction done in its name, as it considers itself more an ethos than an organization. See *supra* Part I.B.

<sup>154</sup> See *supra* Part I.B.

<sup>155</sup> *Id.*

<sup>156</sup> See Pruitt, *supra* note 98, at 5 ("The most one can usually hope for with the mainstreaming strategy is to persuade enough former terrorists to become involved in the politics that

administrative climate where environmental protection is offered may have beneficial effects, not only on the environment, but in suggesting that mainstream environmentalism is not ineffective. Acts of ecoterror are crimes that, no matter which way they are looked at, will invariably do more harm than good. Therefore, states have every right to combat them as they see fit. The Vail attack prosecutions are an example of combating ecoterror with existing criminal statutes, albeit federal ones.<sup>157</sup> Pennsylvania, though yet to utilize it, has established a specific statute aimed at combating ecoterror.<sup>158</sup> Only time will tell if and how states will use these tools in conjunction with their power to dictate environmental policy to combat ecoterror and whether those efforts will be successful.

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the other terrorists become isolated and stop fighting.”); *see also supra* note 151 (positing that the statement criminalization makes is more important than deterrence).

<sup>157</sup> *See supra* Part II.C.

<sup>158</sup> *See supra* Part I.B.2.