# ENVIRONMENTAL CRIMES MONTHLY BULLETIN

***December 2006***

*EDITORS' NOTE:*

Please continue to submit information on relevant case developments in federal prosecutions for inclusion in the Bulletin. If you have a significant photograph from the case, you may email it, along with your information, to Elizabeth Janes at [redacted]. Material may be faxed to Elizabeth at [redacted] If you have information to submit on state-level cases, please send this to the Regional Environmental Enforcement Associations' website at http://www.regionalassociations.org.

You may quickly navigate through this document using electronic links for the *Significant Opinions*, *Active Cases*, and *Quick Links*.

## AT A GLANCE

*SIGNIFICANT OPINIONS*

- **United States v. Johnson, ___ F.3d ___ 2006 WL 3072154 (1st Cir. 2006).**

| Districts | Active Cases | *Case Type* / Statutes |
|---|---|---|
| N.D. Calif. | United States v. Jeffrey Diaz | *Owl Eggs* / Smuggling, False Statements |
| C.D. Calif. | United States v. Ionnias Vafeas<br><br>United States v. Bao Huynh<br><br>United States v. Andrew Nguyen | *Vessel* / APPS<br><br>*Lucky Fish* / Endangered Species Act<br><br>*Cycads* / Endangered Species Act |
| D. Colo. | United States v. Joseph Cannella | *Asbestos Abatement in High School* / CAA, Negligent Endangerment |
| N.D. Fla. | United States v. Michael Bonner | *Charter Vessel Permits* / Magnuson-Stevens Act, Conspiracy, False Statements |
| S.D. Fla. | United States v. Alvin Keel<br><br>United States v. Anthony Vidal Pego<br><br>United States v. InStar Services Group<br><br>United States v. Carib Sea, Inc. | *Sea Turtle Eggs* / Lacey Act, Endangered Species Act<br><br>*Chilean Sea Bass* / Magnuson-Stevens Act, Obstruction<br><br>*Condominium Restoration* / CAA<br><br>*Coral Rock* / Smuggling, Lacey Act |
| E.D. Ky. | United States v. Charles Hungler, Jr. | *Sewage Treatment Plant Operator* / CWA, False Statements |
| D. Maine | United States v. Petraia Maritime Ltd. | *Vessel*/ APPS, Obstruction |
| D.N.J. | United States v. Sun Ace Shipping Company | *Vessel* / APPS |
| S.D. Ohio | United States v. Robert Horner | *Timber Harvesting* / Theft of Timber from Public Lands |

Quick Links



# Significant Opinions

## First Circuit

**United States v. Johnson, ___ F.3d ___ 2006 WL 3072154 (1st Cir. 2006).**

This case remanded a Clean Water Act case involving discharges to wetlands for additional fact-finding, in light of the Supreme Court's decision in *Rapanos v. U.S.*, 547 U.S. ___ (2006). For the remand, the majority opinion in *Johnson* held that the *Rapanos* legal standards require a finding of Clean Water Act jurisdiction if the facts support Justice Kennedy's concurring "significant nexus" standard or the plurality "continuous surface connection" standard. Appellants lost their appeal in a civil case alleging that they had illegally discharged pollutants to federally regulated waters without a permit. The waters were wetlands, which had an undisputed "hydrological[] connect[ion] to the navigable Weweantic River by nonnavigable tributaries." Appellants sought a rehearing *en banc* while Rapanos was pending, but their motion was held in abeyance until the Supreme Court issued a decision. Then, in light of Rapanos, the First Circuit vacated its earlier decision and remanded the case for further proceedings.

This decision provides a cogent review of *Rapanos*, discusses several recent applications of that decision to District Court and Court of Appeals cases, and articulates new conclusions about how the multiple standards articulated in *Rapanos* should be applied. The *Johnson* court described those standards as (1) Justice Scalia's plurality opinion that wetlands are jurisdictional waters under the CWA only when there is a "continuous surface connection to bodies that are 'waters of the United States' in their own right;" and (2) Justice Kennedy's concurring opinion that wetlands possessing a "'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made" are jurisdictional.

Since there was no five-vote majority, courts interpreting *Rapanos* must rely on the Supreme Court's rule in *Marks v. United States*, 430 U.S. 188, 193 (1977), to determine how to apply the decision. That case calls on courts interpreting no-majority cases to apply the position taken by the Justices who concurred in the judgment on the "narrowest grounds." The *Johnson* court analyzed *Rapanos* in light of *Marks* and found that divining the narrowest grounds was fraught with difficulty and "shortcomings." In particular, the decision noted that the Ninth Circuit (*No. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006)) and the Seventh Circuit (*United States v. Gerke Excavating*, 2006 WL 2707971 (7th Cir. Sept 22, 2006)) have recently held that Justice Kennedy's

"significant nexus" test represents the narrowest grounds in *Rapanos*, because it limits federal jurisdiction the least. That conclusion may, however, be undermined, according to the *Johnson* court. Given the right factual basis, a court could logically find that a direct (if minor) surface connection to an undisputed jurisdictional water body--the plurality's touchstone--failed to demonstrate Justice Kennedy's significant nexus requirement. The *Johnson* Court explained that Justice Stevens' dissenting opinion offers a resolution of this dilemma because it reflected that "all four [dissenting] ustices would uphold the Corps' jurisdiction . . . in all other cases in which either the plurality's or Justices Kennedy's test is satisfied." More explicitly, Justice Stevens wrote that "in the unlikely event that the plurality's test is met but Justice Kennedy's is not, courts should . . . uphold the Corps' jurisdiction." In light of that analysis, the *Johnson* decision directed the court below to conduct any additional necessary fact-finding and to find jurisdiction if the facts support the standard of either Justice Scalia or of Justice Kennedy. In doing so, the Second Circuit followed the same approach applied by the district court in *United States v. Evans*, ___ F.Supp.2d___(2006).

# Trials

**United States v. Alvin Keel, No. 9:06-CR-80114 (S.D. Fla.), AUSA Lauren Jorgensen [redacted]**

**Sea turtle eggs**

On October 31, 2006, Alvin Keel was convicted after a bench trial on Lacey Act and Endangered Species Act violations for the unlawful possession of Loggerhead sea turtle eggs and the unlawful transportation of sea turtle eggs.

In July 2006, Keel was seen digging up nests of freshly laid Loggerhead sea turtle eggs, and he was arrested shortly after the incident. Law enforcement officers subsequently discovered a large bag containing two pillow cases filled with 471 sea turtle eggs.

The defendant is scheduled to be sentenced on January 26, 2007. This case was investigated by the United States Fish and Wildlife Service.

Back to Top

# Indictments

**United States v. Petraia Maritime Ltd., No. 2:06-CR-00091 (D. Maine), ECS Trial Attorney Wayne Hettenbach [redacted] and AUSA Rick Murphy [redacted]**

On November 22, 2006, a four-count indictment was returned charging Petraia Maritime Ltd. ("PML"), through the actions of its employees, with three APPS violations for failure to maintain an accurate oil record book ("ORB") and one count of obstructing justice.

PML, a Swedish company, was the sole owner and operator of the *M/V Kent Navigator*, a freighter registered in Gibraltar and doing business in Maine. During a port inspection in August 2004, Coast Guard investigators discovered evidence of illegal bilge waste discharges and the concealment of those discharges by failing to record them in the ORB. The obstruction charge stems from the company allegedly concealing and destroying the equipment used to carry out the discharges.

Two PML chief engineers, Felipe Arcolas and Alfredo Lozada, previously pleaded guilty to making false entries in the ORB.

This case was investigated by the United States Coast Guard.

Back to Top

**United States v. Michael Bonner et al., No. 3:06-CR-00450 (N.D. Fla.), ECS Trial Attorney Mary Dee Carraway** [redacted]

On November 14, 2006, Michael Bonner and Gerald Andrews were charged with conspiracy and two false statement violations for attempting to circumvent a moratorium on charter vessel permits under Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Act") regulations.

In November 2003, the Magnuson Act placed a moratorium on charter vessel/head boat permits for Gulf coastal migratory pelagic (ocean-going) fish and Gulf reef fish in an effort to address concerns regarding over-fishing and declining fish stocks. The regulation required that any person who could provide the National Marine Fisheries Service ("NMFS") with documentation verifying that, prior to March 29, 2001, s/he had a charter vessel or headboat under construction and had spent at least $5,000 toward construction as of that date was eligible for the permit. Specifically, copies of contracts, receipts, cancelled checks, and other applicable documents were required by NMFS to demonstrate that a permit applicant had a boat under construction and had spent more than $5,000.

The moratorium created a demand for the permits since they were not available to all charter boat owners. Anyone who could not meet the March 2001 deadline would have to purchase a permit from another boat owner with the permits valued at approximately $50,000.

Bonner was an Alabama boat builder and Andrews was a charter-boat fisherman in Florida. The indictment states that, in two separate contracts, the defendants agreed that Bonner would build Andrews two 65-foot commercial fishing vessels. The first, the ENTERTAINER, was to be used by Andrews to replace a boat that Andrews had wrecked off the coast of Florida in 2002. The second, the ESCAPE, was to replace a boat purchased by Andrews and his business partner in 2002.

The defendants are alleged to have submitted to the NMFS sales agreements signed and dated March 2, 2001, for both boats when in fact the agreements were actually signed on or about May 1, 2003, in an attempt to secure charter fishing permits prior to the moratorium's going into effect in September 2003.

Bonner and Andrews are scheduled for trial to begin on January 2, 2007. This case was investigated by the National Oceanic and Atmospheric Administration, Office of Law Enforcement.

Back to Top

# Pleas / Sentencings

**United States v. Jeffery Diaz, No. 06-CR-0050 (N.D. Calif.), ECS Senior Trial Attorney Bob Anderson [redacted] and AUSA Michael Nerney [redacted]**

On November 28, 2006, which was the eve of trial, Jeffery Diaz pleaded guilty to a four-count indictment stemming from his smuggling of 12 Austrian Eagle Owl eggs into the United States in 2005 (in heated Easter baskets) and then lying about this conduct on customs forms and elsewhere. Diaz specifically pleaded guilty to two felony smuggling counts and two felony false statement counts. Austrian Eagle Owls are listed as endangered and on the CITES Appendix II list. Their retail value is approximately several thousand dollars per bird.

Diaz is scheduled to be sentenced in April 2007. This case was investigated by the United States Fish and Wildlife Service.

Back to Top

**Owl hatched from smuggled eggs**

**United States v. Ioannis Vafeas, No. 2:06-CR-00585 (C. D. Calif.), AUSA Dorothy Kim [redacted]**

On November 27, 2006, chief engineer Ioannis Vafeas was sentenced to serve seven months' confinement with credit for four months he already had completed. The remaining three months will be served with one month of incarceration and two months' home confinement, followed by two years' supervised release.

Vafeas, a Greek citizen, pleaded guilty in August of this year to an APPS violation for maintaining a false oil record book. From January to June 2006, Vafeas was chief engineer for the *M/T Georgis Nikolos*, a tanker owned by Agiosgeorgis Investments E.N.E. and operated by Diamlemos Shipping Corp., both of which are based in Piraeus, Greece.

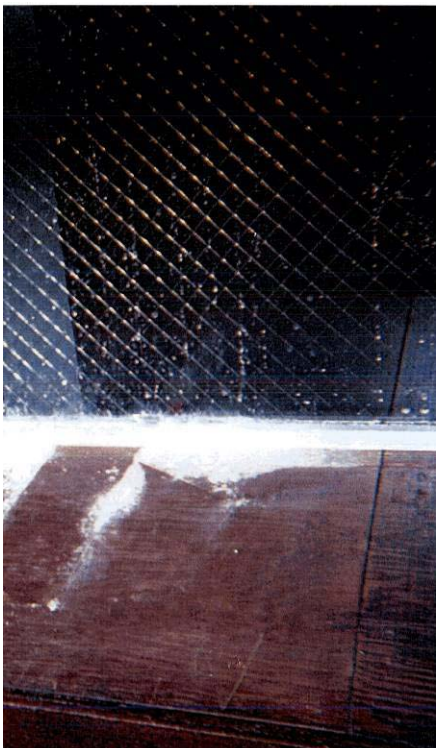
Vafeas admitted that, on numerous occasions, and prior to the ship's arrival in the Port of Long Beach in June of this year, he directed other engine room crew members to use a hose to bypass the oil-water separator on the ship resulting in the discharge of sludge and oily bilge water into the ocean. Vafeas also admitted to destroying the ship's "sounding notebook" used to record waste tank measurements and to directing crew members to dispose of equipment which was used for the illegal discharges.

This case was investigated by the United States Coast Guard and the United States Environmental Protection Agency Criminal Investigation Division.

Back to Top

**United States v. Joseph Cannella et al., Nos. 1:01-CR-00090, 3:04-CR-00152, 1:05-CR-00103 (D. Colo.), ECS Senior Counsel Jim Morgulec [redacted] AUSAs John Haried [redacted] and Tim Neff [redacted], and SAUSA Linda Kato [redacted]**

On November 20, 2006, Joseph Cannella was sentenced to serve six months' home confinement and was ordered to pay a $40,000 fine. The defendant also will be subject to a lifetime ban from the asbestos abatement industry.



**Asbestos on indoor window sill**

Cannella pleaded guilty in September of this year to two counts of negligent endangerment under the Clean Air Act. The pleas grew out of charges that Cannella, a senior management employee at National Service Cleaning Corporation ("NSCC"), an asbestos abatement contractor, and co-defendant Steven Herron, owner of Steve Herron and Associates ("SH&A"), an asbestos abatement consultant, conspired and caused multiple violations of CAA work practice standards relating to the removal and disposal of asbestos at Fort Morgan High School in Fort Morgan, Colorado, in July and August, 1999. Both defendants also were initially charged with multiple mail fraud violations. Herron had been charged with making a false writing in violation of 18 U.S.C. § 1001. Before he could plead guilty, Herron was involved in a serious motorcycle accident and passed away September 14, 2006. A motion to dismiss charges pending against him was filed.

Two other co-defendants previously have been sentenced in this case. Daniel Argil also was employed by NSCC to remove asbestos from the school and was sentenced to serve 68 months' incarceration, followed by three years' supervised release, for his role as the project supervisor. He also was ordered to pay $232,052.90 in restitution to the Morgan County School District.

Argil caused a significant amount of hazardous asbestos to be released into the air at Fort Morgan High School and directed employees to mishandle the material during the removal process. A high-powered water sprayer was used to remove the asbestos, which resulted in asbestos being discharged outside the containment area. The water-laden asbestos migrated to areas within the school, including inside lockers and wall systems. After the water evaporated, the asbestos remained as a dry powder that easily became airborne and thus was much more dangerous. As a result of his actions, Argil left Fort Morgan High School contaminated with asbestos when students, faculty, staff and employees returned to the school in the fall of 1999. Further, NSCC employees made efforts to conceal the company's failure to properly conduct the asbestos abatement project. Argil pleaded guilty to two felony CAA violations and a mail fraud violation. Co-defendant David Backus, an employee for SH&A, pleaded guilty to two mail fraud violations and was sentenced in May 2005 to serve 18 months' incarceration followed by three years' supervised release. Backus also was ordered to pay $15,800 in restitution.

This case was investigated by the United States Environmental Protection Agency Criminal Investigation Division.

Back to Top

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Back to Top

**United States v. Charles Hungler, Jr. et al., No. 3:06-R-00014 (E.D. Ky.), AUSA Robert Duncan, Jr.** [redacted]

On November 17, 2006, Charles Hungler, Jr., owner of Perfect-a-Waste Sewage Equipment Company ("Perfect-a-Waste"), was sentenced to serve a one-year term of probation. Additionally, Hungler, on behalf of the company, was ordered to pay a $10,000 fine. Hungler pleaded guilty in July of this year, individually and for the company, to a Clean Water Act violation for making a false statement on a discharge monitoring report.

Hungler owns and operates Perfect-a-Waste. The defendants both operate the Edgewood Sewage Treatment Plant, located in Franklin County. On July 28, 2005, Hungler submitted a Kentucky Pollutant Discharge Elimination System discharge monitoring report to Kentucky environmental authorities, falsely stating that samples had been taken when, in fact, they had not.

This case was investigated by the United States Environmental Protection Agency Criminal Investigation Division.

Back to Top

**United States v. Antonio Vidal Pego et al., No. 1:05-CR-20740 (S.D. Fla.), ECS Senior Counsel Jim Morgulec [redacted], ECS Senior Trial Attorney Elinor Colbourn [redacted] and AUSA Tom Watts-FitzGerald [redacted]**

***F/V Carran* in Singapore**

On November 13, 2006, Antonio Vidal Pego and Fadilur S.A. pleaded guilty and were sentenced on charges involving the illegal importation of Patagonian and Antarctic toothfish (*a.k.a.* "Chilean Sea Bass"). Pego pleaded guilty to an obstruction of justice violation and was sentenced to serve a four-year term of probation. He is further required to cease all involvement in the toothfish industry. Pego also will pay a $400,000 fine, which will go into the Magnuson-Stevens Fisheries Conservation and Management Act Fund ("Magnuson Fund").

Fadilur, a Uruguayan corporation, pleaded guilty to false labeling, importation of illegally possessed fish, and attempted sale of those fish. The company also will complete a four-year term of probation, cease all corporate activities, and dissolve as a business entity within 45 days. Fadilur will pay a $100,000 fine, which is payable to the Magnuson Fund.

In May and June 2004, 11 containers containing toothfish destined for four U.S. ports were seized by National Oceanic and Atmospheric Administration, Office of Law Enforcement ("NOAA") after discrepancies were found in required documentation submitted prior to the containers' arrival. The defendants subsequently provided to investigators additional documents which were found to have been intentionally altered for the purpose of making it appear that the original paperwork was accurate. The government seized more than 53,000 pounds of toothfish, valued at $314,397 wholesale, which arrived in Miami aboard the *F/V Carran*, a cargo vessel from Singapore. This is the first successful federal felony prosecution in the United States for activities involving illegal importation and sale of toothfish. Patagonian toothfish (*Dissostichus eleginoides*) and Antarctic toothfish *(Dissostichus mawsonii*), a.k.a. "Chilean seabass," are a slow-growing, deep sea species of fish found throughout large areas of the sub-Antarctic oceans. They can live approximately 40 years and breed relatively late in life. The Antarctic toothfish is found only in very southern latitudes and alongside the Antarctic icepack and reaches a smaller maximum length than the Patagonian toothfish. Chilean seabass has been the subject of international conservation efforts in the face of increased fishing pressure from both legal and "pirate" fishing.

This case was investigated by NOAA's Office of Law Enforcement, with assistance from the Department of Homeland Security, Customs and Border Protection Service.

Back to Top

**United States v. Bao Huynh, No. 06-CR-00247 (C.D. Calif.), Former AUSA William Carter.**

On November 13, 2006, Bao Huynh was sentenced to serve two years' probation after earlier pleading guilty to an Endangered Species Act violation for attempting to smuggle Asian Arowana, commonly known as "Lucky" fish, into the United States.

Huynh originally was charged in March of this year with smuggling, false statement, and ESA violations. Arowana are indigenous to Southeast Asia and can live for many years in an aquarium. The fish can grow to an adult length of two to three feet, and they sell for as much as $5,000 apiece in this country.

Huynh attempted to bring a shipment of tropical fish into the United States from Vietnam in January 2006. During an inspection, five Arowanas were found hidden in unmarked bags among other tropical fish. The smuggled fish were not listed on the customs declaration or other attached invoices and shipping papers.

This case was investigated by the United States Fish and Wildlife Service.

Back to Top

**United States v. Sun-Ace Shipping Company et al., No. 2:06-CR-00705 (D.N.J.), ECS Trial Attorney David Kehoe** [redacted]

**Bypass pipe**

On November 13, 2006, Sun Ace Shipping Company ("Sun Ace") was sentenced to pay a $400,000 fine plus an additional $100,000 community service payment to the National Fish and Wildlife Foundation, Delaware Estuary Grants Program, which will be used to protect and restore the natural resources of the Delaware Estuary and its watershed. The company also will complete a three-year term of probation during which time its vessels will be banned from U.S. ports and waters.

On September 6, 2006, Sun Ace pleaded guilty to a one-count information charging an APPS violation for failing to maintain an accurate oil record book. In January 2006, during a Coast Guard boarding of the *M/V Sun New*, a bulk carrier vessel operated by Sun Ace, inspectors found that members of the engine room crew had used bypass hoses to discharge oily wastes overboard into the ocean without using the vessel's oil-water separator.

A three-count indictment was previously returned charging chief engineer Chang-Sig O and second engineer Mun Sic Wang with conspiracy, obstruction of justice, and an APPS violation in connection with illegally discharging sludge and oil-contaminated bilge waste into the ocean using two bypass hoses.

According to the indictment, the engineers used two hoses on a trip from Korea to Camden, New Jersey, between November 20, 2005, and December 31, 2005, to circumvent required pollution prevention equipment and dump sludge and oily bilge waste into the ocean. On January 3, 2006, this bypass equipment was discovered by the U.S. Coast Guard during an inspection of the vessel in New

Jersey. The discharges were not noted in the oil record book, however, and thereby obstructed the investigation.

This case was investigated by the United States Coast Guard.

Back to Top

**United States v. InStar Services Group, Inc., No. 06-CR-60284 (S.D. Fla.), SAUSA Jodi Mazer** [redacted]

On November 8, 2006, InStar Services Group, Inc. ("InStar"), pleaded guilty to, and was sentenced for, CAA asbestos violations arising from a condominium restoration project. InStar is in the business of rehabilitating and restoring commercial and multi-family complexes in the wake of disasters. The company was hired to restore the Hawaiian Gardens Condominium Complex for damages caused by Hurricane Wilma. InStar admitted to knowingly failing to file the required advance notification of intent to conduct demolition or renovation activities for projects where asbestos could be disturbed and for knowingly violating the NESHAPs for asbestos during the renovation.

The company was sentenced to serve five years' probation and must pay a $1,000,000 fine. In addition, InStar will pay $2,000,000 in community service to the Florida Environmental Task Force Trust Fund and implement an environmental compliance plan.

This case was investigated by the United States Environmental Protection Agency Criminal Investigation Division.

Back to Top

**United States v. Carib Sea, Inc., et al., No. 1:06-CR-20677 (S.D. Fla.), AUSA Tom Watts-FitzGerald** [redacted]

On November 8, 2006, Carib Sea, Inc., an aquarium supply company, and Richard Greenfield pleaded guilty to, and were sentenced for, the illegal importation of more than 42,000 pounds of protected coral rock from Haiti to the United States. In March 2006, the defendants attempted to import approximately 357 bags of coral without a valid permit and in violation of CITES.

Carib Sea was sentenced to serve a three-year term of probation and was ordered to make a $25,000 community service payment to the South Florida National Park Trust. Greenfield also must complete a three-year term of probation and pay a $25,000 fine. The defendants were further held jointly liable for storage and transportation costs exceeding $10,000 for the seizure of the coral and also must publish a notice in three publications related to the aquarium trade, explaining the applicable CITES requirements and how they violated the law.

Back to Top

**United States v. Andrew Nguyen, No. 2:05-CR-1208 (C.D. Calif.), ECS Senior Trial Attorney Elinor Colbourn** [redacted] **and AUSA Joseph Johns** [redacted]

On November 2, 2006, Andrew Nguyen pleaded guilty to two smuggling violations and a false declaration in connection with the illegal smuggling of cycads. Nguyen was charged in December 2005 with conspiring to import specimens of cycads protected under CITES. The defendant was further charged with eight counts of smuggling and importing cycads by means of false declarations

and statements and one count of violating the Endangered Species Act. He also attempted to illegally import and sell approximately 800 cycad seeds.

Cycads, which resemble palms or tree ferns, are a small group of primitive-looking plants whose ancestors date back more than 200 million years. Certain cycad species face threats in the wild from habitat loss and over-collection. In April 2001, Nguyen agreed to purchase approximately 50 protected plants from a co-conspirator for approximately $26,000. The plants were shipped to Nguyen from Zimbabwe by a second co-conspirator. Rather than bearing labels with accurate descriptions of the plants, the specimens were labeled with numbers. Nguyen was provided with a key showing which numbers corresponded to which species. The permit accompanying the shipment did not authorize the shipment of any of the species in the actual shipment.

Nguyen is scheduled to be sentenced on December 18, 2006. This case was investigated by the United States Fish and Wildlife Service.

Back to Top

**United States v. Robert Horner et al., Nos. 1:06-CR-00123 and 124 (S.D. Ohio), AUSA Laura Clemmens** [redacted]

On October 23, 2006, Robert Horner and Michael Sark pleaded guilty to, and were sentenced for, one count of theft of timber from public lands for illegally harvesting trees from the Wayne National Forest.

In June 2002, Sark trespassed onto the Wayne National Forest and cut down and removed, or significantly damaged, timber with an approximate value of $9,500. In the course of his removing the timber, he also damaged archeological resources. In October, 2003, Horner trespassed into the Forest where he cut down and removed or significantly damaged 43 trees, including five pulpwood quality trees weighing approximately two tons, with a combined value of approximately $6,500.

Each defendant was ordered to pay a $300 fine and complete a one-year term of probation. Sark also will pay $4,570 in restitution to the United States Forest Service plus $3,099 for the damage to archeological resources. Horner will pay approximately $6,500 in restitution to the United States Forest Service.

This case was investigated by the United States Forest Service.

Back to Top

# Are you working on Environmental Crimes issues?

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[redacted]
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