

# Environmental Crimes

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# Introduction to the Environmental Crimes Issue of the USA Bulletin

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As the Assistant Attorney General of the Environment and Natural Resources Division, I am pleased to introduce this issue of the U.S. Attorneys' Bulletin on environmental crimes. I am proud of the collaborative relationship that the Environment Division enjoys with U.S. Attorneys' offices nationwide and the progress that we have made during the Obama Administration to enhance and sustain that relationship.

The focus on environmental crimes in this Bulletin could not be more timely. The articles in this Bulletin focus on law and policy relating to the criminal prosecution of environmental, wildlife and natural resource cases, and related offenses. They touch on the emerging issues in our practice, including the propriety of applying environmental justice principles to criminal enforcement, the use of the environmental laws to help protect our Nation's workers, and the recent amendments to the Lacey Act to combat illegal logging. Other articles consider difficult questions, such as when a prosecution for strict liability or negligence is appropriate. The remainder of the articles survey selected environmental crimes statutes and highlight general criminal law issues that environmental crimes prosecutors are likely to encounter. I commend the authors for sharing their insights and experiences with us.

The Environment Division handles some of the Nation's most pressing environmental issues. A core mission of the Division, and a priority of the Obama Administration and the Department of Justice, is strong enforcement of civil and criminal environmental laws to protect our Nation's air, land, water, and natural resources. The Division's mission also includes vigorous defense of environmental, wildlife and natural resources laws and agency actions; effective stewardship of our public lands and natural resources; and careful and respectful management of the United States' trust obligations to Native Americans. In all of the work that we do, we are mindful of the goals of environmental justice: to ensure that all communities enjoy the benefit of a fair and even-handed application of environmental laws and that affected communities have a meaningful opportunity for input in the consideration of appropriate remedies for the violations of the law.

During my tenure, I have traveled to many of your districts to meet with you. Each of your districts presents unique opportunities and challenges in enforcing the Nation's environmental, wildlife and natural resources laws. I have seen your commitment to environmental protection and the communities that you serve. Many of you have reached out to us to explore ways in which we may collaborate and leverage our resources. In November 2010, nearly all ninety-three U.S. Attorneys attended the first ever U.S. Attorneys' Environmental Crimes and Enforcement Conference in Washington, D.C. We have continued to work closely with U.S. Attorney Michael Cotter, the Chair of the Environmental Issues Subcommittee of the Attorney General's Advisory Committee, and other U.S. Attorneys nationwide. Together, we have launched task forces, generated referrals to your districts, conducted listening sessions with communities and tribes, provided training, and established mechanisms

to share points of contact and important information. We are encouraged by the vigor of your interest in joint enforcement efforts. You are the face of the Department in your communities, and by working together we can make our work enduring.

The Division welcomes and encourages your interest in our work, and we always like hearing from you. Please feel free to contact me. You may also contact Crystal Brown, Counsel to the Assistant Attorney General, who works on a range of matters involving U.S. Attorneys, at 202-514-2701 or [crystal.l.brown@usdoj.gov](mailto:crystal.l.brown@usdoj.gov), or Stacey Mitchell, Chief of the Environmental Crimes Section, at 202-305-0363 or [stacey.mitchell@usdoj.gov](mailto:stacey.mitchell@usdoj.gov).

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# Environmental Justice in the Context of Environmental Crimes

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## I. Introduction

Environmental crimes are committed in many communities across the nation and occur in a variety of settings. Nevertheless, anecdotal evidence strongly suggests that a disproportionately high percentage of environmental crimes takes place in communities that lack adequate resources to prevent these crimes or simply do not have effective means to provide redress for the violations that occur.

Ensuring that all communities enjoy the benefit of a fair and even-handed application of the law and that affected communities have a meaningful opportunity for input in the consideration of appropriate remedies for violations of environmental laws commonly falls under the rubric of “environmental justice.” No formula exists for addressing environmental justice in the context of environmental crimes prosecutions. This article proposes a number of methods to incorporate environmental justice into the prosecution of environmental crimes using traditional prosecutorial tools and approaches. These methods are by no means exhaustive, nor will every method be appropriate or feasible in every case with environmental justice implications. However, the suggestions in this article, coupled with increased understanding and awareness of environmental justice principles, may trigger further exploration and discussion regarding how the Department of Justice (DOJ) and its attorneys can effectively exercise criminal enforcement powers for the benefit of *all* citizens.

## II. What is “environmental justice”?

Understanding what environmental justice is constitutes an important precursor to understanding how to use prosecutorial tools to address environmental justice concerns. The phrase “environmental justice” means different things to different people. The United States Environmental Protection Agency's (EPA) working definition of environmental justice is “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” ENVIRONMENTAL JUSTICE, <http://www.epa.gov/environmentaljustice>.

The key elements of EPA's definition are “fair treatment” and “meaningful involvement.” The definition focuses on the context of making, applying, and enforcing laws. Other advocates may define environmental justice much more broadly and include issues such as social transformation, economic equality, and political empowerment. *See, e.g.,* Richard Hofrichter, *Toxic Struggles: The Theory and Practice of Environmental Justice*, University of Utah Press, Introduction, 4 (2002); KARL GROSSMAN,

UNEQUAL PROTECTION 271 (Robert Bullard ed., 1994). EPA's definition, however, is well-suited for purposes of discussing environmental justice in the context of criminal enforcement.

The concept of “environmental justice” first received widespread publicity in 1982 when residents of Warren County, North Carolina and civil rights activists staged protests over the siting of a landfill for the disposal of waste electrical transformer oil contaminated with polychlorinated biphenyls (PCBs). The county's population was eighty-four percent black. In 1983, a congressionally-requested study by the United States General Accounting Office of hazardous waste landfills was conducted in eight southeastern states. The Office found that of the four offsite hazardous waste landfills in Region IV, “[b]lack make up the majority of the population in three of the four communities where the landfills are located [and a]t least 26 percent of the population in all four communities have income below the poverty level.” U.S. Gen. Accounting Office, *SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES*, 1 (June 1, 1983).

Subsequent studies by private groups in the late 1980s and early 1990s found racial disparities in both the siting of hazardous waste facilities and the way in which the federal government remediated toxic waste sites and punished polluters. *See, e.g.*, Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, 15 NAT'L L.J. 3, S2-1 (1992); UNITED CHURCH OF CHRIST, COMMISSION FOR RACIAL JUSTICE, *TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES* 13 (1987).

Moreover, environmental justice concerns are not limited to the siting and clean up of hazardous waste facilities. According to a 1992 study conducted by the National Law Journal, “[m]inority communities saw lower average [civil] penalties in federal enforcement of the Clean Water Act, by 28 percent, the Clean Air Act, by 8 percent, and the Safe Drinking Water Act, by 15 percent.” Lavelle & Coyle, 15 NAT'L L.J. at S2-4.

### **III. The federal response to environmental justice**

Responding to this emerging policy issue, the EPA established the Office of Environmental Justice in 1992. In 1994, President Clinton issued Executive Order 12898, titled “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.” Exec. Order No. 12898 (1994). The order mandated that “each Federal Agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.” *Id.* The order further created an “Interagency Working Group on Environmental Justice.” It also required each agency to develop an environmental justice strategy for implementing the order and to collect and analyze information to determine whether their programs, policies, and activities have disproportionately high and adverse human health or environmental effects on minority and low-income populations. Agencies must also gather and analyze similar data for areas surrounding facilities or sites that “become the subject of a substantial federal environmental administrative or judicial action.” *Id.*

### **IV. Department of Justice efforts to promote environmental justice**

Following President Clinton's issuance of Executive Order 12898 on February 11, 1994, Attorney General Janet Reno issued “Department of Justice Guidance Concerning Environmental Justice” (Guidance) that is still in effect today. The DOJ guidance document defines an environmental justice case as “any civil or criminal matter where the conduct or action at issue may involve a

disproportionate and adverse environmental or human health effect on an identifiable low-income or minority community or federally-recognized tribe.” The document emphasizes that the assessment of cases for environmental justice implications is to be done on a case-by-case basis, taking into consideration the following factors:

- whether individuals, certain neighborhoods, or federally-recognized tribes suffer disproportionately adverse health or environmental effects from pollution or other environmental hazards;
- whether individuals, certain neighborhoods, or federally-recognized tribes suffer disproportionate risks or exposure to environmental hazards, or suffer disproportionately from the effects of past underenforcement of state or federal health or environmental laws;
- whether individuals, certain neighborhoods, or federally-recognized tribes have been denied an equal opportunity for meaningful involvement, as provided by law, in governmental decision making relating to the distribution of environmental benefits or burdens. Such decision making may involve permit processing and compliance activities.

The Guidance suggests that a number of questions must be asked to assess the environmental justice implications of a case. These questions include: (1) whether the conduct in question resulted in an identifiable adverse impact on the environment or an identifiable group of people; (2) whether the adverse impact disproportionately affected a low-income, minority, or tribal population; (3) whether the group in question may have suffered disproportionately from the effects of past underenforcement; and (4) whether the group in question was denied a reasonable opportunity for meaningful involvement in government decision-making concerning environmental issues that affected it, such as placement of facilities that adversely impact the environment or the processing of permit applications for activities that result in increased emissions of pollutants into the air or discharges into sanitary sewers or waterways.

The Guidance also directs that once a case has been determined to have the potential for environmental justice issues, the attorney(s) working on the matter have a number of responsibilities. These responsibilities include being alert to the environmental justice factors and requesting additional information from the investigative agency when needed, consulting with the prosecuting office's designated environmental justice coordinator regarding remedial or other action, and reporting the environmental justice matter on internal docket sheets. The attorney is also responsible to work with the agency and/or the attorney's component's environmental justice coordinator concerning the matter and, where appropriate, consider alternatives to litigation. Further, the attorney may consult various databases that contain demographic data. Attorneys are also in a position to work with the agencies with which they interact and provide input on environmental justice issues.

Environmental statutes provide a broad basis for protecting human health and the environment and do not require disproportionate impacts in order to carry out such protection of any group, including minority, low-income, and tribal communities. Environmental justice policies also do not require any particular outcomes for cases; they only require that environmental justice issues be taken into account in the decision-making process and that environmental justice concerns be addressed or mitigated when possible.

On September 22, 2010, the EPA and the White House Council on Environmental Quality held the first principal-level meeting of the Interagency Working Group on Environmental Justice (IWG) in over ten years. Eleven federal agencies and several White House offices attended. Attorney General Eric

Holder reaffirmed the Department of Justice's commitment to promoting environmental justice at the IWG meeting. He stated:

In too many areas of our country, the burden of environmental degradation falls disproportionately on low-income and minority communities—and most often, on the children who live in those communities. Our environmental laws and protections must extend to all people, regardless of race, ethnicity, or socio-economic status which is why the Department of Justice is committed to addressing environmental justice concerns through aggressive enforcement of federal environmental laws in every community.

Even before the IWG meeting, the Environment and Natural Resources Division (ENRD) had formed an Environmental Justice Working Group composed of members from all sections of the Division. ENRD's Environmental Justice Working Group, among other things, is developing methods to work more effectively with agency partners to address environmental justice concerns. The Group also trains members of the Department and those outside the Department to better identify and respond to environmental justice issues in their everyday work, facilitates communication between ENRD and the Civil Rights Division to encourage collaboration on environmental justice matters, and engages in outreach to environmental justice communities to determine their needs and concerns. ENRD has also hosted and participated in numerous environmental justice listening sessions in Washington, D.C. and around the country with communities, environmental justice leaders, tribes, and corporate representatives and has spoken about the Division's environmental justice efforts at various events. These outreach efforts continue to play a part in ENRD's activities.

## **V. How environmental justice issues may arise in the environmental crimes context**

Many reasons explain why environmental crimes occur in disadvantaged communities. One obvious reason is that industrial facilities where such crimes occur are often located in areas with low property values, making land acquisition less expensive. Another reason is that environmental violators may believe that less oversight or law enforcement follow-up to violations occurs in such areas. For example, experience demonstrates that illegal “midnight” dumping of hazardous waste almost always occurs in poor neighborhoods. Under the cover of darkness, the dumper will take a load of drums containing dangerous waste materials to a secluded area, such as a vacant yard, an alley, or an abandoned building, and simply leave the drums there rather than pay the cost of properly disposing of them. As a result, people living in the area, including children and other sensitive populations, may be exposed to potentially injurious chemicals. Such dumping only rarely occurs in an affluent neighborhood.

Similarly, it may be perceived that residents in a disadvantaged neighborhood have less voice and are less connected to those that enforce environmental laws. Consequently, some of those facilities (but certainly not all or a majority) may be more inclined to disregard environmental laws designed to protect human health and the environment, resulting in more unlawful emissions into the air and discharges into sanitary systems and waterways at those locations.

## **VI. Using traditional tools to achieve environmental justice**

Examination of environmental justice in the context of criminal cases has been limited. However, experience and studies in the context of civil enforcement suggest that criminal enforcement should help to ensure that communities suffering from disproportionate environmental burdens receive appropriate attention. Criminal enforcement can produce such an impact only if it is conducted in a consistent manner that diligently applies the principles of fairness and inclusion that are at the core of environmental justice. The goals of environmental justice policies and strategies adopted in the

environmental crimes context should include the development of opportunities for fair participation by all parties affected by environmental violations.

Each environmental crimes case is unique. Some of the tools discussed below may be appropriate in a particular case. In other cases, none of these tools may be a good fit. For yet others, an effective and practical approach may exist that is not discussed in this article. Prosecutors, just as they do during the investigation and prosecution of any crime, must make case-by-case determinations to pursue a criminal case based on the facts and applicable law.

For the purpose of discussing environmental justice, the life of a typical environmental criminal case may be broken into three phases: (1) generating cases or gathering leads; (2) investigation and prosecution; and (3) sentencing or case conclusion. Each stage provides opportunities to deploy the standard investigative or prosecutorial tools in ways that resonate with the basic principles of environmental justice.

### **A. Identifying cases with environmental justice implications**

Criminal environmental cases are identified or generated in a number of different ways and through a variety of agencies, including the EPA, the U.S. Fish and Wildlife Service, the U.S. Coast Guard, the National Oceanic and Atmospheric Administration, the FBI, and Immigration and Customs Enforcement. In some cases, agency regulatory personnel discover violations in the course of conducting regular inspections and determine upon review that the violations are criminal. In others, an agency's criminal investigators receive tips directly from concerned citizens. In still others, a criminal investigation may begin following an emergency response to a release of a pollutant or other significant event.

One important way to ensure fair and equal enforcement for all communities is to strengthen the ability to detect possible criminal violations, including those in places and communities where such violations have not typically been reported. No agency has the ability to be everywhere, so it is important to find ways to have additional eyes and ears on the ground. Also, some communities may be disinclined to report violations due to a mistrust of law enforcement that has grown out of a history of non-responsiveness or perceived (or real) unfair treatment in other contexts. In other situations, community members may not be aware of the availability of law enforcement and other resources to address environmental issues. Still others may not be fully informed about protective laws, the risks associated with certain types of activities or violations, or the possibility of criminal remedies. Therefore, communicating with the community and sharing information is a critical element to encourage the community to become meaningfully involved.

This identification phase of an environmental crimes case dovetails neatly with two central objectives of environmental justice: (1) fostering meaningful community participation; and (2) developing resources to help address disproportionate environmental impacts.

**Using task force resources to identify environmental justice.** State and local law enforcement and government agencies, in the form of police departments, sheriffs' offices, and various code enforcement agencies, are crucial partners in detecting potential environmental crimes. They live and work on a daily basis in affected communities and often have contacts with business and community groups that may be valuable sources of information, both about environmental problems and their potential origins. Police officers and other officials whose work involves regular visits to environmental justice communities and whose activities require interaction with community members are naturally in a

position to personally observe and learn about violations in a way that federal law enforcement agencies simply are not.

One way to reach out to local agencies is through environmental crimes task forces. Task forces, in their most basic form, generally convene at regular intervals with members of various state, local, and federal agencies. These agencies have jurisdiction in particular geographic areas to share information about ongoing and potential cases. Members of the task force may also provide each other with resources, expertise, and other forms of assistance to ensure that cases are handled as efficiently and effectively as possible.

In the context of environmental justice, task forces may be used to educate state and local law enforcement about environmental justice concerns and to encourage them to examine their own enforcement efforts to promote equal enforcement of environmental laws. State and local law enforcement members of a task force may also be a resource for federal prosecutors and agents. Once educated about environmental laws and the types of violations to look for, they can be important sources of information about potential violations, environmental problems in the local geographic area, community concerns, and the environmental compliance history of potential targets.

However, depending on the relationship a particular community has with law enforcement, even state and local law enforcement may lack a fully developed sense of the community's problems and priorities. Thus, consideration should be given as to how non-law enforcement agencies or even non-governmental community organizations can contribute to the work of the task force. Non-law enforcement agencies that may be important in this context include state and local housing authorities, water and sewer authorities, waste management authorities, health departments, fire departments, and park services. These types of agencies are likely to work in all areas of a geographic region and across many socio-economic and racial groups. Non-governmental community organizations may include groups that are specifically focused on environmental or environmental justice issues but may also include neighborhood watch groups, religious organizations, and more general civic and social activist associations. Efforts should be made to ensure that organizations from low income and minority areas are included as well. Local law enforcement and government agencies may assist task force organizers in identifying and contacting the range of available community organizations.

Some information that law enforcement officials may wish to share only among themselves, such as the status of ongoing investigations or sensitive criminal background information, may not be appropriate to share with non-law enforcement attendees. In some, hopefully rare, cases, non-law enforcement agencies such as water and sewer authorities may be potential targets of environmental crimes investigations. To address these issues, task force meetings may be bifurcated into "law enforcement sensitive" and "open" or "public" sessions. Community groups may be invited to special sessions of the task force.

Alternatively, task force members may regularly attend meetings of community groups to help educate their members and provide a face-to-face point of contact for reporting problems and concerns. The feasibility of these options will vary with the size and nature of both the task force and the communities within the task force's geographic area. Regardless of how this interaction is achieved, ensuring open lines of communication between the task force and various community groups should enhance the likelihood that the concerns of the community will be addressed in subsequent enforcement actions carried out by the task force's law enforcement members. Communication may also generate additional leads and help law enforcement agencies detect, investigate, and prosecute more cases of greater significance in environmental justice communities.

**Working with the media to ensure meaningful community participation.** The Department of Justice and United States Attorneys' offices regularly issue press releases when cases are charged, when defendants plead guilty or are convicted, and when defendants are sentenced. The Department's Office of Public Affairs disseminates press releases to major media outlets of national scope in appropriate cases, while press officers for the United States Attorneys' offices disseminate press releases to media outlets within their district. Efforts should be made to ensure that case-related news reaches environmental justice communities. Where task forces have been established and include outreach to community organizations, press releases may be shared with community organization members. Those community organization members may also be asked to suggest what media outlets are most likely to reach people living in their communities.

Prosecutors should also keep in mind that while computers and Internet access may seem ubiquitous, not all segments of the population have regular access to computers or the Internet. Consequently, efforts should be made to ensure that information is not disseminated solely through Internet resources.

**Environmental enforcement sweeps.** One proactive concept that may have significant utility for identifying violations in environmental justice communities is the "environmental enforcement sweep." The idea behind such a sweep is that, where a community faces multiple environmental burdens, administrative, civil, and criminal enforcement tools may be used in tandem to address the problems in a comprehensive fashion.

Assume, for example, that a four square mile area includes an environmental justice community that has substantially higher levels of asthma, cancer, and lead poisoning than people living in other nearby communities. Assume further that there are ten industrial facilities and that four of them have histories of failing to comply with permit and/or regulatory requirements. An environmental enforcement sweep may consist of an investigation of all four out-of-compliance facilities to assess whether administrative, civil, or criminal enforcement is appropriate for each. If appropriate, the sweep may also include air monitoring to ascertain potential causes of the elevated rates of asthma and cancer in that community.

The environmental enforcement sweep for this area would necessarily require substantial work at the front end before on-the-ground enforcement efforts are undertaken. First, the regulatory records of each of the polluting entities would be reviewed to assess what environmental impacts each have had on the community. The agencies in the sweep may review each facility's permit compliance history, enforcement history, and other information that may provide insights into the facility's effects on the surrounding area. Second, other potential environmental factors may be examined. In this example, the high lead concentrations found in blood tests may result from lead paint poisoning that may be connected to the failure of local landlords to make required lead paint disclosures, another violation that is connected to the location. Outreach to the community may also help to gather information about the places where people live. Third, each potential violation of an environmental law(s) would need to undergo assessment so that the appropriate type of enforcement may be determined (for example, whether action should be administrative, civil, or criminal). More than one federal agency may have an interest in participating. Depending on the particular issues in the community, EPA, OSHA, FBI, and others may have a role to play. Coordination with state authorities would also be necessary and helpful.

Once information has been gathered and analyzed and enforcement decisions have been made, implementation of the sweep can take place. Where appropriate, administrative action may be taken to enforce the laws and bring a facility into compliance. If sufficient evidence of criminal activity exists in an appropriate case, special agents and prosecutors may initiate an investigation to assess the propriety of

bringing criminal charges that will have an added deterrent effect. Civil enforcement tools may also be employed to achieve similar results.

The New Jersey Department of Environmental Protection has successfully undertaken environmental enforcement sweeps. The agency assembled an enforcement team, entered a discrete urban area, and conducted broad inspections. During these sweeps, the team engaged in various outreach efforts and compliance-related activities. These targeted enforcement efforts have been used to address a number of issues, including engine idling, waterway protection, wetlands violations, and worker safety.

## **B. Taking environmental justice issues into account during the investigation and prosecution phase**

After a potential violation is identified and, at least initially, determined to be criminal in nature, the case enters the investigation and prosecution phase. At this stage, laws, rules, and regulations curtail the amount of community participation and information-sharing that is possible, particularly during the pre-indictment stage of the case. For example, Rule 6 of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3322 prohibit the disclosure of proceedings before a federal grand jury, except in narrowly defined circumstances. This bar applies broadly, not only to information concerning what actually happened before the grand jury but also to information that could reveal the strategy, direction, scope, or focus of the investigation. *See, e.g., United States v. Dynavac, Inc.*, 6 F.3d 1407, 1413 (9th Cir. 1993); *Fund for Constitutional Gov't v. Nat'l Archives & Records Serv.*, 656 F.2d 856, 869 (D.C. Cir. 1981); *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960). The grand jury process is often used in criminal cases, particularly environmental criminal cases, to acquire documentary and testimonial evidence. Important investigative reasons may also exist for keeping an investigation or parts of an investigation confidential.

Despite these limitations, opportunities are often available to effectively and appropriately engage with communities in the investigation and prosecution phase of the case. Accordingly, this phase of the process may also serve to further both the principles of meaningful involvement and fair treatment, thus allowing community members to play an active role in defense of their own community and helping to better inform the outcome of criminal prosecutions.

**Community members as witnesses.** In many criminal investigations—environmental and otherwise—investigators speak with the people who live and work in the area of the crime to find leads, witnesses, and other evidence pertaining to the crime. Community members may become valuable witnesses. For example, in a case involving the release of a pollutant or hazardous substance, neighbors may have personally witnessed the release or made observations of the effects of the release, such as odors, clouds of dust or other visible emissions, dead vegetation, physical ailments, and so forth, that would tend to prove that the release occurred. In a case involving the illegal taking or killing of an animal, community members may have viewed the actual conduct or observed signs of a take, such as animal carcasses, signs of struggle, or habitat damage. Some community members may be employees of a corporate violator and thus have useful information as a result of their employment. Community members with longevity in the community may also be able to provide information that can be useful in determining whether a particular conduct is part of a practice or pattern of an individual or corporate target.

Typically, law enforcement agents should be able to identify potential witnesses from the community in the normal course of their investigation. When reviewing evidence gathered during the course of the investigation, prosecutors similarly should look for this kind of information and, where appropriate, request it. Community witnesses may not only be a factor in convicting a defendant but may

also be important in achieving an appropriate sentence. In addition to strengthening the potential case, reaching out to community members as witnesses has the added benefit of providing environmental justice communities with a voice in the early stages of the case. Interviews of community members provide agents and prosecutors with a sense of a community's concerns and what outcomes an affected community would like to see at the conclusion of a criminal case. Speaking with community member witnesses leads to information about how the environmental violations have impacted the community. Such communication may also provide agents and prosecutors with an opportunity to educate community members about the criminal justice system, environmental laws and regulations, and the potential availability of other forms of assistance, including legal assistance or medical assistance as appropriate.

**Crime Victims' Rights Act and environmental justice.** In certain circumstances, the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, actually requires some level of information-sharing and community involvement. Accordingly, requirements of the CVRA are consistent with principles of environmental justice, such as the fair and even-handed application of the law and providing affected communities with a meaningful opportunity for input in the consideration of appropriate remedies for violations of environmental laws.

The CVRA affords certain rights to crime victims, including the right to reasonable, accurate, and timely notice of public court proceedings; the right to be present at public court proceedings unless the court finds that the victim is also a potential witness and that his testimony would be materially altered; the right to be reasonably heard at any public proceeding involving release, plea, sentencing, or parole; the right to confer with the attorney for the government; the right to full and timely restitution where provided by law; the right to proceedings free from unreasonable delay; the right to be treated with fairness and with respect for the victim's dignity and privacy. *Id.* § 3771(a). The statute defines a “crime victim” as “a person directly and proximately harmed as a result of the commission of a Federal offense . . . .” *Id.* § 3771(e). Thus, the CVRA is focused on identifiable victims who have suffered some harm as a result of the environmental crime. For prosecutors, obligations under the CVRA begin once an offense is charged in federal district court. An investigative agency's obligations may begin earlier. Attorney General Guidelines for Victim and Witness Assistance, 22-26 (2005).

The CVRA provides that for cases with a large number of victims, such as an entire community or an entire region, the court—usually through a recommendation made in a government motion—must fashion a “reasonable procedure to give effect to” the CVRA. 18 U.S.C. § 3771(d) (2011). So, for example, courts have approved providing notice of court proceedings through press conferences, press releases, specially created public Web sites, newspaper advertisements, toll-free telephone numbers, and proxy notice to group representatives. *See, e.g., In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 559 (2d Cir. 2005); *United States v. Stokes*, 2007 WL 1849846, at \*1 (M.D. Tenn. June 22, 2007); *United States v. Purdue Frederick Co., Inc.*, 495 F. Supp. 2d 569, 573 (W.D. Va. 2007).

Here again, limitations on information-sharing with community members may exist. Before the issuance of formal charges, as noted above, the government is not permitted to share information concerning matters that occur before a grand jury. Given that a community defined as a victim would be specifically approached because an investigation, often involving the grand jury, is underway, it may be extremely difficult in many cases to share detailed information with victim communities without running afoul of grand jury secrecy requirements.

Nonetheless, by ensuring that victims of environmental crimes have notice of court proceedings and by advising them of their right to speak at proceedings such as pleas and sentencing, the CVRA and the procedures that the DOJ has established to assist in its implementation should, in appropriate circumstances, serve as another tool for meaningful involvement of environmental justice communities in

criminal environmental cases. Prosecutors handling environmental crimes cases should carefully analyze who the potential victims are early in the investigation to help maximize the CVRA's usefulness in implementing environmental justice principles.

### **C. Environmental justice in the sentencing and case conclusion phase**

Perhaps the most significant opportunity for meaningful involvement by affected community members in a criminal case occurs at the time of case resolution. An impacted community should be afforded the opportunity to communicate with those deciding how the case is to be resolved and how case resolution may help offset the environmental burden the community has carried. Conceptually, several methods of involving a community are available, including involvement in pleas and sentencing, restitution, compliance with environmental requirements, and community service.

**Community involvement in plea agreements and sentencing.** Community members may be particularly interested in giving input in two stages of the decision-making process: (1) negotiation of a resolution by plea agreement; and (2) sentencing. Community involvement in the first stage may be difficult. When a case has not been charged and the government is negotiating a plea agreement with the target of an investigation, the fact of the investigation generally has not been made public. Various restrictions limit the information that the government may share concerning an ongoing investigation. Thus, if the government announced to a community that it was investigating criminal conduct by a company, described the nature of the investigation, and asked for public comment about a plea agreement it was contemplating, the government could run afoul of its own guidelines and the rules of ethics that govern attorney conduct. Nevertheless, most plea agreements reserve for the judge at least some leeway on the ultimate sentence. While the government and the defendant may agree on the amount of a fine, the court may wish to exercise its discretion in formulating an environmental compliance plan, remediation, community service, or other conditions of probation. In those circumstances, community outreach, town hall meetings, and opportunities for members of the affected community to write to the probation officer and the judge and to be heard at the sentencing hearing may be available. As noted above, the CVRA obliges the court to consider the concerns of a directly affected community.

Fewer concerns exist when the government is negotiating a plea agreement with a defendant who has been charged in an unsealed indictment. In this situation, the nature of the charges and the defendant's conduct are largely public. Particularly where an indictment contains a relatively detailed description of the charges against the defendant, the community will have a better basis to comment on what an appropriate resolution of the case may be. The government, however, is not without limitations. For example, grand jury material would still be considered secret and could not be disclosed to the public, possibly making discussion of certain facts in relation to a potential resolution difficult. Once a defendant has been convicted, by trial or plea, community members have a greater opportunity to become involved, to comment, and to have input on the outcome of the sentencing hearing. In these situations, again, the type of community outreach discussed above should be implemented prior to sentencing.

**Restitution in environmental justice cases.** Three provisions in Title 18 of the U.S. Code specifically provide courts with the authority to impose restitution. Only one of these provisions, however, applies to offenses under the environmental statutes. The first provision, 18 U.S.C. § 3663, gives courts the discretion to order that a defendant provide restitution to victims of Title 18 crimes and for certain other listed federal offenses. Because environmental crimes are not Title 18 violations and are not listed in § 3663, they do not fall within the scope of that section. Second, under certain circumstances for some listed types of crimes, restitution is mandatory under 18 U.S.C. § 3663A. Again, offenses under

environmental statutes are not included. To the extent that a Title 18 offense is used to convict a defendant in an environmental criminal case, the provisions of these two sections may apply.

Restitution, however, *is* authorized in criminal cases involving violations of environmental statutes by a third provision, 18 U.S.C. § 3563. Section 3563 establishes the authority of the courts to set conditions of probation. Subsection (b)(2) of that provision states that the court has the discretion to order a defendant to “make restitution to a victim of the offense under section 3556 (but not subject to the limitation of section 3663(a) or 3663A(c)(1)(A)).” 18 U.S.C. § 3563(b)(2) (2011). This provision, therefore, makes restitution available for crimes other than those specified in the first two provisions; however, it must be as a condition of probation or supervised release and it is discretionary, not mandatory. 18 U.S.C. § 3582(d) (2011).

Restitution may be awarded only to an identifiable victim of a crime. The term victim is described in § 3663(a)(2) as “a person directly and proximately harmed” as a result of the offense. Thus, for this provision to apply to a resident in an environmental justice community, the environmental violation itself must have caused some specific and identifiable harm to that individual. It may be difficult in some environmental cases to identify victims “directly and proximately harmed” by the violation. For that reason, prosecutors should gather and evaluate evidence of direct and proximate harm to individuals during an investigation to make a fair and accurate assessment of who is a victim and to build a strong argument for the court's consideration.

**Compliance and super-compliance in environmental justice cases.** Implementing an environmental compliance plan that is designed to ensure that the facility in question improves its environmental record and complies with the laws created to protect the health of the neighboring community may also benefit members of an environmental justice community that are adversely affected by environmental criminal conduct. A number of cases have used environmental compliance plans. Typically an environmental compliance plan includes a plan to bring the facility into compliance, if it has not already done so, and to keep it in compliance during its term of probation. It may involve the use of detailed equipment upgrades, a court-appointed monitor, an outside consultant, rigorous reporting requirements, and other tools to ensure that the facility not only comes into compliance, but remains there.

Moreover, while compliance with a permit or regulation may be a goal of an environmental compliance plan, it need not be the only goal. These plans may require that the offending facility not only meet, but exceed its legal requirements. For example, if a level of allowable emissions or discharges from a defendant facility exists, the environmental compliance plan may call for an even lower level of specific parameters that are of particular concern. The plan may be even more protective of the health of the environmental justice community than afforded by environmental laws or regulations standing alone. Consequently, going beyond mere compliance may partially offset historical exposures to pollutants at levels that violated a defendant's permit or regulations.

**Community service projects in environmental justice cases.** Another method to improve the environment of affected environmental justice communities is through the use of community service. It is not always possible to directly negate the environmental infringement caused by a violation. For example, discharges into a river may have flowed down stream and be long gone. Thus, it would be virtually impossible to recapture the precise pollutants illegally discharged. In such situations, it may be appropriate for a defendant to participate in a community service program designed to offset the pollution activity caused by its illegal conduct. Actions that improve the quality of such a river may help offset the damage caused by the defendant and improve the quality of life in the affected community.

A number of criteria are available to increase the likelihood that community service projects achieve the goals that are envisioned. First, a “medium” nexus should be involved, that is, the project should have the effect of improving the environmental medium degraded by the unlawful conduct (for example, air, water, or land). Second, a geographic nexus should be identified, that is, the project should be located in the same approximate geographic area as the environmental violation. By using these simple guidelines, prosecutors can help ensure that the communities most directly affected by the pollution will benefit from the community service project.

## VII. Conclusion

The Environmental Crimes Section and the U.S. Attorneys' offices have been prosecuting cases with environmental justice implications for years. Environmental crimes cases have involved defendants that have committed illegal acts, such as exploiting poor and homeless workers by having them illegally remove asbestos without proper safety gear or training; dumping hazardous wastes in poor and minority neighborhoods; illegally discharging waste into waters located near poor and minority communities; and failing to disclose the presence of lead paint to poor and minority apartment tenants. With increased awareness and in appropriate circumstances, DOJ attorneys may go further to promote environmental justice by improving awareness of the issue among investigators and involving environmental justice communities in the crafting of resolutions. ❖

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# Post *Flores-Figueroa*: The Impact on the Knowing Mental State in Environmental Prosecutions

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## I. Introduction

In 2009, the Supreme Court issued its opinion in *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009), addressing the question of how far down the list of elements does the knowing mental state requirement apply. Relying on rules of ordinary grammatical construction, the Court held that the mental state requirement attached far down the line. *Flores-Figueroa* is one of the latest in a line of cases that interpret the knowing mental state in criminal statutes. While these cases establish guidelines for the application of the mental state, the path has often changed course, and uncertainty still exists when applying the mental state requirement to environmental crimes. This article reviews some of the principles, at times conflicting, that have shaped courts' decisions leading up to *Flores-Figueroa* and considers how the *Flores-Figueroa* approach may impact environmental crimes prosecutions.

## II. Using ordinary English grammar as a guide to interpreting the knowing mental state requirement

The statute at issue in *Flores-Figueroa* was 18 U.S.C. § 1028A(a)(1). This statute requires a court to impose a consecutive two-year mandatory period of imprisonment when a defendant has been convicted of one of the enumerated, predicate crimes listed in § 1028A(c), including theft of government property, fraud, or unlawful activities relating to immigration, if in doing so the offender “knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person.” *Id.* Here, the defendant, a foreign national, used counterfeit Social Security and alien registration cards to apply for a job in Iowa. Flores-Figueroa's employer reported the information to U.S. Immigration and Customs Enforcement. Customs discovered that the numbers on his Social Security and alien registration cards belonged to other people. The defendant was charged and convicted of illegal entry into the United States under 8 U.S.C. § 1325(a) and misuse of immigration documents under 18 U.S.C. § 1546(a), both of which constitute predicate offenses under § 1028A. He was additionally convicted of violating § 1028A(a)(1), and his sentence was increased by two years. He did not challenge the convictions for the predicate crimes but appealed his conviction under § 1028A(a)(1).

The critical issue on appeal was whether the knowing mental state requirement under § 1028A(a)(1) meant that the government had to prove that Flores-Figueroa knew that the counterfeit

identification numbers he was using belonged to another actual person. The government argued that the knowledge requirement attached only to the elements up to the “means of identification” language, that is, that the defendant only had to know the identification numbers he was using were false. The defendant argued that he had to know not only that he was using a false “means of identification” but also that the identification was “of another person.”

The Court reversed Flores-Figueroa's conviction under § 1028A(a)(1) by relying on an “ordinary” grammatical reading of the statutory language. It stated that “[a]s a matter of ordinary English grammar, it seems natural to read the statute's word 'knowingly' as applying to all the subsequently listed elements of the crime.” *Flores-Figueroa*, 129 S. Ct. at 1890. The Court further explained that “[i]n ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence.” *Id.* Moreover, the Court emphasized the significance of this “ordinary English” reading when it rejected the government's attempt to distinguish prior holdings where the knowledge requirement had been extended. The Court stated, “[t]he Government correctly points out that in these cases more was at issue than proper use of the English language” but asked, “if more is at issue here, what is it?” *Id.* at 1892-93. Applying ordinary rules of grammar, the Court held that the knowledge requirement applied to all subsequently listed elements and therefore the defendant could not be convicted of violating § 1028A(a)(1), because the government could prove only that he was knowingly using counterfeit identification numbers and not that he knew the numbers belonged to someone else.

The Court also relied on a “natural reading” of statutory language in *Dean v. United States*, 129 S. Ct. 1849 (2009), an opinion issued five days prior to *Flores-Figueroa*. In that case, however, the Court came to a different result, deciding that the intent requirement did *not* apply to all sentencing factors in upholding a mandatory sentencing enhancement. The defendant had accidentally discharged a gun while committing a bank robbery. He admitted to carrying the firearm during the robbery, a violation of 18 U.S.C. § 924(c)(1)(A) that punishes anyone “who, during and in relation to any crime of violence . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm.” Pursuant to § 924(c)(1)(A)(iii), providing for an enhanced sentence if the firearm is discharged, the defendant received an increased sentence of ten years. He did not challenge the conviction under § 924(c)(1)(A) but appealed the sentencing enhancement under § 924(c)(1)(A)(iii), arguing that, for the enhancement to apply, he had to have intended for the gun to discharge.

The Court disagreed, starting “as always, with the language of the statute.” *Id.* at 1853. It noted that § 924(c)(1)(A)(iii) did not contain any mens rea requirement. The defendant, however, argued that Congress had included an intent requirement in the opening paragraph of § 924(c)(1)(A) when it wrote into the statute that the firearm had to be used “during and in relation to” the predicate crime. The defendant further asserted that the intent requirement extended to the sentencing enhancement contained in subparagraph (iii). The Court noted that such a reading would “require[] that a perpetrator knowingly discharge the firearm for the enhancement to apply.” *Id.* at 1854. While the Court tacitly agreed that an intent requirement had been created in the opening paragraph, it rejected the notion that the intent requirement extended to the discharge element contained in subparagraph (iii), stating:

The most natural reading of the statute, however, is that “in relation to” modifies only the nearby verbs “uses” and “carries.” The next verb—“possesses”—is modified by its own adverbial clause, “in furtherance of.” The last two verbs—“is brandished” and “is discharged”—appear in separate subsections and are in a different voice than the verbs in the principal paragraph. There is no basis for reading “in relation to” to extend all the way down to modify “is discharged.”

*Id.* This approach appears to be consistent with the Court's reliance on an “ordinary English” reading in *Flores-Figueroa*. In that case, the word “knowingly” appeared immediately before the elements of the offense in the same sentence, whereas in *Dean* the intent requirement was in a separate subsection from the sentencing factor and the language in the paragraphs used a different voice. However, the reliance on “ordinary” or “natural” readings of the statutes leads to seemingly inconsistent rulings between *Flores-Figueroa* and *Dean* when it comes to the application of a principle of criminal law and carries with it repercussions for environmental prosecutions. For a critical analysis of the Court's reliance on cues taken from the statutory text as opposed to criminal law principles in these two cases, see Eric. A. Johnson, *Does Criminal Law Matter? Thoughts on Dean v. United States and Flores-Figueroa v. United States*, 8 OHIO ST. J. CRIM. L. 123 (2010) (discussing the interpretation of criminal statutes that are silent or ambiguous about the culpable mental state associated with a particular objective element).

### **III. The *X-Citement Video* rule: applying the knowledge requirement to distinguish innocent from culpable behavior**

In *Dean*, the evidence demonstrated that the defendant did not intend to discharge the firearm, and he asserted that the sentencing enhancement did not apply because he did not have the requisite mental state for the discharge factor. In addressing the issue, the Court stated that while “[i]t is unusual to impose criminal punishment for the consequences of purely accidental conduct . . . it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts.” *Dean*, 129 S. Ct. at 1855. Noting that the defendant was “already guilty of unlawful conduct,” the Court further explained that “[t]he fact that the actual discharge of a gun . . . may be accidental does not mean that the defendant is blameless.” *Id.*

The Court's language here reflects a principle previously expressed by the Court in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994). In *X-Citement Video*, the Court relied on *United States v. Feola*, 420 U.S. 671 (1975) and stated that “[c]riminal intent serves to separate those who understand the wrongful nature of their act from those who do not, but does not require knowledge of the precise consequences that may flow from that act once aware that the act is wrongful.” *X-Citement Video*, 513 U.S. at 72; *see also Carter v. United States*, 530 U.S. 255, 269 (2000) (“The presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'”) (citing *X-Citement Video*, 513 U.S. at 72). As interpreted by courts in subsequent opinions, this principle expressed in *X-Citement Video* sets a floor and, in some cases, a ceiling for the knowing mental state requirement.

In *X-Citement Video*, the Court ruled that in order to be convicted under 18 U.S.C. § 2252 (prohibiting the interstate transportation, shipping, receipt, distribution, or reproduction of visual depictions of minors engaged in sexually explicit conduct), a defendant must be aware that the person depicted was a minor. *X-Citement Video*, 513 U.S. at 78. A critical consideration in the Court's opinion was that “one would reasonably expect to be free from regulation when trafficking in sexually explicit, though not obscene, materials involving adults. Therefore, the age of the performers is the crucial element separating legal innocence from wrongful conduct.” *Id.* at 73. Courts have applied this rule to mean that “statutes defining federal crimes are thus normally read to contain a *mens rea* requirement that attaches to enough elements of the crime that together would be sufficient to constitute an act in violation of the law.” *United States v. Figueroa*, 165 F.3d 111, 116 (2d Cir. 1998). Construing the rule in this way “is particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct.” *Id.* at 116 (citing *Liparota v. United States*, 471 U.S. 419, 426 (1985)). Notably, in *X-Citement Video*, the statutory language separated the “knowing” requirement from the “use of a minor” element, but the Court did not deem this separation to be controlling, noting its

“reluctance to simply follow the most grammatical reading of the statute . . .” *X-Citement Video*, 513 U.S. at 70.

The main thrust of the *X-Citement Video* rule thus posits that the knowledge requirement must attach to enough elements of the offense to distinguish innocent from culpable behavior. In *United States v. Figueroa*, 165 F.3d 111, 116 (2d Cir. 1998), the Second Circuit explained that “[t]his principle of construction can be used to set a presumed floor to the knowledge requirement . . .” *Figueroa*, 165 F.3d at 116. A line of cases has developed determining that, once this floor has been met, *X-Citement Video* does not require more. This reasoning was the primary basis for the opinion written by then-Circuit Judge Sotomayor in *Figueroa*. In that case, the defendant, an INS inspector, was convicted of violating 18 U.S.C. § 1327 that provides increased penalties for “[a]ny person who knowingly aids or assists any alien [excludable] under § 1182(a)(2) . . . to enter the United States . . .” *Id.* at 112-13. Section 1182(a)(2) provides for the exclusion of aliens that are convicted of an aggravated felony. The defendant in *Figueroa* admitted that he knew the alien had been excluded and further admitted that he had conspired to permit the alien to enter the country illegally. He argued, however, that he did not know the exclusion was due to the alien's felony status and that, consequently, he did not have the requisite mental state to violate § 1327. He relied on the reasoning set forth in *X-Citement Video* to argue that “the most natural grammatical reading” meant that the knowing requirement extended to all the elements of the offense. *Id.* at 115 (quoting *X-Citement Video*, 513 U.S. at 68).

The *Figueroa* court rejected this argument, explaining that “[i]n the case of statutes like this . . . where a mental state adverb can modify some or all of the remaining words in a sentence, neither grammar nor punctuation resolves the question of how much knowledge Congress intended to be sufficient for a conviction.” *Id.* The court noted that *X-Citement Video* “did not reject the proposition that scienter requirements should be presumed to stop once a defendant is put on notice that he is committing a non-innocent act.” *Id.* at 117. The court upheld the conviction, concluding that “defendants can be found guilty under § 1327 provided they have sufficient knowledge to recognize they have done something culpable.” *Id.* at 118. It found that the mens rea requirement did not extend to the “prior aggravated felony conviction” element and held “that a defendant can be convicted under § 1327 for aiding an alien who is excludable because of a prior aggravated felony conviction if the defendant knows only that the alien is excludable.” *Id.* at 119.

In reaching this conclusion, the court reviewed and relied on a line of cases where, once a threshold of culpability had been established, the mental state requirement was held not to attach to all elements of the offense. For example, the court cited to *United States v. LaPorta*, 46 F.3d 152 (2d Cir. 1994), involving convictions for the destruction of government property. That court held that the defendant did not have to know the property belonged to the government because arson was already an illegal activity. The *Figueroa* court also noted *United States v. Cook*, 76 F.3d 596 (4th Cir. 1996), where the defendant received controlled substances from a minor. In that case, the court held that the defendant did not need to know the age of the giver because knowing receipt of controlled substances was already a crime. The court also relied on *United States v. Hamilton*, 456 F.2d 171 (3d Cir. 1972), where the defendant transported minors across state lines for purposes of prostitution. The *Hamilton* court held that the defendant did not have to know the age of the victims because he was already knowingly engaging in prostitution. *Accord United States v. Taylor*, 239 F.3d 994, 996 (9th Cir. 2001) (upholding conviction for transportation of minor for prostitution despite defendant's belief the victim was not a minor “because the statute is intended to protect young persons . . . transported for illicit purposes, and not transporters who remain ignorant of the age of those whom they transport”).

The *Hamilton* and *Taylor* cases are not inconsistent with *X-Citement Video*. Rather, a comparison of these cases highlights and further clarifies the application of the principle. As discussed, a critical

consideration for the Court in *X-Citement Video* was the fact that trafficking in sexually explicit materials involving adults was not illegal and, therefore, “the age of the performers is the crucial element separating legal innocence from wrongful conduct.” *X-Citement Video*, 513 U.S. at 73. In contrast, prostitution, unlike distribution of sexually explicit materials involving adults, is illegal regardless of the age of the victim. Therefore, the defendant's knowledge regarding the age of minority does not serve to separate innocent from criminal activity. See *United States v. Cox*, 577 F.3d 833, 837 (7th Cir. 2009) (distinguishing *X-Citement Video* from cases involving transportation of minors for purposes of prostitution).

The holdings in *Dean*, *Figueroa*, and other appellate cases limiting the knowledge requirement stand in apparent contrast to the Supreme Court's holding in *Flores-Figueroa*. In *Flores-Figueroa*, the defendant was convicted of possessing and using counterfeit identification documents as evidence of authorized employment in violation of § 1546(a), a predicate offense under § 1028A(c). This situation was similar to the one in *Dean*, where the defendant was convicted of the predicate offense of using a firearm during the commission of a violent crime. Yet, while the Court upheld the enhancement of *Dean*'s sentence, it reached a different result in *Flores-Figueroa* and held that the defendant could not be convicted of aggravated identity theft, despite the fact that he, too, already had a “guilty mind.”

One distinction between *Dean* and *Flores-Figueroa* is that the former involved a mandatory sentencing statute and the latter involved an aggravated offense. Thus, in *Dean*, “if the firearm is discharged” requirement is a “sentencing factor.” See *United States v. O'Brien*, 130 S. Ct. 2169, 2179 (2010). In *Flores-Figueroa*, the “of another person” requirement is an element of the offense to be determined by the trier of fact. *Flores-Figueroa*, 129 S. Ct. at 1890 (referring to the provisions of the statute as “elements of the crime”). However, for purposes of determining the impact of a mental state requirement in either case, the Court did not draw a distinction between the two types of statutes nor did it appear to apply a different standard. As Justice Stevens noted in his concurring opinion in *O'Brien*, “[w]hen used as an element of a mandatory sentencing scheme, a sentencing factor is the functional equivalent of an element of the criminal offense itself.” *O'Brien*, 130 S. Ct. at 2181 (Stevens, J., concurring). Thus, although important procedural and burden-of-proof distinctions exist between convicting a defendant of a crime and enhancing his sentence, the Court did not cite these distinctions. These distinctions do not appear to have influenced the Court's conclusions about the mental state requirement in *Flores-Figueroa* and *Dean*. See *Johnson*, *supra* at 2, (discussing the Court's tacit rejection of the government's argument in *Dean* that the presumption of scienter does not apply to sentencing enhancements).

The basis for the different outcomes must therefore be sought elsewhere. The Court's emphasis on a plain grammatical reading of the statutory text in both *Flores-Figueroa* and *Dean* and the seemingly contradictory outcomes regarding the impact of the mental state requirement may together lead to the conclusion that the Court has elevated the importance of statutory text over criminal doctrine. Other factors may, however, come into play based on criminal law principles that the Court did not emphasize in its opinions. Whether these subtexts played a part in the Court's consideration or may do so in the future may well have an impact on how the mental state requirement is applied in criminal environmental cases.

#### **IV. Cases after *Flores-Figueroa* and the implications for using “ordinary English usage” to interpret the knowing mental state requirement under environmental statutes**

##### **A. The impact of *Flores-Figueroa* on the knowledge of fact v. knowledge of law principle**

Whether courts adopt a greater preference for rules of grammatical construction over principles of criminal law may have significant implications for environmental crimes prosecutions. In the past, courts have declined to follow a strict grammatical reading of a statute when an underlying principle indicated that Congress intended a different result. For example, in *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997) (involving a conviction under the Clean Water Act (CWA), 33 U.S.C. §§ 1251–1274, for a wetlands violation), the court noted “[o]n a first reading of the clause ‘any person who knowingly violates section 1311 shall be punished,’ the order of words suggests that ‘knowingly’ modifies ‘violates’ so that the clause imposes punishment only when one violates the statute with knowledge that he is violating it, *i.e.*, with knowledge of the illegality of his conduct.” *Id.* at 261. Yet the *Wilson* court went beyond its “first-blush reading” of the phrase “knowingly violates” and delved into the CWA’s legislative history as well as common law principles. Relying on the principle that “ignorance of the law provides no defense to its violation,” *id.*, the court held that the statute did not require a defendant to know his act was illegal in order to be convicted. It stated:

In light of these background rules of common law, we may conclude that mens rea requires not that a defendant know that his conduct was illegal, but only that he “know the facts that make his conduct illegal,” unless Congress clearly specifies otherwise.

*Id.* at 262 (citing *Staples v. United States*, 511 U.S. 600, 605 (1994)). See also *United States v. Weintraub*, 273 F.3d 139, 147 (2d Cir. 2001) (where the court in a Clean Air Act (CAA), 42 U.S.C. §§ 7401–7671g, case explained that the phrase “knowingly violates” does not “abrogate the bedrock common law principle that ignorance of the law is not a defense”).

Courts have consistently applied this fundamental principle in the environmental context. Such an application has significantly shaped the knowledge requirement of environmental crimes. For example, the Fifth Circuit, in a case involving defendants who had illegally stored hazardous waste at their facility, summarized that

“knowingly” [simply] means . . . the defendant knows factually what he is doing—storing, what is being stored, and that what is being stored factually has the potential for harm to others or the environment, and that he has no permit—and it is not required that he know that there is a regulation which says what he is storing is hazardous under the Resource Conservation and Recovery Act (RCRA).

*United States v. Baytank*, 934 F.2d 599, 613 (5th Cir. 1991) (relying on *United States v. Greer*, 850 F.2d 1447, 1450 (11th Cir. 1998); *United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990); *United States v. Hoflin*, 880 F.2d 1033, 1039 (9th Cir. 1989); *United States v. Hayes Int’l Corp.*, 786 F.2d 1499, 1502-05 (11th Cir. 1986)). Similarly, in *United States v. Sinsky*, 119 F.3d 712, 715-16 (8th Cir. 1997), a CWA case, the court concluded that the defendant did not have to have knowledge of the permit limitation to be convicted of violating his permit because “[t]he permit is, in essence, another layer of regulation in the nature of a law . . . .” *Accord United States v. Hopkins*, 53 F.3d 533, 540-41 (2d Cir. 1995); *United States v. Weitzenhoff*, 35 F.3d 1275, 1284-86 (9th Cir. 1994).

Reversing the precedent established in *Wilson*, *Baytank*, *Sinsky*, and other cases by placing a greater emphasis on a grammatical reading of the statutory language to require a defendant's knowledge of the law would dramatically alter the prosecution of environmental crimes. However, since *Flores-Figueroa*, courts have generally demonstrated that they are unwilling to elevate a strict grammatical reading over established criminal law precedent. With regard to this particular principle—knowledge of fact versus knowledge of law—the courts have declined to read *Flores-Figueroa* as requiring a defendant to know that his actions were in violation of the law. In *United States v. Vasquez*, 611 F.3d 325, 328-29 (7th Cir. 2010), the court held that a sex offender who had been convicted of failing to register under the federal Sex Offender Registration and Notification Act, 18 U.S.C. § 2250, only had to know he was required to register as a sex offender and was not required to know of the federal requirement. The court explained that “*Flores-Figueroa* did not overrule the long line of cases that have defined the term 'knowingly,' when used in a criminal statute, to mean 'that the defendant realized what he[] was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake or accident.’” *Id.* at 328.

In *United States v. Phillips*, 2010 WL 56026, at \*4 (E.D. Wis. Jan. 6, 2010), a prosecution for an asbestos abatement violation under the CAA, the court held that *Flores-Figueroa* does not affect the well-established “holding that the 'knowingly' element of § 7413 requires only that the defendant knew the underlying facts and circumstances of what he was doing, not specific knowledge of the law being violated.” *Id.* Similarly, in *United States v. Murray*, 663 F. Supp. 2d 709, 712-13 (W.D. Wis. 2009), the court found that the defendant, who had been convicted of a crime of domestic violence, did not have to know it was illegal for him to possess a firearm to be in violation of the law, disagreeing that *Flores-Figueroa* required a different result. Further, in *United States v. Roberts*, 2010 WL 56085, at \*2 (E.D. Tenn. Jan. 5, 2010), employees allegedly devised a plan to take unauthorized pictures of the competitor's manufacturing equipment. The court held that *Flores-Figueroa* did not require the government to prove that the defendants knew the information they had converted met the legal definition of a trade secret. The “knowledge of law v. knowledge of fact” principle was not directly implicated in *Flores-Figueroa* and, to date, the courts have not interpreted *Flores-Figueroa* to require a change in the principle that “ignorance of the law is not a defense.”

### **B. Applicatin of the X-Citement Video rule in environmental cases and the impact of Flores-Figueroa on the rule limiting the knowledge requirement once a culpable state of mind is established**

In *United States v. Ahmad*, 101 F.3d 386, 390 (5th Cir. 1996), the court stated that the “principle issue is to which elements of the offense the modifier 'knowingly' applies.” It noted “[t]he matter is complicated somewhat” because “the phrase 'knowingly violates' appears in a different section of the CWA from the language defining the elements of the offenses.” *Id.* at 390. However, the fact that this phrase is in an entirely different section of the CWA, and is thus completely separated from the remaining elements of the offense, made little difference to the *Ahmad* court. The court held that the knowledge requirement attached to the pollution element and relied on “the long-held view that 'the presumption in favor of a scienter requirement should apply to each of the statutory elements which criminalize otherwise innocent conduct.’” *Ahmad*, 101 F.3d at 390 (citing *X-Citement Video*, 513 U.S. at 69); *see also United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 668-69 (3d Cir. 1984) (concluding that the term “knowingly” applies to all elements of a violation for illegal disposal of hazardous waste under RCRA, even though it is in a different subsection than the other elements).

A strict grammatical reading of the statutory language in the CWA, CAA, and RCRA may suggest that the knowledge requirement does not attach to all elements of the offense because the former

is separated from the latter in the statutes' texts. *See Dean*, 129 S. Ct. at 1854 (where statute's knowledge requirement did not attach to the “discharge” factor contained in a separate subsection); *see also Flores-Figueroa*, 129 S. Ct. at 1894 (“The structure of the text in *X-Citement Video* plainly separated the 'use of a minor' element from the 'knowingly' requirement, wherefore I thought (and think) that case was wrongly decided.”) (Scalia, J., concurring). This approach would potentially weaken the *X-Citement Video* rule that the knowledge requirement attaches to each element that criminalizes otherwise innocent conduct. If applied by the courts, the approach would have a substantial impact on the prosecution of environmental crimes. Somewhat paradoxically, however, the majority opinion in *Flores-Figueroa* described its opinion as being consistent with *X-Citement Video*, even while recognizing that in *X-Citement Video* “the phrase 'the use of a minor' was not the direct object of the verbs modified by 'knowingly,' [and also] appeared in a different subsection.” *Id.* at 1891. Thus, despite the fact that the Court in *X-Citement Video* did not apply “ordinary English grammar,” and therefore, as viewed by Justice Scalia, was “wrongly decided,” *Flores-Figueroa* did not diminish the *X-Citement Video* rule.

What is less clear is whether *Flores-Figueroa* established a rule that more than the *X-Citement Video* “floor” must now be met. To date, courts have been reluctant to read *Flores-Figueroa* as overturning the principle that the knowledge requirement does not apply to all elements of an offense once a threshold of culpability has been proven. For example, in *United States v. Betancourt*, 586 F.3d 303 (5th Cir. 2009), the court relied on a statute's construction as the basis for limiting the knowledge requirement, despite the factual similarities between the scenario in that case and the one in *Flores-Figueroa*. In *Betancourt*, as in *Flores-Figueroa*, knowledge of an element that increased the defendant's sentence was at issue. The defendant had appealed his conviction for possession of more than 100 kilograms of marijuana with intent to distribute under 21 U.S.C. § 841. The defendant argued that the government had not established his knowledge of the quantity of marijuana. Noting that the drug type and quantity were essential elements of the offense, the court nevertheless held that knowledge of these elements was not required for conviction. In doing so, the court distinguished 18 U.S.C. § 1028A(a)(1), the statute at issue in *Flores-Figueroa*, from § 841. The court distinguished the language of the two statutes by noting that “in § 1028A(a)(1) [it is] 'natural' to apply the word 'knowingly' to all 'subsequently listed elements,' [*Flores-Figueroa*, 129 S. Ct.] at 1890.” *Betancourt*, 586 F.3d at 309. The court further explained, however, that “in § 841 it [is not] natural to apply the word 'knowingly' used in subsection (a) to language used in subsection (b), especially because a period separates the two subsections.” *Id.*

In *Betancourt*, the court relied on the statute's construction to distinguish the outcome from *Flores-Figueroa*. In other cases where the statutory structure was more similar to § 1028A(a)(1), the courts have nevertheless distinguished *Flores-Figueroa* and continued to limit the knowledge requirement by referencing Justice Alito's concurring opinion, where he wrote “there are instances in which context may well rebut the presumption” that “the specified *mens rea* applies to all the elements of an offense” and cited *Figueroa* as an example. *Flores-Figueroa*, 129 S. Ct. at 1895 (Alito, J., concurring). In *United States v. Cox*, 577 F.3d 833, 837 (7th Cir. 2009), the court affirmed that a defendant does not have to know the age of a victim to be convicted of knowingly transporting a minor for purposes of prostitution. The court relied on the principle that “a defendant is 'already on notice that he is committing a crime when he transports an individual of any age in interstate commerce for the purpose of prostitution.’” *Id.* at 837 (citing *United States v. Griffith*, 284 F.3d 338, 351 (2d Cir. 2002)). Noting that the statute in *Flores-Figueroa* had “a grammatical construction similar to that [considered] here,” the court in *Cox* nevertheless declined to follow *Flores-Figueroa*. It explained:

[T]he Court did not establish a rule for all circumstances, and *Flores-Figueroa* does not compel an interpretation of § 2423(a) different from the one that we describe above. The *Flores-Figueroa* Court made clear, pointing to a concurring opinion by Justice Alito, that

“the inquiry into a sentence's meaning is a contextual one,” and that a “special context” might call for a different statutory interpretation.

*Cox*, 577 F.3d at 838 (citing *Flores-Figueroa*, 129 S. Ct. at 1891); see also *American Acad. of Religion v. Napolitano*, 573 F.3d 115, 130-31 (2d Cir. 2009) (discussing Justice Alito's concurrence in *Flores-Figueroa* regarding “context”). In *Napolitano*, the court concluded that “the normal approach discussed in *Flores-Figueroa* does not apply to the first knowledge component.” *Napolitano*, 573 F.3d at 131. Thus, the government did not have to establish the defendant's knowledge that the organization that he had donated funds to had been classified as a terrorist organization.

The court in *United States v. Rehak*, 589 F.3d 965 (8th Cir. 2009), reached a similar outcome. The court noted the *Flores-Figueroa* rule that “as 'a matter of ordinary English grammar,' the word 'knowingly' must apply to all the subsequently listed elements of the crime.” *Id.* at 974 (quoting *Flores-Figueroa*, 129 S. Ct. at 1890). Nevertheless, the court concluded that the defendant did not need to know the property he stole belonged to the United States, relying on the long-held rule that the mental state requirement does not attach to an element establishing federal jurisdiction. Similarly, in *United States v. Jeffery*, 631 F.3d 669, 677-78 (4th Cir. 2011), the court concluded that stolen property belonging to the federal government was a jurisdictional element of 18 U.S.C. § 641 and stated, “there is nothing in *Flores-Figueroa* to suggest that the Supreme Court intended to silently overrule the *Feola* and *Yermian* line of cases holding that knowledge of jurisdictional facts is generally not required.” *Id.* at 676. In doing so, it echoed the reasoning underlying *Figueroa*, *Cox*, and other cases, stating, “[s]ection 641's requirement of government ownership . . . does not separate legal innocence from wrongful conduct, for the simple reason that stealing is wrongful conduct whether or not the stolen property belonged to the government.” *Id.* at 677.

In one case where a court followed *Flores-Figueroa*, *United States v. Shim*, 584 F.3d 394, 396 (2d Cir. 2009), the court emphasized that its application of the *Flores-Figueroa* precedent was limited. In *Shim*, the court overturned a conviction for conspiracy to transport women in interstate commerce for the purpose of prostitution. Relying on *Flores-Figueroa*, the court found that the “knowing” requirement qualified “interstate commerce” because “[n]o special context compels a different conclusion . . . .” *Id.* at 396 (where the fact that this element may be jurisdictional was not addressed by the court). In doing so, however, the court emphasized “that [its] holding is confined to the statutory provision at hand.” *Id.* It further provided that when determining the scope of the mens rea element, a court must, “as guided by *Flores-Figueroa*, independently analyze the text and context of the statute as well as the circumstances of the offense.” *Id.*

As the discussions in *Wilson* and *Ahmad* illustrate, reliance on a grammatical reading of the environmental statutes may be used to argue for or against an enhanced mental state requirement. However, a strict interpretation of the statutory language that would result in overturning established principles, such as “ignorance of the law is no excuse” or the “scienter requirement should apply to each of the statutory elements which criminalize otherwise innocent conduct,” seems unlikely. As the post-*Flores-Figueroa* cases indicate, courts remain mindful of “context” in applying the mental state requirement and *Flores-Figueroa* has not resulted in a dramatic shift to a strict grammatical interpretation over long-standing principles of criminal law. In the area of environmental crimes, however, unsettled questions remain and the influence of *Flores-Figueroa* on these issues is still unknown. A notable example of this uncertainty is whether and to what degree the government must show a defendant's knowledge of the last element of a discharge offense under the CWA, that is, the “water of the United States” element.

## **V. *United States v. Ortiz* and *United States v. Cooper*: knowledge of the “water of the United States” element in Clean Water Act cases**

The decisions in *United States v. Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996) and *United States v. Wilson*, 133 F.3d 251, 264 (4th Cir. 1997) establish that the mental state requirement under the CWA means the government must prove “the defendant's knowledge of the facts meeting each essential element of the substantive offense.” *Wilson*, 133 F.3d at 264. This requirement may ostensibly include the defendant's awareness that he was discharging “pollutants” into a “navigable water” or “water of the United States.” CWA, 33 U.S.C. §§ 1311(a), 1319(c)(2), 1362 (definitions of “discharge of a pollutant” and “navigable waters”). In more straightforward instances where the polluter discharges directly into a jurisdictional water, proving the defendant's knowledge of the “water of the United States” element may not be complicated. However, in some CWA cases, the defendant discharges into a conduit that eventually causes the pollutants to enter a jurisdictional waterway. Examples include discharges into ditches, culverts, or municipal storm drains that flow into waters of the United States. The key question in these circumstances is, What must the government prove regarding both the defendant's knowledge that the pollutant will reach a waterway and the jurisdictional status of the receiving water? In the aftermath of *Rapanos v. United States*, 547 U.S. 715 (2006), a case that limited the reach of the CWA over certain tributaries and other waters, this question may require more attention.

Surprisingly, few cases exist where courts directly address this issue. For example, in *Ahmad*, the defendant discharged gas-laden fluids from a leaky tank into a street where it flowed into a storm drain and through a pipe that eventually emptied into Possum Creek. This creek feeds the San Jacinto River that flows into Lake Houston. Defendant also discharged gasoline into a manhole that connected to the sewer system and eventually to the publicly-owned treatment works (POTW). The defendant asserted a “mistake-of-fact” defense, claiming that he believed he was discharging water and not gasoline. The court overturned the conviction because the jury instructions did not require that the government prove the defendant's factual knowledge of the pollutant element, that is, that he was discharging a deleterious substance as opposed to a harmless substance. *United States v. Ahmad*, 101 F.3d 386, 390-91 (5th Cir. 1996). The court did not discuss whether the government should also have been required to prove defendant's knowledge of the “water of the United States” element, that is, whether he knew the storm drain and attached pipe flowed into Possum Creek and whether he knew the jurisdictional status of the creek. *Id.*; see also *United States v. Metalite Corp.*, 2000 WL 1234389, at \*8 (S.D. Ind. July 28, 2000) (involving a discharge through an underground storm water drain into a surface channel then into a tributary of the Ohio River). In *Metalite Corp.*, the court recognized but did not resolve the question of whether the government had to prove knowledge of the “water of the United States” element. *Id.* at \*12.

### **A. *United States v. Ortiz***

This issue came to the forefront in a prosecution in 2002 involving the discharge of wastewater into the Colorado River through a storm water drain. The storm water system was operated by the city of Grand Junction, Colorado. Prior to the 1990s, the city had maintained a combined sewer system that directed both rainwater and sanitary waste to the POTW. In separating the city's combined line into sewer lines and storm drains, it overlooked some connections, resulting in a connection of sewer pipes from some businesses directly to the Colorado River, rather than to the city's POTW. One of those businesses was Chemical Specialties, a propylene glycol distillation facility operated by David Ortiz. Chemical Specialties did not have a permit to discharge to the POTW and was supposed to dispose of all industrial wastewater by trucking it offsite.

In April 2002, propylene glycol was discovered in the Colorado River downstream from Chemical Specialties. City inspectors questioned Ortiz about the discharge, but he denied responsibility. In May, after discovering more propylene glycol in the river, the city tested the storm drain line, revealing the connection between Chemical Specialties' toilet and the river. The city's regulators turned off the water to the toilet and placed tape across it. Inspectors told Ortiz he could not discharge anything from the bathroom sink or toilet until the connection could be corrected and provided him with a portable toilet. A third discharge of propylene glycol into the river subsequently occurred in mid-June. Agents from the Environmental Protection Agency (EPA) traced the discharge back to Chemical Specialties' toilet and found that Ortiz had removed the tape and turned the water back on.

Ortiz was charged with three felony violations of the CWA for the illegal discharges to the Colorado River. The first count was for the discharge in April, prior to the discovery of the misconnected sewer line. During a pre-trial hearing, the district court stated in an oral ruling that it would grant defendant's motion to dismiss the first count unless the government could prove that the defendant knew of the connection from the toilet to the river. The government then obtained a superceding indictment, charging the first offense as a negligence charge. The jury convicted Ortiz of all three counts. However, the trial court overturned the jury's verdict on the first count, finding that even under a negligence standard, the defendant could not be convicted "in the absence of his knowledge that using the toilet would result in the discharge . . . to the river." *United States v. Ortiz*, 427 F.3d 1278, 1281 (10th Cir. 2005). The Tenth Circuit reversed, finding that under a negligence standard, "the CWA does not require proof that a defendant knew that a discharge would enter United States waters" but only that "the defendant had failed to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance." *Id.* at 1283.

The issue left unresolved in *Ortiz* is whether a felony violation requires proof that a defendant knows that his discharge through a storm drain will flow directly to a surface water rather than to a POTW, where the defendant knows he does not have a permit to discharge to either location. The question in that circumstance is whether a defendant may escape liability by asserting that he did not know which of the two prohibited locations the pollutants would ultimately be discharged into. The trial court in *Ortiz* apparently believed he could, even though the evidence established that the defendant knew he lacked a permit to discharge the pollutants, no matter where the wastewater flowed. Because of the way the case proceeded, the issue was not litigated.

The issue is not limited to the unusual facts of *Ortiz*. There are, for example, combined sewer systems in many older municipalities where it may not be clear whether a particular pipe will discharge to a POTW or to a surface water. May a defendant escape felony liability by asserting he mistakenly believed the discharge would go to one place rather than the other? In a related issue, in the *Ahmad* and *Metalite Corp.* cases, the discharges took a circuitous route, first through a storm water system and eventually to surface waters. In those cases, the issue was whether a defendant may escape felony liability because the government cannot establish the defendant's knowledge of the water that will ultimately receive the pollutants. In short, the question is, Does the mens rea requirement attach to the last element of the offense, that is, the "water of the United States" element and, if so, what must the government prove?

### ***B. United States v. Cooper***

The case that most directly addresses the issue is *United States v. Cooper*, 482 F.3d 658 (4th Cir. 2007). In that case, the defendant was convicted of repeated discharges of sewage from his trailer park lagoon into a small creek, undisputedly a water of the United States. He appealed his conviction,

claiming that the government failed to prove that he knew he was discharging pollutants into United States waters and, more particularly, that he was aware of the creek's connections to other waters that gave it jurisdictional status. The court rejected his argument, concluding that the “water of the United States” element is a “classic jurisdictional element.” *Id.* at 664. The court relied on the well-settled principle “that *mens rea* requirements typically do not extend to the jurisdictional elements of a crime . . . .” *Id.* at 664 (citing *United States v. Feola*, 420 U.S. 671, 677 (1975)).

The court also reviewed the statute's construction and noted that the *mens rea* requirement and the “waters of the United States” element are separated and appear in different sections of the CWA. “To say the least, the statute's string of provisions hardly compels . . . a reading “that the government had to establish that the defendant “was aware of the facts connecting the small creek to the regulatory definition of ‘waters of the United States.’” *Id.* at 666. Lastly, the court looked to the purpose of the CWA and explained that “Congress in the CWA clearly intended to provide strong protection to the nation's waterways.” *Id.* The court then concluded that “[t]o attach a *mens rea* to the jurisdictional element would as surely undermine Congress's intent here as it would have in *Feola*.” *Id.*; see also *Feola*, 420 U.S. at 684 (where to effectuate the congressional purpose of affording maximum protection to federal officers the government was not required to prove that the defendant knew the victim of his assault was a federal officer).

The court distinguished its prior ruling in *United States v. Wilson*, 133 F.3d 251, 264 (4th Cir. 1997), where it had required the government to prove “that the defendant was aware of the facts establishing the required link between the wetland and waters of the United States.” *Id.* at 264. In making this distinction, the *Cooper* court relied on the *X-Citement Video* statement that “[c]riminal intent serves to separate those who understand the wrongful nature of their act from those who do not, but does not require knowledge of the precise consequences that may flow from that act once aware that the act is wrongful.” *Cooper*, 482 F.3d at 667 (quoting *X-Citement Video*, 513 U.S. at 72). In *Wilson*, the defendant claimed that he did not know that the wetlands were jurisdictional under the CWA. Because state law “did not appear” to outlaw the discharge, the jurisdictional status of the wetlands separated innocent from criminal conduct and, thus, proof of the defendant's knowledge of the element was required. In contrast, state law in the *Cooper* case prohibited the discharge of sewage into the creek and defendant's conduct was illegal whether or not the creek fell within federal jurisdiction pursuant to the CWA. Thus, defendant's knowledge of the jurisdictional element was not required.

Although the *Cooper* court did not require proof of defendant's knowledge of the jurisdictional status of the water, it held that “[t]he government did . . . have to prove that [the defendant] knowingly discharged the sewage into the creek.” *Cooper*, 482 F.3d at 668. In *Cooper*, it was not difficult to establish the defendant's knowledge that he was discharging into the water because his sewage lagoon discharged directly into the creek and the government provided substantial evidence that Cooper had personal knowledge of the sewage contamination in the stream. But what happens to a charger who releases pollutants into a storm or sewage drain some distance before reaching national waters or into a non-jurisdictional stream that eventually flows to a water of the United States? Assuming that the government can prove that the pollutant actually reached the jurisdictional water, What must it show regarding the defendant's knowledge of the receiving water to convict him of a felony violation?

### C. Issues regarding the knowledge requirement for the “water of the United States” element after *Rapanos*

Prior to *Rapanos v. United States*, 547 U.S. 715 (2006), the issue with regard to storm drains was simplified in cases such as *United States v. Eidson*, 108 F.3d 1336, 1341-43 (11th Cir. 1997), and *United States v. TGR Corp.*, 1998 WL 342041, at \*2 (D. Conn. Mar. 31, 1998). These cases interpreted “waters of the United States” to include manmade conveyances such as storm water drains. *Eidson*, 108 F.3d at 1341-43; *TGR Corp.*, 1998 WL 342041, at \*2. However, the Eleventh Circuit more recently noted that “the Supreme Court indicated in *Rapanos* that *Eidson's* 'expansive definition' of 'tributaries' is no longer good law.” *United States v. Robison*, 505 F.3d 1208, 1216 (11th Cir. 2007) (citing *Rapanos*, 547 U.S. at 725-26). In *Rapanos* the Court explained that “highly artificial, manufactured, enclosed conveyance systems, such as . . . 'mains, pipes, hydrants, machinery, buildings, and other appurtenances and incidents of [a city's] system of waterworks' . . . likely do not qualify as 'waters of the United States,' despite the fact that they may contain continuous flows of water.” *Rapanos*, 547 U.S. at 736. Consequently, the inclusion of highly artificial and enclosed conveyances, such as storm water or sewage drains, under the jurisdictional tributary umbrella is doubtful. In *Robison*, as in *Ortiz* and *Metalite*, the storm drain was treated as the conveyance/point source rather than as a tributary. Similarly, *Rapanos* has arguably limited the reach of the CWA over some waters that were previously deemed to be jurisdictional so that establishing a defendant's knowledge that he was discharging into these waters, even if the pollutants reach a jurisdictional water, may no longer be sufficient to meet the knowledge requirement for the “water of the United States” element.

A discharge into a storm drain or non-jurisdictional tributary may be separated from the receiving water of the United States by a significant distance, and a defendant may credibly claim that he did not know where the discharge would ultimately flow. The question of how much the defendant must know about the “waters of the United States” element thus becomes significant. Pursuant to the *Cooper* reasoning, the government should not be required to prove that the defendant knew that the receiving water met the jurisdictional definition of “water of the United States” where the discharge was also prohibited under state law. See *United States v. Cooper*, 482 F.3d 658, 668 (4th Cir. 2007). Moreover, as a general rule, municipalities prohibit discharges of pollutants into their storm drains and sewer lines through local ordinances. See 33 U.S.C. § 1342(p)(3)(B) (2011) (requiring that permits issued to municipalities for storm drain systems contain provisions that “effectively prohibit non-stormwater discharges into the storm sewers”). Further, discharges into tributaries that are not “waters of the United States” may nevertheless be violations of state law. In either instance, the discharge would be illegal from the outset, supporting the presumption that the defendant acted with the requisite mental state even without knowledge of the receiving water's jurisdictional status.

Aside from the jurisdictional issue, in most instances the government must show that the defendant knew he was discharging into a water. This knowledge is required under *X-Citement Video* when knowledge of that element serves to separate innocent from culpable conduct. However, obvious difficulties appear when establishing a defendant's knowledge of the connection between a storm drain and a particular surface water absent the kind of evidence that was presented in *Ortiz* and *Cooper*, where both defendants were directly informed by local inspectors that the pollutants were found in the river but subsequently discharged again. In cases where such direct proof does not exist, depending on the facts, circumstantial evidence may be used to prove knowledge. See *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1504-05 (11th Cir. 1986) (circumstantial evidence used to prove defendant's knowledge of hazardous waste); accord *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 42 (1st Cir. 1991) (circumstantial evidence used to prove defendant's knowledge of hazardous waste permit).

Many municipalities now place signs near storm water openings to advise the public that the drain will discharge into surface waters. It is also common knowledge that streams and creeks eventually flow into larger bodies of water. Common knowledge may be used to infer a defendant's state of mind. See *Hayes*, 786 F.2d at 1504 (stating that because “[i]t is common knowledge that properly disposing of wastes is an expensive task” the jury could infer that the defendant knew it was improperly disposed of because of the minimal cost); accord *United States v. Wasserson*, 418 F.3d 225, 239 (3d Cir. 2005). Moreover, the CWA is a public welfare statute. See *United States v. Kelly Technical Coatings, Inc.*, 157 F.3d 432, 439 (6th Cir. 1998); *United States v. Sinsky*, 119 F.3d 712, 716 (8th Cir. 1997); *United States v. Hopkins*, 53 F.3d 533, 537-38 (2d Cir. 1995); *United States v. Weitzenhoff*, 35 F.3d 1275, 1284-85 (9th Cir. 1994). As one court stated, “[p]ublic welfare statutes . . . are not to be construed narrowly but rather to effectuate the regulatory purpose.” *MacDonald*, 933 F.2d at 49; but see *United States v. Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996) (finding that CWA was not a public welfare statute).

Few cases have examined the extent of the knowledge requirement for the “water of the United States” element. After *Rapanos*, the question may gain currency because more cases may involve situations where the pollutant reached national waters through a conduit or tributary no longer deemed to be jurisdictional. When a case lacks direct evidence that the defendant knows where his discharge will flow, circumstantial evidence may be sufficient to demonstrate that the defendant knew the pollutants would reach the body of water. If the government can establish the defendant's knowledge through direct or circumstantial evidence that the pollutant would flow to a waterbody (that is also a jurisdictional water), then it should not have to establish the defendant's knowledge of the jurisdictional status of the water, particularly in those cases where his discharge would be a violation of state or local law. However, this assumption depends on whether this nuance of the *X-Citement Video* rule, as applied by the *Cooper* court, remains good law after *Flores-Figueroa*.

#### **D. Ortiz and the mistake-of-fact defense**

In *Cooper*, the government was not required to show that the defendant knew the stream was a “water of the United States” because the defendant's acts were illegal regardless of the water's jurisdictional status. Nevertheless, the government was still required to show that the defendant knew his discharge would reach the stream. In *Ortiz*, it would have been impossible for the government to show that the defendant knew the pollutant from the first discharge would reach the river because the defendant probably believed it was going to the POTW. Yet under the theory that only an *innocent* mistake of fact will provide a defense to liability, it is a reasonable assumption that the knowing mental state requirement was satisfied because the defendant knew the discharge was unpermitted, whether it went to the POTW or the river.

Courts have held that a mistake-of-fact defense must demonstrate that the defendant did not believe he was committing a violative act, as opposed to a mistake of fact that only demonstrates that he did not intend to commit the violation in a particular way. For example, in *United States v. Cook*, 967 F.2d 431, 433 (10th Cir. 1992), the defendant stole a shipment of goods that he believed contained clothing as well as tools. He asserted a mistake-of-fact defense for the theft of the tools but the court upheld the conviction, stating that “[t]he obvious flaw in this argument is that Cook's actions would not have been lawful had the facts been as he supposed them to be.” *Id.* at 433. The court further explained that “[m]istake of fact only affects criminal guilt if the mistake demonstrates that the defendant did not have the state of mind required for the crime.” *Id.* In *United States v. Quarrell*, 310 F.3d 664, 674-75 (10th Cir. 2002), defendants appealed their conviction for excavating artifacts on public land because they believed they were on private property. In denying their claim, the court noted that excavation on private property without permission also would have been illegal and that “such a mistake of fact would

not negate criminal intent because such conduct is unlawful.” *Id.* at 675. In *United States v. Mardirosian*, 602 F.3d 1, 8-9 (1st Cir. 2010), the defendant received stolen paintings but claimed that he believed he subsequently received legal title after-the-fact. The court, noting that his initial possession was unlawful, denied his claim because the mistake-of-fact defense only applies to conduct that is at “all times innocent,” *id.* at 9, and does not apply “once all elements of the crime have been met.” *Id.*; see also *United States v. Feola*, 420 U.S. 671, 685 (1975) (where the defendant knows his conduct is unlawful, the fact that he is unaware that his victim is a federal officer does not preclude conviction under a statute criminalizing assaults on federal officers).

Alternatively, the principle of “transferred intent” may apply in this circumstance. As described by one court, the common-law doctrine of transferred intent was originally invoked to assign criminal liability to a defendant who attempts to kill one person but accidentally kills another. One court has explained this scenario in the following manner: “[I]f you deliberately shoot and kill A, intending to kill B, you are guilty of murdering A, even though you had no intention of harming him . . . Both the forbidden state of mind (intending to kill a person) and the forbidden consequence (killing a person) are present.” *United States v. Marzano*, 160 F.3d 399, 400-01 (7th Cir. 1998). In *Marzano*, the defendant appealed his conviction for money laundering, arguing that he believed the illegal funds he was laundering were derived from drug dealing when in fact they were funds embezzled from a bank. The court applied the “transferred intent” principle, upholding the conviction because all that was required under the statute was defendant's intent to launder illegal proceeds. *Id.* at 403. See also *United States v. Key*, 76 F.3d 350, 353 (11th Cir. 1996) (referring to the use of the “transferred intent” doctrine to hold a defendant liable for defrauding a federally-insured bank where the defendant believed the bank was uninsured).

Applying various principles, these decisions reflect the general rule that the knowing mental state requirement must attach to enough elements of the offense to establish a threshold of culpability, but the requirement is limited once the threshold has been met. However, *Flores-Figueroa* seemingly departed from this rule, requiring that the government prove that the defendant knew the counterfeit information he possessed belonged to another person, even though the defendant had already fraudulently used it to seek employment. Seen in this light, if *Flores-Figueroa* were to be applied in CWA cases, Would the government have to prove that a defendant who knowingly discharged pollutants into a combined sewer system without a permit also knew that it would go to a surface water as opposed to a POTW? On a related topic the question becomes, Does *Flores-Figueroa* require that the government establish a defendant's knowledge of the jurisdictional status of the receiving water, even if his discharge is a violation of state or local law and thus illegal regardless of the water's status?

## **VI. Whether *Flores-Figueroa* establishes a rule that the knowledge requirement applies to each element of the offense**

In his concurring opinion in *Flores-Figueroa*, Justice Alito voiced the following concern: “I suspect that the Court's opinion will be cited for the proposition that the *mens rea* of a federal criminal statute nearly always applies to every element of the offense.” *Flores-Figueroa*, 129 S. Ct. at 1895 (Alito, J., concurring). He joined the majority “except insofar as it may be read to adopt an inflexible rule of construction that may rarely be overcome by contextual features pointing to a contrary reading.” *Id.* at 1896. As examples of cases where “context may well rebut” the presumption that the *mens rea* applies to all elements of an offense, Justice Alito cited to cases that limited the knowledge requirement, such as *Taylor*, where knowledge of the victim's age was not required, and *Figueroa*, where knowledge of the excluded alien's aggravated felony status was similarly not required. Yet, he observed that “[i]n the present case . . . the Government has not pointed to contextual features that warrant interpreting 18

U.S.C. § 1028A(a)(1) (2011) in a similar way.” *Id.* Neither Justice Alito nor the majority opinion discussed the relevance of this line of cases to the *Flores-Figueroa* facts, nor did the Court reference its opinion in *Dean* that it had issued only five days earlier.

A clue to this seeming disparity may be found in the Court's reference to congressional intent, where it noted that “Congress separated the fraud crime from the theft crime in the statute itself.” *Id.* at 1893. Although the Court only briefly discussed this point, the distinction between fraud and theft was a significant factor in the decision reached by the D.C. Circuit in *United States v. Villanueva-Sotelo*, 515 F.3d 1234 (D.C. Cir. 2008), one of the appellate opinions leading to the circuit split that was ultimately resolved by the Court in *Flores-Figueroa*. In *Villanueva-Sotelo*, the defendant, like Flores-Figueroa, had been convicted of the predicate crime of fraudulent use of identification documents under 18 U.S.C. § 1546 and was consequently charged with identity theft pursuant to § 1028A(a)(1). The D.C. Circuit reviewed the legislative history of § 1028A(a)(1) and agreed with the defendant that “Congress intended to target identity theft and the thieves who perpetrate it, rather than to create a sentencing enhancement for individuals who use fraudulent identifying information belonging purely by happenstance to someone else.” *Id.* at 1243. It emphasized that theft incorporates a specific intent requirement, an “intent to deprive the rightful owner of [the property].” *Id.* In finding that the defendant's random selection of numbers used in the identification happened to belong to someone else, the court concluded “[t]hat's not theft.” *Id.*

The court noted that the defendant “had a guilty mind—he knowingly presented a fake permanent resident card to D.C. police officers—but he pled guilty to precisely that charge in the indictment's second count and is being punished accordingly.” *Id.* The court, however, also found that “there is a salient difference between theft and accidental misappropriation.” *Id.* at 1246. Thus, the court distinguished the predicate crime under § 1546, titled “Fraud and misuse of visas, permits, and other documents” as a crime separate from violations of § 1028A, titled “Aggravated identity theft.” *Id.* at 1243 (explaining that “the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute”) (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998)). Justice Alito's conclusion is consistent with the view that “accidental misappropriation” would not satisfy the mental state requirement for a conviction under § 1028A(a)(1), where he states:

[T]he Government's interpretation leads to exceedingly odd results. Under that interpretation, if a defendant uses a made-up Social Security number without having any reason to know whether it belongs to a real person, the defendant's liability under § 1028A(a)(1) depends on chance: If it turns out that the number belongs to a real person, two years will be added to the defendant's sentence, but if the defendant is lucky and the number does not belong to another person, the statute is not violated.

*Flores-Figueroa*, 129 S.Ct. at 1896 (Alito, J., concurring).

Under this reasoning, the *Flores-Figueroa* decision would not necessarily diminish the principle reflected in the *X-Citement Video* statement that conviction for a knowing offense “does not require knowledge of the precise consequences that may flow from that act once aware that the act is wrongful.” *X-Citement Video*, 513 U.S. at 72. A separate crime with different elements is not the same as a consequence of a crime. This point is arguably different than one involving a defendant who knowingly discharges pollutants without a permit into a manhole or storm water grate and simply does not know whether his illegal discharge will flow to the POTW or to a surface water. Either way, the defendant has committed a violation of the CWA that prohibits certain discharges of pollutants without a permit. It is also different than a case where the defendant discharges into a body of water without knowing the

water's jurisdictional status, but where state or local law prohibits the discharge in any event. Either way, the defendant has committed an illegal discharge of pollutants into the waterbody.

The construction of the statute at issue in *Flores-Figueroa* is significantly different from the CWA, where the provisions criminalizing illegal discharges are divided into four different subsections and the knowledge requirement is in a completely different subsection from the substantive elements of the offense. Based on *Flores-Figueroa*'s emphasis on “ordinary English grammar,” the statutory construction may alone justify a different application of the knowledge requirement under § 1028A from the CWA. More importantly, however, it may be that *Flores-Figueroa* is not applicable to situations such as those presented in *Ortiz* and *Cooper* because it applied a different principle of criminal law. If the distinction between crimes of identity fraud and identity theft, as viewed by the *Villanueva-Sotelo* court, was a subtext for the Court in *Flores-Figueroa*, its holding may be viewed as consistent with and not contrary to the rule that the essential purpose of the knowledge requirement is to distinguish innocent from culpable conduct.

In fact, “intent to deprive the rightful owner” of property would be a critical element that distinguishes culpability under one crime from another. Stated differently, even though the defendant in *Flores-Figueroa* was guilty of the crime of fraud, he was innocent of the separate crime of theft unless the government could prove his knowledge of all the essential elements. Unfortunately, the Court provides very little guidance as to whether its opinion in *Flores-Figueroa* may be read in congruence with the principle limiting the knowledge requirement applied in *Cooper*, *Figueroa*, and other appellate opinions, or whether it signals a different and more stringent direction with regard to the application of knowing mental state requirements to the elements of an offense. Determining how this issue takes shape will likely depend on future prosecutions in the environmental arena as well as other areas of criminal law.

## VII. Conclusion

The principle that “the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct” has been accepted and applied in environmental prosecutions. This rule appears to remain sound after *Flores-Figueroa*. However, courts have also presumed that once this threshold of culpability is met, no more is required because of the Supreme Court's statement in *X-Citement Video* that “criminal intent . . . does not require knowledge of the precise consequences that may flow from that act once aware that the act is wrongful.” *X-Citement Video*, 513 U.S. at 72. Whether this aspect of the *X-Citement Video* reasoning remains good law or, conversely, whether *Flores-Figueroa* signals a sea change that the government must prove more may have significant implications for future environmental prosecutions. ❖

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# An Accident Waiting to Happen? Prosecuting Negligence-Based Environmental Crimes

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## **I. Introduction**

In December 2010, NPR's *Talk of the Nation* aired a segment titled, "When An Environmental Accident Becomes a Crime." In opening the segment, Neal Conan stated:

Last week, the U.S. Department of Justice announced civil suits against BP and other companies associated with the massive oil spill in the Gulf of Mexico. The government hopes to recover billions in damages for clean-up costs and for damages to natural resources, and Attorney General Eric Holder made a point to note that a federal criminal investigation is also under way.

Many advocates say that environmental disasters like the BP oil spill and the 1989 Exxon Valdez disaster are clearly crimes and that senior corporate officials should face felony charges and time in prison. But even when thousands of birds and fish die or when toxic sludge poisons the water we drink, the government usually responds with civil suits.

How should we hold corporations accountable for violations?

*Talk of the Nation: When An Environmental Accident Becomes a Crime* (National Public Radio Dec. 21, 2010).

The BP Oil Spill will go down as the worst environmental "accident" in U.S. history. The question then becomes, Was it really an accident? Was it truly unavoidable and unforeseen? Certainly, no one on the Deepwater Horizon rig woke up that morning with the intention of causing one of the largest oil spills ever (when, tragically, eleven men died). What series of acts or omissions leading up to the explosion may have not only caused the explosion but may also have been the product of negligent acts by employees? At what point does a deviation from expected standards of care warrant criminal prosecution? When should catastrophic events that were caused by acts of negligence be prosecuted criminally? What factors should the prosecutor consider and what tools are available to prosecutors to handle such investigations?

This article will address criminal prosecutions of what may on their face appear to be accidents and tragic mishaps arising from corporate conduct—from large oil spills to industrial explosions that result in serious environmental harm and human casualties. It will mainly focus on criminal negligence under the Clean Water Act because this piece of legislation is the principal environmental statute that has been used to prosecute significant pollution events under a negligence theory. The article will also

provide general guidance to a prosecutor who is suddenly faced with a large disaster and needs to decide what course to take.

## II. Criminal negligence under the Clean Water Act

The Federal Water Pollution Control Act (CWA), 33 U.S.C. §§ 1251–1387, commonly known as the Clean Water Act, is a comprehensive statute designed “to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.” *Id.* § 1251(a) (2010). In the wake of the *Exxon Valdez* casualty, an 11 million gallon oil spill in Alaska that devastated the environment and local economy (the detrimental effects on Prince William Sound are still visible twenty-two years later), Congress passed the Oil Pollution Act of 1990 (OPA), 33 U.S.C. §§ 2701–2762, an amendment to the CWA. In pertinent part, the OPA prohibits the “discharge of oil or other hazardous substances (i) into or upon the navigable waters of the United States, adjoining shoreline, or into or upon the waters of the contiguous zone . . . in such quantities as may be harmful . . . .” *Id.* § 1321(b)(3). This provision ensures that oil spills may be prosecuted under the CWA's criminal penalty provisions set out at § 1319(c). The criminal penalty provisions make it a felony to knowingly violate the statute, while negligent violations are misdemeanors. *Compare* 33 U.S.C. § 1319(c)(2) (knowing violations are a felony punishable “by a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than 3 years, or by both”), *with* 33 U.S.C. § 1319(c)(1) (negligent violations, including a violation of § 1321(b)(3), are a misdemeanor punishable “by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than one year, or by both”).

Most criminal CWA cases involve knowing conduct. An employee discharges contaminated wastewater through a make-shift PVC pipe into a nearby waterway instead of having it trucked off-site for proper disposal. A plant manager orders his employees to dump toxic wastewater into the river or into the sewage lines without proper treatment and then falsifies monthly monitoring reports to conceal the violations. Such cases make up the bulk of criminal prosecutions under the CWA and are typically charged as felonies with prison time often sought and ordered. In these cases, the conduct was knowing, even intentional, and resulted in an unlawful discharge of pollutants into a water.

What about negligent conduct that also results in an unlawful discharge of a pollutant into a water of the United States? On November 7, 2007, the *M/V Cosco Busan*, a 900-foot, 68,000 ton container ship hit the San Francisco Bay Bridge. This collision resulted in a 53,000 gallon oil spill that caused widespread damage to the region's fragile ecosystem as well as millions of dollars in losses to the local economy. Captain John Cota, a Bay Area Bar Pilot who was paid almost \$500,000 per year to do one thing—safely navigate large ships in and out of the San Francisco Bay's hazardous and ecologically sensitive harbor—was navigating the ship that day. It was called a terrible accident. A federal criminal investigation, however, uncovered that what happened on November 7 was completely avoidable. Put another way, a series of intentional and negligent acts and omissions by both Captain Cota and the ship's own bridge management team led to this mishap. It was the degree of the Captain's and the crew's negligence that led the U.S. Attorney's Office and DOJ's Environmental Crimes Section to bring criminal charges against both Captain Cota and Fleet Management Ltd., the company that operated the *M/V Cosco Busan*.

In the end, Captain Cota was convicted of criminal negligence under the CWA. He was also found guilty of a strict liability misdemeanor for violating the Migratory Bird Treaty Act, 16 U.S.C. §§ 703–711. Captain Cota was sentenced to almost a year in prison, ordered to pay a fine, and serve 200 hours of community service. The company was convicted of CWA criminal negligence as well as felony false statement and obstruction of justice charges stemming from post-crash conduct that included

falsifying logs and other documents presented to the U.S. Coast Guard. The company paid \$10 million in fines and community service projects related to the environment. It also entered into a comprehensive operational compliance plan. The *Cosco Busan* prosecution has resulted in both applause and criticism. Compare Katherine A. Swanson, *The Cost of Doing Business: Corporate Vicarious Criminal Liability for the Negligent Discharge of Oil Under the Clean Water Act*, 84 WASH. LAW REV. 555 (2009) (arguing in favor of prosecuting corporations under a vicarious liability theory), with David E. Roth et al., *The Criminalization of Negligence Under the Clean Water Act*, ABA CRIMINAL JUSTICE (2009).

The general elements of a CWA negligence crime are that a person discharged or caused the discharge of a pollutant into navigable waters of the United States, the person acted negligently, and the person's negligence was a proximate cause of the discharge. To convict a person for violating the criminal provisions of the CWA specifically relating to the discharge of oil, see 33 U.S.C. § 1321(b)(3), one must further prove that the discharge of oil was of such a quantity "as may be harmful," a relatively easy element to prove when dealing with an oil spill. See 40 C.F.R. § 110.3(b) (noting that a harmful quantity may be as little as it takes to produce a sheen on the water). Because the Supreme Court has chosen not to address the issue, see *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), cert. denied, 528 U.S. 1102 (2000), and only a couple of circuits have addressed the issue directly, prosecutors will likely face challenges concerning the validity of the statute itself.

Defendants often first challenge the constitutionality of the CWA's negligence statute by arguing that due process prohibits the imposition of criminal liability absent mens rea or criminal intent as seen in knowing, willful, or intentional conduct. Similar mens rea challenges occur when dealing with felony charges of knowing violations of the CWA that courts have generally construed as general intent, not specific intent crimes. See, e.g., *United States v. Weitzenhoff*, 1 F.3d 1523 (9th Cir. 1993) as amended on denial of rehearing and rehearing en banc, 35 F.3d 1275, 1280 (9th Cir. 1994). Courts have generally dismissed these arguments and found that neither the felony (knowing) nor misdemeanor (negligent) provisions of the CWA offend due process.

In *Weitzenhoff*, two managers of a sewage treatment plant were convicted of knowingly violating the CWA for discharging approximately 436,000 pounds of pollutant solids into the ocean on 40 separate occasions. At trial, the managers admitted that they authorized the discharges but claimed that their actions were justified under their interpretation of the plant's CWA permit. The jury convicted them of numerous counts, including knowingly discharging pollutants in violation of the permit between March and October 1988 and January and July 1989 and knowingly making false representations in monthly discharge monitoring reports. *Weitzenhoff*, 35 F.3d at 1282. The defendants challenged the intent requirement of the CWA.

The Ninth Circuit held that knowing violations of the CWA are general intent crimes that merely require knowledge of the discharge and not specific knowledge that it was a violation of the CWA. In so doing, the *Weitzenhoff* court found that the CWA is a public welfare statute and explained that "[t]he criminal provisions of the CWA are clearly designed to protect the public at large from the potentially dire consequences of water pollution, see S.Rep. No. 99-50, 99th Cong., 1st Sess. 29 (1985), and, as such, fall within the category of public welfare legislation." *United States v. Weitzenhoff*, 35 F.3d 1275, 1286 (9th Cir. 1993). The court relied on *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971) to conclude that, as a public welfare statute, the CWA did not offend due process by requiring the prosecutor to prove only knowledge of the conduct rather than knowledge of the law or permit violated. The court explained:

In *International Minerals*, the Supreme Court construed a statute which made it a crime to "knowingly violate[] . . . any regulation" promulgated by the ICC, pursuant to 18

U.S.C. § 834(a), a provision authorizing the agency to formulate regulations for the safe transport of corrosive liquids. The Court held that the term “knowingly” referred to the acts made criminal rather than a violation of the regulation, and that “regulation” was a shorthand designation for the specific acts or omissions contemplated by the act. “[W]here . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.”

*Weitzenhoff*, 35 F.3d at 1284 (cites omitted).

Relying on the reasoning of *International Minerals* and distinguishing *Weitzenhoff* from other cases cited by the defendant, the Ninth Circuit further noted that

the dumping of sewage and other pollutants into our nation's waters is precisely the type of activity that puts the discharger on notice that his acts may pose a public danger. Like other public welfare offenses that regulate the discharge of pollutants into the air, the disposal of hazardous wastes, the undocumented shipping of acids, and the use of pesticides on our food, the improper and excessive discharge of sewage causes cholera, hepatitis, and other serious illnesses, and can have serious repercussions for public health and welfare.

*Id.* at 1286. Consequently, the government did not need to prove that the two managers knew their acts violated the permit or the CWA.

The Ninth Circuit addressed the constitutionality of the CWA negligence provision in *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000). In *Hanousek*, a construction project supervisor was alleged to have negligently caused the discharge of a harmful quantity of oil into navigable waters by failing to properly supervise a backhoe operation digging next to a known oil pipeline. Hanousek appealed his conviction, asserting that the government should have been required to prove that he acted with criminal or gross negligence, not ordinary negligence. In upholding the constitutionality of the CWA negligence provision, the court followed its decision in *Weitzenhoff* and held that the CWA is a public welfare statute. *Hanousek*, 176 F.2d at 1121; *accord United States v. Wilson*, 133 F.3d 251, 264 (4th Cir. 1997); *United States v. Sinskey*, 119 F.3d 712, 716 (8th Cir. 1997); *United States v. Hopkins*, 53 F.3d 533, 540 (2d Cir. 1995); *but see United States v. Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996) (felony CWA provisions not subject to a public welfare mens rea exception). The *Hanousek* court held that permitting criminal penalties for simple negligence is entirely proper and does not violate due process. *Hanousek*, 176 F.2d at 1121 (“In light of our holding in *Weitzenhoff* . . . and the fact that a public welfare statute may impose criminal penalties for ordinary negligent conduct without offending due process . . . we conclude that section 1319(c)(1)(A) does not violate due process by permitting criminal penalties for ordinary negligent conduct.”).

The Ninth Circuit rejected Hanousek's argument that he was not in a position to know what the law required and found that he was aware of the dangers in operating heavy machinery next to an oil pipeline. It found that “public welfare legislation is designed to protect the public from potentially harmful or injurious items, *see Staples v. United States*, 511 U.S. 600, 607 (1994), and may render criminal 'a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety,' *see Liparota v. United States*, 471 U.S. 419, 433 (1985).” *Id.* at 1121; *see also United States v. Hong*, 242 F.3d 528, 534 (4th Cir. 2001) (upholding conviction of defendant for negligent violation of CWA based on the responsible corporate officer doctrine).

Defendants who are charged with a negligent violation of the CWA may also argue that Congress did not intend to criminalize ordinary negligence, but instead intended the CWA negligence provision to be interpreted as requiring a higher standard of intent, such as criminal or gross negligence. Courts have rejected this argument, however, and held that prosecutors need only prove ordinary negligence as opposed to some elevated standard of negligence. *See, e.g., Hanousek*, 176 F.3d at 1116.

In *Hanousek*, the Ninth Circuit held that the term “negligently,” as used in the CWA's criminal provisions, should be given its ordinary meaning, “a failure to use such care as a reasonably prudent and careful person would use under similar circumstances.” *Id.* at 1120 (citations omitted). The court bolstered its plain language holding by writing that “[i]f Congress intended to prescribe a heightened negligence standard, it could have done so explicitly, as it did in 33 U.S.C. § 1321(b)(7)(D)” that provides for increased civil penalties for cases involving “gross negligence or willful misconduct.” *Id.* at 1121 (citing *Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”)). Thus, where no limiting adjective lies next to the term “negligence” such as “gross,” “criminal,” or “culpable,” the plain meaning of negligence would not include any such adjective. *Id.*

The Tenth Circuit embraced the Ninth Circuit's plain language approach to § 1319(c)(1)(A). *See United States v. Ortiz*, 427 F.3d 1278, 1282-83 (10th Cir. 2005). A New Jersey district court followed suit in *United States v. Atlantic States Cast Iron Pipe Co.*, 2007 WL 2282514, at \*13-14 (D.N.J. Aug. 2, 2007) (using ordinary negligence instructions and expressly rejecting a higher criminal negligence standard). In *Ortiz*, the defendant was an operations manager and sole employee of a distillation facility that manufactured propylene glycol, an airline wing de-icing fluid. The process generated large amounts of wastewater. Ortiz did not obtain a permit to discharge at the local treatment plant. Instead, Ortiz represented to city officials that he would ship the wastewater to a local business for treatment and disposal when, in fact, he disposed of the wastewater by discharging it into a toilet that connected to a storm water drain leading to the Colorado River.

In upholding the use of an ordinary negligence standard, the Tenth Circuit used an analysis almost identical to the Ninth Circuit's in *Hanousek* to find that the CWA requires evidence of ordinary negligence. The court also held that the government need not prove that a defendant knew a discharge would enter a covered water of the United States in order to secure a conviction. The court explained that “[n]egligence is conduct, and not a state of mind” and stated that “[i]n most instances, it is caused by heedlessness or inadvertence, by which the negligent party is unaware of the results which may follow from his act.” *Ortiz*, 427 F.3d at 1283 (quoting WILLIAM L. PROSSER & PAGE KEETON, *PROSSER AND KEETON ON THE LAW OF TORTS* § 31 (5th ed. 1984)).

At least one state court has followed the same reasoning as *Hanousek* and *Ortiz*. In *People v. Martin*, 211 Cal. App. 3d 699 (1989), the California Court of Appeals upheld a district court's jury instruction allowing criminal liability based on the violation of a standard of ordinary care where the defendant negligently disposed of hazardous waste. The court held that such a standard was permissible under the public welfare doctrine. *Id.* at 715. At least twenty states have adopted water pollution statutes that resemble the language seen in § 1319(c)(1). *See Roth et al., supra* at 1, 7.

An “ordinary negligence” jury instruction would be similar to what was recently used in a trial against a corporation and individual managers for CWA violations:

“Negligence” may be defined as a failure to exercise, in the given circumstances, that degree of care for the safety of others which a person of ordinary prudence would exercise under similar circumstances. It may be the doing of an act which the ordinary

prudent person would not have done, or the failure to do that which the ordinary prudent person would have done, under the circumstances then existing.

*Atlantic States Cast Iron Pipe Co.*, 2007 WL 2282514, at \*13 (D.N.J. Apr. 24, 2009). Another instruction that was used in a Clean Air Act (CAA), 42 U.S.C. §§ 7401–7671g, negligent endangerment case was as follows:

An act is done negligently if one fails to use due care under the circumstances. Ordinary care is that care which reasonably prudent persons would exercise in the management of their own affairs. Because the amount of care exercised by a reasonably prudent person varies in proportion to the danger known to be involved in what is being done, the amount of caution required in the use of ordinary care will vary with the nature of what is being done, and all the surrounding circumstances shown by the evidence of the case. To put it another way, any increase in foreseeable danger requires increased care.

*United States v. Hammer*, No. 97-05005-01-CR-SW-RGC (W.D. Mo. June 21, 1997) (as cited in Joseph J. Lisa, *Negligence-Based Environmental Crimes: Failing to Exercise Due Care Can Be Criminal*, 18 VILL. ENVTL. L.J. 1, 29 (2007)); see also 42 U.S.C. § 7413(c)(4) (2010) (the only other negligent provision in federal pollution statutes).

Not surprisingly, there has been considerable commentary on whether prosecutors should be given such latitude in prosecuting negligence cases under the CWA. If a prosecutor must prove only ordinary negligence, then even the smallest acts of negligence may be criminally prosecuted. See *Hanousek v. United States*, 528 U.S. 1102, 1103 (2000) (Thomas, J., dissenting) (“I think we should be hesitant to expose countless numbers of construction workers and contractors to heightened criminal liability for using ordinary devices to engage in normal industrial operations.”). Another common argument is that civil penalties are the more appropriate remedy for unlawful discharges that result from ordinary negligence. See, e.g., Roth, et al., *supra* at n. 15. Some commentators argue that Congress should amend the CWA to require a showing of gross or criminal negligence. *Id.* This higher standard is akin to proving gross negligence or gross or reckless disregard for the consequences of one's acts or omissions as seen in the Model Penal Code's “heightened” negligence standard:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

MODEL PENAL CODE § 2.02(2)(d) (2011).

There is no evidence, however, to show that prosecutors have run amok in bringing criminal charges for negligent behavior involving normal industrial operations, a showing that would justify the need to impose a heightened standard for proving negligence in CWA cases. Indeed, it appears that the opposite is the case. For example, a 2002 study that examined all federal environmental crimes prosecuted from 1987 to 1997 showed that of the 1,350 cases brought, only 86 (or 7 percent) involved negligence charges. See Steven P. Solow & Ronald A. Sarachan, *Criminal Negligence Prosecutions Under the Federal Clean Water Act: A Statistical Analysis and an Evaluation of the Impact of Hanousek and Hong*, 32 E.L.R. 11153, 11158 (2002) (“The small number of negligence cases actually brought over the past 14 years supports the view that, collectively, federal prosecutors have exercised considerable restraint in this area.”). Moreover, data that also included cases as recent as 2000 showed that of the 117

total negligence cases brought since 1987, over 45 percent involved convictions for both negligent and knowing conduct. *Id.*

The study further found that past CWA negligence cases may be categorized as falling into just four groups: (1) extraordinary environmental harm or human injuries; (2) very serious harm and gross negligence; (3) “compromise” cases where misdemeanor negligence charges served as a means to reach a plea agreement; and (4) “combination” cases where negligence charges were combined with felonies that were charged under environmental statutes and/or traditional Title 18 criminal charges. *Id.*

The study demonstrated that prosecutors are not charging negligence without seriously considering the underlying conduct and the consequences of that conduct. This conclusion raises a question. When should a prosecutor proceed with criminal charges for negligent behavior? Not surprisingly, several of the factors noted above should come into play when deciding whether negligent conduct that led to the unlawful discharge of a pollutant should be prosecuted criminally.

### **III. Prosecuting a negligence case—factors to consider**

Criminal negligence cases are unique compared to the cases prosecutors commonly bring. These cases lack the kind of intentional conduct that usually falls under the categories of lying, cheating, or stealing that are involved in most white collar and environmental cases. Instead, criminal negligence cases involve a series of acts or omissions that have amounted to a breach or a series of breaches of a reasonable standard of care. However, even if a prosecutor has clear authority to pursue criminal charges, the prosecutor must still undertake the same rigorous analysis of whether the charges are provable based on existing law and facts, and review the Principles of Federal Prosecution of Business Organizations if the target is a corporate entity. Title 9, United States Attorneys' Manual, Sec. 9-28.000. The prosecutor must also determine an arguably harder question, whether the charges should be brought in the first place. Prosecutors should not prosecute accidents where the evidence shows that the accident was unforeseeable or unavoidable. Prosecutors should also not prosecute mishaps that resulted from negligent conduct that can be better remedied through administrative or civil enforcement actions. *See id.* at Sec. 9-28.1100. Instead, prosecutors should criminally prosecute negligence cases when a review of all of the applicable factors shows that the most appropriate remedy for the conduct at issue is a criminal prosecution. In other words, prosecutors should bring criminal charges when the negligence, taken as a whole, rises to a criminal level. The following sections provide some factors to consider when deciding whether negligence conduct should be criminally prosecuted.

#### **A. The conduct**

The key factor prosecutors must examine when determining whether a CWA violation occurred is the conduct that resulted in the discharge of oil or pollutants or other harm. If no negligent or knowing conduct was present, the inquiry ends. A prosecutor faced with a sudden oil spill or other significant pollution event will need to investigate all the events leading up to the incident. The first and foremost question is, What type of corporation or corporations were involved? In other words, What type of industry was it? The following questions help to answer this basic question:

- Was the industry highly regulated, particularly with regard to environmental laws and regulations?
- Did the company's operations involve dangerous chemicals or result in disastrous consequences when things went wrong?

- Did the company comply with the applicable health and safety regulations in addition to environmental regulations? (A company that violates one set of regulations often violates other sets of regulations.)
- Did the company follow industry standards? If not, why? Was the failure to follow these standards an attempt to reduce costs and maximize efficiencies and profit to the detriment and risk of health, safety, and the environment?
- How much was spent on budgeting for environmental compliance?
- Was there an environmental compliance manager? If so, was it a real position or more like a bookkeeper with this title?
- Did the company have an operational or environmental compliance plan? If so, did it have teeth or was it just sheets of paper kept in a file?
- Were employees trained on applicable environmental regulations or health and safety regulations?
- Were employees properly trained to handle the machinery or operations that were connected to the spill or pollution event?
- What was the company's compliance history? Had it been found in violation before? Had it been issued numerous warnings or notices of violation or possibly been subject to citizen suits? If so, how often? By whom? Were the number of notices of violations greater than those received by similarly-situated companies?
- Did the company appear to avoid compliance by paying administrative or civil fines without any change in corporate practice?

Additional questions help to focus on the nature of the spill or pollution event itself. Was the event caused by negligence? If so, was it caused by one negligent act that violated an applicable regulation or a series of acts that violated numerous regulations? What was the consequence for violating the regulation at issue? For example, if an employee was not properly trained or supervised as to when to calibrate a piece of equipment and the regulations required calibration every week in a certain manner, would that failure to calibrate every week or calibrate properly result in a simple malfunction of the equipment or could it result in a catastrophic event? Did the negligent act violate a known industry standard or violate the company's own practices and policies?

Proving negligence may be difficult. Experts and regulators may play an important role in assisting the prosecutor to understand the applicable, and often technical, regulations. They may also help to explain relevant industry guidance, ISO standards, and safety management plans. They can explain whether these regulations, rules, standards, or plans were violated and, if so, how egregious the violations were. Were these violations more or less paperwork violations or otherwise minor violations that are to be expected in such a highly regulated industry or were these violations more unique or substantive in nature with more far reaching consequences?

Another area of inquiry is the level of notice that showed a company or individual was operating in a negligent manner. Did regulators issue notices of violation or notify the company that it was operating in violation of applicable regulations? Did outside contractors or employees warn the company that it was operating negligently? If so, were the warnings repeated? Did people warn the company that the negligent practice, if continued, may have catastrophic consequences if something went wrong? Did these warnings or notices of violation go unheeded?

In *United States v. Citgo Petroleum Corp.*, CR No. 08-00077 (W.D. La. Sept. 17, 2008), approximately 56,000 barrels of oil (1.76 million gallons) spilled into the Indian Marais and Calcasieu rivers following a heavy rain storm. An investigation uncovered that Citgo had failed to maintain storm water tanks and adequate storm water storage capacity at its petroleum refinery in Sulphur, Louisiana and that these failures had caused the large oil spill. Citgo pleaded guilty to the negligent discharge of pollutants into two rivers in Louisiana and paid a \$13 million fine. The company admitted to constructing only two storm water tanks in order to trim costs, despite being told by both employees and outside contractors that additional storage was necessary. The company also admitted that it failed to follow standard procedures for maintaining the tanks, including the removal of oil, sludge, and solids from the tanks and failing to repair the skimming equipment. Failure to follow these procedures and the decision to build an inadequate number of storage tanks significantly contributed to the amount of oil spilled.

Another issue that is important to analyze is whether the agency that regulates the entity explicitly or implicitly condoned the conduct that is now being called into question. Did the regulatory agency issue proclamations contrary to applicable statutes or regulations? Did the regulatory agency routinely take no action regarding known non-compliance? While such actions do not necessarily foreclose the ability to bring charges, such factors are key in determining the culpability of the entity and whether criminal charges are warranted or other remedies such as civil or administrative enforcement are more appropriate.

As previously noted, 45 percent of all negligence cases brought between 1987 and 2000 dealt with convictions that also involved knowing conduct. Solow et al., *supra*, at 11158. A prosecutor investigating an oil spill or serious pollution event should be prepared to find, in addition to negligent conduct, knowing and even intentional conduct that violated either an environmental law or a Title 18 statute (for example, false statements or obstruction of justice). The prosecutor may find that a corporation or individual who commits a negligent act with consequences so dire, such as an oil spill or human casualties, has also committed other acts with a greater mental state than the series of acts or failures that led to the incident. Such findings will assist the prosecutor when making the critical determination of whether criminal charges are warranted.

In the *Cosco Busan* oil spill, for example, the investigation uncovered both negligent and knowing conduct. The government learned that Captain Cota did not make an otherwise innocuous mistake that yielded unforeseeably grave damage. Rather, Captain Cota acted—sometimes deliberately—in ways that demonstrated a series of lapses in judgment. These acts produced a disaster that could have been far worse. U.S. Sentencing Memorandum, *United States v. John Joseph Cota*, CR 08-0160 SI (N.D. Cal. July 17, 2009). Captain Cota left the safety of the port in a dense fog when no other Bar Pilot that day did; he had reservations about the ship's radar; he failed to communicate with the crew, as required, about his route and navigational method; he did not actually use radar, the single most reliable method for navigating in fog; he did not understand symbols on the ship's electronic chart that marked the bridge pier; he asked the Master for help and got an ambiguous response that he neither clarified with the Master nor cleared up by consulting the paper chart; he did not explain his confusion to anyone; and he accelerated, despite his apparent confusion. At no time did he stop the ship or proceed to anchor to clear up any confusion. Compounding the situation, Captain Cota failed to accurately report (prior to the allision) his heavy prescription drug use to the U.S. Coast Guard, as required by law on an annual basis, while he operated a large vessel in a dangerous harbor that is home to a highly sensitive environment. *Id.*

Negligence, as well as knowing and intentional conduct, was also present with regard to the shipping company that operated the *Cosco Busan*. The investigation revealed that the acts and omissions of the company's employees were also a proximate cause of the oil spill. These acts and omissions

included the company's failure to adequately train the crew of the particular vessel; the crew's failure to be adequately familiar with certain ship-specific navigational equipment; the crew's failure to engage in a berth-to-berth passage planning process or prepare written plans; the crew's failure to conduct an adequate Master-Pilot exchange of information before embarking; the crew's failure to fully utilize or operate the ship's radar and electronic chart system once underway; and the crew's failure to take fixes during the voyage. U.S. Sentencing Memorandum, *United States v. Fleet Management Ltd*, 2009 WL 3094701 (N.D. Ca. July 15, 2009). In addition to this negligence, the crew carried out a post-crash cover-up by engaging in multiple acts of obstruction of justice, including concealing ship records and creating materially false, fictitious, and forged documents with the intent to influence the Coast Guard's investigation. *Id.*

With regard to the BP oil spill, news accounts and commentary are already showing that a series of acts and omissions that deviated sharply from the appropriate standard of care may have occurred and arguably led to, or were the proximate cause of, the explosion. *See, e.g.*, David Barstow et al., *Deepwater Horizon's Final Hours*, N.Y. TIMES, Dec. 26, 2010, at A1. Moreover, it appears from commentators that BP was not the only one that may have engaged in negligent conduct. Other companies, such as Transocean and Halliburton, may also have deviated from industry standards in the drilling of the Macondo well. David M. Uhlmann, *After the Spill is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Law*, 109 MICH. L. REV. 1413 (2011) (discussing the Gulf Oil Spill with regard to environmental criminal law). For these reasons, it is not surprising that commentators are discussing the existence of a criminal investigation and even opining whether criminal charges will be brought. *Id.*

Once a full understanding of the facts and events leading up to an incident is obtained, the prosecutor will be better able to determine whether the incident truly was an accident, whether it was caused by negligence of the kind that does not rise to the level warranting a criminal prosecution, or whether it was caused by the kind of negligence that constituted such a deviation from an expected and reasonable standard of care that a tragic mishap is not an accident because it was foreseeable, avoidable, and, in some instances, waiting to happen. It is then that a criminal prosecution may be warranted.

## **B. Harm**

Although harm is not generally an element of a water pollution violation (unless one is charging a violation of § 1321(b)(3)), a prosecutor may consider actual harm or potential for harm that resulted from the negligent conduct. In the *Cosco Busan* matter, definite harm was present that amounted to tens if not hundreds of millions of dollars for clean up costs, loss to fishermen and other businesses, and natural resource damages. In the months after the BP Oil Spill, more than 200 million gallons of oil spewed from the well that the Deepwater Horizon oil rig was attached to. The loss to the ecosystem and to the communities and businesses impacted will amount to tens of billions of dollars. *See* Uhlmann, *supra* (citing REUTERS, BP TO RAISE \$50 BILLION FOR OIL SPILL COSTS: REPORT (2010)). The Department of Justice (DOJ) has already filed a civil suit against BP and several other companies. Press Release, U.S. Dept. of Justice, Attorney General Eric Holder Announces Civil Lawsuit Regarding Deepwater Horizon Oil Spill (Dec. 15, 2010) (on file with author). The DOJ alleges CWA violations and seeks civil penalties, cleanup costs, and damages. It has also announced the existence of a federal criminal investigation. *Id.*; *see also* Jerry Markon, *Manslaughter, Other Charges Considered in Gulf Oil Spill Probe*, WASH. POST, Mar. 29, 2011; Dominic Rushe, *BP Managers Could Face Manslaughter Charges Over Gulf Oil Spill*, GUARDIAN, Mar. 29, 2011.

Without a doubt, harm is a key consideration that should factor into any prosecutor's decision to proceed with charges based on criminal negligence. Indeed, the potential for serious harm is also a

consideration. A company's knowing shipment of hazardous materials by air in violation of Department of Transportation regulations may result in a criminal prosecution even if the shipments fortuitously did not result in an explosion on an aircraft. *See, e.g., United States v. Benefit Cosmetics*, CR 08-602 SI (N.D. Cal. Nov. 14, 2009). The presence of significant harm, however, as seen in the *Citgo* spill, the *Cosco Busan* spill, and clearly with the BP Oil Spill, makes it more likely that the DOJ will conduct a criminal investigation into the matter, especially where human casualties also take place. Indeed, the public may be distressed to learn that no criminal investigation is being undertaken.

Some have argued that harm should not be a factor when deciding whether to bring criminal charges and that prosecutors should only look at the defendant's culpable conduct and state of mind, not “the fortuity of whether harm ensues.” Uhlmann, *supra*, at 1420 (responding to this theory). It is the harm itself, however, that demonstrates an unauthorized discharge of a pollutant, a key element of a CWA violation. Moreover, it is the extraordinary and often unmitigable harm that prompted Congress to enact the CWA in the first place and to ensure that criminal negligence charges are available. By enacting the CWA, Congress expressed the public's position that industries may not externalize the cost of their pollution onto the public and that corporations and their employees must act responsibly. When they do not, criminal liability may ensue. *See* 33 U.S.C. § 1319(c) (2010). In other words, preventing oil spills and other serious pollution events from occurring is so important that a duty of care is placed on those that work in industries where spills or discharges may occur and it is expected to be followed. When the duty of care is not followed and a catastrophe happens, charges may be brought. This type of deterrent is precisely what Congress wanted to place on industry when it amended the statute. *See* 136 CONG. REC. S11, 544-46 (1990) (statement of Sen. Joe Lieberman) (“[C]riminal enforcement is a particularly effective tool in securing compliance with our environmental laws; this special deterrent effect should be strongly considered in those cases where the [g]overnment may have discretion to apply civil or criminal penalties.”). Like civil actions, criminal prosecutions can change industry behavior and ensure future compliance with the applicable laws and regulations. Indeed, many would argue that deterrence from a criminal prosecution is much greater. Thus, when a disaster results in significant harm to the environment, prosecutors should consider the harm when deciding whether to open an investigation as well as when deciding whether to proceed with criminal charges.

### **C. Type of industry**

In determining whether a criminal prosecution is warranted, it is also important to examine the type of industry involved. Because environmental crimes are really a subset of general regulatory crimes (for example, food and drug safety, worker safety), the corporations involved in the pollution event are often in highly regulated industries such as the oil industry, the pipeline industry, the chemical manufacturing industry, the nuclear industry, the shipping industry, and the drilling industry. These industries are highly regulated partly because they involve dangerous activity that can have disastrous consequences if something goes wrong (for example, oil spills, pipeline explosions, refinery leaks, chemical or radiation releases). The public expects such industries to be highly regulated and that these industries will comply with the regulations that are designed to ensure the health and safety of its workers, the surrounding community, and the environment. A careful understanding of the industry itself, the regulations that govern a specific industry, and whether the specific company complied with these regulations is key to determining whether the acts or omissions that led to a pollution event rise to the level of a criminal prosecution.

#### **D. Proximate cause**

A prosecutor may find negligent conduct or even a series of acts and omissions that clearly deviated from the law, regulations, industry standards, or even corporate policies. If, however, that negligent conduct was not the proximate cause of the incident that resulted in a pollution event, then the prosecutor will not be able to prove a negligent violation of the CWA. Thus, it is important to analyze and be prepared to argue beyond a reasonable doubt the causal connection between a defendant's negligent conduct and the pollution event. It is important to note that instances may arise where more than one person or entity is the proximate cause of a pollution event. The existence of more than one proximate cause does not necessarily foreclose the ability to prosecute under the CWA. *See, e.g.*, the *Cosco Busan* prosecution. However, a prosecutor will need to analyze the facts and assess the strength of what will likely be finger pointing by one entity towards another. Given that a prosecutor must prove proximate cause beyond reasonable doubt, the existence of multiple proximate causes (and the interplay of or relationship between those various negligent acts or actors) is a factor to consider when deciding whether a criminal prosecution is provable and/or warranted. In such instances, it is possible that a civil or administrative enforcement action is more viable and will better remedy the offending conduct.

#### **IV. Tools available to the prosecutor**

Undertaking a criminal investigation in a large environmental disaster (or any disaster that may have resulted in casualties or invokes a federal interest) is no easy endeavor. Numerous parties will be interested in the matter, including federal, state, and local law enforcement agencies; federal, state, and local regulators; federal safety boards charged with immediately investigating such disasters; local and state governments; federal, state, and local politicians; local citizens; and, of course, the press. It will be imperative to navigate through the obstacles presented by so many interested parties. It also will be imperative to coordinate and work with these parties, especially the relevant law enforcement agencies, safety boards, and regulators. While a separate article can be written on issues that arise while investigating a disaster such as an oil spill or pipeline explosion, a few points may be made.

First, a prosecutor will need to decide whether to open a criminal investigation immediately or wait until other agencies, such as a federal safety board, conduct a separate investigation. There are pros and cons to both approaches and legal and policy issues to consider, all of which can be the subject of a separate article. Suffice it to say, if a prosecutor is faced with such a decision, he should discuss the matter with his management and consider reaching out to Main Justice or other districts to assess the appropriate route to take in a specific investigation.

Second, coordination with state and local law enforcement and regulatory agencies is key. At some point, if potential violations of more than just federal statutes have occurred, a decision will need to be made regarding who takes the lead and moves forward with the investigation. For many reasons, including the high profile nature of the disaster, turf issues may arise. If, however, a strong relationship has been developed among federal, state, and local authorities, the issues surrounding who moves forward and in what manner can be minimized.

Third, investigating these types of cases can take a vast amount of resources. Therefore, a prosecutor should seek to include resources from as many agencies as are willing to assist. EPA's Criminal Investigation Division will have an interest if it is a pollution case. The U.S. Fish and Wildlife Service will also have an interest if wildlife was harmed. The U.S. Coast Guard will have an interest if it involves a large oil spill in maritime waters. The FBI may assist, especially if fraud was involved or if lives were lost. Local and state law enforcement may also have a role here because they typically regulate and enforce the applicable state laws. Several of these agencies have specific expertise that may be used

throughout the course of the investigation. Cross-designation of state and local law enforcement may be useful. Assistance from Main Justice is also a highly recommended option. DOJ's Environmental Crimes Section has highly competent, well-trained trial attorneys whose job is to provide assistance to the ninety-four districts in prosecuting environmental crimes. In addition to bringing specialized knowledge, they may also bring other resources to the investigation, such as additional attorneys, paralegals, or other agency assistance.

## V. Conclusion

Disasters happen—often with terrible consequences to the environment and surrounding community. Many of these disasters are unforeseeable and unavoidable, such as those caused by acts of God, including earthquakes or hurricanes. Other times they are not. In these latter instances, prosecutors will need to determine whether the disaster was caused by negligent behavior and, if so, whether the negligent behavior rises to a level warranting criminal prosecution as opposed to relying on a civil or administrative enforcement action as an appropriate remedy. Given a prosecutor's ability to prosecute ordinary negligence, the sound exercise of prosecutorial discretion in these instances is key to ensuring just and proper resolutions. Prosecuting negligence-based environmental crimes should only be done when the circumstances warrant it. There will be times, however, when a non-criminal remedy is simply not adequate to address or deter the offending behavior. In those instances, the prosecutor should consider whether a CWA negligence charge is appropriate. Such prosecutions, although relatively rare in the scheme of environmental crime prosecutions, not only result in specific deterrence but also general deterrence. It is not uncommon to see convictions in environmental cases change the behavior of not only the convicted defendant, but entire industries. Accidents happen, but sometimes human or corporate behavior creates an accident waiting to happen. When that is the case, prosecution of those responsible may help reduce the likelihood that a similar disaster happens again.❖

## ABOUT THE AUTHOR

❑ **Stacey P. Geis** is an Assistant United States Attorney at the United States Attorney's Office in San Francisco and is the office's Environmental Crimes Coordinator. She was hired in March 2004 to strengthen the office's environmental enforcement program. Since 2004, she has been a member of the DOJ's Environmental Crimes Policy Committee. She has criminally prosecuted dozens of pollution cases, including the 2007 Cosco Busan oil spill, as well as wildlife and fisheries cases. She prosecutes both individuals and corporations for environmental violations and has written several articles, including *Tire Fire Enforcement—Successful Approaches in a Complex, Multi-Media, Multi-Agency Action*, 17 NAT'L ENVTL. J. 10 (2002) and *Endangered Suits: Citizens' Claims Under the ESA*, CAL. DAILY J. (1997). She can be reached at 415-436-7126 or [stacey.geis@usdoj.gov](mailto:stacey.geis@usdoj.gov).✉

# Prosecuting Criminal Violations of the Endangered Species Act

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## I. Introduction

The Endangered Species Act (ESA), 16 U.S.C. §§ 1531–1544, is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 698 (1995) (citation omitted). Its passage marks a commitment by Congress “to halt and reverse the trend towards species extinction, whatever the cost.” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). For almost forty years, the ESA has protected imperiled species of all types, from lichens to blue whales, *see* 50 C.F.R. §§ 17.11, 17.12 (2011), that would likely be extinct today had Congress not passed the ESA. In fact, the ESA's protections have allowed some species, such as the Bald Eagle, to recover to the point where they are no longer technically considered endangered, thus removing them from the ESA's list of protected species.

The ESA's broad prohibition of “tak[ing]” wildlife makes it unlawful to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” an endangered species “or to attempt to engage in any such conduct.” 16 U.S.C. §§ 1532(19), 1538(a)(1)(B), (C) (2011). In addition to the “take” prohibition, the ESA's anti-trafficking measures bar interstate commerce of listed species and implement the United States' treaty obligations under the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES). 16 U.S.C. § 1538(c) (2011); 50 C.F.R. §§ 23.13–23.36 (2011). The ESA also has the potential to stop any federal action in its tracks if the action would jeopardize the continued existence of a listed species or adversely modify its critical habitat. 16 U.S.C. §§ 1536(a), (b) (2011).

Despite its apparent muscle, however, the ESA does not appear to form the basis for prosecutions of federal wildlife crimes as often as one might expect. Notwithstanding the commitment of Congress to halt species extinction, the ESA contains only misdemeanor criminal provisions; it creates no felonies. Consequently, federal prosecutors frequently opt instead to address harm to endangered species by way of other wildlife statutes that provide weightier penalties, although the underlying predicate offense may still be an ESA violation. For example, the ESA can serve as a predicate offense for the more punitive Lacey Act Amendments of 1981 (Lacey Act), 16 U.S.C. §§ 3371–3378 (2011). However, the ESA remains an important tool in the environmental prosecutor's tool kit because it is sometimes the only statute that applies to a given situation or that creates the necessary predicate for a felony violation under another statute.

This article summarizes the ESA's criminal provisions, compares the ESA's penalty scheme to that of other wildlife statutes, ponders the reasons for and consequences of the relative weakness of the

ESA's penalty scheme, and highlights other considerations that prosecutors are likely to encounter in ESA cases.

## II. Prohibited acts

The range of conduct criminalized by the ESA is quite broad. The ESA's prohibitions not only reach harm to listed plants and animals but also apply to possession of and commerce involving individual specimens, living or dead. Specifically, with respect to any animals classified as “endangered” under the ESA, section 1538 makes it unlawful for any person subject to the jurisdiction of the United States to:

- (A) import any such species into, or export any such species from the United States;
- (B) take any such species within the United States or the territorial sea of the United States;
- (C) take any such species upon the high seas;
- (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);
- (E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;
- (F) sell or offer for sale in interstate commerce any such species; or
- (G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to [the ESA] and promulgated by the Secretary pursuant to authority provided by [the ESA].

16 U.S.C. § 1538(a)(1)(A)–(G) (2011). Unlike many environmental protection laws, the ESA has its own express attempt and solicitation prohibitions that make it unlawful “for any person subject to the jurisdiction of the United States to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in this section.” *Id.* § 1538(g). Endangered plants are protected by a similar, though slightly less encompassing, set of prohibitions. *See id.* § 1538(a)(2).

Some non-imperiled species that are similar in appearance to ESA-listed species also receive protection as if they were listed under the ESA. *See* 16 U.S.C. § 1533(e) (2011). This protection is given because individuals sometimes take listed specimens claiming, in good faith or otherwise, that the animal killed was a member of the look-alike non-listed species. For instance, the U.S. Fish and Wildlife Service recently conferred protection upon the non-imperiled shovelnose sturgeon because poachers of the look-alike endangered pallid sturgeon would attempt to evade prosecution by claiming that they thought the animals were shovelnose sturgeon. *See* Endangered and Threatened Wildlife and Plants, Threatened Status for the Shovelnose Sturgeon Under the Similarity of Appearance Provisions of the Endangered Species Act, 75 Fed. Reg. 53, 598 (Sept. 1, 2010).

Although subparagraphs (A) through (F) of 16 U.S.C. § 1538(a)(1) apply only to species listed under the ESA as “endangered” rather than “threatened,” the Department of the Interior has promulgated a regulation that extends all prohibitions in this paragraph of the ESA to all wildlife species listed as “threatened” that fall within its jurisdiction (freshwater and land-based species). *See* 50 C.F.R. § 17.31(a) (2011); *see also* 16 U.S.C. § 1533(d) (2011) (authorizing such regulations). Similar regulatory protections apply to plants listed as “threatened.” 50 C.F.R. § 17.71(a) (2011). The Department of Commerce, which has jurisdiction over marine and anadromous ESA-listed species (72 of the

approximately 1,950 ESA-listed species), has no such blanket regulation protecting “threatened” species but frequently extends similar protections on a species-by-species basis when listing a species as “threatened.” See Daniel J. Rohlf, *Jeopardy Under the Endangered Species Act: Playing a Game Endangered Species Can't Win*, 41 WASH. L. J. 116, 122 (2001). A prosecutor in receipt of a referral for a “threatened” species or a member of an “experimental population” that has been re-introduced into a particular area under 16 U.S.C. § 1539(j) of the ESA should check for special regulations pertaining to that species that may either strengthen or weaken these regulatory protections. See, e.g., 50 C.F.R. §§ 17.40–17.48, 17.84–17.86 (2011).

The ESA's key prohibition is its ban on “tak[ing],” 16 U.S.C. §§ 1538(a)(1)(B), (C) (2011). As explained briefly in Part I, “the term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” any individual of a listed species and also includes an “attempt to engage in any such conduct.” *Id.* § 1532(19). As the definition itself suggests and as the Supreme Court has interpreted it, “[t]ake' is defined in . . . the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife.” *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 704 (1995); but see 16 U.S.C. § 1539(e) (2011) (establishing narrow exemption for subsistence use of ESA-listed species by Alaska natives). With such a broad range of prohibited acts, it is no surprise that the ESA has the potential to ensnare a wide cast of actors, including exotic pet dealers, jewelry and furniture craftsmen, hunters and trappers, property developers, fishermen, utilities, caviar dealers, zoos and circuses, traditional medicine merchants, and handbag makers. Indeed, the commercial incentives created by the scarcity of endangered specimens can give rise to extensive trafficking networks that closely resemble, or are, organized crime syndicates.

Regulations implementing the ESA further expand the list of prohibited acts by defining “harass” as “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3 (2011). The regulations define “harm” as an act “which actually kills or injures wildlife,” including the “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” *Id.*; see also *Sweet Home*, 515 U.S. at 701-08 (upholding “harm” definition against facial challenge). Unpermitted habitat modification may thus be prosecuted in certain circumstances as unlawful harm under the ESA. See *United States v. West*, 3:10-cr-00078 (D. Or. Mar. 29, 2010) (pleading guilty to ESA and Clean Water Act violations from the destruction of coho salmon habitat caused by the intentional re-routing of a stream).

The ESA's take prohibitions apply not only to intentional acts, such as hunting, but to activities that are not intended to take species listed under the ESA but that may nevertheless take species incidentally. 16 U.S.C. § 1539(a) (2011). Incidental taking is only permissible if the entity obtains and abides by an incidental take permit from the Department of the Interior or the Department of Commerce. *Id.* For this reason, it is always important to check for the existence of such a permit before charging. In fact, the Supreme Court rejected the argument that unlawful “harm” only takes the form of “affirmative conduct” or “direct applications of force against protected species.” *Sweet Home*, 515 U.S. at 697, 720. Courts have concluded that the normal operation or passive existence of utilities and other infrastructure may be an unlawful take in several instances. See, e.g., *Loggerhead Turtle v. County Council of Volusia Cnty., Fla.*, 148 F.3d 1231, 1248 (11th Cir. 1998) (civil action).

Relatedly, the term “harm” “encompasses indirect as well as direct injuries.” *Sweet Home*, 515 U.S. at 697-98; see also *United States v. Town of Plymouth*, 6 F. Supp. 2d 81, 90 (D. Mass. 1998) (holding in civil action that the ESA prohibits not only direct takes but “acts of a third party that bring about the acts exacting a taking” including “inaction”); *United States v. Glenn-Colusa Irrigation Dist.*,

788 F. Supp. 1126, 1133 (E.D. Cal. 1992) (holding in a civil action that with respect to prohibited takings generally “[i]t is irrelevant whether the taking is direct or indirect”). Thus, an indirect cause of harm to listed species may give rise to criminal liability under the ESA, subject to “ordinary requirements of proximate causation and foreseeability.” *Sweet Home*, 515 U.S. at 700; *see also Strahan v. Coxe*, 127 F.3d 155, 164 (1st Cir. 1997) (analyzing ESA takings in a civil action under same standard of “causation as it is understood in the common law”).

Knowing violations of the ESA are punishable criminally. 16 U.S.C. § 1540(b)(1) (2011). ESA criminal violations are thus general intent crimes; it is not necessary that the defendant know the legal status of the animal (for example, that it was listed as endangered or threatened) or intend to violate a law. However, the position of the government is that the defendant must know the biological identity of the animal at issue. Prosecutors need to be aware of this Department of the Justice requirement as it does not appear in the available case law. *See, e.g., United States v. Ivey*, 949 F.2d 759, 766 (5th Cir. 1991) (holding that the government need not prove that the defendant knew of the biological identity of the animal); *United States v. Nguyen*, 916 F.2d 1016, 1018-19 (5th Cir. 1990) (same); *United States v. Doyle*, 786 F.2d 1440, 1444 (9th Cir. 1986) (same); *United States v. St. Onge*, 676 F. Supp. 1044, 1045 (D. Mont. 1988) (same); *United States v. Billie*, 667 F. Supp. 1485, 1497 (S.D. Fla. 1987) (same).

The Department's current position arose from *United States v. McKittrick*, 142 F.3d 1170, 1176-77 (9th Cir. 1998). In that case, the Ninth Circuit upheld a jury instruction in an ESA prosecution for the illegal taking of a wolf. The instruction required the government to prove only that the animal was a species protected under the ESA and that the defendant knowingly shot an animal. *Id.* at 1176-77. In opposition to the defendant's certiorari petition, the Solicitor General informed the Supreme Court that the government would no longer “request the use of this [mens rea knowledge] instruction, because it does not adequately explicate the meaning of the term 'knowingly' in [Title 16] Section 1540(b)(1).” *Id.* The Solicitor General based this position on recent Supreme Court case law construing similar “knowing” violations in other statutes. *See, e.g., United States v. X-citement Video, Inc.*, 513 U.S. 64, 72 (1994). Thus, the Department has instructed all prosecutors not to request and to object to the use of the knowledge instruction at issue in *McKittrick*. For more information, see the Department's *McKittrick* Policy, available at <http://dojnet.doj.gov/ecs/wildlife/184182-v1-mckittrick-policy-4feb08.htm>.

The prohibitions in § 1538 apply not only to animals in the wild but also to captive individuals of an ESA-listed species, such as those held by zoos, circuses, and other exhibitors, *see, e.g., United States v. Cole Bros. Circus*, 9:11-cr-0011-MAC-KFG (E.D. Tex. Feb. 22, 2011) (pleading guilty to commercial exchange of Asian elephants without a permit and agreeing to pay a \$150,000 fine), unless one of two narrow exceptions applies. First, the ESA exempts those animals “held in captivity or in a controlled environment on (A) December 28, 1973, or (B) the date of the publication in the Federal Register of a final regulation adding such fish or wildlife species to [the threatened and endangered lists],” so long as they are not and were not held “in the course of a commercial activity.” 16 U.S.C. § 1538(b)(1) (2011). As a practical matter, this exception to the ESA's application to captive animals has little effect at this point because few animals in existence in 1973 are alive today. A handful of elephants whose captivity predates the ESA are still used in circuses but these select few would not qualify for the exception anyway because of their use for a commercial activity. Thus, they remain covered by § 1538 like other circus elephants. *Id.* The second exception addresses falconry and applies to “any raptor legally held in captivity or in a controlled environment on November 10, 1978” or its progeny “until such time as any such raptor or progeny is intentionally returned to a wild state.” *Id.* § 1538(b)(2)(A).

In addition to the taking, export, import, and other prohibitions in § 1538(a), § 1538(c) also makes it unlawful to “trade in any specimens contrary to the provisions of the [CITES] Convention, or to possess any specimens traded contrary to the provisions of the [CITES] Convention.” *Id.* § 1538(c)(1).

CITES protects certain species of fish, wildlife, and plants against overexploitation by regulating trade in the species. Protected species are listed in appendices to CITES. Species in Appendix I, the most protective of the CITES Appendices, are threatened with extinction and may be traded only in exceptional circumstances. Specifically, both the country of export (for example, where the animal was taken) and the country of import must make a scientific determination, independent of the legality of take in the country of export, that the trade at issue will not be “detrimental to the survival of the species involved” before issuing a CITES permit. Convention on International Trade in Endangered Species of Wild Fauna and Flora, art. III, Mar. 3, 1973, 1975 WL 165483, 27 U.S.T. 1087 (hereinafter CITES). Thus, an Appendix I animal moving from one nation to another, living or dead, must be accompanied by both a valid import permit and a valid export permit. *See* CITES, art. III; *see also* 50 C.F.R. § 23.23 (2011). Because trade in Appendix I species is permitted only if it is not detrimental to the survival of the species and is not primarily for commercial purposes, an Appendix I listing effectively bans commercial trade of the species. *See* CITES, art. III.

The parties to CITES monitor and regulate trade in Appendix II species by prohibiting international trade in the species unless certain permits are obtained. Specifically, the species' country of origin must issue a valid export permit. 50 C.F.R. § 23.12 (2011). Species assigned to Appendix II are not necessarily threatened with extinction now but may become so unless trade is strictly regulated to prevent utilization incompatible with their survival. For more detail on CITES permit requirements, see 50 C.F.R. part 23 and Revision of Regulations for the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); Final Rule, 72 Fed. Reg. 48, 402, 48, 416 (Jan. 23, 2007).

### III. Penalties, sentencing, and remedies

Most knowing violations of the ESA related to endangered species are punishable as a Class A misdemeanor, warranting up to one year in prison, 16 U.S.C. § 1540(b)(1) (2011); 18 U.S.C. § 3559(a)(6) (2011), and a \$100,000 fine under the Alternative Fines Act (AFA), 18 U.S.C. § 3571(b)(5) (2011). *But see United States v. Eisenberg*, 496 F. Supp. 2d 578, 583 (E.D. Pa. 2007) (holding that 1988 amendments to the ESA that increased ESA fines superseded the AFA, as amended in 1987, but applying AFA to fines under Lacey Act and Marine Mammal Protection Act). Knowing violations of the ESA related to threatened species are punishable as a Class B misdemeanor, potentially resulting in up to six months in prison and a \$25,000 fine. 16 U.S.C. § 1540(b)(1) (2011). With respect to *fish and wildlife*, this prohibition includes the import, export, or take of ESA-listed species; the possession, sale, or transport of specimens taken in violation of the ESA; the shipment, receipt, or delivery in interstate or foreign commerce of ESA-listed species in the course of a commercial activity even if not unlawfully taken; and the sale of ESA-listed species in interstate or foreign commerce. *Id.* §§ 1540(b)(1), 1538(a)(1). It does *not* include the sale of ESA-listed species in intra-state commerce.

With respect to *plants*, this prohibition includes import and export; the shipment, receipt, or delivery of ESA-listed plants in the course of a commercial activity even if not unlawfully taken; the sale of ESA-listed plants in interstate or foreign commerce; and, rather than taking, the removal, reduction to, possession of, or malicious damage or destruction of any ESA-listed plants that are either on federal land or are taken in violation of any state law, including trespass. *Id.* §§ 1540(b)(1), 1538(a)(2). Thus, taking-type prohibitions as applied to plants are much more limited. A Class A misdemeanor also results when a person engages in any trade contrary to CITES, imports or exports any wildlife or plants—whether ESA-listed or not—without a federal permit, imports or exports wildlife through any point of entry other than designated wildlife entry ports, attempts to violate the ESA, or solicits another to violate the ESA. 16 U.S.C. §§ 1540(b)(1), 1538 (c), (d), (f), (g) (2011).

A Class B misdemeanor results when a person violates any other provision of the ESA or any of the ESA's implementing regulations and is punishable by a maximum of six months in prison and a \$50,000 fine. 16 U.S.C. § 1540(b)(1) (2011); 18 U.S.C. §§ 3559(a)(7), 3571(b)(5) (2010). This prohibition includes the failure of a wildlife importer or exporter (of non-ESA listed species) to maintain proper records and the failure to execute the required customs declaration for trade regulated by CITES. 16 U.S.C. §§ 1540(b)(1), 1538(d)(2), (e) (2011).

Another key enforcement tool is the ESA's forfeiture provision that authorizes the federal wildlife agencies (or the U.S. Department of Agriculture in certain instances), the Coast Guard, and U.S. Customs and Border Protection to seize wildlife with or without a warrant and detain it pending the institution of an action *in rem* for the forfeiture of such wildlife. *Id.* § 1540(e)(3). Any “wildlife . . . taken, possessed . . . transported, delivered, received, carried, shipped, exported, or imported contrary to the provisions of [the ESA], any regulation made pursuant thereto, or any permit or certificate issued hereunder shall be subject to forfeiture to the United States” irrespective of any criminal conviction. *Id.* § 1540(e)(4)(A). Instrumentalities of the crime, including “guns, traps, nets, and other equipment, vessels, vehicles, [and] aircraft,” are also forfeitable upon conviction. *Id.* § 1540(e)(4)(B). Therefore, prosecutors should include such instrumentalities in the charging document for criminal forfeiture. The ESA incorporates by reference the seizure and forfeiture procedures of the “customs laws.” *Id.* § 1540(e)(5); *see also* 19 U.S.C. § 1607 (2011) (enumerating customs seizure provisions). Regulations published at 50 C.F.R. Part 12 implement these provisions.

In addition to forfeiture and misdemeanor penalties, the ESA also requires or authorizes the sentencing judge to take other measures that can serve a remedial purpose. For example, under the ESA, revocation of federal hunting privileges is mandatory on conviction. 16 U.S.C. § 1540(b)(2) (2011). The ESA also authorizes termination of the defendants' federal livestock grazing permits. *Id.* Although the ESA does not expressly authorize monetary restitution in and of itself (for example, for the cost of mitigation measures to help offset the effects of illegal take on an endangered population), it does provide that fines and forfeiture proceedings may be used to pay for the care of seized live animals and plants during the pendency of criminal proceedings and to fund conservation efforts. *Id.* § 1540(d).

Prosecutors should not be deterred from pursuing restitution for ESA violations despite the absence of an express restitution provision in the ESA, especially where the ESA violation involves a Title 18 offense against property (such as conspiracy or smuggling), because restitution may be available in such circumstances under Title 18. For example, in a recent case, *United States v. Bengis*, 631 F.3d 33 (2d Cir. 2011), the Second Circuit Court of Appeals held that restitution was available in a Lacey Act conspiracy case under both the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A, and the Victim Witness Protection Act (VWPA), 18 U.S.C. § 3663. In *Bengis*, the defendants admitted to capturing large quantities of rock lobster in South Africa in violation of South African law, bribing South African officials to look the other way, and attempting to import the lobsters into the United States with false customs declarations. *Id.* at 35-36.

In addition to a prison sentence, forfeiture, and fines, the government proposed a \$40 million restitution payment to the country of South Africa, an amount that the government's expert opined would restore the ecosystem after the harm caused by the defendants. *Id.* at 36-37. The district court denied the request, finding that South Africa did not have a “property” interest in the lobsters within the meaning of the MVRA and that South Africa was not an identifiable victim under the VWPA with an injury caused by the defendants. *Id.* at 37-38. The Second Circuit reversed and remanded on both counts. It held that the South African government's ability to seize and forfeit the lobsters vested a “property” interest in the government under the MVRA at the moment the defendants unlawfully took the lobsters. The court also held that South Africa was a victim for purposes of the VWPA. *Id.* at 40-41.

Even if an ESA referral does not have a Title 18 property offense that may yield restitution under the MVMA or VWPA, restitution may still be available as a condition of probation at the Court's discretion. *See* 18 U.S.C. § 3563(b)(2) (2011) (authorizing the court to order a defendant to “make restitution to a victim of the offense under section 3556 (but not subject to the limitation of section 3663(a) or 3663A(c)(1)(A))”).

In addition to statutory restitution, prosecutors have other remedial tools at their disposal to help offset the harm caused by defendants to the species at issue. For instance, federal law permits a court to order, as a condition of probation, that a defendant refrain from working in a certain profession, refrain from possessing a firearm or weapon, perform community service, or “satisfy such other conditions as the court may impose.” 18 U.S.C. §§ 3563(b)(5), (8), (12), (22) (2011); *but see* 18 U.S.C. § 3561 (2011) (setting general limitations on conditions of probation). Depending on the nature of the ESA violation, each of these probationary conditions could have a restitutionary effect. For instance, an order under 18 U.S.C. § 3563(b)(5) prohibiting the defendant from working as a hunting guide may be remedial if the ESA violation occurred during the provision of such services, because the presence of fewer poachers in the field may help the affected population recover. The weapons ban in 18 U.S.C. § 3563(b)(8) can have a similar effect.

The probation statute also authorizes a court to require a defendant to perform community service as a discretionary condition of probation, 18 U.S.C. § 3563(b)(12) (2011), so long as it furthers the purposes of sentencing set forth in 18 U.S.C. § 3553. *See* U.S.S.G. § 8B1.3 (2010) (community service must be “reasonably designed to repair the harm caused by the offense”); *see also* U.S. Department of Justice, Environment and Natural Resources Division, “Guidance on Restitution, Community Service, and Other Sentencing Measures Imposed in Environmental Crimes Cases” (Jan. 16, 2009) (guidance document advising that community service must have a “nexus” to both the geographic area of the crime and the environmental medium affected by the crime, among other factors); USAM § 9-16.325 (exempting environmental cases from USAM policy of not directing community service payments in plea agreements to third parties that are not victims of the crime, so long as the prosecutor consults with the Environmental Crimes Section (ECS) of the Environment and Natural Resources Division and follows the community service guidance document mentioned earlier in this paragraph).

Under this provision, a court may order a community service project that remedies the ESA violation at issue. For instance, the court ordered a defendant convicted of smuggling protected sea turtles to pay \$5,000 to a sea turtle protection program, perform 350 hours of community service for that program, or participate in a public service announcement. *United States v. Cueva*, 1:07-CR-0358 (D. Colo., Jun. 20, 2008). Similarly, the court ordered a Lacey Act defendant convicted of illegally killing elk to perform twenty-five hours of community service and write a letter to a bow hunting magazine explaining his conviction. *United States v. Arnold*, 4:08-CR-0238 (D. Idaho, Apr. 2, 2009). Probation and community service should not take the place of traditional criminal sentencing options. Most often these remedies are used in conjunction with fines and/or jail time. Perhaps most importantly, restitution may also be included in plea agreements under express terms relating to pleas.

Case-specific remedial measures may be obtained under the open-ended “other conditions” provision in 18 U.S.C. § 3563(b)(22). For example, responding to a prosecutor's request for a remedy under this provision, a court may require a developer to place part of its land in a habitat conservation trust as restitution for unlawfully taking listed species elsewhere on its property. *See, e.g., United States v. West Coast Homebuilders, Inc.*, 02-CR-40128 (N.D. Cal., Jul. 19, 2002) (ordering defendant who unlawfully drained pool, killing endangered red-legged frogs, to preserve another 640-acre parcel of its land as habitat for the remaining frogs); *United States v. Jones*, No. S-90-0216 (D. Md. May 30, 1990) (ordering, in a Clean Water Act case, that 2,500 acres of defendant developer's habitat be placed in a

conservation trust to remedy a violation that caused the death of protected species); *United States v. Ellen*, 961 F.2d 462, 463-64 (4th Cir. 1992) (noting same; a co-defendant of *Jones*). Prosecutors should explore all restitution or remediation options in an ESA case.

#### **IV. Recent Hawaii prosecution highlights the relative weakness of the ESA's penalties**

Although the Lacey Act can be a more potent weapon in the wildlife law enforcement scheme, as explained in another article in this issue of the U.S. Attorneys' Bulletin, the commercial or interstate or foreign commerce elements necessary to meet all of the elements of a Lacey Act offense are not always present. In such cases, the ESA may be the only law that applies. For example, on May 21, 2009, a seventy-eight-year-old Hawaii resident named Charles Vidinha shot and killed an endangered Hawaiian monk seal on the north shore of Kauai with a .22 caliber rifle. *See* Memorandum of Plea Agreement, *United States v. Vidinha*, Cr. No. 09-311 SOM (D. Haw. Sept. 25, 2009). The seal was pregnant with her sixth pup at the time of her death. Consequently, her death was not only lamentable in its own right but was also a significant setback to federal and state efforts in a pursuit to recover the Hawaiian monk seal population. Vidinha initially claimed that he merely intended to scare her away from the fishing nets he had set on a public beach. However, veterinary forensic evidence showed that Vidinha shot her several times at close range. After a federal grand jury returned a one-count misdemeanor indictment charging Vidinha with unlawful “take” in violation of the ESA, Vidinha and the government entered into a plea agreement. Vidinha agreed to plead guilty to the misdemeanor count and be sentenced to a ninety-day term and twenty-five dollar assessment.

Many members of the public in Hawaii opined that Vidinha's sentence was too light given the highly imperiled status of the Hawaiian monk seal (only about 1,100 remain, and the population is declining by four percent annually) and the special reverence placed on it by native Hawaiian culture. However, the ESA has no felony penalty and Vidinha's intrastate, non-commercial conduct did not fall within the scope of the Lacey Act or the Title 18 smuggling offenses often used to pursue felony charges for federal wildlife violations.

The Hawaii state legislature responded to the Vidinha case by proposing Senate Bill 2441. This piece of legislation would have remedied a similar weakness in the state endangered species law. As introduced, S.B. 2441 would have made it a Class C felony to knowingly or intentionally harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect *any* animal or plant protected as an endangered species under state law. Haw. S.B. 2441, § 2, 25th Leg. Sess. (Jan. 22, 2010); *see also* HAW. REV. STAT. § 195D (2011). However, the state Department of Land and Natural Resources (DLNR) objected to the number of species protected by the bill as introduced, claiming that felony criminal penalties were not appropriate for the many endangered species for which “malicious take is not a serious problem.” Written Testimony of Laura H. Thielen, Chairperson, Hawaii Dept. of Land and Natural Resources, Before the Senate Committee on Judiciary and Government Operations, at 1 (2010). DLNR maintained that “[e]ducation and outreach” together constitutes a more appropriate response to combat the intentional lethal take of endangered species. *Id.*

The Senate acceded to DLNR and narrowed the bill's provisions to the Hawaiian monk seal only. *See* HAW. S. COMM. REP. NO. 2608, at 1-2 (2010). The legislature passed the bill in this form and Acting Governor James Aiona signed it into law on June 8, 2010, barely a year after the shooting. *See* Haw. Act 165, 25th Leg. Sess. (2010). Section 1 of the bill as passed refers specifically to the *Vidinha* sentence as its motivation and states that “this sentence is not sufficient to deter future harassment of Hawaii's endangered species” and that “[i]n order to protect endangered species from future harassment and death,

greater penalties need to be imposed.” *Id.* § 1. No analogous response to this case exists at the federal level. Consequently, under federal law, a person may willfully and maliciously kill the last pair of a species and receive only a misdemeanor conviction and associated limited penalty.

Although the U.S. Attorney's Office for the District of Hawaii could have sought the full one-year sentence and rejected the three-month sentence, other factors led the U.S. Attorney's Office to decide that a sentence of three months was a sufficient term of imprisonment, given the sentencing factors listed in 18 U.S.C. § 3553(a). However, a better resolution would have been a guilty plea by Vidinha to a felony statute with the same term of imprisonment. That result would have forever barred Vidinha from lawfully possessing a firearm under 18 U.S.C. § 922(g)(1). In contrast, the offense to which Vidinha pled guilty under the ESA is only a misdemeanor, thus allowing him to lawfully possess a firearm after serving his time in prison. That result undermines the deterrent effect of the statute, especially to hunters like Vidinha.

## **V. Why is there no felony liability in the ESA and why does it matter?**

Other federal wildlife protection statutes that similarly prohibit the taking in commerce of a protected species, such as the Lacey Act, 16 U.S.C. §§ 3371–3378, the Bald and Golden Eagle Protection Act (BGEPA), 16 U.S.C. § 668, and the Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 703– 711, punish knowing or repeat violations as felonies. *See* 16 U.S.C. § 3373(d)(1)(A) (2010) (enumerating felony violations of the Lacey Act); 16 U.S.C. § 668(a) (2010) (authorizing felony punishment for second and subsequent convictions under the BGEPA); 16 U.S.C. § 707(b) (2010) (setting forth felony provisions of the MBTA).

By contrast, the ESA, although passed to protect the most vulnerable species, has never had a felony provision. As originally enacted, a violation of any provision of the ESA relating to an endangered species, an ESA permit, or any regulation implementing the export/import, trafficking, and take prohibitions for such species was punishable by a maximum of one year in prison and a \$20,000 fine. A violation of any other ESA regulation (including those relating to threatened species) was punishable by up to six months in prison and a \$10,000 fine. *See* Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884, § 11(b)(1) (codified as amended at 16 U.S.C. § 1540(b)(1)). In 1988, Congress increased the respective fine amounts to their current levels of \$50,000 and \$25,000, but did not increase the prison sentence. *See* An Act to Amend the Endangered Species Act of 1973, Pub. L. No. 100-478, 102 Stat. 2309 § 1007 (1988); *see also* 18 U.S.C. § 3571(d) (2011) (increasing the Class A misdemeanor fine to \$100,000 and providing that where “any person derives pecuniary gain from the offense, or [where] the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss”); *but see United States v. Eisenberg*, 496 F. Supp. 2d 578, 583 (E.D. Pa. 2007) (declining to apply AFA in an ESA case).

The legislative history of the ESA sheds no light on why Congress did not act to punish ESA violations as felonies during any of the eight amendments to the ESA. Given the strength of the ESA's many other provisions and the importance of the ESA among the nation's environmental laws, the reason behind the absence of felony liability remains unknown. It is possible that Congress knew that many ESA violations have a commercial aspect that allows them to be bootstrapped into a felony by way of the Lacey Act and the lack of felony penalties in the ESA is of no real consequence in those cases. *See* 16 U.S.C. § 3372(a) (2010) (making it unlawful to “import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States . . . .”); *Id.* § 3373(d) (providing felony liability for certain Lacey Act offenses).

However, conduct does not have to be commercial in nature to have catastrophic effects on protected species. This point has been illustrated in cases such as *Vidinha*, discussed earlier. The penalty imbalance appears particularly acute when one considers that the Lacey Act extends to *non-endangered* species. The following comparison demonstrates this point: The intentional non-commercial (for example, sport) killing of the last remaining individual of a protected species—say, the last polar bear—carries less punishment than the interstate sale of a live, non-endangered plant removed from a state park without authorization (so long as the plant has a market value greater than \$350). This bizarre outcome lends support to the theory that the absence of felony penalties in the ESA is an aberration.

Another practical consequence of the ESA's lack of felony liability is that convicted defendants do not lose their right to carry firearms under 18 U.S.C. § 922(g). Although some ESA violations do not involve firearms, many do, including the *Vidinha* case. *See also United States v. Clavette*, 135 F.3d 1308, 1309 (9th Cir. 1998) (shooting of endangered grizzly bear); *United States v. St. Onge*, 676 F. Supp. 1044, 1045 (D. Mont. 1988) (same); *United States v. Billie*, 667 F. Supp. 1485, 1493 (S.D. Fla. 1987) (shooting of endangered Florida panther). Some trafficking-type ESA violations also indirectly involve the use of firearms, where the specimens at issue have already been killed with a firearm. *See United States v. Mason*, No. 1:08-CR-00318 (D. Colo. Oct. 17, 2008) (where defendant pleaded guilty to one ESA violation for importing sport-hunted leopard trophies with falsified CITES export permits and agreeing to a four-year probation period during which defendant is not permitted to hunt anywhere).

The ESA's broad prohibition on the “taking” of an endangered species incorporates a much broader range of activities, including “harassment” of an endangered species, than if it were limited to the intentional or unintentional “killing” of an endangered species. It may appear to some that having the same misdemeanor penalty applicable for both incidental harassment and malicious killing would make little sense, either for deterrent or punishment purposes, when compared to other provisions of the general federal criminal code, Title 18 of the United States Code.

For example, 18 U.S.C. § 113 prohibits assaults within the maritime and territorial jurisdiction of the United States. The jurisdictional basis behind such prosecutions usually is that the crime occurred on a U.S. military base and the offender is a civilian not subject to military prosecution. The FBI usually investigates such assaults, and the offenders are usually prosecuted by Assistant U.S. Attorneys (or military Special Assistant U.S. Attorneys) in federal courts. Section 113, however, carries with it different types of prohibited assaults with different maximum sentences depending on how the assault was committed, whether a dangerous weapon was used, the offender's mens rea, and the extent of harm suffered by the human victim.

Thus, while simple assault is a Class B misdemeanor, punishable by a maximum of six months in prison, the term of imprisonment increases to one year if the victim of the assault is younger than sixteen years of age. 18 U.S.C. § 113(a)(5) (2010). Likewise, if the assault is caused by striking, beating, or wounding, the maximum punishment is only six months, but if the victim suffers “serious bodily injury,” as defined in 18 U.S.C. § 113(b)(2) and 18 U.S.C. § 1365, the term of imprisonment jumps to a ten-year felony. *Id.* § 113(a)(6). Similarly, if the assault was done with the intent to commit murder, the term of imprisonment jumps even further to twenty years. *Id.* § 113(a)(1).

Evaluating *how* the assaultive conduct was committed is also important to determine the punishment. For example, assault “with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse,” is subject to a ten-year term of imprisonment. *Id.* § 113(a)(3). Courts interpret the term “dangerous weapon” broadly to include assaults not only with firearms but also with anything that is capable of causing death or “serious bodily injury.” *See, e.g., United States v. Smith*, 520 F.3d 1097, 1106 (9th Cir. 2008) (concluding that a prison-made knife is a dangerous weapon under § 113); *United*

*States v. Riggins*, 40 F.3d 1055, 1057 (9th Cir. 1994) (explaining that a belt and a shoe can be a dangerous weapon under § 113).

Finally, depending on whether the human victim is killed, even unintentionally, the potential penalties may escalate greatly. For example, if someone commits child abuse on federal property and the child dies from that abuse, then instead of facing a prosecution for child abuse and a term of imprisonment, the offender may face a possible death penalty under 18 U.S.C. § 1111(b) and 18 U.S.C. § 3591–3599.

In contrast, the ESA does not differentiate between listed animals that were harassed and those that were actually killed. It does not consider whether the offender intended to harass or kill; whether a firearm or some other dangerous weapon was used; whether the endangered animal died, even unintentionally, from the “taking;” or whether the taking had a significant consequence from a species recovery perspective. However, the ESA does contain a penalty graduation based on the species' listing status, where violations involving “endangered” species are punishable as a Class A misdemeanor, but those involving a “threatened” species are punishable only as a Class B misdemeanor. *See* 16 U.S.C.

§ 1540(b)(1) (2010); 50 C.F.R. § 17.31 (2011) (extending section 1538 prohibitions to threatened species by regulation). The legislative history of the ESA, however, does not expressly answer why lethal and non-lethal and knowing and willful takes are all prohibited and punished the same way. Congress is presumed to have done so intentionally in the absence of some contravening indication. Perhaps Congress recognized that a non-lethal take often has a domino effect that, although it can rarely be measured, may still have a detrimental impact on individuals and the population as a whole.

Consider, for example, a non-lethal habitat modification that prevents a proven breeding female monk seal from reaching her breeding grounds. In this situation, the population would experience a more adverse effect than it would have experienced had the offense been a lethal take of an elderly male monk seal. Similarly, if harassment or other non-lethal take prevented the female monk seal from breeding or reaching food or critical habitat areas or caused her to be more vulnerable to disease or predation, the non-lethal take may eventually cause undetected, indirect lethal take that is clearly prohibited. *See Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 697-98 (1995). Thus, non-lethal take also warrants prosecution because killing is not the only way to harm individuals and populations.

## **VI. Conclusion**

Unless Congress amends ESA penalties to bring them more in line with those of other federal wildlife laws, prosecutors and investigators confronting a potential ESA violation should first determine whether liability also attaches under the Lacey Act and/or Title 18 smuggling, customs, or false statement offenses, in order to take advantage of the stiffer penalties and broader range of criminalized conduct created by those laws. However, prosecutors and investigators should not shy away from pursuing a stand-alone ESA case despite the absence of felony liability. For many endangered species, the loss of even one individual has a measurable impact on the population's prospects for recovery, as illustrated by the *Vidinha* case.

ECS can assist attorneys with their ESA referral. ECS has specialized wildlife prosecutors that have prosecuted or helped with the prosecution of ESA cases in many districts. Also, if an attorney is too busy to pursue an ESA referral, ECS prosecutors are authorized by the U.S. Attorneys' Manual to take the lead in wildlife criminal prosecutions in all districts. *See* USAM §§ 5-11.102–11.105, 11.110.❖

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*The opinions expressed herein are those of the authors and do not necessarily reflect the position of the U.S. Department of Justice.*

# Achieving Worker Safety Through Environmental Crimes Prosecutions

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## I. Introduction

Congress enacted the Occupational Safety and Health Act of 1970 (the OSH Act) to reduce workplace injuries, illnesses, and deaths in America. Contemporaneously, Congress passed statutes such as the Clean Air Act (CAA), the Federal Water Pollution Control Act (Clean Water Act or CWA), and the Resource Conservation and Recovery Act (RCRA) to protect human health and the environment. The OSH Act, considered by many to be the exclusive source of workplace safety protections, has woefully inadequate criminal provisions. The significantly stronger environmental statutes were designed to protect the general public. This division of the regulatory world into the “workplace” and “everywhere else” has allowed employers that put our Nation's workers in harm's way to escape responsibility for their actions. Through the Worker Endangerment Initiative, the Environmental Crimes Section (ECS) has led the charge to fill this enforcement vacuum. The Initiative is premised on two fundamental principles: (1) environmental crimes lead directly to worker injuries and deaths; and (2) employers that ignore worker safety laws in order to maximize production and cut costs, almost certainly ignore environmental laws as well. Accordingly, ECS partnered with the Environmental Protection Agency and the Department of Labor to increase prosecutions of workplace safety violations through the use of the environmental and general crimes statutes. As a result of the criminal training for Occupational Safety and Health Administration (OSHA) personnel and the improved interagency coordination, federal prosecutors now see more cases that straddle the jurisdictional gap and cases that marry worker safety violations with environmental and Title 18 crimes.

## II. Limitations of the OSH Act

Historically, there has been little criminal enforcement under the OSH Act. Setting aside the 2,200 to 8,000,000 ratio of federal and state OSHA inspectors to workplaces nationwide, 'DEATH ON THE JOB' REPORT 2010, [http://www.aflcio.org/issues/safety/memorial/doj\\_2010.cfm](http://www.aflcio.org/issues/safety/memorial/doj_2010.cfm), the OSH Act itself simply lacks teeth. It contains only three criminal provisions. First, an employer who willfully violates a specific standard, rule, or order causing the death of an employee may be punished by a fine of no more than \$10,000 and/or imprisonment for no more than six months. 29 U.S.C. § 666(e) (2010). Second, giving advance notice of an inspection warrants a fine of no more than \$1000 and/or imprisonment for no more than six months. *Id.* § 666(f). Third, making false statements in a document filed or maintained under the Act mandates a fine of no more than \$10,000 and/or imprisonment for no more than six months. *Id.* § 666(g). It is interesting to note that “[t]he maximum sentence, six months in jail, is half the maximum for harassing a wild burro on federal lands.” David Barstow, *U.S. Rarely Seeks Charges for Death in Workplace*, N.Y. TIMES, Dec. 22, 2003, at A1. These criminal provisions have not been enhanced since their enactment forty years ago. During this time, only seventy-nine criminal prosecutions have been brought under the OSH Act, resulting in a total of only eighty-nine months of incarceration. 'DEATH ON THE JOB' REPORT, *supra*.

OSHA rarely seeks criminal prosecution. Moreover, the Department of Justice prosecutes only a fraction of OSHA referrals. This dearth of criminal actions is not surprising given the hurdles the government must jump over to prove the most serious offense, that is, a willful violation causing the death of an employee. To begin with, only “employers” are subject to prosecution for this offense. “Employer” is defined under the Act as “a person engaged in a business affecting commerce who has employees . . . .” 29 U.S.C. § 652(5) (2010). This definition includes corporations, sole proprietorships, and partnerships. *Id.* § 652(4). Within a corporation, however, individual liability is limited to officers or directors that exercise pervasive and total control and does not extend to supervisory employees. *See United States v. Shear*, 962 F.2d 488, 492 (5th Cir. 1992); *United States v. Doig*, 950 F.2d 411, 414 (7th Cir. 1991); *United States v. Cusack*, 806 F. Supp. 47, 51 (D.N.J. 1992). Also, the offense requires proof of a more stringent mental state standard than the “knowing” standard applicable to most felony environmental offenses. The employer must have acted “willfully,” meaning he not only knowingly committed the violation but did so with intentional disregard of or plain indifference to OSH Act requirements. *United States v. Dye Constr. Co.*, 510 F.2d 78, 81 (10th Cir. 1975). The employer must also have violated a specific OSHA standard as opposed to the OSH Act General Duty clause. Finally, the government must prove that the OSH Act violation was both the “cause in fact” and the “legal cause” of the death. *United States v. Pitt-Des Moines, Inc.*, 970 F. Supp. 1359, 1364 (N.D. Ill. 1997). Notably, no criminal penalty exists for a violation causing serious bodily injury to an employee or for placing an employee at risk of serious bodily injury or death.

The unfortunate fact remains that twelve Americans a day leave for work and never make it home again because of a fatal workplace injury. BUREAU OF LABOR STATISTICS, CENSUS OF FATAL OCCUPATIONAL INJURIES SUMMARY (Aug. 19, 2010), *available at* <http://www.bls.gov/iif/#News>. An additional 50,000 workers die each year from occupational diseases. More than 9,000 workers a day experience a nonfatal injury or illness, some with serious irreversible health effects like amputations, burns, and chemical exposures. With this much danger in the workplace, it is incumbent on federal prosecutors to take a more active role in ensuring that the worst worker safety violators are appropriately targeted.

### **III. The overlap between worker safety and environmental crimes**

Even though primary responsibility for worker safety issues rests with OSHA, areas of overlap exist where environmental statutes effectively provide enhanced criminal enforcement options. The most significant of these areas are the endangerment crimes and the CAA's Section 112 provisions.

#### **A. The endangerment crimes**

Each of the three major environmental statutes includes a “knowing endangerment” provision that carries a penalty of up to fifteen years in prison and, for organizational defendants, a potential \$1 million fine. 33 U.S.C. § 1319(c)(3) (2010) (CWA); 42 U.S.C. § 6928(e) (2010) (RCRA); 42 U.S.C. § 7413(c)(5) (2010) (CAA). The CAA also includes a negligent endangerment provision that carries a penalty of up to one year in jail. 42 U.S.C. § 7413(c)(4) (2010). As demonstrated below, these endangerment statutes can be very potent weapons in promoting workplace safety.

To prove endangerment, the government must show that the defendant committed the underlying environmental crime knowing that his conduct would place another person in imminent danger of death or serious bodily injury. Unlike the OSH Act, a fatality is not a prerequisite for prosecution. Rather, an endangerment prosecution may be premised on the *risk* of death or injury to others. Moreover, because

jurisdiction is not limited to “employers” as it is under the OSH Act, a much broader range of persons, including supervisory personnel and otherwise culpable individuals, may be prosecuted.

A prime example of a knowing endangerment prosecution case is *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001). Elias, the owner of a fertilizer company in Soda Springs, Idaho, ordered his employees to clean out a 25,000-gallon tank so that he could use it to store sulfuric acid. The tank contained over a foot of hardened cyanide-laced sludge from a cyanide leaching process that Elias had patented. Twice, Elias ordered his employees into the tank through a twenty-two-inch manhole cover at the top. He did not provide any personal protective equipment for them. On the second occasion that twenty-year-old Scott Dominguez entered the tank, he collapsed. When emergency responders were finally able to get to Dominguez, he was in severe respiratory distress. In response to questions by both on-scene rescuers as well as the treating physician, Elias insisted that as far as he knew only water and mud were in the tank. By the time a cyanide antidote was finally administered, Dominguez had suffered irreversible brain damage. Elias was tried and convicted of RCRA knowing endangerment for his conduct toward Dominguez, illegal disposal of hazardous waste (which occurred after the accident), and a false statement for creating a confined-space permit after the fact and presenting it to OSHA. Elias was sentenced to seventeen years in prison and ordered to pay \$6.3 million in restitution and \$400,000 in clean up costs.

An example of a negligent endangerment prosecution case is *United States v. Motiva Enterprises*, CR No. 05-21 (D. Del. Mar. 6, 2003). Motiva is an oil refining business owned by Shell Oil Company and Saudi Refining, Inc. On July 17, 2001, at Motiva's Delaware City Refinery, a 450,000-gallon tank containing spent sulfuric acid exploded when flammable vapors reached a heat source during repair of a catwalk above the tank. The explosion killed one employee and injured nine others. Spent sulfuric acid from the tank farm entered the Delaware River and caused a fish kill. The tank that exploded had a history of significant corrosion and leaks. Moreover, Motiva had improperly converted the tank from fresh acid service to spent acid service. In March 2005, Motiva pleaded guilty to negligent endangerment and to two CWA violations. It was sentenced to pay a \$10 million fine. By contrast, the OSHA penalty totaled only \$175,000.

Unfortunately, the overlap between the endangerment crimes and the industrial workplace is not a complete one. For example, the CAA's endangerment provisions require a release of a hazardous air pollutant or extremely hazardous substance into the “ambient air.” 42 U.S.C. § 7413(c)(4), (c)(5) (2010). Although ambient air is not defined in the endangerment provisions of the CAA, it is defined in air quality regulations as “that portion of the atmosphere, external to buildings, to which the general public has access.” 40 C.F.R. § 50.1(e) (2011). Because the public generally does not have access to industrial facilities, the protections afforded by the CAA do not necessarily reach the employees within these facilities. In elaborating on the meaning of 40 C.F.R. § 50.1(e), EPA has repeatedly stated that ambient air does not include the atmosphere over land to which public access is precluded by a fence or other physical barrier. *See, e.g., In re Hibbing Taconite Co.*, PSD Appeal No. 87-3, 5-6 (July 19, 1989), available at [http://www.epa.gov/ttn/nsr/psd1/pdf/p8\\_39.pdf](http://www.epa.gov/ttn/nsr/psd1/pdf/p8_39.pdf). Thus, the ambient air exclusion can be extended well beyond a building to a facility's fence line. In any event, a release completely contained within a facility appears to be outside the scope of the CAA endangerment provisions.

Similarly, one court has questioned the applicability of the CWA endangerment provision to on-site employees. In *United States v. Borowski*, 977 F.2d 27, 28 (1st Cir. 1992), the court reversed a knowing endangerment conviction when the imminent danger was to on-site employees as opposed to individuals at downstream locations. Acknowledging that Borowski endangered his employees by having them empty nickel plating and nitric acid baths into a sink that drained into the municipal sewer system, the court found that the endangerment was completely independent of the CWA violation, not the result

of it. *Id.* at 30. In analyzing the endangerment provision, the court opined that “[t]he Clean Water Act is not a statute designed to provide protection to industrial employees who work with hazardous substances.” *Id.* Although many have criticized this holding as too narrow a reading of the statute, it is prudent to charge this crime only when a causal connection between the illegal discharge and the endangerment exists. Fortunately, the RCRA knowing endangerment provision does not include such limitations. Given the number of employees exposed to hazardous wastes in the workplace, RCRA remains a very powerful tool for improving workplace safety.

## **B. CAA accidental release prevention requirements**

Following the catastrophic gas release from Union Carbide in Bhopal, India, Congress enacted Section 112(r) of the CAA to prevent, detect, and minimize the consequences of any such accidental release in the United States. 42 U.S.C. § 7412(r) (2010). EPA regulations that implement § 112(r)(7)(B) require owners and operators of any source with more than a threshold amount of a regulated substance to create a Risk Management Plan (RMP). *See* 40 C.F.R. § 68.1 (2011). RMPs must contain a hazard assessment, prevention programs, and an emergency response program. 42 U.S.C. § 7412(r) (2010). Knowing violations of the prevention regulations may result in a fine pursuant to Title 18 and/or five years in prison. *Id.* § 7413(c)(1). Because “accidental release” is defined as an “unanticipated emission of a regulated substance or other extremely hazardous substance into the ambient air,” *id.* § 7412(r)(2)(A), the emissions targeted are, again, those that have the potential to do significant harm to the general public rather than to the employees within the workplace.

Section 112(r) was the basis for prosecution following the explosion at BP's Texas City Refinery that killed fifteen employees and injured more than 170 others. *See* Press Release, Dept. of Justice, British Petroleum to Pay More Than \$370 Million in Environmental Crimes, Fraud Cases (Oct. 25, 2007), *available at* [http://www.justice.gov/opa/pr/2007/October/07\\_ag\\_850.html](http://www.justice.gov/opa/pr/2007/October/07_ag_850.html). On March 23, 2005, thousands of gallons of explosive hydrocarbons were released from a “blowdown stack” during the startup of an unleaded gasoline refining unit. The vapor exploded when it reached an idling truck. BP's failure to maintain the mechanical integrity of the blowdown stack, to monitor and inspect the pressure relief valves that sent the hydrocarbons to the blowdown stack, and to ensure that operators followed safe operating procedures served as the root causes of the accident. Moreover, the company improperly placed temporary trailers housing employees a mere 150 feet from the blowdown stack. BP pleaded guilty to violating CAA Section 112(r)(7). Pursuant to the agreement, BP paid a \$50 million fine and was placed on probation for three years. The conditions of the probation included compliance with the requirements set out in civil agreements between BP and OSHA and BP and the Texas Commission on Environmental Quality to implement safety and environmental improvements at the refinery.

## **C. CAA NESHAPs**

Protection for industrial employees can also be found in the CAA's National Emission Standards for Hazardous Air Pollutants (NESHAP) provisions. Section 112 of the CAA required EPA to identify sources of the 189 listed hazardous air pollutants and to establish emission standards for those sources (for example, petroleum refineries, iron and steel foundries, pulp and paper mills). 42 U.S.C. § 7412(c), (d) (2010). Where emission standards were not feasible, EPA was directed to promulgate work practice standards to control the pollutants (for example, asbestos removal, lead-based paint activities, control of benzene emissions). *Id.* § 7412(h). Enforcement of NESHAPs designed to protect human health and the environment, by definition, protects employees working where emission and work practice standards are being violated.

The longest environmental criminal sentences to date were imposed for NESHAP violations. Raul and Alex Salvagno were convicted in the Northern District of New York of conspiracy and violations of the CAA, Toxic Substance Control Act, and RICO Act for illegal asbestos abatements that spanned nearly a decade. *United States v. Salvagno*, 2009 WL 2634647, at \*1 (2d Cir. Aug. 28, 2009); *United States v. Salvagno*, 2009 WL 2634655, at \*1 (2d Cir. Aug. 28, 2009). The Salvagnos caused more than 500 employees to violate the work practice standards set out in the CAA's asbestos NESHAP. Experts that testified concluded that many of those employees that suffered the worst exposure would contract asbestosis, mesothelioma, and lung cancer. Alex and Raul Salvagno were sentenced to twenty-five and nineteen years in prison, respectively, to forfeit \$3.7 million, and to pay \$23 million in restitution. The Second Circuit affirmed the district court's decision. *Salvagno*, 2009 WL 2634647, at \*2; *Salvagno*, 2009 WL 2634655, at \*2.

#### **IV. Combining worker safety violations with environmental crimes**

Where no overlap in jurisdiction occurs between the worker safety violation and an environmental statute, a basis may still exist to prosecute both OSHA and EPA violations in one indictment. This exact situation occurred in *United States v. Atlantic States Cast Iron Pipe Co.*, 2007 WL 2282514, at \*1 (D.N.J. Aug. 2, 2007). Atlantic States, a cast iron pipe foundry in Phillipsburg, New Jersey, had a long history of both environmental and worker safety violations. The company and four of its supervisory personnel were tried and convicted of a multi-object conspiracy, false statements, obstruction of justice, and CWA and CAA crimes. The primary means of tying together violations of the otherwise separate regulatory schemes was a conspiracy to defraud the United States. *Id.* at \*3. Specifically, the defendants were charged under 18 U.S.C. § 371 with conspiring to defraud the United States by obstructing the lawful functions of OSHA and EPA in enforcing federal workplace safety and environmental laws and regulations. The evidence showed that the defendants used similar means to hamper, hinder, and impede both agencies, including false statements to inspectors, failures to report, manipulation of data, and alterations of equipment to cover up violations. In post-conviction rulings, the trial court upheld the government's use of the defraud prong of the conspiracy statute. *Id.* at \*67.

The use of counts alleging conspiracy, 18 U.S.C. § 371, false statements, 18 U.S.C. § 1001, and obstruction of justice, 18 U.S.C. §§ 1505, 1519, in the *Atlantic States* case enabled the government to prosecute managerial personnel who were not “employers” under the OSH Act; to reach conduct arising out of non-fatal employee injuries such as burns, amputations, broken bones, and loss of an eye; and to expose dangerous workplace conditions, without invoking a single OSHA regulation or standard. In the absence of these Title 18 charges, none of the egregious conduct related to worker safety would ever or could have been prosecuted. Moreover, the individual defendants received sentences of seventy, forty-one, thirty-three, and six months in prison. Three of these sentences were significantly greater than those available under the OSH Act. The corporation was sentenced to pay a fine of \$8 million and placed on probation with a court-appointed monitor. This sanction was also unavailable under the OSH Act.

#### **V. Sentencing benefits beyond the OSH Act**

In addition to the much lengthier maximum prison sentences available through environmental and Title 18 offenses, three provisions of the United States Sentencing Guidelines, important to worker safety cases, are available. The first is the base offense level of twenty-four for knowing endangerment resulting from mishandling hazardous or toxic substances, pesticides, or other pollutants. U.S. SENTENCING GUIDELINES MANUAL § 2Q1.1 (2011). The second is the nine-level increase for mishandling hazardous or toxic substances, pesticides, or other pollutants resulting in substantial likelihood of death

or serious bodily injury. *Id.* § 2Q1.2(b)(2). The third is the eleven-level increase for mishandling other environmental pollutants resulting in substantial likelihood of death or serious bodily injury. *Id.* § 2Q1.3(b)(2).

Moreover, although restitution is not available pursuant to the OSH Act, it is available as part of a sentence imposed for an environmental crime. *See* 18 U.S.C. § 3563(b)(2) (2010) (restitution may be imposed as a condition of probation or supervised release). Environmental crimes sentences may include a community service component that can provide substantial benefits to the district where the case is prosecuted. *Id.* § 3563(b)(12), (b)(22). Through a plea agreement, an environmental compliance plan can be ordered for all of an organizational defendant's facilities, not just the one where the violations occurred. Finally, a defendant involved in environmental crimes may lose the right to contract with the government through suspension and debarment by EPA. *See* <http://www.epa.gov/ogd/sdd/debarment.htm>.

## **VI. Parallel proceedings issues in OSH Act cases**

A federal prosecutor with an OSHA-related case should be aware that OSHA citations must be issued within six months of the occurrence of the violation. 29 U.S.C. § 658(c) (2010). Thus, it may be necessary to stay the OSHA administrative proceeding while the criminal investigation is conducted. Staying the proceeding may be done by filing a motion to stay with an Administrative Law Judge (ALJ) of the Occupational Safety and Health Review Commission. 29 C.F.R. § 2200.63 (2011). The parties must then submit reports to the ALJ every ninety days. *Id.* If the OSHA proceeding is not stayed, potential targets may take advantage of the discovery process, including depositions, to learn about the criminal investigation. Moreover, when conducting a criminal investigation parallel to an OSHA proceeding, it is important to anticipate civil or administrative findings or reports that may undermine the criminal investigation, especially when those findings are inaccurate due to lack of access to information the prosecutor has but cannot share.

## **VII. Conclusion**

Over the course of just three weeks, this country saw the deaths of seven workers at the Tesoro Refinery in Anacortes, Washington, of twenty-nine coal miners at Massey Energy's Upper Big Branch mine in West Virginia, and of eleven employees on the Deepwater Horizon in the Gulf of Mexico. Each of these incidents was a tragic reminder of how dangerous the industrial workplace can be and how important it is that employers abide by the laws and regulations designed to protect workers.

Federal prosecutors can greatly advance the cause of worker safety by: (1) ensuring that OSHA personnel in their district receive basic training in environmental and Title 18 offenses, thus enabling them to recognize potential violations and make referrals to other agencies; and (2) establishing a dialogue with OSHA compliance officers and Department of Labor solicitors, along with investigators from the EPA Criminal Investigation Division and the Federal Bureau of Investigation, so that the worst employers can be targeted for investigation and possible prosecution. ❖

## ABOUT THE AUTHOR

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# Prosecuting Industrial Takings of Protected Avian Wildlife

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## I. Introduction

Millions of protected birds and bats are killed each year in the United States by interaction with industrial equipment that could easily be modified to minimize or eliminate such deaths. Nearly all of these creatures, from eagles to the smallest songbirds, are protected by one or more federal statutes, including the Migratory Bird Treaty Act, 16 U.S.C. §§ 703–711, the Endangered Species Act, 16 U.S.C. §§ 1531–1544, and the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668. These laws, along with their regulations and interpretive case decisions, clearly establish federal criminal penalties for the unpermitted taking of protected avian wildlife by companies aware of the risk posed to such wildlife by their facilities that fail to adequately ameliorate the risk. Many such cases have been successfully prosecuted with outcomes benefitting the environment, thus creating a useful template for future litigation. Industrial avian takings cases will continue to be referred to U.S. Attorneys' offices for prosecution. This article provides AUSAs with the information needed to evaluate, prepare, and successfully litigate these cases.

## II. Avian takings by industry

Birds and bats (which are mammals) have likely been killed by contact with industrial equipment for as long as such equipment has existed. Fatal interactions include the following:

- The U.S. Fish and Wildlife Service (FWS) estimates that tens of thousands of raptors and other birds that perch on power poles or transformers are electrocuted each year when their body parts touch two exposed “phases,” or a phase and ground wire, completing an electric circuit (and sometimes causing a power outage). For decades, the electric power industry has acknowledged this problem, and the associated problem of avian death by collision with powerlines. A collaborative group including the FWS and electric industry has published guidelines for making such equipment “bird-safe” in the manual “Suggested Practices for Raptor/Avian Protection on Powerlines.”
- Thousands of waterfowl and other birds are killed each year by contact with surface water associated with mining and fossil energy production facilities. Remediation measures, such as closed-loop drilling, pit netting, “bird-balls,” hazing equipment, and simple grating are well-known to, and frequently employed by, the energy industry.

- Between 4 and 50 million songbirds are estimated to be killed each year by collision with communications towers in this country. Night-migrating songbirds are frequently disoriented by warning lights on the towers and can die by the hundreds after circling the structures and colliding with guy wires or falling exhausted to the ground. Simple modification of warning lights and better construction design can substantially minimize the loss of these migrants.
- The FWS estimates that approximately 440,000 birds (including eagles) are killed each year by approximately 22,000 wind turbines operating in the United States. Proven methods of reducing these takings include pre-construction biological surveys, careful siting, prey reduction on the ground within wind farms, use of advanced turbine designs, increased cut-in speeds, and the timing of turbine operation.
- Certain species of seabirds collide with powerlines on flights between inland nests and the ocean, or become disoriented by un-shielded lights, resulting in direct deaths or “fall out.”

It is impractical to suggest that avian mortality associated with industrial equipment can ever be reduced to zero. However, “Best Management Practices” (BMPs) aimed at preventing or minimizing the take of protected avian wildlife are now generally well-understood by energy and mining industries. As discussed herein, the unpermitted taking of protected birds and bats in situations where companies are aware of the avian risk posed by equipment and facilities, but choose not to employ BMPs, can form the basis for prosecution and imposition of penalties and corrective sanctions on such companies and managers.

### **III. Prosecution intake of the industrial avian takings case**

The FWS has primary responsibility for enforcement of laws protecting migratory and endangered birds and bats. Wildlife agents normally learn of industrial avian takings from citizen reports, industry self-reporting, or over-flights of oil and gas production facilities followed by ground checking. When avian carcasses are discovered and retrieved, cause of death is either obvious (especially in the case of oiling or electrocution), or determined via necropsy performed at the FWS Forensics Laboratory in Ashland, Oregon, a fully-accredited crime lab devoted to linking suspect, victim, and crime scene in wildlife cases. FWS agents generally notify the responsible company of the mortality and provide an opportunity to remedy the situation that caused the avian death. In some cases, the investigating agent will issue a Notice of Violation (NOV) that is handled through the Central Violations Bureau. If the company pays a collateral penalty and modifies its facilities or practices to correct the problem, the case will never reach a U.S. Attorney's office. The fine is generally \$500 plus an additional \$250 per bird or an additional \$1,000 per eagle. However, if the company ignores the agent's notice of the avian taking and its cause or refuses to pay the NOV and remedy the problem, the matter may be referred for prosecution. The FWS referral will include detailed reports of the incident, company contact(s), interviews, and, if necessary, forensic analysis. The AUSA who is assigned this kind of case should consider the following issues when evaluating the referral:

- What species is/are involved? Nearly all avian species in the United States are protected under the Migratory Bird Treaty Act, including eagles (also protected by the Bald and Golden Eagle Protection Act). Endangered and threatened species are also protected under the Endangered Species Act. Knowing which species have been taken will inform the selection of charges, penalties, and permits/exemptions that apply to the conduct.

- What non-law enforcement contact has the company had with the FWS or other state/federal agencies in connection with the condition that has caused the avian taking? Some states have enacted specific regulations governing the siting and operation of energy and mining operations. Federal agencies, such as the Environmental Protection Agency or Bureau of Land Management, may have issued permits that indirectly relate to the equipment or site associated with the avian taking. The content of written or informal communication between government personnel and the subject company may affect the posture of the proposed prosecution by, for example, enhancing evidence of notice and the opportunity to cure or by raising estoppel issues. The referring law enforcement agent may not be aware of all such prior contacts between regulating agencies and the company at this early stage of the case.
- What is the current status of permits, prosecution policy, and caselaw interpretation related to the case? This area of the law is developing rapidly in the courts and regulating agencies. The AUSA is advised to contact the Environmental Crimes Section (ECS) for a discussion of the case prior to accepting or declining the referral. Initial contact can be made with the author of this article at 406-829-3322, or with ECS Assistant Chief Elinor Colbourn at 202-305-0205.

Avian wildlife is protected in this country under three primary statutes. In descending scope of species coverage, they are: (1) the Migratory Bird Treaty Act (MBTA), providing criminal penalties for the illegal take of over 1,000 native bird species; (2) the Endangered Species Act (ESA), providing criminal and civil penalties for the illegal take of about 70 native bird species (all of which also are covered by the MBTA); and (3) the Bald and Golden Eagle Protection Act (Eagle Act), providing criminal and civil penalties for the illegal take of its two eponymous species, both of which also are covered by the MBTA. Each is discussed below.

## **IV. The Migratory Bird Treaty Act**

### **A. Relevant statutory provisions**

The Migratory Bird Treaty Act provides that, unless and except as permitted by regulation, it shall be unlawful at any time, *by any means or in any manner*, to pursue, hunt, take, capture, kill, or attempt to take, capture, or kill, any migratory bird. 16 U.S.C. § 703 (2010) (emphasis added). “Migratory birds” are those defined pursuant to bilateral treaties between the United States and Great Britain, Mexico, Japan, and the Union of Soviet Socialist Republics (now Russia). 16 U.S.C. § 715j (2010). The MBTA protects nearly every bird species in North America, including waterfowl, songbirds, shorebirds, and raptors; the list of all protected species can be found at 50 C.F.R. § 10.12-13. Some birds protected by the MBTA are also listed within other statutes, such as bald and golden eagles (see Eagle Act description, below) and birds that are both migratory and endangered or threatened (see ESA description, below). “Take” is defined differently in all three statutes. In the MBTA, take means “to pursue, hunt, shoot, wound, kill, trap, capture, or collect” or to attempt to do so. 16 U.S.C. § 703(a) (2010). “Kill” is not further defined.

### **B. Penalties**

The MBTA creates three distinct categories of criminal violations: (1) a strict-liability Class B misdemeanor violation for any “person . . . or corporation” that violates the take prohibitions of 16 U.S.C. § 703; (2) a specific-intent Class A misdemeanor violation for the placement of bait to aid in the taking (16 U.S.C. § 707(c)); and (3) a general-intent felony violation where the sale or barter of a

migratory bird or bird part, nest, or egg is involved (16 U.S.C. § 707(b)). Industrial takings of migratory birds are commonly charged under the strict liability Class B misdemeanor provision noted above. The maximum statutory penalty for a corporate defendant convicted of the misdemeanor violation is a \$15,000 fine or twice the gross gain derived from the offense, *see* 18 U.S.C. § 3571(d) (2010), and five years of probation. The MBTA provides no civil penalty; violation of the statute is subject only to criminal sanction.

### **C. Fine disposition**

The North American Wetlands Conservation Act authorizes the use of fines from the MBTA to be deposited into the North American Wetlands Conservation Fund (NAWC). 16 U.S.C. § 4406(b) (2010). This statute provides that “[t]he sums received under section 707 of this title (MBTA) as penalties or fines, or from forfeitures of property, are authorized to be appropriated to the Department of the Interior for purposes of allocation under section 4407 of this title [NAWCA Allocations Section].” Therefore, plea agreements in these cases should notify the court of this provision and specify the Conservation Fund as the destination for fine monies.

### **D. Unit of prosecution**

Industrial MBTA cases often involve multiple takings of several species of protected birds over a long period of time at different facilities. The FWS Forensics Laboratory cannot determine the precise date of death for most avian carcasses it receives. Prosecutors and agents are often left to decide how many separate charges should be filed—one per bird, one per species, one per incident, one per site? Virtually all of these parsings have been used in past cases. *See, e.g., United States v. Apollo Energies*, 611 F.3d 679, 683 (10th Cir. 2010) (one count per inspection that discovered dead birds); *United States v. Corbin Farm Service*, 578 F.2d 259, 260 (9th Cir. 1978) (one count per transaction that resulted in bird deaths); *United States v. FMC Corp.*, 572 F.2d 902, 903 (2d Cir. 1978) (one count per species per day); *United States v. Rogers*, 367 F.2d 998, 999 (8th Cir. 1966) (one count per day); *United States v. Fleet Management, Ltd.*, No. 3:08- CR-00160 (N.D. Cal. 2010) (one count per discharge); *United States v. Exxon Corp.*, No. A90-015 CR (D. Alaska Feb. 27, 1990); *United States v. Equity Corp.*, Cr. No. 75-51 (D. Utah Dec. 8, 1975) (one count per bird).

Most of these cases were resolved by plea agreement, without litigation regarding the unit of prosecution. Judicial analysis of this issue stems primarily from a 1978 district court decision. In *United States v. Corbin Farm Service*, 444 F. Supp. 510 (E.D. Cal. 1978), a pesticide manufacturer was charged with 10 MBTA violations after 10 migratory birds were killed following a single improper application of pesticide to an alfalfa field. The district court agreed that the charges were multiplicitous, finding that although the death of a single protected bird is a violation of the MBTA, the statute and congressional history were ambiguous on the subject of whether grouped deaths should be charged separately, invoking the rule of lenity to hold that the unit of prosecution under the MBTA is each act resulting in the death of one or more birds. *Id.*

### **E. Permits and exemptions**

Regulations clothing the MBTA allow the FWS to issue permits to qualified applicants for falconry, raptor propagation, scientific collecting, special purposes (for example, rehabilitation, educational, migratory game bird propagation, and salvage), hunting, take of depredating birds, taxidermy, and waterfowl sale and disposal. 50 C.F.R. part 13 (General Permit Procedures) and 50 C.F.R. part 21 (Migratory Bird Permits).

**Incidental take by industry.** The MBTA authorizes the FWS to determine the type, means, and extent to which taking protected birds is compatible with the terms of the underlying treaties. However, FWS has not, to date, perceived authority to issue permits for “non-purposeful” takings that are incidental to conducting a lawful activity such as operating energy or mining facilities. Thus, each incidental taking of a bird protected only by the MBTA is a potential criminal violation of the Act, though permits for incidental takings of endangered/threatened birds and bats are available under the ESA and are currently being formulated under the Eagle Act (both of which are discussed below). Also, in February 2011 the FWS released “Draft Guidelines for Land-based Wind Energy Development” that are founded on a “5-tier approach” for assessing potential adverse effects to fish and wildlife and their habitats. These draft Guidelines “describe the information needed to identify, assess, mitigate, and monitor the potential adverse effects of wind energy projects on fish, wildlife, and their habitats, using a consistent and predictable approach, while providing flexibility to accommodate the unique circumstances of each project.”

**Incidental take by the military.** In 2002, a federal court found that the Navy's live-fire training exercises in the Northern Marianas Islands, resulting in the take of migratory birds without a permit to do so, violated the MBTA and the Administrative Procedure Act. *See Center for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161 (D.D.C. 2002), *vacated sub. nom. Center for Biological Diversity v. England*, 2003 WL 179848, at \*1 (D.C. Cir. Jan. 23, 2003). Congress responded by creating the “Incidental Taking of Migratory Birds During Military Readiness Activities Amendment” (Incidental Take Amendment) Pub. L. No. 107-314, 16 Stat. 2509 (2002). The Incidental Take Amendment directs the Secretary to exercise his authority under 16 U.S.C. § 704(a) to prescribe regulations exempting the Armed Forces from the prohibitions of the MBTA for the incidental taking of migratory birds during military-readiness activities. *Id.* Regulations implementing the Incidental Take Amendment were promulgated on February 28, 2007. *See* 50 C.F.R. § 21.15. The regulations, like the statute, exempt only takings “incidental to” military-readiness activities. Other takings by the military are not exempted and are thus prohibited by the MBTA. *Id.* The lack of authority in the Incidental Take Amendment and its regulations for takings outside the scope of specifically defined military-readiness activities affirms the plain language of the prohibition against killing birds by any means or by any manner, unless expressly exempted.

## **F. MBTA application to industrial takings: caselaw development**

Prior to 1970, the MBTA was used to prosecute hunters who violated the time, place, method, or bag-limit constraints of their hunting licenses. FWS agents issued NOV's to poachers and, in the few challenged cases, courts routinely declared that the unambiguous “any means, any manner” language of 16 U.S.C. § 703, lacking any scienter requirement, established a strict-liability violation requiring no proof of a hunter's knowledge or intent to violate the law.

In the early 1970s bird-preservation groups brought attention to the vast numbers of migratory birds poisoned after landing on oil industry “sump pits” in the Midwest. The government responded by bringing the first MBTA charges against oil companies. The companies either pleaded guilty or posed fairly weak challenges to the MBTA charges. The first serious challenge to the MBTA's application in a non-hunting case occurred in 1978, after the Sacramento U.S. Attorney's Office filed MBTA charges against a pesticide application company and three individuals whose misapplication of a pesticide to an alfalfa field killed ducks. *United States v. Corbin Farm Serv.*, 444 F. Supp. 510 (E.D. Cal. 1978), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978). The defendants claimed their activities did not violate the MBTA because poisoning is not expressly forbidden by the MBTA (as it is in the Eagle Act) and because they had no intent to kill birds. They argued that extending the statute to unintentional take would lead to

absurd results, like the prosecution of vehicle drivers who hit a bird or apartment dwellers with whose picture windows birds collide.

The district court upheld the charges on the basis of three conclusions echoed (if not uniformly adopted) in almost all later MBTA decisions. First, the *Corbin* Court noted that the MBTA's "any means, any manner" language is purposefully broad and unqualified. Had Congress wanted to limit takings violations, or impose a scienter requirement, as it did in another section of the MBTA related to unlawful sale of birds, it could have done so. Second, the MBTA protects so many different types of birds, many of which are never subject to hunting seasons, that Congress could not have intended the law to apply only to the illegal conduct of hunters. (The statute's specific contemplation of corporate defendants further supports this view.) Third, citing a Supreme Court decision affirming criminal liability where a food company had allowed its product to become contaminated by vermin, the court characterized the MBTA take violation as a "public welfare offense," imposing liability for acts committed without the intent to violate, where the violator is in a position to prevent the harm and the penalties are minor:

[L]egislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion that it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation. Under such considerations, courts have turned to construing statutes and regulations which make no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime.

*Corbin*, 444 F. Supp. at 535-36 (citing *Morissette v. United States*, 342 U.S. 246, 256 (1952) (affirming criminal liability where a food company had allowed its product to become contaminated by vermin)). The court in *Corbin* continued to write:

The instant case is one in which the guilty act alone is sufficient to make out the crime. When dealing with pesticides, the public is put on notice that it should exercise care to prevent injury to the environment and to other persons; a requirement of reasonable care under the circumstances of this case does not offend the Constitution. If defendants act with reasonable care or if they were powerless to prevent the violation, then a very different question would be presented.

*Id.* at 536.

Meanwhile, the U.S. Attorney's Office in Buffalo, New York filed MBTA charges against a pesticide manufacturing company in a significantly different factual setting. In *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978), the defendant company maintained a wastewater pond on which birds landed, were poisoned, and died. Once the FWS notified it of the deaths, the company implemented a rudimentary Avian Protection Plan (APP) that was largely unsuccessful until the pond was replaced with a modern water treatment facility. MBTA charges filed against FMC were based partly on deaths occurring *after* the company undertook the APP. At trial, the jury was instructed to not consider the company's APP efforts as a defense: "Therefore, under the law, good will and good intention and measures taken to prevent the killing of the birds are not a defense. Therefore, if you find that the birds were killed by the products emitted from the FMC plant, then you must return a verdict of guilty . . . ." *Id.* at 904 (punctuation added).

On appeal, exactly one month after the *Corbin* court pronounced the MBTA applicable to pesticide mis-users, the Second Circuit employed similar logic, without a due care fulcrum, in an

untroubled affirmation of the MBTA's strict-liability application to a company that had tried to initially prevent, and later rectify, its hazardous activity. To the additional question of whether an "act" is necessary to make out a crime in this context, the court analogized to tort law, concluding that an omission in the face of a duty to act is the equivalent of an action and that, in any event, manufacturing a pesticide is an affirmative act. The *FMC* court said:

Although FMC was not aware of the lethal-to-birds quality of the water in its pond . . . nevertheless it was aware of the danger of carbofuran to humans, a fact which caused FMC to wash down the carbofuran areas more frequently, which activity in turn pumped contaminated water into the pond. Imposing strict liability on FMC in this case does not dictate that every death of a bird will result in imposing strict criminal liability on some party. However, the statute does not include as an element of the offense "willfully, knowingly, recklessly or negligently;" implementation of the statute will involve only relatively minor fines; Congress recognized the important public policy behind protecting migratory birds; FMC engaged in an activity involving the manufacture of a highly toxic chemical; and FMC failed to prevent this chemical from escaping into the pond and killing birds. This is sufficient to impose strict liability on FMC.

*Id.* at 908 (punctuation added). The *FMC* court thus seemed to limit its liability finding to "ultrahazardous" activity, coupled with a reliance on prosecutorial and judicial discretion to keep cases and penalties within reasonable bounds.

The most well-known prosecution of industry for taking wildlife in the early 1990s arose out of the 1989 grounding of the vessel Exxon Valdez in Prince William Sound, Alaska, which released approximately 11 million gallons of crude oil. The spill killed as many as 300,000 migratory birds, including at least 250 bald eagles, as well as approximately 2,800 sea otters, 22 orcas, and numerous other wildlife species. Working together, the Alaska USAO and ECS prosecutors indicted Exxon Shipping (which operated the vessel) and Exxon Corporation (employer of the captain, Joseph Hazelwood) on various charges, including violations of the Clean Water Act, 33 U.S.C. §§ 1311(a), 1319(c)(1); the Refuse Act, 33 U.S.C. §§ 407, 411; the Migratory Bird Treaty Act, 16 U.S.C. §§ 703, 707(a); the Ports and Waterways Safety Act, 33 U.S.C. § 1232(b)(1); and the Dangerous Cargo Act, 46 U.S.C. § 3718(b). Exxon Corporation pleaded guilty to one count of violating the Migratory Bird Treaty Act; Exxon Shipping pleaded guilty to one count each of violating the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act. They were jointly fined \$25 million and were ordered to pay restitution in the amount of \$100 million. *See United States v. Exxon Corp.*, No. A90-015 CR (D. Alaska, sentencing Apr. 24, 1991). (Captain Hazelwood was prosecuted by the State of Alaska, acquitted at trial of felony charges, found guilty of negligently discharging oil, and sentenced to a \$50,000 fine and 1,000 hours of community service.)

Also in the early 1990s, three district courts convicted companies of MBTA violations where birds died as a result of exposure to cyanide-laced tailings or settling ponds associated with cyanide leaching mining processes. *United States v. Nerco-Delamar Co.*, No. CR 91-032-S-HLR (D. Idaho Apr. 21, 1992); *United States v. Echo Bay Minerals Co.*, No. CR N-90-52-HDM (D. Nev. Mar. 8, 1990); *United States v. Kennecott Communications Corp.*, No. N-90-16M (D. Nev. Mar. 8, 1990).

Two appellate decisions in the 1990s, resulting from citizen suits challenging Forest Service timber sales on the basis that tree removal would result in the deaths of protected birds, interpreted the MBTA more narrowly. In *Seattle Audubon Society (SAS) v. Evans*, 952 F.2d 297, 302-03 (9th Cir. 1991), the Ninth Circuit observed that the definition of "take" under the MBTA "describes physical conduct of the sort engaged in by hunters and poachers . . ." The *SAS* court did not take issue with the earlier case

law, including expressly the *FMC* decision, acknowledging that “[c]ourts have held that the Migratory Bird Treaty Act reaches as far as direct, though unintended, bird poisoning from toxic substances.” *Id.* at 303. Instead, the court distinguished the case before it to find that indirect takings through habitat modification (timber cutting) that might result in bird deaths are not covered by the MBTA. The court relied on a comparison of the definition of take under the ESA (directly addressing and includes habitat modification under the terms “harm” and “harass”) to “take” under the MBTA, which does not expressly include habitat destruction, harm, or indirect takings. Six years later, in a civil suit alleging an MBTA violation in the Forest Service's authorization of timber harvest that might kill nesting birds, the Eighth Circuit Court of Appeals largely concurred with the Ninth Circuit's holding in *SAS. Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110 (8th Cir. 1997). The Eighth Circuit said:

In this case, the Wildlife Association alleges, and the Forest Service concedes, that logging under the timber sales will disrupt nesting migratory birds, killing some. The Wildlife Association argues that the sales therefore violate MBTA's absolute prohibition against killing or taking nesting birds unless the Forest Service obtains a permit under the Fish and Wildlife Service regulations implementing MBTA. We disagree. Initially, we note that MBTA's plain language prohibits conduct directed at migratory birds—“pursue, hunt, take, capture, kill, possess,” and so forth. The government argues that the statute imposes “strict liability” on violators . . . . Strict liability may be appropriate when dealing with hunters and poachers. But it would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that *indirectly* results in the death of migratory birds. Thus, we agree with the Ninth Circuit that the ambiguous terms “take” and “kill” in 16 U.S.C. § 703 mean “physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918.”

*Id.* at 115 (emphasis in original).

The potential applicability of the strict liability provisions of the MBTA to migratory bird deaths resulting from timber harvests continued to be addressed in private suits under the APA and courts responded by continuing to reason that timber harvesting activities do not constitute a prohibited taking under the MBTA. See *Curry v. U.S. Forest Serv.*, 988 F. Supp. 541, 549 (W.D. Pa. 1997) (“[T]he loss of migratory birds as a result of timber sales of the type at issue in this case do not constitute a 'taking' or 'killing' within the meaning of the MBTA.”) (citing *Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110 (8th Cir. 1997)); *Mahler v. U.S. Forest Serv.*, 927 F. Supp. 1559, 1579, 1583 (S.D. Ind. 1996) (“The MBTA does not apply to other activities that result in unintended deaths of migratory birds . . . . The better reading of the statute is to find that the prohibitions apply only to activity that is intended to kill or capture birds or to traffic in their bodies and parts.”); *Citizens Interested in Bull Run, Inc. v. Edrington*, 781 F. Supp. 1502, 1510 (D. Or. 1991) (finding that the MBTA definition of take describes physical conduct of the sort engaged in by hunters and poachers).

Meanwhile, at least two district courts found that a violation of the MBTA would result from timber harvesting, even though it is not a hunting-related activity, but only where that harvesting is shown to directly kill migratory birds (for example, crush them as the trees fall as opposed to reducing populations over time due to the habitat loss). *Sierra Club v. Martin*, 933 F. Supp. 1559 (N.D. Ga. 1996) (finding plaintiffs seeking injunctive relief had shown a likelihood of success on the merits of their underlying MBTA claim where the Forest Service authorized timber harvest that would result in the deaths of thousands of migratory songbirds), *rev'd on other grounds*, 110 F.3d 1551 (11th Cir. 1997) (finding the MBTA did not apply to federal government agencies); *Sierra Club v. USDA*, No. 94-CV-4061-JPG (S.D. Ill. Sept. 25, 1995) (remanding a Management Plan to the Forest Service for further

consideration of whether the plan would violate the MBTA where the Plan allowed logging during the nesting season).

In 1998 the Environment and Natural Resources Division led the first MBTA/Eagle Act prosecution based on electrocution of avian wildlife. *United States v. Moon Lake Electric Ass'n, Inc.*, 45 F. Supp. 2d 1070 (D. Colo. 1999). Moon Lake is an electric cooperative based in Utah that operated about 2,400 electrical distribution poles and lines in a remote area of northwestern Colorado serving a treeless oil field with a high concentration of rodents and corresponding density of raptors, including golden eagles, ferruginous hawks, and great horned owls. These raptors perched and roosted on Moon Lake's poles, which featured exposed, horizontally-arrayed phase wires posing an avian electrocution hazard. After several raptors were electrocuted by this equipment, FWS notified Moon Lake of its potential liability under the MBTA/Eagle Act and the need to retrofit or otherwise modify their equipment to prevent future avian deaths. The company demurred, electrocutions continued, and the government filed MBTA and Eagle Act criminal charges. Moon Lake sought dismissal of the charges, claiming that neither of the statutes apply to unintentional conduct outside the realm of sport-hunting violations. The company supplemented the well-worn arguments made ten years earlier in *FMC* and *Corbin* with the recent opinions in logging cases noted above.

District Judge Babcock wrote the most exhaustive opinion on the industrial takings issue to date, examining the MBTA's language and legislative history, analyzing each argument raised by Moon Lake, and considering the indirect-take opinions issued in the Eighth and Ninth Circuits since *FMC* and *Corbin*. (He also noted a 1997 Tenth Circuit opinion dealing with possession of migratory bird parts by an individual specifically joining six other circuits in affirming the strict liability nature of § 703 offenses. *United States v. Corrow*, 119 F.3d 796 (10th Cir. 1997)). Judge Babcock rejected the indirect-take, habitat modification decisions as inapposite and disagreed with the Ninth Circuit's analysis in *SAS*, to the extent it could be read as restricting the MBTA's application to hunting activities. In rejecting the windshield/skyscraper *reductio ad absurdum* arguments raised by Moon Lake, he did not rely on the “due care” pillar of *Corbin*, the “inherently dangerous” justification in *FMC*, or the “prosecutorial discretion” safeguard mentioned in both. Instead, Judge Babcock cited the fundamental requirement that the government must prove “proximate cause” even in strict liability cases.

Thus, the court reasoned, “(b)ecause the death of a protected bird is generally not a proximate consequence of driving an automobile, piloting an airplane . . . or living in a residential dwelling with a picture window, such activities would not normally result in liability under (the MBTA misdemeanor provisions), even if such activities would cause the death of protected birds.” *Moon Lake*, 45 F. Supp. 2d at 1085. As a district court decision, of course, this opinion is without precedential value in subsequent appellate litigation, though it is cited in the most recent Tenth Circuit opinion on the issue, discussed below.

Following *Moon Lake*, the MBTA's strict liability take prohibition was applied to a potash mining company whose operations resulted in brine-filled ponds that killed migratory birds. *United States v. Miss. Potash*, No. CR-03-1941 (D.N.M. Sentencing Sept. 27, 2004). Federal courts in Arizona and New Mexico applied the MBTA strict-liability provisions to companies that caused the deaths of migratory birds through exposure to toxic waters created through copper mining operations. *United States v. Phelps Dodge Tyrone Mining Co.*, CR-05-1900 (D.N.M. Sept. 26, 2005); *United States v. Phelps Dodge Morenci, Inc.*, 4:04-CR-01629 (D. Ariz. Dec. 14, 2004). Each of these cases was resolved by plea agreement, without substantive litigation on the issues raised here.

## G. Recent lower court outcomes

In February 2009 a district court judge in New Mexico reversed the conviction, before a Magistrate Judge, of an oil company that had killed at least 34 migratory birds in an poorly-maintained overflow pit. *United States v. Ray Westall Operating, Inc.*, No. CR 05-1516-MV (D.N.M. Feb. 25, 2009). The court's ruling was based on a finding that the MBTA's "any means/any manner" language is ambiguous, was intended to apply only to actions directed at migratory birds, such as hunting, and would lead to absurd windshield/skyscraper results if applied to industry. In July 2009 the Wyoming U.S. Attorney's Office negotiated a pre-indictment plea agreement with PacifiCorp, requiring it to plead guilty to 34 MBTA counts in connection with the electrocution of over 200 eagles on its electric distribution and transmission facilities in Wyoming. PacifiCorp, which was deemed to have reneged on an APP it negotiated with the FWS some years earlier, paid a \$500,000 fine, \$900,000 in restitution/community service, and is required to spend over \$9 million implementing an Environmental Compliance Plan (ECP) during its probationary sentence. *United States v. PacifiCorp*, No. 09-cr-174B (D. Wyo. July 10, 2009). In August 2009, Exxon-Mobil pleaded guilty to MBTA counts brought by the ECS and U.S. Attorney's Office in Colorado, related to its poisoning of about 85 migratory birds on oil and gas well sites and production facilities in five states. *United States v. Exxon-Mobil*, Case No 97-mj-01097 (D. Colo. Aug. 12, 2009). Exxon-Mobil was fined \$400,000 and made \$200,000 in community service payments. The company will spend approximately \$3 million to implement an ECP that is part of its probationary conditions.

In October 2009 a magistrate judge in Louisiana refused to accept the guilty plea of an oil company to MBTA charges involving the deaths of pelicans that had become trapped in the outer casing of a wellhead operated by the company. *United States v. Chevron USA, Inc.*, 2009 WL 3645170, at \*5 (W.D. La. Oct. 30, 2009). Chevron had self-reported the event and, prior to charging, rectified the hazard by installing a steel grate to prevent future entrapments. The opinion in this case plows no new ground: the magistrate concluded that MBTA charges are inapplicable to industry actions whose danger to migratory birds is unforeseeable, that the statute was aimed at people who "hunt and trap migratory birds," and that absurd results, like windshield/skyscraper prosecutions, could result from unfettered application of the strict-liability provisions to all migratory bird takings.

On November 7, 2007 the container ship M/V Cosco Busan struck a support tower of the San Francisco-Oakland Bay Bridge while trying to depart the harbor in heavy fog. The collision released over 50,000 gallons of fuel oil into San Francisco Bay, contaminating widespread beaches and fisheries, and killing at least 2,000 migratory birds, including Brown Pelicans, Marbled Murrelets, and Western Grebes. Several factors contributed to the collision and spill, including impairment of the ship's pilot and certain malfunctioning or non-existent safety systems. After the collision, the company created false and forged documents with the intent to deceive the Coast Guard. The U.S. Attorney's Office for the Northern District of California and ECS prosecutors worked together to indict the pilot and ship management company on charges including violation of the Oil Pollution Act of 1990 (OPA 90, 33 U.S.C. §§ 270–2761), obstruction of justice, false statement, and MBTA. Ultimately, the company pleaded guilty to violating OPA 90 and to felony obstruction and false statement charges, agreeing to pay a \$10 million criminal penalty, \$2 million of which was devoted to funding marine environmental projects in San Francisco Bay. The plea agreement also required the company to implement a comprehensive ECP to include heightened training and voyage planning for its vessels engaged in trade in United States waters. The pilot of the vessel pleaded guilty to violating OPA 90 and the MBTA and was sentenced to 10 months in prison, 1 year of supervised release, and 200 hours of community service. *United States v. Fleet Management, Ltd.*, No. 3:08- CR-00160 (N.D. Cal. Feb. 19, 2010).

## **H. *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010)**

The inconsistent lower-court interpretations of the MBTA's applicability to takings at oil company facilities discussed above were countered, in October 2010, with the first appellate decision directly addressing the issue. In *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010), two oil drilling companies (Apollo and Walker) were charged with MBTA violations after the deaths of migratory birds in “heater-treaters,” which are louvered cylindrical devices used to separate oil from water during pumping operations. The FWS had discovered over 200 protected birds dead in such devices several years earlier, notified the area's oil industry of the problem, and established a grace period during which the devices could be remediated and no charges would be filed. The takings at issue involving Apollo and Walker occurred after the grace period ended. Walker established at trial that it had not received notice of the heater-treater problem from the FWS. Nevertheless, both companies were convicted in magistrate court and the convictions were affirmed by the district court.

The defendant companies appealed to the Tenth Circuit, posing generally the same arguments used by other defendants discussed in this article. They argued that the MBTA is purely a hunting statute; the strict-liability standard is either incorrect or inapplicable to the passive operation of industrial facilities; and due process requires reversal due to statutory vagueness, causal attenuation, and lack of prior warning to Walker about the heater-treater problem. The Tenth Circuit addressed each of these issues in turn, upholding the conviction of Apollo and reversing one of the two counts against Walker. The panel began by swiftly affirming the strict liability nature of MBTA take violations, citing the *Corrow* case mentioned above. *Id.* at 684. Noting that the acts criminalized by the MBTA “may be legion, but they are not vague,” *id.* at 689, the court turned aside the defendants' claims that the statute failed to provide notice of what conduct constitutes a crime. The court agreed with the conclusion in *Moon Lake* that an MBTA take conviction requires proof a defendant was on notice that an otherwise innocuous act, such as operating heater-treaters, would proximately cause a taking in violation of the statute. The panel approved the district court's finding that the government had proved “ 'proximate causation' or 'legal causation' beyond a reasonable doubt” by “showing that trapped birds are a reasonably anticipated or foreseeable consequence of failing to cap the exhaust stack and cover access holes to the heater/treater.” *Id.* at 689-90. The provision of notice and an opportunity to cure prior to charging was an integral part of the panel's due process/proximate cause analysis. It reversed one MBTA count against Walker on a finding that he was not aware of problems with heater-treaters in the oil industry or in his operations at the time the bird underlying that count was found dead in his equipment. *Id.* at 691.

The *Apollo* decision supports the government's approach to industrial avian takings that has developed over the past two decades: provide notice to industry of the risks posed by facilities and equipment, encourage compliance through remediation, adaptive management and, where possible, permitting, and reserve for prosecution those cases in which companies ignore, deny, or refuse to comply with a BMP approach to avian protection in conducting their business.

## **V. The Bald and Golden Eagle Protection Act**

### **A. Prohibitions and definitions**

The Bald and Golden Eagle Protection Act provides, in relevant part, “[w]hoever . . . without being permitted to do so . . . shall knowingly, or with wanton disregard for the consequences of his act, take . . . any bald eagle . . . or golden eagle . . . shall be (subject to Class A misdemeanor penalty).” 16 U.S.C. § 668(a) (2011). The word “whoever” includes associations, partnerships, and corporations. *Id.* § 668(c). To “[t]ake” under the Eagle Act is defined as “to pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, or molest or disturb . . .” *Id.* Significant to this discussion, “disturb” was

defined by regulation at 50 C.F.R. § 22.3 in 2007 as “to agitate or bother a bald or golden eagle to a degree that causes . . . injury to an eagle, a decrease in productivity, or nest abandonment . . . .”

The most notable initial difference between the MBTA and Eagle Act is that the latter does not create a strict liability offense: it applies only to those who act “knowingly, or with wanton disregard for the consequences” of their acts. *See* S. REP. NO. 92-1159, at 4, reprinted in 1972 U.S.C.C.A.N. 4285, 4289 (the defendant “must be conscious from his knowledge of surrounding circumstances and conditions that conduct will naturally and probably result in injury” to a protected bird).

## **B. Penalties**

The Eagle Act is the only federal wildlife protection statute that imposes increased sanctions for repeat offenders. Initial violation of the statute is a Class A misdemeanor, with a maximum punishment for organizational defendants of five years probation and a \$250,000 fine. 16 U.S.C. § 668(a), modified by 18 U.S.C. § 3571(c)(5) (2011). Second and subsequent violations are Class E felonies under 18 U.S.C. § 3559(a)(5), for which an organizational defendant may be sentenced to five years probation and a fine of up to \$500,000, per 18 U.S.C. § 3571(c)(3). A defendant may be subject to the felony penalty enhancement for second and subsequent counts charged in a single indictment. *Deal v. United States*, 508 U.S. 129 (1993).

The Eagle Act provides that one-half of any fine imposed for a violation of the statute, but not to exceed \$2,500, *shall* be paid to the person or persons giving information that leads to the conviction. This provision has not yet been employed in corporate takings cases but remains a live option in future investigations involving civilian tipsters. The Eagle Act sets forth a \$5,000 maximum civil penalty for each violation. 16 U.S.C. § 668(b) (2011).

## **C. Other sanctions**

The Eagle Act is the only wildlife statute that specifically allows federal agencies to cancel a livestock grazing lease, license, permit, or other agreement issued to a defendant who has violated the Act. *See id.* § 668. This provision is a Congressional response to the placement, by livestock operators, of poisons intended to kill predators but that also kill eagles and other raptors.

## **D. Unit of prosecution**

The statute provides that the commission of any act prohibited by this section with respect to a bald or golden eagle shall constitute a separate violation of this section. *Id.* § 668(a).

## **E. Permits and exceptions**

The FWS issues permits under the Eagle Act to take, possess, and transport bald and golden eagles for scientific, educational, and Indian religious purposes, depredation, and falconry (golden eagles) and to take eagle nests when necessary to protect human safety or the eagles. No permit authorizes the sale, purchase, barter, trade, importation, or exportation of eagles, or their parts or feathers. The regulations governing eagle permits can be found in 50 C.F.R. part 13 (General Permit Procedures) and 50 C.F.R. part 22 (Eagle Permits).

**Non-purposeful take of eagles.** Bald eagles were removed from ESA coverage in 2007 after their populations were deemed to be sufficiently recovered. (Golden eagles were never listed under the ESA.) De-listing removed the historical source of FWS authority for issuing incidental take permits for bald eagles and their nests, considered necessary in some circumstances. In 2009 the FWS promulgated

the Final Eagle Permit Rule, providing for the issuance of permits allowing limited take of bald and golden eagles when the take is associated with, but not the purpose of, an otherwise lawful activity, and cannot practicably be avoided. 50 C.F.R. § 22.26. The regulation also authorizes permits to be issued for ongoing or “programmatic” take but establishes a higher standard for permitting such take. The higher standard requires that the take be “unavoidable after implementing advanced conservation practices.” *Id.* The permits will authorize limited, non-purposeful take of eagles by authorizing individuals, companies, government agencies (including tribal governments), and other organizations to disturb or otherwise take eagles in the course of conducting lawful activities, such as operating utilities and airports. Most permits issued under the new regulations would authorize disturbance: in limited cases, a permit may authorize the physical take of eagles, but only if every precaution is first taken to avoid the need for physical take.

**Eagle nests.** Section 22.27 authorizes the FWS to issue permits allowing the intentional take of eagle nests where necessary to alleviate a safety hazard to people or eagles, to ensure public health and safety, where a nest prevents use of a human engineered structure, and where the activity or mitigation for the activity will provide a net benefit to eagles. Removal of eagle nests would usually be allowed only when it is necessary to protect human safety or the eagles.

**Eagles and wind power.** The FWS and wind power industry have known for some time that wind turbines in the western United States pose a significant mortality risk to eagles, especially golden eagles. In response to this problem, the FWS has worked closely with the wind industry to develop permitting and guidance, on issues from site selection to operation that will harmonize the twin goals of promoting renewable energy development and enforcing statutorily-mandated protections for eagles. In February 2011 the FWS issued draft “Eagle Conservation Plan Guidance,” explaining the FWS’s approach to issuing programmatic eagle take permits and providing guidance to applicants and biologists for conservation practices and adaptive management necessary to meet standards required for issuance of these permits and to be in compliance with the Eagle Act. This draft guidance focuses on wind energy (additional modules for other types of industry are planned) and provides a five-tiered approach to siting, construction, monitoring, and operation of wind energy projects, as well as offsetting conservation measures, compliance with which will be required before any eagle take permits under the new Rule will be issued. These regulations also require the FWS to ensure that any permit for take of eagles is “consistent with the goal of increasing or stabilizing breeding populations.” Because the best available scientific assessment of golden eagle populations indicates that some golden eagle populations are not stable and some are declining, the FWS has set regional take thresholds for golden eagles that are zero or close to zero in some areas of the west and southwest. Thus, eagle permits are going to be least available in the areas of highest demand—where wind energy developments are currently operating or slated for development in the western United States.

## **F. Application to avian takings by industry**

The legislative history of the Eagle Act’s amendment in 1972 contains specific discussion between senators and Department of the Interior officials about how the law would be applied to “protect eagles from electrocution.” *Bald Eagle Protection Act: Hearings on S. REP. NO. 2547, H.R. REP. NO. 12186, and H.R. REP. NO. 14731 Before the Subcomm. on the Env’t of the S. Comm. on Commerce, 92nd Cong. 22-24 (1972)*. The only reported decision directly addressing this issue affirmed such an application. *United States v. Moon Lake Electric Ass’n, Inc.*, 45 F. Supp. 2d 1070, 1074 (D. Colo. 1999). As noted in the *Moon Lake* decision, the Eagle Act was modeled after the MBTA and Congress’ intention that it be applied to conduct beyond hunting is reflected in the inclusion of the terms “poison,” “molest,” and “disturb” in its list of prohibited activities. *See id.* at 1085-86.

## VI. The Endangered Species Act

### A. Relevant statutory provisions

The Endangered Species Act makes it a Class A misdemeanor to knowingly and unlawfully “take” an endangered species. 16 U.S.C. §§ 1538(a)(1)(B), 1540(b)(1) (2011).

- The word “take” is defined more broadly under the ESA than under the MBTA or Eagle Act to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” *Id.* § 1532(19).
- FWS regulations define “harass” as “an intentional or negligent act or omission that creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns that include but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3 (2011).
- The regulations also define “harm” to include “an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3 (2011).

The mens rea requirement of “knowingly” requires proof of defendant’s knowledge of the facts that constitute the offense, not proof of an intention to violate the ESA or knowledge that a particular species is listed under its provisions. The Department’s “McKittrick Policy” requires the government to establish that the defendant knew the biological identity of the animal taken, which can pose a prosecution obstacle in cases involving protected species that are visually similar to unprotected species, such as grizzly bears (that can be mistaken for unlisted black bears) and wolves (that can be mistaken for unlisted coyotes).

### B. Penalties

The maximum penalty that can be imposed on a corporate defendant under the ESA for taking an endangered species is five years probation and a \$100,000 fine or twice the pecuniary gain or loss caused by the offense. 16 U.S.C. § 1540(b)(1) (2011); 18 U.S.C. § 3571(b), (e) (2011); *but see United States v. Eisenberg*, 496 F. Supp. 2d (E.D. Pa. 2007) (ESA amendment subsequent to enactment of Criminal Fine Improvements Act of 1987 prevents increase in maximum fine under the latter). Lesser criminal penalties apply to the unpermitted taking of threatened species. Civil, administrative monetary penalties also may be assessed by the Department of the Interior for knowingly taking either endangered or threatened species: a maximum fine of \$25,000 for endangered species; \$12,000 for threatened species. 16 U.S.C. § 1540(a)(1) (2011). A \$500 strict liability civil penalty also may be assessed. *Id.*

### C. Permits and exceptions

A person or organization may apply for an “incidental take permit” under the ESA, authorizing the taking of an endangered species without penalty “if such taking is incidental to and not the purpose of, the carrying out of an otherwise lawful activity.” *Id.* § 1539(a)(1)(B). An entity may seek an Incidental Take Permit (ITP) from the FWS by filing an application that includes a Habitat Conservation Plan (HCP), designed to minimize and mitigate harmful effects of the proposed activity on endangered species. *Id.* § 1539(a)(2)(A)(i)–(iv). If the FWS issues an ITP, it monitors the project for compliance with the terms and conditions of the HCP as well as the effect of the permitted action and the efficacy of the conservation program. 65 Fed. Reg. 35, 242, 253-56 (June 1, 2000).

## D. Application to avian takings by industry

Few criminal cases for avian takings are brought under the ESA, likely because the statute covers fewer species than the MBTA, provides for civil sanctions and incidental take permits, and requires the government to prove a “knowing” mental state for criminal conviction. Civil litigation has, however, fleshed out ESA's application to “indirect take” of endangered species by industry. *See, e.g., Babbitt v. Sweet Home Chapter Of Communities for a Great Or.*, 515 U.S. 687 (1995) (affirming that “harm” applies to indirect takings of listed species, as by habitat modification such as logging that actually kills or injures a specimen). More specifically, a recent district court decision in a citizen suit seeking injunctive relief against a wind power company whose project could harm an endangered bat species contains an excellent discussion of the ESA's application in this area, as well as a fascinating exploration of wind power-avian interaction. *Animal Welfare Inst. v. Beech Ridge Energy*, 675 F. Supp. 2d 540 (D. Md. 2009). *Beech Ridge* echoes previous opinions, including *Sweet Home*, to find that “take” is defined expansively under the ESA and includes an activity reasonably certain to imminently harm, kill, or wound a listed species. In this case, that meant the operation of wind turbines in a location likely to contain endangered Indiana bats that could be killed by contact with the rotors. Read in conjunction with other decisions cited in this article, including *Moon Lake* and *Apollo Energies*, *Beech Ridge* foreshadows the eventual criminal prosecution under the ESA, MBTA, or Eagle Act of a wind power company that knowingly fails to implement a BMP approach in developing a project that poses a credible risk to protected avian wildlife.

The most recent criminal case involving industrial taking of avian species listed under the ESA is *United States v. Kaua'i Island Util. Coop.*, Case No. 10-00296-JMS (D. Haw. Dec. 2, 2010). In *KIUC*, a long investigation by the company and government revealed that immature Newell's shearwaters flying between inland nests and the ocean frequently collided with company powerlines or fell to the ground and were killed after becoming disoriented by unshielded utility lights. The Newell's shearwater is listed as threatened under the ESA and is also protected as a migratory bird under the MBTA. The company's research indicated its lines and lights were killing over 100 shearwaters each year. Prosecution of the case was delayed for several years, during which the company conducted limited remediation and engaged in half-hearted efforts to obtain an ITP/HCP from the FWS. Ultimately, ECS successfully presented a 19-count indictment charging the utility with violations of the ESA and MBTA. In December 2010, pursuant to a plea agreement, the company pleaded guilty to one ESA and one MBTA count, paid a fine of \$40,000, and made a community service payment of \$225,000 to the National Fish and Wildlife Foundation, earmarked for the preservation of protected seabirds on Kauai. During 18 months of probation, the utility is required to modify and reconfigure power lines, monitor avian deaths, and apply for an ITP/HCP.

## VII. Getting to yes

Prosecuting industrial avian takings cases in the typical fashion—indictment (or information/notice of violation), discovery, motions, and trial/plea—can lead to frustrating outcomes, including small penalties, limited remedial orders, and, sometimes, rejection by the judiciary. The author's experience suggests that pre-indictment negotiation of these cases is often more productive. Such an approach involves the following steps:

- Intake of reports by the investigating agency. As suggested in the *Apollo* decision described above, ensure the issues of notice and causation and failure to remediate are adequately supported. If not, suggest further investigation or notice by the agency.

- If prosecution appears justified by the facts and USAM guidelines, send a target letter to the company, suggesting a meeting where the parties can exchange information about the conditions leading to avian takings on company facilities. Counsel for the company and relevant field managers should attend the initial meeting, along with the prosecutor(s) and investigator(s). The goal of the meeting is to explain the provisions of the relevant statutes and prior relevant cases and agreements and to explore the factual background leading to the meeting. Frequently, corporate counsel is not aware, prior to receiving the target letter, that notice has been provided to field personnel or managers by the agency concerning the conditions leading to avian takings. It is unusual to negotiate the precise terms of a potential settlement of the case at this early stage of negotiations.
- Ground-check information received from the defendant company. In some cases, the company may be encouraged to hire a third-party consultant to conduct an audit of the avian mortality risks and past avian deaths associated with its facilities. Sometimes, this audit will expand beyond the initial jurisdiction of investigation. For example, in *United States v. Exxon-Mobil*, Case No 97-mj-01097 (D. Colo. Aug. 12, 2009), the company was initially approached about mortalities in two states, and eventually found problems on facilities in five states, all of which were included in the resulting plea agreement and remediation.
- Begin to develop a pre-charging plea agreement. If birds or bats listed as endangered or threatened have been taken, the company may wish to initiate the ITP/HCP process with the FWS to cover its future takings of all avian wildlife. (As noted herein, such permits are not available under the MBTA and are just beginning to emerge under the Eagle Act.) In the absence of dead, endangered, or threatened species, or a tangible risk to such species, the AUSA will likely suggest a single MBTA or Eagle Act violation for every group of takings logically separated by time or geography. Fine and community service payments are negotiated based on the particular facts of the case, with an eye to prior resolutions and the benefit of counsel from ECS. An ECP, made a condition of probation and discussed below, is a typical feature of these settlements.

## VIII. Sentencing considerations

In cases involving only the take of migratory birds or threatened species—Class B misdemeanors—the advisory Sentencing Guidelines do not apply. U.S. SENTENCING GUIDELINES MANUAL § 1B1.9 (2011). Organizational defendants convicted of Class A misdemeanor crimes for taking eagles or endangered species would be subject to Chapter 8 of the Guidelines, except for the fine calculation, because these violations are sentenced under § 2Q2.1 that is exempted from Part C of Chapter 8. *See id.* § 8C2.1. This means that the prosecutor must negotiate or argue sentencing issues, including fine amounts, using the factors set forth in 18 U.S.C. § 3553. The Alternative Fines Act, authorizing the imposition of a fine of up to twice the gross gain resulting from the offense conduct, may also play a role in plea negotiations and sentencing. *Id.* § 3571(d).

### A. Community service payments

Title 18, United States Code, Section 3563(b) provides that conditions of probation must be “reasonably related” to the factors set forth in 18 U.S.C. § 3553(a)(1), which requires the sentencing court to consider the “nature and circumstances of the offense.” “A court in determining the particular sentence to be imposed, shall consider . . . the nature and circumstances of the offense . . . [and] the need

for the sentence imposed . . . to promote respect for the law . . . to afford adequate deterrence to criminal conduct . . . [and] to protect the public from further crimes of the defendant . . .” *Id.* Section 3563(b)(12) allows the discretionary imposition of “work in community service as directed by the court,” though it does not define “community service” or provide guidance on the kinds of activities that would satisfy the requirement. The Sentencing Guidelines suggest that community service is to be “reasonably designed to repair the harm caused by the offense,” adding in the commentary that

[a]n organization can perform community service only by employing its resources or paying its employees or others to do so . . . . However, where the convicted organization possesses knowledge, facilities, or skills that uniquely qualify it to repair damage caused by the offense, community service directed at repairing damage may provide an efficient means of remedying harm caused.

U.S. SENTENCING GUIDELINES MANUAL § 8B1.3 (2011).

Environmental offenses often involve harm that cannot be directly remedied: as Monty Python proved so eloquently, a dead bird cannot be brought back to life, no matter how beautiful its plumage. The commentary to § 8B1.3 suggests that community service of other than the nature described in that guideline could be acceptable if “such community service provided a means for protective or corrective action directly related to the offense and therefore served one of the purposes of sentencing set forth in 18 U.S.C. § 3553.”

The concepts embodied in these statutes and Guidelines, along with the court's authority under 18 U.S.C. § 3563(b)(22) to require a defendant to “satisfy such other conditions as the court may impose” provide a foundation for requiring community service in avian takings cases. Community service can take the form of both monetary payments and remediation requirements. Such payments are usually directed to the National Fish and Wildlife Foundation (NFWF), a charitable, nonprofit corporation established pursuant to 16 U.S.C. §§ 3701–3709. Its purposes include the acceptance and administration of “private gifts of property for the benefit of, or in connection with, the activities and services of the U.S. Fish and Wildlife Service” and the performance of “such other activities as will further the conservation and management of the fish, wildlife, and plant resources of the United States and its territories and possessions for present and future generations of Americans.” *Id.* § 3701(b)(1), (2). The NFWF is empowered to “do any and all acts necessary and proper to carry out” these purposes, including, specifically, solicitation, acceptance, and administration of “any gift, devise or bequest . . . of real or personal property.” *Id.* § 3703(c)(1), (7).

## **B. The environmental compliance/avian protection plans**

As mentioned in this article, voluntary APPs are becoming fairly common among companies that perceive a risk to avian wildlife posed by their operations. APPs were initially developed for the electric power distribution industry, gradually migrated to the oil and gas industry, and are now being used in the wind power area. Earlier this year the FWS continued its collaborative efforts to help wind developers address the problem by issuing Draft Guidelines for Land-Based Wind Energy Development and Draft Eagle Conservation Plan Guidance, discussed in Part V.E.

A standard condition of probation in every federal case is the prohibition against committing further violations during the probationary period. The method used to achieve this goal in avian takings cases is the ECP, the militarized version of the voluntary APP. The ECP is a written document prescribing steps the defendant company must take to prevent future avian mortality on its facilities. The ECP is often prepared by a third-party consulting firm (at the company's expense), which should conduct a thorough audit of the company's facilities and history of avian takings and describe specific actions,

(such as netting, hazing, prompt closure of reserve pits, etc.) to be taken by the defendant during probation. Close coordination between the defendant company and FWS, including voluntary self-reporting and adaptive management, including amendment of the ECP as necessary during probation, is common. The ECP is reviewed by the prosecution team prior to presentation to the court. Failure of the company to comply with the terms and requirements of the ECP can form the basis for revocation of probation. The plea agreement normally provides that the FWS will not refer for prosecution takings that occur during the probationary period, so long as the company is in compliance with the ECP.

## **IX. Conclusion**

The pesticide threat to migratory bird populations warned of in Rachel Carson's 1962 book, "Silent Spring," has been replaced by hazards from equipment and facilities considered essential to everyday life and eventual energy independence. Over the past fifty years, the regulatory regimes of the MBTA, Eagle Act, and ESA have developed to complement the environmental protections that industry is rightfully expected to observe for our air and water. Energy and mining companies are gradually coming to understand that, in addition to preventing pollution, they also must employ BMPs to minimize the take of protected avian wildlife at their facilities. One way to encourage compliance in this area is for wildlife agents and prosecutors to bring criminal charges in cases where the facts and law justify such a response. Federal policies favoring protection of wildlife and encouraging development of renewable energy need not be in conflict when energy companies act as good neighbors to the environment. The challenge for the prosecutor is determining which takings are unavoidable, causally attenuated, or permitted by regulators and thus not actionable; and which are unpermitted, foreseeable to, proximately caused by, and inadequately addressed by industry, making them amenable to punitive sanctions. Given their still-unusual nature and the potential for long-term benefit to the environment, these cases can be both challenging and very rewarding to the prosecutor and district in which they are brought.

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# The Soothsayer, Julius Caesar, and Modern Day Ides: Why You Should Prosecute FIFRA Cases

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## I. Introduction

In Shakespeare's *Julius Caesar*, the Soothsayer ominously warned, "Beware the ides of March." Caesar's failure to heed this warning made his story a literary "tragedy." Similarly, failing to beware of the "-ides" of today will result in a literal tragedy. The suffix "-ide" means a "chemical compound." WEBSTER'S II NEW COLLEGE DICTIONARY 561 (3d ed. 2008). When the letter "c" is added to the suffix "-ide," the suffix "-cide" is created, meaning "killer." *Id.* at 206. To avoid tragedy, we must beware the modern "-ides," which are the "killer chemical compounds" called pesticides.

True to its suffix, failure to beware of pesticides has yielded tragic effects on human health and the environment. For example, Rachel Carson's landmark book, "*Silent Spring*," Houghton Mifflin (1962), raised a Soothsayer-esque warning that highlighted the adverse effects caused by the misuse of pesticides common to her time. Ms. Carson provided a strong case illustrating that the misuse of these "-ides" was killing many bird species. Once society was deprived of the birds' songs, tragedy would ensue, resulting in a silent spring.

*Silent Spring* also prompted many people to beware of the effects that these "-ides" were having on humans. Science confirmed that the oft-used pesticide dichlorodiphenyltrichloroethane (DDT) was causing significant impact not only on birds but also on humans. Researchers learned that DDT caused cancer, birth defects, and endocrine disruption in animals and feared the same results in humans. They also found that DDT was not only killing insects, birds, and other animals directly exposed to it, but was also killing birds and other animals that fed on organisms that DDT had killed. Researchers determined that when humans eat animals that had preyed on animals or organisms killed by DDT, humans were exposed to DDT in high concentrations. Kushik Jaga & Chandrabhan Dharmani, *Global Surveillance of DDT and DDE Levels in Human Tissues*, 16 INT'L J. OF OCCUPATIONAL MED. & ENVTL. HEALTH 7, 7-20 (2003). Given these tragic effects on human health and the environment, the United States banned the use of DDT in 1972.

These effects also prompted Congress to increase regulation on these modern "-ides" in 1972 by significantly amending the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C.

§§ 136-136y (2010). As explained below, prosecutions under FIFRA are worthy fights to encourage pesticide companies and individual applicators to beware of the "-ides" of the modern day. The sections below briefly outline the provisions of FIFRA followed by an analysis of its criminal sanctions.

## II. FIFRA—a brief outline

FIFRA, through the United States Environmental Protection Agency (EPA), regulates the sale, distribution, and use of pesticides. A “pesticide” is “(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant, and (3) any nitrogen stabilizer . . .” 7 U.S.C. § 136(u) (2010). FIFRA's provisions can be divided into three general sections. First, FIFRA establishes a registration process that sets the legal parameters for the sale, distribution, and use of each registered pesticide. Second, once a pesticide is registered, FIFRA requires that pesticide registrants and pesticide users maintain records regarding their compliance with the terms and conditions established by the registration process. Finally, FIFRA also provides for both civil and criminal enforcement. Each component of FIFRA is discussed below.

### A. The pesticide registration process

The registration process is the cornerstone to FIFRA's regulatory scheme because, subject to narrow exceptions, FIFRA precludes any pesticide from being distributed or sold unless and until it is registered with the EPA. *Id.* § 136a(a). To register a pesticide, the applicant for registration must provide the EPA with several pieces of information. *Id.* § 136a. First, the application must contain the applicant's name and address, the pesticide's name, chemical formula, and all tests and data showing that the pesticide can be used for the purposes that the applicant proposes. *Id.* § 136a(c)(1). To obtain data regarding pesticide use prior to registration, FIFRA allows applicants to obtain an “experimental use permit.” *Id.* § 136c. Providing the EPA with sufficient information about the uses of the pesticide is critical because once the registration is approved, the registrant will be able to distribute and sell only that formulation of the pesticide and make only those representations to the public about the pesticide that the EPA approved in the registration process.

Second, a registration application must include a request that the EPA classify the pesticide as “general use” or “restricted use.” “General use” pesticides do not cause unreasonable adverse effects on the environment when applied for their registered uses, either as directed or in accordance with widespread and commonly recognized practice. *Id.* § 136a(d)(1)(B). These pesticides are available to and may be used by the general public without any specialized training or licensing. *Id.* “Restricted use” pesticides, however, may cause unreasonable adverse effects to the environment, including injury to the applicator, if applied for their registered uses, either as directed or in accordance with widespread and commonly recognized practice. *Id.* § 136a(d)(1)(C). Given the risks that “restricted use” pesticides pose, they can only be applied by a “certified applicator” who has specialized training, has passed a pesticide licensing exam, and holds a valid license to apply the pesticide that is classified for restricted use. *Id.* § 136(e)(1). Most pesticide licensing programs are administered by state governments that have received delegated authority under FIFRA from the EPA. *Id.* §§ 136v, 136w-1, 136w-2.

Third, the applicant must ensure that the proper “labeling” for the pesticide is provided to the EPA. The “labeling” of a pesticide is not just the label on the pesticide container itself. *Id.* § 136(p). Instead, the “labeling” includes all of the literature accompanying the pesticide. This literature describes how, when, where, how much, and by whom the pesticide should be used and includes safety and first aid information. Once approved, the pesticide's “labeling” becomes the law for how that particular pesticide can be used.

Finally, after a registration has been issued, the EPA may revoke it by administrative order. *Id.* § 136k. Upon revocation, the pesticide may not be sold, distributed, or used unless the EPA approves a “re-registration” of the pesticide. *Id.* § 136(z). In sum, registration is the cornerstone of FIFRA's

regulatory regime because it establishes the pesticide-specific law for how each registered pesticide may be sold, distributed, and used.

## **B. Recordkeeping provisions**

To assist with enforcing the pesticide-specific law established during the registration process, Congress requires registrants, producers, and certified commercial applicators to keep records and reports about their pesticide activities. *Id.* §§ 136f, 136g, 136i-1. FIFRA and its implementing regulations empower the EPA to inspect the records of each entity to which the recordkeeping requirements apply. As shown below, failure to maintain adequate records may be grounds to sanction the offending party either civilly or criminally.

## **C. FIFRA's enforcement provisions**

To encourage compliance with FIFRA's registration and recordkeeping requirements, FIFRA contains civil and criminal penalties. FIFRA's civil or criminal penalties serve at least four main purposes: (1) to protect the integrity of the registration process itself; (2) to regulate pesticide sales and distribution; (3) to protect against improper pesticide use; and (4) to protect the enforcement regime itself. The acts that FIFRA forbids are listed below and grouped according to the above-referenced purpose that each prohibition serves.

Protecting the registration process:

- 7 U.S.C. § 136l(b)(3). This provision fosters candid disclosures from applicants for registration about the nature of their product. It protects the integrity of the registration process itself by establishing a felony for “[a]ny person, who, with intent to defraud, uses or reveals information relative to formulas of products acquired” during the registration process. This enforcement provision is discussed in greater detail in Part III below.
- 7 U.S.C. § 136j(a)(2)(D). This provision also fosters candor from applicants for registration and protects the integrity of the registration process by prohibiting disclosures of pesticide trade secrets even when the discloser lacks an “intent to defraud.” This section prohibits revealing any confidential information obtained from the registration process to any unauthorized person regardless of the reason for the improper disclosure.
- 7 U.S.C. § 136j(a)(2)(M), (Q), (R). These provisions preclude the falsification of information, test results, and data used during the registration process.
- 7 U.S.C. § 136j(a)(2)(S). This provision is a catchall provision that precludes violating any regulation governing the registration process. Such regulations are located in 40 C.F.R. part 152.

Regulating pesticide sales and distribution:

- 7 U.S.C. § 136j(a)(1)(A). This provision prohibits the sale of an unregistered pesticide.
- 7 U.S.C. § 136j(a)(1)(B). This provision precludes a pesticide seller or distributor from making representations about a pesticide that the EPA did not approve in the registration process.

- 7 U.S.C. § 136j(a)(1)(C). This provision bars a pesticide seller or distributor from selling a formulation of a pesticide that is different than what the EPA approved in the registration process.
- 7 U.S.C. § 136j(a)(1)(D), (E), (F). These provisions all prohibit the sale or distribution of a misbranded, adulterated, or discolored pesticide.
- 7 U.S.C. § 136j(a)(2)(F). This provision prohibits the sale or distribution of a restricted use pesticide to someone who is not licensed to apply it.

Regulating pesticide use:

- 7 U.S.C. § 136j(a)(2)(G). This provision prohibits the use of a pesticide in a manner inconsistent with its labeling.
- 7 U.S.C. § 136j(a)(2)(P). This provision bans experimental pesticide use on humans without the informed consent of the test subjects.
- 7 U.S.C. § 136j(a)(2)(I)-(K). These provisions prohibit the use of a pesticide contrary to an order from the EPA, including an order revoking the pesticide's registration.

Protecting the enforcement regime:

- 7 U.S.C. § 136j(a)(2)(B), (N). These provisions bar a pesticide registrant, seller, distributor, or user from refusing to keep or submit records and reports required under FIFRA and its implementing regulation. *See also* 40 C.F.R. part 167 (2011).
- 7 U.S.C. § 136j(a)(2)(M). This provision prohibits the falsification of records and reports required under FIFRA and its implementing regulations.

### III. Criminal penalties under FIFRA

Under FIFRA, any one of the above-mentioned unlawful acts may be enforced through civil and/or criminal penalties. Part III, however, discusses only criminal penalties. FIFRA contains three types of criminal sanctions: (1) a felony; (2) a Class A misdemeanor; and (3) a Class C misdemeanor.

First, FIFRA's criminal sanctions contain only one felony. 7 U.S.C. § 136l(b)(3) (2010). Specifically, FIFRA's lone felony provision applies to “[a]ny person, who, with intent to defraud, uses or reveals information relative to formulas of products acquired” during the registration process. *Id.* Persons that are convicted of this crime face up to three years in prison and a fine of no more than \$10,000. *Id.* § 136l(3). However, after FIFRA was enacted, Congress raised the amount of the fine for both individuals and companies. 18 U.S.C. § 3571 (2010). Under § 3571(b)-(c), individuals and companies may be fined either \$250,000 and \$500,000, respectively; under § 3571(d) they may also be subject to a fine amounting to twice the defendant's gain or twice the loss to a third party. To prevail on this felony charge, the government must prove that a person, with intent to defraud, used or revealed information relative to formulas of products acquired under the registration process. Under FIFRA, the term “person” means “any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.” 7 U.S.C. § 136(s) (2010). The element “with intent to defraud” means the same as in other Title 18 offenses. *See, e.g.*, 18 U.S.C. § 1341 (mail fraud). Specifically, the offender must act knowingly and with the intention or the purpose to deceive or to cheat. An “intent to defraud” is ordinarily accompanied by a desire or a purpose to bring about some gain or benefit to oneself or some other person or by a desire or a purpose to cause some loss to some person. EDWARD J. DEVITT ET AL., 1

FEDERAL JURY PRACTICE AND INSTRUCTIONS § 16.04 (4th ed. 1992). Finally, the government must prove that the offender used or revealed formulaic information obtained during the registration process.

Second, FIFRA provides for both a Class A misdemeanor and a Class C misdemeanor when the offender “knowingly violates” any provision of FIFRA. 7 U.S.C. § 136l(b)(1),(2) (2010). FIFRA's Class A misdemeanor includes up to one year in prison and a fine. *Id.*; 18 U.S.C. § 3571(b) (2010). When FIFRA was enacted, Congress set the maximum fine for a “registrant, applicant for a registration, or producer” convicted of the Class A misdemeanor at \$50,000, whereas the maximum fine for a “commercial applicator of a restricted use pesticide” convicted of a Class A misdemeanor was \$25,000. 7 U.S.C. § 136l(b)(1)(A)-(B) (2010). After FIFRA was enacted, Congress passed 18 U.S.C. § 3571, which set a new maximum fine amount for all Class A misdemeanors of \$100,000 for individuals and \$200,000 for corporations. 18 U.S.C. § 3571(c)(5) (2010). Additionally, FIFRA's Class C misdemeanor penalty includes up to thirty days in jail and a maximum fine of \$1,000, an amount that was increased by 18 U.S.C. § 3571 to \$5,000 for individuals and \$10,000 for corporations.

To prove a misdemeanor violation under FIFRA, the government must establish the offender's regulatory identity and that the offender knowingly violated a provision of FIFRA. 7 U.S.C. § 136l(b)(1), (2) (2010). Determining whether to charge the Class A or Class C misdemeanor depends entirely on the regulatory status of the offender. FIFRA's Class A misdemeanor applies only to a “registrant, applicant for registration, or producer” or a “commercial applicator of a restricted use pesticide” who “knowingly violates” any of the provisions of FIFRA discussed in the previous section. *Id.* The Class C misdemeanor applies when a “private applicator or other person” (for example, someone who is not a “registrant, applicant for registration, or producer” or a “commercial applicator”) “knowingly violates” any provision of FIFRA. Consequently, even if a “registrant, applicant for registration, or producer” or a “commercial applicator” were to knowingly violate the same provision of FIFRA as a “private applicator,” the private applicator would be subject only to a Class C misdemeanor whereas the others would face a Class A misdemeanor. Thus, proving the regulatory status of the offender is critical to a FIFRA prosecution.

To establish the offender's regulatory identity for purposes of proving FIFRA's Class A misdemeanor, the government must show that a “registrant, applicant for registration, or producer” or a “commercial applicator” is the offender. The term “registrant” means a “person who has registered any pesticide” under FIFRA. *Id.* § 136(y). An “applicant for registration” is a person who has applied to the EPA to register a pesticide. A “producer” means “the person who manufactures, prepares, compounds, propagates, or processes any pesticide or device or active ingredient used in producing a pesticide.” *Id.* § 136(w). The term “commercial applicator” is a pesticide applicator “who uses or supervises the use of any [restricted use] pesticide” on property other than his own for compensation. *Id.* § 136(e)(3). The list of restricted use pesticides is found at 40 C.F.R. § 152.175.

To establish the offender's regulatory identity for the Class C misdemeanor under FIFRA, the government must show that the offender is a “private applicator” or other person who is not a “registrant, applicant for registration, or producer” or a “commercial applicator.” *Id.* § 136l(b)(2). A “private applicator” is a person who is certified to apply restricted use pesticides for producing any agricultural commodity on land that the applicator or his employer owns or rents. The most obvious example of a “private applicator” is a farmer who is spraying pesticide on the crops that he is growing on land he owns or rents. Once the government has established the regulatory identity of the offender, the next step, proving that he knowingly violated a provision of FIFRA, is the same in both types of misdemeanors.

To prove that the offender “knowingly violate[d]” a provision of FIFRA, the government need not prove that the offender knew the law prohibited his conduct. The term “'knowingly' merely requires proof of knowledge of the facts that constitute the offense.” *Bryan v. United States*, 524 U.S. 184, 193

(1998). An act is done “knowingly” if the person was “conscious and aware” of his act or omission to act, if he “realized what he was doing” or “what was happening around him,” and if he did not act or fail to act because of ignorance, mistake, or accident. EDWARD J. DEVITT ET AL., 1 FEDERAL JURY PRACTICE AND INSTRUCTIONS § 17.04 (4th ed. 1992); *see also United States v. Corbin Farms Serv.*, 444 F. Supp. 510, 519-20 (E.D. Cal. 1978) (“The mens rea requirement in the word 'knowingly' [as used in FIFRA] would protect a person believing in good faith that he was dealing with distilled water . . . .”), *aff'd*, 578 F.2d 259 (9th Cir.1978); *accord United States v. Kelly*, 2000 WL 1909397, \*4 (6th Cir. Dec. 28, 2000). Once the government proves that the offender acted “knowingly,” it must then prove that this knowing act actually violated a provision of FIFRA such as those outlined in Part II.C.

An example of how this is done may be helpful:

Suppose Arnold Woods owns a golf course and is having problems with gophers. Mr. Woods calls Bill Murray, Inc., an extermination company that has a license from State X to use restricted use pesticides to kill vertebrates. Bill Murray, Inc. sends out Employee, who also holds a license from State X to apply restricted use pesticides to kill vertebrates. When Employee sees the extent of the gopher infestation at the golf course, he decides that he should use a pesticide whose sole active ingredient is aluminum phosphide that when applied to gopher burrows, turns into deadly phosphine gas by reacting to the moisture in the soil. The labeling that the EPA approved during the registration process says in capital letters, “THIS PRODUCT MUST NOT BE APPLIED INTO A BURROW SYSTEM THAT IS WITHIN 15 FEET (5 METERS) OF A RESIDENCE OR OTHER BUILDING THAT IS OR MAY BE OCCUPIED BY HUMANS AND/OR ANIMALS.”

However, Employee has never experienced previous problems with this pesticide being too close to a building, so he places pesticide tablets at several spots against the cement foundation of Mulligan's Bar that backs the ninth green. Upon completion, Employee tells Mr. Woods, “The stuff I used should take care of them varmints.” Mr. Woods gladly pays Bill Murray, Inc. for Employee's services, and Mr. Woods prays that the gophers will die. However, when Mulligan's Bar is closing up for the night, the cook and the waitress, who are just finishing their 8-hour shift, become violently ill. They begin vomiting and have difficulty breathing. Both are taken to the hospital where blood work reveals that they have elevated levels of phosphorous in their blood and appear to be suffering from acute poisoning from some type of inhalant. Mr. Woods calls Employee to find out what he used to kill the gophers. After Mr. Woods states that two of his employees are in the hospital because of some inhalant, Employee states that he used aluminum phosphide, a substance that turns into phosphine gas. Mr. Woods is upset and calls the EPA to investigate. The EPA discovers aluminum phosphide tablets at several places surrounding Mulligan's Bar. The EPA refers this case to the United States Attorneys' Office for review and possible prosecution.

Since we are not dealing with the fraudulent disclosure of pesticide formulas obtained during the registration process, the only possible crime under FIFRA in this example is either a Class A or Class C misdemeanor depending on the regulatory status of the violator. FIFRA's Class A misdemeanor would apply here for two reasons. First, Bill Murray, Inc.'s and Employee's regulatory identities are both “commercial applicators of a restricted use pesticide” because both are licensed by State X to apply restricted use pesticides, a job they perform for a fee on property they do not own or rent, 7 U.S.C. § 136(e)(3) (2010). Second, Employee applied a “restricted use” pesticide on the golf course because the

EPA has classified as “restricted use” all pesticides whose sole active ingredient is aluminum phosphide. 40 C.F.R. § 152.175 (2011).

Because the Class A misdemeanor against “commercial applicators of a restricted use pesticide” applies, the government must next show that Employee “knowingly violate[d]” a provision of FIFRA. 7 U.S.C. § 136l(b)(1)(B) (2010). The violation of FIFRA that the government should charge here is that Employee used a “registered pesticide in a manner inconsistent with its labeling.” 7 U.S.C. § 136j(a)(2)(G). The government can show that Employee acted knowingly because of his statements to Mr. Woods immediately after using the pesticide and after he learned that people who worked at Mulligan's Bar were sick. His statements illustrate that he was aware that he was using a pesticide when he performed his work for Mr. Woods. *See United States v. Corbin Farms Serv.*, 444 F. Supp. 510, 519-20 (E.D. Cal. 1978). Next, the government can show that the pesticide was registered by looking at the label and verifying the registration number with the EPA. Finally, the government can demonstrate that Employee used the pesticide in a manner inconsistent with its labeling because he placed the pesticide well within fifteen feet of a building that was occupied by humans even though the label unmistakably prohibited such placement. Thus, Employee is liable for a Class A misdemeanor, automatically making Bill Murray, Inc. also liable under 7 U.S.C. § 136l(b)(4).

#### **IV. Conclusion**

Just as the Soothsayer warned Julius Caesar to “[b]eware the ides of March,” contemporary science has likewise warned modern society to beware of the modern day “-ides”: the “killer chemical compounds” known as pesticides. Unlike Caesar, Congress has opted to heed the Soothsayer-esque warnings from scientists and has enacted FIFRA to regulate the sale, distribution, and use of pesticides. For those who choose to behave like Caesar and ignore the dangers that these modern-day “-ides” pose to human health and the environment, Congress has authorized criminal sanctions. Assistant United States Attorneys should strongly consider prosecuting FIFRA crimes to deter the Caesars of today from engaging in activity that may cause severe, actual tragedies. ❖

#### **ABOUT THE AUTHOR**

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# The Lacey Act Amendments of 2008: Curbing International Trafficking in Illegal Timber

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## **I. Introduction**

Illegal logging destroys forests, watersheds, and habitats and negatively impacts biodiversity, agriculture, fisheries, and global climate change. The scope of illegal logging worldwide is enormous. The World Bank estimated in 2006 that timber harvested illegally on public lands worldwide results in lost assets and revenue in excess of \$10 billion dollars annually in developing countries. *See* STRENGTHENING FOREST LAW ENFORCEMENT AND GOVERNANCE, Report No. 36638-GLB (2006). That money represents funds that could otherwise be used by governments in developing countries to meet the basic needs of their people, better manage their forests and other natural resources, and reduce their international debt. In some locations, the money goes instead to fund armed conflict. In addition to the obvious ecological damages associated with illegal logging and the harm done to forest-dependent people, both the trade in lower-priced illegal timber and the products made from it hurt American wood products companies that operate legally.

Consequently, the United States government has launched a variety of efforts to combat illegal logging and associated trade and to promote trade in legally and sustainably harvested timber and wood products. The United States entered into separate Memoranda of Understanding (MOU) with the governments of Indonesia and China to combat illegal logging and associated trade. Attorneys from the Environment and Natural Resources Division (ENRD) of the Department of Justice (DOJ) participate in the interagency working groups that meet with their foreign counterparts under those MOUs. The United States similarly works with Peru, Liberia, Russia, and other countries on illegal logging issues. Surprisingly, the effort that has resulted in perhaps the most far reaching impact is a seemingly modest change in U.S. laws.

Beginning in 2003, an inter-agency group began meeting at the Council on Environmental Quality to put flesh on the bones of President George W. Bush's Initiative Against Illegal Logging. At times the government representatives were joined by representatives of the interested private industries and by representatives of environmental non-governmental organizations (NGOs). Each federal agency represented in the discussions was asked what it could contribute to the effort. The DOJ representatives repeatedly pointed out that the Department had little to contribute in the way of enforcement until changes were made in U.S. laws. Until such changes took place, a person could clear cut a protected

national park in the heart of a foreign country's rainforest, import the resulting timber into the United States while openly admitting the illegal source, and violate no U.S. law.

Thanks to the joint efforts of government officials, private industries, and environmental NGOs, the necessary changes were made to U.S. law, effective May 22, 2008. Some of the changes have proven to be complicated to implement and prosecutions have been slow in coming. Nevertheless, the new law that amends the century-old Lacey Act, 16 U.S.C. §§ 3371–3378, represents one of the most significant pieces of environmental legislation enacted since the 1970s and is changing the way the international timber and wood products industry conducts business.

## II. The Lacey Act as amended

### A. Provisions added by the Lacey Act Amendments of 2008

The Lacey Act has been the most powerful tool in the arsenal of the prosecutor of fish and wildlife crimes for over a century. However, when it came to crimes involving plants, the statute defined “plant” to exclude the majority of known species. The Lacey Act, until it was amended, applied only to plants that were indigenous to the United States *and* listed under the Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531–1544; on one of the Appendices to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); or on a state's protected species list. Almost all tropical timber, and the majority of other plants, were not covered by the Lacey Act prohibitions. For those that were covered, prohibitions were more limited than for fish and wildlife. For example, trafficking in plants that had been taken in violation of an underlying foreign—as opposed to state or federal—law was not prohibited as it was for fish and wildlife. All that has now changed.

The Lacey Act was amended to cover a much broader range of plants and plant products. These changes became effective on May 22, 2008 as part of the Food, Conservation, and Energy Act of 2008 (Section 8204, Prevention of Illegal Logging Practices). A redlined copy of the Act identifying the provisions added by the Amendments may be found on line at [http://www.aphis.usda.gov/plant\\_health/lacey\\_act/index.shtml](http://www.aphis.usda.gov/plant_health/lacey_act/index.shtml).

As amended, the Lacey Act has three primary new components relevant to combating international trafficking in plants, especially illegal timber and products made from illegal timber. First, the Amendments changed the definition of the term “plant” to expand the application of the Lacey Act. “Plant” is now defined broadly to mean “[a]ny wild member of the plant kingdom, including roots, seeds, parts, or products thereof, and including trees from either natural or planted forest stands.” 16 U.S.C. § 3371(f) (2010). While this definition is both broad and clear, significant exceptions to the definition of “plant” remain and thus constitute important caveats of which prosecutors must be aware. *See id.* § 3371(f)(2). Three general categories of plants remain exempt from the definition of the term “plant” and thus from the provisions of the Act: (1) common cultivars, except trees, and common food crops (including roots, seeds, parts, or products thereof); (2) scientific specimens of plant genetic material (including roots, seeds, germplasm, parts, or products thereof) that are to be used only for laboratory or field research; and (3) plants that are to remain planted or to be planted or replanted (for example, live plants as in the nursery trade). *Id.* However, plants in the last two categories—scientific specimens and “planted” plants—are *not* exempt if they are listed in an appendix to CITES, as an endangered or threatened species under the ESA, or pursuant to a state law providing for the conservation of a species that is indigenous to the state and is threatened with extinction. *Id.* § 3371(f)(3).

The amended Lacey Act requires the Secretary of Agriculture and the Secretary of the Interior, after consultation with appropriate agencies, to jointly promulgate regulations to define the terms

“common food crop” and “common cultivar” that are used in the exemptions. 16 U.S.C. § 3376 (2010). Proposed regulations were published on August 4, 2010, but final regulations have not yet been issued. 75 Fed. Reg. 46859 (Aug. 4, 2010) (to be codified at 7 C.F.R. ch. 3). The proposed regulations are drafted to effectively exclude from this exemption plants listed in an appendix to CITES, under the ESA, or in a similar state list. The rationale behind this exclusion is that any plant considered threatened or endangered cannot be common.

The second major new component of the Lacey Act is that it now makes it unlawful to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant, with certain exceptions, taken in violation of any federal, state, tribal, or foreign law that protects plants. *Id.* § 3372(a)(2). Thus, the Act prohibits a person from bringing into the United States any plant or plant product taken in violation of a foreign law that protects plants or that regulates a variety of plant-related offenses. *Id.* § 3372(a). The foreign laws that serve as the underlying predicate must be plant-related laws. For example, a labor law violation by a timber harvester would not qualify as a predicate offense. Specifically, the Lacey Act enforcement provisions apply to any plant taken, possessed, transported, or sold in violation of any foreign law that protects plants or that regulates the following: (1) the theft of plants; (2) the taking of plants from a park, forest reserve, or other officially protected area; or (3) the taking of plants without required authorization. *Id.* § 3372(a)(2)(B). The Lacey Act also applies to plants that are taken, possessed, transported or sold: (1) without the payment of appropriate royalties, taxes, or stumpage fees; or (2) in violation of any limitation under any state or foreign law governing the export or transshipment of plants. *Id.* In addition, the Lacey Act includes enforcement provisions if a person makes or submits any false record of any plant or plant product that is imported into the United States. *Id.* § 3372(d).

The third major new component created by the Lacey Act Amendments is the addition of a new import declaration requirement for plants and plant products. *See id.* § 3372(f). The amendments make it unlawful, as of December 15, 2008, to import certain plants or plant products without an import declaration. The declaration must include, among other things, the scientific name of the plant being imported or the plant used to make a product being imported, the value of the importation, the quantity of the plant or plant product, and the name of the country where the plant was harvested in. Prosecutors should be aware that enforcement of this declaration requirement is being phased in pursuant to an inter-agency agreement. *See infra* Part III.

The Lacey Act Amendments require the Secretary of Agriculture to review, no later than two years after enactment, implementation of the declaration requirement as well as the effect of an exclusion from this requirement for packaging material provided for in § 3372(f)(3). *Id.* § 3372(f)(4). The review must provide public notice and an opportunity for comment on the review. *Id.* This review is currently being undertaken and public comment has been sought. 76 Fed. Reg. 10874 (Feb. 28, 2011). Section 3372(f)(5) provides that not later than 180 days after the Secretary completes the review, he shall submit a report to Congress containing specified information related to implementation of the declaration requirements. Pursuant to that requirement, the Department of Agriculture's Animals and Plant Health Inspection Service (APHIS) is preparing a draft of the report to Congress describing implementation of the amended Lacey Act's declaration requirement for the period December 15, 2008 to June 30, 2010. Any public comments received by APHIS will inform this statutorily-required report to Congress.

## B. Penalties for violations of the Lacey Act

The penalties for Lacey Act violations were largely unchanged by the 2008 amendments except that penalties for violations of the new declaration requirement were specified. Violations of the Lacey Act may be addressed in three basic ways: (1) through forfeiture of the goods in question; (2) through the imposition of civil administrative monetary penalties; and/or (3) through the imposition of criminal penalties. *See* 16 U.S.C. §§ 3373, 3374 (2010).

**Forfeiture.** The most common enforcement action under the Lacey Act remains forfeiture of the illegal fish, wildlife, or plant. While civil and criminal enforcement actions for penalties under the Lacey Act require the government to prove some level of knowledge or scienter regarding the underlying illegality of the plants or plant products, forfeiture proceedings have no such requirement. The Lacey Act's civil forfeiture provision provides for forfeiture on a strict liability basis. It states:

All fish or wildlife or plants imported, exported, transported, sold, received, acquired, or purchased contrary to the provisions of section 3372 of this title (other than section 3372(b) of this title), or any regulation issued pursuant thereto, shall be subject to forfeiture to the United States *notwithstanding any culpability requirements* for civil penalty assessment or criminal prosecution included in section 3373 of this title.

*Id.* § 3374 (2010) (emphasis added).

Civil forfeiture on a strict liability basis has been a longstanding feature of the Lacey Act and dates from 1981. Many federal courts have confirmed that the Lacey Act's civil forfeiture provisions are imposed on a strict liability basis. *See, e.g., United States v. 144,774 pounds of Blue King Crab*, 410 F.3d 1131, 1133-34 (9th Cir. 2005); *United States v. One Afghan Urial Ovis Orientalis Blandfordi Fully Mounted Sheep*, 964 F.2d 474, 476 (5th Cir. 1992) (per curiam); *Conservation Force v. Salazar*, 677 F. Supp. 2d 1203 (N.D. Cal. 2009); *United States v. 1866.75 Board Feet and 11 Doors and Casings*, 587 F. Supp. 2d 740 (E.D. Va. 2008); *United States v. 2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106, 1117 (S.D. Fla. 1988). Thus, to forfeit imported plants or plant products, the government must show by a preponderance of evidence only that the plant or plant product was imported without a required declaration or taken in violation of a foreign law that protects plants or that regulates a variety of plant-related offenses. The product is then subject to civil forfeiture regardless of whether the person that subsequently dealt with that item had the requisite state of mind to be convicted of a criminal or civil Lacey Act offense.

The amendments to the Lacey Act include a reference to the Civil Asset Forfeiture Reform Act (CAFRA), 16 U.S.C. § 3374(d), providing that “[c]ivil forfeitures under this section shall be governed by the provisions of chapter 46 of Title 18 [United States Code].” This cross-reference to CAFRA in the Lacey Act amendments does not purport to modify CAFRA or alter the interplay between CAFRA and forfeitures under the Lacey Act. Since it was enacted in 2000, CAFRA has set forth the procedures that apply in all civil forfeitures under federal law unless the particular forfeiture statute is specifically exempted in 18 U.S.C. § 983(i)(2).

CAFRA provides a uniform innocent owner defense to civil forfeiture actions. However, § 983(d)(4) of CAFRA states, “Notwithstanding any provision of this subsection, no person may assert an ownership interest under this subsection in contraband or other property that it is illegal to possess.” Under the Lacey Act, it is unlawful for any person to “import . . . sell, receive, acquire, or purchase in interstate or foreign commerce . . . any plant—taken, possessed, transported, or sold in violation of . . . any foreign law, that protects plants or that regulates” plants in several enumerated respects. 16 U.S.C. § 3372(a)(2) (2010). If the government can establish that a person received or acquired a plant or plant

product in violation of § 3372(a)(2), the plant or plant product is “property that . . . is illegal to possess” and, under 18 U.S.C. § 983(d)(4), its owner may not assert CAFRA’s innocent owner defense. *See 144,774 pounds of Blue King Crab*, 410 F.3d at 1135-36; *Conservation Force v. Salazar*, 677 F. Supp. 2d 1203 (N.D. Cal. 2009); *United States v. 1866.75 Board Feet and 11 Doors and Casings*, 587 F. Supp. 2d 740 (E.D. Va. 2008). Thus, under these long-standing provisions, the government may institute civil forfeiture proceedings under the Lacey Act against an importer of illegally taken plants or plant products without proving scienter, notwithstanding the innocent owner defense available under CAFRA.

The Lacey Act does provide for possible remission or mitigation of strict liability forfeiture. *See* 16 U.S.C. § 3374(b) (2010). If property is forfeited administratively, U.S. Fish and Wildlife Service regulations provide that any person that has an interest in property subject to forfeiture under the Lacey Act may file a petition for remission of forfeiture with the Solicitor of the Department of the Interior. 50 C.F.R. § 12.24. If the Solicitor finds the existence of mitigating circumstances to justify remission or mitigation of the forfeiture or alleged forfeiture, the Solicitor may remit or mitigate the forfeiture on such terms and conditions as may be reasonable and just or he may order discontinuance of any proceeding. *Id.* § 12.24(f). If the property in question is worth more than \$100,000 or if a claim is filed in an administrative forfeiture proceeding, a judicial forfeiture proceeding must be initiated. In a judicial forfeiture proceeding a request for remission or mitigation of the forfeiture may be filed with the U.S. Attorney and the request will be decided by the Department of Justice in accordance with 28 C.F.R. §§ 9.4 and 9.5. These procedures for remission help alleviate any potential harshness resulting from Lacey Act forfeitures.

**Civil penalties.** The Lacey Act allows for the imposition of civil administrative monetary penalties of up to \$10,000 for violations of the basic anti-trafficking provision, § 3372(a), against a party who, in the exercise of due care, should have known of the illegal nature of the plant or wildlife in question. Penalties of up to \$10,000 may also be imposed against any person that knowingly violates the false labeling provision of the Act, § 3372(d), or the declaration requirement. 16 U.S.C. § 3373(a) (2010).

**Criminal penalties.** Criminal penalties may also be imposed for either a felony or misdemeanor under the Lacey Act and often depend on the defendant’s knowledge or state of mind when he committed the violations. *Id.* § 3373(d).

Misdemeanor penalties. In order to impose a misdemeanor criminal penalty for a violation of the Lacey Act’s anti-trafficking provisions related to international plant/timber cases, the government must prove the following beyond a reasonable doubt:

- the defendant knowingly imported or otherwise trafficked in or attempted to import or traffick in the plant or plant product or merchandise, using the new definition of plant;
- the plant had been taken, possessed, transported, or sold in violation of an underlying law (discussed above); and
- the defendant, in the exercise of due care, should have known that the plant was taken, possessed, transported or sold in some illegal manner. *Id.* § 3373(d)(2). It is important to note that the government is not required to prove that the defendant knew about the Lacey Act or the precise underlying law or regulation violated when the plant was illegally taken, possessed, transported, or sold. *See, e.g., United States v. Santillan*, 243 F.3d 1125 (9th Cir. 2001).

An individual defendant found guilty of a Lacey Act misdemeanor is subject to the Class A misdemeanor maximum penalty of one year in prison and a fine of up to \$100,000 or twice the gross gain

or loss. 18 U.S.C. § 3571(b)(5), (d) (2011). An organizational defendant convicted of a Lacey Act misdemeanor is subject to a fine of up to \$200,000 or twice the gross gain or loss. *Id.* § 3571(c)(5), (d).

Felony trafficking/import penalties. The defendant's mental state regarding the underlying illegality of the wildlife, fish, or plant at issue is most often what distinguishes felony trafficking violations from misdemeanors. In cases involving interstate trafficking rather than international import conduct, the distinction may also be based on the value of the plants at issue or the commercial nature of the conduct. In order to impose a felony criminal penalty for a violation of the anti-trafficking provisions related to plant/timber cases, the government must prove the following beyond a reasonable doubt:

- the defendant knowingly imported or otherwise trafficked in or attempted to import or traffick in the plant or plant product/merchandise within the new definition of plant;
- the plant had been taken, possessed, transported, or sold in violation of an underlying law (discussed above); and
- the defendant knew the plant was taken, possessed, transported, or sold in some illegal manner. 16 U.S.C. § 3373(d)(2) (2010). As in the case of misdemeanors, the government is not required to prove that the defendant knew about the Lacey Act or the precise underlying law or regulation violated when the plant was illegally taken, possessed, transported, or sold. *See, Santillan, supra.*
- In cases based on interstate transport, the plant had a value of more than \$350 and the violation involved commercial conduct, such as the sale or purchase of the plant. *Id.* § 3371(d)(1).

An individual defendant found guilty of a Lacey Act felony is subject to the Class D felony maximum penalty of five years in prison and a fine of up to \$250,000 or twice the gross gain or loss. *Id.* § 3571(b)(3), (d). An organizational defendant convicted of a Lacey Act felony is subject to a fine of up to \$500,000 or twice the gross gain or loss. *Id.* § 3571(c)(3) and (d).

False labeling/failure to declare penalties. False labeling violations, described in 16 U.S.C. §§ 3372(d) and 3373(d)(3), and declaration requirement violations, described in §§ 3372(f) and 3373(d)(3), may also be misdemeanors or felonies subject to the same penalties described above. A false labeling violation requires the government to prove beyond a reasonable doubt that the defendant knowingly made or submitted a false record, account, or label for or identification of the plant/product that has been or is intended to be: (1) imported, exported, transported, sold, purchased, or received from any foreign country; or (2) transported in interstate or foreign commerce. *Id.* § 3372(d). A declaration violation requires the government to prove beyond a reasonable doubt that the defendant knowingly imported a plant (including products thereof) without, upon importation, filing a declaration accurately stating the scientific name of any plant contained in the importation, the country of harvest, the quantity of any such plant, and the value of the importation. *Id.* § 3372(f). All false labeling and declaration violations must be knowing. However, any such knowing violation is a Class A misdemeanor unless the offense involves: (1) the import or export of the plant or; (2) the sale or purchase, offer of sale or purchase, or commission of an act with intent to sell or purchase plants with a market value of more than \$350. In such cases the violation is a Class D felony.

### **III. Implementation**

A federal government inter-agency group began meeting in the summer of 2008 to cooperatively address issues relating to implementation of the Lacey Act amendments (hereinafter “implementation group”). ENRD is an active participant in this group. The group was initially chaired by APHIS. APHIS maintains a Web site, available at [http://www.aphis.usda.gov/plant\\_health/lacey\\_act/index.shtml](http://www.aphis.usda.gov/plant_health/lacey_act/index.shtml), that provides information on the Lacey Act, relevant Federal Register notices, and guidance to industry. The implementation group also includes representatives of the U.S. Fish and Wildlife Service (USFWS), Customs and Border Patrol (CBP), Immigration and Customs Enforcement (ICE), the Office of the U.S. Trade Representative, the International Trade Commission, the U.S. Forest Service, the Council on Environmental Quality, the State Department, and, most recently, the Office of Management and Budget. The group's primary tasks have been: (1) to advise the Secretaries of Agriculture and the Interior on development of the statutorily-required definitions of common food crop and common cultivar; (2) to implement the import declaration requirement under the amendments; (3) to conduct the statutorily-required review and assist the Secretary of Agriculture with preparation of the required report to Congress regarding the implementation of the plant declaration requirement; and (4) to work on initial enforcement efforts. Implementation of the Lacey Act amendments has garnered close scrutiny from Congress and on several occasions the implementation group has participated in briefings and meetings for Hill staff interested in the progress of various implementation issues.

#### **A. Common food crop and common cultivar definitions**

One of the first tasks addressed by the implementation group was promulgating the required definitions of “common food crop” and “common cultivar.” For decades these terms have been used to describe exceptions to the Lacey Act but until now have not been defined. Limited case law regarding the definitions exists. The most significant involved a ruling that American ginseng was not a “plant” as defined by the pre-amended Lacey Act because it was a “common food crop.” See *United States v. McCullough*, 891 F. Supp. 422, 425-27 (N.D. Ohio 1995). The court reached this conclusion despite, and without discussing, the fact that ginseng is listed on Appendix II of CITES as being threatened by trade. ENRD's position is that *McCullough* was wrongly decided and subsequent ginseng cases have been successfully prosecuted without this issue being raised. See *United States v. Ledford*, 2010 WL 4449091, at \*1-3 (Slip Copy Nov. 1, 2010). The statutory requirement under 16 U.S.C. § 3376(c) to define the terms “common cultivar” and “common food crop” present an opportunity to clarify this issue.

Proposed definitions were published in the Federal Register on August 4, 2010. 75 Fed. Reg. 46859 (Aug. 4, 2010) (to be codified at 7 C.F.R. ch. 3). Each definition provides that species listed as endangered or threatened under the Endangered Species Act, listed in the CITES Appendices (for example, ginseng), or protected under state law, are excluded because they are not “common” for purposes of the Lacey Act.

The public comment period closed on November 29, 2010. APHIS is reviewing and summarizing the comments received and the implementation group is working on revisions. No comments were received that questioned the exclusion of listed species.

#### **B. Implementation of the plant declaration requirement**

The plant declaration requirement is a keystone of the 2008 Amendments. Holding importers responsible for knowing the type of wood or other plant product they are importing and where it was harvested means that the supply chain becomes more transparent, thus deterring trade in illegally-sourced plants and plant products. The requirement also gathers basic information about the nature and quantity

of plant materials coming into the United States, allowing the efficient allocation of enforcement resources. However, the plant declaration requirement applies to millions of plants and plant products imported into the United States each year. Industries that never concerned themselves with tracking the provenance of their source materials are having to rethink their practices and ask questions they never before considered. Agencies that are not used to dealing with large volumes of import declarations must create a mechanism for receiving those declarations from importers in a manner that does not hinder legal trade. They must also answer the many questions they receive regarding information to include in the declaration.

**Phased enforcement of the declaration requirement.** Although the statute established a six month period after enactment before the declaration requirements became effective, it became clear to the implementation group that six months was not enough time to accomplish all that needed to be done. CBP needed to develop a system for declarations to be electronically filed; APHIS had to develop a paper declaration form and a system for collecting and compiling the declarations; and industry members needed time to adjust their practices to gather the information they would now need to provide in the import declarations. Therefore, the implementation group, including ENRD, agreed to a phased approach for enforcing the declaration requirement once it became effective. Interested stakeholders from trade groups and environmental NGOs have also supported this phased declaration enforcement approach. In October 2008 several members of Congress sent a letter to the Administrator of APHIS, the Commissioner of CBP, the Director of the USFWS, and the Assistant Attorney General for ENRD to support a phased approach to implementation of the declaration requirements.

In October 2008 APHIS published a Federal Register notice, 73 Fed. Reg. 58925 (Oct. 8, 2008), proposing this phased approach to enforcing the declaration requirement. The notice identified initial categories to start implementing the requirement. These categories are identified by Harmonized Tariff Schedule (HTS) chapter number. During Phase I parties could voluntarily file declarations but no enforcement would be undertaken for failure to file the declaration. (DOJ and the other federal agencies have consistently made clear that although enforcement for failure to file a declaration form would be phased in, the underlying substantive requirements of the amendments are fully enforceable.) Actual enforcement was to begin with Phase II on April 1, 2009 with goods in certain subchapters of HTS chapter 44 (wood and articles of wood) and chapter 6 (live plants, bulbs, etc.). Phase III was scheduled to begin on July 1, 2009 with goods in HTS chapters 47 (wood pulp), 48 (paper), 92 (musical instruments), 94 (furniture), as well as goods included in Phase II.

As a result of public comments and further discussion, APHIS published a second federal register notice, 74 Fed Reg. 5911 (Feb. 3, 2009), that revised the initial schedule. The categories of goods designated to be included in Phase II beginning on April 1, 2009 were narrowed and the commencement of Phase III was pushed back to October 1, 2009. A new Phase IV, to begin on April 1, 2010, was also established that would include goods in certain subchapters of HTS chapters 44, 48, and 94, in addition to goods in Phases II and III. Issues with respect to implementation of the declaration requirement for certain wood products covered by CBP's expedited release program further delayed the initiation, but Phase II ultimately began on May 1, 2009.

Meanwhile, the implementation group reviewed comments submitted by industry and environmental groups in response to the two Federal Register notices, discussed rationales for phasing in enforcement of the declaration requirement, and started to analyze the experience with Phase II of the enforcement phase-in process. Based on this work the implementation group developed a further revised schedule that was published on September 2, 2009. 74 Fed. Reg. 45415 (Sept. 2, 2009). The schedule did not add any new phases but it revised the products covered in Phases III and IV. The revision took into

account not only the complexity of the plant products at issue but also the risk, to the extent it was known, that products in certain tariff codes may be of illegal origin.

The September 2, 2009 schedule phased in new categories of products at six-month intervals. As each interval phased in these new categories, the declaration requirement became enforceable as to goods in those categories. The last six-month interval commenced on April 1, 2010. Each phase is additive such that all categories listed on the schedule are now being, and will continue to be, enforced. No further products have been added to the phased schedule since that time. However, the September 2009 notice did set forth a list of additional tariff categories that the implementation group was considering for subsequent phases to begin on or after September 1, 2010. Additional phases are anticipated.

**Issues identified during the phase-in to date.** So far, the experiences with implementing the plant declaration requirement and the public comments about the implementation have identified several highly technical issues that the implementation group continues to confront.

Identification of genus and species of plants being imported. Several persons commented that the requirement for importers to provide the scientific name (genus and species) of imported plants and plant products in Lacey Act declarations has been challenging. This commentary was a response to Federal Register notices published by APHIS that solicited comments on implementation of this declaration requirement. A key issue reported by some has been the difficulty in locating sources of information that provide scientific names for the commodities being declared. APHIS has been able to provide a list of Web sites that it considers reliable sources to research the scientific names of some plants, but no single authoritative and comprehensive resource is available to research all plant species that may be in trade.

For many goods requiring declarations, identifying the genus and species has not been problematic. This may be attributable to the size and sophistication of many of the importers filing declarations and to the government's phased approach to enforcement that began with relatively less complex products for which there are a relatively small number of species utilized. However, some types of products present unique challenges for those trying to verify genus and species information either by tracking the sourcing or conducting tests. For example, reused or recycled materials, the use of which should be encouraged, cannot typically be tracked back to the forest source. Methods of testing such complex products to determine the species of plants contained, while rapidly improving, are currently limited in availability and capability and are relatively costly.

In an effort to accommodate some of the current challenges that importers and regulators face with regard to the genus and species requirements of the declaration, APHIS took several preliminary steps. For example, it has identified several special declaration codes that may be used to identify genus and species when certain specific circumstances are met. These special declaration codes are compiled in a guidance document. The document is titled "Lacey Act Plant and Plant Product Declaration Special Use Codes" and is posted on APHIS's Lacey Act Web site. This document addresses issues raised in public comments and divides the issues into three categories: (1) the possible difficulties involved in identifying composite, recycled, reused, or reclaimed materials to the genus and/or species level; (2) the difficulty in identifying the genus and species for certain articles manufactured prior to the passage of the Lacey Act Amendments; and (3) the possible use of a shorthand designation for common trade groupings of species.

Composite, recycled, reused, or reclaimed materials. APHIS has provided guidance in the Special Declaration Codes document to importers regarding how to identify the genus and species of plant material used in composite wood products and recycled, reused, and reclaimed materials. APHIS explained in the guidance that, on October 1, 2009, it began to enforce the declaration requirements for goods in certain HTS chapters that include some goods composed in whole or in part of composite

materials, such as medium density fiberboard (MDF), particleboard, or paperboard, as well as products containing recycled, reused, or reclaimed materials. Importers have claimed that identification of the genus and species of such wood materials may be difficult. Therefore, APHIS explained that if importers are unable through the exercise of due care to determine the genus, species, and/or country of harvest of such materials, the importer may temporarily use certain special codes to identify that information on the declaration. For example, the genus of MDF should be identified as “Special” and the species should be identified as “MDF.” For recycled material, however, the genus should be identified as “Special” and the species should be identified as “Recycled.” Similar special codes were identified for particle board, paper/paperboard, reused material, and reclaimed material. By using the special code, the importer represents that it is not possible through the exercise of due care to determine the genus, species, and/or country of harvest of such materials. If a product is not composed entirely of composite, recycled, reused, or reclaimed materials, the importer must indicate the genus, species, and country of harvest for all other product components. This practice may be revisited as technologies and industrial practices evolve.

Items manufactured prior to May 22, 2008. In its Special Declaration Codes guidance, APHIS also addressed the importation of items manufactured prior to the Lacey Act amendments. APHIS recognized that for products manufactured in whole or in part prior to the amendments, the manufacturer may not have tracked the sources or species of its raw materials. It may thus be impossible to obtain that information after the fact. Therefore, if an importer of items manufactured before May 22, 2008 is unable through the exercise of due care to determine the genus, species, and/or country of harvest of the plant materials contained in that item, the importer may identify the genus as “Special” and the species as “PreAmendment.” If a product is not manufactured entirely before May 22, 2008, the importer must indicate the genus, species, and country of harvest for all product components manufactured after that date. Over time this special code should be used less frequently.

Common trade groupings. Moreover, while not yet a significant problem, importers and regulators may face practical challenges in reporting the scientific name of plant material where the genus of the plant being used in the product is obvious but a large number of species within that genus may potentially have been used and are difficult to distinguish or identify. The law currently requires that if the species used to produce the product being imported is unknown, the declaration shall contain the name of each species that may have been used to produce the plant product. 16 U.S.C. § 3372(f)(2)(A) (2010). As plant products in more HTS codes are phased in for enforcement, situations will arise where importers may be required to list a large number of possible species on declarations, particularly where multiple genera of plants are used in making the product. Such a circumstance presents unique difficulties because the charge that brokers impose on importers for filing declarations is based on the number of lines of text. Importers may find that filing electronic declarations for such products is cost prohibitive and that it is less costly to simply file paper declarations. Furthermore, at present, the electronic declaration does not provide filers with an unlimited number of lines to report Lacey declaration data. As a result, identifying a large number of potential species used in a product may result in an increase in the number and complexity of paper declarations being filed. Because the current quantity of paper declarations presents a significant burden for APHIS, an increase in filing of paper declarations could be problematic.

APHIS has begun to address this issue by making a special use code available for one type of Common Trade Grouping, Spruce Pine Fir (SPF), and is inviting proposals for others. The Special Declaration Special Use Codes guidance explains the circumstances under which the SPF designation may be used. SPF is a common grade of lumber manufactured from varying proportions of spruce, pine, or fir species in Canada. SPF imports from Canada are a combination of several distinct species but identifying the particular species in any individual shipment would be difficult. In its Special Declaration

Codes guidance, APHIS lists fourteen species of spruce, pine, and fir commonly found in SPF lumber. When the list of possible species in a particular shipment of lumber includes all species in the approved list, the importer may identify the genus as “Special” and the species as “SPF” on the plant declaration form. APHIS has identified the plant genera and species that must potentially be included in the lumber to enable the importer to use the shorthand designation. Thus, the use of the designation is consistent with the statutory requirement in 16 U.S.C. § 3372(f)(2)(A) and fulfills the requirements of the Lacey Act regarding identification of the genus and species of plant being imported.

Provided that the special codes for composite, recycled, reused, or reclaimed materials or for the code for goods manufactured pre-amendment are properly used in a Lacey Act declaration that is otherwise in compliance with the requirements of the Act, APHIS will not punish the failure to provide genus, species, or country of harvest information required by the Act's amendments. Specifically, APHIS will not refer for prosecution or take any other enforcement action as to such a declaration filed while this guidance is in effect.

Issues relating to identification of country of harvest. APHIS has noted numerous issues with respect to the data provided by importers in the Country of Harvest portion of the PPQ 505 import declaration. The Lacey Act requires the industry to identify the country from which the plant or plant product was taken (harvested). However, customs documents have long required that the importer declare the “country of origin,” a term of art that may refer to the country of manufacture rather than the country where the plant material in the product was grown or harvested. Thus, for example, a product can be “country of origin” (product of) China but “country of harvest” Indonesia. Some confusion appears to have been experienced regarding the difference between the Lacey Act's requirement of country of harvest and the customs requirement of country of origin. Some plant declarations may mistakenly contain the country of origin rather than the country of harvest.

APHIS has provided guidance and clarification on this topic by reaching out to trade groups with a series of presentations and providing instructional information on the Lacey Act Web site explaining that the country of harvest is the country where the original source material was grown and subsequently cut down, picked, or otherwise removed (for example, harvested). Nevertheless, some inconsistencies appear to remain of which prosecutors should be cognizant.

APHIS also noted in its guidance on Plant and Plant Product Special Use Codes that in many instances where an importer uses one of the Special Use Codes to identify the genus and species of plant material being imported, the importer will know the country of harvest of the plant material and, if so, that information must be provided on the declaration. If circumstances associated with the product in question are such that the country of harvest is unknown, the statute requires that each country from which the plant material may have been taken must be listed. 16 U.S.C. § 3372(f)(2)(B). However, if this list would include more than 10 countries, APHIS has indicated in its guidance that a Special Use Code of “\*\*” (two asterisks) may be used.

#### **IV. Enforcement**

While the prohibitions of the Lacey Act amendments have been in effect since May 22, 2008, enforcement actions have been slow to follow. Various factors contribute to this disparity, including the enforcement phase-in schedule for the declaration requirement, the typical complexity of the international investigations required to substantiate a substantive plant trafficking violation under the Lacey Act, and the scarcity of enforcement resources for these cases.

## A. Forfeiture cases

To date, public enforcement actions have been undertaken only under the forfeiture provisions of the Lacey Act. These provisions involve the seizure and forfeiture of plants (including products) that were improperly declared upon import or were taken, possessed, transported, or sold in violation of some underlying foreign law.

The first such forfeiture action was handled administratively by the Department of the Interior. In *United States v. Three Pallets of Tropical Hardwood*, Inv. No. 2009403072 (June 22, 2010), the Department of the Interior denied a petition for remission filed by an importer seeking the return of a shipment of three pallets of tropical hardwood imported into Tampa, Florida from Peru. The pallets had been seized after information was received from a Peruvian business owner that the shipment was being made with stolen and forged documents. The shipment, valued at just over \$7,000, was declared under tariff code 4421 that covers finished wood products such as clothes hangers, blinds, toothpicks, clothespins, and canoe paddles. At the time, the declaration requirement was not being enforced for this tariff code. The shipment actually contained raw sawn wood that should have been declared under tariff code 4407. The declaration requirement was being enforced for this tariff code at the time of the importation. Prior imports of this kind by this importer had used the proper tariff code of 4407.

The denial of the petition for remission noted the history of use of correct tariff codes and the importer's lack of diligence in handling the transaction, including his failure to request the required information on genus and species, his failure to contact the Peruvian government to determine if he was dealing with a legitimate company, and his failure to follow up on information that indicated that the shipment was questionable. This last failure includes the fact that the importer was asked to make payment directly to an individual rather than the exporting company because the company had gone out of business.

A second civil forfeiture action is being handled judicially and remains ongoing. The action involves wood materials seized from the premises of Gibson Guitars in Nashville, Tennessee. According to the affidavit of a USFWS Special Agent in support of that forfeiture, on September 28, 2009 Customs and Border Protection reported the import of a shipment of Madagascar ebony wood at the Port of Newark, New Jersey. Immigration and Customs Enforcement notified the USFWS Special Agent of the importation that consisted of 5,200 pieces of ebony, sawn sizes, and 2,133 pieces of sawn Madagascar black ebony, sawn sizes, with a total value of approximately \$76,437.59. The shipment was exported by Nagel GMBH and Company KG (Nagel) of Hamburg, Germany to its U.S.-based affiliate, Hunter Trading Company (Hunter) of Westport, Connecticut for its customer, Gibson Guitars of Nashville. CBP notified Hunter that the required Lacey Act declaration had not been submitted upon importation and an employee of Hunter subsequently submitted a declaration for 1,664 cubic meters of ebony, sawn sizes, and 700 cubic meters of Madagascar black ebony, declaring the country of harvest for both as Madagascar.

Since at least April of 2000, the Republic of Madagascar has had various laws that restrict the harvest and export of ebony wood. In 2006 a Madagascar Interministerial Order was entered that required all existing, legally harvested stocks of ebony wood to be declared to the relevant office of the Madagascar Ministry of Environment, Water and Forests. Any ebony not declared under that order is subject to seizure by Malagasy authorities. According to the search warrant affidavit in the public record, investigators have been unable to discover any authorizations for exports of unfinished, semi-worked, or sawn ebony to Nagel from Madagascar since at least September 2006. The Special Agent also examined 2008 inventory records of existing stocks of Madagascar ebony maintained by the Madagascar Ministry

of Environment, Water and Forests and was unable to find any stock of Madagascar ebony wood recorded for Nagel's supplier.

The Defendant Property in this forfeiture proceeding is identified as ebony that originated in Madagascar. The USFWS Special Agent averred in an affidavit in the public record that he believed the Defendant Property was exported from Madagascar and imported into the United States in violation of 16 U.S.C. § 3372(a), prohibiting the import of a plant product taken, possessed, transported, or sold in violation of an underlying foreign law and imported without the filing of a Lacey Act declaration and was therefore subject to forfeiture under the Lacey Act. It was also alleged that the Defendant Property is subject to forfeiture for being involved in a violation of 18 U.S.C. § 545, that is, the fraudulent or knowing importation into the United States of any merchandise contrary to law or the receipt, concealment, purchase, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law. Gibson Guitars has filed a claim in this forfeiture proceeding and moved to dismiss the forfeiture complaint. Briefing in the case continues.

### **B. False labeling cases**

The simplest criminal cases to bring under the Lacey Act, whether involving plants or animals, are false records cases. False labeling cases require only that someone knowingly made or submitted a false record, account, or label for, or false identification of, animals or plants that have been or are intended to be placed in interstate or foreign commerce. 16 U.S.C. §§ 3372(d), 3373 (2010). The falsity need not be material or even submitted to a federal authority. *See United States v. Fountain*, 277 F.3d 714 (5th Cir. 2001). Declaration violations require simply that someone knowingly failed to file a required declaration or knowingly filed a declaration containing false or incomplete information.

Typically such prosecutions are based on actions within United States jurisdiction and are premised wholly on violations of federal laws. Based on experience with wildlife declarations over decades, it is expected that such false records cases would be made most frequently in conjunction with plant declarations falsified to hide questionable or outright illegal sources of timber, either by falsifying the country of harvest (for example, the export of a particular species may be prohibited from one country but not from another) or the genus and species (for example, where the species is protected).

The phase-in schedule for enforcement of the plant declaration requirement and the mechanics related to the implementation of the requirement to date have effectively minimized opportunities for such prosecutions. Some of the categories of plant products most reported to involve illegally-sourced plants are not yet phased in for enforcement of the declaration requirement. In addition, while the declarations being filed to date are largely filed electronically, a significant subset are filed by mailing a hard copy to APHIS. Because of the existence of this hard copy filing option, Customs agents at the ports cannot assume that the lack of an electronic declaration for a particular product being imported means that the shipment lacks such a declaration. Real-time information on the existence of a paper declaration is not consistently available due to lack of personnel to handle such inquiries. As with all types of imports and import documentation, limited personnel in the ports means that shipments are often not checked for a declaration or if a declaration is filed, its accuracy is not verified at the port. While solutions are being developed for some of these issues, these challenges present hurdles that criminal investigations and prosecutions based on false records or labeling must overcome.

### **C. Trafficking cases**

Trafficking cases are exponentially more complex than false records cases, particularly when they involve, in some measure, underlying violations of foreign laws related to the harvest, possession, transport, or sale of the plants or plant products. Thus, for example, a criminal investigation and prosecution of an international timber case, similar to previous fisheries or wildlife cases, may involve obtaining foreign records, foreign government witnesses to testify regarding their laws, coordination with foreign law enforcement authorities, mutual legal assistance treaty requests or letters rogatory, and witnesses located outside the United States. It is not even enough to prove that the plant material in question was illegally sourced in the foreign country. In order to prove a criminal trafficking case, it is also necessary to be able to prove that the defendant knew or, in the exercise of due care, should have known that the plant product in question contained plant material that had been taken, possessed, transported, or sold in some manner illegally.

Despite the challenges, investigations are ongoing and prosecutions are anticipated. Assembling these cases takes considerable time and is obviously a complex and challenging task but bringing such cases remains important to combat this type of illegal activity.

### **V. Practice tips**

Cases such as those outlined above are currently few and far between. Agent resources are scarce for several reasons. APHIS no longer has criminal investigators in its ranks, other than the Department of Agriculture Inspector General's Office; the USFWS has fewer than 200 criminal investigators nationwide whose first priority is fish and wildlife cases; and ICE has other priorities, including terrorism and immigration. Moreover, each such case is resource intensive. However, the USFWS is allocating resources to this area because fish and wildlife often depend on healthy forests for their existence. Recently, the U.S. Forest Service has also begun to allocate agent resources to these cases.

Any AUSA who is referred a case arising under the Lacey Act Amendments of 2008 may want to initially assess the case by asking the following questions:

- Is the wood or plant product covered by the Lacey Act and not exempt as a common food crop or cultivar, scientific specimen, or planted plant?
- What is the species of the wood or plant product in question?
- How can the wood or plant product be identified beyond a reasonable doubt as being that species?
- What is the status of the species under the ESA, CITES, and any state or foreign laws?
- Where, when, and how was the product sourced?
- How was the product exported and traded?
- If imported, how was the product declared?
- Is this type of product currently on the enforcement schedule for the Lacey Act declaration and, if so, was a declaration filed? If so, was the filing in electronic or paper form and what does the declaration(s) show?
- Given the species and the sourcing information, what underlying laws apply that would render the wood or plant product “taken, possessed, transported or sold” in violation of an underlying law as described by the Lacey Act?

- How can those underlying laws be substantiated? Will the issuing authority testify? Were those laws promulgated in a valid manner?
- What is the standard of care for trading in this wood or plant product?
- What admissible evidence is available that any target of the investigation knew or should have known in the exercise of due care that the wood or plant product was “taken, possessed, transported or sold” in some illegal manner?
- What admissible evidence is available that any target of the investigation knew a declaration was required or any false record was in fact false?
- What documents exist that relate to the trade in or import of the wood or plant product, including invoices, shipping records, purchase orders, contracts, photographs, concession permits, phytosanitary certificates, import filings, storage records, etc.? How much of that paper trail does the agent now have and does any of it reflect any false labeling?
- What is the fair market retail value of the wood?
- What is an initial sentencing guideline estimate? *See U.S. SENTENCING GUIDELINES MANUAL § 2Q2.1 (2011).*

Any agent working on such a case should be prepared to answer these questions as well.

Significant resources are available through the Environmental Crimes Section to assist AUSAs facing such first impression cases. These resources range from model pleadings and basic advice and guidance to contacts for particular issues, such as the latest information on scientific capacities for species identification, proof of particular underlying foreign laws, and obtaining trade and customs data. Initial inquiries may be directed to Elinor Colbourn, Assistant Chief, ECS at 202-305-0205.

## **VI. Conclusion**

Trade in illegally logged timber and wood products made from illegal timber robs national governments of needed revenues, impoverishes and destabilizes communities dependent on local forests, undercuts the price of legally harvested forest products, finances regional conflict, undermines the rule of law, acts as a disincentive to sustainable forest management, and results in widespread deforestation, thereby contributing to global climate change. Illegal logging also has profound negative consequences for fish, wildlife, and people that are dependent on forest resources.

The passage of the Lacey Act Amendments catapulted the United States into a global leadership role in the ongoing multilateral effort to combat illegal logging and associated trade. Since the enactment of the Amendments, other nations are now considering laws that are similar to the Lacey Act amendments to help stem this damaging international trade. Consequently, the need for enforcement actions under the Lacey Act in response to such widespread illegal logging and harmful deforestation is enormous. To those profiting from illegal logging, successful prosecutions under the Lacey Act will send a message that the United States will no longer tolerate a “business as usual” mentality that looks the other way as illegally harvested timber and wood products made from such timber flow through the supply chain and enter the United States. By prosecuting Lacey Act cases, federal prosecutors will play an important role in the efforts to combat illegal logging and deforestation and to address the myriad environmental and social harms that result from such environmental crimes. ❖

## ABOUT THE AUTHORS

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