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 As originally enacted, a violation of any provision of the ESA relating to an endangered species, an ESA permit, or any regulation implementing the export/import, trafficking, and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. l: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, 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. 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. 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 un-permitted 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 NOVs 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, 1year 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.*, ***Babbit 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 industry 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 pesti*cides*.

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. § 136*l*(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.§ 136*l*(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.*** § 136*l*(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. § 136*l*(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. § 136*l*(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. § 136*l*(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.*** § 136*l*(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. § 136*l*(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. § 136*l*(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.❖

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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.

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, 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

❑**Elinor Colbourn** is currently the Assistant Chief primarily responsible for supervising federal plant and animal criminal prosecutions in the Environmental Crimes Section. She has been prosecuting federal plant and animal crimes for the Department of Justice for fifteen years and has represented ENRD on the President's Initiative Against Illegal Logging. Ms. Colbourn is a member of the implementation working group for the Lacey Act Amendments and is the author or co-author of several articles, including *Shocked, Crushed and Poisoned: Criminal Enforcement In Non-Hunting Cases Under the Migratory Bird Treaties* (coauthor), 77 DENV. L. REV. 359 (2000) and *Natural Resource Restoration: The Interface Between the Endangered Species Act and CERCLA's Natural Resource Damage Provisions*, (coauthor) 24 ENVIRONMENTAL LAW 717 (1994).

❑**Thomas W. Swegle** is Senior Counsel in ENRD's Law and Policy Section. Mr. Swegle coordinates ENRD's international training and outreach program and has conducted training for judges in Mexico and Central America on adjudicating environmental enforcement cases. He has also represented the Department and spoken in U.S. enforcement efforts to combat illegal logging at numerous international and domestic conferences and meetings. Mr. Swegle also served as a Trial Attorney and Senior Attorney in ENRD's Environmental Enforcement Section and as an Attorney Advisor in EPA's Office of General Counsel (OGC), where he worked on rulemaking and enforcement under the Clean Air Act.✠