


ENVIRONMENTAL CRIMES

MONTHLY BULLETIN

June 2007

EDITORS' NOTE:

Please continue to submit information on relevant case developments in federal prosecutions for inclusion in the Bulletin. If you have a significant photograph from the case, you may email it, along with your information, to Elizabeth Janes at [REDACTED]. Material may also be faxed to Elizabeth at (202) 305-0396. If you have information to submit on state-level cases, please send this to the Regional Environmental Enforcement Associations' website at <http://www.regionalassociations.org>.

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

AT A GLANCE

- [United States v. Johnson](#), 437 F.3d 157 (1st Cir.), vacated and remanded, 467 F.3d 56 (1st Cir. 2006).
- [United States v. Johnson](#), 2007 WL 137310 (11th Cir. May 11, 2007).
- [United States v. Cundiff](#), ___ F. Supp. 2d ___, 2007 WL 957346 (W.D. Ky. Mar. 29, 2007).
- [United States v. San Diego Gas & Electric Co.](#), ___ F. Supp. 2d ___, 2006 WL 3913458 (S.D. Cal. Nov. 21, 2006).
- [State v. Harenda Enterprises, Inc.](#), 724 N.W.2d 434, 2006 WI App. 230 (Ct. App. 2006).

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S.D. Alaska	<u>United States v. Frederick Reynolds</u>	<i>Walrus Ivory Sales/Conspiracy, Marine Mammal Protection Act, Lacey Act, False Statement</i>
C.D. Calif.	<u>United States v. Virginia Star Seafood Corp.</u>	<i>Illegal Catfish Imports/Conspiracy, Lacey Act, Food and Drug Act, Trafficking</i>
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[REDACTED]	[REDACTED]	[REDACTED]
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E.D. Pa.	<u>United States v. Fleet Management Ltd.</u> <u>United States v. Kim Johnson</u> <u>United States v. Martin Schneider</u>	<i>Vessel/ Conspiracy, APPS, Obstruction</i> <i>African Artifact Sales/Endangered Species Act, Lacey Act</i> <i>Whale Teeth Imports/Lacey Act, Marine Mammal Protection Act, Endangered Species Act, Smuggling</i>
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Significant Opinions

1st Circuit

United States v. Johnson, 437 F.3d 157 (1st Cir.), vacated and remanded, 467 F.3d 56 (1st Cir. 2006).

The government filed a civil action charging that defendant growers discharged dredged and fill material without permits in violation of Section 404 of the Clean Water Act, 33 USC § 1344, at three sites that they owned in order to construct, expand and maintain cranberry farms. The sites were not “adjacent to” navigable-in-fact waters of the United States, but were hydrologically connected through a series of immediately adjacent connections to a navigable-in-fact river leading to the Atlantic Ocean. The district court granted summary judgment to plaintiff, holding that there was sufficient basis for the government to exercise jurisdiction over the sites because of evidence that wetlands on the sites were hydrologically connected to navigable waters by nonnavigable tributaries. On appeal, defendants claimed that (1) their property was not covered by the relevant regulation or (2) in the alternative, either the regulation exceeded the authority granted by the Act or the Act exceeded Congress’ power under the Commerce Clause.

Held: The First Circuit, in a 2-1 decision, affirmed the judgment of the district court. The court first analyzed in detail the statutory and regulatory framework of the Act and the decisions in Riverside Bayview Homes and SWANCC (rejecting In re Needham and Harken Exploration) in concluding that jurisdiction over wetlands requires a “significant nexus” between the site in question and a navigable-in-fact-water, but that it does not require adjacency. Applying the methodology of Deaton, the court next addressed the constitutional challenge, finding that under Riverside Bayview Homes and SWANCC, Congress in fact did possess a valid constitutional rationale and authority under the Commerce Clause for assertion of jurisdiction and of Congress’ purpose in creating the Act for “restoring and maintaining” the nations’ waters. The court then found that the statutory phrase “waters of the United States” was sufficiently ambiguous to constitute an implied delegation of authority to the Corps of Engineers and to USEPA to promulgate “gap-filling” rules. It went on to interpret the relevant regulations as encompassing “tributaries” consisting of any open water hydrologically connected to a navigable-water-in-fact, even if interrupted by wetlands en route. The court then found that, under Chevron and in light of Riverside Bayview Homes and SWANCC, those regulations were based upon a permissible construction of the Act and afforded a reasonable basis for determining whether a significant nexus existed between navigable waters and their tributary systems. It found that

the hydrological connection, through the tributary system and its adjacent wetlands, from the sites to a navigable-in-fact river was sufficient here to establish jurisdiction under the Act.

In denying a subsequent petition for rehearing en banc, the First Circuit, after a detailed analysis of the fragmented opinions of the U.S. Supreme Court in Rapanos, vacated its prior decision and remanded to the district court for reconsideration whether the government had jurisdiction over the wetlands in question. Significantly, the court concluded that federal jurisdiction could be established under either the plurality or the concurring (Kennedy) opinion in that case.

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11th Circuit

United States v. Johnson, 2007 WL 137310 (11th Cir. May 11, 2007)

After his Clean Water Act conviction for illegally filling two acres of Florida Bay “bay bottom,” Balch cooperated with the government against his consultant, Johnson, providing details that revealed how Johnson had lied to the Army Corps of Engineers, EPA criminal investigators, and a grand jury. Johnson was convicted of obstruction of justice (18 U.S.C. § 1503), making false statements to a grand jury (18 U.S.C. § 1623), and making false statements to an executive branch agency (18 U.S.C. § 1001). Johnson appealed his conviction and sentence.

Regarding his conviction, Johnson claimed that there was insufficient evidence to show the materiality of statements he had made during the investigation of his client, Balch. Johnson claimed that when he knew that Balch had begun to fill bay bottom was immaterial. Specifically, he claimed that, because Balch, without reliance upon statements from Johnson, was convicted of knowingly causing an unpermitted fill, the idea that Johnson’s lies were material was effectively gutted. The 11th Circuit disagreed, holding that Johnson’s lies “disrupted and interfered with the investigation into Balch’s violations of the Clean Water Act” and were “capable of interfering with the administration of justice and had a natural tendency to influence the government in its decisionmaking process.” Thus, the Court held that there was sufficient evidence for the jury to find that Johnson’s lies were material. The other elements of his crimes were not seriously disputed.

The Court also affirmed a sentencing enhancement for substantial interference with the administration of justice under USSG § 2J1.3(b)(2). The Court observed that the government had correctly conceded that it could not rely on investigative costs incurred prior to the false testimony or the expenses associated with prosecuting the defendant’s underlying perjury offense to support the enhancement. It also agreed with Fifth Circuit case law holding it unnecessary to particularize a specific number of hours spent by government employees to sustain application of the enhancement. The Court upheld the enhancement because the record showed that the government was required to expend additional resources in order to conduct further investigation into the target’s conduct due to the defendant’s false testimony. The Court also found that the sentence imposed, which was at the low end of the advisory guideline range, was not unreasonable.

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District Court

United States v. Cundiff, ___ F. Supp. 2d ___, 2007 WL 957346 (W.D. Ky. Mar. 29, 2007).

Defendants owned two adjoining parcels of land situated adjacent to two creeks that are tributaries of the Ohio River via the intervening Green River. In a civil enforcement action, the court granted summary judgment to the government, holding that defendants had violated the Clean Water Act. Defendants appealed, but while that appeal was pending, the Supreme Court's decision in Rapanos was issued. The Sixth Circuit then remanded for consideration of whether the wetlands at issue were waters of the United States under that decision.

Held: After detailed analysis of the opinions in Rapanos, the court noted a difference among the circuits as to whether the Corps of Engineers may continue to exercise regulatory jurisdiction (1) over wetlands that satisfy the standard either of the plurality opinion *or* of Justice Kennedy's concurring opinion or (2) over only those that satisfy the standard of the plurality opinion. The court elected to adopt the first of these approaches, following the lead of the First Circuit in Johnson. It went on to hold (upon the testimony of a professional wetland scientist and of a supervisor with the Kentucky Division of Water) that there was a significant nexus between the wetlands in question and the Green River (a traditional navigable-in-fact water). The court found that the wetlands performed significant functions affecting the ecological integrity of the tributaries (including water storage, filtering of pollutants and habitat support) that had been adversely impacted by defendants' unauthorized ditch construction, land clearing and filling activities. Alternatively, it found (also from the expert testimony, along with aerial photographs) that the creeks were relatively permanent, continuously flowing bodies of water connected to a traditional interstate navigable water, and that the wetlands in question were adjacent to, and had a continuous surface connection with, the tributaries. Thus, the wetlands met the tests as jurisdictional waters of the United States under either Supreme Court standard in Rapanos.

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United States v. San Diego Gas & Electric Co., ___ F. Supp. 2d ___, 2006 WL 3913458 (S.D. Calif. Nov. 21, 2006).

Defendant utility company assigned its defendant employee to oversee a demolition project. In connection with that project, the employee falsely stated to the county Air Pollution Control District (APCD) that he was a certified asbestos consultant, in an effort to persuade the county agency that asbestos-containing pipe wrap at the site did not constitute regulated asbestos. The company and the employee subsequently were indicted *inter alia* for making a materially false statement in violation of 18 U.S.C. §1001. They moved for dismissal of the false statement count, arguing *inter alia* that the alleged statement was not directly related to an authorized function of USEPA.

Held: The court dismissed the false statement count with prejudice. It noted that the statement at issue was made to an APCD inspector rather than directly to EPA, and that EPA does not require that a "certified asbestos consultant" supervise or be hired regarding asbestos removal or demolition projects. Furthermore, EPA was not affected financially by the false statement. The court found that

there was no direct connection between the alleged false statement and EPA's concurrent enforcement authority pursuant to the asbestos NESHAP regulation under the Clean Air Act, and thus that statement concerned matters merely peripheral to the business of EPA. The court rejected the government's argument that, in delegating its authority to enforce the NESHAP regulations to the APCD, EPA's retention of current enforcement authority provided a direct relationship of the statement in question to an authorized function of EPA.

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State Court

State v. Harenda Enterprises, Inc., 724 N.W.2d 434, 2006 WI App. 230 (Ct. App. 2006).

Defendant under contract inspected material containing asbestos in relation to a renovation of the Milwaukee Auditorium. Rules adopted by the Wisconsin Department of Natural Resources pursuant to authority under state statutes incorporated federal regulations by reference in defining "asbestos-containing material" and prescribed test procedures for determining the asbestos content of materials. In particular, those rules provided that, when discrete strata of material were present, the results for each layer were to be combined to yield an estimate of asbestos content for the sample as a whole. Subsequent to the adoption by the state of the asbestos rules in question, USEPA published in the Federal Register a "clarification" of those rules that it stated were "intended solely as guidance". That clarification was not adopted under established rule-making procedures and (according to EPA) "did not represent an action subject to judicial review". It provided in part that "[i]n general, when a sample consists of two or more distinct layers or materials, each layer should be treated separately and the results reported by layer (discrete stratum)". Some time later, EPA issued another "clarification" reiterating that multi-layered systems must be analyzed as separate materials and that results were not to be combined to determine average asbestos content.

Subsequently, the state, alleging that defendant had relied upon the wrong method for assessing asbestos content (the "averaging" method for combining samples of layered materials set forth in the adopted rules) such that necessary precautions were not taken during the renovation, imposed environmental penalties and ancillary surcharges upon him. At trial, the court granted summary judgment to the state.

Held: On appeal, the intermediate state Court of Appeals reversed, finding that defendant's testing had complied with the law. After stating that "an agency interpretation may not trump a statute's clear language", the court found that the state's application of EPA's clarifications (bolstered by a case decision by EPA's Environmental Appeals Board) was at clear odds with the plain language of the adopted rule.

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Trials

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

On May 17, 2007, after three days of trial, a jury returned guilty verdicts on all three APPS violations charged, but acquitted Petraia Maritime Ltd ("PML") of obstruction.

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

PML, a Swedish company, was the sole owner and operator of the *M/V Kent Navigator*, a freighter registered in Gibraltar and doing business in Maine. During a port inspection in August 2004, Coast Guard investigators discovered evidence of illegal bilge waste discharges and the concealment of those discharges since they were not recorded in the ORB. The obstruction charge stems from the company's allegedly concealing and destroying the equipment used to carry out the discharges.

Two chief engineers, Felipe Arcolas and Alfredo Lozada, previously pleaded guilty to making false entries in the ORB. They each were sentenced to serve one month's home confinement as part of a two-year term of probation and were further ordered to pay a \$3,000 fine.

This case was investigated by the United States Coast Guard.

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Indictments

United States v. Virginia Star Seafood Corporation, et al., No. 2:07-CR-00449 (C.D. Calif.), ECS Senior Trial Attorney Elinor Colbourn [REDACTED], ECS Trial Attorney Mary Dee Caraway [REDACTED] and AUSA Joe Johns [REDACTED]

On May 24, 2007, an indictment was returned charging Virginia Star Seafood Corporation, International Sea Products Corporation, Silver Seas Company, Blue Ocean Seafood Corporation, Henry Nguyen, Peter X. Lam, Arthur Yavelberg, Cafatex, Anhaco, Antesco, Binh Dinh Import Export Company, David S. Wong, True World Foods, David Chu, Dakon International, Henry Yip, and T.P. Company with conspiracy to violate the Lacey Act, the Food, Drug, and Cosmetics Act, and customs laws, specifically for knowingly entering goods by payment of duty less than owed, entry of goods by means of false statements, and trafficking in illegally imported merchandise. Several defendants were further charged with substantive violations of the Lacey Act, entry of goods by means of false statements, importation contrary to law, and trafficking in illegally imported merchandise.

The conspiracy charge stems from the defendants' illegal scheme to import from Vietnam millions of pounds of *Pangasius hypophthalmus*, aka Vietnamese catfish, aka basa, by identifying and labeling the fish as other species in an effort to avoid an anti-dumping duty that was imposed on Vietnamese catfish in January of 2003. The substantive charges involve the defendant importers' creation of false paperwork and labels for the fish, the submission of false statements to Customs and

Border Patrol to effect the entry, the illegal entry of the fish, and the subsequent sale of falsely labeled fish to seafood buyers. In addition, one charge stems from the alleged efforts of defendant Nguyen to re-export such illegally imported product following the execution of a search warrant.

This case was investigated by the National Oceanic and Atmospheric Administration Office of Enforcement, the Food and Drug Agency, and Immigration Customs and Enforcement.

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United States v. Fleet Management Ltd., et al., No. 2:07-CR-00279 (E. D. Pa.), ECS Trial Attorney Jeff Phillips [REDACTED] and AUSA Joan Burnes [REDACTED]

On May 17, 2007, an indictment was returned variously charging two corporations and two crew members with violations stemming from the illegal overboard discharge of bilge waste over a six-month period through the use of the ballast/emergency dewatering system, as well as the use of a flexible “bypass” hose.

Defendant Fleet Management, Ltd., headquartered in Hong Kong, operated and managed a large and growing fleet of vessels, including the Liberian-flagged *M/V Valparaiso Star*. The *Valparaiso Star* was a 9,867 ton refrigerated cargo ship that carried products such as fruit and vegetables from the west coast of South America to the United States and Europe. Defendant Star Reefers Shipowning, Inc., operated the ship and was headquartered in the Cayman Islands. Ship’s master Parag Raj Grewal and chief engineer Yevgen Dyachenko also are named in the indictment.

In January 2007, a motorman from the ship contacted authorities while in port in Philadelphia, stating that he had been ordered by his chief engineer to illegally discharge sludge from oil, bilge, and holding tanks. He further stated that his refusal to do so had resulted in the loss of his job. A subsequent inspection of the ship by Coast Guard inspectors uncovered the bypass hose as well as evidence that oil record book entries had been falsified to conceal these discharges.

The defendants are charged with conspiracy to violate APPS and to obstruct a Coast Guard proceeding along with three substantive APPS violations and an obstruction violation. The obstruction stems from allegations that the defendants placed considerable pressure on the whistleblower to change his story.

This case was investigated by the United States Coast Guard.

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fine and a \$10,000 community service payment. Swart also will be banned from advertising in this country and may have his sentenced reduced if he cooperates against three remaining U.S. hunters under investigation. A number of hunters have already been prosecuted in connection with this case.

Sentencing is scheduled for August 6, 2007. This case was investigated by the United States Fish and Wildlife Service.

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United States v. Frederick Reynolds et al., No. 1:06-CR-00004 (D. Ak.), ECS Senior Trial Attorney Bob Anderson [REDACTED] and SAUSA Todd Mikolop [REDACTED]

On May 17, 2007, Frederick Reynolds pleaded guilty to conspiracy to violate the Lacey Act, Marine Mammal Protection Act, and to make false statements. The plea agreement calls for stipulated sentencing factors (most notably a wildlife market value between \$10,000 and \$30,000) and a joint recommendation of six months' incarceration. Co-defendant Michael Sofoulis pleaded guilty earlier this year to a similar conspiracy violation and was sentenced June 4th to serve six months' incarceration, followed by one year of supervised release. Sofoulis will pay a \$15,000 fine and a \$5,000 community service payment.

The defendants were charged in September 2006 with conspiracy, Lacey Act, false statement, and witness tampering violations, as well as a violation of the Marine Mammal Protection Act, stemming from the illegal sale of beach-found walrus ivory. Federal law allows for this ivory to be legally retained for 30 days prior to registration or tagging. The ivory also subsequently may be transferred, but only for non-commercial purposes, and prior written authorization must be obtained from the United States Fish and Wildlife Service.

The indictment states that Reynolds removed ivory from walrus carcasses that had washed ashore and then prepared certificates that falsely listed other persons as the "hunter" or "owner" of the walrus parts. Reynolds used tagging gear owned by his mother-in-law to sell the ivory (configured as "headmounts") for \$1,000 or more with the help of his friend, Sofoulis, a guide. After hearing of the investigation, Sofoulis approached a fellow guide to whom he had sold ivory and advised him to hide the headmount and remove the tags. He later suggested to this guide/customer that the latter lie to investigating agents about his purchase of the headmount.

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



Walrus headmount

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United States v. Loch Louman et al., No. 3:06-CR-00248 (E. D. Va.), AUSAs Olivia Hawkins and Michael Dry [REDACTED] and SAUSA David Lastra [REDACTED].

On May 14, 2007, Rick Callahan was sentenced to serve a one-year term of probation after previously pleading guilty to a Rivers and Harbors Act (“RHA”) violation. Co-defendant Loch Louman was sentenced on April 30, 2007, to serve 30 days’ incarceration and was ordered to pay a \$1,500 fine. Louman pleaded guilty to an RHA violation stemming from illegal dumping during a bridge construction project.

In the spring of 2000, the Virginia Department of Transportation (“VDOT”) awarded a contract to AMEC Civil, L.L.C., previously doing business as Morse Diesel Civil, L.L.C., to complete the Clarksville Bypass Project in Mecklenburg, Virginia. This project involved the expansion of Route 58 south of the existing bridge, as well as the construction of a new bridge across the J.H. Kerr Reservoir, a state water and a navigable water of the United States. VDOT obtained a Virginia Water Protection Permit, pursuant to the Virginia Water Protection Permit Regulations and section 401 of the Clean Water Act. This permit governed the expansion project and included provisions prohibiting the pouring of wet or uncured concrete into state waters as well as the dumping of construction material or waste material into the reservoir.

During construction of the Bypass Project, Louman, the construction project manager, and Callahan, the project manager, used a hose to pump slurry, a mixture containing water, concrete, and plasticizer, into the Reservoir in violation of the RHA.

This case was investigated by the United States Defense Department Criminal Investigative Service, the Virginia Department of Environmental Quality, and the United States Environmental Protection Agency Criminal Investigation Division.

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United States v. Kim Johnson et al., No. 2:06-CR-00501(E.D. Pa.), AUSA Paul Gray [REDACTED]

On May 10, 2007, Virginia Smith was sentenced to serve a three-year term of probation and ordered to pay a \$500 fine. Co-defendant Kim Johnson was sentenced on April 30, 2007, to pay a \$1,000 fine, and serve five months’ incarceration followed by three years’ supervised release. Smith and Johnson pleaded guilty in January of this year to smuggling, possessing, and selling products from endangered and threatened animal species.

The defendants operated a business known as Authentic Africa, located in Philadelphia, as well as a Web site called *AuthenticAfrica.com* where they sold a variety of African artifacts, decorative items, animal skins, and parts. The defendants sold animal parts in 2002 and 2003 to an undercover United States Fish and Wildlife Service agent. The items included ivory tusks sold for \$2,500, a gorilla skull for \$1,500, three helmet masks containing Colobus monkey fur for \$1,225, a python skin for \$450, a tiger skin for \$5,500, and a jaguar skin for \$8,000.

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

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**United States v. Frank Coe, No. 1:07-CR-00177 (D. Md.), ECS Trial Attorney David Joyce ([REDACTED])
ECS Senior Trial Attorney Richard Udell ([REDACTED]) and AUSA Tonya Kowatz ([REDACTED])**

On May 1, 2007, chief engineer Frank Coe pleaded guilty to an information charging him with conspiracy and an APPS violation for falsifying the oil record book (“ORB”). Coe was employed on the *M/V Fidelio*, one of four car carrier vessels managed by Pacific-Gulf Marine “PGM.” PGM was sentenced earlier this year to pay a \$1 million fine, \$500,000 in community service, and will serve three years of probation.

During his tenure as a chief engineer and a first engineer, Coe was involved in the illegal overboard discharge of oil-contaminated waste water and, as chief engineer, was responsible for the entries made in the ORB that did not reflect these discharges. The oil water separator in fact was rarely used on this ship. During a Coast Guard inspection in March 2003, Coe was unable to demonstrate that the OWS worked and, when a bypass pipe was subsequently discovered filled with oil, he denied having any knowledge of it.

Coe is the third chief engineer to plead guilty in this investigation. Deniz Sharpe, who served as chief engineer of the *M/V Fidelio* after Coe, pleaded guilty on March 7, 2007, to violating APPS involving continuing illegal conduct after the Coast Guard had removed the bypass pipe from the ship. Stephen Karas, the former chief engineer of the *M/V Tanabata* pleaded guilty on March 29, 2007, to conspiracy and to making false statements. An additional chief engineer remains scheduled for trial to begin in October 2007.

This case was investigated by the United States Coast Guard.

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United States v. Martin Schneider et al., No. 2:06-CR-00456-457 (E.D.Pa.), AUSA Manisha Sheth ([REDACTED])

On April 26, 2007, Martin Schneider pleaded guilty to charges stemming from his importing hundreds of Sperm whale teeth from England into the U.S. The teeth had been extracted from Sperm whales illegally hunted and killed by fishing fleets. Schneider pleaded guilty to Lacey Act, Endangered Species Act, and Marine Mammal Protection Act violations, as well as to two smuggling charges.

Investigation revealed that Schneider had been illegally smuggling the whale teeth into this country and re-selling them to merchants who specialize in scrimshaw etchings from at least 2002. Lewis Eisenberg, Schneider’s customer, also pleaded guilty to Lacey Act, Endangered Species Act, and Marine Mammal Protection Act violations for the purchase of the whale teeth.

Both defendants are scheduled to be sentenced on July 25, 2007. This case was investigated by the National Oceanic and Atmospheric Administration, the United States Fish and Wildlife Service, and the Bureau of Immigration and Customs Enforcement, Department of Homeland Security.

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issues?

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