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Introduction to the Environmental Crimes Issue of the USA Bulletin

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I am pleased to once again introduce an issue of the United States Attorneys' Bulletin devoted entirely to the subject of environmental crimes. The articles in this Bulletin focus on critical issues of law. They relate to the criminal enforcement of environmental statutes that are designed to ensure that air, land, and water are protected from the deleterious effects of pollution, and that wildlife and flora are protected from unlawful taking, harvesting, smuggling, and profiteering. This is the second year that an issue of the Bulletin has been devoted to environmental crimes. Environmental criminal enforcement is an important area of law that deserves special coverage.

This year, the Bulletin covers a range of subjects, including: the implications of using the Convention on International Trade in Endangered Species (CITES) in the context of Lacey Act prosecutions, the propriety of applying toxic tort principles in knowing endangerment prosecutions, environmental criminal enforcement as it relates to the extraction of energy resources, the prosecution of cases involving paint wastes, parallel proceedings in environmental civil and criminal cases, the use of forfeiture as an enforcement tool in prosecutions involving plants and animals, issues in prosecutions involving electronic wastes, the use of community service in the sentencing of environmental criminal cases, and the rights of victims of environmental crimes. These articles, which are as interesting as they are varied, provide a window into this dynamic area of federal law enforcement.

As I noted last year, close coordination and collaboration between ENRD and the United States Attorneys' offices across the country is essential to our core mission, which includes the protection of human health and the environment, as well as wildlife, through criminal and civil enforcement. Over the past year, I have traveled to many of your districts to meet with you and discuss strategy and issues of mutual concern. Together we have continued to find new ways to collaborate and maximize our collective resources. Today, more than ever before, we are working together on joint prosecutions; launching initiatives and joint task forces; sharing referrals; exchanging information and advice regarding novel cases and issues; and providing training to Assistant United States Attorneys (AUSAs) and other federal, state, and local law enforcement personnel. Our partnership has never been stronger or more successful and is exemplified by this issue of the Bulletin, which includes articles by a number of AUSAs, as well as ENRD attorneys from the Environmental Crimes Section (ECS) and attorneys from the U.S. Environmental Protection Agency (EPA), another of our key partners in law enforcement.

Two examples of recent cases serve to further illustrate the point. On March 12, 2012, as a result of a joint prosecution involving an AUSA from the Southern District of Florida and an ECS Trial Attorney, the defendant, Enrique Gomez De Molina, was sentenced to serve 20 months in prison for illegal trafficking in endangered and protected wildlife. The defendant unlawfully imported skins from endangered birds and parts of other endangered species from around the world. On June 6, 2011, as a result of a joint prosecution involving an AUSA from the Central District of California and an ECS Senior Trial Attorney, the defendant, Charles Yi, was sentenced to four years in prison for unlawfully

removing and disposing of asbestos, in violation of the Clean Air Act. The defendants in that case had hired untrained workers to remove ceiling material from an apartment complex without informing them that the material they were working with contained asbestos, a known carcinogen. These cases, and so many others, demonstrate the importance of our partnership.

I would also like to take this opportunity to give you a brief update on a subject that was addressed last year, that is, the importance of taking environmental justice considerations into account in the context of environmental criminal enforcement. Environmental justice is defined as "the fair treatment and meaningful involvement of the all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, Environmental Justice page, *available at* http://www.epa.gov/environmentaljustice/. Executive Order 12898, titled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," requires, among other things, that an "Interagency Working Group on Environmental Justice" (IWG) be created, and that each federal agency develop a strategy for implementing the Order. In 1994, Attorney General Janet Reno issued "Department of Justice Guidance concerning Environmental Justice" that has been reaffirmed by Attorney General Eric Holder. In fact, in August 2011, the Department of Justice and multiple other federal agencies signed a Memorandum of Understanding on Environmental Justice to renew the federal government's commitment to addressing environmental justice considerations in agency programs, policies, and activities.

Over the past two years, this Administration, through the IWG, has organized numerous listening sessions in communities around the United States. These sessions have provided community members; federal, state, tribal, and local governments; businesses; academics; and other interested parties with the opportunity to learn about federal initiatives and to speak directly to federal agency representatives about environmental issues that affect them.

These efforts have accelerated over the past year. ENRD has worked directly with federal agency partners, as well as state and local officials and community representatives, in organizing direct outreach to many communities. For example, in July 2011, I accompanied the U.S. Attorney for the District of New Jersey, the EPA Assistant Administrator for Enforcement, EPA's Region I Administrator, and senior staff from ENRD, on a tour of sites in Newark, New Jersey. We met with environmental and community organizations to discuss joint efforts to address environmental challenges, enforce environmental laws, and take steps toward achieving environmental justice. Later that same month, I joined the U.S. Attorney for the Northern District of Alabama, the FBI Special Agent in Charge, and the EPA Regional Administrator in Birmingham, to listen to concerns from residents and community groups regarding a host of environmental challenges in the Black Warrior River Basin. The Black Warrior River provides drinking water for many communities in northern Alabama. In addition, the Division has traveled to Anchorage, Alaska, Missoula, Montana, and other locations in New Mexico, Oklahoma, South Dakota, and Washington, to meet directly with tribal leaders and tribal communities to discuss environmental justice issues affecting them.

We also have reached out to the business community regarding our environmental justice work and plan to continue these efforts in the future. In October 2011, for example, EPA's Assistant Administrator for Enforcement and I met with the Business Network for Environmental Justice to discuss opportunities for corporate engagement with communities. On April 12, 2012, I addressed the 2012 National Environmental Justice Conference and Training Program in Washington, D.C. The program was sponsored jointly by various government agencies, including the U.S. Department of Energy, U.S. EPA, the U.S. Fish and Wildlife Service, and the U.S. Department of Agriculture's Forest Service, as well as various private interests, including PEPCO, Beveridge and Diamond, S.M. Stoller Corporation, Waste

Management, and other companies. On April 26, 2012, I discussed these same issues with members of the environmental criminal defense bar at ALI-ABA's Annual Conference on Criminal Enforcement of Environmental Laws. Responsible companies play a key role in growing our economy and protecting the American people. It is in their best interest to support a system that levels the playing field by penalizing those who cut corners to gain an unfair economic advantage. We have called on industry to be good neighbors.

On a personal note, I wish to recognize the recent passing of ECS Senior Counsel Ray Mushal, one of the true pioneers in the field of environmental crimes and a dedicated public servant for 42 years. Ray prosecuted a number of the earliest landmark environmental crimes cases and helped spark the nation's first environmental crimes enforcement program. In addition to prosecuting cases, Ray helped draft environmental legislation; was involved in the development of federal sentencing guidelines for environmental crimes; helped draft important ENRD policies, including the community service policy; orchestrated annual environmental crimes conferences at the National Advocacy Center; was involved the preparation of a comprehensive set of resource materials, including the Environmental Crimes Manual; and spearheaded the development of the environmental crimes Web site. It is not an exaggeration to say that every environmental crimes prosecutor has benefitted in some fashion from Ray's efforts.

Finally, I wish to express my thanks to the Executive Office of United States Attorneys and the editors of the United States Attorneys' Bulletin for once again choosing to devote an issue to environmental crimes. We welcome and encourage readers' interest both in environmental criminal enforcement matters generally and in environmental justice issues in particular. Please feel free to contact either me or Stacey Mitchell, Chief of the Environmental Crimes Section.

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What Is CITES and How Does It Work for Prosecutors?

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> *"Recognizing that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come."* Convention on International Trade in Endangered Species of Fauna and Flora (1973).

I. Introduction

International trade in animals and plants and their byproducts has existed for centuries to satisfy the demand for food, clothing, shelter, medicine, pets, decoration, religious practices, and the human desire to possess the rare and exotic. The modern era's expansion of global commerce, including technological advancements in acquisition, advertising, electronic payment, and shipping, has been accompanied by a concomitant increase in the legal and illegal animal and plant trade. Profits have also risen as some highly desired species become rarer and prices for their parts rise. The combined illegal global trade is estimated to generate $16-$25 billion annually. *See* MARILYNE P. GONCALVES ET AL., JUSTICE FOR FORESTS: IMPROVING CRIMINAL JUSTICE EFFORTS TO COMBAT ILLEGAL LOGGING vii, The World Bank (Mar. 2012), *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2012/03/23/000386194_20120323015059/Rendered/PDF/676190PUB0EPI0067882B09780821389782.pdf (estimating illegal logging at $10-$15 billion annually); U.S. INTERAGENCY WORKING GROUP, INTERNATIONAL CRIME THREAT ASSESSMENT 29 (Dec. 2000), *available at* https://www.ncjrs.gov/pdffiles1/Digitization/189403NCJRS.pdf (estimating illegal trade in exotic birds, ivory and rhino horn, reptiles, insects, rare tigers, and wild game at $6-$10 billion annually).

Nearly every specimen, part, or product made from a wild plant or animal (collectively referred to hereafter as "wildlife") that crosses the U.S. border in either direction must be accurately declared and offered for inspection and clearance by U.S. authorities. International trade in many of these species is subject to the protections of an international treaty called the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Mar. 3, 1973, 27 U.S.T. 1087. The United States and 174 other countries are members of the CITES treaty. The Endangered Species Act (ESA) implemented the treaty in the United States. 16 U.S.C. §§ 1531-1544 (1978). Any trade contrary to CITES is subject to prosecution under the ESA, as well as the general smuggling statutes, and in many instances under other related statutes. These cases can arise not just in border districts but in any district where a shipment of wildlife can arrive by UPS or FedEx. The purpose of this article is to provide Assistant United States Attorneys with an understanding of the CITES treaty, an explanation of the issues it seeks to address, and practical advice for successfully prosecuting wildlife trade cases.

II. The illegal trade, its profit, and low risks

Most international trade in wildlife specimens, parts, and products is legal, which is why a United States consumer can visit a big-box store and purchase shrimp caught in Thailand, a picture frame made from wood harvested in Indonesia, and a pet python that was imported with a thousand others from a country in Africa. Each year, a small cadre of about 100 Wildlife Inspectors stationed at designated ports around the United States inspect approximately 160,000 shipments declared to contain some type of wildlife. Alongside this vast legal trade, but hidden by false declarations or outright smuggling, is an almost equally large illegal marketplace in live animals for the pet and collector trade, multi-ton shipments of fish for restaurants and wholesalers, and huge consignments of logs and furniture from illegally-sourced wood, along with an almost unimaginable variety of other items, such as rhinoceros horn, sea turtle skin boots, live birds, elephant ivory figurines, primates for pets and medical research, bear gall bladders for the medicinal trade, hunting trophies, and on and on. Approximately $10 million in wildlife items are seized at the U.S. border each year due to noncompliance with U.S. or international law, an amount that "probably only scratches the surface," of the illegal trade in this country alone. Testimony of Benito A. Perez, Chief, Law Enforcement, United States Fish and Wildlife Service, Before the House of Representatives (Mar. 5, 2008).

Government investigations have revealed smuggling methods ranging from the mundane to the incredible, including hidden compartments in luggage, clothing, or containers, misdeclared statements on customs forms or trade permits, trafficking using forged permits, and live animals sent by overnight mail. The Internet has added another area for market growth by providing mass exposure to wildlife products and easy access to the consumer. *See United States v. De Molina*, No. 1:11-cr-20808 (S.D. Fla. Mar. 2, 2012) (defendant acquired hundreds of animal carcasses and parts that originated from Indonesia, Bali, Thailand, and the Philippines, such as orangutan skulls, king cobra, slow Loris, wooly stork, and rare hornbill skulls, through the Internet).

The illegal wildlife trade is frequently a low risk and high profit endeavor. Wildlife commodities acquired at nominal cost in a source country can yield hundreds or even thousands of dollars at the point of sale. For example:

- The initial expense of obtaining a snow leopard skin in China is as low as $250, but the retail value in the West is as much as $15,000. *See Poaching American Security: Impacts to Illegal Wildlife Trade Before the H. Comm. on Natural Resources*, 110th Cong. (Mar. 5, 2008) (statement of Benito A. Perez, Chief, Law Enforcement, U.S. Fish and Wildlife Service).
- The hide of one Tibetan antelope can be purchased from a nomad for the equivalent of a mere $28, but a shahtoosh shawl (made from several Tibetan antelope hides) sells for up to $19,000. *See id.*; Animal Welfare Institute, Endangered Species Handbook, TRADE: TIBETAN ANTELOPE (2005), *available at* http://www.endangeredspecieshandbook.org/trade_tibetan.php.
- A single "African grey parrot exported from the Ivory Coast may be worth US$20 at the time of capture, US$100 at the point of export, US$600 to an importer in the United States or Europe, and over US$1100 to a specialist retailer." GAVIN HAYMAN & DUNCAN BRACK, INTERNATIONAL ENVIRONMENTAL CRIME: THE NATURE AND CONTROL OF ENVIRONMENTAL BLACK MARKETS 11 (2002).

- Sea turtle skins sold for $70 wholesale in Mexico and later used to make a pair of boots are sold for almost $500 in the U.S. retail market. *United States v. Esteban Lopez Estrada*, No. 1:07-cr-00358 (D. Colo. Sept. 6, 2007).

Standing on the thin green line of interdiction are the Wildlife Inspectors mentioned above, along with approximately 200 special agents of the United States Fish and Wildlife Service (USFWS) scattered across the country, who are also tasked with investigating purely domestic wildlife crimes. (Compare that number to the FBI, which has over 300 agents in Miami alone.) Wildlife trade crimes often result in minimal penalties, given the starting point of 6 offense levels called for by United States Sentencing Guidelines § 2Q2.1. Smuggled items having a high commercial value, however, can result in multi-year sentences of incarceration. (Compare that to the base offense level of 26 for most narcotics trafficking violations. UNITED STATES SENTENCING GUIDELINES § 2D1.1(a) (2011)).

The combination of high profit potential and the perception of low detection risk and minimal penalties have lured organized criminal syndicates to join the individual criminals and opportunists usually engaged in this trade. The result is an illicit global trade in wild animals, plants, and fish often estimated to rank second only to the drug trade.

III. CITES

In an effort to control global wildlife trade, multiple nations, including the United States, created the CITES treaty in 1973. The treaty's goal is to preserve the world's species by regulating international trade in plants and animals considered threatened by trade. Originally, the Parties to the CITES treaty were primarily concerned with the rampant trade in a subset of species, including chimpanzees, spotted cats, elephants, and crocodiles. Today, the treaty seeks to protect approximately 5,000 species of animals and 29,000 species of plants against overexploitation through international trade.

A. The origins, purpose, and framework of CITES

In 1963, at a meeting of the International Union for the Conservation of Nature, several countries adopted a resolution calling for an international convention regulating export, transit, and import of rare or threatened wildlife and wildlife products. In 1966 Congress adopted the Endangered Species Conservation Act, which provided for the development of a list of wildlife threatened with global extinction, and limitations on the importation of such species. The Act also provided that the United States should encourage other countries to adopt similar laws and to convene an international meeting regarding the conservation of international species.

On March 3, 1973, the United States and 21 other countries convened in Washington, D.C. and signed the CITES treaty (often still referred to as the "Washington Convention"). Forty years later, it remains the primary mechanism for regulating the international wildlife trade and is "perhaps the most successful of all international treaties concerned with the conservation of wildlife." SIMON LYSTER, INTERNATIONAL WILDLIFE LAW 240 (1985).

The fundamental purpose of CITES is to prevent species from becoming extinct. The treaty reaches this goal by establishing a regulatory mechanism that monitors and, in some cases, prohibits trade in wildlife species that are considered to be at risk of extinction due to trade. The treaty's drafters recognized that individual countries and their citizens would want to determine the use and protection of their own natural resources, including wild fauna and flora. Thus, CITES does not confer enforcement power on itself or on any other international organization. Instead, recognizing the significance of international market forces on the survival of species worldwide, CITES promotes a framework for

international cooperation where the Parties rely on each other to protect native wildlife that moves beyond the jurisdictional limits of a country's national sovereignty. The CITES treaty establishes a regulatory framework only for international trade and does not address any domestic trade or preservation issues. The treaty would not, for example, prohibit a member country from eradicating a CITES-listed species within its own borders. The methodology of CITES is the regulation of international trade, through implementing legislation and through the enforcement efforts of its individual member countries. Using this trade approach, CITES has become the largest, and by many accounts, the most effective international wildlife conservation agreement in the world.

B. The core framework of CITES

The framework of CITES is fairly simple: species considered potentially at risk due to international trade are placed on one of three appendices, each of which imposes different restrictions on the amount, purpose, and permit requirements of trade in those species. Once a species is listed in one of the appendices, Parties are permitted to engage in trade with another country involving that species only with the proper permits or other CITES-authorizing documentation. Required documentation is issued if trade is determined not to be detrimental to the species' survival in the wild.

Appendix I creates the highest level of protection and contains species considered by the Parties to be threatened with extinction, which may or may not be affected by trade. The CITES treaty provides that trade in Appendix I species (including live specimens, parts, and products) must only be authorized in "exceptional circumstances." CITES, Art. I. Thus, international trade is sometimes allowed, such as for scientific or exhibition purposes, but only when such trade is not detrimental to the species survival in the wild *and* the item has been lawfully acquired (or captive-bred) in its country of origin. *Id*. Art. II(2). At the 14th Convention of the Parties (CoP) in 2007, for example, following analysis of scientific data, the Parties voted to allow Namibia and South Africa to each kill and export five Black rhinoceros (listed in Appendix I) as hunting trophies per year, with the proceeds going to Black rhinoceros conservation programs. *Fourteenth Meeting of the Conference of the Parties*, 19 CoP14 Doc. 54 (2007), *available at* http://www.cites.org/eng/cop/14/doc/E14-54.pdf. Prior to shipment of an Appendix I species, the importing and exporting parties must lawfully obtain both an export permit or re-export certificate from the exporting country's Management Authority and an import permit from the importing country's Management Authority. Appendix I contains approximately 800 species, including great apes, lemurs, the Giant panda, many South American monkeys, great whales, cheetahs, leopards, tigers, elephants, rhinoceroses, many birds of prey, cranes, pheasants and parrots, all sea turtles, some crocodiles and lizards, giant salamanders, some mussels, orchids, cycads, and cacti. Their rare status makes them profitable in trade and, accordingly, the frequent object of smuggling.

Appendix II lists species which the Parties consider to be threatened less with extinction, but perhaps could be faced with a higher risk of extinction if trade is not regulated. Appendix II allows trade in these species, including commercial trade, if it is not "detrimental to the survival of that species." CITES, Art. IV(2)(a). Trade in Appendix II species requires a valid export permit or re-export certificate from the species' country of origin. Appendix II lists approximately 32,500 species, including the Great White shark, bigleaf mahogany, mountain zebras, and African grey parrots.

Species are added to, or removed from, Appendix I or II either at a CoP by a two-thirds majority vote, or by a postal vote following consideration of a party's written, scientific proposal. Explained in general terms, for a species to be listed in Appendix I, the proposing party must establish that a species' status meets one of three neutral, scientifically-based criteria to be considered threatened with extinction for the purposes of CITES. To list a species in Appendix II, the proposing party must show that the

species is either in danger of meeting the criteria for inclusion in Appendix I if trade is not regulated, or the regulation of harvesting is needed to ensure that the survival of the species is not threatened. The complete details of the CITES listing criteria is found on the CITES Web site: http://www.cites.org/eng/res/all/09/E0924R14.pdf.

Appendix III contains species that are not threatened with global extinction, but that may be rare in one or more of its "range" states (country of origin), and therefore needs "the cooperation of other Parties in the control of trade." *Id*. Art. II (3). To date, approximately 170 species are listed in Appendix III, including the two-toed sloth and the broad nosed bat. Appendix III differs from the other two appendices primarily in that species are unilaterally listed by simple request of a "range state" — no vote of the Parties is required. Trade in an Appendix III species requires one of the following: (1) an export permit, if the listing Party is also the country of export; (2) a certificate of origin, if the country of export is the nonlisting Party; and (3) a re-export permit for species being exported by the country that originally imported it. The CITES certificate of origin requires that the specimens were legally obtained from within the exporting country.

A current list of all the species listed in Appendix I, II, and III can be found at the CITES Web site: http://www.cites.org/eng/app/index.php.

C. CITES administration

The CITES treaty is administered by the CITES Secretariat, located in Geneva, Switzerland, where a professional staff handles inquiries from Parties; investigates CITES violations; provides assistance in legislation, enforcement, science, and training to the members; prepares reports regarding implementation; and organizes the biennial conferences. *Id*. Art. XII (providing the Secretariat's functions). The Secretariat maintains a Web site, http://www.cites.org, that serves as a significant resource for all involved in the enforcement of CITES.

Every two to three years, the Parties convene for two weeks at a CoP, where they evaluate the implementation of the treaty and consider amendments to improve the treaty's effectiveness. *See id*. Art. XI (describing the tasks of the CoP). "CoP15" was held in Doha, Qatar in March 2009 and was attended by approximately 2,000 wildlife experts and country delegates. In 42 separate proposals, the Parties discussed how best to regulate trade in species including Asian big cats, elephants, rhinoceros, Humphead wrasse, and bigleaf mahogany.

The CITES treaty requires each member country to establish a Scientific and Management Authority to assist in the administration of the treaty. *See id.* Art. IX. The USFWS administers and enforces the treaty in the United States. That agency operates the Division of Scientific Authority, which provides scientific advice on the issuance of permits for international trade and the listing of native and foreign species under CITES. USFWS also houses the Division of Management Authority (DMA), which oversees implementation of CITES, including granting permits or certificates on behalf of the United States. Within the DMA is the Branch of Operations, which is responsible for policy development, and the Branch of Permits. Both of these branches are excellent resources for the prosecutor seeking information about CITES implementation and can be reached through their Web site, http://www.fws.gov/international/contact_about/contact.html.

IV. CITES implementation

CITES is not a "self-executing treaty," meaning that its mission to protect and preserve species is fulfilled only through an individual Party's commitment to the preservation and sustainable use of

species, evidenced by, among other things, rigorous law enforcement. John T. Webb and Robert S. Anderson, *Prosecuting Wildlife Traffickers: Important Cases, Many Tools, Good Results*, 47 UNITED STATES ATTORNEYS' BULLETIN 4, 7 (1999). Parties are required to create domestic laws implementing the treaty's framework and to take appropriate measures to penalize illegal trade in or possession of species listed in the Appendices to CITES. CITES, Art. VIII. The United States implements these requirements of CITES in the first instance through the ESA and through the implementation of regulations. CITES also outlines a Party's other enforcement responsibilities, including designation of ports for entry and exit of species, care for the living specimens, and maintenance of records. *Id*. The United States fulfills these additional obligations through various mechanisms and several types of laws, including the ESA and other laws of general applicability.

Many prosecutors are discouraged to learn that there is no felony violation available in the ESA, no matter how rare or endangered the species at issue. When analyzing CITES violations, prosecutors are not limited, however, to ESA charges. Such violations potentially implicate an impressive array of options, ranging from forfeitures and Lacey Act felony charges to smuggling, conspiracy, and various other fraud charges. *See* Webb, *supra*.

A. The Endangered Species Act

The ESA performs three functions relevant to wildlife trade cases.

The ESA implements the CITES treaty: First, the ESA implements the CITES treaty in the United States, stating in relevant part:

> It is unlawful for any person subject to the jurisdiction of the United States to engage in any trade in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention . . . .

16 U.S.C. § 1538(c)(1) (2012).

The knowing violation of this general intent statute—or the attempt to violate it, per 16 U.S.C. § 1538(g)—is punishable as a Class A misdemeanor, carrying a maximum penalty of one year of imprisonment and $100,000 fine for an individual defendant ($200,000 for an organization), or twice the gross gain or loss caused by the violation. *Id*. § 1540(b)(1); 18 U.S.C. §§ 3571(b), (d), and (e) (2012); *but see United States v. Eisenberg*, 496 F. Supp.2d 578 (E.D. Pa. 2007) (declining to apply § 3571 to the ESA because the Criminal Fine Improvements Act preceded the ESA's 1988 amendment and holding the maximum to be $50,000, as provided by the statute).

As previously stated, CITES only applies to international, trans-border transactions involving listed species, so the practitioner is cautioned to ensure that every case invoking this part of the ESA must provably involve a wildlife specimen, part, or product, that is both listed on Appendix I, II, or III and was provably imported or exported contrary to the treaty's requirements. Put another way, without trade across the U.S. border, there is no CITES violation cognizable in the United States and thus no violation of § 1538 of the ESA. One frustrating aspect of some potential CITES cases is that neither the treaty nor U.S. law requires the possessor of a CITES-listed item within the United States to maintain any documentation or proof of prior legal import or acquisition. This fact makes smuggling pay: once the animal or item has been successfully brought across the border without detection, mere possession (without proof of the smuggling) is not illegal. However, if the illegal entry can be proved, possession of the item is a continuing offense. *See, e.g., U.S. v. Winnie*, 97 F.3d 975, 976 (7th Cir. 1996) (holding that knowing possession of cheetah following such illegal import is an ongoing violation, rendering the wildlife "contraband, just like heroin" in terms of criminal activity).

The USFWS publishes regulations that define what it means to engage in trade contrary to CITES. These regulations provide the general requirements, prohibitions, and exemptions for importation and exportation of species protected by CITES. 50 C.F.R. § 23. Specifically, § 23.13 provides the prohibitions and § 23.91 lists all the species protected by the three CITES appendices by referencing the CITES Web site for an updated listing. *See also*, 50 C.F.R. §§ 10 (General Provisions) and 13 (General Permit Procedures).

The ESA prohibits certain conduct with "threatened" and "endangered" wildlife: The ESA's primary purpose is to protect wildlife the United States has designated as "threatened" or "endangered," by, among other things, prohibiting the unlawful taking and interstate or foreign trade in those species. *See* 16 U.S.C. § 1538 (2012); 50 C.F.R. § 17.11. Like CITES violations, crimes involving endangered species constitute a Class A misdemeanor, with the penalties noted above. Violations involving threatened species are Class B misdemeanors with maximum penalties of six months imprisonment and a $25,000 fine. 16 U.S.C. § 1540(b)(1) (2012). The ESA's list of threatened and endangered species, and some of its prohibitions concerning those species, overlap with the CITES appendices and prohibitions. Consequently, the practitioner is cautioned to avoid conflating the provisions of § 1538(a) (dealing with threatened/endangered species) with § 1538(d) (dealing with CITES violations). For help with this confusing issue, call an ECS trial attorney.

The ESA requires that all animal shipments be accurately declared: In addition to implementing CITES and prohibiting certain acts concerning threatened and endangered wildlife, the ESA requires that virtually all animal (but not all plant) shipments be truthfully declared upon entry to the United States, and be presented for inspection and clearance by USFWS or Customs and Border Protection. Specifically:

- All animals imported into the United States must be presented to and cleared by the USFWS prior to its lawful importation. 16 U.S.C. § 1538(e) (2012); 50 CFR §§ 14.52, 14.61, 14.63.
- All animals imported into or exported from the United States must go through a designated port of entry or exit. 16 U.S.C. § 1538(f) (2012); 50 C.F.R. §§ 14.11, 14.12.
- All importers and exporters must file a completed Declaration for Importation or Exportation of Fish or Wildlife, or Form 3-177. 50 C.F.R. § 14.61.

B. The Lacey Act

Enacted in 1900, the Lacey Act is the nation's oldest wildlife statute, as well as an effective resource in the fight against international trafficking in protected wildlife. 16 U.S.C. §§ 3371-3378 (2012). Relevant to this discussion, the Lacey Act imposes civil or criminal sanctions against any individual who knowingly imports, exports, transports, sells, receives, or acquires wildlife that has been taken, possessed, transported, or sold in violation of a United States law (such as the ESA) or a foreign law. *Id.*

An international trafficking charge under the Lacey Act requires proof of two separate steps regarding the wildlife at issue. First, the prosecutor must show that the wildlife was taken, possessed, transported, or sold in violation of an underlying law, treaty, or federal law governing the wildlife at issue. 16 U.S.C. § 3372(a) (2012). In many instances, the CITES (i.e., ESA) violation, as the underlying law, forms the initial basis for a Lacey Act charge. Second, the prosecutor must show that the defendant knowingly imported, exported, transported, received, acquired, or purchased the wildlife while knowing

of its illegal nature. *Id*. § 3373(d). *See United States v. Carpenter*, 933 F.2d 748, 750 (9th Cir. 1991) (confirming the two-step requirement).

In order to prove a Lacey Act felony case involving the illegal import or export of a CITES-listed species or specimen, the prosecutor must show, in addition to the above two steps, that the defendant knew the wildlife was somehow tainted and that he knowingly imported or exported the wildlife, or attempted to do so. 16 U.S.C. §§ 3373(a), 3373(d)(1) (2012); *see, e.g.*, *United States v. Crutchfield*, 26 F.3d 1098 (11th Cir. 1994) (commercial importers and distributors illegally imported in violation of CITES, and intended to sell certain Fiji banded iguanas, an Appendix I species, in the United States in violation of 16 U.S.C. §§ 3372(a)(1) and 3373(d)(1)(A)). A misdemeanor violation, on the other hand, requires proof that the defendant should have known the wildlife was somehow tainted. 16 U.S.C. §§ 3372(a)(1), 3373(d)(2) (2012). Although an indirect implementation of CITES, the Lacey Act provides another method for charging international wildlife smuggling cases that involve violations of foreign wildlife laws, regardless of whether the wildlife involved is listed under CITES. 16 U.S.C. § 3372(a)(2)(A) (2012). In these cases, the violation of the foreign law is the basis of the Lacey Act charge. *See United States v. Lee*, 937 F.2d 1388, 1391-92 (1991) (defendant smuggled 500 metric tons of salmon that he knew or should have known was taken in violation of Taiwanese law into the United States).

The Lacey Act also makes it a crime to knowingly make or submit a false record, account, or label for, or false identification of, a wildlife item that is transported in interstate or foreign commerce or intended for such transport. 16 U.S.C. §§ 3372(d), 3373(d)(3)(A) (2012). This violation often occurs when the customs documentation or packaging label is falsified to cover up the illegal wildlife shipment. *See United States. v. Bemka Corp*., 368 F.App'x. 941 (S.D. Fla. 2008) (charging defendant with felony Lacey Act false labeling when attempting to export American paddlefish caviar); *United States v. Norris*, 452 F.3d 1275 (11th Cir. 2006) (charging defendant with violation of 18 U.S.C. § 1001 for causing shipments of Appendix II orchids to be shipped with an invalid CITES permit and false label). The Act requires all wildlife shipments traveling in foreign (or interstate) commerce to be accurately marked, labeled, accounted for, or identified. 16 U.S.C. § 3372(d) (2012). This type of Lacey Act violation is similar to the crime described in 18 U.S.C. § 1001 but easier to prove because there is no "materiality" requirement. *See, e.g.*, *United States v. Allemand*, 34 F.3d 923 (10th Cir. 1994) (false labeling conviction valid even in the absence of a duty to file or submit the falsified records).

The Lacey Act authorizes Class E felony and Class A misdemeanor penalties for these crimes, depending on the proof of various elements, thus providing harsher punishment for international wildlife trade violations and functioning as a bigger deterrent mechanism than the ESA. *See* 16 U.S.C. §§ 3372 and 3373 (2012). A Class E felony charge under the Lacey Act provides a statutory maximum of five years in jail and up to a $250,000 fine for individuals. *Id*. §§ 3373(d)(1)(A)-(B), and (d)(3); 18 U.S.C. §§ 3559, 3571(2012). A Class A misdemeanor imposes up to one year in jail and $100,000 fine for individuals. 16 U.S.C. §§ 3373(d)(2) and (3)(B) (2012); 18 U.S.C. §§ 3559, 3571(2012).

The Lacey Act often provides a felony alternative to the CITES case that would be a misdemeanor if charged under the ESA. For instance, Operation Botanical, a USFWS investigation, involved an exporter who attempted to smuggle to Taiwan approximately 430 pounds of American wild ginseng, a CITES Appendix II species, that she had spent several months and $200,000 stockpiling from her illegal local purchases. The defendant failed to possess the CITES-required export permits and falsely labeled the shipment as containing cultivated ginseng, a non-CITES listed species. The defendant was ultimately charged with a Lacey Act trafficking violation, and the USFWS seized (i.e., forfeited) the

wild ginseng, worth as much as $1,200 per pound. *See United States v. Chiu Hung Lo*, No. 1:09-cr-69 (W.D.N.C., Nov. 9, 2009).

The Lacey Act is a complicated statute whose application to a given set of facts can confuse even the most seasoned general prosecutor. The prosecutors in ECS have extensive experience with the Lacey Act and often assist AUSAs engaged in these cases. For a more thorough explanation of how to prosecute wildlife crimes under the Lacey Act, see Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LAND L. REV. 29 (1995). For a summary of successes, see USFWS Office of Law Enforcement, ANNUAL REPORTS, *available at* http://www.fws.gov/le/aboutLE/annual.htm.

C. Smuggling merchandise (wildlife) into the United States

In addition to pursuing charges under the traditional wildlife statutes, prosecutors can also use Title 18 offenses to prosecute international wildlife traffickers. The smuggling statute, 18 U.S.C. § 545, makes it a Class D felony for a person to knowingly or fraudulently import merchandise (including wildlife specimens, parts, and products) into the United States. Specifically, Section 545 provides:

> Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces or attempts to smuggle or clandestinely introduce into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or
>
> Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—
>
> Shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 545 (2012). Trade contrary to United States law includes trade in violation of CITES (as codified in the ESA statute cited above) or simply in violation of the general declaration regulations. *See United States v. Mitchell*, 39 F.3d 465 (4th Cir. 1994) (finding that USFWS regulations, including 50 C.F.R. § 14.61 (wildlife declaration requirement), have the force and effect of law, and therefore are encompassed by the "contrary to law" provision of § 545); *United States v. Richardson*, 588 F.2d 1235, 1238-39 (9th Cir. 1978) (finding that bringing goods—in this case, drugs—into the country without the proper declaration as required by the Federal Drug Administration, violates 18 U.S.C. § 545).

The maximum penalty for smuggling, or importation contrary to law, is up to 20 years in jail and a fine of up to $250,000 or twice the gross gain or loss from the violation. 18 U.S.C. §§ 545 and 3571(b) (2012).

Title 18 U.S.C. § 554 contains the counterpart felony for the knowing export of merchandise (including wildlife) out of the United States contrary to United States law. Keep in mind that § 554 contains an attempt violation, while § 545 does not.

D. Applying other Title 18 offenses to CITES enforcement

United States law allows prosecutors to pursue international wildlife traffickers, including those violating CITES, in much the same way prosecutors charge traditional white collar criminals and organized crime operations. Relevant charges may include such traditional crimes as conspiracy, money laundering, and tax fraud. Title 18 smuggling charges involving CITES violations, such as failure to

declare wildlife exportations, also support money laundering charges. These charges potentially exist in cases when, for instance, a person transfers, transports, or transmits funds between the United States and a foreign country with the intent to promote smuggling. 18 U.S.C. § 1956(a)(2)(A) (2012); *United States v. Viktor Tsimbal*, No. 02-CR-20487 (S.D. Fla. June 6, 2002) (defendant was charged with organizing a caviar smuggling conspiracy in violation of wildlife protection laws, a substantive smuggling violation, money laundering, and obstruction charges); *Lee*, 937 F.2d at 1388 (defendant who smuggled 50 metric tons of salmon into the United States was convicted of conspiracy and money laundering charges). The maximum penalty for money laundering is up to 20 years in jail and a $500,000 fine. 18 U.S.C. § 1956(a)(2) (2012).

The conspiracy statute, 18 U.S.C. § 371, is also a successful charging tool to use against international wildlife traffickers. *See also Norris*, 452 F.3d at 1275 (convicting defendant for conspiracy "to import unlawful merchandise (orchids) into the United States, in violation of 18 U.S.C. § 545, to make false statements to federal customs and plant inspectors, in violation of 18 U.S.C. § 1001(a), and to trade in specimens and possess specimens contrary to the provisions of the CITES and the ESA, in violation of 16 U.S.C. § 1538(c)(1)"). In addition, tax fraud charges have also successfully resulted in jail sentences for many international wildlife traffickers. *See United States v. Silva*, 122 F.3d 412 (7th Cir. 1997) (defendant who smuggled exotic birds into the United States was convicted of failing to report income and for violating the Lacey Act, and was sentenced to 82 months' imprisonment). If a prosecutor analyzes the evidence in a wildlife crime in the same manner as evidence in any other white collar crime or complex transnational crime, then the potential charges are not limited to the Lacey Act and ESA, but instead can include charges ranging from smuggling to wire fraud to tax evasion.

E. Forfeiture of wildlife and equipment used to facilitate the violation

Forfeiture is another effective tool in dealing with CITES violations. The ESA and the Lacey Act each allow for civil forfeiture of the species on a strict liability basis, thereby authorizing seizure without regard to fault or an innocent owner defense. 16 U.S.C. § 1540 (2012). *See United States v. 144,774 Pounds of Blue King Crab*, 410 F.3d 1131, 1132 (9th Cir. 2005) (court held that innocent owner defense was irrelevant regarding king crab imports from Russia that were illegal to possess); *United States v. 2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106, 1118-19 (S.D. Fla. 1988) (court ruled against the importer's innocent owner defense and stated that the importer had a duty to investigate the legality of the permit); *see also Conservation Force v. Salazar*, 646 F.3d 1240 (9th Cir. 2011), *cert. denied, Blasquez v. Salazar*, 132 S.Ct. 1762 (2012) (allowing seizure of leopard trophies killed in Africa and imported with deficient export permits).

In civil forfeiture matters, the burden of proof for the government is preponderance of the evidence. In *United States v. 3,210 Crusted Sides of Caiman Crocodilus Yacare*, the government proved that probable cause existed to believe that the hides were imported (on an unscheduled stop in Miami from Bolivia to Paris) in violation of CITES and the Lacey Act. Specifically, the government showed that the permit accompanying the hides was not an original, as required by CITES, and was not endorsed. The government also demonstrated that Bolivian law prohibited the hunting of undersized caiman and that the shipment contained undersized species, violating the Lacey Act. 636 F. Supp. 1281, 1283-87 (S.D. Fla. 1986). Similarly, in *United States v. 1,000 Raw Skins of Caiman Crocodilus Yacare*, the government met its burden and demonstrated that the wildlife was incorrectly listed on a permit as Caiman crocodilus crocodilus from Colombia, instead of the correct scientific name, caiman crocodilus yacare, in violation of CITES, therefore permitting forfeiture of the skins. 1991 WL 41774, at *4 (E.D.N.Y. Mar. 14, 1991).

Forfeiture covers the entire shipment of animals that included the specific animals shipped in violation of CITES. In *United States v. 3,210 Crusted Sides of Caiman Crocodilus Yacare* (mentioned above), the court allowed seizure of the entire shipment of 10,870 hides, not just the offending ones, based on proof of the CITES, ESA, and Lacey Act violations. 636 F. Supp. at 1287.

Finally, in addition to fines, imprisonment, and forfeiture of the species, the ESA allows seizure of "all guns, traps, nets, and other equipment, vessels, vehicles, aircraft, and other means of transportation used to aid" smugglers, and forfeiture of the same once an ESA conviction is obtained. 16 U.S.C. § 1540(e)(4)(A), (B) (2012). The Lacey Act has a similar provision following a felony conviction, allowing for forfeiture of "vessels, vehicles, aircraft, and other equipment used to aid in the importing [or] exporting . . . of wildlife." *Id*. § 3374(a)(2). Seizure and forfeiture of the illegal wildlife, as well as of the varied equipment used in the commission of the offense, is a valuable deterrent for those who are tempted not to ask basic questions about legality before purchasing wildlife.

F. Tips for prosecutors

Agency Expertise: Significant technical and investigative expertise can be found among the personnel with the agencies who help implement and enforce CITES. The ECS can often assist with identifying a particular resource within an agency, based on past experience. Each agency can, however, also be reached through their Web site. The primary relevant agencies and their roles are:

- The Department of the Interior, the USFWS's lead agency for CITES implementation and enforcement, houses wildlife inspectors, special agents, the Division of Management Authority, and the Division of Scientific Authority, as well as functioning as a repository for CITES import/export documentation. The USFWS can be reached at www.fws.gov.
- The Department of Agriculture houses the Animal and Plant Health Inspection Service (APHIS), and is the lead agency for CITES implementation (with limited enforcement resources) in regard to plants. APHIS is also responsible for inspections of live plants and for monitoring the health of animals presented at the border, and can be reached at www.aphis.usda.gov.
- The Department of Commerce houses the National Oceanic and Atmospheric Administration (NOAA), the lead agency for CITES implementation and enforcement with regard to marine species. The NOAA can be reached at www.noaa.gov.
- The Department of Homeland Security, Customs and Border Protection, and the Immigration and Customs Enforcement (Homelands Security Investigations Directorate) enforce CITES in the context of general import/export enforcement authority, and also function as a repository for all customs import/export documentation, or in the case of paperless entries, links to the brokers holding the paperwork. The departments can be reached at www.cbp.gov and www.ice.gov.
- The Department of Health and Human Service houses the Centers for Disease Control and Prevention (CDC), which has limited wildlife inspection authority linked to disease risks. The CDC can be reached at http://www.cdc.gov.

Key documents and sources: As in any white collar criminal matter, the paper trail can make or break the case. Thus, it is important in any CITES case to understand what the paper trail should, or can, include and where to look for those documents. Acting early to secure, and thereafter properly control, the records is often vital.

A typical CITES case will involve a purchase of wildlife followed by an importation. For the wildlife purchase, the paper trail may include any or all of the following types of records: advertisements; Web sites of the seller, middleman, and/or purchaser; eBay records; purchase orders; invoices; bills; bank records; canceled checks; emails; text messages; packaging; labels; photographs (often sent electronically); inventories; storage records (fish products in particular can include cold storage and trucking or rail records); and taxidermists' records.

Of course, a purchase is usually tied to physical acquisition of the item, which, in a CITES case, means an importation. Import records will fall into several categories. First, there will be records of the physical transportation. These transportation documents may include trucking records, airway bills, bills of lading, vessel movement records, storage facility records, and billing records. These records can be obtained through the private companies that create them, from the target, or from the United States Customs and Border Patrol (CBP) if the records are also required as part of the import declaration package.

Second, an import when declared (versus smuggled), will be tied to customs records related to the official entry of the shipment. These records may include the official customs forms (entry summary and notice of immediate entry), commercial invoice, and bill of lading. While CBP will have summary information in its database, these records are often best obtained from the import broker if one is involved. Of course, the broker will almost certainly notify their customer of the request for their documents, so this should perhaps be one of the final documents sought in an investigation.

Third, wildlife declaration records including the CITES documentation itself, along with the USFWS Declaration Form 3-177 for wildlife entries and the APHIS Plant Declaration Form 505 for plant entries, should be procured. The CITES documentation should all be maintained by USFWS while the Declarations are maintained by the respective agencies. Searches for these records should be requested early in an investigation as production of the records can take some time. While the records should be considered a strong piece of evidence, they may not be definitive. CITES documents collected at the port must make it to central authorities and thereafter be properly filed and maintained and/or entered into a database accurately before they can be found in a search. CITES documents issued by United States authorities may be issued from central offices or in some instances regional or port authorities. Thus, it is important to identify all of the possible issuing authorities for a given document being sought before concluding a negative permit search. The vast majority of CITES and declaration records are electronically maintained and readily searchable, but some records, including at least 15 percent of Plant Declarations, require a hand search of paper records that the investigative agents may have to undertake personally.

Laboratories: A crucial element in any CITES case is proving that the wildlife at issue is a particular CITES-listed species. For this, prosecutors will need to turn to experts. In some instances the wildlife or plant inspector's expertise may suffice, but in many instances it is best to look farther. The USFWS's Forensics Laboratory supports wildlife investigators and prosecutors by identifying the species or subspecies or parts of an animal, determining the cause of death, and assisting wildlife officers in determining whether a violation actually occurred. *See* Forensics Laboratory, U.S. FISH AND WILDLIFE SERVICE, http://www.lab.fws.gov/. The wildlife crime laboratory resembles the typical police lab, except the victim is an animal, fish, or plant. Furthermore, the biologists working in the laboratory also are trained in providing expert witness testimony in court. The National Centers for Coastal Ocean Science similarly has a laboratory that can identify marine species and whose biologists are experienced expert witnesses. *See Marine Forensics*, NATIONAL CENTERS FOR COASTAL OCEAN SCIENCE, *available at* http://www.chbr.noaa.gov/habar/marine_forensics.aspx.

V. Conclusion

CITES is the key multinational governmental mechanism for preserving species and biological diversity on a global scale. CITES' focus on the regulation of international trade, as well as its reliance on domestic implementation and enforcement by its signatories, places great responsibility on enforcement authorities in the United States. As evidenced by its substantial annual financial contributions to the treaty's funding, the United States recognizes and takes seriously this responsibility.

Part of the responsibility of the United States stems from its status as one of the largest consumers of plants and animals in the world. As such, the United States is a market force in the international trade, driving the collection and harvest of animals and plants worldwide. CITES recognizes that such market forces can also drive many species toward extinction. But, the United States also has a solid framework of laws through which to implement and enforce CITES. The laws provide creative, diligent prosecutors with a wide array of charging options when faced with CITES violations. Well-developed cases can result in substantial sentences having significant deterrent effects. CITES-based cases may garner supportive letters to judges from foreign governments, the CITES Secretariat, environmental organizations, and legitimate wildlife businesses. In short, prosecuting criminal CITES violations are feel-good, but professionally challenging opportunities.❖

ABOUT THE AUTHOR

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Forfeiture Primer for Plant and Wildlife Cases

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I. Introduction

Forfeiture may be among the last issues that criminal prosecutors focus on as they investigate, charge, and resolve a case. Forfeiture is, however, a powerful tool, and prosecutors should give careful consideration to the issue of forfeiture early on as they develop their cases. If properly framed and pursued, forfeitures may be among the greatest deterrents and most significant sanctions that can be imposed in plant or wildlife cases.

The most important reasons to include asset forfeiture as an integral part of the overall strategy in handling plant and wildlife cases are to (1) recover the products of the crime (the plants or wildlife themselves); (2) remove the tools or instrumentalities of the crime from circulation so that they cannot be used again; (3) deter others from committing similar crimes; and (4) provide incentives for those dealing in plants and wildlife to take affirmative steps to ensure that their products are legally acquired and traded, thus diminishing the market for illegally-sourced plants and wildlife. This last purpose is served particularly well by administrative and civil forfeitures, where a property owner who did not commit (or could not be held liable for) the underlying criminal violation nonetheless loses the property acquired or traded illegally. An owner whose property is forfeited because his supplier was dealing in illegal plants and wildlife will likely take greater care to find a legal source in the future.

This article explains how to incorporate forfeiture into a plant or wildlife case. The article begins by explaining how to determine the scope of forfeiture authority, both in terms of what property can be forfeited and how that forfeiture can be pursued. It then provides a brief overview of the available methods of forfeiture (administrative, civil, and criminal), describing their respective procedural paths, and discussing some of the most common legal issues that arise when pursuing forfeitures through each of these methods. The article concludes by highlighting some tactical considerations for prosecutors who are pursuing forfeitures.

II. Scope of forfeiture authority

Congress has enacted forfeiture laws in a piecemeal manner over a long period of time. Thus, no single, generic forfeiture law authorizes a court to order the forfeiture of all proceeds of any crime or any property used to commit or to facilitate the commission of any crime. Instead, Congress enacted different forfeiture provisions at different times for different offenses, and the kinds of property that can be

forfeited varies from one offense to another. The lack of uniformity can result in difficulty and confusion for prosecutors who seek to exercise federal forfeiture authorities.

It is, therefore, imperative that a prosecutor start with the basics by first identifying the appropriate forfeiture authority for the violations that are being investigated. These statutory provisions will determine the scope of the property that can be forfeited. Because the scope of property subject to forfeiture often varies with the predicate offenses, understanding the forfeiture consequences of the possible charges is important to determine which charges to bring in a given case.

The major categories of forfeitable property in plant or wildlife cases are (1) the illegally acquired or possessed plants or wildlife, (2) particular kinds of property used in or that facilitated the violation (also referred to as the instrumentalities), and (3) substitute assets. Facilitating property is any property used in committing a violation or that makes a violation easier to commit or harder to detect. Substitute assets may only be forfeited in *criminal* forfeiture cases and consist of other (i.e., legitimate) assets of a convicted defendant equal in value to property that would have been directly subject to forfeiture (for example, the plants or wildlife and/or facilitating property involved in the offenses of conviction), but that has been made unavailable for forfeiture through some act or omission of the convicted defendant such that the directly forfeitable property (A) cannot be located upon the exercise of due diligence; (B) has been transferred or sold to, or deposited with, a third party; (C) has been placed beyond the jurisdiction of the court; (D) has been substantially diminished in value; or (E) has been commingled with other property that cannot be divided without difficulty. The statutory authority also determines how the forfeitures may be accomplished (administratively, civilly, and/or criminally).

The first step in determining the prospects for forfeiture in a specific case is to work backwards from the predicate offense(s) by closely examining each statute that may have been violated. This examination will help to determine both the type of property that may be subject to forfeiture and the manner in which forfeiture can be pursued. Prosecutors should be aware that they may need to look beyond the primary statute at issue because forfeiture provisions are often incorporated from other statutes, given the patchwork nature of forfeiture law. Due to the significant differences in the type of property that may be forfeited depending on the underlying offense, it is particularly important that prosecutors consider what related offenses may be useful to charge for forfeiture purposes in a criminal case.

The Bald and Golden Eagle Act (BGEPA), 16 U.S.C. §§ 668–668(d), provides a useful example of the intricacies of forfeiture authority. It states that "[a]ll bald or golden eagles, or parts, nests, or eggs thereof [that have been treated] contrary to the provisions of this subchapter . . . and [any] equipment . . . and other means of transportation used to aid in . . . violation of this subchapter . . . shall be subject to forfeiture to the United States." *Id.* § 668b(b) (2012). Although the BGEPA does not itself include provisions for administrative forfeitures, it incorporates such provisions by reference to the customs laws. For example, § 668b(c) applies "[a]ll provisions of law relating to the seizure, forfeiture, and condemnation of a vessel for violation of the customs laws" to seizures and forfeitures under the BGEPA, provided that the Secretary of the Interior or his designees exercise or perform "all powers, rights, and duties" that the customs law assigns to the Treasury Department. *See* § 668b(c); *see also* 19 U.S.C. §§ 1607–1609 (2012) (establishing procedures for "summary forfeiture" of vessels without judicial process under certain circumstances).

While the BGEPA provides the authority for civil judicial forfeiture, the statute itself does not authorize criminal forfeiture. However, the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No.106-185, 114 Stat. 202, provides the authority for a criminal forfeiture wherever civil forfeiture is authorized. *See* 28 U.S.C. § 2461(c) (2012); *see e.g.*, *United States v. Vampire Nation*, 451 F. 3d 189,

198-203 (3d Cir. 2006). As amended in the USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192, section 2461(c) also explicitly applies the criminal forfeiture procedures of 21 U.S.C. § 853 to all criminal forfeiture proceedings. This expansion of forfeiture authority is particularly important because criminal forfeiture proceedings allow the government to obtain a money judgment and to recover substitute assets, as noted above.

The most commonly charged statutes in plant and wildlife cases are listed in the following table. As the table demonstrates, the forfeiture provisions in these statutes vary significantly.

Law Violated	**Forfeiture Provision(s) / Type Authorized**	**Facilitating Property: Type of Property / Limitations**
African Elephant Conservation Act, 16 U.S.C. §§ 4201–4245	16 U.S.C. § 1540(e) as incorporated by 16 U.S.C. § 4224(e) administrative, civil, and criminal	*See* 16 U.S.C. § 1540(e) (Endangered Species Act, described below)
Airborne Hunting Act, 16 U.S.C. § 742j-1(a)–(f)	16 U.S.C. § 742j-1(e), (f) administrative, civil, and criminal	guns, aircraft, and other equipment used to aid a violation
Antarctic Conservation Act, 16 U.S.C. § 2401–2413	16 U.S.C. § 2409(d), (e) administrative, civil, and criminal	guns, traps, nets, and other equipment, vessels, vehicles, aircraft, and other means of transportation used in the commission of any violation
Bald and Golden Eagle Act, 16 U.S.C. §§ 668–668d	16 U.S.C. § 668b(b), (c) administrative, civil, and criminal	guns, traps, nets, and other equipment, vessels, vehicles, aircraft, and other means of transportation used to aid a violation
Endangered Species Act, 16 U.S.C. §§ 1531–1544	16 U.S.C. § 1540(e)(4), (5) administrative, civil, and criminal	guns, traps, nets, and other equipment, vessels, vehicles, aircraft and other means of transportation used to aid the violation only available upon conviction of criminal violation
Lacey Act, 16 U.S.C. §§ 3371–3378	16 U.S.C. § 3374 administrative, civil, and criminal	vessels, vehicles, aircraft, and other equipment used to aid a violation—only available: (i) upon a felony conviction; (ii) if the property owner consented to, was privy to, or should have known about the use of the property; and (iii) if the underlying violation involved sale or purchase

Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801–1883	16 U.S.C. § 1860 administrative, civil, and criminal	fishing vessel (including gear, furniture, appurtenances, stores, and cargo) used in connection with the violation
Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1407	16 U.S.C. §§ 1376, 1377(d), (e) civil, criminal	16 U.S.C. § 1376: cargo or monetary value thereof of any vessel or other conveyance subject to jurisdiction of United States employed in unlawful taking of marine mammal 16 U.S.C. § 1377(e): Marine mammals, marine mammal products, or other cargo that is seized in connection with assessment of civil penalty may be judicially forfeited upon assessment of penalty, but must be returned if no forfeiture action is begun within 30 days after assessment of penalty. 16 U.S.C. § 1377(e)(3)(A), (e)(4)(A). Marine mammals and marine mammal products shall be forfeited and other property may be forfeited at the discretion of the court upon conviction for a violation for which criminal penalties may be assessed, but such products must be returned if there is no conviction for an alleged violation of this type unless the government begins proceedings for a civil penalty within 30 days after disposition. 16 U.S.C. § 1377(e)(3)(B), (e)(4)(B).
Migratory Bird Treaty Act, 16 U.S.C. §§ 703–715	16 U.S.C. §§ 706, 707(d) civil, criminal	guns, traps, nets, and other equipment, vessels, vehicles, and other means of transportation used to aid a violation that includes intent to sell, barter, or offer for sale or barter only available upon conviction of criminal violation

Rhinoceros and Tiger Conservation Act, 16 U.S.C. §§ 5301–5306	16 U.S.C. § 1540(e) as incorporated by 16 U.S.C. § 5305a(c), (e) administrative, civil, and criminal	*See* 16 U.S.C. § 1540(e) (Endangered Species Act, described above)
Wild Bird Conservation Act of 1992, 16 U.S.C. §§ 4901–4916	None. Note, however, that this statute prohibits only *importation*. 16 U.S.C. § 4910. For this and other such offenses, prosecutors should consider charges that would authorize use of the forfeiture provisions of the customs laws, including 19 U.S.C. § 1595a (that permits the forfeiture of articles that are imported contrary to federal law, as well as property used to facilitate such importation), as well as of the Lacey Act, 16 U.S.C. § 3374 (described above).	

III. Methods of forfeiture

There are generally three procedural options to accomplish forfeiture in a plant or wildlife case: (1) administrative forfeiture, (2) civil judicial forfeiture, and (3) criminal judicial forfeiture. These options, while distinct, are not mutually exclusive and may be employed together or alternatively in a given case. The three procedural options are briefly discussed below.

A. Administrative forfeiture

Administrative forfeiture is a non-judicial proceeding involving neither a prosecutor nor a court. It is commenced and, in most cases, concluded solely by the federal law enforcement agency that either seized the property subject to forfeiture or "adopted" a seizure made by state or local (or perhaps even foreign) law enforcement authorities. Administrative forfeiture is—and this is important—statutorily limited to forfeiture of the following: personal property valued at less than $500,000, monetary instruments in any amount, drug conveyances of any value, and illegally imported merchandise of any value. *See* 19 U.S.C. § 1607 (2012). Real property, even if valued at less than $500,000, cannot be administratively forfeited. *See* 18 U.S.C. § 985(a) (2012). Property that is not eligible for administrative forfeiture must be forfeited through a judicial forfeiture action, civil or criminal. Also, not all law enforcement agencies have statutory authority to do administrative forfeitures. It is thus important to know whether the seizing agency has such authority, either because the forfeiture authority incorporates by reference the procedural provisions of the customs laws in Title 19 or otherwise provides for administrative forfeiture. If the agency does not, this option is not available for forfeiture.

An administrative forfeiture begins when a federal law enforcement agency seizes property eligible for administrative forfeiture or "adopts" a seizure of such property from a state or local law enforcement agency. If the relevant forfeiture statute incorporates the procedural provisions of the customs laws, warrants for the seizure of property for administrative forfeiture may be obtained pursuant to 19 U.S.C. § 1603(a) in the same manner as a search warrant under Rule 41 of the Federal Rules of Criminal Procedure. The warrant may be obtained upon a showing of probable cause that the property to be seized is subject to forfeiture under a forfeiture statute. Property may be seized for administrative forfeiture without a warrant if there is probable cause to believe the property is subject to forfeiture and an exception to the Fourth Amendment warrant requirement applies, such as a border search. Where a

seizure of property for administrative forfeiture requires entry onto private property in which there is a reasonable expectation of privacy, care should be taken to ensure that the entry comports with the requirements of the Fourth Amendment.

If the agency has statutory authority to administratively forfeit the property, and the property subject to administrative forfeiture is seized, the federal agency conducting the forfeiture initiates the proceedings by (1) sending notice of the seizure and its intent to forfeit the property to anyone reasonably known to it as having a possible interest in the property and (2) publishing notice once a week for three successive weeks. *See* 19 U.S.C. § 1607 (2012). Under CAFRA, the federal agency generally must give this notice within 60 days of a federal seizure or 90 days of a seizure made by a state or local law enforcement agency. *See generally* 18 U.S.C. § 983(a)(1) (2012). The notice instructs property owners interested in challenging the forfeiture that they may do so by filing a claim with the federal agency by the deadline stated in the notice letter or, if the owner received notice by publication, within 30 days of the final publication of the notice. *See id.* § 983(a)(2)(B).

If no one contests the forfeiture by filing a claim within the prescribed period of time, the federal agency enters a declaration of forfeiture, which has the force and effect of a judicial decree of forfeiture, and the forfeiture is completed. *See* 19 U.S.C. § 1609(b) (2012). CAFRA requires that if a claim is filed in the administrative forfeiture, the government has only 90 days after the claim is filed to do the following: file a complaint commencing a civil judicial forfeiture of the claimed property, obtain a criminal indictment seeking criminal forfeiture of the property, obtain a judicial extension of this deadline upon good cause shown or agreement of the parties, or return the seized property to the owner. *See* 18 U.S.C. § 983(a)(3) (2012).

This requirement means that a prosecutor should have already considered what forfeiture paths are possible or preferable and what the time frame is to pursue the forfeiture or the criminal case before the seizure occurs. If the government will not be in a position to file a civil complaint or a criminal indictment within the relevant time periods, it is advisable to delay the seizure, if possible. This delay will lessen the risk of having the property returned to the owner who will likely have a strong incentive to prevent it from being seized in the future.

A cautionary note: If the government seeks criminal judicial forfeiture of particular property by including the property in the forfeiture allegation of a criminal indictment (as discussed below), but the seizing federal law enforcement agency commences an administrative forfeiture proceeding against the same property, it is important for the prosecutors and/or agents involved in the criminal case to communicate with the seizing agency to ensure that the property forfeited through the administrative process is removed or omitted from the criminal indictment.

For all property that can be administratively forfeited, the agencies should initiate the forfeiture within the prescribed deadlines after seizure. An administrative forfeiture is the simplest and most efficient mechanism for forfeiture and the vast majority of forfeitures are uncontested administrative forfeitures. For example, when wildlife is seized in conjunction with the issuance of a Notice of Violation, or ticket, the CAFRA notice of administrative forfeiture is contained on the ticket itself and claims are rarely forthcoming.

B. Judicial forfeiture

A judicial forfeiture begins when the government files a civil forfeiture complaint against the property or includes the property in a criminal indictment. These are two entirely separate, but potentially parallel paths to forfeit property.

Civil forfeiture: A civil judicial forfeiture is an in rem action in which the property to be forfeited is itself named as the defendant, based on the legal fiction that the property is "guilty" because of its involvement in some violation of a criminal statute for which civil forfeiture is authorized. A property owner seeking to challenge the forfeiture action is called a "claimant" and considered to be an intervenor in the government's action against the property.

Civil judicial forfeiture actions are generally preceded by or commenced with the seizure of any personal property to be forfeited. The property may be in government custody before the civil judicial forfeiture action is commenced if it was seized (1) under a valid search warrant or warrantless seizure and its evidentiary value remains extant, (2) under a warrant issued under 19 U.S.C. § 1603(a) and an administrative forfeiture proceeding was commenced against the property in which the owner filed a claim (as explained above), or (3) pursuant to a warrant issued under a statute incorporating the warrant authority of 18 U.S.C. § 981(b)(2). For personal property not seized and validly in government custody prior to commencement of the civil judicial forfeiture action, a "warrant of arrest in rem" may be issued upon the filing of the government's forfeiture complaint authorizing the government to take the property into its custody pending the outcome of the forfeiture action. *See* Rule G(3)(b), Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.

Property, real or personal, may alternatively be secured pending the outcome of a civil judicial forfeiture action through a restraining order (or other form of protective order) issued pursuant to 18 U.S.C. § 983(j). The use of such orders to secure property pending forfeiture carries some risk, perhaps considerable, relative to seizing the property pending forfeiture. This is because the restraining/protective orders generally require the subject property to be left in the custody of the owner or some other third-party, subject to the terms and conditions mandated in the order, which may go beyond restrictions on alienation or transfer of the property and impose affirmative obligations on the owner (e.g., to keep the property fully insured against loss or damage and maintained according to manufacturer specifications; to limit the property to specified uses, in specified areas, at specified times; to allow government inspection of the property and provide the government with documentary evidence of compliance with the terms/conditions of the order such as insurance documents and receipts relating to required maintenance). The use of restraining orders, in lieu of seizure, may occasionally be in the government's interest, particularly where the costs and risks of maintaining and securely storing the property pending forfeiture are quite high, the owner has a genuine need for continued use of the property, and the possibility of the owner violating a restraining/protective order in any way is considered acceptably remote. Such cases may occasionally arise, for example, in plant and wildlife cases against commercially used vehicles, aircraft, or vessels, where a restraining order may allow the owner to pursue his or her livelihood while sparing the government the costs and risks of pre-forfeiture storage and maintenance of the property. Such orders may also occasionally be in the best interest of live animals where temporary placement is difficult or risky for the animals and the care given by the owner is high quality. Restraining/protective orders pursuant to § 983(j) may be obtained either prior to or following the filing of the complaint commencing the forfeiture order, but one caveat as to pre-complaint orders is that the owner(s) of the property may be entitled to notice and opportunity for a hearing.

The Wildlife and Marine Resources Section (WMRS) of the DOJ Environment and Natural Resources Division has concurrent authority with the United States Attorneys' offices (USAOs) to initiate civil forfeiture actions in any district, upon the filing of a claim by a claimant. *See* DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL §§ 5-10.100, 5-10.120 (2008). If a USAO declines a civil forfeiture direct referral from the Department of Interior/Fish and Wildlife Service or the National Oceanic and Atmospheric Administration/National Marine Fisheries Service, the United States Attorneys' Manual requires notification to the Chief of WMRS within three business days. *Id.* at §§ 5-

10.310; 5-10.312. Likewise, the United States Attorneys' Manual requires that a USAO notify the Chief of WMRS of any civil forfeiture direct referral that it accepts. *Id.* WMRS can also assist USAOs with civil forfeiture matters.

Another cautionary note — if an administrative forfeiture results in a claim and the case, involving forfeiture of illegally acquired or possessed plants or wildlife, is referred to the USAO but is declined, the USAO should contact WMRS before the agency makes a decision regarding return of the property.

The primary procedural authorities governing civil judicial forfeiture actions are 18 U.S.C. § 983 and Rule G of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. Under these procedures, the government files a verified complaint alleging that the property is subject to forfeiture under the applicable forfeiture statute and serves process on anyone known to the government as having at least a colorable interest in the property, Supplemental Rule G(4)(b), and publishes notice of the action generally on the government forfeiture Web site. *Id*. Rule G(4)(a). Persons seeking to challenge the forfeiture must file a sworn claim to the property and an answer to the complaint within specified deadlines — otherwise the case ends with entry of a default judgment of forfeiture. If an answer is filed, the case then moves into discovery governed by the Federal Rules of Civil Procedure and motions practice. Most civil judicial forfeiture cases end in either settlement or entry of summary judgment. In cases that proceed to trial, the right to a jury trial is preserved to the same extent as it is in Rule 38 of the Federal Rules of Civil Procedure. This essentially means that there is a right to jury trial if the defendant property was seized on land or anywhere other than the high seas or navigable waters. A civil forfeiture action against property seized on the high seas or navigable waters is considered an action in admiralty and there is no right to a jury trial. *See C.J. Hendry Co. v. Moore,* 318 U.S. 133, 153 (1943); *The Sarah,* 8 Wheat. 391, 394 (1823); *The Betsey and Charlotte*, 4 Cranch 443, 452 (1808); *United States v. One 1976 Mercedes Benz 280S,* 618 F.2d 453, 469 (7th Cir.1980). *See also* Fed. R. Civ. P. 38(e).

Regardless of whether a case ends in summary judgment or goes to trial, the initial burden is on the government to prove the forfeitability of the property, i.e., the nexus between the property and the offense, by a preponderance of the evidence. If the government meets this burden, the burden shifts to the claimant either to rebut the government's showing or to assert an affirmative defense to the forfeiture, the most common of which is the "innocent owner defense" under § 983(d). The statutory "innocent owner defense" requires a claimant to establish his ownership interests and "innocence" by a preponderance of the evidence. To establish "innocence," an owner who held the property at the time of the illegal conduct giving rise to forfeiture must show either lack of knowledge of the illegal conduct or that, upon learning of the conduct, he did all that reasonably could be expected under the circumstances to terminate such use of the property. An owner who acquired the property after the conduct can establish "innocence" by showing that, at the time he acquired the property, he was a bona fide purchaser for value who did not know and was reasonably without cause to believe that the property was subject to forfeiture.

There is an exception to this statutory defense of innocence in plant and wildlife cases to the extent the defendant property consists of the illegally-taken plants or wildlife itself. The statute expressly provides that the defense may not be asserted as to "contraband or other property that it is illegal to possess." 18 U.S.C. § 983(d)(4) (2012). The seminal case applying and interpreting this provision is *United States v. 144,774 Pounds of Blue King Crab*, 410 F.3d 1131, 1135 (9th Cir. 2005), a case involving a civil forfeiture under the Lacey Act. In this case, crab was taken from Russian waters in violation of Russian law and then imported into the United States in violation of the Lacey Act. The importer claimed, under the innocent owner defense, not to have known that the crab had been illegally harvested or imported. Pointing out that king crab is not inherently illegal to possess, the importer argued

that the "contraband exception" to this defense applies only to contraband per se, that is, property inherently illegal to possess. The district court rejected this argument and granted summary judgment for the government and the importer appealed. Because the Lacey Act makes it illegal to import goods that were harvested, possessed, or transported in violation of foreign law, the Ninth Circuit affirmed the forfeiture, reasoning that the phrase "or other property that is illegal to possess" transcended the term "contraband" and reached "property that becomes illegal to possess *because of extrinsic circumstances.*" *Id.* at 1135 (emphasis added). *See also Conservation Force v. Salazar*, 677 F. Supp. 2d 1203, 1207 (N.D. Cal. 2009) (following and expanding on *Blue King Crab*, holding that carcasses of imported endangered species of animals, including trophies, that violate both the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the ESA are not contraband *per se*, but are derivative contraband and fall within the contraband exception in § 983(d)(4)); *United States v. 1866.75 Board Feet and 11 Doors and Casings*, 587 F. Supp. 2d 740, 750-51 (E.D. Va. 2008) (granting summary judgment for the government under 16 U.S.C. § 1540(e) when claimant imported several tons of hardwood that was cut from an endangered species of wood because the wood was illegal to possess within the meaning of § 983(d)(4)); *United States v. Approximately 1,170 Carats of Rough Diamonds*, 2008 WL 2884387, at *9-10 (E.D.N.Y. July 23, 2008) (holding that importation of diamonds in violation of the Clean Diamond Trade Act, 19 U.S.C. §§ 3901–3913, is a strict liability offense and does not have an innocent owner defense); *United States v. Approximately 600 Sacks of Green Coffee Beans*, 381 F. Supp. 2d 57, 62 (D.P.R. 2005) (holding that contraband exception bars the innocent owner defense for importer of illegally imported coffee beans).

The lack of an innocent owner defense renders plant and wildlife forfeiture provisions, at least pursuant to the Lacey Act and the ESA, strict liability provisions. The strict liability nature of the forfeitures fulfills a key policy purpose. Courts explaining this purpose have stated the following:

> [T]he application of strict liability in wildlife forfeitures is necessary to effect Congressional intent. To permit an importer to recover the property because he or she lacks culpability would lend support to the continued commercial traffic of the forbidden wildlife. Additionally, a foreseeable consequence would be to discourage diligent inquiry by the importer, allowing him or her to plead ignorance in the face of an import violation.

United States v. One Handbag of Crocodilus Species, 856 F. Supp. 128, 134 (E.D.N.Y. 1994) (quoting *United States v. 1,000 Raw Skins of Caiman Crocodilus Yacare*, 1991 WL 41774, at *4 (E.D.N.Y. Mar. 14, 1991)); *see also United States v. Fifty-Three Eclectus Parrots*, 685 F.2d 1131 (9th Cir. 1982).

The wildlife specimen's status as contraband or otherwise being illegal to possess may also come into play if the claimant argues that the forfeiture violates the Excessive Fines clause of the Eighth Amendment. *See* U.S. CONST. amend. VIII. That clause does not apply to contraband. *See Austin v. United States*, 509 U.S. 602, 621 (1993); *see also* 18 U.S.C. § 983(a)(1)(F) (2012) (stating in CAFRA that "[t]he Government shall not be required to return contraband or other property that the person from whom the property was seized may not legally possess"). If the claimant successfully argues that the wildlife is not contraband, the government should be prepared to argue that the forfeiture at issue is remedial, rather than punitive, based on the important wildlife protection and wildlife trade purposes of the forfeiture provisions at issue. *See Conservation Force*, 677 F. Supp. 2d at 1209 (explaining that wildlife forfeiture was "remedial" in nature due to the "government's compelling interest in the conservation and protection of endangered species" and thus holding that the forfeiture did not violate the Eighth Amendment) (citing *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 175 (1978)). If an import is involved in such cases, it is also important to determine what the claimant declared on customs forms to be the monetary value of the wildlife. Wildlife importers often low-ball this figure on the

customs forms to reduce their tax obligation and then later claim in court that the wildlife has a much higher value.

Because civil forfeiture is completely separate from the criminal case, the forfeiture action may be filed before indictment, after indictment, or with no criminal case at all. Grand jury material may be used in a parallel civil forfeiture case without a court order. *See* FED. R. CRIM. P. 6(e)(3)(A)(I); 18 U.S.C. § 3322 (2012); *United States v. Warshak*, 2007 WL 4410237, at *13 (S.D. Ohio Dec. 13, 2007). When in doubt, however, the best course of action is to seek and receive a disclosure order pursuant to Rule 6(e)(3)(E)(i).

Although civil forfeiture is a very powerful tool for law enforcement, it has some important limitations. Because civil forfeiture is an *in rem* action against specific property, the government may only forfeit the actual "guilty" property, that is, the property that was derived from or used to commit the offense. Thus, the government cannot secure a money judgment in a civil forfeiture case or forfeit substitute assets when the specific property derived from or used in the offense is no longer available. Such procedures are only available in criminal forfeiture actions.

Criminal forfeiture: In a criminal prosecution, the government can obtain criminal forfeiture of the defendant's property to the extent that the property falls within the scope of the forfeiture authority for the crimes for which the defendant was convicted. A criminal forfeiture starts when the prosecutor includes a forfeiture notice, or allegation, in the indictment. This notice is required by Federal Rule of Criminal Procedure 32.2(a) and may be satisfied by simply tracking the language of the relevant forfeiture statute generically describing the kind(s) of property forfeitable under the statute. The specific forfeitable property can then be named in the indictment or separately in a bill of particulars. If the defendant pleads guilty, the forfeiture should be included in the plea agreement. The Asset Forfeiture and Money Laundering Section of DOJ's Criminal Division maintains an online Intranet site that provides numerous resources regarding forfeiture law, including sample forfeiture allegations for most criminal forfeiture authorities and filed examples of forfeiture forms and pleadings to assist prosecutors.

It is generally necessary to secure property pending criminal forfeiture. Unlike civil forfeiture in which property (except real property) is generally seized and held in custody as a jurisdictional prerequisite as discussed earlier, the statute governing criminal forfeiture procedure specifies that a seizure warrant may be obtained only upon showing that a restraining order may not be sufficient to assure the availability of the property for forfeiture. *See* 21 U.S.C. § 853(f) (2012). Seizure is not a jurisdictional prerequisite for criminal forfeiture because it is an in personam sanction, and jurisdiction for the forfeiture turns solely on the court's jurisdiction over the criminal defendant. Seizure generally affords the greatest degree of security for the government because the property, once taken into government custody, generally remains there throughout the forfeiture action. Restraining orders, by contrast, generally leave the property in the custody of whoever had it when the order issued, subject only to specified restraints on transfer or waste, together with requirements regarding, use, maintenance, insurance, location, and other conditions. Even so, restraining orders are often advantageous to the government as discussed previously, particularly where the costs or risks of maintaining the property pending forfeiture are quite high and there is little likelihood of alienation or uninsured loss (for example, a commercial fishing vessel or aircraft).

Seizing a large boat can be an expensive undertaking and may present significant risks (for example, hurricane season). A restraining order prohibiting the sale of the boat pending the proceedings may be a preferred option. One significant drawback to restraining orders is that, in the pre-indictment period, an ex parte temporary restraining order obtained pursuant to 21 U.S.C. § 853(e)(2) is generally good for only 14 days. To continue the pre-indictment restraint thereafter, the statute requires that the

government afford notice and an opportunity for a hearing to all persons appearing to have an interest in the property (usually including the targets of the criminal investigation). At the hearing, the government bears the burden of satisfying the court that (1) there is a "substantial probability" that the government will prevail on the issue of forfeiture and failure to enter the order will result in the property being made unavailable for forfeiture, and (2) that the need to preserve the availability of the property outweighs the hardship on any party against whom the order is entered. *See* 21 U.S.C. § 853(e)(1)(B) (2012). This hearing often affords defense counsel a chance to preview the government's case and cross-examine whatever witnesses the government puts on the stand. For post-indictment restraining orders, there is no statutory right to notice or a hearing. *See id*. § 853(e)(1)(A). However, most Circuits will afford a defendant a very limited right to a hearing on a post-indictment restraining order where the defendant shows that he or she has no access to unrestrained assets with which to pay defense counsel of choice *and* that "untainted" assets have been restrained. Thus, it is often preferable to seek a restraining order after an indictment or the filing of a civil forfeiture complaint.

Once a criminal forfeiture is commenced and the property secured as described above, the substantive criminal charges proceed apace. The proceeding is said to be "bifurcated" between an initial "guilt phase" and a subsequent "forfeiture phase." *See* FED. R. CRIM. P. 32.2(b). Thus, once the defendant is found guilty of a crime supporting the forfeiture either on a plea or a verdict, the "forfeiture phase" begins. During the forfeiture phase, the government bears the burden of establishing forfeitability of the property by a preponderance of the evidence, and the fact-finder may consider evidence already in the record or additional evidence submitted by the parties and found by the court to be reliable. Under Federal Rule of Criminal Procedure 32.2(b)(5), the defendant can retain the jury to determine the forfeiture or waive the jury. In the vast majority of cases, the defendant elects to waive the jury and has the judge determine the forfeiture issues. When the forfeiture phase is tried to a jury, it returns a special verdict finding as to each asset, deciding whether the government established the requisite nexus between the asset and the offense(s) of which the defendant was convicted. *Id.* 32.2(b)(5)(2). In a bench trial on forfeiture, the court simply makes findings of fact and conclusions of law. Forfeiture settlements require certain approvals depending on the amount of money involved and the settlement terms. *See* DEP'T OF JUSTICE, ASSET FORFEITURE POLICY MANUAL 2008 at 79-96 (2008) (providing a detailed description of the requirements for criminal and civil forfeiture settlements).

After the issue of forfeiture is resolved, the court must promptly enter a "preliminary order of forfeiture" pursuant to Rule 32.2(b)(2). The effect of this order is to forfeit the convicted defendant's interest in the property. The order is entered without regard to any third party rights in the property. This order becomes final as to the defendant at sentencing, or at any time before sentencing if the defendant consents. Rule 32.2(b)(4)(B) requires that the forfeiture be included in the oral pronouncement of sentence in the presence of the defendant and incorporated, directly or by reference, in the written judgment of conviction.

As noted above, third parties have been excluded up to this point. Consequently, once a preliminary order of forfeiture is issued, the government must publish and provide notice of that order to anyone who reasonably appears to be a potential claimant with standing to contest the forfeiture in an ancillary proceeding. *See id*. 32.2(b)(6). If a third party asserts an interest in the subject property, an ancillary proceeding is then held pursuant to Rule 32.2(c). The government cannot forfeit property if a third-party claimant proves that the property belongs to him rather than to the defendant. The defendant cannot file a claim in an ancillary proceeding and third parties cannot challenge the defendant's underlying criminal conviction or the preliminary order of forfeiture.

To establish ownership, a third-party claimant must prove one of two things by a preponderance of the evidence. He must show that he had a legal right, title, or interest in the forfeited property that was

superior to the defendant's interest at the time the property became subject to forfeiture. *See* 21 U.S.C. § 853(n)(6)(A) (2012). To prevail as an owner with a superior interest under § 853(n)(6)(A), the claimant must show that his property interest arose *before* the defendant committed the offense that gave rise to the forfeiture because the government's interest in forfeitable property vests at the time the offense was committed. A third-party claimant may also establish ownership by showing that he acquired the property *after* it became subject to forfeiture, if he was a bona fide purchaser for value who did not know that the property was subject to forfeiture. *See id*. § 853(n)(6)(B). Thus, a claimant can prevail even if he acquired an interest in the subject property after the government's interest vested by satisfying the requirements of § 853(n)(6)(B).

In a criminal forfeiture case, unlike a civil forfeiture case, the government can obtain a money judgment and the forfeiture of substitute, or untainted, assets from the defendant equal to the value of the directly forfeitable property that cannot be forfeited due to certain actions or omissions of the defendant. *See id*. § 853(p); FED. R. CRIM. P. 32.2; *see, e.g.*, *United States v. Day*, 524 F.3d 1361 (D.C. Cir. 2008) (permitting in personam money judgment as part of criminal forfeiture order).

Criminal forfeiture, however, is not always available and in those circumstances civil forfeiture may be the only option. Property cannot be forfeited criminally if (1) no criminal case exists, (2) the defendant is charged with a crime that is not the one supporting the forfeiture, (3) no conviction occurred for the offense that gave rise to the property, or (4) the defendant dies or becomes a fugitive. Deciding whether to use civil or criminal forfeiture, when both are available, involves numerous tactical considerations.

IV. Tactical considerations

The distinctions between administrative, civil, and criminal forfeiture create some tactical choices for prosecutors to weigh.

If a claim is filed in an administrative forfeiture, the property can be forfeited only through judicial proceedings. The best course of action in such a case may be for the prosecutor to proceed along parallel tracks by both initiating a civil forfeiture against the property and including it in a criminal indictment. Once a criminal indictment is filed, the prosecutor can seek to stay the civil forfeiture proceeding until the criminal case is completed. *See* 18 U.S.C. § 981(g) (2012). Then, if the property is not criminally forfeited following the trial, it may still be forfeited in the civil proceeding. A parallel civil forfeiture proceeding provides forfeiture authority when a criminal forfeiture proceeding falls through, such as when the defendant is a fugitive or dies or when the defendant is acquitted of the offense giving rise to the forfeiture.

Alternatively, the government may wish to use civil forfeiture on its own if prosecutors decide not to pursue the related criminal case or if the property at issue is forfeitable based on an offense that is not being charged in the criminal prosecution. Even if a prosecutor ultimately determines that a subject does not have criminal culpability, but could have done better—and could do better in the future—to avoid trafficking in illegally obtained wildlife or plants, a civil forfeiture should be pursued. Because, as discussed above, the "innocent owner" defense is not available in civil forfeiture cases with respect to plants or wildlife that are illegal to possess, using civil forfeiture proceedings to forfeit such items can have an important deterrent effect both for that owner and for others who are similarly situated.

Pursuing forfeiture civilly can also help the government overcome third-party claims against the property. In criminal forfeiture, a third party can defeat forfeiture merely by demonstrating ownership of the property, that is, by showing that he has a right to the property superior to that of the convicted

defendant. *See* 21 U.S.C. § 853(n)(6)(A) (2012). In civil forfeiture proceedings, a third-party must establish not only ownership but also "innocence," as discussed above. Although prosecutors can proceed with civil forfeiture without knowing who the owner of the property is, an investigation into ownership is very important in determining whether to pursue forfeiture and, if so, whether to do so criminally or civilly.

When weighing the benefits of civil or criminal forfeiture, it is important to remember that civil forfeiture is limited to property that is directly traceable to the crime and the government cannot forfeit substitute assets or obtain a money judgment if the forfeitable property is lost or dissipated. Civil forfeiture has another important caveat for tactical evaluation: if a claimant prevails in a civil forfeiture case, the government is liable for the claimant's attorney fees. 28 U.S.C. § 2465(b)(1) (2012).

V. Practical notes

Occasionally, forfeitures in wildlife and plant cases present some particularly unique issues that should be considered and resolved prior to initiating the seizure. For example, seized wildlife and plants may be alive at the time of confiscation. Arrangements must be made, or identified, prior to seizure to ensure the well-being (including euthanasia of injured or ill animals if medically appropriate) and survival of the seized wild animals and plants pending the outcome of the forfeiture case. For wild animals, this may take the form of making special arrangements for temporary housing with an accredited wildlife sanctuary or zoo. In some limited circumstances, this may entail seizing the animals in situ and placing the animals in custody of the target. National Oceanic and Atmospheric Administration's (NOAA) forfeiture regulations expressly authorize the return of live animals to the violator if doing so is "in the interest of the animals' welfare." 15 C.F.R. § 904.502(b)(3). To minimize harm to live animals and to control the cost of their housing, forfeiture actions involving live animals should be expedited to the greatest extent possible.

Similarly, forfeiture cases involving dead fish that were unlawfully caught or transported require special consideration because it is a perishable product. NOAA has special regulations that govern the handling of such fish, including bond provision and auction sales. *See* 15 C.F.R. §§ 904.502, 904.505; *see also* DEP'T OF JUSTICE, ASSET FORFEITURE POLICY MANUAL 2008 at 95 (2008) (explaining that in some cases it is necessary to liquidate the property at issue to preserve its value and then settle or pursue forfeiture of the cash proceeds as a substitute asset). In circumstances where the fish are also being held as evidence and cannot immediately be liquidated, arrangements should be made to maintain the product in a cold storage facility, while addressing the issues of security and custodial integrity of such evidence.

Forfeiture of wood or wood products can cause similar storage concerns, and the related need to plan ahead, where the wood needs to be maintained in climate controlled storage facilities to maintain its condition and quality, and thus value.

Costs that are incurred in the storage, care, and maintenance of wildlife or plants can be significant. Such costs are recoverable from the defendant and should be sought at sentencing or during another appropriate stage of litigation. *See* 16 U.S.C. § 3374(c) (2012) ("Any person convicted of an offense, or assessed a civil penalty, under section 3373 of this title shall be liable for the costs incurred in the storage, care, and maintenance of any fish or wildlife or plant seized in connection with the violation concerned."); 50 C.F.R. § 12.42 (authorizing storage and handling costs to be charged to the violator following forfeiture under the ESA and the Lacey Act).

Once wildlife or plants have been successfully forfeited, their disposition is governed by agency regulations. *See* National Oceanic and Atmospheric Administration, 15 C.F.R. § 904.509; Fish and

Wildlife Service, 50 C.F.R. §§ 12.30–12.39; CITES violations, 50 C.F.R. § 23.78. These regulations make return of live animals to the wild a top priority, where possible, and generally prohibit the introduction of endangered specimens into the stream of commerce.

Funds from criminal forfeitures under the Lacey Act and the ESA may go into designated accounts, rather than the DOJ's or Treasury's general asset forfeiture funds. The specific account information and processes are available from the Criminal Division's Environmental Crimes Section. These accounts should be specified in plea agreements and judgments.

VI. Conclusion

Prosecutors should consider the implications of available forfeiture options early in their cases. In pursuing a forfeiture proceeding, prosecutors should work closely with their agency and civil colleagues to coordinate the processes so that notice deadlines and discovery obligations are met, while also ensuring that criminal proceedings are not compromised. Forfeiture is a powerful weapon in the plant and wildlife prosecutor's arsenal that should be used assertively, but judiciously.❖

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Parallel Proceedings in Federal Environmental Crimes Cases

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I. Introduction

Unlawful activity affecting the environment supplies particularly fertile ground for the generation of parallel criminal and civil or administrative proceedings. By introducing unfamiliar and often vexing issues into an otherwise "normal" criminal investigation and prosecution, such proceedings may frustrate or disrupt a prosecutor's strategic decisions. Further, actions that compromise the independence of the civil proceedings may spawn claims of government abuse and even prove fatal to the criminal case. However, when conducted properly, parallel criminal and civil proceedings can complement one another, thereby helping every involved party accomplish its respective goals. For that reason, Department of Justice (DOJ) litigating components are obligated to pursue parallel proceedings under appropriate circumstances.

A basic framework for obviating common parallel proceedings problems can help environmental crimes prosecutors and their civil counterparts effectively navigate the shoals of their respective parallel proceedings. This article identifies common parallel proceedings issues that environmental crimes prosecutors may confront and, to the extent possible, offers some practical guidance for resolution of those problems. Given the unpredictable and unique character of some parallel proceedings issues, this article does not attempt to identify all parallel proceedings issues that may arise in a particular case.

II. Basic principles

A. Definition of "parallel proceedings"

There is no established single definition of "parallel proceedings." In common usage, the term refers to the simultaneous or successive investigation or litigation of separate criminal, civil, and administrative actions involving a common set of facts by different agencies, different branches of government, or private litigants. In its very broadest sense, the term could even encompass a separate criminal investigation or prosecution by state or local authorities. Because such actions could affect the course of an environmental crimes case, prosecutors should deem any related investigation or litigation activity beyond the prosecutor's control as a "parallel proceeding" of the federal environmental crimes case.

The term "parallel" is somewhat of a misnomer to the extent that it implies two or more proceedings operating at the same time, with equal vigor, toward separate goals. In fact, the separate proceedings may lightly overlap or even occur successively to one another. The prosecutor's focus should be on the capacity of the other proceeding to impact the environmental crimes case, and vice versa, rather than on the formality of when the civil proceeding was initiated in relation to the criminal proceeding. The focus should be on the impact to the case even though, as discussed below, the timing of the respective actions may affect strategic decisions made by prosecutors and their civil counterparts.

B. Why parallel proceedings arise

As a procedural matter, parallel proceedings are neither inherently good nor bad. They exist because the same occurrence (or set of related occurrences) causes separate DOJ litigating components, other governmental agencies (including state and local governmental units), and/or private parties to seek redress of the wrongs that arise from the incident. The parties generally pursue different goals, often focusing their cases on different individuals or entities. The Supreme Court has validated the government's pursuit of simultaneous criminal and civil relief. *See United States v. Kordel*, 397 U.S. 1 (1970) (Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–399d); *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20 (1912) (Sherman Act, 15 U.S.C. §§ 1–40). As one court explained, "The civil and regulatory laws of the United States frequently overlap with the criminal laws, creating the possibility of parallel civil and criminal proceedings, either successive or simultaneous. In the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence." *Securities and Exch. Comm'n v. Dresser Indus., Inc.*, 628 F.2d 1368 (D.C. Cir. 1980) (en banc) (footnote omitted).

In the context of government enforcement actions aimed at violations of environmental laws and regulations, parallel criminal and civil actions arise because the criminal and civil remedies that are pursued by the respective government counterparts are designed to achieve different goals. Civil enforcement tools are uniquely suited for preventing threats of harm to human health or the environment, both immediate and long-term. Especially in the case of dangers caused by chemical wastes, civil emergency response agencies (on the federal, state, or local level) are designed to respond timely to environmental threats. Such response activity may involve the expenditure of government funds for cleanup, the issuance of compliance orders, or the pursuit of court-ordered injunctive relief. Civil injunctive relief also offers a much more effective tool for assuring both immediate and long-term compliance by a chronic violator (usually a corporate entity).

Far more than United States Probation Officers, civil personnel have the expertise and resources to monitor a violator's compliance with ordered injunctive relief that includes technical details that are often set forth in a lengthy and complex consent decree. By contrast, criminal prosecution is better suited to punish individuals who engage in knowing and intentional, or egregiously negligent, criminal activity. Prosecutors must remain sensitive to the legitimate interests of their parallel counterparts and the potential impact that criminal proceedings may have on those interests. Prosecutors must also educate their civil counterparts as to how the parallel civil activity may disrupt or interfere with the criminal investigation and their ability to discharge their unique responsibilities, such as assuring that the government meets its constitutional disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), as well as its statutory disclosure obligations under Federal Rule of Criminal Procedure 16 and the Jencks Act, 18 U.S.C. § 3500.

Anecdotal evidence strongly suggests that parallel proceedings become more difficult when prosecutors demonstrate a lack of sensitivity toward their civil counterparts, and vice versa. Prosecutors should not attempt to avoid the complications of parallel proceedings by forcing other parties to take action that makes the prosecutor's job easier. Rather, prosecutors are far more likely to secure the results that they seek (or at least some compromise in their favor) by opening lines of communication with the other parties. Respectful and mature discussion between the parties about their separate goals and concerns will foster the trust and camaraderie necessary for parties to compromise when their respective interests come into conflict. Flexibility and patience are key.

C. DOJ policy

On July 28, 1997, Attorney General Janet Reno issued a memorandum entitled "Coordination of Parallel Criminal, Civil, and Administrative Proceedings" (1997 Memorandum) that directed each DOJ litigating component and each United States Attorney's office (USAO) to maintain or develop "a system for coordinating the criminal, civil and administrative aspects of all white-collar crime matters within the office." Memorandum from Attorney General Janet Reno to United States Attorneys, Assistant United States Attorneys, Litigating Divisions, and Trial Attorneys (July 28, 1997), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title1/doj00027.htm; *see also* DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 1-12.000 (1998). The 1997 Memorandum specified that each system should include management procedures to address parallel proceedings issues, such as:

- The timely assessment of the civil and administrative potential in all criminal case referrals, indictments, and declinations.
- The timely assessment of the criminal potential in all civil case referrals and complaints.
- The effective and timely communication with cognizant agency officials, including suspension and debarment authorities, to enable agencies to pursue available remedies.
- The early and regular communication between civil and criminal attorneys regarding *qui tam* and other civil referrals, especially when the civil case is developing ahead of the criminal prosecution.
- The coordination, when appropriate, with state and local authorities.

The 1997 Memorandum further directed consultation between prosecutors and their civil counterparts (in both federal agencies and DOJ litigating components) in order to foster information sharing subject to "proper safeguards."

On January 30, 2012, Attorney General Eric H. Holder, Jr., issued a memorandum entitled "Coordination of Parallel, Criminal, Civil, Regulatory, and Administrative Proceedings" (2012 Policy) intended to "update and further strengthen" the policies of the 1997 Memorandum. The 2012 Policy emphasizes the need for "early, effective, and regular communication between criminal, civil, and agency attorneys" to assure that DOJ efficiently pursues all appropriate remedies. *Id.* at 2. The 2012 Policy also directs "criminal, civil and agency attorneys [to] coordinate in a timely fashion, discuss common issues that may impact each matter, and proceed in a manner that allows information to be shared to the fullest extent appropriate to the case and permissible by law." *Id.* The process of coordination and information sharing is directed to continue at all stages (intake, investigation, and case resolution) of the respective parallel proceedings.

In response to the 1997 Memorandum, DOJ's Environment and Natural Resources Division (ENRD) issued Directive 99-21 (Integrated Enforcement Policy) on April 20, 1999. On December12, 2008, Directive 99-21 was superseded by ENRD Directive 2008-02. ENVIRONMENT AND NATURAL RESOURCES DIV., Directive 2008-02 (2008), *available at* http://www.justice.gov/enrd/ENRD_ Assets/Directive_No_ 2008-02_Parallel_Proceedings_Policy.pdf. Directive 2008-02 pertains only to parallel criminal and civil or administrative *enforcement activities*, including parallel investigations:

> For purposes of this document, parallel proceedings means overlapping criminal and civil or administrative enforcement activities with respect to the same or related parties and that deal with the same or a related course of conduct. The overlapping activities may be undertaken simultaneously or sequentially. These activities include enforcement

> actions brought to obtain criminal sanctions, civil penalties, injunctive relief, compliance orders, or cost recovery, as well as pre-filing activities directed at enforcement, including investigative efforts.

Id. at II. (emphasis in original). Thus, as a technical matter, the guidance does not apply when the parallel civil proceeding involves private litigants or other government agencies, such as the National Transportation Safety Board, that conduct investigations without an enforcement purpose. However, prosecutors should be able to readily adapt Directive 2008-02's guidance to situations not involving parallel enforcement actions.

Directive 2008-02 sets forth eleven "general principles" (characterized as "limitations") that ENRD attorneys must adhere to when confronting parallel enforcement actions. *Id.* at III. These principles, discussed at various points below, generally govern the topics of case screening, consultation, information sharing, discovery procedures, compliance with grand jury secrecy requirements, and case resolution. Directive 2008-02 takes a conservative policy approach, primarily to obviate the need for unnecessary litigation, such as unfounded defense claims that the government has improperly utilized the civil proceedings to obtain an unfair advantage in the criminal case:

> Some of the [eleven general principles] may not be required by law and are established as a matter of policy to avoid unnecessary litigation issues. Within the boundaries of these requirements, Division civil and criminal attorneys should coordinate investigations and cases as necessary to protect human health, the environment, and other interests of the United States, and to obtain just results.

Id. Thus, by hewing to Directive 2008-02's general principles, environmental crimes prosecutors can operate within an adequate margin of safety when resolving parallel proceedings issues. Of course, prosecutors should consult any parallel proceedings guidance issued by their own USAO or DOJ litigating component.

III. The prosecutor's civil and administrative counterparts

The type of parallel civil or administrative proceedings that arise in an environmental crimes case will depend, of course, on the nature of the underlying conduct that is the focus of the investigation. They arise automatically when either a need for emergency response activity arises or the criminal investigation was initiated based on information that was first obtained during civil or administrative proceedings. On other occasions, they may arise independently of the criminal investigation. This section identifies some of the more common civil or administrative parties whom a prosecutor may encounter during the course of an environmental crimes case.

A. United States Environmental Protection Agency

The United States Environmental Protection Agency (EPA) is frequently engaged in civil or administrative activity with respect to conduct that is also the subject of a criminal investigation. The EPA is charged with broad authority to regulate pollution sources under many environmental laws, including the Clean Water Act, 33 U.S.C. §§ 1251–1274; the Ocean Dumping Act, 33 U.S.C. §§ 1401–1445; the Clean Air Act, 42 U.S.C. §§ 7401–7449; the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–7000, the primary federal legislation regulating the treatment, storage, and disposal of hazardous waste; the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. §§ 11001–11050; the Safe Drinking Water Act, 42 U.S.C. §§ 300f–300j-26; the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601–2697; and the Federal Insecticide, Fungicide &

Rodenticide Act (FIFRA), 7 U.S.C. §§ 136–136y. The EPA also has primary authority to abate hazardous substance releases pursuant to its authority under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601–9675, commonly known as the "Superfund" law.

Pursuant to authorizing legislation, the EPA has promulgated implementing regulations (primarily at Title 40 of the Code of Federal Regulations) to carry out its responsibilities under these various laws. The EPA's statutory authority also generally includes broad authority to conduct physical site inspections, use administrative subpoenas to obtain information, issue compliance orders, and bring civil judicial and/or administrative enforcement actions to assess substantial fines and assure compliance by the regulated community. Many environmental laws also provide for criminal punishment for knowing (and sometimes negligent) violations of environmental laws and their implementing regulations. *See, e.g.*, FIFRA, 7 U.S.C. § 136l (2012); TSCA, 15 U.S.C. § 2615(b) (2012); Clean Water Act, 33 U.S.C. § 1319(c) (2012); Ocean Dumping Act, 33 U.S.C. § 1415(b) (2012); Safe Drinking Water Act, 42 U.S.C. § 300i-1 (2012) (prohibition against tampering with a public water system); RCRA, 42 U.S.C. § 6928(d) (2012); EPCRA, 42 U.S.C. § 11045 (2012); Clean Air Act, 42 U.S.C. § 7413(c) (2012). Even when a statute does not authorize criminal punishment for a violation of its requirements, unlawful activity may be prosecuted under other federal criminal statutes, including the false statements statute, 18 U.S.C. § 1001.

The EPA maintains a clear distinction between its civil inspectors and its criminal investigators. The former are generally trained to enforce a specific media program (air, water, hazardous waste, drinking water, etc.) and report to the media program management in one of the ten regional offices that EPA maintains around the country. Civil emergency response personnel, including on-scene coordinators (OSCs), are distributed across the United States and report to the local regional office. By contrast, all criminal investigations are conducted by special agents of the EPA's Criminal Investigation Division (EPA-CID). Assigned to Area Offices distributed throughout the United States, EPA-CID agents have the responsibility to investigate the criminal violation of laws administered by the EPA, as well as Title 18 offenses. *See* 18 U.S.C. § 3063 (2012) (defining powers of EPA-CID agents). The Area Offices do not report to the local EPA regional office; rather, they report directly to EPA-CID management in Washington, D.C. EPA also maintains a corps of technically skilled inspectors, analysts, scientists, and other specialists at its National Enforcement Investigations Center (NEIC) in Denver, Colorado. NEIC may be tasked to assist in civil or criminal investigations, as requested. In terms of relative size, the civil enforcement program is substantially larger than the EPA-CID criminal enforcement program. In civil judicial actions, including cost recovery actions and enforcement actions seeking civil penalties and/or injunctive relief, the EPA is represented by ENRD civil litigation components.

On September 24, 2007, the EPA's Office of Enforcement and Compliance Assurance issued its most recent "Parallel Proceedings Policy" (EPA Policy). *See* ENVTL. PROT. AGENCY, PARALLEL PROCEEDINGS POLICY (2007), *available at* http://www.epa.gov/compliance/resources/policies/enforcement/parallel-proceedings-policy-09-24-07.pdf. As further discussed below, the EPA Policy provides detailed guidance concerning the coordination of parallel enforcement proceedings by EPA's criminal and civil enforcement programs.

B. Other federal agencies

Conduct under investigation as an environmental crime may also fall within the jurisdiction and investigative responsibility of several other federal agencies. Some of these agencies are listed below.

United States Coast Guard: The Coast Guard, as part of the Department of Defense, has the responsibility to assure the safety of the United States' navigable waterways. The Coast Guard has

jurisdiction to investigate, among other things, marine casualties and the discharge of oils into the navigable waters of the United States in violation of the Oil Pollution Act, 33 U.S.C. § 1321. Civil and administrative investigations are conducted by personnel from local Marine Safety Offices distributed throughout the United States, whereas criminal investigations are conducted solely by the Coast Guard Investigative Service. The Coast Guard operates the National Response Center and shares authority under Superfund to respond to the threat of hazardous substances being released into the environment. The Coast Guard is also responsible for administering the Oil Spill Liability Trust Fund that may be used to help pay for removal costs and damages caused by an oil spill. The Coast Guard, represented by a DOJ civil litigating component (for example, the DOJ Torts Branch) may initiate civil judicial action to recover expenditures from the Trust Fund.

Occupational Safety and Health Administration (OSHA): Established under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678, OSHA is an agency within the Department of Labor and is charged with setting and enforcing workplace safety standards. Many states enforce these standards pursuant to an OSHA-approved program. OSHA regulations establish safety requirements for various activities that affect the environment, including hazardous waste operations and emergency response activities, *see* 29 C.F.R. §§ 1910.120, 1926.65, as well as asbestos abatement activity, *see* 29 C.F.R. § 1926.1101.

National Transportation Safety Board (NTSB): Pursuant to the Independent Safety Board Act of 1974, 49 U.S.C. §§ 1101–1155 (2012), the NTSB is an independent federal agency that is charged with determining the cause or likely cause of transportation accidents, promoting transportation safety, and assisting victims of transportation accidents and their families. *See id.*; *see also* NATIONAL TRANSPORTATION SAFETY BOARD, http://www.ntsb.gov. The NTSB has jurisdiction to investigate all pipeline accidents causing "significant injury to the environment," highway and railroad accidents, civil aviation accidents, and, in conjunction with the Coast Guard, major marine casualties. *See* 49 U.S.C. § 1131(a) (2012). The NTSB also investigates accidents that cause public safety to be threatened by the release of hazardous substances during transportation. By statute, the NTSB can assert priority over "any investigation by another department, agency, or instrumentality of the United States Government," except that, in cases not involving marine casualties, the NTSB must yield that priority to the Federal Bureau of Investigation if the Attorney General notifies the NTSB that the "accident may have been caused by an intentional criminal act." *Id.* § 1131(a)(2)(A), (B). However, if the notice comes from a federal law enforcement agency rather than the Attorney General, the NTSB, "in consultation with the law enforcement agency, shall take necessary actions to ensure that evidence of the criminal act is preserved." *Id.* § 1131(a)(2)(C). By statute, the NTSB and other investigating government agencies are obligated to "ensure that appropriate information developed about the accident is exchanged in a timely manner." *Id.* § 1131(a)(3). Among other powers, the NTSB may conduct public hearings, administer oaths, and compel the production of records and testimony concerning an accident under investigation. *See id.* § 1113(a). It does not regulate entities engaged in transportation activity; rather, it issues reports of its findings and makes safety recommendations designed to prevent future accidents.

Chemical Safety and Hazard Investigation Board (CSB): The CSB is an independent federal agency created under the Clean Air Act to "investigate (or cause to be investigated), determine and report to the public in writing the facts, conditions, and circumstances and the cause or probable cause of any accidental release [of a regulated substance or other extremely hazardous air pollutant to the ambient air from a stationary source] resulting in a fatality, serious injury or substantial property damage." 42 U.S.C. § 7412(r)(6)(C) (2012); *see also id.* § 7412(r)(2)(A) (defining "accidental release"). Like the NTSB, the CSB does not have criminal or civil law enforcement authority. *See id.* § 7412(r)(6). Rather, the CSB conducts root cause investigations into release incidents for the purpose of

making recommendations to prevent future such releases. *Id.*; *see also* CHEMICAL SAFETY BOARD, http://www.csb.gov. The CSB is obligated to "coordinate its activities with investigations and studies conducted by other agencies of the United States having a responsibility to protect public health and safety." 42 U.S.C. § 7412(r)(6)(E) (2012). Pursuant to a memorandum of understanding, the NTSB is the lead agency with respect to releases that are transportation related. *See id.* The CSB may conduct public hearings, administer oaths, and compel the production of records and testimony concerning a release under investigation. *See id.* § 7412(r)(6)(L), (M). The CSB often conducts investigations into the causes of facility fires and explosions that result in the release of hazardous air pollutants.

C. State and local agencies

Parallel proceedings are often initiated by state and local government agencies. These agencies include emergency response authorities (including local fire and police departments), as well as state agencies that are charged with enforcing state environmental laws and regulations. In addition to enforcing state environmental laws and regulations, states may also be charged with enforcing federal environmental requirements through an EPA-approved state program.

Publicly-owned treatments works (POTWs) are charged with the responsibility to enforce federal Clean Water Act regulations that govern the introduction of pollutants by industrial users into the POTWs (usually through a dedicated sanitary sewer system). These regulations, commonly known as "pretreatment regulations," impose reporting and record-keeping requirements on industrial users of the POTWs and establish limits on the type and amount of pollutants that may be introduced into the POTWs. *See* 40 C.F.R. §§ 403.1–403.13 (2012). POTWs are charged with the responsibility to issue permits (or an equivalent control mechanism) to any "significant industrial user." *See id*. § 403.8(f). Particularly when evidence indicates a threat to the integrity of a POTW's operations, the POTW may initiate administrative or judicial action to terminate the threat, including proceedings to amend or terminate an industrial user's permit.

D. Others

Prosecutors may encounter parallel proceedings in other contexts as well. Environmental offenses may give rise to civil actions seeking injunctive relief and damages under tort or breach of contract theories. In addition, licensing and permit authorities may take action to suspend or terminate privileges of licensees or permit-holders. Civil forfeiture and debarment proceedings may also be initiated ahead of, or concurrent with, the criminal prosecution. Because any of these proceedings may result in evidentiary hearings, discovery activity, and the issuance of findings by a court, an administrative law judge, or a hearing officer, prosecutors should remain vigilant and carefully monitor all such parallel proceedings.

IV. A critical distinction: coordination and information sharing versus improper use of the civil proceeding to further the criminal proceeding

The first and most important distinction that a prosecutor must make is between coordination and information-sharing on one hand, and the improper use of a civil proceeding as a tool of the criminal proceeding on the other. The former is an acceptable means of allowing parallel proceedings to co-exist and complement each other; the latter can result in the suppression of evidence, dismissal of the indictment, and findings of prosecutorial misconduct. Criminal defendants have attempted to suppress evidence or seek dismissal of an indictment on the basis that, when civil proceedings have lost their independent character, prosecutors have violated a defendant's constitutional rights or departed from the

proper administration of criminal justice. In the latter situation, defendants have asked courts to grant relief based on the courts' inherent supervisory authority. The occasional success by defendants who raise such challenges strongly encourages prosecutors to adhere to the following basic guidelines.

- The government may not use its civil or regulatory enforcement authority for the sole purpose of gathering evidence for a criminal prosecution.
- Prosecutors should not direct the actions of regulators for the purpose of gathering evidence for a criminal case. Prosecutors may educate their civil counterparts with respect to what information from a civil investigation may be useful to the prosecutors, but the civil counterpart must independently elect to obtain such information in furtherance of the civil case, and not solely to assist prosecutors. When assessing whether regulatory evidence-gathering that benefits prosecutors is sufficiently independent, courts will look to whether input from prosecutors influenced the agency to act as it did and whether the agency's action served the agency's purposes, as opposed to solely the prosecutor's purposes.
- Regulators need not advise persons who they are taking testimony or gathering documents from about the existence or possibility of a criminal investigation, but they may not affirmatively mislead them.
- The more extensive the communication between prosecutors and regulators is with regard to investigative strategy, the greater the risk that a skeptical court will find that the government overstepped appropriate boundaries.

Directive 2008-02 also offers some guidance. It states that "[a]ttorneys may only conduct civil and administrative discovery when justified by genuine civil or administrative case purposes. The administrative and civil discovery process may not be used as a pretext to obtain information for a criminal investigation." ENRD Directive 2008-02, § III.3. It also provides that "[c]ivil attorneys shall neither confirm nor deny the existence of a criminal investigation to any person outside the Department. Civil attorneys should report any such inquiries to their supervisor, and coordinate with [the Environmental Crimes Section (ECS)] regarding whether any additional steps are necessary." *Id.* § III.5.

A. Cases finding no misuse of parallel proceedings

In *United States v. Kordel*, 397 U.S. 1 (1970), the Supreme Court upheld the validity of the government's simultaneous pursuit of both civil and criminal proceedings. *Kordel* involved the prosecution of two corporate executives for violations of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–399d. The defendants asserted that their due process rights were violated because prosecutors benefitted from interrogatory responses provided by one defendant during a parallel in rem civil action brought by DOJ at the request of the Food and Drug Administration (FDA). Prior to service of the interrogatories, the FDA advised the corporate attorneys of the possibility that criminal proceedings would be instituted. Prior to receipt of the interrogatory responses, the FDA referred the case for criminal charges. The Court rejected the defendants' argument and affirmed the validity of parallel criminal and civil proceedings:

> The respondents urge that even if the Government's conduct did not violate their Fifth Amendment privilege against compulsory self-incrimination, it nonetheless reflected such unfairness and want of consideration for justice as independently to require the reversal of their convictions. On the record before us, we cannot agree that the respondents have made out either a violation of due process or a departure from proper

> standards in the administration of justice requiring the exercise of our supervisory power. The public interest in protecting consumers throughout the Nation from misbranded drugs requires prompt action by the agency charged with responsibility for administration of the federal food and drug laws. But a rational decision whether to proceed criminally against those responsible for the misbranding may have to await consideration of a fuller record than that before the agency at the time of the civil seizure of the offending products. It would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial.

Id. at 11. The Court, however, suggested that it may have ruled otherwise if the civil discovery process had been utilized solely to benefit the criminal prosecution or for some other purpose unrelated to the legitimate goals of the FDA civil action:

> We do not deal here with a case where the Government has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution; nor with a case where the defendant is without counsel or reasonably fears prejudice from adverse pretrial publicity or other unfair injury; nor with any other special circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution.

Id. at 11-12 (footnotes and citations omitted). Because the record did not evidence a "violation of the Constitution" or a "departure from the proper administration of criminal justice," the prosecution was free to make use of the evidence obtained during the FDA civil action. *Id.* at 13.

In *Securities and Exch. Comm'n v. Dresser Indus., Inc.*, 628 F.2d 1368 (D.C. Cir. 1980) (en banc), the Securities and Exchange Commission (SEC) served an administrative subpoena on a corporation that was simultaneously the subject of a parallel criminal investigation. Moving to quash the subpoena, the corporation asserted that it was issued in bad faith by the SEC to bolster the criminal investigation. Alternatively, the corporation sought a protective order precluding the SEC from sharing the information received by the SEC in response to the administrative subpoena with DOJ prosecutors. The Court of Appeals affirmed the district court's denial of the motion to quash. *Id.* at 1390. First, noting the separate goals of the criminal and administrative actions, the court concluded that, under the circumstances presented, no valid reason existed to stay the continuing SEC administrative investigation. *Id.* at 1374-77. Second, because the evidence established that the SEC was acting independently from the criminal investigation and otherwise in good faith, the court rejected the need for a prophylactic protective order preventing the SEC from sharing the subpoena response with DOJ prosecutors. *Id.* at 1384-87. The independence of the administrative and criminal actions was an important factor in the court's conclusions:

> A bad faith investigation, in the Court's conception, is one conducted *solely* for criminal enforcement purposes. Where the agency has a legitimate noncriminal purpose for the investigation, it acts in good faith . . . even if it might use the information gained in the investigation for criminal enforcement purposes as well. In the present case the SEC plainly has a legitimate noncriminal purpose for its investigation of Dresser. It follows that the investigation is in good faith, in the absence of complicating factors. There is, therefore, no reason to impose a protective order . . . .

Id. at 1387 (citing *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 304-05 (1978)) (emphasis added) (footnote omitted); *see also United States v. Fields*, 592 F.2d 638, 646 (2d Cir. 1978) (characterizing

coordination between the SEC and criminal prosecutors as a "commendable example of inter-agency cooperation" that minimizes statute of limitations problems and allows earlier initiation of criminal proceedings, consistent with the defendant's right to a speedy trial).

Defense claims of bad faith by the government in conducting parallel civil proceedings have routinely failed when prosecutors (and criminal investigators) carefully maintained a clear separation between the criminal and civil actions. *See, e.g.*, *United States v. Setser*, 568 F.3d 482, 491-93 (5th Cir. 2009) (no Fourth or Fifth Amendment violations because no " 'trickery' or cloaking of the criminal investigation as civil" existed); *United States v. Carriles*, 541 F.3d 344, 366 (5th Cir. 2008) (reversing district court's finding of government bad faith and concluding that naturalization interviewer only asked questions within the scope of her assigned responsibility); *United States v. Greve*, 490 F.3d 566, 571-72 (7th Cir. 2007) (holding that even though the revenue agent violated Internal Revenue Service policy by continuing to investigate defendant after acquiring evidence of fraud, no Fourth or Fifth Amendment violation occurred given the absence of proof that the revenue agent deceived defendant); *United States v. Blocker*, 104 F.3d 720, 725-30 (5th Cir. 1997) (holding that no Fourth Amendment violation occurred even though the state regulatory agency's contract auditor wore a recording device at FBI direction and received compensation from FBI because, among other factors, the auditor had independent legal access to the subject records and the FBI and USAO repeatedly instructed auditor to do "nothing more, nothing less and nothing different" than what auditor would otherwise have done); *United States v. Copple*, 827 F.2d 1182, 1190 (8th Cir. 1987) (holding that the district court properly denied motion to suppress evidence because, even though the FBI originally notified the Federal Deposit Insurance Corporation of potential violations, the FBI subsequently gathered evidence in an independent investigation within its area of responsibility); *United States v. Okwumabua*, 828 F.2d 950, 953 (2d Cir. 1987) (holding that the district court properly denied motion to suppress admissions because, even though the true identity and purpose of the special agent who participated in the defendant's interview were not disclosed to defendant during interview, defendant was not affirmatively misled); *United States v. Unruh*, 855 F.2d 1363, 1374 (9th Cir. 1987) (holding that the district court properly denied motion to dismiss indictment due to the absence of any evidence that the prosecution instituted the civil proceeding in bad faith); *United States v. Mahaffy*, 446 F. Supp. 2d 115, 123-27 (E.D.N.Y. 2006) (holding that the district court properly denied the motion to suppress statements that were made to SEC investigators because that investigation was not intertwined with parallel criminal investigation, targets knew of criminal investigation, and "[t]here are no facts to suggest that the USAO hid behind or manipulated the S.E.C. with the intention of misrepresenting its true intentions to the defendants"); *United States v. Teyibo*, 877 F. Supp. 846, 856 (S.D.N.Y. 1995) (denying the defendant's motion to suppress evidence because the "SEC pursued its own independent investigation of [the defendant's] activities and did not consult with the United States Attorney's office in any substantive way. . . .[and] the United States Attorney's Office properly conducted its own investigation and maintained grand jury secrecy as is required by federal law"); *United States v. Maniatis*, 2007 WL 1795761, at *2-4 (E.D. Cal. June 21, 2007) (unpublished) (denying motion to suppress statements made to United States Coast Guard inspectors because, even though inspectors boarded vessel following tip that vessel crew had committed a crime by intentionally discharging waste oil through a secret bypass pipe, inspectors had authority to board vessel, inspectors did not affirmatively mislead defendants, and neither the Coast Guard Investigative Service nor the USAO directed or were in any way involved with the inspection).

United States v. Stringer, 535 F.3d 929 (9th Cir. 2008), contains the most recent authoritative analysis of parallel proceedings issues. *Stringer* involved a government appeal of a district court order that dismissed a criminal indictment and was based, in part, on a finding that prosecutors requested that SEC personnel conducting a parallel administrative investigation not disclose the existence of the criminal investigation. In particular, the district court drew from the language in *Kordel*, suggesting that

bad faith may arise in "a case where the Government . . . has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution." *Id.* at 937, quoting *Kordel*, 397 U.S. at 11-12. *See United States v. Stringer*, 408 F. Supp. 2d 1083, 1088 (D. Or. 2006).

The Ninth Circuit reversed and remanded the case for trial. *Stringer*, 535 F.3d at 942. In particular, the Ninth Circuit concluded that no improper use of parallel proceedings occurred where (1) the SEC knew that the USAO was conducting a parallel criminal investigation but, at the request of the USAO, did not disclose the existence of that investigation while taking depositions of persons they knew to be targets of the criminal investigation; (2) the SEC agreed to conduct depositions of the criminal targets in a manner that would create the best possible record for a false statements case that might arise from the depositions; and (3) the SEC asked a deposition court reporter not to tell opposing counsel that there was an AUSA assigned to the case. Per standard practice, the SEC had notified the targets that the SEC regularly makes information in its files available to other agencies, including USAOs. The government's actions were permissible because the SEC's evidence-gathering actions were undertaken in support of a bona fide civil investigation and the SEC did not mislead the targets of the investigation. Because the defendants bore responsibility for their failure to invoke their Fifth Amendment privilege against self-incrimination, the SEC's failure to notify them of the existing criminal investigation did not violate the defendants' constitutional rights. *Id.* at 938 (citing *Minnesota v. Murphy*, 465 U.S. 420, 428 (1984)) (explaining the principle that a defendant's Fifth Amendment privilege "is lost if not affirmatively invoked, even if the defendant did not make a knowing and intelligent waiver").

All of these cases consistently place the burden of establishing the government's bad faith on the defendant.

B. Cases finding misuse of parallel proceedings

The leading cases holding that the government acted in bad faith during the course of parallel civil proceedings are *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977), and *United States v. Scrushy*, 366 F. Supp. 2d 1134 (N.D. Ala. 2005).

In *Tweel*, an IRS revenue agent initiated a civil audit of defendant and his spouse at the specific request of DOJ's Organized Crime and Racketeering Section. With respect to the particular tax years at issue, the IRS had not independently elected to audit the defendant and his wife. During the audit, the defendant's accountant asked the revenue agent whether the audit involved a "special agent." The revenue agent answered in the negative and did not advise the accountant of the existing criminal investigation. In the course of the audit, the accountant produced records that the revenue agent copied and then provided to the criminal investigators.

Following the defendant's conviction for various tax fraud offenses, the Fifth Circuit held that the records were obtained in violation of the Fourth Amendment. *Tweel*, 550 F.2d at 300. In particular, the court held that the revenue agent's negative response to the accountant's question, though literally true at the time it was made, so "misled appellant to such a degree that his consent to the 'search' must be vitiated by the agent's silence concerning the origin of his investigation." *Id.* at 299. Notably, however, *Tweel* reinforced the general principle that an IRS revenue agent does not engage in "fraud, deceit and trickery" merely by failing to warn a taxpayer that the investigation may result in criminal charges. *Id.* (citing *United States v. Prudden*, 424 F.2d 1021, 1032-33 (5th Cir. 1970)). Rather, a finding of bad faith requires that the government must "materially misrepresent the nature of the inquiry" in some way. *Id.*; *cf. Securities and Exch. Comm'n v. ESM Gov't Sec., Inc.*, 645 F.2d 310 (5th Cir. 1981) (explaining that bad faith could only be found if evidence established that SEC affirmatively misled subpoena recipient, recipient was actually misled, and subpoena arose from SEC's improper access to records).

In *Scrushy*, the district court dismissed three perjury counts premised on allegedly false statements made by the defendant during an SEC administrative deposition. 366 F. Supp. 2d at 1137. The district court suppressed the deposition testimony—thereby dooming the three perjury counts—upon finding that the government "departed from the proper administration of justice" in arranging defendant's deposition. *Id.* In particular, the court cited the following factors in support of its conclusion that the SEC's administrative action and the criminal investigation improperly merged: (1) the SEC accountant conducting the deposition tailored his questions based on instructions from the prosecutors, resulting in the accountant refraining from asking certain questions that he would have otherwise asked and asking additional questions that he would not have otherwise asked; (2) the prosecutors asked the accountant to arrange to have the deposition in the Northern District of Alabama so that venue for a false statement prosecution would lie in that district; (3) the SEC accountant was enlisted to assist on the criminal investigation as well as the SEC action; and (4) the SEC accountant did not advise the defendant of, and modified his questions to keep the defendant unaware of, the full scope of the pending criminal investigation. *Id.* at 1137-40. Notably, the court developed its own strict definition of parallel proceedings: "To be parallel, by definition, the separate investigations should be like the side-by-side train tracks that never intersect." *Id.* at 1139.

Particularly due to its reliance on pre-*Kordel* case law, its failure to find that the SEC accountant acted solely to further the criminal investigation, and its suggestion that the "tracks" of parallel proceedings should never "intersect," the precedential value of the *Scrushy* opinion is highly questionable. *See* Jefferson M. Gray, *Potential Ethical Issues in Parallel Proceedings*, 55 UNITED STATES ATTORNEY'S BULLETIN 42, 46 (2007) (discussing multiple problems with the *Scrushy* court's analysis). However, given the complete acquittal of the same defendant in the subsequent trial, the government never appealed the district court's dismissal of the perjury counts.

C. Limitations on defendants' right to discovery upon claims of bad faith

Defendants do not have an automatic right to conduct discovery of the government's decision to conduct simultaneous criminal and civil actions. The leading case is *Dresser Industries*. The court in that case held that, absent a showing of "special circumstances" by the moving party, a district court should generally disallow discovery into the government's motivation for conducting parallel proceedings:

> We recognize that discovery may be available in some subpoena enforcement proceedings where the circumstances indicate that further information is necessary for the courts to discharge their duty. For example, the Supreme Court in [*United States v. LaSalle National Bank*, 437 U.S. 298 (1978)] contemplated some degree of discovery in IRS summons cases to determine the institutional good faith of the IRS in issuing such summonses. However, district courts must be cautious in granting such discovery rights, lest they transform subpoena enforcement proceedings into exhaustive inquisitions into the practices of the regulatory agencies. Discovery should be permitted only where the respondent is able to distinguish himself from the class of the ordinary respondent by citing special circumstances that raise doubts about the agency's good faith. Even then, district courts must limit discovery to the minimum necessary in the interests of justice by requiring specific interrogatories or affidavits rather than full-dress discovery and trial.

Securities and Exch. Comm'n v. Dresser Indus., Inc., 628 F.2d 1368, 1388 (D.C. Cir. 1980) (internal citations, quotation marks, and brackets omitted); *see also Securities and Exch. Comm'n v. Lavin*, 111 F.3d 921, 926 (D.C. Cir. 1997) (concluding that "[b]ecause subpoena enforcement proceedings are

generally summary in nature and must be expedited, discovery is not usually permitted") (citing *Dresser Indus. Inc.*, 628 F.2d at 1388).

D. Avoiding *Tweel* and *Scrushy* situations: the prosecutor as educator

Prosecutors should take steps to ensure that their actions neither compromise the independence of the civil proceedings nor create an appearance of such. The mere appearance of improper influence over the civil proceedings may result in unnecessary court hearings into the government's motivation for conducting the parallel proceedings. On the other hand, prosecutors should not attempt to avoid such problems by taking the extreme step of building a complete "Chinese wall" between the criminal and civil teams that results in neither side communicating with the other. In addition to being contrary to DOJ policy, such a practice prevents prosecutors and agents from communicating with their civil counterparts about the dangers that arise when civil personnel take steps that appear intended to further the federal criminal investigation. The better practice is to be proactive, using education and communication to obviate the risk that any activity by criminal or civil personnel will create the appearance that the criminal and civil proceedings are being improperly conducted.

At the earliest possible time, prosecutors should ensure that the federal criminal investigators are aware of the dangers of casual consultation with civil personnel, particularly the potential dangers associated with making any statement that might be construed as a request that a civil counterpart engage in conduct beyond what they would have otherwise performed. Agents should remember that the concern extends to any activity, including the initiation of interviews, requests for records, and physical examination of facilities. Prosecutors should strongly consider directing criminal investigators to both (1) affirmatively advise their civil counterparts—preferably in writing—that they should do no more or less investigation than they otherwise would perform under the circumstances; and (2) fully document in a case report the transmission of that advice to their civil counterparts, including a summary of any relevant verbal conversations. When the parallel civil counterpart is the EPA, prosecutors should consult and enlist the assistance of a local EPA Regional Criminal Enforcement Counsel to ensure that the criminal investigators know the rules and have discussed those rules with their parallel civil counterparts. Notably, the EPA Policy specifically requires that, at the onset of parallel proceedings, EPA's criminal and civil counterparts establish a Parallel Proceedings Memorandum that sets forth guidelines for how those particular parallel proceedings will be conducted. That memorandum must be distributed to every member of the respective civil and criminal teams and should include specific directions that are designed to assure that the proceedings are conducted properly and in a manner that prevents any appearance of bad faith by the government.

Reducing these concerns to writing will help deter defense claims that civil inspectors are acting intentionally on behalf of prosecutors. Parallel environmental crimes investigations are vulnerable to such claims because a violator's degree of culpability may be relevant in determining an appropriate civil penalty. *See, e.g.*, TSCA, 15 U.S.C. § 2615(a)(2)(B) (2012); Clean Water Act, 33 U.S.C. § 1319(d), (g)(3) (2012); Clean Air Act, 42 U.S.C. § 7413(e) (2012); and EPCRA, 42 U.S.C. § 11045(b)(1)(C) (2012). As a result, civil personnel may aggressively pursue evidence of wilfulness for their own purposes, thereby giving defendants the incorrect impression that the civil personnel are acting as agents of the criminal team. A written memorandum of understanding will be useful in blunting an unfounded defense claim of bad faith.

Prosecutors should directly communicate these same concerns to attorneys representing their civil counterparts, including the civil attorneys for other DOJ litigating components. Even when not dealing with other ENRD civil litigating components, prosecutors can transmit a copy of ENRD

Directive 2008-02 and ask their civil counterparts to adhere to its particular guidelines. Of course, prosecutors should document these communications and ask their civil counterparts to verify that the guidelines have been transmitted to relevant civil personnel. Prosecutors should welcome the opportunity to reiterate these concerns during any coordination meetings with civil counterparts.

Prosecutors should also carefully consider the risks of including personnel who are involved in the civil matter as part of the prosecution team (as opposed to having such personnel merely serve as witnesses). It may be desirable at times to have such personnel serve in a dual role (for example, an EPA employee who is a recognized national expert in the pollution control technology at issue in the case), but having personnel serve in dual roles may create an appearance that the civil proceeding is being directed by the prosecutors. Those concerns become particularly acute when, as part of the prosecution team, such personnel are exposed to grand jury information that has not been otherwise made available to the remaining participants of the civil proceeding. Further, due to the need for continuing civil inspection and oversight, such personnel may have ongoing contact with a target of the criminal investigation (and access to facilities where the target has an expectation of privacy under the Fourth Amendment) based on their role as members of the civil investigation team. Unless absolutely necessary, the preferred course is to not have civil personnel serve in a dual role. When it does become necessary, a written protocol should be developed to ensure the independence of the criminal and civil proceedings.

Finally, prosecutors should liberally consult with ECS for guidance when confronted with unusual or particularly problematic situations.

V. Appropriate information sharing and coordination

A. Information sharing between counterparts

As *Kordel* and *Dresser Industries* make clear, no constitutional, statutory, or ethical barrier exists that prevents civil counterparts from sharing information with the criminal prosecution team. Thus, in the absence of a protective order or strategic factors that make such a request inappropriate, prosecutors should request that their civil counterparts provide them with the relevant information in their possession. Directive 2008-02 authorizes such a disclosure when the prosecutor's civil counterpart is another ENRD litigating component. *See* Directive 2008-02, at § III.4 (except when certain limitations apply, "any information obtained as a result of legitimate civil and administrative discovery may be freely shared with criminal enforcement attorneys"); 2012 Policy, at 4 ("Civil trial counsel should apprise prosecutors of discovery obtained in civil, regulatory, and administrative actions that could be material to criminal investigations"). As appropriate, grand jury or trial subpoenas may be used to compel the production of records from non-governmental parallel parties who are reluctant to provide their information to the government.

Obtaining information from independent agencies such as the NTSB and the CSB may pose additional difficulties. Given their neutral role and public safety mission, these independent agencies may be particularly sensitive to being perceived as conducting investigative activity for the purpose of assisting a separate law enforcement investigation (criminal or civil). Therefore, prosecutors should consult closely with officials and attorneys from these agencies to ensure that DOJ obtains access to their information in a way that does not cast doubt on their neutrality.

The disclosure of information from the criminal prosecution team to a civil counterpart is more complicated. First, the disclosure of information possessed by the prosecution team may be limited by Federal Rule of Criminal Procedure 6(e). When Rule 6(e) does not apply, and in the absence of a protective order or other prohibition, prosecutors are free to disclose information within their possession

to their civil counterparts, provided that doing so comports with applicable policies and makes strategic sense. Prosecutors may also have several information-gathering options that do not implicate Rule 6(e), including the use of administrative subpoenas to gather records, voluntary witness interviews, and sworn statements in lieu of grand jury testimony. Records that are seized pursuant to a search warrant and the fruits of undercover activity also generally fall outside of Rule 6(e)'s secrecy requirements.

Significantly, however, Directive 2008-02 takes a conservative approach by generally prohibiting the sharing of any information from the criminal investigation after the initiation of a grand jury investigation:

> Except as otherwise provided in this Policy, after a grand jury has begun to conduct an investigation, ECS attorneys should not share with civil attorneys information obtained from the criminal investigation unless the information is part of the pre-grand jury record and the fact that it is part of the pre-grand jury record is documented, or there has been court authorization to do so. This requirement exceeds the legal requirements imposed by Rule 6(e) and is established by [ENRD] as a matter of policy and to avoid unnecessary litigation.

Directive 2008-02, at § IV(E). Disclosure on a case-by-case basis may be made with supervisory approval when "warranted with respect to a particular piece of non-grand jury information." *Id.*

The decision to seek a court order authorizing disclosure of information within the limitations of Rule 6(e) is highly case-specific and must be made carefully and in compliance with all pertinent policies issued by DOJ and any involved USAO. The 2012 Policy encourages prosecutors to consider seeking such orders as necessary to assist DOJ civil litigating components:

> Where evidence is obtained by means of a grand jury, prosecutors should consider seeking an order under Federal Rule of Criminal Procedure 6(e) at the earliest appropriate time to permit civil, regulatory or administrative counterparts access to material, taking into account the needs of the civil, regulatory, administrative, and criminal matters, including relevant statutes of limitations, and the applicable standards governing such an order.

2012 Policy at 3.

Of relevance to the parallel proceedings context, disclosure of material subject to Rule 6(e) may be made "automatically" under two conditions. First, under Rule 6(e)(3)(A)(iii), grand jury material may be disclosed to any DOJ attorney for use in connection with civil forfeiture proceedings under federal law. *See* FED. R. CRIM. P. 6(e); *see also* 18 U.S.C. § 3322(a) (2012). Second, under Rule 6(e)(3)(A)(ii), prosecutors may disclose grand jury material to other government personnel (including state, tribal, and foreign government personnel) when "necessary to assist in performing [the prosecutor's] duty to enforce federal criminal law." FED. R. CRIM. P. 6(e). Given the possibility of creating the appearance of an improper disclosure, disclosure of grand jury material to civil counterparts under Rule 6(e)(3)(A)(ii) should be done sparingly and only after consultation with DOJ and/or USAO management.

For most parallel proceedings, disclosure of matters that arise before the grand jury occurs may be made in accordance with a court order issued pursuant to Rule 6(e)(3)(E)(i) that provides: "The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand jury matter . . . preliminary to or in connection with a judicial proceeding." Such orders are not issued lightly given the significant public interests in maintaining grand jury secrecy:

> The courts long have recognized several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appear before the grand jury would be less likely to testify fully and frankly, as they would be open to both retribution and inducements. Second, there also would be the risk that those about to be indicted would flee, or would try to influence grand jurors to vote against indictment. Finally, and perhaps most fundamentally, by preserving the secrecy of the proceedings, we assure that persons who are accused, but exonerated, by the grand jury will not be held up to public shame or ridicule.

In the Matter of Grand Jury Proceedings, Special Sept., 1986, 942 F.2d 1195, 1198 (7th Cir. 1991) (citing *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 217-19 (1979); and *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-82 (1958)) (internal citations omitted).

In deciding whether to issue an order authorizing disclosure, courts balance the secrecy interests against the need to avoid a possible injustice in another judicial proceeding:

> [T]o overcome these [secrecy] interests, the standard for determining when the traditional secrecy of the grand jury may be broken is deliberately stringent: parties seeking disclosure of grand jury transcripts must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed. Put simply, the secrecy of the grand jury proceeding will not be broken except where the party seeking disclosure can show a "compelling necessity" or a "particularized need."

Id. at 1198 (citing *Douglas Oil Co.*, 441 U.S. at 222; and *Matter of Grand Jury Proceedings, Miller Brewing Co.*, 687 F.2d 1079, 1088 (7th Cir. 1982)) (internal citations omitted).

Whether the need for disclosure outweighs the competing societal interests in maintaining grand jury secrecy depends on how strongly implicated the interests in grand jury secrecy are in a particular case. Consequently, when the interests in grand jury secrecy are diminished, the concomitant demonstration of "compelling necessity" or "particularized need" is likewise lessened. *See Douglas Oil Co.*, 441 U.S. at 223 ("It is equally clear that as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification"); *see also United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940) ("[A]fter the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it.").

In the environmental crimes context, grand jury evidence of an ongoing serious risk to public safety or the environment may satisfy the "particularized need" showing required by Rule 6(e), depending on the strength of the competing secrecy interests at issue in the case.

B. Case coordination

The 2012 Policy encourages broad coordination and information-sharing between criminal and civil or administrative parallel counterparts:

> Where parallel proceedings are conducted effectively, the government is able to make more efficient use of its investigative and attorney resources. If the government does not

> consider and properly manage potential parallel matters, it may not be able to realize all of the remedies available to the United States. For these reasons, it is important that criminal, civil, and agency attorneys coordinate in a timely fashion, discuss common issues that may impact each matter, and proceed in a manner that allows information to be shared to the fullest extent appropriate to the case and permissible by law.

2012 Policy at 2; *see also id.* at 3 (directing that parallel proceedings policies developed by all DOJ litigating components should "at a minimum" direct DOJ attorneys to consider "investigative strategies that maximize the government's ability to share information among criminal, civil, and agency administrative teams to the fullest extent appropriate to the case and permissible by law"); Directive 2008-02, § IV(D) (same). Directive 2008-02 also encourages joint coordination between criminal and civil counterparts:

> When it appears that a parallel proceeding may be appropriate, civil and criminal attorneys should exchange information and evidence received from agencies as early as possible in the process, conduct joint investigations where appropriate, and consult together on an ongoing basis, subject to legal and ethical constraints, including those discussed in this Policy.

Directive 2008-02, at III.2.

As discussed above, however, prosecutors must be careful not to create even the appearance that the civil proceedings are being conducted solely to benefit the criminal case. Under all circumstances, prosecutors and their civil counterparts must be sure not to violate ethical limitations on using the parallel proceeding as leverage to induce a defendant's agreement to terms.

> Although the availability of civil relief may be considered in making criminal charging decisions, *see* United States Attorneys Manual § 9-27.250, criminal prosecution shall not be used as a threat to obtain civil settlement. Conversely, civil enforcement shall not be used as a threat to resolve a criminal matter.

Directive 2008-02, § III.9; *see also id.* § III.10 ("[O]nce a decision has been made that criminal sanctions are appropriate, [ENRD] attorneys shall not permit a defendant to trade civil relief in exchange for a reduction in criminal penalties").

VI. Strategic decisions in parallel proceedings

A. Emergency response situations

Parallel proceedings often arise immediately after the occurrence of an incident that creates an imminent and substantial danger to human health or the environment. Such incidents often occur as a result of activity that constitutes an environmental crime (for example, the abandonment of drums containing hazardous waste in a populated area, unlawful asbestos removal activity causing a release of asbestos in a school, or the intentional discharge of waste oil into surface waters). Civil emergency response personnel from federal, state, and local governments with jurisdiction over the incident often converge at the same time in an effort to abate the danger as soon as possible. In addition to conducting interviews of persons with knowledge, such personnel may physically move, sample, or alter the evidence in an effort to mitigate the risk and/or facilitate rapid cleanup.

Eliminating significant and imminent threats to human health and the environment should always take priority over the desire to conduct a thorough forensic examination of the crime scene. However, even when facing such circumstances, prosecutors and criminal law enforcement personnel can take steps

to minimize any negative impact that emergency response actions will have on their ability to conduct a thorough criminal investigation. First, the criminal team should take steps to learn which agencies and individuals have the primary responsibility for conducting emergency response activity. Second, prosecutors must make sure that they have appropriate legal authority to conduct criminal investigation activities at the affected site. While some emergency response activity is conducted in public places or other areas where there is obviously no protected Fourth Amendment interest, emergency response activities are often conducted in private facilities by consent. The consent obtained by emergency responders is almost always limited to civil sampling and site assessment activities, so the prosecution team may need to seek a search warrant to obtain access to the site. Third, the case agent should communicate with the individual in charge of the response (often an EPA OSC) and determine when response activities will occur that may affect criminal evidence collection options (such as when barrels of suspect hazardous waste are going to be removed from the site). The exact nature of the matters to be discussed will vary on a case-by-case basis, but some topics may include the following:

Recording the incident scene: At a public site, after site security is established, emergency responders, consistent with site safety requirements, may allow criminal investigators to photograph or videotape the site both prior to and during response activities. To the extent that such activities are prohibited by safety requirements (for example, disallowing flash photography due to the presence of volatile organic compounds in the ambient air), the agents should document why such evidence was not obtained.

Sampling activity: The criminal team should ask the emergency responders whether they intend to sample chemicals or waste involved in the incident and, if so, the manner in which the samples will be obtained. Gathering this information is necessary because emergency responders may employ sampling methods designed to assess the risks posed by removal of the waste, but which vary from the sampling protocols required for the sample analysis results to support a criminal action. For example, in preparation for removal of suspect hazardous waste during a response action, an OSC may only generate a "composite" sample from several drums of suspected hazardous waste because his primary concern is grouping the waste into broad categories for proper disposal, rather than proving a regulatory violation. Because the composite sample does not represent the chemical nature of any particular drum that the respective aliquots were drawn from and because the separate aliquots may have reacted with each other in the vessel containing the composite sample, the prosecutor's ability to rely on the composite sample to establish (in a RCRA prosecution, for example) that the contents of any particular drum contained hazardous waste is diminished. If emergency responders are not planning to take samples in accordance with formal sampling methods, the criminal team should request that they do so (and provide such samples to the criminal team, which will arrange for their analysis) or allow technical specialists assisting the criminal team to take such samples. In addition, it is important to coordinate with an OSC to learn when hazardous materials are accessible for sampling. For safety reasons, drums must be sampled when they are being staged for removal. If the emergency responders are EPA personnel, the government can often utilize EPA contractor personnel to assist in taking samples.

Chain-of-custody and access to evidence: When physical evidence is going to be maintained by government agency personnel other than members of the criminal investigation team, prosecutors should obtain the possessing agency's agreement to follow strict chain-of-custody protocols and permit the criminal team to inspect such evidence upon request. Prosecutors should also ask for advance warning of any destructive testing of physical evidence so that any concerns can be discussed prior to such testing.

Disclosure of interviews and other information: The criminal team should ask that emergency responders transmit to them the results of any witness interviews conducted in relation to the incident. The first government personnel on the scene (for example, police officers or fire department personnel) often gather identifying data and brief statements of persons who may have relevant knowledge. The criminal case agents should be sure to communicate with responders as necessary to make sure that they have obtained all relevant information in the responders' possession.

Preservation of records: The criminal team should sensitize emergency responders to the possibility that they may become witnesses in a federal criminal case and, therefore, the need for them to generate and maintain thorough and accurate reports of their observations. In addition, all responding personnel, including law enforcement officers, should be directed to preserve any handwritten notes that are generated with respect to the incident.

B. Deciding whether to delay initiation of the civil case

Prosecutors should continue to monitor the progress of parallel civil investigations. If the civil investigation is proceeding ahead of the criminal investigation, a prosecutor should consider the propriety of asking his civil counterpart to defer the filing of a civil action pending completion of the criminal investigation and prosecution. Under Directive 2008-02, the default position is to delay civil proceedings pending resolution of the criminal proceedings "because of Speedy Trial Act considerations, the more substantial deterrent and punitive effect of criminal sanctions, and because results in criminal cases can be used as collateral estoppel in favor of the government in subsequent civil cases on the same issues." Directive 2008-02, § IV(D), n.3. Additional factors include the following:

- The possibility that imposition of civil penalties might undermine a prosecution or the severity of a subsequent criminal sentence.
- The preservation of the secrecy of a criminal investigation, including completion of covert sampling.
- The prevention of a defendant's premature discovery of evidence in the criminal case, through a defendant's exploitation of the civil discovery process to obtain evidence regarding the criminal proceeding.
- The avoidance of unnecessary litigation issues, such as unfounded defense claims of misuse of process in the civil or criminal action.
- The avoidance of duplicative interviews of witnesses and subjects.

EPA Policy, at 4. The decision to delay civil proceedings should further be informed by the anticipated problems (discussed below) that may arise if the cases proceed simultaneously through discovery and trial.

On a case-by-case basis, several factors may weigh in favor of allowing the civil case to be filed prior to conclusion of the criminal case. Those factors include the following:

- The civil violations present a threat to public health or the environment such that injunctive relief should not be delayed.
- The defendant's assets are in danger of dissipation.

- There is an imminent statute of limitations or bankruptcy deadline for the civil claim.
- There is only a marginal relationship between the civil and criminal violations.
- Civil proceedings are in an advanced stage when the potential criminal liability is brought to light.

Directive 2008-02, § IV(D); *see also* EPA Policy, at 5 (same five factors, but listing as an additional factor consideration of whether the civil case is integral to an EPA national priority and whether postponement could substantially and adversely affect implementation of the national effort). Another significant factor weighing against a lengthy delay in the initiation of the civil case is that the civil case evidence may grow stale pending completion of the criminal proceeding. Substantial delays in the criminal investigation or prosecution may cause witnesses to lose memory, unnecessarily delay the pursuit of important injunctive relief, and negatively impact a civil penalty assessment due to a change in the target's financial situation or business activity.

The decision will necessarily turn on the specific facts involved in each particular case and the civil counterpart's receptiveness to delaying the initiation of civil action. Particularly when dealing with civil counterparts not familiar with DOJ policies (for example, state agencies or private parties), such situations present unique opportunities for skilled diplomacy given the respective goals of the criminal and civil parties. Nevertheless, the effort is well worth the time and energy because, once a civil case is filed, courts with jurisdiction over the civil matter may be reluctant to impose stays or protective orders for the benefit of the party that initiated the action.

C. Deciding whether to stay civil proceedings

When a civil action has been filed first, the return of an indictment in a parallel criminal case often results in a stay of the civil proceeding. "[A] court may decide in its discretion to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions when the interests of justice seem to require such action, sometimes at the request of the prosecution, sometimes at the request of the defense." *Dresser Industries*, 628 F.2d at 1375 (internal quotation marks omitted) (citing *Kordel*, 397 U.S. at 12 n.27). Courts make the decision to stay on a case-by-case basis. *Id.* In the parallel proceedings context, several potential factors weigh in favor of a stay:

> Other than where there is specific evidence of agency bad faith or malicious governmental tactics, the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter. The noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case. If delay of the noncriminal proceeding would not seriously injure the public interest, a court may be justified in deferring it.

Id. at 1375-76 (footnote omitted). The potential for discovery abuse is mutual—defendants in the criminal case may be able to obtain information (including Rule 6(e) information) to which the prosecutor's civil counterpart does not even have access, thereby giving those same defendants (or aligned parties) an advantage in the parallel civil proceeding.

Particularly given the substantial likelihood that individual targets of the criminal investigation will invoke their Fifth Amendment privilege against self-incrimination during civil discovery, the defendants in related civil proceedings will, often without government objection, seek a stay of the civil action pending resolution of the criminal case. When they are successful, the decision is essentially made for the prosecution team and the criminal case proceeds to conclusion in the regular manner.

When the civil defendants do not seek a stay, the prosecutor's civil counterpart must decide whether it will seek a stay of the civil proceedings. In making this determination, the prosecutor's civil counterpart generally should consider the same factors that govern the decision of whether to delay initiation of the civil case. *See, e.g.*, EPA Policy, at 4. Prosecutors should communicate to their civil counterparts their concerns about allowing the civil case to proceed ahead of the criminal case, particularly if the civil trial will proceed ahead of the criminal trial.

D. Simultaneous court proceedings

If proceedings are not stayed, the occurrence of simultaneous criminal and civil court proceedings can create substantial strategy problems for prosecutors.

First, the onset of civil discovery may result in important witnesses and criminal investigators having to testify during depositions. A successful attempt by the government to prevent the deposition of special agents with relevant knowledge may impair the ability of the prosecutor's civil counterpart to favorably resolve the civil case. If the agents are produced for deposition, and Rule 6(e) materials have not been disclosed to the civil parties pursuant to court order, prosecutors may need to participate in the civil discovery proceedings to assure that agents do not violate Rule 6(e) when answering deposition questions. These same concerns will arise if special agents are called to testify at court hearings in the related civil proceeding.

Second, for purposes of compliance under Federal Rule of Criminal Procedure 16, *Brady/Giglio* doctrine, and/or the Jencks Act, 18 U.S.C. § 3500, prosecutors may be deemed to be in possession of the information that is generated during the parallel civil case. Especially when the parallel civil counterpart is not represented by a DOJ litigating component, significant problems may be created for prosecutors because they may not be able to directly influence how information is generated and maintained. The criminal team may need to expend significant resources combing through civil files (including electronic communications) to assure compliance with their constitutional and statutory obligations. In addition, personnel who have not been made sensitive to the fact that their email communications may become discoverable in the criminal case may make the unfortunate mistake of memorializing comments that could prove to be embarrassing at trial. Therefore, if cases are going to proceed in parallel, it is imperative that, at the earliest possible time, prosecutors educate their civil counterparts about the prosecutor's discovery obligations and the fact that their files and email messages may become fully discoverable in the criminal case.

Third, allowing the civil case to proceed to resolution ahead of the criminal case presents potential negative consequences. Given the higher burden of proof in criminal cases, an acquittal in the criminal trial does not create collateral estoppel consequences for the parallel civil action. A conviction in a criminal case, however, may allow the prosecutor's parallel counterpart to assert, at least as against the same defendant, collateral estoppel of facts that were necessarily proven in the criminal case. Thus, at least when the defendants are the same, a conviction in the criminal case may eliminate the need for a civil trial. The opposite, however, is not true. If the civil trial proceeds first, success by the prosecutor's parallel counterpart has no affect on the criminal case due to the lower burden of proof that is applicable to civil proceedings. By contrast, a ruling in favor of the defendant in the civil action may lead to

collateral estoppel against the government, even if the prosecutors have more extensive evidence that was not presented during the civil case. *See, e.g.*, *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 171 (1984) (defensive mutual collateral estoppel against the United States allowed). However, the unique importance of criminal proceedings may, in the court's discretion, outweigh the judicial economy concerns that form the underpinnings of the collateral estoppel doctrine. *See Standefer v. United States*, 447 U.S. 10, 24-25 (1980); *United States v. Payne*, 2 F.3d 706, 711-12 (6th Cir. 1993); *United States v. Alexander*, 743 F.2d 472, 476-77 (7th Cir. 1984) (allowing civil-to-criminal collateral estoppel against the government would seriously disrupt the government's ability to enforce regulatory schemes); *United States v. Lasky*, 600 F.2d 765, 768 (9th Cir. 1979); *cf. United States v. Weems*, 49 F.3d 528 (9th Cir. 1995) (prosecution collaterally estopped from trying to prove that defendant knew property was a marijuana grow operation due to findings of an earlier civil forfeiture action); *United States v. Rogers*, 960 F.2d 1501, 1510 (10th Cir. 1992) (determination of issues in defendant's favor in civil fraud action precluded later criminal prosecution of the same issues).

VII. Coordinated resolution of parallel proceedings

The term "coordinated resolution" (or "global settlement") refers to the simultaneous resolution of pending criminal and civil proceedings as part of a single decision-making process. However, due to the potential ethical concerns about using one proceeding to influence the resolution of the other, coordinated resolutions are extremely rare and require high-level approval within DOJ. *See*

Directive 2008-02, III.11 ("[D]ecisions about the initiation, conduct, and conclusion of cases shall be made solely by criminal attorneys and their supervisors with respect to criminal cases, and by civil attorneys and their supervisors with respect to civil cases. . . . [u]nless directed otherwise by the Assistant Attorney General[.]"); *Id.* V ("In general, criminal plea agreements and civil settlements shall be negotiated separately, must separately satisfy the appropriate criminal and civil criteria, and must be embodied in separate documents.")

VIII. Conclusion

Parallel proceedings present prosecutors and their civil counterparts with many challenges and opportunities. Information-sharing and coordination between criminal and civil counterparts that stops short of compromising the independence of the civil investigation can result in greatly enhanced access to information, thereby maximizing the government's ability to protect its interests and pursue the appropriate remedies in a particular case. Prosecutors must communicate effectively with criminal investigators and their civil counterparts to obviate the sometimes unique problems that arise in parallel proceedings affecting environmental crimes cases.❖

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Hydraulic Fracturing: the Growing National Debate

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I. Introduction

Exploration, development, and production of oil and natural gas in the United States are at an all-time high. Advances in technologies such as directional drilling and hydraulic fracturing have made it economically feasible to recover previously inaccessible reserves—reserves that are capable of meeting domestic demand for decades to come. The resulting boom in energy development will undoubtedly help the sagging economy and may decrease United States reliance on foreign oil. Nevertheless, because the effects of hydraulic fracturing have never been fully studied, many fear irreparable damage to human health and the environment. Among the concerns are contamination of drinking water aquifers; harmful discharges into rivers, streams, and publicly-owned treatment works; and increased emissions of toxic air pollutants. This article explores some of these environmental issues and discusses the tools that are available to federal prosecutors to ensure the protection of people and resources.

II. Shale formations across the nation

Extraction from hydrocarbon-rich shale formations is the fastest growing area of onshore domestic energy production. Shale is the source rock for many of the world's most important oil and natural gas deposits. Until recently, oil and natural gas were extracted from "conventional" resources only (that is, accessible deposits that are created when oil and gas migrate out of shale and become trapped in an overlying rock formation such as sandstone). Oil and natural gas that are trapped within shale is "unconventional" because of the difficulty and expense of extraction. Shale, tight sands, and coalbed methane (CBM) are all unconventional sources of oil and gas.

Shale oil and gas development opportunities appear across the contiguous United States. The most active shale gas formations are the Barnett Shale in Texas, the Haynesville/Bossier Shale in Texas and Louisiana, the Antrim Shale in Michigan, the Fayetteville Shale in Arkansas, the New Albany Shale in Indiana, and the Marcellus Shale in New York, Pennsylvania, West Virginia, and Ohio. The largest shale oil formations are the Monterey/Santos Shale in Southern California, the Bakken Shale in Montana and North Dakota, and the Eagle Ford Shale in Texas. Shale exploration and drilling is occurring in areas that have not previously experienced oil and gas production. It is also occurring in close proximity to urban areas and to valuable surface and ground water sources.

III. The hydraulic fracturing process

Extracting oil and natural gas from shale requires a process known as hydraulic fracturing. Hydraulic fracturing, or "fracking," is a drilling process that was first commercially used in 1949. During fracking, fluid is forced at high pressure into the geologic formation containing oil or gas. The fluid fractures the formation, allowing oil and gas to flow to the wellbore (the hole drilled for extraction). Fracking fluid is typically made up of 90 percent water, 9 percent proppant, and 1 percent chemicals. The proppants, usually sand, are granular substances in the fracturing fluid that keep the fissures open when the fluid is withdrawn. The chemicals are a proprietary mix that inhibit the growth of organisms, reduce friction, and increase viscosity. Among the myriad chemicals commonly added to fracking fluid are "demulsifiers, corrosion inhibitors, friction reducers, clay stabilizers, scale inhibitors, biocides, breaker aids, mutual solvents, alcohols, surfactants, anti-foam agents, defoamers, viscosity stabilizers, iron control agents, diverters, emulsifiers, foamers, oxygen scavengers, pH control agents, and buffers." NAT'L PARK SERV., DEP'T OF THE INTERIOR, DEV. OF THE NATURAL GAS RESOURCES IN THE MARCELLUS SHALE 7 (NAT'L PARK SERV. 2009), *available at* http://marcellus.psu.edu/resources/PDFs/marcellusshalereport09. Many of these chemicals, such as benzene, ethylene glycol, naphthalene, and formaldehyde, are known to be toxic.

Fracking is being used in conjunction with "horizontal" or "directional" drilling, a means of extending the wellbore laterally through the part of the rock formation containing the oil or gas. Drillers go down to the level of the shale, turn 90 degrees, and continue drilling horizontally for up to a mile. Drillers can actually drill horizontally in multiple directions, creating several wells from one location. In a report by the Department of Energy, research showed that "[s]ix to eight horizontal wells drilled from only one well pad can access the same reservoir volume as sixteen vertical wells." OFFICE OF FOSSIL ENERGY, DEP'T OF ENERGY, MODERN SHALE GAS DEVELOPMENT IN THE UNITED STATES: A PRIMER ES-3 (Office of Fossil Energy, Apr. 2009), *available at* http://fracfocus.org/sites/default/files/publications/shale_ gas_primer_2009.pdf.

Fracking a horizontal well requires on average five million gallons of fluid. "Flowback" is the fracking fluid that returns to the surface, along with produced water or brine, after the fracking process is completed. Flowback may contain naturally occurring toxic substances such as mercury, lead, arsenic, and naturally occurring radioactive material released by the fracking process. Approximately 15 to 40 percent of the injected fracking fluid returns to the surface during the first days to weeks of recovery. The remaining 60 to 85 percent, along with the chemicals in it, remains permanently underground.

According to the Interstate Oil and Gas Compact Commission, hydraulic fracturing is currently used in 90 percent of all oil and natural gas wells drilled in the United States. Victor Carrillo, Chairman, Railroad Commission of Texas, Statement at the Hearing on H.R. 6 before the House Committee on Energy and Commerce (2005). Fracking is by no means limited to unconventional oil and gas wells. Conventional oil and gas wells are also fracked to stimulate further production. Wells are now being fracked multiple times over the course of several years.

IV. Environmental concerns

Countless recent news articles, Web sites, and documentaries (including a film called *Gasland* by Josh Fox), have chronicled the environmental concerns related to hydraulic fracturing. These stories describe private wells contaminated with gas, homeowners able to ignite drinking water from their taps, methane-based explosions of homes and wells, wastewater containing radioactivity above drinking-water standards being discharged into rivers, and increased incidences of earthquakes in areas where hydraulic

fracturing is occurring. The question posed is whether these incidents are linked in any way to the hydraulic fracturing process.

The most often-expressed concern about hydraulic fracturing is that the process can contaminate drinking water supplies. Most shale formations are thousands of feet underground, whereas most drinking water aquifers are only a few hundred feet deep. Many believe that the thousands of feet of rock between the two make contamination of drinking water by fracking impossible. Assuming, however, that induced fractures from treatments far below the water table do not create geological pathways to usable quality aquifers, human error is always possible. It is up to the drilling companies to ensure proper surface casing design and cementing to isolate and protect aquifers from down-hole pathways of contamination. Operators must monitor casing pressures throughout the life of a well, which can be 20 to 30 years, to identify and correct any down-hole leaks that might establish a pathway. And, of course, not all fracking is occurring thousands of feet beneath water aquifers. In CBM basins, the zones being fracked are close to or within the aquifers. In Wyoming's Wind River Formation (the subject of the Pavillion study below), fracking has occurred as little as 200 feet below drinking water wells.

Other environmental concerns surround the disposal of the millions of gallons of contaminated wastewater that are produced as a result of oil and gas production. The flowback, or produced water that comes back up from the well, may be re-used for additional fracking, deposited into an underground injection well, land applied, treated onsite and discharged to a surface water, or trucked to a publicly-owned treatment work (POTW) or private treatment facility. In the Pennsylvania portion of the Marcellus Shale, for example, 3,012 wells were drilled in 2011 alone. At an average of 5 million gallons of water per well, more than 15 billion gallons of water were used for fracking in Pennsylvania in 2011. Because POTWs in Pennsylvania cannot accept it, approximately 600 million gallons of flowback were treated and disposed of in private or out-of-state treatment facilities. The massive volumes of wastewater and the limited disposal options cause concern that illegal discharges may be made to avoid the expense of the available legal options.

Concerns over the air emissions that are associated with drilling and pipeline compression operations also exist. Emissions may include nitrogen oxides, volatile organic compounds, sulfur dioxide, particulate matter, and methane. *See id.* at ES-5. Nitrogen oxides can combine with volatile organic compounds to create ozone, the main ingredient in smog and a significant health risk. More local environmental concerns include the potential dewatering of streams to supply the millions of gallons needed for fracking fluid, construction-related storm water and erosion control, and traffic, dust, noise, and damaged roads from the thousands of trucks needed to haul in water and supplies and to haul out wastes and product.

V. EPA studies

Prior to 1997, EPA considered hydraulic fracturing to be a well-stimulation technique associated with production and therefore not subject to Underground Injection Control (UIC) under the Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f–300j. In 1997, the Eleventh Circuit disagreed with the EPA and ruled that hydraulic fracturing of CBM wells was indeed subject to the SDWA and UIC regulations under Alabama's UIC program. *See Legal Envtl. Assistance Found., Inc. v. Envtl. Prot. Agency*, 118 F.3d 1467, 1474, 1478 (11th Cir. 1997). After this case was decided, the EPA began a study to determine whether the SDWA should apply to hydraulic fracturing.

The EPA designed the study with three potential phases. The first phase was "a fact-finding effort based primarily on existing literature to identify and assess the potential threat to USDWs [underground sources of drinking water] posed by the injection of hydraulic fluids into CBM wells." ENVTL. PROT. AGENCY, EVALUATION OF IMPACTS TO UNDERGROUND SOURCES OF DRINKING WATER BY HYDRAULIC FRACTURING OF COALBED METHANE RESERVOIRS STUDY, ES-1 (Envtl. Prot. Agency June 2004), *available at* http://fracfocus.org/sites/default/files/publications/evaluation_of_impacts_to_underground_sources_of_drinking_water_by_hydraulic_fracturing_of_coalbed_methane_reservoirs.pdf. EPA focused the study on CBM wells only because "(1) CBM wells tend to be shallower and closer to USDWs than conventional oil and gas production wells; (2) the EPA ha[d] not heard concerns from citizens regarding any other type of hydraulic fracturing; and (3) the Eleventh Circuit litigation concerned hydraulic fracturing in connection with CBM production." *Id.* at ES-7. No examination of the impacts of above-ground operations was to be conducted, nor was the impact of drilling in other types of geologic formations, such as shale, to be considered. EPA stated that it would not continue into the second phase of the study if it determined that "no hazardous constituents were used in fracturing fluids, hydraulic fracturing did not increase the hydraulic connection between previously isolated formations, *and* reported incidents of water quality degradation could be attributed to other, more plausible causes." *Id.* at 2-2 (emphasis in original).

The EPA issued its final report in June 2004. The report alluded to steps in the drilling process other than fracking that could contaminate underground drinking water. It stated that "[t]hese potential causes include surface discharge of fracturing and production fluids, poorly sealed or poorly installed production wells, and improperly abandoned production wells." *Id.* at 6-1, 6-2. Nevertheless, the EPA found "no conclusive evidence" that injection or underground movement of hydraulic fracturing fluids caused water quality degradation. *Id.* at ES-13. Moreover, the EPA surmised that the removal of large quantities of groundwater after fracking, "combined with the mitigating effects of dilution and dispersion, adsorption, and potentially biodegradation, minimize the possibility that chemicals included in the fracturing fluids would adversely affect USDWs." *Id.* at ES-17. Thus, the EPA concluded that "the injection of hydraulic fracturing fluids into CBM wells poses little or no threat to USDWs and does not justify additional studies at this time." *Id.* at ES-1.

The 2004 EPA study was highly criticized both within and outside of the EPA. Whistleblower Weston Wilson, an environmental engineer for the EPA, proclaimed the report scientifically unsound and questioned the impartiality of the expert panel that reviewed its finding. Weston argued that five of the seven members of the peer review panel that supported the EPA's study appeared to have conflicts of interest or potential conflicts of interest and "may benefit from EPA's decision not to conduct further investigation or impose regulatory conditions." Letter from Weston Wilson to Senator Wayne Allard, et al., at 13 (2004), *available at* http://latimes.image2.trb.com/lanews/media/acrobat/2004-10/14647025.pdf. Among the panelists were a petroleum engineer with BP Amoco, a technical advisor for Halliburton, an engineer with the Gas Technology Institute, and two former BP Amoco and Mobil Exploration employees. *See id.* at 13-14. Environmental groups specifically challenged the EPA's conclusion and called for further risk assessments. *See, e.g.*, LISA SUMI, OUR DRINKING WATER AT RISK: WHAT EPA AND THE OIL AND GAS INDUSTRY DON'T WANT US TO KNOW ABOUT HYDRAULIC FRACTURING (Bruce Baizel et al., Apr. 2005).

Despite the limited scope of the 2004 EPA study, it is often misconstrued as having found that hydraulic fracturing is environmentally harmless. The study's conclusion made it possible for Congress to exclude hydraulic fracturing from the SDWA in the Energy Policy Act of 2005, 42 U.S.C. §§ 15801–16524. The subsequent spike in drilling activity and the voicing of environmental concerns led Congress to direct that a new study be conducted. Accordingly, in 2010, the EPA announced that it

would undertake a new, more comprehensive study of hydraulic fracturing. The study plan was released on November 3, 2011. The research is to examine the five stages of water use in hydraulic fracturing: (1) water acquisition, (2) the mixing of chemicals, (3) injection at the well, (4) flowback and produced water, (5) and treatment and disposal of wastewater. The EPA plans to release two reports. The first, at the end of 2012, will summarize existing data, intermediate progress regarding retrospective case studies, scenarios modeling, and laboratory studies. The second, in 2014, will provide additional scientific results on these topics and report on prospective case studies and toxicological analysis. *See* ENVTL. PROT. AGENCY, PLAN TO STUDY THE POTENTIAL IMPACTS OF HYDRAULIC FRACTURING ON DRINKING WATER RESOURCES (Envtl. Prot. Agency, Nov. 2011), *available at* http://www.epa.gov/hfstudy/HF_Study__Plan_110211_FINAL_508.pdf.

Between the release of the 2004 EPA study and the announcement of the 2010 study, the EPA initiated a groundwater investigation near Pavillion, Wyoming. The Pavillion gas field, a large, complex, structural, asymmetric, deep sedimentary basin covering much of central Wyoming, is one of several fields within the Wind River Basin. The field contains 169 vertical production wells. The EPA investigation grew out of complaints of taste and odor problems in well water subsequent to fracking at nearby gas production wells. According to the draft report that was issued on December 8, 2011, analyses of samples taken from deep monitoring wells in the aquifer revealed benzene, methane, and synthetic chemicals that were consistent with gas production and hydraulic fracturing fluids. Thus, the EPA found that hydraulic fracturing was likely impacting groundwater and that gas production activities have likely enhanced migration of gas within groundwater at depths used for domestic water supply. *See* ENVTL. PROT. AGENCY, INVESTIGATION OF GROUND WATER CONTAMINATION NEAR PAVILLION, WYOMING (Envtl. Prot. Agency Dec. 8, 2011), *available at* http://www.epa.gov/region8/superfund/wy/pavillion/EPA_ReportOnPavillion_Dec-8-2011.pdf. The draft study is careful to state that the causal link to hydraulic fracturing has not been conclusively demonstrated and that the analysis is limited to the particular geologic conditions in the Pavillion gas field and should not be applied to fracturing in other geologic settings.

Critics of the study attacked the EPA's methodology and suggested that the EPA either drilled its monitoring wells in the wrong spot or caused the contamination when drilling. In a news release on March 8, 2012, the EPA announced that the United States Geological Survey will be conducting further sampling and that the peer review process of the draft Pavillion study would be delayed until those additional results were publicly available. ENVTL. PROT. AGENCY, STATEMENT ON PAVILLION, WYOMING GROUNDWATER INVESTIGATION (Mar. 2012), *available at* http://yosemite.epa.gov/opa/admpress.nsf/0/17640D4 4F5BE4CEF852579BB006432DE.

VI. Oil and gas industry exemptions

The oil and gas industry is highly regulated at federal and state levels. Wells must be permitted, including design, location, spacing, operation, and abandonment. Other areas of regulation include water management, waste management, air emissions, underground injection, wildlife impacts, surface disturbance, and worker health and safety. Most of this regulation is carried out by the state in which the oil and gas is produced. Yet, while highly regulated, the oil and gas industry is also highly influential. Consequently, Congress has specifically exempted select oil and gas production activities from several federal environmental laws.

The Federal Water Pollution Control Act, or Clean Water Act (CWA), 33 U.S.C. §§ 1251–1387, enacted in 1972, established the structure for regulating discharges of pollutants from point sources into waters of the United States. In 1987 Congress amended the CWA to require a permitting program for

stormwater runoff, but exempted uncontaminated stormwater runoff from oil and gas exploration, production, processing or treatment operations, and transmission facilities. *See id.* § 1342(l)(2) (2012). The EPA nevertheless considered the program to apply to oil and gas construction sites and, beginning in 1992, required stormwater permits for oil and gas construction sites of five acres or more. In the Energy Policy Act of 2005, Congress extended the stormwater runoff permit exemption to all oil and gas construction facilities.

The Safe Drinking Water Act of 1974 (SDWA), 42 U.S.C. §§ 300–300j, requires permits for the underground injection of hazardous substances so as not to endanger America's drinking water supplies. The Energy Policy Act of 2005 exempted the underground injection of fluids or propping agents that are used in hydraulic fracturing operations related to oil and gas production activities from the SDWA. *See id.* § 300h(d)(1) (2012). The exemption for fracking operations does not extend to oil and gas production activities when diesel fuels are used in fracturing fluids. Notably, in December 2003, the EPA entered into a Memorandum of Agreement (MOA) with the three largest hydraulic fracturing companies—Halliburton, BJ Services, and Schlumberger—to eliminate the use of diesel fuel during CBM fracking. These three companies were responsible for 95 percent of all fracking projects in the United States. Several years later, a Congressional investigation found that despite being parties to the MOA, Halliburton, BJ Services, and other oil and gas service companies injected over 32 million gallons of diesel fuel or fracking fluid containing diesel fuel into wells in 19 states between 2005 and 2009. None of the companies sought required SDWA UIC permits for the diesel fuel use. *See* Letter from Rep. Henry A. Waxman, et al., to EPA Administrator Lisa Jackson at 5 (Jan. 31, 2011), *available at* http://democrats.energycommerce.house.gov/sites/default/files/documents/Jackson.EPADieselFracking.2011.1.31.pdf.

The Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901–700, created a "cradle to grave" hazardous waste management program. In the Solid Waste Disposal Act of 1980, 42 U.S.C. §§ 6901–6992k, Congress exempted from the RCRA hazardous waste program wastes that are associated with exploration, development, or production of crude oil and natural gas, pending demonstration by the EPA that they were a danger to human health and the environment. *See id.* § 6921(b)(2)(A) (2012). In 1988, the EPA determined that the regulation of "drilling fluids, produced waters, and other [oil and gas field] wastes associated with the exploration, development, or production of crude oil [and] natural gas" was unwarranted. 40 C.F.R. § 261.4(b)(5) (2012). Accordingly, it is up to the states to regulate these wastes.

The Clean Air Act of 1970 (CAA), 42 U.S.C. §§ 7401–7671q, was passed to protect and enhance the quality of the nation's air resources. The CAA establishes limits called the National Emission Standards for Hazardous Air Pollutants (NESHAPs) for major sources of pollutants. NESHAPs must be met by installing maximum achievable control technology for each source. Smaller sources of pollutants under common control and located in close proximity to one another may be considered as a single source of emissions. *See id.* § 7412(a)(1) (2012). Such aggregation protects the public from sources that on their own are relatively harmless but collectively release large quantities of hazardous pollutants. Congress, however, directed the EPA not to aggregate emissions from oil or gas exploration or production wells or compressor stations with other similar units for any purpose under § 112 of the Act. *See id.* § 7412(n)(4)(A). The results of this exemption can be staggering. For example, in Garfield County, Colorado, "more than 30 tons of benzene are released into the air from 460 oil and gas wells. This is nearly 20 times more benzene than is released by a giant industrial oil refinery in Denver, yet none of the toxic emissions from these oil and gas wells are subject to NESHAPs." AMY MALL, ET AL., DRILLING DOWN: PROTECTING WESTERN COMMUNITIES FROM THE HEALTH AND ENVIRONMENTAL EFFECTS OF OIL AND GAS PRODUCTION 10 (Natural Resources Def. Council Oct. 2007), *available at* http://www.nrdc.org/land /use/down/down.pdf.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601–9675, allows the EPA to respond to releases of hazardous substances or of pollutants or contaminants that threaten human health or the environment, and makes liable those responsible for the release. Under CERCLA, the term "hazardous substance" excludes "petroleum, including crude oil or any fraction thereof . . . and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel . . . ." *Id.* § 9601(14) (2012). Accordingly, even though the list of hazardous substances includes benzene, toluene, ethylbenzene, and xylene, these substances are excluded when they exist as constituents of petroleum or natural gas. The definition of "pollutant or contaminant" similarly excludes petroleum and natural gas. *See id.* § 9601(33). Finally, response costs from a "federally permitted release" are not recoverable under CERCLA. *See id.* § 9607(j). "Federally permitted release" includes hydraulic fracturing activities under both federal law and state law. *See id.* § 9601(10)(G) and (I). In short, it is highly unlikely that typical fracking operations could result in a CERCLA violation.

VII. Criminal enforcement

Despite the exclusions listed above, oil and gas extraction and production activities are subject to criminal enforcement. Unlawful discharges from such operations into surface waters or POTWs are prohibited under the CWA. Spills of pollutants from containment ponds and impoundments and contaminated stormwater runoff to waters of the United States also violate the CWA. Disposal of extraction and production wastes into underground injection wells is regulated under the SDWA. Although Exploration and Production (E&P) wastes are exempted from regulation under RCRA, wastes that are neither from E&P activities nor "uniquely associated" with those activities are regulated under RCRA if they are listed as hazardous wastes or exhibit hazardous characteristics. Non-exempt RCRA wastes include such things as unused fracturing fluids or acids, spent solvents, spilled chemicals, and used equipment lubricating oils and hydraulic fluids. 53 Fed. Reg. 25454 (July 6, 1988). Moreover, the CAA limits air emissions from engines, gas processing equipment, and other sources that are associated with drilling and production. *See, e.g.*, 40 C.F.R. §§ 63.760–63.779 (2012); 40 C.F.R. §§ 63.6580–63.6675 (2012).

Recent examples of prosecutions involving the oil and gas industry include *United States v. John Tuma*, NO. 5:11cr31 (W.D. La. Mar. 22, 2012). Tuma operated Arkla Disposal Services, Inc., a treatment facility in Shreveport, Louisiana, that received off-site wastewater from industrial processes and from oilfield E&P facilities, including flowback and produced water from fracking treatments. In order to avoid treatment costs and to make space for incoming liquid wastes, Tuma discharged untreated wastewater directly into the Red River without a permit, and into the city of Shreveport sewer system in violation of its permit. Tuma was convicted by a jury of conspiracy to violate the CWA and to obstruct an EPA inspection, as well three substantive CWA violations and obstruction of justice. Tuma will be sentenced on July 25, 2012 and faces a maximum penalty of five years in prison on the conspiracy charge, three years in prison on each of the Clean Water Act violations, and five years in prison on the obstruction of justice charge. He also faces a fine of not more than $250,000, or twice the gross gain or loss resulting from the unlawful conduct, or both, per count.

Another recent prosecution arising out of the energy extraction industry is *United States v. John Morgan and Michael Evans*, NO. 10-017 (W.D. Pa. Feb. 16, 2010). Evans, an owner, and Morgan, a site supervisor, of Swamp Angel, LLC, were engaged in oil and gas drilling operations in the Allegheny National Forest. From April 2007 to January 2008, the defendants unlawfully injected 200,000 gallons of brine into a shut in well. Swamp Angel had not obtained a permit authorizing the injection of this brine. After pleading guilty to violating the SDWA, John Morgan received a sentence of 8 months' home

detention, 3 years' probation, a $4,000 fine, and 80 hours of community service. Michael Evans received a sentence of 10 months' home detention, 3 years' probation, a $5,000 fine, and 100 hours of community service.

Statutes such as the Endangered Species Act (ESA), 16 U.S.C. §§ 1531–1544, and the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 710–711, address the impacts caused by oil and gas industry processes to wildlife. In *United States v. Hawk Field Services, Inc.*, No. 11-060 (E.D. Ark. Apr. 8, 2011), Hawk Field Services (HFS) constructed pipelines for the transmission of natural gas. In order to do so, HFS acquired land, cleared an approximately 50 to 75-yard wide path of all trees and vegetation, buried the pipe, and then remediated the land. The United States Fish and Wildlife Service (FWS) discovered that because HFS was not properly controlling erosion, excessive amounts of silt were flowing into the South Fork, Little Fork, and Archey Fork of the Little Red River. Pursuant to the Energy Policy Act of 2005, HFS was exempt from CWA stormwater permit requirements (uncontaminated runoff from drainage conveyances is not a point source discharge). Nevertheless, HFS deposited so much sediment in the streams of the Little Red River watershed—the last remaining home of the speckled pocketbook mussel—that it caused a take of the mussel in violation of the ESA. HFS pleaded guilty on April 8, 2011, in the Eastern District of Arkansas to three misdemeanor counts of taking an endangered species. The court ordered HFS to pay a $350,000 fine and to donate $150,000 to the National Fish and Wildlife Foundation for use in restoration projects in the Little Red River watershed.

Another example is *United States v. Encana Oil & Gas (USA) Inc.*, No. 10-01139 (D. Colo. Aug. 26, 2010). Encana, headquartered in Denver, extracts oil and natural gas from drilling and production operations in the western United States. Several migratory birds died as a result of landing on open or insufficiently protected pits, ponds, tanks, and other Encana facilities. Encana pleaded guilty to a two-count information charging MBTA violations arising out of migratory bird fatalities at its facilities in Colorado and Wyoming. Encana was sentenced to pay the maximum statutory fine of $15,000 per count, an amount that was directed to the North American Wetlands Conservation Fund, and to make a community service payment of $85,000 per count to the National Fish and Wildlife Foundation. Encana was also sentenced to an 18-month term of probation during which it developed and implemented an environmental compliance plan that was focused on preventing future avian mortality at its sites.

VIII. Training and coordination

Successful investigations and prosecutions of crimes within the oil and gas industry require coordination between and across all levels of law enforcement. Local, state, and federal law enforcement entities must be able to work together to detect and investigate all crimes that are associated with the rapid increase in energy extraction and production activities. These activities include "secondary" general crimes, such as drugs, guns, assaults, and vice. To that end, the Department of Justice has begun a concerted effort to train and coordinate the relevant authorities.

In May 2011 the United States Attorneys from the Eastern, Middle, and Western Districts of Pennsylvania, along with the Assistant Attorney General (AAG) for the Environment and Natural Resources Division (ENRD), hosted a statewide "Marcellus Shale Law Enforcement Conference." Organized by EPA's Region 3 Criminal Investigation Division, the two-day conference hosted more than 200 law enforcement agents and attorneys from local, state, and federal entities. The conference was broken into two "tracks." One was for investigators and attorneys and the other was for patrol officers. Presentations were made by experts from Pennsylvania State University's Marcellus Center for Outreach and Research, Pennsylvania State Police, Pennsylvania Bureau of Oil and Gas Management, the EPA, the

FWS, the FBI, and others. In addition to the substantive benefits of the training, the relevant law enforcement personnel had the opportunity to learn about each other and to establish useful networks.

In September 2011 the United States Attorneys of the districts of North Dakota and Montana, and the AAG of the ENRD, addressed the North Dakota Petroleum Council's Annual Meeting. Participants included many national and international Fortune 500 companies from the oil and gas industry. The following day, the team addressed the full assembly of the North Dakota United States Attorney's Office Environmental Enforcement Training Conference. That event provided training and networking to law enforcement officers and to state, local, and tribal officials from across western North Dakota. The training described the various environmental enforcement laws that are applicable to the increased oil production activities occurring in western North Dakota.

The District of Montana and the ENRD hosted a conference in October 2011, titled "Environmental Law Compliance and Enforcement Issues for Energy Producers in North Central Montana." This conference sought to educate the energy industry on applicable environmental laws in the region. Presentations were made by the Bureau of Land Management, the Montana Bureau of Oil and Gas, the EPA, the FWS, and the Environmental Crimes Section. The District of Montana held additional industry and law enforcement training for Eastern Montana in March 2012.

Because much of the energy extraction industry operates in rural areas, beyond population centers and thus beyond the hubs of law enforcement, task forces are a useful means of combining scarce resources to make enforcement more effective. For a successful task force, local, state, and federal agencies must be represented and actively participate. One example is the Western District of Pennsylvania's Environmental Crimes Task Force. Members include, among others, the United States Attorney's Office, the Environmental Crimes Section, the EPA, the FWS, the Occupational Safety and Health Administration, the FBI, the Pennsylvania Attorney General's Office, the Pennsylvania Department of Environmental Protection, the Pennsylvania Bureau of Oil and Gas, Pennsylvania State Police, the Pennsylvania Department of Fish and Game, the Pennsylvania Game Commission, and the Pennsylvania Fish and Boat Commission. The task force meets quarterly to provide training to members on various aspects of environmental law and to discuss potential investigations and prosecutions. A more complete discussion of the use of task forces in environmental crimes can be found in the Environmental Crimes Manual, available for federal government users at http://dojnet.doj.gov/ecs/manual/index.html or by contacting the Environmental Crimes Section.

IX. Conclusion

Experts project that the extraction of shale oil and gas will continue to grow over the next decade. Within the Department, the ENRD is committed to ensuring that energy extraction activities proceed with the utmost regard for public health and safety and that those companies that violate the law are held accountable. Education of the industry and law enforcement about the areas of potential risk is vital. To that end, the ENRD is available to work closely with United States Attorneys' offices from across the relevant areas to host information and training sessions. For more information, please contact Deborah Harris, at Deborah.Harris@usdoj.gov, or Todd Mikolop, at Todd.Mikolop@usdoj.gov.❖

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Enforcement's Role in Taming the Global E-Waste Tsunami

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I. Introduction

When you are at home, take a minute to walk around and take an inventory of how many electronic items you have—and don't forget to look in the basement! How many devices are in use or sitting around waiting for you to find them a new home or throw them away? Then multiply that number by the ever-increasing number of people for whom electronic devices are a way of life, at home and on the go. If the item has an on-off switch, there is a good chance that consumers will throw away their still-functioning devices as "new and better" gadgets come along. The result of our everyday consumption of these items is a tsunami of electronics that is swamping the world, drowning it in unwanted devices, and posing substantial threats to human health and the environment.

How big is the wave? No one knows for sure and estimates vary, but the numbers are staggering and getting bigger. Because each one of us contributes to the problem, the authors did an informal inventory of their own families' devices. The low-tech, two-adult household has four cell phones (two from work), three cordless phones with bases, one MP3 player, one usable computer, one usable computer monitor, three televisions, one with Cathode Ray Tube (CRT) technology, two keyboards, four mice, one printer, two obsolete computers and a color CRT monitor in storage awaiting recycling, three digital cameras, five remote controls, a DVD player and a VCR, plus a collection of decades-old stereo equipment of every vintage, including equipment to play "45s" or "8-track tapes." The high-tech, four-person household (with two teenagers) has much functional equipment in use, including two cordless telephones with bases, four desk top computers (one for school), each with a with keyboard and a mouse, five laptops (one provided by work, and another a netbook), four cell phones, two servers, six pieces of networking equipment, two printers, a scanner, four iPods, three digital cameras, an Xbox, a Wii, Rock Band game equipment, two liquid crystal display (LCD) televisions and one television with a color CRT, six remote controls, six LCD monitors, two boom boxes, an iPad, an iTouch (purchased used while writing this article), and two GPSs. In addition, this household has non-functioning equipment that is awaiting reuse or recycling, including approximately 10 hard drives, 8 CRT monitors, 1 printer, 2 keyboards, a pair of 4-feet tall stereo speakers, a turntable, a Macintosh computer, 2 Palm Pilots, and a Newton (the precursor to the Palm Pilot). Drafting this article motivated the authors to dispose of much of their "older" material in storage—more than a mini-van full—by utilizing local government collection events *and* by checking into companies hired by their local governments to take the collected material.

What happens to electronic devices when they become old, obsolete, or just not the latest, coolest gadget? While reputable companies are increasingly seeing profit in the recycling trade as the volume grows and recycling becomes a requirement in some states, some individuals find easier ways to make a buck by lying, cheating, and stealing rather than recycling or disposing of items responsibly. Many local governments and non-profit organizations sponsor electronic collection days to help protect the environment, often using a collection company with a catchy, "green" sounding name to take the goods donated by public-spirited citizens. Business, educational organizations, and government entities often turn to those who claim to be able to recycle used electronics in an environmentally-sound manner. Some of these companies are legitimate, some are not, and thorough due diligence is required to determine the difference. A sad reality is that much of the materials that are exported around the globe ultimately wind up being dumped in Africa and Asia.

Elderly Chinese farmer trying to earn money by sorting through imported computer scrap.
© 2004 Basel Action Network (BAN)

Technologies and processes are available to handle and recycle used electronics properly. This material, generically called "e-waste," may be in good enough condition to be reused by others or reconditioned or repaired for reuse. It also contains valuable metals and other components that can be reclaimed via labor-intensive processes. However, extracting those materials is expensive and reclamation generates waste material that cannot be used again or must be shipped to a few plants scattered across the world for further processing.

When material is dumped in developing countries, the environmental and human health hazards impact those who are most vulnerable. It is well-documented, by various media outlets and non-governmental organizations (NGOs) around the world, that oftentimes those who extract metals and other valuable material in developing countries are unprotected workers, including children. Some of these individuals are hired by companies and some simply scavenge dumped e-waste to recover precious metals and other raw materials. They often break apart components by hand or burn off unwanted plastic housing that covers valuable components, especially metals. This disassembly and burning exposes lowly-paid workers and others to harmful substances and creates heaps of ash left on the ground that pollute land and water. Photographs of such activities are available by conducting a computer search of "e-waste photographs." Many documentarians and NGOs have photo archives displaying computer reclamation at its most primitive. *See, e.g.*, Basel Action Network Web Site, ban.org.

This article introduces the complex subject of e-waste; highlights efforts by international and American regulators and NGOs to quantify, trace, regulate, and police the trade in used electronics; and discusses the role of enforcement as a necessary part of any solution. It is important to understand that domestic regulation of this material depends on its type and projected future use, and that federal environmental regulation applies only to a specific segment of used electronics. However, given the relative recent recognition of the scope of this problem, private and governmental approaches will continue to evolve. As discussed below, states are showing a great deal of leadership in getting manufacturers and sellers to take responsibility for used electronics. Enforcement has a role to play, but legal and evidentiary challenges are real. Criminal prosecutors may find that combining traditional Title

18 offenses such as conspiracy, fraud, and false statements with Resource Conservation and Recovery Act charges provides the best chance of success.

II. E-waste is swamping the globe

Any discussion of the e-waste tsunami begins with the life cycle of electronics, often referred to as having "upstream" and "downstream" stages. Upstream involves Phase 1, the initial purchase and use of the product, and Phase 2, the reuse of the device for its intended use by giving or selling it to others or putting it "in storage" for reuse. Downstream stages commence at the point where "end of life" (EOL) management begins. In Phase 3, an owner brings an item in for recycling or disposes of it. Phase 4 is more complex. It involves material that is accumulated for recycling and resold "as is" or after some refurbishment in the United States or abroad. The material may also be reprocessed into secondary material streams and then used in new products. Reprocessing often generates residual waste requiring disposal.

Computer waste dump located near water way in Accra, Ghana
© 2009 Basel Action Network (BAN)

Many studies and reports detail the scope of the e-waste universe. However, they vary in many ways depending on what types of devices are included as e-waste, the author's perspective and the source of the report, what sources of information were analyzed (government, manufacturers, trade groups, NGOs, sellers, export records), the years studied, and the assumptions that are built into any attempt to extrapolate from limited data. No matter the variations in these studies, there is no question that the world is drowning in used electronics. For example, in 2008 EPA reported that 2.42 *billion* desk top PCs, PC monitors, portable PCs, peripherals (printers, digital copiers, and fax machines), and televisions were purchased in the United States between 1980 and 2007. It estimated that by 2007, 29.9 million desktop computers, 25.7 million peripherals, 12 million portable computers, 140 million cell phones, and almost 27 million TVs, especially those containing color CRTs, were ready for EOL management. The EPA further noted that, of an estimated 372 million units, 68.5 million were being recycled while 304 million were being disposed of. ELECTRONICS WASTE MANAGEMENT IN THE UNITED STATES, Office of Solid Waste, EPA (July 2008). While the recycling rate was increasing, so was the amount of material that had to be managed.

Meanwhile, in 2007 alone, American consumers purchased another 62 million computers, 37 million peripherals, 34 million mice, 43 million keyboards, 38 million computer CRTs (37 million flat panel), 6.3 million color CRT monitors, along with 28.6 million TVs (20.3 million flat panel), and 182 million cell phones. *Id*. at 8. Many of these items are now nearing the end or at the end of their "useful life" and getting ready for EOL status. With a seemingly inexhaustible consumer appetite for

convenient and portable electronic devices, it should come as no surprise that the amount of material needing EOL management is skyrocketing. And more is to come—Apple, Inc., reported selling 35 million iPhones in the first quarter of 2012 alone. Moreover, while the developed countries have so far been responsible for the tidal wave of devices, especially computers, a 2010 article published by the American Chemical Society estimated that developing countries' output would exceed the developed world between 2016 and 2018. It estimated that by 2030, developing countries would have to deal with 400-700 million computers alone, dwarfing the developed countries' estimated 200-300 million units. *Forecasting Global Generation of Obsolete Personal Computers*, ENVIRON. SCI. TECH. 3232-37 (Mar. 22, 2010).

In August 2011, at a meeting of the Commission for Environmental Cooperation, EPA Administrator Lisa Jackson announced that dealing with e-waste is one of the Agency's six international priorities. EPA aims to work with international partners to address the issues of electronic waste. Administrator Jackson announced, "These priorities will guide the U.S. EPA's work on our shared goals of facilitating commerce, promoting sustainable development, protecting vulnerable populations, and engaging diplomatically around the world. . . . EPA is committed to cleaning up e-waste. That will come by supporting the improvement of design, production, handling, reuse, recycling, exporting, and disposal of electronic waste." Lisa Jackson, Administrator, Environmental Protection Agency, Remarks at the Welcoming Reception for the Commission for Environmental Cooperation Council in Guanajuato, Mexico (Aug. 16, 2010). On March 1, 2012, the Administration announced that the federal government would stop disposing of used electronics in landfills and incinerators and would instead reuse, donate, or recycle them through "certified" e-waste companies only.

With regard to CRTs, the principal focus of EPA's regulatory program thus far, EPA's 2008 report estimated that in 2005, 175,000 tons of TVs and CRT monitors collected for recycling were handled in the following ways: 3,000 tons (2 percent) were resold in the United States after repair or upgrade; slightly more than 3,000 tons were resold abroad after repair or upgrade; another 1 percent of this amount turned into specialty monitors after some refurbishing; and 107,500 tons were used to make new TVs or monitors. Two percent of used CRT glass was recycled into new glass in the United States and 14 percent abroad, while smelting glass for lead recovery in North America accounted for 6 percent. Plastics, metal, and other materials recovery accounted for 12 percent.

EPA has noted that one of the major problems with the ever-expanding export business involves the suitability of material for reuse. For example, "*[i]ndustry experts . . . report that about 30 [percent] of material destined for remanufacturing abroad is not technically suitable for remanufacturing and has to be recycled or disposed. The recycling or disposal of unsuitable units occurs abroad.*" (Emphasis added.) FACT SHEET: MANAGEMENT OF ELECTRONIC WASTE IN THE UNITED STATES (EPA Apr. 2007, revised July 2008). Another researcher has sounded an ominous warning about trends in recycling lead-contaminated CRT glass, a material that EPA encourages advocates to reuse. As the demand for light emitting diode (LED) monitors increases and the demand for CRT monitors decreases, the market for used monitor glass will likely shrink and reduce recycling demand for one of the most vexing parts of the computer waste streams. *Evaluating the Economic Viability of a Material Recovery System: The case of Cathode Ray Tube Glass*, ENVIRON. SCI. TECHNOL. 9245-51 (Nov. 2, 2009).

Interpol has also analyzed export reports submitted to EPA and California for broken CRT exports in 2007. Of the countries that receive these exports, Malaysia led the pack with 55,886 tons and was followed by Canada at 12,885 tons, South Korea, and Brazil. Weights for popular destinations such as China, Mexico, Vietnam, and India were not studied at the federal level, but data submitted to the state of California showed substantial shipments to those countries. Interpol also analyzed data generated by customs officials in Hong Kong concerning seizures of electronics coming from the United States and

Mexico (although the two seized "Mexico" shipments actually originated in the United States). In only six months—March to October 2007—Hong Kong authorities seized 225 tons of used computer monitors, 732 tons of used batteries, and 4.6 tons of TV monitors as e-waste. CHARACTERIZING TRANSBOUNDARY FLOWS OF USED ELECTRONICS: SUMMARY REPORT, 36-37 (INTERPOL JAN. 2012).

III. Recycling and reclamation are labor-intensive businesses

A principal challenge is how to make reuse and recycling of used electronics economically viable while protecting human health and the environment. These goals underlie EPA's approach to regulating CRTs. In other words, the challenge is to determine how the private sector can responsibly handle the volume of e-waste being generated and still make money.

Companies that are engaged in e-waste collection, sales, processing, and remanufacturing, vary in size from small operators with only a handful of employees to large companies with multiple facilities. Interestingly, one of the larger players in the United States is the federal government itself. A Department of Justice component, Federal Prison Industries, Inc. (also known as UNICOR), operates various prison manufacturing operations. One of its more recent enterprises involves e-waste. UNICOR uses approximately 950 inmates at 15 facilities to collect and process e-waste as part of its overall inmate job skill development program. According to its Web site, it recycled, including offering items for resale, 40 million pounds of used electronics in fiscal year 2011. This material came from public and private sources, including donations at drop-off centers. UNICOR's operation is not without controversy, especially regarding its use of prison labor.

Enforcement cases that have been brought so far demonstrate that some individuals attempt to make money by getting paid by generators to dispose of material, while others obtain business by taking e-waste for free. In both situations, some e-waste "collectors" almost immediately sell the waste to unsuspecting buyers with no testing or inspection to determine whether it is usable. These buyers are often overseas and they may not have actually seen the goods prior to shipment or, at best, may have only seen photos sent from a business they found on the Internet. The reality is that, once overseas, much of this material is unusable as is and is broken apart using crude methods to recover valuable metals. Proper recycling takes time, attention to detail, protective equipment for workers, and adherence to the law. Each of these requirements makes recycling expensive. Unfortunately, some of the "collectors" that promise to reuse and recycle everything domestically in a "green" way are poorly-capitalized and are looking to make a quick buck. Attempts are being made to establish standards for the industry that will inform the public what kind of credentials to ask about when contracting with a business and will provide some general consistency in collecting and recycling operations across the world.

To get a first-hand look at one step in the recycling process (reuse and reclamation), in 2011 the authors visited a facility in Philadelphia, Pennsylvania, owned by a company with electronic waste operations in multiple states. Pallets of material shrink-wrapped in plastic arrive via truck and are weighed. Each customer's shipment is tracked through the process, starting with the manual separation of the equipment into one of several hundred categories. The weight of each category has to match the total weight of the shipment when it first arrives at the facility. This information is ultimately provided to the customer. Forklifts move much of the material around a large warehouse space, but laborers physically separate each category of material into individual, large cardboard or plastic containers that hold only that type of device—TVs, computer monitors, keyboards, central processing units, cell phones, printers, and remote controls to name just a few. Workers disassemble items by hand and separate out some parts for further processing. Workers feed printed circuit boards through a shredding machine and then ship

the mixture to facilities overseas for precious metal recovery. They bale plastic destined for use in new products and remove glass from monitors, especially the ubiquitous older, boxy, and white computer ones. Workers also keep an eye out for components that are capable of being reused and sold, such as newer central processing units (CPUs or computer towers) and flat-screen monitors. The authors toured a locked room where such components were taken for testing and repair if needed. In addition, workers remove hard drives from CPUs and store them in locked containers for data security, prior to erasing them. One of the most striking parts of the process was watching a worker manually tape over the ends of every imaginable type of battery to prevent their ends from touching during shipment and causing ignition.

IV. International e-waste efforts

The Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal (the Basel Convention) is an international treaty that took effect in 1992, following numerous reports and public outcry about the shipment and disposal of wastes from developed countries to developing countries. It seeks to reduce the risks that are posed by hazardous and other wastes. The Basel Convention has been signed by 176 countries, including the United States; however, the United States Senate has not ratified the treaty. The United States, Haiti, and Afghanistan are the only countries that have not ratified the Basel Convention. This has resulted in the United States signing bilateral agreements with Canada and Mexico that govern the inter-country movement of hazardous waste as defined by those three countries. These definitions are narrower in scope than definitions used in many countries that have adopted the Basel Convention.

Under the Basel Convention, a working group has been developing technical guidelines on the transboundary movement of electronic equipment and e-waste. In addition, the United States has attempted to restrict or condition exports of certain devices either by legislation, such as the Resource Conservation and Recovery Act (RCRA) criminal provision making it a felony to knowingly export hazardous waste without the consent of the receiving country, 42 U.S.C. § 6928 (d)(1) (2012), or through regulation, such as the requirement of filing notices of intent to export CRTs.

Interpol has also played an important role in assessing how e-waste is being handled internationally. Interpol's Pollution Crime Working Group (PCWG) issued its second report in this area in May 2009, titled "Electronic Waste and Organized Crime, Assessing the Links." Interpol paid consultants to analyze data in the United Kingdom, Europe, and the United States. (The American research was performed by Michigan State University.). The bottom-line conclusion: *"What emerges is a picture of an industry in which unscrupulous operators are able to profit from disposing of waste cheaply and illegally abroad instead of taking the environmentally responsible but more expensive option of full recycling to remove and neutralize toxic materials."* ELECTRONIC WASTE AND ORGANIZED CRIME, ASSESSING THE LINKS, PHASE II REPORT FOR THE INTERPOL POLLUTION CRIME WORKING GROUP 2 (2009) (emphasis added).

Researchers found that the two most common methods used to illegally export electronics involved mislabeling containers to conceal e-waste and mixing waste in legitimate consignments. With regard to America, the Michigan State University researchers noted that the domestic disposal system is "highly dependent on exports because of the lack of appropriate domestic recycling facilities" in the United States. *Id.* at 3. It also explained that exporting computer and TV CRTs appeared to be the most common way of getting rid of such material. Finally, the report noted that recyclers who charge fees to cover the cost of extracting lead and other hazardous materials questioned whether "operators offering free disposal or even paying for e-waste," such as paying non-profit organizations to do the initial

collection, could collect electronics, properly dispose of hazardous material, and make a profit. In other words, perhaps, the competitive and environmental playing field did not appear very level.

Interpol noted a significant increase in transboundary shipments involving used electronics for refurbishment and reuse, disassembly to obtain reusable parts, and recovery of raw materials. Many of these shipments are transported to developing countries that require authorities there to develop systems to manage the recovery through recycling or disposal of the equipment. For example, Interpol noted that EPA believes American markets are export driven because of the overseas demand for raw materials. However, it is also driven by the fact that America does not have facilities that can recover copper and precious metals from circuit boards or CRT glass furnaces. Most of the 20 CRT glass-making furnaces are located in Asia. Plastic recycling facilities and properly equipped smelters for metals are generally located outside the United States. Thus, while a strong, legitimate demand for used electronics exists abroad, the sheer volume of the material and costs of proper handling for recycling provide ample opportunities for e-waste to be collected by companies claiming to "do the right thing" and then doing the opposite.

V. E-waste stewardship through voluntary standards

Although the volume of used electronics and the complexity of managing them in a sound manner seem daunting, attempts to address the "wave" of used electronics are evolving on several fronts. NATIONAL STRATEGY FOR ELECTRONICS STEWARDSHIP (July 20, 2011). Several organizations have developed standards and certification programs for environmentally-thoughtful electronics recycling. These voluntary standards are, in turn, influencing federal and state regulatory efforts that are discussed below.

EPA, states, and non-profit environmental groups are encouraging electronics recyclers to become certified and are encouraging individuals and institutions to choose certified recyclers when recycling electronics. EPA promotes responsible electronics recycling because it (1) reduces environmental and human health impacts from improper recycling, (2) increases access to quality reusable and refurbished equipment to those who need them, and (3) conserves limited natural resources by reducing energy use and other environmental impacts associated with mining and processing of virgin materials. A recycler can obtain certification by demonstrating to an accredited, independent third-party that it meets specific standards designed to ensure safe and environmentally-sound handling and recycling of the electronics. Several accredited certification standards currently exist. In the United States, the following two standards are most-widely known.

First, the Responsible Recycling Practices (R2) certification program is administered by R2 Solutions (R2S), a non-profit organization established to promote the R2 practices. The R2 Practices are a list of requirements designed to ensure proper health, safety, and environmental procedures (for example, development, implementation, and annual review of an environmental, health, and safety management system). The R2 Standard requires companies to ensure that all trade in EOL devices is conducted legally, maximizes reuse of working equipment and components, maximizes recovery of reusable commodities, and adopts performance requirements to inspire innovation. R2S provides education about responsible recycling practices and administrative support for the multi-stakeholder R2 Technical Advisory Committee. R2S also promotes the use of R2 practices and explores opportunities for collaboration in furtherance of responsible electronics recycling throughout the world. R2 standards were negotiated and developed with a broad stakeholder group that included industry and trade associations.

Second, the e-Stewards Initiative is a project of the Basel Action Network and has a mission and certification program similar to that of R2S. The e-Stewards Standard requires implementation of a

certified ISO 14001 environmental management system that incorporates occupational, health, and safety requirements; prohibits hazardous waste disposal in landfills or incinerators; prohibits use of prison labor; requires full compliance with international hazardous waste treaties; prohibits exports of waste electronics from developed countries to developing countries; and requires protection and medical monitoring of recycling workers in every country. According to the EPA:

> [T]he certification programs share common elements that ensure responsible recycling of used electronics. These programs advance best management practices and offer a way to assess the environmental, worker health, and security practices of entities managing used electronics. Specifically, these certification programs are based on strong environmental standards which maximize reuse and recycling, minimize exposure to human health or the environment, ensure safe management of materials by downstream handlers, and require destruction of all data on used electronics.

U.S. ENVIRONMENTAL PROTECTION AGENCY, http://www.epa.gov/wastes/conserve/materials/ecycling/certification.htm.

VI. Domestic regulatory structure

The federal and state governments are finding new ways to promote reuse and recycling, while seeking to protect human health and the environment here and abroad. Efforts are also underway to develop "greener" electronic devices that facilitate EOL reuse, demanufacturing (disassembly), and reclamation processes.

A. Federal RCRA statutory and regulatory program

Navigating through the federal waste management program requires a bit of patience. At the end of the day, if certain used electronics are being handled as though they are waste and contain specified (listed) hazardous wastes or certain hazardous characteristics, then they are defined as "hazardous wastes" and are consequently subject to strict requirements. Let's tiptoe through the regulations.

RCRA regulates "solid wastes" and "hazardous wastes" with a cradle-to-grave approach that addresses the generation, transportation, treatment, storage, and disposal of solid and hazardous waste. RCRA tasks EPA with the responsibility for further developing and enforcing these solid and hazardous waste management requirements. States may seek EPA authorization to administer their own hazardous waste management programs in lieu of the federal program, as long as the state program is equivalent to and consistent with the federal program and provides adequate enforcement. Violations of RCRA can be addressed though administrative or judicial enforcement actions and can be pursued both civilly and criminally.

The RCRA regulations contain a series of requirements for materials that are determined to be "solid wastes" and more stringent requirements for materials determined to be "hazardous wastes." Hazardous wastes are a subset of solid wastes and are more dangerous to human health and the environment. To be a "hazardous waste" under RCRA, a material must first be a "solid waste." RCRA defines "solid waste" to mean garbage, refuse, certain sludge materials, or other "discarded material." *See* 42 U.S.C. § 6903(27) (2012). "Discarded material" is defined as material that is either abandoned, disposed of, or recycled. 40 C.F.R. § 261.2(a) (2012). A material is "abandoned" if it is disposed of, accumulated, or stored pending disposal or in lieu of disposal. *See id.* The term "recycling" includes use, reuse, and reclamation. *See id*. § 261.1(c)(7).

Under RCRA, the term "hazardous waste" means a solid waste that, because of its quantity, concentration, or physical, chemical, or infectious characteristics may cause or significantly contribute to an increase in mortality or serious illness, or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of, or otherwise managed. 42 U.S.C. § 6903(5) (2012). Hazardous wastes are defined as hazardous either because they are on an EPA-promulgated list of hazardous wastes (the "listed hazardous wastes") or because, when tested, they exhibit certain characteristics—ignitability, corrosivity, reactivity, or toxicity (collectively, the "characteristic hazardous wastes"). *See* 40 C.F.R. §§ 261.3, 261.20– 261.24 (2012).

Older computer monitors and televisions with CRTs containing lead pose a significant health and environmental threat. (Despite their volume, other electronic devices and components have not been the focus of federal hazardous waste regulation, likely because their metals test at concentrations below regulatory levels.) A CRT is a vacuum tube, composed primarily of glass, that serves as the visual or video display component of an electronic device. Most CRTs contain, on average, four pounds of lead, a "listed" hazardous substance that EPA has placed on a list of dangerous chemicals due to its toxicity. *Id*. § 261.24(b). Both short-term and long-term exposure to lead can cause a variety of adverse health effects. Young children exposed to lead can suffer lead-poisoning and brain damage resulting in learning disabilities. According to the Occupational Safety and Health Administration, long-term lead exposure can result in severe damage to blood forming, nervous, urinary, and reproductive systems.

The RCRA regulatory threshold for lead is 5 mg/L, or 5 parts per million. Thus, materials testing above that concentration for lead are deemed hazardous. Materials are tested using the toxicity characteristic leaching procedure (TCLP). This procedure does not test the material directly, but instead tests how much lead would leach out of the material. The TCLP test is designed to simulate what would occur in an uncapped landfill where precipitation runs through the material. Of course, direct human exposure to lead when a person disassembles electronics using heat could result in exposure to a much higher concentration of lead and other hazards. This exposure could be particularly dangerous where the individual is not provided with personal protective equipment. The University of Florida has performed studies using the TCLP test. The studies have shown that most color CRTs leach lead at concentrations considerably above the 5.0 mg/L regulatory threshold. 71 Fed. Reg. 42928, 42930-31 (July 28, 2006). Black and white CRTs usually do not fail the TCLP for lead. Therefore, under the usual RCRA analysis, discarded color computer monitors containing CRTs, including monitors that are destined for recycling, would be considered solid waste and likely hazardous waste due to their lead content.

Under RCRA, discarded material is generally considered to be "solid waste." *See* 40 C.F.R. § 261.2 (2012). However, EPA has exempted CRTs from the definition of "solid waste" (and thus hazardous waste), when certain conditions have been met. In July 2006, EPA amended its RCRA regulations to allow greater flexibility in handling computer monitors and televisions with CRTs destined for reuse, recycling, or disposal, in order to encourage reuse and recycling of CRTs. (The Rule became effective in January 2007.) Section 261.4 in Title 40 of the Code of Federal Regulations excludes CRTs from the RCRA definition of "solid waste" under certain conditions. For example, used, *intact* CRTs are not solid wastes *within the United States*, unless they are disposed of, or unless they are speculatively accumulated. *See* 40 C.F.R. § 261.4(a)(22) (2012). Used, *intact* CRTs are also not solid wastes when exported for *reuse abroad*, if the exporter complies with the applicable notice requirement. *See id.* For purposes of this second condition, the term "reuse" means using an item for its intended purpose. The exporter must send a one-time notification to the applicable EPA Regional Administrator that includes a statement that the notifier plans to export the CRTs for reuse, as well as the notifier's name, address, EPA ID number (if applicable), and name and phone number of a contact person. *See id*. § 261.41. Furthermore, the person who exports such CRTs for reuse must keep copies of "normal business

records," such as contracts, in order to demonstrate that each shipment of exported CRTs will be reused. These records must be retained for at least three years.

The Rule also provides a conditional exclusion: Used, *intact*, or *broken* CRTs that are exported for *recycling* are not solid wastes, provided that the exporter notifies EPA of an intended export at least 60 days before the initial shipment is intended to be shipped off-site. *Id*. § 261.39(a)(5)(I). This notification may cover export activities extending over a 12-month or shorter period and must include detailed information about the quantity of CRTs being shipped, the manner in which the CRTs will be recycled, and the foreign recycler. Shipments of CRTs cannot take place until the receiving country consents *in writing* to the receipt of the CRTs and the exporter receives a copy of the Acknowledgment of Consent to Export CRTs from EPA. *Id*. § 261.39(a)(5)(v).

Thus, if a person "disposes of" or "speculatively accumulates" CRTs within the United States, the traditional RCRA solid and hazardous waste analysis applies. With regard to exports of CRTs, a generator or exporter *must* comply with these specific notice requirements to take its CRTs out of RCRA's definition of "solid waste." If the exporter fails to comply with the applicable notice requirements, then CRTs are evaluated just like any other material in determining whether they are solid wastes under RCRA. If color CRTs are deemed to be "solid wastes," they will likely be "hazardous wastes" due to their lead content. Under these circumstances, the more stringent RCRA hazardous waste regulations will apply.

On March 15, 2012, EPA announced proposed changes to the CRT rule and invited comment on various other issues concerning exports of used electronics to, among other things, provide the federal government and receiving countries more information about trading in e-waste. Significant changes include adding a definition of "CRT exporter" to the RCRA regulations. Under the current regulatory structure, generators, collectors, brokers, some shippers, and purchasers sometimes argue that another party involved in a particular transaction is the "exporter" subject to regulation. To address this finger-pointing, the proposed definition of "CRT exporter" includes "*any person* in the United States who *initiates a transaction* to send used CRTs outside the United States for recycling or reuse, or *any intermediary* in the United States arranging for such export." Proposed Definition of CRT Exporter, 77 Fed. Reg. 51, 15343 (Mar. 15, 2012) (emphasis added). While only one exporter would be required to submit information regarding such exports, the EPA proposes to hold each person or entity coming within the definition jointly and severally liable for regulatory violations. The proposed definition of "CRT exporter" also makes clear that the exporter must be located within the United States and thus subject to federal jurisdiction.

In addition to the current requirement that exporters of used CRTs submit notices prior to shipments, the proposed changes would require exporters of CRTs for recycling to file annual post-shipment reports that detail, among other things, when and how much used CRTs (by weight) they actually shipped. The reports would also identify the overseas facilities where the CRTs ultimately wound up. The proposed changes would also alter what is now a one-time notice requirement for exporting used CRTs for reuse. The proposal would change the one-time notice to a submission covering 12 months that estimates proposed exports and would require detailed information on how much would be shipped, by what method, the countries that the material would pass through, where the material would ultimately go, and how it would be reused in the country receiving the CRTs. The EPA invited comment on whether exporters for reuse should have to file annual post-shipment reports similar to what EPA formally proposed for exporters of CRTs for recycling.

From an enforcement perspective, the most useful proposed change, especially with regard to criminal enforcement, flows from requiring exporters to sign certifications with certain reports. For

example, a CRT exporter submitting the annual report detailing shipments overseas for recycling will have to attest that he is personally familiar with the information in the report and that the information in the report is true, accurate, and complete based on "an inquiry of those individuals immediately responsible for obtaining the information." *Id.* The certification advises signers that significant penalties, including fines and imprisonment, may be issued for submitting false information. A similar certification requirement is imposed on exporters that ship used CRTs for reuse when they submit their notices prior to shipment. This certification requires the exporter to certify that the CRTs "described in this notice *are fully functioning or capable of being functional after refurbishment*." *Id.* (emphasis added.) Falsification of these certifications could subject a person to criminal prosecution under the false statement provision of 42 U.S.C. § 6928(d)(4) or 18 U.S.C. § 1001.

B. RCRA civil violations and criminal offenses

Where CRTs are determined to be hazardous wastes under RCRA, the export of such CRTs can give rise to a variety of civil violations and criminal offenses, including violations of RCRA and Title 18.

Section 3008(a) of RCRA authorizes the EPA to order violators to come into compliance. *See* 42 U.S.C. § 6928(a) (2012). RCRA Section 3008(g) authorizes civil penalties of up to $25,000 per day of violation for any violation of RCRA. *Id.* § 6928(g). In recent enforcement cases involving the export of used electronics, the EPA has sought civil penalties for the following violations:

Failure to determine if a waste is hazardous under 40 C.F.R. § 262.11

- Failure to prepare a hazardous waste manifest before transporting waste off-site under 40 C.F.R. § 262.20
- Failure to comply with pre-transport requirements for hazardous waste, including packaging, labeling, marking, and placarding under 40 C.F.R. §§ 262.30–262.33
- Failure to notify the EPA of intent to export a hazardous waste under 40 C.F.R. § 262.53
- The export of a hazardous waste without the consent of the receiving country under 40 C.F.R. § 262.52

The government could consider civil penalties for additional related RCRA violations: (1) failure to obtain storage permits, (2) failure to offer hazardous waste to a transporter possessing a RCRA identification number, (3) failure to placard or offer proper placards, and (4) transporting to unpermitted facilities. In addition to RCRA, generators and transporters of hazardous waste must comply with Department of Transportation regulations governing the movement of hazardous materials.

RCRA subsections 3008(d) and (e) authorize criminal penalties for specified RCRA violations arising out of treatment, storage, transportation, and disposal of hazardous waste. *See* 42 U.S.C. § 6928(d), (e) (2012). In an electronics export case that is prosecuted criminally, the government could pursue many of the violations outlined above if they were committed *knowingly*. RCRA offenses are general intent crimes that require the government to show that the defendant had knowledge of the general hazardous character of the wastes. In *United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990), the court held that "the government [does] not need to prove defendants knew violation of RCRA was a crime, nor that regulations existed listing and identifying the chemical wastes as RCRA hazardous wastes. However, . . . the knowledge element of § 6928(d) does extend to knowledge of the general hazardous character of the wastes."

Since much of the enforcement activity discussed below involves illegal exports of CRTs, two specific RCRA criminal provisions merit a more detailed discussion. First, RCRA § 3008(d)(4) provides felony sanctions for the knowing destruction, alteration, concealment of, or failure to file any record, application, manifest, report, or other document required to be maintained or filed for purposes of compliance with the RCRA regulations. *See* 42 U.S.C. § 6928(d)(4) (2012). The government must prove that (1) the defendant is a person; (2) the defendant knowingly generated, stored, treated, transported, disposed of, exported, or otherwise handled hazardous waste (or used oil); (3) the defendant knowingly destroyed, altered, concealed, or failed to file a document; and (4) the document was required to be maintained or filed for purposes of compliance with the RCRA regulations. This provision would apply when companies or individuals knowingly destroy, create and/or file false information, or fail to file a Notice of Intent to Export hazardous waste. Upon conviction, the defendant is subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years, or both. *Id*. § 6928(d)(7).

After filing a Notification of Intent to Export hazardous waste pursuant to 40 C.F.R. § 262.53, the primary exporter may proceed with shipment only after it has received a copy of the receiving country's written consent to accept hazardous waste from the EPA. If the receiving country does not consent to receipt of the hazardous waste or withdraws prior consent, the EPA will notify the primary exporter in writing. The EPA will also notify the primary exporter of any responses from countries that the e-waste will pass through while in transit.

RCRA § 3008(d)(6) makes it a crime for a person to knowingly export a hazardous waste without the consent of the receiving country or in a manner that is not in conformance with any international agreement between the United States and the receiving country establishing procedures for lawful export. *Id*. § 6928(d)(6). To sustain a conviction for violation of § 6928(d)(6), the government must prove that (1) the defendant is a person, (2) the defendant knowingly exported a hazardous waste, and (3) the defendant did so without the consent of the receiving country. *See id*. It is important to note that the government must be able to establish that the material was a hazardous waste at the time it left the United States. Persons in violation of this provision shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation or imprisonment not to exceed two years, or both. *See id*. § 6928(d)(7). Of course, the fine provisions of the Alternative Fines Act, 18 U.S.C. § 3571, apply to RCRA offenses and could increase statutory maximum fines above the amount set forth in RCRA.

C. State programs

Many states have enacted legislation imposing export restrictions and some states have passed laws that create programs requiring certain entities to participate in and/or fund electronics recycling. As of mid-2012, approximately half of the states have enacted some form of electronics recycling and export legislation, with much of this activity taking place in recent years. States are taking varied approaches, starting with requiring handlers of used electronics to comply with existing laws, prohibiting exports for disposal that present significant risks to health or the environment, increasing record keeping on exports, and requiring documentation of proper management of items in the importing country. For example, California imposes stricter rules than most states and requires the exporter to demonstrate that the export is conducted in accordance with United States and international law, that the export will not be in contravention of the importing country's laws, and that the waste will be managed in the receiving country only at facilities that implement the environmental guidelines of the Organization of Economic Cooperation and Development (OECD).

Some states require original electronics manufactures (OEMs) or large retailers to undertake programs to collect and recycle used electronics, with their level of participation based on their sales or market share data. This "beneficiary-pays" approach is critical when encouraging electronics recycling because reclamation of the raw materials by itself often does not result in enough income to pay for the labor-intensive cost of demanufacturing. State laws define "covered devices" that are included in their programs in a variety of ways, require different parties to participate, and set forth different mechanisms and fees for participation.

For example, in 2009, Pennsylvania began regulating "covered devices," defined as computer and television devices marketed and intended for use by consumers. 35 Pa. Stat. § 6031.102. The law imposes requirements on *manufacturers* of computer and television devices and on *retailers* of those devices in Pennsylvania, regardless of whether sales are through outlets, catalogs, or the Internet. These manufacturers and retailers must register with the Pennsylvania Department of Environmental Protection (PADEP), renew that registration annually, and pay a fee with each registration. Manufacturers and retailers that fail to comply with the registration requirement are prohibited from selling covered devices in the Commonwealth. Manufacturers are also required to develop, submit for PADEP review and approval, and implement a plan for collecting, transporting, and recycling a quantity of covered devices equal to the manufacturer's market share. A group of manufacturers may work together to submit a joint plan. The plan must include (1) the methods and locations for collecting the devices; (2) the names, locations, and processes used for recycling; (3) the means for publicizing collection opportunities; (4) an estimate of the weight to be collected in the first year; and (5) the process for increasing the collection weight the following year.

Pennsylvania retailers are required to notify customers about how and where they can return devices for recycling. Under the Pennsylvania program, manufacturers and retailers cannot charge consumers a fee for the collection, transportation, or recycling of a covered device unless the consumer is provided with a financial incentive of greater or equal value (for example, in the form of a coupon or rebate). Recycling must be done in accordance with applicable federal, state, and local law, and covered devices "may not be exported for disposal in a manner that poses a significant risk to the public health or the environment." *Id*. § 6031.505. All entities must demonstrate to PADEP's satisfaction that the recycling facilities that are being used have achieved and maintained third-party accredited certification of compliance with R2 Practices Standard, e-Stewards Standard, or an internationally accredited third-party standard for safe and responsible handling of such devices.

As states pass laws requiring OEMs and retailers to "take back" used electronics, or arrange for recyclers to take back material from third-party sources, such as businesses and local governments, they attract better capitalized companies to participate in the e-waste recycling business. For example, if a non-profit food cooperative organizes a community electronics collection day, it may then contract with a recycling company to take the material turned in by the public. The recycling company may have a contract with an OEM or a retailer to recycle material brought in by third-parties. In this way, the OEM can apply the amount of goods turned in against its annual recycling obligation. The for-profit recycling company receives a steady income flow from OEMs and also makes money by selling raw material to firms that recover or reuse parts from electronics, such as precious metals. These income streams have to cover the costs of labor and the facility; the disposal of waste material that cannot be used by anyone else; the shipment of material to reclamation facilities in Canada, Europe, and Asia; payments to firms that further process parts containing hazardous substances, such as the lead in glass from CRTs; and still generate a sufficient profit for investors. A company that simply sets up a collection event for the public to drop off a hodge-podge of electronic devices and does little more than sell this e-waste "as is" to a casual buyer, operates on a very, very thin financial and regulatory margin.

D. Proposed congressional legislation

The changes on the horizon, if enacted by Congress, would extend the universe of covered electronic devices that must be recycled and would make OEM requirements apply nationwide. In June 2011 two complimentary bills were introduced in the United States Congress that would address the problem of e-waste and provide national consistency.

The Responsible Electronics Recycling Act, H.R. 2284, 112th Cong. (1st Sess. 2011), would amend RCRA to (1) prohibit the export of "covered electronic equipment" to countries that are not members of the OECD, the European Union, or Lichtenstein; (2) require EPA to promulgate procedures for identifying electronics equipment, and toxic materials in that equipment, that pose a threat to human health and the environment; and (3) establish criminal penalties for knowingly exporting covered electronics in violation of the act. *Id.* at Sections 2–3. This proposed federal law covers a wider variety of devices than those covered by many state laws. In the federal bill, "covered electronic devices" includes not only televisions, computers, and all of their accessories and peripherals (Webcams, speakers, DVD players, etc.), but also digital imaging devices (such a fax machines and printers), digital audio players, telephones and cell phones, networking devices, audio equipment, portable game systems, personal digital assistants, portable global positioning navigation systems, and any other electronic products that EPA determines to be similar. *Id.* In addition, the bill requires the Secretary of Energy to provide grant money for research into recycling of rare metals when a device has reached its end of life.

The Electronic Device Recycling Research and Development Act, H.R. 2396, 112th Cong. (1st Sess. 2011), would require EPA to award grants for creative, innovative, and practical approaches to manage e-waste. *Id.* at Section 3. These approaches include funding research on recycling, reusing, and reducing the use of hazardous waste in electronics; extending the useful life of electronics; and developing "greener devices" that are more environmentally friendly and designed with increased ability to be recycled. *Id.* The bill also requires the National Institute of Standards Technology to develop a database of environmentally friendly alternative materials that could be used in electronic devices. *See id.* at Section 7.

VII. Federal enforcement

The federal government has brought both administrative and criminal enforcement cases against companies and individuals in connection with the alleged mishandling of CRTs and the failure to follow the RCRA regulations. Given the relative newness of the CRT Rule, the Agency has principally relied on administrative enforcement actions to address RCRA violations. In addition, criminal enforcement will likely involve both RCRA charges that are premised on violations of Section 3008(d) and (e) of RCRA, 42 U.S.C. § 6928(d) and (e), and/or Title 18 offenses such as conspiracy, false statements, wire or mail fraud, illegal export of goods, and obstruction of justice or agency proceedings.

On the administrative side, EPA has issued compliance orders to and sought administrative penalties from companies involved in the collection and shipment of used electronics/e-waste overseas pursuant to Section 3008(a) and (g) of RCRA, 42 U.S.C. § 6928(a) and (g). While Hong Kong appears to be a popular destination, other shipments have gone to Vietnam and South Africa. Getting companies to respond to administrative enforcement actions has had mixed success. Some have responded, taken possession of the returned items, and negotiated settlements. Others have not responded at all, especially with regard to taking back items that they shipped out of the country and that a foreign government rejected and returned to the United States. One could argue that a shipper's failure to retake possession of used electronics returned by another country as unacceptable is further evidence that the material was waste when it left the United States.

For example, in *In re EarthEcycle, LLC.*, EPA Docket No. RCRA-HQ-2009-0001 (2009), the EPA sued an Oklahoma-based company that collected and exported used electronic equipment, including color computer monitors containing CRTs. The complaint alleged that the company had induced various non-profit organizations in western Pennsylvania, such as humane societies, to conduct free electronic waste collection events in spring 2009. EarthEcycle then had the collected material, including color CRTs, taken to two warehouses near Pittsburgh, Pennsylvania. As documented by observers employed by the Basel Action Network and reported in the local media, company workers were seen unloading the collected material at the warehouses and then loading it, unpalletized, into 40-foot sea-going shipping containers. The complaint alleged that color monitors generally contain an average of four pounds of lead as well as other metals such as cadmium, mercury, and arsenic.

EPA alleged that, between March 26, 2009 and May 1, 2009, EarthEcycle exported seven containers of used electronics to Hong Kong and two containers to South Africa. The two containers sent to South Africa contained 2,106 used monitors containing CRTs. Hong Kong authorities subsequently intercepted and returned seven containers to the United States in May 2009. Similarly, South African authorities detained the two containers sent to that country. Hong Kong and South African authorities rejected the loads after determining that the loads contained waste electronics. They made this determination after examining the material and the lack of packing to prevent breakage during transit. EPA civil staff inspected the returned containers and found that no attempt had been made to package the electronics to prevent breakage during transit.

The EPA charged EarthEcycle with various RCRA violations, including failure to make hazardous waste determinations, unauthorized export of hazardous waste, failure to notify EPA of its intent to export CRTs for reuse, and various packaging and labeling violations. EPA ordered the company to make arrangements for the return of the containers in South Africa, to take possession of those containers as well as those already returned from Hong Kong, and to submit a plan to EPA documenting how it planned to manage each item (reuse, recycle, or discard). To date, EarthEcycle has not complied with the Order. South African authorities destroyed the used electronics in December 2011, after storing them for more than two years when EarthEcycle failed to ship them back to the United States. EarthEcycle has also failed to take possession of the seven containers shipped back to the United States from Hong Kong in May 2009, and they remain in storage. The storage of these unwanted containers and their contents raises several questions, such as who pays the container company, who pays the storage facility, and who has authority to permit authorities to open, inspect, or search and seize the contents. When exporters refuse to take possession of e-waste returned by foreign authorities, the e-waste becomes the proverbial "hot potato" that no one wants to touch. Customs has the authority to sell or auction any abandoned equipment without inquiring about its future use or disposition. In such circumstances, it is important that regulators work together to ensure that prospective purchasers know what they are buying, the shipment's history, and applicable regulatory requirements.

In re Metro Metals Corporation and Avista Recycling, Inc., Docket No. RCRA-10-2011-0040 (2011), presented a slightly different situation. The EPA sued two companies, both doing business in Minnesota, that collected and attempted to ship 913 used color monitors that were in poor condition and weighed about 30,000 pounds. Metro Metals arranged to ship devices collected by Avista to Vietnam and described the contents as "plastic scrap" on shipping paperwork. United States Customs and Border Protection personnel intercepted the container before it left for Vietnam. In its complaint, the EPA alleged that the CRTs in the container constituted hazardous waste and charged the companies with various RCRA violations. The EPA ordered the companies to arrange for disposal of the hazardous waste or to export the goods in compliance with EPA regulations, including receiving the consent of the receiving country. Neither company complied with the Compliance Order and EPA obtained a default

penalty judgment of $31,600 against the two companies in 2011. However, the container remains in a warehouse, unclaimed by either company.

The most significant enforcement action is a criminal case currently pending in federal court in Denver, Colorado. The case involves a company known as Executive Recycling, Inc. (ER) and illustrates how Title 18 offenses can be the principal focus of a prosecution involving e-waste. ER operated an electronic waste recycling business based in Colorado and also had operations in Utah and Nebraska. Private households, businesses, and government entities paid ER to take e-waste away, including a significant amount of computer and television monitors containing CRTs. On September 15, 2011, a federal grand jury indicted ER, its owner and chief executive officer, and the company's vice president of operations, on charges involving mail and wire fraud; exporting hazardous waste (CRTs containing lead) to another country in violation of RCRA; export of CRTs contrary to law (smuggling); and obstruction of EPA's investigation into ER's export shipping records. *United States v. Executive Recycling, Inc.*, Docket No. 11-cr-00376-WJM (D. Colo. 2011). The indictment alleged that the defendants negotiated the sale of e-waste to buyers in China via brokers, with the buyers often paying ER directly. The defendants loaded e-waste, including CRTs, into shipping containers at their facility in Colorado and then transported them by train to American ports for export. The indictment alleged that ER appeared as the exporter of record for more than 300 exports from the United States between 2005 and 2008. Approximately 160 of the exported containers contained more than 100,000 CRTs.

The grand jury alleged that the defendants made false representations to businesses and governmental entities in order to fraudulently obtain contracts with customers. The indictment further alleged that, as part of their scheme, the defendants promoted their expertise in EPA regulations and the company's commitment to protect the environment from "harmful electronics by-products." Among other things, the company's Web site noted that lead in CRT glass was a harmful by-product and that it would dispose or otherwise handle all e-waste in an environmentally-friendly manner. This included recycling the material "properly, right here in the U.S." rather than sending e-waste overseas. The indictment also alleged that the defendants made similar representations in contracts entered into with customers paying for disposal, such as the City of Boulder and county governments, school districts, hospitals, and commercial businesses. According to the indictment, the defendants made more than $1.8 million on sales to brokers, including the sale of CRTs. The United States seeks forfeiture of proceeds related to the charges in the case. Trial is pending.

Thus, while e-waste regulation is a fairly new area of RCRA, the United States has taken enforcement action against companies and individuals that attempt to ship e-waste out of the country and make it someone else's problem. Given the nature of the regulatory program and the often international scope of this activity, careful attention to the particular facts of a case and coordination among agencies is required in deciding which violations to pursue and in what forum.

VIII. Conclusion

Given the volume of used electronics, it is not surprising that governments, NGOs, and the public are struggling to find cost-efficient ways to deal with the wave of e-waste that moves within and among countries. The developing world is following in the footsteps of developed countries and is rapidly increasing its use of consumer electronics. The tsunami wave of used electronics is growing exponentially. The environmental and public health issues posed by e-waste are becoming better understood. Regulation and enforcement at the international, federal, and state levels must play a role in helping achieve proper management of e-waste, especially in ensuring that collectors and processors are operating on a level economic and environmental playing field. Federal enforcement faces regulatory and

evidentiary challenges. These challenges, however, can be overcome, especially when individuals or companies blatantly fail to follow basic RCRA regulations or lie, cheat, or steal. Public-private partnerships that are developing and promoting certification standards are essential as well.

Consumers also have a key role—they must shop responsibly and be mindful of whether companies have a "take back" program. Consumers should maximize their use of purchased electronics before buying the "latest" gadget. Finally, when recycling, due diligence requires us to look beyond a company's "green" claims and peek behind the curtain: Are the company's owners and managers legitimate business people or crooks looking to sell unwanted and unusable goods to unsuspecting buyers here and abroad in order to make a dollar and then stick someone else with their mess? Looking forward, evolving federal and state laws, coupled with enforcement and more widespread use of third-party certification programs, will hopefully lead to better management of e-waste at home and abroad.❖

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Prosecuting Paint Waste Cases

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I. Introduction

In 2010, the Environmental Protection Agency (EPA) responded to a paint waste site in Eastern Idaho that included more than 3,000 containers of paint waste, much of which turned out to be hazardous waste. The resulting cleanup, which was not the first for this particular individual, cost the government over $498,000. The video of the response and cleanup even made it onto YouTube. In 2008, a similar case in Mississippi with five dump sites resulted in a restitution order requiring the payment of just over $135,000.

The United States wastes an extraordinary amount of paint. An estimated ten percent of the more than 750 million gallons of architectural paint sold each year in the United States goes unused. One EPA document estimates that between 66 and 69 million gallons of unused paint is discarded per year. *Available at* http://www.epa.gov/sectors/pdf/paint_quantity_report.pdf. The average household in California stockpiles one to three gallons of waste paint per year. The state of Washington concluded that in 2008 alone, its residents left unused 1.5 million gallons of the 14.8 million gallons of paint purchased during the year. Unused paint will inevitably become paint waste if not used during its shelf life and may become waste sooner if improperly stored. California estimates that leftover paint comprises 35 percent of all collected household hazardous waste and represents a significant portion of the high cost of running collection programs.

Consumer paint wastes are not the only problem. Industries also generate large amounts of waste paint. The United States automotive industry generates about 75,000,000 pounds of paint sludge each year. Similar paint waste streams from other industries also make significant contributions to landfills. Some industries substitute paint types that may relieve them from regulation under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6908(a) (2012). However, given the vast amount of paint waste that is generated in the United States every year and the costs associated with its proper disposal, it is not surprising that paint waste cases continue to occur.

II. Examples of paint waste cases

Paint waste generators include homeowners, industrial facilities, automotive shops, paint retailers and manufacturers, professional painters, and commercial facilities employing a painting process. Even the concrete industry now uses certain stains to add value to concrete products.

Paint-related waste runs the gamut from unused house paint, such as spray and can, to overspray from automotive spray booths. The wastes are not limited to the paint itself. Thinners and solvents like toluene and acetone that are used to clean paint applicators, including spray guns and standard paint brushes, also contribute to the waste generated from painting operations. Items like paint booth filters, masks, and still bottoms from recycling of solvents, add to the complexity of the regulatory puzzle.

Although it is not unheard of to find these cases in suburban and urban neighborhoods, the classic paint waste case involves the discovery of containers (usually five-gallon buckets) of paint waste

abandoned by the side of the road in a rural area. These "midnight dumper" cases can be difficult to prosecute unless solid evidence of the dumper's identity exists. This article will detail tips for solving these cases in Part VII.

Another typical paint waste case involves the storage of paint waste. At auctions, buyers frequently purchase lots, on pallets or otherwise, sometimes sight unseen. These lots may include good paint or paint that may be unusable because it has aged through freeze and thaw cycles in unheated storage units or for other reasons. Due to the cost of disposing of the paint waste, some of the wastes may end up in "storage" for long periods of time. Storage can mean something as simple as setting the waste out on the ground in the owner's field. Western United States districts have seen more than a few of these storage cases in recent years. One individual who owned a waste cleanup company in the Eastern District of Washington received a year and one day sentence in 2008 for storing large quantities of paint waste in a suburban garage. *United States v. Webb*, No. 2:08-cr-00216-EJL (D. Idaho, Dec. 18, 2008) (Judgment).

If investigators find paint waste, it is likely that they will also find other hazardous wastes. It is common to find corrosive substances along with paint waste. The recent EPA investigation mentioned at the beginning of this article turned up some industrial strength drain cleaner with a negative one pH (highly acidic), along with the large quantity of paint waste.

Finally, pouring paint waste down a drain is a tried and true disposal strategy—albeit an illegal one. Some cases involve the paint itself and other cases might involve solvents. Cases involving drains that lead to publicly-owned treatment works (POTWs) may be prosecuted for violating a pre-treatment permit or for discharging to the POTW without a permit. Not all drains lead to a POTW. Storm drains, which in many cases are marked with warnings, can lead directly to streams and other water bodies. Some drains dead-end into dry sumps. Any of the scenarios involving disposal to surface water would likely violate the Clean Water Act (CWA). 33 U.S.C. §§ 1251–1274 (2012).

III. RCRA regulation of paint waste

In order to qualify as RCRA waste, the material must first meet the definition of solid waste. Simply put, a "solid waste" is any *discarded material* that has not been excluded under the regulations. *See* 40 C.F.R. § 261.2(a)(1) (2012). The term "solid waste," however, does not refer to the physical form of the material; it expressly includes liquids, semisolids, and contained gaseous materials. *See* 42 U.S.C. § 6903(27) (2012). Generally, a solid waste is a hazardous waste if it falls into one of two categories: (1) *listed* hazardous wastes, and (2) *characteristic* hazardous wastes. A "listed" hazardous waste appears by name on one of four lists of hazardous wastes in the regulations. A "characteristic" ("identified" in terms of the elements of an offense under 42 U.S.C. § 6928(d)) hazardous waste, although not specifically named in the regulations, is hazardous because it exhibits one or more of four characteristics that are identified in the regulations. *See* 40 C.F.R. § 261.3(a)(2) (2012). These characteristics are ignitability, corrosivity, toxicity, and reactivity. *Id.* Every hazardous waste, listed and characteristic, is assigned an EPA Hazardous Waste Number that consists of a letter followed by three numbers. Characteristic wastes are known as D wastes. (For example, D001 is an ignitable waste.) Listed wastes are either F, K, P, or U wastes, each of which corresponds to one of the four lists.

RCRA provides a specific exemption for household waste disposal. RCRA excludes from the definition of solid waste materials generated by households, including trash, garbage, and sanitary wastes. 40 C.F.R. § 261.4(b) (2012). Commercial generators of paint waste may not exclude their waste under this exclusion. While most household non-commercial users of paint may dispose of paint in a

landfill, depending on local restrictions, most household paint waste (even latex) ends up in household hazardous waste collection stations rather than in landfills. Several states, most notably Oregon, have started robust recycling programs for household paint wastes.

Paint waste cases typically involve wastes that exhibit the characteristic of ignitablity and occasionally toxicity. To prove that a waste exhibits one or more of the characteristics, it is necessary to show that a "representative sample" of the waste, according to prescribed test methods, exhibits certain properties. A sample that is "obtained using any of the applicable sampling methods specified in Appendix I to Part 261" is considered "representative." *Id.* § 261.20(c). The RCRA regulations prescribe specific tests to determine toxicity or ignitability. Ignitable wastes include a liquid (except an aqueous solution that contains less than 24 percent alcohol) that has a flash point of less than 60 degrees Celsius (140 degrees Fahrenheit), as determined by the Pensky-Martens or Setaflash Closed Cup Test. *Id.* § 261.21. Toxicity is measured by the Toxicity Characteristic Leaching Procedure. *Id.* § 261.24.

Prior to the 1990s, some paints contained mercury. Exterior water-based paint manufactured after September 30, 1991 should not contain mercury. Water-based interior paint made before August 20, 1990 may contain mercury. Any paint destined for disposal that contains more than 200 parts per million of mercury would qualify as hazardous waste based on the characteristic of toxicity. *Id.* Paint manufacturers have largely moved away from producing paints that are characteristic for toxicity; however, it is possible to come across old stock at disposal sites.

Water-based latex paints are not likely to constitute hazardous waste. A common method of disposal for latex paint includes letting the paint dry out or adding kitty litter to the paint to harden it. Commercial paint additives are made specifically for this purpose, but illegal dumpers are unlikely to avail themselves of the additional expense. If the paint waste does not qualify as hazardous waste and has not been disposed to a water of the United States, an illegal disposal still may violate state solid waste disposal restrictions and can be referred to the appropriate state agency for either prosecution or civil adjudication.

IV. RCRA universal waste exceptions

In 1995, EPA provided new regulations designed to encourage nationwide collection and recycling of "universal wastes" by removing disincentives to such programs created by then-existing RCRA regulations. *See* 40 C.F.R. §§ 273.1–273.81 (2012). Although EPA does not currently include paint wastes as universal waste in the federal scheme, the success of the federal universal waste program at keeping such wastes out of landfills encouraged some states to adopt their own universal waste regulations that go beyond federal regulations. Three states specifically regulate paint waste as state universal waste. New Jersey and Pennsylvania regulate oil-based finishes as state universal wastes. Texas regulates paint and paint-related wastes under their state universal waste regulations. Wastes that are disposed of or treated would likely not fall under a state scheme designed to enhance recycling efforts, but storing wastes may implicate state universal waste regulations. Prosecutors in the above-referenced states should consult with state officials before proceeding to determine whether potential targets are recycling wastes.

V. Lead-based paint

Most lead-based paint (LBP) cases occur as the result of illegal demolition of old buildings. The United States banned LBP for household application in 1978. The Toxic Substances Control Act, 15 U.S.C. §§ 2601–2697, and Residential Lead-Based Paint Hazard Reduction Act, 42 U.S.C. §§ 4851–4856, address LBP hazards. The United States Department of Housing and Urban Development

also has guidelines for contractors performing lead-based paint abatements. A lead-based paint illegal storage or disposal case may involve recently-manufactured paint waste, particularly in states bordering Mexico. One study found that a substantial portion of new residential paints manufactured in Mexico contained lead at levels above the United States standard of 90 parts per million. Therefore, it might be productive to have paint waste with a known origin in Mexico analyzed for lead following the TCLP methodology discussed above. Paint used in the United States for painting lines on roads also may contain lead and, while most state transportation agencies no longer contract for such paint, that does not mean old stock is not lying around. One other LBP area to be aware of is spent blasting media from bridge paint-prep jobs. This media sometimes contains lead in excess of regulatory limits because the paint was applied to the bridges decades ago.

VI. Clean Water Act discharges of paint waste

In addition to RCRA hazardous waste storage and disposal cases, a common scenario involves disposal of paint waste directly into storm drains or POTWs without an appropriate permit. The waste need not be characterized or listed as a hazardous waste in order to violate the CWA. The key prohibition of the CWA, 33 U.S.C. § 1311(a), makes it unlawful to discharge "pollutants" except in compliance with certain specified provisions of the act. The discharge needs to occur from a point source that would include paint containers poured into storm drains. Pollutants include chemical wastes and industrial wastes like paint wastes. Most discharges to storm drains in an urban environment will meet the CWA element requiring discharge into a water of the United States. Likewise, disposing of paint wastes to a drain that connects to a POTW will violate the CWA's pre-treatment indirect discharge prohibitions. POTWs generally tolerate the discharge of small amounts of latex paint with wastewater from brush cleaning, but disposing of latex paint will violate most POTW rules. Discharges of non-RCRA regulated paint wastes like latex to dry sumps with no connection to a water of the United States would only result in state criminal liability.

VII. Investigative issues

Identifying targets in side-of-the-road paint waste dumping cases can be challenging, but the problems are not insurmountable. The EPA has expertise in tracing information from paint can labels. Paint manufacturers and commercial paint sales outlets are usually very cooperative in tracking down the lot numbers found on paint labels to narrow down the list of possible targets. Even if the labels are removed, it is sometimes possible to track cans back to the manufacturer by codes that are embedded on the cans themselves. Investigators can then track the cans forward from manufacturer to distributor and ultimately to the sales outlet and purchaser. It is sometimes productive to check with nearby landfills or household hazardous waste collection centers for what are known in the industry as "turnarounds." Turnarounds usually occur when a commercial user of paint attempts to dispose of waste at a center restricted to accepting only household wastes and the center officials inform the waste generator that the center is unable to take the waste. These wastes sometimes end up in empty lots or on the side of a road. Other turnarounds can occur at a landfill authorized to take the waste from commercial sources, when, after learning the cost of disposal, the generator opts to dispose of the waste someplace else or even put the waste back in long-term storage.

Getting a hazardous waste paint case to court requires that the sampling conform to the RCRA requirements discussed above. In many cases, the sampling is straight-forward and only requires collection of samples from a minimal number of containers before forwarding the samples to a lab. EPA

runs several labs around the country, most notably the National Enforcement Investigations Center in Denver, Colorado. Not all paint waste cases involve simple sampling issues, however, and defense attorneys are becoming increasingly adept at challenging complex sampling and testing methods.

In many cases where a large amount of paint waste has been stored or disposed of, it is likely that EPA or a state will send a civil response team to deal with the cleanup. While the basic television police drama would have viewers believe that a "turf battle" arises any time federal officials show up on a crime scene, that scenario is not what usually happens in hazardous waste cleanup cases. In large cases, the states are very willing to turn the cleanup over to a federal response contractor under the direction of an EPA on-scene coordinator, especially where expenditures for these types of cleanups can easily run into six figures. EPA has authority under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9630, to send the responders for cleanup. The result is that the civil contractors assume responsibility for the initial hazcatting (categorizing and segregating wastes by type based on simplified tests) and for the ultimate disposal of any wastes collected from the site.

The problem with CERCLA contractors handling a cleanup (parallel proceeding issues aside) is that the criminal investigators may be marginalized when it comes to evidence collection. In order to process a criminal case, prosecutors should demand that labs run at least some of the representative samples through the full EPA-approved methodologies. If the civil side is not willing to run the additional sampling along with its cleanup samples, prosecutors should insist on sending split samples to an EPA-funded lab. This strategy, however, can create its own host of problems such as differences in analytical results, even when the split results are close, but not identical, in values.

If EPA is not able to achieve full testing under their RCRA methodologies, it is not necessarily the end of the case. Deviation from EPA's methodologies generally "goes to the weight of the evidence and not its admissibility." *United States v. WCI Steel, Inc.*, 72 F. Supp. 2d 810, 824 (N.D. Ohio 1999) (citing *People v. Sangani*, 28 Cal. Rptr. 2d 158 (1994)); *see also United States v. Baytank, Inc.*, 934 F.2d 599, 614 (5th Cir. 1991) (evidence sufficient to prove drums contained hazardous waste even though the government took no drum samples); *People v. Hale*, 34 Cal. Rptr. 2d. 690 (Cal. Ct. App. 1994), *review denied* (Jan 5, 1995) (noncompliance with EPA's methodology was "substantively harmless" and did not preclude the admission of sample analysis in a prosecution for violating hazardous waste laws).

VIII. Sentencing

Paint waste cases should receive the same guideline sentence as any RCRA storage or disposal case sentenced under U.S. Sentencing Guidelines Manual (U.S.S.G.) § 2Q1.2. CWA cases not involving hazardous waste should proceed under U.S. Sentencing Guidelines Manual § 2Q1.3. The base offense level is eight. *See* U.S.S.G. § 2Q1.2(a) (2011). A release to the environment can add six points. *See id.* § 2Q1.2(b)(1)(A). Repetitive discharges may warrant four additional points. *Id.* § 2Q1.2(b)(1)(B). Failure to obtain a permit in disposal cases adds four points. *Id.* § 2Q1.2(b)(4). Substantial expenditure on a cleanup will add an additional four points under § 2Q1.2(b)(3). The circuits have not reached a consensus on a threshold amount for this enhancement. One circuit held that a cleanup expenditure of $76,000 qualified. *United States v. Catucci*, 55 F. 3d 15, 18-19 (1st Cir. 1995). In the Sixth Circuit, anything starting at six figures can trigger application of the guideline. *United States v. Bogas*, 920 F.2d 363, 369 (6th Cir. 1990).

A more contentious guideline issue involves the nine-point enhancement for substantial likelihood of death or serious bodily injury. *See id.* § 2Q1.2(b)(2). While the standard is less strict than the imminent danger required for RCRA knowing endangerment cases, judges are reluctant to apply this enhancement in these types of cases. The comments to the guideline indicate that serious bodily injury

means surgery or hospitalization where there is protracted impairment of a bodily function. One Tenth Circuit case upheld application of the guideline where no actual exposure to the hazardous waste occurred. In *United States v. Dillon*, 351 F.3d 1315 (10th Cir. 2003), the court concluded that the ignitable hazardous waste (1,700 drums) that was stored in an urban area without a permit posed a danger to the community that warranted the imposition of the nine-point enhancement.

IX. Conclusion

While the United States generates huge amounts of paint waste every year, between household hazardous waste collection centers and the availability of recycling for paint, even for commercial users, no excuse warrants the improper disposal of this material. Districts should pursue appropriate prosecutions, where resources are available, to level the playing field for the commercial users who properly dispose of paint waste and to deter future illegal storage and disposals.❖

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The Role of the Crime Victims' Rights Act in Environmental Crimes Prosecutions

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I. Background and introduction

The nation's environmental laws protect our land, water, and air through regulation, administrative enforcement, civil enforcement, and criminal prosecution. Among these enforcement techniques, criminal prosecution is the means of enforcement used least frequently. At the same time, environmental violations that rise to the level of a crime are the violations most likely to involve direct harm to people.

Treating environmental violations as crimes represented an important shift in our nation's regard for its natural resources. For much of our nation's history, the idea that one would need to ask the government before releasing a pollutant into the air or water would have been absurd. And the idea of making the knowing, unpermitted release of a pollutant a felony would have been doubly so. In the nation's early days, control of such releases would have been mostly a private matter, settled in tort, and only if damages could be proved. Thus, environmental crime is a late addition to the list of transgressions that the government punishes through criminal prosecution. *See* Raymond W. Mushal, *Up from the Sewers: A Perspective on the Evolution of the Federal Environmental Crimes Program*, 2009 UTAH L. REV. 1103 (2009). Indeed, until recently, prosecutors faced doubts from Congress, the bench, and juries about whether environmental crime belonged on a list that included assault, murder, and fraud.

Times have changed, and knowing pollution of an ecosystem or wanton destruction of biological diversity is largely recognized as *malum in se* (wrong in itself), rather than merely *malum prohibitum* (wrong because prohibited). Nevertheless, some growing pains remain in environmental crimes prosecution. The concept of victims' rights suffers those pains as investigators and prosecutors are still grappling with how to incorporate victims' rights into their work. In any given case, that task can lead to additional litigation, delay, and other difficulties.

The victims' rights movement grew out of a recognition that prosecutors had failed to address a necessary third party in the prosecution of violent criminal defendants. With the government facing off against a defendant wrapped in constitutional protections, victims of violent crime were too often treated as evidence rather than as people who had been injured by the defendant. Prosecutors would consult victims only for their testimonial value, with little regard for the impact the crimes had on their lives. The criminal justice system had fallen "out of balance—while criminal defendants had an array of rights under law, crime victims had few meaningful" ones. 150 Cong. Rec. S4260, S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). Over time, rights for those victims have developed through the political process, resulting in the 2006 passage of the Crime Victims' Rights Act (CVRA). *See* 18 U.S.C. § 3771 (2012). Thus, victims today fare much better than ever before.

Necessarily and appropriately, the law extended victims' rights beyond those who were victims of violence. Ruinous fraud, identity theft, and economic crime can be life changing, and the victims of those crimes deserve to be made whole, to the greatest extent possible. In fact, the CVRA's statutory definition of "victim" extends victims' rights to corporations when they are defrauded or subjected to theft. In environmental cases, the kinds of harm suffered by victims can be economic, but may also involve illness or even death.

Because environmental crime does have not the same deep, historical roots as its more traditional counterparts, and because the victims' rights movement focused initially on violent crime, the integration of victims' rights practice into environmental crimes prosecution has been challenging. Presented below is an analysis of how victims' rights play a role in the prosecution of environmental crimes, together with examples of how the government can best meet its obligations to victims. The analysis is focused on the CVRA, and on the Department's 2011 Attorney General Guidelines for Victim and Witness Assistance (AG Guidelines), *available at* http://www.justice.gov/olp/pdf/ag_guidelines2011.pdf. This article also provides examples of how crime victims' rights have had an effect on recent environmental cases, and how prosecutors can accomplish even more effective prosecution and sentencing of environmental criminals by wise application of victims' rights concepts.

The CVRA was designed to declare and protect the rights of victims and to ensure their involvement in the criminal justice process. *United States v. Moussaoui*, 483 F.3d 220, 234 (4th Cir. 2007); *Kenna v. United States Dist. Court*, 435 F.3d 1011, 1016 (9th Cir. 2006) ("The [CVRA] was enacted to make crime victims full participants in the criminal justice system."). It is inclusive, covering any person who has suffered harm because of the commission of a federal crime. It is also specific, setting forth eight rights that victims have. As mentioned above, the CVRA was the result of a political process driven by the failures of the judicial system, which included the failure to protect victims from the accused, lack of communication, a failure to seek restitution, and an overarching failure to recognize the vulnerable position of the crime victim in the midst of the governmental act of criminal prosecution. In the CVRA's rights, one can see Congress' mandate to remedy those failures. The rights are:

> (1) The right to be reasonably protected from the accused.
>
> (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
>
> (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
>
> (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
>
> (5) The reasonable right to confer with the attorney for the government in the case.
>
> (6) The right to full and timely restitution as provided in law.
>
> (7) The right to proceedings free from unreasonable delay.
>
> (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

18 U.S.C. § 3771(a)(1)-(8) (2012).

These rights apply whenever a person is harmed by the commission of a federal crime, as detailed below. The Act does not distinguish between violent crime and economic crime. Nor is there a minimal showing of harm necessary to invoke a victim's rights under the CVRA.

The enumerated rights may be asserted by the victims, by counsel on behalf of the victims, or by the government on behalf of the victims, in the district court where a case is pending, or, if no case is pending, in the district where the crime occurred. If the court denies the relief requested, a petition for a writ of *mandamus* can be sought in the court of appeals. *Id*. § 3771(d)(3).

While the CVRA provides a wide range of rights to victims, those rights are not without limits. A failure to afford the rights under the CVRA does not provide grounds for a new trial. However, a victim may move to reopen a plea or sentence if certain conditions are met. *Id*. § 3771(d)(5). Most significantly, nothing in the CVRA "shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction," *id*. § 3771(d)(6), which in plain language has been interpreted to mean that victims have "a voice, not a veto." *United States v. Rubin*, 558 F.Supp.2d 411, 418 (E.D.N.Y. 2008). And, as discussed below, the work of the prosecutor in seeking restitution is not a substitute for tort liability suits that translate the harm suffered by a victim into an economic value.

II. Analysis

A. Who is an environmental crime victim under the CVRA?

The CVRA definition of a "crime victim": The CVRA defines a "crime victim" as a person "directly and proximately harmed as a result of the commission of a Federal offense." 18 U.S.C. § 3771(e) (2012). The AG Guidelines recognize that a victim may be an individual, but also a "corporation, company, association, firm or joint stock company." AG Guidelines, Article III.C.2. The AG Guidelines also direct that "[n]either the federal government, nor any state, local, tribal or foreign government or agency thereof fall under the definition of crime victim for either mandatory services or court-enforceable rights; however, they may qualify for restitution under federal restitution statutes. *See* 18 U.S.C. 3664(I) (2006 & Supp.II 2008)." AG Guidelines, Article III.G.

In many cases, it may be a relatively easy task to confirm a victim's status because the causal link between the crime and the deadly and deleterious effects is easy to see. *See United States v. BP Prods. N. Am., Inc.*, 610 F.Supp.2d 655, 672-73 (S.D. Tex. 2009). In *BP Products*, criminal violation of the Clean Air Act included failure to implement a proper risk management plan to prevent releases of hazardous air pollutants. The failure resulted in a catastrophic explosion from the release of hydrocarbons, killing 15 employees and seriously injuring 170 others. The victims included the surviving family members of the 15 deceased employees and the 170 seriously injured employees. *See also United States v. Keith Gordon-Smith*, No. 08-CR-6019 (W.D.N.Y. Sept. 20, 2010), *available at* http://www.justice.gov/usao/nyw.gordon.html (victims of environmental crime that involved failure to provide protective equipment to asbestos workers included the workers (and their families) who were exposed to airborne asbestos fibers for several months during illegal asbestos removal and disposal).

In other cases, the result may not be as clear-cut because the trial court is not convinced of the cause and effect relationship proffered by the government. In *United States v. CITGO Petroleum Corp.*, 2011 WL 1337101 (S.D. Tex. Apr. 5, 2011), CITGO was convicted of operating two large tanks as illegal oil-water separators. That operation allowed unmitigated benzene emissions for several years. The prosecutors identified approximately 100 individuals living near the CITGO refinery as victims, based on what seemed to be a history of exposure to the benzene fumes. The issue of the victims' status came to be litigated because the defendant objected to the government's plan to call the victims at the sentencing hearing. After a hearing (during which those identified by the government as victims were heard regarding what they believed was the impact of the refinery emissions) and substantial briefing, the court found that the harm alleged was chemical exposure, but that the government's evidence had only shown

common symptoms and complaints of odors emanating from the storage tanks. The court held that notwithstanding the ill health effects suffered by individuals, "rumor, innuendo and suggestion," were not enough to show a nexus between the complained ill health symptoms and CITGO's illegal conduct. *Id.* at *4.

Determining crime victim status can be complicated by the charging decision. The CVRA requires that the direct and proximate harm be from the crime charged, not simply the related conduct by the defendant. Many environmental crimes involve deception, both before the offense is committed and then later, when the defendant tries to cover his tracks. Environmental crimes prosecutions can often include charges designed to reflect that conduct. Typical charges include: false statement, 18 U.S.C. § 1001; Klein conspiracy, 18 U.S.C. § 371; and obstruction of justice, 18 U.S.C. § §1505, 1512, and 1519.

While these types of offenses can be effective prosecutorial tools, they may not be strong vehicles for ensuring that the suffering of victims is redressed through the CVRA. *See United States v. Atlantic States Cast Iron Pipe Co.*, 612 F.Supp.2d 453 (D.N.J. 2009). In *Atlantic States*, the defendant company and four individual defendants were convicted of, *inter alia*, a conspiracy to impair and impede the lawful functions of the EPA and OSHA, as well as obstructing the proceedings of an OSHA investigation. These crimes stemmed from the cover-up of incidents in which employees sustained serious, and in one case fatal, injuries at a cast iron foundry. The government filed a motion asserting that six employees (or their survivors) qualified as crime victims under the CVRA. The court ruled that the criminal offenses were all based upon the deception of OSHA under Title 18, not on violations of OSHA workplace standards. Because of that, the court found that the six employees were not directly or proximately harmed as a result of the charged offense. *Id.* at 532.

These cases lead to the following conclusion: In cases where an environmental crime either brings about obvious harm (deaths and injuries in the *BP Products* case) or where proven exposure is a harm in itself (asbestos exposure in *Keith Gordon-Smith*), a court's identification of victims can be relatively direct. On the other hand, where causation would be the central defense in a tort suit, the government may not prevail in litigation regarding who is a victim. Consequently, it may be necessary to mount a tort plaintiff-style causation case (requiring a phalanx of medical, engineering, and environmental experts), which may require a significant use of resources, with no guarantee of success.

That said, tort-style litigation regarding the status of victims can occur. The government's judgment about the status of victims should be an informed one, and it is important that prosecutors, agents, and victim/witness coordinators consult together to establish who is a victim in any particular case.

Identification of victims: Prosecutors should coordinate with agents early in an investigation to identify all possible victims of an environmental crime. The AG Guidelines state that for prosecutors offices that have access to the automated Victim Notification System (VNS), identified victims' names and contact information "*should be entered into VNS as soon as practicable, but no later than at criminal charging*." AG Guidelines, Article IV.E. (emphasis added). Federal investigative agencies are also responsible for identifying victims of crimes as well as providing services to identified victims. The Victims' Rights and Restitution Act (VRRA) requires that at "the earliest opportunity after the detection of a crime at which it may be done *without interfering with an investigation*," an official responsible shall identify the victim or victims of a crime. 42 U.S.C. § 10607(b) (2012) (emphasis added).

Early identification of victims will help prosecutors ensure that victims' rights are protected. Prosecutors and investigative agents must always ensure that identifying victims, contacting them, and informing them of their rights, is done in a way that does not interfere with or compromise an investigation. Significantly, this duty includes protecting grand jury material from disclosure. FED. R. CRIM. P. 6(e). It is also an opportunity to limit victims' expectations for a quick resolution because the case in still under investigation.

The AG Guidelines also explain that "Department attorneys should inform crime victims that they do not have an attorney-client relationship with any employee of the Department." AG Guidelines, Article V.B.3. Because the prosecutor is generally closely aligned with the victim, there can be confusion on this point. That confusion can be exacerbated in the event the prosecutor must balance the interests of the victim against the interests of justice. An individual victim might wish for a speedy resolution of the case when the prosecutor knows that quick resolution might compromise a broader investigation, including causing the dissipation of assets or allowing a target to abscond. That kind of balancing is certainly permissible under the CVRA, which includes an express "reasonableness" standard for most of the enumerated rights. That kind of tension can sometimes lead a prosecutor to oppose a request that a victim, or a victim's attorney makes before the trial court. If that happens, it will be beneficial if the prosecutor can show that he or she explained to the victim that an attorney-client relationship does not exist between them.

B. Right to reasonable, accurate, and timely notice of proceedings

Title 18 U.S.C. § 3771(a)(2) affords a victim the right to "reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused." Providing notice in multiple victim cases requires utilizing any number of tools to ensure that all victims are duly notified. If not done in a well-coordinated manner, notification of victims could potentially compromise an investigation, as well as the victims' privacy. These legitimate concerns can be addressed through a number of procedures. Prosecutors should consult with Victim/Witness coordinators in the prosecutors' respective districts, as well as with the Executive Office of United States Attorneys' (EOUSA) Victim Witness Staff to see what practices have been used successfully to comply with the CVRA. The AG Guidelines furnish useful distinctions between providing individual notice ("electronic means such as VNS Web site, e-mail, and call center capabilities") and providing notice to large numbers of victims "through media outlets and public Web sites, or proxy notification to . . . community organizations [or] corporate entities . . . ." AG Guidelines, Art. V.D.2.

Timing of notice: The case law and Department of Justice policy on the timing of notification to victims has evolved in recent years, and prosecutors need to be cognizant of what is required of them to effect reasonable, accurate, and timely notice to victims. In the *BP Products* case, before any charges were formally filed, the government and BP negotiated a plea agreement wherein the defendant was to plead guilty to a knowing violation of the Clean Air Act, pay a criminal fine of $50 million, and serve three years' probation. The government moved *ex parte* for an order allowing the parties to file the plea agreement before providing notice to the victims. The government averred that the case had generated national publicity and victims' counsel had leaked information regarding the investigation on a number of occasions during plea negotiations. The government was concerned that notifying approximately 200 known victims and possibly hundreds more would impair both the investigation and the plea negotiation process. In addition, the government argued that if plea negotiations fell apart, the defendant's right to a fair trial could be compromised. *United States v. BP Prods. N. Am.*, 2008 WL 501321, at *1-*2 (S.D. Tex. Apr. 11, 2008). The district court granted the motion and the government filed the plea agreement with the court. *Id.* at *22.

Victims' counsel moved for the court to reject the plea agreement, claiming that the government had violated the CVRA by not providing notice prior to executing the plea agreement. Victims' counsel also argued that the government violated the CVRA by failing to provide the victims with an opportunity to confer with government attorneys in the case during plea negotiations. The district court denied the motion and victims' counsel petitioned the Court of Appeals for the Fifth Circuit for a writ of mandamus. *In re Dean*, 527 F. 3d 391 (5th Cir. 2008). The Fifth Circuit denied the petition, but stated that the government had violated the CVRA: "The number of victims here did not render notice to, or conferring with, the victims to be impracticable, so the victims should have been notified of the ongoing plea discussions and should have been allowed to communicate meaningfully with the government, personally or through counsel, before a deal was struck." *Id*. at 395.

Subsequent to *Dean*, the Sixth Circuit case of *In re Acker*, 596 F.3d 370 (6th Cir. 2010), cast doubt on whether victims are entitled to notice prior to filing of formal charges. In *Acke*r, victims of a price-fixing conspiracy petitioned the court of appeals because the district court ruled that the government had not violated the CVRA when it failed to provide notice to the victims prior to the filing of final charges. The Sixth Circuit affirmed the district court, holding that it is "uncertain" under the CVRA when victims are entitled to such early notice and participation in the plea negotiation process. *Id*. at 373.

Subsequent to *Acker*, the Attorney General issued the AG Guidelines on conferring with victims prior to filing charges:

> Prosecutors should make reasonable efforts to notify identified victims of, and consider victims' views about, prospective plea negotiations. Prosecutors should make these reasonable efforts with the goal of providing victims with a meaningful opportunity to offer their views *before* a plea agreement is formally reached. In circumstances where plea negotiations occur *before* a case has been brought, Department policy is that this should include reasonable consultation *prior* to the filing of a charging instrument with the court.

AG Guidelines, Article V.G.2. (emphasis added). Discussed below are a number of practical considerations to take into account when affording victims the right to consult with government attorneys during plea negotiations. *See* Section E, below.

Notice to Multiple Victims: Environmental crimes can result in harm to scores, hundreds, and potentially thousands of victims. While the government is obligated to provide reasonable, accurate, and timely notice, circumstances may make this difficult in cases involving multiple victims. In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in § 3771(a), the court is required to fashion a reasonable procedure to give effect to the victims' rights, as long as the procedure "does not unduly complicate or prolong the proceedings." 18 U.S.C. § 3771(d)(2) (2012). The AG Guidelines counsel that several forms of outreach may be appropriate in particular cases and encourage creativity to achieve the goal of providing notice to the greatest number of victims possible given the resources available. Further, in every case, "Department employees should carefully evaluate the type of information relayed and the method of communication to minimize the risk that investigations are compromised and that victims' privacy interests are inadvertently invaded." AG Guidelines, Article V.D.2.b.

Accordingly, prosecutors should be prepared to seek relief pursuant to 18 U.S.C. § 3771(d)(2), and provide the court with procedures that will give effect to the victims' rights and not unduly complicate or prolong the proceedings, or compromise the investigation or the victims' privacy. *See United States v. Stokes*, 2007 WL 1849846 (M.D. Tenn. June 22, 2007) (approving the government's

motion to provide notice to approximately 35,000 potential victims of an embezzlement scheme by publishing information related to the case on the USAO Web site, establishing a toll-free telephone line to provide case updates, notifying the victims by proxy through their employers, and publishing a notice in a national publication referring victims to the Web site and toll-free number).

In addition, it is not unusual in environmental crimes that multiple victims may include employees and workers who were directed by their employers to commit the illegal conduct, and who are often itinerant workers with little education and access to media that would otherwise provide them notice of their status as victims. *See United States v. Bragg*, 207 F.3d 394, 400 (7th Cir. 2000) (illegal aliens recruited to remove asbestos without proper protection were "vulnerable victims" under the Sentencing Guidelines). Both of these conditions can present significant and unique challenges for prosecutors attempting to provide notice to potential victims.

Thus, prosecutors are well served by coordinating with investigators and Victim/Witness coordinators in United States Attorney offices as early as possible. Expending the time and effort to accomplish effective notice to multiple victims early on will be well worth the effort in the long run.

C. Right not to be excluded from any public court proceedings

The legislative history and case law addressing the CVRA provide for an expansive reading of a victim's right to be present at any public court proceeding when compared to the witness sequestration rule under Federal Rule of Evidence 615. The CVRA requires that only upon a finding of "clear and convincing evidence" should a victim be excluded from a public court proceeding. 18 U.S.C. § 3771(a)(3) (2012). *See In re Mikhel*, 453 F.3d 1137 (9th Cir. 2006). In *Mikhel*, the district court excluded the victim-witnesses "without determining whether their testimony would be 'materially altered.' " *Id*. at 1139. The government petitioned the court of appeals for a writ of mandamus. The Ninth Circuit issued the writ, holding that a "mere possibility that a victim-witness may alter his or her testimony as a result of hearing others testify is therefore insufficient to justify excluding him or her from trial. Rather, a district court must find by clear and convincing evidence that it is highly likely, not merely possible, that the victim-witness will alter his or her testimony." *Id*. (emphasis in original) (footnote omitted).

An instructive case for environmental crimes prosecutors is *In re Parker*, 2009 WL 5609734 (9th Cir. Feb. 27, 2009). The Parker decision arose out of the case of *United States v. Grace*, 597 F. Supp. 2d 1157 (D. Mont. 2009), where the district court excluded lay witnesses that the government claimed were victims from attending the trial pursuant to Federal Rule of Evidence 615. The defendants in *Grace* were charged with several crimes under Title 18, as well as conspiracy to violate the Clean Air Act. The allegations stemmed from individuals and the environment being exposed for years to tremolite asbestos from the W.R. Grace mine in Libby, Montana.

The government moved under the CVRA, asserting the victim/witnesses' right "not to be excluded" from attending the trial. *Id.* at 1159. The district court initially ruled that the government could not establish that there were any identifiable crime victims in the case pursuant to the government's theory of liability. *Id.* at 1166. The Parkers filed simultaneously for a writ of mandamus, asserting the victims' right to attend the trial under the CVRA. The appellate court found that the district court erred in finding that the victim/witnesses were not victims under the CVRA, and in subsequently excluding them from court proceedings. The appellate court ordered the lower court to make "particularized findings" regarding whether the victim/witness's testimony would be "materially altered" by attending the trial. *Parker*, at *1.

The CVRA and case law set a high bar for excluding victim/witnesses from trial. Nevertheless, the government should be prepared to provide assurances to the court that it is highly unlikely that a victim/witness's testimony would be materially altered by attending the trial. This showing can include providing the court with the victim's prior grand jury testimony, as well as statements from interview reports.

D. Right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding

The CVRA and relevant case law also take an expansive view in affording the victim the right to be reasonably heard at public proceedings. As an initial matter, a victim's ability to be heard at a detention hearing can provide the court with a persuasive argument that the defendant's crime warrants detention pending trial. Such evidence can likewise prompt a defendant to seek a quicker resolution through a plea prior to trial.

Given the wider latitude that the courts and Federal Rules of Criminal Procedure allow at sentencing hearings, victim testimony can be more easily utilized to convince the court of the real harm caused by the defendant's conduct, and, in all likelihood, to obtain a more severe sentence. Regardless of the adjudged sentence, prosecutors are obligated to ensure that victims are in fact "reasonably heard" in court. *See United States v. Degenhardt,* 405 F.Supp.2d 1341 (D. Utah 2005). In *Degenhardt,* victims of financial crime wanted to address the court at the sentencing hearing. The court found that the "right to be heard" provides victims with the right to speak directly to the judge at sentencing because to allow only written submissions would "defy the intentions of the CVRA's drafters . . . and disregard the rationales underlying victim allocution." *Id*. at 1345. However, other courts have held that the right to be heard is not without limits. In *United States v. Marcello,* 370 F.Supp.2d 745 (N.D. Ill. 2005), the son of the murder victim wanted to speak at a pretrial hearing. The court found that because Congress provided for a "right to be heard," but did not provide for a specific "right to speak" in the CVRA, a victim's right to be reasonably heard does not mandate an oral statement. *Id.* at 748.

Prior to sentencing, prosecutors need to maintain contact with victims and/or their counsel. Sentencing may not take place for several months or even over a year after a plea or guilty verdict. Over those long periods of time, memories may fade. Victims understandably may have moved on in their own lives, allowed themselves to put the crime behind them, and may no longer be interested or available to testify at sentencing. It is incumbent upon a prosecutor to ensure that he or she does not lose this crucial opportunity to provide extensive proof of the harm suffered by the victims. To the extent possible and appropriate, prosecutors can encourage victims to be present and testify at sentencing. While the prosecutor has the tools of restitution to help make the victim whole, discussed below, the right to "tell their story" at sentencing can well be a cathartic and healing experience for victims. To the extent the prosecutor is faced with ensuring that large numbers of victims are afforded this right, productive means can include: providing written victim impact statements in lieu of live testimony, videotaped statements, or, when victims agree, having a single spokesperson or victims' counsel speak on their behalf.

E. Reasonable right to confer with the government attorney in the case

As noted above, the AG Guidelines direct that prosecutors should provide victims with notice and an opportunity to confer with the government prior to the filing of formal charges. While prosecutors must give effect to the victims' right to confer, they must also ensure that the prosecutorial process and resultant conviction, by verdict or plea, is in the best interests of the United States. The prosecutor's obligation to afford victims their rights under the CVRA, coupled with his or her duty and authority to

prosecute environmental crimes, is well-stated by the court in *United States v. Rubin*, 558 F.Supp.2d 411 (E.D.N.Y. 2008):

> Although the CVRA is meant to be liberally construed within the confines of the rights guaranteed, there is absolutely no suggestion in the statutory language that victims have a right independent of the government to prosecute a crime, set strategy, or object to or appeal pretrial or *in limine* orders entered by the Court whether they be upon consent of or over the objection of the government. Quite to the contrary, the statute itself provides that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6). *In short, the CVRA, for the most part, gives victims a voice, not a veto.*

Id. at 418 (emphasis added); *see also Does v. United States*, 2011 WL 4793213 (S.D. Fla. Sept. 26, 2011).

General Considerations: The AG Guidelines require that "[f]ederal prosecutors should be available to confer with victims about major case decisions, such as dismissals, release of the accused pending judicial proceedings, . . . plea negotiations, and pretrial diversion." Further, such conferences "should be conducted consistent with applicable rules . . . and professional conduct." AG Guidelines, Article V.G.1.

Conferring with a victim can take many forms. At the outset, contact with the victim should be prefaced by advising the victims that conferring with the government gives them an opportunity to express their views about potential charges and punishments. Equally important, the prosecutor must remind victims that they may seek advice from their own attorney, 18 U.S.C. § 3771(d)(1) (2012), but the prosecutor cannot provide legal advice to the victims. AG Guidelines, Article V.G.1. The prosecutor must make it clear to the victim that the ultimate decision of how the case will be charged and prosecuted is up to the government.

Conferring with government attorneys can serve as a useful source of information for victims, but in a limited context. While the prosecutor can provide a brief discussion of the status of the investigation, such a discussion may not in any way compromise the investigation. The best approach to take in such conferences is for the prosecutor to lay out a general description of the case, the possible charges, and the possible punishments. Thereafter, the prosecutor should maintain a listening mode. This serves a number purposes. First, it gives the victims the opportunity to genuinely express their feelings and experiences about the harm that resulted from the crimes. Second, it provides them an opportunity to state to the government, perhaps for the first time, what they believe would be appropriate charges and punishment. Third, listening carefully, with an agent present, provides an opportunity to gain evidence or information concerning the case that may not have been known prior to the conference.

Victims may be represented by counsel. This can pose a number of issues that the prosecutor will have to deal with in a manner that is consistent with rules of criminal procedure and professional conduct. If a prosecutor learns that a victim is represented by counsel, the prosecutor cannot communicate with the victim outside of counsel's presence. MODEL CODE OF PROF'L CONDUCT R. 4.2 (2012), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_2_communication_with_person_represented_by_counsel.html. Circumstances may arise where contact with the victim without his or her counsel would be "authorized by law," as that language from Rule 4.2 is understood in most jurisdictions. Prosecutors should not reach that conclusion without informed advice from the Professional Responsibility Advisory Office.

Counsel representing the victim in a separate civil action for damages may not have interests that are entirely helpful to or consistent with the government's obligations under the CVRA, Federal Rules of Criminal Procedure, and the prosecutor's duties as a government attorney. As discussed above, victims' counsel might inform the media about meetings with government counsel, despite the government's instructions not to do so, and potentially compromise the investigation and plea negotiations process. Before engaging in any substantive conference with victims' counsel, prosecutors should take advantage of resources available through the Department's Professional Responsibility Advisory Office and EOUSA's Victim Witness Staff, in order to best determine a course of action to be followed with victims' counsel on such issues.

In multiple victim cases, it may not be possible to meet with each individual victim. Therefore, as suggested by the courts and the AG Guidelines, prosecutors may craft innovative and creative processes to ensure that the right to confer is appropriately afforded the victims. Multiple victims may have already agreed to be represented by a single or small group of counsel as their liaison with the government. With large numbers of victims, in order to provide an effective opportunity to confer with the government, prosecutors may need to conduct such conferences in a "town meeting" setting. Prosecutors should seek advice from EOUSA Victim Witness Staff on how best to conduct such meetings, including how to address issues such as protecting the integrity of the investigation and the proper response to the possible media presence. During this process, prosecutors must ensure that through the use of such a public forum, the government has met its obligation to treat victims with "fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a)(8) (2012).

Plea Agreements: In environmental crimes prosecutions, as with criminal prosecutions in general, the majority of cases are resolved through plea agreements. As discussed above, the AG Guidelines state that Department policy is that prosecutors should consult with victims before any formal filing of charges or execution of the plea agreement. The AG Guidelines recognize that affording victims the right to confer regarding plea agreements can involve pitfalls that must be taken into account to ensure that the case is not unduly compromised.

In determining whether and to what extent consultation is reasonable, the prosecutor should consider factors relevant to the propriety and practicality of giving notice and considering views in the context of a particular case, including but not limited to, the following factors:

(a) The impact on public safety and risks to personal safety.

(b) The number of victims.

(c) Whether time is of the essence in negotiating or entering a proposed plea.

(d) Whether the proposed plea involves confidential information or conditions, or whether some other need for confidentiality is present.

(e) Whether the victim is a possible witness in the case and the effect that relaying any information may have on the defendant's right to a fair trial.

AG Guidelines, Article V.G.2. The AG Guidelines also counsel that "the reasonable right to confer concerning possible plea agreements does not obligate the prosecutor to consult with victims every time a term in the plea changes or when particular defendants are added or removed from an investigation or prosecution." *Id.*, Commentary.

A prosecutor may need to explain to a victim the circumstances of a plea agreement executed pursuant to Rule 11 of the Federal Rules of Criminal Procedure. That can include explaining to the

victim, without compromising an investigation or grand jury material, why the government has agreed to recommend a certain sentence pursuant to Federal Rule of Criminal Procedure 11(c)(1)(B). By the same token, if a plea agreement is executed pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), a prosecutor needs to explain to the victim that the government has actually agreed with the defendant that a specific sentenced should be imposed. Further, the victim needs to understand that unless the judge rejects the plea, the agreed upon sentence will be the adjudged sentence. If a victim objects to the plea agreement in either form, the victim has a right to ask the court to reject it. By informing the victim of the possible outcomes that can result from a (B) or (C) plea, the prosecutor will have made a strong record that the victims have been fully accorded the reasonable right to confer.

Adhering to the axiom that victims have "a voice, not a veto" requires a continual balancing of the prosecutor's obligations under the CVRA with his or her duties in resolving a case by plea agreement where appropriate. Victims will not have access to grand jury material or other investigative material that informs the government of weaknesses in the case. Victims may not be aware of tactical necessities for providing a lower-level employee a plea agreement in order to obtain a conviction against a higher-level manager who has greater criminal culpability. In short, victims often will not be aware of a myriad of litigation risks and strengths in the case that must be factored in when reaching a plea agreement.

As long the prosecutor takes steps to afford victims the reasonable right to confer, including seeking appropriate advice from available sources in the Department, the final resolution of a case should withstand judicial scrutiny if challenged under the CVRA. *See United States v. Dreier*, 682 F.Supp.2d 417 (S.D.N.Y. 2010). In *Dreier*, the government and a Chapter 11 trustee entered into an agreement regarding what items and proceeds the government would seek to forfeit and what items were part of the bankruptcy estate. A victim of the defendant's crime objected to the agreement, asserting that it violated the victim's right to full restitution under the CVRA. The court found that the agreement was reasonable and in the collective best interests of all of the victims. The court also found that "[a]lthough the Government is obligated to confer with victims before settling claims, . . . '[n]othing in the [Crime Victims' Rights Act] requires the government to seek approval from crime victims before negotiating or entering into a settlement agreement.' " *Id.* at 421 (*quoting In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 564 (2d Cir. 2005)).

F. Right to full and timely restitution as provided by law

Harm caused by environmental crimes can include physical and psychological injury, death, and pecuniary loss and property damage. Although the prosecutor is not the victim's advocate, he or she is required to ensure that the victim is provided full and timely restitution as provided by law. Thus, the CVRA provides an obligation and an opportunity to see that, to the extent appropriate, a victim is made whole after having suffered harm as a result of the defendant's crimes.

Restitution for victims of environmental crimes may be available under different provisions of Title 18 of the United States Code. First, restitution is available to a victim when the defendant commits a Title 18 offense. 18 U.S.C. § 3663 (2012). Restitution is mandatory for specific offenses under Title 18, including a crime of violence or an offense against property. *Id*. § 3663A. A court may order restitution as a condition of probation. *Id.* § 3563. In addition, a court may order restitution as a condition of supervised release. *Id.* § 3583(d). *See also* UNITED STATES SENTENCING GUIDELINES § 5E1.1(a)(2) (2011), *available at* http://www.ussc.gov/Guidelines/2011_Guidelines/Manual_HTML/5e1_1.htm.

Although 18 U.S.C. § 3663 provides for restitution for victims, it is only for victims of crimes committed in violation of Title 18 and does not include any of the environmental criminal statutes. *See*

United States v. Elias, 269 F.3d 1003, 1022 (9th Cir. 2001). In *Elias*, the defendant was convicted of knowing endangerment under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6928(e). Upon conviction, the district court sentenced Elias to 204 months in prison and ordered the defendant to pay $6.3 million in restitution. The Ninth Circuit vacated the sentence, holding that restitution was not permitted under 18 U.S.C. § 3663 in this case, but that the "district court may consider further amending the sentence by imposing a term of supervised release with a condition requiring restitution, pursuant to U.S. Sentencing Guidelines § 5E1.1(a)(2)." *Id.* at 1022. Upon remand, the district court amended the sentence and ordered that Elias pay restitution as condition of supervised release. Elias again appealed, and the Ninth Circuit affirmed the sentence. *United States v. Elias*, 111 F. App'x. 943, 944 (9th Cir. 2004).

As discussed above, to seek mandatory restitution, the government must show that the victim suffered direct and proximate harm as a result of a Title 18 offense, which may prove to be too attenuated. However, prosecutors should be mindful of the potential for such evidence. Examples include cases in which an environmental contractor is required to properly store, treat, or dispose of hazardous wastes, or properly clean up hazardous pollutants from a facility. If the facility or site owner has contracted with the defendant for proper work and the contract requires that proper certification be provided via the mails or interstate wire, a Title 18 offense may lie for mail fraud, 18 U.S.C. § 1341, or wire fraud, 18 U.S.C. § 1343.

Recall from above the district court's holding in *Atlantic States* that the criminal offense of conspiring to violate OSHA and submitting false statements to hide the OSHA violations did not cause harm to the victims. 612 F.Supp.2d at 532. However, *Atlantic States* may be of limited precedential effect. A different approach is for the government to allege and prove a conspiracy under 18 U.S.C. § 371 to violate the substantive environmental statute (e.g., Clean Air, Clean Water, RCRA). The indictment would include the discharge, emission, or release of a pollutant as an overt act of the conspiracy. If the government can show that the overt act has in fact caused injury to a victim, then the harm has resulted from a violation of the Title 18 offense (18 U.S.C. § 371, conspiracy). Thus, the government could argue for a sentence to include immediate restitution under 18 U.S.C. § 3663.

Unless the factors discussed immediately above are present, restitution as a condition of probation under 18 U.S.C. § 3563(b)(2), or as a condition of supervised release under 18 U.S.C. § 3583(d) and U.S. Sentencing Guidelines § 5E.1.1(a), may be the only options available. In ordering the amount of restitution, the court is required to take into consideration the defendant's ability to pay. 18 U.S.C. § 3664(f)(2(A) (2012). While the fact that a victim has received compensation through insurance or other sources is not to be considered in determining the amount of restitution, *id*. § 3664(f)(2)(B), any amount paid to a victim under a restitution order shall be reduced by any amount later recovered in a federal or state civil proceeding. *Id*. § 3664(j)(2).

Regardless of what provision may apply, prosecutors should obtain the most accurate information regarding economic loss suffered by victims, any compensation provided to victims prior to sentencing, and the defendant's ability to pay restitution, as early possible in the investigation. Accurate information of pecuniary loss and the defendant's ability to pay will allow the court to determine the appropriate amount to make the victim whole. Further, the prosecutor should take the earliest opportunity to make clear to the victim the limitations of the federal restitution provisions; for example, potential timing of repayment and the possibility that it will be incomplete due to the defendant's limited ability to pay. Providing this information will ensure that the victim has a realistic expectation of what amount of restitution, if any, may be ordered. Indeed, since criminal defendants typically dissipate their gains quickly, it is important not to engender false hopes of restitution in victims.

Cases can arise where a victim has not suffered immediate injury, but the government can show by a preponderance of the evidence that the defendant's crime will result in harm to the victim at a later date. In such cases, prosecutors have an opportunity to structure innovative conditions that give effect to the victims' right to be made whole from the harm suffered as a direct and proximate result of the environmental crime. *See, e.g., United States v. Yi*, No. 2:10-cr-00793PA (C.D. Cal. June 7, 2011). In *Yi*, the court granted the governments's motion to use restitution to fund medical monitoring for asbestos workers who were exposed to friable asbestos when they were ordered to perform illegal asbestos removal. The government's motion provided accurate estimates of different medical procedures (x-ray, CAT scan, pulmonary exam) necessary for effective monitoring for asbestos-related diseases that may be contracted by victims.

G. The right to proceedings free from unreasonable delay

Environmental crimes investigations and prosecutions can take several years. While prosecutors may not be able to control the pace of pretrial motions, discovery, or post-trial motions, the CVRA provides victims with a means of asserting the right to have a case move free from "unreasonable" delay. 18 U.S.C. § 3771(d)(3) (2012). The government may seek similar relief on behalf of the victim. *See In re Simons*, 567 F.3d 800 (6th Cir. 2009). In *Simons*, the victim filed a motion to unseal the record in a criminal case. After a three-month delay, the victim petitioned the court of appeals for a writ of *mandamus*. The court issued the writ, holding that the unexplained, three-month delay without a ruling by the district court violated the CVRA. *Id*. at 801.

Once the prosecutor has been in contact with a victim or group of victims, he or she must make sure the victims understand that an investigation and prosecution can take several years. Justice delayed is not necessarily justice denied, but that may be of little solace to victims who have suffered great economic loss, have been severely injured, or who have had a family member killed as a result of an environmental crime. Therefore, due to an array of circumstances that can cause delays, prosecutors and investigators need to ensure that victims have realistic expectations as to how long a case may take to reach a conclusion.

H. The right to be treated with fairness and with respect for the victim's dignity and privacy

Prior to enactment of the CVRA, crime victims did not have a Congressional mandate that protected their rights to be "treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a)(8) (2012). The CVRA now provides victims such rights, and empowers the government to give full effect to those rights. *See, e.g., United States v. Madoff*, 626 F.Supp.2d 420 (S.D.N.Y. 2009). In *Madoff*, press media sought disclosure of emails sent from fraud victims to the U.S. Attorney's Office. The court held that under the CVRA, the presumption of public access needed to be weighed against the victims' privacy rights. The court required disclosure, but allowed the government to redact all identifying information from the emails of those victims who did not consent to the disclosure of their correspondence. *Id*. at 425.

In *United States v. Heaton*, 458 F.Supp.2d 1271, 1271 (D. Utah 2006), the government moved for dismissal "in the interest of justice" of a charge of "using a means of interstate commerce to entice an individual under the age of 18 to engage in sexual activity." The court found the victim's right to be treated fairly extends to all aspects of the criminal justice system, including the victim's right to be heard on the government's motion.

When the government files a motion to dismiss criminal charges that involve a specific victim, the only way to protect the victim's right to be treated fairly and with respect for her dignity is to consider the victim's views on the dismissal. It is hard to begin to understand how a victim would be treated with fairness if the court acted precipitously to approve dismissal of a case without even troubling to consider the victim's views.

The *Heaton* court stated that "to treat a person with 'fairness' is generally understood as treating them 'justly' and 'equitably.' " *Id.* The court added that its inquiry as to whether the victim was treated with fairness includes determining "whether the prosecutor is acting out of *animus* to a victim without having the victim's views on the subject." *Id*. at 1273.

The *Madoff* case makes it clear that an assessment of whether the government has adequately protected the victim's right to privacy includes weighing the presumption of public access needed against the victim's right to privacy. However, the court in *Heaton* adds that the inquiry of whether a victim has been treated with "fairness" also includes whether a prosecutor could be "acting out of animus" towards a victim. Thus the government attorney must take what he or she believes are all reasonable and necessary steps to balance the "interests of justice" with effecting the victim's rights under the CVRA. Having done so, the court may still assess whether the prosecutor has done so without evidence of *animus* towards the victim's right to be treated with "fairness and respect for the victim's dignity." 18 U.S.C. § 3771(a)(8) (2012).

III. Conclusion

In meeting the government's obligations under the CVRA and presenting the government's strongest case at trial and sentencing, environmental crimes prosecutors have indeed obtained significant sentences against defendants. Examples are the *Atlantic States* case (imprisonment up to 70 months and $8 million fine imposed for violations of Clean Water Act and Klein conspiracy to obstruct OSHA investigation) and the *Keith Gordon-Smith* case (imprisonment of 72 months). The nature of environmental crimes will frequently involve victims who have been harmed as a result of the crimes. The circumstances will require our best efforts under the CVRA to ensure that the victims' rights are given full effect. As a result, environmental crimes prosecutors would be well advised to be familiar with the AG Guidelines and the potential pitfalls and benefits.❖

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Organizational Community Service in Environmental Crimes Cases

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Environmental Crimes Section

Once an environmental crimes case is resolved, obtaining a court order for the defendant to engage in community service is one option that is available to prosecutors. Environmental prosecutors should keep in mind that, first and foremost, each prosecution involves criminal conduct and that criminal conduct should be dealt with appropriately, whether it be by a term of incarceration, probation, a criminal fine, or other form of punishment.

In the realm of environmental prosecutions, the use of community service has recently become more popular. Part of the reason for the increasing use of community service in environmental prosecutions may be that prosecutors often (and rightfully) want to rectify the wrongs caused by those who have violated environmental statutes. Prosecutors thus require defendants to take commensurate action to improve the environment. Another reason may be that some corporate defendants find it more palatable to perform community service than pay a criminal fine because a criminal fine carries a greater stigma. Judges, too, may perceive that they are doing more good for the community by keeping money local in the form of community service, rather than sending it to the Department of the Treasury. Finally, community service may result in good public relations for all parties involved.

Although community service should never be the primary goal of an environmental crimes prosecution, legal bases *do* exist for including it in a plea agreement and sentence. When executed in compliance with legal and prudential considerations and in conjunction with appropriate penal sanctions, community service has the potential to result in significant, long term environmental improvements.

Community service is not the same as restitution. Title 18 authorizes and in some cases requires restitution for actual losses or damages to crime victims. *See* 18 U.S.C. §§ 3563, 3663, 3663A (2012); *See also, United States v. Chemical & Metal Industries*, 2012 WL 1301166 (5th Cir. Apr. 17, 2012). However, restitution is limited to victims of a crime. A "victim" is "a person directly and proximately harmed" as a consequence of the offense. 18 U.S.C. § 3663(a)(2) (2012). The legislative history to § 3563 indicates that community service may be appropriate when, among other instances, the victims cannot readily be identified. S. REP. NO. 98-225, at 98 (1983) *reprinted in* 1984 U.S.C.C.A.N. 3182, 3281. This article does not address the issue of restitution to victims of environmental crimes.

I. Legal bases for community service

Community service is generally authorized in Title 18 as a condition of probation (or supervised release after an individual defendant has been released from incarceration). 18 U.S.C. § 3563(b)(12) (2012); *see also* U.S. SENTENCING GUIDELINES MANUAL (U.S.S.G.) § 5F1.3 (2012). Traditionally, community service orders have involved requiring individual defendants to perform work in the community, such as working in a soup kitchen, picking up trash along a road, and painting over graffiti.

The tradition of ordering community service by organizational defendants is of more recent vintage. Nonetheless, the United States Sentencing Guidelines provide some direction on the issue. In a

policy statement in U.S.S.G. § 8B1.3 (Sentencing of Organizations), the Guidelines state that community service should be "reasonably designed to repair the harm caused by the offense." Thus, the Sentencing Guidelines Commission recognized that some harms that are caused by a criminal defendant may not be linked to particular victims and may not be susceptible to direct remediation or restitution.

The commentary to § 8B1.3 recognizes that community service for an organizational defendant is not the same as community service for an individual:

> An 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.

Id. While some corporate defendants will have the ability to directly perform community service in environmental cases, most do not, and it is appropriate, as the Guidelines reflect, for the defendant to "pay[] . . . others to do so . . . ." *Id.*

II. The United States Attorneys' Manual on community service

In 2008, Section 9-16.325 was incorporated into the United States Attorneys' Manual. That provision provides, in pertinent part, that:

> Plea agreements, deferred prosecution agreements and non-prosecution agreements should not include terms requiring the defendant to pay funds to a charitable, educational, community, or other organization or individual that is not a victim of the criminal activity or is not providing services to redress the harm caused by the defendant's criminal conduct.
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> Apart from the limited circumstances described below, this practice is restricted because it can create actual or perceived conflicts of interest and/or other ethical issues.

DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-16.325 (2008).

The Criminal Chiefs Working Group recommended this change due to instances of perceived abuse of extraordinary restitution by some offices. Originally, the Working Group was going to propose an end to all forms of extraordinary restitution except for community restitution that is statutorily authorized for certain drug crimes in 18 U.S.C. § 3663(c). Such an end would also have resulted in the abolition of community service to fund environmental projects in environmental crimes cases.

After several meetings, the Criminal Chiefs Working Group decided to carve out an exception to the prohibition for environmental crimes. The Working Group's agreement to carve out this section was due in large part to guidance that was issued by the Environment and Natural Resources Division (ENRD). ENRD guidance counsels that community service projects have a geographic nexus with the criminal offense, that there be a medium nexus (for example, water for a Clean Water Act case), that there should be limitations on selecting which organizations will receive money to carry out such projects, that there should be limitations on prosecutor involvement with the organizations, and that the amount of money set aside for community service projects be a limited percentage of the overall financial package in a case. As a result, the United States Attorneys' Manual includes an exception that allows for

environmental community service and *requires* any United States Attorney's office that is contemplating such service to consult with the Environmental Crimes Section. That provision states, in pertinent part:

> Neither does this section restrict the use of community service provisions in plea agreements, deferred prosecution agreements or non-prosecution agreements resolving environmental matters. United States Attorneys' Offices contemplating such community service in a matter involving environmental crimes shall consult with the Environmental Crimes Section of the Environmental and Natural Resources Division, which has issued guidance to ensure that the community service requirements are narrowly tailored to the facts of the case. The guidance also requires that any funds paid by a defendant as community service be directed to an entity in which the prosecutors have no interest that could give rise to a conflict and that is legally authorized to receive funds. See USAM 5-11.115.

Id.

Section 5-11.115(b) of the United States Attorneys' Manual further states:

> Environmental crimes often can result in widespread degradation of the environment and threaten the health and safety of entire communities. In such circumstances, community service may be used in conjunction with traditional criminal sentencing options, provided that the community service comports with applicable law and furthers the purposes of sentencing set forth in 18 U.S.C. § 3553. Community service is authorized as a discretionary condition of probation under 18 U.S.C. § 3563(b)(12) and it is addressed in U.S.S.G. § 8B1.3.
>
> United States Attorneys' Offices considering the use of community service shall consult with ECS for guidance. See USAM 9-16.325. A guidance document addressing its use is available on the Environmental Crimes intranet website.

Id. § 5-11.115(b).

The carve-out in the United States Attorneys' Manual reflects an appreciation for an established community service program with appropriate restrictions. It also demonstrates the Department of Justice's (DOJ) commitment to offset environmental impacts that are caused by violations that may not otherwise be directly addressable due to the passage of time and the difficulty of proving harm to identifiable victims for purposes of restitution.

III. The implications of appropriations laws on community service

Both legal and pragmatic issues arise when considering whether to seek community service as part of a resolution of an environmental crimes case. Among those are the Miscellaneous Receipts Act (MRA), 31 U.S.C. § 3302; the Government Corporation Control Act (GCCA), 31 U.S.C. § 9102; and the Anti-Augmentation Principle.

The MRA requires that money received by the government be deposited in the Department of the Treasury, stating, "Except as provided in section 3718(b) of this title, an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. § 3302(b) (2012). Criminal fines are considered to be miscellaneous receipts to be deposited and generally go to the Crime Victims Fund. *See* 42 U.S.C. § 10601 (2012).

Thus, a government employee may not receive funds on behalf of the government and then direct them elsewhere. Moreover, a government employee should not have control over post-conviction "disposition or management of the funds or any projects carried out under the settlement, except for ensuring that the parties comply with the [plea agreement]." Office of Legal Counsel, *Application of the Government Corporation Control Act and the Miscellaneous Receipts Act to the Canadian Softwood Lumber Settlement Agreement*, 30 OPINIONS OF THE OFF. OF LEGAL COUNS. 8 (Aug. 22, 2006) (discussing whether the GCCA is violated when private foundations distribute duties that are held by the United States to "meritorious initiatives" that are related to timber-reliant communities).

Community service must comply with the MRA and not amount to a diversion of funds from the Treasury. However, community service in the form of the defendant funding an environmental project through a third party can be achieved without running afoul of the MRA. A prosecutor can take several steps to minimize MRA risks. First, it is important that a plea agreement containing a community service provision be negotiated and executed prior to the admission of guilt, that is, a plea agreement should be signed that contains the specifics of the community service to be performed before the defendant appears in court to enter his guilty plea. Second, neither the DOJ nor the investigative or other agency should have control over the community service funds after the plea agreement is entered into. The executive branch should not have any discretion over the spending of the funds and should not play a role in the management of community service projects.

These steps minimize the risk that the government might be deemed to be in constructive receipt of the community service funds, which would raise MRA concerns. Constructive receipt may arise when, even though no money actually has been received by a government official, the government has discretion over how the money is spent. Brooke E. Robertson, *Expanding the Use of Supplemental Environmental Projects*, 86 WASH. U. L. REV. 1025, 1043 (2009) (discussing the utility of requiring defendants in environmental cases to perform Supplemental Environmental Project in settlements).

The lesser known GCCA raises issues similar to the MRA. Under the GCCA, an agency may establish a corporation only when it is specifically authorized to do so. *See* 31 U.S.C. § 9102 (2012). In the community service context, the Act would allow the creation of an environmental foundation to manage community service funds resulting from a resolution of a criminal case. However, substantial restrictions exist: (1) the government cannot create the foundation unless specifically authorized, (2) the extent of governmental control over the foundation's operations after it has established cannot be more than negligible, (3) the purpose for which the foundation was created and the function it serves cannot be on behalf of the government, and (4) the funds for the foundation cannot be from the government, unless specifically authorized. *Application of the Government Corporation Control Act and the Miscellaneous Receipts Act to the Canadian Softwood Lumber Settlement Agreement*, 30 OPINIONS OF THE OFF. OF LEGAL COUNS. 6-7 (Aug. 22, 2006).

Under the Anti-Augmentation Principle, a federal agency may not supplement a Congressionally-funded program by adding to the amount that Congress has appropriated for the particular activity. *See Motor Coach Industries, Inc. v. Dole*, 725 F.2d 958, 964-65 (4th Cir. 1984); General Accounting Office, Office of the General Counsel, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, Vol. II, 6-162–6-163 (3d ed. 2006). It has long been established that appropriations are considered a Congressional function under the United States Constitution. *See* U.S. CONST. art. I, § 9, cl. 7. Moreover, funding a program that Congress already has considered in passing a budget raises separation of powers issues. Absent specific statutory authorization for an agency to receive such funds, community service should not augment or add to a program that Congress has already authorized and funded at a specific amount. *See* 31 U.S.C. § 1341(a)(1)(A) (2012). Similarly, community service may not be used to fund an activity that Congress has reviewed and decided not to fund.

IV. Using community service in environmental crimes cases

Community service is an appropriate tool in resolving some environmental crimes cases. It can be used to offset some of the environmental harm that has been caused by a defendant. In many cases, it is difficult or impossible to remedy the precise environmental insult caused by the defendant's offense. For example, where there has been an ongoing illegal discharge of pollutants into a river for months or even years, the pollution cannot be recaptured; it has flowed down the river and has become part of the pollution that is building up in our environment. Similarly, the illegal emission of hazardous air pollutants cannot be filtered from the ambient air through technical means.

Environmental community service can offset some harmful effects. When community service projects are designed and implemented appropriately, with a meaningful relationship between the violation and the project, they can advance the objectives of the environmental statutes. Community service can reduce the adverse impact on public health and the environment that is caused by similar conduct in the same geographic area as the violation. Therefore, in the example noted above, community service activity might include funding a project to help clean up the same river into which the defendant unlawfully discharged pollutants. Community service might also include undertaking a study that is designed to understand how pollutants that are discharged into the river adversely affect aquatic life and/or the health of persons living near the river.

It should be noted that community service is not a panacea. The criminal provisions of the environmental statutes, while part of an overall scheme to protect and enhance the environment, were not drafted to solve all environmental and public health problems associated with a violation. Rather, those provisions are part of the mosaic that is available to punish wrongdoers, deter others, provide restitution to victims, and remediate environmental damage. The principles in chapter eight of the United States Sentencing Guidelines (regarding organizational defendants) reflect that remedying harm caused by the offense is an important goal. Martin Harrell, *Organizational Environmental Crime and the Sentencing Reform Act of 1984: Combining Fines with Restitution, Remedial Orders, Community Service, and Probation to Benefit the Environment While Punishing the Guilty*, 6 VILL. ENVTL. L.J. 243, 264-65 (1995) (discussing environmental prosecutions in the United States and organizational sentencing).

Executive Order 12898, 59 Fed. Reg. 31-01, 32 (Feb. 16, 1994), designed to encourage consideration of environmental justice issues, speaks to the fact that certain segments of the nation's population are disproportionately burdened by exposure to pollution. In selecting a community service project, consideration may be given to those communities that are exposed to higher levels of pollution and rely on food and water sources that are located near where the violation occurred.

The ENRD has established a set of guidelines that address community service. These guidelines are designed to preserve the criminal nature of an environmental crimes prosecution, ensure that projects that are undertaken are completed, protect the integrity of community service projects, and preserve the community service program. The guidance document, which addresses a number of important items, includes the following:

- Community service should not exceed 25 percent of the sanction package. A criminal prosecution is just that, a criminal prosecution. A primary goal of sentencing is deterrence, and deterrence is best achieved by incarceration of individuals and fines against corporations. The sentence in an environmental crimes case should be a message to the public and the regulated community that the defendant committed a serious crime and is being punished accordingly. Community service does not carry the same stigma that a fine does and, consequently, should not be an overly significant proportion of the

sanction package. The amount of any community service funds should be negotiated after determination of restitution and an appropriate fine. Extraordinary circumstances may arise when the community service may be higher than 25 percent, but that should be a rare occurrence and used only after careful consideration.

- Prosecutors should consult with regulatory and technical experts. Community service programs involve areas where prosecutors typically have little or no expertise. It behooves the prosecutor to consult an agency expert who has specialized knowledge about the type of community service project that is involved, the time it will take to complete the project, and the resources necessary to do so. They may also be able to provide important benchmarks to ensure that the project is completed in a timely fashion.

- There should be a geographic nexus and medium nexus between the community service project and the violation. When negotiating the resolution of a case or requesting that a sentence include a requirement that a defendant perform community service, including the commitment of funds, prosecutors should ensure that a nexus to the violation is present. In other words, a relationship between the violation and the proposed activity should be established. The Environmental Protection Agency's policy for civil Supplemental Environmental Projects stresses the importance of the nexus. *See* www.epa.gov/compliance/civil/seps/. The nexus includes a geographic nexus (same general area) and medium nexus (same resource) as involved in the underlying violation.

- Community service should not augment a federal program or activity. Consistent with federal appropriations law, a community service project should not impinge on the appropriations process. Thus, community service that funds a federal program or project should be avoided.

- Prosecutors should not be involved in managing or controlling community service projects. Consistent with the MRA and the doctrine of constructive receipt, a prosecutor should avoid involvement in a community service project after the court has meted out the sentence. (Needless to say, community service funds should not be directed to a program or entity that the prosecutor or anyone from his office is involved in.) However, it is appropriate that there be some oversight to ensure that the project is completed in an efficacious and timely manner. This can be accomplished through a combination of review and reporting to the court by the Probation Department or a third-party expert independent of, but paid for by, the defendant.

- Appropriate limitations on the community service funds should exist, including, among other limitations, publicity and tax deductions. A prosecutor should be careful when negotiating a community service provision to make sure that no unintended benefits accrue to the defendant. For example, a defendant should not be able to publicize a community service project unless the publicity includes explicit acknowledgment that the project was part of a criminal sentence for violating environmental laws. Additionally, a defendant should be prohibited from seeking a tax benefit from the expense of the community service. This prohibition ensures that the government does not end up underwriting a portion of the defendant's criminal sentence. Thus, many plea agreements restrict defendants from capitalizing into inventory or basis or from deducting any costs or expenditures related to community service.

V. Conclusion

A community service project can enhance the condition of the ecosystem in the immediate geographic area affected by an environmental crime. Community service thus can restore and protect natural environments by protecting the environmental medium that is actually or will potentially be adversely affected by the violation or by improving the overall condition of the environmental medium. For example, restoration of a wetland along a river where there have been illegal discharges can have the effect of cleaning the waters that received the pollutants. Prosecutors should familiarize themselves with the legal authorities for community service and DOJ guidelines when exercising discretion to fashion an appropriate community service project.❖

ABOUT THE AUTHOR

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Toxic Torts, Knowing Endangerment, and the W.R. Grace Prosecution

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I. Introduction: Toxic torts v. knowing endangerment

Toxic tort litigation arose in the post-World War II era in response to injuries resulting from the proliferation of chemicals and greater public exposure to such toxins as asbestos, dioxin, and pesticides. This area of law developed substantially after the Love Canal and Three Mile Island incidents, both of which came to a head in the late-1970s. During roughly the same time period, Congress took steps to address this new risk to public health. In 1979, Senators Kennedy, Thurmond, DeConcini, Hatch, and Simpson introduced the Criminal Code Reform Act of 1979 (CCRA), S. 1722, 96th Cong., 2d Sess. (1979). A significant component of the CCRA was the introduction of "endangerment offenses," providing that "a person is guilty of an offense if he engages in conduct that he knows places another person in imminent danger of death or serious bodily injury." CCRA Section 1617, S. REP. NO. 96-553, at 561 (1980). Though Congress did not enact the CCRA, this concept was later adopted in three environmental statutes regulating toxic or hazardous substances: the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387; the Resource Conservation and Recovery Act (RCRA), Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended in scattered sections of 42 U.S.C.); and the Clean Air Act (CAA), 42 U.S.C. §§ 7401-7642.

Toxic torts and the criminal endangerment statutes thus arose as a response to the same post-industrial environmental concerns and hazards to human health. In some respects, the necessary proof under both causes of action mirror each other. However, there are critical differences. Most significantly, toxic tort cases are private civil actions seeking recovery of damages for personal injuries arising from specific exposures, while the endangerment statutes enable the government to enforce against conduct involving toxic substances that present an unacceptable threat of serious harm to the public. Under the former, proof of compensable injury is required for recovery of damages. As a consequence, the concept of causation of actual harm has taken center stage in toxic tort cases. In contrast, the endangerment statutes do not require proof of actual harm. Instead, the government need only prove that a defendant knowingly placed another in "imminent danger" of "death or serious bodily injury" as a result of actions

involving regulated pollutants. *See* Section 309(c)(3) of the CWA, 33 U.S.C. § 1319(c)(3) (2012); Section 3008(e) of the RCRA, 42 U.S.C. § 6928(e) (2012); and Section 113(c)(5)(A) of the CAA, 42 U.S.C. § 7413(c)(5)(A) (2012).

The application of toxic tort standards in an endangerment prosecution introduces concepts that deviate from the goal of protecting the public from "imminent danger" because such standards are shaped by an issue central to all tort cases, that is, that the plaintiff has suffered actual harm. This article will review the role of actual harm in toxic tort civil actions versus the role of "imminent danger" in knowing endangerment prosecutions, and it will discuss, in the context of one recent environmental crimes prosecution, the ramifications of injecting toxic tort principles into an endangerment case.

A. Toxic torts

A tort is "[a] civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages." Black's Law Dictionary (9th ed. 2009). A toxic tort is "[a] civil wrong arising from exposure to a toxic substance, such as asbestos, radiation, or hazardous waste." *Id.* The primary goal of tort law is to compensate those who have been injured by the wrongful actions of another. Because of this focus, tort claims, including toxic torts, require proof that the injury giving rise to the claim for damages has actually occurred and that the defendant caused the injury. Due to the nature of environmental exposures, however, establishing causation in the toxic tort context presents unique difficulties. In contrast to traditional tort claims such as trespass or accidents, where there is an easily-identified cause and result, toxic torts present complicated causation issues because of the difficulty of establishing that a disease or a medical condition resulted from exposure to a particular toxin. This difficulty is compounded by the fact that the onset of symptoms is frequently delayed until months or years after the time of exposure, making the causal link more tenuous and less immediate. Furthermore, because toxins and their effects are not easily understood, all parties must rely heavily upon expert witness testimony to prove or disprove the necessary link between exposure and resultant harm.

The essential role played by the "proof of actual harm" requirement in toxic tort cases is clear in cases in which courts have held that a plaintiff cannot sustain a cause of action in the absence of a present physical injury, and an allegation of a higher *risk* of future harm will not suffice. *See Amendola v. Kansas City S. Ry. Co.*, 699 F. Supp. 1401, 1403-07 (W.D. Mo. 1988) (stating "[i]t is well accepted that an individual must suffer *actual* loss or damage to recover for the negligent acts of another," and reviewing toxic tort cases in which it was held that present physical injury was required to sustain the plaintiff's claim) (emphasis added). *See also Rhodes v. E.I. Du Pont Nemours and Co.,* 636 F.3d 88, 94-95 (4th Cir. 2011) (stating "plaintiff also must produce evidence of a detrimental effect to the plaintiffs' health that actually has occurred or is reasonably certain to occur due to a present harm," and finding that presence of "potentially dangerous, detectable levels" of perfluorooctanoic acid in plaintiffs' blood was insufficient to meet requirement of "actual physical impairment"). The "reasonably certain" requirement of future harm usually requires a showing that there is "a greater than 50% chance that a future consequence *will occur*." *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1160 (4th Cir. 1986), *citing Pierce v. Johns-Manville Sales Corp.*, 464 A.2d 1020, 1026 (Md. 1983) (emphasis added).

The "reasonably certain" or "greater than 50% chance" standard is applied in "latent harm" cases, that is, in those circumstances where the manifestation of physical injury may be delayed for a long period of time after exposure, and a litigant would be unfairly barred by the statute of limitations or otherwise prejudiced if he had to wait until he could demonstrate actual harm before bringing suit. *See* Note, *Latent Harms and Risk-Based Damages,* 111 HARV. L. REV. 1505 (1998). In these circumstances, where a plaintiff has suffered an "assault" or other tortious wrong, but the prospective harm has not yet

manifested itself, the plaintiff must show that the disease or actual harm is "reasonably certain" to occur in the future. *Id.* at 1510. In either instance, the "actual harm" element remains indispensable, that is, the plaintiff must show that the actual harm either has occurred or that it will occur to a legally acceptable degree of certainty.

Because toxic torts so frequently involve latent diseases, the question of future actual harm has evolved over the years into a specialized subcategory of toxic tort litigation requiring expert testimony in the fields of medicine, toxicology, epidemiology, and statistical analysis. Complications arise when harm to any particular individual must be proven because confounding factors, such as a plaintiff's genetic predisposition, exposures to other toxins, or exposures to the same toxins from other sources, must be accounted for. These questions will necessarily vary from one case to another. Moreover, juries are left to grapple with technical evidence and testimony, laden with mind-numbing statistics. As noted by Justice Stephen Breyer (before he was appointed to the Supreme Court), "[m]ost people have considerable difficulty understanding the mathematical probabilities involved in assessing risk." STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 36 (Harvard Univ. Press 1993). This has resulted in an unpredictable system criticized for its inconsistency. As further stated by Justice Breyer:

> That system [of tort law], however, leaves the determination of "too much risk" in the hands of tens of thousands of different juries who are forced to answer the question not in terms of a statistical life, but in reference to a very real victim needing compensation in the courtroom before them. The result is a system much criticized for its random, lottery-like results and its high "transaction costs" (i.e., legal fees) which eat up a large fraction of compensation awards. Whatever its merits and problems, I do not believe the tort system can serve as a substitute for government regulation.

Id. at 59.

The challenges faced by the courts and litigants presented with the ever-increasing complexity of evidence necessary to establish causation of actual harm has been the subject of numerous articles. *See* Bernard D. Goldstein, *Toxic Torts: The Devil is in the Dose*, 16 J.L. & POL'Y 551 (2008); Neal A. Stout & Peter A. Valberg, *Bayes' Law, Sequential Uncertainties, and Evidence of Causation in Toxic Tort Cases*, 38 U. MICH. J.L. REFORM 781 (2005). Moreover, as one court recognized, the "doubling of the dose" standard is not a reliable predictor of future harm because "common sense alone mitigates against establishing a bright line threshold for safe [exposure]." *In re Hanford Nuclear Reservation Litig.*, 292 F.3d 1124, 1137 (9th Cir. 2002) (quoting *In re TMI Litig.*, 193 F.3d 613, 727 n.179 (3d Cir. 1999)) ("We do not believe, for example, that a person who has been exposed to 10 rem of radiation is at risk for developing a neoplasm, but someone exposed to 9.99 rem is not."). However, because proof of actual harm is a necessary element for recovery in tort, it seems likely that the complex challenge of how to establish a quantifiable risk of "actual harm" in "latent harm" tort cases will persist. But as discussed below, the element of "actual harm" is antithetical to the goals of criminal endangerment statutes.

B. Criminal endangerment law

The origins of traditional torts are grounded in common law, and tort law developed historically through the courts. Although toxic torts serve the broader societal aim of deterrence of future harmful conduct, the fundamental function of tort law is to provide a means through which an individual may seek redress. "[Tort law] presupposes that there is no need to address and no legal problem for the law to redress, unless and until someone has brought a complaint before the court. ... [O]nce a dispute is settled

before a tort court, the issue is over. Nothing more need be done." CARL F. CRANOR, REGULATING TOXIC SUBSTANCES: A PHILOSOPHY OF SCIENCE AND THE LAW 51 (1993). In contrast, the endangerment provisions are statutory, and like all penal codes, reflect a collective determination by society outside of the courtroom that certain conduct should be prohibited because it is harmful to the common good.

> Understanding that the conception of *Crime*, as distinguished from that of *Wrong* or *Tort* and from that of *Sin*, involves the idea of injury to the State of collective community, we first find that the commonwealth, in literal conformity with the conception, itself interposed directly, and by isolated acts, to avenge itself on the author of the evil which it had suffered.

HENRY S. MAINE, ANCIENT LAW 320 (New Universal Lib. 17th ed. 1901). Thus, whereas traditional tort law focuses upon the harm suffered by an individual victim, criminal law speaks to society's need to penalize and deter behavior that presents a danger to the community.

One court has distinguished the goals of tort law versus criminal law as follows:

> Tort law has different goals than criminal law. Tort law emphasizes compensating victims who have been injured by another's conduct. The real issue is often whether anyone should be required to compensate the injured party. ... Criminal law, on the other hand, emphasizes punishment, deterrence, and rehabilitation of the individual criminal defendant, rather than focusing on compensation for the injured victim.

J.R. v. State of Alaska, 62 P.3d 114, 118-19 (Alaska Ct. App. 2003). Prevention of harm to the public is also a legitimate goal of criminal law. *See United States v. Salerno*, 481 U.S. 739, 747 (1987) (holding that pretrial detention of dangerous criminal defendants did not violate due process and noting that "[t]here is no doubt that preventing danger to the community is a legitimate regulatory goal"). *See also United States v. Dotterweich*, 320 U.S. 277, 280 (1943) (upholding conviction of company president for distributing misbranded drugs and stating, "[t]he Food and Drugs Act of 1906 was an exertion by Congress of its power to keep impure and adulterated food and drugs out of the channels of commerce. . . . The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection").

Before the environmental endangerment provisions were enacted, Congress had already passed criminal laws that addressed endangerments in other contexts. As the Senate Judiciary Committee noted in its Report on the CCRA, several such statutes already existed, including 18 U.S.C. § 33 (punishing anyone who, "with a reckless disregard for the safety of human life," damages, destroys, or places any explosive or destructive substance in or near a motor vehicle used in interstate commerce); 46 U.S.C. § 2302(a) (misdemeanor for any person who uses a vessel in a "grossly negligent" manner "so as to endanger the life, limb, or property of any person"); 18 U.S.C. § 1716(a) (knowing mailing of any poison, explosive, and "all other natural or artificial ... material which may kill or injure another," is punishable by a year in prison); 18 U.S.C. § 832(a) (knowing transportation of any dangerous explosives or radioactive materials punishable by a year in prison); 18 U.S.C. § 1856 (2012) (any person who starts a fire on or near federal forest lands and leaves the fire without extinguishing it subject to six months in prison); 49 U.S.C. § 46505(b) (illegal to possess or place on board an aircraft a concealed weapon or explosive when done without regard or with reckless disregard for the safety of human life). S. REP. NO. 96-553 at 561.

Noting that only particular endangerments had been addressed in the penal code, the Committee stated that the goal of Section 1617 of the CCRA was to provide a general endangerment provision in Title 18. *Id.* Section 1617 read broadly:

(a) OFFENSE.—A person is guilty of an offense if he engages in conduct by which he places another person in danger of imminent death or serious bodily injury.

(b) GRADING.—An offense described in this section is—

(1) a Class D felony if the circumstances manifest extreme indifference to human life; and

(2) a Class E felony in any other case.

(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

(1) the offense is committed within the special jurisdiction of the United States; or

(2) the offense occurs during the commission of any other offense, over which federal jurisdiction exists, that is described—

(A) in this title; or

(B) in a statute outside this title that is designed to protect public health or safety.

Id. at 561-65.

With regard to non-Title 18 offenses, the CCRA limited section 1617's jurisdiction to conduct that occurred while a defendant was violating specific statutes involving human health, including the CWA, the CAA, the RCRA, the Toxic Substances Control Act (TSCA), and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). *Id.* at 564, CCRA § 1583. Although Congress did not pass the CCRA, it subsequently enacted endangerment provisions based upon Section 1617 directly into the RCRA, the CWA, and the CAA. These provisions thus followed in a line of criminal laws designed to protect and prevent harm to the public in an increasingly complex, industrialized world.

C. The criminal endangerment provisions under the environmental statutes

Section 3008(e) of RCRA, 42 U.S.C. § 6928(e) (2012), was the first "knowing endangerment" provision to be enacted in the environmental statutes. (The Clean Water Act provision, 33 U.S.C. § 1319(c)(3), and the Clean Air Act provision, 42 U.S.C. § 7413(c)(5)(A), are both patterned after RCRA's Section 3008(e), with some variations.) In its conference report on the Solid Waste Disposal Act Amendments to RCRA, the joint Senate and House Committee cited to the Justice Department's "belief that this provision is necessary to protect the public from knowing and unjustified conduct which threatens life or serious bodily harm." 1980 U.S.C.C.A.N. 5028, 5038. It further stated that "no concrete harm need actually result for a person to be prosecuted under this section." *Id.*

The purpose, then, of the "knowing endangerment" provisions of RCRA, the CWA, and the CAA is prevention of harm to the public. The proactive approach taken under the endangerment sections is consistent with the approach taken generally under these and other public welfare statutes. For example, Sections 3001 through 3004 of the RCRA, 42 U.S.C. §§ 6921-6924, establish a "cradle to grave" regulatory framework for the generation, transportation, treatment, storage, and disposal of hazardous waste. The overall goal of this framework is to prevent releases into the environment. The knowing endangerment provision, Section 3008(e) of the RCRA, is triggered when predicate conduct proscribed by the statute is committed, and the perpetrator knows that he has thereby placed another person in imminent danger of death or serious bodily injury.

This system is in keeping with the government's role of safeguarding the health and welfare of the community. One court explained that the role of quantifiable risk within the context of public welfare statutes is necessarily distinct from that in common law torts, because of their different origins and goals:

> A legislature might well altogether outlaw a substance on the ground that it is known to involve a risk of appreciable harm to human beings, without having precise data on the question of how much harm, or what kind of harm, some specific amount of that substance might reasonably be expected to cause some particular kinds of persons or even to an average or an ordinary person. Such legislation would presumably, as an ordinary matter, survive judicial scrutiny as a rational exercise of the police power. ...
>
> Whatever may be the considerations that ought to guide a legislature in its determination of what the general good requires, courts and juries, in deciding cases, traditionally make more particularized inquiries into matters of cause and effect. Actions in tort for damages focus on the question of whether to transfer money from one individual to another, and under common-law principles ... that transfer can take place only if one individual proves, among other things, that it is more likely than not that another individual has caused him or her harm.

Wright v. Willamette Indus., Inc., 91 F.3d 1105, 1107 (8th Cir. 1996) (internal citations omitted).

The purposes of the statutory/regulatory system versus tort law also mean that they differ in terms of outlook. As stated in one treatise:

> For all its imperfections, the regulatory process is far better suited than tort law for controlling subtle risks. Regulatory agencies seek to inhibit risk ex ante, just in case. Courts are only supposed to compensate people ex post, not for risk but for proven harm. Regulators can, at least theoretically, aim for a far higher level of protection than can possibly be achieved by tort law.

Kenneth R. Foster, David E. Bernstein & Peter W. Huber, *Conclusion: Phantom Risk—A Problem at the Interface of Science and the Law*, PHANTOM RISK: SCIENTIFIC INFERENCE AND THE LAW 431, 440 (MIT Press 1993).

Because the endangerment statutes are designed to take a prospective view, that is, address a *risk of harm* that endangers the public at large, as opposed to the retrospective view in tort law that addresses *harm that has occurred* to an individual, a requirement to prove a quantifiable risk of actual harm, with its attendant complexities, is antithetical to the purposes of a knowing endangerment prosecution. Concepts borrowed from the realm of toxic torts, such as a "greater than 50% chance" or a "reasonable certainty" that harm will befall a particular individual in the future, or the related "doubling of the dose" standard, are incompatible with the criminal law's legitimate goal of penalizing and deterring knowing conduct that endangers, but does not necessarily harm, the larger community.

This does not minimize the importance of establishing that the danger of death or serious bodily injury is concrete and not speculative. In its report on the CCRA, the Senate Judiciary Committee stated:

> [T]he ultimate harm posed by the danger, *if the harm were to occur*, must be of the type that is irrevocably fixed by circumstances immediately surrounding the endangering conduct, although it may take a period of time for the full injury to be realized. Of course, it goes almost without saying that the more remote or the less certain the predicted harm from the endangering conduct the more difficult it would be to prove the endangerment prohibited by the section ....

S. REP. NO. 96-553 at 563 (emphasis added). The legislative history of the CCRA thus demonstrates that there must be a significant nexus between the endangering conduct and a substantial *potential* for harm, although this does not require that *actual* harm occur.

In the first RCRA knowing endangerment prosecution, the Tenth Circuit upheld a jury instruction stating that "imminent danger" is "the existence of a condition or combination of conditions which *could reasonably be expected* to cause death or serious bodily injury unless the condition is remedied." *United States v. Protex Indus.*, 874 F.2d 740, 744 (10th Cir. 1989) (emphasis added). *Accord United States v. Little*, 308 F. App'x 256, 260 n.1 (10th Cir. 2009) (in CAA prosecution, "[d]efendant is mistaken in suggesting that the evidence was insufficient to support his conviction [for negligent endangerment] because none of the Government's witnesses could testify, with certainty, that the inmates would experience serious bodily injury or death as a result of their exposure to the asbestos .... [T]he jury was only required to find that the inmates' exposure to conditions in the depot *could reasonably be expected* to have such an effect.") (emphasis in original). This standard, "could reasonably be expected," is qualitatively different from the toxic tort standard requiring a "reasonable *certainty*" that harm will occur. Whereas the former requires the jury to weigh "conditions or combinations of conditions" in judging whether it would be reasonable to expect that death or serious bodily injury may result, the "reasonable certainty" standard as applied in toxic torts requires that a quantitative risk assessment be proven, establishing a statistical level of proof of certain harm. Because Congress expressly rejected the notion that actual harm would be an element of a knowing endangerment offense, the toxic tort standard cannot be reconciled with the goals of the statutes.

The Tenth Circuit recognized that Congress did not intend to require that the government prove certainty of harm under Section 3008(e). In *Protex,* the defendants argued that the "reasonable expectation" standard was too lenient, and that the prosecution should have been required to prove that the toxic exposures were "substantially *certain*" to cause harm. The Tenth Circuit disagreed, finding that Congress intended the term "substantially certain" to apply to "the *mens rea* necessary for commission of the crime, rather than the degree to which defendant's conduct must be likely to cause death or serious bodily injury." *Protex*, 874 F.2d at 744. This finding is consistent with the legislative history of the RCRA knowing endangerment provision, where the conference committee emphasized that "serious criminal charges are not an appropriate vehicle for second-guessing the judgments that are made on the basis of what was known at the time where the person acted without the necessary element of scienter." S. REP. NO. 96-1010, at 38-39 (1980). In other words, Congress intended, through a heightened *mens rea* standard, to reserve knowing endangerment prosecutions for those persons who manifested either an "extreme indifference" or "conscious disregard for human life." *Id.* But, as noted by the *Protex* court, this standard did not apply to the endangerment element. (It should be noted that when the CWA endangerment provision was enacted, Congress excluded the "substantial certainty" standard from the *mens rea* requirement because it had "discouraged prosecutions" under the RCRA. S. REP. NO. 99-50 at 30 (1985)).

As emphasized by the *Protex* decision, "[t]he gist of the 'knowing endangerment' provision of the RCRA is that a party will be criminally liable if, in violating other provisions of the RCRA, it places others in *danger* of great harm and it has knowledge of that danger." *Protex*, 874 F.2d at 744 (emphasis added). The few cases that have addressed this issue are in agreement. *See United States v. Hansen,* 262 F.3d 1217, 1244 (11th Cir. 2001) (conviction upheld where "[t]he evidence showed that [the defendants] knew that the conditions of the plant were dangerous and that the conditions posed a serious danger to the employees"). *See also United States v. Elias*, 269 F.3d 1003, 1017-18 (9th Cir. 2001) (in upholding the defendant's conviction on RCRA knowing endangerment charges, the court stated, "at the end of the day, the question is whether a reasonable person who knew cyanide had previously been stored in the

tank and who was aware of previous health complaints by those working with or near the substance would have known that the sludge in Elias's tank was dangerous to human health." The court also upheld a jury instruction stating that "[t]he government does not need to show that the defendant actually intended to harm or endanger any person"). None of these cases required proof that actual harm was *certain* to occur or that testimony or evidence was required to establish that the exposures presented a quantifiable risk greater than 50 percent. Such a standard, designed by the courts in an attempt to create a legal standard for liability in toxic tort litigation, runs counter to the goals set forth by Congress in enacting the knowing endangerment provisions; that is, punishing those individuals who knowingly endanger but do not necessarily harm other persons and deterring conduct that places the public in harm's way.

II. United States v. W.R. Grace: Shaping of the Clean Air Act knowing endangerment theory of liability in pre-trial litigation

In 2005 a federal grand jury in Montana indicted W.R. Grace and seven individual defendants on multiple counts, including three substantive Clean Air Act knowing endangerment offenses under 42 U.S.C. § 7413(c)(5)(A). Following years of pre-trial litigation and two interlocutory appeals, a jury acquitted defendants following a three-month trial that concluded in May 2009.

The three endangerment counts alleged that W.R. Grace and several individual defendants knowingly endangered residents of the town of Libby, Montana, and particular families by causing those individuals to be continually exposed to releases of asbestos that the defendants left behind in an uncontrolled and dangerous manner after the closure of W.R. Grace vermiculite mining activities in the town. These substantive counts alleged generally that during the relevant time period, the defendants "did knowingly release and caused to be released into the ambient air a hazardous air pollutant, namely, asbestos, and at the time, knowingly placed another person in imminent danger of death or serious bodily injury." The three incidents of endangerment in the three counts more specifically alleged that the named defendants, in violation of 42 U.S.C. § 7413(c)(5)(A), and 18 U.S.C. § 2:

- "placed ... residents of the town of Libby and Lincoln County in imminent danger ... by providing and distributing asbestos contaminated vermiculite material to the community; and by causing defendant W.R. Grace employees and their personal effects to be contaminated with asbestos ...";
- "placed another person in imminent danger ... by selling real property known as the 'Screening Plant' to the Parker family"; and
- "placed another person in imminent danger ... by leasing a property known as the 'Export Plant' to the Burnetts and selling the ... 'Export Plant' to the City of Libby ...."

Indictment, Counts II-IV, *United States v. W.R. Grace*, 2005 WL 5835783, No. 9:05-cr-0007-DWM, (D. Mont. Feb. 7, 2005).

In addition, the government charged a two-object conspiracy, alleging that, from 1976 to 2002, the defendants conspired: (1) to defraud the government by impeding the functions of the United States EPA and the National Institute for Occupational Safety and Health, in violation of 18 U.S.C. § 371; and (2) to knowingly endanger individuals in violation of the CAA, 42 U.S.C. § 7413(c)(5)(A). The overt acts charged in the Indictment, in the government's view, provided a detailed description of a 26-year course of criminal conduct by the charged defendants with two closely related illegal objectives: (1) to conceal from the government the defendants' knowledge of the true dangers of the asbestos-contaminated vermiculite mined and processed by W.R. Grace, and (2) to knowingly allow non-occupational victims in

Libby to be continuously and repeatedly exposed to releases of asbestos in places where the contaminated vermiculite had been placed or left behind. The Indictment alleged that these pathways of asbestos exposure included contaminated private residences and gardens, public school athletic fields, little league baseball diamonds, and former W.R. Grace commercial properties sold without warning to unwary business owners.

Defendants vigorously challenged all aspects of the Indictment, including the CAA knowing endangerment and conspiracy charges, through motions for a bill of particulars, motions to dismiss, and motions in limine. Following district court rulings, a Superseding Indictment, and a Ninth Circuit interlocutory appeal, the government's knowing endangerment charges survived in a limited form. However, the government's theory that the defendants could be held criminally responsible under the CAA knowing endangerment provisions was shaped by the pre-trial litigation in several significant respects.

A. Ruling on motion for bill of particulars regarding "charged releases" of asbestos

One element of the CAA knowing endangerment offense requires the government to prove that the defendant released or caused the release of a CAA hazardous air pollutant (here, asbestos) into the ambient air. Defendants sought a bill of particulars to further specify the exact releases charged. The district court denied this motion, finding that the Indictment provided adequate specificity regarding the dates, locations, and manner of the "charged releases" alleged in Counts II through IV of the Indictment. *United States v. W.R. Grace*, 401 F. Supp. 2d 1103, 1110 (D. Mont. 2005). The district court explained that a common sense reading of the entire Indictment, including the detailed allegations contained in the charged conspiracy overt acts, was "sufficient to inform the Defendants of the theory underlying the Clean Air Act counts," including "when, where, and how" the charged releases of asbestos occurred. *Id*. at 1110.

In essence, the Indictment alleged a continuum of conduct that ultimately resulted in asbestos-contaminated vermiculite materials (raw ore, tailings, and other unprocessed or discarded processed material) being left behind at a wide variety of locations where unsuspecting and unprotected residents could be exposed to repeated releases of asbestos whenever the materials were disturbed. The fact that these releases of asbestos—and accompanying risk of harm—were alleged to occur both before and after the statute of limitations served as a complicating factor in the district court's formulation of evidentiary rulings and jury instructions.

B. Ruling on motions to dismiss the substantive CAA endangerment counts—statute of limitations challenges

The district court partially granted and partially denied defendants' motions to dismiss the substantive CAA knowing endangerment counts on statute of limitations grounds. *United States v. W.R. Grace*, 429 F. Supp. 2d 1207 (D. Mont. 2006). The five year statute of limitations for CAA offenses in the case began to run on November 3, 1999. *Id.* at 1240. In resolving the motion, the court first held that knowing endangerment should not be considered a "continuing offense" that ends only when the endangerment ends. *Id.* at 1239-45. The court accepted, for the sake of argument, the government's view that knowing endangerment should be viewed as a "crime of consequence" that "takes place only where the consequences occur" (quoting *Daeche v. United States*, 250 F. 566, 570 (2d Cir. 1918)). However, the court still viewed the crime as one that could be complete when the consequence *first* occurs:

> The passage [in *Daeche*], though accurate, does not advance the government's contention. To the contrary, the passage confirms that the crime takes place when the consequence (i.e.,

> endangerment) occurs, not when it stops occurring. Just because endangerment may occur over time does not mean that it must do so. There is nothing inherent in the element of endangerment which requires that it be viewed as a continuing offense.

Id. at 1244. The court also disagreed that the term "release," as used in the Clean Air Act knowing endangerment provision, 42 U.S.C. § 7413(c)(5), necessarily indicated that the violation should be considered a continuing offense. It found that the element of a "release" of a hazardous air pollutant could be construed as either a discrete event or an ongoing event. *Id.* at 1245.

The court's conclusion that CAA knowing endangerment was not a continuing offense was not completely fatal to the endangerment charges. It granted defendants' motion to dismiss only "with regard to the criminal conduct ... which was complete as of November 3, 1999." *Id.* Because releases could include discrete events, the court found that the Indictment alleged a viable theory of liability for releases of asbestos and accompanying endangerment that occurred within the statute of limitations period when contaminated vermiculite was disturbed by innocent third parties. Although the court agreed that this might raise the specter of duplicity because the charges could be viewed as alleging more than one "release" in each count, the court reasoned that it could deal with duplicity concerns through jury unanimity instructions. *Id.* at 1245-46.

In a separate ruling granting defendants‹ motion to dismiss the knowing endangerment object of the conspiracy count on statute of limitations grounds, 434 F. Supp. 2d 879 (D. Mont. 2006), the court reiterated the basis for the validity of the surviving substantive endangerment counts:

> The Indictment does not allege any specific "release" of hazardous air pollutants after November 3, 1999. Instead, as the Defendants have stated, the government's theory appears to be that "some of the defendants 'caused' releases within the statute of limitations period by placing contaminated vermiculite in locations where innocent third parties would later unknowingly release tremolite [asbestos] fibers into the ambient air." Defs' Br. at 8. But while that theory may be viable and may therefore bring certain completed substantive knowing endangerment offenses within the limitations period, it does not transfer to the conspiracy charge. Conspiracy requires an overt act within the limitations period, which is not the same as a completed substantive offense within the limitations period. ... Accordingly, the Court's finding that under the government's theory the Indictment alleges completed substantive knowing endangerment counts occurring within the limitations period does not mean that it also alleges an overt act in furtherance of the conspiracy to commit knowing endangerment within the limitations period.

Id. at 885. The district court then found that the original Indictment did not allege overt acts within the limitations period that could clearly be read to further the endangerment object of the conspiracy, and dismissed that object from the conspiracy count. *Id.* at 888. The government superseded the Indictment to cure the pleading defect identified by the district court and to modify charging dates to conform with the court's rulings on the limitation period for the substantive CAA counts. The Ninth Circuit ultimately upheld the validity of the government's Superseding Indictment in *United States v. W.R. Grace*, 504 F.3d 745, 751-54 (9th Cir. 2007) (hereinafter Interlocutory Appeal Opinion), and reinstated the knowing endangerment object of the conspiracy count.

The district court's rejection of the government's continuing offense theory of liability and partial dismissal of knowing endangerment offenses "completed" before November 3, 1999, would serve to complicate the government's ability at trial to present a holistic, scientifically complete picture of the endangerment that had been imposed on non-occupational residents in Libby as a result of the defendants' conduct. In the government's view, its proof at trial showed that Libby residents came into daily contact with numerous pathways of asbestos exposure on a continuous basis, from the time the

contaminated vermiculite was first placed in locations where victims could be exposed, until the spring and summer of 2000, when EPA began to undertake emergency removal actions. The government also introduced expert testimony regarding the concept of cumulative asbestos exposure, which posited that a person's risk of suffering an asbestos-related disease increases as the person's lifetime cumulative exposure to asbestos increases. Thus, a full assessment of the ever-increasing risks posed to Libby residents required consideration of the cumulative impact of all exposures—both before and after November 3, 1999.

The compartmentalization of proof of asbestos releases and endangerment before and after the limitations period under the court's ruling would be difficult, but not impossible, for the government to overcome. Even under the statute of limitations ruling, the government believed it would still be able to show that each release and exposure after November 3, 1999 added an increased risk of asbestos-related disease to the person so exposed. The question would become how much proof would be demanded to show that the post-November 3, 1999 releases presented an imminent danger of death or serious bodily injury under the CAA knowing endangerment provisions. The district court's rulings on defendants' motions in limine began to provide answers to this question, and also began the conflation of knowing endangerment and toxic tort concepts that would complicate and increase the government's burden of proof.

C. Rulings on motions in limine

The historical evidence that exposure to asbestos contained in the Libby vermiculite mined and processed by the W.R. Grace company was generally capable of causing extensive bodily harm was largely undisputed, even by the defendants. The degree to which the government and its experts would be able to use this historical evidence to show that similar dangers were posed by the non-occupational exposure pathways in existence after November 3, 1999 would be hotly contested during the motions in limine phase of litigation. One illustration of the district court's attempt to resolve this issue can be seen in its order denying defendants' motion to exclude the opinion testimony of one of the government's medical experts, Dr. Aubrey Miller. *W.R. Grace et al.*, No. CR 05-07-M-DWM (D. Mont. Mar. 31, 2006) (order denying motion to exclude testimony of Dr. Miller), at pp. 6-7:

> The Defendants' objection to Dr. Miller's testimony lies in the fact that he has not provided a valid epidemiological study showing a direct casual [sic] link between asbestos-related disease and non-occupational exposures to Libby amphibole identical in intensity and duration to those resulting from the alleged post-1999 releases.
>
> The Defendants seek more than the law requires. Dr. Miller's qualifications are beyond question. His theory, i.e., that exposure to airborne releases of Libby amphibole can result in asbestos-related disease, enjoys general acceptance. [n. 6. The Defendants concede the truth of the basic premises underlying Dr. Miller's opinion: "It is uncontested that tremolite asbestos fibers of the type present in Libby can be hazardous to human health, and it is also uncontested that fibers have been released in the ambient air in Libby." Defs' Br. At p. 5]. It is appropriate for Dr. Miller to rely upon his training and experience to interpret the existing epidemiological studies and other information on non-occupational and low-level exposures and offer an opinion as to the danger posed by the alleged post 1999 exposures in Libby. The reliability of such an opinion is not contingent on the presentation of a study measuring the effects of precisely the same exposure levels. "Daubert does not require that every aspect of a theory of medical causation be supported by research on the identical point." (citation omitted).

From the government's perspective, this ruling provided two important guideposts concerning its ability to show endangerment from post-1999 releases of asbestos. First, the expert would be free to offer an opinion as to the general hazardous nature of the Libby asbestos based on his review of Grace's own historical studies, independent historical studies, and government testing and studies. Second, the court would not require a showing that the non-occupational and low-level exposure studies relied on by the expert measured precisely the same exposure levels as posed by the post-1999 exposures in order for the expert to offer an opinion as to whether the post-1999 exposures presented an imminent danger. The district court appeared to demonstrate similar flexibility in denying motions to exclude expert testimony entirely from other government medical expert witnesses, such as a local pulmonologist who had diagnosed and treated Libby residents with asbestos-related disease, and another doctor who had studied asbestos-related diseases suffered by employees of O.M. Scott who had been exposed to low-level exposures of asbestos-contaminated vermiculite used as an ingredient in their horticultural products.

It should be noted that this was not the first time that the district court had weighed the general sufficiency of the basis for Dr. Miller's endangerment opinion concerning Libby residents. Dr. Miller served as a member of a governmental scientific team evaluating whether the public health situation in Libby required the EPA to conduct time-critical emergency removal actions under the authority of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675. In order to justify its removal actions and recover its removal costs from W.R. Grace, the EPA was required to demonstrate that the threat of release of a pollutant or contaminant (here again—asbestos) in Libby posed an "imminent and substantial danger to the public health or welfare." CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) (2012). The EPA's administrative record, which included an endangerment opinion by Dr. Miller, as well as other action memos detailing EPA's evaluation of risks posed at the site, was extensively relied upon and cited by the district court in determining that EPA's finding of an imminent and substantial danger was not arbitrary and capricious, and that EPA had appropriately considered mandatory factors for making an endangerment finding under CERCLA's National Contingency Plan. *United States v. W.R. Grace & Co.-Conn.*, 280 F. Supp. 2d 1135, 1139-44 (D. Mont. 2002) (*Grace I*); 280 F. Supp. 2d 1149 (D. Mont. 2003) (*Grace II*). The Ninth Circuit affirmed, providing its own assessment of the validity of the bases for EPA's endangerment finding:

> The situation confronting the EPA in Libby is truly extraordinary. This cleanup site is not a remote, abandoned mine. Rather, this population of Libby and nearby communities, which the EPA estimates at about 12,000, faces ongoing, pervasive exposure to asbestos particles being released through documented exposure pathways. We cannot escape the fact that people are sick and dying as a result of this continuing exposure.
>
> ....
>
> The EPA's scientific basis for finding an immediate threat to the public health is thoroughly documented over thousands of pages. In addition to the detailed evaluation of the threat in the three Action Memos, the administrative record includes, for example, comprehensive reports by both the EPA's regional toxicologist and senior toxicologist explaining the imminent and substantial endangerment to public health in Libby, extensive responses by the EPA to Grace's comments on the cleanup, and lengthy findings by the Agency for Toxic Substances and Disease Registry [ATSDR] on medical testing conducted on Libby residents.

United States v. W.R. Grace & Co., 429 F.3d 1224, 1226-27, 1246 (9th Cir. 2005).

In the criminal prosecution, the government intended to introduce much of the same evidence of endangerment that had been marshaled by the EPA during its CERCLA public health threat evaluation, fully aware that it would still have to meet the exact terms of the similar, but not identical Clean Air Act

knowing endangerment offense, and criminal burden of proof. While the district court had shown some flexibility in allowing government medical experts to offer opinions on post-1999 endangerment, its separate rulings regarding the admissibility of individual categories of reliance materials that would have formed the basis of such opinions was much more restrictive. The result of these rulings excluded entire categories of evidence—including evidence that both the district court and the Ninth Circuit had relied on and cited in their respective civil CERCLA opinions—leaving the government without sufficient evidence to sustain a conviction. Accordingly, the government filed an interlocutory appeal and was successful in reinstating enough of the excluded evidence to proceed to trial. *See generally*, *Interlocutory Appeal Opinion*, 504 F.3d at 754-66. In particular, the Ninth Circuit held that:

1. The term "asbestos" as applied to the Clean Air Act knowing endangerment offense would be a general definition consistent with its general listing as a hazardous air pollutant under 42 U.S.C. § 7412, and would not be limited to the six particular types of commercial asbestos that are regulated under other environmental programs. *Id.* at 754.

2. The defendants would not be able to avail themselves of a "no visible emissions" affirmative defense. *Id.* at 758.

3. Because the CAA knowing endangerment offense applies to releases of asbestos into the "ambient air," evidence derived from testing of asbestos contaminated vermiculite conducted in indoor environments could be used only for limited purposes. EPA testing of asbestos contaminated vermiculite conducted indoors could not be directly admitted into evidence, but it could be relied upon by government experts to offer an opinion on the friability of the vermiculite, in other words, its general propensity to release asbestos fibers into the air if disturbed. The Ninth Circuit deferred to the district court's holding, however, that experts could not rely upon the specific asbestos concentration levels in these tests as a basis for determining the level of asbestos in post-1999 releases because the tests were not measured under ambient air conditions. Grace's own historic product testing conducted on Libby vermiculite in indoor situations could be directly admitted only for the purpose of showing the defendants' own knowledge of the dangerous nature of the vermiculite. The historic testing could also be relied upon by experts only for the purpose of offering an opinion regarding the general friability of the asbestos in the vermiculite. *Id.* at 759-63.

4. A study conducted by the Department of Health and Human Services' Agency for Toxic Substance and Disease Registry (ATSDR), demonstrating an association between exposure to vermiculite through various pathways found in Libby and higher risk of pleural abnormalities, would not be directly admissible, but could be used by experts as part of a basis for opinion on the dangers of the material. That the study purported to show only an association between an exposure and risk of harm rather than a causal link did not prevent its use as a basis for expert opinion. *Id.* at 763-66.

The Ninth Circuit's reinstatement of the ATSDR study as appropriate expert reliance material, however, was short lived. Following remand, the district court conducted an additional *Daubert* hearing prior to trial and again excluded the study for any purpose, finding that the study was not of the type reasonably relied upon by experts in the field to form an opinion as to danger posed by post-1999 ambient air exposures of Libby asbestos under Fed. R. Evid. 703. *United States v. W.R. Grace.* 597 F. Supp. 2d 1143, 1149-54 (D. Mont. 2009). The district court would only allow limited fact testimony that those involved with the EPA response in Libby used the ATSDR screening program to help them decide

where to focus EPA's sampling efforts, but no witness would be allowed to testify as to the specific results of the study.

While far from ideal, the Ninth Circuit's interlocutory appeal opinion, although further restricted by the district court's post-remand exclusion of the ATSDR study, reinstated enough of the government's anticipated evidence and expert testimony to enable it to bring the case to trial. However, the overall effect of the rulings substantially curtailed the government's ability to present a comprehensive presentation of proof through direct admission of all available evidence, expert testimony, and what it viewed as reasonable inferences to be derived from such evidence.

III. The trial adduced ample proof of endangerment

Trial of this case began February 20, 2009 and concluded on May 8. In essence, the government endeavored to prove that the defendants knowingly endangered residents of Libby, Montana. The government used the testimony of exposed Libby residents; dozens of W.R. Grace internal memoranda and corporate documents demonstrating the hazards posed by its vermiculite; W.R. Grace employees with knowledge of corporate actions and documents; a pulmonologist who had treated asbestos-related diseases in Libby residents for 35 years; and EPA emergency response personnel who documented the extent of asbestos contamination in Libby, the existence of human exposure pathways in the community, and the extreme friability of the asbestos in W.R. Grace's vermiculite. The emergency response witnesses testified that they had determined that those materials constituted an imminent health hazard to people.

The government presented at least eight long-time Libby residents who had been diagnosed with an asbestos-related disease to testify about their exposure pathways to asbestos. A teacher described how vermiculite in the ceiling of a school fell onto the ground when lockers were moved. He also described vermiculite falling from a ceiling while he worked as a plumber's helper with his father. Little League baseball players described piles of vermiculite on and around the baseball diamonds in Libby. One player/coach described how vermiculite was placed in the dugouts and used to absorb water on the fields. A fisherman described piles of vermiculite along the shore of his favorite fishing hole on the Kootenai River, adjacent to the "Screening Plant" property. Two witnesses described vermiculite on the ground at a teenage hangout spot along Rainey Creek Road—the main road accessing WR Grace's mine site. The County Sanitarian described finding vermiculite on a retail business property that had been converted from a W.R. Grace storage building. He also described the "common practice" of Libby residents mixing vermiculite into their garden soil as a soil conditioner.

The government endeavored to prove the requisite knowledge of criminal knowing endangerment through the testimony of former W.R. Grace employees. A financial analyst working for W.R. Grace testified to documentation of his work developing a "decision tree" analysis that assumed that asbestos was a health hazard and that the W.R. Grace's Libby vermiculite contained asbestos. An in-house chemist testified concerning W.R. Grace's efforts to remove the asbestos from its Libby vermiculite products. A research and development technician who rose through the ranks to become W.R. Grace's manager of environmental health and regulatory compliance described the company's repeated efforts to reduce the asbestos released from products made from Libby vermiculite.

The government also produced W.R .Grace internal documents, spanning nearly three decades, charting the history of the company's growing comprehension that the vermiculite it was mining was lethal. The confidential memoranda revealed that at an early stage in the 1960s, W.R. Grace realized that the incidence of fatal lung diseases among the miners was alarmingly high. Recognizing that the vermiculite was contaminated with asbestos, W.R. Grace conducted confidential, in-house testing

beginning in the early 1970s that demonstrated that the asbestos could not be separated from the vermiculite; that the asbestos was especially friable and even small amounts of asbestos contained in the vermiculite could release hazardous levels of asbestos fibers; that this particular form of asbestos caused abnormally high rates of mesothelioma in lab animals; and that the vermiculite the company had distributed throughout the town of Libby would release toxic levels of asbestos when disturbed.

A Spokane-based pulmonologist became the treating physician for most Libby-area residents who developed an asbestos-related lung disease. This doctor testified that he had diagnosed or treated approximately 1800 Libby-area residents with asbestos-related disease. He also testified that he had 31 documented cases of mesothelioma in the Libby-area population and that 11 of those cases were due to non-occupational exposure to asbestos. (Mesothelioma is a rare form of cancer uniquely associated with asbestos that occurs, by some estimates, in as few as 9 persons in a population of 1 million people. The rate of the disease within the small population of Libby was therefore significant.)

Members of the EPA's emergency response team testified at length concerning the extent of the asbestos contamination and the danger it posed to Libby residents. The on-scene coordinator described the extensive media sampling, including air sampling and activity-based sampling that the EPA conducted in order to understand fully the extent and danger of asbestos contamination in Libby. This information was placed onto GIS aerial maps that depicted locations and concentrations of asbestos at all locations relevant to the charges. The team's chief medical officer described the existence of asbestos exposure pathways and non-occupational asbestos-related disease in the Libby-area population. He explained the concept of cumulative exposures to asbestos over time and how each subsequent exposure increased the risk of a person developing an asbestos-related disease. The medical officer concluded that the asbestos-contaminated vermiculite materials found throughout Libby were an imminent health hazard to persons coming into contact with those materials.

IV. The government did not prove a toxic tort

As described above, the government weathered an exceptionally vigorous defense and emerged ready for the jury instruction settlement conference confident in its legal theory of Clean Air Act criminal liability. With respect to the basic elements of the Clean Air Act knowing endangerment violations, the court gave the following instruction:

> For a defendant to be found guilty of the crime of knowingly releasing or willfully causing the release of a hazardous air pollutant into the ambient air, namely, asbestos and at the time, knowingly placing another person in imminent danger of death or serious bodily injury the government must prove each of the following elements beyond a reasonable doubt:
>
> First, that the defendant under your consideration knowingly released or willfully caused the release into the ambient air a hazardous air pollutant, namely asbestos;
>
> Second, that the release occurred after November 3, 1999;
>
> Third, that the defendant under your consideration knew that by knowingly releasing or willfully causing to be released a hazardous air pollutant, namely asbestos, the defendant placed another person in imminent danger of death or serious bodily injury.

United States v. W.R. Grace, 597 F. Supp. 2d 1157 (D. Mont. 2009), Jury Instruction at No. 33, *available at* 2009 WL 1342928 (May 6, 2009).

The government's understanding of the applicable legal definitions of important concepts within these elements differed dramatically from the court's. Based on the authority provided in *Protex*, 874 F2d

at 744; *Little*, 308 F. App'x. at *3; *Price v. United States Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994); and *Elias*, 269 F.3d at 1017-18, the government submitted the following proposed jury instruction, which describes its theory on imminent danger and the increased risk posed by repeated, cumulative exposure to asbestos:

> The term "imminent danger" means the existence of a condition or combination of conditions which could reasonably be expected to cause death or serious bodily injury unless the condition is remedied.
>
> For a finding of imminent danger the government does not need to show that actual harm will occur immediately so long as the risk of threatened harm is present. An imminent hazard may be declared at any point in a chain of events which may ultimately result in harm to the public. While the danger must be an immediate result of the conduct, the existing danger may involve a harm which may not ultimately ripen into death or serious bodily injury for a lengthy period of time, if at all.

United States v. W.R. Grace, 597 F. Supp. 2d 1157 (D. Mont. 2009), Government's Supplemental Proposed Jury Instructions at No. 119, *available at* 2009 WL 1160410 (May 9, 2009).

In contrast to the government's imminent danger theory, the district court instructed the jury:

> A release places another person in "imminent danger" if it is proved beyond a reasonable doubt the release *is more likely than not to cause death or serious bodily injury to a person* exposed to the release.
>
> To find imminent danger it is not necessary for the government to prove a risk that death or serious bodily injury will occur immediately. You must find, however, that the risk of death or serious bodily injury is an immediate result of the conduct.

Id., Jury Instruction at No. 40, *available at* 2009 WL 1342928 (May 9, 2009) (emphasis added).

As a final blow to the government's "increased risk" and "cumulative effect" imminent danger theory, the district court instructed:

> To find a defendant guilty of the charges [knowing endangerment] all of you must unanimously agree as to the same specific release or releases, occurring for the first time after November 3, 1999, that placed another person or other persons in imminent danger of death or serious bodily injury.

Id. at No. 43.

In giving these instructions, the court borrowed heavily from civil toxic tort law and imposed an almost insurmountable obstacle to finding the defendants guilty. With respect to the requirement that there be a release that places another person in "imminent danger," the court disregarded definitions from earlier endangerment cases, such as *Protex*, that held that "imminent danger" meant the existence of conditions that could "reasonably be expected to cause death or serious bodily injury." *Protex*, 874 F.2d at 744. Instead, the court imposed the criminal intent standard on top of the toxic tort standard of causation, requiring the government to prove beyond a reasonable doubt that "the release [was] more likely than not to cause death or serious bodily injury." *Id*. at No. 40. In doing so, the court turned the "imminent danger" requirement into the causal link that is commonly required of plaintiffs in latent harm toxic tort cases. That decision by the court effectively redefined and significantly raised the government's burden of proof. As discussed above, it also reflected a fundamental misunderstanding of

the purposes behind the endangerment statutes and of the differences between civil toxic tort liability and criminal liability for endangerment.

The court then further added to the government's burden by instructing the jury that, in order to find the defendants guilty, the jury must unanimously agree as to the same specific release or releases that placed other persons in imminent danger. Although the court may ostensibly have been trying to avoid duplicity issues in requiring such unanimity (as it had indicated before trial that it would), the instruction nevertheless also significantly lessened the government's chances of prevailing. The specificity requirement coupled with the new definition of "imminent danger" the court imposed meant that the jury had to identify and unanimously agree, beyond a reasonable doubt, that *particular* releases "more likely than not" caused or would cause serious bodily injury. That requirement would have been extremely difficult for the government to meet, especially in light of the kind of evidence the government was allowed to put in, the theory of "increased risk" and "cumulative effect" that it had relied upon, and the fact that even the Indictment did not identify "specific releases" that placed others in imminent danger. By requiring that the jury agree that *specific* releases more likely than not caused defined adverse consequences, the unanimity instruction had the effect of highlighting the causation requirement and diminishing the likelihood that the jury would apply the government's "cumulative effect" rationale. When the evidence adduced in the government's case is juxtaposed with the court's instructions, it becomes apparent that the government's chances of prevailing were greatly diminished.

The defense seized upon the toxic tort standard in closing arguments. Counsel for W.R. Grace argued:

> Then, we're not done. It must cause that release, that identifiable release, not just general. There has to be a release that puts a person. Think of that caustic tank. If you send somebody down to that caustic tank, you know exactly what your are doing. You can see it happen. They go down in that tank, you know you are putting them in harm's way and you watch it as it happened. It's right there. *That's why it's to a person, not people generally. It's to a person.* ... Tr. Transcript 7807.
>
> How much risk? Well, the caustic tank, you know if somebody comes in contact with caustic, they are going to get burned and if they breathe it their lungs are going to get burned. You know it. It's there. *It's going to happen.* That's why it's bad. That's why it's criminal. ... Tr. Transcript 7808.
>
> *It has to be more likely than not to cause the death or serious bodily injury to a person exposed to a release. That is the level of probability that the law requires, more likely than not. Greater than 50 percent.* That's more likely than not. If you have a 50-50 percent chance of something, it can happen or it can't then either side is equally probable. This has to be more likely than not. More likely than not. Again, think heinous. You go down in that tank, pretty darn sure something bad is going to happen to you.
>
> Another example, you expose somebody improperly to radiation. They may not get radiation burns, but if you know that that radiation is pretty intense, *you can calculate the probabilities of their actually getting sick. This says they have to be high probabilities. It's criminal*. It's not designed for something that's minimal or remote. So that is the standard that we're dealing with here in the case. ... Tr. Transcript 7808-7809.

> In a case that's all about risk, the instruction says risk, they didn't have one person that came in and *did a quantitative risk assessment. They had to be able to say more likely than not. You have to have a number.* Not one number slipped their lips. Tr. Transcript 7817.

(Emphasis added).

V. Conclusion: The legal distinctions between toxic tort causes of action and Clean Air Act knowing endangerment crimes must be emphasized and maintained

Toxic tort cases are private civil actions seeking recovery of damages for personal injuries arising from specific exposures. The plaintiff must prove causation of a compensable injury in order to recover damages. In contrast, criminal knowing endangerment statutes allow the government to enforce against acts that expose the public to an unacceptable threat of serious harm. The government need only prove that a defendant has knowingly placed another in "imminent danger" of "death or serious bodily injury" as a result of his actions involving hazardous pollutants. In the *W.R. Grace* case, the government endeavored to prove that the defendants knowingly created an imminent danger to the residents of Libby, Montana by knowingly causing repeated, cumulative exposures to asbestos, thereby increasing the risk of death or serious bodily injury. The government did not endeavor to prove that the defendants knowingly exposed particular individuals in Libby, Montana to specific releases of asbestos that made it more likely than not that the person would develop asbestos-related disease. The conflation of toxic tort liability with criminal knowing endangerment legal principles in the district court's jury instructions gave the jury little choice but to acquit the defendants of the Clean Air Act knowing endangerment crimes alleged in the Indictment.❖

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