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Wildlife Trafficking II

In This Issue

Home, Sweet Home: Prosecuting Endangered Species Act Habitat Modification Cases

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I. Introduction

Congress enacted the Endangered Species Act (ESA) in 1973 "to halt and reverse the trend toward species extinction, whatever the cost." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). Congress declared that "various species of fish, wildlife, and plants . . . have been rendered extinct [and others are in danger of or threatened with extinction] as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1), (2) (2015). Consequently, the ESA and its regulations embody a comprehensive framework to "provide a means whereby *the ecosystems upon which endangered species and threatened species depend may be conserved* [and] to provide a program for the conservation of such . . . species . . . ." *Id.* § 1531(b) (emphasis added). Over 40 years after enactment, more than 1,500 domestic species of fish, wildlife, and plants are listed as endangered or threatened under the ESA. Many of those listed species continue to be threatened by habitat loss.

The ESA contains a full range of administrative, civil, permitting, and criminal enforcement mechanisms. A criminal violation of the ESA occurs when, among other things, a person or entity commits an unauthorized "take" of an endangered or threatened species. *Id.* § 1538(a)(1)(B), (C). "Take" means, among other things, "harass," "harm," "wound," or "kill." *Id.* § 1532(19). Such violations most often arise in the context of shooting, trapping, or poisoning listed species, but they can also occur when development, agriculture, recreation, and other activities modify the habitat essential to listed species in ways that kill, injure, or otherwise harass them. The ESA provides a structure in which "Incidental Take Permits" may be obtained for such activities, but where the habitat modification is unpermitted and resulting harms are unmitigated, a criminal violation may occur.

Investigating and proving an ESA criminal violation based on habitat destruction/modification can be factually and legally challenging. This article highlights the history of such cases, the common obstacles they pose to agents and prosecutors, and suggestions for overcoming them.

II. What constitutes a habitat modification violation?

A. Prohibitions

The ESA requires that when a species is listed as endangered or threatened, the "critical habitat" of the species shall be concurrently designated "to the maximum extent prudent and determinable." *Id.* § 1533(a)(3)(A). "Critical habitat" is defined, in part, as specific geographic areas containing the physical or biological features essential to the conservation of the species. *Id.* § 1533(b)(2). However, designation of critical habitat has legal significance only in the context of actions of federal agencies, which must ensure that their actions do not result in the adverse modification or destruction of designated critical habitat. *See id.* § 1536(a)(2). The ESA does not directly prohibit modification or even destruction of designated critical habitat by non-government actors, and it does not provide criminal penalties for such modification or destruction by Government actors. *See id.* §§ 1538, 1540.

So what constitutes an ESA habitat modification case when a private party or corporation is involved? As mentioned above, the ESA makes it a crime to knowingly "take" any listed species within the United States, its territorial seas, or upon the high seas, *Id.* § 1538(a)(1)(B), (C), and "take" includes, among other things, "harass," "harm," "wound," or "kill." *Id.* § 1532(19).

"Harm" includes "significant *habitat modification or degradation* where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3 (2015) (emphasis added). *See Defenders of Wildlife v. Bernal*, 204 F.3d 920, 924–25 (9th Cir. 2000) (The court quotes § 17.3 and states, "Harming a species may be indirect, in that the harm may be caused by habitat modification, but habitat modification does not constitute harm unless it 'actually kills or injures wildlife.' "). Under its most expansive interpretation, harm can encompass habitat destruction that could drive a species to extinction, even where no deaths of individual members of the species are proven. *See Palila v. Hawaii Dep't of Land & Natural Res.*, 649 F. Supp. 1070, 1075 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988).

"Harass" is defined as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." 50 C.F.R. § 17.3 (2015). A few civil cases have upheld the application of this harassment prohibition. A California district court enjoined a construction project on the basis that the company was causing take of then-listed bald eagles by harassing them. *Ctr. for Biological Diversity v. Marina Point Dev. Associates*, 434 F. Supp. 2d 789, 800 (C.D. Cal. 2006), *vacated*, 566 F.3d 794 (9th Cir. 2008) (injunction vacated as moot after bald eagle delisted). Specifically, the court found that the project modified and disturbed the eagles' habitat, and the eagle population was documented to be declining at the location. *Id.* at 796. *See also Marbled Murrelet v. Pac. Lumber Co.*, 880 F. Supp. 1343, 1365 (N.D. Cal. 1995) (holding that implementing a timber harvest plan during the breeding season created the likelihood of injury to marbled murrelets by annoying them to such an extent that it would disrupt their normal behavioral patterns, as demonstrated by a precipitous decline in marbled murrelet detections at the site).

B. Mental state requirements

The definitions of "harm" and "harass" can be read as requiring different mental state elements that the Government must prove. Every criminal violation of the ESA (no matter what method of take has occurred) is a general intent Class A or B misdemeanor—the statute contains no felony penalty. In all criminal ESA cases, the Government must prove at least that the defendant acted "knowingly," as required by 16 U.S.C. 1540(b)(1). Therefore, the Government must prove the defendant intentionally committed the act that caused the take, knowing it would result in the take of a particular species of fish, wildlife, or plant. The definition of *harm* does not add any further mental state elements. The mental state

requirement is nothing more than "knowingly." In a "take" charge involving "harm," it is not a defense that the defendant did not intend to cause a take. In contrast, the definition of *harass* specifically requires that the act be intentional or negligent. In light of the "knowing" requirement for criminal ESA violations, an intentional harassment (which would, *ipso facto*, be committed knowingly) could be prosecuted as a crime, whereas negligent harassment would be punishable only by administrative or civil sanctions. 16 U.S.C. § 1540(a) (2015).

The ESA's "knowingly" requirements can be met even if the intent of the act is wholly unrelated to the species, for example, a desire to broaden a highway, expand agricultural activities, or produce energy. In 1995 the Supreme Court addressed this issue in the context of a civil lawsuit involving timber cutting that had potential to displace or harm a listed bird species. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 687–88 (1995). The Court rejected the argument that unlawful "harm" only takes the form of "affirmative conduct" or "direct applications of force against protected species." *Id.* at 697, 792 n.15. Rather, as Congress instructed, and as the Court held, "[t]ake is defined in . . . the broadest possible manner to include every conceivable way in which a person can take or attempt to take any fish or wildlife." *Id.* at 704 (internal quotation marks omitted) (citing S. Rep. No. 93-307, at 7 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2995). Thus, where the taking of listed wildlife occurred through the operation of acid wastewater ponds or power lines, the ESA taking prohibition has been applied. *See, e.g.*, *Ka'aina v. Kaua'i Island Utility Coop.*, No. 10-00169 ACK-LEK, 2010 WL 3834999, at *1–2 (D. Haw. Sept. 24, 2010) (power lines); *United States v. Phelps Dodge Morenci, Inc*., No. CR04-1629-TUC-VAM (D. Ari. Dec. 13, 2004) (acid waste).

The ESA contains no prohibition against the destruction (by non-federal entities) of habitat occupied by listed species unless individuals of the species are killed, injured, or harassed as a result. What we call an ESA "habitat modification case" is just one category of unlawful take prosecutions where the method of take is modification of habitat. In every such case, the Government must prove that an individual of the listed species was killed, injured, or harassed as a result of the habitat modification. Whether this conduct is punishable by administrative, civil, or criminal penalties turns on proof of knowledge, foreseeability, and proximate causation.

III. Habitat modification cases

Criminal prosecutions involving take by habitat modification are uncommon. In 1992 two individuals were indicted for allegedly causing the taking of endangered Red-Cockaded Woodpeckers through the cutting of trees within a woodpecker colony area. The case was concluded by way of deferred prosecution agreements leading to dismissals. *United States v. Dunn*, No. 4:92cr117 (M.D. Ga. Feb. 10, 2009). In 1998 a poultry processor pleaded guilty to violating the Clean Water Act and the ESA after it discharged polluted storm water into the adjacent San Luis National Wildlife Refuge. *United States v. Foster Farms Poultry, Inc.*, CR. F. No. 98-5005 AWI (E.D. Cal. Jan. 14, 1998). The storm water, contaminated with chicken manure, escaped a broken pipeline and flowed into vernal pools on the Refuge, one of which contained vernal pool tadpole shrimp, an endangered species. The defendant admitted the resulting damage to the shrimp was a "taking" within the definition of the ESA. The parties stipulated to a sentence of 3 years' probation; a fine of $100,000; a payment to the National Fish and Wildlife Foundation for the creation, enhancement, restoration, and acquisition of wetlands and for endangered species enhancement efforts within the relevant geographic area; restitution of $14,315.61 for natural resource damage assessment costs; and physical improvements to the facility in the amount of $750,000.

In 2011 a natural gas operator in the Fayetteville Shale area of Arkansas was charged with violating the ESA after it failed to control erosion during pipeline construction activities, leading to excessive sedimentation in three streams of the Little Red River watershed and the associated take of endangered speckled pocketbook mussels. *United States v. Hawk Field Services, LLC*, No. 4:11-CR-

00060 (E.D. Ark. Apr. 5, 2011). The company pleaded guilty to three counts of violating the ESA and was sentenced to serve 3 years' probation, pay a $350,000 fine, and make a $150,000 community service donation to the National Fish and Wildlife Fund.

In 2012 flower farmer James Durr pleaded guilty to an ESA taking violation arising from his modification of habitat occupied by endangered bog turtles on his property, aptly named Turtle Creek Farm. *United States v. James Robert Durr*, No. 10-98-RMB (D.N.J. Jan. 3, 2012). The listing rule for bog turtles expressly states that "activities that the Service believes could result in the take of bog turtles include, but are not limited to: (1) Destruction or alteration of the species' habitat by activities that include, but are not limited to, draining, ditching discharging fill material, excavation, impoundment, or water diversion . . .; (2) Destruction or degradation of wetland vegetation used by the turtles for nesting, basking, foraging, or cover; and (3) Discharging or dumping of toxic chemicals or other pollutants into wetlands occupied by the species." Endangered and Threatened Wildlife and Plants; Final Rule to List the Northern Population of the Bog Turtle as Threatened and the Southern Population as Threatened Due to Similarity of Appearance, 62 Fed. Reg. 59,605 (Nov. 4, 1997). The prior owner of Turtle Creek Farm had taken steps to enhance the bog turtle habitat using funds made available through the federal Wildlife Habitat Incentives Program, which provides money to farmers to undertake wildlife habitat improvements on their farms. He had informed Mr. Durr of the presence of the turtles. Shortly after acquiring the farm in December 2005, Mr. Durr re-contoured the furrows in a field and cleared trees along the stream just upstream of the bog turtle habitat. Government employees visited the site after the modifications started and advised Mr. Durr that unless adequate control steps were taken, sediment would wash into the turtle habitat. In the fall of 2006, as predicted, rains washed sediment from the modified areas into the bog turtle habitat.

Pursuant to plea agreement, Mr. Durr pleaded guilty to one ESA misdemeanor. He was sentenced to 1 year of probation with a condition of 50 hours of community service; a Guidelines fine of $1,000; and a payment of $1,000 to the New Jersey Endangered Species office of the U.S. Fish and Wildlife Service, to be used solely for bog turtle conservation in the State of New Jersey.

Between 2010 and 2012 there were at least four additional criminal cases alleging take of listed species by habitat modification. Each of these involved the dewatering or other modification of stream habitat for trout or salmon. *See United States v. Robert H. Block, Jr.*, No. 3:11-CR-00164 (D. Or. Dec. 16, 2011) (defendant sentenced to 5 years' probation, a fine of $1,250, and a community service payment of $1,250 after pleading guilty to one Clean Water Act violation and one ESA violation related to his diversion of stream habitat for threatened steelhead); *United States v. Darigold, Inc.*, Nos. 2:11-CR-00196, 00199 (W.D. Wash. Dec. 1, 2011) (defendant company sentenced to 3 years' probation, a fine of $10,000, a community service payment of $60,000, creation of a compliance plan, and publication of an apology after pleading guilty to one Clean Water Act violation and one ESA violation related to its discharge of ammonia that killed several threatened Chinook salmon); *United States v. Luke Brugnara*, No. CR-0222, 2010 WL 1838885, at *1 (N.D. Cal. May 3, 2010) (defendant sentenced to 15 months' incarceration after pleading guilty to four counts of violating the ESA and two false statement counts related to his intentional blocking of a creek used by threatened steelhead for migration); *United States v. Paul McConnell*, No. 3:10-CR-00205 (D. Idaho Dec. 27, 2010) (three defendants were each sentenced to 2 years' probation and a fine of $2,500 and ordered to pay restitution after pleading guilty to one Clean Water Act violation and one ESA violation related to their channelization of a stream designated at critical habitat for threatened steelhead).

IV. Challenges and strategies in cases involving take by habitat modification

A. Common obstacles to proving take by habitat modification

The following elements must be proved beyond a reasonable doubt to sustain a misdemeanor ESA conviction for unlawful take of listed species via habitat destruction/modification:

- The defendant did knowingly "take" a specimen of a listed species by engaging in conduct constituting "harm" or "harass," as those terms are defined in 50 C.F.R. 17.3;
- The defendant did so unlawfully, in that no agency having jurisdiction over the conduct authorized it;
- The defendant knew the biological identity of the species that would be taken by the conduct.

Each of these elements may be tricky to prove. A prosecutor must ask:

- Is there admissible evidence that establishes actual mortality?
- Is there admissible evidence that establishes injury?
- Is there admissible evidence that establishes a significant impairment or disruption of essential or normal behavioral patterns?
- What admissible evidence ties each or any of those first three factors to the habitat modification in question?
- What admissible evidence proves who is responsible for the modification?
- What admissible evidence proves that the responsible party knew that the species was present and that the modification would kill, injure, or seriously annoy individuals of the species?

In a perfect case, the investigator can provide photographs of the affected location before and after the habitat modification, evidence that the species was present on the site immediately prior to the modification, evidence of injury, death or disturbance of a specimen at the site following the modification, and expert testimony that the modification caused the injury, death, or harassment. Also useful would be confirmation that no government agency or employee authorized the modification, along with the subject's prior knowledge that the modification was unauthorized and likely to take a listed species. Such cases are rare. Actions that can modify habitat (*e.g.* agricultural practices, storm water discharges, tree cutting, stream modifications, etc.) take many forms, are often not *per se* illegal, and may be subject to authorization under some circumstances by one or more federal or state agency. Proving the absence of formal or informal agency authorization of the conduct is critical, but sometimes difficult.

Establishing a causal link between the habitat changes and injury, death, or harassment of a species can be equally difficult. The mere absence of a species where it occurred prior to the habitat change may suggest a causal link to the subject's conduct, but proving this beyond a reasonable doubt requires expert testimony that may be less than unequivocal.

B. Strategies for investigating and evaluating potential take in habitat modification cases

Threat assessment: Virtually every U.S. judicial district contains habitat occupied by an endangered or threatened species. Ideally, local enforcement agencies should identify the most common and serious habitat modification threats to the listed species found in their geographic area. Once those are identified, a threat assessment can help prioritize which species are most at risk, the types of habitat modification that would be most detrimental to them, and, therefore, what conduct may be important to

deter. After this threat assessment is conducted, public-awareness, deterrence, and investigative plans can be developed.

Public outreach—awareness, prevention, and deterrence: Deterrence starts with educating the community about how individuals and companies can pursue their interests while also complying with relevant laws and regulations protecting wildlife. Public outreach should include notice of the protected species present in the area and the administrative, civil, and criminal penalties associated with non-compliance. Such efforts can be targeted on social media, posters, and educational displays in public spaces. Letters addressed to specific companies or individuals whose property or practices are likely to affect listed species can help them avoid inadvertent violations, provide information which may prompt them to seek permitting or other authorization, and establish the knowledge necessary for a criminal prosecution if a violation occurs. Public awareness campaigns can also stimulate reports of violations, leading to prevention through civil injunctive relief (pursuant to 16 U.S.C. § 1540(e)(6)), or agency investigation. The public should be informed about the potential availability of funds from the reward account maintained by the FWS.

Monitoring and investigation plans: Early planning also allows for necessary scientific groundwork to be laid. Priority populations can be monitored, existing surveys updated (resources permitting), industry consultants can be notified, and potential experts identified should they be needed on short notice. These efforts can foster good relationships between the agencies that may have to coordinate closely, on a short timeframe, if/when a violation is later detected and investigated.

Rapid response: Upon receiving a report of habitat modification that may have taken a listed species, investigation should begin immediately. These cases are uniquely susceptible to loss of evidence if the investigation is delayed: dead or injured specimens may be scavenged or intentionally removed, environmental conditions may change, and substances may degrade. The following issues should be addressed as soon as possible after discovery:

- Document the potential crime scene as carefully as any other. If necessary, obtain a search warrant as soon as possible and have the scene secured in the interim. Once on site, photograph, videotape, or otherwise record the scene to the fullest extent possible.
- Collect physical evidence, including carcasses, parts, or other direct evidence of an injury, death, or disturbance.
- Take samples and conduct tests necessary to evaluate harm and causation. These could include pH tests, samples for toxicology tests, sediment cores, plant cuttings, hydrology tests, and population surveys. Again, first determine if doing so will require a search warrant.
- Interview witnesses as soon as possible after the event.
- Identify any nearby populations of the potentially-affected species and conduct population surveys for comparison purposes. If the findings at the modification site indicate, for example, a significantly diminished population, but no observable carcasses, the lack of any decline in neighboring populations can help prove, circumstantially, causation at the modification site. Consider whether evidence exists of a different cause for the population decline.
- Identify an expert for consultation on the relevant causation and biology issues. This may be an outside expert or an agency employee. Sometimes, FWS biologists will be called upon by their agency to prepare a "take assessment statement" in support of potential civil or criminal enforcement. This document, often prepared when no dead or injured specimens are found, constitutes an expert opinion about whether specimens of a listed

species have been injured, killed, or disturbed, based on evidence of prior presence and the type of habitat change wrought by the subject's conduct. The take assessment statement usually contains a biologist's analysis of the law, facts, and science at issue, and is often prepared before the case is referred to a prosecutor. Care should be taken to ensure that a take assessment statement, which may be necessary in support of a civil enforcement action—but premature or inaccurate in the context of a criminal case embodying different elements of proof—does not precede the considered selection of an expert witness fully qualified to evaluate the scientific and forensic issues present in the case. Given the variety of conduct that can modify habitat, the selection of one or more experts in the appropriate field(s) will depend on the particular facts of each case.

- Determine whether the activity constituting the habitat modification was authorized by any agency, such as FWS, EPA, U.S. Forest Service, Bureau of Land Management, U.S. Army Corps of Engineers, Natural Resources Conservation Service, or a state/county or local agency. The case agent should be able to identify potential sources of information in this area and determine fairly quickly whether an issue exists. Although most of these agencies lack the authority to permit the taking of an ESA-listed species, the extent to which the conduct may have been formally or informally authorized will be important to evaluating the case and determining whether and what type of enforcement action is appropriate.
- It will also be necessary to employ investigative methods standard in other criminal cases, such as witness and subject interviews, requests for voluntary production, subpoenas of relevant records (and, sometimes, testimony), inquiry into business organization and ownership, and investigation of the subject's prior relevant history, if any.

C. Charging decisions

Cases involving the unlawful take of ESA-listed species by habitat modification usually present complex factual, scientific, and legal questions. The Department's Principles of Federal Prosecution of Business Organizations are implicated in cases of organizational subjects. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-28.000 (2015), *available at* http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations. The ESA and its regulations and agency policy represent a complex scheme of permitting, mitigation, and sanctions, including administrative, civil, judicial, and criminal penalties. The prosecutor receiving a referral for an ESA habitat modification case is well-advised to contact the Environmental Crimes Section for assistance in evaluating the evidentiary strength of the case, planning additional investigation, and determining whether criminal charges are the appropriate government response to the conduct. The following questions will be addressed in such a consultation:

- Can all the elements of a criminal violation be proven beyond a reasonable doubt?
- Is the ESA misdemeanor sanction—even if provable—the appropriate penalty for the conduct at issue? Is a civil or administrative sanction, or declination, most appropriate?
- What other criminal violations of law might also be involved in the conduct? Are other federal or state environmental crimes, such as Clean Water Act violations or species-specific statutes implicated (for example, the Marine Mammal Protection Act, Migratory Bird Treaty Act, or Federal Insecticide, Fungicide, and Rodenticide Act)? Did the conduct, or attempts to conceal the conduct, involve Title 18 violations such as false statements, conspiracy, fraud, or any of the obstruction statutes? Even where Title 18 charges are included, there may be reason to pursue the ESA charges to recognize the

related resource consequences of the Title 18 violations and the importance of protecting endangered species habitat, as well as the policy goal of specifically deterring illegal habitat modification or destruction.

- Even if the selected charges are all misdemeanors, should the unusual, but legal, step be taken of using the grand jury process and indicting the case rather than issuing a criminal information? This process allows you to hear what concerns members of a jury might have as well as to have the imprimatur of a jury panel on the charging decision from the outset.
- Should a so-called "speaking" indictment or information be used, which may help inform the court and public of the regulatory framework involved in these uncommon cases?

V. Conclusion

The habitat of endangered and threatened species in the United States continues to disappear due to the demands of a growing population and concomitant development of agricultural, transportation, energy, and housing in formerly undeveloped areas. Of all historic land development in the lower 48 states, over a third has occurred since 1982—40 million acres were developed between 1982 and 2007. Much of this newly developed land had been existing habitats, including 17 million acres converted from forests. With U.S. populations continuing to grow, by 2060 a loss of up to 37 million acres (an area the size of Florida) of forest alone is possible. Tom Tidwell, Chief, Address at the 31st Annual Frank Church Conference on Public Affairs (Oct. 20, 2014), *available at* http://www.fs.fed.us/speeches/americas-wilderness-proud-heritage. The habitat that currently remains is constantly at risk of modifications that, even if temporary, may harm remaining populations of listed species.

Most habitat modification can be authorized with the correct review and efforts to minimize and mitigate the impacts on a protected species. *See* 50 C.F.R. §§ 17.22, 17.32 (2015). Habitat modification cases arise in those instances in which the subject knows the species is present, knows the activity will harm or harass that species, and determines not to obtain the required permits (or knows that such a permit is not available because the conduct cannot be approved and/or mitigated). The effective prosecution of these cases, which can threaten an entire local population and, in some cases, the last of a species, is arguably more important to ESA's mandate of species protection than the more common poaching cases that usually involve only one unlawfully-taken specimen. ❖

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An Introduction to the Federal Animal Protection Laws

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The prevention of animal cruelty is a value that has been codified in law since the earliest days of our nation. In 1641, for example, the Massachusetts Bay Colony made it unlawful to "exercise any Tirranny or Crueltie towards any bruite Creature which are usuallie kept for man's use." Collections of the Massachusetts Historical Society 232 (Charles C. Little & James Brown eds., 1843). Many states' animal cruelty laws date to the 19th century, and all states now have at least one felony animal cruelty prohibition. State courts of general jurisdiction hear most animal cruelty cases, but Congress has also given the Federal Government an important role to play with respect to certain types of activities involving animals. Indeed, federal involvement in animal welfare goes back more than 100 years, with the enactment of the Twenty-Eight Hour Law in 1873, which addresses animal welfare issues associated with long-distance animal transport. *See* 49 U.S.C. § 80502 (2015).

In the intervening decades, Congress acted to protect animals in a host of settings—from dog fighting to horse shows to slaughterhouses. Some of these laws are backed by felony penalties and detailed regulations. None authorize citizen-suit enforcement, so enforcement by U.S. Attorneys' offices and the Department of Justice gives meaning to the criminal and civil penalty schemes provided by Congress. This article will provide an introduction to the five primary federal animal protection statutes: (I) the animal fighting venture prohibition statute, (II) the animal Crush Video Statute, (III) the Animal Welfare Act, (IV) the Horse Protection Act, and (V) the Humane Methods of Livestock Slaughter Act. The laws surveyed here parallel, and occasionally overlap with, the federal wildlife protection statutes that may be more familiar to readers of this issue of the Bulletin, such as the Endangered Species Act. In 2014 the Department of Justice added these laws to the portfolio of the Environment and Natural Resources Division (ENRD). *See* UNITED STATES ATTORNEY'S MANUAL §§ 5-10.120 (civil enforcement assigned to the Wildlife and Marine Resources Section), 5-11.101(c) (criminal enforcement delegated to the Environmental Crimes Section) (2015).

This article will first address the laws governing conduct that is outright criminal in nature. Prohibitions of whole classes of activity—such as dog fighting—have driven certain conduct and markets underground. These violations are difficult to detect and often associated with other criminal activities. We will then turn to the laws governing animal welfare enforcement in more prominent, commercial settings, such as exhibitions, laboratories, and slaughterhouses. While these laws also contain criminal prohibitions, they provide a more complex administrative framework for regulated entities that deal with animals. Although animal welfare issues arise in a variety of contexts, all of the laws discussed in this article reflect a cohesive national policy that is aimed at ensuring the humane treatment of animals.

I. Animal fighting venture prohibition: 7 U.S.C. § 2156

A. Animal fighting in the United States

Animal fighting is surprisingly prevalent in the United States. State and national animal control associations estimate that upwards of 40,000 people participate in dog fighting in the United States at a professional level, meaning that dog fighting and its associated gambling are their primary or only source of income. *See United States v. Berry*, No. 09-CR-30101-MJR, 2010 WL 1882057, at *3–4 (S.D. Ill. May 11, 2010). An unknown, but potentially larger, number of people participate in dog fighting on a more occasional basis. Cockfighting is thought to be similarly widespread, and a 2007 estimate valued the U.S. game fowl industry at $2–$6 billion annually. *See United States v. Gibert*, 677 F.3d. 613, 625 (4th Cir. 2012). Dog fighting and cockfighting are the two most common forms of animal fighting in the United States. Other less common forms of animal fighting include: (1) hog-dog fighting, involving one or more dogs being turned loose on a domesticated farm pig or captured wild boar, and (2) bear-baiting, in which captive black bears, often tethered, are set upon by packs of hunting dogs. This article will focus on dog fighting and cockfighting, although the federal statute, 7 U.S.C. § 2156(g)(4), criminalizes all of these forms of animal fighting.

Gambling is the driving force behind these unlawful practices. Participants can also make large sums of money from the breeding and sale of fighting animals. A high volume of illegal commerce in fighting animals occurs brazenly on the Internet and in magazines that function as animal fighting industry trade journals. The street value of successful fighting dogs can reach into the five figures. Some animal fighters operate and conduct commerce in extensive networks that span across state lines, constituting organized crime in the traditional sense of that phrase. The association between animal fighting and other forms of serious crime, such as drug and weapons trafficking and interpersonal violence, is well documented.

In addition to the hazards it poses to community safety, animal fighting is an extreme form of cruelty to animals. Not only do animals suffer grave injuries and frequently die during the fights, but they are also mistreated before and after the fights. Dogs used for fighting typically live their entire lives tethered outside to a stake by a heavy chain, with inadequate or no protection from the elements. It is not uncommon for authorities to discover dogs that have died from thirst, starvation, exposure, or untreated injuries or illness, in the possession of animal fighters. Similarly, roosters used for fighting have their waddles, combs, and spurs crudely "dubbed," or amputated, for the purposes of facilitating fights.

If a losing animal does not die in the ring, the handler will often brutally kill the animal out of embarrassment or as punishment for causing a loss of reputation or gambling funds. Among other documented atrocities, a theme frequently seen in federal dog fighting cases is for dog fighters to electrocute losing dogs. *See, e.g.*, *United States v. Courtland*, 642 F.3d 545, 549 (7th Cir. 2011) (noting defendant's electrocution of a dog); *United States v. Hackman*, 630 F.3d 1078, 1081 (8th Cir. 2011) (observing that defendant attempted electrocution of losing dog after dog became "incapacitated" well over an hour into a fight). Michael Vick and his associates admitted to electrocuting, hanging, drowning, and fatally beating underperforming dogs. *United States v. Peace*, 3:07-cr-274, Statement of Facts, at *9 (E.D. Va. Aug. 24, 2007) (ECF No. 46).

B. Prohibited acts

Congress amended the federal animal fighting statute in 2007, 2008, and 2014, each time strengthening it. It is now a federal crime to "exhibit" or "sponsor" an animal in, be a spectator at, or bring a minor under the age of 16 to, an animal fight, or to possess, purchase, sell, receive, transport, deliver, or train an animal for purposes of participation in an animal fight. 7 U.S.C. § 2156(a), (b) (2015). Commerce in the blades that cockfighters strap to the legs of roosters is also prohibited, *id.* § 2156(e), as is using the mail or other interstate instrumentality to advertise fighting animals or cockfighting knives.

Id. § 2156(c). In effect, Congress has criminalized every aspect of the animal fighting industry. It is not necessary to raid a fight in progress to charge under this section.

Congress also recently broadened the scope of animal fights that are federalized under this provision. Prior to 2008, interstate movement of people or animals was an element of the offense. Now, any of the acts listed above are federally criminalized if the animal fighting venture merely "affect[s]" interstate commerce. *Id.* § 2156(g). One application of the statute to a cockfighting operation without interstate movement of animals or people was upheld in the Fourth Circuit in *United States v. Gibert*, 677 F.3d 613, 618–621 (4th Cir. 2012), based, in part, on the defendants' purchase of equipment that had been manufactured out of state, and on gambling wagers for their cockfighting operation.

The animal fighting statute authorizes the Secretary of the U.S. Department of Agriculture (USDA), who acts through the Department's Office of the Inspector General, to investigate violations of the statute and to seek the assistance of "the Federal Bureau of Investigation, the Department of the Treasury, or other law enforcement agencies of the United States." *Id.* § 2156(f). The FBI has played an important role in recent animal fighting cases. *See, e.g.*, *United States v. Anderson*, 3:13-cr-100 (M.D. Ala. Aug. 23, 2013). Federal cases are also sometimes generated by local investigations. In light of the statute's recent expansion, many cases that are pursued in state court could also be charged in federal court. Therefore, U.S. Attorneys' offices that are interested in pursuing animal fighting cases may find it beneficial to reach out to state or local animal cruelty task forces, as well as animal control offices within their jurisdiction, for investigative leads.

C. Sentencing and forfeiture

Sentencing: It is a felony punishable by up to 5 years in prison and a $250,000 fine to engage in any of the acts listed above—except causing a minor to attend, a 3-year felony, and attending as a spectator, a 12-month misdemeanor. 18 U.S.C. §§ 49(c), 3571(b) (2015). Although there has been no animal fighting prosecution that tests the proposition, the statutory text could be read to permit charging on a per-animal basis, given that the prohibitions refer to actions involving "an animal."

As of the publication date of this article, the U.S. Sentencing Guidelines Manual assigns these violations to a gambling offense guideline, § 2E3.1, which has a base offense level of 10. Courts routinely depart upward or apply an upward variance in dog fighting cases, as envisioned in note 2 to the guideline, for cases involving "extraordinary cruelty," which is arguably present in every animal fighting case. *See, e.g.*, *Anderson*, ECF No. 583 (sentencing primary defendant to 8 years in prison on animal fighting charges); *United States v. Hargrove*, 701 F.3d 156, 164–65 (4th Cir. 2012) (affirming 60-month sentence where guidelines range was 0–6 months, in light of defendant's "cruel and barbaric treatment of the dogs"); *United States v. Courtland*, 642 F.3d 545, 554 (7th Cir. 2011) (affirming upward departures for several co-defendants, including one for the electrocution of a dog that did not perform well at the fight).

Forfeiture: Another important component of the statute is its forfeiture and restitution provision, 7 U.S.C. § 2156(f). Live animals are recovered from nearly every animal fighting operation, and the statute authorizes their seizure and forfeiture. *See id*. The purpose of forfeiting the animals is to ensure that they are not returned to their abusers and to perfect the Government's property interest in the animals so that they can be adopted through local animal shelters or placed with a rescue organization, if appropriate, rather than languishing in temporary custody at the expense of humane societies or the state, local, or Federal Government. Forfeiture of live animals can be accomplished both criminally and civilly. *See id.* § 2156(f), (j).

Civil forfeiture may be preferable in some instances because, if pursued swiftly, it has the potential to conclude more quickly than a federal criminal case. This option is beneficial in a matter involving live animals. In cases involving the seizure of hundreds of animals, the costs of housing, food, staffing, and veterinary care, can escalate quickly. Most local animal shelters do not have the ability to

house that many animals at once, resulting in the need to build or rent temporary housing (for example, at a state fairgrounds), or to coordinate placement at numerous shelters across a large geographic area. Even where shelters are able to house some or all seized animals, extended placement can tie up kennel runs and result in increased euthanasia rates in the general shelter population.

To best avoid these consequences, obtain a final order of forfeiture as soon as possible. Other advantages of civil forfeiture include a lower standard of proof, an increased likelihood that there will be no claimants, and that forfeiture can be obtained in an uncontested proceeding. This is especially true now that mere possession of fighting animals has been made a federal crime and, thus, criminal defendants are often reluctant to file a claim for seized dogs. In some states, it may be more advantageous to obtain civil forfeiture of the animals under state law if state prosecutors will pursue such an action. This is due to the shorter litigation deadlines and because state law provisions require defendants to post a bond for the costs of care of the animals in order to contest the forfeiture proceeding.

Prosecutors from the Environmental Crimes Section and civil litigators from the Wildlife and Marine Resources Section can help assess the relative advantages or disadvantages of state versus federal seizure, bonding, and forfeiture. If federal forfeiture is pursued, the statute authorizes courts to order that defendants make restitution payments for the costs of care of seized animals, *id.*, and the Assets Forfeiture Fund may also be available to pay certain expenses. *See* 28 U.S.C. § 524(c)(1) (2015). In one recent case, the court ordered the defendants to pay $2 million in restitution as part of judgments entered in the criminal case. *Anderson*, ECF Nos. 668, 670, 674, 681–684. The highly successful outcome in *Anderson* is part of a trend toward greater federal involvement in animal fighting cases. In 2014 the Department pursued 10 dog fighting cases and charged 49 defendants.

II. Animal crush videos: 18 U.S.C. § 48

A. Prohibited acts

There unfortunately exists a market for sexual fetish videos in which animals are brutally harmed. In 1999 Congress passed the "Crush Video Statute," 18 U.S.C. § 48, to prevent the production of these videos and images. One common variant of these videos and images, from which the statute derives its name, is films in which people impale and crush small animals, such as mice, kittens, and puppies, to death by stepping on them in high-heeled shoes. An earlier version of this law made it a crime to engage in the commerce of videos or images depicting acts of cruelty to animals, if the cruelty depicted was unlawful either where it occurred or where the video surfaced in commerce. However, the Supreme Court in *United States v. Stevens*, 559 U.S. 460, 463 (2010), struck down this version of the law as overbroad. Congress immediately responded, passing a substantially narrowed statute with the explicit purpose of "clos[ing] the gap in the enforcement of State and Federal animal cruelty laws left open by the Supreme Court's decision." H.R. Rep. No. 111-549, at 2 (2010), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-111hrpt549/pdf/CRPT-111hrpt549.pdf.

The current version of 18 U.S.C. § 48 bears little resemblance to the version struck down in *Stevens*, and was recently upheld against a First Amendment challenge in *United States v. Richards*, 755 F.3d 269, 272 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1546 (Mar. 23, 2015). In the current version, Congress substantially reworked the scope of what comprises a prohibited video or image, which is now defined as "any photograph, motion-picture film, video or digital recording, or electronic image" that:

> (1) depicts actual conduct in which 1 or more living non-human mammals, birds, reptiles, or amphibians is intentionally crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury (as defined in section 1365 and including conduct that, if committed against a person and in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 [of Title 18]); and

(2) is obscene.

18 U.S.C. § 48(a) (2015).

Section 2241 of Title 18 prohibits "knowingly caus[ing] another person to engage in a sexual act [] by using force. . . ." 18 U.S.C. § 2241(a)(1) (2015). Section 2242 prohibits "knowingly . . . engag[ing] in a sexual act with another person if that other person is [] incapable of appraising the nature of the conduct; or [] physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act." *Id.* § 2242(2). Images depicting the acts prohibited by sections 2241 and 2242 are considered "animal crush videos" when those acts are committed against an animal. 18 U.S.C. § 48 (2015). Accordingly, this part of the Crush Video Statute criminalizes bestiality videos, along with images of torture and bodily injury.

The statute makes several acts unlawful with respect to such videos. First, it is unlawful for any person to "knowingly create" such a video if "the person intends or has reason to know that the animal crush video will be distributed in, or using a means or facility of, interstate or foreign commerce; or [] if the animal crush video is distributed in, or using a means or facility of, interstate or foreign commerce." *Id.* § 48(b)(1). It is also "unlawful for any person to knowingly sell, market, advertise, exchange, or distribute an animal crush video in, or using a means or facility of, interstate or foreign commerce." *Id.* § 48(b)(2).

It is commonly understood that the Internet is a "facility or means of interstate or foreign commerce." *See, e.g.*, *United States v. Fuller*, 77 F. App'x 371, 378–79 (6th Cir. 2003). A violation of the Crush Video Statute is a felony with a statutory maximum penalty of 7 years in prison and up to a $250,000 fine. 18 U.S.C. §§ 48(d), 3571 (2015). For U.S. Sentencing Guidelines purposes, violations of the statute are treated similarly to obscenity violations. U.S. SENTENCING GUIDELINES MANUAL § 2G3.1 (2014).

B. Recent case law

The *Richards* case highlights the heinous nature of these videos. A grand jury in the Southern District of Texas indicted Ashley Richards and Brent Justice for producing animal torture videos in violation of the Crush Video Statute. Even when recited dryly, the facts are appalling. As summarized by the Fifth Circuit:

> Generally, the videos portray Richards binding animals (a kitten, a puppy, and a rooster), sticking the heels of her shoes into them, chopping off their limbs with a cleaver, removing their innards, ripping off their heads, and urinating on them. Richards is scantily clad and talks to both the animals and the camera, making panting noises and using phrases such as "you like that?" and "now that's how you [expletive] a [expletive] real good."

Richards, 755 F.3d at 272. The district court initially invalidated the statute as facially unconstitutional in violation of the First Amendment, and dismissed the charges. *United States v. Richards*, 940 F. Supp. 2d. 548, 558–59 (S.D. Tex. 2013). The Fifth Circuit reversed, finding that the obscenity element of the offense rendered the so-called "speech" at issue categorically unprotected. *Richards*, 755 F.3d at 277–79. The Supreme Court recently denied certiorari in this case, and it is presently on remand.

Since Congress re-enacted the statute in 2010, the distribution of animal torture videos like those in *Richards* has retreated back underground and is hard to detect. However, there are still a handful of Web sites that operate brazenly and are dedicated to the production and distribution of bestiality videos. Most, but not all, states specifically criminalize the underlying bestiality conduct. Other states' bestiality laws are framed narrowly and do not reach all of the types of acts seen on these Web sites. The federal definition is broad and encompasses most sexual acts. Investigators and prosecutors working on child

pornography cases may come across bestiality or animal torture videos, and vice versa, as the two are frequently found together.

III. The Animal Welfare Act: 7 U.S.C. §§ 2131–2159

The next set of statutes covers areas in which the Federal Government has a large regulatory presence, including exhibitions, commercial sales, research, and agriculture. The Animal Welfare Act and the Horse Protection Act regulate the treatment of animals outside the context of food production, whereas the Humane Methods of Slaughter Act regulates the treatment of animals within the agricultural setting. Common features of each of these statutory schemes include a licensing or inspection mechanism that is administered by the USDA; a set of prohibited conduct, as well as standards and other guidelines relating to animal care; associated administrative penalties; and a multilayered administrative enforcement process that includes a notice and opportunity to be heard. In addition to the administrative enforcement processes, each of these statutes contains some measure of civil and criminal enforcement mechanisms for which Department of Justice prosecutors and civil litigators have responsibility.

A. Statutory and regulatory background

Originally enacted in 1966 as the Laboratory Animal Welfare Act, the Animal Welfare Act (AWA) sought to: (1) protect dog and cat owners from having their pets stolen and sold for research, and (2) ensure the humane treatment of certain animals actually used in research. Pub. L. No. 89-544, § 1, 80 Stat. 350, 350 (1966). Over the years, the AWA has been amended to more broadly regulate research facilities (for example, commercial laboratories and universities), exhibitors (for example, circuses and zoos), dealers (for example, commercial breeders and animal brokers), and certain carriers (for example, commercial airline carriers). 7 U.S.C. §§ 2131–59 (2015). The AWA's coverage is far-reaching and goes well beyond domesticated animals, to include wild and exotic animals as well as marine mammals. The AWA defines "animal" as any live or dead dog, cat, monkey, guinea pig, hamster, rabbit, or any other warm-blooded animal that is used or intended to be used for research, teaching, exhibition, or as a pet. *Id.* § 2132(g); 9 C.F.R. § 1.1 (2015). However, birds, rats and mice bred for research, horses not used for research, and farm animals used for food or fiber (or research related to food or fiber production), are categorically excluded from this definition. 7 U.S.C. § 2132(g) (2015).

Flowing from its initial purpose, the AWA contains several specific requirements protecting dogs and cats, such as mandating holding periods to limit the quick sale of these pets, prohibiting research facilities from purchasing dogs and cats from unauthorized entities, and limiting the importation of dogs. *Id.* §§ 2135, 2137, 2138. But to effectuate its broader policy of systematically ensuring the humane treatment of animals in commerce, the AWA goes further and establishes a comprehensive enforcement scheme to be administered by the USDA.

First, the AWA requires the USDA to create a licensing system for animal dealers and exhibitors, and prohibits these entities from conducting various commercial activities—including selling or transporting animals for exhibition, research, or use as a pet—without having a valid license. *Id.* §§ 2133, 2134.

Second, the USDA must promulgate standards governing the humane handling, care, treatment, and transportation of animals by dealers, exhibitors, and research facilities—standards that in many ways reflect the core substantive purpose of the Act. *Id.* § 2143. Section 2143 directs that these standards include minimum requirements for handling, housing, feeding, watering, sanitation, ventilation, shelter from extreme temperatures, veterinary care, and separation of species, as well as other issues arising in the research context. *Id.* § 2143(a)(2) & (3). The USDA has, in turn, promulgated fairly extensive species-specific humane handling standards. *See* 9 C.F.R. §§ 3.1–3.142 (2015) (providing standards of care for dogs, cats, guinea pigs, hamsters, rabbits, nonhuman primates, marine mammals, and other warm-blooded animals). These regulations set forth many detailed requirements pertaining to the animals' life in

captivity—from minimum feeding times, to positive physical human contact and play for dogs, to housing social marine mammals with a companion. *Id.* §§ 3.8, 3.109, 3.129.

Finally, the AWA empowers the USDA with investigative authority to detect violations. Dealers and exhibitors are not only required to create and retain certain records relating to the sale, transportation, identification, and ownership of their animals, but must also make these records available for inspection. 7 U.S.C. §§ 2140, 2141 (2015). Among its investigative tools, the USDA has the ability to conduct regular inspections and to confiscate animals that are found to be suffering as a result of a violation of the statute or regulations—all supported by separate criminal penalties for interference with these functions. *Id.* § 2146. Investigations of potential AWA violations are conducted by USDA's Animal and Plant Health Inspection Service's (APHIS) Investigative and Enforcement Services (IES), which employs field investigators who support AWA enforcement, along with a number of other statutory programs, including the Horse Protection Act and the Lacey Act.

B. Enforcement

When there is evidence of a violation of the AWA or the rules, regulations, or standards thereunder, the USDA engages in a familiar multistep enforcement process, which may progress and escalate as the facts warrant. In certain instances, IES may resolve the matter through a pre-litigation settlement agreement, which may include a monetary penalty or other sanction. In other circumstances, IES will refer a violation to the USDA's Office of General Counsel (OGC), which may consult with the Office of Inspector General (OIG) for potential criminal matters and the Department of Justice for potential judicial enforcement actions. In many instances, depending upon the nature of the violations, OGC will institute an administrative enforcement action, which will entail an administrative complaint, motions practice and responsive pleadings, and a hearing before an Administrative Law Judge (ALJ). The ALJ's decision may be appealed to the USDA's Judicial Officer, whose decision becomes the final agency action. The respondent may obtain review of the final agency decision in the appropriate U.S. court of appeals. 7 U.S.C. § 2149 (2015). The culmination of the administrative enforcement process may be the issuance of civil penalties (up to $10,000 per violation per day), a cease and desist order, and/or a suspension or revocation of an AWA license. *Id.*

In conjunction with, and sometimes separate and apart from, the administrative enforcement process, the AWA provides specific judicial mechanisms relating to the misconduct of animal dealers, exhibitors, auction operators, and research facilities. On the civil enforcement side, the Government (through the Attorney General or his delegate) can institute a civil action in district court to collect unpaid administrative penalties, as well as civil penalties for failure to obey a final cease and desist order. *Id.* § 2149(b). An application for a temporary restraining order or injunction may also be sought in district court where there is reason to believe that the health of an animal is in serious danger. *Id.* § 2159. Finally, the AWA imposes criminal penalties of up to 1 year in prison and a $2,500 fine (subject to adjustment under the Alternative Fines Act) for knowing violations of the statute. *Id.* § 2149(d). Intimidation or interference with USDA inspections and enforcement constitutes a felony offense, punishable by up to 3 years in prison and a $5,000 fine (subject to adjustment under the Alternative Fines Act). *Id.* § 2146(b). There is currently no sentencing guideline assigned to the AWA. In such circumstances, an analogous guideline should be used. U.S. SENTENCING GUIDELINES MANUAL § 1B1.2(a) (2014). Other laws surveyed in this article may provide analogous guidelines, depending on the circumstances.

C. Litigation under the AWA

Litigation under the AWA has generally fallen into four categories: (1) defense of agency adjudications, (2) defense of agency rulemakings, (3) affirmative civil enforcement, and (4) criminal prosecution. The majority of cases fall within the first category, where final administrative orders are challenged directly in the courts of appeals. *See, e.g.*, *Horton v. Dep't of Agric.*, 559 F. App'x. 527, 527–

28, 536 (6th Cir. 2014) (affirming agency imposition of civil penalties against petitioner who sold dogs without a license); *ZooCats, Inc. v. Dep't of Agric.*, 417 F. App'x 378, 380, 383 (5th Cir. 2011) (denying petition for review of agency's cease and desist order and revocation of exhibitor's license where exhibitor of tigers, lions, and other wild animals had been found to violate animal housing, feeding, and veterinary care regulations).

A much smaller segment of cases include facial and as-applied challenges to the rules and regulations promulgated under the AWA. *See, e.g.*, *Associated Dog Clubs of New York State, Inc. v. Vilsack*, No. 1:13-cv-01982, 2014 WL 5795207, at *1, *8 (D.D.C. Nov. 7, 2014) (rejecting challenge to a USDA rule that redefined "retail pet stores" (which are exempted from the AWA) to include only face-to-face and not online sellers); *Animal Legal Defense Fund, Inc. v. Glickman*, 204 F.3d 229, 236 (D.C. Cir. 2000) (upholding regulations promulgated under the AWA regarding psychological well-being of nonhuman primates held by exhibitors and researchers). And while there have also been some constitutional challenges to the AWA itself, recent activity in this area has focused on the animal fighting amendments discussed above.

On the affirmative enforcement side, the Government has successfully sought to enforce civil penalties where administrative actions have been unavailing. *See United States v. Felts*, No. C11-4031-MWB, 2012 WL 124390, at *5 (N.D. Iowa Jan. 17, 2012) (granting summary judgment and ordering payment of civil administrative penalties that were imposed by USDA for various violations of humane handling regulations by a dog kennel and dealer). A survey of AWA cases reveals that prosecutors have often been able to charge other Title 18 offenses, including identity theft, mail fraud, false statements, and conspiracy, in connection with underlying animal welfare offenses. A number of these cases have been brought against defendants who fraudulently obtained and sold random source dogs and cats to research facilities without notifying owners that their pets might be used for research. *See, e.g.*, Indictment, *United States v. Martin*, No. 11-cr-54 (M.D. Pa. 2011); Felony Information, *United States v. Baird*, No. 05-cr-002224 (E.D. Ark. 2005); Indictment, *United States v. Davis*, No. 98-60125 (D. Or. 1998). Charges have also been brought directly under the AWA's provisions where, for example, a dealer or exhibitor sells or transports animals for exhibition without a valid USDA license. *See, e.g.*, Information, *United States v. Mazzola*, No. 09-08005 (N.D. Ohio 2009) (alleging counts under 7 U.S.C. § 2149(d) for transporting wild and exotic animals, including wolves, tigers, and bears, for an exhibition without a valid AWA license).

D. Potential intersections between the AWA, wildlife statutes, and other laws

At the national level, the AWA is perhaps the most wide-ranging statute pertaining to animal care. By design, however, the AWA is non-preclusive in nature, and thus may serve as a helpful tool that can be used in conjunction with other state and local law enforcement efforts, as well as with other federal wildlife statutes. For example, the AWA leaves ample room for complementary state and local regulation of animal welfare. *See* 7 U.S.C. § 2143(a)(8) (2015) (stating that the federal humane handling regulations "shall not prohibit any State (or a political subdivision of such State) from promulgating standards in addition to those standards promulgated by the Secretary"); *see also id.* § 2145(b) ("The Secretary is authorized to cooperate with the officials of the various States or political subdivisions thereof in carrying out the purposes of this chapter and of any State, local, or municipal legislation or ordinance on the same subject."). Thus, where state and local laws prohibit inhumane treatment of animals, or otherwise proscribe conduct relating to domestic or wild animals, there may be opportunities for cooperative enforcement. *See, e.g.*, Response to Defendant's Motion to Dismiss Indictment, *United States v. Davis*, No. 98-60125, at 3 (D. Or. 1999) (noting that the prosecution of defendants for improperly obtaining and selling random source dogs was conducted in two phases, the first of which involved prosecution by the state for theft of a companion animal); *cf. DeHart v. Town of Austin, Ind.*, 39 F.3d 718, 722 (7th Cir. 1994) (finding that a local ordinance prohibiting the possession of wild animals or animals capable of inflicting serious physical harm or death to humans was not preempted by the AWA).

At the federal level, the intersection between the AWA and wildlife statutes may provide additional mechanisms for deterring and reducing criminal activity. As discussed above, many aspects of the transport (or trafficking) of wild animals may also trigger the AWA because the AWA provides a mandatory framework for entities to legitimately engage in the commerce of animals—from puppies to tigers. Thus, if a dealer or exhibitor attempts to sell or transport a wild or exotic animal without obtaining an AWA license, he or she may be subject to the Act's criminal provisions. On the other hand, if a licensed dealer or exhibitor is otherwise engaged in conduct that violates the Endangered Species Act, Lacey Act, or other federal or state laws that implicate the transport, ownership, or welfare of animals, such conduct may serve as independent grounds for the termination of an AWA license. *See* 9 C.F.R. § 2.11(a)(4) (2015) (providing that a license will not be issued to any applicant who has been found to have violated any federal, state, or local laws or regulations pertaining to animal cruelty within 1 year of application); *id.* § 2.11(a)(6) (providing the same for any applicant who has been found to have violated any federal, state, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals).

IV. Horse Protection Act: 15 U.S.C. §§ 1821–1831

A. Statutory and regulatory background

Among those animals excluded from the AWA are "horses not used for research purposes." 7 U.S.C. § 2132(g) (2015). There are only a handful of statutes that regulate the care of horses, and they apply in fairly specific contexts. In addition to the Twenty-Eight Hour law, which restricts the transport of horses and other animals, *see* 49 U.S.C. § 80502 (2015), Congress enacted the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331–1340 (2015), which was designed to protect and manage wild horses and burros on public lands. By contrast, the Horse Protection Act (HPA), 15 U.S.C. §§ 1821–1831, was enacted to prevent a very specific practice of animal cruelty on captive horses—a practice known as horse "soring," which is prevalent in the walking horse show industry.

Soring is the practice of injuring a horse's limbs in order to cause the horse to have the type of exaggerated, high-stepped gait that is prized in walking horse show competitions. Soring can occur in a number of ways, including by burning, cutting, lacerating, or applying chemical irritants, spikes, or screws into the horse's legs. 15 U.S.C. § 1821 (2015). In the HPA, Congress declared that the practice of soring was "cruel and inhumane" and gave an unfair competitive advantage to those engaged in this conduct. *Id.* § 1822. The HPA does not directly ban soring itself, instead limiting its reach to activities connected to the movement of sored horses in commerce. Using this framework, the HPA seeks to deter soring by imposing civil and criminal liability for certain actions of horse show managers, horse owners, and those who sore horses. *See* H.R. Rep. No. 91-1597 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4875. The HPA first prohibits the showing, exhibition, sale, and transport of horses known to be sore. 15 U.S.C. § 1824(1)–(2) (2015). The HPA also prohibits horse owners from allowing their horses to be shown, exhibited, or sold while sore. *Id.* § 1824(2). Finally, the HPA imposes liability on managers of horse shows who fail to disqualify sored horses or prohibit the sale of such horses. *Id.* §§ 1823(b), 1824(3)–(4).

The inspection scheme that is contemplated by the HPA is somewhat atypical. The HPA provides for a system of both public and private inspectors to detect and diagnose sored horses at shows and exhibitions. USDA inspectors are authorized to examine horses at shows and exhibitions, *id.* § 1823(e), but because of APHIS's limited resources, the primary means of enforcement is through a private inspection system. *See* OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF AGRICULTURE, AUDIT REP. 33601-2-KC 1 (2010), *available at* http://www.usda.gov/oig/webdocs/33601-02-KC.pdf. The HPA requires the USDA to regulate the appointment of private inspectors. 15 U.S.C. § 1823(c) (2015). The USDA thus established its Designated Qualified Person (DQP) Program, through which it certifies private Horse Industry Organizations (HIOs), who, in turn, license DQPs to inspect horses. 9 C.F.R. § 11.7

(2015). Under the private system, routine inspections are not mandatory but there is an incentive for horse show managers to voluntarily hire private inspectors. If a manager of a horse show opts to hire a DQP, then the manager will only be liable for showing a sored horse if he or she is notified that the horse is, in fact, sore. 15 U.S.C. § 1824 (2015). On the other hand, if the management declines to hire a DQP, then the management is strictly liable for HPA violations, and thus would be liable for failing to disqualify a sored horse, regardless of whether the manager knew that the horse was sore. *Id*.

B. Enforcement

Investigations and administrative enforcement of HPA violations are conducted by USDA's APHIS, through an administrative process that is structured similarly to that under the AWA. Thus, USDA's APHIS may refer violations to OGC, OIG, and the Department of Justice, as the circumstances warrant. In many instances, OGC will institute an administrative enforcement action, which will entail an administrative complaint, motions practice and responsive pleadings, and a hearing before an ALJ. The ALJ's decision can be appealed to the USDA's Judicial Officer, whose decision is the final agency action, appealable to a U.S. court of appeals. *See* 15 U.S.C. § 1825 (2015). Through this administrative enforcement process, USDA can issue civil penalties (up to $2,200 per violation), as well as orders of disqualification of horse exhibitors and show managers. *Id*. § 1825(b), (c) (2015); 7 C.F.R. § 3.91(b)(2)(vii) (2015).

In addition to the administrative enforcement process, the HPA provides for certain judicial measures. The Government can institute a civil action in district court to collect unpaid civil administrative penalties, *see* 15 U.S.C. § 1825(b)(3) (2015), as well as a forfeiture action against property (that is, equipment and devices) used in violations of the HPA or its regulations. *Id.* § 1825(e)(2). The HPA also criminalizes knowing violations of § 1824, which include the prohibited conduct by horse owners, exhibitors, and managers relating to the transporting, showing, and exhibiting of sored horses. *Id*. § 1825(a). Such violations are misdemeanors, with a maximum penalty of 1 year of imprisonment and a $3,000 fine (subject to adjustment under the Alternative Fines Act). Intimidation or interference with official duties under the HPA constitutes a felony offense, punishable by up to 3 years in prison and a $5,000 fine (subject to adjustment under the Alternative Fines Act). *Id.* § 1825. There is currently no sentencing guideline assigned to the HPA. In such circumstances, an analogous guideline should be used. U.S. SENTENCING GUIDELINES MANUAL § 1B1.2(a) (2014). Other laws surveyed in this article may provide analogous guidelines, depending on the circumstances.

C. Litigation under the HPA

The vast majority of litigation under the HPA has included: (1) defense of agency adjudications, *see, e.g.*, *Derickson v. Dep't of Agric.*, 546 F.3d 335, 347 (6th Cir. 2008) (denying petition for review of agency's order disqualifying exhibitor for 2 years and imposing civil penalties for transporting and entering a sored horse in a show), (2) defense of agency rulemaking, *see, e.g.*, *Contender Farms, LLP v. Dep't of Agric.*, 779 F.3d 258, 270–71 (5th Cir. 2015) (finding that the HPA did not authorize a regulation that would require HIOs to impose mandatory suspensions), and (3) criminal prosecutions. Recent criminal cases have involved charges against defendants who trained, transported, and entered sored horses in shows, as well as falsified entry forms. *See, e.g.*, Indictment, *United States v. McConnell*, No. 12-cr-9 (E.D. Tenn. 2012); Indictment, *United States v. Davis*, No. 11-cr-11 (E.D. Tenn. 2011).

D. Concurrent authorities

Although the HPA is a much narrower statute than the Animal Welfare Act, Congress displayed a similar intent to leave this area of regulation wide open for states and localities. The HPA explicitly disclaims any intent to "occupy the field" on this issue, *see* 15 U.S.C. § 1829 (2015), making way for the imposition of local anti-cruelty statutes. This is particularly noteworthy given that the HPA does not

directly prohibit soring itself. Thus, enforcement of the HPA and its regulations may, in some circumstances, be coupled with state prosecutions for soring and other animal cruelty violations. *See, e.g.*, Sentencing Memorandum, *McConnell* , No. 12-cr-9 (noting that the State of Tennessee had also prosecuted the defendant for animal cruelty violations and seized his horses).

V. Humane Methods of Livestock Slaughter Act: 7 U.S.C. §§ 1901–1907

A. The statute

Images of inhumane slaughter occasionally make headlines in print and television news. The Supreme Court recently affirmed that the acts depicted in such images, if proven, may constitute a crime under federal law. *See National Meat Ass'n v. Harris*, 132 S. Ct. 965, 974 (2012). The Federal Meat Inspection Act (FMIA), 21 U.S.C. §§ 601–625, regulates the handling and slaughter of livestock for human consumption at slaughterhouses producing meat for interstate and foreign commerce. First enacted in 1906, the FMIA established a system of inspecting live animals and carcasses in order to prevent the shipment of unwholesome meat products.

In 1958 Congress passed the Humane Methods of Livestock Slaughter Act (HMSA), which requires that all meat purchased through federal procurement and price support programs be slaughtered humanely. Specifically, the HMSA requires that such livestock be:

> (a) . . . rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut; or
>
> (b) . . . slaughter[ed] in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument and handling in connection with such slaughtering.

7 U.S.C. § 1902 (2015). In 1978 Congress extended the HMSA to all slaughterhouses engaged in interstate commerce by amending the FMIA to require that meat inspected and approved under the FMIA be produced "only from livestock slaughtered in accordance with humane methods." Pub. L. No. 95-445, Stat. 1069 (1978).

Specifically, Congress directly required slaughterhouses to comply with the HMSA by amending 21 U.S.C. § 610 to prohibit the slaughter of livestock in a manner other than as allowed by the HMSA:

> No person, firm, or corporation shall, with respect to any cattle, sheep, swine, goats, horses, mules, or other equines . . . slaughter or handle in connection with slaughter any such animals in any manner not in accordance with the Act of August 27, 1958 [the HMSA].

21 U.S.C. § 610 (2015) (listing "prohibited acts"). Pursuant to 21 U.S.C. § 676(a), most violations are a misdemeanor punishable by 1 year in prison and a fine of $100,000 for individuals, or $200,000 for a corporation (as adjusted under the Alternative Fines Act). *See* 18 U.S.C. §§ 3571(b)(5), (c)(5) (2015); *National Meat Ass'n*, 132 S. Ct. at 974 ("A violation of those standards is a crime, see § 676 . . . ."). The FMIA also makes it a felony punishable by up to 3 years in prison if any such violation either "involves intent to defraud" or results in the "distribution or attempted distribution of an article that is adulterated." 21 U.S.C. § 676(a) (2015). The sentencing guideline for all violations of the FMIA, including both humane slaughter and public health violations, is § 2N2.1. This guideline has a base offense level of 6. Administrative enforcement is also authorized. *Id.* § 676(b).

B. The regulations

USDA has promulgated regulations further delineating which slaughtering and handling methods are deemed to be humane, as that term is used in the HMSA and FMIA. *See* 9 C.F.R. §§ 309.1–309.18; 313.1–313.90 (2015). The purpose of these regulations is to ensure that animals are not treated inhumanely at slaughterhouses, beginning at the moment of their arrival. The regulations include: (1) humane handling requirements (that is, unloading animals and driving them into chutes and pens), (2) provisions regarding the handling of disabled, injured, or otherwise non-ambulatory animals, and (3) stunning requirements (that is, rendering animals completely unconscious prior to slaughter). The Supreme Court recently held that certain elements of the HMSA and its accompanying regulations pre-empt state laws in this area. *National Meat Ass'n*, 132 S. Ct. at 975.

The federal humane handling regulations require that the "[d]riving of livestock . . . from the holding pens to the stunning area shall be done with a minimum of . . . discomfort to the animals." 9 C.F.R. § 313.2(a) (2015). Additionally, "[e]lectric prods, canvas slappers, or other implements employed to drive animals shall be used as little as possible in order to minimize . . . injury. Any use of such implements which, in the opinion of the inspector, is excessive, is prohibited." *Id.* § 313.2(b).

The statute and regulations also address non-ambulatory or "downer" animals that are unable to rise and walk after being prodded. In many instances, such animals are suffering from a broken leg(s), although some animals become downed due to illness or neurological condition, including Bovine Spongiform Encephalopathy, better known as Mad Cow Disease. USDA regulations regarding the treatment of downer livestock are designed to protect the public health, as well as the welfare of the animal. For instance, "[d]isabled livestock and other animals unable to move" must either be immediately euthanized or, in some instances, can also be "separated from normal ambulatory animals and placed in [a] covered pen" for up to 24 hours to see if they recover. *Id.* § 313.2(d)(1). Only a USDA inspector can determine whether animals in this pen are allowed to be slaughtered or whether they should be euthanized and not put into the human food supply. *Id.* § 313.1(c). The "dragging of disabled animals and other animals unable to move, while conscious, is prohibited." *Id.* § 313.2(d)(2).

With respect to the statutory requirement that animals be rendered insensible to pain (that is, unconscious) prior to slaughter, the regulations deem four methods of stunning to be acceptable, if done correctly. These include the use of a "captive bolt" gun upon the skull of the animal, electrocution, the use of a gas chamber, and discharge of gunshot into the brain by firearm. *Id.* §§ 313.5, 313.15, 313.16, 313.30. Of these methods, the most commonly used is the captive bolt gun. A captive bolt gun is an "instrument which when activated drives a bolt out of a barrel for a limited distance." *Id.* § 301.2. Regulations require that captive bolt stunners

> shall be applied to the livestock in accordance with this section so as to produce immediate unconsciousness in the animals before they are shackled [hung from one rear leg that is chained to a moving overhead conveyor line], hoisted [elevated completely off the floor by the conveyor line following shackling], thrown, cast, or cut [for purpose of exsanguination].

Id. § 313.15(a)(1). Animals "shall be stunned in such a manner that they will be rendered unconscious with a minimum of excitement and discomfort." *Id.* The regulations further mandate that "[i]mmediately after the stunning blow is delivered the animals shall be in a state of complete unconsciousness and remain in this condition through shackling, sticking [that is, piercing of carotid artery for exsanguination] and bleeding." *Id.* § 313.15(a)(3).

C. Enforcement

Most enforcement of the HMSA is conducted administratively by the USDA's Food Safety Inspection Service, which has administrative authority to, among other things, suspend operations by

withholding grants of inspection. *See, e.g.*, 9 C.F.R. §§ 500.1–500.8 (2015). In addition to administrative enforcement, U.S. Attorneys' offices have pursued criminal charges under the HMSA in some contexts. *See, e.g.*, *United States v. Curbelo*, 1:11-cr-20283 (S.D. Fla. Aug. 31, 2011). Another federal law that applies to livestock is the Twenty-Eight Hour Law. It provides that, subject to some limited exceptions, road and rail carriers "may not confine animals in a vehicle or vessel for more than 28 consecutive hours without unloading the animals for feeding, water, and rest." 49 U.S.C. § 80502(a) (2015). This law is enforceable only by way of modest civil judicial penalties. *Id.* § 80502(d).

VI. Conclusion

A common misperception is that animal cruelty is the sole domain of state courts and state legislatures. However, Congress has been active in this area for decades and has equipped federal prosecutors and litigators with myriad enforcement tools. Federal involvement is particularly important in instances where state or local authorities cannot or will not act, or when the criminal activity at issue spans multiple jurisdictions. Indeed, with respect to humane slaughter violations, federal enforcement may be the only enforcement avenue in light of the Supreme Court's holding in *National Meat Association* that state animal welfare laws, as applied to slaughterhouse activities, are preempted by the HMSA in some contexts.

Moreover, some criminal syndicates, such as large-scale dog fighting rings, are simply too large to effectively combat on the local level. A coordinated, nationwide law enforcement response is needed to confront this type of organized crime. ECS prosecutors and ENRD civil litigators are working on these issues. They are available to consult on and assist with, and are also authorized to pursue criminal and civil matters arising under these statutes. Assistant U.S. Attorneys and federal agents who are interested in investigating and prosecuting these matters are encouraged to contact ECS at (202) 305-0321. These cases warrant action on their own merits, but also further long-standing law enforcement interests in community safety and public health. ❖

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Domestic Fisheries Enforcement

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I. Introduction

Illegal fishing is pernicious. Illegal fishing is distinct from overfishing. The term "overfishing" refers to a scientific assessment as to whether too many fish are being caught over a period of time, usually a year, such that the breeding population becomes too depleted to produce the maximum sustainable yield on a continuing basis. *See* 16 U.S.C. § 1802(34) (2015). The fact that official harvest data—largely provided by the commercial fishing industry—leads government fisheries statisticians to conclude that certain fish populations are not "overfished" does not mean that illegal fishing is not present, or even rampant. Illegal fishing is not reflected in the official harvest data. At some point, depending on the fishery, unreported fishing mortality caused by illegal fishing can undermine population models, masking the sometimes dire situation lurking below the surface and causing fishery management schemes to fail.

Vigorous enforcement is key to protecting marine resources and ensuring a sustainable harvest. However, the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act), 16 U.S.C. §§ 1801–1884, the law that regulates at least 90 percent of domestic fishing in federal waters, has no criminal penalties for substantive fishing violations, such as overharvesting, undersized fish, fishing out-of-season, illegal gear, and fishing in closed areas.

II. Scenario

Consider this scenario: An informer reveals illegal large-scale commercial fishing in your district. What do you do?

A. Step 1: Involve NOAA

Specifically, involve the Office of Law Enforcement (OLE) of the National Marine Fisheries Service, a component of the National Oceanic and Atmospheric Administration (NOAA). NOAA is responsible for implementing the Magnuson Act in conjunction with eight Regional Fisheries Management Councils. *See* 16 U.S.C. § 1852 (2015) (establishment of Regional Fisheries Management Councils). The Councils play a key role in regulating domestic fishing in federal waters. Guided by the statutory mandate to prevent overfishing, while allowing for optimum yield, the Councils establish management measures, for example, defining closed areas, specifying types of gear, setting size limits, or fixing quotas, through fisheries management plans (FMPs). *See id.* §§ 1851 (setting national standards for fishery conservation and management), 1853 (setting contents of FMPs). Once reviewed by NOAA, the FMPs' management measures are promulgated as federal regulations. *E.g.*, 50 C.F.R. § 648.1 (2015) (implementing the FMPs for federal waters of the Northeastern United States).

The penalties for violating almost all of these regulations—save for threats to, and obstruction of, enforcement officials and observers—are not criminal. Instead, they are civil penalties, permit sanctions, and forfeitures that are handled by administrative enforcement attorneys that work for NOAA's Office of General Counsel. 16 U.S.C. §§ 1858–1860 (2015) (setting forth civil penalties). Even though the substantive fishing violations are not criminal on their own, the potential criminal charges discussed in

this article will depend heavily on the intricacies of the relevant FMP, fishing permit, and other NOAA regulations, as well as related state laws.

Therefore, you will need to work with the NOAA investigative agent to collect all the relevant agency materials and establish a conduit to the General Counsel's Office, should there be follow-up legal questions. Also keep in mind that while other agencies (state, Coast Guard, and FWS) have successfully handled investigations into fisheries frauds, there is the danger of missing key information about your target (or witness) that resides in the records maintained by NOAA as part of its administration of the Magnuson Act. The four main types of records are:

- **Fishing permits and permit histories:** Fishing permits are licenses to fish in federal waters and often come with restrictions on fishing activity.
- **Fishing logs, known as Fishing Vessel Trip Reports (FVTRs):** FVTRs are a type of log sheet, as opposed to a bound "Captain's Log." FVTRs require information such as date, vessel name, permit number, and Coast Guard document number, gear used, species caught, species weight, number of hauls, port of landing, and, if available, identity of the fish purchaser(s) (dealers). Vessel operators are required to sign the FVTR under a text box that reads, "I certify that the information provided on this form is true, complete and correct to the best of my knowledge, and made in good faith. Making a false statement on this form is punishable by law (18 U.S.C. [§] 1001)." Magnuson regulations typically require that the vessel operator mail the FVTRs to one of NOAA's regional offices.
- **Reports made by first purchasers of seafood (dealers), known as "dealer reports":** Dealer reports are electronic forms that are submitted through an Internet-based program known as SAFIS. Dealer reports include information such as date of landing, port of landing, catch vessel, corresponding FVTR numbers, commercial grade, species, price, and weight. NOAA utilizes the dealer reports as a check on the information submitted in FVTRs, as well as a source of information used in fisheries management.
- **Vessel Monitoring System (VMS) data that track a vessel's course, speed, and position:** VMS units are required to be installed on many vessels operating under federal permits. VMS tracking data can be useful evidence of illegal fishing, but unless the violation is contingent on a closed area violation, VMS data is typically corroborative in nature.

To the extent the above types of records have individually identifiable information (the kind most useful in a criminal investigation), NOAA treats those records as confidential data. *See* 50 C.F.R. §§ 600.405–.425 (2015) (Confidentiality of Statistics). There are methods to obtain these records by working with NOAA OLE, but the information is not otherwise available through publicly available or conventional online searches. Therefore, if you are dealing with an investigation involving a federal fishery, it is critical to involve NOAA, even if the case is going to be primarily handled by another investigative agency.

B. Step 2: Consider your charging options

There are five principal felony charges to consider in prosecuting your fisheries case: (1) Lacey Act trafficking, 16 U.S.C. §§ 3372(a), 3373(d)(1); (2) Lacey Act false records, 16 U.S.C. §§ 3372(d), 3373(d)(3)(A); (3) False statements, 18 U.S.C. § 1001; (4) Sarbanes-Oxley false records, 18 U.S.C. § 1519; and (5) Mail and wire fraud, 18 U.S.C. §§ 1341 and 1343, respectively.

Lacey Act trafficking: The trafficking crimes in the Lacey Act require two sequential, discrete steps. The first step requires that something be done to the fish to make it illegal. In other words, the fish would have to be "taken, possessed, transported, or sold" in violation of some law or regulation. The

underlying law or regulation can be of state, federal, tribal, or foreign origin. 16 U.S.C. § 3372(a)(1), (2)(A) (2015). One way to look at the underlying illegality is to consider the illegal fish metaphorically "glowing" or "radioactive." What makes the fish glow? The most common types of underlying prohibitions are of the "take" variety, for example, no fishing without a permit, no fishing in the "exclusive economic zone" for Atlantic striped bass, no exceeding the daily trip limit 200 pounds of summer flounder, and no undersized lobster. Also note that the defendant does not have to be the one that commits the underlying offense.

Once the fish is "radioactive," the defendant has to knowingly do something active with the fish, to wit: "import, export, transport, sell, receive, acquire, or purchase" the fish. *Id.* § 3372(a)(1), (2). The law provides for attempt and misdemeanors with various combinations of elements, but for a felony there are additional elements: (1) if the underlying offense is state or foreign law, there needs to be interstate or foreign commerce, (2) if the defendant's conduct is not an import or export, then the defendant's conduct needs to involve a sale or purchase (or offer) of fish with a market value over $350, and (3) in any case, the defendant has to have known that the fish were "taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty, or regulation." *Id.* § 3373(a)(1). Often, as in most environmental crime prosecutions, proving "knowledge" is key. It can also be the most difficult element to prove.

From that brief overview of the Lacey Act and the fact that FMPs are implemented as federal regulations, it would seem that a violation of one of the multitude of fisheries regulations stemming from the Magnuson Act could blossom into a Lacey Act trafficking case. Unfortunately, the Lacey Act specifically exempts "any activity regulated by a fishery management plan in effect under [the Magnuson Act]" from being utilized to establish underlying illegality, for example, from establishing the glow. *Id.* § 3377(a). Thus, you will have to look beyond the vast majority of Magnuson Act regulations in order to put together a trafficking case.

There are some federal fisheries laws that regulate fish in a manner similar to Magnuson's FMPs, but they are separate statutes, for example, the Northern Pacific Halibut Act and the Atlantic Striped Bass Conservation Act. Courts have upheld the utilization of these non-Magnuson federal fisheries laws as underlying offenses under the Lacey Act. *E.g., United States v. Ertsgaard*, 222 F.3d 615, 616 (9th Cir. 2000) (Section 3377 exception only applies to activities regulated under fisheries management plans in effect under the Magnuson Act). Moreover, some states, such as Texas, are largely copying, or incorporating by reference, federal FMPs as part of their state regulations. State regulations are not exempt from being used as a predicate for a Lacey Act violation. Thus, these state laws would fall outside of the Lacey Act's Magnuson Act exception. Similarly, foreign and tribal laws are not exempt from being used as predicate offenses under the Lacey Act.

The Lacey Act includes a 5-year felony. The Lacey Act is popular among prosecutors of crimes involving wildlife and fisheries, in part because a convicted defendant's adjusted offense level under the Sentencing Guidelines is often higher under the Lacey Act than under available Title 18 offenses. Per U.S. Sentencing Guidelines § 2Q2.1(b)(1), if the defendant's offense was committed for pecuniary gain or a commercial purpose, he is at a level eight. But if the value of the fisheries product exceeds $5,000, then the offense level goes up according to what is set forth in the "Fraud Table" found at U.S. Sentencing Guidelines § 2B1.1. Implicitly recognizing that natural resource crimes are undervalued because they often cause damage that goes beyond the purely economic value of the dead species, the Guidelines define "market value" for purposes of the Fraud Table as the "fair-market retail price." U.S. SENTENCING GUIDELINES MANUAL § 2Q2.1 app. 4. Utilizing the retail price can provide significant advantages because seafood prices are often marked up 100 percent to 900 percent from the time the product leaves the dock until it reaches a grocery store or fish market.

Practice tip: Start collecting evidence of retail prices for your investigation's fish species early. Document a variety of prices throughout the area and time period. NOAA keeps excellent,

computerized records of first sale transactions, that is, boat to dealer, but has spotty and incomplete data on the retail marketplace. Do not wait until a sentencing hearing that could occur years in the future to recreate fluctuating pricing data from the past. Make sure the agent is actually getting prices from stores and supermarket seafood counters. A series of camera phone photos over time may suffice. In a pinch, http://seafoodnews.com/ might have some pricing information, but nothing is a substitute for ground-truthed data. Courts might discount or interpret your proffered retail prices differently than you might advocate, but the stronger your data set, the more solid your arguments, and the greater the chance of a higher adjusted-offense level.

Lacey Act false records: If Lacey Act trafficking is not an option, you may have a Lacey Act false records violation. The false records charge has the same Guidelines offense level and guidance (for example, fair market retail price of fish) as trafficking. Moreover, the § 3377 exception for activities regulated under FMPs only applies to trafficking. It does not apply to false records that are otherwise regulated by FMPs or their implementing regulations, such as FVTRs and dealer reports.

Under the false records provision, it is unlawful for any "person to make or submit any false record, account, or label for, or any false identification, of any fish . . . which has been, or is intended to be . . . transported in interstate or foreign commerce." 16 U.S.C. § 3372(d) (2015). Add knowing conduct and market value of $350 or greater and Lacey Act false records is a 5-year felony. *Id.* § 3373(d)(3)(A).

In addition to classic seafood fraud, for example, false labeling as to species, country of origin, or method of harvest, the typical false records charge will emanate from FVTRs and dealer reports. For example, for a particular vessel, each FVTR contains a unique number for each fishing trip. If a fisher wanted to conceal the overharvest or otherwise illegal harvest of a particular species, he or she would ensure that the illegality was not reflected on the FVTR. One manner of falsification would be to omit fish. Another would be to substitute species. In addition, the fisher might also have reason to falsify the location of the harvest.

Falsified dealer reports come into play because the Magnuson Act regulations require that a federally-licensed vessel's catch be sold to a licensed fish dealer. That dealer submits his or her dealer reports with information about the purchase (weight, species, price), but importantly, the dealer must also include the corresponding FVTR number. This means that if a particular fisher was trying to conceal the overharvest of a particular species, he would have to engage the dealer. Both the fisher and the dealer would have to file documents with the same falsifications, lest NOAA detect the inconsistency and refer the case to NOAA OLE for further investigation. This pattern of activity has been recently observed with several vessels involved in the summer flounder fishery in New York.

Practice tip: Lacey Act false records can be an effective charge, but you still need to prove that what is on the actual document (typically FVTRs or dealer reports) is actually false, who completed the record or directed its completion, and what they knew about the falsity. This can be exceedingly hard to do because the underlying conduct that would support or discredit the veracity of the record likely occurred at sea, or at least beyond the ready observation of law enforcement. Despite robust boarding and vessel inspection authorities, NOAA does not have the staff or resources to mount enough patrols to combat illegal fishing in the act. You will have to utilize a variety of investigative techniques to work backward from land to water in order to get the probable cause necessary to get inside a file cabinet or computer to establish knowledge. These techniques could include covert dockside observation (literally counting fish boxes), analytics to detect suspicious price data (selling falsely-reported substitute species for the price—typically higher— of the actual species), analyzing VMS data, and utilizing information gained from the boardings and inspections.

- **Practice tip:** Sometimes Lacey Act false records appear desirable, but a hidden problem remains with establishing the interstate commerce element. Remember, the charge requires that the fish

has to move, or be intended to move, in interstate or foreign commerce. The charge does not require the movement of the false document. Several fishing communities are found next to major cities with healthy appetites for seafood. When those hungry cities are in the same state as the fisher or dealer, it can be difficult to obtain the records that establish whether a particular fish actually traveled, or was destined to travel, in interstate commerce. Without the interstate or foreign commerce element, the Lacey Act false records count collapses, leaving you to explore the Title 18 offenses discussed herein.

False statements: The knowing and willful falsification of an FVTR or dealer report that is submitted to NOAA could serve as a basis for a prosecution under 18 U.S.C. § 1001. Because the offense level starts at six for this offense, and there is no easy way to utilize the fraud table in domestic fisheries cases, this charge is less favored.

Sarbanes-Oxley false records: Despite the recent Supreme Court case, *Yates v. United States*, 135 S. Ct. 1074 (2015), 18 U.S.C. § 1519 can be used in fisheries prosecutions, but only for documents, records, and tangible objects that record or store information. A false FVTR or dealer report to NOAA would fall under the law, as would an onboard chart plotter or ship's computer. The advantage of utilizing § 1519 stems from the Guidelines. Per U.S. Sentencing Guidelines § 2J1.2, the base offense level is 14. Note that § 1519's 20-year maximum penalty makes some folks squeamish in this age where so many are crying, "Overcriminalization!" If you are one of those people, consider utilizing this charge only if the defendant engaged in an ongoing pattern of conduct or if some other sort of aggravating factor was present.

Mail and wire fraud: If you cannot prove that the fish traveled in interstate or foreign commerce, perhaps you can prove that the FVTR or dealer report did. FVTRs are required to be mailed to NOAA. Dealer reports are submitted through an Internet form. The use of the Postal Service makes proving the mailing element of mail fraud relatively straightforward. At the time of this writing, the configuration of the SAFIS dealer report system, with a server hub in Virginia and NOAA regional centers not in Virginia, makes the interstate wiring element fairly straightforward as well. However, the "scheme to defraud" component of both mail and wire fraud leaves some to question the charges' validity in the case of what appears to be only falsified regulatory documents. "Defraud" in the context of 18 U.S.C. §§ 1341 and 1343 means to defraud the victim of money or property. For a governmental victim, there has to be a pecuniary interest, not merely a regulatory one. In the case of falsified FVTRs and dealer reports that were used to cover up the illegal harvest of fish, NOAA is a victim with a clear property right in the fish that should have been forfeited, but for the illegal falsification (and mailing/wiring) of the fisheries documents. Pursuant to the Magnuson Act, NOAA has a property interest in "any fish (or the fair market value thereof) taken or retained, in any manner, in connection with, or as a result of, the commission of any act prohibited by [Magnuson Act itself, a Magnuson Act regulation, or a Magnuson Act fishing permit]." 16 U.S.C. § 1860(a) (2015). By way of example, the Magnuson Act regulations implementing the various fisheries management plans make it unlawful (civil) for any person to "[m]ake any false statement or provide any false information on, or in connection with, an application, declaration, record or report under this part [Magnuson Act regulations]." 50 C.F.R. § 648.14(a)(5) (2015); *see also* 50 C.F.R. §§ 600.725(l), 648.14(a)(6) (2015); *United States v. Oceanpro Industries, Ltd.*, 674 F.3d 323, 331–32 (4th Cir. 2012) (Maryland has a property interest in striped bass that could have been forfeited under state's fishing laws); *United States v. Bengis*, 631 F.3d 33, 38–40 (2d Cir. 2011) (governmental entity has a property interest in seafood that was subject to forfeiture and sale under fisheries regulations).

The decision whether to include a mail or wire fraud charge should be considered when the Lacey Act is unworkable and there is a sufficient amount of wholesale conduct to warrant the use of the Fraud Table at U.S. Sentencing Guidelines § 2B1.1.

III. Conclusion

Fisheries crimes are serious. They represent a threat to the marine environment, the food supply, and the attendant economic and socio-cultural benefits of a sustainable domestic fisheries sector. Because enforcement resources are so limited, when there is an opportunity to make a quality criminal case, you should take it. Quality prosecutions have a general deterrent effect that buffers the paltry enforcement presence. As always, you are encouraged to consult the author and other attorneys in the Environmental Crimes Section with your questions and comments. ❖

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A Primer on Elephant Ivory Trafficking Laws and Prosecution Methods

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Satao was an African elephant, Kenya's largest, and one of the best known elephants in Africa. On May 30, 2014, poachers in the Tsavo Trust National Park slaughtered Satao with poison arrows, sawed off his tusks, and left his mutilated body behind. Sadly, Satao's tragic death is not an isolated case. Over 35,000 African elephants were poached for their ivory in 2013 alone, and with ivory currently fetching approximately $2,100 per pound, the slaughter shows no sign of abating. Asian elephant populations have been decimated, with only an estimated 40,000 remaining in the wild. While the majority of poached and trafficked elephant ivory is destined for China and Southeast Asia, the United States nonetheless plays a part in the market for illegal elephant ivory. In November 2013 the Fish and Wildlife Service (FWS) crushed approximately 6 tons of illegal ivory seized in the United States over the past 25 years. In June 2015 FWS crushed another ton of illegal ivory, nearly all of which had been seized in one case involving a Philadelphia art store owner. The Obama administration has emphasized the scope and impact of illegal wildlife trafficking, and committed to engage in aggressive law enforcement to suppress the elephant ivory trade within our own borders. During his July 2015 trip to Kenya, President Obama announced the publication of a proposed rule to further restrict U.S. domestic trade in African elephant ivory. This article describes current laws and regulations that address the commercial trade in elephant ivory, provides a summary of prohibitions under current law and policy, and presents available avenues of prosecution.

I. Statutory and regulatory provisions

There are two primary statutes regulating elephant ivory transactions: (1) the Endangered Species Act (ESA), specifically 16 U.S.C. §§ 1538–1540, and (2) the African Elephant Conservation Act (AECA), 16 U.S.C. §§ 4201–4245. These statutes provide only for misdemeanor penalties, but violations of these statutes can also serve as bases for felony charges under the Lacey Act, 16 U.S.C. §§ 3372–3373, and the smuggling laws, 18 U.S.C. §§ 545, 554. Due to shifts in discretionary enforcement policies over the years, one particularly important thing to keep track of in the tangle of laws, regulations, and policies that follow is that conduct taking place between 1999 and 2014 involving elephant ivory, especially antique ivory, should be examined very carefully prior to initiating prosecution.

A. Endangered Species Act: U.S.-listed species

The ESA, passed in 1973, creates broad prohibitions on the commercial use of species designated as endangered or threatened under U.S. law. *See* 50 C.F.R. § 17.11 (2015). The Asian elephant is listed as endangered, and the African elephant is listed as threatened. For species designated by the Secretary of the Interior as endangered, 16 U.S.C. § 1538(a)(1) prohibits import or export, delivery, receipt, carriage, transport, or shipment in interstate or foreign commerce in the course of a commercial activity, and sale or offer for sale in interstate or foreign commerce of any specimen. Under regulations issued pursuant to the statute, most of the same prohibitions also apply to species that are designated as threatened, that is, species for which the danger of extinction exists, but is less severe than that faced by endangered species. *See* 50 C.F.R. § 17.31 (2015).

Those regulations, however, create exceptions for certain threatened species—including the African elephant—that are subject to "special rules" promulgated under 16 U.S.C. § 1533 (ESA § 4). The special rule is 50 C.F.R. § 17.40(e), which not only sets forth the prohibitions on import and export, but also establishes permissible uses of African elephant specimens. The special rule's prohibitions on interstate and foreign commerce in African elephant specimens are substantially weaker than the general ESA prohibitions applicable to endangered species. Thus, while it is prohibited to engage in any commercial trade in Asian elephants or parts thereof under the ESA, it is possible, in many instances, to engage in such trade in African elephants or parts thereof under the Code of Federal Regulations.

The special rule prohibits the import of African elephant specimens under § 17.40(e)(2)(i), but makes several exceptions that are delineated in § 17.40(e)(3)(i)–(iii). The first exception allows the import of African elephants (other than sport-hunted trophies and ivory), but only if permit requirements under 50 C.F.R. Parts 13 and 23 are met. The second exception allows the import of African elephant ivory (other than sport-hunted trophies) that is antique (greater than 100 years of age) on the day of import, and of African elephant ivory previously exported from the United States after being registered with FWS. *But see* 16 U.S.C. §§ 4223–4224 (2015) (discussed below). The third and final exception allows African elephant sport-hunted trophies to be imported from countries that: (1) establish and notify the FWS of their ivory quota for the year of export, (2) comply with permit requirements of 50 C.F.R. Parts 13 and 23, (3) show that killing the trophy animal would enhance the survival of the species, and (4) properly mark the specimen in accordance with Part 23.

The special rule also prohibits the *export* of African elephant specimens under § 17.40(e)(2)(i). The exception to this prohibition is § 17.40(e)(3)(ii)(B), allowing the export of worked African elephant ivory in accordance with the permit requirements of 50 C.F.R. Parts 13 and 23. "Raw ivory means any African elephant tusk, and any piece thereof, the surface of which, polished or unpolished, is unaltered or minimally carved." *Id.* § 17.40(e)(1). Worked ivory is any ivory that is not raw. *Id.* Raw African elephant ivory may not be exported for commercial purposes under any circumstances. *Id.* § 17.40(e)(2)(C).

The special rule in § 17.40(e)(2)(i)–(ii), with regard to interstate commerce, prohibits possession, sale, offer for sale, receipt, delivery, transport, and shipment *only* of those African elephant specimens that have been illegally imported into the United States. Note that the Government has the burden of proof in a criminal case to show that the specimen was illegally imported. All other interstate commerce is *not* prohibited, unless it involves the sale or offer for sale (whether in interstate commerce or otherwise) of African elephant sport-hunted trophies imported into the United States in violation of permit conditions under § 17.40(e)(2)(iii).

On July 29, 2015, FWS published a proposed rule to revise the special rule for the African elephant (*available at* https://s3.amazonaws.com/public-inspection.federalregister.gov/2015-18487.pdf). The proposal includes further restrictions on interstate and foreign commerce and commercial export of African elephant ivory. It is intended to ensure that U.S. markets are not contributing to the illegal ivory trade, while at the same time allowing certain activities that FWS does not believe are contributing to the poaching of elephants in Africa. Comments on the proposed rule will be accepted until September 28,

2015. If finalized in its current form, the revised rule will eliminate several of the exceptions described above and further limit permissible transactions in elephant ivory.

The special rule is not the only exception that allows transactions involving African elephant specimens. In 16 U.S.C. § 1539(h), the ESA provides a general exception for antiques. Specifically, § 1539(h) exempts a specimen of an endangered or threatened species from ESA use and transactional prohibitions where the specimen is 100 years old or more, has not been repaired or modified with any part of any endangered or threatened species since 1973, and enters the United States through a designated port for ESA antiques. The user claiming the antiques exception bears the burden of proving that the item is a genuine antique. Ways to meet this burden are discussed in a recent publication by the FWS called Director's Order 210, discussed below. Because ports of entry were only designated in 1982, as a matter of law enforcement discretion, FWS will not take action against items imported prior to that year that meet the other requirements to qualify for the ESA antique exception. *See* FISH AND WILDLIFE SERVICE, U.S. DEP'T OF THE INTERIOR, DIRECTOR'S ORDER 210, APPENDIX A(1)(D) (2014). Note that even where commercial activity with antique ivory may be legal under the ESA, the prohibitions in the African Elephant Conservation Act, discussed below, may nonetheless render that activity illegal. There is also a "pre-Act exemption" in 16 U.S.C. § 1539(f), but this provision applies very narrowly and has no applicability to elephant ivory. A similar exemption in § 1538(b) for specimens held in captivity or in a controlled environment has potential applicability, but it is also very narrow.

B. Endangered Species Act: CITES-listed species

The ESA also implements the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), a treaty regulating international trade in certain species listed by the CITES signatory nations (called Parties) in one of three CITES Appendices. For species listed under CITES, the ESA prohibits not only engaging in trade in such species in violation of CITES, but also possessing any specimen that has previously been traded in violation of CITES. *See* 16 U.S.C. § 1538(c)(1) (2015). The antiques exception in § 1539(h) applies to the CITES-based prohibitions as well, though the import or export of ESA antiques containing or consisting of species that are also listed under CITES requires a CITES pre-Convention certificate issued by the CITES Management Authority in the exporting country. *See* 50 C.F.R. § 23.45 (2015).

CITES is an international treaty, entered into force in 1975, that regulates international trade in listed wildlife and plants by placing limitations on, and requirements for, imports and exports of species that are, or may become, threatened by international trade. The level of protection depends on the categorization of a given species within the CITES framework. CITES classifies wildlife into three Appendices. Appendix I contains species currently threatened with extinction, which are subject to the most restrictive limitations on trade. Appendix I species may, with very limited exceptions, not be imported for primarily commercial purposes under the treaty. CITES, art. 3, July 1, 1975, 27 U.S.T. 1087. Appendix II includes species that are not currently threatened with extinction, but could become so absent regulation of international trade. A species is added to CITES Appendix III by a Party seeking cooperation in the regulation of its trade. CITES allows for the international trade in Appendix-II species upon issuance of an authorizing document by the country of export, granted only when a Scientific Authority in the exporting country determines that the export will not be detrimental to the species' survival, and when a Management Authority of the exporting country is satisfied that the specimen was legally acquired under the exporting country's laws and regulations. *Id.* art. 4.

Asian elephants are listed in CITES Appendix I. Most African elephants are also listed in Appendix I, but the 1997 meeting of the Conference of the Parties to CITES resulted in the African elephant populations of Botswana, Namibia, and Zimbabwe being moved from Appendix I to Appendix II, primarily to accommodate a one-time sale of stockpiles of ivory, and to allow export of legal sport-hunted trophies and certain other specimens. The elephant population of South Africa was transferred to Appendix II in 2000. Permissible trade in specimens from those populations is specified in Note 6 to the

CITES Appendices, *available at* http://www.cites.org/eng/app/appendices.php. Permissible uses include, but are not limited to, trade in hunting trophies for non-commercial purposes and trade in ivory carvings for non-commercial purposes (for Zimbabwe populations only).

Under Article VII of CITES ("Exemptions and Other Special Provisions Relating to Trade"), certain types of specimens are exempt from the CITES trade limitations. Among others, these include pre-Convention specimens and personal or household effects under certain circumstances. Pre-Convention specimens may be traded internationally when the country of export or re-export is satisfied that the specimen was acquired before the species was listed in a CITES Appendix and issues a CITES certificate to that effect. Items that qualify as personal or household effects may be traded internationally without CITES permits under certain conditions. For the most part, the United States does not recognize the personal and household effects exemption for Appendix-I species. Provisions addressing personal and household effects containing African elephant ivory are found at 50 C.F.R. § 23.15(f). In any case charging violations of CITES, always ensure that you are aware of the conditions under which the transaction at issue took place and whether the transaction qualified for one of these exemptions.

The United States codified CITES requirements in the ESA and implementing regulations, found at 50 C.F.R. Parts 13, 14, and 23. Part 13 contains the general requirements and procedures for obtaining FWS permits, including those for import and export of wildlife. Part 14 contains information on procedures for import and export of wildlife. Part 23 contains the regulations that specifically implement CITES, and includes the substantive rules regarding how CITES-listed specimens may be used after import into the United States. *See* 50 C.F.R. § 23.55 (2015).

The basic CITES prohibitions regarding international trade are contained in 50 C.F.R. § 23.13, which prohibits import, export, re-export, or engaging in international trade in specimens of any species listed in a CITES appendix, *unless* those activities meet the requirements established elsewhere in Part 23. The most prominent exception to the import/export prohibition is § 23.15, relating to personal or household effects. Household effect means a dead wildlife or plant specimen that is part of a household move and meets the criteria in § 23.15. Personal effect means a dead wildlife or plant specimen, including a tourist souvenir, that is worn as clothing or as an accessory, or is contained in accompanying baggage and meets the criteria in § 23.15. This exception does not apply to Appendix-I species generally (including the Asian elephant). *Id.* § 23.15(d)(2). It does specifically address, and partially except, African elephant ivory, however, and allows for the export and re-import of worked African elephant ivory when that item is a personal or household effect, the item is being exported by a United States resident who owned and registered the ivory pre-export and intends to re-import that ivory, the item is not sold or transferred while abroad, and the ivory is pre-Convention (the ivory was removed from the wild prior to the African elephant having been listed in CITES on February 26, 1976). *Id.* at § 23.15(f). These transactions must also meet the other requirements of Part 23.

Regarding CITES specimens within the United States, § 23.13 prohibits possession of any specimen of a CITES-listed species that has been traded contrary to CITES or ESA provisions, and use of any CITES specimens contrary to what is allowed under § 23.55. That section ("How may I use a CITES specimen after import into the United States?"), formatted as a table, divides CITES specimens into those that may be used commercially and those that may not. Unlike the ESA prohibitions for endangered and threatened species, § 23.55 makes no distinction between interstate and intrastate commercial transactions for purposes of allowed use after import of CITES-listed species. CITES-listed specimens are limited to non-commercial use once they have been imported into the United States, if they are, in relevant part, either: (a) Appendix-I species, *except* for those imported with certain CITES exemption documents (of which only the CITES pre-Convention certificate is relevant to elephants), or (b) Appendix-II species with an annotation limiting use to non-commercial purposes. Asian elephants fall into category (a) and all African elephants fall into either categories (a) or (b). Appendix-I specimens excepted under category (a), whose import was accompanied by a pre-Convention certificate, are listed at § 23.55(d), and may be used for any lawful purpose, commercial or otherwise, that is compliant with import permit conditions.

A further exception, noted in the § 23.55 table, allows CITES-listed specimens to be used for commercial purposes where the specimen was lawfully imported without restrictions on its use after import, prior to the species having been listed within those categories. No CITES document or ESA permit is required, but it is the seller's burden to prove the applicability of the exception using written records or other documentary evidence. For the African elephant, which was listed in Appendix I on January 18, 1990, this means that, subject to the provisions of the special rule, any African elephant specimen imported into the United States prior to that date, without permit conditions restricting commercial use, may be sold in interstate or intrastate commerce today. Because of the general ESA prohibitions on commercial use of endangered species in interstate or foreign commerce, for Asian elephants, this exception would only apply to intrastate commerce of specimens imported into the United States prior to July 1, 1975 (the date the Asian elephant was listed under CITES). *See* 16 U.S.C. § 1538(a) (2015). Asian elephant specimens imported before this date may therefore only be traded commercially in intrastate commerce (under specific conditions, see above) or pursuant to the ESA antiques exception. *Id.* § 1539(h).

Sport-hunted trophies are governed by 50 C.F.R. § 23.74, which specifies the requirements for importing a sport-hunted trophy of a CITES-listed animal. Section 23.74(c) addresses the issue of "use after import," referring the reader to § 23.55 for guidance on permissible uses for sport-hunted trophies after they are imported. Under § 23.55, sport-hunted trophies of Appendix-I species (including most African elephants), and Appendix-II species with an annotation for non-commercial use (including all remaining African elephants), may only be used for non-commercial purposes once they are within the United States. Note that on April 4, 2014, the FWS suspended the import of sport-hunted African elephant trophies taken in Tanzania and Zimbabwe during calendar year 2014, finding that sport hunting of these populations did not enhance the survival of those populations.

Violations of any of the CITES regulations in 50 C.F.R. Part 23 constitute a violation of the ESA, under either § 1538(a)(1)(G) or § 1538(c). (The factors to consider in making this charging decision are discussed below.)

C. Endangered Species Act: other provisions and penalties

A "catch-all" provision in the ESA prohibits any act in violation of any regulation issued pursuant to the ESA, including those regulations contained in 50 C.F.R. Parts 13, 14, 17, and 23, addressing both U.S.-listed and CITES-listed species. *Id.* § 1538(a)(1)(G). Finally, the ESA also includes an attempt provision, making it illegal to "attempt to commit, solicit another to commit, or cause to be committed" any specified offense. *Id.* § 1538(g).

A knowing violation of any of the ESA provisions discussed here is a misdemeanor offense. Under current Department of Justice policy, proof of knowledge for an ESA criminal violation requires a showing that the defendant knew the biological identity of the species he or she was taking, selling, etc. Violations of § 1538(a)(1)(A)–(F), (a)(2)(A)–(D), (c), (d) (other than record-keeping/filing offenses), (f), and (g), are Class A misdemeanors, punishable by a fine of no more than $100,000 (or twice the gross gain or loss), not more than 1 year in prison, or both. *See* 16 U.S.C. § 1540(b)(1) (2015); 18 U.S.C. § 3571(b)(5) (2015). Violation of § 1538(a)(1)(G), which includes cases involving all other regulations, such as those dealing with threatened species, is a Class B misdemeanor, punishable by a fine of no more than $25,000 (or twice the gross gain or loss), 6 months in prison, or both. *See* 16 U.S.C. § 1540(b)(1) (2015); 18 U.S.C. § 3571(d) (2015). Wildlife involved in any violation and equipment used in the context of any violation is subject to forfeiture upon conviction. 16 U.S.C. § 1540(e)(4) (2015).

D. The AECA and the ivory moratorium

In 1988 Congress, recognizing the increasing threat to African elephant populations, passed the African Elephant Conservation Act. The new statute directed the Secretary of the Interior to establish a

moratorium on the import of African elephant ivory from countries not meeting certain requirements meant to guarantee the sustainable nature of the country's ivory harvest or market. *See* 16 U.S.C. § 4222 (2015). The statute tasks the Secretary of the Interior with determining which ivory-producing countries and intermediary countries meet the requirements of the statute. An ivory-producing country is "any African country within which is located any part of the range of a population of African elephants." An intermediary country is "a country that exports raw or worked ivory that does not originate in that country." *Id.* § 4244(6), (7).

In 1989 the Department of the Interior issued a notice in the Federal Register stating that no ivory-producing or intermediary country met the statutory requirements, thereby establishing a near-complete moratorium on the import of raw and worked ivory into the United States. Moratorium on Importation of Raw and Worked Ivory From all Ivory Producing and Intermediary Nations, 54 Fed. Reg. 24,758; 24,760 (June 9, 1989). The one exception is for legally taken sport-hunted trophies, which may be imported in accordance with ESA and CITES requirements from countries that have established an ivory quota, even if those countries are otherwise subject to a moratorium. 16 U.S.C. § 4222(e) (2015). The AECA also bans all raw ivory exports from the United States under any circumstances. *Id.* § 4223(2).

The blanket moratorium is still in place. Were it to be lifted for any ivory-producing or intermediary country, however, the AECA still contains additional prohibitions pertaining to ivory imports. The statute prohibits importing raw ivory from any country other than an ivory-producing country; importing raw or worked ivory exported from the ivory-producing country in violation of that country's laws or the CITES Ivory Control System; and importing worked ivory, other than personal effects, from any country that has not certified that such ivory was derived from legal sources. *Id.* § 4223(1), (3), (4).

A knowing violation of any of the above prohibitions, contained in § 4223 of the AECA, is punishable by a fine under Title 18, no more than 1 year in prison, or both. *Id.* § 4224(a).

II. Enforcement policy and Director's Order 210

While the AECA moratorium for African elephant ivory remains in place for every ivory-producing and intermediary country, African elephant ivory import rules in the United States are far more complex than a simple unilateral ban. Between 1999 and 2014, the FWS allowed, as a matter of enforcement discretion, the import and export of worked African elephant ivory for non-commercial purposes, as long as it met the requirements of CITES and the ESA. The FWS also allowed the import and export of worked antique ivory, even for commercial purposes, with a CITES pre-Convention certificate (this remains legal under the ESA special rule for the African elephant, but is prohibited under the AECA moratorium). *See* FISH AND WILDLIFE SERVICE, U.S. DEP'T OF THE INTERIOR, LAW ENFORCEMENT MEMORANDUM, No. ENF 4-01 (Mar. 19, 1999).

The FWS changed these policies in its Director's Order 210 (DO210), first issued on February 25, 2014, and revised on May 15, 2014 (*available at* http://www.fws.gov/policy/do210.html). DO210 first addresses the ESA antique exception, establishing detailed guidelines for meeting the user's burden of proof that an item containing an endangered or threatened species is a genuine antique. DO210 next addresses the AECA import moratorium, substantially altering the FWS' prior exercise of law enforcement discretion regarding importation of African elephant ivory. Most significantly, under the current policy, no commercial ivory imports are allowed for any purpose, regardless of the age of the ivory. Nonetheless, DO210 still carves out significant non-commercial exceptions to the full moratorium as a matter of "law enforcement discretion." DO210 lists five circumstances in which the African elephant ivory import moratorium will not be enforced:

1. Raw or worked ivory can be imported by government agents for law enforcement purposes.
2. Raw or worked ivory can be imported for genuine scientific purposes that will contribute to the conservation of the species.
3. Worked ivory may be imported for personal use as part of a household move or inheritance, provided the ivory was legally acquired prior to February 26, 1976, has not been bought or sold since February 25, 2014, and is accompanied by a valid CITES pre-Convention certificate.
4. Worked ivory can be imported as part of a musical instrument under the same conditions as the personal household move exception, except with a CITES musical instrument certificate rather than a pre-Convention certificate.
5. Worked African elephant ivory can be imported as part of a traveling exhibition under those same conditions, with a CITES traveling exhibition certificate rather than a pre-Convention certificate.

III. Ivory trafficking prosecutions in practice

In conjunction with DO210, the FWS published a chart summarizing permissible transactions involving African elephant ivory under the overlapping provisions of the two statutes, as implemented (*available at* http://www.fws.gov/international/travel-and-trade/ivory-ban-questions-and-answers.html). That chart is reproduced in truncated form here, with citations, in order to provide a quick guide to which ivory transactions are legal and illegal.

SUMMARY OF LEGAL AND ILLEGAL ACTIVITY PURSUANT TO DIRECTOR'S ORDER 210 (REVISED VERSION, EFFECTIVE MAY 15, 2014) AND REVISIONS TO U.S. CITES IMPLEMENTING REGULATIONS (50 C.F.R. PART 23) (EFFECTIVE JUNE 26, 2014).	

Import	**Commercial**
	What's allowed:
	• No commercial imports allowed (DO210)
	Non-commercial
	What's allowed:
	• Sport-hunted trophies (no limit) (50 C.F.R. §§ 17.40(e), 23.74; AECA, 16 U.S.C. § 4222(e))
	• Law enforcement and bona fide scientific specimens (DO210)
	• Worked elephant ivory that was legally acquired and removed from the wild prior to February 26, 1976, and has not been sold since February 25, 2014
	  ◦ As part of a household move or inheritance (read more)
	  ◦ As part of a musical instrument (read more)
	  ◦ As part of a traveling exhibition (read more) (DO210)
	What's prohibited:
	• Raw ivory (except for sport-hunted trophies) (AECA moratorium (54 F.R. 24758, June 9, 1989))

Export	**Commercial** What's allowed: • CITES Pre-Convention worked ivory, including antiques, that meet CITES permitting requirements (50 C.F.R. § 17.40(e); 50 C.F.R. Part 23) What's prohibited: • Raw ivory (50 C.F.R. § 17.40(e); AECA, 16 U.S.C. § 4223(2)) **Non-commercial** What's allowed: • Worked ivory items that meet CITES permitting requirements (50 C.F.R. § 17.40(e); 50 C.F.R. Part 23) What's prohibited: • Raw ivory (AECA, 16 U.S.C. § 4223(2))
Sales across state lines (interstate commerce)	What's allowed: • Ivory lawfully imported prior to the date the African elephant was listed in CITES Appendix I (January 18, 1990) (seller must demonstrate) • Ivory imported under a CITES pre-Convention certificate (seller must demonstrate) (50 C.F.R. §§ 17.40(e), 23.55 (revised))
Sales within a state (intrastate commerce)	What's allowed: • Ivory lawfully imported prior to the date the African elephant was listed in CITES Appendix I (January 18, 1990) (seller must demonstrate) • Ivory imported under a CITES pre-Convention certificate (seller must demonstrate) (50 C.F.R. § 23.55 (revised))
Non-commercial movement within the United States	****This action did not impact non-commercial movement within the United States.* Non-commercial use, including interstate and intrastate movement within the United States, of legally acquired ivory is allowed. (50 C.F.R. §§ 17.40(e), 23.55 (revised))
Personal possession	****This action did not impact personal possession.* Possession and non-commercial use of legally acquired ivory is allowed.

IV. Charging options for ivory trafficking cases

As shown in the table, almost all African elephant ivory transactions are governed by the ESA, with a few also being covered by the AECA. Only one AECA case has been litigated at the appellate level, and in that case the court made AECA prosecutions substantially more difficult by ruling that the AECA requires specific intent. *See United States v. Grigsby*, 111 F.3d 806, 822 (11th Cir. 1997) (because the statutory term "knowingly" modifies the word "violates," the AECA requires specific intent to find a defendant criminally liable; conviction overturned where it was not clear whether the defendant

understood the law's prohibitions when she imported ivory from Canada without permits). The Environmental Crimes Section takes the position that this ruling is not correct, though it is, of course, binding within the Eleventh Circuit. The Environmental Crimes Section has not prosecuted any AECA cases to date, in large part because the statutory penalties are the same as those under the ESA, and because the FWS discretionary enforcement policies have limited case referrals.

A. Prohibitions under 16 U.S.C. § 1538(a)(1)(A)–(F)

The ESA offers several avenues for prosecuting illegal ivory transactions, though ESA violations are all misdemeanors (Class A for Asian elephants, Class B for African elephants). The first option is a straightforward application of the prohibitions on import, export, take, sale, and other activities in 16 U.S.C. § 1538(a). For Asian elephants, antique articles are excepted from these prohibitions, but no other exceptions to the import/export ban apply. Asian elephant ivory cases must therefore be vetted for potential antiques defenses, though under DO210 the burden of proof for someone claiming an antiques exception is heavy.

African elephant ivory cases are riddled with pitfalls. The special rule in 50 C.F.R. § 17.40(e) makes things more complex and makes the penalties even lower, although the recent stepped-up enforcement of the AECA abrogates many of those complexities. Where a transaction is legal under the ESA special rule in 50 C.F.R. § 17.40(e), but illegal under the statutory language of the AECA, pay close attention to when the conduct at issue occurred. If it took place prior to May 15, 2014, the table above is not applicable. Be sure to review the FWS 1999 Law Enforcement Memorandum (on file with authors) to ensure that the conduct is not subject to a discretionary enforcement exception to the AECA applicable at the time of the incident. Another factual matter to bear in mind in ESA prosecutions is that, pursuant to current Department of Justice policy, the Government must prove that the defendant was aware of the specific biological identity of specimens involved in the case.

B. CITES-based charges under 16 U.S.C. § 1538(c)

There are two potential avenues for charging conduct in violation of CITES. In the case of the Asian elephant, there will rarely be reason to do this, since any violation of CITES will likely also constitute a violation of the ESA prohibitions under § 1538(a). For the African elephant, however, certain trade that would be allowed under the ESA special rule in 50 C.F.R. § 17.40(e) is not allowed pursuant to CITES. The ESA, in § 1538(c), prohibits trade in contravention of CITES and possession of wildlife traded in contravention in CITES. Cases involving import and export without CITES permits are a good fit for this provision. Alternatively, § 1538(a)(1)(G) prohibits any act in violation of a regulation issued pursuant to the ESA, including any CITES-related regulation in 50 C.F.R. Part 23. This approach is a good option for cases involving illegal purchase or sale of African elephant ivory after it has been imported legally under CITES (although, in such cases, you will likely have the option of bringing felony charges under the Lacey Act or smuggling statute). As noted above, under 50 C.F.R. § 23.55(a) and (b), sport-hunted ivory trophies imported legally with CITES documentation may only be used subsequently for non-commercial purposes. When faced with a "use after import" case under this provision, or any other case predicated on a violation of Part 23, remember that any conduct prior to June 26, 2014 could be subject to litigation regarding the applicability of Part 23 to the specimens at issue. The Environmental Crimes Section has received an unfavorable ruling on this point in the Northern District of Florida, but the issue has not arisen elsewhere. *See United States v. Kokesh*, No. 3:13cr48/RV, 2013 WL 6001052, at *10 (N.D. Fla., Nov. 12, 2013). The Service's revisions to 50 C.F.R. § 23.2 on June 26, 2014, resolve the issues presented in that case.

C. ESA violations as bases for Lacey Act and smuggling felony charges

Often, an ESA violation can be accompanied by subsequent or concomitant conduct that can yield felony charges. The Lacey Act, 16 U.S.C. §§ 3372–3373, prohibits the import, export, transport,

sale, purchase, acquisition, or receipt of any wildlife that has been taken, possessed, transported, or sold in violation of state, federal, or tribal law. Taking, possession, transportation, or sale in violation of the ESA constitutes a predicate offense for Lacey Act purposes. For example, if someone purchases elephant ivory from out of state and then resells that ivory, the resale constitutes a felony violation of the Lacey Act (as long as the ivory is valued at over $350, which it almost always will be).

Sections 545 and 554 of Title 18 similarly prohibit smuggling items into and out of the United States, respectively. The statutes specifically prohibit knowing import or export contrary to U.S. laws, including the ESA. The ESA places multiple limitations on imports and exports. In addition to the straightforward ban on imports and exports of endangered or threatened species without a permit, the ESA also requires CITES documents (for CITES-listed species) and a declaration to the FWS for legal wildlife imports or exports. Smuggling is a viable charge whenever an importer or exporter imports or exports ivory knowing that that transaction is, in some manner, illegal.

When it is impossible to prove the defendant's knowledge of illegality, an ESA misdemeanor charge for import or export of an endangered or threatened species without authorization—a general intent crime—is still viable if the defendant demonstrably knew the biological identity of the species at issue. When the violation is predicated on failure to file an import or export declaration with the FWS, it would be enough to show that the defendant knew the item was ivory (as opposed to specifically African or Asian elephant ivory), because those declarations are mandated for *any* ivory import or export. *See* 50 C.F.R. § 14.63 (2015). In most imports or exports where the defendant attempts to smuggle ivory, the defendant also will fail to file the required declaration form with the FWS. Because import and export declarations to the FWS are required for any wildlife, not just endangered or threatened species, knowledge of the biological identity of the species is irrelevant. Prosecutorial discretion should, of course, be exercised to ensure in each case that the documentation failure is truly of a criminal nature. Normally, this is most demonstrably the case when the failure to declare is accompanied by other criminal activities in the same vein. For this reason, prosecutors are well-served by including a variety of ESA, AECA, and Title 18 charges in the charging document, as applicable. Where a failure to declare charge is available along with other charges, though, it is strategically valuable to include it. Should evidence unexpectedly be excluded, or if a jury finds the Government has not demonstrated the defendant's knowledge of the species' biological identity for the purposes of other ESA violations, a failure to declare charge should still obtain a conviction.

V. Conclusion

Regulation of the elephant ivory market in the United States is complex. While this can be frustrating and result in a number of prosecutorial hurdles, it also creates an unusually broad range of charging options that can be carefully tailored to the facts of any given case. We encourage you to reach out to the authors and the Environmental Crimes Section generally (202-305-0321) for assistance in sorting through the complexities and ensuring successful prosecution of these cases.

Criminal cases involving elephant ivory can have a real impact on species survival. Even cases involving one transaction or one tusk, if publicized within the right communities, can have a deterrent effect on the black market for ivory. Ivory trafficking cases have resulted in substantial periods of incarceration and high criminal fines, including one case in which the defendant, Tania Siyam, was sentenced to 5 years' incarceration and a $100,000 fine in the Northern District of Ohio. *See United States v. Siyam*, 596 F. Supp. 2d 1078, 1090 (N.D. Ohio 2008). Forfeitures and restitution have exceeded $1 million in some cases. Even in jurisdictions where judges or juries may be skeptical of wildlife cases in general, charging the case is essential to demonstrate the Government's commitment to enforcing the laws governing elephant ivory. That commitment to criminal enforcement is critical to the protection of a magnificent species in danger of being destroyed by human greed and disregard for the law. ❖

ABOUT THE AUTHORS

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Operation Crash: Shutting Down the Illicit Trade in Rhino Horns and Elephant Ivory

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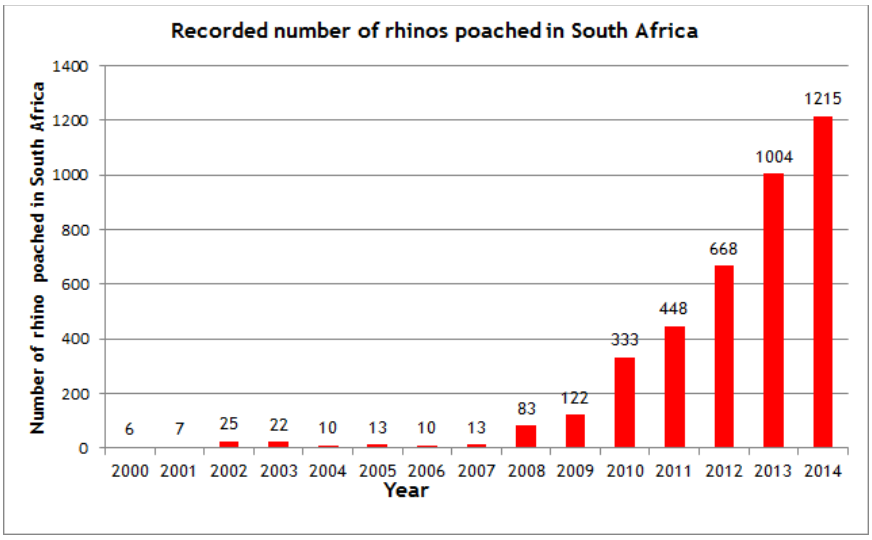
I. Introduction

Operation Crash takes its name from the term for a group of rhinoceros. Most groups of animals are known by a unique name. A group of ants are a "colony," a group of giraffes a "tower," a group of crows a "murder," a group of owls a "parliament," a group of hippos a "bloat," and so on. Many of these group names are also euphonious and otherwise descriptive. A "crash" is a description of a group of rhinos in the sense that rhinos can move together as a group at upwards of 40 miles an hour. Unfortunately, they have extraordinarily limited vision making a literal crash highly probable.

A well-designed moniker does not guarantee an efficacious operation, but it is always a good start. In light of the perilous fate of the rhino, a charismatic mega fauna of prehistoric origin that has survived millennia and has no natural enemy except for humans, the U.S. Fish and Wildlife Service (FWS) began investigating the extent of U.S. participation in the rhino trade in 2011 with the assistance of the U.S. Department of Justice. The resulting effort is an ongoing, proactive, nationwide effort to detect, deter, and prosecute those engaged in the illegal killing of rhinoceros and the unlawful trafficking of rhinoceros horns and elephant ivory.

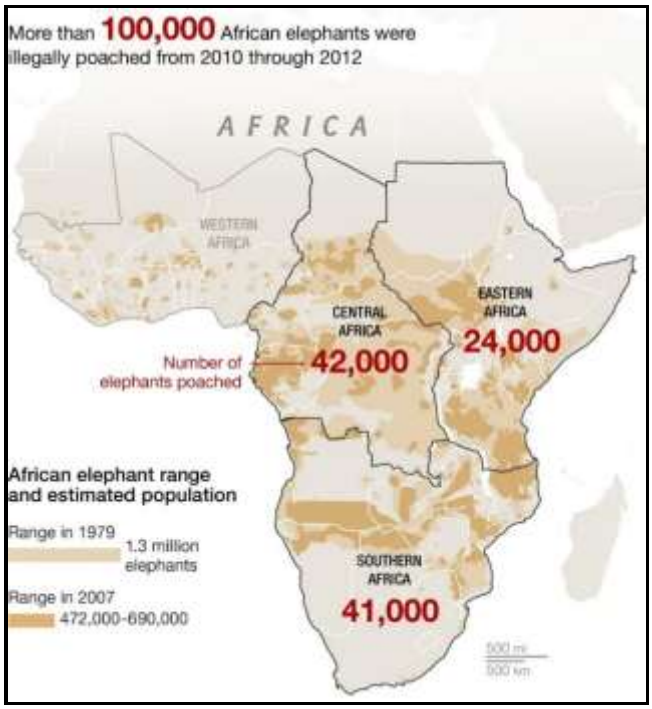
The joint nationwide investigation has found far more criminal conduct than anticipated, especially considering that our country is neither a "range state" nor the primary "destination state" for rhino horn or elephant ivory. To date, there have been more than 25 arrests and seizures of more than $3 million in gold and cash. Prison terms total 263 months thus far. More than 40 rhino horns have been seized, along with hundreds of objects carved from rhino horn and elephant ivory. Operation Crash involves a dedicated group of approximately a dozen FWS agents from the agency's Special Operations Unit who are assigned to the project on a full-time basis, with the assistance of approximately 150 FWS field agents, and coordination with state, federal, and foreign law enforcement agencies.

In recent years, the amount of poaching in South Africa alone, which maintains the best statistics in Africa, has skyrocketed as the value of rhino horn has soared on the black market.



See SAVE THE RHINO, https://www.savetherhino.org/rhino_info/poaching_statistics.

The situation of African elephants is similarly dire and attributable largely to the illegal trade in elephant ivory, which utilizes many of the same smuggling routes and methods as the illegal trade in rhino horn.



See Brad Scriber, *100,000 Elephants Killed by Poachers in Just Three Years, Landmark Analysis Finds*, NAT'L GEOGRAPHIC (Aug. 18, 2014), http://news.nationalgeographic.com/news/2014/08/140818-elephants-africa-poaching-cites-census/.

All five species of rhinos are protected under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), a conservation treaty to which approximately 175 countries are a party. All five rhino species are considered "endangered" under U.S. law, the highest degree of protection. *See* Endangered Species Act (ESA), 16 U.S.C. § 1531 (2015). *See generally* U.S. FISH & WILDLIFE SERVICE, INTERNATIONAL AFFAIRS, *Rhinos*, http://www.fws.gov/international/animals/

rhinos.html; *see also* SAVE THE RHINO, https://www.savetherhino.org/rhino_info; Hannah Beach, *Killing Fields: Africa's Rhinos Under Threat*, TIME MAGAZINE (June 13, 2011); CLIVE WALKER & ANTON WALKER, THE RHINO KEEPERS: STRUGGLE FOR SURVIVAL xi, 9 (2012).

The illicit wildlife trade, including trafficking of rhino horn and elephant ivory as documented by Operation Crash prosecutions, frequently involves organized criminal networks. *See generally* CONVENTION ON INT'L TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA, COP16 DOC. 54.21, REPORT OF THE SECRETARIAT 1 (2013) (REPORT OF THE SECRETARIAT) ("Illegal trade in rhinoceros horn continues to be one of the most structured criminal activities currently faced by CITES. There are clear indications that organized criminal groups are involved in rhinoceros poaching and illegal trade in rhinoceros horn."), *available at* https://cites.org/eng/cop/16/doc/E-CoP16-54-02.pdf; THE WHITE HOUSE, NAT'L STRATEGY FOR COMBATING WILDLIFE TRAFFICKING 3 (2014), http://webcache.googleusercontent.com/search?q=cache:OgBF_LPt0NQJ:https://www.whitehouse.gov/sites/default/files/docs/nationalstrategywildlifetrafficking.pdf+&cd=2&hl=en&ct=clnk&gl=us.

II. Background

Operation Crash has involved different types of cases and criminal conduct, including the trade in raw rhino horns, trade in carved Asian art objects made from rhino horn and elephant ivory, and illegal hunting of rhinos in South Africa. A significant part of the illegal trade involves smuggling into the United States and smuggling out of the United States, in violation of 18 U.S.C. §§ 545 and 554.

A. Raw horns

Most rhino horns originally came to the United States as hunting trophies. However, the astronomical black market value of rhino horn at as much as $30,000 per pound—more than the price of gold—has encouraged a "hunt" for every rhino horn in North America and beyond, regardless of age, species, or legal status.

The demand for rhino horn has long been associated with its use in traditional Chinese medicine (TCM). *See, e.g.*, Nature, *Rhino Horn Use: Fact vs. Fiction*, PBS (Aug. 20, 2010), http://www. pbs. org/wnet/ nature/rhinoceros-rhino-horn-use-fact-vs-fiction/1178/. However, what has emerged as another driving force for illegal trade is the use of rhino horn for *non-traditional* medicinal purposes in Vietnam, which range from a hangover remedy to a cure for cancer. *See* TOM MILLIKEN & JO SHAW, THE SOUTH AFRICA – VIET NAM RHINO HORN TRADE NEXUS: A DEADLY COMBINATION OF INSTITUTIONAL LAPSES, CORRUPT WILDLIFE INDUSTRY PROFESSIONALS AND ASIAN CRIME SYNDICATES 9–10, 16 (2012) (TRAFFIC); Hannah Beach, *Killing Fields: Africa's Rhinos Under Threat*, TIME MAGAZINE (June 13, 2011); http://content.time.com/time/magazine/article/0,9171, 2075283,00.html. There even have been reports of rhino "touts" frequenting hospitals and preying on cancer patients and their families to sell the alleged curative properties of rhino horn. Mostly however, it is the growing wealth in Vietnam and culture of conspicuous consumption that have combined to make ingesting rhino horn a social trend.

> [T]he most obsessive usage of rhino horn today is completely unrelated to illness at all. Belief in rhino horn's detoxification properties, especially following excessive intake of alcohol, rich food and "the good life," has given rise to an affluent group of habitual users, who routinely mix rhino horn powder with water or alcohol as a general health and hangover-curing tonic. . . . Use of rhino horn as an aphrodisiac in Asian traditional medicine has long been debunked as a denigrating, unjust characterization of the trade by Western media, but such usage is now, rather incredibly, being documented in Viet Nam as the media myth turns full circle. Collectively, this group personifies the cultural concept of "face consumption," whereby extravagant usage of something rare and expensive becomes a means to flaunt wealth, status and success amongst friends and associates. These consumers probably account for the greatest volume of rhino horn used

> in Viet Nam today and procurement usually transpires through informal channels, including internet distributors and social networks, often with links to government officials. Popular websites drive this usage with an endless stream of slick come-on slogans: "*to improve concentration and cure hangovers*," "*rhino horn with wine is the alcoholic drink of millionaires*," and rhino horn is "*like a luxury car*."

TRAFFIC, at 10.

B. Libation cups

In China, aside from TCM, demand for rhino horn has escalated due to the interest in, and value of, fake antiques or "Zou Jiu," meaning "to make old" in Mandarin. The new wealth in China has led to an increase in the demand for art objects made from real rhinoceros horn. One of the defendants in Operation Crash readily admitted that he sold the rhino horns obtained in the United States to carving houses in China so that they could be made into art objects that would be sold as antiques.

This brings us to the second type of case, which involves sale and smuggling of carved rhino horn and ivory, including antiques and purported antiques. In China, there is a tradition dating back many centuries of intricately carving rhinoceros horns into ceremonial cups. Drinking from so-called libation cups was believed by some to bring good health and long life. They were also sought after by the rich and powerful because of their alleged ability to detect poison. In the 3rd century, the Emperor Qin Shihaung sent 500,000 men south to obtain rhino horn, as well as elephant ivory. All known rhino species native to China are now extinct. During the tail end of the Ming dynasty, in the 16th and 17th centuries, the carving of libation cups made from rhino horn became increasingly intricate. These genuine antiques became increasingly valuable over the years and were known to some collectors. In 2011 they became even more widely known to the general public when the Public Broadcasting Station's hit TV series, "Antique Roadshow," found five small libation cups to be worth as much as $1.5 million, the highest value collection ever appraised in the show's history. The Oklahoma seller, who purchased the cups inexpensively decades before, responded to learning the true value, "I need an inhaler and I don't even have asthma." *See* ANTIQUES ROADSHOW: CHINESE RHINOCEROS HORN CUPS, CA. 1700, http://www.pbs.org/wgbh/roadshow/season/16/tulsa-ok/appraisals/chinese-rhinoceros-horn-cups-ca-1700--201104A36.

The escalating value of such items has resulted in an increased demand for raw or uncarved rhinoceros horn that has helped fuel a thriving black market and the production of fake antiques made from more recently hunted rhinoceros.

Prior to the President's Executive Order and new regulations issued by the U.S. Department of the Interior, *see* Cassandra Barnum & Laura Noguchi, *A Primer on Elephant Ivory Trafficking Laws and Prosecution Methods*, 63 U.S. Attorneys' Bull. 27 (Sept. 2015), the auction and sale of Asian art objects carved from elephant tusks was commonplace in the United States. The new wealth in Asia fueled purchases from American auction houses and galleries. Operation Crash cases have documented numerous instances and methods in which ivory carvings have been smuggled out of the United States. The most common destination, at least at first, has been Hong Kong. A recent study shows that Hong Kong is both the largest market and that it feeds an even larger market in Mainland China. *See* ESMOND MARTIN & LUCY VIGNE, HONG KONG'S IVORY: MORE ITEMS FOR SALE THAN IN ANY OTHER CITY IN THE WORLD 6 (2015).

C. Illegal hunting

The third type of criminal conduct involves the selling of illegal rhino hunts in Africa to American hunters, in violation of the Lacey Act. As described in Robert Anderson's article, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LAND L. REV. 27, 53 (1995), while rhinos are not native to the United States, in certain instances, the Lacey Act makes it a crime to import, transport, or sell wildlife in violation of federal, state, tribal, or *foreign* law.

The sale of guiding services is specifically included within the definition of a "sale" of wildlife. *See* 16 U.S.C. § 3372(c)(1) (2015). And, the offer of sale, sale, and related payments in the United States to "take" a rhinoceros in violation of foreign law, provides both jurisdiction and venue.

Each of these types of criminal conduct required investigators and prosecutors to devise unique strategies to apprehend those involved and bring them to justice. Like other criminal activity in the modern world, much of the criminal conduct that has been prosecuted to date in Operation Crash has involved the use of the Internet, email, texting, chat services, and mobile phones, where buyers, sellers, and wildlife traffickers conceal and further their illegal activity through the supposed anonymity and global reach of cyberspace. Although there continue to be numerous cases involving hand-carrying contraband across international borders, the use of various express mail services is increasingly common and has made the investigation of this type of crime more difficult.

A nationwide effort, and the international scope of Operation Crash, have also necessitated coordination among the agents, with other investigative agencies, and between prosecutors, as well as with our foreign counterparts. The cases have been prosecuted by the Environmental Crimes Section of the U.S. Department of Justice's Environment and Natural Resources Division and, to date, nine U.S. Attorney's offices (Central District of California, District of New Jersey, Southern District of New York, Eastern District of New York, District of Massachusetts, Southern District of Florida, Eastern District of Texas, Western District of Texas, and District of Nevada).

III. The non-defendant cooperator turned defendant

David Hausman was a purported antiques dealer and expert in antiques made from rhinoceros horn. *See* Transcript of the Sentencing Proceeding, *United States v. Hausman*, No. 12 Cr. 576 (S.D.N.Y. Feb. 14, 2013). He was also a part-time actor. *See* IMDB: HAUSMAN RESUME, http://www.imdb.com/name/nm0369585/resume. It was Hausman who approached the U.S. Fish and Wildlife Service to report illegal activity that he had observed in 2009, namely that recently-made items containing rhinoceros horn were being sold as antique items. Law enforcement quickly realized that the number and value of items carved from rhinoceros horn being sold by major auction houses had climbed sharply at the same time that poaching in Africa had dramatically increased. Hausman offered his expertise and signed a cooperation agreement with the agency. Unlike most cooperators, he was purely a volunteer with some apparent expertise, not a defendant.

Hausman began voluntarily providing information substantiating his allegation, but unbeknownst to the Government, he was also using his inside knowledge of the Government's investigations into rhino trafficking to commit crimes and avoid detection. In September 2011 Hausman responded to an Internet offer to sell the taxidermied head of a black rhinoceros containing two horns. The online seller was actually an undercover Special Agent working on Operation Crash. Before purchasing the horns, Hausman directed the undercover agent to send him an email falsely stating that the mounted rhinoceros was over 100 years old, even though the agent had told Hausman that the rhinoceros mount was of more recent vintage. As Hausman knew, there is an antique exception for certain trade in rhinoceros horns that are over 100 years old. Hausman agreed to send the undercover officer a check for a down payment with the understanding that the check would be returned when the sale took place, so that there would be no written record of the cash transaction. Two months later, Hausman flew from New York to Illinois, where he bought the rhino mount from an undercover officer at a truck stop. Hausman also insisted on a cash transaction and told the undercover agent not to send additional emails in order to avoid creating a written record. After Hausman bought the rhino mount, agents followed him and filmed him sawing off the horns in a motel parking lot. The horns purchased from the undercover agent, along with the whole heads of four rhinoceros were found in his one-bedroom Manhattan apartment during a search on February 18, 2012. When asked about the rhino mount he had just bought in Illinois, Hausman told the interviewing agents that he was working for the Government. He also stated that he had documents to prove that the

horns purchased in Indiana were more than 100 years old and presented the fraudulent document that he had created, just in case the Government learned of his purchase.

In or about December 2010, while purporting to help the Government crackdown on illegal rhinoceros trading, Hausman advised the FWS that a taxidermied head of a black rhinoceros containing two horns was being sold illegally by a Pennsylvania auction house. Then, in March 2011, upon learning that the sale was not finalized, Hausman covertly purchased the mount, paying a friend who resided in Pennsylvania $2,000 to act as a straw buyer so that he could circumvent the prohibition on interstate trade in endangered species. At Hausman's instructions, his friend removed the horns and sent them to him in New York. Hausman then took a most unusual step to cover his tracks. He manufactured a realistic set of fake horns using synthetic materials. The fake horns were cast from a mold he made of the real horns. He mailed the replicas to the straw buyer and directed her to attach them to the rhinoceros head in order to deceive law enforcement in the event that they conducted an investigation and asked to see the mount. Absent close examination of the base, the fake horns were difficult to tell apart from the real ones. Then, after his arrest in February 2012, Hausman contacted the straw buyer to see if she still had the mount, and they agreed that it should be burned or otherwise concealed.

In addition to finding four rhino heads and various horns in his New York apartment, the search of his home revealed that Hausman had made, and was currently in the process of making, new rhinoceros horn libation cups—the very crime that he reported to the Government. Hausman had a book with instructions on how libation cups were carved and a partially completed cup made from a real rhino horn was seize and forfeited.

On July 31, 2012, pursuant to a plea agreement, Hausman pleaded guilty to the two-count Information which charged him with obstruction of justice, in violation of 18 U.S.C. §§ 1519 and 2, and making false wildlife documents, in violation of the 16 U.S.C. §§ 3372(d)(2) and 3373(d)(3)(A). The Probation Department calculated Hausman to have an Adjusted Total Offense Level of 15, with a Guidelines range of 18 to 24 months' imprisonment and a fine range of $4,000 to $40,000, but recommended a sentence of time served (Hausman had not actually served any time). The Government argued for a Guidelines sentence.

At sentencing, U.S. District Judge J. Paul Oetkin noted that the Lacey Act is a charge that does not have the usual human victims, but that there was a need for general deterrence. Judge Oetkin explained that whether the victims were an endangered species or a member of the general public, the laws and leaders of our country have made these actions very serious federal crimes. The court also noted that a Guidelines sentence was justifiable because of the need for general deterrence. However, the court relied primarily on Hausman's age—67 years—and his health, to support a variance and a sentence of 6 months, along with a $10,000 criminal fine payable to the Lacey Act Reward Fund and $18,000 payment to the Rhino Tiger Conservation Fund, from cash seized at his apartment. *See generally* REPORT OF THE SECRETARIAT, at 1; THE WHITE HOUSE, NAT'L STRATEGY FOR COMBATING WILDLIFE TRAFFICKING 3 (2014), http://webcache.googleusercontent.com/search?q=cache:OgBF_LPt0NQJ:https://www.whitehouse.gov/sites/default/files/docs/nationalstrategywildlifetrafficking.pdf+&cd=2&hl=en&ct=clnk&gl=us; s*ee* Press Release, U.S. Dep't of Justice, Antiques Dealer Sentenced In Manhattan Federal Court Six Months In Prison For Crimes Relating To Illegal Trafficking Of Endangered Rhinoceros Horns (Feb. 14, 2013), *available at* http://www.justice.gov/usao-sdny/pr/antiques-dealer-sentenced-manhattan-federal-court-six-months-prison-crimes-relating.

IV. Rhino horns and the nail salon

Rhino horns are made of keratin, the same material in fingernails. Coincidentally and ironically, one of the largest traffickers in rhino horn in the United States used a nail salon as a mailing address to conceal the smuggling. A significant portion of the rhino horns purchased by father and son defendants, Jimmy and Felix Kha, from codefendant, Wade Steffen, were mailed to a nail salon in Los Angeles,

whose owner was also charged. The Khas owned defendant Win Lee Corporation, an import/export business in West Minster, California, where additional parcels containing rhino horns also were received. *See* Indictment (Doc. 14), Government's Combined Sentencing Position for Defendants (Doc. 144), Criminal Complaint 12-0399M, *United States v. Kha et al.*, Case No. 2:12-cr-00202-CAS (C.D. Cal. Feb. 16, 2012).

As part of Operation Crash, 17 search warrants were obtained for packages being sent to the nail salon and directly to the Khas' business. A total of 37 rhino horns were discovered. That investigation might have continued if it were not for the fact that on February 9, 2012, TSA closely examined the domestic luggage of Wade Steffen and some of his alleged accomplices as they sought to board a flight leaving Long Beach, California. TSA's baggage inspection found approximately $337,000 in $100 bills stuffed in various carry-on luggage, including a diaper bag. Consent was provided by one of the travelers to search a camera. The memory card included photos depicting large stacks of U.S. currency taken on various dates, as well as rhino horns being weighed on scales. Also found were several safety deposit box keys.

Search warrants and complaints were promptly sworn out based, in large part, on this overt development. In February 2012, at the time of the arrest of Jimmy and Felix Kha and the execution of various search warrants, FWS agents seized, among other items, rhinoceros mounts; rhinoceros horns; an additional $1 million in cash; approximately $1 million in gold ingots, jewelry, watches, and precious stones; a BMW sedan; and a Toyota Forerunner. Steffen, a former rodeo rider, the Khas, and another Chinese national involved in smuggling the horns out of the country, all pleaded guilty. The Khas were convicted of smuggling, Lacey Act violations, money laundering, and tax fraud, and were sentenced in September 2012 to 46 and 42 months' imprisonment, respectively. The investigation is continuing.

In addition to the prison terms, Jimmy and Felix Kha were ordered to pay a total of $20,000 in criminal fines and a $185,000 tax fraud penalty and assessment. Win Lee Corporation was ordered to pay a $100,000 fine. The Khas and their company also were ordered to pay a total of $800,000 in restitution to the Multinational Species Conservation Fund, a statutorily-created fund that is managed by the FWS to support international efforts to protect and conserve rhinos and other critically endangered species around the world. The defendants previously abandoned their portion of interest in $2 million worth of rhino parts, as well as vehicles seized in the investigation. *See* Press Release, U.S. Dep't of Justice, Smuggling Ring Sentenced in Los Angeles for Criminal Trafficking of Endangered Rhinoceros Horn (May 15, 2013), *available at* http://www.justice.gov/opa/pr/smuggling-ring-sentenced-los-angeles-criminal-trafficking-endangered-rhinoceros-horn.

At sentencing, defense counsel argued that the rhino horns in question were relics with no connection to wildlife species. The Government responded that during the period of the conspiracy, there was a 3,400 percent increase in rhino poaching and noted that the defendants helped to create and supply a market for rhino horn in Asia. Sentencing Transcript, *United States v. Jimmy Kha*, at 29 (C.D. Cal. Mar. 6, 2012).

Operation Crash, and the Kha investigation in particular, highlighted that the domestic trade in rhino horn was ultimately destined for foreign markets and that apprehending those engaged in smuggling is inherently difficult.

V. Luck of the Irish

The ever increasing value of, and demand for, rhino horn has led unscrupulous profiteers to explore every possible way of "sourcing" the horns. *See generally* REPORT OF THE SECRETARIAT, at 1. Starting in about 2010, there was a rash of museum burglaries in Europe where rhino horns were stolen out of exhibits. In some smash-and-grab cases, museum guards were gassed.

In July 2011 Europol, a police organization, issued an alert alleging that there was a threat from an organized crime group that was illegally trading stolen rhino horn. *See* EUROPOL, Europol and Ireland Identify Organised Crime Group Active in Illegal Trading of Rhino Horn, https://www.europol.europa.eu/content/press/europol-and-ireland-identify-organised-crime-group-active-illegal-trading-rhino-horn-9.

> Significant players within this area of crime have been identified as an Irish and ethnically-Irish organised criminal group, who are known to use intimidation and violence to achieve their ends. To source and acquire rhino horns, the group has targeted antique dealers, auction houses, art galleries, museums, private collections and zoos, resorting to theft and aggravated burglary where necessary. To sell specimens, they have exploited international auction houses in the UK, France, USA and China.

Id. Europol's notice also stated:

> Elements of this group are also involved in a variety of other serious crimes across the European Union such as drugs trafficking, organised robbery, distribution of counterfeit products, tarmac fraud and money laundering. Outside the EU, they have been active in North and South America, South Africa, China and Australia.

Id.

Since 2011 Europol has linked 67 rhino horn thefts across 15 European nations to the Rathkeale Rovers, a group of itinerant people of ethnic Irish origin also known as the Irish Travellers, who are alleged to have been heavily engaged in organized illegal trafficking in rhinoceros horns. *See* Adam Higginbotham, *The Irish Clan Behind Europe's Rhino-Horn Theft Epidemic*, BLOOMBERG BUS. (Jan. 2, 2014), http://www.bloomberg.com/bw/articles/2014-01-02/the-irish-clan-behind-europes-rhino-horn-theft-epidemic); Barry Duggan, *Traveller Crime Gang Held After European Police Raids*, IRISH NEWS (Jan. 16, 2013), http://www.independent.ie/irish-news/traveller-crime-gang-held-after-european-police-raids-28959048.html. On September 13, 2013, police staged searches in eight locations in the U.K. and Ireland. In Rathkeale, one of the searches turned up four rhino horns.

Two Irish-nationals associated with the Irish Travellers were successfully prosecuted in the District of Colorado after purchasing four rhino horns from a FWS agent operating undercover. Richard O'Brien and Michael Hegarty were arrested after taking possession of the horns from the agent. In an earlier meeting, O'Brien and Hegarty told the undercover agent that they knew the rhino horns could not lawfully be purchased in interstate or foreign commerce and that they planned to ship them to Ireland concealed within furniture to avoid detection. Upon arrest, O'Brien and Hegarty told agents they intended to deliver the horns and some antique furniture items to an antique store so their coconspirator, another Irish-national, could arrange onward shipment to Ireland. A search of the rental car revealed passports, luggage, a chest of drawers, four large packing boxes, and shrink wrap apparently intended to be used to pack the horns. O'Brien and Hegarty were sentenced in May 2011 to 6 months in prison. *See* Press Release, U.S. Dep't of Justice, Two Irish Nationals Sentenced To Federal Prison For Attempting To Illegally Export Black Rhinoceros Horns (May 26, 2011), *available at* http://www.justice. gov/usao-co/pr/two-irish-nationals-sentenced-federal-prison-attempting-illegally-export-black-rhinoceros.

As part of Operation Crash, investigators focused on evidence that Irish Travellers were continuing to be involved in trafficking rhinoceros horns in the United States. This part of Operation Crash (known as Operation Shamrock) led to the successful prosecution of Michael Slattery, Jr., one of three Irish Travellers who had purchased a rhinoceros mount from The Corner Shoppe, an antique and taxidermy store in Austin, Texas, and sold them to a Chinese national living in New York. At the time of the purchase in 2010, Slattery and two others paid a day laborer to act as a straw buyer in order to purchase the rhino mount because it could only be legally purchased by a Texas resident. Prior to entering the auction house, Slattery instructed the straw buyer to say that the mount was for him [the straw buyer],

and Slattery handed the straw buyer an envelope with $18,000 cash to pay for the mount. The Irish Travellers took the horns to New York City, where they were eventually sold to a person living in China.

Slattery was arrested in 2014, attempting to leave the United States. He pleaded guilty and was sentenced to 14 months in prison. The court found a variance based on the fact that he was young at the time of the offense and had been brought up in a life of crime. At sentencing, Slattery told the Court:

> I bought with an intention to get a profit to sell it but not intention of the animal being killed and slaughtered. I bought it as you buy a piece of furniture. You buy an antique chair. You buy a table. You buy a bookcase. I bought it to resell it to get a profit, for someone who buys it to put over their mantelpiece. But I bought it. I know I broke the law and I am sorry, but I bought it intentionally to resell it. I didn't buy it with the intention for other animals to get slaughtered and other animals to get killed for their horns.

As a result of a continuing investigation, the owner and operator of the Texas auction company that sold the rhino horns to the Irish Travellers was prosecuted for knowingly making a false wildlife document, in violation of the Lacey Act in order to conceal the sale in interstate and foreign commerce. *See* Press Release, U.S. Department of Justice, Texas Man Pleads Guilty to Falsifying a Wildlife Document Related to the Sale of Horns from a Black Rhino (Mar. 26, 2015), *available at* http://www.justice.gov/opa/pr/texas-man-pleads-guilty-falsifying-wildlife-document-related-sale-horns-black-rhino.

VI. Ringleader gets 70 months

As part of Operation Crash, a confidential informant (CI) sold rhino horns to another individual, the "New Jersey Middleman." *See* Joint Factual Statement, *United States v. Li*, Cr. Nos. 13-113 and 13-552 (D.N.J. Aug. 13, 2014). The CI and New Jersey Middleman met at the Vince Lombardi rest stop on the New Jersey Turnpike, where the New Jersey Middleman purchased two black rhino horns on behalf of another foreign buyer. This undercover operation led to another individual, referred to as the Long Island City Dealer, who was purchasing the rhino horns on behalf of Zhifei Li, a Chinese-national living in China, who was the ringleader of far-reaching criminal conduct.

Li was charged in New Jersey before he had ever traveled to the United States. In January 2013, Li traveled to Miami Beach, Florida, bragging to a former accomplice that he had $500,000 to spend on wildlife merchandise. He was arrested after purchasing two black rhinoceros horns from an undercover agent with the FWS Special Operation Unit. During the $59,000 buy/bust, which took place in a hotel room outfitted with video cameras and recording devices, Li told the undercover agent that the horns would be used to make "cups" and that he would buy as much rhino horn as the agent could obtain. He asked if the agent would be willing to ship future purchases directly to his company in Hong Kong.

Li, the owner of Overseas Treasure Finding in Shandong, bought valuable rhino and ivory objects in America and smuggled them to China, in violation of United States (and Chinese) law. He was the self-described "boss" of three individuals who bought rhino horns and antique objects in the United States, including those made of rhino horn and elephant ivory, and smuggled the merchandise to Li in China. At Li's direction, all three collaborators shipped wildlife items to other accomplices in Hong Kong. One of the three was the Long Island City Dealer; another was Jeffrey Wang, who was sentenced to 37 months in the Southern District of New York for his comparatively lesser role in the offenses. *See* Press Release, U.S. Department of Justice, New York Antiques Dealer Sentenced to 37 Months in Prison for Wildlife Smuggling (Dec. 5, 2013), *available at* http://www.justice.gov/opa/pr/new-york-antiques-dealer-sentenced-37-months-prison-wildlife-smuggling. Ning Qui, a third underling and also an Asian art expert for a Dallas auction house, received a 25-month sentence and a $150,000 criminal fine in the Eastern District of Texas. *See* Press Release, U.S. Department of Justice, Texas Antiques Appraiser Sentenced to 25 Months in Prison for Rhino and Ivory Smuggling Conspiracy (May 14, 2015), *available at*

http://www.justice.gov/opa/pr/texas-antiques-appraiser-sentenced-25-months-prison-rhino-and-ivory-smuggling-conspiracy.

Wang was involved in buying rhinoceros horn libation cups and carvings made from elephant ivory on behalf of Li and others and mailing them to Hong Kong. An aggravating factor was that Wang's prior "boss" had been arrested for smuggling in ivory, which apparently did not deter Wang from continuing to engage in criminal conduct with Li. Like Wang, Ning Qui acted at Li's direction and also shipped at least five raw rhino horns weighing at least 20 pounds to Li and Li's accomplices in Hong Kong. Li provided Qiu with detailed instructions on how the horns should be packaged and shipped. Qiu admitted to wrapping the horns in duct tape, hiding them in porcelain vases and falsely describing them on customs and shipping documents, including by labeling them as porcelain vases or handicrafts. In another instance, Li directed an accomplice to declare a crate of two raw ivory tusks as automobile parts so they could be illegally smuggled to Hong Kong.

Li signed a detailed joint factual statement that has served to publicly highlight the wildlife trade and maximize the deterrent impact of the prosecution. Also filed in court as part of the joint factual statement were photographs of some of the evidence in the case. While the full scope of defendant's criminal conduct is unknown, what is known showed Li's crimes involved extensive planning, numerous individuals, numerous acts of smuggling, international coordination, and concealment. One of the most illuminating admissions was Li's explanation that he knew of three factories in China that purchased raw rhino horn to make fake antiques, which he termed "Zou Jiu," a Mandarin word meaning to make something look old.

In pleading guilty, Li admitted that he was the ringleader of an illegal wildlife smuggling conspiracy in which 30 rhinoceros horns and numerous objects made from rhino horn and elephant ivory, worth more than $4.5 million, were smuggled from the United States to China.

At sentencing, U.S. District Court Judge Ester Salas imposed a Guidelines sentence, noting Li's organizational role and the need for deterrence. Observing that Li engaged in extensive subterfuge to conceal his smuggling and that he continued undeterred despite knowing that others had been jailed for similar defenses, Judge Salas commented, "Mr. Li, you would still be doing what you were doing when you were apprehended . . . . You would still be contributing to the epidemic, you would still be feeding the frenzy that now exists." *See* Sentencing Transcript, *United States v. Li*, Cr. Nos. 13-113 and 13-552, at 101 (D.N.J. May 27, 2014).

The court was unpersuaded by the defendant's argument that the horns being smuggled were not from freshly killed or poached rhinos and, thus, his crimes were unrelated to the crisis in Africa. Emphasizing the need for specific and general deterrence, Judge Salas responded:

> I look at this case as one would look at a case of child pornography, where defendants often say to courts, I didn't produce the video, I didn't produce the images, there is no proof that . . . downloading these images somehow feeds the market and feeds the demands. Those arguments fall on deaf ears often times and the reality is that poaching . . . is at an unprecedented level.

Id. at 94–95.

VII. Smuggling by antique gallery owner

In March 2015 Xiao Ju Guan (Tony Guan), the President and Owner of Bao Antiques in Richmond, British Columbia, was sentenced to 30 months imprisonment for attempting to smuggle endangered black rhinoceros horns. *See* Press Release, U.S. Department of Justice, Canadian Antiques Dealer Sentenced In Manhattan Federal Court To 30 Months In Prison For Smuggling Rhinoceros Horns, Elephant Ivory, And Coral (Mar. 25, 2015), *available at* http://www.justice.gov/usao-sdny/pr/canadian-antiques-dealer-sentenced-manhattan-federal-court-30-months-prison-smuggling-0.

Guan, age 40, was arrested after purchasing two endangered black rhinoceros horns. As it turned out, the seller was an undercover special agent with the FWS working on Operation Crash. Guan was not "lured" or invited to the United States, though prosecutors worked closely with the Department's Office of International Affairs on coordination with Canada. In his first communication with the undercover agent, Guan offered to come to the United States, writing: "I would like to know about the price of two rhino horns. If the deal is possible, I will get to US and purchase in person."

Investigators learned about Guan as the result of two prior purchases of rhino horn from U.S. auction houses, including Elite Estate Buyers located in Florida. In one case, Guan had wildlife shipped directly to his business in Canada; in another, it was shipped to a mail drop located near the U.S. border.

Guan and a young woman acting as his interpreter took a redeye flight to New York, jumped in a taxi, and went directly to meet the undercover agents at the storage facility. After purchasing the horns, Guan asked the undercover agents to drive him and his accomplice to a nearby express mail store, where he mailed the horns to an address in Point Roberts, Washington, less than 1 mile from the Canadian border and 17 miles from his business. Guan falsely labeled the box of black rhinoceros horns as containing "handicrafts." In the course of the taped transaction, Guan indicated that he had people who could drive the horns across the border and that he had done so many times before.

The Guan investigation took place on a parallel track to one in Canada. At the same time Guan was arrested in the New York, Canadian authorities executed a search warrant at his antique business in Richmond, British Columbia. Canadian law enforcement officers seized various wildlife objects from the business, nine of which were positively identified as wildlife objects purchased in the United States via a Manhattan-based Internet clearing house that provides access to numerous auctions. These items, made from elephant ivory and coral, were smuggled out of the United States and into Canada without the required declaration or permits. Some were shipped directly to Canada, and others were sent to addresses near the United States–Canada border in Point Roberts, Washington. Guan recruited college-age family members and acquaintances to assist him with smuggling the wildlife items.

Those engaged in one type of criminal activity are often associated with other types of crime. There has been much concern along these lines about the involvement of organized crime in the wildlife trade. *See* Exec. Order No. 13648, 78 F.R. 40621 (2013); THE WHITE HOUSE, NAT'L STRATEGY FOR COMBATING WILDLIFE TRAFFICKING 3 (2014), http://webcache.googleusercontent.com/search?q=cache:OgBF_LPt0NQJ:https://www.whitehouse.gov/sites/default/files/docs/nationalstrategywildlifetrafficking.pdf+&cd=2&hl=en&ct=clnk&gl=us; MARINA RATCHFORD, BETH ALLGOOD & PAUL TODD, INTERNATIONAL FUND FOR ANIMAL WELFARE, CRIMINAL NATURE: THE GLOBAL SECURITY IMPLICATIONS OF THE ILLEGAL WILDLIFE TRADE 8 (2013).

The Guan investigation brings this concern into stark relief. When Environment Canada executed the search warrant at Guan's business, they found approximately 50,000 ecstasy pills stuffed into blue Ikea shopping bags. The street value of the narcotics was as much as $500,000. Several bags of a white powder, a suspected cutting agent for the manufacture of illegal narcotics, were also found at Guan's business and turned over to the Royal Canadian Mounted Police.

VIII. Smuggling auction house president

Ning Qiu and Tony Guan each independently purchased rhino horn from Elite Estate Buyers, known as Elite Decorative Arts, an online auction house located in Boynton Beach, Florida. The fact that an auction house sold raw horns from endangered black rhinos had already caught the attention of the FWS agents working on Operation Crash. The investigation included both consigning and buying endangered black rhinoceros horns from the business across state lines, which is prohibited by the Endangered Species Act.

When approached by an undercover agent, Christopher Hayes, Elite's president and owner, consigned a rhino horn. Although it was to be put up for auction (at which point it would have been purchased by another undercover agent), it was sold in a private sale after news of Operation Crash had been publicized by the first arrests. The resulting conversations with the undercover agent showed a high level of consciousness of guilt. In one call, the undercover agent was told by an employee that the horns were sold because they lacked "provenance," and that Elite had information that the FWS was investigating such transactions and was concerned that the horns could be seized. *See* Government's Sentencing Memorandum (Doc. 29), *United States v. Elite Estate Buyers, Inc.*, No. 9:14-cr-80201-DTKH (S.D.F.L Oct. 24, 2014). In one recorded call, Hayes told the undercover officer that he sold the horns privately and without checking with the undercover seller because "the law is strict," and the horns were not even to be sold outside of the State of Florida. In reality, they were sold to Qui, who lived in Texas, and who then smuggled them to Li via Hong Kong.

As part of his business, Hayes knowingly sold endangered and protected wildlife to foreign nationals whom he or his company knew intended to export the wildlife outside the United States. Often, the purchase price was paid by wiring funds from a foreign bank to the auction house, and the export of the merchandise was arranged without the purchaser ever traveling to the United States. In pleading guilty, Hayes and Elite admitted that he directed buyers to two nearby shipping companies that would aid them in smuggling the wildlife out of the United States. Hayes also aided and abetted the foreign customers by falsifying records and shipping documents to conceal the smuggling.

In all, Hayes and his company were involved in the sale of six endangered black rhinoceros horns, as well as numerous carvings made of ivory and coral. Hayes received a 36-month sentence. The corporate prosecution of Elite resulted in a $1.5 million criminal fine and an agreement that the company would be banned from the all trade in endangered species, including rhinoceros horn, elephant ivory, and coral, for 3 years, as a special condition of probation. The prosecution of Hayes and his company underscore the special responsibility that companies have in ensuring that their businesses do not further the illegal trade in wildlife. *See* Press Release, U.S. Department of Justice, President of Florida Auction House Sentenced to 36 Months for Wildlife Smuggling Conspiracy (May 20, 2015), *available at* http://www.justice.gov/usao-sdfl/pr/president-florida-auction-house-sentenced-36-months-wildlife-smuggling-conspiracy.

IX. Out of Africa

Most of Operation Crash has involved prosecutions concerning rhinoceros horn and elephant ivory of unknown age and origin. These items are highly regulated in order to protect and preserve species in the wild. Some of these horns may have been "old," and some were new. Some may have been smuggled into the United States, while other objects were lawfully imported. In most cases, the facts are unknown and unknowable.

Operation Preposterous, part of Operation Crash, involves the illegal hunting of live rhinoceros in South Africa. A pending indictment in the Middle District of Alabama charges brothers Dawie and Janneman Groenewald, both South African nationals, and their company, Valinor Trading CC (d/b/a Out of Africa Adventurous Safaris), with conspiracy, Lacey Act violations, mail fraud, money laundering, and structuring bank deposits to avoid reporting requirements. The Lacey Act violations are based on the hunting of the rhinos in violation of South African law, which requires the issuance of permits. *See* Press Release, U.S. Department of Justice, Owners of Safari Company Indicted for Illegal Rhino Hunts (Oct. 23, 2014), *available at* http://www.justice.gov/opa/pr/owners-safari-company-indicted-illegal-rhino-hunts.

The Groenewald brothers and other company representatives traveled throughout the United States to attend hunting conventions and gun shows, where they sold outfitting services and accommodations to American hunters, to be conducted at their ranch in Mussina, South Africa. The rhino

hunts were "upsold" later, sometimes after the hunters were already in South Africa. Charges were brought in Alabama based on U.S. contacts, including the fact that Janneman Groenewald lived in Autauga County, Alabama, where Out of Africa maintained bank accounts and engaged in alleged money laundering and structuring of deposits to avoid federal reporting requirements.

The hunters were told that they could kill a rhino, one of the "Big Five," for a fraction of the cost of a legitimate rhino hunt, but that they would be limited to taking photographs and measurements. While the hunters were allegedly told directly or indirectly that the hunts were legal, Out of Africa never obtained the required permits from the cognizant authorities in South Africa. American hunters paid approximately $10,000 for the illegal rhino hunts, compared to approximately $80,000 to more than $100,000 for a legal hunt. Unlike a traditional hunting, the hunters were allegedly told that a particular rhino had to be killed because it was a "problem rhino" that needed to be culled. While no trophy could therefore be exported, the hunters could nonetheless shoot the rhino, pose for a picture with the dead animal, and make record book entries, all at a reduced price. Meanwhile, the defendants are alleged to have profited a second time by cutting the horns off some of the rhinos with chainsaws and knives and selling them on the black market. Eleven illegal hunts are detailed in the indictment, including one in which the rhino had to be shot and killed after being repeatedly wounded by a hunter using a bow and arrow.

The extradition process is ongoing. Dawie Groenewald also stands charged with numerous crimes in South Africa, where he has challenged underlying South Africa law. *See* Laurel Neme, *U.S. Indictment Accuses South African Brothers of Trafficking Rhino Horns*, NAT'L GEOGRAPHIC (Oct. 25, 2014), http://news.nationalgeographic.com/news/2014/10/141023-rhino-wildlife-trafficking-south-africa-safari-club-nra-lacey-act-hawks-operation-crash-groenewalds/. The prosecution of Out of Africa and the Groenewalds stands as a warning shot to outfitters and hunters that the sale of illegal hunts in the United States can be prosecuted in our courts, regardless of where the hunt takes place.

X. Closing thoughts

Environmental crimes and wildlife crimes are real crimes. Like virtually all white collar crimes, the underlying motive is financial. The investigation and prosecution of wildlife crimes is not particularly different from other types of crime. Subpoenas, search warrants, review of telephone and bank records, development of informants, and undercover operations are common. Like other types of crime, a successful prosecution often results in leads for the next case. Operation Crash cases have included many interconnected strings of criminal conduct. Pulling the thread has helped to unravel one criminal conspiracy after another.

Wildlife sentencing is guided by § 2Q2.1 of the U.S. Sentencing Guidelines. This section sets a base offense level of 6 and an enhancement of 2 levels for commercial purpose, but where the driving force is the retail market value of the wildlife (which draws from the values set forth in the fraud table in § 2F1.1), all the same factors of 18 U.S.C. § 3553 come into play. For more information, see the article later in this issue of the Bulletin on sentencing for wildlife crimes. *See* Shennie Patel & Gary Donner, *A Primer on Sentencing in Wildlife Crimes Prosecutions*, 63 U.S. Attorneys' Bull. 73 (Sept. 2015). What is different, compelling, and especially rewarding, is that the underlying subject matter is protecting wildlife.

Despite the similarities, substantive wildlife law is unique. The premise and reach of the Lacey Act is extraordinary. After all, we do not have black rhinos or African elephants here in the United States. The Lacey Act, nevertheless, provides prosecutors with a powerful tool to stop the decimation of these living dinosaurs because it makes it a crime to knowingly import, export, buy, sell, possess, or transport wildlife taken in violation of the wildlife law of any country in the world. *See* 16 U.S.C. § 3373(d) (2015). Market forces here and abroad have the potential to impact the future of these species. While the rhinos and elephants are not native species, the United States is both a destination market and a transit

market. Consequently, we have a special obligation to ensure that we are not contributing to the annihilation of these majestic species.

Each wildlife case offers the prosecutor the opportunity to learn and teach something truly unique and important about a species and/or ecosystem. Lack of familiarity with federal wildlife laws and the serious threat that exists to threatened and endangered species can fuel indifference to wildlife crime or to it not being thought of as a "real crime." Federal prosecutors are distinctly situated to play a critical role in protecting and preserving wildlife and in educating the public. ❖

ABOUT THE AUTHOR

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When the Case Agent Brings You Lemons: Prosecuting Plant Cases

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I. Introduction

The trade in and harvesting of plants is regulated for a variety of purposes, including the protection of agricultural food production from diseases and invasive plant pests, the preservation of forests and wild plants that reduce climate change and also provide needed resources for rural peoples and habitat for wildlife, and the conservation of valuable plant genetic resources for agricultural and medicinal purposes. Federal laws protect plants facing extinction, regulate the trade that might carry plant pests, and ensure that the market demand in the United States does not fuel the illegal cutting of tropical rain forests.

The global illegal trade in plants has been valued in the billions of dollars. The World Bank estimated that illegal logging alone generates approximately $10–15 billion annually worldwide. MARILYNE P. GONCALVES, MELISSA PANJER, THEODORE S. GREENBERG & WILLIAM B. MAGRATH, THE WORLD BANK, JUSTICE FOR FORESTS: IMPROVING CRIMINAL JUSTICE EFFORTS TO COMBAT ILLEGAL LOGGING vii (2012). Plant-related crime, particularly timber-related crime, is gaining global attention, including that of Interpol. *See* INTERPOL: CONNECTING POLICE FOR A SAFER WORLD, http://www.interpol.int/Crime-areas/Environmental-crime/Projects/Project-Leaf (describing Project Leaf (Law Enforcement Assistance for Forests), led, in part, by Interpol and the Department of State).

Prosecutors may encounter a broad range of illegal activities involving plants. Smaller cases may involve such things as the illegal harvest by unsophisticated individuals of protected plants, such as ginseng or saguaro cacti, on federal lands. Larger cases may involve such high stakes violations as the importation of plants not properly inspected or treated for plant pests, putting at risk multibillion dollar crops, or the illegal harvest and international trade of timber worth millions of dollars by sophisticated organized crime organizations aided by corrupt officials.

This article provides an overview of the key criminal statutes governing plants, examples of successful cases brought under those statutes, and a brief synopsis of the resources available to support investigations and prosecutions of violations of those statutes.

II. Statutory landscape

The laws addressing plants are primarily contained in the same statutes that address fish and wildlife, that is, the Endangered Species Act (ESA), 16 U.S.C. §§ 1531–1544, and the Lacey Act, 16 U.S.C. §§ 3371–3378. Fundamentally, the ESA prohibits certain activities involving particular species of plants officially determined either by the United States or by signatories to the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) to be at risk of extinction or of becoming at risk of extinction. The Lacey Act prohibits trade in illegally taken, possessed, transported, or sold plants, and in plants that are falsely labeled. An additional statute unique to plants, including domesticated agricultural and nursery plants, is the Plant Protection Act (PPA), 7 U.S.C. §§ 7701–7786. The PPA regulates conduct related to the possible transmission of plant pests and diseases. Activities in violation of any of these three statutes may also involve various Title 18 crimes, such as smuggling, false statements, or money laundering, or violations of the Foreign Corrupt Practices Act.

The analysis of a potential case involving plants starts, however, with an understanding of the three plant-specific statutes and how they may be implicated by the facts of a given case.

A. Plant Protection Act: 7 U.S.C. §§ 7701–7786

The PPA was enacted in 2000. It consolidated related responsibilities and prohibitions that were previously spread over various statutes, including the Plant Quarantine Act, the Federal Plant Pest Act, and the Federal Noxious Weed Act of 1974. It also implements the International Plant Protection Convention (IPPC) and the Agreement on the Application of Sanitary and Phytosanitary Measures of the World Trade Organization. Enforcement of the PPA is primarily the responsibility of the Department of Agriculture (USDA), Office of Inspector General (OIG), Investigations. The OIG is the law enforcement arm of the Department, with Department-wide investigative jurisdiction. OIG Special Agents conduct investigations of significant criminal activities involving USDA programs, operations, and personnel, and are authorized to make arrests, execute warrants, and carry firearms. Inspector General Act of 1978, 5 U.S.C. App. 3 §§ 1–13 (2015); 7 U.S.C. § 2270 (2015).

The PPA provides that the Secretary of Agriculture may issue regulations "to prevent the introduction of plant pests into the United States or the dissemination of plant pests within the United States." 7 U.S.C. § 7711(a) (2015). The PPA also authorizes the Secretary of Agriculture to:

> certify as to the freedom of plants, plant products, or biological control organisms from plant pests or noxious weeds, or the exposure of plants, plant products, or biological control organisms to plant pests or noxious weeds, according to the phytosanitary or other requirements of the countries to which the plants, plant products, or biological control organisms may be exported.

Id. § 7718. Extensive implementing regulations appear at 7 C.F.R. Parts 300 through 380 and 9 C.F.R. Part 94. These must be carefully parsed to identify potential PPA violations.

The PPA provides for three levels of criminal penalties for violations.

- First, a Class A misdemeanor is set forth providing that "a person that knowingly violates this chapter, or knowingly forges, counterfeits, or, without authority from the Secretary, uses, alters, defaces, or destroys any certificate, permit, or other document provided for in this chapter" is subject to up to 1 year in prison or a fine of up to $100,000, or twice the gross gain or loss caused by the violation. 7 U.S.C. § 7734(a)(1)(A) (2015); 18 U.S.C. § 3571 (2015).
- Second, a Class D felony is set forth providing that "a person that knowingly imports, enters, exports, or moves any plant, plant product, biological control organism, plant pest, noxious weed, or article, for distribution or sale, in violation of this chapter," is subject to up to 5 years in prison

and a fine of $250,000, or twice the gross gain or loss caused by the violation. 7 U.S.C. § 7734(a)(1)(B) (2015); 18 U.S.C. § 3571 (2015).

- Finally, a class C felony is established for any second or subsequent conviction on either a misdemeanor or felony violation, punishable by up to 10 years in prison and a fine of $250,000, or twice the gross gain or loss. 7 U.S.C. § 7734(a)(2) (2015); 18 U.S.C. § 3571 (2015). The PPA also provides civil penalties. *See* 7 U.S.C. § 7734(b) (2015).

Why does it matter? Compliance with, and the enforcement and prosecution of, the PPA safeguards our food, environment, global reputation, and, ultimately, our pocket book. For those who prefer a more detailed answer, Congress explained its reasoning for the PPA quite well:

- Biological control is a desirable, low risk means of ridding crops of pests and noxious weeds, and its use should be facilitated by USDA, other federal agencies, and the states.
- It is the responsibility of the Secretary of Agriculture to facilitate exports, imports, and interstate commerce in agricultural products and other commodities that pose a risk, in ways that will reduce the risk of dissemination of plant pests or noxious weeds.
- Smooth movement of enterable plants is vital to the United States' economy and should be facilitated to the extent possible.
- Existence on any premises within the United States of a plant pest or noxious weed, new to or not known to be widely prevalent, could threaten crops and/or other plants of the United States and be a burden to interstate and foreign commerce.

7 U.S.C. § 7701 (2015).

The economic impact of nonnative, invasive species can be significant. For example, U.S. agriculture loses $13 billion in crops annually from invasive insects, such as vine mealybugs. The aquatic invasive plant, Eurasian watermilfoil, reduced Vermont lakefront property values up to 16 percent and Wisconsin lakefront property values by 13 percent. From 2010 to 2020, an invasive forest pathogen, called sudden oak death, is projected to cost $7.5 million in tree treatment, removal, and replacement costs, corresponding to a $135 million loss in residential property values for California. U.S. FISH AND WILDLIFE SERVICE, U.S. DEP'T OF THE INTERIOR, THE COST OF INVASIVE SPECIES 1 (2012), *available at* http://www.fws.gov/verobeach/PythonPDF/CostofInvasivesFactSheet.pdf.

There is comfort in knowing that, "an ounce of prevention is worth a pound of cure." Benjamin Franklin writing as an "old citizen," PENNSYLVANIA GAZETTE (Feb. 4, 1735).

Federal Phytosanitary Certificates: Federal Phytosanitary Certificates (FPCs) are USDA certificates that document the inspection of plants and plant products for disease and pests. This certificate verifies inspections or treatments required by the importing country as specified by the IPPC, a multi-lateral treaty, and by the Agreement on the Application of Sanitary and Phytosanitary Measures of the World Trade Organization. FPCs form the backbone of the PPA scheme.

The USDA Animal and Plant Health Inspection Service (APHIS), Plant Protection and Quarantine (PPQ) program, serves as the National Plant Protection Organization (NPPO) of the U.S. Government for purposes of the IPPC. In this capacity, APHIS-PPQ coordinates the United States' responsibilities under the IPPC, including the issuance of FPCs.

FPCs are issued to indicate that shipments of plants, plant products, or other regulated articles meet specific phytosanitary import requirements, thus reducing the risk of introduction of a plant pest or disease. FPCs follow an international model certificate format that provides a standard wording and format for the preparation of official FPCs. *See* Requirements for Phytosanitary Certificates, http://www.fao.org/docrep/004/y3241e/y3241e06.htm; *see also* 7 C.F.R. §§ 353.1–353.9 (2015). This is

necessary to ensure the validity of the documents, that they are easily recognized, and that essential information is reported.

One part of the standard wording for an FPC is the requirement to set out the Place of Origin of the plant or plant product. The Place of Origin refers to the place(s) from which a consignment gains its phytosanitary status, that is, where it was possibly exposed to infestation or contamination by pests. Normally, this will be the place where the commodity was grown. However, if a commodity is stored or moved, its phytosanitary status may change over a period of time as a result of its new location. In such cases, the new (stored or moved) location may be considered as the place of origin.

The FPC must be presented to a Customs agent at the Port of Entry at the time the product crosses into the country of import. These forms each contain a unique serial number. Fraudulent FPCs, which may form the basis for criminal charges under the PPA, include those: (1) not authorized by the NPPO, (2) issued on forms or in formats not authorized by the issuing NPPO, (3) issued by persons, organizations, or entities that are not authorized by NPPO, and (4) containing false or misleading information.

The APHIS PPQ export certification program, through which FPCs are issued, does not require certification of any exports, but rather provides certification of plants and plant products as a service to the exporters. After assessing the phytosanitary condition of the plants intended for export, relative to the receiving country's regulations, an inspector issues an internationally recognized FPC (PPQ Form 577). APHIS also enters into written agreements with industry to allow the industry to prepare the FPC to include information that a plant product has been handled, processed, or inspected in a manner required by a foreign government. Although industry personnel may prepare the FPC, an FPC must be verified and signed or certified by personnel who meet the requirements as identified in 7 C.F.R. § 353.6 (Inspection). Inspections must be performed by federal agents or inspectors, or employees of a state plant protection agency who are authorized by the Secretary of Agriculture to perform field inspections.

Enforcement—prosecution examples:

- ***United States v. Am. Pallet Recycling L.L.C.*, No. 2:14-cr-00102-DRH-ARL (E.D.N.Y. Mar. 18, 2015):** USDA, OIG Special Agents determined that Raymond Viola, president and owner of American Pallet Recycling L.L.C., created counterfeit heat treatment stamps and stencils, which he used to stamp and/or stencil wood pallets being shipped overseas. He also created false certificates to accompany the wood pallets in order to make them appear to conform to International Standards for Phytosanitary Measures standards and the PPA. From about January 2009 through December 2010, Viola fraudulently stamped or stenciled wood pallets as heat treated, and subsequently sold them to companies for use in overseas shipping. Pallets such as those manufactured or recycled by Viola are the most common type of wood packaging material (WPM) used in international trade due to its use in storing and preventing damage to commodities. WPM is also a pathway for the introduction and spread of plant pests. Highly destructive wood borers and beetles have been introduced into countries through the importation of untreated WPM.

  In March 2015 American Pallet Recycling was sentenced to pay a fine of $100,000, serve 5 years' probation, and pay a special assessment of $400 for a felony violation of the PPA. Viola was sentenced to 3 years' probation and ordered to pay a fine of $1,000 and a $25 special assessment.

- ***United States v. Linkous*, No. 0:12-cr-60015-JIC (S.D. Fla. July 27, 2012):** Between May 2010 and March 2011, USDA, OIG conducted an investigation into Linkous and associates, who prepared false manifests and invoices to disguise Calamondin citrus plants (which are prohibited from being shipped out of Florida because they can carry

citrus canker and citrus greening disease) as types of plants that were not subject to the interstate shipping prohibition. Citrus canker disease causes defoliation and damage to the leaves and twigs of susceptible plants. It also causes lesions on the fruit of infected plants, rendering the fruit unmarketable.

In April 2012 four Florida residents pled guilty to conspiracy to illegally transporting quarantined citrus plants through interstate commerce in violation of the PPA. They were sentenced to 12 months' probation.

- ***United States v. Santa Maura Spice and Garlic*, No. 3:10-cr-01847-JM (S.D. Cal. Aug. 9, 2010):** USDA, OIG Special Agents discovered a scheme to export chilies from China and India to Mexico, via the United States, to avoid tariffs. The tariff rate for chilies shipped from China or India to the United States is approximately 2.5 cents per kilogram, while the tariff rate for chilies shipped from China or India to Mexico is 26 percent of the price of the chili, typically a much higher amount than 2.5 cents per kilogram. Pursuant to NAFTA, there is no tariff for chilies shipped from the U.S. to Mexico. The corporation provided false Place of Origin information to USDA inspectors in order to obtain multiple FPCs for red chili peppers, claiming they were grown in the United States, when they were in fact grown in, and imported from, China and India. With the false FPCs, the corporation was able to pay the lower tariff rate by shipping products from China or India through the United States to Mexico, instead of shipping it directly to Mexico from China or India.

  In May 2010 the corporation pled guilty to Title 18 charges of false statements and aiding and abetting based on the false FPCs. The California corporation was placed on 3 years' supervised probation, fined $50,000, and ordered to pay a $400 special assessment.

B. Endangered Species Act: 16 U.S.C. §§ 1531–1544

The ESA protects both plant species listed as endangered or threatened pursuant to 16 U.S.C. § 1532 of the ESA (ESA-listed), and plants listed in an Appendix to CITES (CITES-listed). A "plant" is defined for both purposes as "any member of the plant kingdom, including seeds, roots and other parts thereof." 16 U.S.C. § 1532(14) (2015). However, the prohibitions applying to such plants differ according to the list (ESA or CITES) on which the plant species appears.

ESA-listed plants: The ESA contains prohibitions specifically and uniquely pertaining to plants listed as either endangered or threatened under the ESA. Threatened and endangered species may be native to any place in the world; they do not need to be native to the United States. A plant species can be listed as endangered if it is deemed to be in danger of extinction throughout all, or a significant portion, of its range. *See id.* § 1532(6). A plant species can be listed as threatened if it is deemed likely to become endangered in the foreseeable future throughout all or part of its range. *Id.* § 1532(20). Examples of endangered and threatened plants include certain species of *Echinacea* (coneflowers), *Lupinus* (lupines), orchids, and cacti, as well as Johnson's seagrass, certain pitcher plants, certain species of cypress trees, and numerous species of plant endemic only to the Hawaiian islands. *See* 50 C.F.R. § 17.12 for a complete list of endangered and threatened plants. Note that many plants not listed under the federal ESA are nevertheless protected under state laws. If the state laws are violated, you may find related federal Lacey Act charges (see below), including felonies, even where ESA violations are not present.

In respect to endangered plants, unless authorized by a permit or covered by a limited exemption for imports by Native Alaskans, it is prohibited for any person subject to the jurisdiction of the United States to:

1. Import or export such plants
2. Remove and reduce to possession, or maliciously damage or destroy, any such plant from an area under federal jurisdiction
3. Remove, cut, dig up, damage, or destroy any such plant on any other area in knowing violation of any law or regulation of any state or in the course of any violation of a state criminal trespass law
4. Deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such plant
5. Sell or offer for sale any such plant in interstate or foreign commerce
6. Violate any regulation pertaining to such plants promulgated pursuant to the ESA

16 U.S.C. § 1538(a)(2) (2015); *see* 50 C.F.R. § 17.61 (2015). Notable, and perhaps puzzling, differences between the ESA-listed plant prohibitions and the ESA-listed wildlife prohibitions, are the lack of any broad prohibition against the unpermitted taking of any endangered plant, as well as the absence of any prohibition on possession of an endangered plant that was illegally taken.

A knowing violation of prohibitions (1) through (5) above involving an endangered plant species, or of any permit or certificate issued under the ESA, is a Class A misdemeanor, punishable by a fine of not more than $100,000 for an individual or $200,000 for a corporation (or twice the gross gain or loss caused by the violation), or a prison term of not more than 1 year, or both. 16 U.S.C. § 1540(b)(1) (2015); 18 U.S.C. § 3571 (2015). A knowing violation of the last listed prohibition is a Class B misdemeanor, punishable by a fine of not more than $25,000 or a prison term of not more than 6 months, or both. 16 U.S.C. § 1540(b)(1) (2015).

All of the above-listed prohibitions also apply to threatened plants, through 16 U.S.C. § 1538(a)(2)(E) (prohibiting any violation of a regulation issued under the ESA pertaining to any threatened species of plant) and the implementing regulation at 50 C.F.R. § 17.71 (applying all of the prohibitions relating to endangered species of plants to threatened species of plants as well), with one additional exception. Seeds of cultivated specimens of threatened species of plant are excepted from the prohibitions, provided that a statement that the seeds are of "cultivated origin" accompanies the seeds during the course of any activity otherwise subject to the regulations. *Id*. A knowing violation of 16 U.S.C. § 1538(a)(2)(E) is a Class B misdemeanor, punishable by a fine of not more than $25,000 or a prison term of not more than 6 months, or both. 16 U.S.C. § 1540(b)(1) (2015).

Various exemptions from the prohibitions and defenses appear in the ESA for fish and wildlife, but relatively few apply to ESA-listed plants. For example, there is a defense to prosecution if the defendant committed the offense based on a good faith belief that he was acting to protect any individual from bodily harm from any endangered or threatened species. *Id.* § 1540(b)(3). Outside of the movie The Little Shop of Horrors, it is hard to envision a circumstance where a plant species would be implicated. There are two exceptions that may, however, come into play in plant cases. One exemption that may apply to protected plants is that provided for the taking of ESA-listed species by Native Alaskans and the sale of nonedible by-products of species taken pursuant to this exemption, when made into authentic native articles of handicrafts and clothing. *Id.* § 1539(e). The second potentially applicable exemption is for certain antique articles that are: (1) at least 100 years old, (2) composed in whole or in part of ESA-listed species, (3) have not been repaired or modified with any part of any such species on or after December 28, 1973, and (4) entered at a port designated for such entries. *Id.* § 1539(h). This exemption is treated by statute as an affirmative defense, placing the burden of proof on the defendant. *Id.* § 1539(g). The U.S. Fish and Wildlife Service recently clarified its implementation of this exemption in Director's Order No. 210, issued February 25, 2014 (amended May 15, 2014), which is *available at* https://www.fws.gov/policy/do210.html.

CITES-listed plants: A completely distinct list of plants exists pursuant to CITES. *See* CITES, www.cites.org. Unlike ESA-listed plants that are designated through the Department of the Interior, plants listed under CITES are designated by the more than 170 countries, including the United States, that are signatories to CITES. Plants are listed in Appendix I, II, or III to CITES, depending on the degree of trade control needed for their protection.

- Plants listed on Appendix I are those the existence of which is threatened by international trade.
- Appendix II includes species not necessarily threatened with extinction, but in which trade must be controlled in order to avoid utilization incompatible with their survival.
- Appendix III contains species that are protected in at least one country, which has asked other CITES parties for assistance in controlling the trade.

CITES works by subjecting international trade in specimens of selected species to certain controls. All import, export, re-export, and introduction from the sea of species covered by the Convention has to be authorized through a documentation system. Trade in specimens of Appendix I species is permitted only in exceptional circumstances and requires documentation from both the country of export and the country of import. Trade in specimens of Appendix II species is permitted, as long as the trade has been determined not to be a detriment to the species and is accompanied by required documentation from the country of export. Trade in Appendix III species is the least controlled but requires, at a minimum, documentation regarding the country of origin.

The provisions of CITES are implemented pursuant to 16 U.S.C. § 1538(c) and regulations set forth at 50 C.F.R. Part 23. The ESA makes it unlawful for any person subject to the jurisdiction of the United States to engage in any trade in specimens contrary to the provisions of CITES, or to possess any specimens traded contrary to CITES, or to attempt to do so, or cause or solicit another to do so. 16 U.S.C. § 1538(c), (g) (2015). A knowing violation of this prohibition or of any CITES permit or certificate or implementing regulations is a Class A misdemeanor, punishable by up to 1 year in prison and a fine of $100,000, or twice the gross gain or loss, for individuals. *Id.* § 1540(b)(1); 18 U.S.C. § 3571 (2015).

Enforcement: The agency primarily responsible for enforcement of the ESA with regard to plant imports and exports is the Department of Agriculture. *See* 16 U.S.C. § 1532(15) (2015). Three additional agencies are charged with enforcement of the ESA: the Department of the Interior, the Department of Commerce, and the Department of the Treasury. *See id.* § 1540(e). Agents of each of these agencies are authorized to detain for inspection and inspect any package, crate, or other container, including its contents and all accompanying documents, upon importation or exportation. Such agents also may conduct arrests and seizures, as provided by law.

When seizures are contemplated, whether for forfeiture or for evidentiary purposes, it is wise to plan ahead for the storage and proper care and handling of the plants, particularly if they are living specimens. In addition to the biological importance of these living specimens, there is nothing worse than having to explain to a jury that the endangered plants the agency seized in good health from the defendant have perished in the custody of the Government. The cost of such care and storage can be paid from what has been called the "Lacey Act reward account" established pursuant to 16 U.S.C. § 1540(d) (providing for the use of penalties, fines, or forfeitures under the ESA to pay rewards and the costs of caring for, among other things, plants pending the disposition of criminal cases).

In addition to imprisonment and fine penalties set forth under 16 U.S.C. § 1540(b)(1) and 18 U.S.C. § 3571, forfeiture of both plants and equipment used to aid the commission of the violation (such as transport vehicles), restitution, community service, permit and license revocations (including import/export licenses), and debarment, all may be consequences of a criminal conviction.

ESA plant case examples include the following:

- ***United States v. Norris*, 452 F.3d 1275 (11th Cir. 2006):** Between January 1999 and October 2003, Manuel Arias Silva, an orchid dealer from Lima, Peru, made multiple shipments of orchids to George Norris of Spring, Texas. All species of orchids are protected and regulated under CITES, to which Peru is a party, along with the United States. Arias Silva would obtain a CITES permit for the shipments from Peruvian authorities, authorizing the export of certain numbers of artificially-propagated specimens of particular species of orchids. However, Arias Silva would then ship specimens of orchids not included on the CITES permit. Norris and Arias Silva admitted in their respective plea agreements that to conceal the illegal activity they would falsely label the protected species as a species included on the permit. Arias Silva would provide Norris a code or "key" that would provide a means for deciphering the false labels and identifying the true species of the orchids. One shipment in February 2003 included some 1,145 specimens, of which approximately 490 were of species not authorized for export by the accompanying CITES permit. Three of the shipments alone were valued at more than $45,000 based on the actual sales records from Norris' business.

  Each defendant pleaded guilty to the multi-count indictment charging conspiracy to import and importing plant specimens in violation of CITES, as implemented by the ESA. Norris was sentenced to 17 months' imprisonment and 2 years of supervised release for his role in the offenses. Arias Silva fled the United States after entering his guilty plea. He was sentenced in absentia to 21 months' imprisonment, 3 years' supervised release, and a $5,000 fine. *Norris*, 452 F.3d 1278–79.

- ***United States v. Cobb*, CR-12-1594 PHX ROS (D. Ari. Jan. 29, 2013):** Kenneth Brian Cobb was sentenced to 5 years' probation with 8 months of weekend incarceration, and was ordered to pay $32,000 in restitution for stealing 8 saguaro cacti from federal lands. He sold the cacti for approximately $2,000 each. He also exported two cacti to Austria without a valid export permit. Cobb pleaded guilty to a violation of the ESA and to theft of government property. For more information on this case, visit http://www.justice.gov/usao-az/pr/scottsdale-man-sentenced-stealing-cacti-public-lands.

C. The Lacey Act: 16 U.S.C. §§ 3371–3378

Plant provisions added by the Lacey Act Amendments of 2008: The Lacey Act, the United States' oldest wildlife protection statute, has for several decades been used to prosecute persons who traffic in fish and wildlife taken in violation of state, federal, tribal, and foreign laws. However, until the Lacey Act was amended in 2008, it provided only limited protections for illegally taken plants, defining "plant" in such a way as to exclude the majority of plants. The pre-amendment Lacey Act applied only to plants that were indigenous to the United States *and* listed under the ESA on one of the Appendices to CITES or on a state's protected species list. The pre-amendment Lacey Act also did not apply to plants taken in violation of foreign law.

Effective May 22, 2008, as part of the Food, Conservation, and Energy Act of 2008 (§ 8204 on prevention of illegal logging practices), the Lacey Act was amended to cover a much broader range of plants and plant products. A redlined copy of the Act identifying the provisions added by the 2008 Amendments may be found on the Lacey Act Web site maintained by the APHIS at http://www.aphis.usda.gov/plant_health/lacey_act/index.shtml.

As amended, the Lacey Act has three primary components relevant to combating international trafficking in plants, including illegal timber and products made from illegal timber. First, the Amendments changed the definition of the term "plant" to expand the application of the Lacey Act. "Plant" is defined broadly by the Act to mean "[a]ny wild member of the plant kingdom, including roots,

seeds, parts, or products thereof, and including trees from either natural or planted forest stands." 16 U.S.C. § 3371(f) (2015). Three general categories of plants remain exempt from the provisions of the Act under this definition: (1) common cultivars, except trees, and common food crops (including roots, seeds, parts, or products thereof), (2) scientific specimens of plant genetic material (including roots, seeds, germplasm, parts, or products thereof) that are to be used only for laboratory or field research, and (3) plants that are to remain planted or to be planted or replanted (essentially, live plants as in the nursery trade). However, these last two categories (scientific specimens and "planted" plants) are *not* exempt if the plant is listed in an appendix to CITES as an endangered or threatened species under the ESA, or pursuant to any state law that provides for the conservation of species that are indigenous to the state and are threatened with extinction. *See id*.

The Secretaries of Agriculture and the Interior promulgated regulations to define the terms "common food crop" and "common cultivar" used in the exemptions to the Lacey Act definition of the term "plant." Lacey Act Implementation Plan; Definitions for Exempt and Regulated Articles, 78 Fed. Reg. 40940 (July 9, 2013). The definitions of "common food crop" and "common cultivar" are set forth at 7 C.F.R. § 357.2, which explains that both terms apply to plants "produced on a commercial scale" and exclude plants listed in an appendix to CITES, as endangered or threatened under the ESA, or pursuant to a state law that provides for the conservation of species indigenous to the state and threatened with extinction. 7 C.F.R. § 357.2 (2015). The agencies maintain an illustrative list of common food crops and common cultivars on the APHIS Lacey Act Web site. The agencies, also by regulation, defined the term "tree" as used in the Lacey Act as "[a] woody perennial plant that has a well-defined stem or stems and a continuous cambium, and that exhibits true secondary growth." *Id.*

The second new component relevant to plants added by the Lacey Act Amendments is the prohibition making it unlawful to bring into the United States any plant or plant product taken in violation of a foreign law that protects plants or that regulates a variety of plant-related offenses. 16 U.S.C. § 3372(a) (2015). Thus, the Lacey Act now makes it unlawful to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant (as that term is defined in the statute), taken in violation of any federal, state, tribal, or foreign law that protects plants. *Id.* § 3372(a)(2). The foreign laws that serve as the underlying predicate must be plant-related laws. For example, a labor law violation by the timber harvester would not qualify as a predicate offense. Specifically, the Lacey Act enforcement provisions apply to any plant taken, possessed, transported, or sold in violation of any foreign law that protects plants or that regulates:

(1) The theft of plants

(2) The taking of plants from a park, forest reserve, or other officially protected area, or

(3) The taking of plants without, or contrary to, required authorization

Id. § 3372(a)(2)(B). The Lacey Act also applies to plants that are taken, possessed, transported, or sold (1) without the payment of appropriate royalties, taxes, or stumpage fees, or (2) in violation of any limitation under any foreign law governing the export or transshipment of plants. *Id.* In addition, the Lacey Act includes enforcement provisions if a person makes or submits any false record of any plant or plant product that is imported into the United States. *Id.* § 3372(d).

The third major new component brought about by the Lacey Act Amendments is the addition of a new import declaration requirement for plants and plant products. The Amendments make it unlawful, as of December 15, 2008, to import certain plants or plant products without an import declaration. *Id.* § 3372(f). The declaration must include, among other things, the scientific name of the plant being imported (or plant used to make a product being imported), value of the importation, quantity of the plant or plant product, and the name of the country from which the plant was harvested. *Id.*

Prosecutors should be aware that enforcement of this declaration requirement is being phased in pursuant to an interagency agreement. Although the Lacey Act Amendments established a 6-month period

before the declaration requirements would take effect, federal agencies eventually agreed to pursue a strategy of phased enforcement of the declaration requirement in order to accommodate logistical and programmatic issues faced by both the implementing federal agencies and importers. APHIS has published four federal register notices announcing the declaration requirement's phased implementation schedule and the groups of plant products identified by harmonized tariff schedule (HTS) chapter number included in each phase of enforcement. The most recent of these federal register notices, which announced the proposed Phase V of the declaration requirement phase-in, was published in February 2015. *See* Implementation of Revised Lacey Act Provisions, 80 Fed. Reg. 6015 (Feb. 6, 2015). All of these federal register notices are collected on the APHIS Lacey Act Web site. In addition, APHIS maintains a document titled "Schedule of Enforcement of the Plant and Plant Product Declaration" on its Web site that lists all plant product categories by HTS chapter number for which the declaration requirement is being enforced.

Penalties for violations of the Lacey Act: The penalties for Lacey Act violations were largely unchanged by the 2008 Amendments except that penalties for violations of the new declaration requirement were specified. Violations of the Lacey Act may be addressed in three basic ways: (1) through forfeiture of the goods in question, (2) through the imposition of civil administrative monetary penalties, and/or (3) through the imposition of criminal penalties. *See* 16 U.S.C. §§ 3373, 3374 (2015). A detailed explanation of how the Lacey Act penalty scheme applies to violations involving plants was provided in a previous article in the U.S. Attorneys' Bulletin. *See* Elinor Colbourn & Thomas W. Swegle, *The Lacey Act Amendments of 2008: Curbing International Trafficking in Illegal Timber*, 59 U.S. ATTORNEYS' BULL. 91, 94–96 (July 2011).

Enforcement: To date, enforcement actions under the plant provisions of the Lacey Act following the 2008 Amendments have included an administrative forfeiture and an enforcement investigation resolved through a criminal enforcement agreement.

- ***Dep't of the Interior v. Three Pallets of Tropical Hardwood,* INV No. 2009403072 (Office of the DOI Solicitor, June 22, 2010):** This administrative forfeiture action was handled administratively by the Department of the Interior. On June 22, 2010, the Department of the Interior denied a petition for remission filed by an importer seeking the return of a shipment of three pallets of tropical hardwood imported from Peru that entered the United States at Tampa, Florida. The pallets had been seized after information was received from a Peruvian business owner that the shipment was being made with stolen and forged documents. The shipment, valued at just over $7,000, was declared by an import broker under HTS code 4421 (covering finished wood products such as clothes hangers, blinds, toothpicks, clothespins, and canoe paddles). At the time, the Lacey Act declaration requirement was not being enforced for this tariff code under the phased enforcement schedule. However, the shipment actually contained raw sawn wood that should have been declared under HTS code 4407. The declaration requirement was being enforced for this tariff code at the time of the importation. This importer had used the proper tariff code of 4407 for prior imports of this kind.

  The denial of the petition for remission noted the history of use of correct tariff codes by the import broker and the importer's lack of diligence in handling the transaction, including his failure to request the required information on genus and species and failure to follow up on information that indicated that the shipment was questionable. Prior to entering into the business transaction to purchase the Peruvian wood, the petitioner had received an email from the seller, an individual in Peru, indicating that the company he was dealing with had gone out of business. While using business forms of the company that had gone out of business, the Peruvian individual indicated that she could sell Peruvian hardwoods to the seller. She asked that payment be made by money order made

out to her name, not the name of the company. The Department of the Interior stated that the petitioner could have sought information from the government of Peru to verify that he was doing business with a legitimate company or contacted APHIS for guidance and clarification. For more information about this case, visit http://declaration.forestlegality.org/files/fla/lacey_case_us_vs_three_pallets_tropical_hardwood.pdf.

- **Gibson Guitar Corporation (M.D. Tenn. 2012):** The other plant-related enforcement matter resolved since enactment of the 2008 Lacey Act Amendments involved the importation of ebony wood products from Madagascar by the Gibson Guitar Corporation. Gibson is a U.S. company that manufactures a variety of musical instruments, most notably, guitars. Gibson ordered ebony fingerboard blanks from a German company that obtained some of these parts from a forestry operator in Madagascar. Fingerboard blanks are used to make the fretboard of a guitar, which is attached to the neck of the guitar underneath the strings. Madagascar ebony is a slow-growing tree species and supplies are considered threatened in Madagascar due to overexploitation.

  On June 9, 2008, a Gibson wood product specialist traveled to Madagascar for a fact-finding trip arranged by Greenpeace, a nongovernmental organization. The Gibson representative received a translated copy of an order issued by the government of Madagascar that banned all harvest of ebony and prohibited the export of ebony except in certain forms. The order listed examples of products that could be legally exported, but fingerboard blanks were not specifically listed. Trip organizers informed the Gibson representative that their interpretation of the order was that musical instrument part "blanks" would be considered illegal to export.

  Following the trip, one of the trip organizers sent a report to Gibson's president and the Gibson representative who went to Madagascar noting the legal issues that may arise in importing products from Madagascar, such as fingerboard blanks. Gibson continued to order Madagascar ebony fingerboard blanks without seeking assurances from officials in Madagascar, or from the German supplier, that the wood it was purchasing from Madagascar was legally harvested and exported.

  Under a Criminal Enforcement Agreement, the United States agreed to defer prosecution of Gibson for criminal violations of the Lacey Act. Gibson agreed to pay a monetary penalty of $300,000. Gibson also agreed to make a community service payment of $50,000 to the National Fish and Wildlife Foundation to fund research and/or activities to promote the conservation, identification, or propagation of protected tree species used in the musical instruments industry. Gibson also agreed to withdraw its claim to Madagascar ebony that was seized in the course of the criminal investigation. This seized wood was valued at $261,844. In addition, Gibson agreed to implement a Lacey Act compliance program designed to strengthen Gibson's compliance controls and procedures.

III. Where to start

Plants cases can be approached pursuant to the above-described statutory scheme by answering a few basic questions to ascertain which statutes might apply:

- Is the plant species listed pursuant to either the ESA or CITES? (See the ESA.)
- Is it a noxious weed? (PPA)
- Is the harvest or trade in the plant or plant product otherwise regulated by state, federal, foreign, or tribal law? (Lacey Act) If so, how?

- What paperwork is required for the activity in question involving the plant? Was that paperwork accurately prepared and properly filed or submitted or used? (Title 18, Lacey Act, ESA)
- Did any agency issue any paperwork, authorizations, or permits related to the activity in question?
- Does the plant or activity fall within any statutory exception?

Once a possible violation is identified, the case would proceed as any other to identify any potential violations of the applicable laws, the identity of those responsible for the violation, and their mental state with regard to those violations (knowing, willful, negligent). However, because plants are a relatively unusual subject matter for most prosecutors, the following resources may be useful.

A. Investigative and implementing agencies

In most instances, the lead criminal investigation agency for a plant case will be either the OIG of the U.S. Department of Agriculture or the Office of Law Enforcement of the U.S. Fish and Wildlife Service, U.S. Department of the Interior. Criminal investigators from Homeland Security Investigations will also play a significant role in import/export cases. In many domestic plant cases, state officers are a significant component of the investigation team.

In addition to criminal investigators, inspectors and civil investigators play a key role in many cases. Within APHIS there is both an Investigation and Enforcement Service (IES) and a Lacey Act program, as well as two CITES specialists, one located on each coast. IES conducts civil investigations which, when appropriate, may develop into criminal matters that are then referred to the OIG. The Lacey Act program in APHIS consists of three people who implement the 2008 Lacey Act amendments related to plants, including receiving, controlling, and analyzing the plant declarations required under the Lacey Act, which may prove a key component of any import/export case. The other part of the import/export document picture is held by U.S. Customs and Border Protection, which receives and/or controls the required customs declarations and invoices.

The U.S. Forest Service (USFS) is also a font of information and expertise related to trees and the trade therein throughout the globe. In addition, USFS law enforcement officers are available to work on cases involving violations that occur on, or involving, National Forest System lands.

B. Laboratories

Several laboratories are actively engaged in plant identification work, including, among others, the USFS's Forest Products Laboratory in Madison, Wisconsin; the U.S. Fish and Wildlife Service's Forensic Laboratory in Ashland, Oregon; the APHIS Plant Protection and Quarantine Center for Plant Health Science and Technology Laboratory in Beltsville, Maryland; and the Thunen Institute in Germany. Be aware, however, that only the U.S. Fish and Wildlife Forensic Laboratory is certified for forensic work, although some others have worked with chain of custody issues.

Each lab has differing analytical capabilities (morphological identification, DNA, mass spectrometry, fiber analysis, plant pathogens, etc.). Careful consideration should be given to the best analyses for the particular question presented or evidence needed, which may vary depending on the statute at issue. For example, an ESA case may require species identification. Some species or specimens are easily identified by morphology; others require mass spectrometry. DNA may or may not be extractable depending on the processed or aged nature of the plant product. A PPA case may require pathogen identification and a Lacey Act case could involve determining the harvest location of timber. Each issue requires different tests from different laboratories. ECS prosecutors will be able to help you sort through these issues and identify the best scientific resources for your particular investigation and set of questions.

C. Other resources

There are a myriad of public resources available as well. Industry organizations have expertise in markets, trade names, and the economics of the plant trade. A number of non-governmental organizations have useful resources ranging from the ability to do trade analyses to experts on particular countries' timber, sometimes including what documents are required and maps of, and quantities of harvestable timber authorized within, legal timber concessions. Botanical gardens have subject matter experts regarding particular species or categories of plants.

Again, ECS prosecutors have contacts with a variety of these resources and would be happy to provide introductions and contacts for any particular circumstance.

IV. Conclusion

While the laws governing the harvesting of, and trade in, plants may not be well-known, they serve important purposes and violations carry significant criminal penalties. U.S. laws applicable to plants protect native crops and plant species from damage that may total in the millions of dollars each year, and they protect our country from the importation of dangerous invasive pests and diseases. They also protect plants threatened with extinction and provide tools to combat the illegal trade in valuable timber resulting in the deforestation of important tropical and boreal forests throughout our planet. We encourage you to pursue enforcement actions, as appropriate, under these statutes. ❖

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Working With Non-Governmental Organizations in Criminal Wildlife Cases

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The human desire to protect our wildlife is widespread. In virtually every nation, laws regulate the use of natural resources to ensure the continued existence of our animals, fish, and plants. In the United States, the enforcement of those laws is entrusted to law enforcement agencies and the prosecutors who work with them. However, burgeoning human populations, increasingly sophisticated and global illegal trafficking, and limited government resources leave enforcement authorities stretched beyond capacity.

The role of non-governmental organizations (NGOs) as interested parties involved in education, outreach, and sustainable management work, may serve to support the Government's mission in protecting these resources. The motives of these parties run the gamut from ensuring sustainable product sources to a moral belief in the right of all species to exist, and from scientific curiosity to an industry desire for an even commercial playing field. The proliferation of interested parties has resulted in a civil society that, like the illegal traffickers, is increasingly sophisticated and global.

Many of these NGOs have developed specialized interests or missions that have resulted in unique knowledge and access to information. At the same time, environmental law enforcement of all kinds has seen its capacity and manpower diminish. Consequently, some NGOs are taking it upon themselves to investigate violations or acquire information coincidental to their primary missions, and then bringing information to overworked law enforcement personnel.

This article discusses how NGOs, as independent actors with specialized knowledge and information, can play a role in environmental criminal cases, not dissimilar to that of a traditional cooperator. There are differences though, and the article addresses those unique issues that arise when dealing with NGOs as part of an investigation and prosecution. Finally, the article provides guidance to help ensure successful collaboration between government actors and NGOs.

I. Why work with NGOs?

Why should state actors work with NGOs at all? To answer that, we must look at the challenges and needs of law enforcement, and assess whether NGOs can assist with any of those. There are three major hurdles facing law enforcement: (1) limited enforcement personnel, (2) limited expertise in some of the environmental issues, ranging from relevant industries or trafficking patterns to foreign laws or biology, and (3) for certain types of cases, limited international reach.

First, and perhaps most significantly, environmental enforcement personnel are scarce. The majority of investigations are conducted by the U.S. Fish and Wildlife Service (FWS) or the National Oceanographic and Atmospheric Administration (NOAA), although other state and federal agencies contribute to the effort. Within those two major enforcement organizations, the FWS Office of Law Enforcement (OLE) currently employs approximately 202 special agents (and, when fully staffed, is only authorized to employ 261). FWS agents are responsible for investigating wildlife crimes within the United States and its territorial jurisdictions, including crimes involving international smuggling to and from the United States. The NOAA OLE employs approximately 92 special agents to investigate crimes throughout more than 3 million square miles of open ocean and more than 85,000 miles of coastline. The U.S. Department of Agriculture's (USDA) Office of the Inspector General (OIG), charged with investigating plant crimes, employs approximately 150 criminal investigators. The domestic crimes these agents investigate often take place in areas nearly impossible to patrol—forests, wetlands, rivers, and open ocean. In addition, the same investigators are charged with investigating illegal fish and wildlife cases, such as animal parts and timber products that enter the United States from other countries. To say that environmental criminal investigative resources are stretched thin domestically is clear, but they are stretched to the breaking point in the current international climate.

Second, U.S. agencies often lack expertise in the narrow, niche areas that arise in wildlife trafficking investigations, any one of which can be critical to a prosecution. The Government employs some of the best scientific experts in the world, but it simply is neither feasible nor reasonable to employ an expert on every possible topic. For example, the migration patterns of narwhal may be important in determining whether a specific specimen could have been illegally poached, but the expense of employing a scientist whose research focuses on narwhal biology is not the best investment of government resources, considering the incidence of narwhal poaching investigations (though they are surprisingly common). The same analysis can be applied to the biology of thousands of unique and endangered species, the details of foreign ecosystems, or the cultural implications of the trade in a specific animal.

Finally, wildlife crimes—which include poaching, as well as the trade in live animals, animal parts, food products, timber, and more—are increasingly international and necessitate international efforts. Criminal enterprises large and small can now find buyers on different continents just as easily as in their own backyards. The international aspect of many wildlife cases introduces unique difficulties for investigative agencies. While U.S. Customs has thousands of hard-working border and trade specialists, they are rarely trained to know the difference between legitimate trade products and the illicit trade with regard to wildlife. FWS has trained inspectors at some ports, but there are only about 150 such expert inspectors. Illicit international trade is decimating wild populations of elephants, rhinoceros, narwhal, rosewood, and other species. The best way to detect and prevent illicit trade is to know what is coming before it hits our ports, but the U.S. agencies focused on wildlife crime have a very limited international presence.

The FWS recently placed its first foreign attaché in Bangkok, Thailand. They anticipate placing additional attachés soon in Botswana, Peru, and Tanzania, and hope to have a few more in coming years. Neither NOAA nor USDA currently employs any overseas attachés. This is not to say that these agencies do not gather as much international intelligence as possible, but there is a reason that the FBI and Homeland Security have attachés throughout the globe—there is no substitute for on-the-ground interaction and in-country knowledge when so much illegal activity involves actors in foreign countries. The lack of agency personnel overseas is a limitation when it comes to rooting out international trade in illegal wildlife and timber.

In summary, the Government has effective but limited investigative resources, specialized expertise, and international reach. The analysis now turns to whether NGOs are capable of productively bolstering government capabilities.

Unlike environmental enforcement personal, NGO employees are not scarce. In the environmental world, non-governmental actors abound both domestically and internationally. For every investigator who is attempting to determine whether an import is legitimate, there are scores of NGO employees who have, among other things, researched that particular species of wildlife, interacted with potential poachers, or are currently determining wildlife population statistics. Internationally, NGOs are frequently embedded in the culture and communities in which they operate, which makes them privy to valuable information. The relative abundance of NGO personnel and information can help reinforce limited environmental law enforcement resources, even though NGO employees are not government investigators. Their value as a force multiplier to law enforcement is therefore dependent on both sides' recognition of, and adherence to, their respective roles. That dynamic is discussed at length in the next section.

The value of NGO expert knowledge should be readily apparent to government officials. NGOs, including universities, are preeminent employers of specialized experts. These are often the individuals relied on for expert testimony at trial or for non-testifying consultation. They are the people publishing in academic journals and are often the go-to sources when it comes to highly-specialized information.

The scope of international reach is another area where many NGOs excel. While governments are properly constrained from acting on another sovereign's soil, NGOs and their employees and volunteers are far less constrained. A special agent from FWS does not have the authority to independently conduct overseas investigations inside another sovereign nation, yet NGOs, when acting in their own independent interests and not in coordination with law enforcement, can and do collect information in nearly every country in the world. Their motivations vary, from scientific data validation to conservation advocacy or investigating human rights abuses, yet they nonetheless have eyes and ears on the ground. NGO employees often live in remote foreign countries, speak local languages, and know the local environment, both physical and political. This boots-on-the-ground knowledge certainly has value to law enforcement officers working on international trafficking cases.

From this brief analysis, it is clear that NGOs can contribute to U.S. environmental law enforcement goals. The fact remains that the two sides operate in different capacities. Government law enforcement can gather information in ways that are not available to the public and, conversely, private parties can operate in ways that law enforcement cannot, particularly overseas. Investigators are held to a standard of impartiality and privacy that most NGO employees are not, and criminal law enforcement must prove allegations beyond a reasonable doubt with admissible evidence. NGOs will have different agendas and needs, including biases and publicity concerns. Navigating these differences is the key to successfully working with an NGO and will be the focus of the remainder of this article.

II. Suggestions for managing an investigation involving an NGO

Like any working relationship, conducting an investigation in cooperation with an NGO works best when clear guidelines are established at the outset. The following sections offer a few rules that have been useful in successfully managing investigations that rely, in any part, on NGO information.

A. A candid discussion about roles

A candid discussion about roles and expectations should begin any work with NGO cooperators, just as with any more traditional cooperator. In the authors' experience, NGO personnel have been receptive to frank discussions regarding the strict ethics and protocols required in a criminal investigation. NGOs appreciate that there is a role for criminal sanctions, civil sanctions, and general awareness-raising publications. If the information points to potential criminal conduct, then the best remedy from a deterrence and environmental protection perspective may be criminal sanctions—yet those sanctions are not possible if the relevant criminal investigative procedures are not followed.

Criminal investigators should advise the NGO of what those basic rules are, as discussed below, and should further advise the NGO to analyze their priorities to be sure that the limitations of a criminal investigation are worth the constraints on their usual modus operandi. Investigators and prosecutors should make abundantly clear the potential downsides, to both the case and the organization, of beginning to cooperate and then later ignoring the required constraints. Enforcement personnel should consider carefully any past experiences with the NGO and weigh the potential benefits of engaging with that entity against the risks. If both sides determine that it is advantageous for the NGO to cooperate, both sides should reduce that conversation about roles and expectations to writing. In that initial conversation, the following topics, among others, should be discussed.

Information flows only from the NGO to the Government: The first ground rule is that the information flows only one way: from the NGO to the government. The NGO must understand that enforcement personnel will not discuss investigatory progress or any information coming from other sources (though at times NGOs may gain insight simply from the questions asked and requests made). The NGO does not become a member of the investigation team, but rather fills the role of a cooperating individual or expert witness.

Another approach may be to treat an NGO cooperator in the same manner that the Department of Justice has been instructed to treat news media. The relevant regulations are set forth in Title 28, Section 50.2 of the Code of Federal Regulations (CFR). The CFR states that, from the time an entity is the subject of an investigation, information regarding an investigation should not be released to the media, with a few specific exceptions. The proper topics are largely limited to incontrovertible facts the disclosure of which has a legitimate law enforcement purpose, and the length and scope of the investigation. Even within those limits, because the NGO employee could become a witness, any information that the Government provides could later become fodder for claims of bias or collusion.

NGO actions and confidential informants: Perhaps the most important rules to establish with an NGO are those covering their case-related conduct during the investigation. A typical NGO collaboration usually falls into one of two categories: (1) the NGO completed its fact gathering and brought the results to the Government, or (2) the NGO began its fact gathering that continues parallel to the Government investigation. In the first instance, there is less concern about continued investigative actions because the NGO will have finished its field work on that matter and will likely do nothing further unless at the request of law enforcement. In the second instance, however, individuals within the NGO are essentially operating as confidential informants (CIs), even if they are not officially signed on as CIs.

As an expert in the subject matter of the investigation, the NGO is likely accustomed to acting on its own initiative, especially if it was working on the issue prior to its collaboration with law enforcement. However, once collaboration begins, law enforcement is responsible for the investigation and possible prosecution. At this point, as with any other cooperator, it is essential that the Government never direct, *or appear to direct*, an NGO cooperator to do anything that it could not legally do itself. The fruit never falls far from the poisonous tree. Accordingly, the law enforcement agency must establish control of the relationship with a cooperating NGO.

The risk that an NGO might act on its own initiative, to the detriment of a law enforcement investigation, can be minimized by taking the following pre-emptive actions:

1. Establish a clear understanding and acknowledgement that the investigation now belongs to the Government and that any actions taken by the NGO could be viewed as the Government's action. Accordingly, the investigation is the Government's investigation to control and direct. If the NGO is not compliant, document that and stop all communications with it outside of formal legal process (for example, a grand jury subpoena).

2. Establish regular meetings or phone calls to ensure real time awareness of what the NGO is planning or doing. If the NGO is taking actions for the Government, then knowledge of those actions will be imputed to the Government. The Government should, therefore, take concrete steps to ensure that it actually has that knowledge. The NGO should be advised, ideally in writing, that it cannot act without first obtaining approval from the lead agent.
3. Establish a lead agent and a lead representative of the NGO for all communications between the NGO and the law enforcement team. All communications, including those related to strategy, actions, and outcomes, should be shared through these points of contact.
4. Secure the NGO's agreement to share with law enforcement all information obtained by the NGO, in a timely manner, without qualification or regard to whether it is incriminating or exculpatory.
5. Establish a rubric for which, if any, interactions between the NGO and others should be taped. In a traditional investigation, the cooperator will tape interactions. However, in the NGO context, that NGO may merely be taking actions that it would take for its own benefit, regardless of the investigation. The determination of which interactions will be taped is case-dependent, but there should be rules regarding the delineation so that the Government can later explain why some interactions were taped and others were not.
6. Reduce to writing the working relationship between the NGO and law enforcement. This could be accomplished through a formal agreement, such as a Memorandum of Understanding (MOU) or a contract similar to those used with CI's. It could likewise be informally acknowledged through an email or letter.

To a great extent, law enforcement should be guided by any past working relationships with a particular NGO, as well as the complexities of the particular investigation. Depending on those experiences and the nature of the investigation, you may opt for a less formal agreement or insist on a signed MOU. In the end, it is entirely up to the law enforcement team whether to begin to work with an NGO or whether to continue to work with an NGO once a relationship is already in place. The investigative team should not be afraid to set the tone and the rules for the relationship. This includes making changes to the working relationship or ending it all together.

Establish procedures for press and publicity: Not only does information not flow from the Government to the NGO, in many circumstances care must be taken that the NGO's information does not flow from the NGO to anyone else. Information obtained and held by the NGO on the subject of the investigation should be restricted from being disseminated without prior approval by the criminal investigators and/or prosecutors. This will often create tensions and require a degree of trust between NGO and law enforcement personnel.

NGOs, in large part, are in the business of collecting and disseminating information. University researchers feel the pressure to publish or perish, and environmental and industry groups may feel pressure to bring attention to their cause or their organization and to immediately stop further illegal conduct by shedding light on the malefactor or trafficking technique. While disclosure can be very helpful to the NGO, it can be simultaneously very damaging to the ongoing investigative work. A successful publicity effort will, at the least, cause the subject of an investigation to change behaviors and, at the worst, will cause that same subject to hide or destroy evidence of criminal actions and flee. In either case, a non-public investigation will be severely compromised.

Setting the rules surrounding publicity at the outset is therefore imperative to a successful relationship. As mentioned previously, NGOs have their own internal concerns—a donor may be expecting results within the fiscal year or grant funding may be ended without tangible evidence of

progress. The investigation team must determine whether these factors will influence an NGO's need to publish information, and then both sides must determine if collaboration is advisable in that situation.

Establish who could be a witness and explain what that means: The NGO and the investigative team should also designate who within the organization may be a potential witness and discuss what that means. This is important because, unlike the typical fact witness, an NGO is an organization. Depending on the circumstances, that organization may be enormous, and without express agreement as to who is part of the investigation, a case could be compromised.

The government agent must then explain the rules regarding anyone in the organization who may be a witness, whether that is a fact witness or an expert witness. The witnesses must disclose prior statements they have made on the topic of the investigation and should refrain from creating additional statements. Though these considerations are typical of any witness interaction, a typical witness is not an organization. In the current environmental world, investigators, prosecutors, and NGO employees may interact in many ways, including industry meetings, topical workshops, and symposiums. By designating witness roles, any interaction between government investigators and non-witness employees of the NGO can still take place without the restrictions surrounding interactions with fact or expert witnesses.

Discuss document retention and discovery rules: In the law enforcement world, substantive documents pertaining to an investigation must be retained. An NGO employee may never have heard the terms *Giglio* or *Brady*, and is unlikely to know what documents or items must be preserved. Moreover, where an NGO is relatively large, one employee may be the point of contact for law enforcement while another may be blissfully unaware of the cooperation the NGO is providing. Therefore, at the outset, the parties should discuss what document retention is required. At a minimum, the NGO should understand that it must retain all relevant investigative documents and communications, no matter the witness status (or lack thereof) of the holder of the documents, and be ready to provide those to the Government when necessary.

The scope of information collected by a private actor that may become discoverable is highly case-dependent and is beyond the scope of this article. That said, the January 4, 2010 "Guidance for Prosecutors Regarding Criminal Discovery" (the Ogden Memo) is a good starting point. It advises that "prosecutors are encouraged to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes." Memorandum from former Deputy Attorney General David Ogden to Department of Justice Prosecutors (Jan. 4, 2010), *available at* http://www.justice.gov/dagmemorandum-department-prosecutors.

Manage expectations: Another topic at the initial, candid discussion should concern the expectations regarding results and timing. This is important for an NGO because its information was often gathered, or is being gathered, with an eye towards a non-law enforcement programmatic goal. It will likely want to use that same information for its own purposes, and so its expectations of the results and timing of the government investigation take on additional weight. Further, people outside of law enforcement often find it difficult to grasp the amount of work and time that is involved in a criminal prosecution. They often do not know the rules of evidence or fully appreciate the significance of the criminal burden of proof. It is helpful to explain how an inference that is "obvious to anyone" may not be "obvious" when a jury considers only the admitted evidence and listens to a defense attorney's view of where there may be reasonable doubt. For an NGO that is working on time-constrained grants or funding, the sometimes slow grind of the wheels of justice, coupled with the uncertainty of a positive outcome, may deter it from becoming involved in an investigation. But it is far better to find that out in the beginning than halfway through an investigation.

B. Always corroborate NGO-derived information

Once the investigative team has a candid discussion with a would-be NGO collaborator and both parties are ready to move forward, there is still another important factor for success: government corroboration of any NGO information. Though all potential witness information should be corroborated, it is especially important here because NGO witnesses will undoubtedly carry an inference of bias, and because it is in the Government's best interest to have alternative sources of evidence where possible. Often the information gathered by an NGO is not in admissible form and will need to be re-obtained through official channels. For example, an NGO may have a copy of an invoice, but the Government will need to obtain the original through a search warrant or subpoena served on the business entity that created or received the invoice.

Any defense attorney or adverse party to an environmental investigation will immediately attack the credibility of an NGO source because, true or not, the employees of most NGOs (certainly environmental NGOs) are assumed to come from a pro-conservation biased viewpoint. This perceived bias is lessened somewhat when dealing with industry groups or academics, but it is still greater than with many typical fact witnesses. The assumption will be bolstered if the NGO is shown to have advanced its own conservation, research, or programmatic interests by bringing information to criminal investigators. As a result, investigators must diligently attempt to corroborate or alternatively source as much NGO-derived information as possible.

For example, if an NGO provides information that illegal shipments are being moved through U.S. Customs and provides third party foreign customs data, the investigation team should go through official channels to obtain the export paperwork from the foreign country. Or, if an NGO employee has a contact with a subject, the investigative team can ask to have an undercover government agent introduced to the interaction. If an NGO employee states that they received phone calls, texts, or emails from a subject, the Government has the ability to subpoena those records from the telephone company or Internet provider. Even prior to a plea, indictment, or trial, utilizing official and traditional investigative sources will help eliminate claims of bias and verify the information being provided by the NGO before it is tested in court.

The second benefit of thorough validation, which is no different with regard to NGOs than any other witness, is the minimization of reliance on lay witnesses. Criminal investigators have typically been on a witness stand before and are best equipped to handle the potentially stressful process. Government-gathered information thus provides, at the very least, an experienced backup witness to any lay witness that may become difficult to locate or who has difficulty on the witness stand.

III. Case study: Operation Wild Web

In 2012 the FWS initiated an intensive and broad project known as Operation Wild Web. The operation was born from research conducted by an NGO known as the International Fund for Animal Welfare (IFAW) and compiled in the publication, *Killing with Keystrokes*. In preparing that report, IFAW conducted extensive research on Internet advertisements and found that, to a great extent, the sale and purchase of exotic, protected, or prohibited wildlife through the Internet went unchecked. The problem for IFAW, as an NGO with no law enforcement authority, was that there was little the organization could do about the problem aside from publishing its findings.

The FWS was not surprised by IFAW's findings. Conducting enforcement actions against illegal wildlife sales on the Internet was something FWS special agents engaged in on a regular basis. The problem from the enforcement side, however, was that regularly catching and stopping one or two isolated Internet sales did little to curb the problem. The limited law enforcement resources meant that the risk of being caught was minimal, so there was little deterrence for those engaging in illegal Internet

sales. The answer to these problems came in the form of an investigative collaboration between the FWS, partner law enforcement agencies, IFAW, and other NGOs.

After reading IFAW's publications and findings, the FWS field office in Los Angeles developed Operation Wild Web. The FWS partnered with other federal, state, and foreign wildlife and police agencies, including enforcement officials in Indonesia, Singapore, and Thailand, to field scores of agents and officers across the United States and overseas to simultaneously attack illegal wildlife sales on the Internet. The format was simple: each team operated during a coordinated 2-week period and focused exclusively on illegal Internet sales. Investigations were fast—illegal items were identified, undercover contacts were made, and transactions were executed, followed by immediate takedowns, arrests, and eventual prosecutions. The goal at the end of the 2 weeks was to amass as many cases and contraband wildlife items as possible to expose the problem and deter wrongdoers. One small case will never garner the media attention necessary to promote deterrence, but scores of cases and piles of seized evidence create an attractive story for local and national media outlets. All enforcement and prosecutorial agencies agreed to coordinate the drafting and release of media information about the operation, thus maximizing public awareness and subsequent deterrence. This concept was promising, but its success was really made possible by close cooperation with NGOs.

Early in the development of the concept for Operation Wild Web, the lead FWS agent sought the cooperation of IFAW, the Humane Society of the United States (HSUS), and the Freeland Foundation, another NGO with significant operations in Southeast Asia. The FWS wanted IFAW, the HSUS, and Freeland to use their staff and vast networks of volunteers and supporters to help identify potentially illegal advertisements. All three NGOs were eager to cooperate with the operation and agreed to identify and provide responsible staff or volunteers for the project. The NGOs also agreed to some basic ground rules. These included an understanding that the information flow would be one way from the NGOs to the law enforcement agencies and that the NGOs would not be privy to investigative information. The NGOs also agreed that their staff and volunteers would participate in a training session provided by the FWS and that they would not engage in any undercover contacts or independent investigations. They were to simply identify suspicious advertisements and send the Internet addresses of the ads to the appropriate Operation Wild Web team leaders.

The FWS provided a Web-based, real time training for all of the NGO volunteers and staff members, giving them information to help them identify potentially illegal advertisements, as well as instruction on what to do with any suspicious advertisements they found. The NGO staffers and volunteers were instructed to begin their online searches a few days prior to the start of Operation Wild Web.

When the operation started in August 2012, there were seven teams of federal and state wildlife officers simultaneously working throughout the United States. There were also teams operating in Indonesia, Singapore, and Thailand. At the beginning of each day, team leaders would review leads submitted the night before from the cadre of volunteers. Those leads were assigned to operation investigators. Many Operation Wild Web teams were in the field making their first contacts and arrests within 24 hours of the operation's opening day. At the conclusion of the 2-week operation, the Operation Wild Web teams had conducted approximately 150 buy/bust operations and confiscated hundreds of contraband wildlife items, including live endangered animals; exotic skins from tigers, leopards, and jaguars; and live invasive species such as pythons and piranhas.

Following the operation, draft media releases were shared between the enforcement agencies and the NGOs, and each released its statement on the same day and time. Photographs and public information, such as charging documents and probable cause affidavits, were liberally shared among all of the participating agencies and NGOs. The FWS tracked 479 news articles about the operation within 24 hours of the joint releases. The value of such positive media exposure was estimated to be more than $109,000—the amount of taxpayer dollars the FWS would have had to spend to achieve equal media

attention about the agency, its mission, and the problem of illegal Internet wildlife sales. A media firm hired by IFAW reported 335,000,000 Internet "hits" on stories about the operation worldwide within 36 hours of the media releases.

Cooperation between the NGOs and the FWS during this operation yielded four major positive results for the FWS, cooperating state agencies, and state and federal prosecutorial agencies. First and foremost, illegal wildlife was removed from the market, and scores of criminal actors were caught. Second, it further exposed the problems associated with the global use of the Internet to buy and sell exotic wildlife and wildlife parts. Third, it strengthened an environment of cooperation and communication between federal, state, and foreign law enforcement agencies. Fourth, the widespread media attention served to educate the public and expose the problem. Information about enforcement actions is one of the most effective methods of deterring people from engaging in illegal activities. Operation Wild Web serves as an excellent example of how criminal justice agencies can and should effectively work with NGOs on a national and international scale.

IV. Conclusion

The worlds of law enforcement and NGOs have typically been strictly separated, but law enforcement goals can be achieved by working with NGOs in the environmental realm. So long as government officials are candid regarding the rules of criminal enforcement and what is expected of NGOs, and the NGOs are equally candid about their ability, or lack thereof, to comport with those rules, then collaboration can advance the Government's objectives of protecting resources and stemming the flow of illegal wildlife and timber. ❖

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The opinions expressed in this article by SA Newcomer are his own and do not necessarily represent the opinions of the Fish and Wildlife Service, the Department of the Interior, or the United States Government.

A Primer on Sentencing in Wildlife Crimes Prosecutions

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I. Introduction

Today's headlines reflect a wide range, as well as increasing sophistication and scope, of wildlife crime. Wildlife crime, especially those crimes with international connections, has evolved into more organized, traditional "white collar" crime. Monies generated by such crime may even be tied to terrorist activities. *See* The Associated Press, *Officials: Wildlife Products May Finance Terrorism*, N.Y. TIMES, June 16, 2014. Wildlife trafficking—whether it involves the sale of Atlantic Striped Bass illegally caught in federal waters, smuggling rhinoceros horn trophies or native reptiles out of the country, or falsely declaring exotic birds or timber at the border—is driven by the same motive as drug crimes: profits. With rhino horn selling for more than gold, for example, offenders can realize millions in financial gain. The risks of being caught are low. (There are more than 90 times as many FBI special agents as there are U.S. Fish and Wildlife special agents.) For more facts and statistics, visit https://www.fbi.gov/stats-services/publications/todays-fbi-facts-figures/facts-and-figures-031413.pdf/view and http://www.eenews.net/stories/1060011028/.

A. Obtaining the deterrent sentence

High profits and low risk of detection make it imperative that the cases prosecuted result in deterrence. Some courts have imposed significant prison sentences, fines, and restitution, but it is all too common for a court to sentence particularly leniently in wildlife cases. While the statutory maximums under most relevant statutes are 5 years or more, and the Sentencing Guidelines will usually support a deterrent sentence, courts will often depart downward simply because wildlife crimes are not viewed as seriously as crimes involving drugs or guns.

Thus, the reality of wildlife prosecutions is that deterrence can be difficult to achieve given the high profit margins and the low risk of both detection and any resulting significant prison sentence. From a prosecutor's perspective, this reality means that wildlife prosecutions should be developed with an eye towards obtaining a deterrent sentence, that is, in most cases, a significant term of imprisonment for the trafficker and/or the disgorgement of a company's illegally gained assets, plus a meaningful penalty.

The purpose of this article to provide a review of the applicable statutory and Guidelines framework, and suggest steps prosecutors may take, with that framework in mind, to best obtain an appropriate deterrent sentence.

B. Statutory maximums

For the most part, statutory maximum penalties for serious wildlife crimes are adequate to create deterrence. For example, the most commonly used wildlife statute, the Lacey Act, 16 U.S.C. §§ 3371–3378, carries a statutory maximum for a Class D felony offense of 5 years in prison and a fine of $250,000, or twice the gross gain or loss. 16 U.S.C. §§ 3371(d), 3373(d)(1) (2015); 18 U.S.C. § 3559 (2015). Forfeitures and restitution are also available, and supplemental sentencing may be sought (such as public education, community service, or habitat restoration).

In some instances, the underlying wildlife statute provides only for civil penalties or criminal misdemeanors, even for the most serious crimes. For example, the Magnuson Stevens Act, under which most federal fishing is regulated, provides no criminal penalties for substantive fishing violations, no matter how egregious or recidivist. The Endangered Species Act imposes only a Class A misdemeanor, even if the defendant deliberately wiped out an iconic species. However, in most such cases, it is possible to charge other related crimes that carry much more significant statutory maximums. If the illegally taken wildlife is subsequently trafficked, a Lacey Act felony violation might be available. If the wildlife is imported or exported (often without the required documents or with false paperwork), a smuggling violation may have occurred, which now carries a 20-year maximum prison term. Other charging options may include false statements, money laundering, obstruction, or a Foreign Corrupt Practices Act violation.

Prosecutors will want to carefully select from among the potential charges at the outset of a prosecution, keeping an eye on what would best support a deterrent sentence. This means looking for a felony smuggling (10 or 20-year maximums) or Plant Protection Act (10-year maximum) violation in a serious case, but also considering a lesser included misdemeanor charge where the conduct is simply less egregious. This exercise of prosecutorial discretion is, of course, a key first step in ensuring that the punishment fits the crime.

II. U.S. Sentencing Guidelines framework

A. Background

Once the statutory maximum framework is determined, the real advocacy challenge comes within the framework of the U.S. Sentencing Guidelines. In a world where the Guidelines are advisory, prosecutors must persuade federal judges that a Guidelines sentence is necessary, that no downward variance is warranted, and that a sentence satisfies all the goals of sentencing under 18 U.S.C. § 3553(a). Where the defendant is a wildlife offender, this burden of persuasion can be heavy. Judges do not encounter wildlife crimes as often as other types of offenses, and may have little context or framework to rely on in making their decisions. A judge or probation officer drafting a recommendation may struggle with the prospect of sending an offender to prison for a significant term over, for example, illegally dealing in snakes or insects. It is up to the prosecutor to provide the information needed to make such a prospect not only palatable, but obviously necessary.

The starting point is obtaining the correct Sentencing Guidelines calculation. Wildlife crimes, even if charged solely as a smuggling count, fall under § 2Q2.1. Section 2Q2.1 applies to all federal wildlife Class A misdemeanor or felony prosecutions.

B. Section 2Q2.1: Offenses involving fish, wildlife, and plants

Baseline, § 2Q2.1(a): All wildlife sentencing calculations begin with a base offense level of 6, as established by this section.

Specific offense characteristics, § 2Q2.1(b): Specific offense characteristics are set forth here. Each increases the base offense level. A good practice is for prosecutors to carefully review, early in the investigation, each of these three characteristics as they may apply to his or her case, in order to assess the need for the investigation to seek relevant evidence.

First, offenses committed for a pecuniary gain or involving a commercial purpose or pattern of similar violations receive a 2-level enhancement. *See* U.S. SENTENCING GUIDELINES MANUAL § 2Q2.1(b)(1) (2014). Application Note 1 provides that any unlawful conduct involving wildlife done "for receipt of, or in anticipation of receipt of, anything of value, whether monetary or in goods or services" is considered to involve "pecuniary gain." *Id.* § 2Q2.1(b)(1) app. 1. Thus, transportation or exportation of wildlife for sale to another is conduct involving a commercial purpose and for pecuniary gain. Similarly, providing guiding services for a fee is conduct involving a commercial purpose and for pecuniary gain. In most cases involving the trafficking or mislabeling of wildlife, the intention of the defendant to profit is fairly obvious. Prosecutors should be mindful that this enhancement may not be applicable in cases involving an illegal taking, where, for example, an individual illegally shoots a wolf for sport but then leaves the carcass to rot. However, this specific offense characteristic will apply in most wildlife cases and underscores for probation officers and judges that wildlife crime is, like many other crimes, driven by a profit motive and greed.

Second, offenses involving wildlife not quarantined as required by law, or creating a significant risk of infestation or disease transmission potentially harmful to humans or wildlife, also receive a 2-level enhancement. *See id*. § 2Q2.1(b)(2). Instances in which this enhancement is applicable include smuggling live birds or trafficking in turtles with a carapace length of less than 4 inches. Prosecutors do not need to prove that the wildlife in question actually tested positive for disease or that any infestation occurred. The enhancement is justified merely "where the offender violated a wildlife regulation designed to protect public health, regardless of whether the particular animals with which the offender was involved were infected with any disease." *United States v. Narte*, 197 F.3d 959, 963–64 (9th Cir. 1999) (adopting reasoning of *United States v. Eyoum*, 84 F.3d 1004, 1009 (7th Cir. 1996), in which the Seventh Circuit upheld the application of the 2-level enhancement under § 2Q2.1(b)(2) for the importation of small turtles, and acknowledged the well-documented health risks associated with small turtles). Early inquiry should be made into applicable quarantine or health laws. The invocation of this specific offense characteristic can serve to bring home to probation officers and judges some of the serious possible ramifications of wildlife offenses.

Third, there is an enhancement depending on:

(1) The market value of the fish, wildlife, or plants (resulting in an increase according to the table in § 2B1.1(b)(1)), or

(2) The status (depleted marine mammal population or species listed as endangered or threatened by the ESA or in Appendix I to CITES) of the species at issue.

See U.S. SENTENCING GUIDELINES MANUAL § 2Q2.1(b)(3) (2014). The Sentencing Guidelines require the application of whichever enhancement is greater. The first of these enhancements varies with the value; the second enhancement is a flat four levels. So, for example, if the fair market retail value of 100 pounds of Black rhinoceros horns is approximately $2,498,000, then the enhancement, according to a cross reference to § 2B1.1, is 16 levels. Black rhinoceros is also a CITES Appendix I listed species, which would result in a four-level increase according to § 2Q2.1(b)(3)(B). However, because the Guidelines require the greater of the two calculations, the 16-level increase would apply. *See id.*

Determining fair market retail value under § 2Q2.1(b)(3): "Market value" in wildlife cases is the most important factor for sentencing purposes. It is the only factor that can increase the base offense level significantly and, thus, determines whether the Guidelines offense level will support a jail sentence.

For that reason, assessing true market value often is a sticking point between parties negotiating a plea agreement.

"[M]arket value . . . shall be based on the fair-market retail price." *Id.* § 2Q2.1 app. 4. *See, e.g.*, *United States v. Dove*, 247 F.3d 152, 159 (4th Cir. 2001) (rejecting defendant's contention that market value should be calculated using the wholesale price when there is evidence of later sales); *United States v. Eyoum*, 84 F.3d 1004, 1007 (7th Cir. 1996) (rejecting defendant's assertion that "market value" should be calculated using the "smuggler's price" when agreed upon by defendant and a willing buyer as "squarely against the meaning of 'market value' under § 2Q2.1(b)(3)(A)."). Defendants often request a reduction in market value due to damage to the wildlife or failure to sell the wildlife. This argument has been rejected. *See United States v. Oehlenschlager*, 76 F.3d 227, 230 (8th Cir. 1996) (court determined the market value as that of the price of the live birds, even if some of the eggs had not hatched).

Prosecutors can gather evidence from a variety of sources supporting the actual retail, versus the wholesale, value of particular wildlife (that is, TRAFFIC reports surveying the retail price for raw rhinoceros horn in Asia; industry pricing publications such as Urner Barry for fish; advertisements for the wildlife or wildlife parts in question; or admissions from the defendant). It is very important to collect this evidence early in the investigation. The relevant fair market retail value is that at the time of the offense. Often several years can pass between the first offenses, particularly where the case involves a long-term undercover investigation, and the sentencing. It is far simpler to document evidence of the fair market retail value in real time than it is to determine those prices from a historical perspective. Not only will some evidence no longer exist years after the fact, that which does may be obtained only through investigative tools such as grand jury subpoenas, which are likely no longer available by the time of sentencing.

Where fair-market retail price is difficult to determine, Application Note 4 of § 2Q2.1 provides that courts may make a reasonable estimate using any reliable information, such as the reasonable replacement or restitution cost, or the acquisition and preservation (for example, taxidermy) cost. For example, in a case in which the retail value of gall bladders (from poached black bears) is too varied or there is no "legal" market for the product, a prosecutor could offer at sentencing a state regulation establishing the replacement value for a black bear lost due to poaching. Prosecutors have developed creative methods for determining market value and, for the most part, courts have accepted them. *See, e.g.*, *United States v. Calhoun*, 2:09-MJ-19 (W.D.N.C. Jan. 12, 2010) (approving use of State of North Carolina's replacement value for black bears in a case involving illegal transport and attempted sales of bear gall bladders); *United States v. Atkinson*, 966 F.2d 1270, 1273–76 (9th Cir. 1992) (market value of the illegally killed animal is determined by the outfitting fee); *United States v. Begay*, 3:13-CR-08124 (D. Ariz. May 22, 2013) (market value of eagles determined based on replacement costs calculated by an expert).

Keep in mind that in order to reach such alternative methods of valuation, you may need to first ensure that the court makes a finding that the fair-market retail price is difficult to ascertain. *See United States v. Butler*, 694 F.3d 1177, 1182 (10th Cir. 2012) (rejecting the district court's use of the full price of a guided hunt in its calculation of the value of deer that had been taken during defendants' guided hunts, where the court had not first found that fair-market retail price was otherwise difficult to ascertain).

Market value is derived from the value of the wildlife in the charged conduct and the value of the wildlife involved in any "relevant conduct" (discussed below). Where the offense conduct involves a mixture of legal and illegal wildlife (for example, one shipping container in which otherwise legal wildlife is on top the illegal wildlife), the total amount of wildlife should typically be used to calculate the market value of the charged conduct. This is true where: (1) the illegal items were not declared, rendering the paperwork for the entire shipment false and, thus, the entire shipment imported contrary to law, and/or (2) the legal specimens were instrumentalities used to hide the illegal specimens. *United States v. Norris*, 452 F.3d 1275, 1280–82 (11th Cir. 2006) (determining that when a shipment contains both legally and

illegally imported orchids, the market value shall be the value of the entire shipment, not just the value of the illegal orchids).

Note that Application Note 5 of § 2Q2.1 provides for an upward departure "[i]f the offense involved the destruction of a substantial quantity of fish, wildlife, or plants, and the seriousness of the offense is not adequately measured by the market value . . . ."

In sum, the types of evidence which may be used to prove market value are quite varied. Accordingly, it is imperative to develop evidence for market value (that is, fair-market retail price) early in a case, given its import in sentencing.

C. U.S.S.G. Chapter 3: Role in the offense

Once the prosecutor has determined the base offense level and specific characteristics, the next step involves reviewing any applicable adjustments found in Chapter 3, Part B, Role in the Offense. Depending on the role the defendant played in committing the wildlife crime, these adjustments frequently result in more significant punishments. The adjustments also provide for a reduction in offense level in those situations in which the defendant's role was minor as compared to other participants, therefore allowing for a truly fair evaluation of a defendant's culpability. A prosecutor, in assessing a defendant's role in the offense, can review evidence related to *all* of the defendant's relevant conduct and not just the charged conduct. Prosecutors should pay particularly close attention to the Application Notes in this Chapter.

Aggravating role—increasing the offense level, § 3B1.1: Section 3B1.1 provides for a two- to four-level enhancement, depending on the defendant's role in the offense. Defendants who are the leaders or the "brains" behind a criminal activity involving five or more participants potentially receive an offense level increase of four levels. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.1(a) (2014). If the defendant was only a manager or supervisor (and not a leader) of the five or more participants, he or she faces a three-level increase. *See id.* § 3B1.1(b). Finally, if the defendant was an organizer, leader, manager, or supervisor in any other (lesser) capacity, then the potential increase is two levels. *See id.* § 3B1.1(c).

Of particular interest, for purposes of § 3B1.1(a) and (b), Application Note 1 provides that a "participant" must be criminally culpable, but need not be charged or convicted. Wildlife trafficking prosecutions often involve numerous players who were aware of what was occurring but may not necessarily have known that the acts were unlawful. These players, however, are still considered "participants" for determining a defendant's role in the offense. *See id.* § 3B1.1 app. 1. Prosecutors should identify all the participants if requesting a three- or four-level increase for a defendant's role. *See United States v. Butler*, 694 F.3d 1177, 1183 (10th Cir. 2012) (defendant was leader based on "ample evidence that [he] leased the land on which the illegal hunts occurred, hired employees to help with the hunting operation, and personally guided several clients"); *United States v. Li*, 13-00113 (D.N.J. Feb. 13, 2013) (enhancement for role in offense applied where defendant was the ringleader of the smuggling conspiracy involving multiple conspirators smuggling 30 rhinoceros horns and carved objects made from rhino horn and elephant ivory worth more than $4.5 million from the United States to China).

Mitigating role—decreasing the offense level, § 3B1.2: If the prosecutor determines a particular defendant's role to be significantly minor as compared to other participants, § 3B1.2 provides for a downward adjustment of two or four levels. A four-level reduction "is intended to cover defendants who are plainly among the least culpable," and a two-level reduction "applies to a defendant . . . who is less culpable than most other participants, but whose role could not be described as minimal." U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 app. 4, 5 (2014). Application Note 2 specifically states that this downward adjustment "is not applicable unless more than one participant was involved in the offense." *Id.* § 3B1.2 app. 2. In addition, Application Note 3 provides that if a defendant is allowed to

plead to a lesser-included offense, he or she typically is not also eligible to receive a reduction for a minor role based on the scope of the more serious offense.

Special skill or abuse of public or private trust, § 3B1.3: Defendants who use a special skill or abuse positions of public trust in the commission of a wildlife trafficking crime face a two-level enhancement. Of particular note, if the court grants an aggravating role enhancement, an abuse of trust enhancement may also be issued, but a special skill increase may not. *See id*. § 3B1.3. There are few, if any, wildlife prosecutions involving a defendant who occupied a position of trust (that is, a government employee), but there are more opportunities for the enhancement based on special skill. For example, an experienced hunter guide might possess unique hunting and tracking skills that presented hunters with the opportunity to kill a particular animal. This skill could be the basis for an enhancement argument if, for example, the outfitter advertised his "special skill experience" to attract business that led to poaching of a particular species. *United States v. Christopher Loncarich and Nicholaus Rodgers*, No. 14-cr-18, (D. Colo. Mar. 11, 2015) (special skill enhancement applied to each defendant, based on the years each man spent raising and training hounds used in hunts to track and chase mountain lions and bobcats).

Obstructing or impeding the administration of justice, § 3C1.1: If a defendant willfully obstructs an investigation, prosecution, or sentencing of an offense, then he or she potentially faces a two-level enhancement. His or her conduct must be related to the offense of conviction, but the covered conduct is broader than that which could be charged under Title 18 obstruction statutes. *See* U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 app. 4 (2014). In addition, Application Note 1 provides that "[o]bstructive conduct that occurred prior to the start of the investigation . . . may be covered by this guideline . . . ." Note, however, that a defendant's denial of guilt (unless under oath), or refusal to admit guilt, is not a basis for this enhancement. To avoid any sentencing disputes, however, if the obstructive conduct occurred before indictment, prosecutors should consider charging the defendant with an obstruction count in addition to the wildlife charge. If convicted of both counts, the obstruction count will be grouped according to § 3D1.2. *See id.* § 3C1.1 app. 8; *see Yates v. United States*, 135 S. Ct. 1074, 1078 (2015) (charging "Destruction or Removal of Property to Prevent Seizure," 18 U.S.C. § 2232(a)).

Multiple counts, §§ 3D1.1–3D1.5: The conviction of a defendant on multiple environmental counts usually does not result in an increased sentence. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 3D1.1, 3D1.2 (2014). However, sophisticated trafficking crimes often involve counts directed at wholly distinct crimes posing distinct harms that may group separately, such as a Lacey Act trafficking count and a tax evasion or failure to pay count. *See, e.g.*, *United States v. Sidney R. Davis*, Case No. 4:10-cr-00211-BLW (D. Idaho Dec. 12, 2011) (defendant pleaded guilty to operating an unlicensed outfitting business and concealing assets related to that unlicensed business from his bankruptcy petitions; the Lacey Act trafficking counts and bankruptcy fraud counts grouped separately resulting in a two-level increase in the defendant's Sentencing Guidelines range pursuant to § 3D1.4). Such impacts on sentencing should be understood when charging decisions are being made.

Relevant conduct—a sentencing issue to remember: Prosecutors, in assessing their sentencing arguments under Chapters 2 and 3, should be mindful that courts can consider evidence beyond the counts of conviction—evidence which is referred to as "relevant conduct" under § 1B1.3. Included in the types of conduct that qualify as relevant conduct are the defendant's own "acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant" regarding the case at issue. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1)(A) (2014). The second type of conduct applies in joint criminal ventures and actually holds a defendant accountable for the acts of others "in the case of a jointly undertaken criminal activity." *Id.* § 1B1.3(a)(1)(B). For instance, a rhinoceros horn smuggler could be held responsible, for sentencing purposes, for the acts of his or her business partner's son who arranged for the illegal purchase and shipment of horns without the defendant's actual knowledge. Section 3B1.3(a)(2) allows for the consideration of a similar pattern of violations, such as

prior illegal imports or guided hunts. Section 3B1.3(a)(3) and (4) allow for consideration of "all harm that resulted from the acts and omissions . . . and any other information specified in the applicable guideline."

These Sentencing Guidelines sections present a prosecutor with the opportunity to provide a more complete picture of the defendant's conduct and its effect on the wildlife, as compared to just the basic facts in an indictment. Proof of the uncharged, but relevant, conduct only requires preponderance of the evidence. It can also have a significant impact on the fair-market retail value of the wildlife for purposes of calculating the market value under § 2Q2.1(b)(3)(A). When and how to present the underlying circumstances of the case in order to have the greatest impact on the sentence is a matter of personal preference and district practice. Often, wildlife prosecutors provide as much information as possible first to the probation officer, then in the sentencing memorandum, and finally at sentencing, in order to educate the Office of Probation, the court, and even the defense attorney, with respect to the full scope of defendant's charged and uncharged conduct.

Criminal history, §§ 4A1.1–4A1.3: As with more traditional crimes, prosecutors should not forget to conduct a full assessment of a defendant's criminal history. Frequently, due to the low rate of detection, wildlife traffickers are first-time offenders. However, there are often instances where prior convictions appear on a defendant's history, increasing his or her criminal history category and significantly increasing the sentencing offense level. Even if the prior records do not rise to the level necessary to impact the criminal history calculation for sentencing purposes, such history may still be worth having at hand during sentencing. For example, it may be relevant to a judge's consideration of an appropriate sentence under the § 3553 factors, or to counter a defendant's claim of his or her action being a one-time mistake, if the defendant was issued a whole string of "tickets" previously for similar conduct.

Determination of a fine, § 5E1.2: While imprisonment deprives the defendant of liberty, a fine deprives the defendant of the primary reason he or she commits wildlife crime: money. Generally, a fine amount is determined by the fine table in § 5E1.2 of the Sentencing Guidelines and is to be imposed in all cases "except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." U.S. SENTENCING GUIDELINES MANUAL § 5E1.2(a) (2014). In cases where "two times either the amount of gain to the defendant or the amount of loss caused by the offense exceeds the maximum of the fine [table], an upward departure from the fine guideline may be warranted." *Id.* § 5E1.2 app 4. Similarly, an upward departure is warranted where the fine table range does not "ensure both the disgorgement of any gain from the offense that otherwise would not be disgorged (*e.g.* by restitution or forfeiture) and an adequate punitive fine, an upward departure from the fine guideline range may be warranted." *Id.* For example, if a defendant made a gross gain of $250,000 from the sale of illegally taken fish, but the guideline calculation results in a fine of $7,500 to $75,000, the fine fails to disgorge him or her of the profits. Therefore, a prosecutor could justifiably argue for an upward departure of the fine amount to at least $500,000.

Statutory fine amounts under many of the wildlife statutes are very low, sometimes lower even than the Guidelines range fine. However, application of the Alternative Fines Act usually brings the fines into a more appropriate range. *See* 18 U.S.C. § 3571 (2015).

Congress, through seven separate statutes, authorizes the Fish and Wildlife Service (FWS) to use funds from fines, penalties, and forfeitures for purposes such as paying the storage costs for maintaining evidence plants and animals, paying rewards for information, and, under some statutes, for the furtherance of wildlife conservation activities. Prosecutors should be aware of the statutory provisions regarding where fine, penalty, and forfeiture monies must or should be directed. For Lacey Act, ESA, Rhinoceros and Tiger Conservation Act (16 U.S.C. §§ 5301–5306) convictions, fines are used to pay storage costs and rewards. *See* 16 U.S.C. § 1540(d) (2015) (ESA); 16 U.S.C. § 3375(d) (2015) (Lacey Act); 16 U.S.C. § 5305a(f) (2015) (Rhinoceros and Tiger Conservation Act). For cases investigated by FWS, a prosecutor may request that the court direct any such monies to be deposited into the Lacey Act Reward Account.

For cases investigated by NOAA-OLE, the funds may be directed to the Magnuson Act Fund. Four other statutes contain provisions directing money to four additional accounts that can be used to further conservation purposes, as set forth in the following chart.

Law Violated	U.S. Code Citation & Regulation Citation	Statutory Authority For Deposit Of Funds	Deposit Account Notation
African Elephant Conservation Act	16 U.S.C. §§ 4201–4246 None	16 U.S.C. § 4224(d)	"African Elephant Conservation Fund Account"
Endangered Species Act	16 U.S.C. §§ 1531–1544 50 C.F.R. Parts 14, 17, 23, 24	16 U.S.C. § 1540(d)	"Lacey Act Reward Account"
Lacey Act	16 U.S.C. §§ 3371–3378	16 U.S.C. § 3375(d)	"Lacey Act Reward Account"
Marine Mammal Protection Act	16 U.S.C. §§ 1361–1407 50 C.F.R. Part 18	16 U.S.C. § 1375a	"Marine Mammal Protection Act Account"
Migratory Bird Treaty Act	16 U.S.C. §§ 703–715 50 C.F.R. §§ 20, 21	16 U.S.C. § 4406(b)	"North American Wetlands Conservation Fund Account"
Rhinoceros and Tiger Conservation Act	16 U.S.C. §§ 5301–5306 None	16 U.S.C. § 5305a(f)	"Lacey Act Reward Account"
Wild Bird Conservation Act	16 U.S.C. §§ 4901–4916 50 C.F.R. § 15	16 U.S.C. § 4913(b)	"Exotic Bird Conservation Fund Account"

At sentencing or the plea agreement stage, prosecutors are advised to state that funds should be sent to the following address, with the specific account notated on the check: U.S. Fish and Wildlife Service, Cost Accounting Section, P.O. Box 272065, Denver, CO 80227-9060.

Sentencing the corporation, Chapter 8: Although a corporation cannot be sentenced to imprisonment, courts frequently order corporations to pay hefty restitution payments, take remedial steps to clean up the damage its actions caused, or even comply with a probation plan with conditions to prevent further violations. Chapter 8 of the Sentencing Guidelines applies to organizations convicted of

environmental crimes. However, the Guidelines specifically do not apply to the calculation of fines for environmental offenses. *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.1(a) (2014). Instead, the Guidelines provide that for environmental crimes, "the court should determine an appropriate fine by applying the provisions of 18 U.S.C. §§ 3553 and 3572." *Id.* § 8C2.10. Likewise, § 3572 provides a list of factors a court may consider in assessing a fine against a corporation, such as the organization's size, its financial resources, or the pecuniary loss suffered by others. *See* 18 U.S.C. § 3572(a)(1)–(8) (2015). Furthermore, Application Note 2 of § 8C2.1 provides that for environmental cases, the courts should apply §§ 8C2.2 to 8C2.9 to the facts of the case. However, prosecutors should not request a fine amount that would affect the organization's ability to pay restitution. *See* 18 U.S.C. § 3572(b) (2015); U.S. SENTENCING GUIDELINES MANUAL §§ 8B1.1, 8C2.2, 8C3.3 (2014).

In addition to imposing restitution and fines, a court may order a corporation to perform community service as a condition of probation in an effort "to repair the harm caused by the offense." U.S. SENTENCING GUIDELINES MANUAL § 8B1.3 (2014). In those situations in which a corporation's conduct involved, for example, the smuggling of wildlife outside of the country, the court could order the business to establish a project for the protection of surviving members of the species as a community service project.

III. Charging creatively with an eye towards sentencing: Thinking ahead

In consideration of the issues highlighted above, rather than limit the charging document to Title 16 wildlife offenses, it often makes sense to consider more traditional Title 18 charges. Not only are courts more familiar with Title 18 offenses, but they may allow you to broaden the scope of the conduct included in the charging document, the offenses may group separately as they address different harms, and judges may better grasp the true criminal nature of the conduct (for example, where the conduct supports charges not only of violating wildlife statutes, but also smuggling). Charging a Title 18 crime could also make it simpler to obtain restitution. Conduct that satisfies the elements of wildlife crimes, particularly wildlife trafficking and false labeling, often satisfies more commonly charged crimes. However, care should be taken to consider whether the Title 18 charge might be viewed as overly harsh, possibly opening the possibility for adverse case law. *See*, *e.g.*, *Yates v. United States*, 135 S. Ct. 1074, 1079 (2015) (defendant was convicted in district court of destroying or concealing tangible objects (throwing undersized fish overboard) with intent to impede, obstruct, or influence Government's investigation, in violation of 18 U.S.C. § 1519; Supreme Court reversed holding that a "tangible object" within § 1519 is "one used to record or preserve information" and that the fish thrown overboard did not qualify).

The following Title 18 crimes, among others, should be considered.

A. False Statements, 18 U.S.C. § 1001

To prove a Lacey Act false labeling, you must show that the false record, account, or label related to the wildlife, which has been, or was intended to be, imported, exported, transported, sold, purchased, or received from a foreign country; or that the wildlife was, or was intended to be, transported in interstate or foreign commerce. On occasion, it may not be clear whether the falsified document is directly related to the wildlife in question. There may also be some question about whether the prosecutor can prove the defendant "intended" that the wildlife enter interstate or foreign commerce. Under these circumstances, consider charging § 1001. However, keep in mind that charging § 1001 requires proof of elements not required in a Lacey Act false labeling charge, including a materiality requirement and a requirement that the statement be made in a matter within the jurisdiction of a branch of the Federal Government. While charging § 1001 may not have an appreciable impact on sentencing, it can (like any Title 18 offense) facilitate obtaining restitution. *See* 18 U.S.C. §§ 3663, 3663A(c)(1)(A)(ii) (2015); U.S. SENTENCING GUIDELINES MANUAL § 5E1.1 (2014).

B. Smuggling, 18 U.S.C. §§ 545 (into the U.S.), 554 (from the U.S.)

If the wildlife in question was imported into, or exported from, the United States, contrary to law, consider charging smuggling. Smuggling, unlike the wildlife statutes, is a predicate violation for money laundering. It can also render restitution mandatory and allows for broader forfeiture provisions to apply. Another benefit of charging smuggling may be the greater maximum potential sentence: 20 years for § 545 and 10 years for § 554.

C. Obstructive crimes (for example, the destruction or removal of property to prevent seizure), 18 U.S.C. § 2232(a)

As with most crimes, it is not unusual for a secondary crime to arise, related to defendant's efforts to hide his or her conduct. Erasing computer files or destroying some other tangible object used to store information can result in obstruction charges under 18 U.S.C. § 1519. However, in wildlife cases, the obstruction often relates to the defendant's efforts to get rid of the wildlife at issue prior to an anticipated seizure, whether by throwing it overboard a ship or having a friend keep the live animal in the friend's shed. This type of obstruction can be charged under 18 U.S.C. § 2232(a), which carries a 5-year statutory maximum. Such obstruction charges will underscore the defendant's guilty state of mind and intent.

D. Financial crimes (such as structuring and money laundering), 31 U.S.C. § 5324

Individuals engaged in wildlife trafficking, similar to narcotics traffickers, will often seek to conceal their conduct with illegal financial transactions, the simplest of which may be structuring, criminalized by 31 U.S.C. § 5324. Charges alleging financial crimes may also carry substantially higher maximum sentences.

E. Mail and wire fraud, 18 U.S.C. §§ 1341–1351

Consider mail or wire fraud if the circumstances allow, as these also carry substantially higher maximum sentences. For example, § 1341, mail fraud, carries a maximum sentence of 30 years in prison.

IV. Creative sentencing options

In preparing a recommendation or argument in a wildlife crime sentencing hearing, prosecutors should not overlook pursuing creative sentencing options in addition to a term of imprisonment. Such creative options might include: (1) having the defendant—particularly corporate defendants—enter into a compliance plan under which the defendant must not only remedy the conduct (for example, install nets over a retention basin to prevent wildlife from entering the basin), but must also provide periodic updates (to the court, Department of Probation, and/or an independent monitor appointed by the court) as to the defendant's compliance with the remedial plan, (2) having defendant implement training plans for others (for example, employees) and/or engage in community or industry education, (3) having the defendant engage in, or sponsor, research to promote the wildlife or its habitat, (4) having the defendant sponsor wildlife rehabilitation projects, and/or (5) having the defendant pay for public service ads. However, care must be taken to avoid any appearance of forcing a defendant to support a particular organization or political view regarding conservation. Any creative sentencing option should be closely tied to the harm caused by the offense of conviction, either by remedying the harm or avoiding or deterring others from causing similar harm. It is also advisable for the wildlife prosecutor to include in any plea agreement, or recommend at sentence, that the defendant be precluded from claiming "good Samaritan" status, or from seeking a tax advantage for doing what is required by the sentence.

A. Withdrawal of license or permit

If the defendant has a hunting or fishing license, or a wildlife or wood product import/export license, consider having the defendant relinquish the license or permit as part of a plea agreement. You could also recommend that the court ban the defendant from engaging in the licensed conduct for the period of probation.

B. Public apology

Public apologies published in newspapers local to the scene of the crime, to the defendant's neighborhood, or to the particular industry, have a significant deterrent effect. Prosecutors, however, should retain the right to review the drafted apology before publication to avoid having the defendant publish a skewed version of the facts.

C. Ban on trading in wildlife

Often, defendants that illegally traffic in wildlife are also engaged in legally selling or purchasing wildlife, either through a business or as a collector. In *United States v. Elite*, Elite operated as an auction house that sold antiques and objects of art, including objects made from endangered and protected wildlife. As part of its plea agreement, Elite agreed to a ban on it buying, selling, or accepting on consignment, any objects made from wildlife. *See United States v. Elite Decorative Arts*, No. 9:14-cr-80201 (S.D. Fla. Apr. 20, 2015).

D. Forfeiture or abandonment

Forfeiture is a powerful tool for the wildlife prosecutor, especially if the item being forfeited is valuable to the convicted trafficker. If the convicted trafficker has appreciable assets, or if proceeds and/or instrumentalities of their conduct were seized, consider alleging forfeiture in the charging document. Several wildlife laws provide for forfeiture. The Lacey Act, for example, authorizes the forfeiture not just of the wildlife at issue, but also, following a felony conviction, of vessels, vehicles, or other equipment used to aid in the wildlife trafficking. *See* 16 U.S.C. § 3374 (2015); *see also* 16 U.S.C. § 1540(e)(4) (2015). Thus, if the evidence shows that the defendant knowingly used his or her 2015 BMW to transport the illegally purchased rhinoceros horns that were smuggled out of the country, then a prosecutor has a strong argument for forfeiture of that BMW. Prosecutors should be aware, however, that the "innocent owner" defense may be invoked as to instrumentalities (but not wildlife), and then the prosecutor must demonstrate that the owner knew or should have known that the vehicle was being used to aid in the criminal violation.

Prosecutors could also seek substituted assets (that is, the cash value of the 2015 BMW) against the defendant, thereby eliminating the innocent owner defense, if the defendant did not own the vehicle. *See United States v. Hayden*, No. 13-cr-649 (D. Md. Dec. 17, 2014) (commercial fisherman stipulated to having an appraiser assess his fishing vessel's value so that he could forfeit the vessel in the form of substituted assets). Forfeiture of the wildlife, fish, or parts under Lacey Act cannot be defeated by the innocent owner defense. *See United States v. 144,774 Pounds of Blue King Crab*, 410 F.3d 1131, 1133–34 (9th Cir. 2005) (explaining "innocent owner" defense to forfeiture procedure under the Civil Asset Forfeiture Reform Act). Prosecutors may also use provisions in the more traditional white collar crimes, such as money laundering or smuggling, as a basis for forfeiture. *See* 18 U.S.C. §§ 545, 982(a), 1956 (2015).

Rule 32.2 of the Federal Rules of Criminal Procedure provides that the indictment or information must include notice to the defendant of forfeiture before a court may order forfeiture. Therefore, prosecutors are advised to include the notice of forfeiture at the initial pleading stage.

E. Restitution

Restitution is mandatory in many wildlife cases and may be a significant part of the sentence. *See* U.S. SENTENCING GUIDELINES MANUAL § 5E1.1 (2014) (referring to "identifiable victim"). *See also United States v. Hayden*, No. 13-cr-649 (D. Md. Dec. 17, 2014) (Court ordered restitution to the State of Maryland jointly against defendants in the amount of $498,293.40 for 185,925 pounds of Striped Bass illegally harvested in the Chesapeake Bay, as compared to the fine of $40,000); Melanie Pierson & Meghan N. Dilges, *Restitution in Wildlife Cases*, 63 U.S. ATTORNEYS' BULL. 82, 83 (May 2015).

V. Recap

A. Prepare for sentencing during the investigation

The single most important thing a prosecutor can do to ensure success at sentencing is to incorporate sentencing considerations into the investigation at an early stage. Document fair market retail value of the wildlife in real time if possible and, in any event, as early as possible. Consider how a defendant might try to explain his or her actions in a positive or sympathetic light to the sentencing judge and have the investigation attempt to document the validity or invalidity of any such explanation. For example, a defendant who smuggled live reptiles may suggest at sentencing that they were doing so with a motive of breeding and promoting the conservation of the species. The investigation should anticipate this type of explanation and should seek to document any history of successful breeding or involvement with conservation programs and, conversely, any evidence of a profit motive, prior to charging.

B. Draft charging documents and factual statements with an eye toward sentencing

As noted earlier, decisions made at the time of charging or in plea agreements, as to the charges brought and/or pleaded to, form the framework for any sentencing. Consideration should be given to statutory maximums and the additional sentencing advantages that Title 18 charges can carry. Statutory provisions regarding the ultimate disposition of any monetary penalties may also be a factor in a charging decision. The charge, like the sentence, should fit the crime.

Once the charges are selected, include as many facts as possible, either in a speaking indictment or a joint factual statement, to convey right from the start the context of the charges. Unlike a drug case where a simple statement of the elements may be the best approach, in a wildlife case, a statement of the elements alone can leave the court and others wondering what the case is really about. Consider the difference between a charge that says only that wildlife valued at more than $350 was sold by defendant knowing that it was taken in violation of foreign law, versus one that explains that defendant was told that the wildlife he was buying would be killed to fill his order, that the wildlife is highly endangered and relied on by a struggling indigenous tribe for tourism income, was valued at over $1 million, that the number the defendant ordered represented half of the remaining known population, and that he sold it in the United States for a 100 percent profit to wealthy collectors.

C. Engage stakeholders

When confronted with whether a prison term is necessary for a non-violent offender who, for example, smuggled endangered spiders, a court may need more than the prosecutor's advocacy. Consider all the implications of the offense and make sure that any stakeholders are notified of the pending matter and their opportunities to express their views about the impact of the offense and a suitable deterrent sentence. Think beyond the species conservation organizations to also include industry organizations or members (for example, a domestic timber industry group in an illegal timber import case, a seafood restaurant corporation in an illegal (unsustainable) fishing case, or an agricultural organization in a Plant Protection Act case). Letters from such organizations explaining the harm the offense causes and advocating for a significant sentence can hold great sway. Publications on the topic at issue can also be

persuasive—a timely article in a prominent magazine or newspaper, whether coincidentally appearing before (not unusual as investigators are sometimes focused on an issue by such publications in the first place) or after the charges were made public, can help a court understand the importance of the issue.

D. Engage the probation officer

The first line of persuasion will be the probation officer charged with preparing the presentence report. It is a useful practice in wildlife cases to attend the change of plea, or the reading of the verdict, already armed with a set of case reports and a summary memo for the probation officer. Information explaining the conservation context of the violation can be particularly important to include. This makes their job easier and ensures that their first focus is on the facts and impact of the case rather than, for example, the amount of volunteer work the defendant has done since being charged.

VI. Conclusion

In a recent case, a wildlife trafficker was charged with both Title 18 and wildlife crimes related to his smuggling of rhinoceros horns and objects made from such horns, with a market value of over $4.5 million. He was sentenced to 70 months in prison. *United States v. Li*, 13-00113 (D.N.J. Feb. 13, 2013). In cases involving illegal trade in commercial quantities of seafood, sentences have included restitution in the millions of dollars. *See United States v. Bengis*, Nos. 13-2543-cr(L), 13-4268-cr(CON), 2015 WL 1726844, at *1 (2d Cir. Apr. 16, 2015) (affirming restitution order of more than $22 million). To help achieve sentences like these, start thinking about sentencing as early as possible and approach the sentencing process with an eye towards educating the judge and the probation officer so that they fully understand how the defendant's conduct impacts the wildlife, its habitat, and the market. Toward this end, engage stakeholders where appropriate, including industry groups and domestic and foreign conservation organizations and researchers, which may assist in this effort. It is often the case that the probation officer preparing the presentence recommendation to the court is interested to learn as much as possible about the wildlife and how the defendant's conduct impacts that wildlife. This may be particularly helpful if the wildlife in question in not necessarily considered a "rare" or threatened species, such as wild ginseng. Take the time to explain to the court the purpose for the underlying regulations or laws and how the violation at issue fits into the larger conservation picture.

In 2014 the President issued the *National Strategy for Combatting Wildlife Trafficking*, highlighting the United States' commitment to fighting this trade that not only affects the survival of many species, but also threatens national security. The Strategy, among other priorities, strives to strengthen domestic and global enforcement of wildlife protection laws. Federal prosecutors in the United States Attorneys' offices around the country have the unique opportunity to raise the profile of these crimes and obtain significant sentences reflecting the importance of deterring these crimes that steal the heritage of future generations. Whether prosecuting a trafficker for the smuggling of species as impressive as the Black Rhinoceros or as uncharismatic as insects, federal prosecutors are not lacking in tools to achieve significant sentences. A basic understanding of how the Guidelines apply to wildlife trafficking cases prepares prosecutors to build stronger cases. The tools—the laws, the penalties, the investigators—are there. It is up to the wildlife crimes prosecutor to use them effectively to convince a judge to impose an appropriately significant sentence. ❖

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