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ENVIRONMENTAL CRIME

The authors of this article, in their latest annual review of environmental crime enforcement, look at lessons that may be learned from the investigation and prosecution of the Deepwater Horizon oil rig explosion and spill. They examine the criminal provisions of environmental law that could be brought to bear, corporate actions prior to the incident that will draw scrutiny, and issues related to possible obstruction of justice after the incident. They caution that companies should not overlook lessons that could be learned based on the belief that they will never find themselves in a similar situation. As in past reviews, the authors also provide summaries of criminal cases brought around the country last year. And in a special feature, the authors present an interview with top Department of Justice officials on the timely subject of hydraulic fracturing in oil and gas operations.

The State of Environmental Crime Enforcement: A Survey of Developments in 2011

By Steven P. Solow and Anne M. Carpenter

Almost two years after the Deepwater Horizon rig explosion of April 20, 2010, the civil trial between the United States, private plaintiffs, and the major corporate players has been stayed to allow for settlement between certain parties, and as of this writing no criminal charges have been brought by the United States against any corporate party or individual.[1]

[1] The authors would like to thank Mary Ariasaif, Shelene Clark, Katie Noble, and Camille Richard for their assistance in the collection of data and editorial assistance for this article.

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As is almost always the case in complex white-collar cases, the criminal investigation will likely be focused on two areas of potential criminal liability. First, will be the focus on the potential for criminal liability for the spill under the applicable environmental statutes. Second, will be the focus on the potential for criminal liability based on post-incident responses that could be construed as false statements or obstruction of justice.

Before discussing the scope of potential environmental criminal liability, we should consider the lessons to be learned from the government's practice of investigating the response to the government's initial investigation of an incident. This area of liability reinforces the need for all regulated entities to consider, or reconsider, their ability to respond to crisis situations with a predetermined set of plans and procedures, preferably ones that have been vetted through table-top or live drills.

One indication that there is an increasing awareness of the need for such pre-planning crisis preparations by businesses can be found in the marketing of ''incident response'' insurance products. Insurers are offering products that cover the immediate costs of a response, provide response plans and procedures, and provide qualified contractors and technical consultants.[2] Of course, given the potential scope of criminal liability (see, for example, the discussion below regarding the widening scope of liability for obstruction under 18 U.S.C. § 1519), putting a spill response team on the ground is only a part of the response need, which should also include the ability to deal with electronically stored information, witness interviews, legal holds, and more.

There is also the risk that some of the lessons available from catastrophic incidents like the Deepwater Horizon spill will be overlooked because of a human tendency to look at such incidents and say, ''That would never happen to me (us).'' It is an instinct, or perhaps learned response, to seek to distance ourselves from a connection to the misfortunes of others. There is even a name for it: ''cognitive dissonance reduction,'' which is the phenomenon whereby individuals select a desirable interpretation of a threat (''that would never happen to me'') as a way to obtain relief from potential psychological distress (''this could happen to me'').[3] It is a behavior pattern that should be avoided in the corporate context given the broad scope of criminal liability across all regulated activities (environmental, financial, health-care related and others).

Management of Change

One specific area that was extensively considered in the examination of the events leading up to the Deepwater Horizon incident is the area of Management of Change (MOC). It is generally understood that, unless a situation is static and unchanging, every organization must have a way to identify, assess, and respond to change. The ''change'' to be managed may be new circumstances in familiar or routine operations or processes, or it may involve new operations, tasks, processes, equipment, systems, regulations, personnel, technology, or changes in known hazards.

The analysis by the Joint Investigation Team (JIT) of the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) and the U.S. Coast Guard (USCG),[4] as well as the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling (National Commission),[5] paid particular attention to the possible impact of MOC decisions and management oversight on the blowout of the Macondo well. For the purposes of criminal charges, the JIT's conclusions make plain the difficult task faced by the government in its efforts to develop a criminal case in this situation. The agency examinations reveal that there were dozens of MOC moments leading up to the explosion, including changes in the number of recommended centralizers, use of a lost circulation material as spacer, and issues with the performance of well integrity diagnostics. This is only a superficial list, and within each of these decisions are dozens of individual decision points. While many of these actions were not found to be direct contributing causes of the blowout, the story they tell is of great import and value. They illustrate the need to move beyond the conclusion that a spill occurred because of a failure to follow standards and practices.

The difficult job for any organization operating in a highly regulated area with the potential for strict sanctions is to identify the underlying causes of seemingly routine failures and apply the value of that analysis to corporate operations. Failure to do so, particularly in light of the examinations already done on the Macondo well, and the expectations that follow for future operations, raises the risk of civil and potential criminal liability. In this regard, consider the notions of criminal liability under the Clean Water Act's criminal negligence provision,[6] or under Clean Air Act § 112(r), where failure to follow an ''industry standard'' can lead to both individual and corporate criminal liability.[7]

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[2] For example, AIG/Chartis offers a ''Pollution Incident and Environmental Response (PIER) Program,'' a product that offers policy holders immediate access to contractors and environmental consultants, among other services.

[3] *See* Jarcho, E. Berkman & J.M. Lieberman, *The Neural Basis of Rationalization: Cognitive Dissonance Reduction During Decision-making*, Social Cognitive and Affective Neuroscience, 460, 467 (2011) (noting that there are ''studies of emotion regulation which demonstrate that selecting more desirable interpretations of threat is associated with relief from psychological distress,'' *see id.* at 463).

[4] *See* BOEMRE-USCG JIT, Report of Investigation into the Circumstances surrounding the Explosion, Fire, Sinking, and Loss of Eleven Crew Members Aboard the MODU Deepwater Horizon, No. 3721503 (Apr. 2011) [hereinafter ''BOEMRE-USCG JIT, Volume 1'']; *see* BOEMRE-USCG JIT, Report Regarding the Causes of the April 20, 2010 Macondo Well Blowout (Sep. 2011) [hereinafter ''BOEMRE-USCG JIT, Volume 2''].

[5] *See* National Commission, Deepwater, The Gulf Oil Disaster and the Future of Offshore Drilling (Jan. 2011).

[6] *See United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999) (finding, *inter alia*, that evidence of the defendant's failure to follow his predecessor's process aimed at preventing oil spills was sufficient, along with other evidence, to establish criminal negligence under the Clean Water Act).

[7] *See* 42 U.S.C. § 112(r)(7) (requiring preparation of a ''program for preventing accidental releases of regulated substances''); *see also* 42 U.S.C. § 112(r)(7)(A)(ii)(II). The statute must be read in conjunction with its implementing regulation, 40 C.F.R. § 68.67(a), which further requires that the hazard assessment to create the program shall be, among other things, ''appropriate to the complexity of the process.'' What does ''appropriate'' mean in the context of § 112(r)? That is an important question, since the failure to conduct such an ''appropriate'' assessment in connection with an accidental release can result in criminal charges under 42 U.S.C. § 113(c)(1),

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Putting aside, however, any charges for obstruction of justice or fraud post-incident, what potential environmental criminal charges are implicated in the Deepwater Horizon investigation? Provided below is an overview of five federal environmental statutes that will likely be considered by the government and a brief analysis of associated issues. These statutes are:

1. the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 703-712;
2. the Seaman's Manslaughter Act (Seaman's Act), 18 U.S.C. § 1115;
3. the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356;
4. the Rivers and Harbors Act of 1899 (Refuse Act), 33 U.S.C. § 407; and
5. the Clean Water Act (CWA), 33 USC §§ 1319(c), 1321(b)(3).

Both the MBTA and the Refuse Act are strict liability statutes. The MBTA prohibits the killing of migratory birds, either directly, or through the actions of another individual,[8] while the Refuse Act prohibits the discharge of refuse of any kind to coastal waters within three miles of the United States coastline, including discharges that cause refuse of any kind to end up within that three mile range.[9] Violations of both these acts were charged in the *Exxon Valdez* case for the actions that led to what was formerly the biggest domestic oil spill in the nation's history.[10]

The strict liability standard in both the MBTA and the Refuse Act and the government's former use of these acts in the similar circumstances of the *Exxon Valdez* case, suggest that these acts will be strongly considered by the government. The MBTA imposes a fine of up to $15,000 for each violation and/or up to six months in prison for individual defendants,[11] while the Refuse Act imposes a fine of up to $25,000 per day of violation and/or up to a year in prison for individual defendants.[12] More importantly, because the U.S. Sentencing Guidelines do apply to environmental crimes by business organizations, the Alternative Fine provision of 18 U.S.C. § 3571(d) can apply. This provision provides for a fine of ''twice the gross loss'' that resulted from the offense.

'Knowing and Willful,' 'Knowing,' and 'Negligent' Violations

Under the OCSLA, unlike the MBTA or the Refuse Act, the government must prove that the defendant ''knowingly and willfully'' violated ''any term of a lease, license, permit, or regulation issued under the OCSLA that is designed to protect health, safety, or the environment or conserve natural resources.''[13] OCSLA regulation 30 C.F.R. § 250.300(a) provides that a ''lessee shall not create conditions that will pose unreasonable risk to public health, life, property, aquatic life, wildlife, recreation, navigation, commercial fishing, or other uses of the ocean.'' The government may bring charges under the OCSLA if it has sufficient evidence to demonstrate that lessee, in this instance BP,[14] created conditions aboard the rig that posed such an unreasonable risk. With regard to potential penalties, violations of the OCSLA are punishable by a fine of up to $100,000 and/or up to 10 years in prison.[15] Each day that an individual violates the statute constitutes a separate violation.[16]

The Seaman's Act is a lesser-known statute that may be used by the government to address the deaths of the 11 individuals that resulted from the incident. The act incorporates different intent requirements depending on a defendant's role in the death of a seaman. Liability based on simple negligence is reserved for persons on a vessel, owners, charterers, inspectors, or other public officers, whereas a knowing and willful standard must be satisfied to sustain the conviction of corporate executives who are not present on a vessel but who hold operational control.[17] Violations of the act are punished by a fine and/or up to 10 years in prison.[18]

Out of the five statutes that may be used in connection with the Deepwater Horizon incident, only the CWA focuses on the discharge of oil. Under 33 U.S.C. § 1319(c), the CWA imposes criminal liability on any person[19] that negligently (misdemeanor) or knowingly (felony) violates certain subsections of the act, including the prohibition, under 33 U.S.C. § 1321(b)(3), against the discharge of oil either (i) to the navigable waters of the United States, adjoining shorelines, or the waters of the contiguous zone, or (ii) in connection with activities under the OCSLA in such quantities as has been determined harmful by the president.[20]

In the Deepwater Horizon case, a knowing violation of the CWA would require a defendant to have acted intentionally, i.e. volitionally and not by mistake, to discharge the oil regardless of the defendant's knowledge of the legality of the action.[21] In almost all oil spill cases, it is difficult for the government to prove intentional discharges. Unlike a permit violation or an illegal hazardous waste disposal case, where a defendant may mean to thwart a legal requirement regarding discharge or disposal, defendants in an oil spill case cannot mean to spill valuable product or cause the loss of life. One commentator, however, has suggested that the govern-

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which includes fines pursuant to Title 18 and a term of imprisonment of up to five years.

[8] *See* 16 U.S.C. § 707(a); 18 U.S.C. § 2.

[9] *See* 33 U.S.C. § 407; *United States v. Rohm & Haas Co.*, 500 F.2d 167, 176, 6 ERC 2016 (5th Cir. 1974); *United States v. Esso Standard Oil Co.*, 375 F.2d 621, 623, 1 ERC 1038 (3d Cir. 1967).

[10] *See United States v. Exxon Corp. et al.*, U.S. Dist. LEXIS 1821 (D. Alaska 1990).

[11] *See* 16 U.S.C. § 707(a).

[12] *See* 33 U.S.C. § 411.

[13] *See* 43 U.S.C. § 1350(c).

[14] BP was the majority owner and designated operator of the lease for the Macondo well. *See* BOEMRE-USCG JIT, Volume 2, at 16 (Sep. 14, 2011).

[15] *See* 43 U.S.C. § 1350(c).

[16] *Id.*

[17] *See* 18 U.S.C. § 1115.

[18] *Id.*

[19] The definition of ''person'' includes corporations. *See* 33 U.S.C § 1362(5).

[20] The Environmental Protection Agency has determined that a ''harmful quantity'' of oil is an amount that when discharged, violates state water quality standards, causes a film or sheen on the surface of the water, or causes a sludge to be deposited beneath the surface. *See* 40 C.F.R. § 110.3.

[21] *See United States v. Weitzenhoff*, 35 F.3d 1275, 1283-86 (9th Cir. 1993); *United States v. Sinskey*, 119 F.3d 712, 715–19 (8th Cir. 1997).

ment might charge a knowing violation of the CWA under the theory that the parties involved in the rig's operations took so many risks and deviated so much from industry practice that they knew a discharge might occur.[22] However, the analyses undertaken thus far do not appear to support an allegation that industry practice and relevant government requirements prohibited the actions of the parties.

On the other hand, to successfully prosecute a negligent violation of the CWA, the government would need to prove that a defendant caused the discharge of oil due to the defendant's failure to exercise the appropriate degree of care.[23] While the burden is lower than for a knowing violation, the government must still prove that a defendant deviated from the relevant standard of care. In *Hanousek*, the standard of care analysis involved a relatively simple examination of whether steps were taken to protect an oil pipeline during the removal of rocks nearby. In the Deepwater Horizon investigation, to determine the standard of care, the government must conduct an assessment of a complex series of contracts between BP and its partners, relevant American Petroleum Institute (API) standards, and industry guidance documents governing deepwater drilling operations.

Further, defendants may argue that the ''majority'' standard for negligence under the CWA, i.e. ordinary negligence (the failure to use ordinary care), is not applicable, and gross negligence (a gross deviation from the standard of care that a reasonable person would observe in the situation) should apply. Two circuits of the federal courts of appeals have adopted this ''majority'' standard. The remaining circuits, including the Fifth Circuit in which the Deepwater Horizon case is being tried, have not spoken to the issue. Specifically, in the summer of 2011, the U.S. District Court for the Western District of Louisiana recognized that there is ''no controlling precedent in the Fifth Circuit addressing whether the ordinary or gross negligence standard applies in criminal CWA proceedings,'' and that the language of the statute was less than clear on the issue.[24] The holding of the case was based on a superseding legal issue, but the court found in dicta that ''a substantial question with regard to the proper legal standard for negligent violations of the CWA'' existed and has left the issue for the Fifth Circuit to decide on appeal if it so chooses.[25]

However the government eventually proceeds, defendants in the case will most likely advance arguments that the causation between any one entity or individual's specific conduct and the rig explosion is too attenuated to establish criminal liability. The defendants may rely upon the warring theories regarding the role and behavior of the safety barriers and hydrocarbons in the Macondo well, as well as the effect of the multiple independent and intervening decisions instituted by each of the parties during the course of rig operations. We will revisit the outcome of both the civil case, and any criminal charges, in next year's article.

What Were You Thinking? The Destruction of Pre-Investigation Records and Liability for Obstruction Under 18 U.S.C. § 1519

As discussed above, the response by a corporate or organizational entity to an environmental criminal investigation can create criminal liability for obstruction if information is not properly preserved. Further, a recent appellate case has clarified the circumstances in which obstruction can occur under 18 U.S.C. § 1519, to expressly extend liability prior to the initiation of any federal inquiry. This new precedent underscores the need to have effective tools in place to manage employee actions and company responses post-incident.

It has been 10 years since 18 U.S.C. § 1519 was passed as part of the Public Company Accounting Reform and Investor Protection Act, or ''Sarbanes-Oxley Act.'' The provision codified some of the prior judicial interpretations of the federal criminal obstruction of justice statutes, creating a broad scope of liability that addressed not only acts involving the alteration, destruction, mutilation, concealment, or falsification of ''any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter'' within federal jurisdiction, but also actions that were ''in relation to or [in] contemplation of any such matter or case.''[26] Usually obstruction prosecutions are based on alleged acts of obstruction when there is a pending federal investigation or matter, as opposed to actions taken before such an investigation is under way, or in ''contemplation'' of such an inquiry.

In February 2007, the government used the new provision to indict an attorney, Phillip Russell, a criminal and civil litigator in Connecticut, for obstruction of justice.[27] Russell had been retained to represent a church in Greenwich, Conn., after a church employee discovered child pornography on the computer of the church choirmaster, Robert Tate.[28] The day prior to the discovery of the computer, the Federal Bureau of Investigation (FBI) decided to launch an investigation into Tate regarding child pornography and the exploitation of children.[29] It appears that before they knew of the government's decision to officially launch its investigation, church officials provided the computer to Russell, who then allegedly destroyed the device.[30]

The indictment charged Russell with destruction of evidence, in violation of § 1519, as well as obstruction under 18 U.S.C. § 1512(c)(1).[31] The § 1519 violation did

[22] *See* David M. Uhlmann, *Prosecuting Crimes Against the Earth*, N.Y. TIMES, June 4, 2010, at A27.

[23] *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999) (conviction of railroad project supervisor under § 1319(c)(1)(A) where he failed to cover an oil pipeline near a project site with protective materials and one of his workers accidentally ruptured the pipeline with a backhoe, causing oil to spill into a nearby river); *see also United States v. Ortiz*, 427 F.3d 1278, 1283, 61 ERC 1521(10th Cir. 2005) (''[A]n individual violates [the negligent discharge provision] of the CWA by failing to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance.'').

[24] *See United States v. Pruett*, 2011 WL 2894631 (W.D. La. July 15, 2011), at *5-6.

[25] *Id.* at *6.

[26] *See* 18 U.S.C. § 1519.

[27] *See United States v. Russell*, No. 3:07-cr-00031-AHN (D. Conn. *indictment entered* July 18, 2007) [hereinafter ''Russell Indictment''].

[28] *Id.* ¶ 7.

[29] *Id.* ¶ 4.

[30] *Id.* ¶ 13.

[31] § 1512(c)(1) provides that ''[w]hoever corruptly [ ] alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the ob-

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not allege that Russell, or anyone else, had knowledge of the related FBI investigation.[32] Thus, it was evident from the face of the indictment that prosecutors were relying upon the ''in relation to or contemplation'' prong of the statute. The government theory was that Russell knew or should have known that the images on the computer would ultimately be relevant to a federal investigation, and that he intentionally destroyed the evidence *in contemplation of* such an investigation.[33]

At the time commentators noted that this use of § 1519 suggested ''a new era in potential criminal liability for altering, destroying or disposing of records or other evidence well in advance of any actual federal proceeding or matter—and one in which individuals, organizations, and their attorneys will be forced to carefully analyze decisions about the disposition of records or other evidence that might relate to matters that, at some point in the future, are likely to become the subject of federal attention.''[34] The initial counts against Russell, however, were later dismissed and he pleaded guilty to a single substitute count of misprision of a felony, in violation of 18 U.S.C. § 4,[35] for which he was sentenced to one year probation and a $25,000 fine.[36]

After the Russell indictment, federal prosecutors in Tennessee obtained an indictment against David Kernell that also used the ''in contemplation'' prong of § 1519, in connection with the investigation of illegal access to the email account of then-Alaska governor and vice-presidential candidate Sarah Palin.[37] Specifically, Kernell was charged with obstruction of justice for deletion of information from his computer prior to the initiation of any investigation into his actions that related to his effort to gain access to Gov. Palin's email account. [38]

According to court documents, Kernell accessed Palin's email account, changed the password, posted photos from the account on the Internet, and distributed the new password on an Internet message board to allow others to access Palin's account.[39] Kernell later described in an online post how he accessed Palin's account, and claimed to have deleted certain information from his computer out of a fear of being investigated for his actions.[40] Forensic examination of Kernell's computer later revealed that someone, presumably Kernell, removed the record of websites from the internet browser, uninstalled the Firefox internet browser, ran a disk defragmentation program on the computer, and deleted a series of images that had been downloaded from Palin's account.[41]

In the spring of 2010, Kernell was convicted by a jury on the § 1519 charge.[42] Kernell appealed the conviction to the U.S. Court of Appeals for the Sixth Circuit, arguing that § 1519 was unconstitutionally vague on its face and that there was insufficient evidence before the district court to convict him of a violation of the statute.[43]

The Sixth Circuit affirmed the lower court decision in *Kernell*, providing appellate approval for potential criminal liability for obstruction of justice in advance of the initiation of any federal proceeding, with or without knowledge of such a proceeding.[44] The circuit court's decision was consistent with the reasoning of the Connecticut trial court in an early *Russell* order that denied the defendant's motion to dismiss the indictment. The *Russell* court explained that § 1519 was not unconstitutionally vague because the ''common understanding of 'in relation to' and 'in contemplation of,' '' allows a ''person of ordinary intelligence . . . reasonable opportunity to understand that destroying a tangible object with the intent to obstruct a federal investigation, or doing so with reference to, or with the purpose of effecting a federal investigation, *or in anticipation of, or envisioning,* such an investigation, is prohibited, *but that doing so coincidentally is not*.''[45]

Similarly, the Sixth Circuit found that the intent-to-impede language in the beginning of the statute applied to both prongs of the statute, i.e. to both ''the investigation or proper administration of any matter'' within federal jurisdiction and to ''in relation to or contemplation

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ject's integrity or availability for use in an official proceeding . . . shall be fined under this title or imprisoned not more than 20 years, or both.''

[32] *See* Russell Indictment, ¶¶ 1-13. *See* also, *Gillers, Guns, Fruits, Drugs, and Documents: A Criminal Defense Lawyer's Responsibility for Real Evidence*, 63 STAN. L. REV. 813 (2011) (Professor Gillers provides a careful evaluation of a lawyer's duties in varying situations (including the Russell case) where a lawyer is offered, or comes into possession of, an item that has legal significance.)

[33] *See United States v. Russell*, 639 F. Supp.2d 226 (D. Conn. 2007) (order denying motion to dismiss the indictment).

[34] *See* W. Warren Hamel & Lowell M. Rothschild, *The Other Shoe Drops: Using Sarbanes-Oxley Criminal Provision, DOJ Indicts Attorney for Destroying Evidence in Advance of a Proceeding*, BUREAU OF NAT'L AFFAIRS (BLOOMBERG BNA), WHITE COLLAR CRIME REPORT, at 318 (June 8, 2007).

[35] The elements of which are: 1) a felony offense of possession of child pornography committed by another defendant, 2) defendant had knowledge of the commission of the felony offense, 3) defendant failed to notify a judge or relevant federal authority regarding commission of the offense, and 4) defendant deliberately took some affirmative step to conceal the crime.

[36] *See United States v. Russell*, No. 3:07-cr-00031-AHN (D. Conn. *judgment entered* Dec. 21, 2007). In the prosecution of a state senator, following the Russell case, federal prosecutors in Pennsylvania also included obstruction of justice charges under § 1519. *See United States v. Fumo*, 628 F. Supp. 2d 573 (E.D. Pa. 2007). This case, however, did not utilize the ''in contemplation'' prong of § 1519, and relied on the defendant's knowledge of the actual investigation against him. *See Fumo*, 628 F. Supp. 2d at 598 (noting that there had been extensive reporting on the investigation, and the defendant had received a grand jury subpoena in connection with the investigation, prior to the conduct underlying the indictment). The defendant was subsequently convicted of the § 1519 charge. *See United States v. Fumo*, No. 2:06-cr-00319-RB (E.D. Pa. *judgment entered* July 23, 2009).

[37] *See United States v. Kernell*, No. 3:08-cr-00142-1 (E.D. Tenn. *jury verdict entered* Apr. 30, 2010).

[38] *Id.*; *see also United States v. Kernell*, No. 10-6450, at 2-4 (6th Cir. *judgment entered* Jan. 30, 2012).

[39] *See United States v. Kernell*, No. 10-6450, at 3 (6th Cir. *judgment entered* Jan. 30, 2012).

[40] *Id.* at 3-4.

[41] *Id.* at 4.

[42] *See United States v. Kernell*, No. 3:08-cr-00142-1 (E.D. Tenn. *jury verdict entered* Apr. 30, 2010).

[43] *See United States v. Kernell*, No. 10-6450, at 2 (6th Cir. *judgment entered* Jan. 30, 2012).

[44] *Id.*

[45] *See United States v. Russell*, 639 F. Supp.2d 226, 240 (D. Conn. 2007) (emphasis added).

of any such matter or case.''[46] Thus, under this reading, ''the statute does not impose liability for 'knowingly . . . destroy[ing] . . . any . . . document . . . in . . . contemplation of any [federal] matter,' *without* an intent to impede, obstruct, or influence a matter.''[47]

After the *Kernell* decision, potential liability under § 1519 turns on whether the government can prove beyond a reasonable doubt that there is some causal link or relationship between an individual's destruction of a record, and that individual's belief that a federal inquiry related to those records might occur, regardless of whether the inquiry has commenced. Thus, while ''coincidental'' records destruction is innocent behavior, the level of circumstantial evidence that will suffice to prove the culpable intent to destroy records *in contemplation of* a federal inquiry under an environmental, or any other, law, remains to be seen.

EPA's Rogue Employee and Vicarious Criminal Liability of Corporations

As most white-collar defense attorneys know, the mention of a rogue employee is often greeted by government investigators and prosecutors with a look of superciliousness. What that look conveys is the view that a rogue employee claim is simply an attempt to shirk responsibility for the company's failure to exercise appropriate oversight, which failure is then considered a sufficient basis for criminal liability of an entire corporation (as well as suspension and debarment).

Perhaps the EPA Criminal Investigation Division will have more understanding of the problem of rogue employees now that EPA has a rogue of its own. On Sept. 30, 2011, U.S. District Judge Rebecca Doherty found that former EPA CID Special Agent Keith Phillips had, ''for his own purposes, set out with intent and reckless and callous disregard for anyone's rights . . . and reckless disregard for the processes and power which had been bestowed him, to effectively destroy another man's life . . .''[48] The court imposed a $1.67 million award of damages for malicious prosecution following a lawsuit by a Louisiana businessman who had been the target of a government investigation, indictment and abortive prosecution.[49] The court noted that punitive damages cannot be awarded in civil cases against the government but, if allowed, she would have ordered them in this instance.

Between 1996 and 1999, Agent Phillips headed an investigation that led to the indictment of Hubert Vidrine, Jr. and Canal Refining Co. of Church Point, La. In September 2003, as trial was to begin, the charges were dropped. In 2007, Vidrine sued the government on behalf of himself and his wife, for damages resulting from the investigation and prosecution.

The court did not finally resolve the motive for Agent Phillips's behavior, but thought it likely that the married agent was using the continuing investigation as a cover for a sexual affair he was having with an FBI agent also assigned to the case.[50] Phillips provided testimony to the grand jury in support of the indictment that the court later concluded was false and, indeed, Agent Phillips subsequently pleaded guilty to criminal charges of obstruction and perjury for his conduct. The court found that Phillips hid the lack of probable cause to indict the case from all of the other government personnel involved, including his supervisors and the prosecutor assigned to the case.[51] What if Phillips' misdeeds had been those of a corporate employee, instead of a government agent?

The debate over the scope of a corporation's vicarious liability for the acts of an employee in the environmental criminal context was addressed in a 2009 decision of the U.S. Court of Appeals for the Second Circuit. In *United States v. Ionia Management S.A.*,[52] the defendants argued, *inter alia*, that the conviction of the company for the act of a non-management employee required the government to prove more than that the person was acting within the scope of his or her employment. Rather, the government was also required to prove that the company had lacked effective policies and procedures to deter and detect criminal actions by its employees.[53]

The Second Circuit rejected defendants' argument, finding that even without management direction (even though such direction was present) the acts of employees within the scope of their employment is a sufficient basis to hold the company vicariously criminally liable.[54] That presents a frustrating reality for companies that spend millions of dollars on a range of compliance efforts, only to find those efforts considered meaningless due to the acts of even one individual acting contrary to company policy and direction.

In that regard, we note that the Federal Jury Practice and Instructions contain the following in the model jury instructions for Corporate Criminal responsibility:

> A corporate defendant—like an individual defendant—however, may not avoid responsibility for its actions by meaningless or purely self-serving pronouncements. Similarly a corporate defendant—like an individual defendant—may not be held responsible for acts which it tries to prevent.[55]

These proposed instructions are followed by a Note:

> There is nothing in the law that requires that a corporation be held criminally responsible for the action of a rogue employee that, in good faith, the corporation attempted to prevent. Unless a corporation is relieved of criminal liability for acts committed against genuine corporate policy and directives, there is absolutely no compelling reason for a corporation to either direct its agents to conform to the criminal law or to police such policies or, for that matter, to police its employees. To avoid criminal responsibility, however, the corporation must be acting in good faith when it prohibits the conduct and must make a diligent effort to police the directive.[56]

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[46] *See United States v. Kernell*, No. 10-6450, at 9 (6th Cir. *judgment entered* Jan. 30, 2012).

[47] *Id.* (quoting *United States v. Yielding*, 657 F.3d 688 (8th Cir. 2011) (conviction under § 1519 for falsification of a document still possible if no federal inquiry exists)).

[48] *See Vidrine v. United States*, No. 6:07-cv-01204, at 141 (W.D. LA. *judgment entered* Sep. 30, 2011). *See also* 192 DEN A-11, 10/4/11.

[49] *Id.*

[50] *Id.* at 115-18.

[51] *Id.* at 97.

[52] 555 F. 3d 303 (2d Cir. 2009).

[53] *Id.*

[54] *Id.*

[55] *See* 1A Fed. Jury Prac. & Instr. § 18:05 (6th ed.) (2012).

[56] *Id.*

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In Memoriam

Ray Mushal, Longest-Serving Attorney in DOJ Environmental Crimes Section

Along with many others, we mourn the passing of our friend and colleague, Ray Mushal, who died March 8.

For over 40 years, Ray served as an attorney with the Environmental Crimes Section at the Department of Justice. Ray began his work as a trial attorney at DOJ in 1973, following his military service with U.S. Army Intelligence in Vietnam. He was one of the small group of original trial attorneys in the Environmental Crimes Unit that was formed in 1982.

Along with providing an unmatched length of service, Ray played a role in most of the major matters and issues involving the environmental crime program over these decades. In addition to working on dozens of significant investigations, trials and appeals, Ray helped draft legislation, including parts of the Resource Conservation and Recovery Act amendments of 1984, the Clean Water Act amendments of 1987; and the Clean Air Act amendments of 1990. He was an ex officio DOJ representative to the United States Sentencing Commission for many years, helping to draft the environmental crime sections of the United States Sentencing Guidelines.

Ray probably had a role in training just about every single attorney or agent who has worked on environmental crime cases, and he authored or edited almost every page of the Environmental Crimes Manual, and was a universally recognized source of guidance on the most difficult legal issues. Ray was a law professor at George Washington University's School of Law, and he counseled scholars here and abroad on questions about the criminal enforcement of environmental law. He did many good works quietly, including community service, and though he was not one to share excessively, talking about his wife and children was the one sure way to bring a look of unmitigated delight to Ray's face.

We each served or serve as a chief of ECS, and are humbled when we consider the depth of service and commitment that was the life work of Ray Mushal. Ray was also a scholar of the Civil War, and in this short space, it is perhaps best to end with one of his favorite quotations, from Abraham Lincoln's speech at The Cooper Union that, to us, epitomizes Ray's approach to his work. ''Let us have faith that right makes might: and in that faith let us to the end, dare to do our duty as we understand it.'' In protecting the environment, Ray pursued what is right with passionate dedication, while retaining his humility, humor and humanity. We will all miss Ray's intellect, devotion and willingness to speak out for what he believed.

JERRY BLOCK, NEIL CARTUSCIELLO, STACEY MITCHELL, RON SARACHAN, STEVEN SOLOW, JUD STARR, AND DAVID UHLMANN

Enforcement as a Zero Sum Game

EPA's Office of Enforcement and Compliance Assurance (OECA) has issued a new draft National Program Manager Guidance, dated Feb. 10, 2012.[57]

The document applies to all of EPA's national enforcement efforts, including criminal enforcement, and is notable for several reasons:

■ The guidance presents case selection priorities for criminal cases that place a priority on bringing ''Tier 1'' criminal cases, which are described as including cases that involve ''death or actual serious injury.''

■ The guidance notes that because of ''budgetary restrictions and the need to focus scarce resources,'' OECA will significantly reduce criminal enforcement efforts related to vessel pollution, stormwater, asbestos, and underground storage tanks.

■ The guidance states that the criminal enforcement program ''will emphasize'' EPA's National Enforcement Initiatives for FY 201314, as well as Regional Enforcement Priorities.

■ The guidance reiterates that criminal enforcement is an important tool in meeting environmental justice concerns.

EPA's decision to reduce criminal enforcement related to the specific areas above is interesting. From 2006 through 2011, there were some 70 vessel pollution prosecutions. Not all of these cases involved EPA, however, and moving forward the U.S. Coast Guard, which is often the primary agency on vessel pollution cases, may simply fill in any gap left by EPA's decision.

During this same five-year time frame, there were some 45 criminal asbestos prosecutions. If EPA pulls away from these cases, it is unclear who will step in. Moreover, these cases often present instances where there are human victims, often workers who are inadequately trained and/or inadequately protected, and these cases often occur in communities that meet the government's environmental justice definition. Notably, in this year's article, we identify 10 asbestos cases. Two cases appear to fit within the environmental justice framework based on the communities where the violations occurred, and six cases involved the potential for direct, unprotected exposure to asbestos by workers and others, which would seem to qualify the cases as candidates for ''Tier 1'' designation.

The guidance also expresses EPA's intent to reduce self-disclosure efforts by the regulated community under EPA's Self Disclosure/Audit Policy, which has been in existence since 1995. It does not make clear whether

[57] EPA will accept comments on the draft guidance through March 19, 2012, from regions, states, and tribes. Details are available at http://www.epa.gov/planandbudget/annualplan/fy2013.html. *See also* 45 DEN A-11, 3/8/12.

the reduction is aimed at civil or criminal voluntary disclosures (both are covered by the policy), nor does it make reference to the Department of Justice policy, in effect since 1991, which is also related to criminal enforcement in the context of voluntary disclosure efforts.

Finally, it is notable that the guidance expresses OECA's intent to focus an effort to align the criminal enforcement program with EPA's National Enforcement Initiatives. This effort and the effect of the guidance on EPA's environmental criminal enforcement program will be examined in next year's article.

Let's Do the Numbers

In last year's article, we discussed the parameters that influence EPA's enforcement decisions, including the specific criteria that Cynthia Giles, assistant administrator for the EPA Office of Enforcement and Compliance Assurance, explained EPA would focus on in the coming year.[58] Giles stated that EPA will target its criminal enforcement efforts to address cases involving death or serious injury, multiple locations, large or significant enterprises, or those cases impacting vulnerable populations, such as the poor and minorities.[59] Using data garnered from our list of environmental criminal cases for 2011,[60] as well as the U.S. Census and the U.S. Sentencing Commission, we examine the areas in which criminal enforcement was focused for 2011 against these criteria.

Death or Serious Injury

We reviewed information regarding 91 cases from calendar year 2011, and based on our review, two environmental cases from 2011 addressed violations involving death or serious injury. The first, *United States v. Bugman Pest and Lawn, Inc. et al.*,[61] concerned both a company and an individual that were involved in the misapplication of the pesticide Fumitoxin. An employee of the company misapplied the pesticide within 15 feet of a house in excess of the maximum dosage, allegedly leading to the deaths of two children.[62] Both the company and the individual received three years probation, and the company was sentenced to a $3,000 fine. The second, *United States v. Chemical and Metal Industries, Inc.*,[63] involved the death of a Honeywell employee who was exposed to a hazardous chemical, manufactured by the company Chemical and Metal Industries, Inc. (C&MI), after the employee opened a cylinder containing the chemical, which was labeled ''relatively benign refrigerant.'' C&MI pleaded guilty to negligent endangerment under the Clean Air Act and was sentenced to two years probation, a $1 million fine, and $2 million restitution to the victim's estate. C&MI has appealed the sentence to the U.S. Court of Appeals for the Fifth Circuit. In an earlier case related to the employee's death, Honeywell International Inc. was sentenced to two years probation, an $8 million fine, and $4 million restitution.[64]

Multiple Locations

Regarding cases that involved multiple locations in 2011, we found two cases that potentially fit this criteria. The first, *United States v. Blyth et al.*,[65] involved violations by two separate companies, Consolidated Seafood and Reel Fish, for smuggling farm-raised catfish from Vietnam into the United States as wild-caught sole in order to avoid paying duties. The second, *United States v. Pruett et al.*,[66] involved violations by an individual, as well as corporate defendants, for their failure to properly operate wastewater treatment facilities in seven residential Louisiana subdivisions.

Large or Significant Enterprises

Regarding the nature of the corporate defendants involved in criminal cases in 2011, in the 36 cases involving corporate defendants, seven (approximately 19 percent) employed over 1,000 employees, five (approximately 14 percent) employed between 100 to 1,000 employees, and 24 (approximately 66 percent) employed under 100 employees.[67] The total number of corporate defendants in both the small and large company ranges increased from 2010.[68] During 2010, two corporate defendants employed over 1,000 employees, six corporate defendants employed between 100 to 1,000 employees, and 10 corporate defendants employed under 100 employees.[69] Finally, out of the 36 total corporate defendants for 2011, 33 were private and three were public, whereas in 2010, out of the 18 total corporate defendants, two were private, and 16 were public.[70]

Vulnerable Populations

Under EPA criteria, vulnerable or environmental justice (EJ) populations generally include low-income and predominantly minority communities. We assessed demographics[71] in the 2011 cases involving traditional pollution circumstances, i.e. Clean Water Act discharge cases (CWA), Clean Air Act (CAA) emission cases, and cases involving toxic substances or waste violations, to determine how many of the cases were brought in what we believe EPA would define as ''EJ communities.''

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[58] *See* Steven P. Solow and Anne M. Carpenter, *The State of Environmental Criminal Enforcement: A Survey of Developments in 2010*, Bloomberg BNA, Daily Environment Report, at 5 (Mar. 15, 2011). *See* 50 DEN B-1, 3/15/11.

[59] *Id.*

[60] Criminal cases that experienced a significant milestone, either indictment, the entry of a guilty plea, or final disposition were included in our list of reported cases for the year.

[61] No. 1:11-cr-00017-DB (E.D. Utah *sentence entered* Jan. 10, 2012).

[62] *See* Press Release, U.S. Dep't of Justice, Bugman Pest and Lawn, Inc. and Coleman Nocks Plead Guilty to Unlawful Use of Pesticide (Oct. 11, 2011), *available at* http://www.epa.gov/compliance/resources/cases/criminal/highlights/2011/bugman-pest-coleman-nocks-10-11-11.pdf

[63] No. 3:08-cr-00028-RET (M.D. La. *appeal pending* Apr. 8, 2011).

[64] *See United States v. Honeywell International, Inc.*, No. 3:07-cr-00031-RET-SCR-1 (M.D. La., *sentence entered* Sep. 24, 2007). *See also* 178 DEN A-10, 9/14/07.

[65] No. 1:10-cr-00011-CG (S.D. Ala. *sentence entered* May 4, 2011).

[66] No. 3:09-cr-00112 (W.D. La. *appeal pending* June 28, 2011).

[67] Information for five corporate defendants not available.

[68] Information for six corporate defendants not available.

[69] *See* Figure 1, Size of Corporate Defendants 2010 vs. 2011.

[70] *See* Figure 2, Nature of Corporate Defendants 2010 vs. 2011.

[71] Data based in the U.S. Census Bureau's Quick Facts website. *See* U.S. Census Bureau, State & County Quick Facts, *available at* http://quickfacts.census.gov/qfd/index.html.

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We found 14 cases were brought in high minority areas that had populations with 15 percent or greater living below the poverty line. Eight cases were related to CWA discharges, two cases were related to CAA asbestos violations, two cases were related to other CAA violations, and two cases were related to waste and toxic substances violations. The cases and underlying data are set forth below.

CWA Discharge Cases

1. *United States v. Bieri*[72]
   - Area: St. Clair County, Illinois
   - Median Household Income: $48,562
   - Racial Demographic: 30.5% African American, 64.6% Caucasian, 1.2% Asian, 3.7% Other
   - Percentage Below Poverty Line: 15.5%

2. *United States v. Askew et al.*[73]
   - Area: Norfolk, Virginia
   - Median Household Income: $42,677
   - Racial Demographic: 47.1% Caucasian, 43.1% African American, 3.3% Asian, 6.5% Other
   - Percentage Below Poverty Line: 16.5%

3. *United States v. Hebert et al.*[74]
   - Area: Iberia Parish, Louisiana
   - Median Household Income: $41,783
   - Racial Demographic: 62.2% Caucasian, 32% African American, 2.4% Asian, 2% Other
   - Percentage Below Poverty Line: 21.2%

4. *United States v. Integrated Production Services, Inc.*; *United States v. Henson*[75]
   - Area: Atoka, Oklahoma
   - Median Household Income: $31,179
   - Racial Demographic: 73.8% Caucasian, 3.7% African American, 13.8% Native American, 8.7% Other
   - Percentage Below Poverty Line: 22.5%

5. *United States v. NH Environmental Group Inc. dba Tierra Environmental and Industrial Services, et al.*[76]
   - Area: East Chicago, Indiana
   - Median Household Income: $28,999
   - Racial Demographic: 42.9% African American, 35.5% Caucasian, 21.6% Other
   - Percentage Below Poverty Line: 33.1%

6. *United States v. Pruett et al.*[77]
   - Area: Ouachita Parish, Louisiana
   - Median Household Income: $39,823
   - Racial Demographic: 60.4% Caucasian, 36.6% African American, 3% Other
   - Percentage Below Poverty Line: 21.0%

7. *United States v. T.P. Construction, Inc.*[78]
   - Area: Blaine County, Montana
   - Median Household Income: $37,034
   - Racial Demographic: 49.4% Native American, 2% Caucasian, 2.4% Other
   - Percentage Below Poverty Line: 29%

8. *United States v. Tuma et al.*[79]
   - Area: Shreveport, Louisiana
   - Racial Demographic: 54.7% African American, 41.2% Caucasian, 4.1% Other
   - Median Household Income: $35,613
   - Percentage Below Poverty Line: 22.1%

CAA Asbestos Cases:

9. *United States v. Gordon-Smith, et al.*[80]
   - Area: Rochester, New York
   - Racial Demographic: 43.7% Caucasian, 41.7% African American, 3.1% Asian, 11.5% Other
   - Median Household Income: $30,138
   - Percentage Below Poverty Line: 30.4%

10. *United States v. Horan*[81]
    - Area: Rochester, New York
    - Racial Demographic: 43.7% Caucasian, 41.7% African American, 3.1% Asian, 11.5% Other
    - Median Household Income: $30,138
    - Percentage Below Poverty Line: 30.4%

CAA Negligent Endangerment and Title V Violations Cases:

11. *United States v. Chemical and Metal Industries, Inc.*; *United States v. Honeywell International Inc.*[82]
    - Area: Baton Rouge, Louisiana
    - Racial Demographic: 54.5% African American, 39.4% Caucasian, 3.3% Asian, 2.8% Other
    - Median Household Income: $36,964
    - Percentage Below Poverty Line: 25.5%

12. *United States v. Pelican Refining Company LLC*; *United States v. Hamilton*; *United States v. LeBleu*.[83]
    - Area: Lake Charles, Louisiana
    - Racial Demographic: 47.7% African American, 47% Caucasian, 1.7% Asian, 3.6% Other
    - Median Household Income: $36,001
    - Percentage Below Poverty Line: 20.9%

Waste and Toxic Substances Cases:

13. *United States v. Overdorf*[84]
    - Area: Houston, Texas (where hazardous waste was disposed)

[72] No. 3:11-cr-30174-WDS (S.D. Ill. *guilty plea entered* Oct. 5, 2011).

[73] No. 4:10-cr-00112-RBS-FBS-1 (E.D. Va. *sentence entered* Aug. 26, 2011).

[74] No. 6:10-cr-00262-HFS (W.D. La. *sentence entered* Mar. 18, 2011).

[75] No. 6:11-cr-00068-KEW-1 (E.D. Okla. *guilty plea entered* Oct. 11, 2011). *See* 197 DEN A-10, 10/12/11. No. 6:11-cr-00050-KEW-1 (E.D. Okla. *guilty plea entered* July 20, 2011).

[76] No. 2:11-cr-00177-PPS (N.D. Ind. *indictment entered* Nov. 3, 2011).

[77] No. 3:09-cr-00112 (W.D. La. *appeal pending* Jun. 28, 2011).

[78] No. 4:11-cr-00065-RKS (D. Mont. *sentence entered* Sep. 19, 2011).

[79] No. 5:11-cr-00031-TS (W.D. La. *indictment entered* Feb. 24, 2011). *See* 39 DEN A-9, 2/28/11.

[80] No. 6:08-cr-06019-CJS (W.D.N.Y. *appeal pending* Sep. 28, 2011). *See* 185 DEN A-7, 9/23/11.

[81] No. 6:11-cr-06171-DGL (W.D.N.Y. *guilty plea entered* Nov. 7, 2011).

[82] No. 3:08-cr-00028-RET (M.D. La. *appeal pending* Apr. 8, 2011); No. 4:11-cr-40006-JPG (S.D. Ill. *sentence entered* Mar. 18, 2011).

[83] No. 2:11-cr-00227-RTH (W.D. La. *sentence entered* Dec. 15, 2011). *See* 243 DEN A-10, 12/19/11. No 2:11-cr-00130-RTH (W.D. La. *guilty plea entered* Jul. 6, 2011).

[84] No. 9:11-cr-00018-MAC -ZJH-1 (E.D. Tex. *guilty plea entered* Mar. 18, 2011).

- Racial Demographic: 50.5% Caucasian, 23.7% African American, 6% Asian, 19.8% Other
- Median Household Income: $42,962
- Percentage Below Poverty Line: 21%
- Area: Lufkin, Texas (location of facility)
- Racial Demographic: 56.7% Caucasian, 27.4% African American, 1.7% Asian, 14.2% Other
- Median Household Income: $35,988,
- Percentage Below Poverty Line: 20.2%

14. United States v. Murrell[85]

- Area: Baltimore, Maryland
- Racial Demographic: 63.7% African American; 29.6% Caucasian, 2.3% Asian, 4.4% Other
- Median Household Income: $39,386
- Percentage Below Poverty Line: 21.3%

Recently, on Feb. 27, 2012, the EPA, along with all federal agencies, announced the release of their environmental justice strategies and annual implementation reports. EPA has provided a central site to access all the agencies' policies, strategies, work/implementation plans, and guidance on EJ.[86] We will revisit environmental crime enforcement and environmental justice in next year's article, including a further review of the nature of the cases brought and disposed of in 2012.

Trials, Plea Agreements, and Government Discovery Obligations

Plea agreements represent the overwhelming majority, around 95 percent, of dispositions in federal criminal cases. Not surprisingly, environmental criminal cases follow a similar pattern. For 2011, based on data spanning Oct. 2, 2010 to Sept. 30, 2011, the U.S. Sentencing Commission found that 93.6 percent of all environmental and wildlife cases ended with a plea, with the remaining 6.4 percent of cases disposed of by trial.[87]

Our review of the number of guilty pleas versus disposition by trial in environmental crimes for our 2011 case data, and over the last six years, is consistent with the analysis of the U.S. Sentencing Commission. According to our data, the number of cases and the ratio of pleas to trial have increased over the last six years, with a slight dip down in both areas in 2007 and 2009.[88] This trend in our data tracks the numbers published by the U.S. Sentencing Commission, which show that for all types of cases, the ratio of pleas to trial has steadily, if marginally, increased from 2006 to 2010.[89]

In this framework, where most cases are resolved short of trial, questions have been raised regarding the issue of discovery in the context of plea agreements.[90] These questions relate to the overall fairness of the plea process where, despite significant new Department of Justice policies regarding the federal government's pretrial discovery obligations pursuant to FED. R. CRIM. PROC. 16, the government has not moved to expand the scope of discovery pre-plea, and routinely requires the waiver of any discovery rights as part of a plea agreement.[91]

These issues, and the percentage of plea agreements in environmental criminal cases, raise an interesting query. Professor Ellen S. PodgorBNA, in considering plea agreements generally, reflected on the Supreme Court's holding in *United States v. Ruiz*.[92] Ruiz held that a plea agreement in which the defendant waived the right to obtain impeachment information was constitutionally permissible because that waiver related to impeachment information regarding informants or other witnesses, which was ''more closely related to the fairness of a trial than to the voluntariness of the plea.''[93] Professor Podgor notes that this holding leaves open the question as to how the court might rule with regard to the constitutional right to receive exculpatory information, per *Brady v. Maryland*,[94] and whether it is constitutionally permissible to require defendants to waive the right to such information as a plea condition.[95]

This raises an interesting query in the context of plea agreements involving environmental and other regulatory-law based (*malum prohibitum*) crimes. To bring a criminal prosecution pursuant to almost every provision of federal environmental law, there must be what amounts to a civil violation of the statute. Thus, for example, a criminal charge for an illegal discharge under the Clean Water Act requires that all the elements of a Clean Water Act civil offense be provable beyond a reasonable doubt.[96] Given that there must almost always be such an underlying regulatory violation, what obligation should the government have, pre-plea, to provide evidence that may be exculpatory as to the defendant's violation of the regulatory provision?

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[85] No. 1:11-cr-00330-BEL-1 (D. MD. *guilty plea entered* July 19, 2011).

[86] *See* U.S. ENVT'L PROTECTION AGENCY, COMPENDIUM OF FEDERAL AGENCIES' POLICIES, STRATEGIES, WORK/IMPLEMENTATION PLANS, GUIDANCE ON ENVIRONMENTAL JUSTICE, *available at* http://www.epa.gov/environmentaljustice/interagency/iwg-compendium.html. *See also* 38 DEN A-4, 2/28/12.

[87] *See* U.S. SENTENCING COMM'N, PRELIMINARY QUARTERLY DATA REPORT FISCAL YEAR 2011, Table 22: Guilty Pleas and Trials in Each Primary Offense Category (2011).

[88] *See* Figure 3, Environmental Criminal Cases Plea vs. Trial, 2006 to 2011.

[89] *See* U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Figure C: Guilty Pleas and Trial Rates, Fiscal Years 2006 - 2010 (2010).

[90] *See, e.g.*, E. Podgor, *Pleading Blindly*, 80 MISS. L. REV. 1633 (2011); E. Yroshefsky, *Ethics and Plea Bargaining: What's Discovery Got to Do With It?*, 23 CRIM. JUST. 28 (2008); D. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011 (2000).

[91] *See* Podgor, *supra* note 90, at 1633-34 (noting the extensive recent guidance on the discovery obligations of prosecutors); Blank, *supra* note 90, at 2013-14 (discussing the requirement to waive discovery rights in plea agreements).

[92] 536 U.S. 622 (2002); *see also* Podgor, *supra* note 90, at 1643-45.

[93] 536 U.S. at 633 (emphasis omitted).

[94] 373 U.S. 83 (1963).

[95] Podgor, *supra* note 90, at 1643 (noting that courts have split in the consideration of whether *Ruiz* should be extended to exculpatory evidence).

[96] A discharge, from a point source, of a pollutant, by a person, to a water of the United States, either in violation of a permit condition, or without a permit. *See* 33 U.S.C. § 1311(a). To charge such a violation as a crime, the government must additionally prove that the conduct was either knowing, *see* 33 U.S.C. § 1319(c)(2), or negligent, *see* 33 U.S.C. § 1319(c)(1).

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Figures

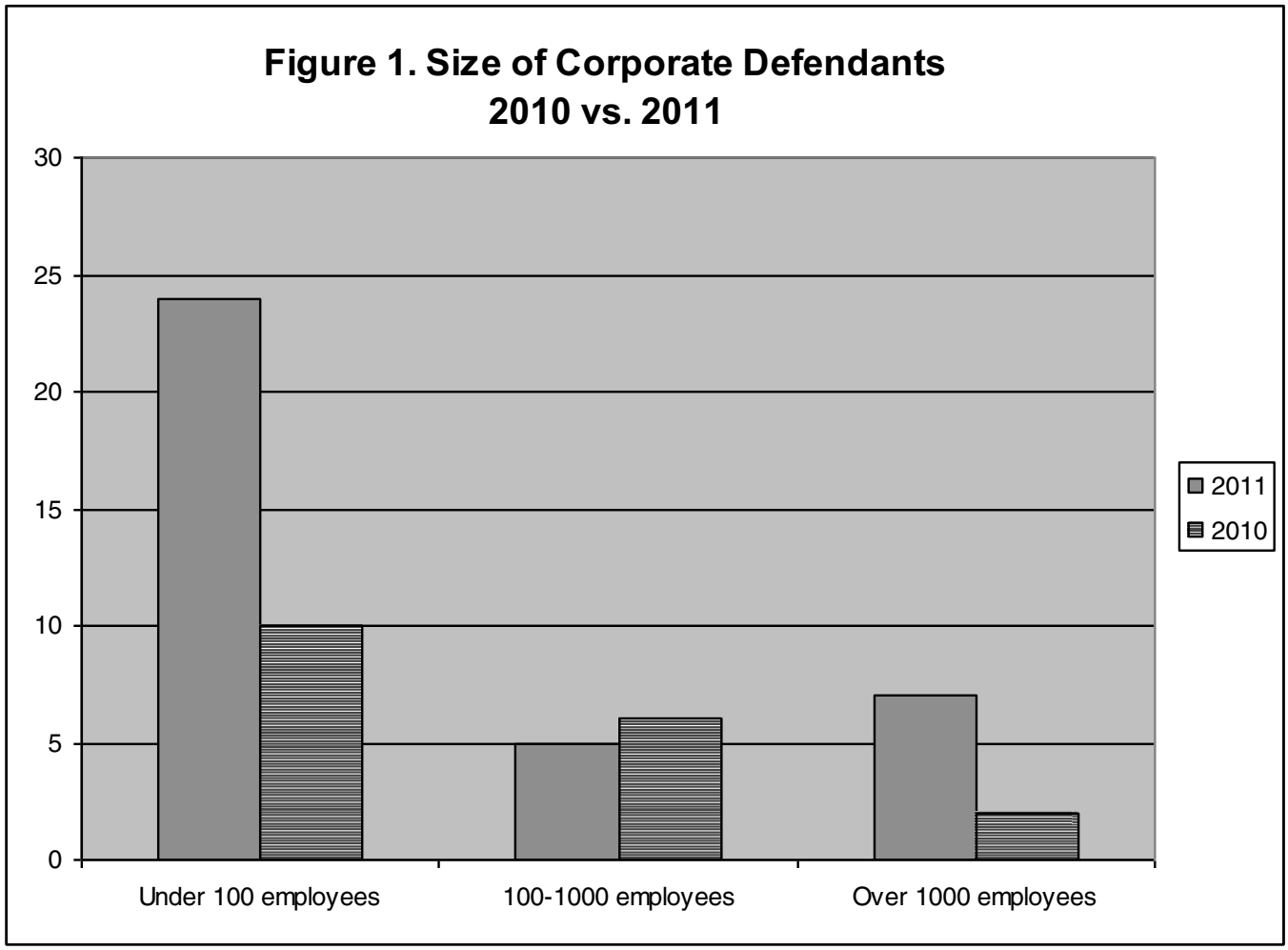


Figure 1. Size of Corporate Defendants
2010 vs. 2011
30
25
20
15
10
5
0
Under 100 employees
100-1000 employees
Over 1000 employees
2011
2010

Figure 2. Nature of Corporate Defendants 2010 vs. 2011

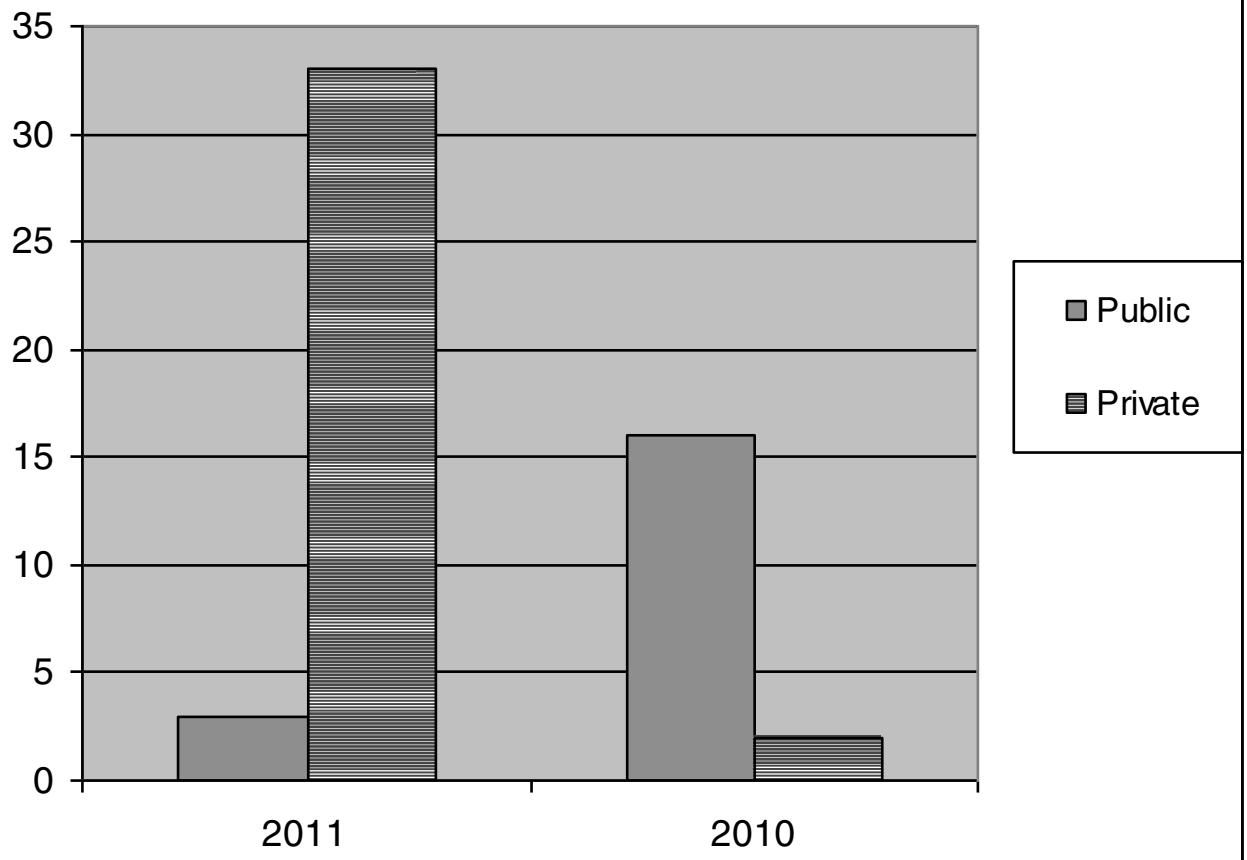
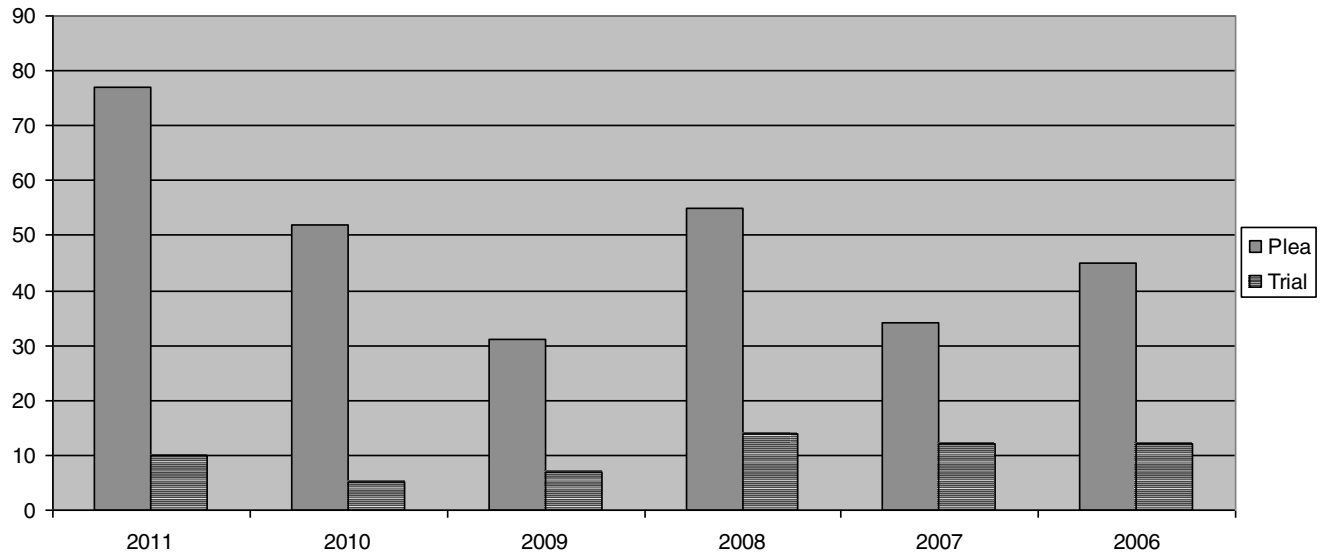


Figure 3. Environmental Criminal Cases Plea vs. Trial 2006 to 2011



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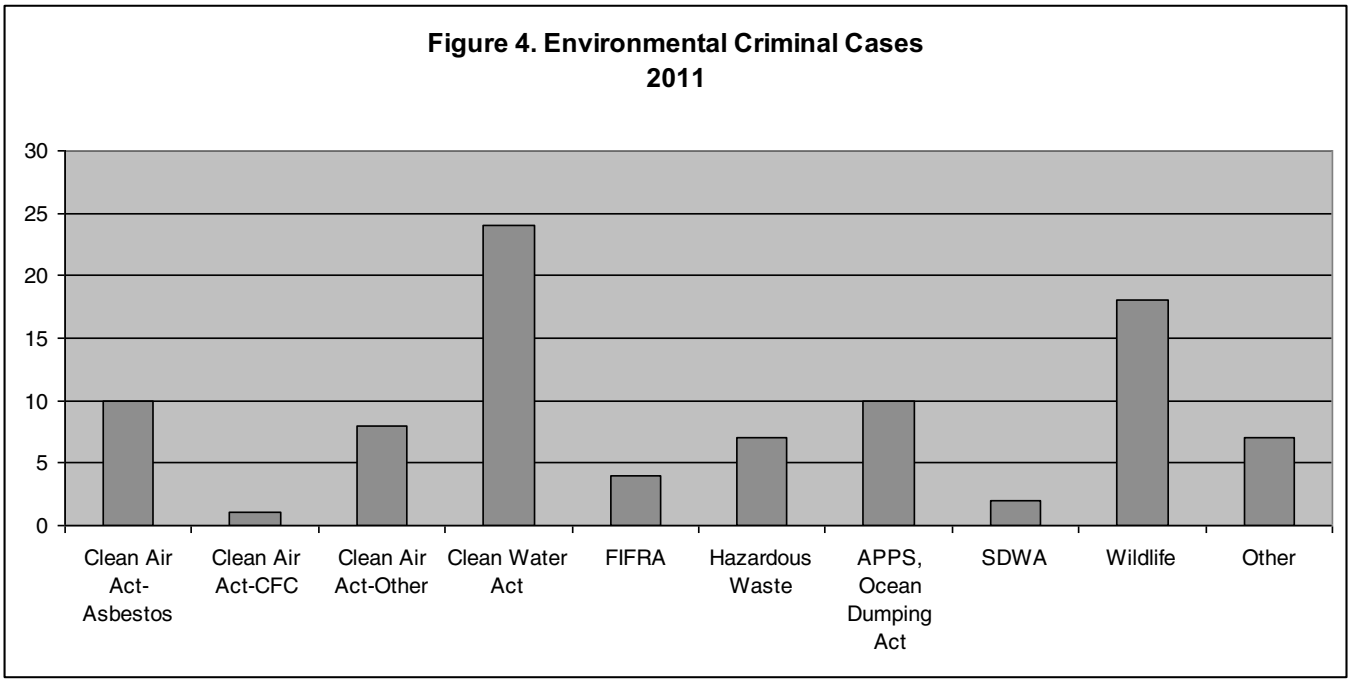

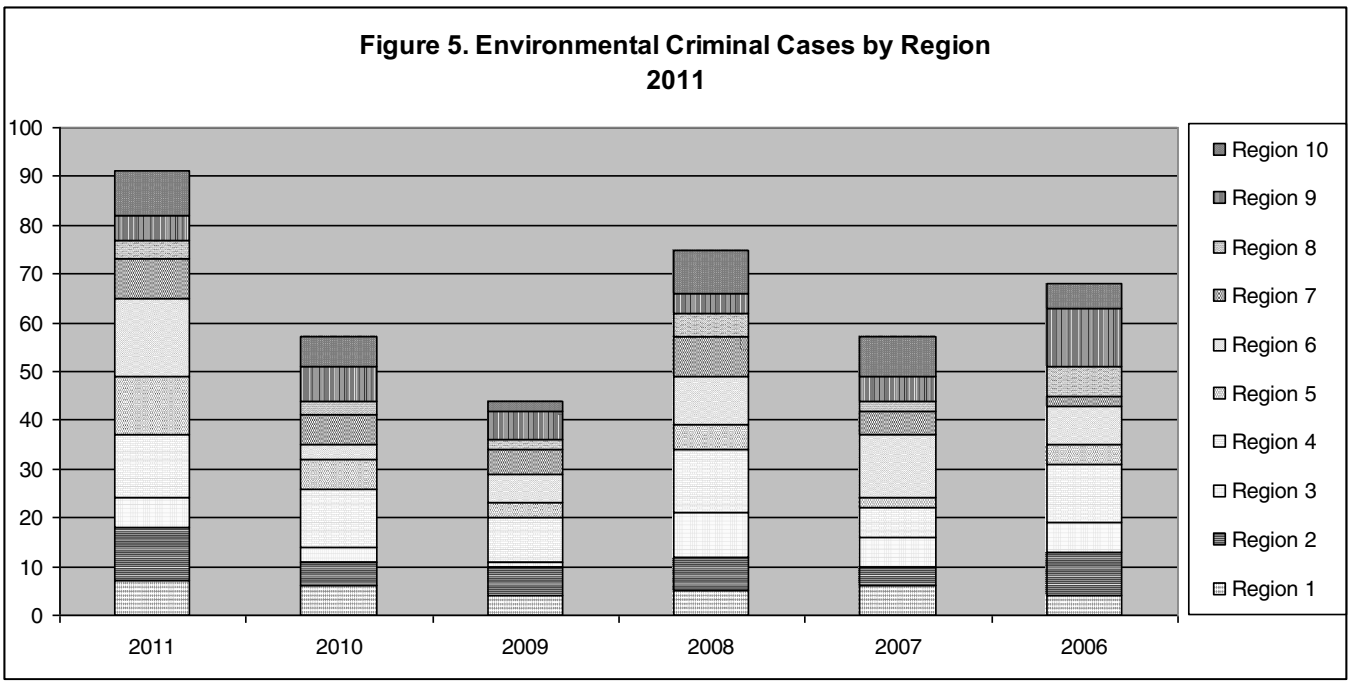

Cases of Note

Like other sources, our data on environmental criminal cases is likely incomplete. Our sources, among others, include the websites of EPA and DOJ, as well as Bloomberg BNA's *Daily Environment Report*, and the always useful Environmental Crimes Blog of Walter James, accessible at http://www.environmentalblog.typepad.com.

AIR CASES

Clean Air Act (CAA) - Asbestos

1) **United States v. Bieri,** No. 3:11-cr-30174-WDS (S.D. Ill. *guilty plea entered* Oct. 5, 2011). Franklin Bieri pleaded guilty Oct. 5, 2011, to violation of the CAA for mishandling asbestos-containing materials. In April 2010, Bieri hired and directed workers to demolish buildings containing asbestos without providing the required notification to the Illinois Environmental Protection Agency. During the demolition, Bieri's workers, under his supervision, failed to follow asbestos management procedures and safety measures that are required under the CAA. Bieri faces up to five years in prison and a $250,000 fine. [Region 5]

2) **United States v. Black,** No. 1:10-cr-00303-RJA (W.D.N.Y. *sentence entered* Mar. 15, 2011). Daniel Black was sentenced March 15, 2011, for violations of the CAA involving the failure to conduct an inspection prior to asbestos removal and the falsification of tax re-

turns. In July 2008, Black, as an officer of Blackstone Business Enterprises Inc. (Blackstone) had authorized the cleanup of a building that was found to contain asbestos insulation around the steam pipes. Black hired four temporary workers for the cleanup who were not trained in asbestos removal or aware of the presence of asbestos in the building. From 2005 to 2007, Black also failed to accurately report income from Blackstone resulting in tax losses of $191,669 to the government. Black pleaded guilty to the charges on Oct. 22, 2010. He was sentenced to 12 months and one day in prison, a $30,000 fine, and two years probation. [Region 2]

3) **United States v. Crompton,** No. 4:10-cr-00191-GAF (W.D. Mo. *guilty plea entered* Oct. 5, 2011). Anthony Crompton pleaded guilty Oct. 5, 2011, to violation of the CAA for the mishandling of asbestos-containing materials in a construction project between April 2001 and July 2006. Crompton failed to properly inspect for asbestos prior to removal of building materials and failed to use proper asbestos containment measures when removing and disposing of asbestos-containing materials. Crompton was the real estate manager for Community Development Corporation of Kansas City (CDC-KC), the company that operated the construction site. CDC-KC's president, William Threatt, was indicted with Crompton in June 2010, but has pleaded not guilty to the CAA violations. Crompton faces up to five years in prison and a $250,000 fine. [Region 7]

4) **United States v. Horan,** No. 6:11-cr-06171-DGL (W.D.N.Y. *guilty plea entered* Nov. 7, 2011). Kenneth Horan pleaded guilty Nov. 7, 2011, to violation of the CAA for failure to adhere to work practice standards applicable to the removal of asbestos. In October 2009, Horan supervised the renovation of a commercial building that he knew contained asbestos but he failed to apply the appropriate safety measures required by the CAA. Horan faces up to five years in prison and a $250,000 fine. [Region 2]

5) **United States v. Gordon-Smith, et al**., No. 6:08-cr-06019-CJS (W.D.N.Y. *appeal pending* Sept. 28, 2011); Nos. 11-4079, 11-4083 (2nd Cir. 2011). Keith Gordon-Smith and his asbestos abatement company, Gordon-Smith Contracting, Inc. (GSC) were found guilty of knowingly exposing workers and public areas to asbestos in violation of the CAA's asbestos work practice standards. GSC workers who demolished a hospital site for the company alleged that during removal of copper pipes, ceiling tile, and scrap metal from the building, asbestos fell on them ''like snow.'' Further, during the demolition, asbestos was allowed to flow from the upper floors of the building through drains and holes to public areas. Gordon-Smith and the company were also convicted of making false statements to an Occupational Safety and Health Administration inspector who investigated the demolition after the receipt of complaints from GSC workers. Gordon-Smith was sentenced to 72 months in prison, restitution of $302,887, and a special assessment of $1,100. GSC was sentenced to a special assessment of $4,400. Both Gordon-Smith and GSC have appealed the sentences to the U.S. Court of Appeals for the Second Circuit (185 DEN A-7, 9/23/11). [Region 2]

6) **United States v. Knapp, et al.**, No. 4:10-cr-00025-JEG (S.D. Iowa *sentence entered* June 22, 2011). Bobby Knapp, the owner of the Equitable Building in Des Moines, Iowa, pleaded guilty March 18, 2011, to conspiracy to violate the CAA and to violations of the CAA's work practice standards related to asbestos removal. Knapp and his employee, Russell Coco, failed to remove all asbestos-containing material from a building before beginning a renovation project on the building that lasted from 2005 until 2008. Knapp was sentenced to 41 months in prison and two years probation. Coco pleaded guilty July 13, 2011, to the same charges as Knapp, and was sentenced to three years probation (122 DEN A-3, 6/24/11). [Region 7]

7) **United States v. Roempke et al.**, No. 2:10-cr-00062-JCC (W.D. Wash. *sentence entered* Jan. 7, 2011). Wolfgang Roempke pleaded guilty May 4, 2010, to the failure to properly remove asbestos, in violation of the CAA, during the demolition of a building he owned in Auburn, Wash. In May 2008, Roempke hired a certified inspector to inspect the property, which revealed rampant asbestos on the building's ceiling, walls and wall paneling, windows, roofing, ventilation system, paneling and floor tile. Roempke took bids to lawfully remove the asbestos, which averaged $20,000. Rather than pay the $20,000, Roempke employed another inspector, Bruce Thoreen, to reassess the asbestos and minimize the contamination. Thoreen produced a false report that concluded the building contained no asbestos. In 2008, Roempke used employees of his car dealership, Auburn Valley Cars, to demolish the building without disclosing the presence of asbestos. Roempke was sentenced to 30 days in prison, three years of supervised release, and a $50,000 fine. [Region 10]

8) **United States v. Soyars,** No. 1:10-cr-00090-WYD (D. Colo. *sentence entered* Feb. 8, 2011). James Soyars, a licensed asbestos abatement supervisor, pleaded guilty Oct. 27, 2010, to violation of the CAA for the failure to dispose of asbestos-containing material at a regulated waste disposal site as soon as practical. From Sept. 9, 2005 to Aug. 28, 2006, Soyars, through his company Talon Environmental Inc., stored and instructed employees to store asbestos-containing materials at a Public Storage facility. Further, neither the bags containing the asbestos, nor the trucks used to transport the asbestos materials, were appropriately marked. Soyars was sentenced to six months in prison, six months home confinement, and a $435,477 restitution payment to the Public Storage facility where the waste was stored. [Region 8]

9) **United States v. Sugar et al.,** No. 2:11-cr-00050-GLF (S.D. Ohio *sentence entered* Aug. 23, 2011). David Sugar, president and owner of Honey Creek Contracting Co. (Honey Creek) pleaded guilty March 8, 2011, to violation of the CAA for mishandling asbestos-containing materials. Sugar, as an agent of Honey Creek, purchased the Weirton Steel Plant, which contained asbestos, for the purpose of renovating the facility. Sugar failed to notify the Ohio EPA prior to removal of the asbestos and failed to properly handle the asbestos-containing materials according to work practice standards required by the CAA. Sugar was sentenced to three years supervised release with 15 consecutive weekends of incarceration, followed by 21 weeks home confinement and a $10,000 fine. Honey Creek was sentenced to a $30,000 fine and is required to pay for ''baseline'' chest x-rays for workers involved in the removal. [Region 5]

10) **United States v. Yi et al.**, No. 2:10-cr-00793-PA (C.D. Cal. *sentence entered* June 7, 2011); **United States v. Yoon**, No 2:10-cr-00575-PA (C.D. Cal. *sentence entered* July 6, 2011). Charles Yi was convicted

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Mar. 29, 2011, and both Joseph Yoon and John Bostick of Los Angeles pleaded guilty Feb. 17, 2011, to conspiracy to violate the CAA's asbestos work practice standards, and to violations of those standards for activities associated with the renovation of a 204-unit apartment complex in Winnetka, Calif., which was purchased by defendants through the real estate company Millennium Group, LLC. Defendants hired a group of workers neither certified nor trained in asbestos abatement to scrape the ceilings of the units without informing them of the presence of asbestos. The work exposed the unprotected workers to asbestos and resulted in the release of asbestos throughout the apartment complex and surrounding area. After the illegal renovation was shut down by an inspector from the Calif. South Coast Air Quality Management District, the asbestos was cleaned up at a cost of about $1.2 million. Yi was sentenced to 48 months in prison, Bostick was sentenced to three years probation, and Yoon was sentenced to two years probation. All three defendants were sentenced to a $5,400 restitution payment (110 DEN A-10, 6/8/11). [Region 9]

Clean Air Act (CAA) - Chlorofluorocarbons

11) **United States v. Arnot, et al.** No. 2:10-cr-00024-RWS-SSC-1 (N.D. Ga. *sentence entered* June 16, 2011). Daniel Arnot, Corey Beard, and Justin Joyner pleaded guilty, in December 2010 and February 2011, to conspiracy and violation of the CAA for the release of ozone-depleting substances into the environment. The defendants stole over-sized commercial air conditioners from businesses and dismantled them to sell the copper and aluminum parts to scrap metal recycling businesses. In order to access the metals, the defendants were required to cut a copper coil in each unit, which released hydrochlorofluorocarbon 22 (aka freon), an ozone-depleting substance. Defendants were sentenced to time served, three years supervised release, and $13,000 restitution (jointly and severally). Arnot was sentenced to a $1,300 special assessment, Beard was sentenced to a $1,000 special assessment, and Joyner was sentenced to a $200 special assessment. [Region 4]

Clean Air Act (CAA) - Other

12) **United States v. Baker et al.,** No. 1:11-cr-00068-ODE -GGB-2 (N.D. Ga. *sentence entered* July 5, 2011). James Hinton, Michael Kelly and Jackie Baker pleaded guilty to conspiracy and violation of the CAA for the falsification of state vehicle emissions inspections. Hinton, a licensed emissions inspector at a ''Stop N Shop'' in Georgia, issued 1,400 false emissions certificates. During vehicle inspections, the defendants connected a ''passing'' vehicle to the emissions inspection equipment, and later manually entered the test vehicle's make and model information into the computer system. This information was transmitted to the Georgia Environmental Protection Division. Kelly was sentenced to 24 months in prison, one year supervised release, and a special assessment of $100. Baker and Hinton were sentenced to two years probation and a special assessment of $100. Hinton was also sentenced to 50 hours of community service. [Region 4]

13) **United States v. Chemical and Metal Industries, Inc.** No . 3:08-cr-00028-RET (M.D. La. *appeal pending* Apr. 8, 2011); No. 11-30327 (5th Cir. Apr. 8, 2011). Chemical and Metal Industries, Inc. (C&MI), a manufacturer of the hazardous chemical antimony pentachloride, pleaded guilty Jan. 13, 2010, to negligent endangerment resulting in death in violation of the CAA. C&MI supplied its customers, including Honeywell International, Inc. (Honeywell) with antimony pentachloride for use in the manufacture of refrigerant products. In 2003, Delvin Henry, an employee of Honeywell, opened a one-ton cylinder labeled by CM&I as containing a ''relatively benign refrigerant,'' which released 1800 pounds of antimony pentachloride from the cylinder and resulted in Henry's death. C&MI was sentenced to two years probation, a $1 million fine, and $2 million restitution to the victim's estate. C&MI has appealed the sentence to the U.S. Court of Appeals for the Fifth Circuit. In a previous, separate action, Honeywell was sentenced to two years probation, an $8 million fine, and $4 million restitution. *See* USA v. Honeywell International, Inc., 3:07-cr-00031-RET-SCR-1 (M.D. La., sentence entered Sept. 24, 2007) (32 DEN A-6, 2/16/07). [Region 6]

14) **United States v. Columbus Steel Castings Co.**, No. 2:11-cr-00180-JLG-1 (S.D. Ohio *sentence entered* Nov. 18, 2011). Columbus Steel Castings Company, Inc., the operator of a steel foundry in Columbus, Ohio, pleaded guilty July 20, 2011, to knowingly violating its CAA Title V permit. The permit violations included the failure to operate air pollution control equipment for four different emission sources at the foundry, the failure to report control equipment malfunctions and deviations, the failure to submit accurate annual compliance certifications, and the failure to perform required monitoring and stack testing. The company was sentenced to one year probation, a $660,000 fine, a $2,400 special assessment, and a $165,000 community service payment to two Columbus-area charitable organizations, and was required to install additional equipment to prevent air pollution at the foundry (224 DEN A-18, 11/21/11). [Region 5]

15) **United States v. Corn Plus,** No. 0:11-cr-00315-JRT-1 (D. Minn. *sentence entered* Nov. 23, 2011). Corn Plus, a Minnesota Cooperative, pleaded guilty to knowingly making a false material statement, representation, and/or certification in a report required under the Clean Air Act for falsely certifying compliance with its CAA Title V Permit. Between 2008 and 2010, Corn Plus failed to report the appropriate air pressure readings on baghouses, a pollution control device designed to prevent the discharge of airborne particulate matter into the atmosphere. The company was sentenced to three years probation, a $450,000 fine, and a $400 special assessment, and was required to implement a compliance plan and associated training program for employees focused on the CAA and Corn Plus's obligations under its Title V Permit (19 DEN A-4, 2/1/10). [Region 5]

16) **United States v. Dickinson et al.,** No. 3:11-cr-00101-MOC-1 (W.D.N.C *guilty plea entered* April 14, 2011). Stephen Craig Dickinson pleaded guilty April 14, 2011, to conspiracy and violation of the CAA for the falsification of state vehicle emissions inspections. Dickinson worked at a used car dealership where he, in cooperation with three other men, employed a device to bypass state emissions inspections and provide a falsified passing result for vehicles. Dickinson faces up to five years in prison and a $250,000 fine. [Region 4]

17) **United States v. Kinard,** No. 3:11-cr-00340-RJC (W.D.N.C. *guilty plea entered* Nov. 17, 2011); **United States v. Haney,** No. 3:11-cr-00342-RJC (W.D.N.C.

guilty plea entered Nov. 17, 2011). Ronald Kinard and Jack Haney pleaded guilty to conspiracy and violation of the CAA for the falsification of nearly 1,300 vehicle emissions inspections. Between January 2010 and August 2011, Kinard and Haney falsified emissions inspections at Kinard's shop Autoworks by hooking up a ''passed'' vehicle to the diagnostics system during the inspection of other cars. Haney further made false statements to federal investigators regarding the number of falsified inspections that he performed. Kinard faces a maximum sentence of five years in prison and a $250,000 fine and Haney faces a maximum sentence of ten years prison and a $500,000 fine. [Region 4]

18) **United States v. Pelican Refining Company LLC,** No. 2:11-cr-00227-RTH (W.D. La. *sentence entered* Dec. 15, 2011); **United States v. Hamilton,** No 2:11-cr-00130-RTH (W.D. La. *guilty plea entered* July 6, 2011); **United States v. LeBleu,** No. 2:11-cr-00266-RTH (W.D. La. *guilty plea entered* Oct. 31, 2011). Pelican Refining Company (Pelican), owner and operator of a crude oil refining and asphalt production facility, pleaded guilty Oct. 12, 2011, to obstruction of justice and violations of the CAA for failure to operate the facility in compliance with its Title V permit. The violations included the failure to implement an environmental compliance plan, the bypass and improper maintenance of environmental control equipment, and the provision of false compliance information to the state. Pelican was sentenced to five years probation, a $10 million fine and $2 million in community service payments to the National Fish and Wildlife Foundation, the Louisiana State Police Emergency Services Unit, and the Louisiana Environmental Trust Fund. In associated cases, Byron Hamilton, vice president of operations for Pelican and Mike LeBleu, asphalt facilities manager for Pelican, both pleaded guilty to negligent endangerment violations of the CAA for causing the release of hazardous air pollutants into the atmosphere (198 DEN A-13, 10/13/11). [Region 6]

19) **United States v. Waked,** No. 2:10-cr-00011-PMP (D. Nev. *sentence entered* Aug. 24, 2011). Wadji Waked pleaded guilty April 25, 2011, to a violation of the Clean Air Act for falsifying vehicle emission test results in the state of Nevada. The Nevada Department of Motor Vehicles, through its database that crosschecks vehicle VIN numbers against vehicles actually inspected by emissions testers, detected the false results submitted by Waked, as well as nine others in the state. Waked submitted approximately 343 falsified emissions records and was sentenced to three years probation and a $100 special assessment. [Region 9]

WATER CASES

Clean Water Act (CWA)

20) **United States v. Acquest Transit, LLC et al.,** No. 1:11-cr-00347-WMS -JJM (W.D.N.Y *indictment entered* Nov. 9, 2011). William Huntress and his companies, Acquest Transit, LLC and Acquest Development, LLC were charged with conspiracy, obstruction of justice, making false statements, and violation of the CWA for the unpermitted filling of wetlands in Amherst, N.Y. According to the indictment, Huntress and his companies purchased property for commercial development purposes with the knowledge that wetlands existed on the property. The defendants filled portions of the wetlands without a permit and falsely stated to the EPA that the property was solely used for agricultural purposes. The defendants also allegedly violated EPA cease and desist orders issued in 2009 that prohibited earth-moving activities on the property from continuing unless authorized by the EPA or the U.S. Army Corps of Engineers. [Region 2]

21) **United States v. Anderson,** No. 2:11-cr-00145-PCE (S.D. Ohio *sentence entered* Sept. 7, 2011). John Anderson, the operator of a Wastewater Treatment Plant in the Village of Pomeroy, Ohio, pleaded guilty June 9, 2011, to violating the CWA by falsifying sampling results reported to the Ohio EPA. Anderson failed to collect and/or analyze effluent samples for the plant on multiple occasions in 2006, 2007, 2008, and 2009, but submitted Monthly Operating Reports to the Ohio EPA indicating that on these dates the effluent was in compliance with all required limits under the facility's permit. Anderson was sentenced to three years of supervised release, including 12 months of home confinement, a $2,000 fine, and 104 hours of community service. Anderson will be prohibited from operating a sewage treatment plant for life. [Region 5]

22) **United States v. Askew et al.**, No. 4:10-cr-00112-RBS-FBS-1 (E.D. Va. *sentence entered* Aug. 26, 2011). Marine Environmental Services, Inc. (MES) and MES's manager Jerry Askew pleaded guilty May 16, 2011, to knowing violations of the CWA and the Refuse Act in connection with discharges from the cleaning of a tanker ship. MES, a tank cleaning company, was hired to clean a decommissioned tanker that contained 2.1 million gallons of polluted water containing bacteria, heavy metals, oil and grease. From October 2005 to July 2006, during the cleaning process, Askew directed MES employees to discharge approximately 500,000 gallons of the polluted water directly into the Elizabeth River in Norfolk, Va. Askew was sentenced to a $15,000 fine, 30 days home confinement, and one year supervised release. MES was sentenced to a $10,000 fine, five years probation, and the performance of a $60,000 community service project benefitting the Elizabeth River. [Region 3]

23) **United States v. Biggio,** No. 1:10-cr-00163-SEB-KPF-1 (S.D. Ind. *sentence entered* April. 12, 2011). Joe Biggio, former Executive Vice President of Ecological Systems, Inc. (ESI), pleaded guilty Oct. 21, 2010, to knowing violations of the CWA for failure to perform representative monitoring under the terms of ESI's pretreatment permit. Biggio authorized ESI employees to collect and analyze multiple samples of the facility's effluent, and to sample during rain events that diluted the discharge, in order to obtain results that reflected lower pollutant concentrations for submission to the City of Indianapolis municipal sewer system. Biggio was sentenced to three years probation and a $15,000 fine (66 DEN A-4, 4/6/11). [Region 5]

24) **United States v. Darigold, Inc.**, No**.** 2:11-cr-00199-MAT-1 (W.D. Wash. *sentence entered* Dec. 1, 2011). Darigold, Inc. (Darigold), one of the country's largest dairy companies, pleaded guilty June 15, 2011, to violations of the CWA and the ESA related to the discharge of ammonia into a creek near one of Darigold's processing plants. The ammonia discharge to the creek was discovered during a fish survey that identified dead fish, including threatened species, near the plant. Further investigation linked the discharge to storm drains at the plant. The company engineer, Gerald Marsland,

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had previously repaired a refrigeration unit at the plant, causing the leakage of ammonia, which he allowed to enter the storm drains and flow into the creek. Darigold was sentenced, for both the CWA and ESA violations, to three years probation, a $10,000 fine, a $5,000 restitution payment, and a $60,000 community service payment. [Region 10]

25) **United States v. DRD Towing Company, LLC**, No. 2:10-cr-00191-ILRL (E.D. La. *sentence entered* Jan. 11, 2011); **United States v. Dantin**, No. 2:10-cr-00190-ILRL (E.D. La. *sentence entered* Jan. 19, 2011); **United States v. Carver,** No. 2:10-cr-00333-HGB (E.D. La. *sentence entered* Apr. 13, 2011); **United States v. Bavaret,** No. 2:10-cr-00334-MLCF (E.D. La. *sentence entered* Aug. 24, 2011). DRD Towing Company, LLC (DRD), a maritime company and operator of the tugboat *M/V Mel Oliver*, pleaded guilty Sept. 8, 2010, to violations of the Ports and Waterways Safety Act (PWSA) and the CWA stemming from actions associated with a collision between the tugboat and the tanker ship *M/T Tintomara*. The *M/V Mel Oliver*, and the fuel oil tanker barge it was pushing, crossed the path of the *M/T Tintomara* and collided with the vessel causing the release of 282,686 gallons of fuel oil into the Mississippi River in violation of the CWA. The improper assignment and staffing of crewmembers by DRD on the *M/V Mel Oliver* created a hazardous condition that facilitated the collision in violation of the PWSA. John Bavaret, the crewmember steering the ship at the time of the collision was not properly licensed to operate the ship without supervision. Terry Carver, the only licensed operator of the *M/V Mel Oliver* on the ship at the time of the collision, did not have a properly licensed operator to replace him. DRD was sentenced to two years probation, a $200,000 fine, and a $525 assessment. Randall Dantin, a co-owner of DRD, pleaded guilty Sept. 8, 2010, to obstruction of justice and was sentenced to 21 months in prison, two years of supervised release, and a $50,000 fine. In separate cases, both Bavaret and Carver pleaded guilty to violation of the PWSA. Bavaret was sentenced to six months in prison followed by three years supervised release and a $125 assessment. Carver was sentenced to three years probation and a $100 assessment (167 DEN A-1, 8/29/11). [Region 6]

26) **United States v. Freedman Farms, Inc. et al.,** No. 7:10-cr-00015-FL-1 (E.D.N.C. *sentence entered* Feb. 13, 2012). William Freedman and his company, Freedman Farms, Inc., pleaded guilty during trial on July 6, 2011, to a negligent and knowing violation of the CWA, respectively, for the discharge of waste from the company's hog farming operation into a waterway in December 2007. The discharges stemmed from overfull waste lagoons on the property. Defendants were sentenced, jointly and severally, to a restitution payment of $1 million. Freedman Farms was sentenced to five years probation and a $500,000 fine. Freedman was sentenced to six months in prison, followed by six months home detention, and one year supervised release (30 DEN A-6, 2/15/12). [Region 4]

27) **United States v. G&K Services, Inc.** No. 4:10-cr-00106 (S.D. Iowa *sentence entered* Jan. 7, 2011). G&K Services, Inc. (G&K), operator of an industrial laundry facility, pleaded guilty Sept. 2, 2010, to negligent violation of the CWA for the discharge of wastewater not in compliance with the facility's pretreatment permit. From October 2005 to August 2008, G&K discharged wastewater from the laundry facility that exceeded the permit limit of 400 mg/l for oil and grease. G&K was sentenced to a $450,000 fine, a special assessment of $125 to the Crime Victim Fund, and ordered to comply with the requirements of its pretreatment permit (11 DEN A-9, 1/18/11). [Region 7]

28) **United States v. Hebert et al.,** No. 6:10-cr-00262-HFS (W.D. La. *sentence entered* Mar. 18, 2011). Environmental Compliance Solutions, LLC (ECS), and ECS's president and part owner Sidney Hebert, pleaded guilty Sept. 22, 2010, to the negligent operation of a water treatment facility in violation of the Clean Water Act. Hebert allowed wastewater to bypass the facility's filtration system and discharge into a canal located in the Port of Iberia. Herbert also failed to maintain required documentation, prepare reports, implement plans, and perform proper testing mandated by the permit. Hebert was sentenced to three years probation and a $1,800 fine. ECS was sentenced to a $50,000 fine and a $200 special assessment. [Region 6]

29) **United States v. Indian Ridge Resort, Inc. et al** No. 3:10-cr-05026-ODS-3 (W.D. Mo. *guilty plea entered* Nov. 21, 2011). Indian Ridge Resort, Inc. (Indian Ridge) and North Shore Investments, LLC (North Shore) both pleaded guilty Nov. 21, 2011, to violations of the CWA for noncompliance with the Missouri State Operating Permit governing the control of storm water discharges associated with industrial activity (General Permit). During construction of the Indian Ridge Resort Community, defendants failed to install adequate Best Management Practices (BMPs) for the control of storm water, failed to conduct adequate inspections of the site, and allowed storm water to discharge from the site. Under the terms of the plea agreement, defendants agreed to five years probation and to implement a compliance program designed to prevent further erosion and discharges from the site. Indian Ridge has also agreed to a $215,000 fine and North Shore has agreed to a $100,000 fine. [Region 7]

30) **United States v. Integrated Production Services, Inc.** No. 6:11-cr-00068-KEW-1 (E.D. Okla. *guilty plea entered* Oct. 11, 2011); **United States v. Henson** No. 6:11-cr-00050-KEW-1 (E.D. Okla. *guilty plea entered* July 20, 2011). Integrated Production Services, LLC, (IPS), a Houston-based natural gas and oil drilling contractor, pleaded guilty Oct. 11, 2011, to a negligent violation of the Clean Water Act for the discharge of acid-contaminated wastewater. In 2007, during hydraulic fracturing operations at the Pettigrew well site, a tank containing hydrochloric acid leaked onto the area located within the well's earthen berm. After rainfall caused the contaminated area to flood, an IPS supervisor, Gabriel Henson, drove a company truck through the earthen berm and caused the discharge of over 400 gallons of acid-contaminated wastewater into a nearby creek. Under the terms of the plea agreement, IPS has agreed to two years probation, a $140,000 fine, a $22,000 payment to the Oklahoma Department of Wildlife Conservation, and to implement a $38,000 compliance and training program regarding proper hazardous waste handling and spill response procedures. In a separate case, Henson pleaded guilty July 20, 2011, to violation of the CWA and faces a $100,000 fine and up to one year in prison (197 DEN A-10, 10/12/11). [Region 6]

31) **United States v. Kie-Con Inc.**, No. 3:10-cr-00934-NC (N.D. Cal. *sentence entered* Sept. 9, 2011). Kie-Con Inc. (Kie-Con), a construction company spe-

cializing in pre-fabricated concrete products, pleaded guilty Sept. 1, 2011, to negligent violation of the CWA for discharges in violation of the permit for a Kie-Con facility. Kie-Con routinely discharged concrete process wastewater with high pH levels in violation of the facility permit into a storm drain that emptied directly to the San Joaquin River. Kie-Con was sentenced to three years probation, a $3.5 million fine, and a $1.5 million community service payment (172 DEN A-6, 9/6/11). [Region 9]

32) **United States v. Mabus,** No. 1:11-cr-00555-JRM (D.S.C. *sentence entered* Sept. 22, 2011). John Mabus pleaded guilty May 24, 2011, to a negligent violation of the CWA for the discharge of wastewater into a navigable water body. Mabus, the owner of a construction company, implemented a sewer line construction project adjacent to a former textile mill. During digging for the sewer lines, contaminated water from an open lagoon on the textile site infiltrated the ditch. Mabus instructed his employees to pump the contaminated water into a nearby waterway for three days during the construction project. Mabus was sentenced to five years probation, including eight months of home confinement, and a $7,500 fine. [Region 4]

33) **United States v. NH Environmental Group Inc. dba Tierra Environmental and Industrial Services, et al.,** No. 2:11-cr-00177-PPS (N.D. Ind. *indictment entered* Nov. 3, 2011). Tierra Environmental and Industrial Services (Tierra), Tierra's owner Ronald Holmes, and Tierra's manager Stewart J. Roth were indicted for violations of the CWA stemming from allegedly illegal discharges of wastewater to the sewer system. Tierra, which did not possess a permit to discharge the facility's wastewater, was required to transport wastewater to other operators for proper treatment and discharge. According to the indictment, the defendants conspired to transport the wastewater to a closed facility owned by Holmes and discharged the wastewater directly from the closed facility to the sewer system. The maximum sentence for the charges is 23 years in prison and $1.75 million in fines. [Region 5]

34) **United States v. Oak Mill, Inc. et al.,** No. 5:08-cr-06016-HFS (W.D. Mo. *sentence entered* June 8, 2011). Robert Arundale and his company Oak Mill, Inc. (Oak Mill), pleaded guilty Nov. 30, 2011, to negligent violations of the CWA for the discharge of wastewater in violation of the company's pretreatment permit. Oak Mill uses acid to reclaim soybean oil from used vegetable oil, and has a permit to discharge wastewater from the process to the city POTW in compliance with federal pretreatment standards. In October 2006, the defendants discharged effluent to the POTW in violations of their permit's pretreatment standards for nickel and zinc. Defendants were sentenced to five years probation, a $50,000 fine, and $4,000 restitution (108 DEN A-15, 6/6/11). [Region 7]

35) **United States v. Patel,** No. 3:10-cr-00724-WHA (N.D. Cal. *sentence entered* June 23, 2011). Dhiren Patel, a former environmental manager at a California beverage bottling facility, pleaded guilty March 16, 2011, to a knowing violation of the CWA for the discharge of pollutants in excess of the facility's permit limit to a publicly owned treatment works. The indictment issued in the case also charged Patel with, among other things, tampering with a monitoring method by diluting permit samples and submitting false statements in the company's discharge monitoring reports. Patel was sentenced to four months imprisonment, followed by one year of supervised release, and 100 hours of community service. Patel must also give four speeches to other environmental managers regarding his offense, protection of the environment, and his prison and community service experiences (53 DEN A-14, 3/18/11). [Region 9]

36) **United States v. Pruett et al.**, No. 3:09-cr-00112 (W.D. La. *appeal pending* June 28, 2011). Jeffrey Pruett and his public water and wastewater treatment companies, Louisiana Land & Water Co. and LWC Management Co., were convicted by a jury Jan. 25, 2011, of violations of the CWA for failure to properly operate wastewater treatment facilities in seven residential Louisiana subdivisions, and the resultant illegal discharges of pollutants from those facilities. Pruett and his companies allowed the discharge of effluent without proper tertiary treatment at the facilities, allowed suspended solids and fecal coliform in treated effluent to exceed permit limitations at the facilities, and allowed the discharge of raw sewage into several residential neighborhoods from the facilities. The defendants were sentenced, jointly and severally, to a $310,000 fine. Pruett was sentenced to 21 months in prison followed by supervised release for one year. Defendants filed an appeal of the convictions in the U.S. Court of Appeals for the Fifth Circuit (108 DEN A-9, 6/9/09). [Region 6]

37) **United States v. Riddle Inc. et al.,** No. 1:10-cr-00118-LRR (N.D. Iowa *sentence entered* Mar. 17, 2011). Gene Riddle, owner of Riddle Inc., a manufacturer of circuit boards for electronic devices, pleaded guilty Nov. 18, 2010, to a negligent violation of the CWA in connection with the discharge of chemicals to a creek near his company's property. On the same day, Riddle Inc., pleaded guilty to a violation of the Resource Conservation and Recovery Act in connection with the unpermitted storage of hazardous materials in a dilapidated building located 400 feet from the creek. The creek flooded in 1993, 2002, and 2009, allowing water to flow freely through the building and mix with the chemicals stored in the building. Riddle and the company were both sentenced to five years probation and a $273,261 restitution payment. Riddle was also sentenced to 120 hours of community service. [Region 7]

38) **United States v. Smith**, No. 3:09-cr-05590-BHS (W.D. Wash. *sentence entered* Jan. 11, 2011). Philip Smith, a commercial land developer, pleaded guilty Sept. 20, 2010, to knowing violation of the CWA for the unpermitted discharge of pollutants into a wetland. In 2005, Smith acquired 190 acres of property approximately 65 percent of which consisted of surface water and wetlands. Smith used mechanized land clearing equipment to excavate wetlands and stream channels and redeposit or discharge the excavated materials. In 2008, the EPA issued Smith an order to restore the damaged wetlands, and subsequently filed a separate civil case for his failure to comply. Smith was sentenced to three years probation, a $20,000 restitution payment, and 100 hours of community service. [Region 10]

39) **United States v. Stolthaven New Orleans, LLC,** No. 2:11-cr-00169-LMA (E.D. La. *sentence entered* Jan. 17, 2012). Stolthaven New Orleans, LLC (Stolthaven), operator of a bulk liquid storage and transfer terminal, pleaded guilty Oct. 13, 2011, to negligent violation of the Clean Water Act for the unpermitted discharge of fluorosilicic acid (FSA) into the Mississippi River. Stolthaven stored the highly corrosive, toxic FSA in

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stainless tanks from 2005 to 2008 during which time multiple leaks and discharges of FSA occurred. During this time, Stolthaven failed to provide rubber lined tanks to properly store the FSA, and failed to provide a backup storage tank for emergency purposes in the event of a catastrophic leak. On March 17, 2008, a major rupture occurred in the FSA tank, causing the release of approximately 50 gallons per minute of the acid. The FSA was collected in a secondary containment area adjacent to tanks containing other hazardous products. To prevent the FSA from mingling with these products and creating a greater harm to human health and the environment, Stolthaven discharged 454,465 gallons of FSA directly into the river. Stolthaven was sentenced to two years probation, a $200,000 fine, and a $150,000 community service payment split between the Louisiana State Police Emergency Services Unit, the Louisiana Department of Environmental Quality Hazardous Waste Cleanup Fund, and the Southern Environmental Enforcement Network Enforcement Training Fund. [Region 6]

40) **United States v. Stricker et al.**, No. 1:10-cr-00505-SL-1 (N.D. Ohio *sentence entered* June 3, 2011). Brothers Thomas and Gregory Stricker and their metal plating company Stricker Refinishing Company, Inc. (SRC) pleaded guilty Jan. 6, 2011, to violations of the CWA for noncompliance with SRC's pretreatment permit. Defendants bypassed SRC's pretreatment process and discharged wastewater generated by the metal plating process, which contains metal nickel, copper, zinc and cyanide, directly into the City of Cleveland sewer system. The Stricker brothers were each sentenced to three years probation, the cost of prosecution, a $30,000 fine, a $25,000 community service payment to Ducks Unlimited, and 500 hours of community service. SRC was sentenced to two years probation, a $30,000 fine, and a $20,000 community service payment to Ducks Unlimited. [Region 5]

41) **United States v. T.P. Construction, Inc.**, No. 4:11-cr-00065-RKS (D. Mont. *sentence entered* Sept. 19, 2011). T.P. Construction, Inc. (TP) pleaded guilty Sept. 23, 2011, to violation of the CWA for the negligent disposal of sewage. After T.P. pumped the septic tanks of residents of the Fort Belknap Reservation in November 2009, the driver of the septic truck, William Hinkle, opened the valve of the truck as he drove across the Reservation, thus releasing the waste. TP was sentenced to one year probation and a $25,000 fine. [Region 8]

42) **United States v. Tuma et al.,** No. 5:11-cr-00031-TS (W.D. La. *indictment entered* Feb. 24, 2011). John and Cody Tuma, father and son, were both indicted Feb. 24, 2011, for conspiracy, obstruction of justice, and violations of the CWA for discharges of untreated wastewater to a local publicly owned treatment works (POTW) and directly into the Red River. The defendants operated a wastewater treatment facility that received wastewater from industrial processes and oilfield facilities. The treatment facility was contracted to treat the waste, and discharge it to either the POTW or the Red River. Defendants constructed pipes from the facility to the river to allegedly release 200,000 gallons of untreated waste daily, and diluted discharges to the POTW with fresh water. During a June 2007 EPA inspection, the defendants prevented the collection of effluent samples by staging an equipment malfunction (39 DEN A-9, 2/28/11). [Region 6]

43) **United States v. Vierstra,** No. 1:10-cr-00204-REB (D. Idaho *appeal pending* Aug. 10, 2011). Mike Vierstra was convicted March 23, 2011, of a negligent violation of the CWA for the discharge of process wastewater from a concentrated animal feeding operation (a dairy) into a local canal. The discharge, which entered the canal from a valve located in one of diary's fields, was discovered by a local state dairy inspector. Once contacted by the inspector, Vierstra shut off the valve to cease the discharge and stated that one of his employees had left the valve open. On Aug. 3, 2011, Vierstra was sentenced to 60 days imprisonment, to be served on consecutive weekends until completion, three years supervised release, and a $12,000 fine. Vierstra has since appealed his conviction to the U.S. Court of Appeals for the Ninth Circuit. [Region 10]

Act to Prevent Pollution from Ships (APPS)

44) **United States v. A.E. Nomikos Shipping Inv. Ltd. et al.**, No. 3:11-cr-00439-SI (D. Or. *sentence entered* Nov. 4, 2011). A.E. Nomikos Shipping Inv. Ltd. (Nomikos) and Lounia Shipping Co. Ltd. (Lounia) both pleaded guilty Nov. 2, 2011, to violating the APPS and making false statements. A U.S. Coast Guard investigation revealed that between June 2011 and Oct. 16, 2011, Lounia and Nomikos, through their employees, directed the crew of the ship *Arion SB* to run the ship's oil water separator incorrectly. In particular, the Chief Engineer instructed the Second Engineer to pipe fresh water directly into the Oil Content Meter to prevent the overboard discharge of over 15 ppm of oil-contaminated waste. The Chief Engineer falsified the Oil Record Book to conceal the illegal discharge. Both defendants were sentenced to a $750,000 fine, a special assessment of $800, and three years probation during which they will be required to develop and implement an environmental compliance plan. [Region 10]

45) **United States v. Cardiff Marine, Inc.,** No. 1:11-cr-00058-MJG (D. Md. *sentence entered* Mar. 17, 2011); **United States v. Grifakis,** No. 1:11-cr-00011-MJG (D. Md. *sentence entered* June 20, 2011). Cardiff Marine, Inc. (Cardiff), a Liberian-registered shipping company and operator of the *M/V Capitola*, pleaded guilty March 17, 2011, to violation of the APPS and obstruction of justice. A May 2010 U.S. Coast Guard investigation, launched after a crew member informed a clergyman of a ''magic pipe'' aboard the vessel, revealed the crew was bypassing pollution control equipment and discharging oily bilge wastes overboard into the ocean, and falsified the Oil Record Book to conceal the discharges. The crew of the *M/V Capitola* made false statements to U.S. Coast Guard inspectors regarding the discharges. Cardiff was sentenced to three years probation, a $2.4 million fine, and an $800 assessment. Dimitrios Grifakis, Chief Engineer of the *M/V Capitola* pleaded guilty May 4, 2011, to obstructing a federal investigation on board the vessel. Dimitrios instructed the crew to perform the illegal discharges, falsified the Oil Record Book, and failed to produce Daily Sounding Records to the U.S. Coast Guard during its investigation. Grifakis was sentenced to six months in prison, two years probation, and an assessment of $200 (38 DEN A-10, 2/25/11). [Region 3]

46) **United States v. Epps Shipping Company,** No. 3:11-cr-00058-DRD (D.P.R *sentence entered* Aug. 18, 2011). Epps Shipping Company (Epps) pleaded guilty

Feb. 25, 2011, to violating the APPS and making false statements. Epps operated the *M/V Carib Vision* without operating pollution control equipment. During a Nov. 6, 2010, U.S. Coast Guard inspection it was discovered that the vessel lacked equipment to treat oily bilge before discharging it into the ocean. The crew admitted to discharging untreated bilge directly into the ocean, which was not recorded in the vessel's Oil Record Book. Epps was sentenced to a $600,000 fine, an $800 special assessment, a $100,000 payment to the National Fish and Wildlife Foundation to rehabilitate coral reefs in Guanica Bay, and was required to develop and implement an environmental compliance plan. [Region 2]

47) **United States v. Ilios Shipping Company S.A.,** No. 2:11-cr-00286-JCZ (E.D. La. *guilty plea entered* Dec. 13, 2011); **United States v. Valentino Mislang,** No. 2:11-cr-00262-HGB (E.D. La. *sentence entered* Dec. 21, 2011); **United States v. Romulo Esperas,** No. 2:11-cr-00263-SSV (E.D. La. *sentence entered* Dec. 13, 2011). Ilios Shipping Company S.A. (Ilios), operator of the *M/V Agios Emilianos* pleaded guilty Dec. 13, 2011, to violation of the APPS and obstruction of justice. From April 2009 to April 2011, the crew of the *M/V Agios Emilianos* circumvented the vessel's pollution control equipment and released oily bilge wastes into the ocean. The crew concealed the discharges by falsifying the Oil Record Book. Under the terms of the plea agreement, Ilios has agreed to three years probation, a $1.75 million fine, a special assessment of $2,000, a $250,000 community service payment to the National Fish and Wildlife Foundation to restore marine resources, and will develop and implement an environmental compliance plan monitored by a third party. The master of the vessel, Valentino Mislang, pleaded guilty Oct. 19, 2011, to conspiracy to obstruct justice for instructing crewmembers to record false information in the Oil Record Book, and lie to the U.S. Coast Guard during an April 2011 inspection. Mislang was sentenced to three years probation. The chief engineer of the vessel, Romulo Esperas, also pleaded guilty Oct. 19, 2011, to conspiracy to obstruct justice for ordering the illegal discharge and falsely recording information in the Oil Record Book. Esperas was sentenced to three years probation. [Region 6]

48) **United States v. Koo's Shipping Company S.A.**, No. 1:11-cr-00034-GK-1 (D.D.C. *sentence entered* Apr. 4, 2011). Koo's Shipping Company S.A. (Koo's), a Taiwanese corporation and operator of the *M/V Syota Maru*, pleaded guilty March 31, 2011, to violations of the APPS and making false statements. Koo's, through crewmembers of the *M/V Syota Maru*, knowingly bypassed pollution prevention equipment and discharged oily bilge wastes directly into Pago Pago Harbor, American Samoa, and falsified the vessel's Oil Record Book to conceal the illegal discharges. The company was sentenced to three years probation, a $750,000 fine, a $1,200 special assessment, and a $250,000 community service payment. [Region 3]

49) **United States v. Noka Shipping Company Ltd. et al.,** No. 2:11-cr-00534-JGJ (S.D. Tex. *sentence entered* June 20, 2011). Noka Shipping Company Ltd. (Noka), operator of the *M/V Florian*, pleaded guilty June 7, 2011, to violation of the APPS and violation of the Ports and Waterways Safety Act (PWSA). Noka, through the senior crewmembers of the *M/V Florian*, concealed the illegal discharge of oil directly into the ocean and falsification of the discharges in the Oil Record Book in violation of the APPS. In violation of the PWSA, Noka failed to report safety hazards on the vessel, in the form of excess oil in bilges and machinery spaces, oil leaks in the main engine and generators, and oil in the ship's fire suppression system. The crew of the *M/V Florian* failed to remedy the issues after identification during a U.S. Coast Guard investigation. Noka was sentenced to five years probation, a $750,000 fine, and a $150,000 community service payment to the National Marine Sanctuary Foundation. [Region 6]

50) **United States v. Sanford Ltd.,** No. 1:11-cr-00352-BAH (D.D.C *indictment entered* Dec. 6, 2011). The New Zealand based company Sanford Ltd. (Sanford), operator of the *F/V San Nikunau*, was indicted Dec. 6, 2011, for violations of the APPS, conspiracy, making false statements, and obstruction of justice. The indictment alleges that Sanford, acting through the crew of the *F/V San Nikunau*, took part in a conspiracy to illegally discharge oily bilge wastes from the vessel and conceal the discharges by recording false information in the Oil Record Book. During a July 2011 U.S. Coast Guard investigation, the company allegedly presented false information to inspectors, informing them that the vessel only discharged water overboard. Sanford faces up to a $3.5 million fine and a $24 million forfeiture. [Region 3]

51) **United States v. Stanships, Inc., et al.,** No. 2:11-cr-00057-CJB (E.D. La. *guilty plea entered* Apr. 12, 2011). Stanships, Inc. (Marshall Islands), Stanships, Inc. (New York), Standard Shipping, Inc., and Calmore Management Ltd., operators of the *M/V Americana*, pleaded guilty April 12, 2011, to violations of the APPS and PWSA. A November 2010 U.S. Coast Guard investigation revealed that crew of the vessel deliberately pumped engine waste overboard and falsified the Oil Record Book to conceal the illegal discharges in violation of the APPS. In violation of the PWSA, the defendants failed to report a hazardous situation on the vessel, in the form of malfunctioning generator. The defendants were each sentenced to five years probation, a $750,000 fine, and a $250,000 community service payment to the National Fish and Wildlife Foundation for conservation and protection of wildlife in Louisiana. [Region 6]

52) **United States v. Uniteam Marine Shipping GmbH**, No. 3:11-cr-00195-CCC-1 (D.P.R. *sentence entered* Sept. 8, 2011). Uniteam Marine Shipping GmbH (Uniteam), a German corporation, operator of the *M/C CCNI Vado Ligure*, pleaded guilty May 19, 2011, to violating the APPS and making false statements. During a May 2010 inspection by the U.S. Coast Guard, excessive amounts of oil in the discharge lines of the vessel's oil water separator were discovered. Further investigation revealed that the crew of the vessel manipulated the oil water separator and discharged oily bilge wastes into the ocean, which were not recorded in the Oil Record Book. Uniteam was sentenced to three years supervised probation, a $600,000 fine, an $800 assessment, a $200,000 community service payment to the National Fish and Wildlife Foundation, and was required to implement a comprehensive advanced pollution prevention training and verification program to monitor vessel operations and train crewmembers. [Region 2]

Rivers & Harbors Act

53) **United States v. Betz et al.,** No. 6:11-cr-60090-AA (D. Or. *plea agreement entered* Aug. 22, 2011). Stephen Betz and Geraldine Ponder pleaded guilty to violating

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the Rivers and Harbors Act for dumping truckloads of rock into the McKenzie River in November 2008 for the purpose of creating a dam. The McKenzie River provides drinking water to Eugene, Ore., and hosts Chinook salmon and bull trout, both threatened species. Neither Betz nor Ponder had obtained the permit necessary to discharge into the river. Both Betz and Ponder were sentenced to three years probation. Betz will pay a $6,500 fine and make a $3,500 community service payment. Ponder will pay a $1,625 fine and make an $875 community service payment. [Region 10]

Safe Drinking Water Act (SDWA)

54) **United States v. Beckman, et al.,** No. 2:10-cr-04021-NKL (W.D. Mo. *sentence entered* Dec. 1, 2011). Scott Allan Beckman, the former mayor of Stover, Mo., and Richard Sparks, the former superintendent of Stover's public works department, were both sentenced to probation and criminal fines for the submission of falsified drinking water samples to the state in violation of the SDWA. Sparks submitted drinking water sampling records to the Missouri Department of Natural Resources that contained a falsified sampling location as well as analyses of samples that had been treated with chlorine prior to testing. Sparks was sentenced to five years probation and a $5,000 fine. Beckman was convicted of lying to federal officials regarding his knowledge of Sparks' activities regarding the falsified sampling records. Beckman was sentenced to 10 years probation, a $10,000 fine and banned from working for state government. [Region 7]

55) **United States v. King,** No. 09-30442 (9th Cir. *judgment entered* Oct. 3, 2011) (originating case No. 4:08-cr-00002-BLW-1 (D. Idaho *sentence entered* Dec. 15, 2009)). The U.S. Court of Appeals for the Ninth Circuit upheld the 2009 conviction of Cory King for violation of the SDWA. In 2005, King had farm workers inject excess surface fluids, without a permit, into four deep irrigation wells on his property. King subsequently made false statements regarding the injections to inspectors from the Idaho Department of Agriculture. King was sentenced to three years probation and a $5,000 fine. [Region 10]

WASTE CASES

Resource Conservation and Recovery Act (RCRA)

56) **United States v. Fromdahl,** No. 4:11-cr-00033-SEH-1 (D. Mont. *sentence entered* Dec. 19, 2011). Robert Fromdahl pleaded guilty June 2, 2011, to one count of transporting hazardous waste to an unpermitted facility, and to one count of storing hazardous waste without a permit. Fromdahl was charged after a Wolfe Point, Mont.-area rancher found 44 drums of unknown waste on a property he was leasing from the Fort Peck Indian Reservation. The drums, the majority of which contained highly acidic hazardous waste, were tracked to Fromdahl's defunct Classic Plating business. The business never obtained a permit for transporting the substances from its facilities, or for storing them offsite. Fromdahl was sentenced to three years probation, and ordered to pay $51,594 in restitution. [Region 8]

57) **United States v. Honeywell International, Inc.,** No. 4:11-cr-40006-JPG (S.D. Ill. *sentence entered* Mar. 18, 2011). Honeywell International Inc. (Honeywell) pleaded guilty March 11, 2011, to knowingly storing hazardous waste without a permit in violation of RCRA. Honeywell owns and operates a uranium hexafluoride conversion facility near Metropolis, Ill. The company is licensed by the U.S. Nuclear Regulatory Commission to possess and manage natural uranium, which it converts into nuclear fuel. Air emissions from the facility's fuel conversion process are scrubbed with potassium hydroxide, or KOH, prior to discharge. In April 2009, EPA special agents executed a search warrant at the facility and found nearly 7,500 illegally stored KOH mud drums (both radioactive and hazardous). Honeywell was sentenced to five years probation, an $11.8 million fine, and a $200,000 community service payment. [Region 1]

58) **United States v. Miami Air International, Inc.,** No. 1:10-cr-20901-FAM-1 (S.D. Fla., *sentence entered* Jan. 20, 2011). Miami Air International, Inc. (MAII), a Florida corporation, pleaded guilty to the illegal storage and disposal of hazardous oxygen generators and personal breathing equipment in violation of RCRA. The subject equipment was removed from a commercial aircraft owned by MAII and stored at a facility that did not have a permit. MAII was sentenced to three years probation, a $125,000 fine, and was required to implement a comprehensive Environmental Compliance Plan. [Region 4]

59) **United States v. Overdorf,** No. 9:11-cr-00018-MAC -ZJH-1 (E.D. Tex. *guilty plea entered* Mar. 18, 2011). David Overdorf, former owner and president of the chemical transportation company H.O.T. Transport Inc. (HOT) pleaded guilty to one count of violating RCRA by disposing hazardous waste material without a permit. HOT employees were directed by Overdorf to wash the interiors of tanks containing hazardous waste and to pump the wastewater into empty tanks. Overdorf directed one of his employees to transport 45,000 tons of this highly ignitable, hazardous wastewater from HOT's facility to a company in Houston, Texas for disposal. As part of his plea agreement, Overdorf will hire an independent environmental engineering firm to examine the extent of soil damage at HOT's facilities. Under the terms of the plea agreement, Overdorf faces up to $250,000 in clean-up costs for any contamination on the site, a $50,000 fine, and up to five years in prison. [Region 6]

60) **United States v. Smith,** No. 3:11-cr-280-RJC (W.D.N.C *guilty plea entered* Sept. 28, 2011); **United States v. Doolin-Smith,** No. 3:11-cr-00146-RJC (W.D.N.C. *guilty plea entered* June 14, 2011). Brian Smith and Kaara Doolin-Smith pleaded guilty to separate charges for the illegal storage and disposal of hazardous waste in violation of RCRA in September and June of 2011, respectively. The defendants owned and operated Dove Environmental Services, a hazardous waste transportation company, from July to November 2010. During that time period, the defendants stored 90 containers of hazardous waste at a public rental storage facility. The storage was discovered in October 2010 after the defendants failed to make rental payments on the storage units. Several of the generators identified on the hazardous waste containers reported contracting Dove to dispose of the waste as far back as 2007. The discovery prompted an emergency response from the Superfund Branch of EPA. [Region 4]

61) **United States v. Wyman,** No. 2:09-cr-00577-GHK (C.D. Cal. *appeal pending* Nov. 21, 2011); No. 11-50493 (9th Cir. Nov. 21, 2011). Edward Wyman was convicted April 5, 2011, of illegally storing ignitable hazardous waste on his property in violation of RCRA. Wyman was criminally charged in June 2009 after a fire and subsequent explosions occurred at his home. During the ensuing clean-up, the discovery of hazardous material resulted in seven calls to the Los Angeles Police Department Bomb and Arson Squad. Wyman was sentenced to five years in prison and a $799,117.18 restitution payment. Wyman has appealed the conviction and sentencing to the U.S. Court of Appeals for the Ninth Circuit. [Region 9]

Toxic Substances Control Act (TSCA)

62) **United States v. Murrell**, No. 1:11-cr-00330-BEL-1 (D. Md. *guilty plea entered* July 19, 2011). Cephus Murrell pleaded guilty July 19, 2011, to three violations of TSCA for lead-based offenses. Murell owned and managed more than 200 rental properties and rental housing units in the Baltimore area. Murrell knowingly and intentionally failed to disclose the presence of lead-based paint hazards to his tenants and potential tenants and violated lead-paint abatement regulations by having lead abatement work performed while children were present on the site and without the presence of a properly certified supervisor. Murrell faces a sentence of up to one year in prison followed by one year supervised release and a fine of $100,000 or not more than $25,000 for each day of violation, whichever is greater. [Region 3]

Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)

63) **United States v. Buerman**, No. 1:10-cr-00072-ML (D.R.I. *sentence entered* Mar. 3, 2011). John Buerman, an eBay salesman with an online store called Catsmartplus, pleaded guilty to the trafficking, distributing, and selling of unregistered, mislabeled pesticides for cats and dogs under the trademark-infringed brands of ''Frontline'' and ''Frontline Plus.'' Buerman falsely represented that the unregistered, mislabeled products were EPA approved. Federal agents discovered the products during the execution of a search warrant based on a tip from a Los Angeles area customer whose cat had an adverse reaction to one of Buerman's products. Buerman was sentenced to three years in prison for the FIFRA violations, and to a two-year concurrent sentence on related gun charges, followed by three years supervised release. [Region 1]

64) **United States v. Bugman Pest and Lawn, Inc. et al.,** No. 1:11-cr-00017-DB (E.D. Utah *sentence entered* Jan. 10, 2012). Bugman Pest and Lawn, Inc. (Bugman) and Coleman Nocks, an employee of Bugman, pleaded guilty to misapplication of a pesticide in violation of FIFRA. Nocks, as an agent of Bugman, applied the pesticide Fumitoxin within 15 feet of a house in excess of the maximum dosage. The application allegedly lead to the deaths of two children.[97] Both defendants were sentenced to three years probation, and Bugman was sentenced to a $3,000 fine. [Region 8]

65) **United States v. Ferreira,** No. 1:10-cr-10245-JLT-1 (D. Mass. *sentence entered* Nov. 30, 2011). Josimar Ferreira pleaded guilty Sept. 1, 2011, to the misapplication of a pesticide in violation of FIFRA. Between 2007 and 2010, Ferreira, in the operation of his business, TVF Pest Control, Inc., claimed he could exterminate bedbugs with a ''special mixture'' of pesticides approved for indoor application. The ''special mixture'' was in fact Malathion, an EPA regulated pesticide that is not approved for indoor use. Ferreira was sentenced to two years probation and a $3,000 fine. [Region 1]

66) **United States v. Rudolph,** No. 3:11-cr-00025-RLY (S.D. Ind. *sentence entered* Oct. 27, 2011); **United States v. Jochem,** No. 3:11-cr-00026-RLY (S.D. Ind. *sentence entered* Oct. 27, 2011); **United States v. Rudolph,** No. 3:11-cr-00027-RLY (S.D. Ind. *sentence entered* Oct. 27, 2011); **United States v. Ficker,** No. 3:10-cr-00033-RLY (S.D. Ind. *sentence entered* Jan. 26, 2011). Michael Jochem, a certified pesticide applicator, Paul Ficker, John Rudolph, and David Rudolph pleaded guilty to the misuse of the pesticide furadan under FIFRA. Jochem originally provided concentrated furadan, an acutely toxic pesticide, to Paul Ficker, who used the pesticide to kill birds on his property in June 2008. Ficker passed the remaining Furadan to John Rudolph, who used it in the same manner, and Rudolph passed the pesticide on to his brother David Rudolph, who also used it in the same manner. Jochem, as a certified applicator under FIFRA, was required to either apply or supervise the application of the furadan. Neither Ficker nor the Rudolphs were certified pesticide applicators. Jochem was sentenced to six months probation and a $5,000 fine, and the Rudolphs were sentenced to a $5,000 fine. Ficker, who also pleaded guilty to making false statements, was sentenced to two years probation and a $10,000 fine. [Region 5]

WILDLIFE CASES

Endangered Species Act (ESA)

67) **United States v. Demorest,** No. 4:11-po-00217-REB (D. Idaho *sentence entered* Oct. 25, 2011). Thomas Demorest pleaded guilty to a knowing violation of the ESA for the operation at Diamond D Ranch, without a permit, of irrigation diversions that lacked fish screens. The irrigation diversion led to the take of threatened Chinook salmon and bull trout. Demorest was sentenced to a $625 fine and two years probation during which time he cannot serve in a management position at the Diamond D Ranch. [Region 10]

68) **United States v. Hawk Field Services LLC,** No. 4:11-cr-00060-HDY (E.D. Ark. *sentence entered* Sept. 14, 2011). Hawk Field Services LLC (Hawk), a wholly-owned subsidiary of Houston-based Petrohawk Energy Corp., pleaded guilty in federal court in Little Rock, Ark. on April 8, 2011, to three counts of taking an endangered species. Hawk was involved in activities related to the development of natural gas properties in the Fayetteville Shale in north-central Arkansas. Hawk admitted to improperly controlling erosion during con-

[97] *See* Press Release, U.S. Dep't of Justice, Bugman Pest and Lawn, Inc. and Coleman Nocks Plead Guilty to Unlawful Use of Pesticide (Oct. 11, 2011), *available at* http://www.epa.gov/compliance/resources/cases/criminal/highlights/2011/bugman-pest-coleman-nocks-10-11-11.pdf.

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struction of a well, from October 2008 to April 2009, which caused the buildup of sediment in a nearby stream. The sedimentation resulted in the take of at least one endangered speckled pocketbook mussel. Hawk was sentenced to three years probation, a $350,000 fine, and a $150,000 community service payment to the National Fish and Wildlife Foundation. [Region 6]

69) **United States v. Kinder Caviar, Inc. et al.,** No. 1:11-cr-00035-MRB (S.D. Ohio *guilty plea entered* Jan. 17, 2012). Kinder Caviar, Inc. (Kinder Caviar), Black Star Caviar Co. (Black Star), Steve Kinder, and Cornelia Kinder were charged March 14, 2011, with the trafficking and false labeling of illegally harvested paddlefish in violation of the Lacey Act. Paddlefish, the eggs of which are marketed as caviar, are protected under federal and Ohio law. The paddlefish population has sharply declined in recent years as a result of overfishing to meet an increased demand for caviar. Between March 2006 and December 2010, the defendants allegedly harvested paddlefish in Ohio waters illegally, and submitted false reports regarding the harvest to the U.S. and Kentucky Fish and Wildlife Services. All four defendants pleaded guilty in January 2012. Black Star and Kinder Caviar each pleaded guilty to one felony labeling violation, and the Kinders each pleaded guilty to one misdemeanor trafficking violation. The individual defendants face up to five years in prison and a $250,000 fine per count. [Region 5]

70) **United States v. Place,** No. 1:09-cr-10152-NMG and 11-1246 (D. Mass. *appeal pending* Mar. 9, 2011). David Place, the owner of Manor House Antiques Cooperative in Nantucket, Mass., was sentenced March 1, 2011, to 33 months in prison for the illegal importation and trafficking of the tusks of narwhal whales, an ESA threatened species, and the teeth of sperm whales, an ESA endangered species. Place filed an appeal of the conviction and sentencing on March 9, 2011. [Region 1]

71) **United States v. Pugh, et al.,** No. 9:11-cr-00011-MAC (E.D. Tex. *sentence entered* Mar. 17, 2011). John Pugh, Wilbur Davenport, and Cole Brothers Inc., pleaded guilty Feb. 22, 2011, in the U.S. District Court for the Eastern District of Texas, to violations of the ESA. Pugh and Cole Brothers Inc., were charged with unlawfully purchasing and selling two Asian elephants, which are listed as an endangered species. The elephants, owned by the circus organization Cole Brothers Inc., were leased to Davenport in 2005. In August 2009, the U.S. Department of Agriculture confiscated one of the elephants from Davenport and then Davenport abandoned the other to the U.S. Fish and Wildlife Service. Pugh and Davenport were sentenced to three years probation and 300 hours of community service. Pugh was ordered to pay a $4,000 fine, and a $1,200 payment to organizations working for the conservation and/or rehabilitation of Asian elephants. Davenport was sentenced to a $5,200 fine, and Cole Brothers Circus was sentenced to four years of probation with a fine of $150,000. [Region 6]

72) **United States v. Xu,** No.1:11-cr-00777-JBW (E.D.N.Y *guilty plea entered* Dec. 6, 2011). On Sept. 17, 2011, Lin Feng Xu, a Chinese national, was discovered carrying 18 ivory carvings in his luggage. Xu admitted he knew the carvings were ivory, that they were valued at approximately $50,000, and that it was a crime to export the ivory from the United States without proper documentation. On Dec. 6, 2011, Xu pleaded guilty to transporting the ivory in violation of the ESA, and faces a maximum fine of $350,000 and 11 years in prison. [Region 2]

Lacey Act

73) **United States v. Birkbeck,** No. 1:11-cr-10224-RWZ (D. Mass. *guilty plea entered* Nov. 30, 2011). Daniel Birkbeck, a commercial fisherman that operated in Rhode Island and Massachusetts, pleaded guilty to violations of the Lacey Act for illegally harvesting 12,140 pounds of striped bass off Rhode Island. Birkbeck harvested the striped bass after the close of the commercial fishing season in Rhode Island and falsely reported that he legally harvested the fish off Massachusetts. Birkbeck faces up to five years in prison and a $250,000 fine per count in violation of the Lacey Act. [Region 1]

74) **United States v. Blyth et al.,** No. 1:10-cr-00011-CG (S.D. Ala. *sentence entered* May 4, 2011). Karen Blyth, David Phelps, and John Popa pleaded guilty to violations of the Lacey Act for trafficking and misbranding seafood. The defendants used the companies Consolidated Seafood and Reel Fish to smuggle 283,500 pounds of farm-raised catfish from Vietnam (known as sutchi) into the United States as wild-caught sole in order to avoid paying anti-dumping duties totaling $145,625. Defendants also mislabeled both the sutchi and 25,000 pounds of perch from Lake Victoria as grouper or snapper, and conspired to sell farm-raised foreign shrimp as wild-caught U.S. shrimp. Some of the fish seized by authorities was found to contain malachite green and Enrofloxin, which are prohibited chemicals in U.S. food. Blyth was sentenced to 33 months in prison, Phelps was sentenced to 24 months in prison, and John Popa was sentenced to 13 months in prison. Blyth and Phelps were each fined $5,000 and all three defendants were sentenced to three years supervised release during which time they are prohibited from participating in the seafood industry. [Region 10]

75) **United States v. Butler, et al.,** No. 6:10-cr-10089-WEB (D. Kan. *appeal filed* July 15, 2011); No.11-3202 (10th Cir. July 15, 2011). James Bobby Butler, Jr. and Marlin Jackson Butler pleaded guilty March 16, 2011, to conspiracy and wildlife trafficking charges for provision of illegal guided deer hunts in southern Kansas in violation of the Lacey Act, and James Butler pleaded guilty to one count of obstruction of justice. The Butlers sold guiding services totaling $775,000 to illegally hunt and kill white-tailed and mule deer. The hunters guided by the Butlers killed deer above the annual bag limits, hunted without permits or with improper permits, and used illegal equipment and/or prohibited methods. James Butler was sentenced to 41 months in prison, three years probation, a $25,000 fine, and $25,000 in restitution. Marlin Butler was sentenced to 27 months in prison, three years probation, a $10,000 fine, and $10,000 in restitution. The Butlers have filed appeals of their sentencing in the U.S. Court of Appeals for the Tenth Circuit. [Region 7]

76) **United States v. Dees,** No. 3:11-cr-00030-BAJ (M.D. La. *sentence entered* Aug. 10, 2011). Larry Dees Sr. and Larry Dees Jr. pleaded guilty to Lacey Act violations for guiding sport hunters into areas where the hunting of American alligators, an endangered species, is unauthorized. On Sept. 10, 2009, the duo led a sport hunter into an unauthorized area and the hunter killed

a 9'4'' alligator. The Dees guided a similar hunt from Sept. 24 to 25, 2009. The Dees were each sentenced to three years of probation and a $2,000 fine. The fine against Larry Dees Jr., however, was suspended due to inability to pay. During the first year of probation, the Dees will be prohibited from all hunting activities of any kind, including guiding, and for the remaining two years will be specifically prohibited from commercial alligator hunting activities, including guiding. [Region 6]

77) **United States v. Delaney et al,** No. 1:09-cr-10312-RGS (D. Mass. *sentenced entered* Sept. 27, 2011). Stephen Delaney, president of South Shore Fisheries, was convicted of a felony violation of the Lacey Act April 8, 2011, for falsely labeling $8,000 worth of frozen Pollock fillets (from China) as Cod loins (from Canada). The price of Cod is approximately $1 per pound higher than the price of Pollock. Delaney was also convicted on one misdemeanor violation of the Food, Drug and Cosmetic Act for misbranding about $203,000 worth of Chinese frozen fillets as products of Canada, Holland, Namibia and the United States. Delaney was sentenced to one year probation, to include three months home detention, and a $5,000 fine. [Region 1]

78) **United States v. Ertel** No. 3:11-cr-00227-HEH-1 (E.D. Va. *guilty plea entered* Oct. 3, 2011). Richard M. Ertel of Spotsylvania, Va., pleaded guilty to two felony violations of the Lacey Act for importing and selling the teeth of sperm whales, an endangered species under the ESA. Under the Lacey Act, it is illegal to import endangered mammal parts into the United States without required permits and certifications, and without declaring the merchandise to U.S. Customs and the U.S. Fish and Wildlife Service at the time of importation. Ertel admitted that from April 2002 to June 2007, he bought sperm whale teeth from sources in the Ukraine and sold the teeth, mostly via the internet, to customers in Virginia and elsewhere in the United States. Ertel faces up to five years in prison and a fine of up to $250,000 for each count in violation of the Lacey Act. [Region 3]

79) **United States v. GEM Manufacturing LLC,** No. 2:11-cr-00019 (D. V.I. *sentence entered* Oct. 26, 2011). GEM Manufacturing (GEM) pleaded guilty July 15, 2011, to violations of the ESA and Lacey Act for knowingly trading in falsely and uncertified labeled black coral, a protected species. GEM used the coral in the manufacture of high-end jewelry and art figurines. Over the last few decades, pressures from overharvesting and the introduction of invasive species have threatened this black coral. GEM was sentenced to a $1.8 million fine, $500,000 in community service payments, and the forfeiture of jewelry and sculptures worth $1.4 million, as well as 13,655 pounds of raw black coral valued at up to $1.02 million. The company will serve three years probation and submit to a ten-point compliance plan. GEM is also prohibited from doing business with both Peng Chia Enterprise Co. Ltd. (Peng Chia), the supplier of the black coral, as well as Ivan and Gloria Chu, Peng Chia's former management team, who were sentenced for related crimes in 2010. [Region 2]

80) **United States v. Langella,** No. 5:11-cr-00302-SLB-HGD (N. D. Ala. *indictment entered* July 25, 2011). David Langella was charged with alleged violations of both Lacey Act and state law for transporting and selling protected reptiles from Arizona in Alabama. The alleged violations occurred between 2006 and 2009 and include the capture of the reptiles, the provision of services to guide others in the capture of the reptiles, the transport of the reptiles, the use of false shipping labels during transport of the reptiles, and the obstruction of law enforcement officers by concealing the illegally captured reptiles. Langella faces up to five years in prison and a fine of up to $250,000 for each count in violation of the Lacey Act. [Region 4]

81) **United States v. Martinez et al.**, No. 3:10-cr-00038 (M.D. La., *sentence entered* Sept. 20, 2011). Two brothers pleaded guilty Sept. 13, 2011, to Lacey Act violations for their role in illegally killing American alligators in violation of the ESA and Louisiana law. In October 2005 and September 2006, Clint Martinez, a licensed alligator hunter, and his brother Michael Martinez, a licensed alligator helper, guided out-of-state alligator sport hunters to unauthorized hunting areas. During the October 2005 hunt, the clients killed an alligator over ten feet, and during the September 2006 hunt, the clients killed an alligator over ten feet and a twelve-foot alligator. The brothers were each sentenced to three years probation, a $5,000 fine, and 200 hours of community service. During the first year of probation, the brothers will be prohibited from engaging in hunting activities of any kind, including guiding and during the remaining two years the brothers will be specifically prohibited from engaging in all commercial alligator hunting activities, including guiding.

82) **United States v. Reeves et al.,** No. 1:11-cr-00520-JBS (D.N.J. *indictment entered* Aug. 16, 2011). Todd and Thomas Reeves and several others were indicted on allegations that the men harvested oysters from the Delaware Bay in excess of quota limits in violation of the Lacey Act between 2004 and 2007. The defendants' company, Reeves Brothers, allegedly falsified the numbers of oysters harvested. The defendants allegedly conspired with Harbor House, a purchaser of oysters, to falsify oyster sales records to reflect lower than the actual numbers. If the defendants are found guilty of violating the Lacey Act, the ten vessels allegedly used in the illegal harvesting will be subject to forfeiture, and each defendant faces prison time and a fine of up to $250,000 for each count in violation of the Lacey Act. [Region 2]

83) **United States v. Wright,** No. 1:11-cr-00103-MRB (S.D. Ohio *guilty plea entered* Feb. 24, 2012). Allan Wright, a wildlife officer for Ohio's Department of Natural Resources (ODNR) was indicted Aug. 17, 2011, for violations of the Lacey Act including falsely obtaining an Ohio resident hunting license for a legal resident of South Carolina, and processing deer kills by the recipient of the license through the ODNR. Wright used his capacity as wildlife officer to confiscate deer antlers from an illegal kill and later stated that he destroyed the antlers even though he had sent them to an individual in Michigan in 2009. Wright pleaded guilty to the charges Feb. 24, 2012, and faces up to five years in prison and a fine of up to $250,000 for each count in violation of the Lacey Act. [Region 5]

Migratory Bird Treaty Act (MBTA)

84) **United States v. Parawan,** No. 4:11-cr-00023-HSM (E.D. Tenn. *sentence entered* Jan. 31, 2012). Lawrence Parawan pleaded guilty to violation of the MBTA Oct. 17, 2011, for killing a Northern Harrier Hawk, which is protected under the Treaty, with the misuse of the pesticide Furadan. In December 2010, Parawan cov-

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ered a chicken carcass with the pesticide and placed the carcass on his property to poison predators. The pesticide-covered carcass poisoned the Northern Harrier Hawk and several other wild animals. Parawan was sentenced to four years probation and a $500 fine. [Region 4]

OTHER

Other – Wire Fraud

85) **United States v. Patterson,** No. 2:10-cr-20247-PJD (E.D. Mich. *sentence entered* Feb. 8, 2011). Donald Patterson, a former inspector for the City of Detroit Health Department, pleaded guilty July 9, 2010, to wire fraud in connection with fraudulent lead paint abatement activities. Patterson, in his role as an inspector, was required to inspect residences where children with high blood lead levels were said to be residing. Patterson threatened residents with prosecution or child neglect charges and solicited cash in return for false certifications of lead paint abatement or abatement training. Patterson was not qualified to provide these certifications, and in some situations, his actions exacerbated the presence of the lead paint. Patterson was sentenced to 46 months in prison and a $662 restitution payment. [Region 5]

Other – Conspiracy/False Statements

86) **United States v. Clark,** No. 1:11-cr-00063-HSM (E.D. Tenn. *sentence entered* Feb. 6, 2012). Donald Jack Clark pleaded guilty Sept. 27, 2011, to making false statements in Discharge Monitoring Reports (DMRs) required to be filed under the CAA in violation of 18 U.S.C. § 1001. Clark falsified the DMRs while working for the City of Niota, Tenn. sewage treatment plant. The DMRs falsely stated that wastewater from the treatment plant had been treated with chlorine and tested for residual chlorine prior to discharge. Clark was sentenced to six months in prison, two years of supervised release including six months of home confinement, a $1,200 assessment, and 150 hours of community service. [Region 4]

87) **United States v. DeLeon,** No. 1:07-cr-10277-NMG (D. Mass. *appeal pending* Oct. 4, 2011). Albania DeLeon was found guilty Sept. 14, 2011, of conspiracy and making false statements in connection with the operation of her business, which placed illegal aliens fraudulently trained in asbestos abatement in temporary employment positions. To facilitate the fraudulent trainings, DeLeon had the illegal aliens sign asbestos abatement exam answer sheets and kept these on file. DeLeon was sentenced to 87 months in prison followed by three years supervised release, a $1.5 million restitution payment, and a $2,800 assessment. DeLeon, who allegedly fled the country during sentencing, has filed an appeal in the U.S. Court of Appeals for the First Circuit. [Region 1]

88) **United States v. Lieze Associates, Inc. dba Eagle Recycling of New Jersey, Inc.,** No. 5:11-cr-00142-DNH (N.D.N.Y. *sentence entered* Dec. 19, 2011); **United States v. DeSimone et al.**, No. 5:11-cr-00264-DNH (N.D.N.Y *indictment entered* June 2, 2011). Lieze Associates, Inc. dba Eagle Recycling of New Jersey, Inc. (Eagle Recycling) pleaded guilty April 11, 2011, to conspiracy to violate the CWA's prohibition on filling wetlands, as well as to defraud the United States and commit wire fraud in furtherance of the violations. Eagle Recycling, along with its co-conspirators, participated in a scheme, from May 2006 through March 2010, to illegally dump 8,100 tons of pulverized construction and demolition debris from its North Bergen, N.J. facility on a New York farm property that contained wetlands. Eagle Recycling fabricated a New York State Department of Environmental Conservation permit to conceal the dumping and mislead other solid waste management facilities and law enforcement. Eagle Recycling was sentenced to three years probation, a $500,000 fine, a $71,285.30 restitution payment, and will be required to develop and implement an environmental compliance plan. In an associated case, *United States v. DeSimone et al.*, the company Mazza & Sons and four individuals, including the owner of Eagle Recycling and the owner of the New York farm property, were charged with conspiracy to violate the CWA, to defraud the United States, to obstruct justice, and to commit wire fraud in connection with the scheme to transport and dump construction and demolition debris on the New York farm property. [Region 2]

Other - Smuggling

89) **United States v. Clery,** No. 1:11-cr-20280-AJ (S.D. Fla. *sentence entered* July 29, 2011). Brendan Clery pleaded guilty April 26, 2011, to the illegal importation of 278,256 kilograms of HCFC-22. In 2007, Clery, in the operation of his business Lateral Investments, smuggled large quantities of HCFC-22 into the United States for sale on the black market. Neither Clery nor Lateral Investments had an ''unexpended consumption allowance'' that would allow for the legal importation of the gas. The HCFC-22 had a market value of $1,438,270. Clery was sentenced to 18 months in prison, a $10,000 fine, and forfeiture of $935,240. [Region 4]

90) **United States v. Harp USA, Inc**., No. 1:11-cr-20092-JEM (S.D. Fla. *sentence entered* Feb. 22, 2011). Harp USA, Inc. (Harp), pleaded guilty Feb. 14, 2011, to the illegal importation of hydrochlorofluorocarbon 22 (HCFC-22), an ozone-depleting refrigerant gas. In July 2010, Harp submitted a petition to import approximately 1,874 cylinders of HCFC-22, which falsely represented source facility information, previous uses, source equipment, and claimed the gas was from a single source. Harp was sentenced to three years probation, a forfeiture of $206,140, a $400 assessment, and a $25,000 community service payment to the Southern Environmental Enforcement Training Fund. [Region 4]

Other - Parole Violation

91) **United States v. Ward,** No. 1:11-cr-00196-NRB (S.D.N.Y. *sentence entered* July 22, 2011). Peter Ward, formerly convicted of violating the CAA for unlicensed asbestos removal, pleaded guilty to violating the terms of his probation for working in an asbestos-related industry. Ward submitted Monthly Supervision Reports to the Probation Office that purported to report his earnings, but failed to document some of his earnings that were coming from asbestos-related work, and tried to conceal the nature of the work. Ward was sentenced to 21 months prison, three years probation, a $2,000 fine, and a $1,700 special assessment. [Region 2]

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The opinions expressed here do not represent those of BNA, which welcomes other points of view.

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HYDRAULIC FRACTURING

ENFORCEMENT

In the last year, hydraulic fracturing, or fracking, has been the subject of extraordinary government attention and media coverage. To better understand the perspective and goals of the federal government in this area, Bloomberg BNA Insights authors Steven P. Solow and Anne M. Carpenter, with the law firm Katten Muchin Rosenman LLP, asked Ignacia S. Moreno, Assistant Attorney General in charge of the Justice Department's Environment and Natural Resources Division, and Peter Smith, the U.S. Attorney for the Middle District of Pennsylvania, to comment on the hydraulic fracturing focus by the federal government.

Hydraulic Fracturing: A Conversation With the Justice Department

Interview with Assistant U.S. Attorney General Ignacia S. Moreno and U.S. Attorney Peter Smith

Introduction

As is widely known, the process of fracking itself is not new. What is more recent is the application of this technique in horizontal wells drilled within natural-gas shale formations. The use of this horizontal drilling process reduces the number of above ground well pads and decreases surface impacts associated with traditional vertical drilling of a natural gas well.

However, concerns have been raised about risks associated with fracking that could involve air and water discharges as well as issues related to waste disposal.

To frack a horizontal well, operators use small explosions to create cracks in shale formations that hold natural gas, then pump in fluid comprising predominately water mixed with sand and chemicals. By pumping in the fluid under high pressure, the shale is further fractured and the granules of sand in the fluid prop the fractures open, allowing natural gas and fluid to flow back to the surface.

The exploration and production of natural gas from shale by fracking is supported by the current adminis-

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tration[1] and a bipartisan group of state officials, and is even recognized by the Environmental Defense Fund[2] as a source of energy that reduces carbon dioxide emissions. At the same time, the process has attracted significant questions and outright opposition by community groups and others. Although the study and regulation of hydraulic fracturing (HF) is far from complete, the Department of Justice and the Environmental Protection Agency have placed an increased enforcement focus on investigating fracking operations, utilizing existing environmental laws.

The following is our interview—conducted via email—with the government's chief environmental enforcement official and the U.S. attorney responsible for an area of the country that has seen a proliferation of fracking operations:

Steven Solow/Anne Carpenter: *On May 25, 2011, DOJ's Environment and Natural Resources Division and the U.S. Attorneys for the Eastern, Western, and Middle Districts of Pennsylvania sponsored the Marcellus Shale Law Enforcement Training Conference, which looked at criminal enforcement options involving HF operations. In an area that is still undergoing legal and regulatory development and study, why the effort toward criminal enforcement?*

Peter Smith: The use of hydraulic fracturing is not new to the oil and gas industry—HF has been commercially used since the 1950's. HF did not appear in Pennsylvania, however, until about 2007. What followed was a rapid expansion of drilling in Pennsylvania in what has proved to be the second largest natural gas shale in the world. The Department of Justice (DOJ) held the Marcellus Shale Law Enforcement Training Conference to educate the law enforcement community about the HF process and related emerging issues. The conference agenda went beyond the environmental concerns of HF to cover other concerns such as commercial vehicle regulation, drugs and vice, and officer safety in incidence responses.

Solow/Carpenter: *Has the intense public focus on the HF process over the past year shaped DOJ's criminal investigation and enforcement effort?*

Ignacia Moreno/Peter Smith: DOJ has engaged in a series of training sessions for federal, state, and local law enforcement officials about the HF process and energy extraction as a whole. We cannot comment on whether DOJ is involved in ongoing investigations of oil and gas producers using the HF process.

Solow/Carpenter: *Are HF operations already covered by environmental criminal enforcement based on existing laws (Clean Air Act, Clean Water Act, the Resource Conservation and Recovery Act and the Safe Drinking Water Act)?*

Moreno: Many aspects of the HF process are covered by existing environmental laws. The actual injection of fracking fluids into wells is exempted from regulation under the Safe Drinking Water Act (SDWA), except when the fracking fluid contains diesel fuel. However, disposal of energy extraction wastes into underground injection wells is regulated under the SDWA. The flowback or produced water that comes back up from the well must be properly treated and disposed of. This includes when it is deposited into an underground injection well, treated onsite and discharged to a surface water, or trucked to a Publicly Owned Treatment Work (POTW) or private treatment facility.

Unlawful discharges from oil and gas extraction into surface waters or POTWs are prohibited under the Clean Water Act. Spills of pollutants from containment ponds and impoundments to U.S. waters are also violations under the Clean Water Act, as is contaminated stormwater runoff. Although Exploration and Production (E&P) wastes are exempted from regulation under the Resource Conservation and Recovery Act (RCRA), wastes that are neither from E&P activities, nor ''uniquely associated'' with those activities, are regulated under RCRA if they are listed hazardous wastes or exhibit hazardous characteristics. Many aspects of the Clean Air Act (CAA) apply to emissions from energy extraction activities, including some National Emission Standards for Hazardous Air Pollutants (NESHAPs) such as NESHAPs from Oil and Gas Production Facilities (40 CFR Part 63, Subpart HH), and NESHAPs for Stationary Reciprocating Internal Combustion Engines (40 CFR Part 63, Subpart ZZZZ).

We address impacts to wildlife caused by oil and gas industry processes through other statutes. Among these are the Endangered Species Act, in a case involving runoff of sedimentation from a natural gas facility into a river causing a take of an endangered species, and the Migratory Bird Treaty Act, in cases involving bird deaths resulting from improperly managed impoundments.

Solow/Carpenter: *Is there any connection between HF criminal enforcement and the DOJ/EPA focus on environmental justice issues?*

Moreno: HF has brought drilling operations closer to urban areas and to tribal lands. A disproportionate number of environmental crimes take place in communities of color, low-income communities, and other communities that are either particularly vulnerable to environmental violations or are burdened by environmental degradation. We seek to ensure that all communities enjoy the fair and even application of the law and a meaningful opportunity for input in the consideration of appropriate remedies for criminal violations of environmental laws.

Solow/Carpenter: *Is there any connection between DOJ's efforts and the EPA National Enforcement Initiative on Energy Extraction?*

Moreno/Smith: EPA's Criminal Enforcement Division worked closely with DOJ's criminal prosecutors to develop the Marcellus Shale Law Enforcement Confer-

[1] President Obama, 2012 State of the Union Address (Jan. 24, 2012).

[2] Env'tl Defense Fund, Taking the Natural Gas Industry to Task, *available at* http://www.edf.org/energy/taking-natural-gas-industry-task (''In 2001, shale gas accounted for 2% of America's natural gas supply. Today, it accounts for nearly 30%. From an environmental perspective, that could be good news—if drilling is done right. Natural gas emits less greenhouse gas pollution than coal when burned, and it avoids mercury, sulfur dioxide and other dangerous pollutants that come from coal.'').

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ence and continues to work with us to conduct similar training in other areas experiencing drilling growth due to HF.

Solow/Carpenter: *Given resource constraints, does a focus on HF mean that DOJ and EPA are shifting away from other areas of criminal investigation and enforcement? If not, is DOJ/EPA providing additional resources to assist in this effort?*

Moreno/Smith: We can only speak to the resources of ENRD and the Middle District of Pennsylvania, but we do not expect our energy extraction work to take resources away from other core areas of criminal enforcement.

Solow/Carpenter: *The Marcellus Shale Law Enforcement Training Conference was publicly described as designed to ''strengthen communication and coordination among federal, state, and local law enforcement.'' Given the involvement of state and local law enforcement in the training last spring, is DOJ/EPA approaching HF criminal enforcement with a task force approach, in which the investigation and prosecution efforts are coordinated across local, state and federal jurisdictions?*

Smith: DOJ and EPA are taking a collaborative approach to HF training and potential enforcement action. Because of technological advances in extraction, the oil and gas industry is moving into areas that have no prior history with it. Coordinating across jurisdictions ensures that we focus our attention on activities that, if mishandled, can have devastating effects on the health of people and the environment.

In Pennsylvania, the three U.S. Attorney's offices are coordinating their criminal and civil enforcement activities in several areas, including environmental matters and health care fraud. Marcellus Shale is just one aspect of that coordination. Extraction from Marcellus Shale development in Pennsylvania is having a huge impact across the state. It is simply too big for federal law enforcement agencies to ignore.

The U.S. Attorney's offices have long-standing relationships with state and local law enforcement agencies, communities, service agencies, public interest, business and industry groups. These relationships include task forces when appropriate for special projects and investigations, as well as training programs, and periodic information-sharing events. Marcellus Shale development, including but not limited to hydrofracking, directly affects concerns such as violent street crime, illegal immigrant issues, highway and motor vehicle safety, pipeline safety, waste disposal, leasing fraud, terrorism and political corruption issues, all of which are matters of federal, as well as state and local interest and jurisdiction. The May 2011 conference was a reflection of those concerns and our desire to address them.

Solow/Carpenter: *How widely attended was this training beyond Pennsylvania prosecutors, and has there been additional federal law enforcement training involving HF operations?*

Moreno/Smith: The majority of the over 200 attendees were law enforcement investigators and agents from state and local government.

There has been additional federal law enforcement training. The District of North Dakota sponsored an Environmental Enforcement Training Conference in September 2011 to provide training to law enforcement officers and state, local, and tribal officials on laws applicable to the increased oil production activities occurring in Western North Dakota.

The District of Montana and the Environment and Natural Resources Division hosted a conference in October 2011, titled ''Environmental Law Compliance and Enforcement Issues for Energy Producers in North Central Montana.'' This conference was aimed at the producers rather than the regulators or law enforcement community, and sought to educate the energy industry on applicable environmental laws in the region. The District of Montana is also planning additional industry and law enforcement training for 2012.