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In This Issue

INTRODUCTION

By Lois J. Schiffer
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We are pleased that the U.S. Attorneys' Bulletin has given us the opportunity to welcome all of you to the world of environmental law and policy through this and the next issue. The cases are important, the legal issues and policy disputes fascinating, and the outcome of protecting our environment for ourselves and future generations a worthy goal. Through these articles we hope to provide useful information for those of you who already handle environmental cases, and to entice more of you to this work.

The Environment and Natural Resources Division works closely with the U.S. Attorneys throughout the country on cases that fall into five major categories: pollution, public lands and natural resources, wildlife, land acquisition and Indian resources. Pollution cases include civil and criminal enforcement actions under laws protecting air, water, and land; Superfund cases; challenges to federal agency regulations; and decisions on pollution. Most of the public land and natural resource cases involve defense of decisions by federal agencies about forest management, grazing, oil and gas leasing, and mineral development. We also participate in water adjudications in the west, and defend challenges to agency compliance with the National Environmental Policy Act. Wildlife cases cover civil and criminal enforcement of laws protecting wildlife; wildlife smuggling cases; and defense of agency decisions that must take into account Endangered Species Act concerns. They also include fisheries and coastal zone management cases. Land acquisition is to acquire land for public uses, including national parks, courthouses, and military bases. We also handle inverse condemnation (takings) cases. Finally, Indian cases include affirmative cases to secure treaty hunting and fishing and other treaty rights for tribes in exercise of the United States' trust responsibility; and defense of decisions by federal agencies affecting Indians and tribes.

The articles in this issue focus on law and policy related primarily to pollution cases. They are a good mix of legal analysis and policy debate. They set forth both useful information for handling cases and a flavor of the policy problems that surround the effort to protect our environment. We welcome your interest, and invite you to call with reactions, questions, and requests for further information. The Division's point of contact for U.S. Attorneys are those people listed in our "experts" directory, or, if you would like help finding a contact, then Ignacia Moreno, who can be reached at (202) 514-5243 or Ignacia.Moreno@usdoj.gov .

We like to think of our work as guided by the Native American principle of seventh-generation thinking: that our efforts today take into account the effect they may have on our children, our grandchildren, and their grandchildren, seven generations out. It gives us the long view, and underscores the importance and excitement of protecting our environment.

With warm regards,

Deterrence: A Strong Environmental Crime Program Leads to Industry Compliance and a Cleaner Environment

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Thanks to the hard work of hundreds of Federal investigators and prosecutors, environmental crimes prosecution has produced record fines and terms of imprisonment. Below are a few recent examples:

! The District of Colorado convicted the Louisiana Pacific Corporation of making false statements to a regulatory agency, mail and wire fraud, and conspiracy to violate the Clean Air Act. The corporation paid a $5.5 million fine for the Clean Air Act violation and $31.5 million in fines related to consumer fraud. They also convicted two corporate managers.

! The Southern District of Mississippi convicted Paul Walls of 48 counts of FIFRA violations for misuse of a highly toxic crop pesticide in homes. These violations had caused hundreds of people to become sick, and had cost the government millions of dollars in cleanup costs. The sentence consisted of the maximum one year for each count, and Walls will serve more than six years in prison. This is the longest sentence ever for a FIFRA case.

! In the Southern District of Florida, the District Puerto Rico, the District of the Virgin Islands, the District of Alaska, the Central District of California and the Southern District of New York, Royal Caribbean Cruises, Ltd. (RCCL) pled guilty to a fleet-wide conspiracy to discharge harmful quantities of oil and hazardous chemicals into United States waters, making false statements to the Coast Guard, and obstruction of justice. The corporation will pay a $27 million fine. Two senior RCCL engineers were indicted, and they are currently fugitives.

! The District of Alaska convicted a North Slope oil drilling contractor of illegally disposing of hazardous waste by injecting it down oil wells, and allowing its release into aquifers. Along with several employee convictions, the corporation paid a $1 million fine, and will spend $2 million developing a model compliance program.

! The Eastern District of Missouri convicted the Burlington Northern Railway of illegally releasing more than 100 tons of lead-contaminated wastes, some of which reached a tributary of the Mississippi River. The company will pay more than $19 million in criminal fines and cleanup costs, and has developed a compliance program. Two employees were indicted.

These prosecutions, and others across the country, play critical roles in protecting the environment. These cases perform three vital functions:

1. Punish egregious violators, and assure local communities that the government is protecting the

health of citizens and protecting natural resources;

2. Deter future violators, especially individuals; and

3. Inform the regulated community that Federal enforcement sets a uniform standard for compliance; that no matter where a business operates in the United States, it must comply with federal environmental laws. This provides a level playing field for businesses that invest the time and money to comply with the law.

By helping to insure compliance with environmental laws, criminal enforcement has played an integral part in the story of our nation's success. That success includes cleaner air and water across the country. For example, 25 years ago, only one-third of the nation's waters were considered fishable and swimmable. Today, that proportion has been nearly reversed, and more than 60% are clean enough to be fishable and swimmable.

The key to the successes in criminal enforcement has been the effective cooperation among the United States Attorney's Offices, the Department's Environmental Crimes Section (ECS), the EPA's Office of Criminal Enforcement, Forensics, and Training (OCEFT), and a growing roster of other law enforcement agencies.

For example, following the passage of the Pollution Prosecution Act of 1990, EPA's corps of criminal investigators has increased fourfold, with highly trained and experienced agents spread across the country. In the past year, the FBI dedicated more agent time to environmental crimes than any prior year. The Department of Transportation increasingly uses criminal enforcement to ensure compliance. The Coast Guard has worked with the EPA's Criminal Investigation Division and the FBI on more than 35 successful prosecutions of vessel pollution. The EPA, FBI, and United States Customs have cooperated in an enforcement initiative against smugglers of banned ozone-depleting chemicals, leading to more than 60 convictions in three years. The Defense Criminal Investigations Service (DCIS), along with criminal investigators in each branch of the military, is increasing efforts to ensure environmental compliance at Federal facilities. More than 200 AUSAs have received training in environmental crimes prosecutions in the past few years. More and more USAOs are promising to dedicate at least one AUSA to environmental crimes prosecutions. Training opportunities for prosecutors and agents are expanding to include the first ever Department of Justice course on Science for Environmental Prosecutors, as well as increased agent training. For additional information on the upcoming training for prosecutors, or information on agency contacts for agent training, please contact ECS Assistant Chief Robin Greenwald, (202) 305-0377.

Successful enforcement means integrating Federal resources with state and local enforcement efforts. Much administration of Federal environmental programs has been delegated to the states. To ensure the flow of information about the worst violators, and to make the Federal enforcement efforts responsive to local problems, the EPA's OCEFT has led the way in working with joint Federal, state, and local task forces. Currently, the OCEFT is participating in nearly 100 nationwide task forces, and participating in investigations with state and local agencies that serve as the "eyes and ears" in environmental crimes detection. Federal law enforcement agencies throughout the country are following this lead, and even the FBI currently participates in some 35 environmental crime task forces.

OCEFT also opened the Center for Strategic Environmental Enforcement to compile and analyze data which identifies environmental crimes that have historically gone undetected. The Center also serves as a resource for local, state, federal, and international law enforcement by using regulatory, law enforcement, and publicly available data sources.

The Department's Environmental Crimes Section has become an important resource for districts with both established and developing criminal enforcement programs. ECS trial attorneys independently handle cases nationwide, and are working with AUSAs in approximately 75% of the federal districts. ECS trial attorneys and AUSAs have had outstanding success in their joint investigations and prosecutions, including

four of the five cases listed at the beginning of this article. ECS provides model indictments, briefs, and jury instructions, and can respond to short-notice requests for assistance on motions practice and other matters. ECS also publishes the multi-volume Environmental Crimes Manual and the quarterly *Environmental Crimes Bulletin*. Copies of these publications can be obtained from ECS by calling (202) 305-0378.

The AGAC Environmental Crimes Subcommittee works closely with ECS and the Environment Division on a range of policy issues. One of the best examples of this effort has been the Department's response to legislative proposals that would seriously hinder law enforcement efforts. AAG Lois Schiffer and USA Veronica Coleman (W.D. Tenn.) presented key testimony to oppose audit privilege and immunity and other anti-law enforcement bills on the federal level, and AGAC members and the Environment Division have provided testimony and comments regarding state audit privilege and immunity legislation that would undermine federal environmental protection standards. Working closely with the AGAC, OCEFT, and prosecutors around the country, ECS drafted a series of legislative proposals, including an "attempt" provision for environmental crimes that would greatly enhance enforcement by investigators and prosecutors.

One outgrowth of this close cooperation has been the development of enforcement initiatives. By rapidly responding to national patterns of criminality, these initiatives represent a new enforcement methodology — moving from a program that was predominantly responsive to problems to one that is more aggressive and proactive. In our respective roles as Co-Chairs of the AGAC Subcommittee on Environmental Crimes, Director of OCEFT, and Chief of ECS, we are working closely to build on these successes. We believe that a strong criminal enforcement program appropriately punishes the worst violators, and drives compliance throughout all environmental programs. Unfortunately, despite all the best efforts of federal, state, and local law enforcement, environmental crimes continue to be a national problem, and the defendants range from small operators to some of the largest corporations.

In the coming months we will develop new enforcement efforts, push for legislative reforms to support law enforcement at every level, and continue our efforts to develop strong environmental criminal enforcement programs in every Federal district. We look forward to working with your office, either to expand the work we already do together, or to begin working together. Environmental criminal enforcement is crucial to the health and safety of our communities, to the preservation of our nation's natural resources, to fairness for law-abiding businesses, and to a safe and healthy future for our children. ~

Prosecuting Wildlife Traffickers: Important Cases, Many Tools, Good Results

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"Between $10 billion and $20 billion in plants and animals were traded illegally around the world last year, with the United States leading the list of buyers, at about $3 billion."

Donovan Webster, *The Looting and Smuggling and Fencing and Hoarding of Impossibly Precious, Feathered and Scaly Wild Things*, New York Times Magazine, Feb. 16, 1997, at 28.

I. Introduction

International wildlife traffickers today face a spectrum of prospective federal charges, from century-old Title 16 conservation offenses, to today's "white collar" offenses. But to understand what charging options lie ahead, federal prosecutors must be willing to sift through the entire text of conservation statutes to find the applicable criminal provisions scattered there. New federal prosecutors will soon learn, however, what their more experienced colleagues already know. The effort is worthwhile; flagrant wildlife offenders can and do receive stiff sentences under the Sentencing Guidelines. Wildlife and Marine Resources Section prosecutors who specialize in wildlife trafficking violations can lighten your burden along the way to conviction.

The diversity of wildlife trafficking is co-extensive with the diversity of the earth's fauna. Live animals—exotic birds (parrots and macaws), mammals, reptiles, and fish—are hidden in secret compartments, in shipping containers, under clothing, or in luggage, and smuggled across international borders, or are openly declared at the border, but accompanied by false paperwork to make their importation appear legal. Wildlife parts too numerous to list (or even imagine) are smuggled at one time or another for commercial or personal use: big game trophy animals, animal skins, ivory, complete tiger carcasses, bear gall bladders and bile salts, rhinoceros horns, whole or ground (a reputed aphrodisiac and one of the world's most valuable commodities), fresh sea turtle eggs, and mounted butterflies (whose species worldwide number in the tens of thousands). This trade in live animals and their parts feeds a voracious market of exotic medicine users, collectors, wildlife dealers, clothiers, leather craftsmen, and pet fanciers.

Though often overshadowed by the publicized problem of habitat loss and degradation, illegal wildlife trade deserves serious attention from federal prosecutors. First, this trade contributes directly to the loss of global biodiversity. Poaching drives species such as the tiger, rhinoceros, and Asian bear closer to extinction. Second, live animals inhumanely transported in cramped or concealed compartments frequently die before reaching the market. Third, this trade spreads disease, and introduces injurious pests and exotic species that crowd out native species, permanently damaging or altering natural ecosystems. Fourth, organized crime is making an aggressive entry into the international wildlife marketplace.

The export of our native wildlife is also a serious problem, and poaching of domestic wildlife has reached epidemic proportions. More than one hundred native species, including twelve listed as "endangered" or "threatened" under the Endangered Species Act of 1973, are routinely killed within our national parks.

Today, traffickers face stiff federal criminal penalties from:

1. Traditional fish and wildlife trafficking statutes usually found in Title 16, such as the Lacey Act Amendments of 1981 (commonly called the Lacey Act), 16 U.S.C. §§ 3371-78;

2. More vigorous application of Title 18 offenses—such as money laundering, smuggling, and tax and currency transaction violations — once reserved for drug and white collar offenders. Traffickers confront a gauntlet of wildlife and white collar charges, with maximum penalties of twenty years' imprisonment, $500,000 fines, and other Title 16 conservation sanctions, such as forfeiture (wildlife and other property), civil penalty assessment, injunctive relief, and permit revocation.

AUSAs are authorized to prosecute violations of Federal wildlife laws. *See* USAM 5-10.310, 5-10.312. In the Department's Wildlife and Marine Resources Section of the Environment and Natural Resources Division, a team of six wildlife prosecutors provides information and support to local federal prosecutors conducting federal wildlife prosecutions, and can and does assume the lead role in prosecuting complex, multi-district, or novel cases anywhere in the United States. The Wildlife Section has sample charging language, jury instructions, and a variety of subject matter outlines. The Division also has an experienced staff in the Appellate Section to handle criminal appeals. Please notify the Appellate and Wildlife Sections of any fish and wildlife criminal appeals. *See* USAM 2-2.000, 2-2.111, 2-3.220, and USAM 5-8.300.

II. Regulation of the International Wildlife Trade

A. The Lacey Act

The Lacey Act, enacted in 1900, is the United States' oldest national wildlife protection statute. After 100 years and many revisions, the Lacey Act is now an anti-trafficking statute protecting a broad range of wildlife. The Lacey Act applies to all "wild" (i.e., not domesticated) animals, alive or dead, and to any part, product, egg, or offspring. 16 U.S.C. § 3371(a). The Act's prohibitions have two prongs: wildlife trafficking, both domestic and international, and false labeling (the wildlife equivalent of an 18 U.S.C. § 1001 offense).

The Lacey Act attacks wildlife trafficking by making it unlawful to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife already taken (i.e., captured, killed, or collected), possessed, transported, or sold in violation of state, federal, American Indian tribal, or foreign laws, or regulations that are fish or wildlife-related (the so-called "underlying law" or "predicate offense"). 16 U.S.C. § 3372 (a). Together, these are referred to as the "two steps" necessary for an offense. *United States v. Carpenter*, 933 F.2d 748 (9th Cir. 1991). An interstate or foreign commerce nexus is required when the "underlying law" violated is state or foreign, but none when it is federal or tribal law. 16 U.S.C. § 3372(a)(1)-(2). A two-tiered penalty scheme exists, creating both misdemeanor and felony offenses, distinguished by the defendant's knowledge of the underlying law violations. 16 U.S.C. § 3373(d)(1) and (2). For a felony, the defendant must "know" about, or be generally aware of, the illegal nature of the wildlife, but not necessarily the specific law violated. *United States v. Todd*, 735 F.2d 146 (5th Cir. 1984). A misdemeanor merely requires that the defendant, "in the exercise of due care," should know the facts constituting the underlying law violation. "Due care is that degree of care which a reasonably prudent person would exercise under the same or similar circumstances." 9th Cir. Crim. Jury Instr. 9.8.3 (1997); S. Rep. No. 97-123, at 10-12 (1981); 1981 U.S.C.C.A.N. 1758-59. This is a lesser-included offense of a felony violation. *United States v. Hansen-Sturm*, 44 F.3d 793 (9th Cir. 1995). Felony violations, in addition to a "knowing" scienter or *mens rea* requirement, require either proof that the defendant "knowingly" imported or exported wildlife, or "knowingly" engaged in conduct during the offense that involves the sale, purchase, offer, or intent to sell, purchase, or offer wildlife for over $350. Felony violations can result in up to five years imprisonment, a $250,000 fine ($500,000 for organizations), and forfeiture of equipment involved in the offense,

while the maximum Class A misdemeanor penalty is one year imprisonment and a $100,000 fine ($200,000 for organizations). 16 U.S.C. §§ 3373(d), 3374(b), and 18 U.S.C. § 3571. Strict liability forfeiture exists for wildlife contraband without the need to first obtain a criminal conviction. 16 U.S.C. § 3374 (a); *United States v. One Afgan Urial Ovis Blanfordii Fully Mounted Sheep*, 964 F.2d 474 (5th Cir. 1992). Violations can be aggregated for charging purposes; the government need not charge the defendant with the smallest "unit of prosecution" available. *United States v. Tempotech Indus., Inc.*, Nos. 95-1097(L), 95-1113, 95-1433,1996 WL 14056 (2d Cir. Jan. 12, 1996) (one count for each years's aggregate offenses).

The Act also requires that contents of shipments of fish and wildlife traveling in interstate or foreign commerce be accurately marked and labeled on the shipping containers. Failure to mark or label a shipment properly is a civil penalty violation punishable by a fine. 16 U.S.C. §§ 3372(b) and 3373(a)(2). But making or submitting any false record, account, label for, or identification of any wildlife transported or intended to be transported in interstate or foreign commerce may be prosecuted as either a misdemeanor or felony, depending on what additional specific conduct occurs. This parallels trafficking offenses. 16 U.S.C. §§ 3372(d), 3373(d)(3). No "underlying law" or "predicate offense" is required for these false labeling offenses. *United States v. McDougall*, 25 F. Supp. 2d 85 (N.D.N.Y. 1998).

One unique feature of the Lacey Act is its ability to incorporate foreign laws as an underlying law or predicate offense to "trigger" a Lacey Act violation. This is best illustrated in the prosecution of Taiwanese nationals for attempting to import 500 metric tons of salmon taken in violation of a Taiwanese law that they themselves had not violated. *United States v. Lee*, 937 F.2d 1388 (9th Cir. 1991). In another case, a California defendant was charged with selling tarantulas collected in violation of Mexican law. At trial, the relevant Mexican law was admitted to serve as the underlying violation for a felony conviction. *United States v. Cook*, No. 94-50607, 1996 WL 144224 (9th Cir. Mar. 29, 1996). A person who imports wildlife into the United States taken, possessed, transported, or sold in violation of a foreign law or regulation of general applicability (local, provincial, or national laws all included) can be prosecuted in the United States for a Lacey Act offense built upon a violation of that foreign country's laws. Of course, the defendant need not be the one who violated the foreign law; the wildlife itself becomes "tainted" even if someone else commits the foreign law violation, but the defendant must know or should know, in the exercise of due care, about its illegal nature.

The Lacey Act occupies a central place within the framework of federal wildlife laws for several additional reasons. First, the Lacey Act applies to a wider array of wildlife than any other single protection law, including the Endangered Species Act. Second, it has the stiffest potential penalties. It can "bootstrap" some federal misdemeanor offenses into felonies, and use as underlying laws prohibitions found in statutes with no criminal penalties. *United States v. Cameron*, 888 F.2d 1279 (9th Cir. 1989). Third, its prohibitions have a greater reach. Lacey Act offenses are subject to a federal five year statute of limitations, not a shorter one applicable to the underlying law. *United States v. Borden*, 10 F.3d 1058 (4th Cir. 1993). The current utility of the Lacey Act is best reflected by the Ninth Circuit Court of Appeals publication of model Lacey Act jury instructions in the *Manual of Model Criminal Jury Instructions*. 9th Cir. Crim. Jury Instr. 9.8.1- 8.4 (1997). For a more detailed Lacey Act explanation, *see* Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trading*, 16 Pub. Land. L. Rev. 29 (1995).

B. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

In 1973, 21 countries signed a document called the Convention on International Trade in Endangered Species of Wild Fauna and Flora. 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES]. Frequently called "CITES," and sometimes "the Washington Convention" (it was signed in Washington, D.C.), this treaty became effective in 1975. It now boasts more than 140

member nations. CITES seeks to regulate the international wildlife trade (i.e., the import, export and re-export of live and dead animals, fish and plants, and their parts and derivatives) by placing species in three "Appendices," based on the degree of threatened extinction by international trade. Willem Winjestekers, *The Evolution of CITES*, 4th ed. (1995); CITES Art. II. CITES regulates trade between countries, imposing the greatest restrictions on species found in Appendix I and the least on those in Appendix III. This is implemented through a program of permits or certificates, issued by both member and non-member countries, that must accompany lawful shipments.

The type of permit or certificate required, and the restrictions placed on the CITES shipment, depend on the particular appendix in which a species is listed: either Appendix I, II, or III. CITES Arts. III, IV, V. Appendix I is the most restrictive and bans wildlife trade between countries for commercial purposes. Appendix II permits some commercial trade under permit for species not yet considered in danger of imminent extinction. Appendix III contains species which are of special concern only to a country where they exist and are even less rigorously regulated. CITES Art. V.

CITES is not a self-executing treaty. It contains no internal implementation or enforcement mechanism which automatically establishes enforcement infrastructures, management authorities, or penalties within the countries acceding to the treaty. Thus, CITES can only be effective to the extent that member countries enact and enforce the specific provisions. The United States has done so through the Endangered Species Act. 16 U.S.C. §§ 1537a; 1538(c)(1).

C. Other Federal Laws Penalizing Illegal Wildlife Trafficking

1. The Endangered Species Act. The Endangered Species Act (ESA), 16 U.S.C. §§ 1531-43, enacted in 1973, is one of the country's most significant wildlife laws. ESA authorizes a listing of wildlife species considered by the Federal Government to be in imminent danger or threat of extinction, and requires government action to restore populations of those species. Both exotic and domestic species are listed, matching many of those listed by CITES. 50 C.F.R. § 17.11, 17.12.

The ESA also helps interdict wildlife traffickers. First, the statute and implementing regulations make it illegal for any person subject to the jurisdiction of the United States to import, export, offer, or sell in interstate or foreign commerce, or to receive, carry, transport, or ship in interstate or foreign commerce in the course of a commercial activity, any endangered or threatened species. *See* 16 U.S.C. § 1538(a)(1); 50 C.F.R. 17.31. Lists of endangered and threatened species appear in regulations published by the Department of the Interior. 50 C.F.R. §17.11. The ESA also makes it unlawful to "take" (defined by 16 U.S.C. § 1532(19) as "to harass, harm, pursue, shoot, wound, kill, trap, capture or collect or attempt to engage in any such conduct") any endangered or threatened species within the United States or its territorial seas or upon the high seas. 16 U.S.C. §§ 1538(a)(1)(B)-(C).

Second, the ESA also carries out our CITES obligations, designates the United States Fish and Wildlife Service to carry out its functions, and prescribes penalties for anyone caught importing, exporting, or possessing CITES-listed specimens traded in violation of the treaty. 16 U.S.C. §§1537a, 1538(c)(1), 1540(b)(1). *See United States v. Winnie*, 97 F.3d 975 (7th Cir. 1996) (possession of cheetah imported in violation of CITES illegal).

Third, the ESA makes it unlawful to import or export wildlife at any customs port of entry other than those designated by the Department of the Interior, fail to declare wildlife to either U.S. Customs or Fish and Wildlife Service officers upon importation or exportation, or engage in business as an importer or exporter of wildlife without a license from the United States Fish and Wildlife Service. *See generally* 50 C.F.R. Part 14. A criminal violation of ESA only requires general intent. It can occur without the defendant knowing that the wildlife is protected, and without intending to violate the law. *United States v. McKittrick*, 142 F.3d 1170 (9th Cir. 1998).

Most criminal violations of the ESA are Class A misdemeanors with penalties ranging from one year imprisonment and fine; $100,000 for

individuals and $200,000 for organizations. 16 U.S.C § 1540(b)(1). A few violations, generally those involving threatened species, are Class B misdemeanors with maximum penalties of six months imprisonment and $25,000 fine. *Id*. Though the maximum fine is $25,000, it nonetheless is treated as a petty offense. *United States v. Clavette*, 135 F.3d 1308 (9th Cir.), *cert. denied*, 119 U.S. 151 (1998).

Fish and wildlife trafficked, sold, or received in violation of law are subject to forfeiture on a strict liability basis (without regard to fault and without a so-called "innocent owner" defense). *United States v. One Handbag of Crocodilius Species*, 856 F. Supp. 128 (E.D. N.Y. 1994). Equipment, vehicles, vessels, aircraft and other means of transportation used to aid the commission of an offense where the government obtains a criminal conviction are subject to forfeiture, too. 16 U.S.C. § 1540(b)4).

2. Customs, Smuggling and Other General Criminal Laws Used in Wildlife Trafficking Cases. Some Title 18 offenses are particularly well suited for prosecuting wildlife traffickers' conduct. The smuggling statute, 18 U.S.C. § 545, a Class D felony, is a charging option whenever wildlife is illegally imported into the country. Concealing contraband upon importation is one obvious smuggling violation, but the statute has a much broader reach. For example, all wildlife entering the United States must be cleared, and all persons entering the United States must accurately declare any wildlife in their possession. 50 C.F.R. § 14.61; 19 C.F.R. § 148.11. Violation of any of these requirements may trigger a smuggling charge.

The second paragraph of the smuggling statute,18 U.S.C. § 545, sets forth two types of smuggling offenses commonly used in wildlife cases:

a. One offense is to import knowingly, or bring into the United States, merchandise (i.e., wildlife) contrary to law. The crime is complete if the defendant knowingly imports merchandise contrary to another United States law. *United States v. Davis*, 597 F.2d 1237 (9th Cir. 1979). "Contrary to law" means contrary to any U.S. law or regulation of general applicability, *United States v. Mitchell*, 39 F.3d 465 (4th Cir. 1994). Even if it is only a misdemeanor or merely an agency regulation, it still supports a felony charge under § 545. *Id.*; *Duke v. United States*, 255 F.2d 721 (9th Cir. 1958); *Steiner v. United States*, 229 F.2d 745 (9th Cir. 1956). False statements made in Customs entry documents have been considered contrary to the Customs laws which require the submission of accurate information to import merchandise, e.g., the importation was "contrary to 19 U.S.C. §§ 1481, 1484, or 1485." *United States v. Cox*, 696 F.2d 1294 (11th Cir. 1983). The underlying law may be a CITES violation. *United States v. Ivey*, 949 F.2d 759 (5th Cir. 1991).

b. The other offense under that paragraph is knowingly to receive, conceal, buy, sell, or facilitate the transportation, concealment, or sale of merchandise, knowing the merchandise was imported or brought into the United States contrary to law. *Id*. This, of course, allows prosecutors to follow the stream of smuggled merchandise to find culpable downstream parties. Proof of the defendant's knowledge of the law violated upon importation is required.

The first paragraph of the smuggling statute, containing additional smuggling prohibitions, includes the phrase "intent to defraud," which some courts have found troublesome. Courts have given it two interpretations, one helpful to wildlife prosecutions and another harmful, if not ruinous, to them. Many circuit courts have concluded that the phrase means nothing more than an "intent to avoid and defeat the United States Customs laws." *United States v. Robinson*, 147 F.3d 851 (9th Cir. 1998); *United States v. Kurfess*, 426 F.2d 1017 (7th Cir. 1970); *United States v. McKee*, 220 F.2d 266 (2nd Cir. 1955). This interpretation supports wildlife prosecutions. The Third Circuit, however, has concluded that the phrase means to deprive the government of revenue. *United States v. Menon*, 24 F.3d 550 (3rd Cir. 1994). This is an interpretation that is probably fatal to most wildlife cases: duties are usually not owed on imported wildlife.

In cases involving the unlawful importation of fish or wildlife where the defendant violated both a foreign law and another U.S. law or regulation

upon importation, a choice exists between prosecuting a defendant under 18 U.S.C. § 545 or the Lacey Act. Generally, the smuggling statute is preferable. Where the government charges smuggling, instead of Lacey Act, the law requires no specific proof of the applicable foreign law. Fed. R. Crim. P. 26*; see, e.g., Mitchell*, 39 F.3d 465; *United States v. One Afghan Urial Ovis Orientalis Blanfordi Fully Mounted Sheep*, 964 F.2d 474 (5th Cir. 1992). A smuggling charge can support a money laundering charge. The money laundering statute defines "specified unlawful activity" to include smuggling offenses under 18 U.S.C.§ 545, including those where "merchandise" (i.e., fish or wildlife) is brought into the United States "contrary to law." *See Lee*, 937 F.2d 1388. Consequently, the government can charge money laundering, when appropriate, where smuggled wildlife comes into the United States. Money laundering charges arise most frequently in international trafficking cases where someone transfers, transports, or transmits funds from the United States to another country (or vice-versa), with the intent to promote wildlife smuggling. 18 U.S.C. § 1956(a)(2)(A). The maximum penalty is 20 years imprisonment and/or a $500,000 fine. *Id.*

3. Other Title 18 Offenses. Of course, many other Title 18 offenses can apply. Lying on any declaration form or to government inspectors would also constitute a felony "false statement" offense. 18 U.S.C. § 1001. Conspiracies not only to commit substantive offenses, but also to defraud the United States, often arise. 18 U.S.C. § 371. Where applicable, the government may bring tax violations against the wildlife smuggler who fails to report or otherwise conceals income derived from wildlife trafficking. *See* 26 U.S.C. § 7201 *et seq*. Today, wildlife traffickers can expect to have the book thrown at them. *See, e.g., United States v. Kloe et al.*, No. 96-131-CR-ORL-22 (M.D. Fla., Jan. 10, 1997) (defendant convicted of conspiracy, Lacey Act, Endangered Species Act, smuggling, and money laundering offenses connected with his illegal import of Malagasy reptiles, taken illegally in that country, and transported to the United States through Germany and Canada for pet sale; sentenced to 46 months imprisonment and fined $10,000); *United States v. Silva*, 122 F.3d 412 (7th Cir. 1997) (defendant convicted of conspiring to smuggle exotic birds into the U.S., and failing to report taxable income, sentenced to 82 months' imprisonment and fined $100,000 ; co-defendant convicted of tax charges alone and sentenced to 27 months in jail); *United States v. Wegner et al.*, Nos. 96-50015, 96-50022, 1997 WL 367901 (9th Cir. July 2, 1997) (defendant convicted of conspiracy and tax violations, after failing to report accurately illegal gains from the sale of smuggled cockatoos, sentenced to 5 years' imprisonment and fined $10,000); *United States v. Lee*, 937 F.2d 1388 (ring leader of conspiracy to smuggle 500 metric tons of salmon into the U.S. convicted of conspiracy, Lacey Act, and money laundering charges, and sentenced to 70 months' imprisonment).

III. Sentencing of Wildlife Trafficking Cases - Section 2Q2.1 of the Sentencing Guidelines

All types of federal wildlife and wildlife-related crimes committed by an individual, Class A misdemeanors or felonies, including conspiracy to violate wildlife laws (18 U.S.C. § 371) and smuggling violations involving wildlife (18 U.S.C. § 545), have a base offense level of 6, pursuant to U.S.S.G. Section 2Q2.1. Three groups of specific offense characteristics enhance the offense level:

1. Offenses committed for a pecuniary gain or involving a commercial purpose;

2. Offenses involving wildlife not quarantined as required by law or creating a significant risk of infestation or disease transmission potentially harmful to humans or wildlife; and

3. Offenses where either:
! the wildlife's market value (i.e., fair market retail price) exceeds $2,000 (resulting in an offense-level increase according to the table in Section 2F1.1 Fraud and Deceit Guideline); or
! a depleted marine mammal population, or a species listed as endangered or threatened by the ESA or on Appendix I to CITES was involved, in which case a minimum four-level enhancement ensues. U.S.S.G. § 2Q2.2(b)(1),(2), (3).

Points to remember. The Application Notes for Section 2Q2.1 define guideline terms expansively and tend to result in more offense levels than the language of the guideline alone. *See United States v. Eyoum*, 84 F.3d 1004 (7th Cir.1996). Do a rough guideline calculation using Section 2Q2.1 and Chapter Three adjustments soon after a case referral. Rank the wildlife referral against the others received. The results may surprise you.

Another surprise awaits for organizational defendants: organizational fines are not calculated using the steps in Sections 8C2.2 through 8C2.9. They instead jump directly to Section 8C2.10. U.S.S.G. §§ 8C2.1 comment. (backg'd); 8C10. A complete description of the Sentencing Guidelines application to federal wildlife cases is too complex for presentation here, though the sentences described for cases and noted in this article illustrate that wildlife traffickers in the United States do receive lengthy terms of incarceration and stiff fines, especially when long-term commercial activity increases the overall market value (using both offense and relevant conduct). Market value is the single guideline factor most likely to increase the total offense level computation.

IV. Conclusion

The United States now has a framework of laws, penalties, and dedicated investigators and prosecutors in place, with all the necessary tools to interdict illegal wildlife and punish wildlife traffickers, both domestic and international. But how aggressively will we apply our interdiction tools? To say that our Earth's wildlife bounty is at stake is not hyperbole. Shipment by shipment, some species move ever closer to the most dire consequence: extinction. That may be the true cost of failure.

National Initiatives Developed to Combat Widespread Environmental Crimes

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In recent years prosecutors have worked to identify emerging nationwide environmental crimes, and to develop coordinated proactive enforcement efforts. This requires the quick discernment of a national pattern of criminality from a few cases; the sharing of data among federal agencies; and regular communication among all parties dealing with the criminal problem. Two examples of national environmental enforcement initiatives follow.

NATIONAL CFC ENFORCEMENT INITIATIVE

Defendant: . . . [T]he guy called me this morning. He says he can get it for me for tomorrow. Only two hundred pieces. He's not going to be able to get me five hundred pieces.

Confidential Informant: Yeah?

D: So don't make any more phone calls or whatever because I don't have five hundred. I have only two hundred for you . . . .

* * * *

CI: What's the price, the price is still gonna be, what? Four seventy-five. . . or. . . .

D: Yeah, it's gonna be four-seventy-five. . . yeah.

— Transcript of an undercover buy/bust of ozone-depleting chemicals, known as CFC-12.

Over the last five years, smuggling of CFC-12 (Freon ®) has threatened to undermine an international agreement to phase out worldwide production and use of chemicals harmful to the Earth's ozone layer. This compound, a chlorofluorocarbon (CFC) widely used as a refrigerant in car air conditioners, has a thriving black market featuring markups larger than those in narcotics transactions. CFCs endanger human health and the environment by destroying the high-altitude, or stratospheric, ozone layer that shields the Earth from harmful ultraviolet solar radiation.

The Department of Justice's Environmental Crimes Section, with the cooperation of United States Attorney's Offices, the EPA's Criminal Investigative Division and Stratospheric Ozone Protection Program, the United States Customs Service, the Federal Bureau of Investigation, and the Internal Revenue Service, launched an enforcement effort in 1995 to stop the smuggling of CFCs. This nationwide effort has resulted in 91 convictions, 40 years of imprisonment, and 68 million dollars in fines and restitution. In *United States v. Refrigeration, U.S.A., Inc.*, the defendant corporation was fined 37 million dollars. The court sentenced the president of the corporation to 37 months in prison, a $375,000 fine, and required him to cooperate with the IRS in the assessment and collection of all taxes due. The court required him to immediately surrender more than $4.4 million held in offshore accounts and forfeit real property in Miami and London.

Montreal Protocol and Criminal Penalties. CFC-12 is an ozone-depleting chemical that migrates into the upper atmosphere and catalyzes. This chemical reaction destroys ozone. Because these catalysts are persistent in the atmosphere, small amounts can lead to large scale ozone depletion. Ozone, while harmful at ground level, is necessary in the upper atmosphere to protect the earth from the sun's harmful ultraviolet radiation. Increased radiation which reaches the earth because of ozone depletion is also responsible for health problems such as skin cancer and cataracts.

In 1987, more than 130 countries signed an international treaty known as the Montreal Protocol. The treaty provided for a gradual phase-out of ozone-depleting chemicals. The treaty banned production and importation of the most harmful CFCs from developed countries, such as the United States, by January 1, 1996. Knowing violations of this ban are subject to criminal sanctions under the Clean Air Act. *See* 42 U.S.C. §§ 7413, 7661A 40 C.F.R. Part 82.

CFC Working Group. The Environmental Crimes Section became aware of the developing black market for CFCs from several significant cases brought in the Southern District of Florida. These

cases, coupled with intelligence from industry and federal agencies, showed that chemical manufacturing facilities in several countries, including Russia, China, India, and Mexico, were producing CFC-12, which was ending up on the United States black market.

In response, the Environmental Crimes Section consulted analysts from Customs and EPA to determine whether Customs' import declarations and EPA records indicating who had lawful authority to possess CFC-12 matched. The analysis revealed 12 suspicious geographic areas. This information was provided to Assistant United States Attorneys, Customs, the EPA, FBI, and IRS investigators from those geographic areas. The Environmental Crimes Section, in consultation with Assistant United States Attorneys, the EPA, Customs, and IRS agents, also developed a training manual that provided guidance for investigating and prosecuting CFC smuggling operations.

After an initial training session in 1995, the attendees saw a need to meet again and share information about developing case law and regulatory changes, share non-grand jury information about subjects operating in multiple districts, coordinate cooperation with foreign law enforcement in trans-boundary criminal prosecutions, and coordinate the immunization of witnesses where the individual has criminal exposure in multiple districts. The Working Group meets quarterly, and includes Assistant United States Attorneys and criminal investigators from most major United States ports. Bruce Pasfield, ECS Assistant Chief, is the current chair. For additional information about the Working Group or CFC prosecutions, contact Mr. Pasfield, (202) 305-0321, or ECS paralegal Liz Janes, (202) 305-0378.

Need for Continued Enforcement and Deterrence. Despite successful law enforcement efforts in combating CFC-12 smuggling, the potential for continued smuggling remains high. The domestic supply of stockpiled CFC-12 is dwindling. Also, many vehicles using CFC-12 in air-conditioning systems still need servicing. The danger is that they will service these vehicles with black market CFC-12, rather than the more environmentally-friendly replacement products. Unfortunately, the international treaty allows developing countries such as China, Russia, and India to lawfully produce CFC-12 until 2006. In addition, recent investigations show that Halon 1301, a chemical once used as a fire suppressant, has become a new black market commodity. Unchecked, the smuggling of these compounds could have serious consequences.

Even following the Montreal Protocol's phase-out regime, the ozone levels probably will not return to normal for several decades. Meanwhile, the human health threat associated with ozone depletion becomes more acute. Data released by the National Oceanic and Atmospheric Administration (NOAA) indicates that 1995 ozone values for middle and high latitudes were 10-20% lower than values observed during these months in the early 1980s. *See* NOAA, Northern Hemisphere Winter Summary 95/1, April 1995. Experts expect the increased thinning to result in 33,000 new cases of skin cancer per year in the United States. H. Slaper, L.J.M. Velders, J.S. Daniel, F.R. De Gruijl, and J.C. Van Der Leun, *Estimates of Ozone Depletion and Skin Cancer Incidence to Examine the Vienna Convention Achievements*, 384 NATURE 256-58 (1996). Increased use of CFCs from smuggling will exacerbate this health threat. Criminal enforcement and deterrence, however, can help prevent future health problems and environmental deterioration.

NATIONAL VESSEL POLLUTION ENFORCEMENT EFFORT

The United States Coast Guard, the Environmental Protection Agency, the Department's Environmental Crimes Section, and United States Attorneys' Offices have undertaken a concentrated enforcement effort to prevent the pollution of oceans and inland waterways by ships.

Training to Federal Agents, Officers, and Local First Responders. The initial focus of the enforcement effort was to train the Coast Guard and federal agents in the development of successful criminal prosecutions, and in the deterrence of future acts of pollution. These training sessions have been conducted by ECS Assistant Chief Greg

Linsin, ECS trial lawyers, Assistant United States Attorneys, and Coast Guard officers. To date, they have held training in more than 25 locations around the country. Attendees include federal agents, Coast Guard officers, local and state employees, and officials charged with the initial response to, and investigation of, marine casualties, oil spills, hazardous spills, and other pollution incidents.

Successful Criminal Prosecutions. Since 1993, the Executive Office for United States Attorneys (EOUSA) statistics indicate that 36 prosecutions for vessel pollution occurred across the country, 26 individuals were sentenced, and criminal fines of more than $112 million imposed. Several cases have resulted from proactive United States Coast Guard surveillance operations, designed to detect and prosecute unlawful vessel discharges in United States waters.

One prosecution that occurred this past year is *United States v. Royal Caribbean Cruises, Ltd*. ("RCCL"), *et al.* (pending). RCCL, one of the world's largest cruise lines, pleaded guilty to seven felonies in Puerto Rico. These included a fleet-wide conspiracy to discharge harmful quantities of oil into United States waters from at least five cruise ships; knowing violations of the Oil Pollution Act; making false statements to the United States Coast Guard; and obstruction of justice. The court sentenced the RCCL to pay an eight million dollar fine. Two corporate executives were convicted of related crimes, and the investigation continues.

IDENTIFYING EMERGING PATTERNS OF CRIMINALITY

The Environmental Crimes Section is surveying certain industries and widespread practices to determine whether any nationwide criminal problems exist that require a coordinated enforcement effort. Please contact Deborah Smith, ECS Deputy Chief, (202) 305-0368, with any useful information about a prosecution in your district that may illustrate a pattern of environmental crime. This information may allow prosecutors across the country to identify criminal misconduct more quickly, and move to eliminate it before substantial damage can be done to human health and the environment. ~

Audit Privilege and Immunity Laws

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Your United States Attorney's office is investigating whether to bring criminal charges against a company for violations of the Clean Water Act. To determine whether company officials knew that they were violating the statute, the grand jury subpoenas internal company documents. The company moves to quash the subpoena, arguing that the documents relate to an environmental audit and are privileged under state audit law.

While this scenario is hypothetical, the controversy regarding such privilege laws, and laws providing immunity for violations discovered through voluntary auditing, is very real. Twenty-four states have audit privileges or disclosure immunity laws in effect, and members of Congress have introduced bills in recent sessions that could create similar federal legislation.

We should offer incentives to encourage voluntary environmental auditing. Internal auditing is an important tool to ensure legal compliance and improve environmental quality. There is sharp disagreement, however, about how much incentive is appropriate.

The Justice Department and the Administration strongly believe that audit privilege and immunity laws do not provide appropriate incentives. The Department has repeatedly opposed federal immunity legislation, most recently in the written testimony submitted by Assistant Attorney General Lois J. Schiffer and United States Attorney Robert C. Bundy to the Senate Committee on Environment and Public Works on October 30, 1997. As Attorney General Reno stated in a letter to EPA Administrator Carol Browner, "I oppose the creation of a new evidentiary privilege or immunity law because such legislation would reduce our ability to enforce the environmental laws that protect the public's health and safety and our precious natural resources."

The Department has repeatedly argued that privilege laws can conceal critical information from public and government agencies about threats to public health and the environment. Promoting secrecy hinders the central concept that underlies our efforts in environmental regulation: public accountability. Mandatory reporting disclosure has been a central part of nearly every major federal environmental statute enacted since the 1970s.

In addition, litigation over the scope and applicability of audit privileges can divert scarce judicial and prosecutorial resources from efficiently concluding environmental litigation and remedying threats to human health and the environment.

In addition to, or instead of, creating a privilege, some state laws provide that disclosure of an environmental audit provides immunity from enforcement actions for the violations revealed by that audit. These immunity provisions interfere with effective enforcement, and threaten to diminish the incentive for companies to prevent violations and maintain a high standard of care. Companies that strive to achieve compliance could be at a competitive disadvantage against companies that cut corners and then seek immunity. Government prosecutors should be allowed to reward law-abiding companies, while retaining the ability to punish companies using audits to hide illegal conduct. Granting immunity from enforcement is tantamount to allowing a bank robber to escape prosecution if the individual reveals the robbery and promises to give the money back.

Evidence also demonstrates that strong enforcement encourages auditing. As government officials continue to enforce environmental laws, more companies are performing audits, and audit conducting companies are expanding and improving programs.

State audit privilege laws breed unnecessary and expensive litigation and hamper the public's right to know about threats to safety and the

environment. In Arkansas, for example, a company attempted to use the state audit privilege law to hide environmental impact information from local citizens who, after being subjected to repeated plumes of ammonia, sulfuric acid, and other air pollutants, suffered respiratory ailments. In Cincinnati, a company tried to invoke the state audit law to suppress disclosure of environmental data that was critical to understanding whether one of its properties had leaked explosive gas. Because these laws serve to hide violations from the public and the government, we can only assume that there are many more successfully hidden violations than known cases.

Encouraging voluntary compliance does not require the enactment of privilege and immunity statutes which hamper enforcement of the law. The Department and EPA have already implemented policies that guide the use of discretion to reward good-faith efforts in increasing environmental compliance. These policies encourage both compliance auditing and candid disclosure of known violations.

The EPA's audit policy, issued in December 1995, offers concrete incentives for auditing and voluntary disclosure. To qualify for policy benefits, entities must disclose and correct the violation promptly, prevent recurrences, remedy environmental damage, and cooperate with the EPA. The policy excludes repeat violations, violations of consent orders or agreements, and violations that present imminent or substantial threats to public health or the environment or that result in serious harm. When entities meet all policy conditions, the EPA will 1) eliminate any gravity-based penalty (the "punitive" portion of the penalty, which is the penalty amount in excess of the company's economic gain from non-compliance), and 2) not recommend criminal prosecution, if the violations do not suggest corporate involvement or a management practice to conceal or condone violations. The EPA's policy also does not routinely request companies to submit audits, absent independent evidence of a violation.

The Department and EPA policies work in tandem. To encourage audits and compliance, the Department issued a guidance memorandum in 1991 for prosecutors making decisions involving environmental crimes. Prosecutors are to consider whether there has been: 1) prompt and complete disclosure; 2) cooperation; 3) preventive measures and compliance programs; and (4) correction of the violation. The essential message of the guidance is that good-faith efforts by a violator to identify and prevent problems, report them, and promptly fix them, should be among factors to consider in prosecutorial decision-making. Other factors include state of mind, violation duration, human health or environmental effects, and whether the violations reflected a common attitude within an organization. Such mitigating factors may even convince prosecutors that no criminal case should be brought at all.

These policies are yielding positive results when companies perform audits, disclose violations uncovered by those audits, and correct the violations. EPA and Department enforcement records over many years demonstrate a commitment to give such actions great weight in deciding the appropriate response.

For example, when the Potomac Electric Power Company (PEPCO) determined that it had discharged pollutants from a Maryland facility, it disclosed that fact to the Federal Government and cooperated with authorities. As a result, only the responsible individual was charged, and PEPCO was not criminally prosecuted.

A case from Alaska also illustrates the favorable treatment for disclosure under the Department's 1991 policy. When Russell Metals, Inc. learned that managers of recently-acquired subsidiaries, the White Pass Alaska companies, were under investigation for trying to cover up a large oil spill into the Skagway River, it cooperated with the Department by fully disclosing the circumstances of the oil spill, the cover-up by the White Pass companies, and other environmental violations. The government prosecuted the company's CEO, the contractor, and the White Pass corporation. The Department did not prosecute Russell Metals, which disclosed information and cooperated with the investigation.

In South Dakota, a meat-packing plant's parent corporation, Chiquita Brands, learned from an internal investigation that its subsidiary, the

John Morrell Company, was repeatedly violating the Clean Water Act by dumping slaughterhouse waste into the Big Sioux River, and deliberately falsifying reports to conceal its crimes. Chiquita disclosed Morrell's violations to federal authorities. The South Dakota United States Attorney's Office prosecuted Morrell and several employees who had condoned the violations. Chiquita was not charged. The Department's policy is to consider cooperation in determining the relief sought, even if the degree and timeliness of cooperation are not sufficient to warrant a no-prosecution decision. Morrell pled guilty to several felony counts. Consistent with policy, Morrell's cooperation was a factor in the plea negotiations.

The voluntary disclosure policies of the Department and the EPA are a fair and balanced approach to handling audits and self-disclosure, and they work well. They achieve results that proponents of audit privilege and disclosure immunity legislation attempt to achieve. At the same time, they preserve two cornerstones of our efforts to protect the environment: effective enforcement and public accountability.

Questions or concerns regarding environmental audit legislation can be addressed to James F. Simon, Deputy Assistant Attorney General of the Environmental & Natural Resources Division (202) 514-3370, or James Eichner, Trial Attorney in the Policy, Legislation and Special Litigation Section of the Environment & Natural Resources Division (202) 514-0624. ˜

Supplemental Environmental Projects in Settlement

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Most of the statutes enforced by the Environmental Enforcement Section, including the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and the Resource Conservation and Recovery Act, authorize courts to enjoin continuing violations of the law, and assess civil penalties for past noncompliance. These powerful tools are designed to ensure compliance with laws and protect public health and the environment. Civil penalties not only punish violators, but deter individuals from committing similar future violations. This can promote widespread compliance. Also, because the statutes establish high maximum daily penalties, with the actual penalty determined by the court based on statutory criteria (e.g., 42 U.S.C. § 7413(e)), the court has great flexibility in making the punishment fit the violation.

While prohibitory injunctions and civil penalties protect the public from future harm by stopping the violations and penalizing offenders, they do not redress environmental harm caused by past violations. Injunctions requiring defendants to take action and counter the effects of past violations can, however, fulfill this purpose. Court authority under environmental statutes to enter such injunctions is not yet clearly established with case law. Moreover, courts may be reluctant to enter injunctions requiring defendants to redress environmental harms if the harms are difficult to prove or quantify. Where available injunctive relief and civil penalties fail to provide complete redress for environmental harm, the government is generally receptive to offers by defendants and, indeed, may affirmatively encourage offers to perform environmentally beneficial projects as part of an overall settlement of civil claims.

From the defendant's perspective, the benefit of performing such projects is the expectation that good conduct will result in a lower civil penalty demand by the government than would otherwise be demanded in settlement negotiations. This expectation is justified. A defendant that is willing to implement a project to redress the harm caused by violations is demonstrating a commitment to the environment, and that is an appropriate factor for the government to consider in determining a civil settlement penalty. A defendant that agrees to perform such projects in settlement will pay a lesser civil penalty for the violations.

From the government's perspective, the projects can have important environmental and public health benefits. For example, a project that decreases a violator's discharges to levels that are meaningfully below legal limits can improve water quality in a receiving body of water. Similarly, a project that requires the defendant to provide a local governmental entity with pollutant-efficient vehicles can enhance air quality in a community. These supplemental environmental projects, called "SEPs," can also be designed to protect sensitive ecosystems. For example, some SEPs have provided for the purchase of critical habitat areas, with ownership transferring to a governmental authority or non-profit conservancy group, maintained in perpetuity. Other SEPs may offer direct public health benefits by providing for an exposed population to be tested for the health effects of exposure to degraded air or water.

SEPs can also play an important role in enforcement actions for violations that affect minority or low income populations, as such groups may be disproportionately affected by pollution. These settlement projects can reduce pollution to these populations and restore the community environment. In fact, obtaining early and effective community input is often a key element in ensuring an SEP's success. EPA and the Department are presently exploring ways of best obtaining community input.

Thus, as a general rule, the government can maximize the benefits of civil settlements where it obtains: 1) prompt compliance with the law; 2) a civil penalty that both fully recoups the economic benefit that accrued from non-compliance, and deters the defendant, and others similarly situated, from future non-compliance; and 3) a binding commitment from the defendant to perform one or more environmentally beneficial projects, not otherwise legally required.

This practice of considering defendants' offers to perform environmentally beneficial projects as part of the settlement process has been formalized in EPA's Supplemental Environmental Projects Policy. EPA Supplemental Environmental Projects Policy, 63 Fed. Reg. 25,037 (1998) (this regulation can be found at *http://es.epa.gov/oeca/sep/sepfinal.html*). SEPs are defined as environmentally beneficial projects a defendant agrees to undertake in settlement of a civil enforcement action that the defendant was not otherwise legally required to perform. The principal functions of the policy are to define the types of projects acceptable as SEPs, ensure that settlements incorporating the SEPs are consistent with statutorily conferred enforcement authority, and ensure that the Government recovers an appropriate civil penalty.

EPA's current SEP Policy became effective May 1, 1998, though prior versions were in existence since 1991. SEPs have proven to be a very effective mechanism for achieving significant environmental benefits. For example, in *United States v. Jefferson County, Alabama,* 119 S. Ct. 2069 (1999), which involved Clean Water Act violations by a county at eleven wastewater treatment plants, the settlement included an environmental restoration SEP, valued at $30 million, that provided for the acquisition of permanent conservation easements in riparian lands. Another environmental restoration SEP was negotiated in *United States v. Sewerage and Water Board of New Orleans,* (E.D. La.) (unpublished disposition), where the defendant agreed to perform a water quality improvement project at an abandoned local beach, with the goal of restoring a portion of Lake Pontchartrain to fishable and swimmable conditions. In *United States v. National Steel Corp.*, (S.D. Ill.) (unpublished disposition), a Clean Air Act enforcement action, the defendant agreed to implement two pollution reduction SEPs, valued at $2.4 million. One of the SEPs will reduce fugitive dust from the defendant's facility, which is located close to low-income homes and a hospital. The second SEP is a residential hazardous waste collection project, co-sponsored with the state EPA.

A pollution prevention SEP was part of the settlement in *United States v. American Insulated Wire Corp.*, (D. Mass.) (unpublished disposition). This project was designed to reduce the defendant's pollution discharges to the Blackstone River to virtually zero, and to conserve water through the installation of a closed-loop wastewater treatment and recycling system. The settlement also included a pollution reduction SEP, which will reduce air emissions of sulfur oxides, nitrogen oxides, and particulates from the defendant's plant by substituting natural gas for coal in the factory's boilers. The combined value of the SEPs in the case was $1 million. In another recent case, a settlement included two SEPs valued at $1.1 million. The first SEP required $1 million worth of work to restore contaminated land and wetlands in the vicinity of the company's facility, which is located in a low-income neighborhood of South Chicago. The second SEP was an environmental audit SEP, requiring the defendant to spend $100,000 on an environmental management audit. *United States v. Sherwin-Williams Co.*, (N.D. Ill.) (unpublished disposition).

Additional categories of approved SEPs include public health projects, environmental compliance promotion projects, and emergency planning and preparedness projects. These, as well as the categories referred to in the examples above, are described more fully in the SEP Policy. SEPs should generally fall within the policy's defined categories. Others may be considered, but will require heightened coordination at EPA and the Department.

Those unfamiliar with the policy need to read it thoroughly, and should consult with experts at EPA and the Department on its limitations prior to discussing the appropriateness of a SEP with a

particular defendant. Several features of the policy, however, warrant special mention. The most notable feature is that the policy applies only in negotiated settlements of civil enforcement actions. It does not apply once a case has been litigated to judgment or during an appeal. Civil penalties agreed upon pursuant to a Consent Decree, or adjudicated by a court, must be paid to the United States Treasury. SEPS are not penalties and should not be characterized as such. If they were penalties, the Miscellaneous Receipts Act ("MRA") would require that they be deposited in the Treasury. Although a few courts have erroneously held otherwise, a court has no authority to direct a civil penalty to be used to fund an environmental project, no matter how compelling the circumstances or the need appears to be. *See United States v. Smithfield Foods, Inc.*, 982 F. Supp. 373, 375 (E.D. Va. 1997). Such action would constitute an improper diversion of funds from the United States Treasury, and intrude on Congressional appropriations power. SEPs are permissible, if and only if, there is no fixed debt at the time of the negotiation. Since SEPS are based on the indeterminate nature of a penalty, it is not appropriate for SEPs to mitigate fixed, stipulated penalties. Rather, the government may consider the defendant's willingness to implement a SEP as a mitigating factor only when it has discretion to decide the amount of civil penalty to accept in settlement.

A second important feature of the policy—and a limitation on the government's ability to mitigate penalties—is a general mandate to recover the economic benefit derived from failure to comply in a timely manner. It is EPA and Department policy that a civil penalty must recover the economic benefit of non-compliance. Defendants should not profit from violations. For example, a defendant that fails to install pollution control equipment when required has been able to defer the capital expenditure associated with the purchase of the equipment. This results in financial savings. The penalty should exceed the economic benefit, regardless of how much the SEP costs to implement. This is only fair and appropriate. No defendant should obtain an economic advantage over its competitors through non-compliance.

SEPs are not a substitute for recovering economic benefit, though. A penalty payment to the United States Treasury has more sting and deterrent value than a project that enhances the defendant's own community or community standing, or a project that reduces the defendant's future risk of prosecution. One related concern is the requirement that all publications referring to the SEP specify that the SEP is undertaken in settlement of an enforcement action. While SEPs admittedly show an environmental commitment, law-breakers should not become heroes.

A third feature of the policy is the elaboration of guidelines designed to ensure SEPs stay within Congressional authority conferred on EPA and the courts. For example, an SEP must be consistent with any provision of the statute that the defendant violated, and must advance at least one statutory objective. Additionally, there must be a connection, or "nexus," between the violation and the SEP. For example, a water quality improvement SEP has the goal of restoring swimmable and fishable conditions to a lake degraded by unpermitted discharges in violation of the Clean Water Act. This furthers an objective of the Clean Water Act and, therefore, has the requisite nexus. This nexus ensures that a SEP truly redresses statutory violations, as opposed to accomplishing unrelated EPA or Department objectives.

SEP policy also defines EPA's role in relation to implementation, the requirement for certainty about the SEP at the time of a finalized settlement, and addresses concerns about improper augmentation of a federal agency's appropriation. For example, SEPs cannot be used to augment the agency's budget where Congress has already provided or refused funding. These legal guidelines are discussed in detail in the policy.

A fourth policy addresses the relationship between 1) the requirement that a SEP be a project the defendant is not otherwise legally required to perform, and 2) the scope of injunctive relief that the United States can obtain under the violated statute. By definition, an SEP cannot be something that the defendant is already required by law to do, or can be required to do by the court in the enforcement action, or in another action. There is not always a bright line test; yet the fundamental

principle is that the government gets something of value which makes the defendant's settlement obligation onerous enough to serve as an adequate deterrent to similar violations. If the defendant offers an SEP that it believes it may be required to do anyway, and the Government mitigates the penalty in consideration of the SEP, the defendant gains a significant financial benefit, and the government loses the deterrent value of a stronger settlement.

A fifth feature of the policy addresses the question of accountability for the SEP's completion. SEP policy requires the defendant to assume responsibility for the SEP's performance. This requirement would, for example, prohibit a SEP where a defendant purchases a degraded habitat, and, because the defendant does not want to restore or maintain the property, proposes to write a check for the purchase price and allow EPA to use the funds to restore and maintain the property. Because the SEP would qualify as an environmental restoration SEP, it would seem proper to consider it as part of the settlement. Unfortunately, because the SEP policy prevents EPA from having control over funds to implement an SEP, and because the defendant must be responsible for the SEP's performance, EPA would reject the proposed SEP.

A solution would be to restructure the SEP proposal so that a third party — perhaps a local nature conservancy group — would contract with the defendant to implement the SEP. The defendant would remain responsible for the ultimate performance of the SEP, but could then contract for the needed expertise. The restrictions on EPA's role in SEP implementation would be resolved.

One consequence of SEPs being available only through settlement of civil penalty claims is that the government may have to forego attractive projects if settlement negotiations break down. We do not, however, seek SEPs as remedial relief when such relief is within the scope of injunctive relief sought. The environmental statutes we enforce provide for broad injunctive relief, and as a matter of policy, the government should seek the most complete relief available by law. We are attentive to cases in which courts enjoin defendants to undertake environmental restoration efforts. In one recent case, a defendant violated NPDES permit limits and agreed, as part of the injunctive relief, to clean up a contaminated river bed. The injunctive relief was not limited to an order to comply with the permit. In several other cases, defendants agreed to "offset" excess air emissions by undertaking certain activities, including retiring pollutant credits that could have been sold or used by the company. Because these agreements were part of the demand for injunctive relief, there was no basis for penalty mitigation. To the extent courts can be persuaded to order restoration as part of comprehensive injunctive relief, in addition to future compliance, SEPs should not be sought.

There is no doubt that, even with more comprehensive injunctive relief, SEPs will continue to play important roles in securing favorable settlements. This ensures compliance, promotes deterrence, restores the environment, and helps redress harm in affected communities. Creative SEPs that are attuned to the facts and needs of each case are a challenging and rewarding part of our practice. ~

Enforcement Concerns Surrounding Electronic Transmissions of Environmental Reports

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Society has become increasingly dependent on electronic media, such as the internet, electronic mail, and electronic data interchange (EDI), for communication, commercial transactions, and information gathering. The federal, state, and local governments are keeping in step by offering a growing number of ways for the public to do business with them. This trend is visible in the environmental regulatory arena as well, where the governments are exploring, and already adopting, mechanisms for the regulated community to submit reports to regulatory agencies via an electronic transmission. For the environmental enforcement attorney and environmental criminal prosecutor, the shift to electronic reporting raises serious legal issues that should be addressed prior to any governmental agency adopting a new electronic reporting system.

Framing the Issues. Compliance with the environmental laws and the improvement of the environment's health are the result of strong enforcement efforts against violators of environmental laws. To remain effective in the future, the government must maintain a "credible deterrence" against noncompliance. In other words, it is necessary that the regulated community know that, if it submits false information to the regulatory agency or violates the law and fails to report that violation to the regulatory agency, the government will bring an appropriate enforcement action against the responsible individuals. This enforcement goal can be consistent with, and even enhanced by, the development and implementation of electronic reporting, provided that fundamental legal and security protections are incorporated into an electronic reporting system. An electronic reporting system, however, will be superior to traditional paper submissions only if it is implemented with sufficient safeguards to ensure the identification of the entity and person submitting the data, and that the data received by the agency is the same data sent by the regulated entity.

Many federal environmental enforcement cases are based upon documents and information given to state agencies that have been authorized to administer the federal program, so it is important to consider state electronic transmissions processes. Many states recognize the need to ensure that collection of data from the regulated community continues to produce admissible and persuasive evidence of criminal wrongdoing. This in turn ensures that knowing violations of the environmental laws, and false statements to the government, can be prosecuted criminally. Some state representatives argue, however, that they do not need an electronic reporting system to prove a violation of law beyond a reasonable doubt, and that their states bring few criminal cases for environmental violations anyway. According to these representatives, developing a simple, inexpensive, and quick-to-implement electronic reporting system is more important than ensuring legal safeguards which allow prosecution for committing an environmental crime or filing a false environmental report.

This approach could seriously harm federal enforcement in two major ways. First, if the EPA has authorized the state to administer the program, the state would fail to protect its own enforcement powers, as well as render the federal government's enforcement authority ineffective. Second, if a system is set up that fails to identify the entity submitting the data, or fails to tie the data to the entity submitting the information, it is likely that the regulated community will become aware that electronically transmitted data could not form the

basis of an enforcement action. As a result, the system would not deter the regulated community from falsifying data. Without maintaining the *ability* to bring a criminal prosecution for knowing violations of the environmental laws, the regulated community would not be sufficiently deterred from violating the law. Noncompliance, even deliberate, would be reduced to a "cost of doing business" decision, without the threat of criminal enforcement.

To ensure the admissibility of electronically submitted data, any system of electronic reporting must, at a bare minimum, include the following: 1) data integrity, so information received electronically can be proven beyond a reasonable doubt as the same information sent by the regulated entity; and 2) the identity of the entity submitting the data to the government electronically, so the government can prove beyond a reasonable doubt that a specific individual within the facility electronically submitted the information. This way, an entity submitting knowingly false information can be punished criminally. How these factors are met and analyzed under the applicable rules of evidence continues to be the subject of much discussion.

Paper versus electronic submissions. The concern about electronic transmission of environmental reports stems from the reason such reports are initially relevant. Take, for example, a discharge monitoring report (DMR) submitted by an entity that has a permit to discharge certain waste into the water (commonly called an NPDES permit) under the Federal Clean Water Act. That permit contains discharge limits and requirements for testing the effluent of the discharge. The law requires the permittee to file DMRs each month, to inform the regulatory agency about its discharge and to verify compliance. If a permittee discovers a problem with its treatment processes that causes a deviation from parameters set forth in the permit, and the person responsible for submitting the DMR does not want the agency to know about the deviation, the submitter could decide to file a false report.

A traditional paper submission requires compliance with the permit parameters to be reported, followed by a certification. The reporting individual must sign that the certification that the information contained in the report is true and accurate. Because the entire report is before the person making the certification, the signer certifies that the document's data is true and complete. The paper document is then sent to the agency via the United States mail, a courier service, personal delivery, or telefax. The permittee typically retains a photocopy of the document. The regulatory agency receives the document, stamps it "received," and files it. Months or years later, when the government learns about a DMR falsification and decides to prosecute the entity, the prosecutor has the original DMR sent to the agency, including the signature of the person who submitted the document. The government can then determine whether the document was altered. The Federal Rules of Evidence are tailored to the admissibility of paper, not electronic transmissions. Case law interpreting the Rules is also based on paper submissions and their admissibility. Jurors, familiar with paper, need no explanation regarding the meaning of a paper submission. Unfortunately, there are flaws to paper submissions. For example, signatures can be forged, and paper submissions may be lost or misfiled by the agency.

Electronic reporting systems, like paper submissions, offer both advantages and disadvantages. For example, in the electronic world, devising a system without any of the paper submission safeguards is quite possible. If the only security mechanism incorporated into the electronic reporting system is a password issued to the regulated entity, any number of the entity's employees could have password access. This makes it nearly impossible for the government to identify the person who submitted the data. Data transmitted electronically frequently needs downloading into a different format, which *alters* the document. Moreover, it is possible that the electronically transmitted information cannot be retained in its original format, and will not be accessible in its original form when it is needed for an enforcement action. Furthermore, an entity could alter an electronic copy of the transmitted document after an investigation for submitting false information becomes known, thereby creating

a "he said, she said" situation. This cannot be resolved without obtaining evidence that the permittee altered the document after forwarding it to the regulatory agency.

Despite the inherent difficulties, electronic reporting of information can offer several benefits that paper submissions cannot. It can make the information contained in the submission more accessible. If electronic reporting is implemented with appropriate legal and security measures, it can prove as reliable as paper submissions, and without many of the paper burdens. In the end, it is imperative that any electronic reporting system contain, at a minimum, the same safeguards that paper submissions have.

Does the relevant law permit electronic filings? There is no known general legal bar to the use of electronic reporting systems by government agencies. Nevertheless, implementation of an electronic reporting system for the submission of reports and other data requires a preliminary inquiry to determine whether the existing statutes and regulations permit an electronically transmitted report, in place of a handwritten signature. This inquiry should focus on whether there are any requirements that particular documents be either signed, in writing, or both. If such requirements exist, it is possible that, without a legislative or regulatory amendment, courts will not recognize the validity of an electronically filed or authenticated document, and, as a result, no enforcement tools will be available.

For example, in *In re Kaspar*, 125 F.3d 135 (10th Cir. 1997), the court, reviewing a provision of the bankruptcy statute that required a statement to be "in writing" to be the basis to have a debt declared dischargeable, *see* 11 U.S.C. § 523(a)(2)(B), specifically rejected the argument that it should recognize electronic transmissions as "in writing." The court explained that, despite technological advances, Congress has not changed the words of the *statute*, and courts are bound by the law as they find it, not as they would like it to be.

Evidentiary considerations for developing electronic reporting systems. Assuming relevant law and regulations do not prohibit implementation of an electronic reporting system, the regulatory agency developing the system must ensure that the transmitted information is admissible in a court of law, and persuasive to the trier of fact. Without satisfying these two fundamental evidentiary principles—admissibility and persuasiveness—an electronic reporting system cannot provide the effective evidence needed to maintain the current level of credible deterrence.

The following is a list of important factors to establish about an electronically filed environmental report:

- That the report was (or was not) sent;
- The report sending date;
- How and by whom the report was sent (including the corporate entity and individual);
- The report receiving date;
- That the report was not altered from the time it was sent by the regulated entity to the time it was received by the regulatory agency;
- The report contents; and
- That the report was stored and retrievable by the agency without alteration of the data.

The Federal Rules of Evidence govern how electronically transmitted information may be admitted into evidence. While there are still unanswered questions about whether electronically transmitted data, in only electronic format, is documentary evidence at all, it will be assumed, for purposes of this article, that judges will continue to find electronic reports to be documentary evidence for purposes of the Federal Rules of Evidence.

The testimony of witnesses knowledgeable about the electronic submission's creation, transmission, receipt, and storage is required to satisfy the authenticity and reliability requirement. For example, assume the government prosecutes an individual for filing a false DMR. There must be proof that the electronically transmitted DMR is what it purports to be. This means that the DMR downloaded by the agency is the same DMR sent by the individual, that the individual was responsible for the false DMR being transmitted to

the agency, and that the DMR was not altered or changed by conversion, formatting, or storage of the electronic information. If these elements are satisfied, the electronic submission will be admitted. Once admitted, additional testimony may also be necessary to explain the document.

Authentication as condition of admissibility. Authentication of a document, Fed. R. Evid. 901, means proof that the writing is what the proponent claims it to be. Traditional paper documents are generally authenticated by the signature, which may require an expert handwriting comparison.

There are special rules for authenticating documents created by a technological process, such as x-rays, EKGs, and ballistics tests. F.R. Evid. 901(b)(9) provides that evidence describing the technological process or system can authenticate such documents, along with a showing that the process or system produces accurate results. The following elements of proof are necessary for technological processes: 1) that the technological process is accurate, 2) that the machine ("hardware") was in working order at the relevant time, and 3) that a qualified operator of the process operated the machine. In an electronic reporting system, the government must demonstrate the reliability of the computer processes used, by both the sender and receiver of the information, while creating, transmitting, storing, and retrieving the data. While courts often take judicial notice that certain technological processes are accurate (such as x-rays, radar, and ballistics tests), there are no cases in which a judge has taken judicial notice of accuracy for electronic data creation, transmission, storage, or retrieval processes. Furthermore, judicial notice of a technological process is *not* determinative in a criminal case where the court allows the jury to reach its own conclusions regarding the validity and reliability of a technological process. F.R. Evid. 201(g).

Authenticity can also be established through chain of custody evidence at trial. Determination of chain of custody rests on the common sense resolution of two questions: 1) whether the item offered into evidence is the original item collected, and 2) whether the item's attributes have substantially changed, such that its current representation does not reflect the attributes it had at the time of creation.

The authentication of audiotapes is a potential model. Audiotapes require proof of the origin of the communication, that the statement is accurate as spoken, and that the tape has not been altered. For an audiotape to be trustworthy, it cannot contradict what it is being used to prove, *United States v. Thompson*, 130 F.3d 676, 683 (5th Cir. 1997), and it must reach a level of understandability or legibility such that, when the jurors hear the tape, they do not misconstrue the conversation. *United States v. Powers*, 75 F.3d 335, 341 (7th Cir. 1996). To establish a chain of custody analogous to audiotapes for an electronic transmission, the government would have to offer evidence about the sender's computer process for entering data, creating the report, and sending it to the agency, and the agency's process for receiving, reading, storing, and retrieving the information.

External proof of authenticity of electronically transmitted reports may be problematic. First, it is possible that testimony will be required to prove an unbroken chain of custody regarding file movement of the data, with verification that the data is unchanged. Second, under some electronic reporting systems, the electronic evidence must be reformatted. The government, therefore, must convert the data into a format that is usable and readable. This reformatted version may not be the same as the data forwarded by the reporter of the information. Third, electronic reports do not have a commonly recognized *signature*, and there is no consistent case law defining what constitutes a reliable *signature* for electronic reports. Fourth, the government is not likely to have access to the type of circumstantial evidence that is common for authenticity of paper documents, such as witnesses who saw the report being entered into the computer, or the defendant's own later actions in reliance on the report. While these issues might pose problems for the government prosecutor in seeking the admission of data in the future, it is probable that the issue will be clarified over the years by legislation or judicial precedent.

The persuasiveness of an electronically transmitted report. Once a judge admits a document into evidence, the government carries the

burden of showing that the document is reliable. In other words, the government needs to use the document, together with other evidence, to persuade jurors that the government is correct, and that the defendant violated the law. This may be a formidable task with electronic reports.

An electronic report may be admitted into evidence in the same manner as a paper report, but this does not mean that the electronic evidence is the equivalent of paper evidence. It is unlikely that a finder of fact will find electronic evidence as reliable and persuasive as its paper equivalent because it can be unfamiliar, complex, and confusing. Consider the typical jury asked to listen to the testimony about admissibility and persuasiveness of the electronic evidence. That jury will represent a cross-section of the community in which the crime occurred, and, thus, consist of individuals who are knowledgeable about computers, those who are computer literate but not sophisticated about technology, and those who have little or no knowledge of or experience with computers. The difficult task for the prosecutor in such a situation is obvious. How much technical evidence should be offered to explain the computer system? How should witnesses communicate the necessary information in a way that reaches all three jury groups? How much reliance will the less sophisticated jurors place on the opinions of their fellow jurors who are technically knowledgeable about computers, especially if their opinions differ from those of the government's experts?

These persuasiveness concerns would arise even if the system were technologically and operationally flawless. In the real world, those who use computer technology in their daily lives know that electronic systems are not technologically flawless. One small glitch can wipe out or alter entire segments of information. Add the factor of human error in operating a complex computer system, and the imagination can run wild. The possibility, or even probability, of these malfunctions only adds to a juror's concerns about the government's reliance upon electronically transmitted information. Moreover, once electronic reporting systems are in place, the government may not have any other evidence to prove its case. One purpose of converting from paper to electronic reporting systems is to reduce the burden of retaining traditional paper evidence.

Proposed legal and security criteria for electronic reporting systems. Despite the issues and concerns outlined above, electronic reporting will probably become the means of doing business with the government in the future. To ensure that the government maintains its enforcement authority, the following criteria must be satisfied, especially for reporting systems accepting information requiring certification.

1. Data Integrity. The data integrity criterion is intended to protect the electronically transmitted message from being altered or corrupted. It ensures what is commonly referred to as "non-repudiation" of message content. In other words, with appropriate safeguards for data integrity, the sender of the information cannot later argue that the information received by the regulatory agency is not the same information that was originally submitted. Data integrity requires sufficient controls on access to the electronically transmitted information from the time of transmission, through storage and archiving.

Access control by the reporting entity requires procedures to prevent the sender from altering the information once he or she has forwarded it to the regulatory agency. Access control by the receiver requires procedures to prevent alteration of the data once it is received.

To ensure data integrity, a system should have a mechanism to acknowledge delivery and receipt of the electronically transmitted information to enable the receiver to authenticate the delivered message, its contents, and the identity of the sender. This also creates proof that the message was delivered to the intended recipient.

2. Authentication. Two issues are relevant to authentication of electronic reporting systems: 1) the report's origin, and 2) the receiver. The report origin criterion legally binds the *signature* of the sender to the information being sent. This ensures that the sender is bound to the data. Report origin authentication, like data integrity, ensures against non-repudiation by the sender. The primary issues in ensuring report origin authentication are 1) what

type of *signature* is necessary (i.e. password, pin, digital signature, biometric signature, encryption, etc.), and 2) how the *signature* will bind the sender to the information submitted.

The receiver authentication criterion establishes the authenticity of the organization to which the data was sent, such as a public or private key infrastructure (PKI).

3. Chain of custody. Chain of custody requires establishing an audit trail for electronically transmitted information. These trails must validate the integrity of the data sent and provide a direct connection from sender to receiver. Once the data is received, the trail must show its movement within the agency and through the end of a trial or appeal.

4. Record Retention. The record retention criterion requires an electronic reporting system to record all data transmissions and retrievals. Record retention must also provide long-term accessibility, in a retrievable format, to the electronically transmitted information, as the information is often needed in an enforcement action many years after originally sent.

In addition, though not necessarily a criterion for admissibility in an enforcement action, an electronic reporting system should ensure data confidentiality. This criterion would protect the contents of the electronically transmitted message from being disclosed to someone other than the intended recipient. A sealed envelope or limited access storage area would accomplish this for a paper submission. The security measures necessary to ensure data confidentiality are similar to those for data integrity: 1) protection against unauthorized use of submitter's system (by controlling access to the submitter's computer room, or by issuing passwords to authorized individuals); 2) protection against access to the information during transmission; and 3) protection against use of the recipient's system (by controlling the computer room or issuing passwords as above).

Conclusion. This article focused on the inherent problems of transmitting information electronically when that information becomes the basis of, or relevant evidence in, a criminal prosecution; yet, the benefits of electronic submissions should not be ignored. Electronic reporting systems will, and should, be implemented throughout the government. Such systems, however, should not be implemented until the problems outlined have been addressed, and until there are workable solutions to solve those problems. Technology is developing every day that may make paper submissions an historical footnote. It is this technology that ensures the continued viability of local, state, and federal law enforcement. ~

International Activities of the Environment and Natural Resources Division

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Notorious wildlife smuggler Keng Liang "Anson" Wong and two of his associates were arrested and indicted for smuggling more than 300 animals, worth nearly half a million dollars, into the United States over a three-year period. At least 39 of those species are threatened with extinction, and protected under both United States and international law.

Among those threatened animals was the Komodo dragon, the world's largest lizard, which can grow to ten feet long and weigh more than 200 pounds. These animals are found naturally only on Komodo and nearby islands in the Lesser Sunda chain of Indonesia. The Komodo dragon is worth about $30,000 on the black market. It is endangered by both human encroachment upon its habitat and the greed of smugglers like Wong.

The arrests of these smugglers resulted from a long-term undercover investigation that involved cooperation among the Justice Department, the Mexican Attorney General's Office, the United States Fish and Wildlife Service, the United States Customs Service, INTERPOL, and the Royal Canadian Mounted Police. The apprehension of smugglers is one of many international activities of concern to the Department's Environment and Natural Resources Division (ENRD). These activities cover environmental matters such as: the prosecution of wildlife smugglers; admiralty; and litigation of cases in international trade tribunals (e.g., driftnets on the high seas and turtle excluder devices). The ENRD provides assistance in negotiating agreements on a variety of issues, including climate change; investments; and protecting the environment on the U.S. border with Mexico.

Both ENRD's "domestic" and international activities focus on ensuring effective enforcement of the nation's environmental protection laws. ENRD also seeks to ensure that the United States' international commitments help to support, not undermine, those protections.

Negotiation of International Agreements. International agreements affect environmental protection in different ways. For example, in the Kyoto Protocol to the Framework Convention on Climate Change, the parties commit to take steps to protect the environment. In contrast, the Free Trade Area of the Americas Agreement (FTAA), which is being negotiated among most of the countries in the hemisphere, is not an "environmental agreement." Nevertheless, it could affect our ability to protect our environment. For example, the Investment Chapter of the FTAA will govern the relationship between governments and certain foreign investors. If not properly drafted, it could affect a party's ability to enforce environmental protection regulations that affect the investments of foreign nationals.

One of ENRD's chief interests is to ensure that all international agreements allow for high levels of environmental protection. In addition, the Division seeks to make sure that environmental agreements contain enforceable commitments and mechanisms for verifying compliance, and that all provisions, especially ones on liability and judicial review, are consistent with United States law. Attorneys also review proposed legislation, testimony, reports, and other documents relating to international environmental issues. In addition, they help other agencies draft legislation, regulations, and ratification packages to secure signature and implementation of international agreements. Where appropriate, the Division coordinates with other Departmental components,

such as the Antitrust, Civil, and Criminal Divisions.

ENRD has played a vital role in the negotiation of several international agreements. For example, Division attorneys were part of the negotiating teams for the North American Agreement on Environmental Cooperation (NAAEC) (a side-agreement to the North American Free Trade Agreement), the Kyoto Protocol, and the FTAA. In addition, ENRD has played a significant role in developing United States positions for the negotiation of the Framework Convention on Biodiversity, the Basel Convention on the Control of Transboundary Movements of Hazardous Waste, and annexes to the International Convention for the Prevention of Pollution from Ships (MARPOL).

Finally, Division attorneys help negotiate and implement international diplomatic declarations, plans of action, and statements regarding sustainable development and international enforcement, which include the Declaration and Plan of Action from the Bolivia Summit on Sustainable Development. In the Summit's Plan of Action, democratically elected governments in the hemisphere agreed to participate in a variety of cooperative activities to promote clean drinking water and sustainable agriculture forests.

Implementation of International Agreements. How an agreement is implemented is often as important as how it is worded. The Division actively participates in the implementation of many environmental protection agreements. Sometimes a Division representative serves on the United States delegation to high level meetings of the organizations created to implement the agreement. For example, the Assistant Attorney General or her representative participates in the annual National Coordinators' meeting, under the United States-Mexico "La Paz Agreement." This meeting sets the agenda for efforts to protect the environment in the border region. The Division also participates in a La Paz Agreement work group that seeks to promote cross-border cooperation between local officials enforcing environmental law. To this end, the parties created bilateral regional subgroups that consist of representatives from local, state, federal, and United States tribal government agencies. Participants in the subgroups include representatives from a wide range of agencies in the two countries, including those responsible for environment, justice, customs and transportation.

The activities of the regional subgroups have included training on a range of topics to a variety of audiences. Courses for government officials have focused on hazardous wastes (regulation, detection of illegal shipments, safe handling, and management), detecting illegal shipments of CFCs, and safely handling pesticides. Subgroups have also provided seminars on the regulations that apply to industrial generators, and a workshop on Mexico's Self-Auditing and Self-Disclosure Policy for officials in the maquiladora industry.

ENRD is also part of the North American Working Group on Environmental Enforcement and Compliance, created under the NAAEC. Canada, Mexico, and the United States work cooperatively to improve law enforcement through a variety of activities, including training law enforcement officials, and sharing information that may lead to the identification and prosecution of law breakers. The Division also supports the work of the North American Wildlife Enforcement Group (NAWEG), which focuses on combating wildlife smuggling. This group holds training workshops for wildlife and customs officials to help them detect the smuggling of endangered species. NAWEG and the National Fish and Wildlife Forensics Laboratory recently presented a seminar for Mexican officials and forensic experts on forensic techniques and crime scene investigation, focusing on species identification and medicinal trade issues. The group is now examining whether there is a need to establish new protocols for the exchange of enforcement data.

In addition, ENRD attorneys serve on the various interagency working groups, established to develop the government's positions on the implementation of various agreements. These agreements include the United Nations Convention on Law of the Sea, the Antarctic Protocol on Environmental Protection, the Framework Convention on Biodiversity, and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes.

When international disputes arise concerning the application of United States environmental law, the Division often participates in the litigation. Recent examples of such activities include litigation before the World Trade Organization over importation of reformulated gasoline, the use of turtle-excluder devices in shrimp nets, and the use of driftnets on the high seas.

Enforcement of Domestic Law Implementing International Commitments. Finally, the Division, in coordination with the United States Attorneys and other agencies, enforces domestic laws that implement international obligations. For example, the Division leads an interagency, nationwide initiative to address the smuggling of ozone-depleting substances that violate the Clean Air Act and the Montreal Protocol on Substances that Deplete the Ozone Layer, an international agreement governing the manufacture and trade of these substances. The Division also prosecutes violations of the Endangered Species Act, which implements the Convention on International Trade in Endangered Species of Wild Fauna and Fora (CITES), and the Lacey Act, which makes it illegal for United States citizens to take wildlife species in violation of foreign law. These types of prosecutions frequently involve foreign nationals and, as with the arrest of Anson Wong, require the cooperation and assistance of enforcement officials in other countries. The Division has participated in several international organizations in which environmental enforcement officials come together to exchange information in support of domestic law enforcement. These organizations include the G-8 Senior Experts Group on Transnational Crime, CITES, and INTERPOL.

The Division is also participating in efforts to facilitate the exchange of enforcement-related information among countries. These discussions have focused on each government's ability to exchange specific types of information. As part of these discussions, the countries have also exchanged information about the ability and willingness of the government to withhold from public disclosure information provided to it by another government based simply on that government's request. In addition, United States and Mexican officials have agreed to prepare guidance for law enforcement officials about information sharing. At a recent meeting, officials from the Department of Justice, the Environmental Protection Agency, and PROFEPA agreed to prepare and issue a communication informing field personnel in both countries about allowed cooperative efforts. This will enable officials to share information and provide assistance in gathering and presenting evidence for both civil and administrative environmental enforcement cases. The communication will include discussions about the use of existing information sharing mechanisms and a list of contacts in both countries with expertise in relevant areas.

The Division is involved in a wide range of environmental matters that have international components. In the international arena, the Division seeks to protect the environment as a general matter, and to promote the enforcement of United States law protecting the environment and natural resources. This is done by working to ensure that new international commitments do not undermine existing protections. It is also done by participating in the implementation of those agreements and the enforcement of domestic law related to that implementation. ~

A Primer for Litigating Superfund Hazardous Waste Cases

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Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 United StatesC. § 9601 et seq., better known as the "Superfund" law, in 1980, responding to the discovery of significant human health hazards at Love Canal, the Valley of the Drums, and other infamous sites, where polluters dumped or buried hazardous wastes. The law created a "Superfund" to help pay costs of investigating and cleaning up these sites, and imposed liability for cleanup costs on the parties responsible for creating the sites. Congress significantly refined and amended the law in 1986. CERCLA gives the government unique and powerful legal tools to achieve cleanup goals. In the 18 years since its enactment, we have enforced this law vigorously, dramatically affecting companies' behavior in dealing with hazardous wastes in the United States. In addition, the Environmental Protection Agency (EPA) has reformed application of CERCLA to hazardous waste sites in order to secure faster and fairer cleanups of these threats to human health and the environment.

Basic CERCLA response actions. The United States, typically through EPA, addresses contaminated sites through statutorily authorized removal actions, remedial actions, or a combination of both. The authority to perform removal actions is quite broad, but often encompasses short-term, partial, or urgent responses to health and environmental threats posed by hazardous substance releases. Remedial actions, also defined broadly, typically are longer-term, comprehensive responses to threats posed by a site, and generally are the permanent responses to such threats. Since CERCLA became law, the government has carried out thousands of removal actions, and hundreds of remedial actions, across the Nation.

Principles of Civil Liability

The fundamental concept of CERCLA liability is: "the polluter pays." To achieve that goal, Congress created a broad statutory liability net, imposing liability for site cleanup costs on four categories of parties:

1. Current owners and operators of a facility or vessel from which there is a release or threatened release of a hazardous substance;

2. Parties who owned or operated the facility or vessel at the time treatment or disposal of hazardous substances occurred;

3. Parties who generated the hazardous substances and arranged for its treatment or disposal by a third party (known as "generators"); and

4. Parties who transported the hazardous substances for treatment or disposal, if they selected the site.

42 U.S.C. § 9607(a). In Superfund parlance, these categories are collectively called "potentially responsible parties" (PRPs). Liability under Section 107(a) applies "notwithstanding any other provision or rule of law, and subject only to the defenses" for releases or threatened releases of hazardous substances caused solely by an act of War; act of God; or an act or omission of a third party with whom the defendant had no connection. 42 United StatesC. § 9607(b).

The key terms making up the prima facie elements of a CERCLA claim are defined broadly. Liability can arise concerning any "facility,"

including any building, structure, installation, well, pit, landfill, storage containers, or area where waste has "come to be located." 42 U.S.C. § 9601(9). Substances are "hazardous" and addressable if designated as pollutants or toxic wastes under other environmental statutes, or designated hazardous by EPA under CERCLA. 42 U.S.C. §§ 9601(14), 9602(a). Reference to the Solid Waste Disposal Act supplies expansive meanings to the terms "disposal" or "treatment " of a hazardous substance. 42 U.S.C. §§ 6903, 9601(29).

CERCLA liability can be imposed on individuals and corporations if the individual or the entity falls into any of the four listed liability categories. We have brought many cases successfully against individuals, especially operators of hazardous waste sites, where they had significant, day-to-day personal involvement in disposal activities. *See, e.g.,United States v. Northeastern Pharm. and Chem. Co.* (*NEPACCO*), 810 F.2d 726 (8th Cir. 1986). In appropriate circumstances, courts have imposed liability on "parent" and "successor" corporations. The Supreme Court recently addressed corporate parent liability in *United States v. Bestfoods, et al.*, 524 US 51 (1998), holding that parent corporation liability under CERCLA can be established either by evidence that the parent, through its officers, employees, or agents, controlled or directed the operations of the subsidiary's facility, or by sufficient evidence to pierce the corporate veil.

In addition to the broad statutory liability provisions, years of case law developed three important legal principles of CERCLA liability: strict, retroactive, and joint and several. These principles form the bedrock of CERCLA enforcement.

Courts have uniformly agreed that CERCLA liability is strict, i.e., without regard to negligence or other fault. *See, e.g., United States v. Colorado & Eastern R.R. Co.* (*CERC*), 50 F.3d 1530, 1535 (10th Cir. 1995); *United States v. Monsanto Co.*, 858 F.2d 160, 167 (4th Cir. 1988); *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985). The government only needs to prove that a party falls into one category of liability to obtain a liability judgment. Liability rulings are often decided by summary judgment.

Retroactive liability has been one of the most controversial principles. Although the statute is not explicit, courts have consistently held that Congress intended CERCLA liability to apply to parties whose actions occurred many years before enactment of the statute. In fact, most Superfund sites (e.g., Love Canal) were created long before 1980, and harms flow from sites long after creation. If liability were not retroactive, the "polluter-pays" principle could not be enforced. The courts also have consistently upheld the constitutionality of retroactive liability under repeated attacks by defendants. *See, e.g., United States v. NEPACCO*, 810 F.2d at 734, (citing *Usery v. Turner Elkhorn Mining Co.*, 428 United States 1 (1976)) (upholding retroactive liability scheme under the Due Process Clause as a rational means of spreading the costs of responding to hazardous waste sites among those parties who created or profited from past disposal practices); *United States v. Monsanto*, 858 F.2d at 173-74; *United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997) (upholding CERCLA's retroactive liability scheme as a valid exercise of Congress' authority under the Commerce Clause); *United States v. Vertac Chem. Corp*., 33 F. Supp.2d 769 (E.D. Ark. 1998) (rejecting both due process and takings challenges to CERCLA, based on *Eastern Enters. v. Apfel*, 118 S. Ct. 2131 (1998)); *United States v Alcan*, Nos. 87-CV-920, 91-CV-1132, 1999 WL 304682 (N.D.N.Y. May 11, 1999).

When site harm is "indivisible," courts have agreed that CERCLA imposes joint and several liability. Many Superfund sites are a "chemical soup," where different chemical wastes from many generators have been dumped. In these circumstances, courts have consistently upheld the application of the joint and several liability principle of the Restatement of Torts, where each defendant is liable to the plaintiff for the entire cost of the cleanup. *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997); *O'Neil v. Picillo*., 883 F.2d 176, 178 (1st Cir. 1989); *United States v. Monsanto*, 858 F.2d at 171; *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983). Joint and

several liability is not imposed where defendants can meet their burden of showing divisible harm, which can be apportioned among specific causes. *See United States v. Alcan Aluminum Corp.*, 964 F.2d 252 (3rd Cir. 1992), *on remand*, 892 F. Supp. 648 (M.D. Pa. 1995), *aff'd*, 96 F.3d 1434 (3d Cir. 1996); *United States v. Alcan Aluminum Corp.*, 990 F.2d 711 (2d Cir. 1993); *United States v. Bell Petroleum Servs., Inc.*, 3 F.3d 889 (5th Cir. 1993). Yet, being able to demonstrate divisibility of harm is unusual for a PRP; therefore, joint and several liability is common. *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 348 (6th Cir. 1998); *United States v. CERC*, 50 F.3d at 1535.

The stakes of Superfund liability are often very high, and cleanup costs for Superfund sites typically involve many millions of dollars. The United States promotes fairness, however, through CERCLA settlements. Presently, private parties carry out seventy percent of all cleanup work at Superfund sites. Nonetheless, there has been much private litigation, as assertions of CERCLA claims frequently cause contribution claims among the PRPs regarding the appropriate share of their cleanup liability. CERCLA specifically recognizes and preserves private contribution claims. This enables PRPs to mitigate the ultimate impact of their joint and several liability, and obtain a fair allocation of cost among themselves. 42 U.S.C. §§ 9607(a)(4)(B), 9613(f); *Centerior Service*, 153 F.3d 344; *Pinal Creek*, 118 F.3d 1298.

Enforcement Program. Congress gave EPA two basic choices for enforcing CERCLA's "polluter-pays" principle. These options are to either: 1) require PRPs to clean up the site, or 2) clean up the site using Superfund money, and recoup the costs. Under its "enforcement first" policy, EPA typically requires the PRPs to conduct the cleanup if they are viable and capable. This conserves the Superfund's resources for sites that have no financially viable PRPs to conduct the cleanup. Also, when EPA conducts a cleanup, CERCLA requires the state to provide a 10% funding match, which often poses an obstacle to a government cleanup.

PRPs conduct most of the remedial action at Superfund sites under consent decrees with the United States. EPA follows a statutory procedure for offering PRPs the opportunity to enter a pre-litigation settlement. 42 U.S.C. § 9622(e). The settlement process, titled "Remedial Design and Remedial Action" (RD/RA) negotiations, begins with a "special notice" letter to the PRPs, inviting them to enter a consent decree with the United States to perform the cleanup. If PRPs make a "good faith offer" to do so, a several months-long negotiation period follows. Both EPA and department attorneys participate in these negotiations. If appropriate, the government enters a consent decree with the PRPs, and lodges it with the court for a 30-day public comment period, before moving the court for entry. 42 U.S.C. § 9622(d). Occasionally, there is opposition to entry of a consent decree, often from citizen groups or non-settling PRPs, whose contribution claims against the settling PRPs will be barred by the consent decree. 42 U.S.C. § 9613(f)(2).

For PRPs who decline to enter consent decrees, EPA has very powerful unilateral administrative order authority under CERCLA to require PRP cleanups. 42 U.S.C. § 9606(a). Failure to comply with an administrative cleanup order subjects PRPs to penalties of up to $25,000 per day (increased to $27,500 per day by a penalty inflation adjustment provision of the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701). *See* 42 U.S.C. § 9606(b). Also, if EPA then performs the cleanup, defendants are liable for punitive damages of up to three times EPA's costs. 42 U.S.C. § 9607(c)(3).

Because of the effectiveness of consent decrees and administrative orders in getting PRPs to clean up Superfund sites, CERCLA enforcement litigation mostly consists of "cost recovery" cases, where the government seeks to recover EPA's various site cleanup costs. These cases may involve very large sums of money (e.g., $105 million cost-recovery judgment secured in *United States v. Vertac Chemical*, 46 F.3d 803 (E.D. Ark. 1998)); $95 million recovered in *United States v. Kramer*, 19 F. Supp.2d 273 (D.N.J. 1998); and $137 million recovered for the Love Canal cleanup). CERCLA also authorizes EPA to

settle cost-recovery claims through administrative agreements, subject to the approval of the ENRD Assistant Attorney General, when the government's claim exceeds $500,000. 42 U.S.C. § 9622(h).

Another major type of CERCLA enforcement litigation arises from the imposition of liability for damages for injury, destruction, or loss of natural resources, which result from hazardous substances released into the environment. 42 U.S.C. §§ 9607(a)(4)(c), 9607(f). This liability is imposed on the same parties liable for site cleanup, and is strict, retroactive, and joint and several. The United States currently has several very large natural resource damage cases pending, including *United States v. ASARCO*, 28 F. Supp.2d 1170 (D. Idaho 1998) and *United States v. Montrose Chem. Corp.*, 980 F. Supp. 1112 (C.D. Cal. 1997).

Other CERCLA enforcement cases include actions to enforce EPA administrative access or information requests under Section 104(e). These cases are brought to obtain access to Superfund sites for investigation and remediation, to enforce administrative orders, or to collect penalties for non-compliance. Government CERCLA claims also appear frequently in bankruptcy cases involving company or individual PRPs.

EPA administrative reforms also guide CERCLA enforcement actions. For example, the Department and EPA ordinarily seek to resolve liability of small volume contributors, called "de minimis" parties, early in the process, thereby avoiding the potentially significant transactional costs of litigation. 42 U.S.C. § 9622(g).

CERCLA enforcement litigation is frequently complex, including many defendants and third-party defendants, cross-claims for contribution or indemnification, counterclaims against the government, and bankruptcy claims. ENRD's Environmental Enforcement Section (EES) has developed significant expertise in managing CERCLA cases and addressing the complex issues of law and fact. The EES's litigation record has been extraordinarily successful, thanks to powerful tools granted by the statute and developed by the courts, and to years of dedication and hard work by the trial attorneys of EES, USAOs, and EPA.

Defensive Litigation. In addition to CERCLA enforcement, there is a considerable amount of defensive Superfund litigation, which ENRD's Environmental Defense Section usually handles. For example, the Department defends challenges to Superfund nationwide regulations, such as the National Contingency Plan, 40 C.F.R. Part 300 (a set of regulations containing the procedures and cleanup decision-making process to be employed at Superfund Sites). *See State of Ohio v. United States Environmental Protection Agency*, 997 F. 2d 1520 (D.C. Cir. 1993), and the Natural Resource Damages Assessment regulations. *See Kennecott Utah Copper Corp. v. United States Dep't of Interior*, 88 F.3d 1191 (D.C. Cir. 1996). The Department also defends challenges to a great variety of EPA site-specific administrative actions, such as liens and access and cleanup orders.

In addition, there is a considerable amount of defensive cost-recovery litigation involving federal agencies. Section 120(a), a waiver of sovereign immunity, requires departments, agencies, and instrumentalities of the United States to be treated as private parties under CERCLA, including for liability purposes. 42 U.S.C. § 9620(a). For example, the used oil disposal from a federal agency motor pool could lead to "generator" liability at a recycling facility. Thus, defendants frequently bring counterclaims for contribution against the United States. In such cases, ENRD attempts to resolve government liability based on the federal PRP's contribution.

Role of the Government Attorney. Typically, there are three or four government attorneys involved in a Superfund civil enforcement matter—EPA regional staff attorney, ENRD's trial attorney, an Assistant United States Attorney, and if there are federal PRPs or claims asserted against EPA, an ENRD Environmental Defense Section (EDS) attorney. In cases involving damage to natural resources, attorneys from the trustee federal agency, typically the Department of the Interior (DOI), the National Oceanic and Atmospheric Administration (NOAA), or the Department of Agriculture (USDA), will also be

involved. In addition, states frequently become co-plaintiffs in Superfund cases, where a state Attorney General's office attorney can become involved.

The roles of the several attorneys vary, depending on the nature, time, and resources available to each office. The EPA regional attorney is responsible for developing the case, providing support during litigation, and leading administrative settlements and technical issues. EPA Headquarters attorneys may become involved if there is a difficult or precedent-setting legal issue in the case. Similarly, an attorney from DOI, NOAA, or USDA will provide case development and support for a natural resources damages case. Department trial attorneys are lead trial counsel for CERCLA enforcement and defensive cases.

Opportunities for AUSA Participation. AUSA participation in CERCLA litigation can vary from serving as local counsel—for advice and filing purposes—to full participation in trial and litigation. For example, AUSA Wendy Schwartz (S.D.N.Y), took the lead role in the recent trial *United States v. Freeman*, (unpublished), and AUSA Cathy Votaw (E.D. Pa.), has handled the long-running litigation in *United States v. General Battery*, 661 F. Supp. 1214 (E.D. Pa 1988).

Many AUSAs prefer involvement in short-term CERCLA enforcement litigation, such as obtaining judicial orders of access to a Superfund site, enforcing administrative information requests ignored by PRPs, and seeking penalties for violations of administrative orders. For EPA, CERCLA actions are procedurally initiated by a referral from the EPA Region in which the Superfund site is located, sent to ENRD, and copied to the USAO. ENRD has a standard practice of notifying the USAO when it receives a referral, and invites AUSA participation. With defensive claims, the United States Attorney should be served with the claim or counterclaim. The United States Attorneys' Offices work out their participation level on a case-specific basis.

On rare occasions, an EPA office may contact the USAO directly, for example, because of an immediate need to obtain access to a site. In that event, the USAO should contact ENRD's Environmental Enforcement Section as quickly as possible. EES Chief Joel Gross can be reached at (202) 514-4353.

The ENRD strongly encourages and welcomes AUSA involvement in CERCLA cases, as well as cases concerning other ENRD-enforced environmental statutes (e.g., Clean Air Act, Clean Water Act, Solid Waste Disposal Act, Oil Pollution Act, and Safe Drinking Water Act). AUSAs who wish to participate in a particular case, or are generally interested in environmental enforcement litigation, are encouraged to contact EES Chief Joel Gross, Deputy Chief Bruce Gelber, (202) 514-4624, or Walker Smith, (202) 514-1998). For defensive cases, contact EDS Chief Letitia Grishaw or Deputy Chief Anna Wolgast at (202) 514-2219. ˜

Forging Partnerships in Protecting the Environment

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Wherever possible, the Department of Justice looks to "forge partnerships among law enforcement agencies at every level of government. [We] seek to coordinate the resources of local, state, and federal government to avoid duplication and fragmentation in law enforcement and to ensure that we pursue all matters according to principles of federalism and in the best interest of the community and the country." *Combined Statement of Attorney General Janet Reno and Deputy Attorney General Eric H. Holder, Jr. before the United States Senate Committee on the Judiciary (July 1998).*

This statement by the Attorney General and Deputy Attorney General, made in a discussion of the Department's Anti-Violent Crime Initiative, demonstrates the Attorney General's commitment to cooperation with state and local governments in law enforcement. As frequently stated by Lois Schiffer, Assistant Attorney General for the Environment and Natural Resources Division (ENRD), cooperation with colleagues in state and local government is critical if we are to achieve the shared mission of protecting the environment. Through the combined efforts of the ENRD and the United States Attorneys' Offices (USAOs), the Attorney General's commitment to cooperation is being carried out across the country.

Working System of Federalism. Our federal, state, and local environmental laws seek to assure all American citizens a basic level of environmental protection. A working system of federalism is critical to achieving successful environmental compliance with those laws. States are the primary implementers of environmental law, as nearly all federal environmental statutes provide for delegation of programs to the states. States often have the best access to information on polluters and their environmental impacts. Local governments are usually the most directly affected by environmental violations, and therefore are the first entities to learn of environmental problems affecting a community. The Federal Government has expertise across the spectrum of environmental issues, the depth to handle large cases, and the reach to address pollution across state lines. The Federal Government can also use its unique perspective to stop industry from pitting one state against another to lower environmental protections, for short-term economic advantage, while causing long-term damage to the environment and public health. Finally, the Federal Government can step in to enforce environmental laws when a state is under-budgeted.

By working in a partnership with state and local governments, Department attorneys can maximize the chances of success and use of resources, focus limited resources on the most significant cases, and avoid duplication and misunderstanding. The Department is actively involved in developing new partnerships, and maintaining existing ones, to advance the common mission. As the Department forges these partnerships, USAOs are uniquely situated to serve as liaisons, given the strong relationships that exist between Assistant United States Attorneys (AUSAs) and state and local officials. ENRD attorneys also form strong ties while working with state and local attorneys on selected cases, forging the groundwork for future cooperation.

Civil Environmental Enforcement. The Department also facilitates the formation of partnerships through formal practices. For example, Environmental Enforcement Section attorneys routinely provide notification to states before filing a civil suit, inviting coordination in the action. Due to these outreach efforts, the enforcement section and USAOs are bringing more cases jointly with states. In many cases, states are co-plaintiffs, and work closely with our attorneys through discovery, settlement discussions,

briefings, or by just sitting at the trial counsel table. Occasionally, civil penalties recovered in joint cases may be split between the federal and state governments. The public, however, always benefits from addressing the violations and obtaining injunctive relief.

In cases against large municipalities, Department attorneys often work with offices of the state attorneys general. For instance, this past spring, ENRD attorneys and the USAO for the Eastern District of New York worked with the State of New York to settle Safe Drinking Water claims against the City of New York. The settlement requires the City to pay a $1 million civil penalty and perform Supplemental Environmental Projects valued at $5 million.

Cooperative efforts with states also extend to cases against industries. For instance, our partnership with the State of California has led to the successful resolution of a series of Clean Air Act cases against major automobile manufacturers. This past spring and summer, ENRD attorneys worked with the State of California to resolve Clean Air Act cases against Ford Motor Company and American Honda Motor Company for violating mobile source emission regulations. Ford agreed to spend $7.8 million for the United States' claim that Ford installed a device that defeats the emissions control systems on 1997 Econoline vans. This included a civil penalty of $2.5 million. In the largest Clean Air Act settlement in history, Honda agreed to pay a $12.6 million penalty to settle allegations that it sold vehicles with disabled emission control diagnostic systems. The case announced last year against General Motors for Clean Air Act violations, involving emission control system violations in Cadillacs, laid the groundwork for a successful working relationship with California.

Environmental Crimes. On the criminal side, the Federal Environmental Criminal Enforcement Program has, from the outset, emphasized working closely with state and local agencies. To ensure close cooperation when the Department prosecutes environmental crimes, Department attorneys and AUSAs participate in coordinating committees and task forces made up of state and local officials. These committees pool all investigative and prosecutorial levels—federal, state and local — to share strategies and information, and generally help environmental enforcement efforts.

As Senator Sessions stated in a hearing last year, the environmental crimes working group in Alabama (which includes the state attorney general, state environmental agency, USAOs, EPA, Coast Guard, and others) is a "good model" for law enforcement coordination. Another great example of the importance of state-federal cooperation in enforcement of environmental crimes is the Environmental Crime Task Force in the Eastern District of Missouri. This task force has been very successful in coordinating and prosecuting environmental crimes. Because the State of Missouri has only misdemeanor penalties for violations of environmental law, there are clear benefits to proceeding to federal district court. The Missouri State Attorney General has designated two assistant attorneys general to handle cases in federal court through the USAO.

The United States is also cooperating with the State of Tennessee in an ongoing criminal prosecution, *United States v. Robert E. Kelly Jr. and Robert E. Kelly III* (W.D. Tenn.), where the defendants have been charged with pesticide misuse and conspiracy to violate the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) in illegally applying highly toxic pesticides in Memphis area homes. This is one of several joint, on-going cases involving the illegal application of pesticides. The Tennessee Department of Agriculture and the Shelby County Department of Health are working closely with EPA, ENRD, and USAO attorneys in the investigation and development of the case. Another recent example of cooperation is *United States v. Hendrix* (D. Ariz.), in which the defendants pled guilty to the illegal killing of mountain lions on Forest Service grazing allotments. State of Arizona Fish and Game wardens performed the investigation, and ENRD and the USAO for the District of Arizona prosecuted the case, after a state court held the conduct in question to be outside the scope of the available state criminal provisions.

Besides helping USAOs with the environmental crimes prosecutions, the

Environmental Crimes Section also works with state officials to train state and local prosecutors, investigators, and technical personnel in the development of environmental crimes cases. Attorneys are also involved with the Federal Law Enforcement Training Center in Brunswick, Georgia. They assist in developing basic curricula, and regularly serve as faculty members. Attorneys from the Environmental Crimes Section also routinely participate in training events held by various state and local organizations across the country. Further, the Environmental Crimes Section publishes the "Environmental Crimes Section Bulletin," and distributes it to state and local prosecutors. This bulletin provides current information on environmental crimes cases and issues. The section also distributes a wide range of reference materials for the prosecution of environmental crimes to the same audience.

Amicus Participation. ENRD also participates in cases as an amicus curiae, primarily to promote development of the law in cases where the Federal Government is not a party. Recently, in *K&K Construction, Inc. v. Michigan Department of Natural Resources*, 575 N.W.2d 531 (Mich. 1998), the Department filed an amicus brief supporting the State of Michigan. Landowners, who alleged that the state's denial of a permit to fill wetlands constituted an unconstitutional taking without compensation, sued. The Michigan Supreme Court ruled in the state's favor, and held that the denial of the permit did not constitute a taking.

The amicus process is a two-way street, and in a recent United States Supreme Court case, *United States v. Bestfoods et al.*, 524 United States 51 (1998), the United States benefitted from the briefs filed by the State of Michigan as a party, and by 29 other states as amici curiae. In addition, ENRD Assistant Attorney General Lois Schiffer argued the case before the Supreme Court, and was supported by a representative of the Michigan Attorney General's Office, who joined her at the counsel table. The Supreme Court ruled unanimously, in favor of the United States, that liability can fall to parent corporations under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) for contamination at a facility owned and operated by a subsidiary, where the parent actively participates in, or exercises control over, the subsidiary's operations.

Counselor for State and Local Affairs. The Department has also expressed its commitment to pursuing a partnership with state and local governments through the creation of a new position—Counselor for State and Local Environmental Affairs. The Counselor works with state and local attorneys, and with attorneys throughout ENRD, to maximize cooperative efforts and ensure cordial dealings, even when the Department is on the opposite side. The Counselor also acts as an adviser to Assistant Attorney General Lois Schiffer on issues of concern to state and local governments, and serves as a liaison to states, local governments, and state and local organizations such as the National Association of Attorneys General and the National District Attorneys Association.

Conclusion. Governments work best when they work as a team. Many people view governments as the sources of problems, rather than the solutions. By working with state and local governments, Department of Justice attorneys can solve environmental problems more effectively, and help restore the public's faith in the local, state, and federal governments. ~

Capturing Economic Benefit as the First Part of Securing an Appropriate Civil Penalty: Making the Violator Disgorge Unfair Gain

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Environmental civil penalties are routinely imposed by courts to serve traditional social goals such as providing restitution, deterrence, and retribution. *See Tull v. United States*, 481 United States 412, 422 (1987). Even where injunctive relief would render the violation incapable of repetition, a substantial penalty is warranted to deter others in the regulated community from displaying the same scofflaw attitude. *SPIRG of New Jersey v. AT&T Bell Labs.*, 617 F. Supp. 1190, 1201 (D.N.J. 1985) (fact that defendant ceased discharges does not eliminate need for civil penalties as deterrent); *United States v. Phelps Dodge Indus.*, 589 F. Supp. 1340, 1367 (S.D.N.Y. 1984) (sale of offending division did not eliminate need for general deterrence).

In assessing penalties under environmental statutes, courts have mandated that:

> [E]ffect should be given to the major purpose of a civil penalty: deterrence. . . . first, to discourage the offender himself from repeating his transgression; and second, to deter others from doing likewise. [Penalties] should be large enough to hurt, and to deter anyone in the future from showing as little concern as [the defendant] did for the need to [comply].

United States v. Mac's Muffler Shop, Inc., Civ. A. No. C85-138R, 1986 WL 15443, *8, 25 ERC 1369, 1375 (N.D. Ga. Nov. 4, 1986) (assessing penalties under the Clean Air Act). *Accord, e.g., SPIRG v. Hercules, Inc.*, No. 83-3262, 1989 WL 159629, 19 Envtl. L. Rep. 20903 (D.N.J. Apr. 6, 1989); *SPIRG v. AT&T*, 617 F. Supp. at 1201; *United States v. Velsicol Chem. Corp.*, No. C-75-462, 1978 WL 23473, 8 Envtl. L. Rep. 20745 (W.D. Tenn. Aug. 31, 1978); *State of Ohio ex rel. Brown v. K & S Circuits*, No. 79-950, 1984 WL 19037, 15 Envtl. L. Rep. 20162, 20163 (Ohio Com. Pl. Sept. 5, 1984). *See also United States v. Marathon Pipe Line Co.*, 589 F.2d 1305, 1309 (7th Cir. 1978).

But how much civil penalty is enough to deter violations, both specific and general? Penalty criteria established by statute and case law shape the answer to this question; yet, the first part of any effective penalty is to eliminate any benefit the defendant derived from a violation. The wrongdoer must be separated from ill-gotten gains, and be deprived of the economic benefit of the violation.

Courts typically conclude that separating a violator from economic benefit is a necessary component of a proper penalty assessment, though not the only necessary component of such an assessment. *See, e.g., SPIRG v. Monsanto Co.*, Civ. A. No. 83-2040, 1988 WL 156691, *14, 29 ERC 1078, 1090 (D.N.J. Mar. 24, 1988) ("To simply equalize the economic benefit with the penalty would serve ill the possibility of discouraging other and future violations. Some additional penalty should be imposed as a sanction."); *United States v. Mun. Auth. of Union Township & Dean Dairy Prods., Inc.*, (*"Dean Dairy*") 929 F. Supp. 800, 806 (M.D. Pa. 1996), *aff'd.*, 150 F.3d 259 (3d Cir. 1998) ("The goal of deterrence requires that a penalty have two components. First, it must encompass the economic benefit of non-compliance to ensure that the violator does not profit from its violation of the

law. Second, the penalty must include a punitive component in the form of a sum in addition to economic benefit. . . ."). The benefit recapture will not make the penalty effective standing alone; however, without recapture, the penalty secured is economically ineffective as either a general or specific deterrent.

Some environmental statutes require consideration of economic benefit in assessing a civil penalty. *See* 33 U.S.C. § 1319(d) (Clean Water Act); 42 U.S.C. § 7413(e). Case law under the environmental statutes generally endorses disgorgement of economic benefit as essential to deterrence. Deterrence of future violations is best accomplished by ensuring that proven violators do not profit by non-compliance. Those who cut legal corners believe they can gain many financial advantages:

> First, by delaying the expenditure of funds on compliance, a violator obtains the use of the money for other purposes in the meantime. Second, a violator may also avoid some costs altogether—for example, the costs of maintaining and operating the pollution control system until it is implemented. Third, a violator may, in addition, obtain a competitive advantage as a result of its violation—for example, it may be able to offer goods at a lower price, thereby possibly increasing its sales and profits.

Chesapeake Bay Foundation v. Gwaltney of Smithfield Ltd., 611 F. Supp. 1542, 1558 (E.D. Va. 1985) *aff'd in part, rev'd in part,* 890 F.2d 690 (4th Cir. 1989). For these reasons, the economic benefit of non-compliance normally serves as the floor, below which the civil penalty should not be mitigated. *See also, Atlantic States Legal Found. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1141 (11th Cir. 1990) ("Insuring that violators do not reap economic benefit by failing to comply with the statutory mandate is of key importance if the penalties are successfully to deter violations"); *Atlantic States Legal Found. v. Universal Tool & Stamping, Co.*, 786 F. Supp. 743, 753 (N.D. Ind. 1992) ("[T]he amount of the civil penalty must be high enough that the penalty does not merely become a cost of doing business. . . or, it becomes more profitable to pay the penalty rather than incur the costs of compliance."); *PIRG v. Powell Duffryn Terminals, Inc.*, 720 F. Supp. 1158, 1166 (D.N.J. 1989), *aff'd in part*, 913 F.2d 64 (3d Cir. 1990) ("To serve [as a deterrent], the amount of the civil penalty must be high enough to insure that polluters cannot simply absorb the penalty as a cost of doing business. Otherwise, a rational profit maximizing company will choose to pay the penalty rather than incur compliance costs.").

Only a handful of courts have taken a different view. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.* (*TOC*) *Inc.*, 956 F. Supp. 588 (awarding a civil penalty smaller than the economic benefit derived from the violation), *vacated*, 149 F.3d 303 (4th Cir. 1998), *petition for cert. filed*, 67 United StatesL.W. 3364 (United States Nov. 9, 1998) (No. 98-822); *United States v. Roll Coater, Inc.*, 1991 WL 165771, 21 Envtl. L. Rep. 21072, 21075 (S.D. Ind. Mar. 22, 1991) (dicta) (in setting penalty, district court stated that other factors may decrease penalty below benefit. Then, court settled on a greater penalty and concluded that final penalty will not be increased, as "the penalty after all mitigation is larger than the estimated economic benefit, and therefore will serve as a deterrent and a punishment."); *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1397 (9th Cir. 1995) (In holding Section 309(d) requires imposition of a penalty, court amplified, in dicta, that exercise of discretion might allow "nominal" penalty in appropriate circumstances).

Procedures developed by EPA have called on the government to recover, as part of a civil penalty, the violator's economic benefit of non-compliance. *See, e.g., Policy on Civil Penalties*, EPA General Enforcement Policy #GM-21, *recodified as PT.1-1* (Feb. 16, 1984), p. 3 ("[A]llowing a violator to benefit from non-compliance punishes those who have complied by placing them at a competitive disadvantage. This creates a disincentive for compliance. For these reasons, it is [EPA] policy that penalties generally should, *at a minimum*, remove any significant economic benefits resulting from failure to comply with the law.") (emphasis in original). *See also, Agencywide Compliance and*

Enforcement Strategy and Strategy Framework for EPA Compliance Projects (May 1984), p. 26 ("An important aspect of determining the appropriate penalty amount is the amount of money saved or expenses that were delayed as a result of being in non-compliance. Civil penalty actions are often necessary even if the underlying violation has been corrected, to deter future violations, and to restore economic equity to other regulated parties which have invested the resources needed to be in compliance all along.")

Assessing part of a penalty, based on economic benefit, requires the benefit to be transformed into an amount of money. The following approaches show how this can be done.

Standard Approach - Delayed/Avoided Costs: The BEN Model. EPA developed a computer model known as "BEN" to calculate, for settlement purposes, the economic benefit derived from delaying or avoiding compliance with environmental statutes. EPA designed BEN to make a relatively easy and quick calculation of the economic benefit. BEN accomplishes this by providing standard inputs for key financial variables, while also requiring the user to supply some case-specific information. Use of the model encourages uniform determinations about economic benefit, and can be applied in conjunction with EPA's settlement guidances to secure appropriate figures for civil penalty settlement. Defendants who do not settle lose the benefits of these settlement policies, and run the risk that the United States will pursue much larger penalties at trial. BEN and EPA's settlement penalty guidance are used only for settling penalty claims. Of course, a BEN analysis (or similar analysis) could be presented at trial, typically through an expert, to prove the existence and size of an economic benefit.

Standard inputs to BEN calculations include: 1) the violator's profit status (*i.e.*, profit or not-for-profit organization); 2) amount of capital investment required; 3) one-time non-depreciable expenditures; 4) annual expenses; 5) the dates of non-compliance and compliance; and 6) the date of the penalty payment. The model uses these factors to calculate the benefit that inured to the defendant by buying, building, and operating its pollution control later than required by law.

Defendants facing significant penalties based on economic benefit, and industry trade associations frequently argue that these variables should be derived or calculated differently. For example, defendants often object to the manner in which the BEN model analyzes the benefit which accrues from delayed expenditures on capital equipment needed for proper pollution control.

Such attacks go to the method, rather than the idea, of economic benefit. As this idea is used by various enterprises in making decisions about whether or when to invest money, it is difficult for a defendant to reject the idea that economic benefit related to violations is relevant to penalty assessment. Thus, defendants often retreat to fighting over the appropriate method for calculating such benefit.

These attacks typically are fought out on a case-by-case basis. EPA can help analyze and address such attacks, both through its own employees (including EPA's National Enforcement Investigations Center), and through contracts with private-sector economic consultants. Similarly, in appropriate cases, DOJ's Environment Division uses financial analysts from the Antitrust Division to help analyze assertions about the benefit that flowed from a violation.

EPA continues to work on improving the BEN model. In response to a request from a regulated industry for EPA to issue its economic benefit model (or some form of it) as a rule, EPA is soliciting public comment on BEN, and has issued a Federal Register notice, requesting comments on the question of capturing violation benefit. EPA is reviewing these comments and hopes to publish a response shortly.

Other Approaches: Economic Advantages Such as Market Share Held or Profits Earned From a Violation. The BEN model may not always be the most apt measure of benefit. Such models work best when a defendant's failure to install equipment allows the defendant to spend less money than if timely installation and operation of pollution control equipment occurred. But, where the violator's benefit arises from other kinds of economic advantages, the government must look

for other ways to measure the benefit. Sometimes these benefits can be measured by a violator's revenue, market, production, or other factors relevant to economic competitiveness.

In the recent *Dean Dairy* decision, 150 F.3d 259, the Third Circuit upheld a district court penalty assessment based on defendant's production levels. In that case, the government proved economic benefit by demonstrating that the defendant could have complied with the law by lowering its production of the goods; but, that the lower production would have meant foregone sales to a significant customer, along with fewer earnings realized from such sales. The panel upheld the penalty imposed, reasoning that "[r]equiring a company to reduce the amount of pollution it creates to comply with its permit is not unreasonable." *Dean Dairy*, 150 F.3d at 266. The court found this approach appropriate, even though the defendant had not saved money by delaying expenditures on pollution control, as overall costs would have been lower if that control equipment had been brought on-line in a timely manner. The court stated:

> . . . [Defendant] chose neither what proved to be the economically sensible option (building the pretreatment facility) nor the alternative option of reducing the amount of waste produced. Accordingly, it must bear the consequences.

Id.

Some courts have provided leeway to litigants looking for alternate, case-specific approaches to prove economic benefit by acknowledging that the benefit flowing from a violation need not be determined with perfection. A reasonable and fair approximation is enough. *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 348 (E.D. Va. 1997) (economic benefit analysis provides an approximation of amount of money a company has gained over its competitors by failure to comply); *Dean Dairy*, 150 F.3d at 263 (quoting *Smithfield Foods*, 972 F. Supp. at 348).

In addition, it may be worthwhile to examine the economic benefit based on an analysis of other factors, such as capture of market share. Such an analysis could be especially appropriate in cases where a violator captured a larger market share, or preferred competitive position, by pressing ahead with facility construction or product production without securing permits related to pollution emission limits, required pollution control equipment determinations, or other environmental requirements that take time and money to accomplish.

There may be some situations where pressing for benefit recapture is unwise, based on litigation risk or some economic limitation of the violator. For example, where a defendant lacks the capacity to pay a penalty that includes all of the economic benefit received, settlement for a lesser amount may be entirely appropriate. Situations like these should be examined with scrutiny, however. Inability to pay the cost of compliance is no defense to liability or penalty assessment. An attempt to operate without paying the cost of environmental compliance is no more a viable business operation than one which attempts to avoid paying any other applicable cost of doing business. Indeed, where such violator declines to settle, the best course may be to press for a civil penalty judgment without regard to inability to pay, and then leave to the Executive Branch the decision of when and how to enforce that judgment.

Courts also have examined with scrutiny penalty demands against municipalities because large penalties can result in transfers of tax revenues from one government treasury to another. In recognition of this issue, EPA has altered its Clean Water Act settlement penalty guidance. *Interim CWA Settlement Penalty Policy*, p. 17 (Mar. 1, 1995). That guidance supplies a method for calculating an appropriate settlement penalty that takes into consideration the special circumstances of a municipality. The calculation of a proper penalty amount under the new 1995 EPA settlement policy was derived in part from a historical review of civil penalty judgments in cases involving municipalities.

Finally, even where a settlement includes a supplemental environmental project (SEP), the settlement should also include a civil penalty greater than the economic benefit of violations. SEPs are no substitute for civil penalties and serve

different goals. We use penalties to deter future violations and level the economic playing field. Those tasks are most easily accomplished by a penalty payment. SEPs, however, are used to secure environmental benefits directly, once penalty considerations have been adequately addressed.

Fortunately, the problem areas for economic benefits are few. Generally, a settlement or litigated judgment in an environmental enforcement matter will not accomplish deterrence or economic equality if it allows a violator to keep any portion of the economic benefit fairly attributable to the violation of the law. Regardless of whether economic benefit is approximated by a method like BEN (which looks at delayed or avoided compliance costs), is analyzed based upon a marginal profit or earnings analysis (as in *Dean Dairy*), or analyzed by some other case-specific approach that yields a reasonable estimate of economic benefit, the very first criterion for assessing the propriety of a civil penalty is whether it recaptures the violator's economic benefit. ˜

Anacostia High School Environmental Crimes Course: A Trial Workshop on the Anacostia "Midnight Dumping" Case

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On June 2, 1994, residents of a public housing complex in the Anacostia neighborhood of Southeast Washington, D.C., discovered buckets and pails of hazardous waste in a dumpster. The city evacuated three apartment buildings for the night. Testing revealed that the pails and buckets contained dangerous substances listed as hazardous wastes under the Resource Conservation and Recovery Act (RCRA), including cyclohexanone, tetrachloroethelene, methylene chloride, toluene, and acetone. The Environmental Protection Agency and the FBI investigated and found that a resident of the housing complex had seen her boyfriend place the pails and buckets in the dumpster on the afternoon of June 1, 1994. The resident's boyfriend, Patrick Hill, worked in the warehouse of a small cleaning company. To avoid the high cost of proper disposal, a co-owner of the company, Mary Ellen Baumann, had paid Hill $400 to get rid of the waste chemicals. Both Mary Ellen Baumann and Patrick Hill pleaded guilty to illegally disposing hazardous waste, in violation of RCRA, in District Court.

This case, which occurred just blocks from Anacostia High School, now serves as the basis for a semester-long environmental crimes course taught by volunteers from the Environment and Natural Resources Division (ENRD). Along with a teacher from Anacostia High School, attorneys and staff from all sections of the Division instruct juniors and seniors about how environmental crimes occur in their neighborhood, the laws that protect against these crimes, and how these cases are prosecuted and defended. The students in the course perform exercises as both prosecutors and defense attorneys.

The course begins with an overview of environmental issues, and continues to examine both the environmental law specific to the case and criminal procedures. Students conduct exercises in areas such as: collecting evidence; interviewing witnesses, filing charges against suspects, defending suspects; preparing for trial, and participating in a mock trial.

The ENRD staff structure the course like the "Street Law" classes taught at high schools by law students, but with some important differences. Attorneys from the Division developed and wrote the course materials, including interview reports of witnesses and suspects; documentary evidence such as lab analyses of hazardous materials; and a grand jury transcript. The rewritten material is designed to highlight particular legal and procedural issues, and to balance the prosecution and defense aspects of the case. The students "investigate" and develop the case through these materials and use them in the mock trial.

Also, rather than having one teacher instruct the entire class, a different ENRD attorney teaches each week. Thus, each week is a distinct topic, and teachers can prepare independently of each other. ENRD personnel teach two of the five classes each week, and the high school teacher handles the remaining three. This makes the program feasible, as litigation and travel schedules hinder a more demanding time commitment. Best of all, this approach promotes one of ENRD's main goals: to involve as many ENRD attorneys and staff as possible in the local community.

ENRD would be happy to share materials and experience with anyone who would like to set up a similar program in another community. Call Dick Lahn at (202) 616-3098, or Jennifer Whitfield at (202) 305-0348.

Wetlands Protection Under the Clean Water Act

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Both civil and criminal wetlands enforcement actions, under section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, help protect the nation's wetlands and waterways from illegal development and destruction. Cases range in size and character of the violator from individuals to sophisticated corporate entities. They also vary in the size and nature of wetlands affected, from thousand-acre marshes to smaller excavation sites. Section 404 actions present challenges on several fronts. They often involve complex scientific, factual, and legal issues. This article will discuss basic elements of a section 404 violation, commonly raised defenses, challenges in trying 404 cases, and what assistance the Department's Environmental Defense Section can provide.

The Basics of a Wetlands Enforcement Action. Section 404 generally requires obtaining a permit from the agency that shares responsibility with EPA for the federal wetlands protection program — the United States Army Corps of Engineers ("Corps"). The section 404 permit is for the "discharge of dredged or fill material into the navigable waters" of the United States. 33 U.S.C. §§ 1344(a). "Dredged or fill material" includes fill dirt, rocks, or any other material used to fill a wetland. Section 404 does not require, however, the importation of the material into the wetland. Using earthmoving equipment to move dirt and vegetation in a wetland can constitute a discharge of dredged or fill material. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983); *United States v. Brace*, 41 F.3d 117 (3d Cir. 1994). A classic section 404 violation involves a developer using heavy equipment to fill and level a marshy area to build on it without a Corps permit. However, draining wetlands can be just as harmful as filling them. Some developers excavate drainage ditches in wetlands and place excavated material in a non-wetland area. To curb this activity, the Corps and EPA have issued regulations requiring permits for "incidental fallback" of soil and other materials from such excavation operations. *See* 58 Fed. Reg. 45,008 (1993). *But see Nat'l Mining Ass'n v. EPA*, 145 F.3d 1399 (D.C. Cir. 1998) (the court held these regulations invalid).

Newcomers to section 404 might wonder how a marshy area can be considered "navigable waters." 33 U.S.C. § 1362(7) defines "navigable waters" as "waters of the United States"; but, the Supreme Court held that Corps' jurisdiction over the Nation's waters is not limited to just navigable waters, but in fact, extends to the farthest reach of the Commerce Clause, including wetlands adjacent to waters used in interstate commerce. *United States v. Riverside Bayview Homes*, 474 United States 121 (1985). The Supreme Court was keenly aware that lakes and rivers cannot be viewed in isolation from their watersheds and surrounding ecosystems, and that wetlands often form a vital part of ecosystems. 474 United States at 135.

Perhaps the most important task in a wetlands case is proving that the wetland at issue is worth protecting or, if destruction of the wetland has occurred (as often happens), that its destruction merits a significant penalty and affirmative injunctive relief. Although awareness of the value of wetlands has improved over the past 20 years, many people still view wetlands as "swamps" that lack any practical value, other than as dumping grounds. For example, it is typical for wetland violators to denigrate the wetland at issue as "a mud puddle that is dry half the year," and argue they improved the land by putting it to a "more valuable" use.

In fact, wetlands serve important biological functions. They harbor unique assemblies of plants and wildlife, including endangered species. Wetlands directly benefit human communities by storing excess water, thereby diminishing the

likelihood of floods, and by filtering harmful contaminants from storm and flood waters. As wetlands serve many different roles and have various values, it is imperative that the trier of fact understand the wetland's importance.

Section 404(f) provides a series of exemptions from permitting requirements, and defendants often try to characterize their activities as falling within an exempted category. These exemptions include: farming, ranching, and forestry activities; maintaining or reconstructing dikes and levees; maintaining transportation structures and roads; and maintaining drainage ditches. 33 U.S.C. § 1344(f). The regulations regarding these exemptions—e.g., the circumstances under which farming, ranching, and forestry activities or road maintenance or construction can occur without a permit—are specific. *See* 33 C.F.R. § 323.2. Also, an activity that appears to be exempted under subparagraph (1) of section 404(f) can be "recaptured," and require a permit under subsection (2) of 404(f), if the activity results in a conversion of wetlands to dry land. Section 404(f) exemptions are narrowly construed, *United States v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986); *United States v. Brace*, 41 F.3d at 124 (3d Cir. 1993), and the burden is on the defendant to show that its activities both satisfy the requirements of section 404(f)(1) and avoid recapture. *Akers*, 785 F.2d at 819 (citing *Avoyelles*, 715 F.2d at 926); *See also Brace*, 41 F.3d at 124.

A defendant may also claim that a "Nationwide Permit" shields its activities. A Nationwide Permit is a general permit that authorizes certain activities on a national basis, 33 C.F.R. § 330.2(b), because they have minimal impact on wetlands or waters of the United States. There are 32 Nationwide Permits for activities such as fish and wildlife harvesting, bank stabilization, cranberry production, and emergency watershed protection. For a Nationwide Permit to be effective, however, a permittee must satisfy the particular conditions for each permit, as well as comply with certain requirements known as "General Conditions" and Section 404 only conditions. These conditions are established by Corps regulations, 33 C.F.R. § 330.4(a); 33 C.F.R. part 330, appendix A.

Challenges Presented in Section 404 Actions. Trial attorneys should not underestimate the role of experts in a wetlands enforcement action. Experts are usually necessary to explain the value of the wetlands, and may be necessary to show the property at issue is in fact a "wetland" for purposes of the Clean Water Act. A wetland is defined as an area that is "inundated or saturated by surface or ground water at a frequency or duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions," such as a slough or bog. 33 C.F.R. § 328.3(b). Thus, whether an area constitutes a "wetland" depends upon an analysis of an area's soils, vegetation, and hydrology.

Another important role for experts is to show why injunctive relief is appropriate. Sometimes, restoration of a wetland to its original, healthy condition can occur. In such cases, restoration will be the remedy of choice, and, if necessary, the expert can help explain why the government's plan is preferable to the defendant's. In some instances, however, the damage is irreversible, or a structure has already been built, and the judge decides not to order removal.

The issue then becomes what alternative relief to seek. The answer will depend both on the circumstances of each case, and the creativity of counsel. Whatever relief is proposed, however, expert testimony is important to show that it is the right relief.

Creativity is very important in settlements. Penalties can be partially offset by supplemental environmental projects ("SEPs"), where the violator takes on a project to preserve or improve a resource that is related to the one damaged. SEPs can include donating high quality wetlands to conservation groups or granting conservation easements on lands owned by the violator—though any SEP in a consent decree must comply with EPA's SEP Policy.

Another issue frequently raised by defendants is the statute of limitations. The CWA does not include a specific statute of limitations, but the general limitations period for federal civil penalty actions is five years. 28 U.S.C. § 2462. The United States takes the position that wetlands

violations continue in nature as long as the illegal fill remains in place. Courts, however, have not uniformly endorsed this approach. *United States v. Reaves*, 923 F. Supp. 1530, 1534 (M.D. Fla. 1996) (agreeing with the United States); *contra United States v. Telluride Co.*, 884 F. Supp. 404, 406 (D. Colo. 1995), *rev'd on other grounds*, 146 F.3d 1241 (10th Cir. 1998) (Claims seeking injunctive relief are not subject to the five year limit of 28 U.S.C. § 2462).

Role of the Environmental Defense Section. The Environmental Defense Section has substantial experience litigating section 404 civil cases throughout the United States, and the Section can help United States Attorney's Offices in many ways. Help can include anything from model briefs and discovery documents to practical advice. Besides institutional knowledge, the Section maintains a model litigation report and consent decree. Coordination between United States Attorneys' Offices and EDS is also important in the settlement context, to ensure consistency in treatment of violators. ˜

Enforcement of Federal Lead-Based Paint Disclosure Rules

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This article reviews and discusses:

! The new federal requirements for providing information concerning lead-based paint hazards to buyers and renters of most housing constructed before 1978;

! The remedies available for enforcing these requirements; and

! The role Department of Justice attorneys may play, in conjunction with our client agencies, to successfully punish and deter violations and protect children from lead poisoning.

The federal rules discussed here impose modest requirements on sellers, landlords, and agents, which are designed to ensure that buyers and renters receive the information they need to protect their children. Compliance with these requirements, and the investigation of compliance with these requirements, should be simple and straightforward. The involvement of Department attorneys, working with agencies like the Environmental Protection Agency (EPA) and the Department of Housing and Urban Development (HUD) can enhance the effectiveness of the Federal Government's enforcement efforts.

I. Background -- Enactment of Title X and Promulgation of Disclosure Rules

Congress passed the Housing and Community Redevelopment Act in 1992. Title X of that Act, titled the "Residential Lead-Based Paint Hazard Reduction Act of 1992," was enacted in response to findings that lead poisoning is widespread among American children, with minority and low-income communities disproportionately affected. Even at low levels, infant lead poisoning causes IQ deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity, and behavior problems. The health and development of children living in as many as 3.8 million homes are endangered by flaking lead paint and paint-contaminated dust. Individuals of all ages, but especially children under the age of six, fetuses, and women of childbearing age, are at risk. In 1991, the Secretary of Health and Human Services characterized lead poisoning as the "number one environmental threat to the health of children" nationally. Since 1978, the Federal Center for Disease Control has lowered the blood-lead level of concern from 60 to 10 micrograms per deciliter.

Although the average blood-lead level of American children and the percentage of children with elevated blood-lead levels have declined over the past 20 years (largely through the removal of lead from gasoline and food cans), lead-based paint in many residences continues to pose the risk of lead poisoning. From the turn of the century to the 1940s, paint manufacturers used lead as a primary ingredient in many oil-based house paints. As lead-free latex paints became more popular, the use of lead-based paints declined, and the United States Consumer Products Safety Commission (CPSC) banned the residential use of lead-based paint in 1978.

Unfortunately, the historic use of lead-based paints can cause current hazards. Lead-based exterior house paint can contaminate children's play areas by flaking off or leaching into soil. Lead-based interior paints can, through normal wear (particularly around windows and doors), form lead dust, which disperses into the air and onto various household surfaces. Dust can then be inhaled or ingested through hand-to-mouth activities. HUD recently estimated that nearly five percent of American children ages 1-5 suffer from lead poisoning (almost one million children). The incidence is 16% among low-income children living in older housing, and 22% for African-American children. *See* HUD Budget Would Boost

Funding for Lead Hazard Control by 40 Percent, HUD Press Release No. 98-64 (Feb.10, 1998).

Title X mandates disclosure of the presence of lead-based paint, and requires that information concerning its hazards be provided to prospective buyers and renters. Specifically, Section 1018 of Title X, 42 U.S.C. § 4852d, requires EPA and HUD to promulgate regulations requiring that owners of "target housing," i.e, housing constructed before 1978:

1. Distribute a lead hazard information pamphlet to prospective buyers and renters;

2. Disclose known lead-based paint and/or lead-based paint hazards to prospective buyers and renters;

3. Provide to prospective buyers a 10-day period in which to conduct a risk assessment or inspection before finalization of a sale; and

4. Include, in all sales contracts, both an attached Lead Warning Statement, and an acknowledgment signed by the purchaser.

There are limited exceptions to this rule that cover housing for the elderly or disabled (unless any child under 6 resides or is expected to reside in such housing), or any 0-bedroom dwelling. *See* 15 U.S.C. § 2681(17).

In March 1996, EPA and HUD jointly issued regulations pursuant to Section 1018 which are codified, respectively, at 40 C.F.R. Part 745, Subpart F (§§ 745.100-19), and 24 C.F.R. Part 35, Subpart H (§§ 35.80-98). This "Disclosure Rule" became effective on September 6, 1996, for owners of more than four residential dwellings, and on December 6, 1996, for owners of one to four residential dwellings. *See* 61 Fed. Reg. 9064 (1996).

The Disclosure Rule requires sellers and landlords of target housing to disclose to buyers and renters the presence of any known lead-based paint and hazards, and to provide buyers and renters with the informational pamphlet titled "Protect Your Family from Lead in Your Home," issued by HUD, EPA, and the CPSC. The rule further provides home buyers with a ten-day period (unless waived by the purchaser in writing) to conduct an inspection for lead-based paint or risk assessment, and requires the inclusion of specific warning language about lead-based paint in sales contracts and lease agreements. Section 1018(a)(4), 42 U.S.C. § 4852d(a)(4) of the Disclosure Rules specifically places responsibility for compliance with these requirements not only on the sellers and lessors of target housing, but also upon any agent the seller or lessor contracts with to sell or lease such housing. The Disclosure Rule is designed to complement, rather than to displace, existing state and local laws that address lead-based paint, some of which impose similar notification requirements, and some of which require actual abatement where children are suffering from lead poisoning or paint hazards.

II. Sanctions for Violations

Title X authorizes civil administrative penalties by HUD or EPA, as well as criminal penalties, injunctive relief, and treble damage awards in private civil actions for violations of Section 1018 of the Disclosure Rule.

Civil Administrative Penalties. With respect to EPA enforcement, Title X incorporates (with one significant modification to the penalty amount) enforcement provisions established under the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-92. Section 1018(b) of Title X defines any violation of §1018 as a "prohibited act under Section 409 of TSCA, 15 U.S.C. § 2689." Section 16 of TSCA, 42 U.S.C. § 2615, generally authorizes civil penalties for violations of Section 409 of TSCA (and thus Section 1018 of Title X), in an amount not to exceed $25,000 per violation. Section 1018(b)(5), though, caps penalties for violations at $10,000. With respect to HUD enforcement, Title X incorporates by reference HUD's civil administrative penalty authority up to $10,000 per violation, under Section 102 of the Department of Housing and Urban Development Reform Act of 1989, 42 U.S.C. § 3545. *See* 42 U.S.C. § 3545(f)(2). Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461), as amended by the Debt Collection Improvement Act of 1996 (31 U.S.C. § 3701), EPA issued a regulation increasing by ten percent the maximum civil monetary penalties that can be imposed pursuant to the agency's statutes.

This increased the maximum penalty to $11,000 per violation. *See* 61 Fed. Reg. 69360 (1996). HUD likewise increased the maximum civil penalty to $11,000. *See* 62 Fed. Reg. 68152 (1997).

While Title X grants EPA and HUD the same administrative penalty authority (in amount), by simply incorporating existing EPA and HUD enforcement authorities, its drafters created different liability standards for the same violation, depending on whether the addressed violation is an EPA or HUD administrative proceeding. EPA civil enforcement under TSCA is based on strict liability, and requires neither knowledge nor intent for Section 409 violations; however, Section 102 of the HUD statute authorizes assessment of civil penalties only for "knowing[ ] and material[ ]" violations. 42 U.S.C. § 3545(f)(1). There is no indication in the legislative history of Title X concerning Congressional intent on this difference.

Criminal Sanctions. Title X authorizes criminal penalties for violations of Section 1018 and the Disclosure Rule by defining any such violation as a prohibited act under Section 409 of TSCA, 15 U.S.C. § 2689. This section provides that any person violating Section 409 shall be, upon conviction, subject to a fine of up to $25,000 per violation and/or up to one year imprisonment. In addition to, or in lieu of the above criminal penalty, a civil penalty, a fine of up to $25,000 per violation and/or imprisonment of up to one year may be imposed. Since TSCA and Title X cap fines, the Alternative Fines Act may be authority for higher criminal fines for Section 1018 violations, as there is no express indication by Congress that the fines provided therein are intended to override the fines set forth in the Alternative Fines Act. *See* 18 U.S.C. § 3571(e).

Injunctive Relief. Title X authorizes the HUD Secretary "to take such lawful action as may be necessary to enjoin any violation" of Section 1018. 42 U.S.C. § 4852d(b)(2). Title X's definition of Section 1018 violations as prohibited acts under Section 409 of TSCA gives federal district courts jurisdiction to order injunctive relief. Section 17(a)(1) of TSCA grants jurisdiction to the district courts to restrain any Section 409 violation (and thus Section 1018 violations), and to compel the taking of any action required by or under TSCA.

Private Treble Damage Suits. Title X creates civil liability for any person who knowingly violates Section 1018 to the purchaser or lessee "in an amount equal to three times the damages incurred by such individual." 42 U.S.C. § 4852d(b)(3). Under Section 1018(b)(4), 42 U.S.C. § 4852d(b)(4), courts are authorized to award a prevailing plaintiff in such an action its court costs, reasonable attorney fees, and expert witness fees.

III. Enforcement Approach and Activities by EPA and HUD to Date

With the promulgation of the Disclosure Rule, EPA and HUD made clear their intent that "outreach and compliance assistance" would play a major part of the agencies' compliance program. *See* 61 Fed. Reg. at 9077-78. In a separate release, EPA announced that, during the first year following the effective date of the Disclosure Rule, it would focus on compliance assistance to ensure that the public and the regulated community were aware of new requirements, and would issue civil penalty actions only in response to egregious violations that put the public at risk. *See* "United States Environmental Protection Agency Compliance Assistance Approach to Lead-Based Paint Disclosure Requirements (Section 1018)," August 1996.

Simultaneously with its outreach and compliance assistance efforts, EPA developed an "Interim Enforcement Response Policy" (Interim ERP) for the Disclosure Rule, and issued it on January 23, 1998. The Interim ERP (available on the EPA's web site at *http://es.epa.gov/oeca/ore/tped/toxpest.html*) spells out the procedures EPA intends to follow, criteria for deciding appropriate levels of action (*i.e.*, warning letter, civil administrative action, criminal prosecution, or injunctive relief), and the method of calculating civil penalty amount for various violations. The statutory provisions guide HUD's enforcement, as well as procedures that HUD promulgated pursuant thereto. *See* 42 U.S.C. § 3545(g)(2) and 24 C.F.R. Part 30. These procedures include notices of intent to request civil money penalties,

civil money penalty panels, administrative hearings and appeals, judicial review, and penalty collection. HUD's civil penalty guidelines require that HUD consider, among other things, the gravity of the offense and injury to the public, the violator's awareness of procedures and culpability, any history of violations, ability to pay, the amount of benefits received from the violation, the deterrence of future violators, and any other factors justice may require. 24 C.F.R. § 30.80. HUD has further recognized the desirability of consistency with EPA in civil penalty imposition under a rule promulgated jointly and, accordingly, has indicated its agreement and intent to follow the guidelines set forth in the EPA's Interim ERP.

Because of the concurrent Title X enforcement authority for EPA and HUD, and the agencies' mutual desire to use enforcement resources as efficiently as possible, EPA and HUD entered a Memorandum of Understanding (MOU) at the conclusion of the one-year focus on education, outreach, and compliance assistance efforts. The intent of the MOU is to serve as "a framework for consultation, information-sharing, and mutual assistance in civil and criminal enforcement of Section 1018 of [Title X] and the Disclosure Rule." *Memorandum of Understanding Between the Environmental Protection Agency and the Department of Housing and Urban Development for the Enforcement of Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992* (Nov. 18, 1997) at 2. Among other things, the MOU mandates meetings between EPA and HUD on at least a quarterly basis to discuss joint agency matters through designated liaisons. The MOU further provides that either agency may refer to the other a Section 1018 case (which the receiving agency may, in its discretion, accept or decline), and may request from the other agency a Section 1018 case. The agencies subsequently agreed to a "Guidance on Coordination Between EPA & HUD Section 1018 Lead-Based Paint Disclosure Rule Investigations Consistent with HUD-EPA MOU," under which HUD has primary investigatory responsibility for HUD-assisted housing (including HUD-assisted public housing, Section 8-assisted housing, FHA insured housing, HUD-owned housing, and housing assisted under HUD grants), while the two agencies share jurisdiction of private housing.

EPA and HUD also recognize the importance of consistency in the interpretation and application of the Disclosure Rule. Accordingly, the agencies issued a joint "Interpretive Guidance for the Real Estate Community on the Requirements for Disclosure of Information Concerning Lead-Based Paint in Housing." This guidance, issued in two parts on August 20, 1996, and December 5, 1996, is available on EPA's web site at *www.epa.gov/opptintr/lead/leadbase. htm*. It provides the agencies' responses to many questions from the real estate community about how the Disclosure Rule applies in practice (e.g., to co-ops and condominiums, to mobile homes, to pre-1978 rehabilitated housing), and is an important resource to consult for any enforcement situations being contemplated.

In November 1997, HUD took its first step toward Section 1018 enforcement by issuing a number of inquiries to landlords of public housing to determine their compliance with the Disclosure Rule. In July 1998, EPA proposed its first administrative civil penalties under the Disclosure Rule, totaling $439,725, against the United States Navy in Kingsville, Texas, two landlords in Philadelphia, Pennsylvania., and a realty firm in Ponca City, Oklahoma, for failing to disclose to tenants information on lead-based paint. Reflecting its targeting of violations involving health risks, in all four cases, EPA is alleging that the properties contained lead-based paint and were occupied by families with young children. The complaint against the Navy involves 11 housing units at Kingsville Naval Air Station occupied by enlisted personnel and their families, which included young children under the age of six. One of the Philadelphia cases involves an apartment with lead-based paint rented without the required disclosure of lead-based paint to a mother with a three-year old child, even after the City of Philadelphia declared the apartment unfit for human habitation. See "EPA Imposes First Civil Penalties for Failure to Disclose Information on Lead-based Paint," EPA Press Release (July 29, 1998). As of June 30, 1999, EPA has filed 14 administrative complaints, seeking a total of

$585,000 in civil penalties, and issued 286 notices of noncompliance to sellers, brokers, realtors, agents and landlords for violations of the Disclosure Rule.

On July 15, 1999, the Department filed in federal district court in the District of Columbia the first ever judicial cases for violation of Section 1018 and the Disclosure Rule. Accompanying four of the complaints were proposed consent decrees embodying settlements of more than $1 million worth of lead paint abatement and $259,000 in civil penalties and other commitments. The four settlements involve multi-family apartment owners and management companies that rent approximately 4,000 units in 33 buildings, whose failure to warn their tenants about known and potential lead hazards came to light as a result of a joint initiative by the Department and HUD. Specifically, under the four proposed consent decrees, the defendants agreed to pay $87,000 in penalties to the United States Treasury, to commit $172,000 to support community-based projects to reduce the incidence of childhood lead poisoning in the District of Columbia, to immediately provide tenants with the required warnings about lead-based paint, and to correct lead-based paint hazards in their units. In a fifth case that also resulted from the joint initiative with HUD, the Department filed a complaint for violation of Section 1018 and the Disclosure Rule against two other companies operating approximately 300 residential units in the District of Columbia. In addition to these judicial cases, HUD also announced its initiation of 45 administrative enforcement actions in 20 cities. See "Attorney General Reno and Housing Secretary Cuomo Announce Settlements of More than $1 Million in Nationwide Effort to Protect Children from Lead Poisoning," DOJ-HUD Press Release (July 15, 1999).

IV. Potential for Judicial Enforcement

Several observations can be made regarding the potential role of the Department in enforcing Section 1018. First, Department attorneys involved in enforcement activity with respect to housing under other statutes should be aware of the requirements of the Disclosure Rule, and alert to the possibility that those who violate some statutory or regulatory requirements may well violate others. If the Department is looking into other housing-related violations, determining compliance with the Disclosure Rule would be potentially fruitful. Such a determination should neither be complex nor resource-intensive. Sellers, landlords and agents are required to maintain records for a three-year period showing whether or not they provided or ensured provision of the required information to buyers and renters. See 24 C.F.R. § 35.92(c)(1); 40 C.F.R. § 745.113(c)(1). Department attorneys can notify HUD and EPA, either to request investigation or to refer possible violations. (HUD and EPA should be notified prior to undertaking investigation into particular persons to avoid duplication or interference with any investigations the agencies may be conducting.) Each of the ten EPA Regional Offices has a designated lead coordinator to whom inquiries, requests, or referrals may be directed. (These coordinators are listed on EPA's web site at *http://www.epa.gov/opptintr/lead/leadoff1.htm*.) HUD's enforcement efforts are coordinated through its Office of General Counsel in Washington, D.C. (contact: John B. Shumway, (202) 708-3137, ext. 5190). United States Attorneys offices may also wish to employ their personnel to investigate the possibility of violations of Section 1018 and the Disclosure Rule even where there is no "pendent" housing claim under review. Again, prudence dictates that such efforts be undertaken upon appropriate coordination with HUD and/or EPA.

Upon discovery of violations, Department and agency attorneys should meet to discuss the remedies that may be desirable in light of the particular facts and circumstances. If a straightforward civil administrative penalty is appropriate, Department attorneys may provide their evidence to HUD or EPA for administrative processing. If criminal sanctions or injunctive relief appear appropriate, Department attorneys should encourage HUD or EPA to refer the matter formally to the Department to pursue these remedies. In considering the possibility of injunctive relief, the government should consider the likelihood of future violations, as well as any unredressed harm stemming from the past

violations. Where the government concludes the violator is likely to engage in further noncompliance, an injunction to comply with the Disclosure Rule may be an effective deterrent by raising the additional specter of judicial contempt sanctions to punish future violations. In some factual settings, it is possible that broader relief—including, perhaps, inspections for the presence of lead-based paint, or abatement—may be necessary and appropriate to remedy the violations. The proposed consent decrees lodged on July 15, 1999, in district court in the District of Columbia will, if approved, provide favorable precedent for obtaining abatement as injunctive relief to redress past violations of the Disclosure Rule. In negotiations with violators, a unified presentation by agency and Department attorneys of the full array of available remedies that the government may pursue—both administrative and judicial—should maximize the potential for a favorable resolution, including the possible mitigation and prevention of harm to children at risk from lead poisoning.

Conclusion. Section 1018 of Title X and the Disclosure Rule promulgated thereunder impose modest requirements on sellers and landlords of target housing, and on their agents, to disclose to prospective buyers and renters specific information known about the presence of lead-based paint, as well as general information about the hazards associated with lead-based paint, and what steps can be taken to minimize such hazards. While the federal requirements do not include abatement of existing lead-based paint hazards, federal enforcement of disclosure obligations can contribute to increased abatement activity. Although Title X gives EPA and HUD principal responsibility for Section 1018 enforcement, Department attorneys can make important contributions to children's health by being aware of the disclosure requirements, checking compliance (both independently and in conjunction with investigations into other housing-related violations), and coordinating with EPA and HUD in devising aggressive strategies for investigating and resolving violations. ~

Fair Notice of Complex Regulations: When Does Enforcement of Ambiguous Regulations Violate Due Process in Civil Penalty Cases?

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Due process requires that a person receive fair notice of what the law requires or prohibits before being deprived of property. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 United States 306, 314 (1950). Fair notice does not mean that laws must be free of all ambiguity. Unless First Amendment issues are at stake, the test is whether reasonable persons would have known that their conduct was at risk. *Maynard v. Cartwright*, 486 United States 356, 361 (1988). In practice, courts generally require more specific notice in criminal cases than in civil cases involving purely economic regulations. *Village of Hoffman Estates v. Flipside*, 455 United States 489, 498 (1982). Civil statutes that impose strict liability and high penalties, like many environmental statutes, may also be subject to stringent notice requirements if their sanctions have a "quasi-criminal" character. *See, e.g., United States v. Hoechst Celanese*, 128 F.3d 216, 224 (4th Cir. 1997).

Successful fair notice defenses bar penalties and other sanctions for past conduct, but do not prevent an agency from compelling future compliance with a new, reasonable interpretation. Once an agency announces its interpretation of a regulation, even one that was previously unknowable, that interpretation will govern the future conduct of all who have notice. *ITT Grinnell Corp. v. Donovan*, 744 F.2d 344, 350-51 (3d Cir. 1984). The announcement itself provides fair notice of the conduct the agency will require.

To decide whether a particular defendant had adequate notice, courts look beyond the language of the statute or regulation. A defendant who has actual notice of a law's meaning cannot complain that the law was poorly drafted. *See, e.g., Celanese*, 128 F.3d at 229. Defendants also cannot complain about poor drafting if they had reason to question the law's meaning, and the necessary information was available. *See, e.g., United States v. Vasarajs*, 908 F.2d 443, 449 (9th Cir. 1990); *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1337 (6th Cir. 1978). In criminal cases, the Supreme Court has found fair notice when a person could determine a law's scope by investigating facts or conducting legal research. *See, e.g., McGowan v. Maryland*, 366 United States 420 (1961); *Rose v. Locke*, 423 United States 48 (1976).

Interpretations in Criminal Cases. In criminal cases, the Supreme Court has recognized the fundamental unfairness of prosecutions when the government misled a defendant about the lawfulness of conduct. *See, e.g., United States v. Pennsylvania Indus. Chem. Corp.*, 411 United States 655 (1973). This defense, sometimes known as "entrapment by estoppel," arises from the Due Process Clause, and applies when the government assured the defendant that conduct was legal, and the defendant reasonably relied upon the advice. *See, e.g., United States v. Howell*, 37 F.3d 1197, 1204 (7th Cir. 1994). Vague or contradictory statements by the government are not enough. "Rather, [a defendant] must demonstrate that there was 'active misleading' in the sense that the Government actually told him that the proscribed conduct was permissible." *United States v. Aquino-Chacon*, 109 F.3d 936, 938 (4th Cir. 1997).

The defense is often litigated, allowing appellate courts to define when reliance is

reasonable. Reliance on the comments of state officials is not reasonable when the officials lack the authority to bind the Federal Government. *See, e.g., United States v. Etheridge*, 932 F.2d 318, 320-21 (4th Cir. 1991). Nor can defendants reasonably construe official silence as assent. *See, e.g., United States v. Lichenstein*, 610 F.2d 1272, 1280 (5th Cir. 1980). Also, defendants cannot rely upon ambiguous advice when put on notice to make further inquiries. *See, e.g., United States v. Abcasis*, 45 F.3d 39, 44 (2d Cir. 1995).

Interpretations in Civil Cases. Defendants in civil penalty cases have also attempted to construct defenses by showing that government officials made inconsistent or confusing interpretations. So far, no court has expressly recognized entrapment by estoppel as a defense to civil liability. However, a few courts, when analyzing a fair notice defense, have considered evidence of an official's confusion. When government officials interpreted the law inconsistently, defendants have argued that a private person could not have had fair notice of the law. Two recent environmental cases analyze the role of official confusion in a fair notice defense.

In *General Electric v. United States*, 53 F.3d 1324 (D.C. Cir. 1995), the court reviewed a penalty that the Environmental Protection Agency (EPA) assessed for violations of a regulation designed to control a toxic chemical. The court deferred to EPA's interpretation of the regulation, finding it reasonable. Reasonableness alone, however, was not enough to satisfy due process. Fair notice of agency interpretations must be provided, too. "If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation." *Id.* at 1329.

The court found insufficient notice for several reasons. EPA's interpretation, in the court's view, strayed far from common understanding. Further, the court noted that two EPA regional offices appeared to have previously endorsed the defendant's interpretation. The court summarized by stating: "Where, as here, the regulations and other policy statements are unclear, where the petitioner's interpretation is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not 'on notice' of the agency's ultimate interpretation of the regulations, and may not be punished." *Id.* at 1333-34. The court's analysis, however, gives secondary status to evidence of inconsistent interpretations, instead emphasizing both that the regulation was vague, and that the defendant relied upon a reasonable competing interpretation. The diminished role the court gave to inconsistent interpretations was appropriate. In criminal cases, where due process protections are greatest, the law bars the government from prosecuting when it has actively misled the defendant, and the defendant relied on the advice. Allowing inconsistent or confusing interpretations to bar a civil penalty case, without evidence that the regulatory scheme is unconstitutionally vague, or that the defendant relied on government advice, would give civil defendants greater protection from the Due Process Clause than criminal defendants.

The Fourth Circuit also addressed another variation of the fair notice defense: whether evidence of inconsistent agency interpretations alone is sufficient to show inadequate notice. In *United States v. Hoechst Celanese Corp.*, 128 F.3d 216 (4th Cir. 1997), the United States sought to penalize a defendant for violating an EPA regulation governing benzene emissions. The case turned on the definition of an exemption, and whether EPA gave fair notice of how to interpret the exemption. As in *General Electric*, the court acknowledged the merit of the defendant's interpretation, but found the EPA interpretation reasonable, after an extensive analysis of the administrative record, and deferred to it. The court then turned to the fair notice defense.

Both parties urged the court to decide the fair notice question by looking to information outside the regulation. The parties relied on typical environmental sources: the administrative record and Federal Register; interpretations by EPA employees; interpretations by states that administer

the regulation; and evidence that the defendant knew the correct interpretation. Because the defendant's interpretation had some merit, and EPA's interpretation was not widely known, the court looked for evidence that the defendant had actual notice of EPA's interpretation. The court found no such evidence prior to 1989, and for a variety of reasons, found EPA gave insufficient notice of its interpretation until August 1989. The court then turned to the period after August 1989.

EPA argued that the defendant received actual notice in August 1989 from two letters sent from the EPA regional office, explaining the agency's interpretation. The defendant argued the letters did not provide adequate notice because they were inconsistent with other EPA interpretations discovered after litigation began. The defendant cited *General Electric*, where the court stated "it is unlikely that regulations provide adequate notice when different divisions of the enforcing agency disagree about their meaning." *General Electric*, 53 F.3d at 1332. In essence, the defendant argued that official confusion alone supports a fair notice defense, even when particularized notice of regulatory obligations was received.

The defendant's argument did not convince the Fourth Circuit panel. Finding that EPA's letters gave the defendant authoritative notice of the agency's interpretation, the court gave no weight to evidence of other, allegedly inconsistent interpretations, as the defendant could not show reliance upon them. "Without contemporaneous knowledge of and reliance on these allegedly inconsistent interpretations, [the defendant] had no reason to believe EPA Region 4 was providing it with anything other than EPA's definitive interpretation . . . ." *Hoechst Celanese*, 128 F.3d at 228. This conclusion is consistent with well-established jurisprudence in criminal cases. Just as in criminal cases, due process requires the court to focus on what the *defendant* knows, and whether a reasonable person in the defendant's position would have had fair notice. By itself, regulatory confusion, unknown to the defendant, is insufficient to support a fair notice defense.

Conclusion. All parties deserve fair notice, if their conduct is prohibited or constrained by law. Defendants should not, however, have incentives to avoid such knowledge or take illegal advantage of what is well known in the business community. Further, actual knowledge of violations overcomes any argument that government officials made inconsistent or confusing interpretations. As the Fifth Circuit noted in *NLRB v. Sunnyland Packing Co.*, no agency can guarantee that everyone in it will act consistently. 557 F.2d 1157, 1160-61 (5th Cir. 1977). Because a defendant who lacks notice is at the heart of a fair notice claim, the claim depends on what a defendant knew, or could have known, about the law's requirements. ~

The National Environmental Policy Act-A Litigator's Guide to an Often-Raised Environmental Statute

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Introduction

The enactment of the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. §§ 4321-4370(d), marked the arrival of a major piece of federal environmental legislation. One senator described the Act as "the most important and far-reaching environmental and conservation measure ever enacted by Congress." 115 CONG. REC. 40,416 (1969)(remarks by Sen. Jackson). The Act applies to all federal agencies; thus any department or agency can be a potential client. For the federal attorney, a NEPA case can provide an interesting opportunity to explore such issues as the military's incineration of nerve gas, the Park Service's management of bison, NASA's satellite launches, NIH's genetic engineering research, DOE's nuclear non-proliferation initiatives, and the Fish and Wildlife Service's reintroduction of endangered species, to name just a few.

The potential for judicial challenges to agencies' NEPA documentation is far reaching. For example, in 1993, federal agencies prepared approximately 500 environmental impact statements (EIS) and 50,000 environmental assessments (EA). *See The National Environmental Policy Act: A Study of its Effectiveness After Twenty-Five Years*, Executive Office of the President, Council on Environmental Quality (January 1997) at 19. These numbers do not take into account the many other actions deemed to be categorically excluded from the requirements of NEPA.

Legal Framework

The statutory and regulatory framework for NEPA can be found in three places: (1) the statute, as set forth in 42 U.S.C. §§ 4321-4334, which contains mandates and policy statements; (2) the Council of Environmental Quality (CEQ) regulations, 40 C.F.R. Parts 1500-1508 (1978), which contain definitions of key NEPA terms and direction on NEPA compliance; and (3) the regulations and guidelines for the particular agency. While some agencies' regulations merely mirror the CEQ regulations, agencies such as the Forest Service and Corps of Engineers promulgated regulations that contain additional and helpful guidance. The CEQ regulations are of particular import. The CEQ was created by a provision of NEPA, 42 U.S.C. § 4342, and its regulations are binding on all federal agencies, 40 C.F.R.§ 1507. "CEQ's interpretation of NEPA is entitled to substantial [judicial] deference," *Andrus v. Sierra Club*, 442 United States 347, 358 (1979). A substantial body of case law on NEPA exists.

NEPA sets forth the Federal Government's directive to, among other things, "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 433(a). NEPA intends to insure that federal agencies examine and disclose the potential environmental impacts of their proposals before commencing a project. *See Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council*, 435 United States 519, 558 (1978); *see also Robertson v. Methow Valley Citizens Council*, 490 United States 332, 349 (1989)(NEPA "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed

information concerning significant environmental impacts."). Public involvement is an integral part of NEPA. *Robertson*, 490 United States at 349. An examination of possible environmental impacts should include ideas not only from the agency, but also from the public and other local, federal and tribal entities. 42 U.S.C.§ 4332; 40 C.F.R. § 1503.1 (requiring public participation and comment for an EIS); 40 C.F.R. § 1506.6 (notice requirements).

Many of the government's actions are subject to NEPA. Classic examples are issuances of federal licenses, leases, and permits, and federal approval of funding or plans, even for non-federal projects. *See* 40 C.F.R. §1508.18 (definition of major federal action). To fulfill NEPA's action forcing requirements, an agency must complete one of three actions: (a) prepare an environmental impact statement (EIS); (2) prepare an environmental assessment (EA); or (3) deem the action categorically excluded. The three actions are not mutually exclusive. For example, an agency may complete an EA to decide if it needs to complete an EIS.

It is a requirement that an agency complete an EIS for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). If the agency is unsure of the environmental impacts of the proposed project or believes the project will not have a significant environmental impact on the surrounding human environment, however, the agency may prepare an EA. 40 C.F.R.§ 1508.9; *see also Sierra Club v. Espy*, 38 F.3d 792, 802-03 (5th Cir. 1994) (discussion on nature and purpose of EA). If, upon completion of the EA, the agency determines that the proposed action will have no significant environmental impact, it may prepare a Finding of No Significant Impact (FONSI), and then proceed to start the project. 40 C.F.R. §§ 1501.4(c)-(e), 1508.13. An agency may determine that a routine action, such as purchasing paper supplies or completing road maintenance, is categorically excluded from the requirements of NEPA because it will have no environmental impact. 40 C.F.R. § 1508.4. In invoking a categorical exclusion, however, the agency must determine that it fits into a category of excluded actions in its regulations and it must determine that there are no "extraordinary circumstances." *See Bicycle Trails Counsel of Marin v. Babbitt*, 82 F.3d 1145, 1456 (9th Cir. 1996) (discussion of categorical exclusion).

Review Principles

An important starting point in litigating NEPA is the principle that NEPA is a procedural statute; it does not mandate or dictate the agency's substantive results. *See Robertson*, 490 United States at 350. As explained by the Supreme Court in a 1978 opinion, "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural ... It is to insure a fully informed and well-considered decision, ..." *Vermont Yankee Nuclear Power Corp.*, 435 United States at 558.

Notwithstanding this principle, a plaintiff may try to challenge the agency's conclusion. Yet, a court's examination into the validity of the conclusion is not permitted. *See Kleppe v. Sierra Club*, 427 United States 390 (1976) ("Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions."); *see also Strycker's Bay Neighborhood Council v. Karlen*, 444 United States 223, 227-28 (1980) (court "cannot interject itself into the area of [agency] discretion."). Under NEPA, the plaintiff is limited to challenging, and the court to reviewing, the agency's decision making process.

A second important aspect of NEPA litigation is the limited avenue by which a party may seek judicial review. NEPA contains no private right of action. Thus, a party's usual avenue for review is the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. *Lujan v. National Wildlife Fed'n*, 497 United States 871, 882 (1990). Under the APA, the scope of the court's review is limited to the agency's administrative record. *Florida Power & Light Co. v. Lorion*, 470 United States 729, 743 (1985); *Camp v. Pitts*, 411 United States 138,

142 (1973). The administrative record should document all the relevant considerations leading up to the agency's final decision. *See* 5 U.S.C. § 706 (Court shall review "whole record" that was before the agency at the time of its decision). Thus, in APA cases, the administrative record is analogous to the evidentiary record submitted for a tort or criminal action. As a practical note, often cases alleging an NEPA violation commence quickly, with a filing of a motion for a TRO or preliminary injunction, shortly after, or in conjunction with the filing of a complaint. Under the tight time frame of a request for preliminary injunctive relief, the agency may compile an incomplete and inadequate administrative record. The agency must carry out a careful review of the administrative record to insure that the record contains all important documents.

Under the APA, supplementation of the administrative record and/or discovery outside the administrative record is generally prohibited. *Citizens to Preserve Overton Park v. Volpe*, 401 United States 402, 420 (1971). The Supreme Court has noted that evidence outside the administrative record may be permitted under the following limited circumstances: (1) to explain a highly scientific or technical issue in the record; (2) to discuss gaps in the record when the record is so lacking as to frustrate judicial review; or (3) when plaintiffs have made a strong showing of bad faith or improper behavior at the time of the administrative decision. *Volpe*, 401 United States at 420. At times, a district court may attempt to stretch these limitations, or even go outside these limitations, and allow a party to submit evidence and witnesses. *See e.g. Sierra Club v. Glickman*, 974 F. Supp. 905, (E.D. Tx. 1997), *on appeal* (court conducted *de novo* review); *see also County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1379 (2d Cir. 1977), (Court allowed submission of expert testimony and data). Counsel should strongly oppose such actions as witnesses and extra-record materials are outside the scope of information that the agency considered as part of its decision making process.

Not only does the APA dictate the scope of review, but also the standard of review. The court should review the agency's decision based on the narrow and highly deferential standard of 5 U.S.C.§ 706(2)(A), which limits review to a determination of whether the agency acted in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Volpe*, 401 United States at 416 (arbitrary and capricious standard requires court to decide whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment"). For an NEPA claim, the court shall determine if the agency took the requisite "hard look" at the environmental consequences of the proposed action, and if answered positively, then the agency did not act in an arbitrary or capricious manner. *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 United States 87, 97-98 (1983).

Three other related issues are worth noting: (1) under the APA, agency action is entitled to a presumption of administrative regularity, *Volpe*, 401 United States at 415; (2) an agency's examination of environmental impacts, particularly in matters of scientific debate, shall be afforded considerable deference; and (3) an alleged violation of NEPA is not evidence of "per se" irreparable harm. The second issue has been characterized as a limitation on the court's ability to become a referee in a battle of the experts. The agency can rely on the reasonable opinions of its own experts, when experts express conflicting views. *Marsh v. Oregon Natural Resources Council*, 490 United States 360, 378 (1989). As to the third issue, plaintiffs may contend that an alleged violation of NEPA is per se irreparable harm for purposes of issuing a preliminary injunction. The Supreme Court and many circuits have addressed and refuted this argument. *Amoco Production Co. v. Village of Gambell*, 480 United States 531, 542 (1987) (There is no presumption of irreparable harm as a result of the alleged procedural violation) *See also Wisconsin v. Weinberger*, 745 F.2d 412, 427 (7th Cir. 1984) (overturning district court decision to issue an injunction on an alleged

NEPA violation because "failure to balance the weight of the alleged NEPA violation against the harm the injunction would cause the Navy and to the country's defense.")

Common NEPA Issues:

1. Determination of Significance.

When agencies either complete an EA or deem an action categorically excluded, plaintiffs commonly allege that the proposed action is significant. This triggers a need for an EIS. Court decisions on whether an agency prepared the proper level of documentation often focus on the significance, or lack of significance, of the proposed action. *See* 40 C.F.R.§ 1508.27 (in determining significance, the agency should consider both context and intensity). It is important to stress to the court that the determination of significance is a factual determination that shall not be overturned unless the court, under the APA standard, finds the decision to be arbitrary and capricious. *See Baltimore Gas & Elec. Co.*, 462 United States at 97-8; *see also Marsh*, 490 United States at 378 (discussion of standard for reviewing the agency's determination).

2. Evaluation of Alternatives

An EIS, and an EA to a lesser extent, must consider alternative courses of action. 40 C.F.R.§ 1502.14 (alternatives are the heart of the EIS process). Frequently, a plaintiff will protest that the range of alternatives is inadequate, and provide one or more examples of alternatives they contend should have been considered. NEPA law requires an agency to identify, explore, and consider a *reasonable* range of alternatives. 42 U.S.C. § 4332(C)(iii) and (E); 40 C.F.R. §1502.14. The agency must also consider a no action alternative. *Id.* What is reasonable "depends on the nature of the proposal and the facts of each case." *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026 (1981). Courts have defined reasonableness as including some notion of feasibility. *See Vermont Yankee Nuclear Power Corp*, 435 United States at 551. Alternatives that are remote or speculative, *Associations Working for Aurora's Residential Environment v. Colorado Dep't of Transportation*, 153 F.3d 1122, 1130 (10th Cir. 1998), or infeasible, ineffective, or inconsistent with basic policy objectives, *Seattle Aubudon Soc'y v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996), need not be considered.

3. Cumulative Impacts, Connected Actions and Segmentation

The requirement to consider cumulative and connected actions as part of one proposal, and the prohibition against segmentation of related actions for the purpose of avoiding significance, are integrally related. *See* 40 C.F.R. § 1508.7 (cumulative impacts); 1508.25(a)(1)-(3) (connected, similar and cumulative actions); 1508.27(b)(7) ("Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts"). Plaintiffs may raise one or more of these claims. The CEQ recently issued guidance on this aspect of the regulations. *See Considering Cumulative Effects Under the National Environmental Policy Act*, Council on Environmental Quality, Executive Office of the President (January 1997). It includes "eight general principles of cumulative effects analysis and lays out ten specific steps that the NEPA practitioner can use to analyze cumulative effects." *Id.* at vii. CEQ regulations further suggest that it may be appropriate for an agency to prepare a programmatic EIS for actions that are "connected," "cumulative," or sufficiently "similar." 40 C.F.R.§ 1508.25; *see also Kleppe*, 427 United States at 406 (the decision to prepare a programmatic EIS is initially committed to the agency).

4. Supplementation

The CEQ regulations outline that supplementation of an EIS is required when: (1) the agency makes "substantial changes" to the project or (2) there are "significant new circumstances or information relevant to environmental concerns or bearing on the proposed action or its impacts" that were not discussed or disclosed in the existing

environmental documentation. 40 C.F.R. §§ 1502.9(c)(1)(i) and (ii). The bulk of the litigation has focused on the definition of "significant new circumstances or information." The fact that information is new does not trigger supplemental analysis. The trigger is the presence of information that will have a significant environmental effect and that was not previously examined in the NEPA documentation. The Supreme Court recognized this distinction in *Marsh v. Oregon Natural Resources Council*, the leading case on supplementation, noting that "an agency need not supplement an EIS every time new information appears after EIS finalization. To require otherwise would render agency decision making intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." *Marsh*, 490 United States at 373; *see also Wisconsin v. Weinberger*, 745 F.2d 412, 420 (7th Cir. 1984) (new information must give "seriously different picture of the likely environmental harms stemming from the proposed project").

Resources

Special thanks to Assistant Chief Charles Findlay for his assistance in framing and editing this article. This article was intended to be an overview. In completing more detailed research, an abundance of NEPA case law in all the judicial circuits, can be found. Other reference materials include Daniel R. Mandelker, *NEPA Law and Litigation* (Clark, Boardman & Callaghn Environmental Law Series), and a CEQ website called NEPANET, "http://ceq.eh.doe.gov." NEPA cases constitute a large portion of the case load for the General Litigation Section. Members of the section can be contacted for assistance.

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Honors and Awards

1999 Prosecutor of the Year

Assistant United States Attorney Michael R. Snipes has been selected as *Prosecutor of the Year* by the International Association of Financial Crimes Investigators. Mr. Snipes has been a federal prosecutor in the Criminal Division of the Dallas Headquarters office of the United States Attorney's office for the Northern District of Texas since 1991. Mr. Snipes has successfully prosecuted many extremely complicated financial crime cases involving bank fraud, credit card schemes, mail theft, stolen checks, and stolen credit cards. His successful prosecutions have resulted in the dismantling of several theft rings in the district. These successful prosecutions by Mr. Snipes have saved financial institutions millions of dollars as a result of the lengthy prison terms most of his defendants have received for their convictions.

"This prestigious award from the International Association of Financial Crimes Investigators is true recognition of Mike's dedication and personal drive to see that justice is served to victims of financial crimes," said United States Attorney Paul Coggins. "Mike is a strong advocate for crime victims and represents our office well."

Career Opportunities

Terrorism and Violent Crime Section of the Criminal Division of the Department of Justice is seeking experienced attorneys (GS-13 to GS-15)

The Terrorism and Violent Crimes Section (TVCS) of the Criminal Division of the Department of Justice is seeking several experienced attorneys in Washington, D.C. TVCS has a broad range of responsibilities in the areas of international terrorism, domestic terrorism, and violent crime. Included among these responsibilities are: conducting and assisting in domestic terrorism, extraterritorial terrorism, criminal gang and firearms prosecutions; developing and implementing federal crisis response strategies and procedures; identifying candidates for removal by the Alien Terrorist Removal Court; participating in the designation of terrorist groups; developing and prosecuting cases involving terrorist fund raising; handling of criminal immigration matters; formulating and reviewing federal criminal legislation; developing and implementing initiatives in various areas of TVCS expertise including gangs and juveniles; and providing support and advice to Assistant United States Attorneys in prosecutions of cases within areas of TVCS expertise.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least two and one-half years of post J.D. legal experience. Applicants must also have a strong academic background as well as excellent research and writing skills, and preferably have litigation experience. Some travel may be required.

Current salary and years of experience will determine the appropriate salary level from the GS-13 ($58,027-$75,433) to the GS-15 ($80,658-$104,851) range. Applicants must submit a

resume or OF-612 (optional application for Federal Employment), writing sample and performance appraisals for the last three years to the address below. A current SF-171 (application for Federal employment) will still be accepted as well. Please submit applications to:

United States Department of Justice, Criminal Division, Terrorism and Violent Crime Section, Attn: Ronnie L. Edelman, Principal Deputy Chief, Patrick Henry Bldg, 601 D Street NW, Room 6500, Washington, D.C. 20530

These positions are open until filled.

Office of General Counsel is recruiting highly qualified attorneys at the GS-11 to GS-15 level.

The Office of General Counsel (OGC) of the Central Intelligence Agency (CIA) is recruiting highly qualified attorneys at the GS-11 to GS-15 levels to join its exciting and challenging legal practice. OGC is responsible for advising the Director of Central Intelligence (DCI) on all legal matters relating to his role as head of the CIA and head of the United States Intelligence Community.

OGC handles a wide variety of legal issues, including both civil and criminal litigation; foreign intelligence and counterintelligence activities; counterterrorism; counternarcotics; non-proliferation and arms control; personnel and security matters; contracting, finance, and budget matters; tax; immigration; international financial transactions; corporate law; copyright; intellectual property; foreign and international law; and legislation.

Our practice provides the opportunity to interact with a wide variety of United States Government agencies, Congress, federal and state courts, and the private sector. OGC lawyers have regular contact with other intelligence community agencies, the White House, the National Security Council, and the Departments of Defense, State, Justice, Treasury, and Commerce.

Written inquiries only. We will respond within 45 days if there is further interest. All applicants must successfully complete a thorough medical examination, a polygraph interview, and an extensive background investigation.

United States citizenship is required. Graduation from an ABA-accredited law school and active bar membership from any of the 50 states, District of Columbia, Puerto Rico, or the United States Virgin Islands are required.

All interested applicants are encouraged to apply.

Please send a resume, law school transcript, legal writing sample, and legal references to :

OGC Administrative Officer, Office of General Counsel, Central Intelligence Agency, Washington, DC 20505.

UPCOMING PUBLICATIONS

Below you will find the current *Bulletin* publication schedule. Please contact us with your ideas and suggestions for future *Bulletin* issues. Please send all comments regarding the *Bulletin*, and any articles, stories, or other significant issues and events to AEXNAC01 (JDONOVAN). If you are interested in writing an article for an upcoming *Bulletin* issue, contact Jim Donovan at (803) 544-5155, to obtain a copy of the guidelines for article submissions and publication deadlines.

January 2000	**Environmental II: Natural Resources**