Oregon State Bar Environmental & Natural Resources Section

OUTLOOK

Environmental & Natural Resources Section

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Environmental Crimes

Introduction: To Everything There is a Season

By Susan L. Smith, Executive Committee and Issue Editor, Environmental and Natural Resources Section, Oregon State Bar

During the last few years, most Oregon environmental lawyers have lost track of both federal and state environmental crimes issues. Although the U.S. Attorney for the District of Oregon Karen Immergut indicated that she placed emphasis on environmental crimes, competing priorities prevented her from devoting significant prosecutorial resources to that effort. Environmental crimes were clearly not a national priority of the Justice Department and nationally environmental criminal prosecutions declined. On the state level, as District Attorneys in Oregon counties struggled to find sufficient resources to prosecute violent crimes and to find beds in county jails for violent offenders, prosecution of environmental crimes was the last thing on their minds. As a result, during the last decade, environmental violators in Oregon faced a diminishingly small risk of criminal prosecution along with extremely small administrative penalties.

Times have changed. The administration of President Barack Obama will be far more supportive of more stringent environmental regulation and strict enforcement of environmental laws, including prosecution of environmental crimes. When a new U.S. Attorney appointed by President Obama replaces Ms. Immergut, that presidential appointee is likely to prove more zealous in prosecuting environmental crimes.

Even more important to Oregon lawyers, Attorney General John Kroger is seeking resources to create an environmental crimes unit within the Oregon Department of Justice. Since 1997, when Oregon enacted its environmental crimes statute, district attorneys across the state have had responsibility for prosecuting environmental crimes and they have only occasionally brought such prosecutions. That, however, is about to change. The creation of an environmental crimes unit within Oregon DOJ would the same strong stimulus for environmental crimes prosecutions as did the initial creation of the Environmental Crimes Section in the U.S. Justice Department back in the mid-1980s. Although district attorneys will retain authority to prosecute environmental crimes and the Attorney General will no doubt coordinate closely with district attorneys, clients with recurrent environmental violations, especially those that result in harm to human health or the environment, face a much higher risk of criminal prosecution.

As a result, Oregon environmental lawyers need to refresh their recollection about Oregon environmental crimes as well as federal environmental crimes. The most recent issue of the ABA's Section on Environment, Energy, and Resources magazine E&NR dealt with environmental crimes, primarily at the federal level. This issue of Outlook seeks to bring an Oregon perspective to the issues that surround environmental criminal prosecution.

Enforcing Environmental Crimes: Filling the Gap in Oregon

By John Kroger, Attorney General for the State of Oregon

Oregon has a worldwide reputation as an environmental leader. Yet the state lacks a weapon that is crucial for an effective environmental enforcement program: the capacity to prosecute criminal violations of environmental laws.

There is not a single full-time environmental crimes prosecutor for the State of Oregon. The fact that many states and even cities around the country have robust environmental crimes units only makes the absence of such a unit in Oregon more glaring.

The lack of state environmental prosecutors means that DEQ and other state agencies must turn to over-worked county district attorneys to go after criminal polluters. But many DAs lack the resources or expertise to prosecute complex environmental cases. A Department of Justice Environmental Crimes Unit would be perfectly poised to take on such cases.

To achieve this goal I have asked the Oregon Legislature for roughly $700,000 a year to fund the state's first environmental crimes unit. The unit would include two prosecutors and an investigator who would work with state natural resource agencies and the Oregon State Police. The goal of the unit is to prosecute serious violations of the criminal laws that protect the quality of the water, air, land and wildlife resources that make Oregon such a special place to live. Even at a time of tight budgets, this minimal level of funding is critical to deter violations that for some have unfortunately been seen as merely a cost of doing business.

The new unit would work closely with investigators from DEQ and the Oregon State Police to identify the cases where criminal enforcement is warranted. New DEQ Director Dick Pedersen supports increasing the state's capacity to enforce environmental crimes and I believe having a close working relationship between the Department of Justice and DEQ is absolutely necessary for the environmental crimes unit to succeed.

Even with the addition of two new prosecutors and an investigator, the Department of Justice will have to prioritize our enforcement efforts. The Department's main focus will be on repeat violators or violations that pose a significant risk to public health or the environment. The case for criminal prosecution is especially strong for a polluter who has failed to obey the law even after years of repeated civil penalties.

While most people and businesses in Oregon take our environmental laws seriously, those who cut corners on environmental compliance gain an unfair competitive advantage. In today's economic climate, creating a strong environmental enforcement program not only is good for our water and air, it also helps create a level playing field for the vast majority of businesses who take Oregon's environmental laws seriously.

The Environmental Crimes Unit will work closely with DEQ and the Oregon State Police in prosecuting cases as well as supporting District Attorney's offices in their prosecution of environmental crimes.

Civil enforcement plays a critical role in Oregon's overall environmental enforcement program. But there is an equally important need for criminal enforcement, especially in cases where civil enforcement has proven ineffective. Most Oregonians assume that the State already has the capacity to prosecute environmental crimes and it is time to make that assumption a reality.

I believe this initiative is of vital importance to our state and look forward to working with everyone to see it succeed.

DEQ Supports Criminal Prosecution of Environmental Liars and Cheaters

By Les Carlough, Senior Policy Advisor, Office of Compliance and Enforcement, Oregon DEQ

Deterrence is the holy grail of environmental enforcement. Both the government and the public believe that penalizing environmental violators deters both the person penalized and other potential violators from violating environmental regulations: a person is less likely to violate if they run the risk of enforcement. For this reason, enforcement is often considered the fundamental and critical element of environmental regulatory programs. But our quest, like that of King Arthur's knights, has been based more on faith than informed understanding. This is because deterrence is notoriously difficult to measure.

Much of deterrence occurs in the minds of unidentified people who – through news, casual conversation and other means – hear that someone else was

penalized for wrongful conduct, and then decide not to do something that the law prohibits. How does one measure that?! How does one predict whether enforcement will deter in a given case or given program? We think that incentives, education and assistance are effective in stimulating compliance and that civil penalties and criminal prosecutions are also effective. But what mix of these various alternatives produces the greatest compliance and highest environmental return? State and federal agencies are increasingly concerned about these questions as they are more and more obligated to make strategic decisions based on data and to produce measurable results.

Oregon's DEQ is at the forefront of this debate, having done seminal research into the deterrent effect of our own enforcement programs. DEQ hired an independent marketing firm to survey 450 randomly-chosen small, medium and large "companies" located throughout Oregon that have licenses, permits or registrations with DEQ. Participants were asked a variety of questions designed to ascertain their company attitudes about environmental compliance and enforcement, whether their company had made pro-environment changes in their operations and pollution management during the preceding three years, what motivated their company to make the changes, and which factors were most important in their decision-making processes. A discussion of all the conclusions from the study is beyond the scope of this article, but the full report is available online at DEQ's website.

One surprising finding from the study is that technical assistance and inspection visits appeared to prompt more changes than the threat of penalties. Based on the responses from the survey and other verification data, DEQ estimates that hearing about technical assistance at other companies stimulated 15% of their compliance changes and hearing about inspections at other companies stimulated 28% of their compliance changes. Compare those successes to 7% of the changes resulting from hearing about penalties at other companies. These results may initially seem paradoxical because we often assume that penalties are the primary motivator for deterrence.

However, it is difficult to tease apart the contributing effects of multiple and overlapping factors and there are several possible explanations. First, DEQ contacts many more companies through inspections and assistance than through enforcement, so hearing about penalties may simply be less common. Second, companies may have meant that hearing about inspections or assistance visits gave them the proximal motivation to make the change, but they may also have been concerned about the possibility of later detection and enforcement should they not make required changes. Third, companies may not think that penalties are a financial threat – indeed, 28% of the companies surveyed thought that penalties would be less than the amount saved through violation. Last, while penalties themselves may not be the most important *direct* concern, penalties tend to accompany secondary negative impacts like forced shut-down and criminal prosecution. According to the survey results, these were statistically more important motivators than penalties themselves. Penalties may also cause damage to reputation, community pressure, and deterioration of customer loyalty which also appeared to be more important motivators.

Determining the "right" penalty amount for violations is complicated because of the many factual, evidentiary, legal, and policy issues which must be considered. A particular penalty must be sufficiently severe to be taken seriously by the violator as well as by the whole regulatory community. A rule of thumb about compliance with regulatory systems is that 20% will always try to comply, 5% will always try to evade compliance, and 75% will try to comply as long as the noncompliant 5% are caught and penalized. Because violators often gain an economic advantage by avoiding costs of compliance, the penalty must be sufficiently potent to assure the many complying companies that their interests are being protected. Penalties that are viewed as too small increase the likelihood of continued noncompliance and also defection by complying companies.

Penalties that are too severe, however, may not be good deterrents either. If penalties are overly large, they may encourage additional illegal conduct by those hoping to avoid detection and punishment for their original violations. If the regulated community perceives penalties as too large, they may develop contempt for the compliance program and goad others into violating. If the public views the penalties as unfair, there may be administrative, judicial, or political ramifications that undermine enforcement. Because there are disadvantages in penalties that are too small *and* that are too large, agencies like DEQ must carefully consider the appropriateness and equity of the penalties imposed for noncompliance.

Using its rules and internal management directives, DEQ considers many factors in determining whether to issue a warning letter, whether to assess an administrative penalty, and – if a penalty is issued – how large it should be. We believe these tools are generally adequate to stimulate compliance, to take away the economic advantage of noncompliance, and to create risks needed to deter others. These administrative cases also initiate an escalating enforcement process if the company does not return to compliance or repeatedly violates. Repeated or continuous violations will receive increasingly larger penalties. At the top of this escalation process is revocation of the permit or license for companies that demonstrate they are unable or unwilling to comply with environmental laws. According to the participants in the survey, the possibility of this "death penalty for business" is one of the top motivators for compliance, but it is seldom used because most entities come into compliance or go out of business for other reasons.

Another type of enforcement – criminal prosecution – is also one of the top motivators. In fact, most violations of

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environmental laws may be prosecuted as misdemeanors. Violations related to water quality, air quality, and hazardous waste may also be prosecuted as felonies, if the violator meets the requisite *mens rea* requirement or the violation causes substantial harm. Generally, these crimes are white-collar versions of typical criminal behavior: lying, cheating, and stealing. In the early days of environmental crimes prosecution many considered environmental crimes to be victimless and therefore less important than other crimes. That attitude is shifting. With increased press coverage of environmental matters, people are realizing that those who cheat on environmental requirements can degrade the integrity of our environment and its ability to sustain our good health. While the consequences of a criminal conviction can be loss of personal liberties like freedom and the right to vote, in addition to monetary penalty, the public, legislators, and the courts have been, and are increasingly, very supportive of enforcement of environmental laws through criminal prosecution.

Because our data show that the possibility of criminal prosecution is one of the most important motivators for deterrence and compliance, DEQ is diligent in identifying possible environmental crimes and referring them to the proper authorities. DEQ learns about potential criminal behavior through citizen complaints, disgruntled employees, and routine inspections and file reviews. If DEQ inspectors encounter violations that appear *deliberate, deceitful*, or *dishonest*, they discuss the matter with staff in DEQ's Office of Compliance and Enforcement. Important considerations at this stage of the analysis include:

1. Whether the person knew or should have known and understood the law;
2. Whether the person intended or knew the likely outcome of the action;
3. Whether the violation showed reckless disregard for others;
4. Whether the violation created actual or potential harm to humans or to the environment;
5. Whether the person had a history of noncompliance with environmental laws, especially the law at issue;
6. Whether the person attempted to conceal violations through false statements or tampering with monitoring or pollution control equipment; and
7. Whether the person cooperated with regulatory authorities to correct the violation, mitigate the harm, or clean it up.

Cases with some or all of these factors are then discussed with the Oregon State Police or the U.S. Environmental Protection Agency's Criminal Investigation Division. On occasion, DEQ has also worked with the U.S. Federal Bureau of Investigation, the U.S. Bureau of Land Management, and the U.S. Coast Guard. If the criminal investigatory agency determines that an investigation is warranted, it may conduct additional inquiry which may involve execution of search warrants, interrogation of witnesses and suspects, and other work. If the investigators determine that a crime was committed they may immediately cite the alleged violator with a misdemeanor in the Oregon state system or may present the matter to a prosecutor in the county district attorney's office or sometimes to the U.S. Attorney's office for other charges. Oregon Attorney General, John Kroger, has stressed that there is inadequate prosecution of environmental crime and that this deficiency undermines compliance with the laws designed to protect public health and the environment. Currently, his office is seeking to fund an environmental crimes unit, which would assist district attorneys and conduct additional prosecutions of environmental crimes in the State courts.

Prosecutors conduct their own evaluation about whether the violations should be prosecuted criminally. ORS 468.961 requires the Oregon Attorney General or county district attorney to personally adopt guidelines for deciding which environmental felonies to prosecute and to approve a pre-indictment certification that the violation meets those guidelines. The Department of Justice adopted "Model Guidelines for Prosecution of Environmental Crimes" that county district attorneys may use in establishing their own county guidelines. DEQ's Environmental Crimes Coordinator often assists in presenting the case to the prosecutor, in outlining the prima facie case, and in evaluating whether the violations meet the prosecution guidelines. Those guidelines may differ slightly between counties, but generally will include many of the same factors that DEQ considers, as listed above, plus other factors including:

1. Whether public sanctions are needed to protect human health and the environment or to deter others from committing similar violations;
2. Whether administrative penalties and remedial orders would be more efficient, effective or enforceable;
3. Whether the prosecution would likely result in conviction;
4. Whether the conviction would result in a significant sentence; and
5. Whether the prosecution justifies the resources necessary for the prosecution.

The result is that the violations most likely to be prosecuted criminally at both the state and federal level are those in which the violator did something similar to conduct that is already generally accepted as criminal activity in other areas of the law: cheating on taxes, assaulting someone for personal gain, covering up to escape legal responsibility or liability. Common environmental violations that are criminally prosecuted include deliberate illegal disposal of wastes; illegal emissions or discharges; deliberate illegal cost-saving short-cuts in pollutant management; reckless pollution that injures others; falsification of information in applications, monitoring reports, or certifications; and dishonesty with government regulators or investigators trying to address the resulting problem.

Businesses and DEQ both know that perfect compliance with environmental laws can be difficult. Advances in

environmental science and shifts in political climates result in changes in the technical requirements of rules and permits. Abnormal weather, unpredictable equipment failures, tortious conduct by others, and other unforeseen circumstances can interfere with routine company procedures, further complicating compliance. DEQ believes that there is a need for discretion to avoid draconian enforcement in situations of rare and minor violations. However, DEQ also is aware that threats of enforcement are needed to create fairness for those who work to meet regulatory obligations and to create deterrence for those who might not. Research shows that one of the most effective deterrents is the criminal sanction. For the sake of compliance, for the sake of public health and the environment, if your clients lie, cheat, or steal with regard to their environmental responsibilities, DEQ hopes they will be prosecuted.

Avoiding Criminal Prosecution of Environmental Violations in Oregon

By Hong N. Huynh, Miller Nash LLP

Ms. Huynh is a partner practicing environmental and natural resources law at Miller Nash LLP. She frequently advises clients on environmental compliance matters as well as defends them in administrative and judicial enforcement proceedings. She litigated Oregon's diligent prosecution standard under the Clean Water Act.

John Kroger, Oregon's new Attorney General, has made prosecuting environmental crimes one of his top priorities. He affirmed this campaign promise by appointing Brent Foster as special counsel for environmental enforcement and policy. Mr. Foster was the former executive director of Columbia Riverkeepers, a nonprofit citizen group that has brought citizen suits against a number of companies in the Pacific Northwest region for environmental law violations.

With the Attorney General's high level of commitment to environmental criminal prosecutions, Oregon Department of Environmental Quality ("DEQ") will no doubt scrutinize companies subject to environmental regulation more closely. Because of this increased attention, regulated companies must become more attuned to their environmental compliance status, even in this time of economic hardship. By taking immediate steps to address potential noncompliance issues, companies reduce the risk of being criminally prosecuted, which is costly in countless ways.

Oregon law provides several tools and procedures allowing companies to assess their compliance status and resolve the discovered violations before those violations give rise to criminal prosecution.

Auditing the Current Status

First, a company needs to know its current compliance status. An ongoing comprehensive management program that frequently tracks and reports violations to all levels of corporate management is the best way for a company to be in control of its environmental compliance. Absent such a program, companies can conduct a one-time audit, using either a consultant or internal expertise. The audit should be carried out in compliance with industry standards such as ISO 14011 or ASTM E 2107.

The information from the audit will help the company assess compliance with various environmental program requirements, from wastewater to air discharges to historical and current releases of hazardous substances. Frequently, companies are concerned that conducting an audit will lead to information that will be discovered by DEQ or citizen groups. To avoid this risk, companies can conduct an audit under the direction of an attorney, which may provide protection of audit information as attorney-client communication or attorney work product.

Additionally, the company can conduct such an audit under Oregon environmental audit privilege law that protects qualified audit reports from being admitted as evidence in an administrative or civil action. See ORS 468.963. Note, however, that the audit cannot be withheld from a criminal proceeding. Also, the United States does not recognize state environmental audit privileges and, subject to limitations provided in the United States Environmental Protection Agency's (EPA) audit policy, may seek to discover and use such information in federal administrative, civil, and criminal enforcement actions.

Under Oregon's environmental audit privilege, the audit must meet certain requirements in order to be privileged. The audit must be a voluntary, internal, and comprehensive evaluation, and may be conducted by the owner or operator, by the owner's or operator's employees, or by independent contractors. Furthermore, the audit report must:

1. Be labeled "Environmental Audit Report: Privileged Document" and prepared as a result of an environmental audit.
2. Be prepared by the auditor, which may include the scope of the audit, the information gained in the audit, and conclusions and recommendations, together with exhibits and appendices;

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3. Have memoranda and documents analyzing portions or all of the audit report and potentially discussing implementation issues; and
4. Have an implementation plan that addresses correcting past noncompliance, improving current compliance, and preventing future noncompliance.

Certain information cannot be privileged and protected, even if it is made a part of a qualified audit report: (1) documents, communications, data, reports, or other information required to be collected, developed, maintained, reported, or otherwise made available to a regulatory agency; (2) information obtained by observation, sampling, or monitoring by any regulatory agency; and (3) information obtained from a source independent of the environmental audit.

Reporting the Violations

If a company conducts an audit or a compliance assessment, it needs to be prepared to make reports of those violations for which the law mandates reporting and otherwise address violations that are discovered.

Certain federal and state environmental laws and permits require reporting of known violations. While not an exhaustive list, the following violations must be reported upon discovery:

- Releases of a reportable quantity of hazardous substances within 24 hours under cleanup and hazardous waste laws;
- Releases of hazardous material or substances into the public water system, including groundwater sources, that result in a violation of the primary drinking water standards under the Safe Drinking Water Act;
- Any below ground releases of petroleum from an underground storage tank ("UST") system;
- Above ground releases of petroleum from a UST system in excess of 42 gallons (or less if the release cannot be contained or cleaned up within 24 hours);
- Any above ground releases to waters that result in a sheen; and
- Violations of certain requirements or conditions in air and wastewater discharge permits.

There are other environmental conditions for which the law does not require reporting. For example, a company's discovery of a historical release of a hazardous substance on land is arguably not reportable when it does not know whether a reportable quantity was released.

Beyond the statutory audit privilege, DEQ issued a policy in 2005 that provides incentives to encourage companies to conduct a voluntary audit and to disclose the discovered violations. See *Internal Management Directive on Self-Policing, Disclosure, and Penalty Mitigation* (the "Self-Policing Policy"). If a company meets this policy, DEQ will not refer the violation for criminal proceedings and will reduce any civil penalties that are assessed.

Under the Self-Policing Policy, the company must conduct a voluntary audit and must disclose the discovered violations within 21 days of the discovery. The discovery of the violations must be through "voluntary" means in that they cannot be discovered through mandated monitoring, sampling, or auditing required by law, permit, order, or consent agreement. For example, wastewater discharge violations discovered as part of a compulsory monthly sampling and reporting program do not qualify as voluntary discovery. On the other hand, other violations, such as inaccurate record keeping or operating without a permit, may qualify when they are discovered through a voluntary audit. When disclosing, the company must follow a detailed process and must respond to requests for extensive information, including plans for corrective action.

Settling the Violations

Once the company discloses the violations, the company should try to resolve them through an administrative settlement with DEQ. While companies may regard these settlement discussions as time-consuming and expensive, the benefit of such settlement far outweighs the risks and burden of criminal enforcement.

Depending on the type of violations involved, DEQ may take several actions to administratively resolve the violations. Once the violations are known, DEQ may issue a notice of noncompliance or a notice of permit violation. DEQ may follow this with a formal enforcement action by issuing a notice of assessment of civil penalty or a remedial action order.

If a penalty amount is assessed, DEQ has discretion to settle at a reduced amount. OAR 340-012-0170(1). DEQ takes into consideration the following factors in reaching a settlement:

1. New information obtained through further investigation or provided by the company;
2. Deterrent effect of compromise or settlement;
3. Whether the company will employ extraordinary means to correct the violation or maintain compliance;
4. Prior penalty settlements;
5. The company's ability to pay the civil penalty;
6. Impact of settlement on the goal of protecting human health and the environment; and
7. The relative strength or weakness of DEQ's evidence.

The company can also urge DEQ to allow it to fund a supplemental environmental project, in lieu of paying any penalty or at least in lieu of a portion of the penalty. These projects represent a positive solution for all parties, allowing the company's money to benefit directly the local community rather than disappear into the dark hole of the government's coffers.

DEQ and the company often finalize the settlement through a formal Mutual Agreement and Order ("MAO"). The MAO stipulates certain facts, assesses penalties, and provides a compliance

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OSB Environmental and Natural Resources Section presents

The Promise of Development:
Natural Resource Issues in a New Economy

Seventh Mountain Resort 18575 SW Century Drive, Bend, OR 97702 **(541) 382-8711**

Thursday May 7, 2009, *1 ATJ or general MCLE credit*

6:00-6:30 p.m.: Registration

6:30-7:30 p.m.: ***Robert A. Brunoe,*** *General Manager, Branch of Natural Resources, Confederated Tribes of the Warm Springs Reservation of Oregon, Tribal Perspective on Furthering Resource Protection and Economic Development* (Presentation and Q&A)(Introduced by Ellen Grover, Karnopp Peterson LLP)

7:30-9:00 p.m.: Reception and short Environmental and Natural Resources Section monthly Executive Committee meeting—all welcome

Sponsored by **Schwabe Williamson & Wyatt**

Friday May 8, 2009, *9.5 general MCLE credits*

7:30-8:00 a.m.: Registration

8:00-8:45 a.m.: **Mike Carrier,** *Governor Kulongoski's Natural Resource Policy Director (Presentation and Q&A) (Introduced by Diane Henkels, Attorney at Law)*

8:45-10:00 a.m.: **Panel Discussion:** Rural Land Development and Resource Management—Are Destination Resorts Good or Bad? (Moderated by Pam Hardy, Attorney at Law)

Ken Lite, *Hydrologist, Oregon Water Resources Department. What is known about the flow of groundwater in the Upper Desichutes Basin.*

Paul Dewey, *Attorney. Recognizing and assessing potential resource impacts from rural development, such as destination resorts*

Martha Pagel, *Schwabe Williamson & Wyatt. Understanding ground water permits and the effect of mitigation*

Richard Whitman, *Director, Oregon Department of Land Conservation and Development. How does Goal 5 work and what is the state's role in managing resource impacts?*

Steve Hultberg, *Ball Janik LLP. Destination resorts: Economic development and effective mitigation.*

10:00-10:10 a.m.: Break

10:10-11:45 a.m.: **Panel Discussion Fish and water:** Habitat Conservation Plans in Central Oregon (Moderated by John Marsh, Parametrix, Inc.)

Steve Johnson, *Central Oregon Irrigation District: On the hook—An irrigation district perspective.*

Nancy Gilbert, *U.S. Fish and Wildlife Service: A federal regulator's perspective.*

Robert Brunoe, *Confederated Tribes of the Warm Springs Reservation of Oregon, A tribal perspective.*

Brett Swift, *American Rivers: A perspective from an environmental non-governmental organization.*

Julie Keil, *Portland General Electric Company (PGE): On the hook, too—Federal hydropower licensee perspective.*

12:00-1:00 p.m.: **Lunch speaker and Q&A: *Brent Foster,*** *Oregon Department of Justice, Special Counsel to the Attorney General, The Role of Environmental Enforcement in a New Economy* (Introduction by Ellen Grover, Karnopp Peterson LLP) *(Buffet lunch provided)*

1:00-1:15 p.m.: Break

1:15-5:30 p.m.: **Afternoon Session:** The State of Renewable Energy in Oregon (Introduction by Hong Huynh, Miller Nash LLP.)

1:15-1:45 p.m.: ***Michael Grainey,*** *Director, Oregon Department of Energy. Current sources of energy powering Oregon with focus on central Oregon; forecasted energy sources expected to power Oregon with focus on Central Oregon; main policy issues.* (Introduction by Hong Huynh, Miller Nash LLP)

1:45-3:00 p.m.: **Panel Discussion:** Technical presentation on renewable energy sources and their challenges (moderated by Kimberlee Stafford, Tonkon Torp, LLP)

Alex Sifford, *Sifford Energy Services: Biomass and geothermal power generation*

Matt Giblin, *Invenergy: Wind power generation*

Steve Hummel: *Solar power generation*

3:00-3:10 p.m.: Break

3:10-5:00 p.m.: **Panel Discussion:** The Nuts and Bolts of Renewable Energy Projects (moderated by Hong Huynh, Miller Nash LLP)

Lizzie Rubado, *Energy Trust of Oregon: Public policy incentives*

Karen Williams, *Lane Powell PC: Tax credits for renewable energy: Challenges and opportunities for bringing a renewable energy project to market*

John White, *Oregon Department of Energy: Oregon energy siting requirements*

Chris Rycewicz, *Miller Nash LLP: Environmental permitting and impacts of renewable energy projects*

5:00-5:30 Plenary for Q & A for renewable energy speakers and panelists

There is a block of rooms reserved at the Seventh Mountain Resort, the rate is $99/night, phone Sharron Stewart at 888-784-4386, she is available Monday-Friday from 8:30-4:30.

Registration Fee:
(SENR07) (813-4565-000)

Private Attorneys and Industry............................. $250.00
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TOTAL = $______

Seminar Registration:
❍ I would like to participate via web conference **(email address required below)**

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2. FAX with VISA or MasterCard number: 503-968-4456
3. MAIL with check: Oregon State Bar, CLE Service Desk, PO Box 231935, Tigard, OR 97281-1935

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Cancellation requests must be received at least 48 hours prior to the start of the seminar to qualify for a refund. Requested are accepted by via phone, fax, or mail; please see "Three Ways to Register" for contact information.

OUTLOOK
Environmental & Natural Resources Section

Spring 2009

ENVIRONMENTAL CRIMES

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There are Issue Editor and author opportunities available for upcoming newsletters. As Issue Editor you can coordinate writers and articles to educate ENR Section members on a timely topic. Each issue has at least one volunteer issue editor.

We are also seeking volunteers to write case summaries of leading environmental and natural resources cases. If interested, please contact David Ashton.

Those wishing to follow up on topics addressed in *Outlook* should consider purchasing the 2006 Supplement to the Environmental and Natural Resources Law Deskbook. With 43 chapters of detailed information, the Deskbook and Supplement present discussions on national and Oregon environmental statutes, rules, and cases. Contact OSB CLE Publications or an ENR Executive Committee Member for more information.

Attorneys using *Outlook* should also research original and other sources.

schedule that allows the company time to achieve ultimate compliance. This is particularly useful if the company needs time to assess its noncompliance condition, to procure and operate pollution-control equipment, or to obtain a required permit. In some cases, the MAO may need to go through a public comment period before it can be finalized.

Conclusion

While the economy may be in flux, Oregon has clearly signaled the high priority it intends to place on criminal prosecution of environmental violations. Companies will face increasing pressure in the coming years to remain in full compliance with environmental laws. Companies should exert increasing efforts to comply with environmental laws and to discover and address known violations, before they become involved in criminal proceedings.

Traps for the Unwary: Interpreting Mental State Requirements in Oregon Environmental Crimes

By Susan L. Smith, Professor of Law,
Willamette University College of Law

In 1997, Oregon adopted the Oregon Environmental Crimes Act (OECA), codified at ORS 468.920 - 468.959, recognizing that, under certain circumstances, violations of environmental regulations concerning hazardous waste, air pollution, and water pollution should be treated as crimes, rather than as administrative enforcement matters. These newly created environmental crimes joined a number of other crimes related to the environment and natural resources, ranging from poaching to discarding refuse in waters of the state. The analysis of mental state in this article, however, is limited to the pollution control crimes created by the OECA.

The Importance of Mental State Requirements in Defining Oregon Environmental Crimes

Oregon environmental crimes are typically distinguished from garden variety regulatory violations by one or more of three elements. First and foremost, environmental crimes require a culpable mental state, typically "knowingly." For example, all of the Oregon hazardous waste crimes, the air pollution and water pollution felonies, the aggravated felony of environmental endangerment, and the supplying false information felony require a "knowing" mental state as to some element of the crime. Four Oregon environmental felonies elevate a misdemeanor to a felony if, in committing the misdemeanor, the defendant "recklessly" causes substantial harm to human health or the environment. The misdemeanor water pollution offense requires only "criminal negligence." Second, several Oregon environmental felonies turn on the element of harm: a misdemeanor violation becomes a felony by the State proving "substantial harm to human health or the environment" as

defined in ORS 468.920. Third, several Oregon environmental felonies can be proven by showing the defendant knew his actions violated the law.

Given the prominence of mental state in distinguishing between a crime and a mere violation of environmental regulations, it may seem surprising that there is little case law addressing the mental state requirement in Oregon environmental crimes. The only Oregon environmental crimes case reported to date concerning mental state, State v. Maxwell, 161 Or App 468 (1999) examined whether the State had offered sufficient evidence to establish defendant's knowing disregard of the law. The other reported Oregon environmental crimes case, State v. Stevens Equipment Co., 165 Or App 673 (2000) (tried by the author), dealt with defendant's challenges to the District Attorney's decision to prosecute. The dearth of case law on Oregon environmental crimes can be explained by two factors. First, there have to date been relatively few environmental criminal prosecutions brought by the State, due to the technical difficulty and expense of these prosecutions and the competing priorities of district attorneys who have been solely responsible for prosecution of these crimes. Second, due to reluctance of some judges and juries to treat regulatory offenses as serious crimes, state prosecutors are unlikely to bring cases when culpability in terms of mental state is at all questionable.

However, as Attorney General Kroger devotes Oregon Department of Justice (DOJ) resources to environmental crimes, we are likely to see both more state environmental criminal prosecutions overall as well as state prosecutions in situations where the defendant's mental state may be a bit more arguable. Thus, given the new environmental criminal enforcement structure in Oregon, it behooves all environmental lawyers to have a clear understanding of the mental state requirements associated with Oregon environmental crimes as well as the recently evolving case law in Oregon with respect to mental state requirements more generally.

Oregon Criminal Code Provisions on Mental State

The Oregon Criminal Code (OCC) general provisions, including those on mental state, generally apply to crimes outside the code unless the statute creating the crime specifies otherwise. With respect to environmental crimes, the legislative history does not indicate any legislative intent to supersede the OCC. Thus, the OCC provisions on mental state as well as the Oregon case law discussing mistake of fact and mistake of law should be used to interpret the OECA mental state requirements. ORS 161.035(2); *State v. Rutley*, 343 Or 368 (2007).

Two major sets of issues typically arise in interpreting statutory mental state requirements. The first set occurs when the offense contains no specific mental state element. In that event, the courts must determine the minimum culpable mental state that a defendant must have to commit the crime and to which elements that culpable mental state applies? The second set of issues occurs when one or more mental state elements are specified by the offense. In that event, the courts must determine to which elements that mental state applies. In other words, how far down does the mental state element travel? The courts must also determine, for cases in which the mental state does not apply to every element of the offense, whether any culpable mental state is required for the remaining elements? Fortunately, no environmental crimes created by the OECA raise the first set of issues because each environmental crime contains at least one mental state requirement. However, the second set of issues is raised by virtually every Oregon environmental crime.

Several key OCC provisions on mental state bear on interpretation of the mental state requirements for Oregon environmental crimes. First, ORS 161.095 provides the basic requirements of culpability: a conduct that includes a voluntary act or omission and a culpable mental state. As to mental state, ORS 161.095 (2) specifies that a person is not guilty of a crime unless the person acts with a culpable mental state with respect to each material element of the offense that necessarily requires a culpable mental state, unless ORS 161.105 provides otherwise. "Culpable mental state" is defined by ORS 161.085 (6) to be intentionally, knowingly, recklessly, or with criminal negligence as defined in 161.085 (7) – (10), which provide specific definitions of each of those culpable mental states. Thus, the minimum culpable mental state in Oregon is criminal negligence.

ORS 161.105 contains the exceptions to the culpable mental state requirement. ORS 161.105 (1) (a) classifies any offense included within the OCC that eliminates the requirement for a culpable mental state as a non-criminal violation. ORS 161.105 (1) (b) allows an offense defined by a statute outside the OCC enacted after 1971 to be classified as a crime even though it lacks a culpable mental state, provided that the criminal statute clearly indicates a legislative intent to dispense with any culpable mental state requirement for the offense or for any material element thereof. ORS 161.105 (2) classifies an offense, defined by a statute outside the OCC that was enacted before 1972, that does not require a culpable mental state as a violation. Under ORS 161.105(3), when an offense outside the OCC requires no culpable mental state as to one or more of its material elements, the State may allege and prove at least criminal negligence, in which case commission of the offense is a crime.

ORS 161.115 contains rules for construing the mental state requirements of offenses. ORS 161.115 (1) states that when an offense specifies a culpable mental state, but does not specify the element to which it applies, that culpable mental state applies to each material elements of the offense "that necessarily requires a culpable mental state." Thus, ORS 161.115(1) indicates that any mental state word included in the offense is applied to every material element to the extent that the element "necessarily requires a culpable mental state." As

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we explore later, Oregon courts have experienced great difficulty in interpreting mental state requirements due to the "confusing appearance of circularity" of this phrase. *State v. Blanton*, 284 Or 591 (1978). ORS 161.115(2) specifies that the culpability required for an offense is at least criminal negligence. ORS 161.115(3) provides that proving a more culpable mental state is sufficient to establish a lesser mental state requirement. For example, when a crime requires criminal negligence, it is sufficient if the State proves recklessness.

Interpreting Mental State Requirements for Oregon Environmental Crimes that Require "Knowingly" Conduct

Most Oregon environmental crimes contain a "knowing" or "knowingly" mental state requirement as to the conduct of the defendant. The crimes imposing a knowing requirement for the conduct include:

- unlawful storage, disposal or treatment of hazardous waste in the first and second degrees,
- unlawful transportation of hazardous waste in the first and second degrees,
- unlawful air pollution in the first degree,
- unlawful water pollution in the first degree,
- environmental endangerment, and
- supplying false information by mishandling required documents.

To begin, it is critical to note that "knowingly" is specifically defined in ORS 468.020 to include both the meaning given to the term under the OCC definition in ORS 161.085 <u>and</u> what criminal lawyers call willful blindness: knowingly can mean "a person acts with conscious purpose to avoid knowledge of a conduct or a circumstance in violation of [environmental requirements]." So, a client who deliberately avoids knowing what is happening at a plant is as guilty as the client who has actual knowledge.

Take a rather common example: mishandling storage of hazardous wastes. This occurs whenever a facility violates the conditions placed on conditionally exempt generators or small quantity generators of hazardous wastes, and as a consequence needs a treatment, storage or disposal facility (TSDF) permit. It is a misdemeanor for a person, in violation of the TSDF permit requirement, to knowingly store hazardous waste. If a plant manager avoids knowledge of how his plant is handling hazardous waste, he is as guilty as the manager who knowingly allows his plant to accumulate sufficient waste so that it is no longer qualifies as a conditionally exempt or small quantity generator, but chooses not to obtain a TSDF permit.

In cases of actual knowledge, let us look at what the plant manager might need to know. Obviously, the defendant must know that he is storing something. But, there are other questions to answer: does he need to know that he is storing a waste that is hazardous in character? Does he need to know that the waste being stored is classified as hazardous waste? Does he need to know that how much waste is being stored? Does he need to know that the law requires a permit if he is storing more than a certain amount of waste? Does he need to know that the facility does not have a permit? Does he need to know that a permit is required?

The OCC indicates that when a statute defining an offense contains a mental state requirement, that mental state requirement applies to all material elements of the crime "that necessarily require a culpable mental state." The Oregon Supreme Court has defined "material element" to include all elements defining the offense, not including elements such as jurisdiction, venue, and such. Thus, in the example above, the defendant must know he is committing the acts that the law considers "storing." But he does not need to know that the law considers those acts to be "storing." State v. Maxwell, 161 Or App 468 (1999).

But what if the defendant mistakenly believes that the facility has a permit? That would appear to be a mistake of fact rather than the mistake of law analysis adopted in *Maxwell*. Looking back to the statute, the language that makes knowing storage of hazardous waste a crime is the "violation of ORS 466.095 or 466.100 or any rule, standard, license, permit or order adopted or issued under ORS 466.020, 466.095 or 466.100." ORS 466.100 forbids disposal of hazardous waste except at permitted hazardous waste disposal sites. But, there is no mental state word connected to the violation clause and it precedes the words "knowingly treats, stores, or disposes." Ordinary statutory interpretation would not apply the "knowing" requirement to any aspect of the violation because of the careful placement of the "knowing" mental state requirement after the violation clause and before the conduct of treat, store or dispose. But, ORS 161.115 (1) takes the mental state word in the crime and applies it to all material elements "that necessarily require a culpable mental state." Similarly, 161.095 (2) requires a culpable mental state for all material elements "that necessarily require a culpable mental state."

The question becomes what do ORS 161.115 (1) and ORS 161.095 (2) mean? Based on the Oregon courts' interpretation of "material elements," the element of violating Oregon hazardous waste law is clearly a material element. But, is it a material element "that necessarily require[s] a culpable mental state?" The Oregon Supreme Court has refused to make sense of this phrase in ORS 161.095 (2) observing that this section appears to be circular. *State v. Rutley*, 363 Or 368 (2007); *State v. Blanton*, 284 Or 591 (1978). As a result, it has simply thrown up its hands and ignored that phrase. As interpreted by the most recent decision of the Oregon Court of Appeals, if there is a mental state word in the crime, it applies to every material element. *State v. Rutley*, 202 Or App 639 (2005), *rev'd in part on other grounds*, 363 Or 368 (2007). This interpretation is quite problematic in the context of interpreting both the hazardous waste misdemeanors as well as the air pollu-

tion and water pollution misdemeanors, as will become apparent when those crimes are discussed more fully below.

An Alternative Interpretation Restricting the Material Elements That Require a Culpable Mental State

Although Oregon courts have been frustrated in construing the phrase "that necessarily require a culpable mental state" in ORS 161.095 and 161.115, that phrase does not make the OCC mental state requirements circular and should not be simply stricken by the courts as surplusage. The Oregon courts appear to lack the background information necessary to make sense of this phrase and as a result have wrongly decided cases involving mental state.

The best interpretation of that phrase in both ORS 161.095 and ORS 161.115 derives from the common law doctrine of mens rea. The common law required that the defendant have a culpable mental state with respect to any circumstance element that was essential to the wrongfulness of the defendant's conduct. For example, the defendant in a burglary needs have a culpable mental state as to the dwelling being that "of another" (i.e. someone else's house) because if the house was his own there would be nothing wrong with breaking and entering into it. On the other hand, the defendant in a burglary does not need to have a culpable mental state as to the building in question being a "dwelling." If the defendant thinks he's breaking into someone's office, but it turns out to be someone's dwelling because they routinely sleep in the office, the defendant still committed conduct that was wrongful and the element of "dwelling" is thus not essential to the wrongfulness of his conduct. Thus, ORS 161.095 and ORS 161.115 should be interpreted to give meaning to the phrase "that necessarily require a culpable mental state," and the meaning, supplied by the common law, is that a culpable mental state is required only for material elements essential to the wrongfulness of the defendant's conduct.

In the case of unlawful disposal, treatment or storage in the second degree, is the circumstance that the defendant's conduct violates hazardous waste law essential to the wrongfulness of the conduct? Possibly one could argue that disposing, treating or storing hazardous waste is always wrong even without a violation of law. However, more realistically, the key to why the defendant's conduct is wrong is that it violates a legal requirement regarding the safe handling of hazardous waste. So, not having a permit required by hazardous waste law is essential to the wrongfulness of the conduct and the knowingly mental state must be applied. Thus, if one mistakenly believed one had a permit, but actually did not, ORS 161.115 (1) would prevent a conviction.

But, what if one knows one does not have a permit, but mistakenly believes that hazardous waste law does not require a permit. That is a mistake of non-criminal law, which in a majority of states is treated like a mistake of criminal law, i.e. it is not a defense. In a minority of states, a mistake of non-criminal law is treated like a mistake of fact, i.e. it is a defense. What is the Oregon position on this question? Honestly, we do not know.

Yet, the offense of unlawful disposal, treatment or storage of hazardous waste in the second degree needs to be construed in light of its sister felony, unlawful disposal, treatment or storage of hazardous waste in the first degree. The only attribute that distinguishes the two crimes is that the first degree felony requires the defendant acted in knowing disregard of the law. Thus, this misdemeanor should not be construed to require knowing disregard of hazardous waste law. Similarly, the unlawful transportation of hazardous waste misdemeanor should not be construed to require knowing disregard of hazardous waste law.

Interpreting the "Knowingly Violate" Requirement in the Misdemeanor Air Pollution Crime and the Misdemeanor Water Pollution Crime

Unlawful air pollution in the second degree punishes persons who "knowingly violate" various air pollution control requirements. Because it is structured so differently from the hazardous waste misdemeanors, one might interpret this crime to require knowledge of the pollution control requirements being violated. However, three considerations counsel against such an interpretation and in favor of interpreting them in the same manner as the hazardous waste misdemeanors. First and foremost, like the crimes analyzed above, the only difference between a second degree misdemeanor and a first degree felony is "knowingly disregards the law in committing the violation." So, to preserve the distinction between the felony and the misdemeanor, the misdemeanor air pollution crime should be interpreted to require knowledge of the facts that constitute a violation, not knowledge of the law that makes the facts a violation. Second, similarly worded federal statutes are construed in that manner. Third, that construction is consistent with the general principles of criminal law regarding mistakes of non-criminal law.

Unlawful water pollution in the second degree punishes a person who "with criminal negligence violates" various water pollution control requirements. A common sense construction might require criminal negligence as to the non-criminal law being violated, the water pollution control requirements. Unlike the misdemeanor air pollution crime, the felony requires knowing conduct that leads to water pollution, not just negligent conduct. So the analysis used for the hazardous waste misdemeanors and the air pollution misdemeanor, that the felony and misdemeanor would be indistinguishable if so interpreted, does not apply in this case. Yet the parallel language between the

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misdemeanor air pollution crime and the misdemeanor water pollution crime suggests that they should be construed similarly. Also, the general principles of criminal law regarding mistakes of non-criminal law suggest that a criminally negligent mistake of non-criminal law should not excuse a defendant who is criminally negligent with respect to the conduct, circumstances, and results that constitute a water pollution violation.

The Mental State Requirements for Environmental Endangerment

The most serious environmental felony, environmental endangerment, is committed when one knowingly commits felony hazardous waste, air pollution or water pollution crimes and "as a result, places another person in imminent danger of death or causes serious physical injury." The problematic interpretation of ORS 161.115(1) is most dramatic with respect to this crime, which is a felony punishable by 15 years in prison and a $1 million fine for individuals and a $2 million fine for corporations and other organizations. Following the rule of ORS 161.115 (1) as currently interpreted by Oregon courts, the knowingly mental state requirement should be extended to the endangerment element, requiring that the defendant know that by his conduct he was placing someone in imminent danger of death or causing serious bodily injury. This will be a difficult burden for the State to meet even in the most egregious cases. However, if one adopts the alternative interpretation suggested above and gives weight to the restrictive language of "that necessarily requires a culpable mental state," endangerment is not essential to the wrongfulness of defendant's conduct (which already constitutes a felony). So, under the alternative interpretation or giving weight to the legislature's structuring of the statute, no mental state is required for the endangerment element.

Conclusion

When counseling clients about potential criminal liability, one must use care in discussing the mental state requirements of environmental crimes. Those who litigate these cases should appreciate the lack of case law construing the mental state requirements associated with environmental crimes, use care in articulating the mental state requirements associated with these crimes, and anticipate that a great deal of litigation will be necessary before the courts fully flesh out just exactly what a defendant must be thinking to commit an Oregon environmental crime. Otherwise, you may get ensnared in these traps for the unwary.

It's For the Birds: Criminal Prosecution of Wind Energy Producers

By Ryan McGraw, J.D./M.B.A. 2009 (expected)
Willamette University

This article argues that rapid deployment of wind turbines is an essential component of the effort to mitigate climate change and that the substantial exposure of the wind industry to possible criminal prosecution for causing bird death must be eliminated by amending the Endangered Species Act, the Migratory Bird Treaty Act, and the Bald and Golden Eagle Protection Act to exempt bird fatalities caused by collisions with wind turbines.

Why Wind?

Wind energy has become a key alternative energy source in our battle to cut greenhouse gas emissions and mitigate global warming. Conventional electricity generation is the largest industrial source of greenhouse gas (GHG) emissions, accounting for over 40% of emissions from energy, while wind energy generation emits zero pollutants. Wind generated electricity currently displaces 28 million tons of CO_2 per year in the United States with the potential to displace upwards of 800 million tons CO_2 per year by 2030.

According to the American Wind Energy Association, wind energy currently accounts for nearly 1% of America's electricity supply with a total installed capacity of approximately 19,500 megawatts ("MW"). Growth in the wind industry has been rapid, with a 45% increase in installed capacity in calendar year 2007 alone, and in the past 10 years the cumulative capacity from wind energy has increased more than five-fold. Figure 1 shows annual and cumulative capacity of wind energy in the United States.

Wind energy is an extremely efficient energy source as measured by its energy payback ratio (EPR). The EPR is the amount of energy produced divided by the amount of energy invested, thus the higher the ratio, the more efficient the energy source. An Elsevier Science study compared the various EPR of various energy options. According to the study, wind energy has the second highest EPR with a ratio of 39. Figure 2 indicates the study's results.

The Environmental Drawback: Wind Turbines Kill Birds

The chief environmental drawback of wind energy is its effect on birds. Since

at least the early 1980s, wind turbines have been known to kill birds due to collisions. Estimates on the amount of deaths are widely varied, due to inaccuracies in reporting, collection, and scavenging. In addition, bird kills can be minimized by turbine design and location. However, one commonly accepted figure is that a wind turbine generally kills an average of 1-2 birds per year. These bird fatalities cause significant tension within the wind energy industry, as media coverage has spawned public uneasiness, mitigation costs have soared, and cases are beginning to be litigated.

Federal Laws Protecting Birds Could Be Enforced Against the Wind Industry

Three federal laws arguably apply against those in the wind energy industry who construct or operate wind turbines due to the bird fatalities caused by turbine collisions: the Endangered Species Act (ESA), the Migratory Bird Treaty Act (MBTA), and the Bald and Golden Eagle Protection Act (BGEPA) (called collectively the "bird laws").

Endangered Species Act

Those in the wind industry constructing and operating wind turbines that kill birds face possible ESA criminal enforcement action, in addition to civil enforcement under a strict liability standard.

Under the ESA, a defendant is criminally liable if the defendant knowingly violates a number of provisions of the statute and regulations, including the provision forbidding acts that cause a take of a threatened or endangered species. Killing birds by constructing or operating wind turbines appears to fit within the ESA's broad definition of take. Defendants "take" wildlife if they "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Courts interpret "take" broadly, with one court stating that it should be "construed in the broadest possible manner to include every conceivable way in which a person can take or attempt to take...wildlife." The U.S. Supreme Court in *Babbit v. Sweet Home Chapter of Communities for a Great Oregon*, 515 US 687 (1995), approved the broad definition of harm found in U.S. Fish and Wildlife regulations, 50 C.F.R. Part 17. The Court held that logging operations adversely modifying habitat of listed species in ways that led to actual killing of members of the species does constitute a taking under the ESA. An example of the breadth of ESA takings can be found in *Palila v. Hawaii Dept, of Land and Natural Resources (Palila II),* 852 F.2d 1106 (1988), in which the Ninth Circuit held that a taking occurred when a state agency allowed sheep to graze on tree seedlings that, when fully grown, *might* have fed or sheltered endangered birds. Note, however, that elements of actual and proximate causation still must be met.

"Knowledge" for the purposes of the ESA is interpreted to be general intent. General intent can be established by showing that the defendant had knowledge s/he was taking an animal,

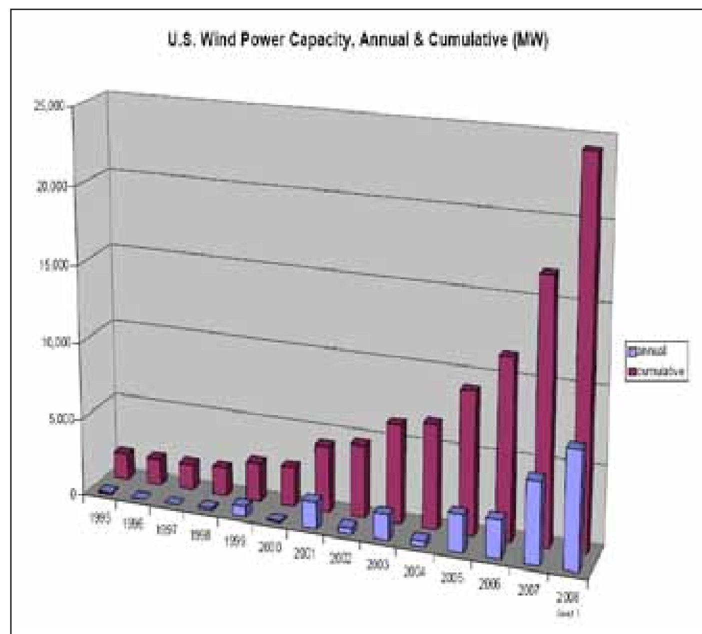

Figure 1: ***U.S. Annual and Cumulative Wind Power Capacity***
Source: www.awea.org

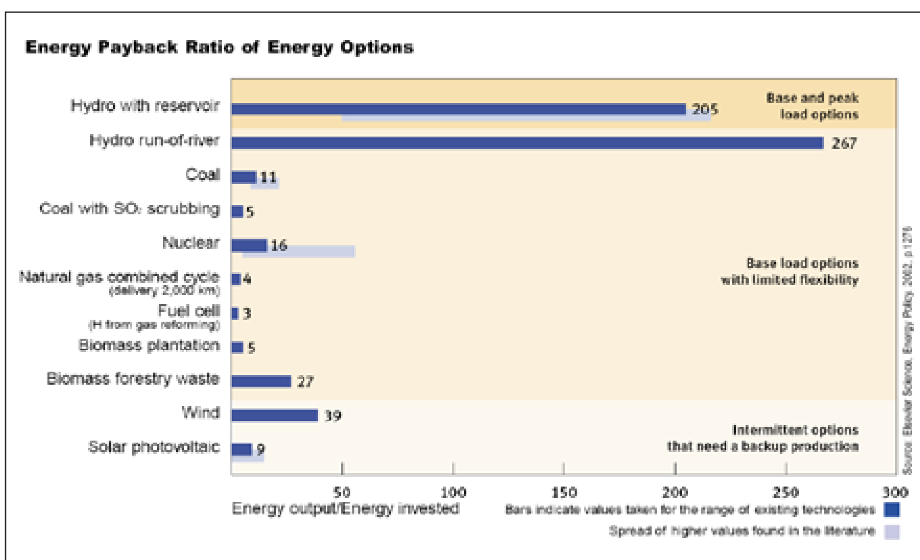

Figure 2: ***Energy Payback Ratio of Energy Options***
Source: www.hydropower.org

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regardless of whether s/he knew it was protected. When convicted of knowingly killing an animal under the ESA, a defendant can be fined $50,000 per violation up to $250,000 for individuals and $500,000 for an organization, and imprisoned for up to one year.

The Migratory Bird Treaty Act

The wind industry also may face criminal enforcement under the Migratory Bird Treaty Act, 16 USC § 703-711, in addition to being strict liable for civil penalties.

A defendant commits a misdemeanor under the MBTA if the defendant's act caused a take or kill of a native migratory bird. The government must prove the defendant did "by any means or in any manner…take... [or] kill…any migratory bird, [or] any part, nest, or egg of any such bird ..." Under the U.S. Fish and Wildlife Service regulations, 50 CFR Part 10, "take" for purposes of the MBTA is defined as to "pursue, hunt, shoot, wound, kill, trap, capture, or collect," or to attempt any such act.

The Ninth Circuit held in *Seattle Audubon v. Evans* 952 F.2d 297 (9th Cir. 1991), that this regulatory definition proscribes only conduct traditionally undertaken by hunters and poachers. Under *Seattle Audubon*, obviously construction and operation of wind turbines that incidentally kill migratory birds would not constitute a take under the MBTA because those activities are not traditionally performed by hunters and poachers

In earlier cases, the Ninth Circuit was more liberal in applying the MBTA. In *United States v. Corbin Farm Serv.*, 578 F.2d 259 (9th Cir. 1978), the court held that the misapplication of pesticides to farmlands resulting in the deaths of migratory birds was sufficient to constitute a killing "by any means or in any manner" under the MBTA. In making this decision, the court relied heavily on an amendment to the Act that included the word "poison" within the definition of a "take." The court reasoned that the legislative reliance of the BGEPA on the MBTA and subsequent inclusion of the word "poison" in the BGEPA was sufficient to show legislative intent to include poisoning in the MBTA. Due to the divergent Ninth Circuit holdings, a legal question exists even in the Ninth Circuit regarding whether actions not traditionally performed by hunters and poachers may constitute a take or kill under the MBTA.

The MBTA provides penalties in the form of criminal misdemeanors and felonies, as well as forfeiture of equipment used in the taking or transportation of migratory birds. Since the felony provisions and forfeiture provisions of the MBTA have intent to sell as an element, they are unlikely to be applied to construction and operation of wind turbines. On the other hand, the MBTA misdemeanor is an attractive charge for prosecutors because it does not contain a mental state requirement and can be interpreted as a strict liability offense. Even though the U.S. Supreme Court under *Liparota v. U.S.*, 471 U.S. 419 (1985) and *Staples v. U.S.*, 511 U.S. 600 (1994) interpreted federal criminal statutes to require proof of a culpable mental state when the regulatory violations involve "an innocent activity," Professors Mandiberg and Smith in their environmental crimes treatise *Crimes Against the Environment* (1997) suggest that the *Liparota* and *Staples* innocent activity analysis is limited to felony prosecutions.

Any person violating the MBTA can be convicted of a misdemeanor, fined up to $15,000, and be imprisoned for up to six months. A misdemeanor conviction is based on strict liability, meaning a person unintentionally committing a MBTA violation can still be sentenced to prison. In theory, therefore, a person could pay $15,000 and go to prison for six months if s/he accidentally killed a protected bird in an innocent manner. However, such accidents usually meet with only nominal punishment.

While the MBTA does not provide for heightened penalties after a subsequent offense, courts have held that multiple acts leading to MBTA violations can lead to multiple convictions. If, however, the same transaction leads to multiple takings or killings of protected birds, the defendant may only be convicted of one violation. The "unit of prosecution," therefore, is the transaction leading to the taking of protected birds, and not the raw number of takings.

The Bald and Golden Eagle Protection Act

The wind industry could also face criminal liability as well as civil penalties and forfeiture of wind turbines and other equipment under the Bald and Golden Eagle Protection Act (BGEPA), 16 USC § 668. Under the BGEPA, a defendant is subject to enforcement action if the person knowingly, or with wanton disregard for the consequences of his act, takes a bald or golden eagle without a permit. To "take" means to "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest, or disturb" an eagle. A taking is not necessarily limited to acts traditionally undertaken by hunters but possibly any act that could lead to an eagle being harmed. Takings have thus been found due to electrocutions from power lines, the misapplication of pesticides, and dumping waste water.

The mental state requirement that a person must "know" or act with "wanton disregard for the consequences" is a lower threshold than it might appear on its face. Although courts acknowledge that the BGEPA is not a strict liability offense, some courts construe it as a general intent statute, which only requires an intent to commit the act that naturally and probably would result in harm, even if the accused did not know his/her actions would harm an eagle. Other courts state that specific intent to cause harm must be shown. In short, most courts have held that, as used in the BGEPA, the term "knowledge" means that the accused need only know that wildlife could be harmed by his/her actions for misdemeanor offenses. The government might well be able to make such a showing with respect to persons constructing and operating wind turbines.

A first-time criminal offender may be

fined $5,000 and imprisoned for up to one year. A second or subsequent BGEPA conviction leads to enhanced criminal penalties of $10,000 per violation up to a $250,000 maximum fine for an individual or $500,000 for an organization, and two years in prison. As "the commission of each taking… constitute[s] a separate violation," each taking could be fined the maximum amount under the act. While courts are divided on the issue, recent precedent indicates multiple violations in one conviction can lead to enhanced penalties. In *Street*, the defendant simultaneously pled guilty to two counts of illegally taking bald and golden eagles. Street received a sentence of sixteen months, thereby evoking imposition of the act's enhanced penalty clause. Upon review by the appellate court, the judgment was affirmed on the basis of persuasive U.S. Supreme Court precedent in *Deal v. United States*, 508 U.S. 129 (1993). Invoking enhanced penalties for multiple violations in one conviction means that, if multiple eagles are harmed, the accused can be sentenced to a maximum of two years in prison and ordered to pay a maximum of $10,000 for each eagle s/he harmed.

Imposition of criminal sanctions varies as a function of the violation's severity. In cases involving only the illegal possession of eagle parts, small fines and probationary periods are commonly assessed. When defendants are convicted of illegally hunting and/or selling eagles or eagle parts, criminal fines of $2,000 or more and prison sentences longer than a year have been assessed. In *United States v. Moon Lake Electric Ass'n*, 45 F.Supp.2d 1070 (D. Colo. 1999), a defendant was convicted of illegally killing twelve golden eagles, four ferruginous hawks, and one great horned owl, totaling seven violations of the BGEPA and six violations of the MBTA. Due to the severity of the violation and the ability of the defendant to mitigate harm, a fine of $100,000, a three-year probationary period, and mandatory retrofit of equipment were imposed on the cooperative. Although the violations were not limited to golden eagle deaths, the sanction illustrates the government's ability and willingness to criminally prosecute organizations that do not take steps to mitigate harm to protected birds.

Section 668b(b) states that "all…equipment…used to aid in the taking…of any bird, or part, nest, or egg thereof, in violation of [the BGEPA]…shall be subject to forfeiture to the United States." This means that, even without specific intent to cause harm to an eagle, personal property used in the commission of the violation may be seized by the government. The legal threshold for the government to seize property is thus significantly lower than under the MBTA.

the MBTA," one can argue that takings and killings under the BGEPA must also be performed in a manner traditionally undertaken by hunters and poachers. Thus, this argument should be made simultaneously for the MBTA and BGEPA in the event that the government files charges alleging such violations. Prevailing on this argument would absolve companies and their directors and officers of all liability under the MBTA and BGEPA.

The defendant must be able to distinguish *United States v. Corbin Farm Serv.*, 578 F.2d 259 (9th Cir. 1978), which expanded the coverage of the MBTA in the Ninth Circuit by including poisoning as an illegal method of "taking" migratory birds. The defendant could argue the holdings in *Bull Run, Seattle Audubon* and *Corbin Farm* are consistent. While *Corbin Farm* held that poisoning is covered by the MBTA, the company could argue that poisoning is a traditional method of hunting and poaching. If accepted, the argument would restrict the reach of the MBTA in the Ninth Circuit to methods used by hunters and poachers. As turbine collisions are not now, nor have they ever been, methods of hunting or poaching, and following Ninth Circuit precedent, wind farm operators would not be found guilty of any MBTA or BGEPA violations

While it is true that the Ninth Circuit defines a "take or kill" to apply

Penalty	ESA	MBTA	BGEPA
Maximum Criminal Fine	$50,000	$15,000	$10,000
Maximum Prison Term	1 year	6 Months	2 years
Maximum Civil Fine	$25,000	-	$5,000
Forfeiture	Permissive with felony	Permissive with felony	Permissive

Table 1: ***Penalties Associated with the Bird Laws.***

Do Bird Kills "Take" Under the Bird Laws?

The key issue in any enforcement action against a defendant wind energy company under either the MBTA or the BGEPA is likely to be whether a "take or kill" occurred. The most recent decisions in the Ninth Circuit, *Citizens Interested in Bull Run, Inc. v. Edringon*, 781 F.Supp. 1502 (D. Or. 1991) and *Seattle Audubon v. Evans,* 952 F.2d 297 (9th Cir. 1991) hold that an illegal MBTA taking occurs only when fatalities are due to actions traditionally performed by hunters and poachers. The Ninth Circuit has not yet addressed this question with respect to the BGEPA. Given Ninth Circuit dicta that "the BGEPA was modeled after…

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only in the context of acts traditionally undertaken by hunters and poachers, a circuit split exists on this issue. The District Court of Colorado, for instance, held in *United States v. Moon Lake Electric Ass'n*, 45 F.Supp.2d 1070 (D. Colo. 1999), that a "take or kill" is not restricted to intentionally harmful conduct. In *Moon Lake,* an electrical cooperative was convicted of illegally killing twelve golden eagles, four ferruginous hawks, and one great horned owl by accidental electrocution from power lines. This holding effectively interpreted the reach of the Bird Laws to all acts that harm federally protected birds, taking a different approach than the Ninth Circuit. As such, the government can argue that the court should adopt that approach and hold that avian fatalities due to wind turbine collisions are covered by the Bird Laws.

While a court could justifiably hold either way, the legislative history, public policy, and lack of specific intent required in the Bird Laws likely tips the scales in favor of the government. Moreover, even if the industry did prevail on this argument with respect to the MBTA and the BGEPA, the government could prosecute under the ESA without any difficulty if it could prove that threatened or endangered species had been harmed.

Readers interested in this issue may want to also read John A. McKinsey, *Regulating Avian Impacts Under the Migratory Bird Treaty Act and Other Laws: The Wind Industry Collides with One of Its Own, the Environmental Protection Movement*, 28 Energy L. J. 71 (2007).

Conclusion

The high risk of civil enforcement, criminal prosecution, and forfeiture under the Bird Laws that is faced by the wind industry may depress investment in this critical industry. Congress has an opportunity to spur continued high levels of investment in the wind energy industry at near-zero cost to society by amending the ESA, the MBTA, and the BGEPA to clearly exempt bird fatalities due to wind turbine collisions. Such amendments would drastically reduce the risk to investors that prosecution may occur, which would result in huge cash outflows and reduced cash inflows, and thus drastically reducing the overall value of wind energy investments. Moreover, such amendments are arguably no different than the laws as written today – in such case amendments would serve only to clarify ambiguous language and provide explicit security to investors. As tax subsidies to the wind energy industry are phased out, investors will not be able to justify huge investments in equipment that will not produce the desired returns. The use of amendments to the Bird Laws has the effect of producing an economic stimulus to rational investors by reducing the overall risk of the investment, increasing the value of investing in wind energy, and encouraging development of this critically important alternative energy source.

The current high level of investment in wind energy is of significant importance to the security of our nation and world. As the deleterious effects of global warming are observed at increasing levels, our nation must take action to reduce the amount of GHG emissions on a long-term scale. While wind energy is certainly not the only answer to this problem, it has the potential to become a major part of our renewable portfolio and reduce the overall GHG emissions in the United States. As such, it is critical that the federal government take significant steps to encourage continued high investment levels in wind energy, and that our society understands the need to balance renewable, sustainable energy against the risk of prosecution for unintentional avian fatalities.

A National Perspective on Environmental Criminal Enforcement: Will it Change?

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This article provides a national perspective on federal environmental criminal prosecutions in terms of historical priorities of the U.S. Environmental Protection Agency (EPA) and the Department of Justice (DOJ) and the possible effect of the election on those priorities and on federal environmental criminal enforcement structure and policies more generally. This article also provides insight into other new developments at the federal level that will affect federal environmental crimes prosecutions.

Recent Historical Perspective

In 2007, Grant Nakayama, Assistant Administrator for Compliance and Enforcement in charge of criminal enforcement for the U.S. Environmental Protection Agency (EPA) stated that he expected criminal enforcement to increase, stressing "high-impact" cases expected to most benefit human health and the environment. High impact cases include cases that address an

environmental or health problem was national in scope (*i.e.* one that leaves a significant environmental footprint) with widespread noncompliance.

At the same point in time, DOJ's priorities were slightly broader. Stacey Mitchell, Chief of the U.S. Department of Justice (DOJ) Environmental Crimes Section, indicated DOJ was focusing prosecutions in three specific areas: the Worker Endangerment Initiative; the Vessel initiative and EPA's National Enforcement Priorities. DOJ's Worker Endangerment Initiative prosecutes OSHA and environmental violations together because DOJ believes that companies that ignore OSHA regulations also ignore EPA regulations. Ms. Mitchell indicated, however, that even though OSHA was continuing to refer cases, DOJ did not currently have any new worker endangerment cases. Vessel cases continued to be a focus of the Environmental Crimes Section because the desired deterrent effect had not yet been achieved. In response to EPA's National Enforcement Priorities, DOJ was focusing on Clean Air Act cases and persistent non-compliance with permits under the Clean Water Act.

Based upon the considerable number of cases DOJ prosecuted in 2008, Mitchell's analysis that federal criminal prosecutions have not yet effectively deterred vessel violations appears accurate. In 2008 alone, DOJ concluded seven vessel cases. Six cases involved deliberate discharges of oily water. One case was brought against Kinder Morgan Bulk Terminals Incorporated ("KMBT") located in Portland, Oregon. KMBT was convicted of a felony Ocean Dumping Act offense, for its participation in loading wet, off-specification potash on a vessel that was later dumped into the ocean. The federal court fined KMBT $ 240,000.

Although new worker endangerment cases were not brought in the final two years of the Bush administrative, the Atlantic States case remains illustrative of those cases. The 34-count indictment charged Atlantic States Cast Iron Pipe Co, a subsidiary of McWane Inc., and five named managers, with conspiracy to violate federal clean air and water regulations and laws governing workplace safety, as well as obstruction of criminal and regulatory investigations by the USEPA and OSHA. On April 26, 2006, after a seven month trial and six days of jury deliberations, Atlantic States and four company officials were found guilty of committing flagrant abuses of environmental and worker safety laws. The charges included, among others, the regular discharge of oil into the Delaware River, concealing serious worker injuries from health and safety inspectors, and maintaining a dangerous workplace that contributed to multiple severe injuries and the death of one employee at its Phillipsburg, New Jersey facility. The individual defendants convicted were the plant manager, the maintenance supervisor, the finishing superintendent, and the human resource manager. The former engineering manager at the plant was acquitted on three counts. The case and is the longest environmental crimes trial prosecuted by the USDOJ.

How will the Election Change Federal Environment Criminal Prosecutions ?

Will the election affect EPA and DOJ enforcement policies? The answer, of course, is both yes and no. A change in presidential administrations will undeniably bring new enforcement priorities and initiatives. The Obama Administration, by contrast, will wrestle with environmental enforcement issues raised by increased renewable energy production, expanded biofuel refining and marketing, and newly implemented climate change regulations. As these new priorities filter into the strategic plans and initiatives of the USEPA and the USDOJ, they will inevitably color the enforcement choices made by upper agency management.

These changes at the upper echelons of government, however, do not translate into deeper shifts in on-going enforcement initiatives. The power to choose and pursue environmental enforcement rests largely with career staff and attorneys at the USEPA and USDOJ who will often initiate and manage cases through multiple Presidential administrations. Any effort to intervene in environmental enforcement actions by political appointees or other agencies carries a high risk of public outcry and backlash if those efforts come under public scrutiny. As a result, environmental enforcement initiatives can move forward even when a new Presidential administration directly disagrees with the underlying legal theory of the enforcement action or even seeks changes to regulations that would bar similar future enforcement actions. For example, New Source Review air enforcement actions against utilities and refineries have continued throughout the current Bush Administration despite efforts to reform NSR regulations that would have foreclosed similar lawsuits in the future.

Congressional efforts may also influence enforcement policies in the new Administration. Congress has directly intervened before into EPA's enforcement decisions by mandating the hiring of additional enforcement officers and rejecting efforts to cut enforcement budgets. Beyond forcing the allocation of resources to enforcement efforts, Congress has turned the light of public scrutiny onto environmental enforcement trends under the current Administration to criticize allegedly low numbers of enforcement actions, prosecutions and convictions. This congressional examination has led to reports on the state of CERCLA enforcement as well as inquiries into the scope and nature of prosecutions under the Federal Water Pollution Control Act after the *Rapanos* decision.

This milieu will probably lead to a strong degree of consistency between past and future environmental enforcement policy at the ground level. While the new President will undoubtedly help shape fundamental policy and directions for EPA and DOJ into the future, environmental enforcement – like a steadily paced train on a level track – will initially swerve only slowly through any

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new Administration.

The Crime Victims' Rights Act

The Justice for All Act was signed into law by President George W. Bush on October 30, 2004. The Act contained four major sections, including the Crime Victims' Rights Act (CVRA) enumerating eight victims' rights. Generally, the CVRA requires prosecutors to let victims know that they can seek the advice of an attorney about the rights established by the CVRA; it allows victims to file motions to reopen a plea or a sentence in certain circumstances; and mandates that victims have the right to be reasonably heard at any public proceeding involving release, plea, or sentencing. Either the victim or the government may assert the victim's rights in the district court and may file a petition with the court of appeals if not satisfied. The CVRA requires the Attorney General to designate a DOJ administrative authority to investigate complaints about violations of crime victims' rights and to create sanctions for DOJ employees who fail to meet obligations to victims. However, the CVRA does not create a separate cause of action allowing victims to bring suit against the Federal government, nor is it intended to impair prosecutorial discretion in a case. The CVRA creates no attorney-client relationship between the victim and a DOJ representative.

On March 23, 2005, there was an explosion at the BP Products refinery in Texas City, Texas. Fifteen workers were killed, and more than 170 others were seriously injured. With permission from a federal judge to avoid notifying victims of plea discussions, federal prosecutors and BP worked out a deal and then submitted it to a District Court for approval. The agreement has a BP subsidiary pleading guilty to a violation of the Clean Air Act, calls for a $50 million fine and sentences the oil giant to three years' probation. Twelve of the injured victims joined in a challenge to a plea bargain. The victims were ultimately granted a hearing, and filed 134 impact statements. The victims even made comments on the date BP entered its guilty plea. The District Court denied the victims' request to reject the agreement, and the victims filed a mandamus petition with the Fifth Circuit Court of Appeals.

The Fifth Circuit granted the mandamus, in part because the Fifth Circuit was under a seventy-two (72) hour deadline. The Fifth Circuit ultimately held that the plea agreement violated the CVRA for two reasons: 1) the government filed sealed, *ex parte* motions when it should have conferred with the victims; 2) the District Court's rationale of protecting BP from prejudicial media coverage was not sufficient to waive the victims' rights under the CVRA. But, the Fifth Circuit did not issue a final writ of mandamus because the victims had all been granted an opportunity to be heard on the date on which BP entered its plea and through their supplemental briefs. The Fifth Circuit's admonished that it leans very heavily upon the District Court to consider the victims rights and expressed confidence that the District Court would "carefully consider [the victims'] objections and briefs as this matter proceeds" when the District Court decides whether to approve the plea agreement.

The victims then asked the United States Supreme Court to delay the action on the plea agreement and contended that the plea deal is too lenient, and that it was worked out without any input from the victims in violation of the CVRA. The issue in the stay application was the standard of review to be applied by federal appeals courts when crime victims seek an order to compel a judge to uphold their rights under the CVRA.

In July 2008, the U.S. Supreme Court denied a request by the victims to stop a settlement in the case. The Supreme Court's action made Judge Lee Rosenthal's decision on approval of the plea agreement the next step in sentencing. Judge Rosenthal heard evidence on medical bills and lost wages of people who died or were hurt in the 2005 explosion at BP's Texas City refinery to determine whether a $50 million fine is sufficient given tangible victim losses, but she refused to consider non-economic losses. On March 12, 2009, she approved the plea agreement of a $50 million fine and three years probation.

McNulty Issues

On August 28, 2008, Deputy Attorney General Mark R. Filip announced that DOJ has revised its corporate charging guidelines. The new guidelines address one issues of particular interest, the area of cooperation credit. The revised guidelines state that credit for cooperation will not depend on the corporation's waiver of attorney-client privilege or work product protection. Rather, credit for cooperation will depend upon the disclosure of relevant facts. Corporations that disclose relevant facts may receive due credit for cooperation, regardless of whether they waive attorney-client privilege or work product protection in the process. Corporations that do not disclose relevant facts may not receive such credit. Under the predecessor policies (the Thompson and McNulty memoranda) federal prosecutors were allowed to request the disclosure of non-factual attorney-client privileged communications and work product. With two well established exceptions, the new guidance forbids it.

The new guidelines also introduce changes beyond the question of attorney-client privilege and work product waivers. They instruct prosecutors not to consider a corporation's advancement of attorneys' fees to employees when evaluating cooperation. They also make clear that the mere participation in a joint defense agreement will not render a corporation ineligible for cooperation credit. In addition, the new guidance provides that prosecutors may not consider whether a corporation has sanctioned or retained culpable employees in evaluating whether to assign cooperation credit to the corporation.

The announced revisions and policy changes are being included for the first time to the United States Attorneys Manual, which is binding on all federal prosecutors within DOJ. For more information about the DOJ's Principles of Federal Prosecution of Business Organizations, you can visit the DOJ's

web site at http://www.usdoj.gov. To read Deputy Attorney General Mark R. Filip's speech announcing the changes - ttp://www.usdoj.gov/dag/speeches/2008/dag-speech-0808286.html.

The change in the policy was DOJ's attempt to forestall the Attorney-Client Privilege Protection Act (HR 3013), which passed the House and awaits action in the Senate. The Attorney-Client Privilege Protection Act would protect the privilege in any federal investigation or criminal or civil enforcement matter. That legislation would prevent future administrations from overturning the Filip directive and apply it to all agencies, not just DOJ.

Research Resources

Readers may benefit from reviewing the research resources that are listed below:

Mandiberg and Smith, Crimes Against the Environment (LEXIS 1997 with supplements through 2004)
Comprehensive treatise covering all aspects of criminal, administrative, environmental, wildlife and natural resources law pertinent to federal environmental crimes. This resource should soon be available without charge on line at SSRN.

Kathleen F. Brickey, Environmental Crime: Law, Policy, Prosecution, Aspen Publishers (2008) Introductory text on federal environmental crimes by white collar criminal expert.

Environmental Crimes Blog, Walter James III, author, http://www.environmentalblog.typepad.com/

Environmental Law Prof Blog, Susan L. Smith, editor and author, http://lawprofessors.typepad.com/environmental_law/

U.S. EPA Criminal Enforcement website, http://www.epa.gov/compliance/criminal/

International Network for Environmental Compliance and Enforcement website, http://www.inece.org/

Environmental Crimes, Natural Resources & Environment magazine, (ABA Section on Environment, Energy and Resources Winter 2009)

Martin Harrell, Joseph J. Lisa, and Catherine L. Votaw, Federal Environmental Crime: A Different Kind of "White Collar" Prosecution

Milo C. Mason and Paul B. Smyth, Reviewing Nonreviewable Prosecutorial Discretion: What and Who Is Behind the Big, Powerful Curtain

James J. Periconi, The State of Environmental Crimes Prosecutions in New York

Claudia A. McMurray, Wildlife Trafficking: U.S. Efforts to Tackle a Global Crisis

Ani Youatt and Thomas Cmar, The Fight for Red Gold: Ending Illegal Mahogany Trade from Peru

Susan F. Mandiberg, What Does an Environmental Criminal Know?

J. T. Morgan, The Mythical Erosion of Mens Rea

Kirk F. Marty, Criminal Prosecution of Responsible Corporate Officers and Negligent Conduct under Environmental Law

Kevin M. Cassidy, The Role of Motive in White Collar Environmental Crimes

Judson W. Starr, Brian L. Flack, and Allison D. Foley, A New Intersection: Environmental Crimes and Victims' Rights

James D. Oesterle, "Citizen Rewards" to Promote Environmental Crimes Prosecutions

Gregory F. Linsin, Environmental Self-Audit and Voluntary Disclosure to What End?