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Is Increased Criminal Liability for Regulatory Offenses Justified?

Collaboration

*Feds, States Get
Together on Regs*

Contention

*Agencies, Courts on
Waters of the U.S.*

Debate

*More Habitat
Conservation Plans?*

Time for Environmental Crimes

Criminal prosecution for major regulatory offenses, for a while the norm and then the exception, is once again on the rise. Government officials, facing dwindling enforcement budgets, are hauling malfeasant corporations and their executives into court to face charges. Will new legislation undermine their efforts?



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EDITOR'S NOTE: We are pleased to feature another-view *SIDEBARS* on criminal enforcement by representatives of the Justice Department, the defense bar, and the oil and gas industry and would welcome other views on this topic in future editions. We also invited the companies featured in this article to submit *SIDEBARS*, but they declined to do so at this time.

The world did a double-take last September when U.S. regulators revealed that Volkswagen had installed a “cheat device” on an estimated 11 million diesel cars, with some 500,000 on the road in the United States. Operated through the vehicle’s software, the mechanism shut down pollution controls on the road, making the cars faster and more powerful — but increasing emissions anywhere from 10 to 40 percent higher than permitted by law. Clever technology reactivated the controls when the vehicle was evaluated for compliance with the Clean Air Act’s National Ambient Air Quality Standards for ozone at a governmental facility, burning off enough nitrogen oxide emissions that the vehicles squeaked by the test.

Harvard and MIT experts calculate that the added pollution killed as many as 59 people in the United States and imposed social costs (illness, days off work, etc.) of up to \$450 million. Global totals — diesels are much more popular overseas — are proportionally higher. The ruse was such a blatant demonstration of scofflaw behavior that VW’s stock price plunged 35 percent, CEO Martin Winterkorn resigned, and business pundits speculated the giant corporation might even go broke.

The VW matter is the juiciest case to cross the screen of federal environmental prosecutors since their \$4 billion criminal settlement with BP for the Deepwater Horizon disaster. Relegated to pursuing routine cases against cruise ships that illegally dump wastewater offshore, the lawyers at the Department of Justice’s Environmental Crimes Section had suffered the further disappointment of being forced by the courts to drop manslaughter prosecutions against the two BP “company men” who called the shots aboard the Deepwater Horizon leading up to the blowout. VW’s emergence as perhaps the most audacious corporate criminal since Enron galvanized the prosecutors, and a criminal investigation was launched almost immediately. The Detroit U.S. attorney and fraud section specialists are also involved.

Open questions include whether VW’s U.S. managers were aware of the scam; whether American courts can assert jurisdiction over European executives; or if DOJ will focus exclusively on prosecuting the company and settling for a huge fine, as it did in the GM and Toyota auto defect cases. The prosecutors’ relationship with VW management seems quite hostile, and DOJ may have to litigate. Also unresolved are the terms of any potential

settlement: should regulators compel VW to pay for pollution reductions elsewhere, or should compensating its customers take precedence? Public interest groups have already begun to lobby regulators over these issues.

Pulling the camera back a few steps to evaluate the episode in context, VW is not alone. The scandal is but the latest in a spate of recent indictments for crimes involving harm to public health, consumer and worker safety, and the environment. DOJ's



new activism was motivated in part by harsh criticism of its failure to prosecute any of the bankers who played prominent roles in the 2008 economic crash. Dissatisfied with the civil settlements signed by financial institutions even though they forked over billions of dollars, U.S. senators, federal judges, media commentators, and public interest groups speculated that “too big to jail” was Attorney General Eric Holder’s rule of thumb for such cases.

In response, DOJ prosecutors became quite sensitive to reports of mismanaged industrial operations that had violent outcomes, not just in the environmental arena, but with respect to worker and consumer fatalities, injuries, and illness. So far, no one has been able to develop reliable statistics to document an increase in white collar crime in the health, safety, or environmental arenas. Yet a 24/7

news cycle has allowed DOJ to identify potential targets simply by surfing the web.

For example, a series of blatant failures to conform to industry-wide safety standards have led to the sale of contaminated food (peanuts, eggs, ice cream, cantaloupes, spinach, and chicken) that have killed or sickened hundreds and probably thousands, generating several prosecutions. (Food-borne disease is almost always underestimated because of diagnostic and reporting problems.) Stuart Parnell, CEO of the Peanut Corporation of America, was sentenced to 28 years in prison by a federal district court judge in Georgia for shipping peanut paste

that had tested positive for salmonella and appending false “Certificates of Analysis” that promised customers the food was safe. The paste was incorporated into thousands of products and a subsequent outbreak of food poisoning killed nine and sickened 714.

In the fall of 2012, a small compounding pharmacy in Massachusetts shipped thousands of injections contaminated with fungal meningitis nationwide, causing 64 deaths and 751 serious illnesses. The criminal trial in that case involves a potent combination of federal Racketeer Influenced and Corrupt Organization Act and state

second-degree murder charges.

The Upper Big Branch coal mine in West Virginia imploded on April 5, 2010, taking 29 lives in the worst mine disaster in four decades. Massey Energy CEO Don Blankenship was convicted of conspiracy to violate mine safety laws. He’ll be sentenced this spring, although the penalty for his egregious behavior is capped at one year in prison.

A January 2014 spill of 7,500 gallons of 4-methylcyclohexanemethanol into Charleston, West Virginia’s drinking water supply from a rusting tank farm upstream prompted indictments and guilty pleas.

Last but by no means least, the automobile industry has endured a series of embarrassing revelations about unprecedented levels of defects, including sudden unintended acceleration in Toyotas, GM’s faulty ignition switches, Takata’s bursting airbags

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in several carmakers' vehicles, and now VW's cheat devices. Toyota and GM settled for \$1.2 billion and \$900 million, respectively, without acknowledging criminal culpability in "deferred prosecution agreements." The decision to turn the cases civil without pursuing any individual indictments generated a strong backlash from public interest groups. Takata and VW likely may find it more difficult to secure such favorable results. In each case, according to government documents, the companies spent years wringing their hands about problems they should have realized were dangerous defects and neglected to make timely notice to federal regulators.

The upshot of all this activity is that federal prosecutors are now opening a criminal investigation within days of any well-publicized corporate fiasco involving harm to public health, worker or consumer safety, or the environment. Such investigations do not always produce indictments or convictions, but they are changing perceptions about what is at stake in cases where noncompliance with the most basic safety rules produces accidents that are both foreseeable and preventable and result in mass suffering.

Action is now encouraged from the top. Holder's successor as attorney general, career prosecutor Loretta Lynch, has signaled that she supports this more aggressive approach. Just days before the VW revelations, Sally Yates, DOJ's deputy attorney general, issued a memorandum directing prosecutors to emphasize charges against individual corporate executives whenever possible. The first opportunity to implement the new policy may well involve VW executives.

DOJ's toughening stance seems to have accelerated the momentum of conservative efforts on Capitol Hill to weaken the laws that apply to so-called "regulatory crimes," shoving health, safety, and environmental criminal enforcement into the powerful cross-currents of an election year. Leading the charge for making it tougher to prosecute white collar crimes in the health, safety, and environmental arenas are the Heritage Foundation, the Cato Institute, and Koch Industries. Resisting these reforms are DOJ prosecutors, the Center for American Progress, and Public Citizen. On the campaign trail, Democrats Hillary Clinton and Bernie Sanders compete avidly over who will be toughest on

Wall Street (a reference read as extending to the manufacturing sector), while Republicans promise to eliminate the regulators who investigate such incidents.

What are the shared lessons of the BP and VW fiascoes? Given those lessons, is criminal prosecution a better response than civil penalties and injunctions? Will conservatives succeed in changing federal law to undermine such cases and, if so, to what degree?

The origins of BP's and VW's journeys to disaster are eerily similar. At the outset, according to reporting by the *New York Times*, the *Financial Times*, *Frontline*, and ProPublica, two men with overweening ambition ascended to CEO. BP's John Browne and VW's Martin Winterkorn were determined to transform their already massive corporations into the largest and most powerful in their respective global industries. They embarked on relentless and single-minded crusades to out-maneuver, out-sell, out-innovate, and buy-out competitors. Browne's mania, described in detail by President Obama's Oil Spill Commission, which was chaired by former Senator Bill Nelson, a Florida Democrat, and former EPA Administrator William Reilly, who served a Republican president, created an atmosphere where bad news from mid-level managers simply was not tolerated. Other disturbing phenomena soon emerged, including "groupthink" (a group gravitates toward consensus without rigorous discussion); "consensus decisionmaking" (diffusing individual accountability by asking, often through electronic means, whether anyone dissents); the "normalization of deviance" (some aspect of an industrial operation is malfunctioning but the group rationalizes that deviation until the problem deteriorates to the point that a disastrous failure occurs); and "milking the plant" (running a factory to failure by neglecting maintenance with plant managers hoping the hit to the facility's profitability will manifest on their successors' watch, when restorative work becomes unavoidable). The cumulative result of these disturbing traits was a corporation-wide blindness to the implications of intolerable risk.

BP's sins invariably lead back to colossal neglect

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Criminal Penalties Deter Criminal Behavior

Without adequate enforcement, our environmental laws have little meaning, and fail to serve their purpose of protecting the air, land, water, and natural resources. When I became assistant attorney general, I immediately established as a primary goal of the Environment and Natural Resources Division vigorous enforcement of federal pollution control and wildlife protection laws. I believe criminal prosecutions can and should address and deter egregious conduct that imperils public health and the environment. The division has responded in an exceptional fashion, strategically increasing our criminal enforcement work.

The prosecution of Tonawanda Coke Corporation and its environmental control manager, Mark Kamholz, illustrates the continual need to prosecute violations of our bedrock environmental laws, and to hold both individuals and corporations responsible for their actions.

At the Tonawanda facility in New York, the company's violations of the Clean Air Act resulted in releases of chemicals that can cause cancer and otherwise harm human health. For years, people living in the low-income community near the facility were forced to breathe this contaminated air. These citizens' monitoring helped build the civil and criminal enforcement actions brought by the United States and New York. A jury convicted Tonawanda and Kamholz of multiple CAA and Resource Conservation and Recovery Act violations, resulting in one of the largest court-ordered fines ever levied in an air pollution case. Kamholz's sentence included prison, supervised release, a fine, and community service.

The division is also fighting abuse of a program designed to further our nation's energy independence and combat climate change.

Federal law establishes programs that create monetary incentives for the production of renewable fuels, and biodiesel producers and importers can generate and attach credits — known as renewable identification numbers — to biodiesel they produce or import. Because certain companies need RINs to comply with regulatory obligations, they have significant market value. The department has recently prosecuted several schemes to sell fraudulent RINs and defraud biodiesel buyers and taxpayers. A court just sentenced an individual involved in a RIN fraud scheme to 20 years' imprisonment, three years' supervised release, and a \$56 million restitution payment.

The catastrophic coal ash spill into North Carolina's Dan River in 2014 demonstrates what happens when a corporation neglects its facility infrastructure. Three Duke Energy Corporation subsidiaries pled guilty to nine Clean Water Act violations and were sentenced to five years' probation, a \$68 million fine, and a \$34 million payment for environmental projects and land conservation. When I announced these plea agreements in North Carolina I emphasized that they would also help prevent future environmental disasters by requiring Duke subsidiaries to implement environmental compliance programs that will be overseen by an independent monitor.

Our Vessel Pollution Program is a concentrated effort to prosecute those who illegally discharge pollutants into the oceans, coastal waters, and inland waterways. At the end of my first year at ENRD, criminal penalties imposed in these cases resulted in more than \$359 million in fines and over 30 years of

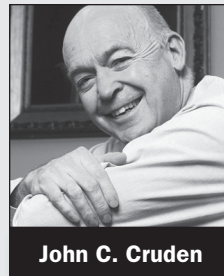
prison. Two German companies recently pled guilty to failing to maintain an accurate oil record book under the Act to Prevent Pollution from Ships and witness tampering, and were sentenced to pay \$1.25 million in fines and a significant community service payment.

Wildlife trafficking is a billion-dollar business that is decimating populations of elephants, rhinoceroses, tigers, and marine species, and threatens security, hinders sustainable development, finances armed groups, and undermines the rule of law. "Operation Crash" is an ongoing multi-agency effort to detect, deter, and prosecute those engaged in the illegal killing of rhinoceroses and trafficking in their horns. This initiative has resulted in more than 25 successful prosecutions, and we are continuing to unravel the international networks involved in these crimes. Defendants in these cases have been sentenced to significant terms of imprisonment and the forfeiture of mil-

lions of dollars. Last year I led the U.S. delegation to the international Wildlife Trafficking Conference in Botswana, where real steps were made to create an international demand reduction strategy and breath new life into enforcement.

The Department of Justice's environmental and wildlife prosecutions send a strong deterrence message and illustrate the vital importance of criminal enforcement of these laws. I am proud of the men and women of the division, who are enforcing the nation's laws in a vigorous but fair manner.

John C. Cruden is the assistant attorney general in charge of the Environment and Natural Resources Division. He was president of ELI from 2011-15.



John C. Cruden

At Volkswagen, CEO Martin Winterkorn's crusade to become the largest automaker in the world faltered on his determination to popularize diesel cars in the United States as fuel-efficient, cleaner alternatives to gasoline

of daily operations. Concerned about the company's public image as breakneck acquisitions produced negative balance sheets, Browne instilled an exceptionally harsh cost-cutting regime across BP's global facilities, delaying basic maintenance, decimating supervisory ranks, eliminating crucial training, and deemphasizing regulatory compliance programs. As explained in the excellent documentary *The Spill*, produced by *Frontline* and PBS, these practices produced two precursors to the Gulf of Mexico spill: a massive oil leak on the North Slope of Alaska from a pipeline BP had neglected to inspect or repair, and a fatal explosion at its aging Texas City refinery that could have been avoided by a capital investment of \$150,000.

At VW, Winterkorn's crusade to become the largest automaker in the world faltered on his determination to popularize diesel cars in the United States as fuel-efficient, cleaner alternatives to gasoline. According to in-depth reporting by the *Financial Times*, the company had a "dysfunctional corporate culture" that tolerated rulebreaking. In 2005, as VW prepared to roll out the new U.S. models, engineers discovered that the air emissions control devices would flunk U.S. testing, which was substantially stricter than comparable European requirements. A *Scientific American* analysis of the engineering challenges confronted by the company explains that such equipment is difficult to design because the best devices are bulky and require constant maintenance. VW tried to avoid these problems by using a cheaper version with no maintenance demands. Rather than go back to the drawing board and delay the rollout when they learned their emissions devices were not working well, some as-yet-unknown group of executives told the engineers to invent a fix, which turned out to be the cheat device.

Sadly, none of the agencies responsible for policing BP or VW was able to disrupt these displays of corporate hubris. The agencies conducted routine enforcement regarding BP, while VW's fraud was overlooked for almost a decade.

Working with two sets of regulators — EPA and OSHA — DOJ prosecutors forced BP to sign corporate criminal and civil settlements regarding

the North Slope spill and the fatal Texas City explosion. Browne apologized after both incidents and pledged to do better. The company paid penalties and fines in the tens of millions of dollars. The penalties were hailed as the highest ever collected by OSHA but they amounted to a small nuisance in the context of BP's multi-billion-dollar bottom line. BP paid for a blue ribbon taskforce to investigate Texas City and to

address the urgent question of whether conditions at its other refineries were as bad. Chaired by no less a public figure than James Baker, secretary of state during the George H.W. Bush administration, the group's report was a withering condemnation of BP's reckless disregard of fundamental safety rules at its refineries. None of these responses changed the corporation's risk-tolerant behavior.

Then, in April 2010, as the Deepwater Horizon crew rushed to close the Macondo well temporarily so that the drilling rig could be towed off to its next assignment and BP could stop paying \$1 million a day in rent, the company's misadventures in America produced another tragic outcome. As revealed by the Oil Spill Commission's report, the chain of command aboard the rig was nothing less than dysfunctional. Not only was responsibility for different aspects of this high-hazard operation diffused among three companies — BP, Transocean (owner of the rig), and Halliburton (manufacturer of the cement used to plug the well) — but BP's structure for decisionmaking had degenerated into a babble of voices, with engineers sitting in Houston making recommendations to the "company men" aboard the rig. This chaotic process had no effective checks or balances because regulators at the Department of the Interior and the Coast Guard were desperately short-staffed and technically unprepared to evaluate risks aboard thousands of rigs and platforms. Unlike the comparable British regulatory regime applicable to deepwell production in the North Sea, DOI did not require a unified command organized under a single individual at the company.

Turning to VW, as its diesels gradually took hold in the American market, the cheat device located on the cars worked quite well, until years after it was first installed, when an obscure group of researchers at West Virginia University discovered it

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Weighing Intent in Environmental Prosecutions

Criminal prosecution is absolutely warranted when corporations or individuals intentionally commit environmental crimes. However, federal and state environmental statutes impose criminal liability for wrongful environmental acts absent a strict *mens rea* requirement demonstrating intent or willfulness to commit alleged criminal acts. Accordingly, criminal prosecution by the government can sometimes occur on a negligence or strict liability basis.

According to the Justice Department, from 1998 through 2014 it concluded criminal cases against more than 1,083 individuals and 404 corporate defendants for environmental violations, resulting in a total of 774 years of incarceration and \$825 million in criminal fines and restitution. EPA adds that in 2015, federal environmental prosecutions resulted in 129 years of incarceration for sentenced defendants and generated \$404 million in combined federal administrative, civil judicial penalties, and criminal fines plus \$4 billion in court-ordered environmental projects.

Yet different results ensue when the government or its agents engage in conduct that arguably would result in prosecution if private sector actors did the same thing. Consider these two recent examples.

On August 5, 2015, EPA contractors working to pump and treat contaminated water at the Gold King Mine near Durango, Colorado, inappropriately used heavy equipment and failed to correctly gauge water pressure within the abandoned mine, resulting in a discharge of more than 3 million gallons of contaminated wastewater into the Animas River. Lead levels rose to 12,000 times in excess of applicable standards. Colorado declared a state of emergency as the Animas

turned an eerie fluorescent yellow. Local residents expressed concerns about their health and businesses were shut down.

EPA waited more than 24 hours before providing state and local officials with specific information about the incident and its potential health effects. It was later learned through a Freedom of Information Act request that, prior to the spill, the government “knew of a blowout risk for tainted water at the mine.” EPA Administrator Gina McCarthy accepted responsibility for the accident on behalf of the agency, stating she was “absolutely, deeply sorry that this ever happened.”

Under the Safe Drinking Water Act, EPA regulates lead in drinking water through the Lead and Copper Rule, which includes use of corrosion control to prevent lead from leaching into water. In a cost-cutting move in 2014, the city of Flint, Michigan, stopped purchasing treated water from the city of Detroit and began using the Flint River as its water source without providing corrosion control treatment. Several months later, following a number of boil-water advisories for the residents of Flint, tests confirmed the presence of unacceptable amounts of lead in its drinking water.

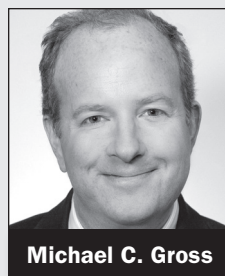
Residents began to complain to EPA about these concerns. A June 2015 internal EPA memo called the lack of corrosion control “a major concern.” Yet the agency took no immediate action and elected not to release the memo for more than four months so it could be “revised and fully vetted by EPA management.” By September, high levels of lead were confirmed through blood tests of children, and a month later, Flint was switched back to Detroit’s water system.

While EPA persists in arguing that fault lies with the Michigan Department of Environmental Quality, the EPA regional administrator was ultimately fired. McCarthy has since said, “We know Flint is a situation that never should have happened.” A member of Congress told McCarthy, “You had authority under the law and you didn’t do it.”

The environmental tragedies of the Animas and Flint appear to be accidents and not intentional bad acts. Both incidents demonstrate that EPA, charged with enforcing federal environmental laws and recommending civil matters for potential criminal enforcement to the Department of Justice, is not infallible. But unlike the regulated community, EPA enjoys sovereign immunity for these highly publicized environmental disasters.

Yet consider how private actors would have been treated in these circumstances. Under some current federal and state environmental laws, criminal prosecution and substantial civil penalties can be sought against private companies and individuals absent willful behavior for accidents which adversely impact the environment. These same players are also susceptible to follow-on civil lawsuits by private parties seeking restitution for resulting damages.

Criminal referrals and environmental prosecution should be limited to clear cases of intentional misconduct. In so doing, we can restore the public’s faith in the ability of environmental regulators to protect the environment and treat the regulated community fairly.



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by accident. According to NPR, a small environmental group had hired the engineering team to test on-road diesel emissions from cars. They expected the U.S. cars to drive cleaner than those from Europe. By happenstance, two American-owned VWs ended up in the initial mix of test objects. The researchers soon observed a significant gap between on-road emissions and emissions levels measured during stationary testing. They informed California and EPA regulators. After weeks of wrangling with defiant VW executives, EPA and the California Air Resources Board initiated enforcement.

This sequence would be less damning of regulatory capacity if cheat devices were a new invention. But old documents made available to reporters by the Center for Auto Safety revealed that EPA had been aware of them almost since its inception. The documents showed that VW had paid a \$120,000 penalty to EPA for installing cheat devices in its cars as far back as 1974. In 1998 EPA settled a massive \$1 billion case against diesel engine manufacturers for cheat devices on trucks.

Conservative critics of criminal enforcement might claim that bureaucratic incompetence was to blame for these failures, not criminal behavior. They might also argue that BP and VW are rogue outliers and have been more than adequately punished by the marketplace. Moderates and liberals would respond that weak laws, budget shortfalls, and relentless bipartisan ridicule have undermined the agencies' ability to prevent disasters. They would say that BP and VW are just the most extreme examples of corporations succumbing to the pressures of globalization at the expense of more fundamental values like worker and consumer safety and the protection of the environment.

At the beginning of the 20th century, some prominent sociologists believed that criminality was rooted in mental illness and social class. Criminals, especially violent ones, were born to lower-class mothers and fathers with bad genes. In a landmark 1939 speech to the American Sociological Society, Edwin Sutherland began one of the most effective assaults on these assumptions by coining the phrase

"white collar crime" to describe the roster of illegal acts committed in the course of doing business by people of otherwise respectable social standing.

The federal government's expansion, spurred by the New Deal, accelerated by the Great Society, and triggered again by post-Vietnam and -Watergate reforms, persuaded Congress to substantially increase the universe of white collar federal crimes. Many were tied

to the regulatory system, including crimes involving harm to public health, worker or consumer safety, and the environment. A seminal 1943 Supreme Court case, *U.S. v. Dotterweich*, which involved the sale of adulterated drugs, established the concept of "public welfare offenses." Justice Felix Frankfurter's opinion justified application of the "responsible corporate officer" (also known as the "responsible relation") doctrine for such offenses when the "circumstances of modern industrialism" affect "the lives and health of people" who "are largely beyond self-protection." In 1975, the Court reaffirmed the doctrine in *U.S. v. Park*, which involved unsanitary conditions in a food warehouse. Both cases featured the prosecution of individual managers who supervised lower-level employees and could have prevented the illegal acts. The responsible corporate officer doctrine is correctly understood as expanding the universe of people who might be culpable for acts (or emissions) they controlled rather than only for activities they personally accomplished.

Despite these important developments, federal, state, and local police remained overwhelmingly preoccupied — and very busy — prosecuting street crime, including nonviolent drug offenses. Today, with five percent of the world's population, the United States is home to 25 percent of its prisoners. One in three American adults has a criminal record. Even among elite federal investigative units like the FBI, concerns over terrorism have crowded out any capacity to develop white collar cases in either the financial or the health, safety, and environmental fields. The result is that, according to University of Texas Law School professor Susan Klein and her student, Ingrid Grobey, regulatory crimes account for only two percent of federal prosecutions.

Environmental criminal enforcement has been one of the few exceptions to this general neglect. It

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The Importance of Prosecutorial Discretion

The oil and natural gas industry's top priority is to operate in a safe and environmentally responsible manner. According to the U.S. Bureau of Labor Statistics, the petroleum industry had 28.9 percent fewer safety incidents than the private sector as a whole from 2005–14. Still, government enforcement of environmental laws is an important part of the oversight process for a highly regulated industry. While there is a role for criminal enforcement, there need to be limits as to when prosecutors criminalize non-intentional behavior.

For the most part, federal environmental laws appropriately recognize that criminal enforcement must be reserved for the worst violations, involving knowing or willful violations. Statutes like the Resource Conservation and Recovery Act, the Pipeline Safety Act, the Endangered Species Act, and the Toxic Substances Control Act include criminal enforcement provisions that apply only to those specific instances where criminal sanctions are truly justified. There are numerous examples where these provisions have been used in a targeted manner to address violations that have involved bad acts.

But there are situations where the environmental laws are silent on what level of *mens rea* is required for criminal liability to attach — or worse, statutes like the Clean Water Act, where the stated *mens rea* is wholly inconsistent with the heightened level of intent that is typically necessary to support a criminal violation. In such instances, it is incumbent on prosecutors to exercise careful discretion to avoid creating liability extending far beyond what is reasonable or what Congress intended. This concern is relevant

not only to the oil and natural gas industry, but also to a wide variety of other private activities, including the everyday activities of the average American citizen.

The Migratory Bird Treaty Act is a perfect example. Enacted in 1918, the MBTA makes it unlawful “to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale . . . [or transport] any migratory bird, any part, nest, or egg of any such bird.” Violations of this broad provision can lead to criminal liability, including up to six months in prison.

The MBTA does not, however, state what *mens rea* is required for a criminal violation, and prosecutors have brought criminal enforcement actions against companies for “passive” violations (i.e., where no person acts to bring about the taking or killing of a protected bird), asserting that no intention is necessary to establish a criminal violation of the statute. A number of federal courts have agreed with this approach, while others have disagreed, including the Fifth Circuit just last year in *United States v. Citgo Petro. Corp.*

A proper reading of the MBTA and its legislative history indicates that the statute does not extend criminal liability to passive violations. Nonetheless, prosecutors continue to pursue criminal sanctions under the MBTA, which makes it an excellent example of where prosecutorial discretion is necessary, due to the potentially vast scope of what could be considered “criminal liability” under the terms of the statute.

The list of migratory bird species includes almost all species of North American birds, including

crows and many types of pigeons. The list of activities that could result in bird deaths is equally broad, ranging from constructing a building to owning a cat. Interpreting the MBTA to apply to passive impacts that result from otherwise lawful activities threatens to punish countless everyday activities, not to mention activities necessary for a multitude of industries to function — even when diligent companies and people take extensive and well-designed precautions.

For environmental statutes where the *mens rea* is low or absent, prosecutors have abundant tools to deter harmful, but not intentional, behavior without having to resort to criminalizing

unintentional acts. Environmental enforcers have collected massive fines and imposed broad reaching injunctive relief under available civil authorities, which typically have a strict liability standard. Prosecutorial discre-

tion is appropriate not only with respect to individuals but also for industry, where the collateral consequences of criminal enforcement can include negative effects to the economy, shareholders, and jobs.

Environmental laws protect our people, our country's natural resources, and our way of life. Criminal enforcement certainly can be appropriate under fitting circumstances, but prosecutors should reserve that enforcement and the accompanying severe consequences for those instances where it is truly warranted.



Stacy Linden

Stacy Linden is vice president, general counsel, and corporate secretary for the American Petroleum Institute.

*BP and VW show
that two trends
could define the
resurrection of white
collar environmental
criminal enforcement:
the waxing of the
multinational
corporation and
the waning of the
regulatory state*

had its heyday from roughly 1987 to 2002. But companies paid only modest penalties. Individuals either were not indicted or did not serve time. In extremely rare cases, they went to low-security prisons for short sentences. The white collar defense bar argued that prosecutors were persecuting their clients for conducting routine business that had great social value. Judges seemed to agree, low-balling sentences for the defendants brought to trial. DOJ's Environmental Crimes Section kept plugging away, but the flow of cases slowed substantially and got little attention.

Meanwhile, back in the mainstream economy, two strong trends converged that not only explain the behavior of BP and VW, but could define the resurrection of white collar environmental criminal enforcement: the waxing of the multinational corporation and the waning of the regulatory state.

Globalization produced the first trend, putting corporations based in developed countries like the United States, Germany, and Japan not just in ferocious competition with each other but looking over their shoulders at growing production capacity in mainland Asia and Africa, where labor and energy costs are lower. As multinationals grew larger, executive rationales for cutting costs and neglecting regulatory compliance were enabled by management structures that diffused accountability. BP's Browne and VW's Winterkorn were men of education, extraordinary entrepreneurial skills, and large-than-life charisma. With the benefit of hindsight, though, how can we fathom what they were thinking as they undertook enormous risks to achieve their goals? Did they understand those risks and just not care, confident that any legal repercussions would never reach them, exhibiting "reckless indifference"? Or were they protected by layers of subordinates too fearful to make waves, exhibiting "willful blindness"?

In either event, such behavior is punishable under federal criminal law. So far, DOJ prosecutors have been very hesitant to climb the corporate ladder toward more senior levels of management using either theory. Unless investigators discover a smok-

ing gun indicating that individual managers were on notice that their operations were teetering on the edge of disaster, prosecutors hang back.

The BP and Volkswagen scandals, by their size and audacity, should motivate significant changes in the approach to criminal environmental enforcement, and if those changes make DOJ more aggressive, they will come just in time, because EPA and the states'

routine civil enforcement is arguably in worse shape than at any time since the agency was created 46 years ago. EPA has endured a decade of deep budget cuts and endless bureaucracy bashing. In constant dollars, EPA has less to spend than at any time since the 1990s, when it began to implement the latest Clean Air Act Amendments. Last year, it announced a 30 percent cut in routine inspections and a 23 percent reduction in civil enforcement actions. Most of the states delegated to implement regulatory programs are in at least as dire shape.

Aggressive criminal prosecutions, especially against individuals, are the best alternatives to the shortfall of routine civil enforcement because they magnify the deterrence value of even the small number of cases that are brought. The assumption behind DOJ's "Yates memorandum" instructing prosecutors to consider prosecuting individuals whenever possible is that corporations don't move themselves into the untenable position of a BP or a VW without malfeasance at the highest levels by a relatively large number of executives. If this assumption is correct — and the details of the two corporations' fall from grace fully supports that conclusion — determined prosecutors can find senior managers to indict, sending a powerful message about individual culpability in a system that has all but forgotten it.

Opponents of such prosecutions argue that correcting corporate policies for the future is the pre-eminent goal of enforcement. Criminal enforcement interferes with that goal because as soon as government investigators entertain the possibility of indictment, potential witnesses shut down; distrust congeals meaningful dialogue; and the all-important goal of developing a settlement that effectively mandates compliance founders on the shoals of needlessly harsh punishment.

These points are more convincing if your diagnosis of BP's and VW's behavior is that relatively

*Language in
a House bill is
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low-level employees sabotaged their employer, either through venality or incompetence, even though the company's leadership was genuinely committed to the broad concept of "safety culture," a term used to connote not just regulatory compliance but an energetic and comprehensive effort to reduce risk to the public and the workforce. Few among the hundreds of people involved in investigating BP's historical performance or VW's emerging scandal would argue that top management at either company perceived safety culture as an important goal. These and other notable examples of white collar environmental crime are best characterized by the famous proverb of undocumented origin: the fish rots from the head.

Police shootings of young African Americans have become the civil rights issue of the era, and the energy they have unleashed has provoked a long overdue reevaluation of the criminal justice system. Many proposals have emerged, but at the head of the queue is sentencing reform that would eliminate mandatory minimum sentences for non-violent drug and other offenses. President Obama has adopted the cause as a legacy issue and a genuinely bipartisan group of senators managed to negotiate a compromise that was recently approved by the Judiciary Committee. As the legislation started moving toward markup, what Sheldon Whitehouse (D-RI) calls a Trojan Horse emerged, pushed by Orrin Hatch (R-UT) and conservative groups such as Koch Industries and the Heritage Foundation.

The Hatch bill (S. 2298) would supply a "default *mens rea*" provision to be read into any provision of federal law that does not incorporate its own *mens rea* standard, including environmental regulations, which never do. Because *mens rea*, or a guilty mind, is one of two elements prosecutors must prove to achieve conviction — the other is the commission of an illegal act, or *actus rea* — any significant change could disrupt the entire system, producing years of litigation to clarify its nature and scope. The Hatch bill's new standard would require prosecutors to prove that the defendant was "practically certain" that his/her acts or omissions would have certain consequences that in fact occurred as a result

of the crime. The bipartisan group rejected these changes, but Senator Hatch continues to push them.

Over on the House side, Judiciary Committee Chairman Bob Goodlatte (R-VA) delivered an ultimatum to Ranking Members John Conyers (D-MI) and Sheila Jackson Lee (D-TX): agree to default *mens rea* provisions or he would not move sentencing reform. They succumbed and the House Judiciary Committee voted

to approve a bill sponsored by Representative James Sensenbrenner (R-WI).

The House bill (H.R. 4002) is more than a little confusing. It states that when a provision of federal law does not incorporate a *mens rea* standard, the standard is "knowing." That term of art is defined in the legislation to mean that in any case where a "reasonable person" in the "same or similar circumstances" would not know or "would not have reason to believe" that the conduct was "unlawful," prosecutors must prove that the defendant in fact did know or had "reason to believe" his/her conduct was unlawful. These changes are apparently intended to eliminate the longstanding doctrine that ignorance of the law is not a defense to criminal charges. Conflicting interpretations of this language abound.

Because most environmental statutes incorporate a "knowing" standard, the legislation might not affect the prosecution of cases unless judges decide to read the more constricted definition of *mens rea* into all criminal cases. A second vital question is whether the bills apply to regulatory violations. Hatch's staff says yes, but House staff deny that intent.

Civil rights, environmental, and consumer groups are working hard to defeat the *mens rea* provisions but the most determined opponent of both bills is DOJ, which argues with gritted teeth that fiddling with *mens rea* could make it impossible to prosecute terrorists, as well as other unsavory characters. No one has a response to DOJ's concerns about unsettling decades of established law nor the possibility that this uncertainty could slow white collar prosecutions to a trickle.

BP and VW are just the latest examples of corporate malfeasance resulting in mass death, injury, loss, and suffering. As prosecutors are again beginning to haul environmental miscreants into court to face criminal charges, now is not the time to amend the law to make ignorance a valid excuse. **TEF**