Criminal Liability and the Clean Air Act: Should We Rely on Prosecutorial Discretion?

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Environmental compliance is one of the most complex challenges industrial operators face in their daily activities. Among environmental obligations, the Clean Air Act\(^1\) (“CAA” or “Act”), requires owners and operators to comply with thousands of overlapping and sometimes conflicting statutes, regulations, and permit obligations.\(^2\)

Most companies expend significant efforts and expense managing environmental compliance. Obligations include a variety of regulations that apply to emissions sources, as well as applying for, obtaining, and complying with a variety of permits that authorize air emissions and water discharges. Environmental compliance obligations range from typical production recordkeeping to process monitoring to filing required reports with federal, state, and local environmental agencies.

Owners and operators of manufacturing, transportation, logistics, and end user facilities must also meet “general duty” clauses designed to protect the public from undue harm.\(^3\) General duty clauses require owners and operators to minimize emissions and protect the

\(^1\) 42 U.S.C.A. § 7401 et. seq. (West 2012).
public from the risk of death or serious bodily injury. Owners and operators may be required to take extra precautions beyond those required for various permits and regulatory obligations.

The public became aware of the potential danger that industrial accidents pose to people near industrial facilities after the 1984 Bhopal, India industrial accident that took thousands of lives. In the 1990 Clean Air Act Amendments, Congress gave the Environmental Protection Agency (“EPA”) authority to address offsite impacts of industrial accidents, where the EPA could punish those who endanger, or whose actions threaten to endanger, the public.

Industrial operators are generally not interested in endangering the public, but accidents happen. When they do, the government must investigate the accident and the underlying circumstances to evaluate what, if any, enforcement mechanism is required to address the problems found in the investigation. The EPA then must decide to forego enforcement, or to utilize its broad civil enforcement authority, or to refer the matter to the

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4 Id.
8 The Chemical Safety Board neutrally investigates critical industrial accidents under its Clean Air Act authority. See, 40 CFR 60.1700 (West 2012).
Department of Justice ("DOJ") Environmental Crimes Division ("ECD") for criminal prosecution.\(^9\)

In most cases, the EPA will utilize its civil enforcement authority and enter into a consent decree with the owner or operator to resolve the matter.\(^{10}\) Sometimes, however, the EPA will refer the matter for criminal enforcement.

Prosecutorial discretion in criminal enforcement is virtually absolute.\(^{11}\) However, due to limited resources, the EPA must carefully select cases to refer to the DOJ, and the DOJ must carefully select which cases to prosecute.\(^{12}\) Many authors have written about the criteria the EPA and DOJ should use to select cases for criminal prosecution.\(^{13}\) In 1994, EPA developed its


\(^{10}\) Id. at *7.

\(^{11}\) Id. at *3.

\(^{12}\) Id. at *7.

own criteria to guide its investigators in selecting potential criminal cases.\textsuperscript{14} These guidelines ask investigators to consider as critical factors actual or threatened bodily harm caused by an incident, the actor’s prior violation history, and how timely the actor reported the incident to the appropriate authorities.\textsuperscript{15} The EPA also considers if the underlying activities were properly permitted, if other misconduct or falsified records were commonplace within the company, and what efforts the owner or operator makes to audit their facilities and correct issues found during audits.\textsuperscript{16} Finally, because criminal enforcement is expensive, the guidelines ask the EPA to consider if it can meet substantially the same enforcement goals using its civil enforcement authority.\textsuperscript{17}

Likewise, the DOJ has created guidelines for deciding which cases to accept for criminal prosecution.\textsuperscript{18} Like the EPA, the DOJ considers voluntary disclosure by the company, cooperation with the agencies responsible for response to the incident and underlying permits, preventative measures taken by the actor to prevent and/or minimize the impact of issues,

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\textsuperscript{14} Earl Devaney, \textit{The Exercise of Investigative Discretion}, (Jan. 12, 1994)
\textsuperscript{15} \textit{Id.}
\textsuperscript{16} \textit{Id.}
\textsuperscript{17} \textit{Id.}
\textsuperscript{18} Dept. of Justice, Factors In Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator, (1991)
\end{flushright}
prior compliance history, internal disciplinary action taken by the company, and subsequent compliance efforts taken to prevent future recurrence.\textsuperscript{19}

In practice, the owner’s or operator’s intent in the underlying acts that result in compliance problems also weighs heavily in a decision to prosecute.\textsuperscript{20} Most criminal environmental statutes require that actors knowingly commit acts that endanger the public before prosecuting.\textsuperscript{21} However, the “knowing” \textit{mens rea} only means only that the actor knew of the act occurring, not that the act \textit{violates} any specific law or that the act endangered the public\textsuperscript{22} Courts adopt this interpretation because the public endangerment provisions in environmental law qualify as public welfare statutes.\textsuperscript{23} Because “ignorance of the law is not an excuse,” prosecutors do not need to prove that the actor intended to violate environmental law when public safety is impacted or threatened.\textsuperscript{24} In addition to knowing endangerment, actors negligently releasing regulated materials into air in a manner causing death or serious bodily injury are also subject to criminal prosecution, but with lesser penalties.\textsuperscript{25}

\begin{itemize}
\item \textsuperscript{19} \textit{Id.}
\item \textsuperscript{20} Harrell, \textit{supra} note 13 at 4.
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} \textit{Id.}
\item \textsuperscript{23} \textit{Id.} at 5. \textit{See also}, U.S. v. Int’l Minerals, 402 U.S. 558, 564. The Supreme Court noted that “knowing” \textit{mens rea} applies to the actor’s conduct, not knowledge of the underlying law. The Court noted that “ignorance of the law is no defense.”
\item \textsuperscript{24} \textit{Id.}
\item \textsuperscript{25} \textit{Id.}
\end{itemize}
Environmental law defines “person” as natural persons as well as a variety of corporate entities.\textsuperscript{26} Therefore, prosecutors may choose to prosecute companies, individuals within companies or both.\textsuperscript{27} Responsible corporate officials, those with the authority and responsibility to know about, prevent, or stop environmental violations, can be prosecuted under most environmental statutes.\textsuperscript{28} Criminal liability is not limited to corporate officers, but may also extend to lower level employees responsible for minimizing or preventing incidents that endanger the public.\textsuperscript{29}

Most actors accused of environmental crimes do not fit the profile of the typical criminal.\textsuperscript{30} Corporate officers, facility managers, and environmental professionals, all potentially culpable for environmental crimes, tend to be college educated professionals with little to no criminal history.\textsuperscript{31} Juries may not want to convict these esteemed community members.\textsuperscript{32}

The role of the in-house site managers and environmental compliance staff is a critical consideration in evaluating whether to prosecute environmental crimes.\textsuperscript{33} If the government

\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
\textsuperscript{30} Id. at 6.
\textsuperscript{31} Id. at 28.
\textsuperscript{32} Id.
\textsuperscript{33} Marty, supra note 13 at 37.
can find a greed motive, it could convince a jury that a knowing criminal violation occurred. Prosecutors review if financial gain, corporate advancement, or performance goals to not report environmental problems may provide motive to in-house actors to fail to prevent, monitor, or report environmental issues. Prosecutors may also try to find a pervasive corporate culture discouraging compliance to maximize profits as a reason to justify prosecution. Environmental managers may tolerate noncompliance because of internal corporate pressure for them to keep their jobs. While not a legal defense, peer pressure to fit within the company may cloud an environmental professional’s judgment in certain situations. Resisting peer pressure may be difficult where that environmental professional’s judgment on a specific point may be the only thing to avoid prevent criminal enforcement.

Environmental enforcement cases are very fact specific within a regulatory world that very few, including prosecutors, fully understand. In most situations, agencies authorize owners and operators to release a certain amount of regulated materials through the variety of permits and emissions standards that apply to a company’s operations.

\(^{34}\) Id. at 38.  
\(^{35}\) Id. at 39.  
\(^{36}\) Id.  
\(^{37}\) Id. at 40.  
\(^{38}\) Id.  
\(^{39}\) Id.  
\(^{40}\) Id.  
\(^{41}\) Id.
enforcement necessarily involves distinguishing between authorized emissions and those emissions not contemplated during the permitting and regulatory processes.\footnote{Id.}

Below I discuss the types of criminal enforcement of environmental crimes available to prosecutors. These criminal enforcement tools include environmental crimes, general criminal law concepts, and state law authority. I also review how the Clean Air Act criminal endangerment provisions have evolved over time, including several recent examples of Clean Air Act endangerment prosecutions. Finally, I analyze how corporate environmental and operations managers could minimize their criminal exposure, and how prosecutorial overreach may complicate efforts to do the right thing.

I. Background

Congress gave the DOJ,\footnote{Id.} acting on behalf of the EPA,\footnote{Henry Klementowicz, Gabriel Maser, Daniel Starck, Brent Tunis, \textit{Environmental Crimes}, 48 Am. Crim. L. Rev. 541, 545 (Spring 2011).} wide ranging powers to enforce the Clean Air Act.\footnote{42 U.S.C.A. § 7413(c)(1) (West 2012).} Criminal prosecution is available to enforce knowing violations of the main CAA provisions, including most of the Act’s source control and permitting programs.\footnote{Id.} Criminal sanctions are also available for making a “false material statement, representation, or

\textit{[\ldots]}
certification” in required periodic compliance certifications, under both the CAA\textsuperscript{47} and the general False Statements Act.\textsuperscript{48} Most of the conduct proscribed in § 113(c), the CAA criminal enforcement provision, is based on a knowing \textit{mens rea}.\textsuperscript{49} The common knowing standard from general criminal law, “that the defendant realized what he/she was doing and was aware of the nature of his/her conduct, and did not act through ignorance, mistake or accident” applies to environmental criminal cases.\textsuperscript{50}

\textbf{A. Risk Management Plan}

In the 1990 Clean Air Act Amendments, Congress directed the EPA to work with the Occupational Safety and Health Administration (“OSHA”) to prevent accidental releases of

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\item \textsuperscript{47}42 U.S.C.A. § 7413(c)(2)(A) (West 2012).
\item \textsuperscript{48}18 U.S.C.A. § 1001(a) (West 2012). The False Statements Act originated from the Civil War Era False Claims Act. \textit{See also}, note 47 \textit{supra}. The False Statement Act sanctions “[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully – 1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; 2) makes any materially false, fictitious, or fraudulent statement or representation; or 3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years.”
\item \textsuperscript{49}See, 42 U.S.C.A. § 7413(c)(1) (knowingly violates emissions standards), § 7413(c)(2) (knowingly files false reports), § 7413(c)(3) (knowingly fails to pay fees due to agencies); § 7413(c)(5) (knowingly endangers the public by such releases).
\end{enumerate}
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hazardous substances that endanger human health and the environment. The EPA created the Risk Management Program ("RMP") to regulate offsite impacts due to toxic and flammable substances produced or managed onsite. Many RMP requirements overlap with OSHA Process Safety Management ("PSM") program elements. Because all RMP regulated facilities are also included as PSM covered processes, both the EPA and OSHA regulate RMP facilities. The CAA accidental release provisions includes a general duty clause, requiring owners and operators of facilities handling hazardous substances "to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of accidental releases which do occur."

Two statutory endangerment provisions apply to actors endangering the public while releasing hazardous substances. First, any person who knowingly "places another person in imminent danger of death or serious bodily injury" by releasing hazardous substances is subject

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51 42 U.S.C.A. § 7412(r) (West 2012). OSHA, part of the Department of Labor, has no off-site authority, and can only regulate labor related activities or consequences of such activities within an employer’s boundaries. Congress assigned EPA the task of regulating human health risks beyond workplace boundaries.

52 40 C.F.R. 68 (West 2012).

53 40 C.F.R. § 68.130 (West 2012).


55 29 C.F.R. 1910.119(a)(1) (West 2012). See also, 40 C.F.R. 68.130 (West 2012). OSHA defines a covered process as a set of equipment containing not less than 10,000 pounds of a flammable substance. A regulated facility may contain one or more covered processes. OSHA requires PSM be implemented at each covered process separately. EPA includes any PSM covered process containing not less than 10,000 pounds of 69 listed hazardous substances. Therefore, all RMP covered processes are in PSM, but not all PSM covered processes are in RMP.

56 Id.

to up to 15 years of imprisonment and/or monetary penalties.\textsuperscript{58} In addition, “[a]ny person who negligently releases [hazardous substances] and who at the time negligently places another person in imminent danger of death or serious bodily injury” may be imprisoned for up to one year and/or fined.\textsuperscript{59}

The general “knowingly” definition described above applies to these endangerment provisions.\textsuperscript{60} However, the CAA does not define negligence.\textsuperscript{61} Because Congress did not incorporate any gross negligence phrasing in § 112(r), an ordinary negligence standard is presumed by one author.\textsuperscript{62} The cases involving negligent endangerment described below resulted in plea agreements; therefore, there are no published court opinions addressing this question.\textsuperscript{63}

\textbf{B. Prosecutorial Discretion: When Should Criminal Prosecution Be Brought?}

The CAA also contains a variety of civil enforcement provisions, covering a wide variety of actions where criminal enforcement is not appropriate or available. Just as the EPA and DOJ

\textsuperscript{58} 42 U.S.C.A. § 7413(c)(5)(A) (West 2012). The general “knowingly” definition described above applies to this citation.
\textsuperscript{60} Int’l Minerals, supra note 23.
\textsuperscript{62} Id. at 27-28.
created guidelines to guide in the civil or criminal enforcement questions, Professor David Uhlmann evaluated when prosecutors may consider prosecuting environmental crimes.\textsuperscript{64}

1. **Significant Risk of Harm**

Many environmental protection statutes arose in response to well-known environmental disasters.\textsuperscript{65} Few would argue that egregious environmental violators should be subjected to criminal sanctions.\textsuperscript{66} For example, the March 23, 2005 British Petroleum Texas City, Texas refinery incident caused significant harm to the public and the environment. One of the 29 processing units inside the refinery exploded, taking the lives of 15 contract workers assisting BP from trailers located near the impacted process unit.\textsuperscript{67} This incident, which occurred during a startup of a part of the refinery, also injured 170 workers.\textsuperscript{68}

While the facts in this case would have allowed the government to pursue knowing or negligent endangerment, the government did not bring these charges.\textsuperscript{69} BP paid $50,000,000

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\textsuperscript{64} David Uhlmann, Environmental Crime Comes of Age: The Evolution of Criminal Enforcement In the Environmental Regulatory Scheme, 2009 Utah L. Rev. 1223, 1246 (2009).
\textsuperscript{65} Novak, supra note 121 at 571-572.
\textsuperscript{66} Uhlmann, supra note 64 at 1246-1247.
\textsuperscript{68} Id. at *6.
\textsuperscript{69} OSHA and the Texas Commission on Environmental Quality reached separate plea agreements with BP concerning this incident.
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to settle the Clean Air Act claims, $21,361,500 to resolve OSHA claims, and $336,566 to settle Texas Commission on Environmental Quality (“TCEQ”) violations.  

    Among the enforcement actions in response to the incident, BP pled guilty to knowingly violating the RMP regulations concerning the unit that was involved in the incident.  

Specifically, BP pled guilty to inadequate mechanical integrity practices in the unit, as required by RMP, and to not protecting workers by informing contractors working from trailers in the vicinity of the covered process area of the risks associated with the operation.  

2. False Reporting

Falsifying reports, or excluding material information from a certification report, is a common criminal charge under the CAA. The CAA requires owners and operators of regulated facilities to periodically certify compliance with a variety of permit and regulatory requirements. Actors who knowingly file a materially false certification or knowingly fail to accurately file required notices are subject to prosecution.  

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71 B.P, supra note 67 at 7-8,  
74 See, 42 U.S.C.A. § 7661c(c) (West 2012).  
control or monitoring equipment, or who fabricate monitoring data generated from emissions
or process monitoring equipment, are also subject to prosecution.\textsuperscript{76}

For example, Diaego North America submitted false visible emissions monitoring
records to the state agency implementing the CAA permitting program on behalf of the EPA.\textsuperscript{77}
For at least part of the time the company submitted the false data, the actual data was not
required to be submitted to the agency under the operating permit.\textsuperscript{78} In this case, the
environmental manager was recently sentenced to two years of home confinement for filing
false certifications, because he generated false records to support a compliance certification.\textsuperscript{79}
In another case, an environmental manager in another facility was prosecuted for submitting
false information to support a compliance certification after the state no longer relied on the
data that the manager falsified.\textsuperscript{80}

In addition, a portion of the False Statements Act (18 U.S.C. § 1001) overlaps the CAA
false statements authority.\textsuperscript{81} Courts interpret § 1001 broadly. For example, an employee
terminated for refusing to conceal evidence of environmental compliance problems at a

\textsuperscript{76} 42 U.S.C.A § 7413(c)(2)(C) (West 2012).
\textsuperscript{77} U.S. v. La. Pac., 925 F.Supp. 1484, 1489 (D. Colo. 1996); overturned on other grounds 106 F.3d 345 (10th Cir.
1997). at 1489. As the events here took place between 1988 and 1992, before the Title V program from the 1990
CAA Amendments took effect, these conditions derived from the state operating permit system.
\textsuperscript{78} Id. The state removed the monitoring requirement in a permit amendment that took effect during this period.
\textsuperscript{79} Information at 1, U.S. v. Lynch, 5:09-cr-00334-LS (E. D. Pa. May 15, 2009). The defendant falsely reported that
certain emissions monitoring occurred when it did not, and filed a Title V operating certification that the
monitoring was conducted.
\textsuperscript{80} La. Pac., supra note 77 at 1490
\textsuperscript{81} 18 U.S.C.A. §1001(a) (West 2012).
A petroleum refinery was allowed to pursue a wrongful termination action because he refused to violate §1001.\textsuperscript{82}

Prosecutors may choose to file false statements charges under the CAA, the False Statements Act, or both.\textsuperscript{83} This choice often occurs in the context of improper asbestos abatement, where asbestos contractors are required to follow certain CAA procedures, such as providing the EPA ten days notice before conducting asbestos abatement.\textsuperscript{84} Thus, for example, a property owner removing asbestos from a closed refinery and its environmental consultant, were convicted of violating the §113(c)(2)(A) provision by not filing appropriate asbestos abatement documents with the EPA before dismantling the refinery.\textsuperscript{85} These defendants were also convicted under 18 U.S.C.A. § 1001 for falsely stating to the agency inspector that asbestos was not present at the work site.\textsuperscript{86} The CAA violation would not directly address the false statement about the absence of asbestos that were addressed by the Title 18 charge.\textsuperscript{87} Finding that the Rule of Lenity did not apply when two statutory provisions covered different aspects of the same conduct, the court allowed prosecutorial discretion to govern which charges may be

\textsuperscript{84} 40 C.F.R. 61 Subpart M (West 2012).
\textsuperscript{85} Shaw, supra note 83 at 874.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
applied to such conduct. Prosecutors were thus allowed to choose one charge over another to take advantage of the differing penalties available under each statute.

The environmental consultant assisting the refinery demolition was also convicted of concealing a material fact in an asbestos abatement filing made with the EPA under 18 U.S.C. § 1001(a)(1). The court found that the consultant, acting solely as the agent of the owners and not as owner or operator, assumed the duty to file materially correct reports once the consultant engaged in preparing reports to be submitted to the government.

Another provision of the False Claims Act, the originating source of the False Statements Act, known as the “reverse” False Claims Act, criminalizes presenting to the government a knowingly false claim for payment. However, courts will not uphold “reverse” False Claims Act claims that an actor should be liable to the government for fees, fines, or penalties that would have potentially been due but for the actor concealing emissions of regulated air

88 Id.
90 Shaw, supra note 83 at 876-877.
91 Id. The CAA and its implementing regulations often specify owner, operator, or owner/operator obligations. Here, the responsibility or liability for failing to accurately complete and submit documents to EPA was extended by agency theory to the consultant only when the consultant accepted the responsibility to complete the documents.
92 18 U.S.C.A. § 3729 (West 2012). This Civil War era statute originally criminalized war profiteering, but has been applied to a variety of false billing actions.
pollutants.\textsuperscript{93} Thus, in one case a plaintiff attempted to assert that environmental non-compliance denied the government fee revenue that would have been due had the facility complied with applicable reporting requirements.\textsuperscript{94} The court reasoned that potential penalties that could be imposed in a possible future enforcement action were too remote to become a CAA obligation,\textsuperscript{95} stating “there is no free-floating obligation actionable under the False Claims Act that arises merely because a person must obey the law or the terms of an regulatory permit.”\textsuperscript{96} The parties did not raise, nor did the court address, any other Title 18 issues.\textsuperscript{97}

\section*{3. Failing To Work Within the Regulatory System}

The EPA and DOJ will prosecute companies that ignore environmental requirements. For example, Hershey Creamery Company,\textsuperscript{98} a Harrisburg, PA based ice cream manufacturer and distributor, was charged in 2008 with a single count under CAA § 113(c)(4) for knowingly failing to prepare required RMP documents and programs.\textsuperscript{99} Between 1999 and 2007, the company knowingly failed to implement the RMP program and falsely certified to the EPA in 1999 and 2004 that it had complied with the RMP.\textsuperscript{100} The EPA presumed that, because the

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  \item \textsuperscript{93} U.S. ex rel. Bain v. Georgia Gulf, 386 F.3d 648, 657-658 (5th Cir. 2004).
  \item \textsuperscript{94} Id.
  \item \textsuperscript{95} Id. at 653-654.
  \item \textsuperscript{96} Id. at 656-657, citing U.S. v Q Int’l Courier, 131 F.3d 770, 774 (8th Cir. 1997).
  \item \textsuperscript{97} Id. at 658-659.
  \item \textsuperscript{98} Not to be confused with The Hershey Company, the chocolate manufacturer.
  \item \textsuperscript{99} Information at 1, U.S. v Hershey Creamery., No. 1:08-cr-00353-SHR (Mid. D. Pa. Sep. 24, 2008).
  \item \textsuperscript{100} Id. at *5.
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company was not implementing the RMP, it endangered the public.\textsuperscript{101} The EPA audited the company in 2005, and found that the required RMP management system had not been implemented.\textsuperscript{102} The company pled guilty, and was given one year of probation and a $104,000 fine.\textsuperscript{103} In addition, OSHA also fined the company $100,000 for failing to implement PSM after a 2004 inspection.\textsuperscript{104}

A smuggler of ten foreign-manufactured vehicles not intended for the United States automobile market was convicted of smuggling under 18 U.S.C.A. § 545 and of knowingly concealing material facts from the government under 18 U.S.C.A. § 1001.\textsuperscript{105} Although motor vehicle importers must certify that the vehicles being imported conform to EPA air pollution regulations,\textsuperscript{106} the importer falsified conformity certificates for ten foreign cars, purporting to exercise a one-car exemption for foreign-specification vehicles.\textsuperscript{107} The appeals court sustained the False Statements Act convictions on the basis that the importer, by using false names on

\textsuperscript{101} Id. at *8.
\textsuperscript{102} Id. at *6-7.
\textsuperscript{103} Plea Agreement at 1, U.S. v. Hershey Creamery, No. 1:08-cr-00353-SHR (Mid. D. Pa. Sep. 24, 2008). The court also required the company to retain a specific RMP consultant, who was required to provide the court with quarterly updates.
\textsuperscript{104} Id. at *6. This inspection occurred just before the company certified to EPA that it had implemented the steps required in both the PSM and RMP programs.
\textsuperscript{105} U.S. v. Gardner, 894 F.2d 708 (5th Cir. 1990).
\textsuperscript{106} 42 U.S.C.A. § 7522(a)(1) (West 2012). Importers must develop a “certificate of conformity” describing how the motor vehicle complies with the CAA.
\textsuperscript{107} Gardner, supra note 105 at 710, citing 19 C.F.R. § 12.73(c) (1986). This case arose before a 1987 overhaul of the underlying law, abolishing the 1981 personal use exemption.
the import declaration forms, deceived the Customs Service into allowing the vehicles into the United States.\textsuperscript{108}

4. Repetitive Violations

The EPA and DOJ ordinarily attempt to resolve operating problems at permitted facilities using their civil enforcement authority.\textsuperscript{109} However, for particularly difficult cases where the facility facially participates in the regulatory system but fails to comply for long periods of time, the government may use its criminal enforcement authority to focus the company's attention on environmental compliance.\textsuperscript{110} Often the decision to pursue criminal prosecution is intended by the enforcement staff to ask the question: “Do we have your attention?”\textsuperscript{111}

Tonawanda Coke, a coke oven operator in the Buffalo, NY suburbs, was indicted for false reporting of excessive benzene emissions and obstruction of justice. The EPA and the New York State Department of Environmental Protection (“NYSDEC”) investigation began when a local resident’s group took air samples and detected airborne benzene concentrations exceeding NYSDEC guidelines by 75 times.\textsuperscript{112}

\textsuperscript{108} \textit{Id.} at 718.
\textsuperscript{109} Reich, \textit{supra} note 9 at *7.
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} Personal Communication, Lisa Jeter, Inspector, Regional Air Pollution Control Agency, Dayton, OH (Nov. 2, 2011).
After a surprise EPA and NYSDEC inspection, the company and Mark Kamholz, its Environmental Manager, were indicted for violating the Clean Air Act and the Resource Conservation and Recovery Act, as well as for obstruction of justice.\textsuperscript{113} The CAA indictment charged that, during various times between 2004 and 2009, the company discharged benzene emissions from several locations in violation of its Title V operating permit.\textsuperscript{114} The obstruction of justice charge involved an alleged practice where employees would cease discharging benzene from a pressure relief valve during scheduled NYSDEC and/or EPA inspections.\textsuperscript{115} During a 2009 surprise inspection, facility employees were observed by environmental inspectors attempting to change the pressure relief settings on one such valve.\textsuperscript{116} The trial of this case has been continued until at least March 2012.\textsuperscript{117}

Columbus Steel Castings operates the largest steel casting foundry in the United States.\textsuperscript{118} Between 2004 and 2007, the foundry failed to operate several air pollution control devices, failed to report malfunctions of other air pollution control equipment to the Ohio Environmental Protection Agency (“Ohio EPA”) as required in their operating permit, and failed

\textsuperscript{113} Indictment at 1, U.S. v. Tonawanda Coke, No. 1:10-cr-00219-WMS-HKS (W.D. N.Y. Jul. 29, 2010).
\textsuperscript{114} Id. at *9 - *27. The RCRA violations involved knowingly storing benzene wastes without the appropriate RCRA permit.
\textsuperscript{115} Id.
\textsuperscript{116} Shogren, supra note 112.
\textsuperscript{118} Columbus Castings, \texttt{http://www.columbuscastings.com} (last visited Feb. 20, 2012). The foundry now operates under the name Columbus Castings.
to test emissions as required by their air permit.\textsuperscript{119} Pleading guilty to a six-count indictment, the foundry was sentenced to $660,000 in fines, $165,000 in community service, a year of probation, and upgrades of four air pollution control systems.\textsuperscript{120}

\textbf{C. Direct and Indirect Actor Defendants}

Congress has criminalized many environmental releases that endanger the public, often in an effort to encourage individuals and companies to follow accepted practices.\textsuperscript{121} Organizations owning and operating facilities that endanger the public may be held criminally liable under the CAA.\textsuperscript{122} Direct individual actors within the CAA, such as operations staff responsible for operating facilities, are also liable for criminal CAA offenses, regardless of position.\textsuperscript{123} Further, responsible corporate officials ("RCO") who supervise the conduct of actors committing crimes may be vicariously liable for the actions of their employees.\textsuperscript{124} Other, lower level indirect actors, such as business managers within companies, who have “a

\footnotesize{
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  \item U.S. v. Columbus Steel Castings, case 2:11-cr-00180-JLG, Document 17 (Plea Agreement) at *3 (Nov. 14, 2011).
  \item Id.
  \item Klementowicz, supra note 44 at 560, citing 42 U.S.C.A § 7413(c)(5)(e).
  \item 42 U.S.C.A. § 7602(e) (West 2012). "The term ‘person’ includes an individual, corporation, partnership, association, State, municipality, political subdivision of a state, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.”
  \item U.S. v. Dotterweich, 320 U.S. 277 (1943).
\end{itemize}
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responsible share in the furtherance of the transaction which the statute outlaws” may also be criminally liable.\textsuperscript{125}

In an early application of the RCO doctrine, two brothers who owned a wastewater treatment plant at a mushroom farm, as well as the corporate farm entity, were convicted of Clean Water Act violations from the wastewater treatment plant.\textsuperscript{126} The court applied the RCO doctrine to include not only the corporation but the brothers as corporate officers.\textsuperscript{127}

In another variation of the RCO doctrine, Edwin Tuttle, the Chief Executive Officer (“CEO”) of Pennwalt Corporation, appeared in court to plead guilty on behalf of his company to four Clean Water Act and Comprehensive Environmental Response, Compensation, and Liability Act misdemeanor violations.\textsuperscript{128} Though not charged, the court demanded that the CEO appear to deliver the pleas to reinforce the RCO doctrine.\textsuperscript{129}

\textbf{D. Other Criminal Charges}

Because federal prosecutors are more familiar with traditional “Title 18” offenses, as described below, they may use several other criminal statutes to criminally pursue

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\textsuperscript{125} Novak, \textit{supra} note 121 at 577-578, citing U.S. v. Park, 421 U.S. 658, 669 (1975).
\textsuperscript{126} U.S. v. Frezzo Brothers, 602 F.2d 1123, 1129 (3rd Cir. 1979).
\textsuperscript{127} \textit{id.} at 1125.
\textsuperscript{129} Joseph Block and Nancy Voisin, \textit{The Responsible Corporate Officer Doctrine – Can You Go To Jail For What You Don’t Know?} 22 Envtl. L. 1347, 1348 (Fall 1992). \textit{See also}, Nancy Mullikin, Holding the “Responsible Corporate Officer” Responsible: Addressing the Need for Expansion of Criminal Liability for Corporate Environmental Violators, 3 Golden Gate U. Envtl. L. J. 395, 3xx (Spring 2010).
environmental actors. The False Statements Act, described above, is the most common of these Title 18 offenses charged in environmental cases, but prosecutors have used several other Title 18 provisions to address environmental crimes.

1. Money Laundering

Prosecutors may include money laundering charges in environmental cases. For example, an auto parts importer who illegally imported R-12 refrigerant was convicted of money laundering under 18 U.S.C. § 545 for selling the illegal refrigerant and depositing illegally earned funds into his bank account. Similarly, an asbestos contractor convicted of illegal asbestos abatement activities was also convicted of conspiracy to launder money. The appeals court hearing a sentencing challenge in this case reinforced that money laundering from illegal asbestos abatement constituted a typical circumstance to utilize the harsh money laundering sentencing guidelines.

130 Joseph Lisa, Honest Services Fraud, 56 Fed. Law. 55, 56 (June 2009).
131 U.S. v. Alghazouli, 517 F.3d 1179, 1187-1188 (9th Cir. 2008). R-12 is a chlorofluorocarbon refrigerant. Domestic production or import of R-12 was banned in 1995 under the Montréal Protocol.
132 Id.
133 U.S. v. Thorn, 317 F.3d 107, 111 (2d Cir. 2003).
134 Id. at 126-127.
2. Mail Fraud and Honest Services Fraud

Sending materially false environmental certification documents through the mail at one time constituted mail fraud. However, the Supreme Court held that mail fraud only applied if the actor obtained money or property as a result of the fraud. In response, Congress enacted the honest services fraud provision to address fraud conducted through the mails and wires where the actor deprived a private or public victim of the intangible right to honest service. Honest services fraud, where an actor can be criminally liable for depriving “another of the intangible right of honest services,” but not tangible rights in money or property, is another potential environmental charge. Honest services fraud has emerged as an untested opportunity to prosecute actors creating false records, specifically knowingly false environmental compliance certifications, to cover up underlying violations.

Prosecutors could readily apply honest services fraud to local, state, or federal governmental actors committing environmental crimes. However, a prosecutor could conceivably apply this charge to anyone submitting data, including a false certification, to the

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137 Id.
138 Id. at 57, citing 18 U.S.C.A. § 1346 (West 2011).
139 Id. at 58.
140 Id.
government, impeding the government’s ability to execute its duties.\textsuperscript{141} This statute provides prosecutors a new and untested area to charge environmental actors under Title 18.\textsuperscript{142}

3. Conspiracy and Racketeering

The general federal conspiracy statute provides, “[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.”\textsuperscript{143} A conspiracy charge is separate from the offense that is the object of the conspiracy.\textsuperscript{144}

Actors can also be held responsible for crimes committed by others under several theories. Under an aiding and abetting theory, an actor can be held responsible for assisting another actor committing a crime.\textsuperscript{145} Co-conspirators may also subject an actor to criminal

\begin{flushleft}
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} 18 U.S.C.A. § 371 (West 2012).
\textsuperscript{144} Fromm, supra note 135 at 848-849, discussing U.S. v. Import Certification Lab., 18 Env’t Rep. (BNA) 1993 (C.D. Cal. Jan. 8, 1988) (three car emissions laboratory managers convicted of conspiracy, received five year sentences under 18 U.S.C.A. § 371, where only a one year sentence was available under 42 U.S.C.A. § 113(c)(1) for falsifying vehicle emissions test results.)
\textsuperscript{145} U.S. v. Weintraub, 273 F.3d 139,143 (2nd Cir. 2001).
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liability for acts of others.¹⁴⁶ Racketeering Influenced Corrupt Organization Act charges may also be available to the government in prosecuting environmental crimes.¹⁴⁷

4. Obstruction of Justice

In addition, companies who file “materially false deviation reports” masking the true condition of the environmental compliance program may be charged with obstruction of justice.¹⁴⁸ For example, an officer of Technic Services knowing altered asbestos air monitoring results during demolition of an Alaska paper mill.¹⁴⁹ The court held that, in soliciting false testimony from employees about the facts in the case, the corporate officer obstructed justice during the EPA’s CAA and Clean Water Act investigations.¹⁵⁰

5. State Enforcement

Federal endangerment charges are raised by federal prosecutors,¹⁵¹ but when a state prosecutes for actions within its jurisdiction, it may rely on similar authority. On June 28, 2008, the United Oil Recovery facility in Middletown, Ohio was managing a batch of industrial

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¹⁴⁷ Fromm, supra note 135 at 851-852.
¹⁴⁹ U.S. v. Technic Services, 314 F.3d 1031, 1036 (9th Cir. 2002).
¹⁵⁰ Id. at 1044-1045.
¹⁵¹ 42 U.S.C.A. § 7413 (West 2012). CAA Section 113 allows for “Federal Enforcement.” No state law enforcement provision of federal provisions was anticipated. However, states can enforce delegated rules or state environmental law.
wastewater when, after addition of a wastewater treatment chemical, hydrogen sulfide gas was released from a wastewater treatment tank, causing the death of one employee from poisonous gas exposure.\textsuperscript{152} The State of Ohio indicted the company and the environmental, health, and safety manager for manslaughter, reckless homicide, criminal endangering, and violating of the facility’s wastewater pretreatment permit.\textsuperscript{153} The company president and plant manager were also charged with criminal endangering.\textsuperscript{154}

The state criminal endangerment statute, under the Ohio Revised Code § 2909.09 arson statute, used a reckless \textit{mens rea} requirement.\textsuperscript{155} After the jury found the company not guilty of reckless homicide, the court granted the company’s motion to acquit the company, and thus its employees, of the other charges.\textsuperscript{156}

6. Crime Victims Rights Act

One author has proposed enforcing environmental crimes under the Crime Victims Rights Act (“CVRA”), 18 U.S.C. § 3771.\textsuperscript{157} The CVRA was originally enacted to provide murder

\textsuperscript{153} \textit{Id.}
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} O.R.C. §2909.06 (West 2012).
\textsuperscript{157} Ashley Ferguson, We’re Victims Too!: The Need for Greater Protection of Environmental Crime Victims Under The Crime Victims Rights Act, 19 Penn St. Envtl. L. Rev. 287 (Spring 2011).
victims’ families the right to participate in the criminal prosecution of actors accused of crimes.\textsuperscript{158} In environmental cases, the CVRA provides that crime victims, typically neighbors and those impacted by the act being prosecuted, have the right to participate in proceedings against the accused.\textsuperscript{159} Prosecutors in the BP Texas City case considered, but rejected, using CVRA authority to involve victims into the prosecution process.\textsuperscript{160} The Fifth Circuit, ruling on a victim appeal of CVRA rights, held that the government should accommodate the victim representatives in plea agreements, even at the early stages of prosecution.\textsuperscript{161}

In \textit{Atlantic States Cast Iron Pipe}, the court ruled that neighbors of the facility were not CVRA crime victims, and thus were not afforded access to the prosecutorial process.\textsuperscript{162} However, in the W.R. Grace Libby, Montana case (discussed below), the Ninth Circuit granted the government’s mandamus petition to involve victims in the prosecution process under CVRA.\textsuperscript{163}

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\textsuperscript{158} \textit{Id.}
\textsuperscript{159} \textit{Id.}
\textsuperscript{160} \textit{Id.} Prosecutors decided that invoking CVRA in this case was impractical due to the hundreds of victims involved.
\textsuperscript{161} \textit{Id.}, citing \textit{In re Dean}, 527 F.3d 391 (5th Cir. 2008).
\textsuperscript{162} \textit{Id.}, citing \textit{Atl. States Cast Iron Pipe Co.}, 612 F.Supp.2d 453 (D. N.J. 2009).
\textsuperscript{163} \textit{Id.}, citing \textit{In re Parker}, Nos. 09-70529, 08-70533, 2009 U.S. App. LEXIS 10270 at *1 (9th Cir. Mont. Feb. 27, 2009).
II. Recent Examples

The EPA and DOJ have brought several high-profile CAA criminal enforcement cases under many theories, which I explore below.

A. Pelican Refining

Pelican Refining, a petroleum refiner near Lake Charles, Louisiana, was charged with, and pled guilty to, two counts of violating various Clean Air Act permit conditions and obstruction of justice.\(^{164}\) The facility stored gasoline in a storage tank with a failed floating roof, used a handheld flare gun to ignite the site flare after the flare igniter failed, and collected petroleum hydrocarbons leaking from process equipment in plastic children’s bathing pools.\(^{165}\) The company had no environmental staff, bypassed key air emissions control equipment, and fabricated laboratory testing data.\(^{166}\)

The two CAA counts charged knowingly violating the facility’s Title V Operating Permit over almost two years.\(^{167}\) The obstruction of justice count alleged that Pelican knowingly and willfully filed materially false compliance certifications with the Louisiana Department of

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Environmental Quality ("LDEQ") and concealed the true compliance problems from LDEQ.\textsuperscript{168} The information also accused Pelican of knowingly endangering the public under the RMP program.\textsuperscript{169}

The plea agreement reached between the DOJ and the defendant required Pelican to pay a $10 million criminal fine, $2 million for community service, and to serve five years probation.\textsuperscript{170} The company was also required to submit to outside environmental consultant oversight in order to continue operations, as well as to retain a third party to conduct quarterly environmental and safety audits.\textsuperscript{171}

In addition, Byron Hamilton, Pelican’s Houston-based Vice President of Operations, pled guilty to two counts of negligently placing other persons in imminent danger of death or serious bodily injury as a RCO under CAA §113(c)(4).\textsuperscript{172} Mike LeBleu, Pelican’s Lake Charles-based Asphalt Facilities Manager, also pled guilty to one count of negligent endangerment under §113(c)(4).\textsuperscript{173} LeBleu, as an indirect actor, had allowed the asphalt manufacturing process to release potentially toxic amounts of hydrogen sulfide gas without attempting to either protect

\textsuperscript{168} Id. at *2. LDEQ is delegated EPA’s authority to administer the Title V program in Louisiana. Representations to LDEQ are considered representations to EPA.
\textsuperscript{169} Pelican Refining, supra note 50.
\textsuperscript{170} Id. at 7-10. The community service payment was distributed to local non-governmental organizations to support environmentally beneficial projects.
\textsuperscript{171} Id.
\textsuperscript{172} Plea Agreement at 1, U.S. v. Hamilton, Plea Agreement, No. 2:11-cr-00130-RTH-PHJ (W.D. La. Jul. 6, 2011). Sentencing was pending when this article as of March 18, 2012.
the employees working in the area or mitigate the toxic releases.\textsuperscript{174} LeBleu’s sentencing was pending as of March 31, 2012.\textsuperscript{175}

OSHA, lacking criminal enforcement authority, did not act as the lead agency in this action. When the DOJ seeks criminal endangerment charges, it relies on EPA authorities, such as the CAA, to provide the option of criminal enforcement not available under OSHA.\textsuperscript{176}

\textbf{B. Tonawanda Coke}

As described above, Tonawanda Coke was indicted for emitting many times the allowed benzene emissions rate over several years.\textsuperscript{177} Given benzene’s acute toxicity,\textsuperscript{178} prosecutors could have also brought a negligent or knowing endangerment charge against Tonawanda Coke. Proof that the company knowingly bypassed emissions controls and emitted excess benzene outside its air permit authorization would prove the elements of knowing endangerment by the company, and its environmental manager.

Actors knowingly releasing HAPs beyond their permit limits, knowing that the release places others in imminent danger of serious bodily injury are subject to felony

\textsuperscript{174} \textit{Id.} Hydrogen sulfide gas is a potentially fatal air toxic gas regulated by the Clean Air Act and the Superfund Amendments and Reauthorization Act of 1986. The refinery failed to develop and follow a monitoring and employee exposure program for such exposures.
\textsuperscript{175} Minute Entry at 1, U.S. v. LeBleu, No. 2:11-cr-00266-RTH-CMH (W.D. La. Mar. 6, 2012).
\textsuperscript{176} See, 29 U.S.C.A. §654(a) (West 2012). The OSHA general duty clause, requiring employers to provide a safe work place for employees, does not include criminal enforcement.
\textsuperscript{177} Shogren, supra note 112.
endangerment.\textsuperscript{179} Congress listed benzene as a HAP and has regulated benzene emissions from coke oven operations since 1993.\textsuperscript{180} Although employees who know the job hazards choose to engage in hazardous employment, the CAA §113(c)(5) “occupational hazard defense” does not absolve companies of endangering the local community.\textsuperscript{181} In addition, the “actual awareness defense,” where the actor is only responsible for actual awareness or belief of the dangers, is not readily available in these cases where the public, not just employees operating facilities emitting regulated air pollutants, may be harmed.\textsuperscript{182} Here, the facility’s knowing release of a known carcinogen above authorized permit limits could rise to criminal endangerment.

In \textit{Tonawanda Coke}, the prosecutors used their absolute discretion to not charge the defendants with Clean Air Act endangerment. The same exercise of discretion also allowed the company and its management to escape criminal charges concerning EPA coke oven regulations, which could be available for falsely certifying compliance with Section 112 Maximum Achievable Control Technology (“MACT”) standards regulating Tonawanda’s coke ovens.\textsuperscript{183} Prosecutors could have charged knowing endangerment based on the toxicity and

\textsuperscript{179} 42 U.S.C.A. §7613(c)(5)(A) (West 2012).
\textsuperscript{181} 42 U.S.C.A. §7613(c)(5)(C) (West 2012).
\textsuperscript{182} 42 U.S.C.A. §7613(c)(5)(B) (West 2012).
\textsuperscript{183} 42. U.S.C.A. §7612(c)(2) (West 2012).
amount of excess benzene emissions, but elected only to charge the defendants with technical violations of various CAA requirements.

C. BP Deepwater Horizon

The April 20, 2010, the offshore oil drilling rig Deepwater Horizon exploded, taking eleven lives and releasing millions of gallons of crude oil into the Gulf of Mexico.184 Professor Uhlmann argues that British Petroleum (“BP”), the owner of the ill-fated exploration well, as well as BP’s drilling and well service contractors, may be indicted under the Clean Water Act and other law for the crude oil release.185 In addition, BP may face potential criminal endangerment charges.

The EPA regulates air emissions from oil and natural gas production operations.186 Crude oil is a mix of many chemicals, including several that are regulated as HAPs.187 The release of HAPs from an industrial accident would satisfy the emission release condition of either a CAA negligent or knowing endangerment charge. The human toll from this incident would satisfy the imminent danger element.188 Professor Uhlmann suggests that the

185 Id. at 1417-1418. Professor Uhlmann also suggests that BP could also face criminal charges under the Migratory Bird Treaty Act, 2 U.S.C.A. §703(a), and the Seaman’s Manslaughter Statute, 18 U.S.C.A. §1115.
186 Id.
187 40 C.F.R. §63.760 et.seq. (West 2012). MACT Subpart HH, National Emission Standards for Hazardous Air Pollutants From Oil and Natural Gas Production Facilities, regulates HAP emissions from oil development activities.
188 Uhlmann, supra note 184 at 1432.
government can meet the Clean Water Act ordinary negligence standard based on currently known facts. CAA negligent endangerment is also based on ordinary negligence. Therefore, the government could charge BP with CAA negligent endangerment, CWA negligent discharge, or both.

The remaining question is whether the government could prove the knowing element to establish the CAA felony charge. Professor Uhlmann suggests that the government may be able to establish that BP knowingly violated the Clean Water Act. BP and the drilling contractors deviated from standard industry practices when drilling and completing the Maconda well and implemented inadequate management controls over exploration activities. Several investigations have concluded that cost containment, not sharing information about prior incidents to prevent future incidents, and failure to properly evaluate technical project elements contributed to inadequate management controls on the Maconda project. The government would need to establish that BP and the drilling contractors had, within their normal technical knowledge, awareness that its actions endangered its workers. The occupational hazard affirmative defense, described above, only applies if the workplace hazards

189 id, citing U.S. v. Ortiz, 427 F.3d 1278, 1283 (10th Cir. 2005).
190 Lisa, supra note 61 at 4.
191 Uhlmann, supra note 184 at 1431-1432.
192 id. at 1431.
193 id. at 1426.
194 id.
are not “reasonably foreseeable.” However, if prosecutors can learn that, from past experience, BP and its contractors should have or could have predicted the but-for cause of the incident, then the occupational hazard affirmative defense would not apply. The government would be able to show that BP and the well contractors did not adequately know that its employees freely consented to the hazardous activity of an inadequately supervised drilling operation.

**D. Ashland Saint Louis Park**

On May 16, 1997, the Ashland Saint Louis Park, Minnesota refinery suffered a fire and explosion in its process sewer systems. Due to an a high level alarm on a flare knock-out drum, an indication that the drum was too full of material to safely operate, hydrocarbons from the refinery operating units were transferred to a sewer system for further management. This sewer overflow caused a small manhole fire, which the site response team extinguished. A short time later, additional liquid hydrocarbons, likely fed from the overflowing knock-out drum, erupted from the same sewer manhole, ignited, and caused a vapor cloud explosion and fire.

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198 Id. at *12.
199 Id.
200 Id. at *12 - *13.
Shortly after the explosion, Ashland merged its refinery operations into a joint venture with Marathon Oil called Marathon Ashland Petroleum (“MAP”).\(^{201}\) After the merger was finalized, Ashland pled guilty to negligent endangerment and knowingly submitting a false compliance certification to the Minnesota Pollution Control Agency (“MPCA”).\(^{202}\) Ashland was sentenced to probation, which included conditions subjecting Ashland to corporate and regulatory oversight of its refinery operations. However, the probation terms did not reflect the fact that Marathon owned the majority of the joint venture now operating the refinery.\(^{203}\) Because MAP was not the actual corporate successor to Ashland, the federal appeals court invalidated all probation conditions requiring Ashland to provide oversight or access to the refinery,\(^{204}\) and amended the probation to include only refinery upgrades and other terms, such as fines, restitution and community outreach, that Ashland directly controlled.\(^{205}\) Here, it seems that if the prosecutors had drafted charges against both the corporation and the refinery, rather than just the operating company, the government could have crafted probation conditions that targeted both the corporate management system and refinery operations. The prosecutors should have sought to amend the plea agreement to incorporate the merger into the judgment.

\(^{201}\) U.S. v. Ashland, 356 F.3d 871, 872-873 (8th Cir. 2004). The merger was announced the day before the fire.  
\(^{202}\) Id.  
\(^{203}\) Id.  
\(^{204}\) Id. Ashland continues to operate other businesses, but no longer participates in the refinery business.  
\(^{205}\) Id. at 875.
E. Motiva, Delaware City, Delaware

On July 17, 2001, the Motiva Delaware City, Delaware refinery suffered an explosion of a sulfuric acid tank when welders working above one of the tanks created a spark that ignited flammable vapors in the tank.\textsuperscript{206} One contract maintenance worker lost his life, and eight other workers were injured.\textsuperscript{207}

Though sulfuric acid, the material stored in the tank that exploded, was not subject to RMP regulations,\textsuperscript{208} the refinery operator pled guilty to negligent endangerment under CAA § 113(c).\textsuperscript{209} The owner at the time of the incident paid $12 million as a penalty, reimbursed the EPA $170,175 for cleanup costs, spent $7.5 million upgrading the refinery, and provided $6.3 million in supplemental environmental projects to benefit the local community.\textsuperscript{210} A civil action, addressing Clean Water Act and CERCLA matters,\textsuperscript{211} required the new operator, which had purchased the refinery after the incident, to complete facility upgrades to address the

\textsuperscript{207} \textit{Id.}
\textsuperscript{208} 40 C.F.R. § 68.130 (West 2012). Sulfuric acid is not listed among the flammable or toxic chemicals in Tables 1 through 4 of this regulation. However, sulfuric acid is an “extremely hazardous substance” under 40 C.F.R. § 355, Appendix A (West 2012). Thus the prosecution under §113 instead of §112(r).
\textsuperscript{210} \textit{Id.} at *10-*.\textsuperscript{11}. \textit{See also, Id.} at *29 - *33 (Motiva supplemental environmental projects included as part of the civil penalty. \textit{See also}, Motiva Enterprises Sulfuric Acid Spill, \url{www.epa.gov/reg3hwmd/npl/DEN000305677.htm} (Feb. 16, 2012) (last visited Mar. 18, 2012).
\textsuperscript{211} U.S. v.. Motiva Enterprises, Case 1:02-cv-01292-SLR, Document 84 at *1 (Sep. 20, 2005).
underlying causes of the incident.\textsuperscript{212} The owner at the time of the incident paid all civil penalties.

\textbf{F.  W.R. Grace, Libby, Montana}

The W. R. Grace Company ("Grace") purchased a vermiculite mine in Libby, Montana in 1963.\textsuperscript{213} Libby’s vermiculite, used as an insulator and to aid in planting drainage, was contaminated with asbestos that was released to the air and ground during processing.\textsuperscript{214} In the early and mid 1990s, Grace wrapped up mining and processing operations in Libby, closing the mine and selling two processing plants in the area that supported the mine.\textsuperscript{215} Until Grace closed the mine in 1990, the company used mining fill materials for various uses around the Libby area.\textsuperscript{216} Local residents used the vermiculite to insulate their houses, as base material for their athletic fields, and as fill material for any number of local construction projects.\textsuperscript{217} Employees took vermiculite home for personal use.\textsuperscript{218} After the mine closed, the Libby community began to understand the health risks from the vermiculate, as entire families were

\begin{footnotesize}
\begin{itemize}
  \item[\textsuperscript{212}] \textit{id.} at \textsuperscript{*12} - \textsuperscript{*29}.
  \item[\textsuperscript{213}] Carly Flandro, \textit{From Libby, [Mt.] to Wilder, Ky., with Dust},
  \item[\textsuperscript{214}] \textit{id.}
  \item[\textsuperscript{215}] \textit{id.} at \textsuperscript{*6}. Grace sold the screening plant in 2003, and several other parcels up through 1995.
  \item[\textsuperscript{216}] \textit{id.}
  \item[\textsuperscript{217}] Libby Natives at UM Prepare, Reflect as Grace Trial Set To Begin,
  \item[\textsuperscript{218}] U.S. v. W.R. Grace, Superseding Indictment, Case 9:05-cr-00007-DWM Document 590 at \textsuperscript{*5}.
\end{itemize}
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diagnosed with asbestosis.\textsuperscript{219} Asbestosis mortality in Libby has been reported at a rate 40 to 80 times comparable rates to the rest of Montana or throughout the United States.\textsuperscript{220}

In 2005 and 2006, the government indicted Grace and several company executives under the Clean Air Act, accusing the company of, among other things, knowingly endangering the residents of Libby through their handling of mine products and tailings.\textsuperscript{221} By the time the government was able to assemble its case and file charges; however, the statute of limitations had expired on all actions before November 3, 1999.\textsuperscript{222} By that time, Grace no longer actively managed any of the vermiculate or mine tailings allegedly causing the asbestosis.\textsuperscript{223} The main issues in controversy in the indictment were the thirty-year history of evolving scientific knowledge of asbestos disease and Grace’s knowledge that Libby vermiculite was tainted with asbestos.\textsuperscript{224} To prevail on the merits of the CAA knowing endangerment claim, the government needed to persuade the finder of fact that Libby knowingly endangered Libby residents after

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\textsuperscript{219}\textit{Id.} Asbestosis is a incurable lung disease that decreases lung capacity.
\textsuperscript{220}U.S. v. W.R. Grace, \textit{supra} note 218 at *10.
\textsuperscript{221}\textit{Id.} at *1. The first indictment, filed November 30, 2005, was superseded by the June 26, 2006 filing.
1999, long after its conduct had ended in Libby. Following a complex trial with numerous
evidentiary challenges, the jury found Grace and its executives not guilty on all charges. 225

Given the magnitude of this case, and the government resources expended on it, the
government could have asked for a jury instruction on negligent endangerment as a lesser
included offense of the knowing endangerment charge. The only statutory differences
between the knowing and negligent charges are the mens rea elements. Thus, the offenses are
defined as:

Any person who negligently [knowingly] releases into the ambient air any hazardous air
pollutant listed pursuant to section 7412 of this title or any extremely hazardous
substance listed to section 11002(a)(2) of this title that is not listed in section 7412 of
this title, and who at the time negligently (knows at the time that he thereby) places
another person in imminent danger of death or serious bodily injury. . 226

The Supreme Court has adopted a five-part test to determine if a finder of fact can
convict an actor of a lesser included offense. 227 First, one of the parties must request the lesser
included offense instruction. 228 Second, the elements of the lesser offense must be identical to
the greater offense’s elements, except for a mens rea element. 229 Third, some evidence must

(last visited Feb. 20, 2012).
228 David E. Rigney, Propriety of Lesser-Included-Offense Charge to Jury In Federal Criminal Case – General
229 Id.
justify convicting on the lesser charge but not the greater charge.\textsuperscript{230} Fourth, there must be some basis the finder of fact to use that evidence from step three differentiating the two charges to find the accused guilty of one charge but not the other.\textsuperscript{231} Fifth, the offense must exhibit mutuality, where the instruction could be requested either by the prosecution or the defense.\textsuperscript{232}

The Grace prosecution could have asked for a negligent endangerment jury instruction.\textsuperscript{233} First, either side could have satisfied the request condition were it to have asked for a negligence instruction.\textsuperscript{234} Second, as shown above, the elements in both the negligence and knowing endangerment charges are the same, other than the \textit{mens rea} terms.\textsuperscript{235} Third, the government was unable to show that Grace knowingly endangered the public after 1999,\textsuperscript{236} but the fact finder could have found negligence, in Grace’s not taking affirmative steps to mitigate Libby’s health risks once it learned that the vermiculite and mine tailings continued to cause asbestosis in the community. Fourth, because Grace’s affirmative acts pre-dated 1999, and the only remaining endangerment pathway was exposure to already placed vermiculite,

\textsuperscript{230} \textit{Id.} \\
\textsuperscript{231} \textit{Id.} \\
\textsuperscript{232} \textit{Id.} \\
\textsuperscript{233} \textit{U.S. v. W.R. Grace, case 9:05-cr-00007-DWM Document 1187, Jury Instructions (May 6, 2009). } See also, Document 874, Supplemental Jury Instructions, and Documents 973 and 874, Objections To Jury Instructions. Neither the government nor defendants offered a negligence instruction. \\
\textsuperscript{234} \textit{Id.} \\
\textsuperscript{235} 42 U.S.C.A. § 7413(c)(4) and (c)(5) (West 2012). \\
\textsuperscript{236} \textit{Supra note 225.}
the government could differentiate the evidence between knowing endangerment and negligence. Nothing in the record or prior precedent prevented either party from asking for a negligent endangerment instruction. Therefore, if one of the parties wanted to ask for a negligence jury instruction, the judge may have well given this instruction.

Lesser included charge jury instructions are a trial-specific tactical decision. A prosecutor may not want to be seen as weakening its case by asking the jury to downgrade a critical charge. In this case, although the statute of limitations and other evidentiary restrictions limited the trial to acts occurring after 1999, almost a decade after Grace closed its operations, Grace’s failure to take further steps to minimize public exposures supported a negligence charge for not capping and controlling remaining vermiculite exposures in Libby, or at least educating the public on how to minimize vermiculite dust exposure. However, the government may have not raised the lesser included charge because it believed it had a strong enough case and did not need the lesser charge jury instruction.

Grace and its executives believed that the government evidence was not strong enough to prove the charges, as the jury later found. Therefore, the defense would not raise the lesser included charge for tactical reasons, because a misdemeanor jury instruction may have exposed their clients to unnecessary risk of conviction of a lesser charge.

III. Observations

The government may choose to subject chronic violators to criminal, rather than civil, enforcement. In several cases described above, such as Pelican Refining, Columbus Steel Castings, and Tonawanda Coke, the facilities were operating within the compliance system, but
suffered multiple violations spanning several years. Usually, if a company makes its best efforts to reach agreement with the agency, agencies will work within the civil enforcement system. Some operators may resist accepting the civil penalties that come with self-disclosure, but the EPA attempts to provide enforcement discretion to reduce or eliminate penalties.

Ignoring or disregarding the regulatory process more likely results in criminal actions. Even with a company’s best efforts, some deviations from emissions standards, monitoring requirements, and operating permit conditions may still occur. If a company is trying to comply, it should be able to avoid criminal enforcement. However, those who knowingly disregard the regulatory process, like a long list of asbestos abatement contractors, illegal refrigerant and engine importers, and Hershey Creamery’s knowing disregard of the compliance system, invite criminal enforcement. Those who falsely certify compliance, lie to the government, or submit falsified monitoring data also invite enhanced scrutiny.

The suite of “Title 18” crimes, such as conspiracy, false statements, honest services fraud, and money laundering, provide prosecutors additional opportunities to prosecute suspected environmental criminals. While environmental statutes include false certification sanctions, the fines and prison terms available under Title 18 usually exceed the environmental statute’s penalties by a wide enough margin to encourage prosecutors to charge under Title 18. Title 18 also gives prosecutors the option to charge not only principals in the illegal activities, but also many who assist in the process.

The other major trend is where the government wants to punish those responsible for large events and major health risks traceable to industrial activities. Unfortunately, even with
the best preparation, planning, and prevention programs, industrial accidents may still happen. When operators knowingly take unnecessary and unwise risks that endanger the public, criminal sanctions may be appropriate. Management must balance operating risk with public protection in designing and implementing preventative maintenance and capital upgrades.

In addition, the government sometimes wants to set an example. In the Grace case, the government sought any means to prevent others from spreading acute health hazards like Grace did over the years in Libby, MT. However, the court found that Grace’s actions after 1999, the period covered by the criminal indictment, did not endanger the public. Prosecutorial missteps also compromised this case.

Where an actor knowingly places chemicals into the environment, and those chemicals directly caused serious bodily injury, the government may be able to show knowing endangerment. This would require the government to show that the operator knowingly disregarded permit limits and emissions standards, as compliance with the regulatory program is a full defense against endangerment. Had Grace known decades before about the asbestos contamination in its vermiculite, the health hazards of trace asbestos in their industrial activity and the widespread use of mine products as fill material, insulation, and soil amendment, then a knowing endangerment charge would more likely stick. Prosecutors could pursue knowingly endangering the nearby public in a case like Tonawanda Coke, where the coke ovens exceeded benzene emissions standards by 75 times and operations staff purportedly bypassed emissions controls. Operators of facilities that exceed emissions limits by wide enough margins to cause a
substantial excess cancer risk in neighboring populations should be aware of this potential enforcement option.

Charging criminally those who operate a facility that experiences an unfortunate industrial accident, without showing intent to create conditions that endanger the public, may constitute prosecutorial overreaching. In the United Oil Recycling case, the government was unable to show that management knowingly placed its workers at risk. Prosecutors charging criminally those operating facilities involved in an unfortunate accident do nothing to encourage owners and operators to improve operations to further protect its employees and the public. Also, the government could not show that recent Grace actions endangered the public, only that acts occurring long before Congress passed the 1990 CAA Amendments created a local health crisis. Before the government charges owners, operators, and management with endangering the public, it should objectively determine if management knowingly operated an unsafe facility, or if the incident was just an unfortunate set of circumstances industry should learn from.

Negligent endangerment has an enforcement role, when preventable circumstances cause unnecessary public risk. Ordinary negligence is easy to find in many situations. However, the government typically does not pursue negligent endangerment in every industrial accident. Every negligent endangerment case has resulted in a plea agreement, so the companies involved seem to have agreed that there was more that reasonably could have been done to reduce the risk of harm. Management of change, an element of PSM and RMP where facilities affirmatively study how proposed changes impact operations and the public, is only required
for PSM and RMP covered processes. However, a company that wishes to minimize its
exposure to criminal enforcement should weigh adopting some of the PSM concepts to its non-
covered processes.

Owners and operators must beware of the very fine line between seemingly normal
operations and criminal liability. Simple negligence in a seemingly normal operational decision
could bring jail time. Or least criminal charges that the company and its employees would need
to defend. And make sure the agency thinks it has your attention.