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## Criminal Prosecution for Environmental Lawbreakers: A Statute with No Bite

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2017]

CRIMINAL PROSECUTION FOR  
ENVIRONMENTAL LAWBREAKERS:  
A STATUTE WITH NO BITE

I. INTRODUCTION

Surely, no one would be surprised to learn that without adequate law enforcement and commensurate prosecution, a certain percentage of the population would repeatedly ignore the law; environmental law violators are no exception to this notion.<sup>1</sup> The purpose of the Environmental Protection Agency (EPA) is to protect individuals from egregious risks that may negatively affect their health or the environment in their daily routines.<sup>2</sup> In 1982, the EPA established the criminal enforcement program, and in 1988, Congress exercised its full enforcement authority upon the recognition that it must combat environmental crimes in order to prevent pollution and significant harm to human health.<sup>3</sup> The program enforces compliance with the law by “investigating cases, collecting evidence, conducting forensic analyses and providing legal guidance. . . .”<sup>4</sup> Additionally, the program aids in the prosecution of those responsible for the criminal conduct of posing a threat to human health and the environment.<sup>5</sup>

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1. For a discussion of the development and history of the environmental law enforcement program, see *infra* notes 18-33 and accompanying text.

2. See *Our Mission and What We Do*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/aboutepa/our-mission-and-what-we-do> (last visited Dec. 7, 2016) (explaining goals and purpose of Environmental Protection Agency); see also Steven P. Solow, *Preventing An Environmental Violation From Becoming A Criminal Case*, 18 NAT. RESOURCES & ENV'T. 19, 20 (2004) (defining factors to establish “significant environmental harm”). To determine whether a violation constitutes “significant environmental harm,” the EPA considers the following factors: (1) actual harm that is detrimental to human health or the environment; (2) the threat of such “harm by an actual or threatened discharge, release, or emission;” (3) the failure to report any discharge, release, or emission and any dangers that may result from not reporting; and (4) a “single violation that represents a ‘trend or common attitude within the regulated community.’” *Id.* at 20.

3. See *Criminal Enforcement*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/enforcement/criminal-enforcement> (last updated Dec. 5, 2016) (providing overview of criminal enforcement program).

4. *Id.* (explaining enforcement program duties).

5. See *id.* (describing what program provides for individuals or corporate defendants who have been charged with serious environmental crimes).

An environmental law violation is classified as a white-collar crime.<sup>6</sup> This allows the government to not only criminally charge individuals for white-collar crimes, but to impose sanctions on corporations as well.<sup>7</sup> An investigative partner of either the EPA's Criminal Investigation Division or the Fish and Wildlife Service examines potential environmental crimes.<sup>8</sup> Like other criminal cases, the prosecutor's ultimate goal is to seek justice and not merely a conviction.<sup>9</sup> While the majority of these cases usually results in a plea agreement, the Environmental Crimes Section (ECS) maintains successes in federal court.<sup>10</sup> Between October 1998 and September 2014, the ECS completed criminal cases against more than a thousand individuals and over four hundred corporate defendants, which resulted in a total of approximately 774 years of incarceration and up to \$825 million in criminal fines.<sup>11</sup> Fines are often imposed to negate profits that are made from engaging in illegal activities.<sup>12</sup>

This article asserts that the current criminalization for environmental law violations is ineffective.<sup>13</sup> Overzealous prosecution invites over-deterrence and deprives criminal sanctions of their "moral stigma," while lenient criminal sanctions undermine the deterrence objectives and devalue the environmental laws.<sup>14</sup> Accordingly, Part II of this article examines the evolution and current trends of criminal prosecutions for environmental crimes by focusing on the two main federal violations: pollution and wildlife

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6. See *Environmental Law Violations*, LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/environmental\\_law\\_violations](https://www.law.cornell.edu/wex/environmental_law_violations) (last visited Jan. 22, 2016) (elaborating on responsibilities of EPA).

7. See generally *id.* (explaining how white-collar crimes are penalized). The most popular penalties include fines, community confinement, paying the cost of prosecution, restitution, and imprisonment. *Id.*

8. See *Environmental Crimes Section*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/enrd/environmental-crimes-section> (last visited Jan. 22, 2016) (explaining prosecutors' roles in environmental crime cases).

9. See *id.* (explaining prosecutors' roles and procedure).

10. See *id.* (explaining environmental criminal procedure and potential outcomes).

11. See *id.* (demonstrating success in punishing defendants for violating environmental laws).

12. *Environmental Law Violations*, *supra* note 6 (identifying sentences imposed when convicted).

13. For a further discussion regarding the effectiveness of the criminalization of environmental law violations, see *infra* notes 140-150 and accompanying text.

14. See Charles J. Babbitt, Dennis C. Cory, and Beth L. Kruchek, *Discretion And The Criminalization Of Environmental Law*, 15 DUKE ENVTL. L. & POL'Y F. 1, 1 (2004) (explaining inconsistencies with reaching goals of environmental laws).

crimes.<sup>15</sup> Part III analyzes the overall negativity of the current enforcement program, criticizes the sentencing guidelines, and provides a resolution for overzealous prosecutors.<sup>16</sup> Finally, Part IV discusses the future impact on those creating a substantial risk to our health and environment.<sup>17</sup>

## II. BACKGROUND

### A. The History of Environmental Criminal Law

American citizens did not seriously address the impact of environmental pollution until the 1960s, when Congress implemented more precautionary and remedial measures to regulate illegal conduct.<sup>18</sup> Today, the United States has almost five decades of experience with criminal prosecution of environmental violations.<sup>19</sup> The initial objective of increasing prosecution was to reduce pollution that was damaging the United States' air, water, and land.<sup>20</sup> At the time, the only means of regulating pollution was the Rivers and Harbors Act of 1899, which protected the "navigability of federal waters."<sup>21</sup> Violators of this Act were strictly liable and charged with misdemeanors.<sup>22</sup> Next, the federal enforcement of wildlife, through the Lacey Act, was and presently remains a strong foundation to protect plants and animals from being illegally traded or transported.<sup>23</sup> The Lacey Act is the oldest statute that focuses on wildlife protection.<sup>24</sup>

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15. See generally *Environmental Crimes Section*, *supra* note 8 (last visited Jan. 22, 2016) (mentioning evolution and current trends of environmental law prosecution).

16. For a discussion regarding the analysis of the current environmental enforcement program, see *infra* notes 140-244 and accompanying text.

17. For a discussion regarding the future impact of the environmental enforcement program, see *infra* notes 229-244 and accompanying text.

18. See *Historical Development Of Environmental Criminal Law*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/enrd/about-division/historical-development-environmental-criminal-law> (last visited Jan. 22, 2016) (explaining development of environmental criminal law). From the late 1960s through the 1980s, Congress enacted the environmental statutes that prosecutors used for corresponding purposes to regulate industrial pollution. *Id.*

19. See *id.* (discussing how America now has experience in handling environmental violations).

20. See *id.* (providing background on development).

21. See *id.* (providing history on original Rivers and Harbors Act).

22. See *id.* (providing background on Rivers and Harbors Act).

23. See *Historical Development of Environmental Criminal Law*, *supra* note 18 (explaining effect of wildlife prosecution).

24. See Robert S. Anderson, *The Lacey Act: America's Premier Weapon In The Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LAND. L. REV. 27, 29 (1995) (providing history of Lacey Act).

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In 1970, as a result of the enactment of the Clean Air Act (CAA), Congress took an aggressive approach to criminal enforcement; the CAA, as well as subsequent acts, treated violations as misdemeanors.<sup>25</sup> It was not until 1980 that an environmental law violation was treated as a felony under federal law.<sup>26</sup> As a result of the increased severity in grading, the maximum punishment exceeded one year of imprisonment.<sup>27</sup> Similarly, the Clean Water Act (CWA) criminalized storage or disposal of hazardous waste in United States' waters without a permit.<sup>28</sup> This new law posed problems for the "waste management practices" that operated across the United States and subjected corporations and their employees to felony prosecution if "committed 'knowingly' by corporations and their employees."<sup>29</sup> The CWA and CAA are among the laws that most commonly regulate pollution.<sup>30</sup>

The purpose of treating environmental law violations as felonies was to draw attention and resources to the enforcement of environmental laws.<sup>31</sup> The increase in punishment was designed "to criminalize additional types of violations, to increase penalties, and to add knowing endangerment provisions to environmental statutes."<sup>32</sup> The EPA and Department of Justice (DOJ) demonstrated a commitment to investigating and prosecuting environmental crimes in order to protect the nation's natural resources more effectively.<sup>33</sup>

## B. Prosecution of Federal Pollution Crimes

Pollution, particularly in waters, is an unresolved problem in the United States, causing many individuals to suffer from exposure

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25. See *Historical Development of Environmental Criminal Law*, *supra* note 18 (explaining enactment of Clean Air Act).

26. See David M. Uhlmann, *Environmental Crime Comes of Age: Evolution Of Criminal Enforcement In The Environmental Regulatory Scheme*, 2009 UTAH L. REV. 1223, 1224 (2009) (explaining introduction of environmental laws as felonies).

27. See *Historical Development of Environmental Criminal Law*, *supra* note 18 (providing background on development).

28. See 33 U.S.C. §1319(c) (2006) (elaborating on Act's requirements).

29. See Uhlmann, *supra* note 26, at 1224 (explaining potential problems with new Clean Water Act).

30. See Arnold W. Reitze, Jr., *Criminal Enforcement Of Pollution Control Laws*, 9 ENVTL. LAW. 1, 15 (2002) (illustrating most common pollution statutes).

31. See *Historical Development of Environmental Criminal Law*, *supra* note 18 (justifying creation of felonies for environmental laws).

32. Reitze, *supra* note 30, at 10 (explaining increase in criminal penalties).

33. See *id.* (giving reasons for stringent change in environmental violations).

to hazardous chemicals.<sup>34</sup> With a goal of maintaining America's renowned beauty, Congress has enacted numerous laws to ensure healthy air, non-polluted waters for fishing, and uncontaminated land.<sup>35</sup> Furthermore, in order to deter illegal polluting, legislators added criminal provisions to statutes.<sup>36</sup> These laws focus on individuals or corporations that knowingly and consciously break the law.<sup>37</sup> Congress' primary objective in introducing criminal prosecution to environmental laws was to prevent businesses that break these laws from gaining an advantage over competitors who comply with the laws.<sup>38</sup> Moreover, the criminal consequences convey a message to the public that pollution is abhorrent to the country.<sup>39</sup> Today, the CWA provides a basic framework for monitoring any discharge of water pollutants and "regulating quality standards for surface waters in the United States."<sup>40</sup>

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34. See generally Mark W. Schneider, *Criminal Enforcement Of Federal Water Pollution Laws In An Era Of Deregulation*, 73 J. CRIM. L. & CRIMINOLOGY 642, 642 (1982) (explaining prominent problem with pollution).

35. See *Prosecution of Federal Pollution Crimes*, DEP'T OF JUSTICE, <http://www.justice.gov/enrd/prosecution-federal-pollution-crimes> (last visited Jan. 22, 2016) (explaining why laws have been enacted for pollution).

36. See *id.* (explaining goals in enacting such laws); see also Act to Prevent Pollution from Ships, 33 U.S.C. §§ 1901-1912 (2015); Atomic Energy Act, 42 U.S.C. §§ 2011-2296 (1992); Clean Air Act, 42 U.S.C. §§ 7401-7671 (1990); Comprehensive Environmental Response, Compensation and Liability Act (CERLA), 42 U.S.C. §§ 9601-9675 (2002); Deepwater Port Act, 33 U.S.C. §§ 1501-1524 (2002); Emergency Planning and Community Right to Know Act (EPCRA) 42 U.S.C. §§ 11001-11050 (1986); Energy Supply and Environmental Coordination Act, 15 U.S.C. §§ 791-798 (1974); Federal Hazardous Material Transportation Law, 49 U.S.C. §§ 5101-5127 (2005); Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (2004); Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1251-1387 (1987); Noise Control Act, 42 U.S.C. §§ 4910 (1978); Ocean Dumping Act (ODA), 33 U.S.C. §§ 1401-1445 (1974); Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356 (1978); Ports and Waterways Safety Act, 33 U.S.C. §§ 1221-1236 (2002); Rivers and Harbors Appropriations Act, 33 U.S.C. §§ 401-467 (1983); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (1984); Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-26 (1996); Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201-1328 (1977); Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2692 (1986) (listing federal pollution crimes).

37. See *Prosecution of Federal Pollution Crimes*, *supra* note 35 (discussing targets of new law).

38. See *id.* (explaining goal of implementing criminal prosecution).

39. See *id.* (demonstrating negative effects of pollution). The government typically bears the burden of proof by demonstrating the defendant engaged in pollution and possessed the requisite intent, "knowingly." *Id.* It is insufficient to show that the conduct was a mistake. *Id.*

40. *Summary of the Clean Water Act*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/laws-regulations/summary-clean-water-act> (last updated Sept. 8, 2016) (summarizing Clean Water Act regulations).

### C. The Clean Water Act

The Rivers and Harbors Act of 1899 (the Refuse Act) had an important influence on the deliberations for the CWA.<sup>41</sup> The Refuse Act and the CWA predominantly regulate water pollutants.<sup>42</sup> Before 1982, the EPA pursued twenty-five criminal cases despite its initial intention to enforce violations civilly.<sup>43</sup>

Originally, legislators enacted the Refuse Act to control the navigability of the waterways, but over time, legislators have used the Act to combat pollution.<sup>44</sup> Additionally, the CWA also prohibits entities from polluting.<sup>45</sup> The purpose of the CWA is to “maintain the chemical, physical and biological integrity of the Nation’s waters. . . .”<sup>46</sup> The CWA authorizes criminal prosecution for “knowing discharges of oil or other hazardous substances ‘in such quantities as may be harmful . . . ,’ but it is not . . . [usually] used to charge in criminal cases.”<sup>47</sup> Congress included misdemeanor penalties until 1987, when felonies were added to the Act for first-time violations.<sup>48</sup> Pollutants that are banned through the CWA include radiological, medical, and high-level radioactive waste.<sup>49</sup> Further, the EPA has

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41. See *id.* (showing influence Refuse Act had on CWA).

42. See Lindsay A. Larson III and Jean Paul Picou Overton, *Representing Corporate And Individual Clients In Criminal Prosecution For Environmental Pollution: A Primer*, 19 TUL. MAR. L.J. 113, 114 (1994) (illustrating most popular regulations for water pollution).

43. See Jane F. Barrett, “Green Collar” Criminals: Why Should They Receive Special Treatment?, 8 MD. J. CONTEMP. LEGAL ISSUES 107, 108-09 (1997) (discussing trend in criminal cases before 1982).

44. See Larson, *supra* note 42, at 114 (elaborating on reason for Refuse Act); see also 33 U.S.C. § 407 (1988) (identifying statute). Under the Refuse Act, individuals or businesses can be prosecuted for endangering the waterways by obstructing navigability or polluting the environment. See Larson, *supra* note 42, at 114. Contrary to most criminal statutes, violators are not required to possess a specific intent to be convicted under this Act. *Id.* Regardless of an individual’s due care or lack thereof, an individual may be found liable because “[t]he [main] purpose [of the Refuse Act] is to require people to exercise whatever diligence they must to keep refuse out of public waters.” *Id.* (citing *United States v. White Fuel Corp.*, 498 F.2d 619 (1st Cir. 1984)). Defendants most commonly respond to a Refuse Act violation by asserting that their actions were in accordance with an issued permit. *Id.*

45. See Larson, *supra* note 42, at 114 (discussing prohibitions under CWA).

46. See Christopher Huber et al., *Environmental Crimes*, 33 AM. CRIM. L. REV. 607, 651 (1996) (discussing purpose of CWA).

47. See Uhlmann, *supra* note 26, at 1243 n.103 (explaining purpose of CWA).

48. See Barrett, *supra* note 43, at 108-09 (discussing felonies in provision of CWA).

49. See Huber, *supra* note 46, at 653-54 (explaining which discharges are banned).

broad discretion in establishing water quality standards and modifying “effluent limitations.”<sup>50</sup>

Similar to the Refuse Act, the CWA does not require a specific criminal intent for negligent violations of the environmental policy.<sup>51</sup> Contrary to the Refuse Act, however, the CWA contains a provision that mandates immediate notification to the federal government agency upon illegal discharge.<sup>52</sup> Immunity is awarded to natural persons who provide the proper notification under Section 1321(b)(5), which prevents the reported pollution from being used against him or her in a subsequent criminal prosecution.<sup>53</sup>

#### D. Prosecution of Wildlife Crime

##### 1. Congress’ Motivation and Role

Congress enacted the Lacey Act in 1900 to impose federal enforcement on those who disregard wildlife protection laws.<sup>54</sup> Specifically, this Act makes it a federal crime to violate the “wildlife laws of any state, tribe, or foreign country, and then move or trade the wildlife across [United States] borders.”<sup>55</sup>

Because states were responsible for regulating over-hunting wildlife, Congress’ objective was to help state laws combat the interstate commerce of wildlife.<sup>56</sup> After several amendments, the Lacey Act’s current main focus is to prohibit international and interstate wildlife trafficking.<sup>57</sup> The Lacey Act strictly prohibits the failure to make indications for wildlife shipments, as well as prohibits trade in wildlife, plants, or fish that have been illegally “taken, possessed,

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50. *See id.* (demonstrating EPA’s role relative to CWA).

51. *See* Larson, *supra* note 42, at 128 (differentiating between Refuse Act and CWA). The government only bears the burden of proof to demonstrate that a willful act occurred. *Id.* Knowledge of endangerment violations pursuant to Section 1319(c)(3)(B), “actual belief” or “actual awareness” of imminent danger is sufficient to meet the requisite level of intent. *Id.*

52. *See id.* (distinguishing CWA from Refuse Act).

53. *See* 33 U.S.C.A. § 1321 (West 2014) (discussing when immunity is awarded to natural persons); *see also* Larson, *supra* note 42, at 128 (explaining how immunity exists for individuals).

54. *See* Anderson, *supra* note 24, at 29 (explaining purpose of enacting Lacey Act).

55. *See Prosecution of Federal Pollution Crimes, supra* note 35 (providing prohibitions of Lacey Act).

56. *See id.* (explaining why Congress enacted Lacey Act); *see also* Endangered Species Act, 16 U.S.C. § 1531 (1988); *see also* Bald and Golden Eagle Protection Act (BGEPA), 16 U.S.C. § 668 (2015); *see also* Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 707 (2015) (identifying laws that protect wildlife).

57. *See* Anderson, *supra* note 24, at 29 (discussing main goal of Lacey Act).



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transported, or sold.”<sup>58</sup> Both provisions subject transgressors to civil and criminal liability.<sup>59</sup>

Regulating wildlife trade deters depletion or extinction of threatened species and the importation of non-native species, and prevents the spread of serious or fatal diseases to humans, animals, or plants; it also bans both the inhumane transportation of wildlife and the distortion of trade.<sup>60</sup> It is also important for Congress to regulate this illegal conduct because these actions pose several potential environmental and national security threats to the United States.<sup>61</sup>

Congress aims to prevent the environmental risks of decreasing the biodiversity of plant life, animal life, and invasive species, as well as the spread of diseases through illegal wildlife trade.<sup>62</sup> The national security threats are another serious concern of Congress because they oftentimes lead to strategically planned crimes and drug trafficking.<sup>63</sup> Moreover, some terrorist groups fund their violence through illegal wildlife trade.<sup>64</sup> This particular conduct is unique to wildlife crimes, not pollution crimes.<sup>65</sup>

Congress has broad discretion when evaluating the United States’ policy to combat wildlife trafficking.<sup>66</sup> Leading analysts established potential issues that Congress may encounter when combatting illegal wildlife trafficking, such as determining trade and investigation funding levels; assessing the effectiveness of foreign aid to wildlife trafficking; encouraging private-sector involvement in wildlife trade regulation; utilizing trade sanctions to punish foreign

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58. See 16 U.S.C. §§ 3372, 3373 (2015) (stating specific prohibitions of Lacey Act).

59. See *id.* (discussing appropriate actions for violations).

60. See Liana S. Wyler and Pervaze A. Sheikah, *International Illegal Trade in Wildlife: Threats and U.S. Policy*, CONG. RESEARCH SERV. 1 (Mar. 3, 2008), <http://fpc.state.gov/documents/organization/102621.pdf> (explaining importance of regulating wildlife).

61. See *id.* at 1 (explaining importance of regulating wildlife).

62. See *id.* at 11 (explaining Congress’ intent and objectives for regulating wildlife).

63. See *id.* at 1 (explaining repercussions with national security threats).

64. See *id.* at 19 (explaining how terrorists may solicit finances for violent acts). The limited anecdotal evidence that is publicly available points to terrorists engaging in illegal poaching in several areas of Asia and Africa as well as smuggling illegal wildlife to advance their finances and organized crime groups. *Id.* at 8. These terrorist groups gravitate towards regions of high biodiversity to take advantage of permeable borders, “weak states, and criminal sympathizers.” *Id.* at 19.

65. See *Prosecution of Federal Crimes*, supra note 35 (distinguishing between federal pollution crimes and wildlife crimes).

66. See *id.* (explaining Congress’ role in protecting wildlife from illegal hunting).

countries; incorporating free trade agreements; and addressing domestic and international demand through public campaigns.<sup>67</sup>

## 2. *Enforcing Wildlife Crimes*

Several United States agencies, such as the Fish and Wildlife Service (FWS) and National Oceanic and Atmospheric Administration (NOAA), are responsible for investigating potential wildlife violations.<sup>68</sup> State officers are authorized to investigate state violations, which may then result in federal cases.<sup>69</sup> In 1979, the DOJ's Environment and Natural Resources Section created the Marine Sources Section (MSS) due to an increase in complex cases.<sup>70</sup> The prosecutors from the MSS often consult with the Assistant United States Attorneys and federal investigators, and occasionally take the principal prosecutorial role.<sup>71</sup> Prosecutors also have significant discretion in filing additional charges, such as smuggling, conspiracy, tax, and money laundering to supplement the wildlife traffic charge.<sup>72</sup> Because the demand for illegal wildlife is highest in the United States, prosecutors face a great challenge in trying to prevent international suppliers' illicit conduct.<sup>73</sup>

To combat illicit activities, wildlife investigators use a similar approach to those who work in narcotics enforcement.<sup>74</sup> Some of the evidence the prosecutors obtain against defendants charged with illegal wildlife activity stem from "anticipatory warrants" and "controlled deliveries of contraband wildlife."<sup>75</sup> When they learn of what evidence the prosecution acquired, defendants are more inclined to cooperate and turn against the vendors.<sup>76</sup> Disclosing such information may result in a reduced sentence or immunity, de-

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67. See Wyler, *supra* note 60, at 1 (explaining possible issues Congress may encounter in evaluating U.S. policy to combat wildlife trafficking).

68. See Anderson, *supra* note 24, at 34 (identifying other various agencies for investigation).

69. See *id.* at 34 (explaining who conducts investigations).

70. See *id.* (introducing new section through DOJ).

71. See *id.* at 34-35 (explaining role of prosecutors in new section).

72. *Id.* at 36 (discussing broad discretion of prosecutors to add additional, related charges).

73. See *Prosecution of Federal Crimes*, *supra* note 35 (noting difficulties prosecutors face with environmental cases).

74. See *id.* (discussing approaches to preventing wildlife crimes).

75. *Id.* (explaining how evidence is frequently obtained).

76. *Id.* (detailing effects of defendant's cooperation, including obtaining information). The more compelling the evidence, the more likely the prosecutor's side will win in favor of the public. *Id.* The defendant's product and/or services may be boycotted since the public will believe the defendant is taking advantage of them. *Id.*

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pending on the prosecutor.<sup>77</sup> Moreover, cooperation and voluntary compliance are crucial to maintaining an effective environmental enforcement program.<sup>78</sup>

The government creates a notable deterrence effect in the community when suppliers are convicted.<sup>79</sup> Enforcing the federal environmental crimes emphasizes the importance of wildlife management by state, tribal, and foreign governments and reflects on these entities in a positive light.<sup>80</sup> Perpetrators of wildlife crimes could face any of the following punishments: “prosecution of both individual and organization offenders; repayment of the wrongful proceeds; community service to lessen any harm inflicted; and forfeiture of wildlife used in furtherance of the crime.”<sup>81</sup>

#### E. Corporations Are People Too

Corporations are expressly considered “persons” in the enforcement of environmental laws.<sup>82</sup> Consequently, a corporation that violates environmental statutes is subject to criminal liability.<sup>83</sup> Corporations are also legally responsible for their employees’ and agents’ actions.<sup>84</sup> It is rare for a corporation to gain exemption from liability by claiming its conduct resulted from “independent, misguided employees,” which is why a corporation cannot exonerate itself from a violation by pointing to the illegal conduct of one of its employees.<sup>85</sup> “[T]his . . . applie[s] [in] [demonstrating] the liability of a ‘well-intentioned’ municipal corporation under the [CWA].”<sup>86</sup> Additionally, “corporate officers are [held accountable] for [ ] [actions] . . . within their [explicit] knowledge and con-

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77. Robert I. McMurry & Stephen D. Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 LOY. L.A. L. REV. 1133, 1159 (June 1986), <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1537&context=llr> (discussing effect of cooperation with government on sentencing).

78. *See id.* (explaining how to maintain effective program).

79. *See id.* (discussing government impact on prosecution).

80. *See id.* (discussing significance of enforcing wildlife crimes).

81. *See Prosecution of Federal Crimes*, *supra* note 35 (illustrating possible penalties defendants face).

82. McMurry, *supra* note 77, at 1155 (defining corporations with respect to statute).

83. *See id.* (explaining how corporations are subject to liability).

84. *See id.* (explaining corporations role in conjunction with its employees). The courts impose this standard of liability because employees’ knowledge represents the knowledge of the corporation. *Id.*

85. *See id.* at 1155-56 (elaborating on corporations’ liability).

86. *See id.* at 1156 (quoting *United States v. Little Rock Sewer Comm.*, 460 F. Supp. 6 (E.D. Ark. 1978)) (demonstrating how liability is applied to environmental statutes).

trol.”<sup>87</sup> The governing case on this issue, *United States v. Johnson & Towers, Inc.*<sup>88</sup>, determined that “person” is to be interpreted broadly to target any individual or corporation that manages regulated material and conduct despite the level of severity.<sup>89</sup> To mitigate conflicts of interests that may arise between an employee and corporation, the environmental statutes protect employees from being fired and also suggest procedures for reporting violations.<sup>90</sup>

#### F. Defending Environmental Crimes

Constitutional defenses are known to have limited success for environmental law crimes.<sup>91</sup> The defense that fails most commonly claims that the National Environmental Policy Act (NEPA) violated the non-delegation doctrine between state and executive authorities.<sup>92</sup> Courts have continually upheld that Congress has the authority to delegate powers to the EPA, despite the EPA’s status as a regulatory agency.<sup>93</sup> Furthermore, several courts have also rejected a defense that alleges environmental statutes are unconstitutionally vague, thus, violating citizens’ due process rights under the Fourteenth Amendment.<sup>94</sup> Finally, courts have also rejected the notion “that federal statutes exceed federal authority under the [C]ommerce [C]ause[.]”<sup>95</sup>

Defendants who wish to raise a Fourth Amendment defense, alleging that a government party conducted an unreasonable search or seizure, need to show that they had a “legitimate expectation[ ] of privacy[ ]” in order to gain standing to bring a claim.<sup>96</sup>

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87. See McMurry, *supra* note 77, at 1156 (explaining extent of corporate responsibility for criminal actions).

88. *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3d. Cir. 1984) (illustrating “person” as corporation), *cert denied*, 105 S. Ct. 1171 (1985).

89. See *id.* at 667 (illustrating legislative intent for broad interpretation for “person”).

90. See McMurry, *supra* note 77, at 1159 (explaining how employees are protected from employer’s retribution).

91. See Huber, *supra* note 46, at 617-18 (describing constitutional defenses for environmental violations).

92. See *id.* at 618 (elaborating on most popular constitutional defense).

93. See *id.* at 618 n.73 (citing *South Terminal Corp. v. EPA*, 504 F.3d 646, 676-77 (1st Cir. 1974); *United States v. Mills*, 817 F. Supp. 1546, 1552-55 (N.D. Fla. 1993); *State v. Union Tank Car Co.*, 439 So. 2d 377 (La. 1983)) (explaining EPA’s authority).

94. See *id.* at 618 (focusing on lack of success of Fourth Amendment defenses).

95. See *id.* (footnote omitted) (focusing on failure of Commerce Clause defenses).

96. See Huber, *supra* note 46, at 619 (illustrating requirements to raise Fourth Amendment defense).

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The “probable cause” threshold implemented in the language of the Fourth Amendment is lowered for environmental cases, which reduces the government’s burden to obtain a search warrant in comparison to the government’s burden to obtain a search warrant in the investigation of other crimes, such as robbery.<sup>97</sup> Similarly, inspections under the National Pollution Discharge Elimination System (NPDES) also allow for a lower standard for probable cause.<sup>98</sup> “The EPA has [much] discretion” in deciding if an investigation is appropriate and necessary.<sup>99</sup>

There are caveats when raising a constitutional defense in an environmental case.<sup>100</sup> A defendant may be sued both civilly and criminally when the government collects evidence of deliberate violations that warrant criminal prosecution or evidence of an on-going violation that requires injunctive relief.<sup>101</sup> If both actions are deemed appropriate, then “courts will issue [a] protective order[ ] to [shield] . . . civil discovery [materials from the government] [ ] us[ing] [that information] in [a] criminal proceeding[ ].”<sup>102</sup> In the event there are “contemporaneous[ ] . . . actions,” a defendant may be inclined to raise a Double Jeopardy defense under the Fifth Amendment; it is unlikely to be successful, however, because the defendant is not subject to multiple criminal punishments.<sup>103</sup> There are a few defenses that have great potential to be effective.<sup>104</sup>

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97. *See id.* (footnote omitted) (exhibiting lower standard for probable cause in environmental law); *see also* *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (further explaining probable cause standard). Pursuant to the Fourth Amendment, “a search[,] . . . [with or] without a warrant[,] must be based upon ‘probable cause’ to believe that a violation has occurred.” *Id.*; U.S. CONST., AMEND. IV (providing Fourth Amendment protection). Probable cause is present if enough evidence exists to “persuade a ‘reasonable man[ ].’” *Sibron v. New York*, 392 U.S. 40, 78 (1968) (explaining probable cause standard).

98. *See* Huber, *supra* note 46, at 619 (distinguishing lower standard implemented for administrative probable cause).

99. *See id.* (explaining EPA’s realm of discretion).

100. *See id.* at 609 (explaining downsides to raising constitutional defenses).

101. *See id.* at 607 (differentiating between civil and criminal lawsuits).

102. *See id.* at 620 (footnote omitted) (showing how defendants have some protection from Double Jeopardy).

103. *See* Huber, *supra* note 46, at 620 (footnote omitted) (showing lack of success for Double Jeopardy). A paramount Supreme Court case in 1997 established that Double Jeopardy “protects only against the imposition of multiple *criminal* punishments for the same offense[.]” *See Hudson v. United States*, 522 U.S. 93, 99 (1997) (emphasis in original) (citations omitted) (explaining protections of Double Jeopardy Clause). The imposition of civil fines in addition to a criminal prosecution does not trigger the Double Jeopardy Clause. *Id.* The defendant, however, is still subject to prosecution by separate sovereigns for the same criminal conduct. *Id.*

104. *See* Huber, *supra* note 46, at 610 (explaining additional successful defenses). The defendant may be successful when he reasonably relies on an “admin-

Still, ignorance of the law or legal rights is not a complete, persuasive defense.<sup>105</sup>

## G. The Criminal Enforcement

### 1. *Criminal vs. Civil Actions*

Criminal enforcement is known to have “a [more] [significant] deterrent effect than civil actions[.]”<sup>106</sup> While corporations “cannot be imprisoned,” they can be subject to monetary criminal sanctions, as well as exposition to negative “opprobrium” that is coupled with engaging in illegal conduct.<sup>107</sup> The negative criticism that accompanies a conviction can harm the reputation and pecuniary situation of a corporation and its future.<sup>108</sup> “[A] criminal conviction . . . [also hinders a corporation’s] [cap]ability to bid on [future] government contracts.”<sup>109</sup> Civil enforcement for a corporation, on the other hand, appears to be “a cost of doing business[.]” as the corporation merely incurs “[expenditures to] defend[ ] the [suit] and pay[s] . . . [the respective] judgment [imposed.]”<sup>110</sup>

The “willful acts[ ] [that are alleged in a criminal action] [ ] are not [protected] by insurance policies, [n]or by the power and duty to indemnify[.]” and as a result, are more likely to result in “personal liability.”<sup>111</sup> Contrary to traditional crimes, like robbery

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istrative action[.]” *Id.* at 621 (footnote omitted). “[R]egulations [that] were adopted [inconsistent] to procedural requirements[ ]” may also benefit defendant’s case. *Id.* (footnote omitted). Both the EPA and the DOJ favor regulated entities’ “voluntary compliance efforts[.]” *Id.* The EPA is willing to exclude punitive penalties if companies or public agencies “voluntarily identify, disclose, and correct violations.” *Id.* The EPA will refrain from making recommendations to the DOJ if the party acts in “good faith to identify, disclose, and correct violations.” *Id.*

105. *See id.* (explaining ignorance of law is not complete defense).

106. *See* McMurry, *supra* note 77, at 1157 (comparing criminal and civil enforcement). Enforcement authorities have deduced that awareness of the possibility of substantial fines and/or imprisonment enhances the deterrent effect. *Id.* at 1143.

107. *See id.* at 1157-58 (footnote omitted) (explaining deterrent effects of criminal sanctions on corporations).

108. *See* Carol Dinkins & Sean Lonnquist, *The Belt And Suspenders Approach: The Advantages Of A Formalized Environmental Compliance Program*, 2009 UTAH L. REV. 1129, 1129 (2009) (explaining ramifications of guilty verdict on environmental crimes).

109. *See* McMurry, *supra* note 77, at 1158 (footnote omitted) (explaining repercussions for corporations following criminal sanctions).

110. *See id.* (quotation marks omitted) (footnote omitted) (explaining how corporations cover costs of civil actions brought against companies even when individuals are named in suit).

111. *See id.* (footnotes omitted) (discussing lack of insurance policy protection).

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or assault, those who violate environmental laws are typically eminent citizens without a prior criminal record.<sup>112</sup> It is undisputed that the American criminal justice system has more experience prosecuting these “traditional crimes” than environmental violations.<sup>113</sup> Nevertheless, within the past few years, there has been an increase in awareness of the propriety and efficiency of criminal prosecution as a means for enforcing environmental laws to maintain the nation’s beauty.<sup>114</sup> At first, courts were hesitant to impose sentences for environmental violations; they then acknowledged that harm to both the environment and any potential victims cannot be measured.<sup>115</sup>

## 2. *The Prosecutor’s Role*

There has been much controversy concerning the government’s possible overreach in pursuing environmental crimes.<sup>116</sup> First, however, it is critical to understand the role a prosecutor assumes in such pursuits.<sup>117</sup> The DOJ allows prosecutors unfettered discretion “in determining when, whom, how, and even whether to prosecute for apparent violations of [f]ederal criminal law.”<sup>118</sup> Prosecutors are expected to use common sense and good judgment to amplify the utmost deterrent effect, ensure environmental laws

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112. See *id.* at 1159 (explaining typical violators of environmental crimes). Criminal sanctions also create the possibility of the individual serving jail time. *Id.* “[T]he most compelling prosecutions typically involve repeated misconduct, which compounds the wrongdoing and limits any doubt about the defendant’s intent.” See David. M. Uhlmann, *Prosecutorial Discretion and Environmental Crime*, 38 HARV. ENVTL. L. REV. 159, 215 (2004) [hereinafter, *Prosecutorial Discretion*] (describing criminal sanctions and effectiveness for recidivism).

113. See Robert W. Adler, *Introduction: Environmental Criminal Prosecution: Essential Tool Or Government Overreaching?*, 2009 UTAH L. REV. 1097, 1102 (2009) (quotation marks omitted) (comparing America’s experience with criminal violations to environmental violations).

114. See *id.* (explaining America’s new attention to criminal prosecution and environmental laws).

115. See *id.* (illustrating reasoning behind imposing sentences).

116. *Principles of Federal Prosecution*, DEP’T OF JUSTICE, *Principles of Federal Prosecution* (July 1980) [hereinafter cited as *Federal Prosecution*] (discussing controversy of prosecutors’ roles).

117. For a discussion of the prosecutor’s roles in environmental crimes, see *infra* notes 118-128 and accompanying text.

118. See *Federal Prosecution*, *supra* note 116 (explaining prosecutors’ discretion to bring suit). Prosecutorial discretion is very broad with respect to environmental laws. In fact, critics argue that Congress has delegated too much authority to prosecutors; the decision to pursue a case criminally may easily be determined by whether the case involved a criminal investigator. See *Prosecutorial Discretion*, *supra* note 112, at 163 (emphasizing prosecutor’s roles and appropriate discretion).

are followed, and avert any harm that accompanies violations.<sup>119</sup> “[T]he regulated community” is skeptical of prosecutors’ discretion because it is unsure “which environmental violations will [actually] result in criminal prosecution.”<sup>120</sup>

The government dedicates extra attention to violations that involve “false reports . . . and . . . fail[ure] to obtain [a] [ ] permit[ ] [ ]” for various activities.<sup>121</sup> These types of cases assess the “[efficiency,] effectiveness[,] [and strength] of the EPA’s regulatory programs.”<sup>122</sup> In particular, the veracity of these programs depends upon “[the] obligation to obtain and abide by [ ] permits.”<sup>123</sup> Failure to honestly report any pollution activity undermines self-policing and beneficial effects from encouraging environmental protection, especially because the government now has no means of retrieving the information.<sup>124</sup> “The government . . . [lacks] the resources to [ensure] every permit[ ] [holder] . . . [is] reporting [ ] compliance status[ ] [both accurately and honestly.]”<sup>125</sup> This demonstrates the importance of voluntary compliance and providing information to the government.<sup>126</sup> Illegal discharges without a permit “are [ ] the most environmentally [dangerous] [activities][ ]” because there is a heightened possibility that the public will be exposed to hazardous substances, which will then contaminate the environment.<sup>127</sup> As a result, the government’s primary concern is to prosecute those violators without permits and anyone encouraging such conduct.<sup>128</sup>

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119. See *Federal Prosecution*, *supra* note 116, at 1 (detailing prosecutors’ roles in upholding environmental laws); see also McMurry, *supra* note 77, at 1163-65 (explaining expectations for prosecutors).

120. See *Prosecutorial Discretion*, *supra* note 112, at 163 (explaining “regulated community[’s]” reservations about prosecutorial discretion).

121. See McMurry, *supra* note 77, at 1162 (explaining importance of obtaining permit).

122. See *id.* (explaining assessment of cases).

123. See *id.* (explaining importance of abiding by permits).

124. See *id.* (explaining failure to abide by permit rules undermines effect of regulation). Entities who provide false statements, conceal information, or obstruct justice are subject to criminal liability under environment laws and Title 18 of the United States Code. *Id.*

125. See *id.* (explaining difficulty for government to monitor all permit holders).

126. See McMurry, *supra* note 77, at 1162 (explaining importance to government of relying on voluntary compliance).

127. See *id.* at 1162-63 (footnote omitted) (explaining dangers of illegal discharges without permit).

128. See *id.* at 1163 (explaining dangers of not holding permits).



3. *The Effect of Sentencing Guidelines on Corporations*

Congress created the United States Sentencing Commission (USSC) to provide guidelines and promote “uniformity” for federal judges when sentencing defendants.<sup>129</sup> The federal sentencing “guidelines [play] an advisory[, not mandatory,] role” in helping judges impose more consistent and uniform sentences for those convicted of the same crimes.<sup>130</sup> In 2004, the USSC amended the guidelines controlling “compliance and ethics programs[,]” along with business entities involved in criminal conduct, including environmental programs.<sup>131</sup> This proposed amendment did not specifically target environmental programs, but simply “appl[ied] [to] compliance and ethics programs [in] general[ ]”<sup>132</sup> The amendment required that institutions exercise “due diligence” in order to avoid engaging in criminal conduct within the business and to encourage “a commitment to[ward] compliance with the law[s][ ]” within the business.<sup>133</sup> The federal sentencing guidelines also acknowledge that certain measures should be taken periodically to mitigate any criminal conduct in the future.<sup>134</sup> The importance of these requirements derived from “[the] convict[’s] [ ] culpability score and . . . probation[ ] [conditions.]”<sup>135</sup>

While no sentencing guidelines tailored to environmental violations have been adopted as of now, the USSC reviewed a proposal (Draft) that an independent Advisory Working Group on Environmental Offenses submitted in November 1993.<sup>136</sup> The Draft addressed the importance of compliance programs when passing sentences on organizations found guilty of environmental of-

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129. See Patrick J. Devine, *The Draft Organization Sentencing Guidelines For Environmental Crimes*, 20 COLUM. J. ENVTL. L. 249, 252 (1995) (providing background for United States Sentencing Commission). This also helped prevent “unwarranted sentencing disparities among defendants with similar records[.]” *Id.*

130. See Dinkins, *supra* note 108, at 1140 (explaining role of sentencing guidelines). While the guidelines are not mandatory, it is required that judges consider them. *Id.*

131. See *id.* (explaining amendment for controlling corporation criminal conduct within corporations).

132. See *id.* (explaining amendment to sentencing guidelines).

133. See *id.* (footnote omitted) (analyzing purpose of ethics program); see also U.S. Sentencing Comm’n Guidelines Manual § 8B2.1, U.S. SENTENCING COMM’N (2008) (elaborating on basic requirements for compliance program).

134. See Dinkins, *supra* note 108, at 1140-41 (explaining mitigating conduct).

135. See *id.* (explaining role and importance of compliance and ethics programs).

136. See *id.* at 1142 (explaining proposal for environmental law sentencing guidelines).

fenses.<sup>137</sup> The principal purpose of the Draft was to control organizations, encourage commitment to environmental conformity, and construct satisfactory environmental compliance program.<sup>138</sup> Many of the factors that were presented in the Draft proposal appeared “in the sentencing guidelines’ evaluation of a compliance program.”<sup>139</sup>

### III. “EARTH’S MEDICINE:” ANALYSIS

#### A. The Overall Negativity

“The current [environmental] enforcement [program] . . . [frequently presents] violat[ions] [of fundamental] principles of fairness,” which ultimately causes the community to face serious repercussions.<sup>140</sup> For instance, corporations incur high expenses in abiding by the “vague . . . environmental regulations[, all] to avoid [the risk of] prosecution.”<sup>141</sup> Additionally, individuals are in jeopardy of being unjustly and disproportionately punished for violating environmental laws.<sup>142</sup> More importantly, the government does not focus on its primary objective of effectively improving the quality of the environment; instead, the government devotes a vast amount of time and money to litigation focused on technicalities of the corporations’ and individuals’ compliance with the implemented laws.<sup>143</sup> Meanwhile, citizens are left to “suffer [through exposure to] [ ]

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137. *See id.* (showing which organizations are targeted). The proposal emphasized the existence of a compliance program at an organization and failure to implement one would increase the level of culpability. *Id.* The program must be “document[ed] . . . [and] designed . . . in a [way] that . . . [effectively] monitor[ed] . . . [the] environmental laws[.]” *Id.* Conversely, “if [the] organization [could] demonstrate [ ] . . . such a program [was established prior to the charged offense], . . . [it would] reduce [ ] . . . [the] level [ ] [ ]” of culpability. *Id.*

138. *See id.* (explaining purpose of proposal for specific environment sanctions).

139. *See Dinkins, supra* note 108, at 1143 (footnote omitted) (noting factors proposed appear in current compliance program).

140. *See Alexander Volokh and Roger J. Marzulla, Environmental Enforcement: In Search of Both Effectiveness and Fairness*, REASON FOUND. (Aug. 1996), <http://reason.org/files/8c014ffde14ebd7a3ad267ae5bb85ba8.pdf> (illustrating conflict with principles of fairness).

141. *See id.* (explaining how businesses incur high expenses).

142. *See id.* (explaining disproportionate sanctions among individuals who violate environmental laws).

143. *See id.* (noting that government not improving environment through litigation expenses). Because the government is devoting much attention, time and money in prevailing over the defendant, the objective of maintaining and improve America’s beauty is not achieved. *Id.*

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dirt[y] water[s][ ] [and] [ ] polluted air[s]” that can subsequently lead to health hazards.<sup>144</sup>

Environmental laws must not only educate the public about what conduct is permitted or prohibited, but they must also set forth proportionate penalties that deter the public from acting irresponsibly.<sup>145</sup> There is no bright-line rule that dictates how the environmental enforcement program can achieve the highest efficiency; there are, however, simple principles that should be greatly considered.<sup>146</sup> The program should explicitly assert prohibitions in a clear and concise manner, predict punishments for certain violations, and “[pursue] environmental improvement[ ] [instead of] numerical enforcement[.]”<sup>147</sup> In addition, in order to protect the basic aspects of fairness, the program should give the criminal penalties only to those who are “morally blameworthy[ ]” and truly responsible for the criminal acts.<sup>148</sup> This would require relying more heavily on “civil [and] administrative penalties[.]”<sup>149</sup> Finally, the enforcement program must continuously act in accordance with the Bill of Rights to protect the citizens’ constitutional rights.<sup>150</sup>

## B. Statistics, Trends, and Remedies

The DOJ’s “Environment and Natural Resources Division [(Division)] [finished only] [fifty-three] [ ] cases in fiscal year 2013[.]”<sup>151</sup> That number has gradually decreased since 2001, when nearly five hundred cases criminal cases were opened.<sup>152</sup> The DOJ

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144. *See id.* (explaining consequences citizens face for pollution).

145. *See* Volokh, *supra* note 140 (laying out foundation for environmental laws).

146. *See id.* (proposing principles to ensure effective environmental compliance program).

147. *See id.* (proposing that prohibitions should be clearly and explicitly stated).

148. *See id.* (explaining immoral and criminal behavior should be greatly distinguished).

149. *See id.* (proposing alternative penalties to enforce distinction between immoral and criminal behavior).

150. *See* Volokh, *supra* note 140 (ensuring program stays within citizens’ constitutional rights).

151. *See* Carey L. Biron, *Criminal Prosecution Rates for Corporate Environmental Crimes Near Zero*, MINT PRESS NEWS (July 25, 2014), <http://www.mintpressnews.com/criminal-prosecution-rates-for-corporate-environmental-crimes-near-zero/194479/> (recording number of cases DOJ concluded in 2013).

152. Graham Kates, *Environmental Crime: The Prosecution Gap*, THE CRIME REP. (July 14, 2004), <http://www.thecrimereport.org/news/inside-criminal-justice/2014-07-environmental-crime-the-prosecution-gap> (focusing on decrease in criminal investigation for environmental law violations).

has admitted to directing “more attention [to] terrorism cases . . . [following the tragic events] of Sept[ember] 11, 2001, . . . [rather than] to white[-]collar crime[s.]”<sup>153</sup> “[T]he [main] concern . . . [is that these] preventative [measures] . . . have [significantly] [ ] weakened over the past decade[.]”<sup>154</sup>

According to EPA records, one analyst noted, “[M]ore than [sixty-four thousand] facilities are [ ] listed in agency databases as being in violation of federal environmental laws, but in most years, fewer than one-half of one percent of violations trigger criminal investigations[.]”<sup>155</sup> Environmental statutes, such as the CAA and the CWA, authorize the EPA to decide whether a complainant should file a violation as civil or criminal action; the government, however, typically decides to file civil charges instead.<sup>156</sup>

Despite the number of cases filed, penalties imposed, and years of imprisonment distributed to defendants, there is no substantial effect on the success of the environmental enforcement program in improving and maintaining the United States’ renowned beauty.<sup>157</sup> This regime is not receiving significant results, and in the process, it is exceeding limits “of judicial [discretion], regulatory interpretation, and strict liability[.]”<sup>158</sup> The mere fact that these environmental statutes are written so broadly, yet with so much complexity, invites overzealous prosecutors to abuse their discretion in enforcing these environmental statutes.<sup>159</sup>

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153. See Biron, *supra* note 151 (discussing negative impact September 11, 2001 had on enforcing environmental laws). The greatest impacts that resulted from the September 11 terrorist attacks was that the Federal Bureau Investigation (FBI) did not make as many appearances and EPA was dedicating most of its attention to homeland security. See Raymond W. Mushal, *Up From The Sewers: A Perspective on the Evolution of the Federal Environmental Crimes Program*, 2009 UTAH L. REV. 1103, 1117 (2009) (analyzing environmental crimes program after tragic events).

154. See Biron, *supra* note 151 (elaborating on decrease in preventative measures because of September 11).

155. See Kates, *supra* note 152 (discussing approximate facilities that are in violation of environmental laws).

156. See *id.* (focusing on governments’ decision to file civil instead of criminal charges). The government is more motivated to file civil charges because the environmental statutes do not provide a requirement of intent or knowledge of wrongdoing with respect to civil enforcement. See McMurry, *supra* note 77, at 1136 (comparing civil charges to criminal charges).

157. See Volokh, *supra* note 140 (showing ineffectiveness of current environmental program).

158. See *id.* (explaining overexertion of judicial discretion). Judicial discretion is supposed to emphasize the effect the offender’s sentence will have on society. See Babbitt, *supra* note 14, at 52 (emphasizing importance of judicial discretion).

159. See Volokh, *supra* note 140 (explaining overexertion of prosecutorial discretion). Prosecutorial discretion emphasizes “fairness to the individual and . . . ensure[s] . . . offender[s] . . . [are treated] just[ly] [ ] within the judicial system.”

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*1. CWA Enforcement, Improvements, and Mental State*

Regarding the CWA, case law suggests that prosecutions are not uniform or consistent among jurisdictions and similar violators.<sup>160</sup> Statistics demonstrate that the purpose of enforcing the water pollution laws, which aim to improve overall water quality, is being overlooked.<sup>161</sup> In 2010, it was “reported that [forty-four] percent of rivers and streams, [sixty-four percent] of lakes and reservoirs, and [thirty percent] of bays and estuaries” were not safe for fishing or swimming.<sup>162</sup> Sanctions imposed on those who contaminate the waters are decreasing, however, and the penalties decreased by more than one-quarter between 2004 and 2008.<sup>163</sup>

Furthermore, many polluters fail to renew and abide by the terms and conditions of their permits, which influences the magnitude of environmental effects.<sup>164</sup> If the facility has filed a renewal application within a reasonable time, the Administrative Procedure Act authorizes operations with an expired permit; it is almost impossible, however, to regulate every permit holder.<sup>165</sup> According to the EPA’s 2003 analysis, approximately twenty-five percent of major facilities defied their CWA permits’ terms and conditions.<sup>166</sup>

Many questions surround the appropriateness of the mental state standard for these crimes and the courts’ lack of guidance in

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*See also* Babbitt, *supra* note 14, at 52 (emphasizing importance of prosecutorial discretion).

160. *See* Babbitt, *supra* note 14, at 7 (explaining cases have suggested inconsistencies). *Compare* United States v. Wells Metal Finishing, 922 F.2d 54, 54 (1st Cir. 1991) (imposing fifteen months of imprisonment, no fine, and one year of probation for “knowingly discharging” hazardous pollutants in violation of CWA), *with* Babbitt, *supra* note 14, at 8 (discussing United States v. Gienger Farms, where court imposed only twenty-thousand dollar penalty for discharging 1.3 million gallons of pollutants in Oregon’s Tillamook Bay).

161. *See* Jay P. Shimshack & Michael B. Ward, *Improving Clean Water Act Enforcement*, RESOURCES FOR THE FUTURE (Jan. 8, 2010), <http://www.rff.org/blog/2010/improving-clean-water-act-enforcement> (illustrating that enforcement of CWA is not consistent and frequently overlooked). In fiscal year 2009, the CWA had 3,488 EPA enforcement inspections and evaluations whereas in fiscal year 2013, it decreased to 3,071. *See* Robert Esworthy, *Federal Pollution Control Laws: How Are They Enforced?*, CONG. RESEARCH SERV. (Oct. 7, 2014), <https://www.fas.org/sgp/crs/misc/RL34384.pdf> (comparing fiscal year inspections and evaluations).

162. *See* Shimshack, *supra* note 161 (providing statistics to support showing of lack of CWA enforcement).

163. *See id.* (explaining decrease in imposition of sanctions).

164. *See id.* (focusing on repercussions for failure to renew and abide by legal permit).

165. *See id.* (explaining expired permits are allowed in some circumstances). Approximately fifteen percent of major facilities possessed outdated permits, according to the EPA reports in 2003. *Id.*

166. *See id.* (providing statistics to show how many entities violate permit laws).

explaining necessary additional facts.<sup>167</sup> For instance, an individual may err and reasonably believe the conduct is lawful.<sup>168</sup> When hearing CWA violations, courts have had trouble distinguishing between knowledge of the law and knowledge of the facts.<sup>169</sup> The defendant must know a discharge has occurred and that it was done in violation of a permit.<sup>170</sup> Without the additional element of knowing about the permit, this creates a challenge in differentiating among defendants who pollute in compliance or violation of a permit.<sup>171</sup>

In addition to the courts' lack of guidance, courts have inconsistently satisfied the elements that require a "knowing" mental state.<sup>172</sup> For example, many circuits differ in the level of proof necessary to sustain a knowing violation; most courts only require proof that the defendant knew the discharge was of hazardous substance.<sup>173</sup> Congress' choice to adopt the mental state of "knowingly" as opposed to "willingly" is appropriate because the government bears the burden of showing the defendant knew about the conduct involved and simultaneously emphasizing the corporations' and individuals' responsibility to adhere to environ-

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167. See Uhlmann, *supra* note 26, at 1235 (raising concern with "knowingly" mental state standard for environmental crimes).

168. See *id.* at 1237 (explaining concerns with mental state standard for environmental crimes). A defendant is likely to encounter such belief when the interpretation of a law has changed or a new regulatory program has been implemented. *Id.*; see also *United States v. Sinskey*, 119 F.3d 712 (8th Cir. 1997); *United States v. Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996) (showing mistake of law is no defense for environmental crimes).

169. See Uhlmann, *supra* note 26, at 1239 (explaining problems courts face with CWA cases). In CWA cases, the government must show the defendant knew what was being discharged regardless of knowing about the law. *Id.* at 1237.

170. See *id.* at 1237 (specifying government's burden of proof for CWA cases).

171. See *id.* (explaining importance for additional element in CWA cases). The mere requirement of "knowing" does not distinguish among administrative or civil causes of actions because polluters typically act "knowingly;" prosecutors' discretion allows for them to decide which cause of action is appropriate, not Congress' limits. See *Prosecutorial Discretion*, *supra* note 112, at 171 (emphasizing mental state requirement).

172. See Reitze, *supra* note 30, at 28 (discussing circuit split regarding proof required to show violations).

173. See *id.* (explaining inconsistency among court opinions). The Second, Eighth, and Ninth Circuits require a showing that the defendant knew of the underlying conduct. *Id.* at 29; see, e.g., *United States v. Hopkins*, 53 F.3d 533 (2d Cir. 1995); *Sinskey*, 119 F.3d at 715; *United States v. Weitzenhoff*, 35 F.3d 1275, 1286 (9th Cir. 1993) (demonstrating defendant's requisite knowledge). The Fourth and Fifth Circuits, on the other hand, have demanded more extensive knowledge. See, e.g., *United States v. Wilson*, 133 F.3d 251, 265 (4th Cir. 1997); *Ahmad*, 101 F.3d at 390 (demonstrating requisite mental intent among circuits).

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mental laws.<sup>174</sup> To advance consistency among courts, the term “knowingly,” with respect to all environmental crimes, should be consistent with the interpretation used in criminal law.<sup>175</sup>

Other criminal concepts should be considered, like “the rule of lenity,” which compels courts to interpret ambiguous statutory language in favor of the defendant, and “the void-for-vagueness” doctrine, which protects defendants when the meaning of a law is unclear.<sup>176</sup> The mere act of harming the environment and human health holds substantial weight when deleterious and hazardous materials are involved, which supports the argument that ignorance of the law is not a defense.<sup>177</sup> If courts were to make the legal ignorance defense available to defendants, then this would invite offenders to “take advantage of the system by deliberately remaining ignorant of the law or simply failing to acknowledge the law or their knowledge of its existence.”<sup>178</sup>

The enforcement of the CWA should be revamped to ensure better management and consistency.<sup>179</sup> Fines should be more efficiently advertised and strictly enforced to “exploit the spillover effects.”<sup>180</sup> Another way to advance compliance is to require polluters and regulators to disclose related data and public accountability.<sup>181</sup> If organizations publicize their strong commitment to

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174. See Uhlmann, *supra* note 26, at 1239 (explaining why Congress requires knowledge rather than willfulness for environmental crimes).

175. See *id.* at 1237 (clarifying that appellate courts use “knowing” in accordance with general criminal law approach); see also *Bryan v. United States*, 524 U.S. 184, 193 (1998) (clarifying that appellate courts use “knowing” in accordance with general criminal law approach). “Knowingly” is defined as “proof of knowledge of the facts that constitute the offense” while “willingly” is defined as “the defendant acted with an evil-meaning mind [such as] he acted with knowledge that his conduct was unlawful.” *Id.* at 201.

176. See Uhlmann, *supra* note 26, at 1238 (proposing adoption of other criminal concepts). “Void-for-vagueness” doctrine applies “if a reasonable person in the defendant’s position would be unable to determine what conduct is forbidden by the law.” *Id.* at 1233; see also *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (defining reasoning for void-for-vagueness doctrine).

177. See Uhlmann, *supra* note 26, at 1238 (addressing mental state requirements for environmental laws as “reduced mens rea”); see also *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558, 562, 563 (1971) (explaining ignorance of law is not defense).

178. See Christine L. Wettach, *Mens Rea And The “Heightened Criminal Liability” Imposed On Violators Of The Clean Water Act*, 15 STAN. ENVTL. L.J. 377, 399-400 (1996) (elaborating on unavailability of ignorance of law defense).

179. See Shimshack, *supra* note 161 (explaining enforcement of CWA should be revised for more flexibility and better management).

180. See *id.* (hypothesizing advertisement of fines may reduce pollution).

181. See Clifford Rechtschaffen, *Enforcing The Clean Water Act In The Twenty-First Century: Harnessing The Power Of The Public Spotlight*, 55 ALA. L. REV. 775, 794 (2004) (proposing “spotlighting” to enhance compliance).

reducing pollution, this can increase conformity with the CWA and reduce pollution in waterways to promote safe, clean fishing, and swimming.<sup>182</sup>

## 2. *Lacey Act Enforcement and Improvements*

To further demonstrate the inconsistencies among criminal prosecution for environmental violations, there has been much discussion regarding the sufficient nexus between wildlife protection and the Lacey Act.<sup>183</sup> Similar to the CWA, the mental state standard has been challenged.<sup>184</sup> Congress has rid the Act of the “double intent” requirement, “knowingly and willfully,” and has amended it to only require “knowingly.”<sup>185</sup> The Lacey Act should be revised to have a specific intent requirement to demonstrate that the defendant purposely and consciously violated the law.<sup>186</sup>

Another criticism of the Lacey Act is “overcriminalization,” the prosecution of individuals for conduct that is not typically considered unlawful.<sup>187</sup> Most of this concern derives from Congress’ decision to weaken the mental state standard.<sup>188</sup> To remedy this issue and alleviate criminalizing innocuous conduct, individuals and businesses should be given a better understanding and clear-cut provisions of the culpability standards under the Lacey Act.<sup>189</sup>

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182. *See id.* at 794-95 (explaining potential benefits of “spotlighting” to enhance compliance). “Spotlighting tools” had the EPA highlight regulated firms’ compliance records and performance by the National Pollutant Discharge Elimination System. *Id.*

183. *See* C. Jarrett Dieterle, *The Lacey Act: A Case Study In The Mechanics of Overcriminalization*, 102 *GEO. L.J.* 1279, 1280 (2014) (discussing problems with Lacey Act).

184. *See id.* at 1304 (criticizing low *mens rea* requirement for Lacey Act).

185. *See id.* at 1290-91 (showing chronological evolution of mental standard for Lacey Act). Prior to 1969, an individual was subject to imprisonment “for a mere ‘knowing[ ]’ violation.” *Id.* at 1301. Then, in 1969, to ensure people with good intentions did not end up in prison, Congress raised the standard to “knowingly and willfully.” *Id.* The Act was then again amended in 1981, and the standard was lowered to merely “knowing” because of the level of difficulty the government faced to succeed on criminal convictions pursuant to the Act. *Id.*

186. *See id.* at 1304-05 (analyzing negatives for lower *mens rea* standard and proposing alternatives).

187. *See id.* at 1281 (defining overcriminalization).

188. *See* Dieterle, *supra* note 183, at 1282 (explaining origin of concern for overcriminalization). There has also been criticism that the concern that “overcriminalization” derived from Federal Sentencing Guidelines has resulted in more lenient sentences. *See* Babbitt, *supra* note 14, at 63 (describing various types of sentences for criminals). Because of this, some violations are improperly treated as a criminal cause of action, or, to the other extreme, actual criminal behavior is punished too severely. *Id.*

189. *See* Dieterle, *supra* note 183, at 1305 (considering amendments to Lacey Act to curb overcriminalization).



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Due to the great confusion and discrepancies that have resulted from statutory language, Congress should adopt a standardized mental state requirement in accordance with the American Law Institute's Model Penal Code; this would simultaneously accomplish keeping entities abreast of the laws.<sup>190</sup> Specifically, this approach would avoid "watered down" requirements, like those currently implemented within the Lacey Act.<sup>191</sup> Additionally, this change will have a long-term effect on separating those who inadvertently violate environmental laws from those who are sophisticated, repeat offenders.<sup>192</sup>

In addition to altering the mental state requirement, the Lacey Act included the element of exercising due care in knowing the illegal nature of conduct.<sup>193</sup> American importers can protect themselves from both criminal and civil penalties by exercising due care when deciding which products are "legally harvested, processed, and exported."<sup>194</sup> Congress, however, does not set a *de minimis* standard for what constitutes "due care."<sup>195</sup> Law-abiding importers should have a set of guidelines to obey to prevent exposure to future liability.<sup>196</sup>

### C. Criticism of Sentencing Guidelines

#### 1. *White Collar Crimes v. Environmental Crimes*

Environmental crimes should not be treated like white-collar, "economic crimes," such as fraud or embezzlement, because they are categorically different.<sup>197</sup> Thus, utilizing the federal sentencing guidelines and imposing such punishment to regulate environmen-

190. *See id.* at 1304 (proposing standardized *mens rea* alternative to prevent confusion in statutory interpretations).

191. *See id.* at 1304-05 (proposing standardized *mens rea* requirement similar to Model Penal Code).

192. *See id.* at 1305 (explaining long-term positive consequences in utilizing proposed standardized *mens rea* alternatives).

193. *See* Anderson, *supra* note 24, at 49 (explaining 1969 amendment to Lacey Act).

194. *See* Pervaze A. Sheikh, *The Lacey Act: Compliance Issues Related to Importing Plants and Plant Products*, CONGRESSIONAL RESEARCH SERVICE 1, 16 (Feb. 25, 2014), <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R42119.pdf> (illustrating implementation of due care standard). The standard of due care "refers to the amount of attention and effort a reasonable person would expend in a similar situation." *Id.* at 16-17. Congress' intent in imposing this standard was to minimize random enforcement efforts. *Id.*

195. *See* Dieterle, *supra* note 183, at 1303 (discussing Congress' intention for "due care" and why Congress should implement guidelines).

196. *See id.* (explaining how importers would benefit from set guidelines).

197. *See* Devine, *supra* note 129, at 294 (explaining severity of environmental crimes).

tal criminal conduct is unnecessary.<sup>198</sup> Environmental crimes involve the criteria of accountability, such as negligence and strict liability, unlike economic, white-collar crimes.<sup>199</sup> Second, environmental statutes are enacted in furtherance of monitoring conduct that directly impacts the environment, whereas white-collar crime statutes merely create elements of the offense.<sup>200</sup> Finally and most importantly, environmental crimes are not easily cured by restitution to the victim, unlike most economic crimes.<sup>201</sup> Environmental harms, such as destruction of ecosystems, long-term pollution, and the extinction of species, may never be remedied.<sup>202</sup> These damages to the environment create a more egregious risk that simply cannot be addressed in accordance to the economic crimes' philosophies.<sup>203</sup>

The development of federal environmental crimes is still relatively new and convictions are rare; for this reason, the sentencing statistics are not a dependable source of determining whether courts will distribute such sanctions uniformly.<sup>204</sup> There is minimal evidence to support a historic disparity in sentencing for environmental violations.<sup>205</sup> As a result, it would be moot to introduce specific environmental sentencing guidelines.<sup>206</sup> The federal sentencing guidelines' main objective is still achieved in ensuring a reduction in disparity between sentences for similar crimes by similar offenders without adopting this amendment of incorporating federal sentencing guidelines.<sup>207</sup>

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198. *See id.* (explaining reason for unnecessary guidelines).

199. *See id.* (comparing and contrasting economic crimes from environmental crimes).

200. *See id.* (comparing and contrasting economic crimes from environmental crimes).

201. *See id.* (explaining why restitution remedy is more appropriate for economic crimes than environmental crimes).

202. *See Devine, supra* note 129, at 294-95 (explaining environmental harms may never be remedied).

203. *See id.* at 295 (explaining damages to environment cause substantial health hazards).

204. *See id.* at 297 (showing sentencing statistics are not reliable for relatively new environmental crime category).

205. *See id.* at 296 (explaining irrelevance for adopting sentencing guidelines specific to environmental laws based on history of enforcing environmental crimes).

206. *See id.* (explaining environmental enforcement program's relative newness and negative repercussions).

207. *See Devine, supra* note 129, at 297-98 (elaborating on objectives of Federal Sentencing Guidelines).

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## 2. *The Immaterial Proposal*

The Draft that was initially proposed to the USSC in November 1993 had deficiencies that made it superfluous.<sup>208</sup> The Draft would create many complications, including strains on the judicial system.<sup>209</sup> Following the proposed recommended provisions would have led to excessive litigation and expenditures to determine whether parties had any potential to decrease or increase fines.<sup>210</sup> If Congress approved the Draft, a new body of case law would have been needed to separate other guidelines, which would have frustrated judges and tested their patience.<sup>211</sup> It would not be possible to simplify the Draft without sacrificing Congress' goals of efficiency and fairness.<sup>212</sup>

Additionally, the Draft proposed severe penalties.<sup>213</sup> To compute fines, the Drafters utilized maximum statutory fines, which are typically reserved for recurring and heinous crimes.<sup>214</sup> The Draft also prevented the issuance of multiple counts, even when the counts arose out of the same occurrence or activity, which could potentially "send fines for multiple count convictions in an upward spiral."<sup>215</sup> The Draft gave courts discretion in determining fines, but generally in raising such fines, not in decreasing them; there were limitations on analyzing mitigating factors that reduced fines, yet no restrictions on analyzing aggravating factors that increased fines.<sup>216</sup>

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208. *See id.* at 270-71 (focusing on proposal for specific environmental law sentencing guidelines).

209. *See id.* at 271 (explaining how proposal would cause strains on judicial system).

210. *See id.* at 272 (explaining proposal would increase frivolous, useless lawsuits).

211. *See id.* at 292 (explaining proposal would require new case law). In 1993, a *National Law Journal* survey showed that corporations admitted to violating environmental statutes because of the "uncertainty and complexity" of the laws. *See* Volokh, *supra* note 140, at 8 (emphasizing corporations failure to comply with laws). Seventy percent of the corporate lawyers surveyed believed it was not feasible to fully comply with the environmental statutes. *Id.*

212. *See* Devine, *supra* note 129, at 273 (highlighting how utilizing proposal would forfeit judicial and administrative efficiency).

213. *See id.* (focusing on severe penalties included in proposal for specific environmental guidelines).

214. *See id.* (focusing on proposal's potential abuse for imposing maximum statutory fines).

215. *See id.* at 274 (explaining negative effect for not allowing multiple counts for conduct arising out of same transaction or occurrence).

216. *See id.* at 274-75 (elaborating on inconsistencies for judges to impose fines).

The harsh penalties included in the Draft raised serious concerns for organizations and also placed a strain on the judicial system.<sup>217</sup> The proposed fines could hinder the eligibility for federal government contracts and loans.<sup>218</sup> The organizations convicted of these environmental offenses would reasonably fear bankruptcy because they would be faced with overwhelming fines despite pleading guilty or cooperating with the government.<sup>219</sup> This would drive their decision to risk their chances and request a full trial, which exerts judicial and administrative pressures.<sup>220</sup>

The aforementioned reasons create a non-exhaustive list to support the irrelevance of the Draft Guidelines; the list, however, should coerce organizations to implement compliance programs to avoid encountering many environmental offenses.<sup>221</sup> Compliance programs will preserve any future hardships and expenses if organizations actively abstain from engaging in environmental crimes.<sup>222</sup>

#### D. Resolving Abuse of Prosecutorial Discretion

To both preserve the criminal enforcement of environmental crimes and control overreaching prosecutorial discretion, it is recommended that prosecutors pursue cases that involve at least one of the following aggravating factors: (1) significant harm to the environment or public health; (2) engaging in deceitful conduct; (3) functioning outside the regulatory system; or (4) repetitious illegal behavior.<sup>223</sup> These aggravating factors have been selected because they frustrate the effectiveness of the environmental protection program.<sup>224</sup> In particular, prosecutors should pay close attention to

217. See Devine, *supra* note 129, at 275 (illustrating how harsh penalties raise concerns to entities).

218. See *id.* at 274-75 (explaining how fines affect corporations); see also Dinkins, *supra* note 108, at 1143 (demonstrating how imposing fines affect eligibility for government contract eligibility).

219. See Devine, *supra* note 129, at 276 (explaining why imposition of fines gives reason for corporations to fear bankruptcy).

220. See *id.* (illustrating exertion on judicial system because corporations want to go to trial more often).

221. See Dinkins, *supra* note 108, at 1143 (explaining compliance program will help control environmental offenses).

222. See Devine, *supra* note 129, at 299 (explaining benefits of compliance program for organizations that avoid criminal conduct).

223. See *Prosecutorial Discretion*, *supra* note 112, at 164 (establishing aggravating factors for prosecutors to consider). The most compelling cases for judges and juries involve substantial harm. *Id.* To provide more structure, harm should be categorized as follows: "(1) serious bodily injury; (2) knowing or negligent endangerment; (3) animal deaths; (4) cleanup costs; (5) evacuations and emergency responses." *Id.*

224. See *id.* (explaining reason for choosing specific factors).

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“deceitful conduct,” as it sends a powerful message to the public that unlawful pollution can go undetected and their negative consequences will affect the environment.<sup>225</sup> It also deprives regulators of pertinent information needed to create an adequate permit system and make sound decisions regarding lawful pollution.<sup>226</sup>

Providing the prosecutors with stricter guidelines would prevent pursuing violations that have little to no legal merit; it would also provide the community with a better understanding of which environmental violations are charged criminally and the role of the environmental enforcement program.<sup>227</sup> In addition, prosecutors who focus their energy on cases involving the aforementioned aggravating factors will ameliorate concerns about “overcriminalization.”<sup>228</sup>

#### IV. “A NEW TOMORROW:” IMPACT

Society has a compelling interest in reducing pollution and deterring illegal environmental behavior to both preserve the United States’ renowned beauty and protect its citizens from hazardous substances.<sup>229</sup> Society has a further interest in ensuring that penalties for noncompliance are not unjustly severe, disproportionate, or inconsistent.<sup>230</sup> An effective justice system, therefore, is dependent upon the proper balance of the paramount roles of prosecutorial and judicial discretion in order to impose criminal sanctions.<sup>231</sup> Consequently, criminal sanctions are an integral part of the deterrent approach for environmental laws.<sup>232</sup>

The great inconsistencies and doubts raised by the current environmental enforcement program may cause future offenders to no longer fear the threat of prosecution, which negates the initial ob-

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225. *See id.* at 197 (explaining why deceitful conduct is most important factor).

226. *See id.* at 199 (explaining effect deceitful conduct can have on regulation).

227. *See id.* at 164 (explaining advantages of guidelines for prosecutors). Not only will these guidelines limit prosecution for cases that involve the risk of substantial harm, but also for any conduct that is considered criminal in other contexts. *Id.*

228. *See Prosecutorial Discretion, supra* note 112, at 166 (explaining how prosecutorial discretion will alleviate concerns for overcriminalization).

229. *See Babbitt, supra* note 14, at 60 (explaining society’s compelling interest in preventing environmental harm caused by illegal activity).

230. *See id.* (explaining society’s compelling interest in justly punishing violators).

231. *See id.* at 52 (explaining balance for effective criminal justice system).

232. *See id.* at 59, 63 (explaining role of prosecutorial and judicial discretion).

jective of deterring illegal, heinous behavior.<sup>233</sup> The legal system breaches its duty to society when there is a great disparity among offenders who are sentenced.<sup>234</sup> Sentences must not only be based on judicial discretion, but must also be foreseeable in order for society to discern the benefits of imposing consistent, economical deterrent sanctions.<sup>235</sup> Accordingly, society's compelling interest in promoting stable, foreseeable, and proportionate deterrence will be satisfied if there is a reduction in sentencing disparity and criminal sanctions are imposed when absolutely appropriate.<sup>236</sup>

The endless controversy regarding the role and effectiveness of the criminal enforcement program for environmental laws validates the substantial need for a stronger, standardized framework, and provides for a better "empirical understanding" of its application.<sup>237</sup> Enforcing a new framework is admittedly difficult and a perfect system is always a work in progress, but there must be affirmative action to effectuate positive changes and improvements.<sup>238</sup> Continuing or further relaxing the current investigative and prosecutorial processes is definitely not a solution, or at least, not a good solution to this problem.<sup>239</sup> The current path may lead to the extinction of some species of plant and animal life, poisoned recreational waterways, contaminated reservoirs, ill-health, and above all, death of American citizens.<sup>240</sup> Cost containment, a fiscal responsibility to our government, is among the charges.<sup>241</sup> Because of this, a better balance must be reached.<sup>242</sup> As responsible mem-

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233. *See id.* at 56 (explaining how inconsistencies in justice system affect deterrence objective).

234. *See* Babbitt, *supra* note 14, at 56 (demonstrating how legal system breaches duty to society to treat offenders equally).

235. *See id.* at 58 (explaining why sentences need to be foreseeable and consistent).

236. *See id.* at 63 (explaining how society's interest can be achieved). Criminal sanctions are deemed appropriate when entities engage in conduct that risks or causes considerable harm to the environment and public health while disobeying or seeking to operate outside the written law. *See Prosecutorial Discretion*, *supra* note 112, at 215 (explaining when criminal sanctions should be imposed).

237. *See Prosecutorial Discretion*, *supra* note 112, at 214 (explaining improvements for enforcement program).

238. For a discussion on how to improve the current environmental law program, see *supra* notes 167-182, 183-196, 223-228 and accompanying text.

239. For a discussion of the statistics and trends of the current environmental law program, see *supra* notes 151-159 and accompanying text.

240. For a discussion of the environmental harms, see *supra* notes 61-65, 202-203 and accompanying text.

241. For a discussion of the negative effects of the current environmental program, see *supra* notes 140-150 and accompanying text.

242. For a discussion of why a better balance must be reached, see *supra* notes 229-237 and accompanying text.

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bers of society, American citizens are stewards of the environment charged to protect and preserve it for today's population and for generations to come.<sup>243</sup> Nothing short of enforcement and prosecution that attains this goal should be permitted.<sup>244</sup>

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243. For a discussion of the purpose of the Environmental Protection Agency, see *supra* note 2 and accompanying text.

244. For a discussion of the overall negative aspects of the current environmental law program, see *supra* notes 140-150 and accompanying text.

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