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## MULTI-JURISDICTIONAL AND SUCCESSIVE PROSECUTION OF ENVIRONMENTAL CRIMES: THE CASE FOR A CONSISTENT APPROACH

JOHN F. COONEY\*

One of the most important policy issues facing the federal environmental criminal enforcement program is how the Department of Justice (“Department”) should coordinate the prosecution of corporations for violations of law that occur in several judicial districts and thus fall within the jurisdiction of multiple United States Attorneys. The pattern of prosecutions in the multi-district cases of the last decade demonstrates that in some cases, the standing Department policy governing successive prosecutions has not been followed, resulting in a substantial waste of scarce prosecutorial resources and unfairness to corporate defendants.

In important corporate criminal cases outside the environmental area, such as the highly visible prosecutions against Enron and WorldCom coordinated by the Department’s Corporate Fraud Task Force,<sup>1</sup> all crimes against the company have been charged in a single corporate prosecution. This Article examines whether there are features of environmental criminal cases that might warrant multiple prosecutions against a corporation on similar charges in different judicial districts and would justify a departure from the normal Department policy on successive prosecutions.

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\* Partner, Venable LLP. The author’s firm participated in the *Royal Caribbean* and *McWane* cases discussed in this Article. Venable’s Judson Starr and Joseph Block, two former Chiefs of the Environmental Crimes Section, reviewed and commented on this Article.

<sup>1</sup> The Corporate Fraud Task Force was created by Executive Order No. 13271, 67 Fed. Reg. 46,091 (July 9, 2002). It consists of the Deputy Attorney General, two Assistant Attorneys General, the Director of the FBI, and seven U.S. Attorneys. The Task Force provides direction for the investigation and prosecution of significant cases of corporate fraud and related financial crime.

## I. UNIQUE ASPECTS OF ENVIRONMENTAL PROSECUTIONS

Two factors define environmental criminal prosecutions: the absence of a specific intent element for the crimes and the division of prosecutorial authority between Washington and the offices of the ninety-four U.S. Attorneys.

## A. ABSENCE OF A SPECIFIC INTENT ELEMENT

Most environmental criminal statutes do not require the government to prove that the defendant wrongfully intended to discharge a pollutant, but simply require evidence that the individual or entity knew that it was taking action likely to lead to release of a pollutant. For example, the criminal enforcement provision of the Clean Water Act<sup>2</sup> provides that any person who “knowingly violates” specific provisions of the statute or “any permit condition or limitation” may be guilty of a felony,<sup>3</sup> and that any person who “negligently violates” those sections or a permit provision may be guilty of a misdemeanor.<sup>4</sup>

The courts have consistently held that the knowledge requirement imposed by § 1319(c)(2) requires only a general awareness that the defendant was dealing with a pollutant and awareness that a discharge was occurring or was likely to occur. The critical case was *United States v. Weitzenhoff*.<sup>5</sup> There, five judges of the Ninth Circuit dissented from the denial of rehearing en banc in a case involving conviction for a felony violation of the Clean Water Act.<sup>6</sup> The dissenters objected that the phrase “knowingly violates” in § 1319(c) required proof of actual knowledge<sup>7</sup> and that the panel had improperly treated the statute as creating a “public welfare” offense for which no evidence of intent was required to support a conviction.<sup>8</sup> The Supreme Court denied certiorari.<sup>9</sup> Since then, lower courts have routinely upheld convictions based on a minimal showing of awareness and without requiring proof of illegal intent.<sup>10</sup>

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<sup>2</sup> 33 U.S.C. § 1319(c) (2000).

<sup>3</sup> *Id.* § 1319(c)(2).

<sup>4</sup> *Id.* § 1319(c)(1).

<sup>5</sup> 35 F.3d 1275 (9th Cir. 1994), *cert. denied sub nom.* Mariani v. United States, 513 U.S. 1128 (1995).

<sup>6</sup> *Id.* at 1293.

<sup>7</sup> *Id.* at 1293-94 (Kleinfeld, J., dissenting).

<sup>8</sup> *Id.* at 1296 (Kleinfeld, J., dissenting).

<sup>9</sup> *Mariani*, 513 U.S. 1128.

<sup>10</sup> In *Hanousek v. United States*, Justices O'Connor and Thomas dissented from the denial of certiorari in a case that challenged the constitutionality of a conviction under § 1319(c) based on the public welfare offense doctrine. 528 U.S. 1102 (2000) (Thomas, J.,

The knowledge requirement is particularly attenuated for corporations. Under the doctrine of respondeat superior, a company may be held criminally liable for the actions of its employees if the acts were taken on its behalf and were within the scope of the employees' authority.<sup>11</sup> Under the doctrine of collective knowledge, the knowledge of all employees may be aggregated and imputed to the corporation.<sup>12</sup> Thus, a corporation may be convicted of a felony offense even if no one person had awareness of the facts necessary to satisfy the knowledge requirement.

A criminal charge against a corporation is relatively easy to prove. Stripped to its essentials, the government only needs to demonstrate that a substance that falls within the statutory definition of a "pollutant" was released into the environment;<sup>13</sup> that the release can be traced to a corporate facility;<sup>14</sup> and that a sentient corporate employee at the facility took a step that proximately resulted in a release.<sup>15</sup> Other factors related to the discharge—such as the subjective intent of employees, the existence of corporate policies designed to prevent discharges, or the adoption of enhanced environmental equipment and controls—do not affect the essential elements of the offense or constitute affirmative defenses. They are relevant only to the prosecutor's decision whether to indict and, if so, what offenses and how many counts should be charged.

For these reasons, corporations rarely take environmental criminal charges to trial. When the government concludes that a criminal disposition is appropriate, the company usually concludes that its self-interest would be served by a negotiated plea agreement, through which it may seek to minimize the number of charges and the financial consequences.

#### B. ALLOCATION OF PROSECUTORIAL AUTHORITY IN ENVIRONMENTAL CASES

Responsibility for prosecuting environmental crimes is divided between the U.S. Attorneys in various judicial districts and the Environmental Crimes Section ("ECS"), a group of approximately thirty lawyers located in the Environment and Natural Resources Division in Washington, D.C. who are dedicated exclusively to the prosecution of

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dissenting). The Justices were not able to attract additional support for their position, and the Supreme Court has never considered this issue.

<sup>11</sup> *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972).

<sup>12</sup> *See, e.g., United States v. Bank of New Eng.*, 821 F.2d 844, 856 (1st Cir. 1987).

<sup>13</sup> *See* 33 U.S.C. § 1362(6) (2000).

<sup>14</sup> *See United States v. Technic Servs., Inc.*, 314 F.3d 1031, 1043 (9th Cir. 2002); *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 645-46 (2d Cir. 1993).

<sup>15</sup> *See Technic*, 314 F.3d at 1042.

environmental offenses and related crimes.<sup>16</sup> ECS personnel are involved in larger and more complex environmental criminal investigations and in cases that involve national criminal enforcement policy priorities.<sup>17</sup>

U.S. Attorneys handle the majority of environmental prosecutions by volume, while the ECS takes the lead in prosecution of between 25% and 30% of cases. The ECS cases, however, account for approximately two-thirds of the total fines and restitution obtained in federal environmental criminal cases. The ECS is also involved in most large corporate investigations and prosecutions.<sup>18</sup>

The current allocation of prosecutorial responsibilities is, in part, the result of a policy dispute in the early 1990s. In a series of highly visible environmental cases, U.S. Attorneys and the ECS contested their respective roles in investigations and the ultimate decision whether to initiate a criminal prosecution. A group of U.S. Attorneys and state officials who were unhappy with ECS's decisions took their concerns to Congress. During the 1992 presidential election campaign, the Oversight Subcommittee of the House Energy and Commerce Committee held a well-publicized hearing to explore whether senior political officials of the Department were stifling efforts by line prosecutors and the EPA to bring environmental criminal charges against corporations.<sup>19</sup> One of the principal issues of concern to the Subcommittee was what it perceived to be an effort by Main Justice to centralize control over environmental cases and to curtail the authority of the U.S. Attorneys to initiate environmental prosecutions without explicit approval from Washington.<sup>20</sup>

In August 1994, Attorney General Reno resolved the dispute by issuing an amendment to the *United States Attorneys' Manual* ("USAM") that divided prosecutions into "national interest cases" and lower priority

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<sup>16</sup> Interview by Corporate Crime Reporter with David M. Uhlmann, Chief, Env'tl. Crimes Section, U.S. Dep't of Justice (Feb. 23, 2004), reprinted in 6 A.B.A. SEC. ENV'T ENERGY & RESOURCES 12, 13 (2005), available at [www.abanet.org/environ/committees/environcrimes/newsletter/may05/envenforcementMay05.pdf](http://www.abanet.org/environ/committees/environcrimes/newsletter/may05/envenforcementMay05.pdf) [hereinafter Uhlmann Interview].

<sup>17</sup> *Id.*

<sup>18</sup> David M. Uhlmann, Chief, Env'tl. Crimes Section, U.S. Dep't of Justice, Speech to the District of Columbia Bar Association (Dec. 6, 2005) [hereinafter Uhlmann Speech]; see Uhlmann Interview, *supra* note 16.

<sup>19</sup> See *EPA's Criminal Enforcement Program: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 102d Cong. (1992).

<sup>20</sup> See STAFF OF SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE H. COMM. ON ENERGY AND COMMERCE, 102D CONG., DAMAGING DISARRAY: ORGANIZATIONAL BREAKDOWN AND REFORM IN THE JUSTICE DEPARTMENT'S ENVIRONMENTAL CRIMES PROGRAM (Comm. Print 1994).

cases.<sup>21</sup> The revised policy established the current structure, under which responsibility for the investigation and prosecution of environmental crimes would rest with the U.S. Attorneys, “except in cases of national interest.”<sup>22</sup> In cases of national interest, the U.S. Attorney’s Office and the ECS “participate jointly as co-counsel from the initiation of the investigation through prosecution, unless otherwise agreed.”<sup>23</sup> The term “case of national interest” was defined to include “a case with simultaneous investigations in multiple districts.”<sup>24</sup>

As joint co-counsel in cases of national interest, the exact roles of ECS personnel and U.S. Attorneys are subject to negotiation, and the outcome varies from case to case.<sup>25</sup> The allocation of responsibilities in a specific matter may depend upon such factors as the relative technical expertise of the prosecutors involved, their respective workloads, the political significance of a matter within the local jurisdictions, and its importance in terms of overall national priorities. In some matters, ECS personnel may conduct the investigation, present nearly all the evidence to the grand jury, and take the lead at trial. In other cases, the U.S. Attorney may run the case, or the two offices may divide the responsibilities.

The joint authority over major environmental crimes prosecutions engages the basic centrifugal mechanism that affects the Department in other enforcement fields. Once a criminal investigation is initiated in his district, the U.S. Attorney typically will seek to initiate a prosecution if a criminal charge can be brought in good faith and with a reasonable certainty of success at trial. The desire to prosecute may be based upon a number of factors, including the prosecutor’s belief that under his oath of office, he is obliged to prosecute a crime that has been committed in his district; a desire to realize a return on investment of staff time and resources in the investigation; and the public relations benefits for him personally and the office institutionally for convictions of a company responsible for pollution that affects local residents.

The division of prosecutorial authority in cases of national interest did not provide guidance to the ECS and the U.S. Attorneys concerning which charges should be brought against a corporation and where the case should be prosecuted. Rather, the prosecutors must resolve those issues for

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<sup>21</sup> OFFICE OF THE ATTORNEY GEN., BLUESHEET REVISION TO THE U.S. ATTORNEYS’ MANUAL ON ENVIRONMENTAL CRIMES (1994), available at [http://www.usdoj.gov/ag/readingroom/usam\\_env.htm](http://www.usdoj.gov/ag/readingroom/usam_env.htm).

<sup>22</sup> U.S. ATTORNEYS’ MANUAL § 5-11.104 (2000) [hereinafter USAM].

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* § 5-11.105.

<sup>25</sup> *Id.*

themselves under the general Principles of Federal Prosecution that apply to all Department lawyers.<sup>26</sup> On occasion, the current allocation of authority has had the unintended consequences of making it difficult to resolve cases in which a corporation is under investigation in multiple jurisdictions and thus has created tension with longstanding Department policy concerning successive prosecutions.

## II. MULTI-JURISDICTIONAL PROSECUTIONS

### A. MULTI-JURISDICTIONAL PROSECUTIONS OF VESSEL OWNERS

Among its major enforcement priorities, the ECS maintains a vessel pollution program to attack illegal discharges of oily wastewater on the high seas.<sup>27</sup> This program has been in place for nearly a decade and commands 15-20% of ECS's resources.<sup>28</sup> It has generated a significant number of multi-jurisdictional prosecutions.<sup>29</sup>

Under international law, primary enforcement responsibility for violations of marine environmental standards lies with the country in which the vessel is registered.<sup>30</sup> A country may have jurisdiction to investigate and take enforcement action against a foreign flag vessel for illegal discharges that occur in its ports or near its coasts, subject to international law limitations.<sup>31</sup> For the most part, however, discharges of oil and other pollutants in the open ocean are subject to direct enforcement action only by the flag state.

The vast majority of ocean-going vessels are registered outside the United States.<sup>32</sup> Over the years, U.S. environmental authorities have concluded that discharges of oil from vessels are having a substantial adverse effect on the oceans and that many flag states, especially those that maintain "open registries" (known pejoratively as "flags of convenience"), are uninterested in or unable to take meaningful enforcement action against

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<sup>26</sup> *Id.* § 9-27.000.

<sup>27</sup> Uhlmann Speech, *supra* note 18.

<sup>28</sup> Uhlmann Interview, *supra* note 16.

<sup>29</sup> *See infra* Parts II.A.1-2, IV.C.2.

<sup>30</sup> United Nations Convention on the Law of the Sea, arts. 94, 217, Dec. 10, 1982, 1833 U.N.T.S. 397, available at [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf).

<sup>31</sup> *Id.* art. 216.

<sup>32</sup> *See* U.S. MARITIME ADMIN., TOP 20 MERCHANT FLEET OF THE WORLD: SELF-PROPELLED OCEANGOING VESSELS 1,000 GROSS TONS AND GREATER (2004), available at [http://marad.dot.gov/MARAD\\_statistics/Flag-MFW-7-04.pdf](http://marad.dot.gov/MARAD_statistics/Flag-MFW-7-04.pdf).

their vessels.<sup>33</sup> In the mid-1990s, the United States developed a legal theory that has allowed it to enforce governing international standards against discharges of oil by foreign flag vessels that occur outside U.S. jurisdictional waters, as long as a vessel ultimately calls in a U.S. port.<sup>34</sup>

The Act to Prevent Pollution from Ships (APPS),<sup>35</sup> and the Coast Guard's implementing regulations,<sup>36</sup> require each vessel that calls at a U.S. port to maintain an accurate Oil Record Book in which all discharges of oil from the vessel must be documented. The Coast Guard has instituted an aggressive program of inspecting Oil Record Books of foreign vessels that call in U.S. ports to detect failures to honor the requirement to document oil discharges.<sup>37</sup> The Department has filed a significant number of criminal actions against vessel owners for making false statements in violation of 18 U.S.C. § 1001 and other statutes, when the Oil Record Book misrepresents a discharge as having been in conformance with international requirements, even if the release occurred outside U.S. jurisdictional waters.<sup>38</sup>

### 1. *The Two Prosecutions of Royal Caribbean*

Beginning in October 1994, the government conducted an investigation of allegations that foreign flag vessels owned by Royal Caribbean Cruise Lines were illegally discharging oily wastewater and other pollutants into the ocean.<sup>39</sup> The company's vessels called regularly in many U.S. ports, where they presented the Coast Guard with Oil Record Books that did not document these discharges.<sup>40</sup> The Department ultimately initiated criminal investigations in six judicial districts, each of which was led by the ECS with assistance from the local U.S. Attorneys.<sup>41</sup>

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<sup>33</sup> David G. Dickman, Lecturer, United States Criminal Enforcement Related to Vessel-Source Pollution: The Confluence of National and International Law (Nov. 2001) (ALI-ABA Advanced Study Course on Criminal Enforcement of Environmental Laws).

<sup>34</sup> *See id.*

<sup>35</sup> Pub. L. No. 96-478, 96 Stat. 2297 (1980) (codified at 33 U.S.C. §§ 1901-15). APPS was promulgated to enforce Annexes I and II of MARPOL, the 1978 Protocol to the International Convention for the Prevention of Pollution from Ships, 17 I.L.M. 546 (1978), amending 12 I.L.M. 1319 (1973).

<sup>36</sup> 33 C.F.R. § 151.25 (2005).

<sup>37</sup> Dickman, *supra* note 33, at 18.

<sup>38</sup> *See generally infra* Parts II.A.1-2, IV.C.2.

<sup>39</sup> Factual Basis at 3-4, *United States v. Royal Caribbean Cruises Ltd.*, No. CR 00-509 (S.D. Fla. July 21, 1999), No. CR 99-737 (S.D.N.Y. July 21, 1999), No. CR 99-167 (C.D. Cal. July 21, 1999), No. CR 99-0089 (D. Ala. July 21, 1999).

<sup>40</sup> *Id.* at 4.

<sup>41</sup> *Id.* at 2.



In the course of the investigations, the courts vindicated the government's position that presentation of a false Oil Record Book constituted a crime that occurred in U.S. territory, even though the discharge may have occurred outside U.S. jurisdictional waters or in the territorial waters of another country.<sup>42</sup> In *United States v. Royal Caribbean Cruises, Ltd.*, the court held that the United States could assert criminal enforcement jurisdiction for a false statement in an Oil Record Book concerning a discharge that occurred within Bahamian waters.<sup>43</sup> "The discharge of oil in an improper manner is one crime; the failure to keep an Oil Record Book as required under MARPOL/APPS is another; and the deliberate presentation of a false material writing to the U.S. Coast Guard is another."<sup>44</sup>

After the Southern District of Florida upheld the government's authority to prosecute discharges outside U.S. waters, Royal Caribbean sought to negotiate a comprehensive resolution of its criminal liability. Even though the ECS held the lead role in each grand jury investigation, the government initiated a multi-stage, multi-district series of prosecutions and guilty pleas throughout the country.

a. The First Prosecution

On June 2, 1998, Royal Caribbean entered into a plea agreement with the ECS and the U.S. Attorneys for the Southern District of Florida and the District of Puerto Rico.<sup>45</sup> The company agreed to plead guilty to seven counts of illegal discharges of oily wastewater, presentation of false Oil Record Books, conspiracy, and obstruction of justice.<sup>46</sup> It agreed to pay a \$1 million fine in the Southern District of Florida, an \$8 million fine in Puerto Rico, and an additional \$1 million as community service.<sup>47</sup> The company also agreed to a term of probation of five years, one condition of which required it to implement a comprehensive Environmental Compliance Program under which it would adopt practices for proper storage, treatment, and disposal of waste streams on all its vessels.<sup>48</sup>

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<sup>42</sup> *United States v. Royal Caribbean Cruises Ltd.*, 11 F. Supp. 2d 1358, 1364 (S.D. Fla. 1998).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1368.

<sup>45</sup> Plea Agreement at 1-3, *United States v. Royal Caribbean Cruises Ltd.*, No. 96-333 (D.P.R. June 2, 1998), No. CR 98-103 (S.D. Fla. June 2, 1998).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

b. The Second Round of Pleas

The first round of guilty pleas ended neither the investigations nor the prosecutions. In 1999, the ECS and the U.S. Attorneys in six jurisdictions prosecuted the company for “similar environmental crimes” to those for which it had pleaded guilty in 1998.<sup>49</sup>

In February 1999, the company initially pleaded guilty to three felony charges in the Central District of California. In July 1999, Royal Caribbean, the ECS, and the six U.S. Attorneys entered into a comprehensive plea agreement (which included the charges in the Central District of California), by which the company pleaded guilty to a total of twenty-one felony counts and agreed to pay an additional \$18 million in fines.<sup>50</sup> The charges and fines were carefully allocated among the six U.S. Attorneys’ Offices as follows:

- Southern District of Florida: four counts; \$3 million fine.
- Southern District of New York: four counts; \$3 million fine.
- Central District of California: three counts; \$3 million fine.
- District of Alaska: seven counts; \$6.5 million fine.
- District of the Virgin Islands: two counts; \$1.5 million fine.
- District of Puerto Rico: one count; \$1 million fine.<sup>51</sup>

In each of the six jurisdictions, the government prosecuted the company for what were essentially the same acts. In each jurisdiction, the company pleaded guilty to at least one count of presentation of a false Oil Record Book; the other counts involved illegal discharges of specified pollutants into U.S. territorial waters and failure to dispose properly of ship-generated hazardous wastes.<sup>52</sup> In each jurisdiction, the crimes to which the company pleaded guilty involved acts that had occurred before entry of the 1998 plea in Miami and San Juan.<sup>53</sup> The great majority of these offenses (sixteen of twenty-one) had occurred in 1994 and 1995.<sup>54</sup>

In each jurisdiction, Royal Caribbean separately agreed to a five-year period of probation, one condition of which required implementation of the Environmental Compliance Program to which the company already had

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<sup>49</sup> Press Release, U.S. Dep’t of Justice, Royal Caribbean to Pay Record \$18 Million Criminal Fine for Dumping Oil and Hazardous Chemicals, Making False Statements (July 21, 1999), available at <http://www.usdoj.gov/opa/pr/1999/July/316enr.htm>.

<sup>50</sup> Plea Agreement, United States v. Royal Caribbean Cruises, No. CR 99167 (C.D. Cal. July 21, 1999).

<sup>51</sup> *Id.* at 7-19.

<sup>52</sup> Factual Basis, *supra* note 39, at 2-3, 9-18.

<sup>53</sup> *Id.* at 4-9.

<sup>54</sup> *Id.* at 4-7.

agreed in the 1998 plea and which the sentencing judge in the Southern District of Florida had approved.<sup>55</sup>

## 2. *The Pattern of Prosecution in Other Vessel Pollution Cases*

Other corporate vessel pollution investigations have been resolved by joint pleas in multiple jurisdictions; a plea in one jurisdiction; or a plea in one jurisdiction, coupled with an explicit waiver of the Department's ability to prosecute the company in other districts. None of the other cases was resolved through two rounds of prosecutions as in the Royal Caribbean matter.

### a. Joint Pleas in Multiple Districts

In March 2004, the U.S. Attorneys for the Western District of Washington, the Central District of California, and the Northern District of California entered into a joint plea agreement with Höegh Fleet Services ("HFS"), by which the company pleaded guilty to seven counts each of knowing failure to maintain an Oil Record Book that recorded all discharges, presentation of a false Oil Record Book, and obstruction of the investigation.<sup>56</sup> The counts and fines were explicitly divided among the three districts:

- Western District of Washington: three counts; \$1.5 million fine.
- Central District of California: two counts; \$1 million fine.
- Northern District of California: two counts; \$1 million fine.<sup>57</sup>

The company agreed to serve a four-year term of probation, one condition of which required it to adopt an Environmental Management System/Compliance Plan, applicable to all thirty-eight HFS vessels.<sup>58</sup>

Similarly, in March 2005, the ECS and the U.S. Attorneys for five districts entered into a joint plea agreement with Evergreen International, by which the company agreed to plead guilty to twenty-five representative charges of knowing failure to maintain an Oil Record Book that recorded all discharges, presentation of a false Oil Record Book, obstruction of the investigations, and negligent discharge of oily wastewater.<sup>59</sup> In each

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<sup>55</sup> *Id.* at 7-21.

<sup>56</sup> Plea Agreement at 2, *United States v. Höegh Fleet Servs. A/S*, No. CR 03-5765 (W.D. Wash. Mar. 11, 2004), No. CR 04-195 (C.D. Cal. Mar. 11, 2004), No. CR 04-40030 (N.D. Cal. Mar. 11, 2004).

<sup>57</sup> *Id.* at 5.

<sup>58</sup> *Id.* at 6.

<sup>59</sup> Plea Agreement at 23, *United States v. Evergreen Int'l, S.A.*, No. CR 05-238 (C.D. Cal. Mar. 30, 2005), No. 05-291 (D.S.C. Mar. 30, 2005), No. 05-294 (W.D. Wash. Mar. 30, 2005), No. CR 05-305 (D.N.J. Mar. 30, 2005), No. CR 05-306 (D. Ore. Mar. 30, 2005).

district, the company agreed to plead guilty to five separate counts and pay a \$5 million fine (\$2 million of which took the form of community service payments). The company also agreed in each jurisdiction to serve a three-year term of probation, one condition of which required it to adopt a comprehensive Environmental Compliance Plan that would apply to the company and three related entities.<sup>60</sup>

b. Fleet-Wide Prosecution in One District

In April 2002, Carnival Cruises pleaded guilty in the Southern District of Florida to six felony counts of presenting false Oil Record Books by six of its vessels.<sup>61</sup> The company was fined \$18 million (\$9 million of which was in the form of community service payments).<sup>62</sup> Carnival also agreed, as a condition of probation, to implement a worldwide Environmental Compliance Plan that would apply to all of its companies that operate cruise lines, including those not involved in the investigation.<sup>63</sup>

c. Fleet-Wide Prosecution in One Jurisdiction, Coupled with Waivers of Prosecution in Other Jurisdictions

In July 2002, the ECS and the U.S. Attorney for the Southern District of Florida entered into a plea agreement with Norwegian Cruise Lines, by which the company agreed to plead guilty to a single count of knowing failure to maintain an accurate Oil Record Book and to pay a fine of \$1 million, plus an additional \$500,000 in community service payments.<sup>64</sup> The company agreed to serve a three-year term of probation, one condition of which required it to adopt a comprehensive Environmental Compliance Plan applicable to all its cruise ships. In turn, the government agreed to forego further criminal prosecution of the company in eight other districts.

The pattern of prosecutions demonstrates that there is no inherent reason why fleet-wide vessel pollution investigations must be resolved through multiple rounds of prosecutions in multiple jurisdictions, as occurred in the Royal Caribbean case. The record shows that the government has been able to obtain large fines and broad and enforceable future compliance commitments through a single prosecution in one district.

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<sup>60</sup> *Id.*

<sup>61</sup> Information at 4-9, *United States v. Carnival Corp.*, No. CR 02-20350 (S.D. Fla. Apr. 17, 2002).

<sup>62</sup> *Id.* at 5-6.

<sup>63</sup> *Id.* at 7.

<sup>64</sup> Plea Agreement at 1-4, *United States v. Norwegian Cruise Line Ltd.*, No. CR 02-20631 (S.D. Fla. July 31, 2002).

## B. MULTIPLE PROSECUTIONS OF MCWANE, INC.

In January 2003, prompted by a *New York Times* article reporting on alleged environmental and worker safety violations at the company's plants, the federal government initiated investigations concerning the environmental practices at industrial facilities owned by McWane, Inc. in several judicial districts. The ECS conducted most of the investigations, although the U.S. Attorney took the lead in the District of New Jersey.

The Department ultimately initiated five criminal proceedings against McWane in four judicial districts.

In December 2003, the company and five employees were indicted in the District of New Jersey on thirty-five counts arising out of alleged environmental violations at its Phillipsburg, New Jersey facility, including violations of the Clean Water Act, the Clean Air Act, CERCLA, and related Title 18 offenses.<sup>65</sup> Trial of the case began in September 2005 and was expected to last five months.

On May 25, 2004, the company and four employees were indicted in the Northern District of Alabama (Birmingham Division) on twenty-five counts charging violations of the Clean Water Act and related Title 18 offenses at its Birmingham facility.<sup>66</sup> On June 10, 2005, after a six-week jury trial, the company was convicted of conspiracy to violate the Clean Water Act, making a false statement to the government, and eighteen substantive violations of the Clean Water Act. On December 6, 2005, the court sentenced the company to pay a fine of \$5 million, and the company agreed to fund a \$2.7 million environmental project. The company also was placed on probation for five years.<sup>67</sup>

In March 2005, the company pleaded guilty in the Eastern District of Texas to one count of concealing material information within the jurisdiction of EPA and one count of knowing violation of the Clean Air Act.<sup>68</sup> The company agreed to pay a fine of \$4.5 million and to serve a period of five years' probation, one condition of which required implementation of a Compliance Agreement with EPA that required extensive environmental improvements.

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<sup>65</sup> Indictment at 1-51, *United States v. Atl. States Cast Iron Pipe Co.*, Crim. No. 03-852 (D.N.J. Dec. 2003).

<sup>66</sup> Indictment at 8-29, *United States v. McWane, Inc.*, Crim. No. 04-PT-0199-S (N.D. Ala. May 25, 2004).

<sup>67</sup> Judgment in a Criminal Case (For Offense(s) Committed On or After November 1, 1987), *McWane*, Crim. No. 04-PT-0199-S (Dec. 6, 2005).

<sup>68</sup> Plea Agreement at 1, *United States v. Tyler Pipe Co.*, Crim. No. 6:05-CR-29 (E.D. Tex., Mar. 2005).

After the jury in Birmingham convicted the corporation on twenty counts, the government initiated two further criminal prosecutions against the entity.

On July 28, 2005, the company was prosecuted for a second time in the Northern District of Alabama, this time in the Southern Division. It agreed to plead guilty to one count of a willful violation of a federal Occupational Safety and Health regulation at its Anniston facility, which led to the death of an employee, in violation of 29 U.S.C. § 666(e); and one count of treatment of hazardous waste without a permit, in violation of the Resource Conservation and Recovery Act.<sup>69</sup> The company agreed to pay a fine of \$3.5 million, to serve a three-year term of probation, and to perform community services valued at \$750,000.

On November 3, 2005, the company and two individuals were indicted in the District of Utah on six counts of conspiracy, violations of the Clean Air Act, and making false statements to EPA concerning its air emissions.<sup>70</sup>

### III. THE POLICY ON SUCCESSIVE PROSECUTION

The policies governing Department of Justice attorneys in the exercise of criminal enforcement authority are set forth in the *Principles of Federal Prosecution*, first issued by former Attorney General Benjamin Civiletti in 1980 and incorporated into the *U.S. Attorneys' Manual*.<sup>71</sup> The Department has long maintained a formal policy on successive prosecution, generally known as the Petite Policy, which governs the decision “whether to bring a federal prosecution based on *substantially the same act(s) or transactions*

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<sup>69</sup> Plea Agreement at 1-3, *United States v. Union Foundry Co.*, No. CR 05-00299 (N.D. Ala. July 28, 2005).

<sup>70</sup> Indictment at 6-13, *United States v. McWane, Inc.*, No. CR 05-00811 (D. Utah Nov. 3, 2005).

<sup>71</sup> USAM, *supra* note 22, § 9-27.000. Attorney General Civiletti explained the purposes of the Principles as follows:

In normal circumstances, the Department of Justice does not investigate or prosecute every possible felony that comes to our attention. We exercise discretion. We stay our hand in individual cases . . . for the purpose of doing justice and advancing the common good.

...

Any discretionary power can be abused; and if our investigatory and prosecutorial discretion could be exercised capriciously or irregularly, it would threaten, not advance, the interests it is designed to serve. For that reason we have developed guidelines that structure and restrain the exercise of our discretion in individual cases, thereby introducing a measure of principle and regularity into a sensitive subjective process.

Benjamin Civiletti, former Attorney Gen., *The Alfred P. Murrah Lecture on the Administration of Justice at Southern Methodist University: Post-Watergate Legislation in Retrospect* (Oct. 31, 1980).

involved in a prior . . . federal proceeding.”<sup>72</sup> The purposes served by the Policy are: “to vindicate substantial federal interests through appropriate federal prosecutions, to protect persons charged with criminal conduct from the burdens associated with multiple prosecutions and punishments for substantially the same act(s) or transaction(s), [and] to promote efficient utilization of Department resources.”<sup>73</sup>

The Petite Policy precludes the initiation or continuation of a federal prosecution, following a prior federal prosecution based on substantially the same acts or transactions, unless three substantive prerequisites are satisfied: first, the matter must involve a substantial federal interest; second, the prior prosecution must have left that interest demonstrably unvindicated; and third, applying the same test that is applicable to all federal prosecutions, the government must believe that the defendant’s conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact.<sup>74</sup> As a procedural prerequisite, the subsequent prosecution must be approved by the appropriate Assistant Attorney General.

By its terms, the Policy on Successive Prosecution applies equally to corporate defendants and natural persons.<sup>75</sup> The Policy applies “whenever there has been a prior . . . federal prosecution resulting in an acquittal, a conviction, including one resulting from a plea agreement, or a dismissal or other termination of the case on the merits.”<sup>76</sup>

In determining whether a second prosecution may be authorized, the critical factor is the second criterion, whether “the prior prosecution . . . left the federal interest demonstrably unvindicated.”<sup>77</sup> In this connection, the Petite Policy explicitly provides that “[i]n general, the Department will presume that a prior prosecution, regardless of the result, has vindicated the

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<sup>72</sup> USAM, *supra* note 22, § 9-2.031.A (emphasis added). The Policy is an internal Department of Justice guidance, promulgated to guide the exercise of prosecutorial discretion, and does not create any right that is enforceable in court by third parties. *Id.* § 9-2.031.F. It is enforceable only by senior policy officials of the Department, in exercising due diligence over criminal cases that subordinate prosecutors propose to file. *See United States v. Caceres*, 440 U.S. 741 (1979).

<sup>73</sup> USAM, *supra* note 22, § 9-2.031.A.

<sup>74</sup> *Id.*

<sup>75</sup> *See* Memorandum from Larry D. Thompson, Deputy Attorney Gen., to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations § II.A (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm) [hereinafter Thompson Memo] (“Generally, prosecutors should apply the same factors in determining whether to charge a corporation as they do with respect to individuals.”); USAM, *supra* note 22, § 9-27.220.

<sup>76</sup> USAM, *supra* note 22, § 9-2.031.C (emphasis added).

<sup>77</sup> *Id.* § 9-2031.A.

relevant federal interest.”<sup>78</sup> That presumption may be overcome by a showing that:

— “the prior sentence was manifestly inadequate in light of the federal interest involved and a substantially enhanced sentence . . . is available through the contemplated federal prosecution.”

— “the choice of charges, or the determination of guilt, or the severity of the sentence in the prior prosecution was affected by” such factors as incompetence, corruption, intimidation, undue influence; court or jury nullification in clear disregard of the evidence or the law; or the unavailability of significant evidence, either because it was not timely discovered or known by the prosecution.<sup>79</sup>

The scope of the Policy on Successive Prosecution is best explained in *Petite v. United States*.<sup>80</sup> *Petite* was indicted and convicted in the Eastern District of Pennsylvania for conspiracy to make false statements in deportation hearings held in Philadelphia and Baltimore. He was subsequently indicted and convicted in the District of Maryland for suborning perjury in the Baltimore hearings. *Petite* appealed on the ground that his subsequent conviction violated the Double Jeopardy Clause.<sup>81</sup> When the case reached the Supreme Court, the Solicitor General did not oppose the granting of certiorari but informed the Court that the government was considering whether the second prosecution “was consistent with the sound policy of the Department in discharging its responsibility for the control of government litigation,” wholly apart from the validity of the double jeopardy claim.<sup>82</sup> After certiorari was granted, the government filed a motion to vacate the judgment of conviction and to remand with directions to dismiss the indictment. The Department represented to the Supreme Court that

it is the general policy of the Federal Government “that *several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions*, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement.”<sup>83</sup>

The Supreme Court granted the motion and remanded with instructions to dismiss.

The requirement of the *Petite* Policy that all offenses arising out of a single transaction should be prosecuted together remains fully viable,

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<sup>78</sup> *Id.* § 9-2.031.D.

<sup>79</sup> *Id.*

<sup>80</sup> 361 U.S. 529 (1960).

<sup>81</sup> *Id.* at 529-30.

<sup>82</sup> *Id.* at 530.

<sup>83</sup> *Id.* (emphasis added).



despite its longevity. As recently as May 2005, Attorney General Gonzales stated,

[W]e understand that irresponsible or overreaching exercise of investigatory and prosecutorial powers—in addition to being unjust—can create its own problems, through overdeterrence. Overdeterrence can discourage innovation, discourage law-abiding conduct, and discourage competition . . . . Additionally, we are mindful of the burdens and challenges that you and your clients face when there are *multiple investigations*—one following the other—by different state and federal governmental agencies *into the same underlying conduct*.<sup>84</sup> At the Justice Department, we are fully aware of these considerations and issues.

By its terms and its logic, the Policy on Successive Prosecution is fully applicable to environmental prosecutions, including cases that span several judicial districts. With its focus on definition of the federal law enforcement interest, protecting defendants charged with crime from the burdens of multiple prosecutions and punishments, and efficiency in the utilization of scarce prosecutorial resources, the Policy provides an important analytical tool for assessing the wisdom of the multiple corporate prosecutions that have been filed in environmental criminal cases.

#### IV. THE PATTERNS OF PROSECUTION IN SOME MULTI-JURISDICTIONAL CASES CONFLICT WITH LONGSTANDING DEPARTMENT POLICIES

Department policies provide that (1) offenses arising out of the same underlying misconduct should be charged and tried together in one prosecution; and (2) there is a presumption that a prior prosecution, regardless of the result, has vindicated the federal law enforcement interest.<sup>85</sup> These principles apply as fully in the environmental area as they do in other Department criminal enforcement programs, such as corporate fraud. Further, in prior environmental cases, the federal law enforcement interest has in fact been vindicated by a comprehensive prosecution in one jurisdiction.<sup>86</sup>

It is difficult to square the patterns of prosecution in several recent environmental prosecutions, notably *Royal Caribbean* and *McWane*, with these longstanding Department policies. Those multi-jurisdictional prosecutions have caused the harms that the policies were intended to prevent, by consuming a disproportionate amount of scarce prosecutorial

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<sup>84</sup> Alberto Gonzales, U.S. Attorney Gen., Address at the National Legal Center General Counsel Conference (May 10, 2005) (emphasis added).

<sup>85</sup> See *supra* notes 17-18 and accompanying text.

<sup>86</sup> See *infra* Parts IV.C.1-2.

resources and diminishing the “impact of Federal resources on crime” and imposing unfair burdens on the corporate defendants.<sup>87</sup>

A. WHAT CONSTITUTES “SUBSTANTIALLY THE SAME ACTS OR TRANSACTIONS?”

Under Department policies, two critical questions determine the scope and locus of prosecutions that may appropriately be brought against a corporation that is under multi-jurisdictional investigation: (1) whether “substantially the same acts or transactions,” or in the Attorney General’s phrasing “the same underlying conduct,” were involved in the alleged violations in multiple districts; (2) whether a subsequent prosecution in another jurisdiction would be justified on the ground that the federal law enforcement interest was not “fully vindicated” by a first, comprehensive prosecution of the company.

The threshold question is whether “substantially the same acts or transactions” are involved. In an environmental case, it would be a relatively simple matter for an advocate of a separate prosecution to argue that the general policy favoring a consolidated prosecution or the Petite Policy does not apply, by focusing on relatively small differences in the operation of industrial plants in different districts or the constituents of waste streams from vessels that call in different ports. The same problem affects other areas of criminal enforcement. In those cases, the Department generally looks to the heart of the matter and does not base its decisions on distinctions among fact situations articulated in the same manner that lawyers distinguish adverse precedent. For example, in the cases coordinated by the Corporate Fraud Task Force, the Department brought one comprehensive prosecution that addressed all species of criminality that it found, even if the investigations uncovered multiple numerous distinct instances of wire fraud or false statements for which the company technically could have been prosecuted separately in multiple districts.

Under the Principles of Federal Prosecution, the Department does not prosecute every illegal act that could be charged separately against a corporation. Rather, the Department initially charges “the most serious offense that is consistent with the nature of the defendant’s conduct, and that is likely to result in a sustainable conviction.”<sup>88</sup> Thereafter, the government determines whether to file additional charges to “adequately reflect the nature and extent of the criminal conduct involved.”<sup>89</sup> In

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<sup>87</sup> Thompson Memo, *supra* note 75, § XI.B.

<sup>88</sup> USAM, *supra* note 22, § 9-27.300.A; *see* Thompson Memo, *supra* note 75, § XI.

<sup>89</sup> USAM, *supra* note 22, § 9-27.320.B.1.

determining what additional charges to bring against a corporation, the prosecutor properly may consider the Sentencing Guideline range yielded by the proposed charges and whether that punishment would be “proportional to the seriousness of the defendant’s conduct.”<sup>90</sup> The Sentencing Guidelines reinforce this policy by requiring that similar offenses in a “course of conduct” situation be grouped together for sentencing purposes.<sup>91</sup>

The result is that the Department generally brings a comprehensive prosecution against the corporate defendant in one jurisdiction, even if the investigations spanned many districts. The indictment or information contains a representative sample of the violations that, in their totality, are sufficient to vindicate the law enforcement interest. The most commonly charged criminal offenses in environmental cases (i.e., illegal discharges from separate vessels or facilities; submission of fraudulent Oil Record Books to different Coast Guard officers in various ports; obstruction of the investigation) fit comfortably within the traditional framework by which the Department brings representative charges that are proportional to the magnitude of the misconduct. Indeed, a single, comprehensive prosecution appears uniquely practicable in multi-district environmental cases, because of the high likelihood that the ECS will be involved in each investigation.

At another level, some of the most important acts that may be under investigation in multiple districts explicitly involve, in the Attorney General’s phrase, “the same underlying conduct.” In many cases, one focus of the investigations is whether senior corporate officials are responsible for illegal acts or systematically ignored their environmental obligations, with the result that violations of law occurred in several jurisdictions. If senior level misconduct factors into the government’s charging decision, the policy rationale for a comprehensive prosecution of the company in one district is likely at its strongest.

## B. CONTINUING ILLEGAL ACTIVITY

The strongest case for a successive prosecution in another jurisdiction would be presented if, after the first indictment or the first conviction, the

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<sup>90</sup> Thompson Memo, *supra* note 75, § XI.B.

<sup>91</sup> The Federal Sentencing Guidelines seek to limit the significance of the government’s charging decision and to prevent multiple punishments for substantially identical offense conduct by grouping counts and treating the conduct as a single offense for purposes of the Guideline calculations. U.S. SENTENCING GUIDELINES MANUAL § 3D (2004). Grouping is appropriate when counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan. *Id.* § 3D1.2.

government determined that the company had continued to violate the law in a manner similar to the conduct underlying the first case. In the face of continuing criminal activity, the government's law enforcement interests obviously would be "demonstrably unvindicated," and the Department would be fully justified in bringing a second prosecution.

This consideration has not been a factor in the successive prosecutions in the environmental area. In *Royal Caribbean*, all charges related to activity that occurred before the first guilty plea, and sixteen of the twenty-one counts involved discharges that had occurred at least three years before the first plea.<sup>92</sup> Similarly, in *McWane*, the conduct involved in the second prosecution in the Northern District of Alabama and in the District of Utah case had occurred well before the company was convicted in the Birmingham proceeding.<sup>93</sup>

### C. OBTAINING THE RELIEF NECESSARY TO VINDICATE THE FEDERAL INTEREST

In the corporate context, the law enforcement interests of punishment, deterrence and rehabilitation "are generally accomplished by substantial fines, mandatory restitution, and institution of appropriate compliance measures including, if necessary, continued judicial oversight."<sup>94</sup> The record in environmental criminal cases demonstrates that the government generally has been able to obtain these sanctions through a single prosecution.

#### 1. *The Government May Obtain a Fine Proportional to the Illegal Conduct in a Single Prosecution*

In prosecutions confined to a single jurisdiction, the Department has been able to obtain sufficiently large fines to punish and deter corporate offenders and otherwise vindicate the law enforcement interest. Several factors combine to give the Department sufficient charging flexibility that it generally should have a valid factual basis for bringing in one jurisdiction a sufficient number of charges to produce a criminal fine in the amount the government believes appropriate. Felonies generally may be punished by a

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<sup>92</sup> Plea Agreement at 2-5, *United States v. Royal Caribbean Cruises, Ltd.*, No. 96-333 (D.P.R. June 2, 1998), No. 98-103 (S.D. Fla. June 2, 1998).

<sup>93</sup> Plea Agreement at 1-3, *United States v. Union Foundry Co.*, No. CR 05-00299 (N.D. Ala. July 28, 2005); Statement by Defendant in Advance of Guilty Plea, *United States v. McWane, Inc.*, No. CR 05-811 (D. Utah Feb. 8, 2006); Indictment at 6-14, *McWane*, No. CR 05-811 (D. Utah Nov. 3, 2005).

<sup>94</sup> Thompson Memo, *supra* note 75, § XII.B.

fine of \$500,000 per count or twice the gain obtained by the defendant.<sup>95</sup> Environmental statutes permit separate criminal charges to be filed for each illegal discharge. Pursuant to § 1001, charges may be brought for each false statement made to the government.<sup>96</sup> In theory, this would allow the government to file a charge for each time a vessel's Oil Record Book is produced each time it calls in a port. Moreover, in vessel pollution cases, the closely related acts of the company's failure to keep an accurate Oil Record Book and its presentation of an inaccurate Oil Record Book to the Coast Guard inspectors can be charged as separate offenses.

For example, in *United States v. MSC Ship Management Ltd.*, the corporate owner of a container ship pleaded guilty in the District of Massachusetts to eleven counts of violation of APPS and related Title 18 offenses (conspiracy, false statements, obstruction of the investigation, destruction of evidence) resulting from detection of an illegal bypass pipe on the vessel, which allowed vessel engineers to make illegal discharges that bypassed the oil-water separator.<sup>97</sup> The company agreed to pay a \$10 million criminal fine plus an additional \$500,000 in community service payments.<sup>98</sup> The bypass equipment was discovered in a single inspection.<sup>99</sup> Nevertheless, the law provided the government sufficient charging authority so that, without considering possible violations in other U.S. ports in which the company's eighty-one vessels call, the ECS and the U.S. Attorney were able to vindicate the government's law enforcement interests and obtain "the largest criminal fine paid by a defendant in an environmental case in Massachusetts history."<sup>100</sup>

Similarly, in the *Carnival* case, the government brought a single prosecution in the district in which the principal port served by the company's vessels was located.<sup>101</sup> Through this case, the Department obtained a criminal fine of \$18 million.<sup>102</sup>

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<sup>95</sup> 18 U.S.C. § 3571(c)-(d) (2000).

<sup>96</sup> *Id.* § 1001.

<sup>97</sup> Plea Agreement at 7-22, *United States v. MSC Ship Mgmt. (H.K.) Ltd.*, No. CR 05-10351 (D. Mass. Dec. 19, 2005).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Press Release, U.S. Dep't of Justice, Ship Company To Pay \$10.5 Million for Covering Up Oil Pollution (Dec. 19, 2005), available at [http://www.usdoj.gov/opa/pr/2005/December/05\\_enrd\\_680%20%20.html](http://www.usdoj.gov/opa/pr/2005/December/05_enrd_680%20%20.html).

<sup>101</sup> Plea Agreement, *United States v. Carnival Corp.*, No. CR 02-10350 (S.D. Fla. Apr. 17, 2002).

<sup>102</sup> *Id.* at 5.

2. *The Government May Obtain Effective Relief Assuring Future Compliance with the Environmental Laws in a Single Proceeding*

The Department of Justice may obtain, through one prosecution, enforceable commitments that the offending corporation will comply with the environmental laws in the future. Once the government obtains such relief through an appropriate conviction and sentence, this aspect of the federal interest is fully vindicated. A subsequent corporate conviction in another jurisdiction likely would produce only redundant terms of probation and environmental compliance obligations.

For example, in *United States v. A.P. Moller-Maersk, A/S*, the vessel owner entered into a plea agreement with the U.S. Attorney for the Northern District of California, by which it pleaded guilty to a single count of presentation of an Oil Record Book and agreed to pay a fine of \$500,000.<sup>103</sup> The company agreed to serve a three-year term of probation, as a condition of which it was required to adopt an Environmental Compliance Plan that would apply to eighty-five vessels in its fleet.<sup>104</sup> Similarly, in *MSC Ship Management*, as part of its guilty plea involving a single ship, the company was required to implement an Environmental Compliance Plan that would apply to eighty-one ships that call in the United States.<sup>105</sup> In the *Carnival* case, as part of a plea agreement in the Southern District of Florida, the company agreed to adopt an Environmental Compliance Plan that would apply to all vessels operated by its subsidiary cruise lines.<sup>106</sup> The federal interest in rehabilitation and compliance was fully vindicated by these single convictions.

The government's ability to obtain comprehensive remedial relief is not confined to vessel pollution cases. In *United States v. BP Exploration (Alaska), Inc.*, the ECS and the U.S. Attorney for the District of Alaska entered into a plea agreement with the local exploration subsidiary of a company by which the subsidiary pleaded guilty to one count of the strict liability crime of failure to notify the government of the release of a hazardous substance, was fined \$500,000, and was sentenced to five years'

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<sup>103</sup> Plea Agreement at 2, *United States v. A.P. Moller-Maersk, A/S*, No. CR 05-00606 (C.D. Cal. Sept. 26, 2005).

<sup>104</sup> *Id.*

<sup>105</sup> See *supra* note 81.

<sup>106</sup> Further, in the plea agreement in *Höegh*, the company agreed to make all thirty-eight of its vessels subject to the Environmental Management System imposed as a condition of probation. See *supra* note 45. Similarly, in *Evergreen International*, the company agreed, as a term of probation, that its Environmental Compliance Plan would apply to the company and three related entities. See *supra* note 47.

probation.<sup>107</sup> As a condition of probation, the defendant and its corporate parent agreed to establish a permanent Environmental Management System that would cover all BP Amoco companies, subsidiaries, and affiliated business entities engaged in the exploration, drilling, or production of oil anywhere in the United States or its territories, including offshore operations in the Gulf of Mexico.<sup>108</sup>

In sum, in prior environmental criminal cases, the Department has obtained through one conviction in a single prosecution sufficient fines and enforceable rehabilitation and compliance commitments from corporations to satisfy the federal law enforcement interest. Under these circumstances, since the federal interest has already been vindicated, a subsequent corporate prosecution in another jurisdiction would violate the policy on successive prosecution.

#### D. LOCALIZED NATURE OF ENVIRONMENTAL HARM

Illegal discharges may cause discrete harm to humans and the environment in the local area where they occur.<sup>109</sup> It could be argued that this factor differentiates environmental enforcement from other types of criminal cases that the Department prosecutes in one jurisdiction (i.e., securities fraud, where illegal acts may occur in many jurisdictions but the harm to shareholders is identical), and justifies separate prosecution and punishment in multiple districts if there were illegal releases in several localities.

The flaw in this argument is that harm to the environment is not cured by the acts of prosecution and conviction. The criminal process can punish and deter the offender and obtain enforceable commitments for future environmental compliance. Clean ups and restitution, however, are obtained through separate civil lawsuits and administrative proceedings. The civil suits often are settled by consent decrees drafted in cooperation

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<sup>107</sup> Plea Agreement at 3-4, *United States v. BP Exploration (Alaska) Inc.*, No. CR 99-0141 (D. Alaska Sept. 23, 1999).

<sup>108</sup> *Id.* at 9-10.

<sup>109</sup> "Harm" has several meanings in environmental criminal cases, in addition to its role in determining the proper locus for a prosecution discussed in the text. Strictly speaking, proof of harm is not an essential element of most environmental crimes. In many cases, it is not possible for scientists to show that the environment actually was harmed by a specific illegal discharge, although it can be shown that all discharges taken as a group have adverse effects. Environmental prosecutors nonetheless are concerned about the absence of proof of harm in their cases and will introduce it if available. Their concern is absent evidence of harm, defense counsel will portray the case as a victimless crime, which might make juries less willing to convict, especially individuals, and judges less willing to impose strong sentences.

with the Environmental Protection Agency. The potential collateral estoppel effect of a criminal conviction plays an important role in the preparation of these decrees.

The punishment and deterrence effects of the criminal process on the offender are identical regardless of the district in which an appropriate conviction is obtained. If a comprehensive case can be brought in one jurisdiction, then a separate conviction need not be obtained in each other local jurisdiction to accomplish these results, because the first conviction will vindicate this federal interest. This is particularly true in vessel pollution cases, where the principal harm is interference with a governmental function, the ability of the Coast Guard to police compliance with applicable legal requirements. This federal interest is not local in nature and can be vindicated by one conviction in any appropriate jurisdiction.

Similarly, as discussed above, the environmental compliance obligations obtained by a corporate conviction in one jurisdiction will protect all other districts, as demonstrated by *BP Exploration (Alaska), Carnival, Norwegian Cruise Lines, A.P. Moeller-Maersk*, and *MSC Ship Management*. The six pleas in the second round of prosecutions in *Royal Caribbean* clearly demonstrate that even if a successive prosecution occurs, the terms of probation and the Environmental Compliance Program that would be imposed by the sentencing court are no different from those that the government may obtain in the first prosecution.<sup>110</sup>

In sum, localized differences in the environmental harm suffered cannot be resolved through the criminal process. They must be addressed in a different manner, by carefully tailoring the Environmental Compliance Plan and the Consent Decree in any companion civil case to address in detail each type of illegal discharge that occurred in corporate facilities.

#### E. CENTRIFUGAL FORCES WITHIN THE DEPARTMENT

Due to its decentralized structure, the Department of Justice has long wrestled with the problems caused by the desire of a U.S. Attorney to bring a prosecution if an investigation produces sufficient admissible evidence that a crime occurred in his jurisdiction. In this regard, the “environmental harm” factor plays a different, and important, role in the Department’s prosecutorial calculus, in the sense that the U.S. Attorney may insist on filing criminal charges if an illegal discharge caused significant harm to the local environment or otherwise was highly publicized. This consideration appears to have played a part in the Department’s decision to require pleas

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<sup>110</sup> Factual Basis, *supra* note 39, at 7-21.



in multiple jurisdictions in the *Höegh*, *Evergreen International*, and *Royal Caribbean* cases.

This dynamic within the Department is no different in the environmental field than in other criminal enforcement areas. It is inherent in the division of authority between litigating units in Main Justice and the U.S. Attorneys. In the environmental area as elsewhere, this issue involves a mixture of principled arguments and considerations of self-interest of the prosecutorial units involved.

Neither the Principles of Federal Prosecution nor the Thompson Memorandum authorize the filing of multiple prosecutions to accommodate the competing desires of various prosecutorial units within the agency. Rather, the Department's policy remains, as it was at the time of *Petite*, that all offenses based on the same acts or transactions should be brought in one prosecution. This means that, as in other enforcement areas, the issues of what charges should be brought, and in which District, should be resolved through discussions among the affected prosecutors, applying the standards set forth in the Principles of Federal Prosecution. The outcome in the environmental criminal area is anomalous, however, because the Department appears to rely on multi-district prosecutions more frequently than it does in other areas.

#### F. POTENTIAL PROSECUTION OF INDIVIDUALS

Another recurring issue that applies in environmental criminal cases, as it does in other enforcement areas, is the relationship between a corporate prosecution and the potential prosecution of individual employees. This issue inevitably becomes entangled with questions, discussed elsewhere in this symposium, concerning the Department's suggestions that in order to receive credit for cooperation, a corporation should waive the attorney-client privilege for internal investigations.<sup>111</sup> The Thompson Memorandum specifically cautions prosecutors that they "should be wary of attempts to shield corporate officers and employees from liability by a willingness of the corporation to plead guilty."<sup>112</sup> The Chief of the ECS has stated his concern that when the Department seeks to investigate whether higher level

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<sup>111</sup> See Barbara Crutchfield George & Kathleen A. Lacey, *Investigation of Halliburton Co./TSKJ's Nigerian Business Practices: Model for Analysis of the Current Anti-Corruption Environment on Foreign Corrupt Practices Act Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 503 (2006); William R. McLucas, Howard M. Shapiro & Julie J. Song, *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. CRIM. L. & CRIMINOLOGY 621 (2006).

<sup>112</sup> Thompson Memo, *supra* note 75, § VI.B.

company officials were responsibly involved in environmental violations, corporations may try to hide the facts behind broad privilege claims.<sup>113</sup>

One aspect of the discussion of corporate pleas and waiver of the privilege is unique to environmental crimes, in light of the record of prior multi-district prosecutions in this area: What the Department should not do is use its decentralized organization and the multi-jurisdictional nature of many environmental investigations as a tool to bludgeon a company into waiving the privilege and settling. The government should not seek to disaggregate or unbundle otherwise similar violations and pile on indictments in other districts besides the jurisdiction that is the focal point of the criminal activity. Such an approach would convert the privilege waiver from a factor to be considered in determining the adequacy of the company's cooperation analysis into a mandatory condition of obtaining a plea. Such a course of action would not be justified either by the Principles of Federal Prosecution or by the Thompson Memorandum and would contradict repeated public statements by senior Department officials.

If a company refuses to agree to a plea, the Department should bring a comprehensive prosecution against related acts that sufficiently vindicates the federal law enforcement interest and should bring that case to trial. As noted, the government can be confident in its ability to prevail because of the quasi-strict liability nature of environmental crimes for corporations, in the absence of a specific intent requirement.

#### V. THE DEPARTMENT SHOULD ESTABLISH A NEW DECISION MAKING PROCESS TO RESOLVE ISSUES PRESENTED BY MULTI-DISTRICT ENVIRONMENTAL INVESTIGATIONS

As the prior analysis shows, there generally are no considerations unique to the environmental area. That means that, in this area alone, the federal interest would be "demonstrably unvindicated" by bringing a comprehensive criminal prosecution against a corporation in one jurisdiction. The policy on successive prosecution applies fully in this field. However, the pattern of prosecutions in environmental cases suggests that the decisionmaking process within the Department has not always worked effectively in multi-jurisdictional investigations. Accordingly, the Department would be well advised to develop a new procedure to consider the policy decisions presented by multi-district investigations, modeled on the successful operation of the Corporate Fraud Task Force.

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<sup>113</sup> Uhlmann Speech, *supra* note 18.

A. SEVERAL PROSECUTIONS APPEAR INCONSISTENT WITH THE PETITE POLICY

Several recent environmental prosecutions appear inconsistent with the principles set forth in the Petite Policy.

1. *United States v. Royal Caribbean Cruises, Ltd.*

In *Royal Caribbean*, there is little ground for arguing that the first round of convictions left the federal interest “demonstrably unvindicated.”<sup>114</sup> The company pleaded guilty to the seven counts that the Department demanded, and the courts imposed the sentences that the ECS sought.<sup>115</sup> It thus cannot be said that the “prior sentence was manifestly inadequate in light of the federal interest involved,” because the government received what it wanted.<sup>116</sup>

The conduct involved in the second prosecutions occurred prior to entry of the first pleas; indeed, sixteen of the twenty-one charges occurred at least three years previously. The terms of probation, including the critical environmental compliance obligations, were identical to those imposed after the first convictions. In the end, all the Department achieved through the second round of prosecutions was an increase in the criminal fine, while consuming a significant amount of prosecutorial and investigative resources.

2. *United States v. McWane, Inc.*

In *McWane*, the government brought a thirty-five count indictment in New Jersey for what it has characterized as “a whole host of environmental crimes and worker safety violations . . . a far reaching conspiracy to violate environmental and worker safety laws, and to cover up those violations through false statements, witness intimidation and obstruction of justice.”<sup>117</sup> Even assuming that the outcome of this trial would not sufficiently vindicate the federal interest, the situation changed fundamentally when the Department later indicted and obtained a twenty count jury verdict against the company in the Northern District of Alabama. After that conviction, it would be exceedingly difficult for the government to show that the results of those two prosecutions would leave the federal interest “demonstrably unvindicated.” Nonetheless, the Department thereafter brought two further

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<sup>114</sup> USAM, *supra* note 22, § 9-2.031.A.

<sup>115</sup> Plea Agreement at 7-19, *United States v. Royal Caribbean Cruises*, No. CR 99167 (C.D. Cal. July 21, 1999).

<sup>116</sup> *Id.* § 9-2.031.D.

<sup>117</sup> Uhlmann Interview, *supra* note 16.

criminal prosecutions against the company on environmental and worker safety charges similar to those involved in the first two cases. Even if the courts sentenced the company to the maximum fine available in the last two cases, the increased fine would not constitute the kind of “substantially enhanced sentence” that the Petite Policy requires in order to justify a successive prosecution.<sup>118</sup>

### 3. *Multi-Jurisdictional Vessel Pollution Prosecutions*

In the multi-jurisdictional vessel pollution prosecutions, the counts and pleas were carefully allocated among the various districts. This pattern raises the question whether multiple pleas were required, rather than a comprehensive plea in one jurisdiction, to resolve the centrifugal problems within the Department. Since there is no centralized decisionmaking forum for multi-district cases, there is a risk that one or more prosecuting units involved in one branch of the case will take the defendant’s desire to settle as an opportunity to insist on a separate plea in its jurisdiction as the price to be paid for obtaining the finality that the corporation seeks to obtain. The time and expense involved in such seriatim negotiations can prove quite substantial.

#### B. RECENT PROSECUTIONS APPEAR TO GIVE LITTLE WEIGHT TO SOME OF THE FACTORS THAT THE PRINCIPLES OF FEDERAL PROSECUTION CONSIDER IMPORTANT

In addition to vindicating federal law enforcement interests, the Policy on Successive Prosecution is intended “to protect persons charged with criminal conduct from the burdens associated with multiple prosecutions and punishments for substantially the same act(s) or transaction(s) [and] to promote efficient utilization of Department resources.”<sup>119</sup> These considerations appear to have been given little or no weight in some prior environmental cases.

#### 1. *The Burdens Associated with Multiple Prosecutions*

Defending a government investigation and subsequent prosecution is an expensive proposition, even for large companies. The costs of defending multiple investigations increase substantially with each new case. Environmental consultants’ fees and attorneys’ fees are substantial, and the costs escalate substantially if an indictment is returned. The time and attention of corporate management is diverted from normal business

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<sup>118</sup> USAM, *supra* note 22, § 9-2.031.D.

<sup>119</sup> *Id.* § 9-2.031.A.

activities, which can adversely affect the company's competitive position. Moreover, the salaries and expenses incurred by corporate staff tasked with collecting documents and responding to prosecutors' requests can be a substantial drain on company funds.

The burden on companies has been of great significance in the vessel pollution cases. The boarding of ships, inspections of vessels, and requests to produce crew members in multiple locations can delay scheduled departures and arrivals in port. These factors can substantially disrupt the day-to-day operations of cruise lines, oil and gas tankers, and container ships, with severe consequences for the vessel owner. In addition, most witnesses in these investigations are foreign citizens who spend much of their time at sea, which means that the owner faces significant staffing problems when vessel personnel have to be produced in investigations. The company also incurs substantial costs when documents must be obtained from vessels scattered all over the world.

Taken together, these factors place a substantial operational and financial burden on companies called upon to defend multiple investigations and prosecutions. In addition, there is a substantial fairness issue presented by the multiplication of investigations and criminal charges. There is a "David versus Goliath" element to this situation. It is difficult enough for a company to take on the government in a single case. The piling on of criminal charges in multiple districts applies substantial leverage against the company to settle for reasons that may bear little relation to the validity of a particular charge, taken in isolation.

## 2. *Efficient Utilization of Government Resources*

The Thompson Memorandum provides that corporate prosecutions should "maximize the impact of Federal resources on crime."<sup>120</sup> There are substantial reasons to believe that successive prosecutions in the environmental field have not had that effect.

As the Petite Policy notes, successive prosecutions come at a substantial cost to the government, including both direct costs and opportunity costs.

— The direct costs include the time and attention of prosecutors; the costs of investigating agents (at EPA, the FBI, and the Coast Guard); the costs of technical personnel and support staff; and the costs to the judicial

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<sup>120</sup> Thompson Memo, *supra* note 75, § XI.B.

system of running multiple grand juries and conducting multiple trials or plea proceedings.<sup>121</sup>

— The opportunity costs reflect the fact that while prosecutors and investigators are running out the string by preparing successive prosecutions against a company, these resources will be diverted from the higher-valued return to the public offered by the detection and prosecution of environmental crimes that are not already known. The resources devoted to successive prosecutions produce a diminishing marginal return for the federal interest. The benefits that would be derived by freeing up the resources that have been diverted to successive prosecutions and using them to fund new investigations may not be quantifiable, but they are real.

Efficiency in the use of scarce prosecutorial resources should be a priority concern of senior Department officials. As Attorney General Gonzales testified before Congress in March 2005, as part of the Department's efforts to improve its management in the current era of greater budget discipline: "the Department continues to evaluate its programs and operations with the goals of achieving both component-specific and departmental economies of scale, increased efficiencies, and cost savings/offsets to permit us to fund initiatives that are of higher priority."<sup>122</sup> Avoiding the waste of governmental resources incurred through successive prosecutions of conduct that is highly similar to behavior that is already the subject of a criminal proceeding would contribute to the cost-efficiency of department operations.

#### C. THE DEPARTMENT SHOULD CREATE AN INTERNAL PROCESS TO ADDRESS THE ISSUES PRESENTED BY MULTI-JURISDICTION ENVIRONMENTAL CASES

To avoid repetition of the waste of government resources and apparent piling on that has occurred in recent multi-jurisdictional prosecutions, the Department should establish a new policy process that would allow senior

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<sup>121</sup> The Department has reduced these costs in one respect by no longer holding separate sentencing hearings in each District involved in a multi-jurisdictional prosecution. The current practice is to have cases transferred to one jurisdiction for sentencing in all proceedings, which saves court time and ensures consolidated probation. This practice does not avoid the major expenses involved in successive prosecutions, which are incurred at the investigation stage. Moreover, if the cases are sufficiently similar that they can be sentenced together, this practice begs the question why the illegal conduct cannot also be prosecuted in one comprehensive case.

<sup>122</sup> *Statement before the Subcommittee on Science, the Departments of State, Justice, and Commerce, and Related Agencies of the House Committee on Appropriations*, 109th Cong. (1st Sess. 2005) (Alberto Gonzalez, Attorney Gen. of the U.S.), available at <http://www.usdoj.gov/ag/testimony/2005/022805fy06aghousetestimonyfinal.htm>.

policy officials to review and determine, on a comprehensive basis and after full discussion between the Environment Division and the U.S. Attorneys in whose districts the investigations are underway, how appropriate criminal charges could be brought against an offending corporation in one proceeding, and in a manner that fully vindicates the federal interest.

As with the Corporate Fraud Task Force, this policy review group should include officials from Main Justice and affected U.S. Attorneys. The group should provide a forum for senior officials to discuss among themselves and resolve what degree of corporate punishment is appropriate, given the evidence discovered in all the investigations, and where a comprehensive prosecution should be brought to vindicate the federal interests involved. Such a policy process would better assure that these decisions are driven by the policy factors set forth in the Principles of Federal Prosecution, and would avoid the waste of prosecutorial resources that would be involved in massing successive corporate prosecutions that produce little marginal benefit for the public.

The Department could institute such an arrangement on a case-by-case basis for a particular investigation. However, the Department would be well advised to institute this policy change through a general order issued before it is needed in a particular case, to eliminate the risk that it would be subject to political criticism that the action was driven by potential favoritism in a specific case.