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*Practice Group(s):**Environmental, Land  
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## Two Federal Decisions Signal Further Expansion of Criminal Liability for Environmental Crimes

By **Barry M. Hartman and Christine Jochim Boote**

Recently, two federal courts, including the influential U.S. District Court for the District of Columbia, issued opinions in criminal environmental cases involving violations of recordkeeping requirements. Like most environmental criminal cases, the recordkeeping violations were the result of discharges that were not authorized, and not reported. Taken together, these decisions illustrate how federal courts continue to impose broad criminal liability on corporate defendants, their officers and employees in alleged violations of federal environmental statutes.

The first case, decided in the U.S. Court of Appeals for the Fifth Circuit, upheld convictions and sentences against a wastewater treatment owner and operator and two of his companies for violations of the Clean Water Act (“CWA”).<sup>1</sup> Defendant-Appellant J. Jeffrey Pruett, through Defendant-Appellants Louisiana Land & Water Co. and LWC Management, operated twenty-eight wastewater treatment facilities in Louisiana subject to the CWA’s National Pollutant Discharge Elimination System (“NPDES”) permit program. The seventeen-count indictment charged Appellants with violations at six of the facilities, including:

- (1) failure to provide proper operation and maintenance of the facilities;
- (2) failure to maintain monitoring results as required by the permits;
- (3) discharge in excess of effluent limitations; and
- (4) unpermitted discharge.<sup>2</sup>

In the appeal, Appellants challenged jury verdicts finding that they had knowingly violated effluent limits and recordkeeping requirements, and negligently violated operation and maintenance requirements. The court rejected all of Appellants’ arguments. Most significantly, the court rejected Appellants’ argument regarding how the misdemeanor count alleging negligent operation and maintenance should be charged. The Fifth Circuit agreed with the Ninth and Tenth Circuits in concluding that 33 U.S.C. § 1319(c)(1)(A) requires only proof of ordinary negligence (as opposed to gross negligence) to impose misdemeanor criminal penalties for violations of NPDES permit conditions, because “the statute explicitly requires negligence.”<sup>3</sup>

The Fifth Circuit did not address Appellants’ apparent argument that the CWA requires a showing of gross negligence because it *is not* a public welfare statute.<sup>4</sup> The judicially-created Due Process exception for “public welfare” offenses provides that public welfare offenses only require a showing

<sup>1</sup> United States v. Pruett, No. 11 30572, slip op. (5th Cir. May 15, 2012).

<sup>2</sup> 33 U.S.C. §§ 1311(a), 1342, and 1319(c)(2)(A).

<sup>3</sup> Pruett, slip op. at 11-13 (citing United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999) and United States v. Ortiz, 427 F.3d 1278 (10th Cir. 2005)).

<sup>4</sup> Joint Original Brief of Defendants-Appellants at 26-29, United States v. Pruett, No. 11-30572 (5th Cir. Oct. 24, 2011); and Joint Reply Brief of Defendants-Appellants at 18-20, United States v. Pruett, No. 11-30572 (5th Cir. Jan. 17, 2012).

## Two Federal Decisions Signal Further Expansion of Criminal Liability for Environmental Crimes

of ordinary negligence. In the Ninth Circuit, Appellants explained, the court relied on its finding that the CWA *is* a public welfare statute as a basis for concluding that CWA misdemeanors do not require a showing of criminal negligence. Thus, they argued, because the Fifth Circuit had previously determined that the CWA *is not* a public welfare statute, the opposite is true, i.e., a showing of criminal negligence is required.

Instead, the Fifth Circuit distinguished the case on which Appellants relied, *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996), on the basis that *Ahmad* required the court to evaluate the relevant showing necessary under the “knowing” provisions of the CWA in § 1319(c)(2)(A), as compared to § 1319(c)(1)(A), which the court determined explicitly requires only a showing of negligence.

The court’s failure to expressly address whether the CWA is a public welfare statute leaves open a circuit split between *Ahmad* and *United States v. Hanousek*<sup>5</sup> as to how the CWA should be interpreted. Why didn’t the court address this issue? It is entirely likely that it believed *Ahmad* is sound and that at some point the conflict between the Ninth Circuit and Fifth Circuit on whether the CWA is a public welfare statute should ultimately be heard by the Supreme Court. It is also possible that it viewed the case as not framing the issue in a manner that would result in an affirmance of the Fifth Circuit’s view of the negligence showing required under the CWA.

The Fifth Circuit’s ruling affirms a sentence against Pruett for twenty-one months incarceration for knowingly violating the effluent limit and recordkeeping requirements and twelve months for negligently violating operation and maintenance requirements, to run concurrently, and a fine of \$310,000. Louisiana Land & Water Co. was fined \$300,000 and LWC Management was fined \$240,000.

In the second case, the U.S. District Court for the District of Columbia in *United States v. Sanford, Ltd.*,<sup>6</sup> denied Defendants’ motions to dismiss in a case involving seven counts of violating federal laws when two former ship engineers allegedly discharged oil-contaminated sludge and bilge waste into the ocean and falsified records relating to these discharges. The alleged violations took place on the ship San Nikunau during two separate voyages in July 2010 and July 2011. In January 2012, a grand jury returned a Superseding Indictment charging the Defendants, Sanford Ltd., the shipping company that owns and operates the San Nikunau, and two ship engineers, James Pogue and Rolando Ong Vano<sup>7</sup>, with conspiracy<sup>8</sup>; failure to maintain accurate oil record books (“ORB”)<sup>9</sup>; falsification of records relating to a fishing voyage<sup>10</sup>; obstruction of justice<sup>11</sup>; and unlawful discharge of oil waste.<sup>12</sup>

Of particular note, Defendants Sanford Ltd. and Pogue unsuccessfully argued that counts alleging ORB violations should be dismissed because, in part, the controlling regulation, 33 C.F.R. § 151.25(d)(4)<sup>13</sup>, does not impose a duty to make an ORB entry for waste accumulated in *machinery*

<sup>5</sup> *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999).

<sup>6</sup> *United States v. Sanford, Ltd.*, No. 11-cr-00352, 2012 U.S. Dist. LEXIS 66473 (D.D.C. May 14, 2012).

<sup>7</sup> Defendant Vano entered into a plea agreement on April 18, 2012 (Docket No. 116).

<sup>8</sup> 18 U.S.C. § 371.

<sup>9</sup> 33 U.S.C. § 1908(a) (making it a Class D felony to knowingly violate the 1973 International Convention for the Prevention of Pollution from Ships and the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (“MARPOL”); Annex IV to the Antarctic Protocol, and associated regulations); 18 U.S.C. § 2; and 33 C.F.R. § 151.25.

<sup>10</sup> 18 U.S.C. § 1519.

<sup>11</sup> 18 U.S.C. §§ 1505 and 2.

<sup>12</sup> 33 U.S.C. §§ 1907(a) and 1908(a); 18 U.S.C. § 2; and 33 C.F.R. § 151.10(b).

<sup>13</sup> 33 C.F.R. § 151.25(d)(4) requires entries “be made in the Oil Record Book on each occasion . . . whenever . . . the following [takes] place . . . [d]ischarge overboard or disposal otherwise of bilge water that has accumulated in machinery spaces.”

## Two Federal Decisions Signal Further Expansion of Criminal Liability for Environmental Crimes

*spaces*, nor does it require an entry for “internal transfers” of oily bilge waste. The court rejected these arguments, finding that “machinery spaces,” as the term is used in the regulation, “means spaces on a ship containing machines that use oil and are capable of generating oil waste” and not simply the ship’s engine room.<sup>14</sup> Further, the court reasoned that “the natural, commonsense reading of the regulation implies that all disposal of bilge waste from machinery spaces, whether the disposal is overboard or ‘otherwise’ to other parts of the ship, must be recorded in the ORB.”<sup>15</sup> The decision clarifies this court’s understanding of what constitutes “disposal” in terms of the recordkeeping requirements in 33 C.F.R. § 151(d)(4).

This decision is significant because it was issued by the U.S. District Court for the District of Columbia and is likely to be followed by the agency throughout the nation.

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<sup>14</sup> Sanford, 2012 U.S. Dist. LEXIS 66473, at \*27-32.

<sup>15</sup> Id. at \*24.