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A Message from the Chair

I want to give you an update on the plans for the CLE program at the fall meeting of the Environmental Law Section. I also want to urge you to attend the meeting because the CLE component will involve an unprecedented approach to Section educational efforts, which in turn should be both exciting and fun.

As you know, the fall meeting is scheduled for The Otesaga Hotel in Cooperstown over the last weekend in September—Friday, September 27, to Sunday, September 29. The CLE program will take place on the morning of Saturday, September 28.

If the program (described below) is insufficient to attract you, early fall in Cooperstown is spectacular. Attractions include a Section-wide softball game on Saturday afternoon, an opportunity to tour the Baseball Hall of Fame, the beauty of Otsego Lake, museums (Farmers' Museum and the Fenimore Art Museum), the shops of the village, etc. It's a great place to spend a weekend.

The CLE program—for which four credits will be awarded—has been designed to broaden participation in Section activities by government attorneys and not-for-profit sector attorneys. In recent years, the role in the Section played by attorneys in the private sector, particularly those at law firms, has grown, largely because attorneys from government and from not-for-profit environmental organizations have not joined the Section (or the Bar Association) or have allowed their membership to lapse. That diminished presence has resulted in meetings and Committee work products which, though continuing at a very high level, sometimes lack input from vital segments of the environmental legal community.

In an effort to address that status quo, the chairs of the fall meeting's CLE program—Glen Bruening, Michael Lesser and Miriam Villani—have developed a Saturday morning agenda which features attorneys from the three primary government environmental enforcement agencies in New York: the Department of Environmental Conservation, the Attorney General's Office, and the U.S. Environmental Protection Agency Region 2 Office. The focus of the four-hour program will be on negotiating a multi-jurisdictional, multi-media case.

The program will open with a panel discussion among the heads of each of those three enforcement offices as well as other representatives of government, the private sector and the not-for-profit sector. Follow-

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ing that will come an hour-and-a-half block of time for five breakout sessions, each one focusing on a different environmental medium and each one led by government attorneys from the three agencies.

The goal of the breakout sessions is to provide a more intimate and free-flowing exchange of ideas and perspectives than can ordinarily occur in a room of over one hundred people. By concentrating on a particular medium, but with the backdrop of the panel discussion which preceded it, each breakout session will afford every person attending the chance to home in on his or her area of interest while still providing the structure necessary for a common set of discussion points across the five sessions. Finally, by placing at least three government attorneys in each session, the organizers have ensured that the various points of view will be brought to bear on the issues.

The program will conclude with attendees reconvening in a plenary session to review the areas of agreement, the significant differences, and the unique perspectives uncovered during the individual breakout sessions. The aim is not to achieve consensus but to educate on how the different environmental media programs lead to different enforcement efforts on the part of the government and different responses by representatives of the object of those enforcement efforts—and when and where there are similarities.

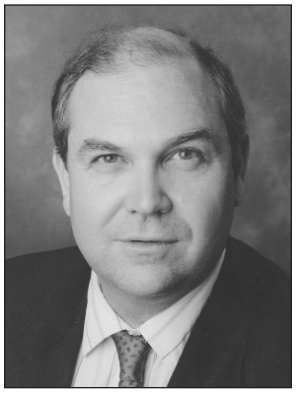
Glen, Michael and Miriam have worked extraordinarily hard to put together a first-rate program. Because it is imaginatively designed to involve you in a very direct way, the program will require participation by you. In fact, its success will hinge on it.

I very much hope that the excitement of this interactive approach and the lead role played by government and not-for-profit sector attorneys will entice you to attend. If not, as I said at the outset, Cooperstown is spectacular in the fall.

I look forward to seeing you at the end of September.

John L. Greenthal

From the Editor



I have just received my copy of the Section's Committee Chair Manual. Several people worked on this over the past couple of years, with Ginny Robbins chairing the Committee on Committees that directed the project, and Phil Dixon drafting the Manual. My sense is that we are the first Section to have undertaken such an extensive review of our structure, and to have ambitiously restructured so as to better accomplish our goals. The product looks very professional. It is easily accessed, with attachments for proposed by-laws, a sample committee agenda, sample committee report, sample committee mission statement, information regarding New York State Bar Association (NYSBA) staff contacts, and, last but certainly not least, criteria for articles submitted to the *Journal*. The goal has been to help facilitate committees in their various endeavors that have, historically, provided such contributions to the growth of environmental law in New York. With so many of our active professionals so engaged in so many tasks and responsibilities, it is understandably hard to maintain focus on some committee activities. The Manual is designed to provide a self-help guide to which committee chairs, and particularly new committee chairs and members, can refer as they chart out each coming year. The Manual reinforces the importance which the Section, and even the larger legal community, attaches to the efforts of our many fine and active committees.

In this issue, Bill Ruskin submits an article on an environmental issue that has achieved special prominence of late: mold. Reports in the popular press have abounded regarding toxic mold, and incisive scientific analysis regarding the actual toxicity of various molds and their public health effects is just beginning to catch on. Bill is a Connecticut product liability and environmental attorney. The article, which is comprehensive, addresses basic terms and general symptoms, brings us up to date on how the public health issue has arisen, evaluates causation, correlates this information with litigation, evaluates the role of insurance, examines disclosure issues in real estate transactions, and also informs us regarding legislative efforts in various states to address this new field. The article is particularly timely in that it corresponds with a significant CLE program recently convened at Malcolm Pirnie by Jerry Cavaluzzi, Co-Chair of the Environmental Insurance Committee, in which Bill participated. Gene Devine also submits an article on behalf of the Environmental Insurance Committee. This article is intended as an introduction to subsequent short articles on various insurance issues with which many members might not be familiar. This article explains aspects of finite risk environmental insurance.

Lou Alexander provides information on the Section's Minority Fellowship Program, and includes information about recent Fellows. Jason Capizzi, the Student Editor, has again shepherded the case summaries prepared by students in St. John's Law School Environmental Law Society.

Finally, readers should note that the Section's Transportation Committee, co-chaired by Phil Weinberg and Bill Fahey, is looking to expand its membership in anticipation of expanding the Committee's review of transportation issues. Transportation is an often under-appreciated component of environmental law, but a critically important aspect of land use and intra-municipal and regional commuting. In view of the disruptive events in New York City this past year, and the need to unexpectedly shift transportation resources and develop alternative modes of transportation within a metropolitan area that depends on comprehensive and smooth commuting, not to mention commercial transportation needs in one of the country's prime commercial centers, how and where we move people and goods on a daily, and even an hourly, basis has taken on a new urgency. However, the older urgencies are still present, in that we increasingly must respond to multiple reasons why transportation-related pollution must be reduced. We see mass transit encouraged, yet costs rise and ridership falls; trains promise the unclogging of suburban corridors to hub cities, yet Americans seem to drive more cars than ever before. Longer-distance trains promise better riding in many cases than airplanes, and certainly seem more attractive from a security perspective, yet Amtrack seems perpetually on federal life-support. Every set of problems, though, presents not only challenges, but also new opportunities. The very waterways that challenge easy ground access around New York harbor invite water-borne access. The New York City waterfronts, once known for the less savory aspects of urban life, are seeing a rebirth in not only residential uses, but also in recreational water uses. All of these events require cohesive and well-considered guidance and encouragement from the private as well as the public sectors. Transportation necessarily is at the core of how we preserve, but also creatively use, our expansive waterfront. This segue really reflects some of my own personal interests, but it illustrates how such a committee can take a critically important set of related issues and productively explore how to solve problems and develop opportunities. If anyone is interested, give Phil or Bill a call.

We at the *Journal* wish all of our readers and happy and safe summer.

Kevin Anthony Reilly

The Committee on Committees: An Effective Redundancy

By Virginia C. Robbins

Since January 2001, the Section's Committee on Committees has been evaluating the structure and function of our committees to determine whether changing the way the committees do their business might enhance the vitality and relevance of the Section. **Ginny Robbins** was appointed Chair of the Committee on Committees (COC) by **Gail Port** during her term as Section Chair. The Committee members are **Lou Alexander, Phil Dixon, Bill Ginsberg, Alice Kryzan, Jim Periconi** and **Gail Port**. This article describes the Committee's accomplishments and its future activities.

1. Committee Assessment

At its first meeting in January 2001, the COC:

- Defined the business of the Section's committees;
- Identified committee strengths and weaknesses;
- Defined the role of committee co-chairs; and
- Drafted an action plan.

The COC developed a list of proposed actions that it believed would increase the participation of committee chairs and members of the Section.

2. Planning Retreat—November 2001

The COC sponsored a two-day retreat at the Arden House in Harriman, New York. The following Executive Committee members attended the Retreat: **Lou Alexander, Phil Dixon, Drayton Grant, John Greenthal, Jan Kublick, Joan Leary Matthews, Jim Periconi, Gail Port, Kevin Reilly, Jim Rigano, Ginny Robbins, Dan Ruzow, Kevin Ryan** and **Miriam Villani.** After Friday evening dinner, the participants engaged in a lively exchange regarding the objectives of the meeting and committee structure and function. The actions described below were a direct result of discussions at the Retreat.

3. Committee Chair Manual

The COC decided that it would be helpful if the Section had a Committee Chair Manual to describe the Section's expectations of committee chairs. **Phil Dixon** volunteered to draft the Manual. After several iterations, the Manual was presented to and accepted by the Executive Committee in January 2002. The final Manual, dated April 2002, was distributed at the April 24 Executive Committee meeting.

The Manual describes the responsibilities of committee chairs, the structure and governance of the Section and the resources available to committees to complete their work; and contains various attachments (by-laws, sample committee agenda and committee report, sample committee mission statement, NYSBA staff contacts and Section *Journal* submission criteria). Committee chairs are reminded that the best way to encourage and retain membership in the Section is to involve as many members as possible in committee work.

Each committee is to establish an annual agenda to be submitted by June 1 of each year to the Section's officers. The May 26, 2002 annual agenda of the Environmental Justice Committee, prepared by Co-Chairs **Lou Alexander, Eileen Millett** and **Arlene Rae Yang,** was recently distributed to the Executive Committee as an example of what each committee needs to prepare.

Committee chairs are to maintain active communication with their members and attend Executive Committee meetings. Committees are expected to hold at least three meetings during the year, two of which may be at the NYSBA January meeting and the Section's Fall meeting. As appropriate, committee chairs will provide reports of committee activities at these meetings. Periodic reports on committee activities should be submitted to the Section's *Journal*. Each committee should also finalize a mission statement to be published in the Section's *Journal* or on its Web site.

Committees are also expected to assist in soliciting articles for publication in the Section *Journal*. Lastly, each committee is to conduct at least one activity annually, which may involve a Section program or a CLE program. There are many ways to satisfy the "activity" requirement, for example, participation in meetings or presentations or the development of an educational document such as a legal update, "Hot Topic" alert or white paper. The Section's officers and NYSBA staff are available to provide resources and assistance to the committees in carrying out their work.

4. Ad Hoc Committee on Diversity

The Ad Hoc Committee on Diversity is a newly formed committee of the Section. The Executive Committee members who volunteered to serve on this committee are **Joan Leary Matthews (Co-**

Chair), Eileen Millett (Co-Chair), Mike Lesser, Jim Sevinsky and **John Greenthal.** The committee's charge is to identify the diversity needs of the Section in areas of membership, programming and committee functions as well as any other areas that the committee identifies. The committee will develop recommendations, strategies and/or guidelines to address any needs identified. The Section seeks diversity by sector (public/private/not-for-profit/citizen advocacy), gender and race.

5. Committee Consolidation

The COC and the Section's officers have concluded that they will not request specific committee consolidation at this time. However, if committee co-chairs voluntarily seek to consolidate in order to enhance the work they are engaged in, the Section Chair will consider the request and respond.

6. Expansion of the Editorial Board of the *Journal* to Include "Article Rainmakers"

Recently, **Kevin Reilly**, editor-in-chief of the *Journal*, has indicated that the pool of articles available for publication in the *Journal* is small. The COC, in consultation with Kevin, has proposed to expand the editorial board of the *Journal* to include certain Executive Committee members whose status in the environmental community affords them the opportunity to solicit articles of interest for the *Journal*. Kevin will soon contact those members to seek their involvement.

7. Establishment of the Section Cabinet

A Section Cabinet is proposed in the upcoming by-laws revisions. The Section Cabinet will focus on emerging environmental issues and policy concerns. The function of the Cabinet will be issues-spotting to keep the Section's leadership up to date on current developments and to assure that the Section plays an active role, as appropriate, in legislative and policy developments.

8. Upcoming Initiatives

a. *Committee Preference Survey*. The COC will soon prepare a survey form for distribution to the entire Section membership. The objective of this survey is to refresh the Section's committee membership rosters. In this way, practitioners whose interests have changed over the years may switch their committee membership. It is anticipated that a committee membership survey would be conducted every five to seven years.

b. *Officer Review of Committees*. Each year, the Section's officers will select five committees and conduct an in-depth review of the activities of these committees. The objective of this examination is to assist committee chairs in planning and programming. It will also afford the co-chairs an opportunity to explain the mission, goals and objectives, and activities of the committees to the officers.

The COC plans to sponsor a second retreat at Arden House in early November 2002. This retreat will be an opportunity for those who choose to attend to consider Section issues and concerns in a relaxed setting with ample discussion time. Although the Section's Executive Committee meets three times a year, its agendas are often packed with items, and it is difficult to discuss any topic at length. In contrast, a retreat setting encourages open discussion of items relating to the Section's structure and governance and allows action plans to be developed and implemented during the next year.

As Chair of the COC, I would like to express my deep appreciation to the members of the committee and the Executive Committee who participated in the November 2001 Retreat and who have been willing participants in the implementation of the action plans developed at that time. Thank you.

Mold: Corporate Prevention and Response

By William A. Ruskin

A ninth-century author described a dreaded outbreak: "A great plague of swollen blisters consumed the people by a loathsome rot so that their limbs were loosened and fell off before death." The disease, "St. Anthony's Fire," was caused by the ingestion of toxic amounts of *Claviceps purpurea*, a fungus that infests rye flour. Common symptoms of this mold poisoning were gangrene and burning pain in the extremities. It also could cause convulsions, hallucinations, psychosis and death.

Named for St. Anthony, the patron saint of those infected with the disease, "St. Anthony's Fire" was sometimes linked with epidemics of "dancing mania" which occurred between the thirteenth and sixteenth centuries, and may explain the psychosis and convulsions attributed to the women accused of witchcraft in the Salem trials of 1692.

Mold poisoning was only identified as the cause of "St. Anthony's Fire" in the seventeenth century. The fungus thrived in the cold, damp growing conditions that were then prevalent in France and Germany. Outbreaks occurred during the Middle Ages as entire populations consumed bread made from contaminated rye.[1]

The hysteria over "St. Anthony's Fire" may be considered a harbinger of the mold crisis now confronting us centuries later. Although witches are not yet being burned on the stake, the plaintiff bar has singled out insurers, builders, building supply companies, developers and others for legal action, if not outright demonization. Many of the stories of mold-induced psychosis and injury are as colorful (and sadly, as unscientific) as the medieval descriptions of those early sufferers of St. Anthony's Fire. One medieval monk, exhausted from the strain of caring for the large numbers of those hopelessly ill, prayed, "The fire of earth hot, and the fire of hell is hotter . . . who will quench the fire? Who will heal the sick? May the fire of God consume the Evil One!" In these modern times, we look to science to discern rational thought from superstition. Increasingly in the mold debate, however, the cries of the ignorant, the fearful and those seeking to cash in on the hysteria threaten to drown out the voices of those espousing good science.

The Fungus Among Us

The term "toxic mold" has become a buzz word in the media and among plaintiff lawyers. However, scientists stress that most of what is in our environment is plain old mold, which is an ecologically vital organism that may be found virtually everywhere and includes airborne particles such as bacteria, fungi and pollen.

Some molds produce mycotoxins as secondary metabolic products. Mycotoxins are poisonous substances that contaminate indoor environments. Mycotoxins, which are typically referred to as *toxigenic fungi*, may be cytotoxic, disrupting cellular structures such as membranes and interrupting important processes, including protein, RNA and DNA synthesis. Researchers are particularly concerned about multiple mycotoxins from mold spores growing in moist indoor environments. The American Conference of Governmental Industrial Hygienists broadly describes "biological contamination" as aerosols, gases, and vapors of biological origin of a type and concentration likely to cause disease or predisposed persons to adverse health effects.

Mycotoxins are known to cause adverse effects to many body systems, including the vascular, digestive, respiratory, nervous, cutaneous, urinary and reproductive systems. Aflatoxins, a type of mycotoxin that contaminates agricultural products, have been shown to hepatotoxic and carcinogenic.

One of the litigation challenges for defense lawyers is that many of the typical symptoms of a mold reaction are not unique to mold and may be attributable to any number of causes. These include:

rash	diarrhea
eye irritation	pneumonia
respiratory tract infections	fever
dry, hacking cough	fatigue
dry skin	concentration problems
hair loss	brain damage
stomach ache	cancer

Under present law, plaintiffs may be successful even if their illness is temporary and fairly minor. The courts have not yet set limits on de minimis exposures and injuries. Part of the problem is that there are no recommended exposure limits.

Therefore, data interpretation often involves a comparison of indoor versus outdoor and complaint versus non-complaint areas. In the absence of any regulatory criteria, there is a risk that courts may allow plaintiff experts more leeway in offering their opinions than would be the case if there were established standards.

Why Has Mold Become an Issue Only Recently?

An increase in mold-related complaints may be attributable in part to changes in construction practices that began during the 1970s at the height of the energy crisis. These construction practices arose from efforts to reduce energy consumption and led to construction with centralized heating, ventilation and air conditioning (HVAC) systems and sealed windows. These construction innovations often had the effect of restricting the flow of outside fresh air into the building and trapping moisture. Compounding the problem, some of the newer construction materials, such as synthetic stucco products and drywall, may not allow moisture to escape as easily as other more traditional building materials. Many construction and finishing materials used in modern construction are highly susceptible to fungal biodeterioration. These materials include paper fiber gypsum board, porous insulation, vinyl wall covering, pressed wood products, porous ceiling tiles, and textile wall and floor coverings.

To flourish, molds need a moist environment, oxygen, and organic material in which to establish themselves and to grow. Where building construction practices result in the accumulation of excessive amounts of moisture in the building, mold growth can flourish, particularly when the moisture problems remain undiscovered or unaddressed. Therefore, moisture problems and subsequent microbial contamination may result from condensation accumulation, water leaks, problems in building systems such as plumbing, HVAC units, and improper building design and construction.

"AirFAQS," a publication of Air Quality Sciences, Inc. suggests that various engineering steps be taken to prevent moisture and fungal growth in modern air conditioned buildings in warm humid climates. These proposals suggest that a builder or building operator serious about preventing mold may face significant costs in addressing mold concerns: (1) installing vapor diffusers and air retarders near the envelope's exterior surface; (2) operating the building so the indoor air is slightly positive to outdoor air; (3) drying wet construction materials before sealing them into building components; (4) using permeable wall coverings on interior surfaces and interior walls that may be subject to increased moisture; (5) avoiding cooling interior space below the mean monthly outdoor dew point temperature; (6) substituting biodeterioration/resistant materials for those susceptible to fungal growth; and (7) inspecting all structural components for water damage and visible mold growth prior to investing capital.

Mold Litigation Challenges

1. **Damages**: Damages issues in mold cases may be challenging because some of the damages alleged in mold litigation are unconventional or unusual. These include claims for evacuation/moving costs, temporary lodging costs, living expenses, damage and degradation to the building, repair costs, diminution of property value, decontamination of personal property, emotional distress, and fear. In some cases, the plaintiff has claimed that the mold was so prevalent and difficult to remediate that the house in which he lived had to be torn down. In one case, homeowners organized the local fire department to burn down their house. They calculated that the cost of rebuilding their home was less than the cost of remediation. In Eugene, Oregon, a family burned their house down after their treating physician attributed frequent nose bleeds, flu-like symptoms and severe headaches to mold. When a plaintiff who believes she has been affected by mold takes such drastic measures, it is often difficult for the defendant to argue that the action taken by the plaintiff was unreasonable or unnecessary. Moreover, once a plaintiff has burned down her house, it is difficult to perform an assessment of the nature of the mold problem or the etiology of the plaintiff's symptoms.
2. **Keeping "junk science" out of the courtroom:** Keeping "junk science" out of the courtroom is an important first line of defense in mold cases. Under *Daubert*, courts will examine various factors in determining whether to permit an expert to testify, including whether the expert's methodology is scientifically valid; whether the expert's opinions can be "tested"; and whether the expert's opinion has been subjected to peer review. In particular, *Daubert* challenges may be useful in challenging the techniques used by some plaintiffs' experts in collecting, analyzing and interpreting mold samples.
3. **Attacking Plaintiff's Case**: To establish a mold contamination case, a plaintiff generally has to show: (1) water intrusion; (2) resulting mold growth; (3) a pathway for exposure; and (4) adverse health effects attributable to mold. To build a successful defense, it is necessary to attack plaintiff's proof at each step—intrusion, growth, exposure pathway and effect.
4. **Establishing Alternative Causation**: Although the plaintiff has the burden of proof, as a practical matter, juries require defendants to "explain" a plaintiff's illness. One key to a successful defense of a mold claim is performing a thorough investigation of the plaintiff's home and working environment. If possible, this investigation should be initiated as soon as practicable. The investigation should consider whether the

plaintiff's symptoms may be attributable to other air quality problems, such as car exhaust, smoke or poor air ventilation and circulation in buildings. Moreover, allergies may be caused by dust mites, cockroaches, effluvia from domestic animals and various other micro-organisms. Separate and apart from mold, there are many potential causes for becoming ill in a building.

Where psychological injuries are alleged, it is important to investigate whether the plaintiff's psychiatric injuries pre-existed the mold exposure to determine whether plaintiff's claims may be attributable to a pre-existing condition. Neuropsychologists are able to rule out psychological factors as the sole cause for cognitive impairment. Toxic mold exposure patients have demonstrated disruption in their performance on certain types of neuropsychological tests, but not others.

5. **What Is Your Jury's Mold IQ?** If you see a black slimy substance making its way up the wall in a wet dank space, it is likely that you have a mold question. However, to test your knowledge of molds, draw a line from the mold type listed on the left to the appropriate mold description on the right.[2]

Stachybotrys chartarum	caused highly publicized deaths of 16 infants in Cleveland who suffered from bleeding lung disease—green-black, slick mold
Poria incras-sata	causes devastating structural damage (the house-eating fungus)
Aspergillus	pathogenic, disease-producing microorganism (others *Coccidiodes*, *Histoplasma*, *Blastomyces*)
Penicillium	used to make cheese, such as bleu cheese and Stilton; some may be toxic
Chaetomium	brain abscess, peritonitis and cutaneous lesions may result

As in any toxic tort case, educating judge and jury is of paramount importance. Exposures to mold can lead to a variety of health effects that fall within four general categories: allergy, infection, irritation and toxicity. It is important to keep in perspective that the presence of one fungus, called noble rot, is responsible for the magnificent sweetness of fine French sauternes, and other molds give certain cheeses, such as bleu cheese and Stilton, their unique flavor and taste. The jury must be made to understand that, like all chemical contaminants, the overall health impact will be determined by factors such as the amount and duration of exposure and the susceptibility of the exposed individual. If an individual's symptoms do not abate when he or she is removed from the contaminated environment, the claims of causal relationship should be challenged.

In addition to the slimy substance climbing up the wall in the basement, some micro-organisms produce microbial volatile organic compounds (MVOCs) that can contaminate indoor airs. Like other gases and vapors, these MVOCs can be collected and analyzed by gas chromatography/mass spectrometry. Many MVOCs have odor thresholds in the parts per billion and part per trillion concentration ranges and cause the characteristic musty or moldy odor of damp or water-damaged indoor environments. MVOCs are often used by indoor air quality investigators as indicators of microbial growth, which may otherwise be hidden from observation.

Legislative Efforts at Establishing Standards

Unlike chemical exposures, the signs and symptoms associated with mold exposure are too varied to be used in developing survey protocols. For example, itchy eyes, a common mold complaint, is also caused by humidity, particulates and VOCs. For this reason, efforts by the states or the federal government to set permissible exposure limits for mold exposure may be problematic and subject to regulatory challenge.

1. New York

New York Senate Bill No. 5799 was introduced on October 3, 2001 to enact the Toxic Mold Protection Act. If enacted, the Act would direct the New York State Department of Health (DOH) to convene a task force to advise the Department on standards with respect to toxic mold. Moreover, DOH would be required to: (1) consider the feasibility of adopting permissible exposure limits for mold in indoor environments; (2) consider adopting assessment standards for mold to avoid adverse health risks; (3) balance the protection of public health with the technological and economic feasibility of adopting such standards; and (4) develop remediation standards.

2. California

On October 5, 2001, California enacted the Toxic Mold Protection Act of 2001, which is codified at Cal. Health & Safety Code §§ 26100 *et seq.* The Act focuses on setting permissible levels of mold exposure for

humans and sets up a task force to develop standards. In addition, the Act requires that mold and health complaints be studied; that the feasibility of adopting permissible exposure limits in indoor environments be determined; that permissible exposure limits that avoid adverse health effects be developed; and that practical standards to assess health be set forth.

3. Connecticut

Connecticut currently has no mold legislation under consideration.

4. Federal

There are presently no OSHA standards for permissible exposure level limits for mold. However, Congressman John Conyers (D. Michigan) plans to introduce federal legislation designed to protect consumers from the physical and financial effects of toxic mold damage. Conyers' Federal Toxic Mold Act would require states to license and monitor mold inspectors and mold "remediators"; require the Centers for Disease Control (CDC) to authorize long-term mold health studies; provide state access to federal relief funds in the event of a mold disaster striking; require insurers to offer mold coverage; and require real estate developers and home sellers to disclose mold problems to prospective purchasers. Conyers' bill would also require CDC to come up with threshold limits for mold exposure.

The CDC is working with the Institute of Medicine to review the mold literature. Because there are so many varying opinions on mold in the scientific and public health community, the CDC plans to issue what it hopes will be an authoritative report by mid-2003.

Where the Action Is—Recent Litigation

1. Landlord/Tenant Suits

In *Haverford Partnership v. Stroot*[3] plaintiffs won an award of $1.04 million from a landlord, who failed to address water leaks and mold problems in the apartment. Plaintiffs alleged that their asthma attacks and other health problems were caused by the mold in their apartment. Plaintiffs recovered on a theory of implied warranty of habitability.

2. Product Liability/Construction Defects

Owners and investors anticipate that the modern buildings they construct will remain physically sound for a lifetime of 50 to 100 years. The tenants of those buildings expect that their offices will provide a comfortable and healthy work environment. If the building is located in a warm humid climate, the potential liability for a poorly designed new building can be substantial. In cases where occupants had to be evacuated because of allergic respiratory disease, the restoration costs in those buildings have exceeded their original capital costs.

In *Centex-Rooney Construction Co. v. Martin County, FL,*[4] the county claimed that water intrusion and high humidity fostered mold and mildew in county office buildings, and sued the builder for construction defects. The county established that the construction defects caused the moisture problems which resulted in the mold developing; that due to the moisture, the buildings had become infested with mold; that there was a causal connection between the mold and health problems complained of; that remediation uncovered structural and electrical defects which required repairs of exterior walls and windows; and that the defects were caused by the construction company and its subcontractors. On appeal, the appeals court rejected defense arguments that the county had failed to establish a breach of contract and affirmed a $114 million judgment for the plaintiffs, including $8.8 million in damages, and $5.4 million in prejudgment interest.

It may be anticipated that there will be increased product liability/construction defects litigation if the function of the product in question is related to water or moisture. Claims of shoddy construction practices will likely focus in part on leaky roofs and inefficient drainage systems. There may also be increased litigation involving such products as water heaters, refrigerators, air conditioners and water filtration systems.

Erin Brockovich, champion of toxic tort victims, has her own mold problems. In a suit against her builder alleging shoddy construction, Brockovich claimed that mold forced her out of her $1 million home. She alleged that as a result of the toxic mold in her former home, she and other family members suffered from rashes, chronic headaches, respiratory ailments and sinus infections.

3. Real Estate Non-Disclosure Cases

In these cases, the purchaser of mold-contaminated property is likely to argue a breach of a fiduciary duty owed to the buyer by the buyer's agent and that this duty required the agent to investigate facts not known to the agent. These cases are likely to be hotly debated because the visible clues of mold contamination may be subtle. The seller's agent is not as likely to be liable to a third party or to the buyer unless the buyer is an intended beneficiary of the agent's supply of information.

4. Nuisance

Nuisance claims typically arise from activities that are injurious to health. A common example is a sewer backflow claim, which may result in viruses, bacteria and mold problems.

5. Insurance Coverage Actions

Insurance coverage has inspired the most litigation in the toxic mold arena to date. Mold damage is typically excluded from homeowners' policies. However, the courts look to water damage and other covered damage to find coverage.

If the factor causing the mold is excluded from coverage, then the mold damage itself will probably be excluded from policy coverage. In cases where there are multiple factors which may be responsible for the mold, the court may look to the proximate cause of the mold as the determining factor. These are fact-intensive issues, which an insurer must aggressively investigate to avoid a claim of bad faith. However, confusion over what kind of mold damage should be covered by insurance has led to a proliferation of expensive lawsuits.

In *Cooper v. American Family Mutual*,[5] the homeowner reported wall and floor damage due to a plumbing leak. The insurer paid the homeowner the cost of repairs, but denied any payment for the cost of repairing the damage caused by mold. The court stated that Arizona had not adopted the efficient proximate cause rule. Hence, the insurer was permitted to limit liability when there was a concurrent causation clause in the contract. Thus, the damages due to mold were properly excluded from coverage.

In *Hatley v. Century-National Insurance Co.*,[6] the homeowners discovered mold in their kitchen and bathroom after their seven-year-old son was hospitalized and doctors discovered that his cystic fibrosis was aggravated by *Aspergillus* mold spores in his lungs. The insurer claimed that mold was excluded from the policy, incorrectly basing the determination on California policy clauses rather than Arizona policy. The court found that the insurer was not in breach of contract. However, it ruled that the facts may support a reasonable jury to find that the insurer's refusal to pay for damages warrants punitive damages for bad faith. After deliberating for five hours, the jury awarded the family $244,000 in compensatory and $4 million in punitive damages.

In *Rich v. Liberty Mutual Insurance Co.*,[7] the plaintiff owned a car that had mold damage due to a flood. He asked the insurer to replace the seats, but the insurer refused and only had the car cleaned. The plaintiff got sick from the mold and sold the car below its "Blue Book" value. He sued for the damages caused by the insurer's failure to perform its contractual obligations. The plaintiff recovered the difference between the repair and the replacement costs, rental and towing costs for a total award of $8,591.

In *Blum v. Chubb Custom Insurance Co.*,[8] the plaintiff-homeowner settled for $1.5 million in a mold-related bad-faith lawsuit.

In *Anderson v. Allstate Insurance Co.*,[9] several pipes burst in the plaintiff's home. Since no one was living in the home due to remodeling, the leak went undetected and caused mold growth. The plaintiff sued, claiming that the insurer violated the implied covenant of good faith and fair dealing by unreasonably claiming that a coverage issue existed and trying to coerce him to accept a lowball offer. Plaintiff was awarded $500,000 in damages and $18 million in punitive damages. The judge reduced the punitive damages to $2.5 million. This case is on appeal.

In the highly publicized case, *Ballard v. Fire Insurance (Farmers)*,[10] Texas state court refused to allow plaintiff's experts to testify on the ground that their data was unreliable. In this case, the Ballard's bathroom plumbing leaked causing the wood floors to buckle. When the floors would not dry, they contacted their insurer. The insurer refused to pay for the removal of the floor. The Ballards contended that they were forced out of their home and that toxic mold caused Ron Ballard's brain damage. Despite disallowing plaintiff's experts from testifying, the jury still awarded the plaintiffs $32 million finding that the insurance company acted in an unfair, deceptive and fraudulent manner. The moral of the *Ballard* story is that you can win your *Daubert* hearing and exclude plaintiff's experts' testimony and still get walloped with an adverse jury verdict.

According to a *Wall Street Journal* story titled "Hit with big losses, insurers put squeeze on homeowners" (May 14, 2002), mold surfaced as a "high-profile and high-dollar problem" when Farmers was ordered to pay $32 million on the *Ballard* claim. According to the article, the publicity surrounding *Ballard* brought an avalanche of mold claims in Texas.

Last year, Farmers registered more than 12,000 mold claims, up from 12 in 1999. Allstate reported that its monthly tally of Texas mold claims climbed to 1,000 in the first three months of this year, up from 40 a year earlier. According to an estimate provided by a Texas insurance agents group, mold-related homeowner losses amounted to $138 million for December 2001 alone.

According to an estimate provided by a Texas insurance agents group, mold-related homeowner losses amounted to $138 million for December 2001 alone. According to a representative of Farmers, Jerry Carnahan, "the industry is definitely afraid of mold. You've got this unknown bogey called mold and people are taking drastic actions." Although mold-related claims are not the only type of claims causing the insurance industry to reevaluate underwriting guidelines, the recent rash of increased homeowner claims is resulting in higher premiums and loss of coverage.

Remediation of Mold

1. Guidelines

Municipal building codes generally adopt ventilation requirements and standards established by the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE). Two excellent sources are: (a) *Standard and Reference Guide for Professional Water Damage Restoration,* which provides an industry consensus on water damage restoration; and (b) *Bioaerosols: Assessment and Control*, published by the American Conference of Governmental Industrial Hygienists (ACGIH), which provides commonly accepted methods for mold remediation.

2. Prevention is Key

There is no practical means to eliminate all indoor mold, but there are considerations which, if attended to, may keep mold problems to a minimum. These include:

1. Clean and dry environments will not produce toxic mold—mold needs water, warmth and a food source to grow.
2. If flooding or water leaks occur, wet areas must be cleaned and dried immediately. When the environment becomes dry, the microbial "bloom" passes and levels of bioaerosols would be expected to drop, until moisture was again present to support growth.
3. Small patches of mold may be effectively cleaned with a 10 percent bleach-and-water solution.
4. Larger areas may require professional cleaning services.
5. All buildings should undergo regularly scheduled maintenance, including inspections for water leaks, faulty seals around windows and doors, and HVAC ducts. During such inspections, it is important to check for visible mold or mildew.

Will New England Give the Cold Shoulder to Mold?

Mold "gold" may prove to be fool's gold for plaintiff lawyers in New England because our seasonal changes prevent the continuous humid and hot environment molds require to thrive. Although New England is cold and dry, there is sufficient humidity for molds to grow. As temperatures drop, the air holds less moisture and condensation occurs, leaving water on windows and other cold surfaces. As a result of these regional differences, the solution for eliminating mold varies in each climate region.

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Endnotes

1. This description of St. Anthony's Fire is contained in an article by Carol Hart, titled "*Forged in St. Anthony's Fire: Drugs for Migraine,*" Modern Drug Discovery (March/April 1999).
2. The correct answer is directly across the column.
3. 2001 Del. LEXIS 201 (May 7, 2001).
4. No. 96-2537 (Fla. App. June 28, 1996).
5. No. CV 00-1097 PHX-JAT, 2002 U.S. Dist. LEXIS 1807 (Jan. 23, 2002).
6. No. CV 2000-006713 (Ariz. Super. Ct.).
7. No. 2000-CA-1482 (La. App. 4th Cir.).
8. No. 99-3563 (Texas Dist. Ct.).
9. No 00-907 (E.D. Cal.).
10. No. 99-05252 (Texas Dist. Aug. 8, 2001).

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Finite Risk Environmental Insurance

What it is and when to consider it

By the Committee on Environmental Insurance

By now, most practitioners have heard of at least one of the following popular environmental insurance products. There is the most utilized form—Environmental/Pollution Liability—which protects against cleanup and liability claims; Cleanup Cost Cap, or Stop Loss, which caps the expected cleanup costs of a particular remedial project; Secured Creditor, or Collateral Impairment Lender Liability, which provides protection to a commercial real estate lender; Contractor's Pollution and/or Professional Services Errors & Omissions for the environmental contractor and engineering firms; and even Asbestos and Lead Paint "In-Place" policies, which protect the owner of real estate tainted by these hazards. (For more details on these coverages in general, please see our previous article "Environmental Insurance for Brownfields Redevelopment," *The New York Environmental Lawyer*, Volume 19, No. 2 (Spring 1999) NYSBA.)

However, when the topic switches to Finite Risk insurance, the response is typically "What is that?" Finite Risk, also known as Blended Finite and Blended Risk Transfer, is a combination financial and insurance mechanism that allows for a party to transfer its known and unknown liabilities under a hybrid insurance policy. Finite Risk is not traditional insurance coverage. It is a vehicle that is utilized to assign the financial liabilities associated with contaminated properties from the legally Responsible Party (usually the property "owner" or "operator") to an insurance carrier. It is funded fully by the Insured and administered by the insurance company.

We have also heard Finite Risk accurately described as being like purchasing an insurance product, immediately filing a claim, and having the insurance company begin paying out for cleanup costs from dollar one. In exchange for the "premium," the insurance company agrees to assume the responsibility for paying the cleanup costs for the contaminated property up to the policy's limits of insurance.

Although Finite Risk insurance can be implemented without the Pollution Liability segment, for illustration purposes we have presented a typical Finite Risk program, which incorporates all the segments:

- **Cleanup Cost Cap Segment**: This component of the policy is similar to stand-alone cost cap insurance. It pays for additional remediation, up to the policy limits, that may be required if the known contamination is more widespread or worse than anticipated, if new or different contamination is found, or if new regulatory requirements are established.
- **Pollution Liability Segment**: This component of the policy is similar to pollution liability insurance. It provides protection against third-party claims for bodily injury, property damage, cleanup costs, business interruption, natural resource damages and diminution in property value where accompanied by physical damage. Legal defense costs and expenses associated with defending against such claims are included within the coverage and erode the limits of insurance.
- **Timing and Inflation Segment**: Finite Risk insurance provides protection against the "timing risk" associated with a long-term cleanup project. It can help to eliminate the risk that expenditures may occur sooner or later than expected. It also assumes the financial risk that inflation will make the remediation more costly than projected at the outset.

Finite Risk insurance policies can have long time frames, in some cases up to 30 years, with total limits of up to $100 million available from a single insurance carrier. One benefit of using Finite Risk over standard insurance is that a longer policy term can be negotiated for the Pollution Liability portion so that it matches up with the expected duration of the entire cleanup project.

An important distinction between a Finite Risk insurance program and a straight Cost Cap insurance policy is who actually bears responsibility for payment of the cleanup work. With Finite Risk insurance, the Responsible Party pays the insurer up-front a lump sum premium amount equal to the projected cleanup costs, including inflation, plus the cost of insurance, less the time-value of money. Thereafter, the insurance company pays all of the expenses and costs, including any cost overruns, up to the limits of insurance purchased. In contrast, with straight Cost Cap insurance, the Responsible Party manages the cleanup and handles paying out all of the expenses associated with such until the anticipated clean up costs (plus deductible) are exceeded and the insurance layer is reached.

An example of a typical Finite Risk scenario is as follows:

> A former industrial property is being sold "as is," with Buyer assuming all responsibility for cleaning up the site. However, the parties cannot agree on how much of a discount is warranted

for the cleanup costs, as their respective engineers have come up with significantly different cost estimates. Seller's engineer estimates cleanup costs of $3.5 million, while Buyer's engineer has estimated $6.5 million. Broker has negotiated a Finite Risk program with an insurance carrier that will cap the cleanup costs at $5 million (in 2002 dollars) by providing an additional $5 million of Cost Cap cleanup insurance above the $5 million anticipated costs. Additionally, Broker wrapped a Pollution Liability policy around the cleanup to provide liability protection for unknowns and third-party claims.

The following table, which is for illustration purposes only, shows a cost breakdown for the above scenario:

Projected Cleanup Costs (20 year time frame)		$5,000,000
Projected Inflation (2.5% per annum)		$375,000
Insurance Premium	+	$ 500,000
Sub-Total		$5,875,000
Less Interest Credit (90-day T-Bill rate 3.5%)	-	$650,000
Total Finite Insurance Premium		$5,225,000

The amount paid up front ($5,225,000) is treated as insurance premium and thus may present the Insured with beneficial tax advantages.[1] The premium consists of two different components:

1. The present value of the estimated cost of cleanup, plus a management fee; and
2. A fee for the insurance policies (Cost cap and Pollution Legal Liability).

The funds designated for the "cleanup" component are placed in an interest-bearing commutation account, and money from this account is used to pay for the cleanup costs as the remediation project progresses. These costs are typically paid from the first dollar and are considered losses under the Cost Cap portion of the insurance program. In contrast, the "insurance" component of the premium is typically fully earned upon inception of the policy and is thus not recoverable.

During the cleanup process, the balance in the commutation account will be equal to the original starting balance minus the administrative fee, cleanup costs and expenses paid to date, plus investment interest at the guaranteed T-Bill rate. If the actual costs and expenses are ultimately less than those originally projected, the Insured should be entitled to a return of a portion of these savings. Alternatively, if actual costs and expenses exceed the original projected cost estimates, the Cost Cap insurance portion of the Finite Risk program will address these additional expenses, up to the limits of insurance purchased.

Finite Risk insurance can be an invaluable tool for purchase and sale transactions where the buyer and seller cannot agree on a fixed price for cleanup. Alternatively, it can help corporations move liabilities (i.e., a contaminated property) from their balance sheet and recognize the potential tax advantages of such. However, part of the attraction of a Finite Risk program is the time-value of money; the cleanup needs to be sufficiently large (typically greater than $3 million) and long enough (at least four years) for that value to be recognized.

With regard to competition in the insurance marketplace, there are currently six insurance companies with an A.M. Best's rating of A- or better that offer Finite Risk insurance coverage. These include AIG, Chubb, XL Environmental (f/k/a ECS), Zurich, Kemper and Hartford. With this many companies to turn to, there are very few risks that cannot be insured. However, as a typical Finite Risk program is 10+ years in duration, it is highly recommended that the program be placed with a financially viable and reputable insurance company.

In summary, Finite Risk insurance is a combined financial and insurance mechanism that can be a very useful tool in the knowledgeable practitioner's toolbox. It can replace or supplement indemnity, cap financial exposures to a redeveloper, assist in getting real estate transactions done, and provide financial liability relief to corporate balance sheets. As these policies are negotiated individually for each client's specific risk, it is highly recommended that you contact an insurance broker with a thorough understanding of the technical, legal and environmental issues involved, as well as a knowledgeable tax advisor.

Endnote

1. For an exact determination of this benefit, a legal and/or tax advisor should be consulted.

This Environmental Insurance Committee article was written by Gene Devine (primary author), with contributions from Jerry Cavaluzzi, Co-Chair of the Committee and General Counsel for Malcolm Pirnie Inc.; and Committee members Andrea Fuller, Chubb Environmental Services, and Anthony Bonfa, Esq.

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Recipients of Environmental Law Minority Fellowships Named

Left to Right: **Environmental Justice Committee Co-Chair, Louis Alexander, 2002 Fellowship Recipient, LaVonda S. Collins, and 2001 Fellowship Recipient, Frederick Wen, at the Environmental Law Section's 2002 Annual Meeting**

Four law students were awarded Minority Fellowships in Environmental Law at the January 2002 meeting of the Environmental Law Section of the New York State Bar Association. The fellowship recipients include:

- LaVonda S. Collins, who is a first year law student at Albany Law School. Ms. Collins is a graduate of Columbia College, where she majored in psychology. Prior to law school, she worked as a housing counselor in Syracuse, New York.
- Christine M. Cyriac, who is a first year law student at Pace University School of Law, and a member of the school's Asian-American Law Students Association and Environmental Law Society. Ms. Cyriac is a graduate of Boston University, where she majored in environmental science and biology. She has also received a Master of Public Health from the University of Illinois at Chicago.
- Tara Torno, who is a second year law student at the Cardozo Law School and a member of the school's Environmental Law Society. Ms. Torno is a graduate of the State University of New York at Albany, and has interned with the U.S. Environmental Protection Agency, Region II.
- Daniel Yohannes, who is a first year law student at Pace University School of Law, and a member of the school's Black Law Students Association and Student Bar Association. Mr. Yohannes is a graduate of the State University of New York at Stony Brook, with a B.A. in multidisciplinary studies with a concentration in environmental science.

The Minority Fellowship Program was established in 1992 as a joint project of the environmental law committees of the New York State Bar Association and the Association of the Bar of the City of New York. The program seeks to provide opportunities to minority law students in the environmental legal field. Past fellowship recipients have worked at the Region II Office of the U.S. Environmental Protection Agency, the New York State Department of Environmental Conservation, the New York State Department of Law, and such environmental organizations as Environmental Defense and the Natural Resources Defense Council.

Minority law students were eligible for fellowship consideration if they were either enrolled in a law school in New York State, or were permanent residents of New York State and were enrolled in a law school in the United States. This year's applications were reviewed by a panel of judges that included attorneys Evan Van Hook, Eileen Millett, and Louis Alexander. The four fellowship winners received stipends to spend the summer of 2002 working in environmental positions with the government or with environmental interest organizations.

The Fellowship recipients will also participate in meetings of the New York State Bar Association and the Association of the Bar of the City of New York's environmental law committees during this year, and will be assigned a mentor from the environmental bar for the summer.

Louis A. Alexander
Eileen Millett
Arlene Yang

Left to Right: **Environmental Justice Committee Co-Chairs, Louis Alexander and Eileen Millett, with 2002 Fellowship Recipient, LaVonda S. Collins, at the Environmental Law Section's 2002 Annual Meeting**

Wildlife Protection and Public Welfare Doctrine

By David P. Gold

I. Introduction

The Florida panther is a small-footed, reddish-brown cougar that once ranged throughout much of the southeastern United States. Today it is one of the world's most endangered species; about 70 remain, all living in a small portion of southwest Florida.[1] On a dark December night in the Florida Everglades a hunter came across one of these cats and shot it with his pistol, wounding it. Then he blew its head off with his rifle.[2] The hunter was charged with a criminal violation of the Endangered Species Act (ESA), which makes it unlawful "knowingly" to harm an endangered species.[3] At trial, the defendant conceded that he had killed an endangered species under the meaning of the Act. He claimed, though, that it was too dark a night for him to have known what species it was when he shot. To convict, he argued, the government would have to prove that he knew that the yellow eyes he aimed at belonged to a Florida panther.[4]

In that case, *United States v. Billie*, the court held that Congress did not intend to impose such a heavy burden on the government.[5] The *Billie* court did not dispute the general principle that there is no crime without a guilty mind and that absent a clear statutory expression to the contrary, a showing of mens rea is required for every material element of an offense. Relying in part on a prior decision under another wildlife protection statute, however, it held that the ESA fell under an exception to this principle.[6] That exception is often called "public welfare doctrine." Public welfare doctrine provides that in interpreting certain modern regulatory statutes it should not be presumed that Congress intended to require mens rea for every element. Rather, where the statute is ambiguous, Congress is presumed to have intended to further enforcement of the regulatory regime by limiting mens rea requirements. According to this view, "knowingly" under the ESA means that a hunter who knew he was harming an animal can be convicted if the animal was listed as endangered, regardless of whether he knew that animal was endangered.

The ESA is one of many wildlife protection statutes—statutes intended, in whole or in part, to protect wildlife. Courts have not, however, been uniform in viewing crimes under wildlife protection statutes as public welfare offenses. Some courts interpreting these statutes have applied the general principles of mens rea requirements, with the result that mens rea is required for every element.[7] This dispute and the consequences that flow from it are the subject of this article.

This article argues that wildlife protection statutes *are* an exception to the general rule—that they fit comfortably within the jurisprudence of public welfare doctrine—and that the failure to apply the doctrine to those statutes would compromise their enforcement. It also recognizes that making this exception poses certain risks. Section II considers the common law mental state requirements that provide the background to public welfare doctrine and then identifies the characteristics of public welfare doctrine that emerge from the relevant Supreme Court cases. Section III analyzes three wildlife protection statutes—the ESA, the Lacey Act, and the Migratory Bird Treaty Act—under public welfare doctrine and argues that all three are properly viewed as creating public welfare offenses.[8] It also addresses the danger of an interpretation that could lead to unfair convictions. Section IV discusses the developing conflict among the courts and argues that this conflict is likely to impair enforcement of wildlife protection statutes. Finally, it proposes ways to resolve the conflict, or at least mitigate its negative consequences, by administrative and legislative means.

II. Public Welfare Doctrine

Public welfare doctrine is a modern doctrine of criminal law providing that in interpreting certain regulatory statutes it should be presumed that Congress did not intend to require mens rea, except where it did so expressly. It is an exception to the general rule that crimes are presumed to require a mental state for every material element. Both the general rule and the exception are mere presumptions: they are inapplicable where Congress has expressly required, or expressly declined to require, mens rea for a given element of a crime. Part II(A) considers the usual mental state requirements that provide the background to public welfare doctrine. Part II(B) identifies the characteristics of public welfare doctrine that emerge through an analysis of the relevant Supreme Court cases.

A. General Principles of Mental State Requirements and a Note on Technical Terms

Under the common law, those who commit prohibited acts may not generally be convicted of a crime unless they can be shown to have acted with a guilty mental state, or mens rea.[9] In interpreting modern statutory crimes, the Supreme Court has adopted and repeatedly affirmed this principle, stating that "the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."[10] Consequently, where a criminal statute omits any mention of a mental element, the

Court generally presumes that the legislature nonetheless intended that mens rea be required for conviction,[11] unless the legislature has clearly expressed the contrary intention.[12]

Statutes that create crimes with more than one element present a further difficulty. For example, a state may make it a misdemeanor "to damage a government building." Assuming the general rule applies that mens rea is required, is it required only with respect to the act of damaging, or is it also required with respect to the second element—the required attendant circumstance, that the building is owned by the government? In interpreting such statutes, modern American courts, including the Supreme Court, have generally adopted the presumption that the legislature intended mens rea to be required for every element, including any attendant circumstances.[13] Where a statute expressly requires a specified level of mens rea for the *act*, but is ambiguous with respect to other elements, the specified mens rea is usually presumed to apply to all elements.[14]

A word about three technical terms is in order. This article will use the term "specific intent" to describe a crime that includes more than one element, where a mental state is required with respect to every element. "General intent" will be used to describe a crime for which a mental state is required with respect to the proscribed act, but not with respect to any other element (whether or not the crime has other elements). "Strict liability" will be used to describe crimes for which no mental state is required at all. It should be noted that "specific intent" and "general intent" have been used in a variety of other senses as well,[15] although there is nothing novel or idiosyncratic about the usage employed in this article.[16] In spite of the potential confusion, this article uses these terms, because, when carefully defined, they add precision to the discussion. In particular, using the term "general intent" distinguishes crimes whose *actus reus* has a mental state requirement (but which may have additional elements not requiring mens rea) from those crimes whose *actus reus* lacks a mental element, such as felony murder.[17] While some courts and commentators have termed both of these categories "strict liability,"[18] it advances precision to reserve "strict liability" for crimes that permit conviction where the *act itself* was committed without any mens rea.[19] This article will use these terms in these senses even when discussing a case that did not use them, or used them in a different sense.

As indicated above, the general rule in modern American criminal law is that every element of a crime requires mens rea, that is, crimes are presumed to require specific intent, in the absence of clear statutory language to the contrary. In a "century-old but accelerating tendency," however, a new class of crimes has arisen, crimes lacking a common law tradition and commonly referred to as "public welfare offenses," which courts have often interpreted not to require mens rea except with respect to elements for which the legislature has been clear in requiring it.[20] The rest of Part II examines this development and the characteristics of this new class of offenses.

B. The Characteristics of Public Welfare Offenses and the Development of the Doctrine

Although the Supreme Court's jurisprudence on public welfare doctrine could properly be said to begin in 1922, with *United States v. Balint*,[21] it was not until 1952, with *Morissette v. United States* that the Court used the term "public welfare" to describe a new class of offenses for which it should not be presumed that the legislature intended to require mens rea.[22] The Supreme Court has never offered a simple formula for identifying a public welfare offense—and, in fact, has explicitly declined to do so.[23] However, a synthesis of the cases reveals four qualities that the Court has generally considered characteristic of a public welfare offense. First, the crime is always a violation of a modern regulatory statute with little or no common law history. Second, the activity regulated by the statute is of such a nature that those engaging in it can reasonably be expected to take the precautions necessary to avoid violations. Third, conviction brings only minor penalties and little damage to the perpetrator's reputation. Fourth, the statute would be unusually hard to enforce if specific intent were required.[24]

The first characteristic, that the crime lacks a common law history, begins with the understanding that, with few exceptions, common law crimes require mens rea for every element.[25] Where Congress has codified what is essentially a common law crime, it is assumed that Congress intended to retain the common law mens rea requirements, except where it has expressly abandoned them. In *Morissette v. United States*, the defendant, who had taken used shell casings from a government bombing range, was tried and convicted under a federal statute providing criminal punishment for "whoever embezzles, steals, purloins, or knowingly converts" property of the United States.[26] The trial court had held that knowing conversion of U.S. property required knowledge only that the defendant was taking possession of the property.[27] It thus prevented the defendant from presenting evidence showing that he had believed the casings had been abandoned.[28] The Supreme Court reversed, holding that the federal statute was primarily a codification of the common law crime of larceny, and that "we have not found, nor has our attention been directed to, any instance in which Congress has expressly eliminated the mental element from a crime taken over from the common law."[29] Because common law larceny required knowledge that the property belonged to another, the Supreme Court held that Congress intended the same mens rea require-

ment to apply to its codification of the common law crime.[30]

The Supreme Court cases applying strict-liability or general-intent interpretations confirm the rule: they have uniformly concerned regulatory statutes lacking a common law history. In *Balint v. United States*, the Court held that, under the Narcotic Act of 1914,[31] a defendant could be convicted for selling medications without the required order form, even if he did not know that what he was selling was a regulated drug.[32] Another drug regulation case, *Dotterweich v. United States*, upheld the conviction of a corporate officer for misbranding drugs and improperly shipping them in violation of the Federal Food, Drug and Cosmetic Act,[33] although it was not shown that he had any personal knowledge of the misbranding or shipping.[34] In *United States v. Freed*, conviction for possession of unregistered hand grenades[35] was permitted in the absence of a showing that the defendant knew that the hand grenades were unregistered.[36] In each of these cases, the activities at issue were made unlawful by a regulatory statute—a drug statute or a weapons regulation statute—without a common law history.

The second characteristic of public welfare offenses—that the activity regulated is of such a nature that those engaging in it can reasonably be expected to take the precautions necessary to avoid violations—encompasses three qualities of a regulated activity. First, it is an activity most people do not undertake. For example, most people do not sell pharmaceuticals. Second, those that do undertake it are on notice that they are involved in an activity that is likely to be highly regulated and so may require extraordinary care. The druggist, for example, is aware that governmental regulations impose on him a high burden of care. Third, the care required to avoid violation is not more than can reasonably be expected of those undertaking the activity. Druggists have the opportunity to learn the characteristics of their products, and we reasonably expect them to do so. Under these circumstances, conviction without specific intent may not be unfair. As Chief Justice Taft reasoned in *Balint*, "Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided."[37] Public welfare offenses, thus, often involve professionals working in fields that require special training, as in *Balint*[38] and *Dotterweich*.[39]

Activities that exhibit these three qualities often involve the handling of dangerous materials. The very nature of the activity, in such cases, may put the actor on notice of the high level of care that is likely expected. As Justice Douglas noted in *Freed*, "one would hardly be surprised to learn that possession of hand grenades is not an innocent act."[40] The issue of the dangerousness of the regulated activity is thus a common feature of public welfare doctrine jurisprudence and will arise with some frequency in our consideration of the application of the doctrine to wildlife protection statutes in Part III, below.

Dangerousness is not, however, either a sufficient or a necessary condition for the application of public welfare doctrine. Dangerousness is insufficient to trigger public welfare principles, because it is only significant where the activity is not widely undertaken by non-specialists, and only to the degree that it puts actors on notice that the activity requires extraordinary care. It does not overcome the presumption in favor of specific intent when the activity is one that non-professionals might be engaged in without being aware of the regulations.[41] Dangerousness is not a necessary property of an activity regulated as a public welfare offense, because dangerousness is not the only form of sufficient notice.[42]

The third characteristic of public welfare offenses, that conviction brings only minor penalties and little damage to the reputation, is based upon the presumption that Congress would not authorize severe punishment for acts that were committed, in some sense, innocently. Both *Morissette* and *Staples* identified penalties and harm to reputation as factors in public welfare analysis,[43] and *Staples* cited the felony-status of the crime as a factor in reversing conviction.[44]

The fourth characteristic, that the statute would be unusually hard to enforce if specific intent were required, is both a judgment that Congress would not lightly dispense with mens rea requirements and an application of the principle of statutory interpretation that a law should be interpreted in a way that furthers its purpose.[45] Because public welfare offenses tend to criminalize neglect and omission rather than directly harmful acts,[46] and because they tend to involve activities whose complexities are unknown to most people, it is often particularly difficult for prosecutors to prove a defendant's knowledge. This was an important factor in *Balint*, for example, where a drug-seller's knowledge of his own drugs was at issue.[47]

The four characteristics identified here reflect a synthesis of the cases, rather than the analysis of any one case. The Supreme Court has never made clear how much weight to give these various factors or explained whether any specific combination of these factors would be decisive in establishing that a statute was or was not a public welfare statute. The next section considers the four characteristics of public welfare doctrine in the context of wildlife protection statutes. Because the Court has given no guidance about the weight of the characteristics, the only course in analyzing the wildlife protection statutes is to consider them all.

III. Public Welfare Doctrine and Wildlife Protection Statutes

While most federal environmental crimes have a statutory mens rea requirement with respect to the prohibited act, many are ambiguous as to whether the mental element applies also to elements of attendant circumstances.[48] Because of this ambiguity, courts have faced the question whether to adopt the usual presumption that Congress intended to require specific intent, or whether these crimes fall into the category of public welfare offenses, for which, in the absence of legislative intent to the contrary, only general intent is required. Environmental statutes take many approaches to a wide range of problems. As a result, applying the analysis of Part II(B) to the various statutes leads to a variety of results.[49] Each statute must thus be considered in its own context. As will be seen, though, many commonalities among the wildlife protection statutes produce similar conclusions under public welfare doctrine analysis, as courts have recognized, both implicitly and explicitly. This section addresses the major issues of public welfare doctrine in the context of three wildlife protection statutes. Part III(A) considers the ESA, Part III(B) the Lacey Act, and Part III(C) the Migratory Bird Treaty Act (MBTA).[50] Part III(D) addresses the concern that adopting a public welfare approach might cause innocent actors to fall within the purview of these statutes.

A. Public Welfare Doctrine and the Endangered Species Act

With certain exceptions, the ESA makes it unlawful to "import . . . or export";[51] to "take" within the United States, upon its territorial seas[52] or "upon the high seas";[53] to "deliver, receive, carry, transport, . . . ship,"[54] "sell or offer for sale in foreign or interstate commerce"[55] species listed as endangered by the federal Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS),[56] or to "possess, sell, deliver, carry, transport, or ship" species imported, exported, or taken in violation of the Act.[57] To "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[58]

The ESA provides for both civil and criminal penalties. Civil penalties range up to $12,000 per person per violation.[59] Criminal prosecution is available against "[a]ny person who knowingly violates" the provisions of the Act, other than those related to filing and recordkeeping.[60] The maximum criminal penalty for violating the provisions referred to above, or regulations promulgated thereunder, is a fine of $50,000, imprisonment for one year, or both.[61]

It is ambiguous whether the "knowingly" of the criminal violations provision[62] applies only to the *actus reus*, making it a general intent crime, or whether it applies also to all the attendant circumstances, in which case it is a specific intent crime. The ambiguity arises because within the ESA itself the enforcement provisions are separated from the acts prohibited, and because some of the prohibited acts are not defined by the ESA itself but rather by regulations promulgated by the agencies. The issue, neatly framed in *United States v. St. Onge*, one of the first cases to address it, is "whether the government must prove that defendant knew he was shooting a grizzly bear at the time he pulled the trigger, or whether the government need only prove that he knowingly shot an animal which turned out to be a grizzly bear."[63]

St. Onge held that knowledge that the animal was a grizzly bear was not required.[64] Under the analysis discussed in Part II(B), this appears to be the right outcome. As the *St. Onge* court noted, the ESA is a regulatory statute.[65] It does not have a common law history.[66] A more difficult question—and one not considered by any of the ESA cases—is whether the regulated activity is such that those engaging in it can reasonably be expected to take the precautions necessary to avoid violations. Although hunting is, arguably, dangerous, it is also widely undertaken by nonprofessionals. As *Staples* shows, this weighs against its falling within public welfare doctrine.[67] Nonetheless, it seems unlikely that a hunter could be unaware that hunting is a highly regulated activity,[68] and awareness of regulation was the primary concern in *Staples*. Furthermore, hunters are able to learn to identify the species they are hunting,[69] and, of course, are able to refrain from shooting animals they cannot identify. Thus, as the *Morissette* Court put it, they are "in a position to prevent [the harm] with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities."[70] The third issue concerns the severity of the penalty and the potential damage to reputation. The regulatory conviction upheld without specific intent in *Balint* had a maximum punishment of five years in prison.[71] By comparison, the maximum punishment of a $50,000 fine and one year in prison, under the ESA,[72] appears small.[73] The final question is whether the statute would be unusually hard to enforce under a specific-intent regime. *St. Onge* addressed this directly, holding that the Act's "purposes would be eviscerated if the government had to prove that the hunter recognized the particular subspecies protected."[74] Although the court did not provide any further analysis on this point, it is not hard to fill in the reasoning. Many people do *not* know how to distinguish endangered species from non-endangered species. Hunters may be shooting at animals that are distant or moving; they may, as in *United States v. Billie*,[75] be shooting in the dark. These conditions make it plausible for almost any defendant to claim that she did not know the species. To exacerbate the problem, there

are likely to be no witnesses to the crime, or at least none that are impartial.

Other courts that have interpreted the mens rea requirements of the ESA have uniformly agreed with *St. Onge* that the statute requires only general intent.[76] Further, two of these courts, including the Ninth Circuit, have at least implicitly viewed the question of mens rea requirements within the context of wildlife protection statutes generally, by citing mens rea issues under other wildlife protection statutes. *Billie* cited a case under the Migratory Bird Treaty Act.[77] *United States v. McKittrick*, which involved the killing of a gray wolf in violation of the ESA and then transporting it in violation of the Lacey Act, cited a case under the African Elephant Conservation Act, which it argued "indicate[d that] section 11 [of the ESA] requires only that McKittrick knew he was shooting an animal, and that the animal turned out to be a protected gray wolf."[78] Both of these courts relied on other wildlife protection statutes to conclude that the ESA required only general intent.

B. Public Welfare Doctrine and the Lacey Act

The Lacey Act is a complex statute creating civil and criminal penalties for trade in wildlife, fish, and plants acquired in violation of state, federal, tribal, or foreign environmental laws.[79] *United States v. Bronx Reptiles* is the only reported case involving mens rea requirements under current provisions of the Lacey Act.[80] *Bronx Reptiles* was brought under a provision making it "unlawful for any person, including any importer, knowingly to cause or permit any wild animal or bird to be transported to the United States . . . under inhumane or unhealthful conditions."[81] Violators may be fined up to $10,000, imprisoned for up to six months, or both.[82] In contrast to the ESA cases, *Bronx Reptiles* held that importing animals under "inhumane or unhealthful conditions" under the Lacey Act is not a public welfare offense and therefore should be read to require specific intent.[83]

The defendant, Bronx Reptiles, Inc., a large commercial importer, imported 73 Solomon Islands frogs and a larger number of skinks, from the Solomon Islands.[84] The animals arrived at John F. Kennedy Airport in New York, in two wooden crates, where an FWS inspector found that most of the frogs had been packed in an unhealthful manner that predictably caused their death.[85] Those that survived the trip died within a day after their arrival.[86] Civil penalties under the same provision of the Lacey Act had been assessed against Bronx Reptiles four times for prior acts of importation under inhumane or unhealthful conditions, including for a violation earlier the same year involving inhumane and unhealthful packing of frogs.[87]

In response to this fifth violation, the government charged Bronx Reptiles with a misdemeanor, seeking a $10,000 fine.[88] Bronx Reptiles had used an agent in the Solomon Islands to arrange the packing and shipping, and the government failed to show that Bronx Reptiles knew that the frogs would be packed in an inhumane or unhealthful manner.[89] The issue before the trial court was whether the Act required such a showing, or whether the defendant's knowledge that it was causing the importation was sufficient for conviction, if the importation was inhumane or unhealthful.[90]

The public welfare offense analysis set forth in Part II(B) leads to the conclusion that knowledge of the packing conditions is not required. First, the Lacey Act is not the codification of a common law crime, but rather, as the trial judge noted, a modern, regulatory statute,[91] albeit a fairly old one. Second, those who undertake to import wild animals can reasonably be expected to take the precautions necessary to ensure humane and healthful packing conditions. The Lacey Act provision primarily regulates the conduct of professionals who know that they are involved in a highly regulated activity.[92] Importers are able to take steps to control the conditions of importation. For instance, they can require specific packing conditions by contract with overseas shippers,[93] and they can refuse to do business with shippers that are unscrupulous.[94] Third, the maximum penalties and potential reputational damage from conviction are well within the range of other public welfare offenses. The maximum fine of $10,000 is one-fifth that of the ESA, while the maximum prison sentence of six months is half that of the ESA and one-fifth that of the regulatory crime at issue in *Balint*.[95] Finally, enforcement of the provision would be unusually difficult under a specific intent regime. Because the packing of animals for importation into the United States is, by definition, done outside the United States, the witnesses and documents needed to show knowledge are commonly outside the jurisdiction of any U.S. court. Thus, if specific intent were required, Congress's design to hold importers responsible for inhumane treatment of animals they import would be frustrated, because, as the trial judge put it, "it would be virtually impossible for the government to prove that an importer knowingly caused the shipment of an animal with knowledge that the overseas shipper was sending the animal under inhumane conditions."[96]

In an opinion emphasizing the first and fourth of these characteristics, Magistrate Judge Pollack, who conducted the trial without a jury, convicted Bronx Reptiles, holding that general intent—knowledge on the part of the defendant that it was causing or permitting the importation of animals—satisfied the mens rea requirement for conviction.[97] In reaching that conclusion the magistrate judge analogized to the ESA, citing *St. Onge*[98] and *Billie*,[99] and to the MBTA, citing *United States v. FMC Corp.*[100] and *United States v. Boynton*,[101] and thus implicitly recognized the interrelatedness of

the wildlife protection statutes.[102] The district court judge affirmed in a three-paragraph opinion adopting Magistrate Judge Pollack's decision.[103]

The Second Circuit reversed, in a divided panel, holding that knowledge of the unhealthful packing conditions was required under the statute.[104] The majority disagreed that the government would rarely be able to show knowledge of how overseas shippers packed animals; it thought circumstantial evidence and the theory of conscious avoidance would enable prosecutors to convict. [105] It did not discuss this as a factor in public welfare analysis, however.[106] The discussion of public welfare doctrine discussed only one issue: dangerousness. "Frogs are not 'potentially harmful or injurious items,'" and "there is . . . nothing about transporting them that would 'place[] [a defendant] in responsible relation to a public danger . . . alert[ing it] to the probability of strict regulation."[107] Therefore, violating regulations concerning the importation of frogs was held not to be a public welfare offense.[108] There was no consideration of the regulatory nature of the crime or of the magistrate judge's arguments by analogy to other wildlife protection statutes and case law.[109]

The majority in *Bronx Reptiles* focused on the harmlessness of the frogs because it incorrectly supposed that public welfare doctrine requires dangerousness as an element of notice. Assuming that the court was correct that importing animals is not a dangerous activity,[110] dangerousness is logically unnecessary to notice and is arguably a misreading of the Supreme Court cases.[111] The relevant question is whether a defendant would be aware that he is involved in a highly regulated activity.[112] The *Bronx Reptiles* analysis thus rested on a misunderstanding of the principles underlying public welfare doctrine.

C. Public Welfare Doctrine and the Migratory Bird Treaty Act

The MBTA[113] makes it unlawful for anyone "at any time, by any means or in any manner" to "pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, [or] offer to purchase" migratory birds.[114] The MBTA differs from the ESA and the Lacey Act in that its misdemeanor provision does not include any express mens rea, even for the *actus reus*.[115] The maximum penalty for a misdemeanor conviction is $15,000, imprisonment of up to six months, or both.[116] Also unlike the ESA and the Lacey Act, the MBTA does not provide for civil penalties.[117]

Because there is no express mens rea requirement for any element for conviction under the MBTA, the public welfare doctrine analysis has stark consequences. If it is a public welfare statute, then the presumption is that Congress intended to permit strict liability conviction.[118] The Second Circuit, in *United States v. FMC Corp.* held exactly this—that proof of causation alone was sufficient—upholding the conviction of a pesticide manufacturer that unknowingly killed migratory birds by poisoning a pond from which the birds drank.[119]

Under the analysis of Part II(B), the *FMC* court reached the correct conclusion, although the application of public welfare doctrine is less clear regarding the MBTA than regarding the ESA and the Lacey Act. First, like the regulatory crimes under the ESA and the Lacey Act, the killing of migratory birds is a modern crime without a common law history.[120] The second question, whether the MBTA regulates activities of such a sort that those engaging in them can reasonably be expected to take the precautions necessary to avoid violations, requires more caution. By regulating unintended and unknowing killing, the MBTA may regulate a wider variety of activity than, for example, the ESA, which regulates only knowing acts. In *FMC*, the court was able to rely on the fact that the defendant "engaged in the manufacture of a pesticide known to be highly toxic."[121] Courts that have required mens rea under the provision are those that have viewed certain affected activities, such as hunting, as too innocuous to provide sufficient notice to potential violators. An example is the Fifth Circuit's decision in *United States v. Delahoussaye*, which declined to apply strict liability for fear that doing so "would simply render criminal conviction an unavoidable occasional consequence of duck hunting."[122] *Staples* did hold that the mere possession of a gun is insufficient notice.[123] The Fifth Circuit exceeded the scope of *Staples* by holding that hunters are not on notice, even though hunting is very highly regulated.

The third characteristic of public welfare offenses, that conviction brings only minor penalties and little damage to the reputation, is as easily met under the MBTA as under the Lacey Act and more easily than under the ESA, given their respective maximum penalties.[124] The fourth question is whether the statute would be unusually hard to enforce if specific intent were required. As *FMC* indicates, a wide range of dangerous activities can cause harm to migratory birds unintentionally and unknowingly. Strict liability may be the only way to ensure that potential violators take it upon themselves to learn how their conduct might affect migratory birds.[125]

Most courts have agreed with *FMC* that the misdemeanor provision of the MBTA permits strict liability conviction, including six of the other seven circuits that have addressed the issue.[126] Even the dissenting circuit, the Fifth, has not required more than a negligence standard.[127] It is also worth noting that *Delahoussaye*, in which the Fifth Circuit articulated its rule, preceded Congress's 1986 reenactment of the provision, which rather clearly approved the interpretation set forth by

the majority of circuits.[128] On the other hand, in 1998 Congress adopted the Fifth Circuit rule for criminal violations of the MBTA resulting from "tak[ing] any migratory game bird by the aid of baiting, or on or over any baited area,"[129] which was the allegation in *Delahoussaye*. Arguably, this ratification of the *Delahoussaye* approach to baiting-related violations supports the application of strict liability under other circumstances. The Fifth Circuit itself has not made this distinction,[130] although it has not yet addressed the 1998 amendments. Although the negligence standard of *Delahoussaye* increases the burden on prosecutors in comparison to the strict liability standard of the other circuits, prosecutors in the Fifth Circuit have apparently been able to meet the challenge: in all three Fifth Circuit cases that turned on the mens rea requirement, including *Delahoussaye* itself, the convictions were affirmed.[131] Thus, while the Fifth Circuit has never provided a thorough explanation for its unique rule, negligence does seem to have provided a sufficient tool for prosecutors to enforce the MBTA, while minimizing the risk of convicting the innocent.[132]

Perhaps because the case law on mens rea is better developed under the MBTA, decisions under the statute have rarely cited cases under the ESA and the Lacey Act, as cases under those acts have cited to the MBTA, and to each other.[133]

D. Range of Activities Encompassed by the Acts

As Parts III(A)–(C) have suggested, the activities affected by the ESA, the Lacey Act, and the MBTA are undertaken primarily either by professionals or by people who can for some other reason—in some cases because of the obvious dangerousness of the activity itself—be expected to know that they are acting within a highly regulated sphere. If this were not so, then the actors could not be expected to take the precautions necessary to avoid violating the pertinent provision, with the result that the crime would not manifest the second characteristic of a public welfare offense.[134] It can be objected, however, that under any of these acts, a defendant might appear who could not have been expected to know, or to find out, that his activities were subject to these kinds of regulations.

The ESA cases discussed above concern hunting, which is both highly regulated and dangerous in an obvious way. Prohibited "tak[ing]" under the ESA,[135] though, encompasses a broader range of acts, including some indirect harms to protected species. Most importantly, the Supreme Court has upheld an agency definition of "take" that includes "indirectly injuring endangered animals through habitat modification."[136] This definition might be more likely to produce unfair convictions because the range of activities affected is so broad. Even under this broader definition, many likely defendants would be professionals—construction companies and timber companies, for example—engaged in dangerous and highly regulated activities; among non-professionals, those who engage in significant construction projects might reasonably be expected, like hunters, to become aware of the regulations. Furthermore, because general intent is required, those who did not know that they were harming any animal could not be found guilty.

Nonetheless, as not all construction is major construction, and as minor habitat modifications can sometimes cause harm to animals, it is surely possible for a non-professional, engaged in an innocuous activity in an environmentally sensitive area, knowingly to harm an animal she did not know was endangered. In *United States v. Town of Plymouth*, a federal district court found that driving an off-road vehicle on the beach can result in a "tak[ing]" of the endangered piping plover by "interfering with [its] breeding, nesting and feeding habitat."[137] Although no criminal charges were brought in that case, it raises the concern that an unsuspecting visitor to a beach could be punished criminally for driving over a nest she did not know belonged to an endangered species.[138]

The same kind of anomaly is imaginable under the Lacey Act. Indeed, it was, in part, the risk of making criminal acts out of a "vast range of remarkably innocuous behavior" that led the majority in *Bronx Reptiles* to interpret the Lacey Act violation it addressed as a specific intent crime: a casual purchaser of a pet could become guilty of a crime "by purchasing a once-wild animal or bird . . . knowing only that the direct or indirect result of the purchase is that a 'wild animal or bird [will] be transported to the United States.'"[139] In *Staples*[140] and *Liparota v. United States*,[141] the Supreme Court has shown its disinclination to presume that Congress would criminalize apparently innocent activities undertaken by non-specialists. Depending on how one analyzes the causation, the majority may or may not have been correct that under a general intent regime, a casual purchaser of a pet in a pet store could be guilty of "knowingly . . . caus[ing] or permit[ting] any wild animal or bird to be transported to the United States . . . under inhumane or unhealthful conditions."[142] The intervening action of the pet store, which would arrange the importation, might release the ultimate purchaser of responsibility. Under other possible circumstances, though, causation would be uncontroversial. For example, the casual purchaser might place an order for direct shipment of an animal on the Web site of a foreign wildlife dealer, directly "caus[ing] . . . [the] wild animal . . . to be transported." Although the vast majority of importation is likely to be undertaken by professionals, the potential for unsuspecting consumers to run afoul of the statute is troubling. Of further concern, and perhaps implicitly underlying the majority's decision in *Bronx Reptiles*, is the sweeping breadth of the Lacey Act as a whole, whose provisions criminalize

not only unhealthful importation, but also knowing importation in violation of any state, federal, or foreign environmental law.[143]

The MBTA, because it does not explicitly require any knowledge at all, creates the greatest danger of unfair convictions. Perhaps in recognition of this danger, some courts have limited the range of punishable acts to those that cause direct harm to the protected species, such as hunting and spreading poison, holding that indirect harms, such as timber harvests causing injurious habitat modification, exceed the Act's purview.[144] Furthermore, as noted above, the facts of the cases tend to confirm the intuition that mostly professionals and those undertaking dangerous and highly regulated activities will tend to fall within the realm of what is prohibited. However, it is easy to imagine possible exceptions, particularly for those violating the explicit statutory prohibitions against possession or sale of migratory birds.[145]

Although it is possible to imagine scenarios in which innocent non-professionals could be prosecuted under any of these three statutes, all three regulate activities that are undertaken overwhelmingly by professionals or those otherwise on notice of the existence of regulations. The rare exception should not lead courts to infer a congressional intent to require specific intent. Still, the troubling possibility of exceptions should be addressed. One solution is to rely on agency discretion not to prosecute the truly innocent. As the Supreme Court has stated in *Staples*[146] and *Liparota*[147], though, this option offers insufficient protection.[148]

The remainder of this article addresses the inconsistency in judicial interpretations of the ESA, the Lacey Act, and the MBTA, and proposes solutions that would further enforcement without authorizing the conviction of the innocent.

IV. Conflict Among the Federal Courts in Interpreting Wildlife Protection Statutes

The preceding analysis of three wildlife protection statutes reveals that all three statutes fit comfortably within the public welfare tradition, and largely for the same reasons. That similarities dominate the analysis of three statutes whose goals are interconnected and overlapping is not surprising. The surprise would have been the opposite conclusion—for example, if our analysis had compelled the presumption that Congress intended a weak mens rea requirement for crimes of trafficking in migratory bird feathers, but a strong mens rea requirement for crimes of illegal importation of wild animals. The case law, however, has produced just this kind of inconsistent result. Part IV(A) discusses the conflict among the courts in interpreting the statutes and the nature of the inconsistency. Part IV(B) proposes resolutions, by administrative and legislative means.

A. Defining the Conflict

The crimes this article has discussed, under the ESA, the Lacey Act, and the MBTA, share with one another the qualities of public welfare offenses as developed by the jurisprudence of the Supreme Court. They also share a common purpose of using criminal penalties to protect certain animals from harm by humans. In evaluating mens rea requirements under these statutes, many courts have recognized the connection that wildlife protection statutes bear to one another. Accordingly, courts interpreting one wildlife protection statute have cited decisions under other wildlife protection statutes and interpreted these statutes in light of one another.[149] The result, however, has not been complete consistency.

For crimes under the ESA,[150] every court that has addressed the issue has held that only general intent is required.[151] However, among the federal appeals courts, only the Ninth Circuit and Fifth Circuit have addressed the issue.[152] Mens rea requirements under the Lacey Act have been addressed only by the Second Circuit. At least with respect to the unhealthful importation provision, that circuit held, a criminal violation of the Lacey Act is *not* a public welfare offense and so specific intent is required.[153] Regarding the misdemeanor provision of the MBTA,[154] there has been near, but not total, agreement: seven of eight circuits have held that in declining to express any mens rea requirement, Congress intended to create a strict liability offense.[155] These seven are the Second, Third, Fourth, Sixth, Seventh, Eighth, and Tenth.[156] The Fifth Circuit has held, on the contrary, that a showing of negligence is required.[157]

Most circuits have thus come to the conclusion that this article has argued: all three wildlife protection statutes create public welfare offenses. The two outliers are the Second Circuit regarding the Lacey Act and the Fifth Circuit regarding the MBTA. Notably, each of these circuits has applied the opposite interpretation to one of the other statutes: the Second Circuit has followed the majority view of the MBTA, while the Fifth is one of the two circuits to hold that the ESA requires only general intent. Viewed from the point of view of individual statutes, there is a circuit split only with regard to the MBTA. As discussed above, however, the Fifth Circuit rule under the MBTA has not apparently hindered prosecution compared to the rule in the majority jurisdictions and appears unlikely to be followed by other circuits.[158] Furthermore, it is regarding the other two statutes that the law is unstable. When the ESA and the Lacey Act are viewed together, a divisive split appears, with only three circuits having spoken so far, the Ninth and Fifth in favor of general intent and the Second requiring specific intent. Courts interpreting these statutes have commonly looked to judicial decisions under other wildlife protection statutes for

guidance;[159] it is unclear in which direction the remaining circuits will move.

B. Resolutions

A specific intent requirement could weaken enforcement of the ESA, the Lacey Act, or the MBTA, in ways suggested in Part IV(A)–(C). However, simply requiring general intent under the ESA and the Lacey Act, and no mens rea at all under the MBTA, risks conviction of the innocent, as discussed in Part III(D). This part then proposes possible administrative actions that could provide partial enforcement solutions, and ends with a proposed legislative solution that would be more thorough and would properly balance enforcement against potential unfairness to defendants.

1. Administrative

Under a president who desired vigorous enforcement of wildlife protection statutes, the regulatory agencies could take steps to mitigate some of the consequences of a specific intent requirement, even without appealing to the other branches of government. The means available to the agencies would be more effective with respect to the Lacey Act than with respect to the ESA or the MBTA.

Under the Lacey Act, the Secretary of the Interior is empowered with broad authority to "prescribe such requirements and issue such permits as he may deem necessary for the transportation of wild animals and birds under humane and healthful conditions."[160] One way to overcome the difficulties of showing that an importer knew about the packing conditions of the animals it was importing would be to promulgate rules that effectively require knowledge by importers. For example, importers could be required to make contractual arrangements with shippers, specifying the conditions in which animals are to be packed, and to retain proof that they had done so.[161] They could also be prohibited from using shippers who had failed to provide proper packing conditions in the past. As a violation of these rules would be subject to the same criminal penalties as unhealthful importation itself,[162] it would be difficult for importers to use their ignorance as a defense. The regulations would thus create a regime approximating negligence. Such regulations would not encompass the exceptional case in which animals were shipped improperly despite the importer's having made proper arrangements with a reputable shipper.

While parallel strategies are conceivable under the ESA and the MBTA, they would tend to be more burdensome to both the agencies and the regulated parties and also less likely to be effective, especially where the regulated parties are not a small number of professionals. For example, to make it more difficult for hunters to claim they did not know the species they were shooting, the FWS could promulgate regulations requiring hunters to know how to identify all the endangered species that are found in the area they will be hunting.[163] It could require them to pass tests on the subject. Unfortunately, this would be an enormous undertaking for the agency,[164] and also a severe inconvenience to countless hunters. Furthermore, hunters who admitted knowing how to identify endangered species in general, might nonetheless convince juries and judges that they had misidentified the particular animal they had shot at in the particular instance that led to the indictment, rendering the regulation ineffectual. Thus, for statutes intended to protect wildlife from the general public, administrative solutions are probably unworkable.

2. Legislative

Congressional action would be the only reliable way to further vigorous enforcement of wildlife protection statutes uniformly across circuits. The simplest solution would apply to all criminal provisions in specified wildlife protection statutes, and would require that for all elements for which no mental state is expressly specified, none will be required for conviction. This would overturn the Second Circuit's interpretation of the Lacey Act[165] and the Fifth Circuit's interpretation of the MBTA.[166] A more satisfactory approach would be to include, in addition to such a provision, a clause designed to address the perils of no-fault conviction observed by the Second and Fifth Circuits in those decisions and addressed above in Part III(D). One way to do this would be to include a "due care" provision, requiring the government to show, based on an objective test, that, regardless of knowledge, the defendant failed to take proper precautions to avoid violating the Act.[167] Under this solution, professional importers who repeatedly imported animals in unhealthful conditions in violation of the Lacey Act would be subject to criminal penalties, while a casual purchaser at a pet store would not. If drafted properly, such a clause would be a lower burden for the government than a common law negligence standard, in that it would require actors to take steps to acquire proper knowledge and would prohibit actors who were aware of their ignorance from engaging in the regulated activity at all. Thus, under the ESA, a hunter who killed an endangered species would be criminally liable not only if he knew or should have known what species he was shooting at, but also if the animal was moving too quickly to be identified clearly. A due care provision would change the standard most notably under the MBTA, as failure of due care would be required for both the act and the attendant circumstances for misdemeanor conviction, whereas under the current statute, in most circuits, strict liability prevails.[168] Undoing the harshness of strict liability should be considered a benefit, and the experience in the Fifth Circuit suggests that it would not pose too great a challenge to prosecutors.[169] Congress could thus provide the most complete and most

balanced solution to enforcement problems under wildlife protection statutes.

V. Conclusion

Wildlife protection statutes fit comfortably within the jurisprudence of public welfare doctrine. Application of the doctrine, moreover, furthers the statutes' purpose of protecting wildlife from certain types of harms from humans. In interpreting the crimes these statutes create, therefore, judges should presume that Congress intended not to require mens rea except with respect to those elements for which it required mens rea expressly. The two circuits that have addressed this issue in cases under the ESA have come to this conclusion, as have a majority of circuits addressing the same issue under the MBTA. Under the Lacey Act, however, the one circuit court to face the question answered it in the opposite way. This misstep could impair enforcement, and the inconsistency across wildlife protection statutes poses a further danger.

The executive and legislative branches of the federal government could address the difficulties in enforcement created by the inconsistent judicial interpretations. The relevant administrative agencies could promulgate rules designed to mitigate the difficulties created by a general intent standard under animal protection statutes. While such rules would probably succeed in aiding Lacey Act enforcement, they would be less likely to aid enforcement under the ESA or the MBTA. Congress is in the best position to resolve the conflict among the courts in interpreting wildlife protection statutes, and only Congress could do so in a way that advances enforcement while also addressing the perils of no-fault conviction.

Endnotes

1. Florida Panther Net Handbook, *at* http://www.panther.state.fl.us/handbook/natural/physical.html (last visited Jan. 10, 2002).
2. *Too Many Chiefs, Not Enough Panthers*, The Economist, Sept. 5, 1987, at 24.
3. *United States v. Billie*, 667 F. Supp. 1485, 1485 (S.D. Fla. 1987); *see* 16 U.S.C. §§ 1538(a)(1)(B), 1532(19) (1994).
4. *Billie*, 667 F. Supp. at 1492–93; *Too Many Chiefs, Not Enough Panthers*, *supra* note 2.
5. *Billie*, 667 F. Supp. at 1492.
6. *Id.* (citing *United States v. Engler*, 806 F.2d 425, 432 (3d Cir. 1986)).
7. *See, e.g.*, *United States v. Bronx Reptiles, Inc.*, 217 F.3d 82, 86–88 (2d Cir. 2000) (applying the Lacey Act).
8. This article focuses on these three statutes for reasons described below. *See infra* note 50.
9. As the maxim goes, *actus non facit rerum, nisis mens sit rea. See* Edward Coke, The Third Part of the Institutes of the Laws of England 6, 107 (1815). In Blackstone's famous translation, "an unwarrantable act without a vicious will is no crime at all." 4 William Blackstone, Commentaries 21 (Yale Collection, 1765–69). The precise definition of mens rea is far from clear, as courts and commentators have long noted. *See*, *e.g.*, *Morissette v. United States*, 342 U.S. 246, 252 (1952) ("The unanimity with which [courts] have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element."); Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 Utah L. Rev. 635, 637 (1993) ("Few conceptual pursuits in any area of the law have proven so beguiling as the attempt to give an accurate account of the so-called mental element required for criminal liability."); George P. Fletcher, Rethinking Criminal Law 398 (1978) ("There is no term fraught with greater ambiguity than that venerable Latin phrase that haunts Anglo-American criminal law: mens rea."); Sanford H. Kadish, *The Decline of Innocence*, 26 Cambridge L.J. 273, 273 (1968) (observing that a great "quantity of obfuscation" has been created by the term); Francis Bowes Sayre, *The Present Significance of Mens Rea in the Criminal Law, in* Harvard Legal Essays 399, 402 (1934) ("Mens rea, chameleon-like, takes on different colors in different surroundings.").
10. *Dennis v. United States*, 341 U.S. 494, 500 (1951). The Court has often quoted this passage in later decisions. *See Staples v. United States*, 511 U.S. 600, 605 (1994); *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978); *United States v. Freed*, 401 U.S. 601, 613 (1971) (Brennan, J., concurring); *Smith v. California*, 361 U.S. 147, 150 (1959).
11. *See*, *e.g.*, *Staples*, 511 U.S. at 605 (reversing no-fault conviction, although statute did not explicitly require mens rea).
12. The Supreme Court has generally held that legislatures may permissibly eliminate the mental element altogether, so that the question is usually limited to "the construction of the statute and of inference of the intent of Congress." *United States v. Balint*, 258 U.S. 250, 253 (1922). The constitutional limits of strict liability crimes are unclear. As Herbert Packer famously observed, mens rea "is not a constitutional requirement, except sometimes." Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 107. An evaluation of this issue would exceed the scope of this article. For a valuable recent attempt to make sense of the pertinent decisions by the Supreme Court, see Alan C. Michaels, *Constitutional Innocence*, 112 Harv. L. Rev. 828 (1999).
13. *See*, *e.g.*, *Staples*, 511 U.S. at 604-08 (reversing conviction for non-registration of automatic weapon, where owner did not know his weapon was automatic, although statute did not explicitly require knowledge). *Cf.* Model Penal Code § 2.02(1) ("[A] person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense."). The Model Penal Code permits conviction without mens rea only for minor infractions whose maximum punishment does not include imprisonment or probation. *See id*. § 1.04(5).
14. *See*, *e.g.*, *Morissette*, 342 U.S. at 270–71 ("[K]nowing conversion requires more than knowledge that defendant was taking the property into his possession. He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion.").
15. Some courts, for example, use "specific intent . . . to mean an intention to do a future act or achieve a particular result." *People v. Hood*, 1 Cal. 3d 444, 457 (Cal. 1969) (Traynor, C.J.). Others use "specific intent" to describe crimes that have intent to violate the law as an element. *See*, *e.g.*, *United States v. Phillips*, 19 F.3d 1565, 1577 (11th Cir. 1994) (discussing decisions using the term "specific intent, meaning . . . acting with a 'bad purpose' to disobey or disregard the law"). Still other courts use "specific intent" to describe crimes for which knowledge of the law is a

material element. *See*, *e.g.*, *United States v. Ivey*, 949 F.2d 759, 766 (5th Cir. 1991) (holding that knowledge of the law is not required under the ESA). Others use "specific intent" and "general intent" to distinguish among *levels* of mens rea. *See*, *e.g.*, *State v. Cameron*, 514 A.2d 1302, 1307 (N.J. 1986) (describing common law "specific intent" crimes as those which the New Jersey Code of Criminal Justice describes as requiring "purpose" or "knowledge," and "general intent" crimes as those the Code describes as requiring "recklessness" or criminal "negligence").

16. *See* Colin Crawford, *Criminal Penalties for Creating a Toxic Environment: Mens Rea, Environmental Criminal Liability Standards, and the Neurotoxicity Hypothesis*, 27 B.C. Envtl. Aff. L. Rev. 341, 369 (explaining that a general intent crime requires a mere "intentional action" to convict, whereas a specific intent crime requires a specified purpose or awareness of a "specific circumstance" (citing Sandford Kadish & Stephen Schulhofer, Criminal Law and its Processes: Cases and Materials 230 (5th ed. 1989) and Susan F. Mandiberg, *The Dilemma of Mental State*, 25 Envtl. L. 1165, 1206 (1995)); *see also United States v. Freed*, 401 U.S. 601, 607 (1971) (upholding indictment for possession of unregistered hand grenades, although it was not alleged that defendant knew the grenades to be unregistered, because "[t]he Act requires no specific intent or knowledge that the hand grenades were unregistered."); *Pena-Cabanillas v. United States*, 394 F.2d 785, 788 n.2 (9th Cir. 1968) (defining "general intent" as the intent "to do or not do the act"). For a useful history of these terms and their application in the environmental context, see Mandiberg, *supra*, at 1203–16.

17. Under the typical felony murder provision there is no mens rea requirement for killing, which is the *actus reus* of the crime. As one textbook case puts it, "a killing committed in . . . the perpetration of . . . robbery is murder of the first degree . . . whether the killing is wilfull, deliberate and premeditated, or merely accidental or unintentional." *People v. Stamp*, 2 Cal. App. 3d 203, 209 (Ct. App. 1969). Of course, felony murder does require a guilty mind in the general sense, in that the defendant must knowingly perpetrate a felony. *See* Michaels, *supra* note 12, at 839.

18. *See*, *e.g.*, Michaels, *supra* note 12, at 830 (using "strict liability" to refer to crimes for which any element lacks a mens rea requirement).

19. To be perfectly clear how this article will use these terms, consider again the jurisdiction that makes it a misdemeanor "to damage a government building." If it is a specific intent crime, then, assuming knowledge is the minimum required mental state, a defendant can be convicted only if she damaged a government building, knowing both that she was damaging it and that it was a building owned by the government. If it is a general intent crime, she must have knowingly damaged a building, and the building must have belonged to the government, but she need not have known that the building belonged to the government. If it is a strict liability crime, she could be convicted for having damaged a government building through an act that she did not even suspect could damage a building, for instance if she posted a sign on the wall of the building with an adhesive that, unknown to her, was highly corrosive. Note that in all three of these situations, the defendant has *acted* in such a way as to damage the building. If she could be convicted for having been hurled violently against the building by an attacker and thereby damaging it, then the crime would have no *actus reus* requirement. This last possibility, which must be carefully distinguished from strict liability, is not at issue in this article.

20. *Morissette v. United States*, 342 U.S. 246, 253–55 (1952). By now the tendency is a century-and-a-half old.

21. 258 U.S. 250 (1922) (allowing conviction for selling medications without required order form, regardless of whether defendant knew he was handling regulated products).

22. *Morissette*, 342 U.S. at 254–56 (1952).

23. *Id.* at 260.

24. Other synthesizers of public welfare doctrine have produced superficially different lists of characteristics. Judge (later Justice) Blackmun, for example, summarized the doctrine as follows:

> [W]here a federal criminal statute omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where conviction does not gravely besmirch, where the statutory crime is not one taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent.

Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960). This article has attempted a synthesis that is conducive to an explication of underlying reasons. In substance, however, it is essentially identical to the summaries by other commentators.

For a history of public welfare offenses in England and the United States and an early attempt to synthesize the relevant cases, *see generally* Francis B. Sayres, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933).

25. *See supra* Part II(A).

26. *Morissette*, 342 U.S. at 270–76; 18 U.S.C. § 641 (1994).

27. *Morissette*, 342 U.S. at 272–74.

28. *Id.* at 248–50.

29. *Id.* at 251.

30. *Id.*

31. Pub. L. No. 63-223, 38 Stat. 785 (1914).

32. *United States v. Balint*, 258 U.S. 250, 251 (1922).

33. 21 U.S.C. §§ 301–392 (1994).

34. *United States v. Dotterweich*, 320 U.S. 277, 286 (1943).

35. Under 26 U.S.C. § 5861 (1994).

36. *United States v. Freed*, 401 U.S. 601, 607 (1971).

37. *Balint*, 258 U.S. at 254.

38. *Id.* at 251.

39. *Dotterweich*, 320 U.S. at 286.

40. *Freed*, 401 U.S. at 609.

41. An example is *Staples v. United States*, in which the defendant was convicted for possession of an unregistered "machinegun," in violation of the National Firearms Act. 511 U.S. 600, 602–03 (1994); *see* 26 U.S.C. §§ 5861(d), 5845(a)(6) (1994). The defendant's gun, originally semiautomatic, had been modified by another, making it capable of automatic fire and thereby bringing it within the statutory definition of "machinegun." *Staples*, 511 U.S. at 603; *see* 26 U.S.C. § 5845(b) (1994). The defendant claimed ignorance of the modification. *Staples*, 511 U.S. at 603 (1994). The trial judge instructed the jury that it could convict regardless of whether the defendant knew his gun had the characteristics that brought it within the statute. "It would be enough to prove he knows that he is dealing with a dangerous device of a type as would alert one to the likelihood of regulation." *Id.* at 604 (quoting jury instruction from trial transcript). The Supreme Court reversed, reasoning that "a general rule . . .

that dangerous and regulated items place their owners under an obligation to inquire at their peril" could lead to weak mens rea requirements for many apparently innocent activities. *Id.* at 614.

42. *See infra* notes 107–12 and accompanying text. The Supreme Court itself has confused the issue of when to consider dangerousness, in *Liparota v. United States,* 471 U.S. 419 (1985). That case, which was about mistake of law rather than mistake of fact and so not directly relevant to the issues in this article, seems to have decided that food stamp regulations did not fall within public welfare doctrine because violations of food stamp regulations do not "seriously threaten the community's health or safety." *Id.* at 433. The *Liparota* Court did, though, in the same discussion, focus on the role of dangerousness in the analysis, that "a reasonable person should know [that dangerous activities are] subject to stringent public regulation." *Id.*

43. *Morissette v. United States*, 342 U.S. 246, 254–56 (1952); *Staples*, 511 U.S. at 618–19.

44. *Staples*, 511 U.S. at 618–19. The issue of whether felony conviction without mens rea is constitutional is beyond the scope of this article.

45. *See*, *e.g.*, *United States v. Park*, 421 U.S. 658, 669 (1975) (arguing that a statute should be interpreted in a way that effectuates the legislature's purpose in enacting it).

46. *See Morissette* at 255–56.

47. *United States v. Balint*, 258 U.S. 250–52 (1922) (holding that scienter is not required "in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement").

48. In addition to the statutes discussed in Part III(A), (B), and (C), *see*, *e.g.*, 33 U.S.C. § 1319(c)(2) (1994) ("[k]nowing violations" provision of Clean Water Act).

49. Consider, for example, the question of whether the crime has a common law history. Some clearly do not. Criminal offenses under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136 (1994), which essentially creates a product registration regime, are an example. These seem close to the drug-regulation crimes found not to require specific intent in *Balint*, 258 U.S. at 252, and *Dotterweich v. United States*, 320 U.S. 277, 286 (1943). The first court to address the construction of FIFRA's ambiguous knowledge element cited those cases as precedent and held that FIFRA "clearly falls within the framework of other regulatory schemes." *United States v. Corbin Farms Service*, 444 F. Supp. 510, 519–21 (E.D. Cal. 1978). Some environmental statutes, though, have origins, or at least analogs, in state common law. Nuisance laws, for example, have long prohibited some of the same acts that the Clean Water Act (CWA) now does. Highlighting this point, the Supreme Court has held that the CWA partially pre-empts state nuisance law. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) ("[T]he CWA precludes a court from applying the law of an affected State against an out-of-state source."). Note, however, that a violation of nuisance law did not generally result in criminal punishment.

50. This article focuses on these three statutes because they have the most developed case law. The discussions here may also be relevant to other wildlife protection statutes with criminal provisions. The Marine Mammals Protection Act, 16 U.S.C. §§ 1361–1407 (1994), for example, restricts the taking of marine mammals within the United States and on the high seas. *See also* 50 C.F.R. § 216.11(c). It provides maximum penalties of $20,000 fine, one year in prison, or both, §1375(b), for "knowing[]" violators. The Bald Eagle and Golden Eagle Protection Act makes it unlawful to "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import" bald eagles or golden eagles. *See* 16 U.S.C §§ 668–668d (1994). Maximum criminal penalties for a first offense are a $5,000 fine, one year in prison, or both. Subsequent violations are subject to up to a $10,000 fine and up to two years in prison, or both. *See id.* § 668(a). One district court held that a defendant could not be convicted for selling eagle feathers if he thought they were turkey feathers. *United States v. Allard*, 397 F. Supp. 429, 433 (D. Mont. 1975). Other wildlife protection statutes with criminal provisions include the Airborne Hunting Act, *see* 16 U.S.C. § 742j-1 (1994), the Wild Free-Roaming Horses and Burros Act, *see* 16 U.S.C. §§ 1331–1340 (1994), the Animal Welfare Act, *see* 7 U.S.C. § 2149(b)(1994), the Whaling Convention Act, *see* 16 U.S.C. §§ 916–916(l)(1994), the Public Health Service Act, *see* 42 U.S.C. § 271 (1994), the African Elephant Conservation Act, *see* 16 U.S.C. § 4201–45, and the Fur Seal Act, *see* 16 U.S.C. §§ 1151–1175 (1994). For a useful, if somewhat out-dated, overview of these and other wildlife protection statutes, *see* Richard Littell, Endangered and Other Protected Species: Federal Law and Regulation (1992).

51. 16 U.S.C. § 1538(a)(1)(A) (1994).

52. *Id.* § 1538(a)(1)(B).

53. *Id.* § 1538(a)(1)(C).

54. *Id.* § 1538(a)(1)(E).

55. *Id.* § 1538(a)(1)(F).

56. More precisely, the ESA empowers the Secretaries of Interior and Commerce, for land and marine species, respectively. The Secretaries have delegated their authority to the agencies. *See* 16 U.S.C. § 1538(a)(1)(F) (1994); 50 C.F.R. § 424.01 (2000).

57. 16 U.S.C. § 1538(a)(1)(C) (1994).

58. 16 U.S.C. § 1532(19) (1994). The ESA also authorizes the Secretary of the Interior and the Secretary of Commerce to promulgate regulations to implement the Act, *id.* § 1540(f), and makes it unlawful to violate those regulations as well. The FWS and NMFS are also authorized to list and promulgate regulations for the protection of "threatened species." *Id.* § 1535(a)(1)(g). The ESA also protects endangered and threatened plants. *Id.* § 1538(a)(2).

59. 16 U.S.C. § 1540(a) (1994).

60. *Id.* § 1540(b)(1) (1994).

61. *Id.*

62. *Id.*

63. *United States v. St. Onge*, 676 F. Supp. 1044, 1045 (D. Mont. 1988).

64. *Id.*

65. *Id.*

66. The common law offered little in the way of wildlife protection and nothing that resembles our modern regimes. Perhaps the closest common law analog to the ESA and the other statutes considered in this article is the "wildlife trust doctrine," which grew out of the English Crown's responsibility to act "as trustee to support the title [to wildlife] for the common use." Hope M. Babcock, *Should* Lucas v. South Carolina Coastal Council *Protect Where the Wild Things Are?*, 85 Iowa L. Rev. 849, 881 (2000) (internal quotations omitted). However, the Crown was expected to act to protect property rights, rather than to serve purposes advocated by modern environmentalists. *See id.* at 881–82 & nn.133, 135.

67. *See Staples v. United States*, 511 U.S. 600, 602–03 (1994); *supra* note 41.

68. *See*, *e.g.*, Jeffrey S. Thiede, *Comment: Aiming for Constitutionality in the First Amendment Forest: An Analysis of Hunter Harassment Statutes,* 48 Emory L.J. 1023, 1027 (1999) ("[H]unters are restricted as to the time of year and the hours of the day they may hunt, the type of gun they may use, the sex of the animal they may hunt, and the number of each species they may take. Many [hunting] devices . . . are prohibited." (footnotes omitted));

Donald C. Douglas, Jr., *Comment: A Comment On Louisiana Wildlife Agents And Probable Cause: Are Random Game Checks Constitutional?*, 53 La. L. Rev. 525, 525 (1992) ("Virtually every hunting and fishing activity has some licensing or permit requirement.").

69. An industry of field guides depends on this ability. *See*, *e.g.*, Christopher S. Smith, Field Guide to Upland Birds and Waterfowl, back cover (2000) ("This pocket field guide includes everything needed to correctly identify 73 species of North American waterfowl and upland game birds.").

70. *Morissette v. United States*, 342 U.S. 246, 256 (1952). *But see infra* Part III(D).

71. *United States v. Balint*, 258 U.S. 250, 251 (1922); Narcotic Act of 1914, Pub. L. No. 63-223, 38 Stat. 785 (1914).

72. 16 U.S.C. § 1540(b)(1) (1994).

73. Admittedly, this level of punishment is small only by comparison.

74. *United States v. St. Onge*, 676 F. Supp. 1044, 1045 (D. Mont. 1988).

75. *United States v. Billie*, 667 F. Supp. 1485 (S.D. Fla. 1987); *see supra* Part I.

76. *See United States v. McKittrick*, 142 F.3d 1170, 1176 (9th Cir. 1998), *cert. denied*, 525 U.S. 1072 (1999) ("McKittrick need not have known he was shooting a wolf to 'knowingly violate' the regulations protecting the experimental population."); *United States v. Nguyen*, 916 F.2d 1016, 1019 (5th Cir. 1990) ("The government was not required to prove that Nguyen knew that this turtle is a threatened species. . . ."); *St. Onge*, 676 F. Supp. at 1045 (D. Mont. 1988) ("[T]he government cannot be required to prove that he had the specific intent to take a grizzly bear."); *Billie*, 667 F. Supp. at 1493 ("[T]he Government need prove only that the defendant acted with general intent when he shot the animal in question."). Two other cases have cited *Billie* and *St. Onge* with approval for their holding that ESA requires only general intent. *United States v. Ivey*, 949 F.2d 759, 766 (5th Cir. 1991); *United States v. Asper*, 753 F. Supp. 1260, 1287 (M.D. Pa. 1990). *Ivey* and *Asper*, though, hinge on mistake of law, not mistake of fact.

77. *Billie*, 667 F. Supp. at 1492 (citing *United States v. Engler*, 806 F.2d 425, 432 (3d Cir. 1986)).

78. *McKittrick*, 142 F.3d at 1177 (citing *United States v. Grigsby*, 111 F.3d 806, 817 (11th Cir. 1997)).

79. 16 U.S.C. § 3372 (1994). For a brief overview and history, see Littell, *supra* note 50, at 111–12.

80. As noted in Part III(A), the defendant in *McKittrick*, 142 F.3d at 1176, was charged under a Lacey Act provision in addition to the ESA. That provision of the Lacey Act, though, 16 U.S.C. § 3373(d)(2) (1994), has an express mens rea requirement regarding the attendant circumstances at issue in *McKittrick*. *See id.*

81. *United States v. Bronx Reptiles, Inc.*, 217 F.3d 82, 86 (2d Cir. 2000); *see* 18 U.S.C. § 42(c) (1994). The Act further provides that "the conditions of any vessel or conveyance, or the enclosure in which wild animals . . . are confined therein, upon its arrival in the United States . . . shall constitute relevant evidence in determining whether" this provision has been violated. § 42(c)(1). Also, "the presence in such vessel or conveyance at such time of a substantial ratio of dead, crippled, diseased, or starving wild animals . . . shall be deemed prima facie evidence" of a violation. § 42(c)(2).

82. 18 U.S.C. § 42(b) (1994); *see* 18 U.S.C. § 3571(c)(6) (1994).

83. *Bronx Reptiles*, 217 F.3d at 90 (2d Cir. 2000).

84. *United States v. Bronx Reptiles, Inc.*, 949 F. Supp. 1004, 1005–07 (E.D.N.Y. 1996), *aff'd*, 26 F. Supp. 2d 481 (E.D.N.Y. 1998), *rev'd*, 217 F.3d 82, 90 (2d Cir. 2000). This decision will hereinafter be referred to in short-form citations as "*Bronx Reptiles I*," while the Second Circuit decision will be referred to simply as "*Bronx Reptiles*." Skinks are long-tailed, cone-headed lizards. 10 Encyclopedia Britannica 865 (15th ed. 1995).

85. *Bronx Reptiles I*, 949 F. Supp. at 1006. Because their respiratory system fails if their skin dehydrates, frogs must be packed with damp materials, including a reservoir of water and a sponge. To prevent them from damaging their skin through violent motions during transit, they must be packed in small compartments. Because if one frog dies, bacteria from its decomposing body can kill others it is packed with, frogs must be packed in small numbers. The frogs that Bronx Reptiles imported were packed with no source of moisture, all 73 together in one large compartment. *Id.* The frogs were less valuable than the skinks, which may explain why they were packed so carelessly. The skinks survived the journey in good health. *Id.*

86. *Id.*

87. *Id.* at 1007–08.

88. *Id.* at 1004; *see* 18 U.S.C. § 3571(c)(6) (1994). Although the Act provides for imprisonment as well as fines, 18 U.S.C. § 42(b) (1994), no individuals were charged and only fines were sought.

89. *Bronx Reptiles I*, 949 F. Supp. at 1012 n.14.

90. *Id*. at 1010–11.

91. *Id.* at 1012.

92. Importation of wild animals is a highly regulated field. *See*, *e.g.*, 50 C.F.R. § 14.93 (2000) (requiring importer to maintain records of all wildlife transactions for five years, make available for inspection place of business, inventory and records, and certify familiarity with all FWS laws applicable to his business); §§ 14.93(b)(7), 114.94(d) (inspection fees); § 14.61 (shipment declarations, including identification of species and country of origin); §§ 14.51–55 (inspection and clearance); § 14.54(a) (requiring 48-hour notice of shipments); §§ 14.31–33 (requiring use of ports staffed by FWS unless special justification for using another); § 14.12 (listing only four staffed ports on the east coast); § 13.12 (particular requirements for individual species). Other regulations and statutes similarly regulate the field.

93. The government made this point in its brief to the Second Circuit. *See* Brief for Appellee, United States at 34, *United States v. Bronx Reptiles, Inc.*, 217 F.3d 82 (2d Cir. 2000) (No. 98-1686).

94. *But see infra* Part III(D).

95. *See supra* notes 72, 82 and accompanying text.

96. *Bronx Reptiles I*, 949 F. Supp. at 1012. Although directly applicable only to *criminal* prosecutions under the "unhealthful conditions" provision of the Lacey Act, *Bronx Reptiles'* specific intent requirement could weaken *civil* enforcement under that provision as well. Civil actions under the Lacey Act proceed under a general provision making it unlawful "to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States." 16 U.S.C. § 3372(a)(1) (1994). The prohibited act in both civil and criminal contexts is "knowingly caus[ing] or permit[ing importation] . . . under inhumane or unhealthful conditions," under 18 U.S.C. § 42(c). It is the "knowingly" of § 42(c) that the Second Circuit interpreted to apply to the conditions as well as to the importation, so civil enforcement would appear to require knowledge of the conditions as well. The general civil enforcement provisions already require a showing that the defendant "in the exercise of due care should know that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty, or regulation." 16 U.S.C. § 3373(a)(1) (1994). Whether the "should know" of this provision would apply in addition to, or instead of, the actual

knowledge that *Bronx Reptiles* now requires under the underlying "conditions" provision is an open question. One might argue that the *Bronx Reptiles* holding does not apply to the civil provision, because it was reached in reliance on principles of criminal law. However, the majority claimed to rely on a textual analysis as well, and there is no textual basis for distinguishing the two situations. If *Bronx Reptiles* is interpreted to require knowledge of conditions in both civil and criminal contexts, it could severely hinder enforcement of the "unhealthful conditions" provision. (The negligence-like requirement of the civil enforcement provision ("should know") could be considered an argument in favor of requiring specific intent, in order to avoid the anomaly of a higher mens rea requirement for civil liability than for criminal conviction for the same act. However, the anomaly is probably explained as an unintended consequence of the interworking of two provisions that apply to a different range of acts. Whereas 18 U.S.C. § 42(c) pertains only to inhuman or unhealthful conditions, 16 U.S.C. § 3373(a) concerns all "conduct prohibited by any provision of this Act." *Id.* Congress evidently failed to iron out the inconsistency between its negligence-like standard for a wide range of civil violations and its lower, general-intent standard for one specific crime.).

97. *Bronx Reptiles I*, 949 F. Supp. at 1012 n.14.

98. *Id.* at 1011–14; *see United States v. St. Onge*, 676 F. Supp. 1044, 1045 (D. Mont. 1988); *supra* text accompanying notes 62–76.

99. *United States v. Billie*, 667 F. Supp. 1485, 1492 (S.D. Fla. 1987); *see supra* section I.

100. *Bronx Reptiles I*, 949 F. Supp. at 1011–14; s*ee United States v. FMC Corp.*, 572 F.2d. 902 (2d Cir. 1978); *infra* text accompanying notes 119–126.

101. *Bronx Reptiles I*, 949 F. Supp. at 1011–14; s*ee United States v. Boynton*, 63 F.3d 337, 343 (4th Cir. 1995); *infra* note 126 and accompanying text.

102. As noted above, the Lacey Act is primarily a device to enforce other statutes. *See supra* note and accompanying text; *see also* notes 78, 80 and accompanying text (discussing *McKittrick*).

103. *United States v. Bronx Reptiles, Inc.*, 26 F. Supp 2d 481 (E.D.N.Y. 1998), *rev'd,* 217 F.3d 82 (2d Cir. 2000).

104. *United States v. Bronx Reptiles, Inc.*, 217 F.3d 82, 90 (2d Cir. 2000).

105. *Id.*

106. Rather, it is discussed in the section concerning the usual presumption in favor of specific intent. *Id.* This organizational tactic was a double victory for specific intent. First, it allowed the majority to argue that, even if it was wrong that prosecutors would be able to show knowledge, its hands were tied by the "fundamental presumption" in favor of specific intent. *Id.* ("[T]hat decision belongs to Congress, not to us."). Second, it eliminated one of the central arguments in favor of applying public welfare doctrine—before the discussion of public welfare doctrine had even begun.

107. *Id.* at 91 (quoting *Staples v. United States*, 511 U.S. 600, 607 (1994)).

108. *Bronx Reptiles*, 217 F.3d at 90.

109. In fact, not a single case pertaining to an environmental law other than the Lacey Act is cited.

The majority begins its analysis by claiming that it "seems reasonably clear from a reading of the text that the word 'knowingly' in this sentence refers to all three of the phrases that follow." *Id.* at 86; *see* 18 U.S.C. § 42(c) (1994); *supra* text accompanying note 81. This surprising assertion is not defended textually and may have failed to convince even its author, for the bulk of the majority opinion addressed the proper issue of the case: how to interpret the mens rea requirement "[i]f a simple review of the language" does not resolve the question. *Id.* at 87. The only truly textual argument in the decision is that "there is nothing in the structure or punctuation of §42(c) that signals the reader that 'knowingly' does *not* apply to the phrase 'under inhumane or unhealthful conditions.'" *Bronx Reptiles*, 217 F.3d at 86. This, of course, is an argument that the text is ambiguous. Regarding a more serious concern identified by the majority, see *infra* Part III(D).

Judge Oakes dissented. He disagreed with the majority's assessment of the difficulty of convicting if specific intent were required, *Bronx Reptiles*, 217 F.3d at 93, and refuted the majority's view that dangerousness was a necessary element for notice under public welfare doctrine. In his view, "[t]he fact that [the defendant] is arranging for the transport of animals that are *alive*" was sufficient notice. *Id.* at 92. He argued that Bronx Reptiles could have taken steps to insure that its shippers packed its animals in a healthful manner, *id.* at 91, and that "the evidence in this case is sufficient so that a jury could find that Bronx Reptiles knew there was a high probability that the frogs would be shipped under inhumane conditions and was aware that it was doing something wrong." *Id.* at 93. In putting forth knowledge of likelihoods as a basis for conviction, the dissent seems to have been arguing that something like negligence or recklessness regarding the unhealthful packing conditions should be required. No such finding of knowledge or expectations on the part of Bronx Reptiles appears in the decision of the magistrate judge or the district judge. Because Judge Oakes perceived that the defendant had a level of mens rea (though short of knowledge) he did not share the majority's concern that upholding the conviction would criminalize innocent acts. *Id.* The dissent followed the majority in ignoring the wildlife protection statutes and case law.

110. Factually, there is a plausible argument that the court was incorrect that imported animals are not dangerous. Although the court was not briefed on this issue, *see* Brief for Appellee, United States, *United States v. Bronx Reptiles, Inc.*, 217 F.3d 82 (2d Cir. 2000) (No. 98-1686), animals imported under unhealthful conditions are more likely to contract diseases, and those already ill are more likely to spread disease to humans and other animals. In one study related to zoonosis from turtles, for example,

> latent salmonella infections were "activated" by simply dehydrating the turtles for 10 to 14 days. The authors of the study suggested that many human infections that resulted from turtles certified to be free of salmonella organisms actually were acquired from animals who had latent infections exacerbated by the stress of shipping and new and unnatural environments, such as pet stores, holding facilities, and diet alterations.

Douglas R. Mader, Reptile Medicine and Surgery 23 (W.B. Saunders Company 1996). As this study indicates, the improper care of animals, including the sort of harsh treatment that Bronx Reptiles was charged with (including, specifically in this case, dehydration), can result in increased risk of infection in humans from bacteria carried by animals. *See also* California Zoological Supply, Reference Sheet #1102 Reptile Associated Salmonella (2000), *available at* http://www.calzoo.com/pdf/salmonlla.pdf ("Stress and other factors will initiate the release of the bacteria [that leads to salmonella] from reptiles."). As it turns out, imported animals, including especially "exotic pets" have created a significant public health problem. *See* Mark Derr, *Lure of the Exotic Stirs Trouble in the Animal Kingdom*, N.Y. Times, Feb. 12, 2002, at F5. Reptiles alone account for about 20 deaths and 90,000 injuries a year in the Unites States, from salmonella, bites, and constriction by snakes, among other causes. *Id*. Dog attacks, by contrast, lead to only 12 deaths each year. *Id*. If the court had been aware that imported animals, and particularly those that

are mistreated, pose a substantial danger to humans, perhaps it would have given greater weight to the argument that Congress intended to put the burden on the importer to avoid that risk.

One might also object to the majority's focus on the fact that frogs, in particular, are not dangerous. *Bronx Reptiles*, 217 F.3d at 90; *see supra* text accompanying note 107. The statute being interpreted encompasses the importation of any animal. 18 U.S.C. § 42(c) (1994). Quite a few animals are rather obviously dangerous. Even if some importers import only "harmless" animals, Congress might well have considered animal importation a dangerous activity.

111. *See supra* text accompanying notes 40–42.

112. As the dissent noted, there is no question that Bronx Reptiles was so aware, as it had been cited under the same regulations four times previously. *Bronx Reptiles*, 217 F.3d at 92; *United States v. Bronx Reptiles, Inc.*, 949 F. Supp. 1004, 1007–08 (E.D.N.Y. 1996), *aff'd,* 26 F. Supp. 2d 481 (E.D.N.Y. 1998), *rev'd,* 217 F.3d 82, 90 (2d Cir. 2000); *supra* text accompanying note 87. Both the majority and the dissent seemed to miss the more central point, however, that the importation of animals is a highly regulated activity, often regulated in minute detail, so that notice to importers can hardly be an issue. *See supra* note 92.

113. *See* 16 U.S.C. §§ 703–712 (1994).

114. *Id*. § 703. The whole list of prohibited acts is quite long. *See id.*

115. *Id*. § 707(c). There is also a felony provision under the MBTA, which requires "intent to sell, offer to sell, barter or offer to barter." *Id*. § 707(b)(1). This requirement was added in 1986, in response to a Sixth Circuit case holding the lack of the mens rea requirement unconstitutional. *United States v. Wulff*, 758 F.2d 1121, 1125 (6th Cir. 1985). The case law on the new felony provision is not well developed, and this article will not address it.

116. 16 U.S.C. § 707(a) (1994 & Supp. V 1999).

117. *See* 16 U.S.C. §§ 703–712 (1994).

118. *See supra* Parts II(A) and II(B).

119. 572 F.2d 902, 906 (2d Cir. 1978).

120. *See supra* note 66.

121. *United States v. FMC Corp.*, 572 F.2d 902, 907 (2d Cir. 1978).

122. *United States v. Delahoussaye*, 573 F.2d 910, 912–13 (5th Cir. 1978).

123. *See Staples v. United States*, 511 U.S. 600, 602–03 (1994); *supra* note 41.

124. *See supra* text accompanying notes 61, 82, 116 and accompanying text. When *FMC* was decided, the maximum penalty was a fine of $500, imprisonment for six months, or both. *See FMC*, 572 F.2d at 904.

125. Even *Delahoussaye*, which required negligence, noted that "to require . . . actual guilty knowledge . . . would render the regulations very hard to enforce and would remove all incentive for the hunter to take reasonable precautions 'to clear the area.'" *Delahoussaye*, 573 F.2d at 913.

126. *See United States v. Corrow,* 119 F.3d 796, 805 (10th Cir. 1997); *United States v. Boynton*, 63 F.3d 337, 343 (4th Cir. 1995); *United States v. Smith*, 29 F.3d 270, 273 (7th Cir. 1994); *United States v. Engler*, 806 F.2d 425, 431 (3d Cir. 1986), *cert. denied*, 481 U.S. 1019 (1987); *United States v. Catlett*, 747 F.2d 1102, 1105 (6th Cir. 1984); *Rogers v. United States*, 367 F.2d 998, 1001 (8th Cir. 1966), *cert. denied*, 386 U.S. 943 (1967). *But see Delahoussaye*, 573 F.2d at 913. The *Corrow* court mistakenly implied that the Ninth Circuit decided the issue in *United States v. Wood*, 437 F.2d 91 (9th Cir. 1971). *Corrow*, 119 F.3d at 805.

127. *See Delahoussaye*, 573 F.2d at 912 ("[A] minimum form of scienter—the 'should have known' form—is a necessary element of the offense.").

128. *See* S. Rep. No. 99-445, at 16 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6113, 6128 ("Nothing in this amendment is intended to alter the 'strict liability' standard for misdemeanor prosecutions under 16 U.S.C. § 707(a), a standard which has been upheld in many Federal court decisions."). *Delahoussaye*, 573 F.2d at 912–13.

129. Migratory Bird Treaty Reform Act of 1998, Pub. L. No. 105-312, § 102, 112 Stat. 2956, 2956 (*codified at* 16 U.S.C. § 704(b) (Supp. V 1999)).

130. *United States v. Adams*, 174 F.3d 571, 576 (5th Cir. 1999) ("Unique among the circuits, we require a minimum level of scienter as a necessary element of an offense of the MBTA." (internal quotation marks omitted)).

131. *See id.*; *United States v. Sylvester*, 848 F.2d 520, 521 (5th Cir. 1988); *Delahoussaye*, 573 F.2d at 913. Dissenting in *United States v. Lee*, Judge Politz argued that "[i]n affirming the convictions of these defendants, the majority has abandoned *Delahoussaye*'s holding and guiding principle: that the 'should have known' form of scienter is a necessary element." 217 F.3d 285, 290 (5th Cir. 2000). In *Adams*, convictions were reversed, in the shadow of the no-strict-liability rule, but the determinative issue was the meaning of the word "baiting" under the regulations. 174 F.3d at 576.

132. Reported cases are, admittedly, a small portion of the data one would require to consider fully the consequences of the rule on enforcement. Most obviously, the effect on deterrence, if any, is not reflected.

133. *See supra* notes 77–78, 98–102 and accompanying text.

134. *See supra* Part II(B) (discussing the issue of whether the activity regulated by the statute is of such a nature that those engaging in it can reasonably be expected to take precautions necessary to avoid violations).

135. 16 U.S.C. § 1538(a)(1)(B) (1994).

136. *Babbitt v. Sweet Home Chapter Communities for a Great Ore.*, 515 U.S. 687, 702 (1995).

137. 6 F. Supp. 2d 81, 82 (D. Mass. 1998).

138. *Town of Plymouth* involved, rather, the duty of the municipality to prevent the use of such vehicles where they created the risk of prohibited takings. *Id.*

139. *United States v. Bronx Reptiles, Inc.*, 217 F.3d 82, 86 (2d Cir. 2000) (quoting 18 U.S.C. § 42(c) (1994)).

140. *Staples v. United States*, 511 U.S. 600, 614–15 (1994).

141. *Liparota v. United States*, 471 U.S. 419, 433 (1985).

142. 18 U.S.C. § 42(c) (1994).

143. 16 U.S.C. §§ 3372(a), 3373(d) (1994). However, the general criminal provisions of the Act explicitly require a minimum level of culpability with respect to attendant circumstances. S*ee id.* § 3373(d)(2) (requiring for conviction that the defendant "in the exercise of due care should know that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation").

144. *See*, *e.g.*, *Newton County Wildlife Ass'n v. United States Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997) ("[I]t would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that *indirectly* results in the death of migratory birds."). *See generally* Helen M. Kim, *Comment: Chopping Down the Birds: Logging and the Migratory Bird Treaty Act*, 31 Envtl. L. 125 (2001) (arguing that loggers have inappropriately escaped conviction); Larry Martin Corcoran & Elinor Colbourn, *Shocked, Crushed and Poisoned: Criminal Enforcement in Non-Hunting Cases Under the*

Migratory Bird Treaties, 77 Denv. U. L. Rev. 359, 389–90 (1999) (discussing timber harvest cases under MBTA).

145. *See supra* Part III(C).

146. *Staples v. United States*, 511 U.S. 600, 614 (1994).

147. *Liparota v. United States*, 471 U.S. 419, 433 (1985).

148. *But see United States v. FMC Corp.*, 572 F.2d. 902, 905 (2d Cir. 1978) ("Such situations properly can be left to the sound discretion of prosecutors and the courts.").

149. *See supra* notes 77–78, 98–102 and accompanying text.

150. *See supra* Part III(A).

151. *See supra* note 76.

152. *See United States v. McKittrick*, 142 F.3d 1170, 1176 (9th Cir. 1998), *cert. denied*, 525 U.S. 1072 (1999); *United States v. Nguyen*, 916 F.2d 1016, 1019 (5th Cir. 1990).

153. *United States v. Bronx Reptiles, Inc.*, 217 F.3d 82, 90 (2d Cir. 2000); *see supra* Part III(B).

154. *See supra* Part III(C).

155. From the point of view of public welfare doctrine, it will be remembered, this holding is consistent with that of general intent under the ESA, because the ESA expressly requires knowledge with respect to the actus reus. *See supra* notes 60–61 and accompanying text.

156. *See United States v. Corrow* 119 F.3d 796, 805 (10th Cir. 1997); *United States v. Boynton*, 63 F.3d 337, 343 (4th Cir. 1995); *United States v. Smith*, 29 F.3d 270, 273 (7th Cir. 1994); *United States v. Engler*, 806 F.2d 425, 431 (3d Cir. 1986), *cert. denied*, 481 U.S. 1019 (1987); *United States v. Catlett*, 747 F.2d 1102, 1105 (6th Cir. 1984); *United States v. FMC Corp.*, 572 F.2d 902, 906 (2d Cir.1978); *Rogers v. United States*, 367 F.2d 998, 1001 (8th Cir. 1966), *cert. denied*, 386 U.S. 943 (1967); *supra* note 126.

157. *See United States v. Delahoussaye*, 573 F.2d 910, 913 (5th Cir. 1978); *supra* notes 127–131.

158. *See supra* notes 127–131.

159. *See supra* notes 77–78, 98–102 and accompanying text.

160. 18 U.S.C. § 42(c) (1994).

161. Barbara R. Newell, an attorney at the Animal Legal Defense Fund, has proposed regulations along these lines to the FWS. Letter from Barbara R. Newell to Kevin R. Adams, Chief, Division of Enforcement, U.S. Fish and Wildlife Service 1 (Jan. 10, 2002) (on file with author). Newell would require an importer to certify both that it has provided its foreign exporter with FWS pamphlets detailing humane shipping standards, and that it has made those shipping standards an express term and condition of its agreement with the exporter. *Id*. False certifications could be prosecuted as such. *Id*. at 2 (citing 18 U.S.C. § 1001 (1994)).

162. 18 U.S.C. § 42(b).

163. The ESA also delegates broad power to the agency "to promulgate such regulations as may be appropriate to enforce this chapter." 16 U.S.C. § 1540(f) (1994).

164. The federal government would probably have to administer any programs itself, in order to avoid "commandeering" problems under *Printz v. United States*, 521 U.S. 898, 917 (1997).

165. *See United States v. Bronx Reptiles, Inc.*, 217 F.3d 82, 90 (2d Cir. 2000); *supra* Part III(B).

166. *See United States v. Delahoussaye*, 573 F.2d 910, 913 (5th Cir. 1978); *supra* notes 126–133 and accompanying text.

167. An example of such a clause is found in a provision of the Lacey Act discussed briefly above. *See supra* note 80; 16 U.S.C. § 3373(d)(2) (1994).

168. *See supra* Part III(C).

169. *See supra* note 131 and accompanying text.

David Gold tied for first place in the Environmental Law Section's Essay Contest. He received his J.D. this past May from Columbia Law School. From this coming September through August 2003 he will be a law clerk to Judge Stephen Reinhardt of the Court of Appeals for the Ninth Circuit. I am grateful to Stanley Alpert, Megan Brodkey, Bradley Karkkainen, Debra Livingston, Jenna Minicucci, Corinne Schiff and Jason Solomon for their vrey helpful discussions, comments and suggestions.

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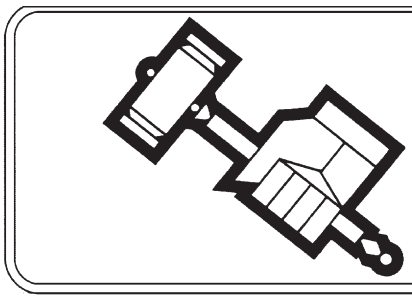

Administrative Decisions Update

Prepared by Peter M. Casper

CASE: ***In the matter of the application for a mined land reclamation permit pursuant to Article 23 of the Environmental Conservation Law (ECL), a freshwater wetland permit pursuant to Article 24 of the ECL, a State Pollutant Discharge Elimination System (SPDES) Permit pursuant to Article 17 of the ECL, and an Air Pollution Control Permit pursuant to Article 19 of the ECL for a proposed mine in the Town of Hartford, Washington County by Jointa-Galusha LLC.***

AUTHORITIES: ECL Article 23 (Mined Land Reclamation Permit) (MLRP)

ECL Article 17 (State Pollutant Discharge Elimination System Permit) (SPDES)

ECL Article 24 (Freshwater Wetland Permit)

ECL Article 19 (Air Pollution Control Permit)

6 NYCRR Parts 420 through 425 (MLRP)

6 NYCRR Parts 750 through 758 (SPDES)

6 NYCRR Part 663 (Freshwater Wetland Permit)

6 NYCRR Part 201 (Air Pollution Control Permit)

DECISION: On May 7, 2002, New York State Department of Environmental Conservation (DEC) Commissioner Erin Crotty (Commissioner) issued an interim decision with respect to appeals from Administrative Law Judge (ALJ) P. Nicholas Garlick on, among other things, impacts to wetlands and DEC Jurisdiction over unmapped wetlands located near a proposed mining operation.

A. Facts

Jointa-Galusha, LLC (Applicant) owns approximately 1,300 acres in the Town of Hartford, on which it currently conducts mining operations. The Applicant proposes to expand its mining operation with the addition of a new mine which would occupy approximately 190 acres. There exists approximately 35 acres of wetlands on the Applicant's property in the area of the proposed mine, which are not included on the DEC's final freshwater map applicable to the proposed mine. The 35 acres of wetlands are connected to mapped freshwater wetlands elsewhere on the Applicant's property.

In connection with its proposal the Applicant applied for a Mined Land Reclamation Permit; a SPDES permit; a Freshwater Wetland Permit; and an Air Pollution Control Permit. The DEC designated itself lead agency under the State Environmental Quality Review Act (SEQRA) and on April 6, 2000 determined that the project may have a significant environmental impact and required the preparation of an Environmental Impact Statement (EIS).

On October 1, 2001, ALJ Garlick addressed various issues raised by intervenors—which consisted of a group called Hartford Opposes Mineral Extraction (H.O.M.E.) and two individual residents who did not belong to H.O.M.E. (collectively "Intervenors")—and the Applicant. Discussed below are the Commissioner's determinations with respect to these rulings.

B. Discussion

Impacts on Wetlands

ALJ Garlick, among other things, made several rulings which related to potential adverse impacts to wetlands by the Applicant's project. He determined that the Applicant's study on wetland recharge was sufficient in analyzing any potential impacts. ALJ Garlick also determined that the expected rainfall and the impermeability of the clay under the wetlands provided a reasonable basis for the finding that there were no likely groundwater supply problems associated with the project. He also determined that the Intervenor's proof with respect to potential threats of invasive species migration was insufficient and speculative. Finally, ALJ Garlick determined that the issue regarding the Applicant's proposal to pump water from the mine should be adjudicated unless the Applicant withdrew its plans to pump the mine water into the wetlands. The Intervenors appealed all of the issues mentioned above. The Applicant stipulated on the record that it would withdraw its pumping proposal and argued that as a result the ALJ's ruling on pumping was moot.

The Commissioner upheld the rulings made by ALJ Garlick with respect to the potential impacts on the wetlands. In support of her decision, the Commissioner pointed to Intervenors' own report which showed that the presence of the purple loosestrife—an invasive species—is already on the premises and Intervenors' concerns over temperature changes and pH levels were rendered moot by the Applicant's decision not to pump.

Wetlands Permitting and Jurisdictional Issues

ALJ Garlick made seven rulings on the issue related to the unmapped wetlands that were discovered during the permitting process for the project. The ALJ required the DEC to assert jurisdiction over the unmapped wetlands prior to the project commencing. The ALJ also required the Applicant to obtain a wetlands permit from the DEC prior to the construction of a proposed access road from the mine site. The ALJ also held that it was premature to decide issues related to the wetlands standard for the new wetlands permit. However, the ALJ did rule that the issue of an alternate location of the access road could be adjudicated. Finally, the ALJ held that no issue existed with respect to the adequacy of proposed compensatory wetlands, even though Applicant's mitigation plan involved the creation of wetlands to mitigate for the damage to the unmapped wetlands impacted by the access road.

On appeal, the Applicant argued that the DEC has no authority to regulate unmapped wetlands. While Intervenors agreed with the ALJ with respect to the need to assert jurisdiction over the unmapped wetlands, they further argued that the DEC has a mandatory duty to assert jurisdiction in accordance with ECL § 24-0301(7) and *In re Dailey.*

The Applicant, among other things, also appealed the ALJ's ruling with respect to the need for adjudicating alternative access roads, stating that the two northern routes are impracticable. Among several arguments raised by Intervenors on this issue, they argued that adjudication of alternative access roads should be upheld as a matter of law, since DEC Staff's failure to appeal this Ruling indicated that DEC Staff disagreed with the Applicant. The Intervenors also argued that the statements made by the Applicant's attorney in its appeal arguing that the road alternatives to the north are not feasible should not be considered since such contentions did not constitute expert proof and were not in the record.

Finally, the Intervenors argued that the ALJ's determination that the mitigation plan provided by the Applicant was adequate was incorrect and should be reversed. In support of their argument, the Intervenors stated that since there were factual disputes with respect to whether the mitigation plan provides different functions and values than the wetlands destroyed by the project, the issue must be adjudicated.

In making her Decision, the Commissioner stated that the jurisdictional issues presented by the parties have broad and substantive and procedural implications on how the DEC carries out its permitting and environmental review obligations for unmapped, yet jurisdictional wetlands. The Commissioner pointed out that the 35-acre wetlands on the Applicant's site are connected to mapped freshwater wetlands and thus qualify as wetlands subject to the jurisdiction of the DEC. The Commissioner concluded that, regardless of the wetlands' present status, the unmapped wetlands should be treated as part of an entirely larger freshwater wetland complex subject to the jurisdiction of the DEC. This is required by the duty imposed upon the Department to safeguard New York State's valuable wetland resources in accordance with the authority set forth in the State's "Freshwater Wetlands Act," stated the Commissioner. In making her determination, the Commissioner refused to suspend the permit review process to allow for a map amendment hearing on the existing unmapped jurisdictional freshwater wetlands, as requested by Intervenors in their appeal. The Commissioner did state that the adjudicatory hearing could be used to develop a record on the impact of the Project on the wetlands such that both the procedural and substantive requirements of the freshwater wetland regulations and SEQRA could be met.

As a result of her determination with respect to the unmapped wetlands, the Commissioner suspended any adjudication required by her Interim Decision pending the modification of the existing draft wetlands permit to address the new jurisdictional wetland area and to make any additional modifications necessary for the Applicant's proposed access road, given the recognition of the jurisdictional nature of the unmapped wetlands. The Commissioner did uphold the ALJ's determination that the Applicant's proposed mitigation plan was sufficient since the plan included mitigation for the potential impacts of the proposed access road.

Other Issues

The Commissioner reversed the ALJ's ruling that mitigation measures were foreclosed for adjudication on noise issues except for the machinery and equipment used at the site. The Commissioner called for further information on noise and its impacts on the surrounding area which will be needed during the adjudicatory process to meet the SEQRA "hard look" requirement.

Several ancillary rulings by the ALJ were upheld by the Commissioner, including, among others, adequate review of potential archeological impacts, visual impacts, groundwater impacts and impacts on endangered species.

C. Conclusion

Based upon the foregoing determinations, the Commissioner remanded the matter to the ALJ for further proceedings consistent with her Interim Decision.

* * *

CASE: ***In the matter of the application for a tidal wetlands permit, use and protection of water permit, and water quality certification pursuant to the Environmental Conservation Law (ECL) by Stephen Kroft (Applicant).***

AUTHORITIES: ECL Article 15 (Water Resources)

ECL Article 25 (Tidal Wetlands)

6 NYCRR Parts 608 (Use and Protection of Waters)

6 NYCRR Part 661 (Tidal Wetlands)

DECISION: On July 8, 2002, New York State Department of Conservation (DEC) Commissioner Erin Crotty (Commissioner) adopted the hearing report of Administrative Law Judge (ALJ) Richard R. Wissler, subject to limited comments. In his report, ALJ Wissler determined that the Applicant's proposed dock would cause undue adverse impacts to tidal wetlands located near the Hamlet of Noyack, Town of Southampton, Suffolk County.

A. Facts

The Applicant sought various permits from the DEC to construct a private dock facility at his private residence in Noyack, New York. The site is on the south shore of Noyack Bay, which is a part of the Peconic Estuary. On March 9, 2001, DEC Staff advised the Applicant that his permit application was denied because the dock as proposed would have an undue impact on the present and potential values of the tidal wetlands at the site and the proposal was not reasonable and necessary taking into account alternatives such as the use of a mooring to anchor a boat. Pursuant to proper Notice, the ALJ convened the public legislative hearing on August 12, 2001. Fourteen persons spoke at the hearing, including the Applicant. The Applicant's engineer testified and stressed the need to make the dock substantial enough to withstand winter ice impacts. The South Fork Groundwater Task Force, among others, spoke against the proposed dock and stressed the need to protect the waters of the Peconic Estuary and stated that the construction of this dock and others that would follow would be detrimental to the protection of the estuary.

An issues conference was convened following the public legislative hearing and only the DEC Staff and the Applicant participated as no one else had filed for party status. The issues for adjudication were: (1) Whether the proposed project meets the standards for issuance of a tidal wetlands permit in 6 NYCRR § 661.9(b)(1)(i), (ii) and (iii); (2) Whether the proposed project meets the standards for issuance of a protection of waters permit specified in 6 NYCRR § 608.8; and (3) Whether the proposed project meets the standards for issuance of a water quality certification pursuant to 6 NYCRR § 608.9. In February and March the parties submitted briefs in support of their various arguments.

ALJ Wissler ruled that the project does not comply with the standards for a tidal wetlands permit, in that it would have an undue adverse impact on the tidal wetland at the site for marine food production, wildlife habitat, flood and hurricane storm control, cleansing ecosystems, absorption of silt and organic material, recreation and open space appreciation. The ALJ found that shading from the 1,592 square foot structure would cause a significant diminution in the ability of species to survive. In making his ruling, the ALJ asserted that the analysis required by 6 NYCRR § 661.9(b)(1)(i) is site-specific, and the fact that the size of the Applicant's project is minuscule when compared to the entire area of Noyack Bay is irrelevant and does not negate the existence of important tidal wetland functions at the site. Additionally, the ALJ ruled that the project does not comply with the standards in 6 NYCRR § 661.9(b)(1)(ii) in that it is not compatible with the public health and welfare. Specifically, the public currently enjoys unobstructed access to nearly six miles of beachfront in the area of the site. The area is used by the public for walking, swimming, shellfishing and recreational boating. The ALJ ruled that the Applicant's project would diminish this fundamental right of access.

The ALJ also ruled that the project did not comply with the standards set forth in 6 NYCRR § 661.9(b)(1)(iii) in that it was not reasonable and necessary, taking into account the reasonable alternatives that exist to the proposed project, like the use of a nearby commercial marina or the utilization of a mooring buoy. The ALJ finally ruled that the project failed to meet the requirements for a protection of waters permit and water quality certification since the proposal was found not to be reasonable and necessary. As a result of his rulings, the ALJ recommended that the application be denied without prejudice to pursue a new application for a residential dock structure similar in design and size to the Green and Barry/Burke permits previously issued by the DEC.

B. Discussion

In her decision, the Commissioner agreed with the ALJ with respect to the Applicant's failure to meet his burden, as required by 6 NYCRR 661.9(a) & (b), to demonstrate that the proposed project complies with standards for issuance of the necessary permits. The Commissioner stated that the project's size in such a pristine location would cause undue adverse impacts to the tidal wetlands in the area. The Commissioner also noted that the Applicant failed to demonstrate that the project was reasonable and necessary as required by 6 NYCRR § 661.9(b)(iii), given the alternatives discussed above.

As a final note, the Commissioner did not adopt the ALJ's recommendation concerning the re-application by the Applicant for a dock to the extent it implies that the DEC is compelled to approve a permit for a smaller dock, if applied by the Applicant, based upon the existence of previous permits approved for the Applicant's property. She stated that the determination of whether or not to grant a permit must be governed by the site-specific factors existing at the time a permit application is made, including particularly the current state of the natural resources at the site. In support of her decision, the Commissioner cited *In re Application of Richard and Carol Leibner,* Decision of the Commissioner, March 16, 2000; vacated on other grounds, *Leibner v. NYSDEC*, 291 A.D.2d 558 (2d Dep't 2002).

C. Conclusion

Based upon the foregoing determinations, the Commissioner remanded the matter to the ALJ for further proceedings consistent with her Interim Decision.

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Recent Decisions in Environmental Law

Student Editor: Jason P. Capizzi

Prepared by students from the Environmental Law Society of St. John's University School of Law.

Stephenson v. Dow Chemical Co., 273 F.3d 249 (2d Cir. 2001)

Facts: Appellant Joe Isaacson served in Vietnam from 1968 to 1969 as a crew chief in the Air Force. He worked at an air base where aircraft used to spray Agent Orange were stationed. In 1996 he was diagnosed with non-Hodgkins lymphoma. Isaacson filed suit in August 1998 in New Jersey State Court; the case was later removed to federal court.

Appellant Daniel Stephenson served both on the ground and as a helicopter pilot in Vietnam from 1965 to 1970. He alleged he was in regular contact with Agent Orange during his service. On February 19, 1998, he was diagnosed with bone marrow cancer. Stephenson filed suit in the Western District of Louisiana in February 1999.

Appellees are chemical manufacturers who produced and sold Agent Orange to the United States government during the Vietnam War, and were party to a 1984 class action settlement.[1] The 1984 class action settlement covered all individuals in the United States, New Zealand and Australian Armed Forces at any time during 1961 to 1972 who were injured from exposure to Agent Orange, *inter alia,* while in or near Vietnam. Spouses, parents, and children of the veterans born before January 1, 1984 directly or derivatively injured as a result of the exposure were included in the class.[2] The settlement set up a fund from which claims were to be paid from January 1, 1985 until December 31, 1994. This ten-year period was deemed sufficient to include most probable plaintiffs.[3]

The Judicial Panel on Multidistrict Litigation (MDL Panel) transferred Appellants' suits to Judge Jack B. Weinstein in the Eastern District of New York. The suits were consolidated, and then dismissed under Fed. R. Civ. P. 12(b)(6); it was asserted that the claims were barred by the 1984 class action settlement. Appellants brought an appeal before the United States Court of Appeals for the Second Circuit. The Court of Appeals held that Appellants were not proper parties to the 1984 settlement because of their inadequate representation, and as such were not bound by its terms.

Issues: Whether a previous settlement can be collaterally attacked, due to an inadequate representation of those whose claims arose after the exhaustion of the settlement's funds, without *res judicata* barring the claim.

Analysis: Finding that Appellants were not adequately represented in, and therefore not bound by, the prior 1984 class action settlement, the Court of Appeals vacated and remanded Judge Weinstein's dismissal. Since Appellants' needs were not addressed in the 1984 settlement, the Court of Appeals determined that holding them to that settlement would violate due process. The Court of Appeals followed the Supreme Court decisions in *Amchem Prods., Inc. v. Windsor*,[4] and *Ortiz v. Fibreboard Corp.*,[5] which allowed claimants deemed inadequately represented to prevent class action settlements from barring their claims.

Res judicata ordinarily applies given the following four conditions: "the earlier decision was a final judgment on the merits, by a court of competent jurisdiction, in a case involving the same parties or their privies, and involving the same cause of action."[6] Appellants fall within the class definition of the 1984 settlement; they both served in Vietnam between 1961 and 1972, and were allegedly injured by Agent Orange. The critical difference according to the Court of Appeals is that Appellants learned of their injuries only after the 1984 settlement funds had expired in 1994. Because the 1984 settlement did not address post-1994 claimants, binding Appellants to that settlement is a violation of due process.

William A. Makin, '03

Endnotes

1. *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984).
2. *Stephenson v. Dow Chemical Co.*, 273 F.3d 249, 252 (2d Cir. 2001).
3. *Id.* at 253.
4. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).
5. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).
6. *Stephenson,* 273 F.3d at 259 (quoting *In re Teltronics Services, Inc.*, 762 F.2d 185, 190 (2d Cir. 1985)).

* * *

S. Camden Citizens in Action v. New Jersey Dep't of Envtl. Prot., 274 F.3d 771 (3d Cir. 2001)

Facts: Plaintiffs, a community organization based in the South Camden, New Jersey neighborhood of "Waterfront South" and individual residents of Waterfront South, sought injunctive relief against defendant-appellant New Jersey Department of Environmental Protection (NJDEP) and intervenor-appellant St. Lawrence Cement Co., L.L.C. The residents of Waterfront South are predominately minority citizens and the neighborhood is "environmentally disadvantaged," housing a disproportionate number of Camden's contaminated sites and facilities with air pollution emission permits. Plaintiffs claimed that the NJDEP violated Title VI of the Civil Rights Act of 1964 by issuing an air permit to St. Lawrence for a ground granulated blast furnace in Waterfront South, asserting that the granting of the permit both amounted to intentional discrimination in violation of section 601 of Title VI[1] and resulted in a disparate racial impact in violation of section 602 of Title VI.[2] Plaintiffs believed that section 602 and its implementing regulations contained an implied right of action and brought suit pursuant to 42 U.S.C. § 1983. In *South Camden I*,[3] the district court granted the plaintiffs injunctive relief, and in *South Camden II*,[4] the defendants appealed to the Third Circuit.

Issue: Whether USEPA regulations promulgated under section 602 can create a private right of action enforceable under section 1983.

Analysis: To obtain a preliminary injunction, plaintiffs must demonstrate the probability of eventual success in the litigation. In *South Camden II*, the court found that the plaintiffs presented a "legally insufficient" case in this regard, as they attempted to advance through section 1983 "a cause of action to enforce § 602 of Title VI and its implementing regulations" that does not exist.[5]

The court begins its analysis by noting that *South Camden I* was decided prior to *Sandoval*,[6] where the Supreme Court recently decided that "neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602," and held that "no such right of action exists."[7] However, because the *South Camden* plaintiffs based their suit on section 1983 rather than section 602 and its regulations, the circuit court examined "whether disparate impact regulations promulgated pursuant to § 602 may, and if so do, create a right that may be enforced through a § 1983 action."[8]

The circuit court acknowledged that section 1983 has been interpreted to provide a remedy not only for constitutional or equal rights violations, but also for violations of rights created under federal statutes, except where "Congress has foreclosed such enforcement of the statute in the enactment itself" or "the statute did not create enforceable rights . . . within the meaning of § 1983."[9] The Supreme Court has established a three-part test to determine whether a federal statute creates such a right, evaluating whether Congress intended the statute to benefit the plaintiff, the specificity of the statute, and whether the statute unambiguously imposes a "binding obligation on the states."[10] Plaintiffs here asserted that the USEPA regulations promulgated under section 602 (rather than the statute itself) created such an enforceable right. In *South Camden I*, the district court agreed, applied the Supreme Court test, and granted the injunctive relief. However, in *South Camden II*, the circuit court found this conclusion erroneous and held that regulations alone cannot create a right enforceable under section 1983, leaving the plaintiffs with no federal right to enforce. In reversing the district court's order, the circuit court held that "a federal regulation alone may not create a right enforceable through § 1983 not already found in the enforcing statute" and rejected the position "that enforceable rights may be found in any valid administrative implementation of a statute that in itself creates some enforceable right."[11]

Supporting its conclusion, the circuit court noted that "the Supreme Court never has stated expressly that a valid regulation can create such a right."[12] The court analyzed the precedent cited by the district court, and found its reliance consistently misplaced. It found that the cases relied upon by the district court either dealt with regulations that defined rights which Congress actually did intend to confer through the statute in question or entirely skirted the issue presented in this case: whether a regulation alone can create a right enforceable under section 1983. The court did acknowledge *Loschiavo*,[13] where the Sixth Circuit held that federal regulations can in fact create a right enforceable under section 1983. However, in rejecting the *Loschiavo* approach, the circuit court cited the *Sandoval* holding and noted Congress' intent, or, more accurately, lack of intent to create an enforceable private right of action under section 602 and its implementing regulations. Finally, the court discussed policy considerations, and pointed out that adherence to the district court's holding would "subject vast aspects of commercial activities to disparate impact analyses by the relevant agencies."[14] The circuit court decided that Congress and not the courts should create such policy.

Circuit Judge McKee submitted a strong dissent, opining that the majority read *Sandoval* too broadly, claiming that it deals only with the existence of an enforceable right of action under section 602, not section 1983. Judge McKee felt that *Sandoval* did not affect the court's holding in *Powell* that "§ 1983 provides an

independent avenue to enforce disparate impact regulations promulgated under § 602 of Title VI."[15] Finally, Judge McKee focused on the dissent in *Sandoval*, which presumed that the remedy extinguished by the majority holding in that decision could still be attained via section 1983.

Matthew Heinz '03

Endnotes

1. 42 U.S.C. § 2000d (2001).
2. 42 U.S.C. § 2000d-1 (2001).
3. *S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.*, 145 F. Supp. 2d 446 (D.N.J. 2001)
4. *S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.*, 274 F.3d 771, 774 (3d Cir. 2001).
5. *Id.* at 777.
6. *Alexander v. Sandoval*, 532 U.S. 275 (2001).
7. *S. Camden Citizens in Action*, 274 F.3d. at 778.
8. *Id.* at 779.
9. *Id.* (quoting *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 423 (1987)).
10. *Id.* (quoting *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997)).
11. *Id.* at 790.
12. *Id.* at 781.
13. *Loschiavo v. City of Dearborn*, 33 F.3d 548 (6th Cir. 1994).
14. *S. Camden Citizens in Action*, 274 F.3d at 790.
15. *Id*. at 796 (McKee, J., dissenting).

* * *

New York v. Premier Color of N.Y., Inc., 728 N.Y.S.2d 86 (2d Dep't 2001)

Facts: Appellant, Premier Color of New York, operates a textile plant. The plant emanates noxious odors and has been deemed a public nuisance. The New York State Supreme Court, Kings County, granted Respondent's, the State of New York, motion for a preliminary injunction against the operation of the plant until the nuisance is abated. Appellant appealed the Supreme Court's decision to the Appellate Division of the New York State Supreme Court, Second Department. The Appellate Court modified the judgment by enjoining the plant's operation except during specific hours of the morning.

Issue: Whether a preliminary injunction against the operation of a textile plant that presents a public nuisance was erroneously granted.

Analysis: When a party seeking a preliminary injunction demonstrates a likelihood of success on the merits, irreparable injury without such relief, and a balance of the equities in their favor, a preliminary injunction may be granted.[1] Having noted Appellant's installation of a wet electrostatic precipitator as an alleged long-term solution to the emission problem, and that a temporary closure of the plant would most likely lead to the permanent closure of their textile-dying business, the Appellate Court found the balance of the equities to be in Appellant's favor.[2]

The Appellate Court modified the judgment of the Supreme Court by limiting the plant's operation to between the hours of 1 a.m. and 6 a.m. until the efficacy of the wet electrostatic precipitator can be measured.[3] The Appellate Court reasoned that operation during the morning hours would minimize the deleterious effects of the emissions on those surrounding the plant.[4] The matter was remitted to the Supreme Court for a hearing on Respondent's application for a permanent injunction.

Jason P. Capizzi '03

Endnotes

1. *See Doe v. Axelrod,* 73 N.Y.2d 748, 750 (1988).
2. *New York v. Premier Color of N.Y., Inc.,* 728 N.Y.S.2d 86, 86-87 (2d Dep't 2001).
3. *Id.*
4. *Id.* at 87.

* * *

UPROSE v. Power Auth. of N.Y., 729 N.Y.S.2d 42 (2d Dep't 2001)

Facts: Appellants, United Puerto Rican Organization of Sunset Park (UPROSE), et al., commenced an article 78 proceeding to review determinations of the Power Authority of the State of New York (NYPA) and the New York State Board on Electrical Generation Siting and the Environment (the "Siting Board") concerning the placement of 11 simple cycle gas-powered turbine generators. In August 2000, the NYPA authorized the purchase of the generators, and after reviewing locations, determined that two were going to be sited in Sunset Park Brooklyn; one in Williamsburg, Brooklyn; two in Long Island City, Queens; three in the South Bronx; one in Brentwood, Long Island; and one in Staten Island.

Public Service Law article X applies to a "major electric generating facility" (a facility generating more than 80 megawatts (MW))[1]; the generators at issue each have a net generating capacity of 44 MW. Designated as the lead agency pursuant to the State Environmental Quality Review Act (SEQRA), the NYPA petitioned the Siting Board for an exemption from article X pursuant to assurances that any two generator units on a common site would produce less than 80 MW. The Siting Board granted the exemption provided that the NYPA makes a "legally binding commitment" to such assurances.[2]

The NYPA next prepared an Environmental Assessment Form (EAF) and issued a negative declaration, concluding that the emissions from the generators were insignificant and that an environmental impact study was not warranted. Appellants filed an article 78 action to review the decision of the Siting Board exempting the generators from article X, and to annul the negative declaration issued by the NYPA. On April 9, 2001, the New York State Supreme Court, Kings County, denied the petition and dismissed the proceeding. That same court later amended its determination on April 20, 2001, but awarded the same relief. Appellants appealed to the New York State Appellate Court, Second Department, to review the decision.

Issues:

1. Whether the Siting Board properly interpreted Public Service Law § 160 by exempting the generators from article X.
2. Whether the New York State Supreme Court erroneously held that the NYPA's negative declaration was correctly determined.

Analysis: The Appellate Court determined that the Siting Board acted within the scope of its legitimate power when it interpreted Public Service Law § 160. In determining whether an administrative agency acted within the scope of its power, the court must "[engage] in 'a realistic appraisal of the particular situation to determine whether the administrative action reasonably promotes or transgresses the pronounced legislative judgment.'"[3] Since Public Service Law § 160 does not specify whether a design standard or operational standard should be used to define generating capacity, the Appellate Court concluded that the Siting Board's use of an operational standard was realistic and reasonable. The Appellate Court reasoned that since the Legislature failed to specify a standard in Public Service Law § 160 as it has in other sections, it could be inferred that the administrative agency was permitted to use its own discretion when making a determination.

The Supreme Court, however, erred in failing to annul the NYPA's negative declaration. When the NYPA concluded that the generating project would not have any significant adverse effects on the environment, they failed to take into account the existence of small particle pollution. The Appellate Court stated that the NYPA failed to take a "hard look"[4] at the detrimental effects of small particle pollution, specifically the 2.5-micron particulate matter. For this reason, the NYPA should have undergone an environmental impact study as to the potential adverse health effects of small particle pollution.

Regarding the NYPA's decision to forgo an environmental impact study, the Appellate Court held that an environmental impact statement must be prepared, but that the building of plants to operate the generators should continue. The Appellate Court concluded that since the projects were almost completed, the injunction should be stayed until January 31, 2002. On that date, the NYPA should have had sufficient time to prepare an environmental impact statement addressing the potential health concerns of the 2.5-micron particulate matter.

Seth Cohn '03

Endnotes

1. N.Y. Pub. Serv. Law § 160(2) (2002).
2. *UPROSE v. Power Auth. of N.Y.*, 729 N.Y.S.2d 42, 44 (2d Dep't 2001).
3. *See Niagara Mohawk Power Corp. v. Public Service Comm'n*, 69 N.Y.2d 365, 372 (1987) (quoting *Consolidated Edison Co. v. Public Service Comm'n*, 47 N.Y.2d 94, 102 (1979)).
4. *See Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417 (1986).

* * *

Silvercup Studios, Inc. v. Power Auth. of N.Y., 729 N.Y.S.2d 47 (2d Dep't 2001)

Facts: Appellants, the Power Authority of the State of New York (NYPA), planned to construct 11 natural gas powered turbine electric generators throughout the city, two of which were to be cited at 42-20 to 42-28 Vernon Boulevard, Long Island City, Queens (the "Site"). This project was classified as a Type 1 action. On November 11, 2000, the NYPA issued a negative declaration indicating that the Site would cause no adverse environmental impacts. Following hearings and a period for public comment, the requisite air pollution control permits were issued to the NYPA by the New York State Department of Environmental Conservation (DEC).

Respondent, Silvercup Studios, Inc., initiated an article 78 proceeding against NYPA seeking to have the air permits revoked and construction at the Site enjoined. Respondent claimed that the negative declaration was erroneous because construction and operation of the facility would have several adverse impacts on the environment. The New York State Supreme Court, Queens County, annulled the negative declaration and the issuance of the air pollution control permits. The Supreme Court ordered a positive declaration to be issued, and a full environmental impact statement (EIS) completed by the NYPA. Further construction of the site was also enjoined and restrained. The Second Department of the New York State Supreme Court Appellate Division stayed the injunction and affirmed the order demanding the issuance of a positive declaration and full EIS in accordance with the State Environmental Quality Review Act (SEQRA); the annulment of the air pollution permits was reversed.

Issues:

1. Whether the NYPA should have issued a positive declaration and prepared a full EIS regarding the Site.
2. Whether the DEC properly issued air pollution control permits to the NYPA.

Analysis: As the self-designated lead agency, the NYPA prepared an environmental assessment form (EAF), and then issued a negative declaration for the Site. The Supreme Court, however, found that the negative declaration was issued before information of possible environmental impacts, documented in the EAF, was submitted to the NYPA.[1] The Supreme Court therefore ordered, and the Appellate Court affirmed, that the negative declaration be annulled, a positive declaration issued, and a full EIS executed.

The threshold for the preparation of an EIS is low. SEQRA mandates an EIS when a project *may* have a significant environmental effect.[2] Although under SEQRA a Type 1 action is presumed to have a significant adverse impact on the environment, the Appellate Court stayed the injunction since the "construction [had] already commenced and [was] practically complete."[3] The stay was granted until January 31, 2002 to give the NYPA enough time to comply with SEQRA.

The judicial standard of review of a lead agency's SEQRA determination is whether it was in violation of lawful procedure, affected by error of law, or was arbitrary and capricious or an abuse of discretion.[4] A court may review the record to decide whether the lead agency took a "hard look" at the environmental concerns and made a "reasoned evaluation" in its determination, but deference must ultimately be given to the agency's determination.[5]

The Supreme Court annulled the air pollution permits granted by the DEC on procedural grounds. However, finding that the time for public comment was in compliance with the applicable regulations, the Appellate Court reversed. The required time for public comment is 30 days,[6] and public hearings must begin within 90 days after a permit application is complete.[7] Completed on November 20, 2000, notices of Appellant's permit application were posted in newspapers and on the DEC's Web site by November 22, 2000. On December 14, 2000, hearings were held, and the public comment period was extended to December 22, 2000. Since the public comments failed to raise any substantive or significant issues, an adjudicatory hearing was not warranted.

Brian McCaffrey '03

Endnotes

1. *Silvercup Studios, Inc. v. Power Auth. of N.Y.*, 729 N.Y.S.2d 47, 49 (2d Dep't 2001).
2. *See Omni Partners, L.P. v. County of Nassau*, 654 N.Y.S.2d 824, 826 (2d Dep't 1997).
3. 729 N.Y.S.2d at 50.
4. *See Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990).
5. *See Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417 (1986).
6. N.Y. Comp. Codes R. & Regs. tit. 6, § 621.5(d)(6)(i) (2002).
7. N.Y. Comp. Codes R. & Regs. tit. 6, § 621.7(g) (2002).

* * *

***Sierra Club v. Whitman*,** 268 F.3d 898 (9th Cir. 2001)

Facts: Appellants Sierra Club, Grand Canyon Chapter, et al., brought suit against the United States Environmental Protection Agency (USEPA), et al., under section 1365(a)(2) of the Clean Water Act for failing to take any action against the City of Nogales or the International Boundary and Water Commission in their joint operation of the Nogales International Wastewater Treatment Plant (the "Plant") which was polluting the Santa Cruz River. The Plant serves about 185,000 people in Arizona and Mexico.

The USEPA administers a system of permits designed to limit the discharge of specified pollutants into waterways. The Plant was issued a permit that expired in 1996, and in 1998 another was issued, but withdrawn by the USEPA before it came into effect. Between January 1995 and January 2000, the Plant had violated its permit limitations 128 times. Appellants sought to compel the USEPA to find violations or bring enforcement proceedings against the operators of the Plant under 33 U.S.C. § 1365(a)(2), which allows any citizen to sue "the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator."[1] Given the USEPA's sovereign immunity, the United States District Court of Arizona dismissed the case due to a lack of jurisdiction; the United States Court of Appeals for the Ninth Circuit affirmed.

Issue: Whether the failing or refusing to find a violation and take enforcement action under the Clean Water Act is within the USEPA Administrator's discretion and not subject to judicial review.

Analysis: Suits against any agency of the United States are barred by sovereign immunity unless they are explicitly waived,[2] as is the case in suits alleging the USEPA Administrator's failure to perform a non-discretionary duty.[3] Appellants brought their claim based on 33 U.S.C. § 1319(a)(3): "Whenever on the basis of any

information available to [her] the Administrator finds that any person is in violation of [permit conditions], [she] shall issue an order requiring such person to comply with such section or requirement, or [she] shall bring a civil action in accordance with subsection (b) of this section."[4]

The Court of Appeals recognized that in order to bring a civil suit, the USEPA must first find a violation before sanctioning the violator. The Court of Appeals found that 33 U.S.C. § 1319(a)(3) contained no language rebutting the USEPA's discretionary authority or imposing an implicit duty on the Administrator to make findings, and that Appellant's did not overcome the traditional presumption that it is within the discretion of an agency to investigate, make findings, or enforce violations unless otherwise indicated.[5] Furthermore, given the structure of the permit and enforcement system, the Court of Appeals noted that the USEPA would unreasonably be strained should they be required to make findings for every apparent violation.

The Court of Appeals concluded that because the presumptions of discretion remain, sovereign immunity was not waived, and Appellants' claim under 33 U.S.C. § 1365(a)(2) failed. The United States Court of Appeals for the Ninth Circuit affirmed the District Court's dismissal; Circuit Judge Ronald M. Gould offered a concurring opinion.

Michael Owh '03

Endnotes

1. 33 U.S.C. § 1365(a)(2) (2002).
2. *Sierra Club v. Whitman*, 268 F.3d 898, 901 (9th Cir. 2001).
3. 33 U.S.C. § 1365(a)(2) (2002).
4. 33 U.S.C. § 1319(a)(3) (2002).
5. *See Heckler v. Chaney*, 470 U.S. 821, 838 (1985).

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