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A Look at Possible Criminal Charges Arising from the Gulf Oil Spill

*Lindsey Etheridge, 2011 J.D. Candidate, Univ. of Mississippi School of Law
Niki L. Pace, J.D., LL.M.*

On June 1, 2010, U.S. Attorney General Eric Holder assured the American people that the Department of Justice (DOJ) would “prosecute to the full extent any violations of the law” committed by BP and others involved, namely, Transocean and Halliburton, in the Deepwater Horizon oil spill.¹ To that end, DOJ is reviewing the actions of all parties involved (collectively responsible parties) for any possible violations or illegal behavior. The investigation includes a look into potential violations of the Clean Water Act, the Migratory Bird Treaty Act, and the Endangered Species Act, as well as the Oil Pollution Act of 1990. This article provides a look at likely criminal sanctions responsible parties may face under environmental laws.

Clean Water Act

In passing the Oil Pollution Act of 1990, Congress amended the Clean Water Act’s (CWA) list of criminal violations to include negligent discharge of oil.² As amended, § 311 of the CWA carries specific liability provisions related to oil spills and contains an express prohibition against harmful discharges of oil into navigable waters of the United States. Those discharging the oil may also face prosecution for failure to report an oil spill or providing false information regarding the spill.³ Additionally, the CWA prohibits the unauthorized discharge of pollutants into U.S. waters and violations of established water quality standards. Those found in violation of the Act may face criminal penalties.

In assessing a potential violation, the CWA distinguishes among negligent violations, knowing violations, and knowing endangerment, with increasing penalties, respectively.⁴ A negligent violation is an act of ordinary negligence which leads to a discharge of a pollutant. Ordinary negligence occurs when one fails to use such care as a reasonably prudent and careful person would use under similar circumstances.⁵ A knowing violation requires the government to prove that the defendant knew the nature of his acts and performed them intentionally. It is not necessary to prove that the defendant knew his actions were unlawful.⁶ To show knowing endangerment, the defendant must possess actual knowledge or belief that his conduct placed another person in imminent danger of death or serious bodily injury.⁷

The CWA imposes a range of criminal penalties from fines as low as \$2,500 and/or imprisonment for up to one year for negligent violations to fines as high as \$250,000 and/or imprisonment for up to 15 years for knowing endangerment. In addition, when an organization, as opposed to an individual, is convicted of knowing endangerment, the organization can be subject to a fine of up to \$1 million.⁸ The decision to bring criminal charges by the federal government is discretionary, not mandatory. In deciding whether to pursue criminal prosecution, the government may consider factors such as prior history of the violator, the preventative measures taken, the need for deterrence, and the extent of cooperation.

Endangered Species Act

The Endangered Species Act (ESA) provides legal protection for endangered and threatened species along with the ecosystems on which they depend (termed “critical habitat” by the ESA)

species along with the ecosystems on which they depend (termed "critical habitat" by the ESA). The Act achieves these protections primarily through two provisions: § 7 (consultation) and § 9 (take prohibitions). Section 7 requires consultation by federal agencies to ensure that their actions (including the issuance of permits) do not jeopardize endangered species.⁹ While this provision is unlikely to trigger enforcement actions against responsible parties, the Center for Biological Diversity has issued its "Notice of Intent to Sue" several federal agencies, alleging agency failure to comply with § 7 with regard to oil spill related activities.

Responsible parties, however, may face substantial penalties for violations of § 9. Section 9 forbids the taking of an endangered species; the provision extends to the territorial sea as well as the high seas.¹⁰ The ESA defines take as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."¹¹ Regulations further break down the provision by defining harm as "an act which actually kills or injures wildlife," and explaining that "[s]uch act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."¹² The ESA places criminal penalties on any person who knowingly violates any provision. Criminal penalties consist of a maximum fine of \$50,000 and/or imprisonment for not more than one year, or both. Additionally, lessees of federal lands could face potential revocation of their leases if convicted of criminal violations of the ESA.¹³

In the Gulf of Mexico, the U.S. Fish & Wildlife Service has identified 38 protected plant and wildlife species that may be impacted by the oil spill, including 29 endangered species. The species range from birds to reptiles and include the West Indian manatees, whooping cranes, Mississippi sandhill cranes, gulf sturgeon, and four species of sea turtles.¹⁴ The National Marine Fisheries Service also lists the endangered sperm whale as potentially impacted by the oil spill.

Marine Mammal Protection Act

Marine mammals receive additional protection under the Marine Mammal Protection Act (MMPA). Enacted in 1972, the MMPA prohibits the taking of a marine mammal without a permit, much like the ESA, and defines take to mean "harass, hunt, capture or kill...."¹⁵ The Act extends beyond U.S. waters to include the high seas as well. However, the MMPA includes three statutory exceptions. Most notably, the Act permits, upon request, the authorization of the unintentional taking of "small numbers of marine mammals" incidental to activities such as outer continental shelf oil and gas development.¹⁶ This exception is limited, however, to instances that will have only a "negligible impact" on the species and its habitat. The MMPA carries substantial penalties. Individuals face civil penalties of up to \$10,000 for each violation. Knowingly violating the act may garner an individual a fine as high as \$20,000 per violation and/or one year imprisonment.¹⁷

Migratory Bird Treaty Act

The Migratory Bird Treaty Act (MBTA) prohibits the hunting, taking, capturing, killing, selling, and transporting of any native U.S. migratory bird, nest, or egg, at any time and by any means or in any manner.¹⁸ A violation of the MBTA is a misdemeanor. Anyone convicted is subject to a maximum fine of \$15,000 or maximum imprisonment of six months, or both.¹⁹

While the MBTA is primarily concerned with intentional hunting and capturing of migratory birds, many courts have held that a person may violate the Act without intent or knowledge; therefore a violation is, in effect, a strict liability crime.²⁰ Courts have similarly held that a person's activities, though not expressly directed at the taking of any wildlife, violate the Act if they have the incidental effect of killing protected species.²¹ The language of the MBTA supports this interpretation with its use of the phrase "by any means or in any manner" and including "kill" among the prohibited actions, which does not necessarily indicate intent.²² However, a Louisiana district court ruled in 2009 that the MBTA is not intended "to apply to commercial ventures where, occasionally, protected species might be incidentally killed as a result of totally legal and permissible activities."²³ In reaching this conclusion, the district court distinguished its holding from other cases where the taking occurred as a result of prohibited acts, implying that the higher

standard of strict liability would still apply to violations resulting from the oil spill.

Oil Pollution Act of 1990

While criminal charges for violating the OPA are found in CWA § 311 (discussed above), the OPA provides for a range of other penalties. In addition to cleanup costs and other financial obligations, the OPA imposes civil penalties for failure to satisfy OPA's financial responsibility requirement. This requirement obligates responsible parties to provide financial assurance to the federal government of their ability to meet potential financial obligations under the OPA. These obligations include the ability to pay for cleanup costs, damages to natural resources, and other costs.²⁴

The statutorily defined obligation for an offshore facility located in federal waters is \$35 million. However, the President may require a higher amount, up to \$150 million, where he determines the

amount is justified “based on the relative operational, environmental, human health, and other risks” posed by the operation.²⁵ Failure to comply with this provision may result in a maximum civil penalty of \$25,000 per day and/or judicial action against the responsible party, including a judicial order terminating operations.²⁶ The act also preserves the authority of state and federal governments to impose fines or penalties (both criminal and civil) for violations of other laws relating to the oil spill.²⁷ Texas, Louisiana, and Florida each have state specific oil spill laws that may apply.

Conclusion

DOJ continues to investigate responsible parties for any potential violations of these acts along with other criminal statutes. Attorney General Eric Holder has vowed to prosecute those responsible to the fullest extent of the law, claiming “We will not rest until justice is done.”²⁸ Meanwhile, the presidentially created BP Deepwater Horizon Oil Spill and Offshore Drilling Commission began proceedings mid-July in New Orleans. The Commission is tasked with providing recommendations on preventing and mitigating any future offshore drilling oil spills.

Endnotes

1. Eric Holder, U.S. Attorney General, Remarks on the Gulf Oil Spill (June 1, 2010) (transcript available at <http://www.justice.gov/ag/speeches/2010/ag-speech-100601.html>).
2. 33 U.S.C. § 1319(c) (2010).
3. *Id.* § 1321(b)(3), (5).
4. *Id.* § 1319(c).
5. See *United States v. Ortiz*, 427 F.3d 1278 (10th Cir. 2005); *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999).
6. *United States v. Hopkins*, 53 F.3d 533, 539 (2nd Cir. 1995).
7. 33 U.S.C. § 1319(c)(3)(B)(i).
8. *Id.* § 1319(c).
9. 16 U.S.C. § 1536.
10. *Id.* § 1538(a).
11. *Id.* § 1532(19).
12. 50 C.F.R. § 17.3 (2010).
13. 16 U.S.C. § 1540(b), (c) (2010).
14. U.S. Fish & Wildlife, *Wildlife Threatened by Gulf Oil Spill*, (June 2010), available at <http://www.fws.gov/home/dhoilspill/pdfs/FedListedBirdsGulf.pdf>.
15. 16 U.S.C. §§ 1372 & 1362(13).
16. *Id.* § 1371(a)(5).
17. *Id.* § 1375.
18. 16 U.S.C. §§ 703-712 (2010).
19. *Id.* § 707(a).
20. See, e.g., *Rogers v. United States*, 367 F.2d 998, 1001 (8th Cir. 1966); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 534 (E.D. Cal. 1978), *aff'd*, 578 F.2d 259 (9th Cir. 1978); *United States v. Moon Lake Elec. Ass’n, Inc.*, 45 F. Supp. 2d 1070, 1073 (D. Colo. 1999).
21. See *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978); *United States v. Apollo Energies Inc.*, 2009 U.S. Dist. LEXIS 6160, 2009 WL 211580 (D. Kan. 2009).
22. 16 U.S.C. § 703(a) (2010).
23. *United States v. Chevron USA, Inc.*, 2009 U.S. Dist. LEXIS 102682, 2009 WL 3645170 (W.D. La. 2009).
24. 33 U.S.C. § 2716
25. *Id.* § 2716(c)(1)(C).
26. *Id.* § 2716a.
27. *Id.* § 2718(c).
28. Eric Holder, *supra* note 1.

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