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July 11, 2007

The Honorable Alberto R. Gonzales
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Re: DOJ's Prosecution Policy For Environmental Offenses

Dear Attorney General Gonzales:

The Washington Legal Foundation (WLF) hereby petitions the Department of Justice (DOJ) to review and revise its practices and policies regarding the exercise of discretion by DOJ and U.S. Attorneys to investigate and criminally prosecute cases that have been referred by the Environmental Protection Agency (EPA) and other agencies regarding violations of federal environmental laws. As more fully discussed herein, WLF submits that criminal referrals in many cases are not justified, do not adequately consider alternative non-criminal remedies, and fail to comport with EPA's enforcement policy, which requires a showing of *both* significant environmental harm *and* culpable conduct. In addition, WLF requests that DOJ review its policies regarding criminal prosecution of environmental violations that are multi-jurisdictional and often result in successive prosecutions by U.S. Attorneys' Offices for the same offense, a practice which is both unfair and wasteful of scarce enforcement resources.

Accordingly, in order to prevent future abuses of DOJ's criminal enforcement discretion, WLF, as part of its CRIMINALIZATION OF FREE ENTERPRISE-BUSINESS CIVIL LIBERTIES PROGRAM, requests DOJ to reexamine the process by which it screens criminal referrals from EPA and other agencies (1) to ensure that criminal referrals comply with the agency's own enforcement policy and (2) to determine whether criminal prosecution is warranted in any event. Besides declining prosecution, other options available to prosecutors that should be utilized more often include referring the matter to appropriate state authorities, recommending civil or administrative remedies, or utilizing pre-trial diversion, such as deferred prosecution agreements.

WLF submits that current practices often result in inconsistent criminal enforcement of environmental laws because enforcement is often initiated and prosecuted by local U.S. Attorneys rather than being authorized, directed, and

controlled by Main Justice. For example, a typical wetland infraction under the Clean Water Act may be viewed by one U.S. Attorney's Office as a minor regulatory matter that is better handled administratively or civilly by the EPA. Yet another U.S. Attorney's Office may view that same case as warranting felony criminal prosecution, even if there is little or no environmental harm, or a lack culpable criminal intent.

In order to address these concerns, WLF requests that DOJ establish an environmental enforcement policy review group or task force composed of appropriate representatives from DOJ, including DOJ's Environmental and Natural Resource Division, Criminal Division, and the Attorney General's Advisory Committee (AGAC), including its Environmental Issues Subcommittee. DOJ may also consider establishing an interagency group to include appropriate representatives from EPA's Division of Enforcement and other agencies. Furthermore, the regulated community, members of the defense bar, and other interested persons and groups should be given an opportunity to provide comment and make recommendations on these issues for DOJ's consideration, either informally or through a formal advisory committee established for that purpose.

Interests of WLF

WLF is a national non-profit public interest law and policy center based in Washington, D.C., with supporters in all 50 states, many of whom are subject to regulation and the enforcement of local, state, and federal environmental laws. WLF devotes substantial resources to promoting free enterprise principles, a limited and accountable government, and civil and criminal justice reform.

As part of WLF's CRIMINALIZATION OF FREE ENTERPRISE-BUSINESS CIVIL LIBERTIES PROGRAM, WLF litigates environmental cases supporting individuals and businesses charged with environmental infractions, particularly where there is an absence of harm or lack of criminal intent or mens rea. *See, e.g.*, *Riverdale Mills Corp. v. Pimpare*, 392 F.3d 55 (1st Cir. 2004) (civil suit filed against EPA after criminal charges were dropped following discovery that EPA agents altered pH level readings of wastewater from facility); *United States v. McNab/Blandford*, 331 F.3d 1228 (11th Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004) (criminal prosecution and eight-year prison sentences imposed for shipping frozen seafood in wrong containers); *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993) (lack of criminal intent), *cert. denied sub nom*., *Mariani v. United States*, 513 U.S. 1128 (1995); *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996); *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000); *United States v. Hansen*, 262 F.3d

1217 (11th Cir. 2001), *cert. denied*, 535 U.S. 1111 (2002). WLF has also appeared in cases opposing unfair criminal prosecutions of business organizations that harm innocent employees and stockholders. *See, e.g., Arthur Andersen, L.L.P. v. United States*, 544 U.S. 696 (2005).

In addition, WLF's Legal Studies Division has published numerous articles and sponsored briefings on corporate criminal liability and environmental policy. *See, e.g.*, Richard Ben-Veniste and Raj De, *The "McNulty Memo": A Missed Opportunity To Reverse Erosion Of Attorney-Client Privilege* (WLF Legal Backgrounder, 2007); Paul Clinton Harris, Sr.; *Culture of Privilege Waiver Compromises Corporate Compliance* (WLF Legal Backgrounder, 2007); Michael R. Sklaire and Joshua G. Berman, *Deferred Prosecution Agreements: What Is The Cost Of Staying In Business* (WLF Legal Opinion Letter, 2005) Joe D. Whitley and Douglas S. Arnold, *Prosecutors and Courts Expand Criminalization of Environmental Law* (WLF Legal Backgrounder, 2001); Thomas G. Echikson, *New DOJ Policies Increase Risk Of Parallel Environmental Prosecutions* (WLF Legal Opinion Letter, 1999); George J. Terwilliger, III, *Corporate Criminal Liability: A Handbook For Protection Against Statutory Violations* (WLF Monograph, 1998); Keith A. Onsdorff, *Abuse of Environmental Prosecutions Undermines Trust In Government* (WLF Legal Opinion Letter, 1996).

More particularly, WLF petitioned the EPA on June 12, 2007, requesting the EPA to review and revise its criminal enforcement policy to ensure that criminal investigations and referrals to DOJ for criminal prosecution comport with EPA's own policy and that alternative non-criminal remedies be used. WLF also petitioned the EPA in 2001 to stop abusive criminal investigatory tactics, such as the use of armed EPA agents, and to advise targeted companies and employees of their rights when conducting on-site searches or interviews. WLF submits that abusive criminal prosecutions can be curtailed in a comprehensive manner by controlling or limiting the kind of cases that EPA refers to DOJ for prosecution and by a proper screening by DOJ of those referrals.

DOJ Criminal Prosecution Policy

As a general matter, DOJ's prosecution policy properly recognizes the serious nature of filing criminal charges against individuals and entities, regardless of the subject matter of the offense. According to DOJ's *Principles of Federal Prosecution* reprinted in DOJ's United States Attorneys' Manual (USAM):

> The manner in which Federal prosecutors exercise their

> decision-making authority has far-reaching implications, both in terms of justice and effectiveness in law enforcement and in terms of the consequences for individual citizens. A determination to prosecute represents a policy judgment that the fundamental interests of society require the application of the criminal laws to a particular set of circumstances -- recognizing both that *serious violations of Federal law* must be prosecuted, and that *prosecution entails profound consequences for the accused and the family of the accused whether or not a conviction ultimately results*.
>
> The availability of this statement of principles to Federal law enforcement officials and to the public serves two important purposes: ensuring the fair and effective exercise of prosecutorial responsibility by attorneys for the government, and promoting confidence on the part of the public and individual defendants that *important prosecutorial decisions will be made rationally and objectively on the merits of each case*.

USAM 9-27.001 **Preface** (emphasis added).

WLF believes that the judicious use of criminal enforcement powers is all the more important with respect to prosecuting environmental and other regulatory offenses because those offenses are not inherently wrong, or *malum in se* crimes, such as fraud, robbery, or assault. Rather, they are regulatory offenses, or *malum prohibitum*, which regulate the use, storage, and handling of certain chemicals and other substances, establish permissible levels for the emission of pollutants, or require permits for certain land-use and other activities. These complex and confusing laws and regulations can easily be violated without even knowing that the law or regulation exists, or without any resulting environmental damage.

WLF submits that criminal prosecutions should be reserved for the rare and egregious case where the violation results in substantial environmental damage that is irremediable or causes serious bodily harm *and* where there is culpable conduct reflected by past violations and a high degree or level of specific intent to deliberately violate the law. After all, companies that are regulated by the EPA, and the people that own and manage them, are engaged in socially useful and desirable activities, such as producing energy, chemicals, and other products needed by society, while providing jobs and stimulating economic development at the local and national levels. Accordingly, DOJ should require the referral agency, whether it be the EPA, the

National Marine Fisheries Services, or other agency, to make a compelling case to DOJ why a particular case merits the use of scarce prosecutorial resources, as opposed to the use of administrative and civil remedies and penalties, which can also achieve appropriate levels of deterrence and punishment.

In that regard, WLF notes that pursuant to DOJ's *Principles of Federal Prosecution*, U.S. Attorneys have the following options once they receive a referral from the EPA:

> USAM 9-27.200 **Initiating and Declining Prosecution–Probable Cause Requirement.**
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> A. If the attorney for the government has probable cause to believe that a person has committed a Federal offense within his/her jurisdiction, he/she should consider whether to:
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> 1. Request or conduct further investigation;
> 2. Commence or recommend prosecution;
> 3. Decline prosecution and refer the matter for prosecutorial consideration in another jurisdiction;
> 4. Decline prosecution and initiate or recommend pretrial diversion or *other non-criminal disposition*; or
> 5. *Decline prosecution without taking other action.*

Id. (emphasis added).

WLF urges DOJ to exercise its discretion more often to decline prosecution altogether, refer the matter to state authorities, or to recommend pretrial diversion or other non-criminal disposition as provided by subsection A(4) with respect to environmental offenses. As previously noted, environmental statutes fall within the category of *malum prohibitum*, and Congress provided ample non-criminal remedies for their enforcement. In addition, many states have environmental laws that overlap with federal laws, and are often a more appropriate forum for resolving environmental infractions. DOJ's criminal enforcement policy reiterates the view that criminal prosecutions should be declined if "[t]here exists an adequate non-criminal alternative to prosecution." USAM 9-27.220(A). This policy of utilizing non-criminal remedies is further explained in the U.S. Attorneys' Manual as follows:

> USAM 9-17.150 **Non-Criminal Alternatives to Prosecution.**

> A. In determining whether prosecution should be declined because there exists an adequate, non-criminal alternative to prosecution, the attorney for the government should consider all relevant factors, including:
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> 1. The sanctions available under the alternative means of disposition;
> 2. The likelihood that an effective sanction will be imposed; and
> 3. The effect of non-criminal disposition on Federal law enforcement interests.
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> B. **Comment**. When a person has committed a Federal offense, it is important that the law respond promptly, fairly, and effectively. This does not mean, however, that a criminal prosecution must be initiated. In recognition of the fact that resort to the criminal process is not necessarily the only appropriate response to serious forms of antisocial activity, *Congress and state legislatures have provided civil and administrative remedies for many types of conduct that may also be subject to criminal sanction.* Examples of such non-criminal approaches include civil tax proceedings; civil actions under the securities, customs, antitrust, or other regulatory laws; and reference of complaints to licensing authorities or to professional organizations such as bar associations. Another potentially useful alternative to prosecution in some cases is pretrial diversion. *See* USAM 9-22.000.
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> Attorneys for the government should familiarize themselves with these alternatives and should consider pursuing them if they are available in a particular case. Although on some occasions they should be pursued in addition to the criminal law procedures, on other occasions they can be expected to provide an effective substitute for criminal prosecution. In weighing the adequacy of such an alternative in a particular case, the prosecutor should consider the nature and severity of the sanctions that could be imposed, the likelihood that an adequate sanction would in fact be imposed, and the effect of such a non-criminal disposition on Federal law enforcement interests.

Id. (emphasis added). Unfortunately, DOJ prosecutors are not taking full advantage of the non-criminal remedies available to them.

EPA's Criminal Enforcement Policy

Because DOJ prosecutors or U.S. Attorneys do not normally initiate criminal

prosecutions for violations of environmental laws without a referral from the EPA or other client agency that enforces environmental statutes and regulations, it is imperative that DOJ examine the agency's own enforcement criteria to assess whether a criminal referral to DOJ is even warranted in the first place. WLF submits that because the EPA often seems to ignore its own enforcement policies, it is incumbent upon DOJ to have an effective screening system in place to ensure that the standards are met for such referrals. In any event, even if a criminal referral appears to satisfy the agency's own standards, the DOJ and U.S. Attorneys should decline to exercise their prosecutorial discretion unless they are fully satisfied that alternative non-criminal remedies are not available or have been exhausted.

EPA's Criminal Enforcement Policy is outlined in EPA's Memorandum, *The Exercise of Investigative Discretion*, from Earl E. Devaney, Director, Office of Criminal Enforcement, to All EPA Employees Working in or in Support of the Criminal Enforcement Program (Jan. 12, 1994). The so-called Devaney Memo "sets out the specific factors that distinguish cases meriting criminal investigation from those more appropriately pursued under administrative or civil judicial authorities." *Id*. at 1. The Devaney Memo states:

> [T]he Office of Criminal Enforcement has an obligation to the American public, to our colleagues throughout EPA, the regulated community, Congress, and the media to instill confidence that EPA's criminal program has the proper mechanisms in place to ensure the discriminate use of the powerful law enforcement authority entrusted to us.

Id. at 2. Indeed, the Devaney Memo further recognizes the seriousness of EPA's criminal enforcement duties, entrusted to it by Congress:

> The criminal provisions of the environmental laws are the most powerful enforcement tools available to EPA. Congressional intent underlying the environmental criminal provisions is unequivocal: *criminal enforcement authority should target the most significant and egregious violators.*

Id. (emphasis added). The Devaney Memo further cites congressional intent, noting that criminal enforcement is *not* appropriate for "minor or technical variations from permit regulations or conditions." *Id*. Accordingly, the memo specifies that the case selection criteria for criminal prosecution "will be guided by two general measures - significant environmental harm *and* culpable conduct." *Id*. (emphasis added).

The Devaney Memo defines "significant environmental harm" as "actual harm" that "has an identifiable and significant harmful impact on human health and the environment" or the "threat" of such significant harm. *Id*. at 4. Simple failure to report emission data or information to the EPA, although a regulatory violation, should be subject to criminal investigation only when the failure to report "is coupled with actual or threatened environmental harm." *Id*.

As for "culpable conduct," the Devaney Memo lists several factors to consider, such as history of repeated violations and concealment of misconduct or falsification of records. Significantly, a "major factor" indicating culpable conduct is "deliberate" misconduct:

> Although the environmental statutes do not require proof of specific intent, evidence, either direct or circumstantial, that a violation was deliberate will be a major factor indicating that criminal investigation is warranted.

Id. at 5. As the Devaney Memo concludes:

> EPA has a full range of enforcement tools available - administrative, civil-judicial, and criminal. There is universal consensus that less flagrant violations with lesser environmental consequences should be addressed through administrative or civil monetary penalties and remedial orders, while the most serious environmental violations ought to be investigated criminally. The challenge in practice is to correctly distinguish the latter cases from the former.

Id. at 6.

On its face, the Devaney Memo appears to recognize that criminal enforcement of environmental laws should be the last resort, to be undertaken only where there is *both* significant environmental harm *and* genuine culpable conduct. Yet many of following criminal investigations, referrals, and prosecutions by DOJ over recent years clearly did not meet the enforcement criteria spelled out in either the Devaney Memo or DOJ's *Principles of Prosecution* and other guidance.

Case Studies of Abusive Criminal Prosecutions

1. In *United States v. Knott*, 106 F. Supp. 2d 174 (D. Mass. 2000), Riverdale

Mills Corporation (RMC), a small business located in Northbridge, Massachusetts, and its owner, James M. Knott, Sr., were indicted on felony charges for allegedly violating an EPA regulation by discharging rinsewater from RMC's award-winning facility into the public sewer with a pH level of less than 5.0 standard units. The indictments were preceded by what the district court accurately described as a "virtual `SWAT Team'" raid on the small facility by some 20 armed EPA Special Agents, FBI, and other law enforcement personnel. *Id*. at 180.

The EPA did not claim that the town's wastewater treatment facility was damaged in any way by RMC's allegedly acidic rinsewater. Nor were there any allegations that RMC's rinsewater caused the treatment facility to violate any EPA regulations governing its discharge of treated water into the nearby Blackstone River.[1] Thus, even if the pH levels of the facility's wastewater violated EPA regulations as alleged, they would have been harmless technical infractions. Yet, when the indictment was issued, EPA and DOJ officials, including then-U.S. Attorney Donald K. Stern and former Chair of the Attorney General's Advisory Committee, announced in press releases with much fanfare that RMC and Mr. Knott were polluting public waterways and facing stiff fines and prison terms for their alleged crime.

In the course of defending themselves against the unjustified felony criminal charges pursued by Assistant U.S. Attorney William P. Stimson, Mr. Knott and RMC demanded that the government turn over the original log books of the EPA civil agents who took and recorded the initial pH readings of the rinsewater a few days before the raid. The agents' hand-written notes revealed that lawful and neutral pH readings of 7 were altered so that one 7 was made to look like a 4 and that other 7's were crudely altered to look like 2's. The pH readings taken by the EPA during the subsequent raid on RMC all showed lawful pH readings of 5 or above at the point where the public sewer line actually connects to the end of RMC's sewer pipe some 100 yards from the facility. The district court suppressed the evidence of the altered pH levels because they were taken in violation of RMC's and Mr. Knott's Fourth Amendment rights. All charges against RMC and Knott were suddenly dropped the week before the trial was to begin.

WLF assisted RMC and Mr. Knott in filing a subsequent lawsuit for malicious

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[1] Indeed, during the grand jury proceedings that led to the indictment of RMC and its owner, the manager of the town's treatment plant was initially called to testify before the grand jury, but was told his testimony wasn't needed after he informed prosecutors that the pH levels of incoming effluent at the town's treatment facility were normal.

prosecution against the United States under the Federal Tort Claims Act for the criminal prosecution and a *Bivens* lawsuit against the two EPA agents who took the pH readings. Due to the difficulty in prevailing in such cases under legal standards immunizing the government from liability, the district court was constrained to deny the claim for malicious prosecution, although it reiterated that the two EPA agents violated the Fourth Amendment rights of RMC and its owner by searching the premises without a warrant to test the company's wastewater.

In its decision, the district court expressly "reproved [the EPA] for its sloppy recording of pH values [and] subsequent heavy-handed treatment of RMC, including the conduct of an unconsented and therefore unconstitutional search of the plant. That negligent conduct caused the Plaintiffs, a law enforcement agency and, ultimately, the taxpayers unnecessary expense." *Riverdale Mills Corp. v. United States*, No. 00-401237-NMG (D. Mass. 2004), slip op. at 21-22. The government appealed the findings against the EPA agents, and again, due to qualified immunity protections of government agents, the court of appeals reversed the district court. *Riverdale Mills Corp. v. Pimpare*, 392 F.3d 55 (1st Cir. 2004).

The EPA's heavy-handed criminal enforcement tactics, used against RMC and Mr. Knott, were also featured in a special segment on CBS's *60 Minutes* in 2001. The *60 Minutes* program also reported a similar surprise raid of American Carolina Stamping, a small family business in North Carolina, by some two dozen armed EPA and FBI agents wearing flak jackets and other riot gear. EPA agents threatened its owner, Steven McNabb, and his family with criminal prosecution for a non-existent regulatory offense. No criminal or civil charges were filed.[2]

2. In *United States v. Trinity Marine Baton Rouge, Inc*., Crim. No. CR99-60053, a small chemical company and two plant managers were indicted in U.S. District Court, Western District of Louisiana, for allegedly violating the Resource Conservation and Recovery Act (RCRA) for the improper transportation and storage or disposal of hazardous waste without a permit, in violation of 42 U.S.C. § 6928(d)(2). Similar to the criminal investigatory tactics employed against Riverdale Mills and American Carolina Stamping, a "SWAT Team" of almost two dozen armed Special EPA Agents from EPA's Criminal Investigation Division (CID), FBI, and other law enforcement officers raided the company; falsely accused Mr. Vidrine of

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[2] WLF has a videotape copy of the *60 Minutes* program which it will provide to DOJ under separate cover, and which should be required viewing by appropriate DOJ officials and U.S. Attorneys.

storing hazardous waste and lying about it; prevented female clerical employees from the company's marketing department from using the restrooms for several hours; prevented those same employees from calling their homes and daycare centers to make plans to have children picked up; falsely told the employees that Mr. Vidrine had been poisoning them and giving them cancer; and threatened them with imprisonment if they did not provide damaging evidence against Mr. Vidrine.

Serious questions were raised by Mr. Vidrine about the way in which this case was initiated and prosecuted over four years by then-U.S. Attorney Michael D. Skinner, his Assistant U.S. Attorneys, and EPA agents, employees, and consultants. As reported in the online version of *The Baton Rouge Advocate* (*www.2theadvocate.com*) of September 27, 2003 (Bruce Schultz, "*Marine Service Company Cleared; Charges in Hazardous Waste Case Dropped*"), it appears that the EPA's chief witness in the case, Mike Franklin, claimed that he had taken samples of the alleged hazardous waste and had it tested. However, neither the EPA nor federal prosecutors could produce the test results allegedly proving RCRA violations.

Nevertheless, federal prosecutors and the EPA insisted on using Mr. Franklin as their key witness, even though subpoenas issued by the prosecutors to chemical testing laboratories in the area failed to turn up any lab results of the alleged hazardous waste in question. To no avail, the government went so far as to place Mr. Franklin under hypnosis in a desperate attempt to obtain information about the alleged testing samples. Defense attorneys investigated the background of EPA's star witness and argued to the court, according to the news account, that "Mr. Franklin's credibility [was] questionable because of a history of cocaine addiction that causes hallucinations." *Id.*

Unbelievably, and apparently with EPA's urging, federal prosecutors continued to insist that the government should be able to use Mr. Franklin as their key witness and appealed the judge's decision to exclude Mr. Franklin's testimony to the Fifth Circuit. They reluctantly withdrew the appeal when the Solicitor General's Office wisely decided not to approve it. On September 17, 2003, on the eve of trial, federal prosecutors filed a motion to dismiss the indictment against all three defendants, stating that "[d]evelopments in this matter since the indictment have revealed facts and circumstances which, in the interests of justice, warrant dismissal of the indictment." The district court granted the motion the next day.

Mr. Vidrine was forced to spend his entire retirement savings of $180,000 on attorney's fees to defend himself over a four-year period against the bogus charges.

"Anybody who has to go through this and not lose their sanity or life, it's just amazing," Vidrine was quoted as saying in the *Baton Rouge Advocate* article. "I didn't think it could happen in America," he added. After contacting WLF for counsel and advice, Mr. Vidrine filed a complaint in September 2005 with the EPA and DOJ for malicious prosecution under the Federal Tort Claims Act (FTCA). To date, no substantive response has been made to the complaint. A malicious prosecution lawsuit for damages under the FTCA is expected to be filed in the near future against the United States.

3. In *United States v. McNab/Blandford*, 331 F.3d 1228 (11th Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004), three hard-working U.S. seafood importers/wholesalers Robert Blandford, Abner Schoenwetter, and Diane Huang (all represented by WLF in the Supreme Court) and one Honduran seafood exporter, David Henson McNab, were convicted for the "crime" of importing frozen seafood in the wrong containers. In an outrageous case of abuse of prosecutorial discretion, the seafood dealers were indicted under the Lacey Act for importing frozen lobster tails from Honduras allegedly in violation of an obscure Honduran regulation requiring that frozen seafood be shipped in cardboard boxes instead of the transparent plastic bags that were used. Also, because about three percent of the 70,000 pound shipment consisted of lobster tails that were less than 5.5 inches in length, those lobster tails allegedly violated another Honduran regulation on size limits (even though the U.S. National Marine Fishery Service, which enforces the Lacey Act and launched the criminal investigation, published official monthly price lists for the U.S. seafood industry, listing the going price of Honduran spiny lobster tails measuring less than 5.5 inches.).

While this regulatory violation under the Lacey Act should have been subject to administrative or civil penalties (including civil forfeiture) at best, DOJ prosecutors, including U.S. Attorney J. Don Foster for the Southern District of Alabama and Special Assistant U.S. Attorney Elinor Colbourn from Main Justice, brought additional criminal charges in order to ratchet up the prison sentence under the Sentencing Guidelines.[3] Because the seafood was shipped in clear, transparent plastic bags, instead of opaque cardboard boxes, they were also charged with "smuggling," even though the shipments regularly cleared through U.S. Customs and Food and Drug Administration (FDA) inspections at the port near Mobile, Alabama. Oddly, if

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[3] The Lacey Act, 16 U.S.C. §§ 3371-78, prohibits the importation of fish, wildlife or plants in violation of United States law, any state law, or foreign law, and is intended to protect exotic or endangered birds, animals, and other species. The Honduran spiny lobsters in the *McNab* case do not fall in that general category.

the seafood had been shipped in opaque cardboard boxes, which would need to be ripped open to inspect the contents, that would not be considered smuggling; however, DOJ considers the shipment of frozen seafood in see-through plastic bags, where the contents are readily visible to anyone, to constitute illegal smuggling.

DOJ prosecutors, not content with adding the smuggling felony charges to the Lacey Act counts, piled on more counts by also charging the defendants with money laundering. According to prosecutors, because the importers paid for the "illegal" seafood that was "smuggled" into the country in the normal course of their business, they were considered to be trafficking in illegal goods in violation of money laundering statutes. This novel use of the money laundering statute caused the trial judge to exclaim, "I find that difficult to understand how that's money laundering." *United States v. McNab*, Trial Transcript, Vol. VI, p. 1060, lines 24-25 (Oct. 23, 2000).

For these "crimes," McNab, Blandford, and Schoenwetter, all first offenders, were sentenced to an outrageous prison term of eight *years* under the flawed and harsh Sentencing Guidelines, as well as being ordered to pay stiff fines and to forfeit their property. Ms. Huang, also a first-offender and mother of two small children, was sentenced to prison for two years.

Amazingly, the Honduran regulations that served as the predicate for the Lacey Act charges (and thus, for the smuggling and money laundering charges as well) were declared by Honduras to be null and void, repealed, and otherwise of no legal effect by Honduran courts, the Honduran Attorney General, and other high level Honduran officials. Nevertheless, in a 2-1 decision, the U.S. Court of Appeals for the Eleventh Circuit upheld the convictions and excessive sentences. *McNab*, 331 F.3d 1228. In a strongly worded dissent, Circuit Judge Fay declared, "what was thought to be a crime turns out not to be a crime under Honduran law"; therefore, "under both U.S. and Honduran law, retroactive application [of the Honduran rulings invalidating the laws] is warranted for a criminal defendant charged or convicted of a subsequently declared invalid criminal statute." *Id*. at 1250. The defendants are currently serving their stiff eight-year prison terms in federal prison for their environmental "crimes."

4. In *Rapanos v. United States*, 126 S. Ct. 2208 (2006), a property owner/developer was criminally prosecuted for moving sand on his property without a permit which the government alleged was required because the property contained wetlands subject to federal jurisdiction. The Supreme Court ruled in the civil prosecution of Mr. Rapanos that the federal government did not have jurisdiction over his property. *Id*. at 2224. In any event, even if there were federal jurisdiction, the

relentless and unnecessary criminal prosecution of Mr. Rapanos was clearly an abuse of prosecutorial discretion. Indeed, the following exchange at Mr. Rapanos's sentencing hearing in the U.S. District Court for the Eastern District of Michigan between Chief Judge Lawrence P. Zatkoff and Assistant U.S. Attorney Jennifer Peregord on March 15, 2005, illustrates the abusive nature of this prosecution:

> **THE COURT**: I'm asking myself and people are asking me, why is the government so determined to send this defendant to prison for moving his sand? Number one -- I think it's a two-prong thing -- number one, this defendant is a very disagreeable person. * * * *
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> Number two, this person . . . had the audacity and the temerity to insist upon his constitutional rights. * * * *
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> And this is the kind of person that the Constitution was passed to protect. He is exactly the person who should be protected by the Constitution.
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> People ask, well, what did this person dump to pollute the waters of the United States? Did he dump oil, radioactive substances, sewage, garbage, herbicides, pesticides, insecticides, fungicides, fertilizer, detergent, lead, iron, copper, mercury, benzene, dioxin, PCB's, PCP's, bacteria, DDT, chlordane, nitrates or cyanide? No. He didn't dump that. He polluted the waters of the United States by moving sand from one area of his property to the other.
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> * * *
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> I am finding that the average US citizen is incredulous that it can be a crime for which the government demands [a substantial term of] prison for a person to move dirt or sand from one end of their property to the other end of their property and not impact the public in any way whatsoever.
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> * * *
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> **MS. PEREGORD**: Just very briefly, your Honor. It is the government's position that the likeability or lack thereof of the defendant had absolutely nothing to do with this prosecution. *Moreover, sand is more toxic and destructive to wetlands than any of the substances the Court mentioned.*

United States v. Rapanos, No. 03-20023, Sentencing Transcript at 12, 16 (March 15,

2005) (emphasis added).

The government's astonishing response to the court's valid concerns is remarkable in at least two major respects. First, the DOJ prosecutor, while denying Judge Zatkoff's belief that the prosecution was motivated by the defendant's uncooperative attitude with regulators, did *not* refute the Court's belief that another major factor was driving the prosecution, namely, the defendant's insistence on asserting his constitutional rights. Second, the absurd representation to the Court that non-toxic sand "is more toxic and destructive to wetlands" and the environment than deposits of lead, mercury, radioactive wastes, sewage, and other pollutants is truly bizarre, undermines DOJ's credibility, and only serves to further demonstrate why the *Rapanos* case is a perfect example of prosecutorial abuse.

5. In *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000), an independent contractor, hired to straighten a section of railroad track in Alaska, accidentally punctured a buried pipeline with a backhoe. The pipeline was quickly shut down. While a small quantity of oil leaked into the nearby river, no lasting environmental damage occurred. Mr. Hanousek, a company supervisor who was off-duty at home eating dinner that evening when the accident occurred, was criminally prosecuted for negligently discharging oil into navigable waters. Upon conviction, he was given the maximum sentence of 12 months of confinement under the harsh Sentencing Guidelines. On appeal to the U.S. Court of Appeals for the Ninth Circuit, he argued unsuccessfully that the trial court erred by letting the jury convict him based on what was effectively a civil negligence standard.

Unfortunately, the U.S. Supreme Court denied review. However, the strong dissent from the denial of certiorari by Justice Thomas, joined by Justice O'Connor, illustrates the fundamental problem in all these environmental cases: a low level or absence of criminal intent or mens rea can trigger a criminal prosecution under environmental laws that are improperly characterized as "public welfare offenses." Under the "public welfare offense" doctrine, individuals can be held strictly liable and criminally prosecuted for violations of laws and regulations that govern the handling of inherently dangerous products, such as explosives or dangerous chemicals, but only if the punishment is a small fine or a short period of confinement.[4]

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[4] Characterizing environmental offenses as public welfare offenses has been sharply criticized by commentators:

Public welfare offenses are “virtually always . . . crimes punishable by

However, environmental violations, even for minor or technical violations that do not involve inherently dangerous products, such as minor wetland permitting violations, can result in substantial fines of $50,000 per day and three-year prison sentences for a single count. Furthermore, substantial prison sentences are called for under the harsh U.S. Sentencing Guidelines. Such reality compelled Justice Thomas to observe that "[t]he seriousness of these penalties counsels against concluding that the [Clean Water Act] can accurately be classified as a public welfare statute." *Hanousek*, 528 U.S. 1102 (2000). Justice Thomas further noted that:

> [W]e have never held that any statute can be described as creating a public welfare offense so long as the statute regulates conduct that is known to be subject to extensive regulation and that may involve a risk to the community. Indeed, such a suggestion would extend this narrow doctrine to virtually any criminal statute applicable to industrial activities. I presume that in today's heavily regulated society, any person engaged in industry is aware that his activities are the object of sweeping regulation and that an industrial accident could threaten health or safety. To the extent that any of our prior opinions have contributed to the Court of Appeals' overly broad interpretation of this doctrine, I would reconsider those cases. Because I believe the Courts of Appeals invoke this narrow doctrine too readily, I would grant certiorari to further delineate its limits.

Id. at 1104-05.

Hanousek and similar cases also raise the troubling issue of expanding the responsible corporate officer doctrine. That doctrine allows corporate officers to be criminally prosecuted for violations committed by company employees. Federal prosecutors should understand, however, that invoking that doctrine presents certain

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> relatively light penalties such as fines or short jail sentences, rather than substantial terms of imprisonment." On the other hand, "knowing" violations are serious felonies. . . . Therefore, because violations of [the Clean Water Act] are punishable by fines of up to $50,000 per day, imprisonment of up to three years, or both, it is inappropriate to apply the general intent standard to such violations.

Randall S. Abate & Dayna E. Mancuso, *It's All About What You Know: The Specific Intent Standard Should Govern "Knowing" Violations of the Clean Water Act,* 9 N.Y.U. ENVTL. L.J. 304, 311, 336 (2001).

dangers:

> Like their subordinates, corporate officers also risk being snared in a large net for "knowing" violations of federal environmental statutes. The responsible corporate officer doctrine, which pre-dates the enactment of federal environmental statutes, is the source of this potential danger. The mens rea standard for knowing violations in the context of corporate officers has been relaxed to allow two alternate sources of knowledge: 1) imputed knowledge; and 2) deliberate avoidance (or willful blindness). These two forms of knowledge eliminate the need for actual knowledge to secure convictions of corporate officers for "knowing" violations.

Abate & Mancuso, *supra* note 4, at 311.

Applying the responsible corporate officer doctrine to the prosecution of environmental felony offenses, in effect, confers "designated felon" status on industrial business managers. *See* Brenda S. Hustis & John Y. Gotanda, *The Responsible Corporate Officer Doctrine: Designated Felon or Legal Fiction?* 25 LOY. C. CHI. L.J. 169 (1994). WLF submits that indiscriminate criminal prosecution of plant managers, or the threat of such prosecutions, will make it all the more difficult for companies to attract competent personnel and thus, could have negative consequences on the ability of a company to comply with numerous local, state, and federal environmental laws and regulations.

In short, as WLF's case studies demonstrate, it is relatively easy to initiate criminal prosecutions of environmental infractions. Because of the substantial risk of heavy fines and imprisonment that can be imposed on targeted defendants, it is vitally important that DOJ prosecutors and U.S. Attorneys ensure that their criminal enforcement powers are not abused.

The McNulty Memo Contains Conflicting Guidance on Non-Criminal Sanctions

In addition to DOJ's general *Principles of Federal Prosecution* discussed above, DOJ has also issued a supplemental guidance regarding prosecution of businesses, aptly entitled *Principles of Federal Prosecution of Business Organizations.* The most recent version was issued in December 2006 by Deputy Attorney General Paul J. McNulty (the "McNulty Memo") and is appended to Title 9 of the USAM, Criminal Resource Manual, Section 162. One of the primary reasons for the revision was the widespread complaint that U.S. Attorneys' Offices were unfairly demanding or

pressuring corporate targets to waive their attorney-client privilege in order to be viewed as cooperative in a criminal investigation and thus, deserving leniency. The McNulty Memo takes a step in the right direction in limiting the abuse by requiring DOJ approval for certain privilege waiver requests. However, because the revision still leaves the matter open for abuse, remedial legislation, the Attorney-Client Privilege Protection Act of 2007, will be reintroduced in the U.S. House of Representatives this week.

In any event, when the McNulty Memo was released, the headline of the Justice Department's Press Release announcing the Memo cast corporate crime only in terms of fraud (a *malum in se* offense) rather than in terms of regulatory offenses (or *malum prohibitum*): "U.S. Deputy Attorney General Paul J. Mcnulty [*sic*] Revises Charging Guidelines for Prosecuting *Corporate Fraud*" (Dec. 12, 2006) (emphasis added). In the press release, Deputy McNulty touted DOJ's past efforts "to investigate and prosecute *corporate fraud*" over the last five years. *Id*. (emphasis added). In addition, in a speech announcing the release of the revised principles, Deputy McNulty again emphasized the criminal prosecution of "corporate fraud," making references to Enron and similar cases, and emphasizing the protection of the investing public and the integrity of the stock markets. *See* "Prepared Remarks of Deputy Attorney General Paul J. McNulty at the Lawyers for Civil Justice Membership Conference Regarding the Department's Charging Guidelines in *Corporate Fraud* Prosecutions," (New York, Dec. 12, 2006) (emphasis added).

The emphasis on prosecuting "corporate fraud" was reiterated yet again by Deputy McNulty recently in a speech on March 8, 2007, before the Corporate Counsel Institute, entitled "Cooperation and Corporate Stewardship." In his speech, Deputy McNulty noted that "[t]he cornerstone to a sustained law enforcement effort involving corporate fraud is corporate self-policing." He concluded his remarks by stating: "As the Chairman of the Corporate Fraud Task Force, I can tell you that the Department is committed as ever to fighting corporate fraud."

On the same day that Deputy McNulty was giving his speech, Deputy Assistant Attorney General Barry M. Sabin was testifying before Congress about the controversial attorney-client waiver issue presented in the McNulty Memo. He too underscored the corporate fraud focus in his written testimony, and included a separate heading entitled "<u>The Battle Against Corporate Fraud Remains a Priority of the Department of Justice</u>." Testimony of Barry M. Sabin, Deputy Assistant Attorney General, Criminal Division, Before The House Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, Concerning The Right To

Counsel In Corporate Investigations 6 (March 8, 2007).

WLF has several concerns about the emphasis on "corporate fraud." In the first place, fraud requires a showing of specific intent by individuals. Accordingly, justice can be served by prosecuting the culpable individuals engaged in any such fraud without prosecuting the organization, which has the deleterious effect of punishing innocent employees and shareholders. *See, e.g., Arthur Andersen, L.L.P. v. United States*, 544 U.S. 696 (2005). Furthermore, despite DOJ's repeated emphasis on "corporate fraud," the McNulty Memo unfortunately lumps so-called "environmental crimes," which are regulatory offenses, into the fraud/*malum in se* category. The McNulty Memo thus states: "First and foremost, prosecutors should be aware of the important public benefits that may flow from indicting a corporation in appropriate cases." McNulty Memo, section II(B). One of the considerations given for corporate prosecution is that "certain crimes carry with them a substantial risk of great public harm, e.g., *environmental crimes* or financial frauds . . . ." *Id*. (emphasis added). WLF submits that the McNulty Memo sends the wrong message by treating so-called environmental crimes on a par with financial fraud while begging the question as to what constitutes an "environmental crime." A related and equally important question is whether non-criminal penalties are more appropriate for this kind of regulatory offense.

In that regard, the McNulty Memo starts off in the right direction but sends a mixed or confusing message to U.S. Attorneys regarding the prosecution of business organizations for regulatory offenses. Thus, section III of the McNulty Memo, **Charging a Corporation: Factors to Be Considered**, specifies nine factors that "*must be*" considered, which generally are the same factors in determining whether to charge an individual. *Id*. (emphasis added). One of the factors that *must be* considered is the "adequacy of remedies such as civil or regulatory enforcement actions (see section XI, *infra*)." *Id*. However, when one refers to section XI of the McNulty Memo, the mandatory "must" terminology of section III is transformed into the permissive "may" and the hortatory "should" as follows:

> **XI. Charging a Corporation: Non-Criminal Alternatives**
>
> A. General Principle: Non-criminal alternatives to prosecution often exist and prosecutors may consider whether such sanctions would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct. In evaluating the adequacy of non-criminal alternatives to prosecution, *e.g.*, civil or regulatory enforcement actions, the prosecutor

may consider all relevant factors, including:

1. the sanctions available under the alternative means of disposition;
2. the likelihood that an effective sanction will be imposed; and
3. the effect of non-criminal disposition on federal law enforcement interests.

B. Comment: The primary goals of criminal law are deterrence, punishment, and rehabilitation. Non-criminal sanctions may not be an appropriate response to an egregious violation, a pattern of wrongdoing, or a history of non-criminal sanctions without proper remediation. In other cases, however, these goals may be satisfied without the necessity of instituting criminal proceedings. In determining whether federal criminal charges are appropriate, the prosecutor ***should consider*** the same factors (modified appropriately for the regulatory context) considered when determining whether to leave prosecution of a natural person to another jurisdiction or to seek non-criminal alternatives to prosecution. These factors include: the strength of the regulatory authority's interest; the regulatory authority's ability and willingness to take effective enforcement action; the probable sanction if the regulatory authority's enforcement action is upheld; and the effect of a non-criminal disposition on federal law enforcement interests. *See* USAM 9-27.240. 9-27.250.

Id. (emphasis added). Whether this discrepancy in language between section III and section XI regarding the exercise of prosecutorial discretion was intentional or not, the discrepancy remains. This gives prosecutors more discretion in bringing criminal actions against businesses for regulatory offenses than they should otherwise have. Accordingly, WLF requests that the permissive "may" should be changed to the mandatory "must," and similar changes should be made throughout the USAM.

DOJ's Prosecution Policy for Offenses Affecting Several Judicial Districts

WLF submits that another aspect of DOJ's prosecution policy as it relates to environmental offenses that should be addressed involves cases where a violation of an environmental statute or regulation occurs or has effects in more than one jurisdiction. This may happen where the pollutants or emissions in question migrate through the environment via the air or water. These multi-jurisdictional cases present their own enforcement problems. As one commentator and practitioner put it:

One of the most important policy issues facing the federal

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

John F. Cooney, *Multi-Jurisdictional and Successive Prosecution of Environmental Crimes: The Case for a Consistent Approach,* 96 J. CRIM. L. & CRIMINOLOGY 435 (2006).

Part of this problem stems from the fact that in 1994, Attorney General Janet Reno -- in response to criticism from Congressman John Dingell that Main Justice was limiting environmental prosecutions by local U.S. Attorneys -- essentially gave local U.S. Attorneys broad discretion to bring criminal charges in most environmental cases with little or no oversight by Main Justice. *See* USAM 5-11.104 **Responsibility for Case Development and Prosecution**. Accordingly, the Environmental Crime Section (ECS) of Main Justice only "takes the lead in prosecution of between 25% and 30% of cases" that are "national interest" cases. *Id*. at 438.

> The division of prosecutorial authority in cases of national interest did not provide guidance to the ECS and the U.S. Attorneys concerning which charges should be brought against a corporation and where the case should be prosecuted. Rather, the prosecutors must resolve those issues for themselves under the general Principles of Federal Prosecution that apply to all Department lawyers. On occasion, the current allocation of authority has had the unintended consequences of making it difficult to resolve cases in which a corporation is under investigation in multiple jurisdictions and thus has created tension with longstanding Department policy concerning successive prosecutions.

Id. at 439-40.

WLF Recommendations

WLF submits that the division of authority between Main Justice and U.S. Attorneys in prosecuting environmental offenses needs to be re-examined, not only with respect to multi-jurisdictional violations, but also with respect to all other cases. WLF recommends that DOJ reconsider Attorney General Reno's 1994 decision to divest Main Justice of central authority over the prosecution of environmental offenses. Requiring all environmental prosecutions to be approved by Main Justice would bring consistency to the process and hopefully, would preclude future abusive criminal prosecutions of the kind described earlier that brings discredit to DOJ.

Even if the authority to prosecute environmental offenses continues to be divided between Main Justice and local U.S. Attorneys, it is imperative that proper and effective screening procedures be implemented to ensure that criminal prosecutions are rarely used, and that alternative non-criminal remedies be considered, as discussed in this petition.

At a minimum, DOJ should establish an appropriate policy review group or task force, similar to one suggested by one leading practitioner, to consider all the issues raised in WLF's petition, including suggested changes to the U.S. Attorneys' Manual.

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

Cooney, 96 J. CRIM. L. & CRIMINOLOGY 464 (2006).

WLF's primary goal is to curtail the practice of criminalizing business activities and to ensure that non-criminal remedies for environmental infractions are utilized whenever possible. Such remedies not only provide sufficient deterrence and

punishment, but often are more effective in remediating any damage to the environment.

CONCLUSION

For the foregoing reasons, WLF requests that DOJ undertake a thorough review of its policies and practices regarding the exercise of prosecutorial discretion when enforcing federal environmental laws and regulations. WLF also requests that DOJ implement our recommendations, including the suggested revisions to the U.S. Attorneys' Manual. Finally, WLF requests the opportunity to meet with you or other DOJ officials to discuss the matters raised in this petition.

Respectfully submitted,

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Chairman and General Counsel

Paul D. Kamenar
Senior Executive Counsel

cc: The Honorable Paul J. McNulty, Deputy Attorney General
The Honorable William Mercer, Acting Associate Attorney General
The Honorable Alice Fisher, Assistant Attorney General, Criminal Division
The Honorable Ronald J. Tenpas, Acting Assistant Attorney General, Environment and Natural Resources Division
The Honorable Johnny Sutton, Chair, Attorney General's Advisory Committee and U.S. Attorney for the Western District of Texas
The Honorable David Dugas, Chair, Environmental Issues Subcommittee of the Attorney General's Advisory Committee and U.S. Attorney for the Middle District of Louisiana