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CLEAN WATER ACT

ENFORCEMENT

The Environmental Crimes Enforcement Act of 2011, which was approved by the Senate Judiciary Committee, is an understandable response to the Deepwater Horizon oil spill in the Gulf of Mexico last year. However, the authors contend that its directive to the Federal Sentencing Commission to review and amend sentencing guidelines for Clean Water Act offenses is unnecessary because the current guidelines, together with statutory maximum penalties, already are adequate to address serious breaches of environmental law.

Environmental Crimes Enforcement Act Is Unnecessary And Carries Risk of Severely Punishing Simple Negligence

BY BRUCE PASFIELD AND ELISE RINDFLEISCH

The Environmental Crimes Enforcement Act (ECEA) of 2011 was drafted by the Senate Judiciary Committee in direct response to the Deepwater Horizon incident in the Gulf of Mexico. The bill seeks to direct the U.S. Sentencing Commission to review and amend the Federal Sentencing Guidelines to increase penalties for criminal Clean Water Act offenses and seeks to mandate restitution for such offenses.

The unfortunate impacts of the Deepwater Horizon incident may make criticism of this bill unpopular. However, lawmakers would be well advised to carefully

review its provisions before voting in favor. A close examination of the ECEA reveals that it is an unnecessary piece of legislation because the guidelines already account for the serious nature of CWA offenses and other environmental crimes, and the Department of Justice is already mandated to seek restitution for CWA violations under the Crimes Victims' Rights Act (CVRA), 18 U.S.C. § 3771. Any proposed changes could have the unintended consequence of criminalizing simple negligence to the point that defendants will face significant jail time in many cases where it is not warranted. Moreover, although the bill is a response to the Gulf spill, it would subject defendants to stricter penalties for a wide

range of CWA and other environmental offenses unrelated to oil drilling.

I. ECEA Sentencing Directive Puts Cart Before the Horse

The ECEA contains a directive that the “United States Sentencing Commission *shall review and amend* the Federal Sentencing Guidelines . . . applicable to persons convicted of offenses under the Federal Water Pollution Control Act . . . in order to . . . appropriately account for the actual harm to the public and the environment from the offenses” (emphasis added).¹ The bill also includes a requirement that in “*amending*” the guidelines, the Commission “*shall*” ensure the guidelines reflect certain factors, including the serious nature of the offenses, the need for an effective deterrent, and actual harm to the public and the environment resulting from the offenses.²

This language puts the cart before the horse. Instead of directing the Commission to review the guidelines to determine *if* changes are necessary, the bill assumes changes are required and directs the Commission to make the necessary amendments. Blanket and reckless mandates to increase criminal penalties may be popular, but they are often dangerous.

For example, under environmental sentencing guideline § 2Q1.2, mentioned in the ECEA, there is little distinction made between the calculations for felony versus negligent conduct. Unless the Sentencing Commission were to create separate and distinct guidelines for negligent and felony offenses, the increase in penalties would apply across the board. Since at least two appellate courts have ruled that the level of negligence required for a CWA criminal violation is simple negligence, a defendant convicted of simple negligence for merely flipping the wrong switch would be subject to the same guideline and same increase in penalties as someone who knowingly polluted the environment.

¹ Environmental Crimes Enforcement Act of 2011, S. 350, 112th Cong. § 2(a)(1) (2011). The bill was approved by the Senate Judiciary Committee May 19, 2011, on a vote of 13-3 (98 DEN A-1, 5/20/11); see also <http://www.gpo.gov/fdsys/pkg/BILLS-112s350rs/pdf/BILLS-112s350rs.pdf>.

² The full text of the requirement states:

REQUIREMENTS- In amending the Federal Sentencing Guidelines and policy statements under paragraph (1), the United States Sentencing Commission shall—

(A) ensure that the guidelines and policy statements, including section 2Q1.2 of the Federal Sentencing Guidelines (and any successor thereto), reflect—

(i) the serious nature of the offenses described in paragraph (1);

(ii) the need for an effective deterrent and appropriate punishment to prevent the offenses

(iii) the effectiveness of incarceration in furthering the objectives described in clauses (i) and (ii);

(B) consider the extent to which the guidelines appropriately account for the actual harm to public and the environment resulting from the offenses;

(C) ensure reasonable consistency with other relevant directives and guidelines and Federal statutes;

(D) make any necessary conforming changes to guidelines;

(E) ensure that the guidelines relating to offenses under the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code. *Id.* a § 2(a)(2).

If the bill were to advance, its language should be changed to provide the Commission with the discretion to make changes, if appropriate. The authors believe that if the Commission conducts a careful review of the sentencing guidelines it will advise Congress that the federal government has ample authority to properly punish CWA offenses and no further increases in penalties are needed.

II. Advisory Nature of Guidelines Makes Changes Unnecessary

The Federal Sentencing Guidelines are nonbinding rules that set out a uniform sentencing policy for individuals and organizations convicted of felonies and misdemeanors in the U.S. federal court system. The guidelines were drafted in 1987 by the U.S. Sentencing Commission. The Commission was created by the Sentencing Reform Act of 1984 and members are appointed by the president and confirmed by the Senate. Originally, the federal sentencing statute contained a provision that made the guidelines mandatory. However, in the 2005 case *United States v. Booker*, the U.S. Supreme Court struck down this provision, and the Guidelines are now advisory.³

The now advisory nature of the guidelines makes an increase in penalties for CWA violations unnecessary. The Supreme Court in *Booker* instructed district courts to focus on a wide range of factors in determining a sentence.⁴ Following this direction, if a court believed that a particular CWA violation warranted greater punishment, it could depart upward from the guidelines and sentence a defendant up to the statutory maximum provided by law. Since CWA knowing endangerment charges are already punishable by up to 15 years in prison⁵ and felony offenses by up to three years in prison,⁶ courts have ample authority to severely punish a defendant in the appropriate case. Further, a court can, without departing from the guidelines, “stack” multiple felony counts to increase a sentence above a statutory maximum if the guideline calculation calls for a higher sentence.⁷ For example, if a two-count CWA offense resulted in a guideline offense level of 22, corresponding to a 41-51 month term of incarceration, a court could stack the two counts to reach above the 36 month CWA statutory cap and impose the calculated guideline sentence. What is more, if a judge failed to account for the harm to the public and the environment from a particular offense, the sentence could be overturned, as sentences are still subject to appellate review for “reasonableness.”⁸

³ *United States v. Booker*, 543 U.S. 220 (2005).

⁴ *Id.* at 261.

⁵ 33 U.S.C. § 1319 (c)(3)(a).

⁶ *Id.* at (c)(2).

⁷ Under guideline § 3D1.1, “Procedure for Determining Offense Level on Multiple Counts,” offense levels for multiple counts are consolidated into a single “combined offense level.” In turn, guideline § 5G1.2, “Sentencing on Multiple Counts of Conviction,” provides that where the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment that the combined offense level dictates, then the sentence imposed on one or more of the other counts shall run consecutively to produce a combined sentence equal to the total dictated punishment. See, e.g., *United States v. Elias*, 27 Fed.Appx. 750, 753 (9th Cir. 2001).

⁸ *United States v. Booker*, 543 U.S. at 261.

In short, the Supreme Court in *Booker* already gave courts discretion to increase or decrease penalties beyond what is provided for in the guidelines. Short of increasing the statutory maximum penalties—which the ECEA does not do—the bill cannot further alter that traditional power.

A. Sentencing Guidelines for CWA Offenses Are Adequate

Assuming *arguendo* that courts do not regularly depart from the guidelines in sentencing defendants, an examination of sentences for CWA offenses reveals that the guidelines provide ample authority to punish the full range of CWA offenses. We examine each major category of offenses and provide examples of how the guidelines are applied in environmental crimes cases.

i. Knowing Endangerment Offenses

The most serious environmental crimes offense is known as knowing endangerment. This offense is often equated to state manslaughter statutes as the harm and intent standards are similar. Knowing endangerment offenses are defined as “offenses committed with knowledge that the violation placed another person in imminent danger of death or serious bodily injury.”⁹ Sentences for such offenses are calculated pursuant to § 2Q1.1 of the guidelines titled “Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants.” A straightforward knowing endangerment charge has a base offense level of 24, which equates to 51-63 months of imprisonment.¹⁰ Further, an application note to § 2Q1.1 suggests an upward departure if actual (as opposed to possible) death or serious bodily injury results,¹¹ which could extend the sentence up to the statutory maximum of 15 years imprisonment.

As shown by § 2Q1.1, the ability to strictly punish egregious crimes is already present in the Guidelines. In the case of *United States v. Elias*, a federal district court judge sentenced Allen Elias, the owner of a chemical processing and fertilizer company, to 17 years imprisonment for knowingly exposing his employees to cyanide gas and making false statements to the government.¹² Elias ordered his employees to clean a cyanide storage tank without taking the proper Occupational Safety and Health Administration-required safety precautions.¹³ As a consequence, an employee suffered permanent brain damage.¹⁴

Elias was convicted under the knowing endangerment provision of the Resource Conservation and Recovery Act.¹⁵ An almost identical provision is found in

⁹ Federal Sentencing Guidelines Manual § 2Q1.1, Background (2010).

¹⁰ *Id.* at (a).

¹¹ *Id.* at Application Note 1.

¹² *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001).

¹³ *Id.* at 1007.

¹⁴ *Id.* at 1014.

¹⁵ Elias was found guilty on four counts. The first count “charged that Elias had stored or disposed of hazardous waste without a permit, knowing that his actions placed others in imminent danger of death or serious bodily injury in violation of 42 U.S.C. § 6928(e), the Resource Conservation and Recovery Act (“RCRA”). Counts II and III . . . charged him with im-

proper disposal of hazardous waste without a permit in violation of 42 U.S.C. § 6928(d). Count IV charged Elias with a violation of 18 U.S.C. § 1001 for making material misstatements relating to the [OSHA] confined space entry permit.” *Id.* at 1008.

ii. Knowing Violations Involving Hazardous Substances or Pollutants

The next most serious environmental crimes offense involves felony level violations of the CWA and other environmental statutes. In the environmental crimes context all felony offenses require at least “knowing” conduct. Knowing conduct generally requires a defendant to have acted with the intent to perform a certain act.¹⁶ Felony violations of the CWA and other environmental statutes are calculated pursuant to either § 2Q1.2, titled “Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce,” or § 2Q1.3, titled “Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification.”¹⁷ The main distinction between § 2Q1.2 and § 2Q1.3 is the base-level offense. § 2Q1.2 applies to offenses involving substances that are specifically defined as hazardous or toxic substances or pesticides by statute and carries a base-level offense of 8, whereas § 2Q1.3 applies to offenses involving all other environmental “pollutants” not specifically identified by statute and carries a base-level offense of 6. Most CWA sentences are calculated using § 2Q1.3 because CWA offenses involve substances identified broadly as pollutants and the prosecution would need to separately prove that a particular pollutant was also listed as hazardous substance by statute for § 2Q1.2 to apply. However, as shown in the chart below, most of the same specific offense characteristics are considered in both § 2Q1.2 and § 2Q1.3 and it is the specific offense characteristics that have the greatest potential to increase sentences under either provision.

proper disposal of hazardous waste without a permit in violation of 42 U.S.C. § 6928(d). Count IV charged Elias with a violation of 18 U.S.C. § 1001 for making material misstatements relating to the [OSHA] confined space entry permit.” *Id.* at 1008.

¹⁶ A full examination of the exact definition of “knowingly” as used in the CWA is beyond the scope of this article and is not necessary for examination of the application of the Guideline. For simplicity purposes the readers should assume that felony CWA offenses require a violator to act with some level of intent as opposed to acts performed negligently or with no intent at all, *i.e.*, strict liability.

¹⁷ There is debate in the legal community about whether the environmental Guidelines calculation for the routine felony offense may result in too severe of a penalty. The authors defer this discussion to other articles. For purposes of examining the current bill, it is clear that the guidelines are sufficiently severe.

§ 2Q1.2. Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce

	<u>Offense Level</u>	
Base Offense Level ¹⁸	8	
<i>Specific Offense Characteristics</i>		
Ongoing discharge - hazardous/toxic substance, pesticide ¹⁹	6	
Substantial likelihood of death/serious bodily injury ²⁰	9	
Disruption of utilities/evacuation/expensive cleanup ²¹	4	
Transport, treat, store, dispose w/o permit/in violation of permit ²²	4	
<i>Maximum offense level</i> ²³	31	108-135 months of imprisonment = possible maximum sentence

§ 2Q1.3. Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification

	<u>Offense Level</u>	
Base Offense Level ²⁴	6	
<i>Specific Offense Characteristics</i>		
Ongoing discharge ²⁵	6	
Substantial likelihood of death/serious bodily injury ²⁶	11	
Disruption of utilities/evacuation/expensive cleanup ²⁷	4	
Discharge w/o permit/in violation of permit ²⁸	4	
<i>Maximum offense level</i> ²⁹	31	168-210 months of imprisonment = possible maximum sentence

¹⁸ Federal Sentencing Guidelines Manual § 2Q1.2(a).

¹⁹ *Id.* at (b)(1)(A).

²⁰ *Id.* at (b)(2).

²¹ *Id.* at (b)(3).

²² *Id.* at (b)(4).

²³ Federal Sentencing Guidelines Manual Ch. 5 Pt. A, Sentencing Table.

²⁴ Federal Sentencing Guidelines Manual § 2Q1.3(a).

²⁵ *Id.* at (b)(1)(A).

²⁶ *Id.* at (b)(2).

²⁷ *Id.* at (b)(3).

²⁸ *Id.* at (b)(4).

²⁹ Federal Sentencing Guidelines Manual Ch. 5 Pt. A, Sentencing Table.

An examination of these provisions in the felony context reveals that the penalties under § 2Q1.2 or § 2Q1.3 are ample to punish the more egregious conduct of concern in the ECEA. For example, in felony conduct involving death or serious bodily injury, where knowing endangerment is not charged or provable, a court can still impose up to nine additional points under § 2Q1.2 and 11 points under § 2Q1.3.³⁰ Further, an offense in which this specific characteristic applies, and where there were *repetitive releases of pollutants* into the environment *without a permit* (two specific offense characteristics that apply to nearly all felony CWA offenses), would be punished by 70-87 months imprisonment. If a judge were to stack multiple counts, the

³⁰ Federal Sentencing Guidelines Manual at § 2Q1.2(b)(2) and § 2Q1.3(b)(2).

sentence could easily exceed both the statutory maximum of 36 months for felonies and the 51-63 months of imprisonment the guidelines recommend for a knowing endangerment charge. Thus authority to punish egregious cases already exists. Again we note § 2Q1.2 and § 2Q1.3 are unlikely to come into play in the felony context for the Deepwater Horizon spill because, to the authors' knowledge, there is no evidence of knowing conduct related to the spill. Yet in the appropriate felony cases involving serious environmental harm, sufficient authority already exists to adequately punish a defendant.

Further, in cases involving less serious harm, the guidelines still provide ample punishment. In *United States v. Goldfaden*, defendant Goldfaden was convicted of discharging hazardous and industrial waste

into a sewer system without a permit.³¹ In applying the specific offense characteristics, the court increased the defendant's sentence six levels for causing repetitive releases and four levels for discharge without a permit, and Goldfaden was sentenced to the statutory maximum of three years imprisonment.³² A considerable sentence was also imposed in *United States v. Weitzenhoff* where a plant manager who discharged waste activated sludge (WAS) directly into the ocean without treatment was found guilty of CWA, conspiracy, and false statement charges,³³ and sentenced to 21 months imprisonment.³⁴

As demonstrated above, the possible penalties under § 2Q1.2 and § 2Q1.3 already reflect the seriousness of the offense, and meet the goals of effective deterrence, punishment, and rehabilitation. Heightened sentences, as called for by the ECEA, are not required and could lead to injustice, especially in a simple negligence setting as discussed below.

iii. Negligence Violations Involving Hazardous Substances and Other Pollutants

Negligence violations under the CWA and other environmental statutes are also calculated pursuant to either § 2Q1.2 or § 2Q1.3. The guideline calculation for negligence violations does not differ significantly from the calculation for knowing felony violations. For example, if negligent conduct was at issue in *Goldfaden*, the court would have applied the same base-level offense and the same specific offense characteristics, and Goldfaden would have had the exact same total offense level calculation. In order for a court to distinguish between felony and negligent conduct under the current guideline scheme, a court would need to apply a downward departure, as recommended in an application note to each guideline.³⁵ Since *Booker*, the overriding majority of courts have not departed from the guidelines in imposing sentences. Thus, if the sentencing guidelines for environmental crimes are further increased, those charged with simple negligence³⁶ will presumably be

subject to the same offense level as those convicted of felonies, and the only way to account for the disparate intent will be through a downward departure.

Although negligence violations have a one year misdemeanor statutory cap, as with the case of felony violations, this cap does not necessarily protect from too stringent a sentence because multiple counts may be stacked. In *United States v. Hong*, the defendant was convicted and sentenced on 13 counts of negligently violating pretreatment requirements of the CWA.³⁷ The defendant was sentenced to 36 months imprisonment for these misdemeanor violations.³⁸ To achieve a 36 month sentence, the judge stacked the one year statutory maximum on the first three counts – each one year term to be served consecutively.³⁹ As shown in *Hong*, stacking can occur for negligence violations and, especially in the context of simple negligence conduct, presents a serious potential for abuse. The Deepwater Horizon case presents a significant threat for such abuse as an overzealous prosecutor may attempt to fix criminal liability on one or more individuals to “send a message” about the seriousness of the offense. While there may be ample blame for the spill, it would be a miscarriage of justice to use the current guidelines, let alone an amended set of guidelines with greater penalties, to make a scapegoat of a single individual for a single act of simple negligent conduct in violation of the CWA. In this respect, the Sentencing Commission should consider amending the guidelines to allow courts to impose lesser sentences for simple negligent conduct without having to depart downward from the guidelines.

III. The ECEA's Restitution Provision is Unnecessary

The ECEA makes restitution to identifiable victims mandatory for criminal CWA violations.⁴⁰ Currently, discretion to impose restitution lies with the federal judge hearing the case.⁴¹ DOJ has authority to seek restitution, and the CVRA, 18 U.S.C. § 3771, guarantees victims of crime “[t]he right to full and timely restitution as provided in law.”⁴² Although the ECEA does change existing law by making restitution mandatory rather than discretionary, for criminal CWA violations restitution is already imposed in cases where it is justified, and a historical examination of CWA criminal enforcement cases demonstrates this.

for criminal liability under other statutes. The heightened gross negligence standard is significantly different from simple negligence, requiring distinctly different mental states.

³⁷ *United States v. Hong*, 242 F.3d 528, 51 ERC 2185 (4th Cir. 2001).

³⁸ *Id.* at 530.

³⁹ “In calculating the appropriate term of incarceration, the magistrate judge first determined that Hong was subject to a sentencing range of 51-63 months pursuant to the sentencing guidelines. After departing downward four levels to a guideline range of 33-41 months, the magistrate judge concluded that the appropriate sentence under the guidelines was 36 months imprisonment.” *Id.* The court imposed the statutory maximum on all 13 counts, but did not stack the later ten counts, directing them to be served concurrent with the three year sentence on the first three counts. *Id.*

⁴⁰ Environmental Crimes Enforcement Act of 2011, S. 350, 112th Cong. (2011) (proposing to amend 18 U.S.C. § 3663A(c)(1)(A)).

⁴¹ See 18 U.S.C. §§ 3553, 3663.

⁴² 18 U.S.C. § 3771(a)(6).

³¹ *United States v. Goldfaden*, 959 F.2d 1324, 35 ERC 1177 (5th Cir. 1992).

³² *Id.* Although on appeal the Fifth Circuit found that the district court erred in applying § 2Q1.2, rather than § 2Q1.3, it upheld all of the sentencing enhancements. The sentence was further enhanced two levels for obstruction of justice, but even without the obstructive conduct, Goldfaden would have been subject to 27-33 months of imprisonment.

³³ *United States v. Weitzenhoff*, 1 F.3d 1523, 1528 at n.1, 38 ERC 1365 (9th Cir. 1993).

³⁴ *Id.* at 1536. Weitzenhoff's co-defendant, Mariani was given an upward departure for his obstructive conduct and sentenced to 33 months of imprisonment. Obstructive conduct often increases sentences, but is not a core environmental crime offense, thus we do not include a discussion of Mariani's sentence for illustrative purposes in this article.

³⁵ Federal Sentencing Guidelines Manual § § 2Q1.2, Application Note 4, 2Q1.3, Application Note 3 (2010).

³⁶ At least two federal appellate courts have interpreted the degree of negligence that triggers criminal liability as simple negligence, which is “[n]egligence in which the actor is not aware of the unreasonable risk that he or she is creating, but should have foreseen and avoided it.” Black's Law Dictionary, 1063. Essentially, simple negligence can amount to no more than a plant manager's switch of the wrong valve. In contrast, gross negligence—“a conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to a party,” *Id.* at 1062, is the minimum level of negligence required

A recent case in the U.S. District Court for the Central District of California, *United States v. Davis Wire Corp.*, is such an example. Davis Wire discharged highly acidic wastewater into the sewer system in violation of the CWA.⁴³ Davis Wire was sentenced to pay \$1.5 million in restitution to the Los Angeles County Sanitation District for the damages the wastewater caused.⁴⁴

Furthermore, mandatory restitution required under the ECEA would only be for identifiable victims, not for harm to natural resources or communities. The term “crime victim” defined in the CVRA and the term “victim” that would apply in the ECEA are defined identically, “a person directly and proximately harmed as a result of the commission of [an offense].”⁴⁵ Therefore, the bill does little to change existing legal authority. Neither current law, nor the ECEA, provides for restitution to communities that suffer from a crime or for the harm to natural resources.

IV. Conclusion

The Sentencing Guidelines already contain sufficient penalties for criminal CWA offenses. The possible pen-

⁴³ *United States v. Davis Wire Corp.*, No. 2:10-cr-00966-AGR (C.D. Cal. sentencing Oct. 26, 2010).

⁴⁴ *Id.*

⁴⁵ 18 U.S.C. § 3663A(a)(2), 3771(e).

alties under § 2Q1.1, § 2Q1.2, and § 2Q1.3 demonstrates the seriousness of the offense. They meet the goals of effective deterrence, punishment, and rehabilitation.

Further, the guidelines fail to account for a difference in punishment for negligent conduct except by use of a downward departure. Thus a significant penalty is possible for a mere accidental flipping of the wrong switch. An increase in penalties, as called for under the ECEA, would only make this possibility worse.

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The opinions expressed here do not represent those of BNA, which welcomes other points of view.