Section of Environment, Energy, and Resources
AMERICAN BAR ASSOCIATION

Environmental Enforcement and Crimes Committee Newsletter

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WORD FROM THE CO-CHAIRS

Rich Alonso and Christine LeBel

> When we try to pick out anything by itself, we find it hitched to everything else in the universe. –John Muir

Greetings and welcome to the SEER Environmental Enforcement and Crimes Committee. Already deep in the midst of planning for the 2015–16 bar year, we, as your committee chairs, wanted to reach out and say a personal "hello" to the members who make this committee great and let you know of some exciting upcoming opportunities. We are excited about programs and publications we are developing at the moment. We are planning various quick teleconferences on pressing environmental enforcement issues where we will have the opportunity to hear from key government officials and learn about the future of our practices. The committee is also planning to co-sponsor various programs with other SEER committees that reach beyond enforcement topics, but are important for us to understand and make us better all-around practitioners. We are planning two or three newsletters this year to bring breaking subject matter content to our members and afford publication opportunities to our members. If you are interested in authoring on topics of interest to the committee, please let us know.

A little bit about us, your chairs:

Rich Alonso is a partner in the Environmental Strategies Group for the D.C. office of Bracewell & Giuliani, where he advises manufacturers and energy companies on environmental, permitting, compliance, and enforcement issues before state and federal agencies, with particular expertise in Clean Air Act compliance. Rich previously served as chief of the Stationary Source Enforcement Branch at the U.S. Environmental Protection Agency's Office of Enforcement and Compliance Assurance. In this capacity, he was EPA's second-ranking official for Clean Air Act enforcement.

Christine LeBel entered practice through Vermont Law School's environmental law program and currently works in state-level environmental permitting and enforcement as senior counsel with the Massachusetts Department of Environmental Protection. She works cross-bureaus on a variety of matters ranging from solid waste to drinking water. Prior to joining the Commonwealth state government, Christine worked in private litigation practice. She is a long-time member of the Section, previously involved, among other things, in publications as the executive editor of *Natural Resources & Environment* magazine.

We have an exciting year mapped out and under way, with opportunities for our supporters to author articles and participate in substantive panels, among other things. We'd love to hear from you. If you have ideas for CLEs, articles, or anything else pertaining to the world of environmental crimes and enforcement, please contact us and we'll see how we can best put your input to work.

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Vol. 16, No. 1, January 2016
Kevin Sali, Editor

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NEW JUSTICE DEPARTMENT POLICY CALLS FOR PROSECUTING INDIVIDUALS, NOT JUST CORPORATIONS, IN CIVIL AND CRIMINAL MATTERS

Timothy K. Webster

In September of 2015, the Justice Department announced a new policy, born of the Madoff, Sanford, and other major financial scandals, which requires its civil and criminal prosecutors to redouble their focus on pursuing individuals in connection with corporate investigations and prosecutions. The policy, entitled "Individual Accountability for Corporate Wrongdoing," was issued by Deputy Attorney General Sally Q. Yates. *See* http://www.justice.gov/dag/file/769036/download (hereinafter "Yates Memo"). Notably, the Yates Memo is addressed to and binding upon *all* components of the Justice Department, including the Environment and Natural Resources Division. While the Yates Memo stands for the indisputable proposition that the government should always consider pursuing individuals in, for example, corporate financial fraud cases, the basis for this proposition is far less clear in areas like environmental law where civil liability is usually strict (and sometimes joint and several) and criminal liability is often based on a very low threshold of general intent. This article will explore the Yates Memo and its potential application to environmental matters.

The Yates Memo

The Yates Memo sets out six principles to guide Justice Department enforcement actions:

1. Both criminal and civil investigations of corporations should focus on individuals from the inception of the investigation.
2. Criminal and civil attorneys handling such investigations should be in routine communication with one another.
3. To be eligible for *any* "cooperation credit," corporations must provide the Justice Department with all relevant facts about the individuals involved in alleged corporate misconduct.
4. Absent extraordinary circumstances, no corporate settlement may provide protection from criminal or civil liability for any individuals.
5. Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires, and declinations as to individuals in such cases must be memorialized.
6. Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against individuals based on considerations *beyond* the individuals' ability to pay.

Most white-collar practitioners peg item 3 as the main thrust of this guidance: corporations seeking leniency must rat out potentially culpable individuals. For example, in subsequent speeches, Justice Department officials elaborated on their concerns that companies were "dragging [their] feet" in ways that "thwarted the department's ability to bring charges against responsible individuals." *See, e.g.*, http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-city-bar-0. Deputy Attorney General Yates herself described the policy as setting forth an "all or nothing" proposition for corporate cooperation, *see* http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school (hereinafter "Yates Speech"), although she later clarified that credit for self-disclosure can be separated from credit for cooperation. *See* http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0.

But the Yates Memo has far more sweeping implications for both white-collar and environmental practitioners than just corporate cooperation credit in criminal investigations.

General Concerns

The Yates Memo is another in a line of memoranda issued by deputy attorneys general concerning corporate investigations and prosecutions. The

2008 "Filip Memo" is the most recent statement of general policy, entitled "Principles of Federal Prosecution of Business Organizations." *See* http://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf. It is codified in title 9 U.S. Attorneys' Manual § 28.000. How the Yates Memo will be incorporated into the U.S. Attorneys' Manual, and how it will be interpreted, are not yet known. Regardless of practice area, white-collar practitioners should be concerned about the following:

Cooperation credit requires disclosure of individual wrongdoing. As discussed above, the Yates Memo requires disclosure of information concerning individual wrongdoing in order to obtain "cooperation" credit under the Filip Memo criteria.

The Yates Memo muddies the water on privilege waivers in internal investigations. The Filip Memo established that a "corporation does not need to produce, and prosecutors may not request," privileged materials "as a condition for the corporation's eligibility to receive cooperation credit," including notes of interviews conducted during an investigation, "so long as the corporation timely discloses relevant facts about the putative misconduct." *See* http://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf. Although both the Yates Memo and the accompanying speech carefully limit the required disclosures to "non-privileged" information, it is unclear how the Justice Department will address assertions of privilege in internal investigations in the assessment of total cooperation, particularly with regard to any decisions by defense attorneys not to share interview memos reflecting the statements of individuals who may be potential targets for prosecution. Likewise, if a company is unable to establish individual culpability through an internal investigation, it may have no practical choice but to waive privilege in order to demonstrate why not. The Yates Memo's emphasis on both discovering and disclosing any and all relevant facts about potentially culpable individuals has the potential to put companies in an untenable position in which maintaining privilege and receiving cooperation credit are mutually exclusive aims.

The Yates Memo may drive internal investigations deeper. In large or complex corporate structures, identifying any particular individual responsible for wrongdoing may be difficult. Deputy Attorney General Yates emphasized that the onus is on the corporation to resolve that question, stating that "[i]f they don't know who is responsible, they need to find out" (Yates Speech. Establishing the culpability of an individual—beyond what might be required solely to identify the wrongdoing and enable basic remediation—can require deep and costly probing. It may be possible to identify individuals whose roles in certain conduct would warrant termination, but the new guidance suggests that the Justice Department expects companies to go further. Given the description of the new approach as "all or nothing," careful consultation with experienced counsel will clearly be required for any company seeking cooperation credit to determine just what sort of tailoring is appropriate for a given investigation.

The Yates Memo may impact the retention of counsel for individuals. Although practices vary, business entities often do not provide counsel to individuals during internal investigations that do not yet involve the government (or at least not immediately and not broadly). This is especially true in matters that are likely to be prosecuted civilly, if at all. Given the increased focus on individual liability, the Yates Memo may cause companies to make counsel available earlier and to a greater number of employees (and even former employees) in both potentially civil and criminal cases—thus enormously increasing both the cost and complexity of internal investigations. The increased use of individual counsel can stymie the government, which may be unhappy with the practice and, if so, a backlash may result.

The Yates Memo may alter the progression of investigations and resolutions. The Yates Memo requires that if investigation of individual wrongdoing is still ongoing, an accompanying

corporate case can be closed only if prosecutors memorialize a clear plan for the resolution of the individual cases. During her speech, Deputy Attorney General Yates indicated that, in practice, the Justice Department will seek "[i]n most instances [to] . . . resolve cases with individuals before or at the same time that we resolve the matter against the corporation." This raises the possibility that corporations could spend long periods in limbo, "cooperating" with the Justice Department but never able to obtain closure. Limbo may change to purgatory for public companies that must disclose the investigations in SEC filings. Similarly, the requirement that prosecutors memorialize the reasons for any declination of prosecution against individuals has the potential to encourage more such prosecutions, imposing ongoing cooperation obligations for companies and further extending the time before any issues can be closed.

The Yates Memo may reduce the role of financial ability in making civil charging decisions. Deputy Attorney General Yates indicated that, going forward, "civil lawyers will be looking at factors similar to those considered by criminal prosecutors" and that "financial resources will only be one factor" in making civil charging decisions, *see* Yates Speech. This recasts the role of civil litigation against individuals to focus on establishing accountability and broader deterrence, rather than achieving a monetary recovery.

Implications for Environmental Practitioners

The Yates Memo's push for consideration of charges against individuals seems ill suited to environmental enforcement. Civil liability for most environmental violations is strict, meaning that an individual may be culpable just by virtue of taking (or failing to take) some action that ultimately results in an alleged violation. Should a wastewater operator be held individually liable for civil penalties under the Clean Water Act if samples later show the discharge exceeded permit limits for some parameter? After all, she caused the discharge to occur by operating the system. Should the environmental engineer who reviewed an expansion project be sued for civil penalties if the government later alleges the project required a permit under the Clean Air Act? Should a truck driver be jointly and severally liable for a $100 million landfill cleanup because he transported hazardous substances to the site in the 1950s? If financial ability is no longer a key consideration, will the government bankrupt individuals for the sake of deterrence?

Historically, civil enforcement against individuals has been rare and has usually been limited to situations where the responsible entity was a sole proprietorship or closely held company, or the individual's conduct was fraudulent or otherwise particularly egregious. But the Yates Memo may alter the landscape by requiring a new focus on civil environmental enforcement against individuals. Furthermore, the heightened corporate disclosures required by the Yates Memo may place more information about potential violations in the public domain, leading to increased risk of citizen suit enforcement.

The case for application of the Yates Memo to environmental crimes is also dubious. Many environmental crimes require only general intent, with simple negligence sufficient to establish criminal liability under statutes such as the Clean Air Act, Clean Water Act, and various wildlife statutes. The Justice Department has always had the power to do what the Yates Memo now requires, but it has historically struck a balance (with some notable exceptions) by only pursuing individuals who evidence some degree of scienter or other malfeasance. The Yates Memo, however, burdens prosecutors by requiring a greater investment of resources focusing on potential individual liability, both during the investigation and as part of the approval process for charging decisions. The result could lead to seismic shifts in the scope of environmental criminal investigations, with the great potential for fundamentally unfair results.

Conclusion

The Yates Memo struck at the heart of the white-collar bar, yet it has made only a minimal

impression on environmental practitioners. But beware: the Yates Memo is not limited to financial fraud and applies to all practice areas. Strict application to environmental enforcement would cause a paradigm shift in both civil and criminal enforcement matters, but that result also seems unlikely. Only the passage of time will tell how the Justice Department will interpret the applicability of the Yates Memo to environmental law. In the meantime, environmental practitioners should consider the potential impact of this new policy on their matters.

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Save the Date

Help spread the word about the MDEP

application deadline February 15

The Membership Diversity Enhancement Program (MDEP) is an initiative by the ABA Section of Environment, Energy, and Resources designed to increase the number of government lawyers and diverse lawyers in our Section. These lawyers have typically been under-represented among our members. The program's goal is to have the Section's programs, publications, and other activities reflect the diverse perspectives and interests of all lawyers who practice in the in the environmental, energy, or natural resources law areas.

Applications must be received by **Monday, February 15, 2016.**

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CHALLENGING CAUSATION IN ENVIRONMENTAL CRIMES CASES

David B. Weinstein, Christopher Torres, and Jacob T. Crabtree

In late 2008, the Centers for Disease Control and Prevention ("CDC") confronted an impending public health crisis. One hundred sixty-six people were hospitalized with salmonella-related illnesses. Dr. Ian Williams, Outbreak Response Branch chief at CDC, headed an investigation that identified Peanut Corporation of America's ("PCA") King Nut peanut butter as the source of the salmonella outbreak. An ensuing federal investigation resulted in conspiracy, fraud, and obstruction of justice charges against several PCA executives and employees. *See United States v. Parnell*, No. 1:13-CR-12 (WLS), 2014 WL 4388523 (M.D. Ga. Sept. 5, 2014).

When the government indicated that Dr. Williams would provide expert testimony at trial that the King Nut peanut butter caused the outbreak, the defendants moved to exclude his testimony. *Id.* at *1. Defendants sought to prevent Dr. Williams from testifying that (1) illnesses were caused by salmonella, and (2) for every reported case of a salmonella-related illness, there was likely an additional 30 unreported cases. *Id.* at *2. Defendants offered two exclusion theories at a *Daubert* hearing. First, they argued that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice and should be excluded under Federal Rule of Evidence 403. *Id.* Second, they argued that the Confrontation Clause barred Dr. Williams's testimony because he relied on information gathered and developed by others. *Id.* at *3, *5. The court rejected both arguments and denied the motion to exclude. *Id.* at *1. A jury subsequently returned a guilty verdict.

A *Daubert* Hearing?

Though the *Parnell* court conducted what it termed a *Daubert* hearing, the label is deceptive because the defendants did not appear to challenge Dr. Williams's testimony on pure *Daubert* grounds. The focus of a true *Daubert*-type inquiry is, of course, "the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission." *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 594–95 (1993). In *Parnell*, however, the defendants stipulated that Dr. Williams was an expert and that his methodology in tracing salmonella to PCA's facility was "an accepted scientific method in his field." *Parnell*, 2014 WL 4388523, at *2.

The *Parnell* opinion details the method by which Dr. Williams determined that PCA was responsible for the salmonella outbreak. *See id.* at *1–*2. Officials collected samples of salmonella bacteria found at the sick patients' homes and at the PCA facility where King Nut peanut butter was produced. *Id.* at *2. Using the "well-established technique" of pulsed-field gel electrophoresis ("PFGE"), Dr. Williams's team produced the DNA "'fingerprint[s]' of the tested strain[s] of bacteria." *Id.* at *1. Dr. Williams concluded that PCA was the source of the salmonella outbreak by comparing these bacterial "fingerprints" and determining that they were a "match[]." *Id.* at *2.

Daubert in Criminal Cases

The utility of challenging the government's introduction of expert testimony under *Daubert* in criminal cases is uncertain. *See* Nat'l Research Council, Nat'l Acad. of Sci., Strengthening Forensic Science in the United States: A Path Forward 97 (2009) (the "NAS Report"). The NAS Report recognized that "reported opinions do not offer in *any way* a complete sample of federal trial court dispositions of *Daubert*-type questions in criminal cases." *Id.* (emphasis added). Nonetheless, recent scholarship and Eleventh Circuit case law addressing the admissibility of expert testimony imply ways in which more robust challenges to the admission of expert testimony may be mounted in environmental crimes cases involving questions of causation. In the context of forensic science disciplines, the National Academy of Sciences

noted the dangers of *not* questioning scientific evidence even where there have been advances in the disciplines:

> Those advances, however, also have revealed that, in some cases, substantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people. This fact has demonstrated the potential danger of giving undue weight to evidence and testimony derived from imperfect testing and analysis. Moreover, imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence.

NAS Report at 4. In fact, the NAS Report notes that there are disparities in forensic science operations across agencies; there is a lack of standardization, certification, and accreditation; and there is a challenge of interpretation. *See id*. at 5–8.

This article suggests two avenues by which a *Daubert*-type challenge might be used if opportunity arises in an environmental crimes case involving causation questions.

Fingerprints?

Dr. Williams's reliance on comparing PFGE-produced bacterial fingerprints to determine that the same strain of salmonella was present in both the homes of individuals affected by salmonella-related illnesses and the PCA facility, which allowed causation to be inferred, is intuitively satisfying. The role played by the bacterial fingerprints is recognizably analogous to the role played by human fingerprints in a more typical criminal prosecution. Fingerprint evidence has "been used to identify people for more than a century in the United States" and is a popularly accepted identification method. NAS Report at 136. The analogizing of PFGE to a concept like "fingerprinting" could mislead an attorney, judge, or trier of fact to believe that such evidence is always reliable. *See Parnell*, 2014 WL 4388523, at *1.

By way of example, the NAS Report suggests that fingerprint identification evidence may be susceptible to a reliability challenge under *Daubert*. The NAS Report identified numerous issues associated with the reliability of fingerprint identification and concluded there remains "considerable room for research." NAS Report at 145. The 300-plus page NAS Report casts doubt on the perceived infallibility of fingerprint identification, as well as other established forensic techniques such as shoeprint evidence and bloodstain pattern analysis. *See id.* at 103–04, 149, 177. One commentator has written on the sordid history of governmental suppression of legitimate research regarding the scientific reliability of fingerprinting. *See* Paul C. Giannelli, *Daubert and Forensic Science: The Pitfalls of Law Enforcement Control of Scientific Research*, 2001 U. Ill. L. Rev. 53, 78–81 (2011). Of course, while *Parnell* did not involve human fingerprints, the lesson remains the same: a criminal defendant should not hesitate to challenge a proposed expert's methodology on *Daubert* grounds, despite the methodology's rhetorical appeal or assumed reliability.

Challenging Causation

The government sought to utilize Dr. Williams's testimony to prove that the salmonella found in PCA's facility caused the hospitalized patients' illnesses. This assertion was predicated on salmonella's general capacity to cause illness, as well as the asserted specific causation of the individuals' hospitalizations. The Eleventh Circuit provides a useful *Daubert*-based causation jurisprudence that was recently reiterated in *Chapman v. Proctor & Gamble Distributing, LLC*, 766 F.3d 1296 (11th Cir. 2014), which could be used to challenge such assertions. *Chapman* delineated two categories of analysis. "The first category consists of 'cases in which the medical community generally recognizes the toxicity of the [substance] at issue' to 'caus[e] the injury plaintiff alleges.'" *Id*. at 1303 (quoting *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1239 (11th Cir. 2005)). Examples of this are cigarette smoking and lung cancer, and asbestos and mesothelioma. *Id*.

> [T]he second category contains cases, where the medical community generally does not recognize the substance in question as being toxic and having caused plaintiff's alleged injury. *Id.* These cases require a two-part *Daubert* analysis, comprised of (1) general causation, "whether the [substance] *can* cause the harm plaintiff alleges," *id.*, and (2) specific causation, whether experts' methodology determines the substance "caused the plaintiff's *specific* injury[.]"

Id. (quoting *Hendrix ex rel. G.P. v. Evenflo Co.*, 609 F.3d 1183, 1196 (11th Cir. 2010)).

In *Chapman*, the court applied the second category of analysis and addressed general causation and specific causation. It noted that when expert testimony purporting to establish general causation is challenged under *Daubert*, the district court reviews "reliable methodologies, including dose-response relationship, epidemiological evidence, background risk of the disease, physiological processes involved, and clinical studies" to determine that the expert has satisfied the scientific method. *Id.* at 1306. The *Chapman* court also articulates the methodology for a specific causation analysis:

A reliable differential analysis requires an expert to "compile a comprehensive list of hypotheses that might explain" a plaintiff's condition. *Hendrix*, 609 F.3d at 1195 (citation and internal quotation marks omitted). The "expert must provide reasons for rejecting alternative hypotheses using scientific methods and procedures and the elimination of those hypotheses must be founded on more than subjective beliefs or unsupported speculation." *Id*. at 1197 (citation and internal quotation marks omitted). An expert's failure to enumerate a comprehensive list of alternative causes and to eliminate those potential causes determines the admissibility of proposed specific-causation testimony.

Chapman, 766 F.3d at 1310. The *Chapman* court cautions against inferring specific causation based on temporal proximity and emphasizes that an expert must consider an individual's background medical conditions when determining specific causation. *See id.* at 1309–10.

Although *Chapman* concerned a civil toxic-tort claim, the framework for evaluating expert testimony may be applied to environmental criminal cases involving causation issues. While it may not be useful in cases where general causation is well established, it should be useful where it is not. *See McClain*, 401 F.3d at 1239 ("The court need not undertake an extensive *Daubert* analysis on the general toxicity [causation] question when the medical community recognizes that the agent causes the type of harm a plaintiff alleges."). As the NAS Report cautions, however, we may not want to be so quick to assume that general causation is well established, even when our experience or intuition suggests that it might be.

Conclusion

While opportunities for *Daubert* challenges may not always present themselves in environmental crimes cases, when they do they should be considered carefully. Counsel can look to emerging scholarship, like the NAS Report, and case law, like *Chapman*, for useful guidance on challenging expert testimony in environmental crimes cases.

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ENVIRONMENTAL CITIZEN SUIT DEFENSE STRATEGIES

Al Axe and Lisa Dyar

Citizen suits under the federal environmental laws are being filed with increased frequency. This is probably due, in part, to generally reduced enforcement budgets of relevant state environmental agencies. Further, government efforts to improve regulatory transparency and electronic availability of data submitted by regulated entities have increased the amount of and speed with which members of the public can access information about potential regulatory violations. Developers, states, environmental groups, and even economic competitors can be citizen plaintiffs.

A citizen suit is a lawsuit filed by a private citizen to enforce federal law. Citizen suit provisions appear in more than a dozen federal laws. The provisions share many similarities, but the specific language of the applicable statute determines how an individual citizen suit will proceed under that statute. Even with relevant statutory language differences, there are some common strategies to keep in mind to help avoid or defend against most citizen suits.

Notice. Most citizen suit statutes require plaintiffs to provide 60 days' notice before filing a lawsuit. The purpose of the notice period is to provide opportunities for the relevant regulatory agency to initiate an enforcement action and the regulated entity to achieve compliance before a citizen suit is initiated. Strict compliance with the notice provisions is required, and improper notice may be a basis for challenging a suit. The recipient of a notice of intent letter related to a citizen suit should take prompt action because, in most cases, correcting the alleged violation before suit is filed may deprive the federal court of jurisdiction to hear the case or otherwise moot the lawsuit.

Ongoing violations. Most environmental statutes require some level of current or continuing violations by a defendant at the time a citizen lawsuit is filed. Certain historical air violations that are repeated may also be a basis for a citizen suit. Compliance after a suit is filed may not divest the court of jurisdiction if a violation was continuing or was likely to recur at the time the complaint was filed.

Type of violation. By their terms, environmental citizen suit statutory provisions are often limited to certain types of violations. Some alleged violations may be excluded because they do not fall within the scope of the relevant citizen suit statute. For example, the Clean Air Act authorizes citizen suits for violations of "emission standards or limitations" and the Clean Water Act authorizes suits for violations of "effluent standards and limitations." An evaluation of specific statutory definitions of defined terms such as these can be a potential basis for excluding some alleged violations, thereby narrowing the scope of a lawsuit.

Agency action. In many situations, a governmental agency has already initiated an enforcement action to address violations, but not all government action is sufficient to block a citizen lawsuit from going forward. Civil actions in court, and some administrative actions, can preclude a federal court from having jurisdiction over the citizen suit if the action is being "diligently prosecuted" by the government to require compliance. Recovery of the economic benefit of non-compliance is often key to demonstrating diligent prosecution by the government.

Evidence. Defendants in a citizen suit can and should plan a comprehensive approach to the development of facts and regulatory interpretations to counter a citizen plaintiff's allegations. In addition, citizen plaintiffs must be held to their burden of proving violations, their impacts, and any resulting economic benefit, and of justifying the relief requested. For example, in the recent decision of *Environment Texas Citizen Lobby, Inc. v. ExxonMobil Corporation et al*., 66 F. Supp. 3d 875 (S.D. Tex. 2014) (on appeal to the Fifth Circuit), the federal district court found that the plaintiffs had largely failed to link their health and

environmental claims to the alleged violations. Further, introducing evidence that a defendant has implemented a systematic compliance program that encompasses evaluation, analysis, and correction can help to mitigate penalties and injunctive relief in citizen suits.

Penalties. Statutory maximum penalties can be as high as $37,500 for each day of each violation, but the award of civil penalties in citizen suits is "highly discretionary." *See U.S. v. Tull*, 481 U.S. 412, 427 (1987). Because of the wide range of possible environmental violations, courts must consider certain factors in assessing penalties in citizen suits (e.g., seriousness and duration of the violations, compliance history and size of the defendant, payment of penalties, and any economic benefit of noncompliance). These penalty assessment factors can influence the amount of a penalty up or down at the trial judge's discretion. In some situations, even where citizen plaintiffs can show that violations have occurred, courts are not necessarily bound to impose *any* penalty for such violations.

Attorneys' fees. Awards of attorneys' fees are generally permissible in citizen suits when a party has had some measure of success and the court determines an award is appropriate. Some courts have found it "appropriate" to award fees where a citizen suit has served the public interest, *See, e.g.*, *Sierra Club v. EPA*, 769 F.2d 796 (D.C. Cir. 1985). Calculating the fee amount is highly discretionary, but recovery is not limited to citizen plaintiffs. As demonstrated in *Sierra Club v. Energy Future Holdings Corporation and Luminant Generation Company LLC*, No. W-12-CV-108 (W.D. Tex. Aug. 29, 2014), defendants may be awarded attorneys' fees where it is determined that the suit is "frivolous, unreasonable or groundless, or that the plaintiff continued to litigate after it clearly became so."

Team. Defending a citizen suit in federal district court warrants a litigation attorney familiar with the local rules and judiciary, an environmental lawyer that knows the applicable substantive environmental and regulatory framework and regulatory agencies, and technical experts such as regulatory compliance experts, toxicologists, economic experts, and air dispersion modelers who can assist counsel and provide the necessary expert testimony at trial.

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OPINION: SALT OF THE EARTH? ENFORCING FRACKING'S FALLOUT OF WASTE

Prof. Jim O'Reilly

A broad community response to significant environmental problems begins with understanding of the details, then separation of the objective data from opinions, then an effort for consensus, and then selection of a credible strategy for legislators to consider. As a longtime city council member who was reelected in November 2015, I am acutely aware of public accountability of elected officials for making prudent environmental choices. It's rarely an easy trade-off.

In my state of Ohio, as with a dozen other states, the rush toward natural gas "unconventional drilling" by fracturing shale ("fracking") has posed serious environmental challenges. For example, what should Ohio allow to be done with the 20 million barrels of fracking waste liquids and sludges produced in, or imported into, the state just in the first nine months of 2015? This chemical "brine," with extremely concentrated chemical and radioactive issues, poses a problem in our area, as it may for your region as well. Consider a few steps:

Step 1: Seek first to understand that the economics of gas are different than the economics of waste produced by gas wells. Natural gas bubbles from shale rock are methane, which offers a financial lifeline for drillers. Many of the speculative limited liability company ("LLC") drillers in shale "plays" are carrying lots of debt, and they need to continue drilling for as long as their outflow of marketable methane is greater than their costs. Waste on a shale fracking site is a cost that a driller may seek to avoid by dissolving the LLCs when the well is plugged. The conglomerate purchasing fracked gas does so at arm's length from behind a corporate "veil" and declines to pay for site cleanups. Cap a well, leave its waste pond, drive away, dissolve the LLCs . . . this familiar checklist leaves citizens to pay for cleanups.

Step 2: This radium- and thorium-laced chemical sludge is toxic waste. No easy reuse is possible. Lawyers should focus on the waste on your county's well pad—who owns it, where does it go, how is it restrained from escape into aquifers, and what happens if a spark ignites tanks full of it? The Greeley, Colorado, *Tribune* published a dramatic 2015 news photo of a lightning-caused deep red conflagration, as its photographer captured the exploding truck of gas wastes as the truck was blown a hundred feet in the air . . . a waste challenge indeed. The Resource Conservation and Recovery Act amendment of 2005 and the Superfund definitional exclusion of gas wastes will blow up anyone's hopes to collect cleanup costs from the ultimate buyers of the extracted gas.

Step 3: Recognize that handling of the liquid waste, too toxic to be used for any beneficial agricultural purpose, must involve some commercial entity's payments to a transporter for the removal of the waste. Ben Lupo sits in federal prison today because he transported the waste from the fracking site to a pipe leading to the local river in Ohio. If he had been paid more, would he have acted responsibly with the waste? Texan Jason Halek was indicted in North Dakota on August 24, 2015, for 13 counts of illegally disposing of loads of toxic fracking brine water; others in his group had already pleaded guilty of the same crime.

Step 4: Finding new landfill sites is difficult; it will need to be done more rapidly because the rock from drilling gas wells will permanently occupy an otherwise reusable space in the local landfill. Modern landfills are designed to settle down and then to be refilled. Time and weather cycles shrink the mixed home and business wastes, burying them while their paper and food waste decompose, removing methane gas and drawing off filtered liquids as leachate, until the waste cells are shrunken down enough for the later load to be placed on top of the sunken space. A community that does not want another site taken for a new landfill will embrace this cycle of planned shrinkage and reuse. But radium-bearing nuggets of rock never shrink, and so if fracking waste is allowed into the region's landfill, then the search for a community's next landfill site must begin sooner in time than land use planners had expected. You readers who are environmental enforcers

can "Be the Change." You carry credibility with legislators on issues of potential explosions and fires; urge them to mandate a fire safety protocol with distance setbacks, and explain that state law should be revised to compel the LLCs that are involved in gas waste and gas drilling to carry liability insurance and name the community as additional insured for the new mandatory post-closure cleanup bond. You enjoy good relations with emergency planners; match the disclosure of waste contents with the truck placards and warnings to see if the volatile radioactive fracking waste is concealed by use of placards describing the radium-laced liquids as "brine" or "saltwater." You carry clout with first responders; help them to get the breathing apparatus needed for the volatiles that may be accidentally ignited in your rail yards or your barge canal. And you have inspection authority, so visit the tanks and trucks and rail cars and injection wells, and demand documentation of the contents and the disposal plans**.** *Be the Change*, or at least be an advocate for improved waste handling.

And what can legal defenders of gas drillers do today?

- Get to know the Corporate Compliance Manager.
- Urge that financial responsibility measures be taken by your clients before the accidents occur.
- Urge the client to budget for and actually purchase casualty and liability coverages sufficient to remediate the foreseeable worst cases.
- And urge the client to train, practice, demonstrate, and equip the on-site company responders, so that the waste problem does not explode out of control.

The fallout from not preparing is far worse than the alternatives, so help your client to enjoy those gas profits with one eye on the risk-reduction possibilities.

University of Cincinnati **Prof. Jim O'Reilly** *is the author of West's "Law of Fracking" (2015). The opinions expressed are solely those of the author.*

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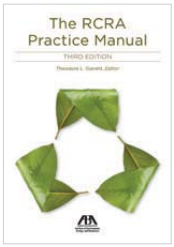

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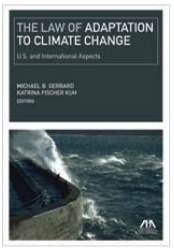

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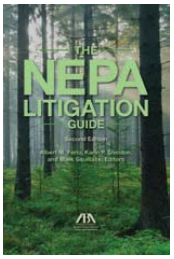

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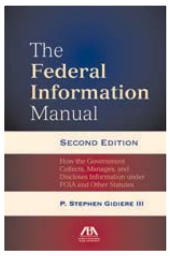

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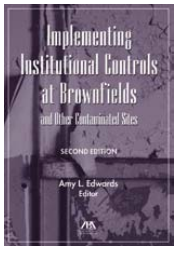

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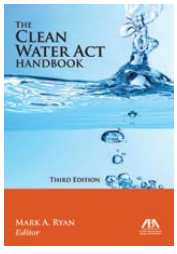

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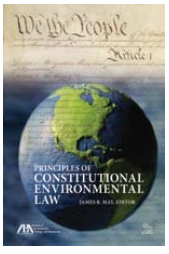

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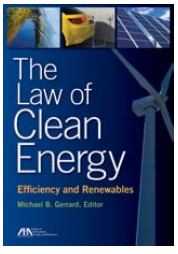

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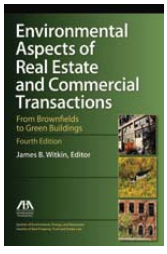

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