The 2010 Oil Spill: Criminal Liability Under Wildlife Laws

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Summary

The United States has laws that make it illegal to harm protected wildlife. Those laws could be used to prosecute those who caused the 2010 oil spill. Perhaps the most famous of these laws is the Endangered Species Act (ESA), which provides for both criminal and civil penalties for acts that harm species listed under the act. The Marine Mammal Protection Act (MMPA) also provides for civil and criminal punishment when an action takes a marine mammal. The Migratory Bird Treaty Act (MBTA) makes it a crime to kill migratory birds.

While there are endangered species and marine mammals in the area affected by the Gulf of Mexico oil spill, it is more likely that any criminal prosecution would use the MBTA rather than the ESA or the MMPA. This is because the MBTA is a strict liability statute in relevant part, unlike the other laws. Accordingly, the prosecution does not have to show that the defendant(s) intended to harm wildlife. The prosecution does not have to prove that the defendants knew their action(s) would lead to an oil spill to find liability. The MBTA was used to prosecute Exxon following the *Exxon Valdez* spill and has been used for decades to find corporations and even their employees criminally liable for the deaths of protected birds.

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Introduction

In April 2010 an explosion occurred on an oil rig in the Gulf of Mexico, reportedly killing 11 people, and, causing the worst oil spill in U.S. history.[1] Millions of barrels of oil are believed to have leaked into the Gulf of Mexico. As the oil spreads, the implications for harm to wildlife grow.

The United States has many laws that protect wildlife from harm. This report will discuss three: the Endangered Species Act, the Marine Mammal Protection Act, and the Migratory Bird Treaty Act.[2] The Endangered Species Act (ESA), for example, prohibits actions that harass, harm, wound, or kill a listed species (meaning either a species listed as threatened or endangered).[3] The Marine Mammal Protection Act (MMPA) prohibits actions that harass or kill marine mammals, further defining harassment as "any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal ... or (ii) has the potential to disturb a marine mammal ... by causing disruption of behavioral patterns."[4] The Migratory Bird Treaty Act (MBTA) makes it unlawful "by any means or in any manner" to take, kill, or attempt to take or kill "any migratory bird, any part, nest, or egg of any such bird."[5]

Criminal Law Basics

Jurisdiction of U.S. Laws on the Outer Continental Shelf

Before analyzing what behavior may be a crime under those laws, some initial jurisdictional issues need to be discussed. The wildlife statutes of this report have different rules regarding where they apply. For instance, the ESA applies to "persons under the jurisdiction of the United States" who take a listed species in the United States, on the territorial seas of the United States, or on the high seas.[6] The MMPA applies to the United States as well as "waters under the jurisdiction of the United States," which is defined as including territorial sea, and waters 200 miles seaward from its coast.[7] The MBTA has no statement regarding its jurisdictional reach.

With or without a statement of jurisdiction, these acts apply to the oil spill from a well located approximately 50 miles off the coast of Louisiana. The Outer Continental Shelf Lands Act (OCSLA) attaches U.S. jurisdiction over the site:

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[1] An estimated total of 4.1 million bbl were released into the Gulf (4.9 million bbl leaked, but 800,000 bbl captured before it leaked into the Gulf). See Official Site of the Deepwater Horizon Unified Command, at www.deepwaterhorizonresponse.com/go/doc/2931/840475.

[2] Potential criminal liability under other federal and state criminal laws is beyond the scope of this report. For information on how oil may harm wildlife and their habitat, see CRS Report R41311, *The Deepwater Horizon Oil Spill: Coastal Wetland and Wildlife Impacts and Response*, by M. Lynne Corn and Claudia Copeland.

[3] 16 U.S.C. § 1538—prohibiting taking listed species; 16 U.S.C. § 1532—defining take as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

[4] 16 U.S.C. §§ 1362(13), 1362(18A).

[5] 16 U.S.C. § 703(a).

[6] 16 U.S.C. § 1538(a).

[7] 16 U.S.C. § 1362(15).

> The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State.[8]

Jurisdiction over the People Who Committed the Acts

The next issue in enforcement is to find to whom these laws apply. Each describes a violation in terms of its being committed by a *person*. Under the ESA, a *person* is defined as including an individual, corporation, and private entity, and an officer, employee, agent of the federal, a state, or foreign government.[9] The MMPA defines *person* to include people, businesses, and parts of governments, such as employees, departments, and agents.[10] While the MBTA does not define *person*, it states that "any person, association, partnership, or corporation" may be guilty of a crime under the act.[11] Accordingly, it appears that all of these laws apply not just to individual actions but to those of corporations or other business entities, or people acting in an official capacity for those organizations.

Prosecution Under the Wildlife Statutes

A violation of a law may be either civil or criminal. The ESA and the MMPA provide for both criminal and civil violations, while the MBTA addresses only criminal prosecutions. Civil and criminal violations differ in how they were committed and how they are punished. This report will focus on criminal violations.

Endangered Species Act

Typically, there are differences between the type of behavior that leads to a civil violation versus the type of behavior that leads to a criminal violation. However, the ESA makes no distinction, requiring only that the violation be done *knowingly*. Under the ESA, someone has committed a violation of the ESA if they "knowingly violate ... any provision of this chapter, or any provision of any permit or certificate issued hereunder."[12] That language appears both in Section 1340(a) for civil violations and Section 1340(b) for criminal violations. It is up to the prosecutor (or the agency recommending prosecution) whether the action is charged civilly or criminally. In either case, killing or harming a listed species violates the act (if it is not otherwise permitted under the act).[13] A criminal violation of the ESA is a misdemeanor.

[8] 43 U.S.C. § 1333(a)(1).

[9] 16 U.S.C. § 1532(13).

[10] 16 U.S.C. § 1362(10).

[11] 16 U.S.C. § 707(a).

[12] 16 U.S.C. § 1340.

[13] The Minerals Management Service (MMS) (now known as the Bureau of Ocean Energy Management, Regulation, and Enforcement [BOEMRE]) indicated that the following endangered species are likely to be in the area of the spill: Northern Right whale, Blue whale, Fin whale, Sei whale, Humpback whale, Sperm whale, West Indian manatee, (continued...)

The term *knowing* applies to the act being committed, not to the violator's understanding of the law; that is, a hunter does not have to know that the animal she shot was endangered, only that she knew she was shooting something.[14] It refers to the defendant's mindset, or *mens rea*. In contrast, other statutes may require *specific intent* to commit an illegal act, meaning the defendant intended to commit a crime. Instead, the knowing standard is described as requiring *general intent*, meaning the defendant intended to commit an act and that act turned out to be a crime. The ESA has been held to be a general intent statute.[15]

The ESA used to be a specific intent statute. Before being amended, the statute required a prosecutor to show the defendant acted *willfully* to establish a criminal violation.[16] One environmental law expert has noted how the knowing standard of mens rea over other, stricter, requirements can make prosecution easier:

> Why is this more relaxed mens rea element important for the government's deterrence objectives? ... Relaxing mens rea ... can dramatically improve the prosecutor's chance of success. This is true for crime in general. Indeed, it is especially so for environmental crime, at least where those violating environmental regulations are large corporations where individuals making decisions may seek to remain willfully ignorant.[17]

ESA and the Oil Spill

The knowing requirement seemingly nullifies any prosecution for the oil spill for harm to listed species. A crime, or in fact, a civil violation, could be prosecuted under the ESA only if someone (e.g., BP, Deepwater Horizon, Halliburton, or any of their employees or agents) *knew* that their actions would lead to an oil spill. Under a general intent statute, a defendant has to intend to commit an act (meaning the spill or the blowout) and that act turned out to be a crime. That is a difficult standard to prove in this context. It is not enough to show that someone was reckless or irresponsible, or ignored important information. To convict, it must be shown that the defendant or defendants knew their actions would cause a spill.

(...continued)

Leatherback turtle, Green turtle, Hawksbill turtle, Kemp's Ridley turtle, Loggerhead turtle, Gulf sturgeon, Whooping crane, Piping plover, Alabama beach mouse, Choctawhatchee beach mouse, St. Andrew beach mouse, and Perdido Key beach mouse. MMS Outer Continental Shelf Oil & Gas Leasing Program: 2007-2012, Final Environmental Impact Statement MMS 2007-003. Available at http://www.boemre.gov/5-year/2007-2012FEIS.htm.

[14] See United States v. McKittrick, 142 F.3d 1170, 1176-77 (9th Cir. 1998) (gray wolf) (holding intent requirement of ESA was satisfied when defendant knew he shot an animal, and that animal turned out to be a protected gray wolf, not that the defendant knew that the animal was protected); United States v. St. Onge, 676 F. Supp. 1044, 1045 (D. Mont. 1988) (grizzly bear) (indicating that issue is whether defendant shot at an animal knowingly, not whether defendant recognized the animal he was shooting); United States v. Billie, 667 F. Supp. 1485, 1492 (S.D. Fla. 1987) (Florida panther) (rejecting defendant's argument that government needs to prove defendant knew animal he was shooting was protected as "without support in law or reason").

[15] See U.S. v. Kapp, 2003 WL 23162408, *8 (N.D. Ill. 2003) ("the ESA does not require proof that the defendant had a criminal objective or was even aware of the unlawfulness of his conduct").

[16] P.L. 95-632, § 6(4) substituted *knowingly* for *willingly* in what is codified at Section 1540(b)(1), addressing criminal violations. The *knowing* requirement in the civil provision (Section 1540(a)) appeared in the original public law and remains.

[17] Richard J. Lazarus, *Mens Rea In Environmental Criminal Law: Reading Supreme Court Tea Leaves*, 7 Fordham Envtl. L.J. 861 (Symposium, 1996).

Marine Mammal Protection Act

Because the MMPA also has a knowing standard for its criminal violations, it appears that criminal prosecution under this act for harm to marine mammals such as dolphins, whales, and manatees, is unlikely.

Under the MMPA, a "person who knowingly violates any provision of this subchapter or of any permit or regulation issued thereunder [not including takings by commercial fishing operations] shall, upon conviction, be fined not more than $20,000 for each such violation, or imprisoned for not more than one year, or both."[18] The case law for the MMPA is not as extensive as that of the ESA. However, the Ninth Circuit has discussed the mens rea under the MMPA, clarifying that the standard is *knowing*, not merely *negligence*.[19] Like the ESA, violations of the MMPA are misdemeanors.

While the ESA requires establishing knowing conduct to prove a civil violation, the MMPA has no such requirement. Civil violations occur if a person "violates any provision of this subchapter or of any permit or regulation issued thereunder."[20] Accordingly, intent is not necessary. A civil fine under the MMPA can reach $11,000.[21]

MMPA and the Oil Spill

Thus, while the ESA does not appear to provide a vehicle for either civil or criminal prosecution for animals killed or injured by the oil, due to its knowing standard, and criminal prosecutions under the MMPA are similarly restricted, civil charges remain available under that act. Civil violations may be fined up to $11,000 for each violation.[22] Because the MMPA penalizes activities that not only kill or injure a marine mammal, but those that harass or interrupt breeding, breathing, feeding, or sheltering, the fine could be substantial.

Migratory Bird Treaty Act

The mens rea for the MBTA is different from that in the ESA and the MMPA. It allows prosecution of misdemeanors based on strict liability.[23] This means instead of having to show that defendants knew they were committing a particular act, the prosecution only has to show that an

[18] 16 U.S.C. § 1375(b).

[19] United States v. Hayashi, 22 F.3d 859, 862 (9th Cir. 1994) ("Under the MMPA, no criminal penalty can attach for negligent conduct").

[20] 16 U.S.C. § 1375(a)(1).

[21] According to the penalty chart posted by the General Counsel of the National Oceanic and Atmospheric Administration, the recommended minimum fine for killing a marine mammal is $3,250 for a first violation, $4,500 for a second violation, and $8,500 for a third violation. See NOAA Office of General Counsel Penalty Schedules at http://www.gc.noaa.gov/enforce-office3.html.

[22] The statute provides a civil penalty of $10,000. 16 U.S.C. § 1375(a). However, under the Debt Collection Improvement Act, that amount has been adjusted for inflation and is now $11,000. 73 Fed. Reg. 75321 (Dec. 11, 2008); 15 C.F.R. § 6.4(e)(10).

[23] A knowing standard applies to felony charges relating to taking migratory birds with the intent to sell or selling migratory birds. 16 U.S.C. § 707(b). Additionally, charges relating to baiting birds require proof of knowledge. 16 U.S.C. § 704(b).

act happened. Under strict liability, actors are liable for a violation regardless of what they knew or what they meant to do. It is the easiest standard under which to prosecute.

The portion of the MBTA that addresses misdemeanor violations[24] invokes strict liability: "any person, association, partnership, or corporation who shall violate any provisions of said conventions or of this subchapter, or [violate a regulation] shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $15,000 or be imprisoned not more than six months, or both."[25] The statute is expansive, prohibiting taking a migratory bird "by any means or in any manner."[26] *Taking* is defined in the regulations as "pursue, hunt, shoot, wound, kill, trap, capture, or collect."[27]

The statutory history of the MBTA makes reference to its strict liability provisions. In discussion regarding the 1986 amendment of the act, in which the felony provision regarding taking a bird to sell or barter was modified, the Senate addressed the misdemeanor provisions that are at issue here:

> Nothing in this amendment is intended to alter the "strict liability" standard for misdemeanor prosecutions under 16 U.S.C. 707(a), a standard which has been upheld in many Federal court decisions.[28]

In 1998, the Senate again discussed preserving the strict liability provision for misdemeanors even though the provision that addressed the mens rea for bird baiting[29] violations was being modified. It focused on the long history of strict liability under the act:

> The elimination of strict liability, however, applies only to hunting with bait or over baited areas, and is not intended in any way to reflect upon the general application of strict liability under the MBTA. Since the MBTA was enacted in 1918, offenses under the statute have been strict liability crimes. The only deviation from this standard was in 1986, when Congress required scienter for felonies under the Act.[30]

Although the original purpose of the MBTA was to protect birds from hunting, it has long been used to prosecute any sort of taking of birds, including when they die from contamination. The Department of Justice, in a memorandum supporting its prosecution of an oil company and its employee for killing migratory birds in open-top oil tanks,[31] refers to three unpublished cases in

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[24] One section of the MBTA has a felony provision but pertains to selling birds. 16 U.S.C. § 707(b). Another portion of the MBTA requires a knowing violation but pertains to baiting birds. 16 U.S.C. § 704(b). Those two sections are not relevant to this discussion.

[25] 16 U.S.C. § 707(a).

[26] 16 U.S.C. § 703(a).

[27] 50 C.F.R. § 10.12.

[28] S. Rep. 99-445 (1986), 1986 U.S.C.C.A.N. 6113, 6128.

[29] Baiting birds is when hunters put food in an area to draw birds to them. Violations related to baiting are found in 16 U.S.C. § 704(b).

[30] S. Rep. 105-366, at 3 (1998). One court rejected this history as being commentary of a later Congress rather than evidence of what a current Congress has intended to legislate. U.S. v. Chevron USA, Inc., No. 09-CR-0132, 2009 WL 3645170 (W.D. La. 2009) (rejecting a plea agreement wherein Chevron had agreed to plead guilty under the MBTA to killing 14 brown pelicans trapped in its rig caisson).

[31] United States v. Citgo Petroleum Corp., No. 06-563-S, 2007 WL 2049382, Trial Memorandum of the United States Regarding Violations of the Migratory Bird Treaty Act - Counts Six Through Ten (S.D. Texas June 26, 2007) (hereinafter *DOJ Memorandum*).

which oil companies were convicted under the MBTA for the deaths of birds in oil sump pits.[32] That same DOJ Memorandum refers to three cases in which companies and/or individuals were convicted of killing migratory birds as a result of contaminated mining tailings or collection ponds.[33] These cases illustrate that convictions under the MBTA are possible when migratory birds are killed incidentally by being poisoned or otherwise harmed by contaminants, rather than being specifically targeted.

In one case, the Second Circuit discussed the strict liability standard of the MBTA. The court referenced the jury instructions of the trial court, in which jurors were advised that:

> under the law good will and good intention and measures taken to prevent the killing of the birds are not a defense.... The Government in this case does not have to prove that the defendant intended to kill the birds. You may convict the corporation even if you find that the killing of the birds was accidental or unintentional provided that you find that the FMC Corporation did kill the birds as charged in the indictment.[34]

In that case, a pesticide manufacturer was charged with killing 92 migratory birds that died in a wastewater pond at its plant. The Second Circuit found that no intent to kill the birds was necessary to support a conviction under the MBTA.[35] Its decision rested in part on the fact that the defendant was manufacturing something known to be dangerous. It distinguished the criminal act of the defendant from other actions, such as accidently hitting a bird while driving, stating that any punishment for those technical violations is best left to "the sound discretion of prosecutors and the courts."[36] Under a similar analysis, it appears likely that an oil spill, which is known to be toxic, would be an act for which a defendant may be found strictly liable under the MBTA.

The Tenth Circuit revisited the constitutionality of the strict liability standard.[37] It upheld the statute but found that, under certain circumstances, the application of the act could be unconstitutional. The court was reviewing the conviction of two operators of oil drilling equipment known as heater-treaters. Dead birds had been found in heater-treaters in the area, and the U.S. Fish and Wildlife Service (FWS) had conducted an educational campaign to inform operators of the danger and liability. Following the educational campaign, two different operators were prosecuted for migratory birds killed in their equipment. The Tenth Circuit reversed one of the convictions, finding that the death had occurred before the operator had knowledge that the behavior could be criminal. The court said that when actions are commonly not criminal or

[32] DOJ Memorandum at 3 (United States v. Stuarco Oil Co., 73-CR-129 (D. Colo. 1973) (company charged and pled nolo contendere to 17 counts under the MBTA for deaths of birds resulting from company's failure to build oil sump pits in a manner that could keep birds away); United States v. Union Tex. Petroleum, 73-CR-127 (D. Colo. 1973) (prosecution of oil company for maintenance of oil sump pit); United States v. Equity Corp., Cr. 75-51 (D. Utah 1975) (company charged with and pleaded guilty to 14 counts under the MBTA for deaths of 14 ducks caused by the company's oil sump pits)).

[33] DOJ Memorandum at 3 (United States v. Kennecott Communications Corp., No. N-90-16M (D. Nev. Mar. 8, 1990); United States v. Echo Bay Minerals Co., No. CR N-90-52-HDM (D. Nev. 1990); United States v. Nerco-Delamar Co. (a.k.a. Delamar Silver Mine), No. CR 91-032-S-HLR (D. Idaho Apr. 21, 1992)).

[34] United States v. FMC Corp., 572 F.2d 902, 904 (2d Cir. 1978) (the $500 fine under the MBTA was upheld).

[35] For other circuit court decisions upholding strict liability for MBTA violations (although not necessarily related to contamination), see United States v. Morgan, 311 F.3d 611 (5th Cir. 2002); United States v. Corrow, 119 F.3d 796 (10th Cir. 1997); United States v. Boynton, 63 F.3d 337 (4th Cir. 1995); United States v. Engler, 806 F.2d 425 (3d Cir. 1986); United States v. Wood, 437 F.2d 91 (9th Cir. 1971).

[36] United States v. FMC Corp., 572 F.2d at 905.

[37] United States v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010).

dangerous, there must be fair notice before strict liability can be imposed.[38] This may be distinguished from the facts of the Gulf oil spill in that oil is known to be toxic.

Another court also questioned the strict liability standard in the oil patch. Despite the acceptance by the Fifth Circuit of the strict liability standard for MBTA crimes,[39] a lower federal court in Louisiana refused to impose strict liability on an oil company whose equipment caused the death of 14 brown pelicans. In *United States v. Chevron USA, Inc.*, the court for the Western District of Louisiana rejected a plea agreement in which Chevron pleaded guilty to having killed the birds in violation of the MBTA.[40] The district court referenced Fifth Circuit precedent,[41] noting the Fifth Circuit had been in the minority in refusing to accept strict liability to that class of criminal cases (baiting) before the law was amended.[42] The district court then indicated it would not accept strict liability for this type of crime. The district court stated that it "declines to extend the Fifth Circuit's application of strict liability under the MBTA" to the conduct of the defendant. The court found the defendant did not have "fair warning" that its drilling rigs would kill brown pelicans. In addition to rejecting Fifth Circuit precedent, which it found was unrelated, the court rejected the persuasive value of the convictions in the *Apollo* case by the lower Kansas federal court (before the Tenth Circuit had decided the appeal),[43] saying it "simply declines to adopt the reasoning and rationale of that decision."[44]

MBTA and the Oil Spill

The most similar case to the 2010 oil spill is that of the *Exxon Valdez*, in which Exxon Corp. and a subsidiary were convicted of violations of the MBTA.[45] Exxon agreed to a $150 million criminal fine, but as part of an agreement with the United States, paid $25 million instead.[46] Exxon also paid $100 million in criminal restitution for injuries to fish, wildlife, and habitat.[47]

Based on other similar prosecutions under the MBTA, a court could possibly find liability for the corporations involved in the 2010 spill, their subsidiaries, and their officers and employees, which, under the MBTA, includes fines and up to six months imprisonment.[48]

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[38] United States v. Apollo Energies, Inc., 611 F.3d 679, *18-19 (10th Cir. 2010).

[39] United States v. Stephans, 142 Fed. Appx. 821 (5th Cir. 2005); United States v. Morgan, 311 F.3d 611 (5th Cir. 2002).

[40] No. 09-CR-0132, 2009 WL 3645170 (W.D. La. Oct. 30, 2009) (*Chevron USA*).

[41] United States v. Sylvester, 848 F.2d 520 (5th Cir. 1988) (holding that prosecution could not show that hunters knew the field was baited and that strict liability did not apply); United States v. Delahoussaye, 573 F.2d 910 (5th Cir. 1978) (holding that penalizing hunters when they could not have known field was baited was contrary to law).

[42] Chevron USA, at *3.

[43] United States v. Apollo Energies, Inc., Nos. 08-10111-01-JTM, 08-10112-01-JTM, 2009 WL 211580 (D. Kan. January 28, 2009), *aff'd in part, rev'd in part*, United States v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010).

[44] Chevron USA, at *5.

[45] United States v. Exxon Corp., No. A90-015 CR (D. Alaska sentencing April 24, 1991). While the civil penalty challenge was resolved by the U.S. Supreme Court (*Exxon Shipping Corp. v. Baker*, 128 S. Ct. 2605 (2008)), no decision regarding the criminal penalties was published.

[46] Exxon Valdez Oil Spill Trustee Council Settlement webpage at http://www.evostc.state.ak.us/facts/settlement.cfm. See also Exxon Shipping Corp. v. Baker, 128 S. Ct. at 2613 (referring to the criminal prosecution).

[47] Id. The misdemeanors under the MBTA were just one of five different types of criminal charges brought, which was the only wildlife act used.

[48] The defendants for the *Exxon Valdez* spill included Exxon and a subsidiary. The ongoing case against Citgo, referenced above, also includes a subsidiary and the environmental manager of the site as defendants. United States v. (continued...)

There is no way at this point to estimate what, if any, criminal penalty might be assessed against a defendant as a result of the oil spill. According to FWS, 5,362 bird carcasses have been collected as of August 30, 2010, although that number cannot account for the number of birds that simply sunk after being coated with oil.[49] For example, following the *Exxon Valdez* spill, 35,000 dead birds were found, but the Exxon Valdez Oil Spill Trustee Council estimated that over 250,000 birds were killed.[50] Additionally, it does not always follow that an MBTA fine is calculated per dead bird. At least one court has held that the crime is based on the number of acts that led to birds being killed and not on the number of birds killed.[51] The act also makes it a crime to *take* a bird, which includes wounding it. It is not clear whether being coated in oil would be considered a wound.

MBTA criminal penalties reported in case law are varied. In the *United States v. FMC Corp.*, summarized above, 92 bird deaths resulted in a $500 penalty.[52] At the time of that case, the maximum fine was $500. In a 2009 case in which two migratory birds were found dead in machines used to treat crude oil, a total of $2,000 in fines was assessed: $1,500 against a corporation for one violation, and $250 against an owner/operator for one violation.[53] A steel company was assessed a $65,900 fine for the deaths of 28 migratory birds in its runoff water system, although ultimately found not guilty.[54]

Alternative Fines Act

Prosecution under the MBTA may also consider a section of the criminal code, 18 U.S.C. § 3571, which originated in the Comprehensive Crime Control Act of 1984 and was amended by the Alternative Fines Act. The Alternative Fines Act addressed certain problems with criminal penalties. Congress created the law to "make criminal fines more severe."[55] The statute relates penalties to the incarceration time and sets uniform fines for those felonies and misdemeanors. It does this in two steps: one to classify the crime (18 U.S.C. § 3559); and the other to set the fines based on those classifications (18 U.S.C. § 3571). Thus, under 18 U.S.C. § 3559, a statute that imposes no more than six months in jail (such as the MMPA and the MBTA) is classified as a Class B misdemeanor. A statute that imposes no more than one year imprisonment (such as the ESA) is classified as a Class A misdemeanor. The fine amounts for Class A and Class B misdemeanors are set under 18 U.S.C. § 3571. A Class A misdemeanor imposes a maximum fine of $100,000 on an individual defendant, and a Class B misdemeanor imposes a maximum fine of $5,000 for an individual defendant. The fines in both cases are doubled for defendants that are organizations.

(...continued)

Citgo Petroleum Corp, C-05-563 (S.D. Texas). See also United States v. Cota, No. CR 08-00160 (N.D. Cal. June 22, 2009) (accepting the plea of a ship's captain under the Clean Water Act and the MBTA for harm resulting from oil spill following allision with the San Francisco Bay Bridge; management company of the ship was also a defendant).

[49] FWS, Consolidated Fish and Wildlife Collection Report (August 30, 2010), at http://www.fws.gov/home/dhoilspill/collectionreports.html.

[50] http://www.evostc.state.ak.us/facts/qanda.cfm.

[51] United States v. Corbin Farm Service, 444 F. Supp. 510 (E.D. Cal. 1978).

[52] United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978).

[53] United States v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010).

[54] United States v. WCI Steel, Inc., No. 5:04 MJ 5053, 2006 WL 2334719 (N.D. Ohio August 10, 2006).

[55] H.R. Rep. 98-906, at 1 (1984), 1984 U.S.C.C.A.N. 5333, 5433.

However, if a statute's penalty provision post-dates that 1984 act, the fines under Section 3571 do not apply. Both the ESA and the MBTA were amended to change the criminal penalties after 1984.[56]

Congress changed the ESA's criminal fines in 1988.[57] The amendment set the maximum criminal fine at $50,000. Even if prosecution were brought under the ESA, which, as discussed above, appears unlikely, the $100,000 criminal penalty provided by Section 3571 for a Class A misdemeanor would not apply.[58]

Similarly, the 1998 amendment of the MBTA set a fine of $15,000.[59] However, this fine is larger than the $5,000 provided by Section 3571 for a Class B misdemeanor.

The Alternative Fines Act also includes a doubling provision that allows a fine of twice any financial loss: "if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss."[60] However, it is likely that a court would find that the MBTA amount prevails and the doubling provision is not available. For one thing, the current MBTA criminal fine provision post-dates the Alternative Fines Act. Additionally, when amending the MBTA fines, Congress specifically applied the Alternative Fines Act to another type of violation (the bird baiting provision in Section 707(c)), suggesting a purposeful omission regarding the misdemeanor provision. If a court held that it did apply, defendants prosecuted for the oil spill could be responsible not just for the $15,000 fine under the MBTA, but for twice the pecuniary losses incurred by anyone as a result of the spill, such as cleanup expenses and lost revenue.[61]

Conclusion

While the three major wildlife statutes provide for criminal penalties, the mens rea requirement of two of them (the ESA and the MMPA) appears to prohibit their application to the 2010 oil spill. Both require proof that a defendant knew it was committing the act of causing an oil spill, which does not appear at this point to match the known circumstances surrounding the oil spill. However, the MBTA imposes strict liability on defendants and seems to be a useful tool for prosecution, especially in light of what appear to be massive numbers of bird deaths as a result of the oil spill. Strict liability means that the prosecution has to show only that the defendant was responsible for the act, not that it knew or intended to spill oil.

[56] The original criminal penalty of the MMPA appears to have been superseded by Section 3571. However, the knowing standard is likely to bar criminal prosecution under this act, and so this act is not discussed further.

[57] P.L. 100-478, § 1007, 102 Stat. 2309.

[58] See United States v. Eisenberg, 496 F. Supp. 2d 578. 581-3 (E.D. Pa. 2007) (holding that the ESA amendments that post-date the 1984 act evidence congressional intent to impose a criminal fine lower than that of the 1984 act).

[59] P.L. 105-312, § 103, 112 Stat. 2956.

[60] 18 U.S.C. § 3571(d).

[61] The Alternative Fines Act was used to assess the criminal fine against Exxon. However, that prosecution pre-dated the 1998 change to the MBTA, meaning the MBTA amendment superseding the Alternative Fines Act was not in place. Also, the grouping of the fines in the Exxon prosecution makes it impossible to determine whether any doubling was related to the MBTA rather than to the other criminal charges brought against the company.

Earlier prosecutions under the MBTA have charged corporations, their subsidiaries, and even employees with crimes under the MBTA, making it likely that the same type of defendants could be named should the United States prosecute under the act. Criminal fines of up to $15,000 per act are available under the law; however, it is not known whether that fine would be assessed per dead or wounded migratory bird or per criminal action.

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