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ENERGY CRIMES—FEDERAL AND STATE CRIMINAL PROSECUTIONS IN THE ENERGY SECTOR

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§ 30.01 Introduction*

Criminal prosecutions under federal and state environmental laws recently have targeted conduct related to the production, transmission, and processing of fossil fuels and electricity. Though temporarily halted during the Trump administration, the Biden administration has revived criminal prosecutions under the Migratory Bird Treaty Act (MBTA)[1] and the Bald and Golden Eagle Protection Act (BGEPA)[2] at wind energy facilities and will undoubtedly revive prosecutions in the upstream oil and gas production sector. Federal prosecutors also continue to bring criminal charges under various environmental statutes related to high-profile explosions, fires, and releases of material from industrial facilities. Though somewhat rarer, federal prosecutors have been willing to charge criminal violations of the Clean Air Act's (CAA) general duty clause,[3] most recently

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[1] 16 U.S.C. §§ 703–711.

[2] *Id.* §§ 668–668d.

[3] 42 U.S.C. § 7412(r)(1).

at a facility at which an explosion and fire injured several employees. And state prosecutors have recently begun charging energy companies under state criminal statutes where the company's operations are alleged to have caused destructive wildfires.

This chapter summarizes the grounds for criminal liability in these areas and digests some of the leading examples of criminal prosecutions.

§ 30.02 Migratory Birds and Eagles

[1] Introduction to Species Protection and "Take"

In the United States, species can be protected by a variety of laws, the widest ranging of which is the Endangered Species Act of 1973 (ESA).[4] Migratory bird species, however, are protected no matter their population statuses under the MBTA, with bald and golden eagles enjoying an additional layer of protection under the BGEPA.

While the populations of many migratory birds and eagles are now stable and thriving, this was not always the case. The MBTA was enacted in 1918 in response to the significant overhunting that had begun in the 1800s of many bird species, primarily in pursuit of plumes to use in millinery.[5] Similarly, in 1940, the BGEPA was enacted in response to a sharp decline in bald eagle populations due to both hunting and habitat loss (the golden eagle was added in 1962, both to protect the golden eagle's declining populations and because bald and golden eagles are difficult to distinguish on sight).[6]

Central to the function—and differing interpretations—of all three of these laws is the legal concept of "take." Take is defined differently in each statute, and each statute arises from a different historical context and legislative intent. Take undoubtedly includes intentional killing and hunting under all three, but other acts may be more controversial, particularly ones that are considered "incidental take." Incidental takes are those that are not intentional but occur as the result of an otherwise lawful activity.[7] Therefore, incidental takes are the primary concern of developers and industry.

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[4] 16 U.S.C. §§ 1531–1544.

[5] *See* Solicitor's Opinion M-37050, "The Migratory Bird Treaty Act Does Not Prohibit Incidental Take," at 2 (Dec. 22, 2017).

[6] After a significant rebound in population, the bald eagle was designated "least concern" in 2007 on the federal level, though it is still protected under some state laws. *See* U.S. Dep't of Agric., "Index of Species Information: Aquila Chrysaetos," https://www.fs.usda.gov/database/feis/animals/bird/aqch/all.html.

[7] *See* 50 C.F.R. § 21.95; *see also* Migratory Bird Permits; Programmatic Environmental Impact Statement, 80 Fed. Reg. 30,032, 30,034 (May 26, 2015) (notice of intent).

While incidental takes without a permit are always unlawful regarding a species protected under the ESA or BGEPA, the applicability of the MBTA is less settled. Has a company committed a crime under the MBTA if a migratory bird species dies on its power lines? Is a wind farm liable under the BGEPA for an eagle killed by one of its turbines? How far does the statute really extend? The answers to these questions have varied over time and may be subject to more change in the future. This section will discuss the applicability of the MBTA and BGEPA to various parts of the energy sector, their enforcement, and the possible regulatory changes in the future.

[2] Migratory Bird Treaty Act

The MBTA is the implementing law for a convention signed by the United States and Great Britain (on behalf of Canada) in 1916. Today, there are a total of four underlying conventions to the law, including Mexico, Japan, and Russia.[8] The law's definition of "take" is "to pursue, hunt, shoot, wound, kill, trap, capture, or collect," or attempt to do so, and "migratory bird" covers almost every wild bird found in the United States.[9]

In determining whether the law covers incidental take, the language of these conventions is often referred to, as well as the contents of the congressional floor debate.[10] One side argues that the statute prohibits any take within the limits of proximate cause.[11] The other argues that the statutory definition of "take," when analyzed in its context, clearly indicates only active and purposeful acts.[12] Therefore, under one interpretation, a great many acts that lead to the non-purposeful death or injury of a bird would be unlawful; under the other, a person would at the very least need to be taking an affirmative, purposeful step toward the bird's harm.

[a] Circuit Split and Uneven Enforcement

These warring interpretations have been the source of an administration-dependent pendulum effect on regulatory guidance as well as a circuit split. Therefore, the possibility of enforcement under this law is currently

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[8] *See* M-37050, *supra* note 5, at 5–8.

[9] 50 C.F.R. § 10.12; *see* U.S. Fish & Wildlife Serv. (FWS), "Migratory Bird Treaty Act of 1918," https://www.fws.gov/law/migratory-bird-treaty-act-1918.

[10] *See, e.g.*, M-37050, *supra* note 5, at 2–10; Solicitor's Opinion M-37041, "Incidental Take Prohibited Under the Migratory Bird Treaty Act," at 6–8 (Jan. 10, 2017); Am. Petroleum Inst. & Indep. Petroleum Ass'n of Am., "Comment Letter on Migratory Bird Permits; Programmatic Environmental Impact Statement, 80 Fed. Reg. 30,032," at 4–5 (July 27, 2015) (API Comments).

[11] *See generally* M-37041, *supra* note 10; United States v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010).

[12] *See generally* M-37050, *supra* note 5; United States v. CITGO Petroleum Corp., 801 F.3d 477 (5th Cir. 2015).

highly dependent on who is in office, as well as the location where the harm took place.

A lower court is bound to follow the precedent in its applicable circuit court of appeals. Therefore, in the U.S. Court of Appeals for the Tenth Circuit, where cases such as *United States v. Apollo Energies, Inc.*,[13] control, an MBTA violation is far more likely to be prosecuted than in the U.S. Courts of Appeals for the Fifth, Eighth, or Ninth Circuits, where the controlling cases do not recognize incidental take as being within the MBTA's scope. Notably, the matter has not yet been brought to the U.S. Supreme Court by any party on either side of the divide. Until it is, the interpretation of this law will remain up to the circuit courts.

[b] Diverging Interpretations of "Take"

Beginning in the 1970s, the government began to prosecute MBTA cases against various industrial sectors for incidental takes, beginning with bird deaths related to oil pits.[14] The first prosecutions that resulted in reported opinions, however, each related to pesticide poisonings. *United States v. Corbin Farm Service*[15] and *United States v. FMC Corp.*[16] each found that the defendants could be held liable for birds killed by their use of pesticides: in *Corbin*, when the defendants sprayed a pesticide on a field where birds were known to feed, and in *FMC*, when the defendant allowed pesticide-contaminated wash water to escape into a pond. Each case examined the issue of intent, largely by the application of analogies to other areas of law. While each of these courts applied strict liability to the defendants' conduct, each also limited their rulings: in *Corbin*, by suggesting that a defendant who "acted with reasonable care or [was] powerless to prevent the violation" would not have violated the MBTA;[17] and in *FMC*, by relying on the defendant's "extrahazardous activities," a tort law concept that imposes strict liability.[18]

In 1991, in *Seattle Audubon Society v. Evans*, the Ninth Circuit embarked on a discussion of the concept of "direct" versus "indirect" take under the MBTA, ultimately determining that habitat destruction indirectly causing bird death was not a take within the meaning of the MBTA.[19] Notably, the

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[13] 611 F.3d 679 (10th Cir. 2010).

[14] *See* M-37041, *supra* note 10, at 13.

[15] 444 F. Supp. 510 (E.D. Cal. 1978).

[16] 572 F.2d 902 (2d Cir. 1978).

[17] *Corbin*, 444 F. Supp. at 536.

[18] *FMC*, 572 F.2d at 907.

[19] 952 F.2d 297, 303 (9th Cir. 1991).

difference between direct and indirect take is *not* the same as the difference between intentional and incidental take.[20] Rather, the direct/indirect question is closer to the question of what, exactly, *caused* the bird death, whereas the intentional/incidental question is about the *mental state* of the person causing the bird deaths. Still, *Seattle Audubon*, when read in concert with *Corbin* and *FMC*, sets up the analysis that incidental take can be covered under the MBTA, as long as it is also direct. *Mahler v. U.S. Forest Service* in the U.S. District Court for the Southern District of Indiana assembled a detailed rebuttal to this analysis,[21] while *United States v. Moon Lake Electric Ass'n* from the U.S. District Court for the District of Colorado assembled the arguments in support of an incidental-inclusive interpretation of take under the MBTA.[22]

In 2010, the Tenth Circuit decided *Apollo Energies*, which is now the binding precedent regarding incidental take under the MBTA in that circuit.[23] In that case, a U.S. Fish and Wildlife Service (FWS) investigation found bird remains in several heater-treaters, where the birds had fallen in through the equipment's exhaust pipes and louvers. Following this investigation, the FWS launched a public education campaign to alert oil producers to the issue, during which time it chose to not recommend prosecution for any associated violations. However, once the grace period had ended, another search of Apollo Energies, Inc.'s (Apollo), heater-treaters, as well as another company whose case was consolidated with Apollo's, yielded more bird carcasses in the equipment, and the FWS recommended the violations for prosecution.[24]

Based on a previous Tenth Circuit case as well as a sampling of cases from other circuits, the *Apollo Energies* court concluded that the MBTA was a strict liability law, requiring no intent.[25] The defendants pursued a due process argument, arguing that the definition of "take" in the MBTA was unconstitutionally vague and did not provide fair notice of what acts would constitute criminal activity.[26] The court dispensed with both of these arguments, finding that "[t]he actions criminalized by the MBTA may be legion, but they are not vague,"[27] and that the limitations of proximate

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[20] *See* M-37041, *supra* note 10, at 18 n.123.

[21] 927 F. Supp. 1559 (S.D. Ind. 1996).

[22] 45 F. Supp. 2d 1070 (D. Colo. 1999).

[23] 611 F.3d 679 (10th Cir. 2010).

[24] *Id.* at 683.

[25] *Id.* at 684–86.

[26] *Id.* at 688–89.

[27] *Id.* at 689.

cause, and its attendant requirement of foreseeability, meant that the MBTA provided sufficient fair notice to be constitutional.[28]

An important factor in the prosecution of this case was the fact that the defendants had been previously informed of the problem by the FWS and did not sufficiently remedy the issue before the FWS came to check on it again.[29] In no way does the statute itself require this kind of forewarning or knowledge; however, it has consistently been a key factor cited by courts and by the U.S. Department of Justice (DOJ) when discussing MBTA incidental take prosecutions.[30] Even in *Apollo Energies*, one of the violations for one of the companies involved was reversed when it was found that the company had not received the public education materials and had no way to know of the problem before it happened.[31] Regardless, with *Apollo Energies* as its controlling precedent, the Tenth Circuit is considered one of the strictest circuits regarding MBTA violations.

In 2015, the Fifth Circuit came to a very different conclusion than the Tenth Circuit when it decided *United States v. CITGO Petroleum Corp.*[32] While it agreed that criminal intent was not required under the MBTA, it disagreed that acts not deliberately undertaken to wound or kill birds were included in the definition of "take." The *CITGO* court found that taking is inherently a purposeful activity, stating that " 'to take' . . . is not something that is done unknowingly or involuntarily."[33]

Under this interpretation, a deliberate act by a person against a bird they mistakenly believe is not protected under the MBTA remains a crime that is treated with strict liability. However, in the court's analysis, any act that is not deliberately directed at a bird cannot be a take under the MBTA. This removes from the scope of the MBTA circumstances such as an accidental car strike, bird deaths on electrical lines, and the conduct at issue in *CITGO*—namely, the use of unroofed tanks that resulted in what the lower court had found were foreseeable, proximately caused bird deaths.[34]

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[28] *Id.* at 689–90.

[29] *Id.* at 691.

[30] *See* Press Release, DOJ, "ESI Energy LLC, Wholly Owned Subsidiary of Nextera Energy Resources LLC, Is Sentenced After Pleading Guilty to Killing and Wounding Eagles in Its Wind Energy Operations, in Violation of the Migratory Bird Treaty Act" (Apr. 5, 2022) (ESI Press Release); Press Release, DOJ, "Utility Company Sentenced in Wyoming for Killing Protected Birds at Wind Projects" (Nov. 22, 2013) (Duke Energy Press Release).

[31] 611 F.3d at 691.

[32] 801 F.3d 477 (5th Cir. 2015).

[33] *Id.* at 492.

[34] *Id.* at 488.

The *CITGO* court stressed another factor in its decision: that the breadth of the law as interpreted by the Tenth Circuit is "hard to overstate."[35] The opinion notes that if the incidental take interpretation were followed, all owners of "big windows, communication towers, wind turbines, solar energy farms, cars, cats, and even church steeples" could be found guilty of a crime under the MBTA.[36] While the government generally does not prosecute MBTA crimes against individual car drivers or cat owners, this characterization of the law is not overstated when it comes to the energy sector. In recent years, owners of wind turbines have been prosecuted resulting in significant penalties for bird deaths at their facilities.

[3] Bald and Golden Eagle Protection Act

The BGEPA has a less contentious legal history than the MBTA due to its more expansive statutory authority and definition of "take." The statute explicitly authorizes the development of a permit program for taking eagles in relation to otherwise lawful activities, such as agriculture, and only outlaws unpermitted take.[37] Additionally, the law was developed in response to an overall drop in eagle populations, rather than being specific to overhunting as in the MBTA.[38] Because of these factors, the coverage of incidental take under the BGEPA is non-controversial, and the primary exercise of the law is via its permitting program.

The first "eagle take permit" (ETP) program was developed in 2009, with an individual permit option as well as a five-year programmatic permit for reoccurring takes. Eagle takes are of particular concern to wind energy developers; however, the limited time frame on the programmatic permit immediately presented a problem to the wind energy sector. Developers expressed concerns that the short-lived permits were affecting their ability to obtain financing, given that wind energy projects have operational lives typically far longer than five years.[39]

In response to the difficulties faced by renewable energy and other long-term projects, the FWS revised the rule in 2013 to allow for programmatic

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[35] *Id.* at 493; *see also* API Comments, *supra* note 10, at 7; M-37050, *supra* note 5, at 33–36.

[36] *CITGO*, 801 F.3d at 494; *see also* M-37050, *supra* note 5, at 34.

[37] 16 U.S.C. § 668a; *see also* Protect Our Cmtys. Found. v. Lacounte, 939 F.3d 1029, 1044 (9th Cir. 2019).

[38] *See* Endangered and Threatened Wildlife and Plants; Removing the Bald Eagle in the Lower 48 States From the List of Endangered and Threatened Wildlife, 71 Fed. Reg. 8238, 8240 (proposed Feb. 16, 2006) (to be codified at 50 C.F.R. pt. 17).

[39] *See* LeAnne Burnett, "Adjusting for Wind: USFW Extends Term for Eagle Take Permits," *ACOEL Blog* (Aug. 7, 2014).

permits with 30-year terms.[40] However, this rule was initially set aside by a California court,[41] and the 30-year permit was not finally promulgated until 2016.[42] In addition to extending the maximum term to 30 years, the 2016 rule streamlined the permitting process and standards, and established regional take limits based on "eagle management units." The 2016 rule also revised the application criteria: where the stricter 2009 rule had required a showing that all take was unavoidable even with the use of advanced conservation practices, the 2016 rule revised this to incorporate a practicability standard.[43]

However, the ETP program still currently includes several more onerous provisions that may discourage its use, most notably third-party fatality monitoring. Regarding wind energy, permittees are typically required to have at least two years of monthly pre-construction data, as well as three years of post-construction monitoring, all of which must be arranged by the permittee.[44] This typically involves several types of surveys, and is typically the most expensive part of an ETP.

The rule is currently being revisited, with the FWS seeking comment on some of the more burdensome aspects of the rule.[45] One proposal being considered is systematic, "pooled" post-construction monitoring directed by the FWS, removing the need for individual permittees to organize their own monitoring programs. The FWS has asked for comment on "targeted" revisions to the rule as well as potential new regulatory approaches entirely, such as patterning an ETP program off the U.S. Army Corps of Engineers' nationwide permit program, which authorizes impacts to wetlands and other waters with little to no review for projects that have minimal effects on the environment.[46]

[4] Criminal Enforcement

While both the MBTA and BGEPA can be criminally enforced, MBTA cases are more common, often requiring the defendant to seek a permit

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[40] Eagle Permits; Changes in the Regulations Governing Eagle Permitting, 78 Fed. Reg. 73,704 (Dec. 9, 2013) (to be codified at 50 C.F.R. pts. 13, 22).

[41] Shearwater v. Ashe, No. 5:14-cv-02830, 2015 WL 4747881 (N.D. Cal. Aug. 11, 2015).

[42] Eagle Permits; Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests, 81 Fed. Reg. 91,494 (Dec. 16, 2016) (to be codified at 50 C.F.R. pts. 13, 22).

[43] *See id.* at 91,500.

[44] 50 C.F.R. §§ 22.26(d)(3)(ii), .80(c)(2).

[45] Eagle Permits; Incidental Take, 86 Fed. Reg. 51,094 (Sept. 14, 2021) (advance notice of proposed rulemaking).

[46] *See* 33 C.F.R. §§ 330.1–.6.

under the BGEPA as part of a settlement agreement.[47] MBTA prosecutions for incidental takes are far more likely in states covered by circuits with precedent friendly to that interpretation, where they will be less vulnerable to challenge.

One of the most recent enforcement cases was settled with ESI Energy LLC (ESI) earlier this year under the law of the Tenth Circuit.[48] ESI and its subsidiaries own and operate wind energy generation facilities throughout the country, including in the Tenth Circuit states of Colorado, New Mexico, and Wyoming. Under a plea agreement, ESI pleaded guilty to three counts of violating the MBTA, each for the deaths of golden eagles striking wind turbine blades at its facilities in Wyoming and New Mexico.[49] ESI also acknowledged that at least 150 bald and golden eagles have died at 50 of its 154 wind energy facilities, 136 of which have been determined to be attributable to turbine blade strikes. Because the birds struck were bald and golden eagles, the DOJ took the position that both the MBTA and the BGEPA had been violated. However, the parties agreed to a settlement including only the MBTA counts in exchange for ESI agreeing to apply for ETPs at 50 of its facilities, as well as in recognition of previous mitigation efforts undertaken by ESI.[50]

This is not the first major wind energy settlement under the MBTA, and the factors leading to the settlements as well as their outcomes tend to be similar. ESI agreed to a fine, restitution, and a five-year eagle management plan requiring the implementation of up to $27 million in measures intended to minimize eagle deaths, as well as compensatory mitigation to be paid for future eagle deaths or injuries, and the promise to seek BGEPA permits. The first wind energy settlement—against Duke Energy in 2013—contained very similar provisions, though on a smaller scale.[51]

[a] Enforcement Discretion

Because it is difficult to avoid running up against the overbroad scope of the law when interpreting the MBTA to include incidental take, the government frequently argues that its reliance on enforcement discretion is sufficient to control the law's scope. The currently valid M-Opinion from the Solicitor of the Interior (following the revocation of a more recent, Trump-era M-Opinion) discusses the government's "longstanding and consistent

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[47] *See, e.g.*, ESI Press Release, *supra* note 30; Duke Energy Press Release, *supra* note 30.

[48] ESI Press Release, *supra* note 30.

[49] Judgment, United States v. ESI Energy LLC, No. 0:22-cr-00048 (D. Wyo. Apr. 6, 2022).

[50] ESI Press Release, *supra* note 30.

[51] Duke Energy Press Release, *supra* note 30.

interpretation" that the MBTA includes incidental take,[52] and the measures the government has taken in response.[53] In particular, the M-Opinion criticizes the Southern District of Indiana's 1996 *Mahler* opinion, which related how the MBTA could not extend to incidental, or non-purposeful, take. The M-Opinion criticized the court's "failure to recognize the proper role of enforcement discretion" in its analysis, leading it to use "unsupportable circular logic."[54] The limits to the scope of the MBTA, the M-Opinion contends, are imposed by the proximate cause analysis discussed by *Seattle Audubon*, and enforcement discretion exercised by the FWS and DOJ.[55] The latter factor is, in the government's view, sufficient to address any due process concerns, as the agencies will take into account "the foreseeability of the take."[56]

However, as the now-revoked opinion later that year described, relying on enforcement discretion to impose limits on a potentially unconstitutional interpretation of a federal statute "hangs the sword of Damocles over a host of otherwise lawful and productive actions."[57] That opinion disagreed with the incidental-inclusive circuits' idea that proximate cause is a sufficient limitation on the MBTA's scope of liability, and it additionally noted that many of the limits applied to the MBTA by court interpretations are limits that are found nowhere in the text of the statute itself.[58]

[b] Voluntary Guidelines

Another limit that has been argued to exist on the MBTA is the publishing of voluntary guidelines for various industries by the FWS.[59] These guidelines generally recommend best practices for the applicable industry to avoid the incidental take of birds, and the FWS's stated policy is that it will consider a company's adherence to the guidelines when considering whether to pursue enforcement of a take.[60] Upon request, the FWS will also review a company's bird management plans, such as a bird and bat conservation strategy or an eagle conservation plan developed in accordance

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[52] M-37041, *supra* note 10, at 24.

[53] *Id.* at 12–13.

[54] *Id.* at 29.

[55] *Id.* at 30.

[56] *Id.*

[57] M-37050, *supra* note 5, at 1.

[58] *Id.* at 35–36.

[59] M-37041, *supra* note 10, at 14–15.

[60] FWS, "U.S. Fish and Wildlife Service Land-Based Wind Energy Guidelines," at 6 (Mar. 23, 2012).

with FWS guidelines.[61] However, this review is advisory only and does not grant an entity any protections from future enforcement. Still, an entity's adherence to voluntary guidelines or mitigation measures, whether they are reviewed or recommended by the FWS, is considered in deciding to pursue enforcement, as is the entity's overall history of cooperation with the FWS. Note, though, that it should also be considered that seeking recommendations from the FWS and then choosing not to implement them may have the opposite effect.

[5] Looking Forward: Recent Rulemaking Developments

The FWS is currently engaged in developing a formal regulatory structure to resolve some of the uncertainties surrounding the MBTA. While these regulations intend to codify the government's current position that the MBTA does include incidental take, efforts to develop a permit program under the MBTA have previously garnered some support from industry.[62]

The advance notice of proposed rulemaking (ANPR) issued by the FWS last year proposes to base a system of regulations using a three-tiered approach: (1) identifying programmatic exceptions where incidental take is always authorized (such as most activities by individuals and other noncommercial activities); (2) a general permit covering common activity types, such as those involved in energy and transportation development; and (3) specific individual permits for unusual circumstances.[63] Most energy sector industries would likely draw from the second category, as these make up the bulk of activities specifically identified by the FWS in the ANPR.[64]

Currently, the scope of any such permitting program, the activities it would authorize, and the conditions it would impose are not defined. However, the FWS indicated that it plans to draw from existing guidelines in developing permit conditions.[65] The system as envisioned in the ANPR would involve registration and reporting requirements, though the FWS

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[61] *Id.* at 55.

[62] *See* INGAA Found., "Development of a Permit Program for Incidental Take of Migratory Birds" (2010). *But see* API Comments, *supra* note 10, at 12–13 (preferring voluntary guidelines to a permit program).

[63] Migratory Bird Permits; Authorizing the Incidental Take of Migratory Birds, 86 Fed. Reg. 54,667, 54,669 (Oct. 4, 2021) (advance notice of proposed rulemaking).

[64] *Id.* at 54,669–70.

[65] *Id.* at 54,669.

stated that these requirements would not need to be "extensive" and could be limited to the reporting of carcasses found during routine operations.[66]

In the absence of circuit consensus on the MBTA's interpretation, formal regulations may be the most viable way to resolve some of the uncertainty surrounding migratory bird take and would certainly provide clarity to entities on what conduct will face enforcement and what will not. However, it is also very likely that any permit program would face challenges in the circuits that have held incidental take is not covered under the MBTA, as a threshold issue would be whether the FWS has the statutory authority to authorize incidental takes. For the immediate future, entities should continue to carefully assess their projects for risks related to birds and eagles.

§ 30.03 Incident Enforcement

[1] Introduction

This section explains the kinds of incidents that give rise to federal criminal enforcement following explosions, fires, and releases at energy facilities. While companies should expect investigations following these incidents, successful criminal prosecutions are not guaranteed. Faced with limited resources, prosecutors are most likely to pursue and obtain convictions where systemic failures and corporate mismanagement cause significant environmental harm or human tragedy. Accordingly, this section reviews (1) the most relevant criminal statutes, (2) four recent and notable incidents, (3) the success of prosecutions following these incidents, and (4) recommendations for companies to limit criminal liability.

[2] Theories of Criminal Liability Following Industrial Incidents

Industrial incidents at energy facilities can implicate a broad range of environmental and criminal statutes. While some environmental statutes criminalize the unreasonable discharge of pollutants into the environment, others criminalize willful or knowing violations of certain regulations. Prosecutors may also look to Title 18 of the U.S. Code when entities engage in deceitful conduct during investigations.

[a] Clean Water Act and Clean Air Act

Because industrial incidents often result in spills to water or emissions of hazardous air pollutants, the criminal provisions of the Clean Water Act (CWA) and the CAA are common prosecutorial hooks following these incidents. The CWA criminalizes the negligent or knowing discharge of (1) a pollutant from a point source into a water of the United States without

[66] *Id.*

a permit or in violation of a permit and (2) oil or a hazardous substance into a water of the United States, upon adjoining shorelines, into a contiguous zone in a harmful quantity, or in connection with offshore activities.[67] The CWA makes it a separate crime for a person to knowingly discharge oil or a hazardous substance and, at the time, place another person in imminent danger of death or serious bodily injury.[68] Similarly, the CAA criminalizes the negligent or knowing release of any hazardous air pollutant or extremely hazardous substance if a person also negligently or knowingly places another in imminent danger of death or serious bodily injury.[69]

[b] Other Federal Environmental Statutes

Because they criminalize negligent discharges of hazardous material, the CWA and CAA penalize more conduct than other spill-related environmental statutes such as the Comprehensive Environmental Response, Compensation, and Liability Act and the Resource Conservation and Recovery Act (RCRA), which criminalize the knowing failure to notify authorities of a hazardous substance release and the knowing treatment, storage, or disposal of a hazardous waste without a permit.[70] Other environmental statutes that criminalize conduct above mere negligence include the Outer Continental Shelf Lands Act, the Federal Mine Safety and Health Act (MSHA), and the Natural Gas Pipeline Safety Act (NGPSA), all of which criminalize knowing and willful violations of applicable regulations and standards.[71]

[c] Title 18 of the U.S. Code

In cases involving deceptive or misleading conduct, prosecutors may pursue charges under Title 18 of the U.S. Code, which criminalizes conspiracy, fraud, false statements, destroying evidence, and obstruction of justice.[72] While environmental statutes such as RCRA, the CWA, and the CAA criminalize similar conduct, "[p]rosecutors frequently include Title 18 charges . . . to highlight traditional badges of criminality. . . . Title 18 charges . . . are most familiar (and therefore acceptable) to federal district court judges."[73] Other potentially relevant Title 18 charges include

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[67] 33 U.S.C. §§ 1311(a), 1319(c)(1)–(2), 1321(b)(3).

[68] *Id.* § 1319(c)(3).

[69] 42 U.S.C. § 7413(c)(4)–(5).

[70] *Id.* §§ 9603(b), 6928(d)(2)(A).

[71] 43 U.S.C. § 1350(c); 30 U.S.C. § 820(a); 49 U.S.C. § 60123(a).

[72] *See* 18 U.S.C. §§ 371, 1001, 1341, 1501–1521.

[73] David M. Uhlmann, "Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme," 2009 *Utah L. Rev.* 1223, 1248.

voluntary or involuntary manslaughter, which criminalize the unlawful killing of a human being.[74]

[d] State Statutes

Companies should also be aware of state laws that criminalize certain conduct that causes industrial incidents. For example, Pennsylvania's Clean Streams Law operates similarly to the CWA by criminalizing the negligent, knowing, or intentional discharge of industrial waste into state waters and failure to comply with any order, permit, or license of the state's department of environmental protection.[75] Companies also can be prosecuted under federal and state laws for the same conduct arising from the same incident.[76]

[3] Examples of Criminal Prosecutions Following Major Industrial Incidents

As exemplified by the following four industrial incidents, criminal charges are likely when systemic or corporate mismanagement cause significant environmental harm or human tragedy. The subsection begins with the blowout of BP Exploration and Production Inc.'s (BP) Macondo offshore drilling well, which caused one of the worst environmental disasters in U.S. history. It then details prosecutions at three other energy facilities where corporate mismanagement resulted in significant environmental harm or human tragedy.

[a] BP's Macondo Well (Deepwater Horizon Oil Spill), Gulf of Mexico

On April 20, 2010, BP's Macondo well blew out, causing an explosion at the Deepwater Horizon oil rig that killed 11 workers, spilled four million barrels of oil into the Gulf of Mexico, and cost billions of dollars in economic loss to the Gulf Coast.[77] Federal investigations concluded that BP's well blew out primarily because of "systemic failures by industry management,"[78] such as failing to conduct adequate risk analyses.[79]

With these findings, the DOJ charged three corporate entities and five individuals with violations of various criminal and environmental laws. As the operator of the well, BP pleaded guilty to the most numerous and

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[74] 18 U.S.C. § 1112.

[75] *See* 35 Pa. Cons. Stat. §§ 691.307, .602(b).

[76] *See* Gamble v. United States, 139 S. Ct. 1960 (2019).

[77] Nat'l Comm'n on the BP Deepwater Horizon Oil Spill & Offshore Drilling, "Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling," at vi (2011).

[78] *Id.* at 122.

[79] *Id.* at 122–23.

serious criminal charges, which included 11 counts of felony manslaughter, two counts of violating the CWA and MBTA, and one count of felony obstruction of Congress.[80] Among other terms, the company agreed to pay a record $4 billion in criminal penalties and fines, half of which would help restore the Gulf Coast.[81] Transocean Ltd., the owner and operator of the Deepwater Horizon rig, pleaded guilty to violating the CWA, and Halliburton Energy Services, Inc., a cementing contractor, pleaded guilty to destroying evidence.[82] Finally, none of the individuals charged received prison time; three pleaded guilty to individual misdemeanors and received probation while two others were acquitted or had charges dismissed.[83]

[b] Performance Coal Company, Upper Big Branch Mining Explosion, West Virginia

On April 5, 2010, a massive coal dust explosion killed 29 mine workers at the Upper Big Branch (UBB) coal mine in Montcoal, West Virginia.[84] Federal investigations determined that the mine operator's "unlawful policies and practices" primarily caused the explosion.[85] Specifically, the operator, Performance Coal Company, engaged in "systematic, intentional, and aggressive efforts . . . to avoid compliance with basic safety and health standards," which would have contained or prevented the explosion.[86]

While the government ultimately reached a non-prosecution agreement with the operator's corporate successor, it successfully charged five individuals with a slew of Title 18 charges, including lying to investigators, attempting to destroy evidence, falsifying safety records, and conspiring to

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[80] Guilty Plea Agreement at 1, United States v. BP Expl. & Prod., Inc., No. 2:12-cr-00292 (E.D. La. Nov. 15, 2012).

[81] *See* EPA, "Summary of Criminal Prosecutions," https://cfpub.epa.gov/compliance/criminal_prosecution/index.cfm?action=3&prosecution_summary_id=2468.

[82] *See* Press Release, DOJ, "Transocean Agrees to Plead Guilty to Environmental Crime and Enter Civil Settlement to Resolve U.S. Clean Water Act Penalty Claims from Deepwater Horizon Incident" (Jan. 3, 2013); Press Release, DOJ, "Halliburton Pleads Guilty to Destruction of Evidence in Connection with Deepwater Horizon Disaster and Is Sentenced to Statutory Maximum Fine" (Sept. 19, 2013).

[83] *See* Jonathan Stempel, "No Prison Terms for Gulf Spill as Final Defendant Gets Probation," *Reuters* (Apr. 6, 2016).

[84] Mine Safety & Health Admin., "Report of Investigation: Fatal Underground Mine Explosion," at 1 (Dec. 11, 2011).

[85] *Id.* at 2.

[86] *Id.*

thwart mine safety enforcement and to violate regulatory standards.[87] Individuals' prison sentences ranged from 10 months to nearly four years.[88]

[c] PG&E, Natural Gas Pipeline Explosion, California

On September 9, 2010, a pipeline owned by Pacific Gas and Electric Company (PG&E) ruptured and released 47.6 million cubic feet of natural gas in a residential area of San Bruno, California.[89] The natural gas ignited, causing an explosion and fire that killed eight people and destroyed 38 homes.[90] A criminal investigation determined that PG&E flouted safety regulations, programs, and rules prescribed by the NGPSA, such as failing to identify threats to its natural gas pipelines.[91] Thereafter, a federal grand jury indicted PG&E on 12 counts of violating the NGPSA.[92] PG&E contested the felony charges and a federal jury convicted the utility on five of the NGPSA charges, as well as on an additional obstruction of justice charge.[93] A judge ordered PG&E to pay $3 million in penalties, complete 10,000 hours of community service, submit a corporate compliance and ethics monitorship program, and spend $3 million to publicize its offenses and steps to prevent them in the future.[94]

[d] Summit Midstream Partners, Pipeline Spill, North Dakota

In 2014, a pipeline owned and operated by Summit Midstream Partners, LLC (Summit), ruptured near Williston, North Dakota, and discharged over 750,000 barrels of produced water into waterways for five months as it transported the waste from drilling wells to disposal wells.[95] No one was

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[87] "Convictions Related to the Upper Big Branch Mine," *Charleston Gazette Mail* (Oct. 27, 2017).

[88] *Id.*

[89] Nat'l Transp. Safety Bd., NTSB/PAR-11/01, "Pipeline Accident Report: Pacific Gas & Electric Company Natural Gas Transmission Pipeline Rupture and Fire," at 1 (Aug. 30, 2011).

[90] *Id.*

[91] *See id.* at 108–14.

[92] Indictment at 15–19, United States v. Pac. Gas & Elec. Co., No. 3:14-cr-00175 (N.D. Cal. Apr. 1, 2014).

[93] *See* Press Release, DOJ, "PG&E Found Guilty of Obstruction of an Agency Proceeding and Multiple Violations of the Natural Gas Pipeline Safety Act" (Aug. 9, 2016).

[94] *See* Press Release, DOJ, "PG&E Ordered to Develop Compliance and Ethics Program as Part of Its Sentence for Engaging in Criminal Conduct" (Jan. 26, 2017).

[95] Criminal Information at 8, United States v. Summit Midstream Partners, LLC, No. 1:21-cr-00152 (D.N.D. Aug. 5, 2021).

injured in the spill, but prosecutors nonetheless sought criminal charges because Summit ignored signs of leaks and failed to notify authorities about the spill.[96]

Prosecutors indicted Summit for criminal negligence under the CWA, and the company admitted it (1) negligently designed and constructed its pipeline, (2) operated the pipeline without an effective leak detection system, and (3) continued to operate the pipeline without determining the cause of a known and sustained drop in pressure.[97] Summit agreed to pay a $15 million penalty and implement various safety and reporting measures.[98]

[4] Evaluating Criminal Prosecutions Following Industrial Incidents

As exemplified above, the success of criminal prosecutions following industrial incidents is not guaranteed.[99] For instance, after the BP oil spill, prosecutors could not convict any employees because they were unable to prove that any one individual had sufficient responsibility over the incident.[100] While the criminal acts of corporate employees and agents can be attributed to the corporation, "the same aggregate theory of liability cannot be used against individuals, who . . . are responsible only for their own actions."[101] For example, prosecutors secured the criminal convictions of five individuals associated with the UBB explosion because those individuals acted on their own such as by falsifying records and lying to authorities.

Furthermore, even if prosecutors focus just on corporate entities, juries can acquit them. Although a jury convicted PG&E for some of its NGPSA charges, it acquitted PG&E of six charges of knowingly failing to keep accurate records.[102] It is unknown why the jury acquitted PG&E of these

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[96] *See id.* at 6–7.

[97] Joint Factual Statement at 2, United States v. Summit Midstream Partners, LLC, 1:21-cr-00152 (D.N.D. Aug. 5, 2021).

[98] *See* Press Release, DOJ, "Pipeline Company Sentenced to Largest-Ever Inland Spill" (Dec. 6, 2021).

[99] Consider, for example, the difficulties faced by state prosecutors in attempting to bring Arkema Chemical to trial after explosions and air releases during Hurricane Harvey. The court dismissed the criminal charges against the company and its managerial officers before the case got to the jury.

[100] *See* David M. Uhlmann, "After the Spill Is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Law," 109 *Mich. L. Rev.* 1413, 1444 (2011).

[101] *Id.* at 1445.

[102] *See* Jack Morse, "Now PG&E Wants Its Conviction Thrown Out in San Bruno Blast Case," *SFist* (Aug. 18, 2016).

charges, but acquittals can happen for various reasons including strong witness testimony, effective defense counsel, and trial judge decisions.[103]

Outside of these limitations, prosecutors will fare better where they can identify negligent conduct that contributed to the discharge of pollutants or oil into the environment. In the cases above, prosecutors had little trouble with proving their case against defendants charged with violating the criminal negligence provisions of the CWA. Because negligence is a relatively low standard, an entity will likely determine that contesting criminal negligence charges is either not worth the litigating expense or that accepting responsibility is the best way to rehabilitate its image.[104]

[5] Recommendations

Even if a prosecution is ultimately unsuccessful, there is still prosecutorial risk for energy companies involved in industrial incidents. To prepare for and manage these risks, companies should consider the following recommendations especially given the Biden administration's recommitment to criminal incident enforcement.[105]

[a] Stay Aware of Safety Monitoring Requirements

Prosecutions often occur when facility operators neglect and fail to maintain mandatory environmental, health, and safety programs. With statutes like the MSHA and NGPSA, companies should stay apprised of their regulatory burdens through regular compliance checks or audits. Even though these statutes require a higher standard than just mere negligence, companies should leave no doubt with investigators that they earnestly tried to comply with required safety programs.

[b] Diligently and Truthfully Engage with Regulators

Companies should also diligently and truthfully engage with regulators before and after an industrial incident. In many instances, regulatory and internal safety oversights allowed safety violations to go unchecked, and companies paid the hefty price. To avoid this, companies should diligently engage with regulators before an incident occurs. If an incident does occur, entities should diligently cooperate with investigators to avoid any potential

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[103] *See* David M. Uhlmann, "Prosecutorial Discretion and Environmental Crime Redux: Charging Trends, Aggravating Factors, and Individual Outcome Data for 2005-2014," 8 *Mich. J. Envtl. & Admin. L.* 297, 357 (2019).

[104] *See id.* at 354; Sarah N. Lynch, "Summit Midstream Partners Pleads Guilty in Largest U.S. Inland Spill from Oil Drilling," *Reuters* (Sept. 22, 2021).

[105] *See* Todd Kim, Assistant Att'y Gen., DOJ, Remarks at the American Bar Association's National Environmental Enforcement Conference's Section of Environment, Energy and Resources (Dec. 14, 2021).

appearance of deceptive or misleading conduct that can be charged under Title 18.

§ 30.04 General Duty Clause

[1] Introduction

Another criminal enforcement authority relevant to the energy sector is the general duty clause (GDC) found in 42 U.S.C. § 7412(r)(1) and enforced by the U.S. Environmental Protection Agency (EPA). As the word "duty" suggests, the GDC's goal is to encourage proactive behavior. It imposes a general duty upon owners and operators of stationary sources that handle extremely hazardous substances to (1) identify hazards that may result from releases, (2) design and maintain a safe facility, and (3) minimize the consequences of accidental releases that do occur.[106]

The GDC complements the EPA's more widely known authority under section 112(r)(7) of the CAA, which tasks the EPA with developing guidelines "to assist . . . in the preparation of risk management plans" and providing model risk management plans.[107] The GDC "is broader than the Risk Management Program Rule [(RMP)] in section 112(r)(7) because it [does not have minimum quantity thresholds and] applies to all stationary sources with . . . extremely hazardous substances . . . ."[108]

The GDC exists only as a statutory provision: the EPA has not promulgated implementing regulations.[109] In contrast to the specific RMP requirements codified in 40 C.F.R. pt. 68, the GDC's mandate is vague and measured solely by performance. As the EPA has acknowledged, the GDC "is not a regulation and compliance cannot be checked against a regulation or submission of data."[110] However, the EPA encourages adoption of industry codes and consensus standards related to hazardous substances and has pointed to these as providing a benchmark against which GDC compliance may be evaluated.[111]

The EPA's enforcement of GDC requirements has been on the rise. In September 2021 alone, EPA Region 9 announced at least five settlements

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[106] *See* 42 U.S.C. § 7412(r)(1).

[107] *Id.* § 7412(r)(7).

[108] Peter Kenyon & Tyler Amon, "Criminally Unsafe: Prosecuting Violations of Section 112(r) of the Clean Air Act," 68 *Dep't of Just. J. Fed. L. & Prac.* 53, 56 (2020).

[109] *See id.* Even though the GDC is a standalone provision, GDC-like language has been incorporated in the EPA's general regulations for its New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants programs. *See, e.g.*, 40 C.F.R. § 63.6(e); *see also id.* § 60.11(d).

[110] *See* EPA, EPA 550-F-20-002, "The General Duty Clause," at 1 (Apr. 2020).

[111] *See id.* at 1–2.

resolving alleged violations of the RMP and GDC programs.[112] Citizen groups also continue to push for increased GDC enforcement.[113]

The following discussion identifies the elements of a criminal GDC violation and the necessary mental state. It then reviews a recent case in which the United States successfully prosecuted a criminal violation of the GDC. It then describes how the EPA approaches enforcement in this area and concludes with several observations and recommendations for the regulated community.

[2] Elements of the Offense

Violations of the GDC can be prosecuted criminally under section 113(c) of the CAA.[114] A criminal prosecution under the GDC has been interpreted as requiring proof of the following:

- "the defendant was the owner or operator of a stationary source" that "produced, processed, handled or stored an extremely hazardous substance";
- "the stationary source posed a hazard of [an] accidental release of such substance into the ambient air";
- "the defendant failed [ ]: (1) to identify hazards that may result from such releases using appropriate hazard assessment techniques, (2) to design and maintain a safe facility taking such steps as are necessary to prevent releases, and (3) to minimize the consequences of accidental releases which do occur"; and
- "the hazard was recognized by the [d]efendant, or generally within the [d]efendant's industry."[115]

"[H]arm is not an element of section 112(r) crimes."[116]

Section 113(c) applies to "any person," and "person" includes corporations. However, section 112(r) has a narrow scope and applies only to the "owner or operator" of a stationary source. "Operator" includes not only business entities but also senior management personnel and corporate

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[112] *See, e.g.*, Press Release, EPA, "U.S. EPA Penalizes Four California Facilities More than $800,000 for Clean Air Act Chemical Safety Violations" (Sept. 9, 2021); Press Release, EPA, "U.S. EPA Penalizes Hawaiian Ice for Chemical Safety Violations" (Sept. 8, 2021).

[113] *See* Dawn Reeves, "Environmentalists Urge EPA to Expand Air Law General Duty Enforcement," *InsideEPA* (Apr. 5, 2021).

[114] 42 U.S.C. § 7413(c).

[115] United States v. Margiotta, No. 17-cr-00143, 2020 WL 820835, at *2 (D. Mont. Feb. 19, 2020) (order denying defendant's motion for judgment of acquittal or for a new trial); *see also* Kenyon & Amon, *supra* note 108, at 57–58.

[116] Kenyon & Amon, *supra* note 108, at 57.

officers.[117] The term "person" does not include "an employee who is carrying out his normal activities and who is acting under orders from the employer," unless that person committed a "knowing and willful" violation.[118] A defendant acts "willfully" if he acted "with knowledge that his conduct is unlawful" and he acts "knowingly" if he "had knowledge of the facts constituting the offense."[119] Thus, there are varying thresholds for the mental state required for prosecution—owners and officers will be guilty for knowingly violating the GDC and lower level employees carrying out their normal activities will only be guilty if they violate the GDC knowingly and willfully.[120]

[3] Conviction in *United States v. Margiotta*

Although the CAA provides for criminal prosecution of GDC violations, such prosecutions are rare.[121] Nonetheless, at least one recent case highlights the circumstances where facility operators or other individuals may face criminal charges under this provision.

United States v. Margiotta arose out of an explosion and fire at a waste oil processing facility in Wibaux, Montana.[122] The defendant, Peter Margiotta, the company president and director of Custom Carbon Processing, Inc., was convicted of one count of knowingly violating the GDC, one count of CAA knowing endangerment, and one count of conspiracy to violate the CAA.[123] Margiotta was warned by his employees during construction of the facility that the facility would release hazardous and flammable hydrocarbons, requiring explosion-proof electrical wiring and lighting and adequate ventilation.[124] Instead, he directed the facility to operate with temporary non-explosion-proof wiring and lighting and inadequate ventilation. Margiotta ignored repeated warnings about hazardous conditions at the facility before an explosion in December 2012 that injured several employees.[125]

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[117] 42 U.S.C. §§ 7412(r)(1), (7), 7413(h).

[118] *Id.* § 7413(h).

[119] Kenyon & Amon, *supra* note 108, at 60 (citing Bryan v. United States, 524 U.S. 184, 191–96 (1998); United States v. Weintraub, 273 F.3d 139, 147, 151 (2d Cir. 2001)).

[120] *See id.*

[121] *See* United States v. MGP Ingredients, Inc., No. 5:19-cr-40021, 2019 WL 3318363, at *2 (D. Kan. July 24, 2019) ("there just simply aren't that many of these [GDC] indictments brought" (quoting the federal prosecutor in the case)).

[122] *See* No. 17-cr-00143, 2019 WL 4394338 (D. Mont. Sept. 13, 2019) (order denying defendant's motion to dismiss Count 2 and defendant's motion to strike).

[123] *See id.* at *1.

[124] *Id.*

[125] *Id.*

Following his indictment, Margiotta argued that because the GDC incorporates the duty "in the same manner and to the same extent" as the general duty under the Occupational Safety and Health Act (OSHA), which imposes only civil penalties for violations of its GDC, then the CAA must also provide only civil penalties for violations of the same clause.[126] The court rejected this argument after finding that each statute is distinct and carries its own requirements, and that enforcement in this case was governed by section 113, which authorizes criminal penalties for knowingly violating certain provisions of the CAA, including section 112.[127]

The court also rejected Margiotta's separate argument that the GDC was unconstitutionally vague, noting that several courts have upheld the constitutionality of the OSHA's GDC against similar challenges.[128] Applying those principles to this case, the court explained that industry standards provide fair notice to individuals about what kind of conduct is prohibited, and in this case, there were industry standards and warnings Margiotta ignored that caused the explosion.[129]

After the case proceeded to a trial where a jury convicted Margiotta of his CAA charges, Margiotta moved for judgment of acquittal or for a new trial, arguing there was insufficient evidence to support his convictions.[130] The court denied Margiotta's motions, holding that the government presented the jury with sufficient evidence to meet each element of the GDC charge.[131] The court found that the jury heard sufficient evidence that Margiotta acted knowingly in failing to identify, recognize, and minimize hazards at the facility.[132] "Ample testimony" revealed Margiotta was the final decision maker, knew the facility was operating and the risks posed by its continued operation, and directed a supervisor to accept a shipment of a dangerous substance to be used at the facility.[133]

[4] Criminal Penalties

The CAA provides that persons convicted of violating the GDC shall face a criminal fine or a maximum term of five years in prison, or both.[134]

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[126] *Id.* at *3.

[127] *Id.* at *4.

[128] *Id.* at *6–7.

[129] *Id.*

[130] *See* United States v. Margiotta, No. 17-cr-00143, 2020 WL 820835, at *1 (D. Mont. Feb. 19, 2020) (order denying defendant's motion for judgment of acquittal or for a new trial).

[131] *Id.* at *2.

[132] *Id.* at *3.

[133] *Id.*

[134] 42 U.S.C. § 7413(c)(1).

Following his convictions, Margiotta was sentenced to 18 months in prison, a criminal fine of $50,000, and ultimately, restitution payments to account for the harm caused by the explosion.[135] Restitution is authorized under Title 18, which provides that courts must calculate the "full amount of each victim's losses" that the defendant directly caused, regardless of the defendant's financial resources.[136] However, in some cases like *Margiotta*, it is not always easy to determine how much harm the defendant directly caused without the decisions of others who, "in one way or another, contributed to the chain of events that brought about" the harm.[137] In those situations, the court will convene a restitution hearing for the parties to present their estimates of the harm the defendant directly caused.[138] In *Margiotta* other entities bore some responsibility for the explosion and apportioned this responsibility among themselves through amounts they agreed to pay the victims for their lost income.[139] The court found Margiotta himself liable to pay restitution for the amounts that the victims and his company agreed in a civil action were directly and proximately caused by his criminal conduct.[140]

[5] U.S. Environmental Protection Agency Guidance

Because the EPA may either initiate a civil suit or request a criminal action for knowing violations of the GDC, the EPA's own guidance on how it approaches GDC investigations and enforcement is instructive for the regulated community. The EPA's leading internal guidance on this issue explains that to ensure compliance with the GDC, the agency "must assess the extent to which owners and operators have implemented . . . any applicable industry practices or standards, or state or federal regulations."[141] Part of this assessment requires that owners and operators determine themselves the intrinsic hazards at their facilities, the risks of accidental releases, and the potential effects of the releases on public health and the environment.[142]

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[135] United States v. Margiotta, No. 17-cr-00143, 2020 WL 5259902, at *1–4 (D. Mont. July 10, 2020).

[136] 18 U.S.C. § 3664(f)(1)(A); *see* United States v. Gamma Tech Indus., Inc., 265 F.3d 917, 927 (9th Cir. 2001).

[137] United States v. Margiotta, 475 F. Supp. 3d 1152, 1155 (D. Mont. 2020) (order and findings on restitution).

[138] *See id.* at 1156.

[139] *Id.* These entities were involved with either the production or transportation of the hazardous material or the facility's construction. *Id.* at 1154 n.1.

[140] *Id.* at 1156.

[141] EPA, EPA 550-B00-002, "Guidance for Implementation of the General Duty Clause Clean Air Act Section 112(r)(1)," at 12 (May 2000).

[142] *Id.* at 12–13.

In addition to hazard assessments, the EPA will look at whether the owner and operator designed and maintained a safe facility based on safety codes, chemicals used, equipment, standard operating procedures, training programs, and other programs at the facility.[143] Finally, the EPA will assess whether the owner or operator minimized the consequences of an accidental release via any emergency response plans, coordination with local officials, training, and exercises.[144]

[6] Outlook and Recommendations

Regardless of who takes the White House next, enforcement under section 112(r) of the CAA will remain a priority. The Trump administration maintained section 112(r) enforcement as a National Compliance Initiative (NCI) and continued to aggressively pursue section 112(r) enforcement actions. This is partly because section 112(r) is an area of exclusive federal jurisdiction,[145] such that increased EPA enforcement of section 112(r) was consistent with the Trump EPA's emphasis on cooperative federalism and view that states should take the driver's seat whenever possible.[146] Furthermore, the successful GDC criminal prosecution in *Margiotta* provides prosecutors a blueprint for future prosecutions.

Through fiscal year 2023, reducing risks of accidental releases at industrial and chemical facilities will be one of the EPA's NCIs.[147] And this emphasis on section 112(r) will continue past 2023 based on the EPA's strategic plan for fiscal years 2022–2026.[148] Facilities located in environmental justice communities that emit hazardous air pollutants or volatile organic compounds should expect increased federal inspections and oversight and aggressive enforcement;[149] California, Illinois, and New Jersey have announced similar priorities. This includes oil and gas production and

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[143] *Id.* at 14–16.

[144] *Id.* at 16–17.

[145] *See* Order Denying a Petition for Objection to Permit at 7–8, *In re* Hazlehurst Wood Pellets, LLC, Petition No. IV-2020-5 (EPA Dec. 31, 2020).

[146] This emphasis on cooperative federalism may partly explain the overall decline in CAA prosecutions under the Trump EPA compared to the Obama EPA. *See* David M. Uhlmann, Univ. of Mich. Pub. L. & Legal Theory Research Paper No. 685, "New Environmental Crimes Project Data Shows that Pollution Prosecutions Plummeted During the First Two Years of the Trump Administration," at 2–3 (2020).

[147] *See* EPA, "National Compliance Initiatives," https://www.epa.gov/enforcement/national-compliance-initiatives.

[148] *See* EPA, "FY 2022-2026 EPA Strategic Plan" (Mar. 2022).

[149] *See* Memorandum from Assoc. Att'y Gen., DOJ, to Heads of Dep't Components and U.S. Att'ys on the Comprehensive Environmental Justice Enforcement Strategy (May 5, 2022), https://www.justice.gov/asg/page/file/1499286/download.

refining, petrochemical manufacturing, and many other energy-related industries.

The GDC's vague requirements leave many companies uncertain about their regulatory obligations. This necessitates more comprehensive risk management strategies. For smaller organizations, who may have the heaviest compliance burden in terms of resources and cost, the EPA suggests they perform a hazard review, ideally using a qualified engineer.[150] This means taking a "serious look" at the hazards posed by the facility's operation to increase the EPA's comfort that the facility understands such hazards.[151] The EPA also recommends that facility operators identify hazardous material industry codes and standards and comply with such codes and standards because "[i]f a facility understands the codes and standards and is working to comply with them, that would also give the EPA comfort" that the facility is fulfilling its GDC obligations.[152]

§ 30.05 Wildfire Enforcement

[1] Introduction

The—what has seemingly become annual—cycle of wildfire, public outcry, criminal charges, and settlement that PG&E, one of the nation's largest natural gas and electric companies, has found itself embroiled in serves as a focal point for analyzing criminal enforcement of wildfires caused by energy and utility companies. In response to increasing wildfire intensity, damages, and an awareness of the consequences companies like PG&E are facing, many utility and upstream energy companies have implemented, and continue to implement, significant wildfire prevention and resiliency measures.[153] While the incentives of both parties to a criminal prosecution over a wildfire likely lead to settlement, companies should understand how such prosecutions arise. This section discusses the theories of criminal liability used by prosecutors in criminal wildfire cases against energy and utility companies, and the ways in which such prosecutions might be resolved.

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[150] Daniel J. Pope & Kevin D. Collins, "EPA's Risk Management Plan with Craig Haas," *Bracewell Envtl. L. Monitor Podcasts* (Oct. 11, 2021) (quoting Craig Haas, National Manager for the EPA's Chemical Accident Prevention regulatory enforcement program).

[151] *Id.*

[152] *Id.*

[153] *See generally*, Allen Best, "Colorado Utilities Fear Wildfire Risk—and Liability—Amid Warming Climate," *Energy News Network* (Sept. 30, 2020).

[2] Theories of Criminal Liability for Causing Wildfires

The charges brought in state prosecutions for wildfires are generally of two broad categories, the first being traditional penal code provisions and the second covering the criminal provisions associated with more complex (and sometimes industry-specific) regulatory codes. Both categories include crimes of varying severity, ranging in both consequence (e.g., small-scale property damage to loss of life) and culpability (e.g., negligence to willfulness). Typically, prosecution of wildfires is carried out under the purview of state prosecutors rather than federal authorities.

[a] State Criminal Code Violations

The first general category of criminal liability for wildfires arises out of state penal codes. These codes contain state-specific versions of codified common law principles, including prohibitions against recklessly or negligently causing fires that damage homes,[154] impacting land and uninhabited structures,[155] or seriously injuring people.[156] This category also includes criminal statutes covering manslaughter. The provisions include aggravating factors that can serve to ratchet up the consequences of the charge at the penalty phase. Common aggravating factors include whether firefighters or other emergency personnel were injured while responding to the wildfire and whether multiple people or buildings were damaged by the wildfire.[157] There are additional statutes related to those discussed above covering the willful or knowing causation of wildfire (i.e., arson), but such charges are extremely unlikely to be filed in the context of a wildfire stemming from the practices or equipment of an energy or utility company.

[b] State Regulatory Code Violations

The second general category encompasses the criminal violations that have been built into the states' regulatory codes. These may be more complex than the more traditional penal codes and may be harder for the state to prove in criminal court. Examples include utility code prohibitions against the unsafe operation of equipment or failing to follow utility

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[154] *E.g.*, Cal. Penal Code § 452(b); Ariz. Rev. Stat. Ann. § 13-1702; Colo. Rev. Stat. § 18-4-105.

[155] *E.g.*, Cal. Penal Code § 452(c); Ariz. Rev. Stat. Ann. § 13-1702; Colo. Rev. Stat. § 18-13-109.

[156] *E.g.*, Cal. Penal Code § 452(a); Colo. Rev. Stat. § 18-4-105.

[157] *E.g.*, Cal. Penal Code § 452.1(a)(2).

commission orders and regulations,[158] health and safety code prohibitions against the emission of harmful substances (e.g., the wildfire's smoke and toxic gases),[159] or natural resources code prohibitions against burning lands.[160] These regulatory-criminal provisions can include both misdemeanor and felony charges. In the context of regulatory misdemeanors, a mens rea finding of negligence may not even be required. Additionally, these crimes can often be charged cumulatively for each day the wildfire persists but are often capped at specific monetary amounts.

[c] Federal Enforcement

Historically, criminal prosecutions against corporations for wildfires are primarily brought by prosecutors representing the states and their respective political subdivisions. This is primarily because there is no federal criminal statute that specifically contemplates wildfires, or even reckless and negligent burning generally. Where the federal government does prosecute arson (i.e., intentional burnings), it does so by tying the unlawful activity to federal statutes criminalizing certain uses and improper handling of explosives, the destruction of federal property, or activities that otherwise implicate interstate travel or commerce.[161] Such statutes, however, are ill-suited for addressing accidental wildfires caused by businesses. Conceivably, federal prosecutors could also attempt to prosecute a business for causing a wildfire under the CAA's knowing endangerment provision, which makes it a crime to endanger another person negligently or knowingly through the release of hazardous air pollutants (via the smoke and ash produced by the wildfire) into the ambient air.[162] But this theory has

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[158] Under Cal. Pub. Util. Code § 2110, each violation or failure to comply with any provision of the utilities code is a misdemeanor. Consequently, every utilities code provision and California Public Utilities Commission order or rule carries the threat of criminal enforcement. *See also* Colo. Rev. Stat. § 40-7-102.

[159] *E.g.*, Cal. Health & Safety Code § 42400.3 (making it a crime to emit an air contaminant, like wildfire smoke and related particulate matter and ash with reckless disregard for the risk of injury or death to any person); *id.* § 41700 (prohibiting the discharge of quantities of air contaminants that cause injury or nuisance to any considerable number of persons or the public).

[160] *E.g.*, Cal. Pub. Res. Code § 4421.

[161] *See generally* John Panneton, "Federalizing Fires: The Evolving Federal Response to Arson Related Crimes," 23 *Am. Crim. L. Rev.* 151 (1985).

[162] 42 U.S.C. § 7413(c)(4).

yet to be tested and criminal prosecutions over wildfires have remained with state authorities.[163]

[3] Complaint Resolution

Wildfire criminal complaints often end up settled in exchange for dismissal, or at least deferral, of the criminal charges. This trend is likely due to the converging incentives of the defendant businesses and prosecuting entities toward settlement instead of the uncertainty of trial.

[a] Consequences of Conviction

Businesses can face a wide range of consequences if convicted of wildfire crimes. Convictions can lead to loss of contracting opportunities, reputational damage, and follow-up civil litigation. In some cases, individual executives or employees can also be charged with criminal offenses for their involvement in causing a wildfire separate from the corporation itself. However, some states prohibit the use of jail time as a punishment for such persons where they lack direct knowledge of criminal conduct. These heightened mens rea requirements for punishing individuals for their involvement in the wildfire can make charging business executives and managers very difficult. Accordingly, charging executives or managers with crimes related to wildfires is rare. Penalties associated with criminal convictions are often significantly lower than those agreed to in settlements (as discussed below), but civil suits or penalties will often proceed in parallel with any criminal proceeding.[164] Accordingly, businesses often prefer to include stipulations barring, or at least deferring, criminal prosecution during settlement negotiations.

[b] Settlements

While criminal complaints might be filed, or at least threatened, in a state enforcement action against an energy company or utility for allegedly causing a wildfire, nearly all cases end up in some form of settlement. Companies prefer settlement to control the scope of their total liability,

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[163] This does not mean, however, that DOJ attorneys will not file civil suits seeking damages for fires on federal lands. Indeed, over a decade ago, attorneys from the DOJ's Eastern District of California office obtained a $102 million settlement from the Union Pacific Railroad Company after winning on some preliminary damages and discovery issues in federal court. *See* Press Release, DOJ, "Eastern District of California, Largest Settlement Ever in a Forest Fire Case" (July 22, 2008).

[164] For example, PG&E pleaded guilty to 84 counts of involuntary manslaughter for its role in causing the 2018 California Camp Fire. While penalties associated with the criminal charges only totaled $3.5 million, the company also settled with government agencies and municipalities for $25.5 billion. *See* Vanessa Romo, "PG&E Pleads Guilty on 2018 California Camp Fire: 'Our Equipment Started That Fire,'" *NPR* (June 16, 2020).

avoid trial risks, reduce expenses, and minimize the negative exposure often accompanying court proceedings.

Prosecutors often also prefer settlement for wildfire cases because most of the remedies available through criminal proceedings can also be obtained via settlement. These include third-party oversight of the utility or energy company at fault, prohibitive injunctions against certain conduct, and certain performance or monetary obligations. Additionally, prosecutors can include the revival of criminal charges from a failure to adhere to the terms of the settlement agreement. Importantly, recent changes in how courts calculate damages to land and natural resources means the government attorneys can negotiate for more compensation than what was previously available in settlement talks.[165] Historically, damages were limited to the lesser of the reduction in value of land and timber or the cost to repair damage from the wildfire.[166] The recovered damages for newer civil claims are around six to seven times higher than they were under the older damages formulations.[167]

[c] *People v. Pacific Gas & Electric Co.*

The latest high-profile settlement between PG&E and a California political subdivision resolving wildfire liabilities was entered in April 2022.[168] The stipulated final judgment between PG&E and the Sonoma County District Attorney settled the criminal complaint first filed in spring 2021 (and a subsequent civil complaint) regarding the 2019 Kincade Fire, which the California Department of Forestry and Fire Protection and Sonoma County alleged PG&E caused by failing to maintain its electrical transmission lines properly. Beyond a combined $20.25 million in monetary penalties, the settlement also contains injunctive relief requiring specific performance and inspection commitments and prohibiting further violations.[169] But most significantly, the settlement also provides for independent third-party monitoring of PG&E fire prevention and related maintenance

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[165] In *United States v. Union Pacific Railroad Co.*, the court held that the United States could seek compensation for the "unique character" of the forests damaged by the 2000 Storrie Fire beyond the market value of timber destroyed. 565 F. Supp. 2d 1136 (E.D. Cal. 2008). Additionally, in 2012, federal prosecutors recovered "intangible non-economic environmental damages" for a fire found to be negligently caused by the defendant. United States v. CB&I Constructors, Inc., 685 F.3d 827, 837 (9th Cir. 2012).

[166] Elias Kohn, "Wildfire Litigation: Effects on Forest Management and Wildfire Emergency Response," 48 *Envtl. L.* 585, 601–02 (2018).

[167] *Id.*

[168] Stipulated Final Judgment, People v. Pac. Gas & Elec. Co., No. SCV-270567 (Cal. Super. Ct. Apr. 8, 2022).

[169] *Id.*

operations for a probationary period of five years.[170] This type of provision is more likely to be judicially imposed following a criminal conviction.[171] Deficiencies identified by the independent monitor and left unresolved by PG&E can lead to additional penalties under existing California law.

[4] Recommendations

While some observers and wildfire victims may express dissatisfaction that most wildfire criminal charges against businesses result in settlements, prosecutors and government officials often characterize such settlements as the best option for their communities given the statutory restrictions on financial penalties and other limitations on punishments that can be assessed against corporations and their executives in criminal cases.[172] Additionally, understanding that utility companies provide critical services to their states, some legislatures have begun to consider measures that limit the exposure companies face for wildfire damage, require increased wildfire resiliency and prevention measures, and introduce state-run "insurance" funds to help utilities cover wildfire liabilities.[173] As wildfires continue to dominate summer headlines, businesses should continue to follow these legislative developments and keep abreast of enforcement trends.

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[170] *Id.* at 14–20.

[171] Indeed, PG&E had just finished its previous probationary period associated with its conviction for the San Bruno incident discussed in § 30.03[3][c], *supra*. *See* Robert Burnson & Mark Chediak, "PG&E Probation Ends as Judge Calls It a 'Continuing Menace,'" *Bloomberg* (Jan. 19, 2022).

[172] *See* Olga R. Rodriguez & Mike Liedtke, "PG&E Reaches $55 Million Deal to Avoid Criminal Charges in Counties Ravaged by Recent Wildfires," *KQED* (Apr. 11, 2022).

[173] For example, in 2019 California enacted Assembly Bill 1054, which was designed to help utilities manage financial risks from wildfires while also requiring additional hardening measures.