RESPONDING TO ALLEGATIONS OF ENVIRONMENTAL CRIMES IN OREGON—AN ANALYSIS OF OREGON'S ENVIRONMENTAL CRIMES ACT

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While running for Oregon Attorney General in 2008, John Kroger pledged to make Oregon the nationwide leader in environmental protection. He promised "a tough new approach to environmental enforcement,"[1] using Oregon's Environmental Crimes Act (OECA)[2] as the vehicle to achieve that goal. Mr. Kroger cited the lack of a "centralized environmental crimes unit" as the primary cause for what he viewed as a history of under-enforcement in this area.[3] Without such a unit, Mr. Kroger explained, "a nonprofit group, or a citizen or the DEQ . . . ha[s] to shop [potential environmental criminal cases] to the district attorneys"[4] who, according to Mr. Kroger, typically "have little expertise, interest or funding for prosecutions that are often lengthy, complicated, and expensive."[5]

In light of those concerns, and at Mr. Kroger's urging, the Oregon Legislative Assembly passed legislation in 2009 to establish an Environmental Crimes Unit within the Oregon

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[1] Camilla Mortenson, *Attacking Ecocrime, Stomping out Oregon's Polluters*, EUGENE WEEKLY, Nov. 26, 2008, *available at* http://www.eugeneweekly.com/2008/11/26/coverstory.html.

[2] Ch. 422, 1993 Or. Laws 956 (codified at ORS 468.920, *et seq.* (1993)).

[3] Mortenson, *supra* note 1.

[4] *Id*.

[5] Jeff Barnard, *Oregon AG Faces Tough Job Funding Environmental Unit*, KOMO NEWS, Jan. 24, 2009, *available at* http://www.komonews.com/outdoors/news/38277434.html.

Department of Justice.[6] Mr. Kroger believed that the unit was necessary to "ensure the swift and professional prosecution of the most serious toxic dumping and pollution cases."[7]

Some commentators have questioned the wisdom of and/or the need for regulating in the environmental area using criminal sanctions,[8] and Mr. Kroger's record in that area as Attorney General was spotty.[9] But those issues are beyond the scope of this paper. Whatever one thinks of the wisdom or necessity of Oregon's increased focus on criminal environmental enforcement, the DOJ's Environmental Crimes Unit remains active. As a result, it is important for companies and practitioners alike to understand the contours and potential limitations of Oregon's statutory criminal enforcement scheme. This paper describes the history of the OECA, discusses some of its key terms, and analyzes several defenses and facial challenges that defendants might assert if faced with an indictment.

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[6] H.B. 5022, 74th Leg. Assem. (Or. 2009).

[7] John Kroger, Guest Opinion, *Earth Day II: Upping the Ante on Environmental Crime*, THE OREGONIAN, April 22, 2009, *available at* http://www.oregonlive.com/opinion/index.ssf/2009/04/upping_the_ ante_on_environment.html; Chris Rizo, *Kroger: Oregon has 'New-Found Emphasis' on Prosecuting Polluters,* LEGAL NEWSLINE, June 5, 2009, *available at* http://legalnewsline.com/news/221356-kroger-oregon-has-new-found-emphasis-on-prosecuting-polluters.

[8] *See, e.g.,* Wesley D. Sherman, *The Economics of Enforcing Environmental Laws: A Case for Limiting the Use of Criminal Sanctions*, 23 J. LAND USE & ENVTL. L. 87 (Fall 2007). Indeed, even Oregon's Department of Environmental Quality has recognized the significant limitations of regulating through enforcement actions, particularly in an area in which the standards and regulations are as amorphous as they are under the OECA. *See* Oregon Dept. of Environmental Quality, *General Deterrence of Environmental Violations: A Peek into the Mind of the Regulated Public* at 61-63, *available at* http://www.deq.state.or.us/programs/enforcement/DeterrenceReport.pdf.

[9] *See, e.g.,* Scott Learn, *Details Surface on Brent Foster's Exit from Oregon Attorney General John Kroger's Office*, THE OREGONIAN, May 4, 2010, *available at* https://www.oregonlive.com/news/index.ssf/2010/05/details_surface_on_brent_foste.html.

I. OREGON'S ENVIRONMENTAL CRIMES ACT

A. A Brief Legislative History: Compromise Aimed at Balancing Effective Enforcement Against the Dangers of Over-Criminalization and Unconstrained Prosecutorial Discretion.

The OECA resulted from a confluence of factors in the early 1990s. In 1990, Congress amended the federal Clean Air Act[10] by (among other things) requiring states wishing to administer their own permitting programs to have adequate criminal enforcement authority.[11] Furthermore, as one of only five states without environmental felony sanctions (and with both Washington and California providing for felony sanctions in certain circumstances) some feared that Oregon risked becoming a "safe harbor for polluters hoping to gain a competitive edge by ignoring environmental regulations."[12] For those reasons, then-Attorney General Kulongoski and the Department of Environmental Quality (DEQ) convened a five-person task force to review the adequacy of existing environmental criminal laws in Oregon and to draft legislation to satisfy the federal Clean Air Act's requirements.[13]

Ultimately, Attorney General Kulongoski, the DEQ, the Oregon State Police, and the Oregon District Attorneys Association (ODAA) sponsored Senate Bill 88, which enumerated a number of new environmental felonies. The bill's sponsors made clear their intent that felony sanctions would be directed only at the most "egregious, intentional violations," and only at those who "deliberately choose to pollute the environment and expose citizens to serious illness

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[10] 42 U.S.C. § 7401, *et seq.*

[11] *See* Clean Air Act Amendments of 1990 § 502(b)(5)(E) (codified at 42 U.S.C. § 7661a(b)(5)(E) (1990)).

[12] See Oregon Environmental Crimes Act: Hearing on S. 88 Before the S. Comm. on Agriculture and Natural Resources, 67th Sess. (Or. 1993) (hereafter "Hearings (Mar. 8, 1993)") (statement of Ted Kulongoski, Oregon Att'y Gen.).

[13] *See id.* (statement of Fred Hansen, Director, Oregon Department of Environmental Quality).

or injury based on a cold calculation that . . . compliance with the law is not cost-effective."[14] However, the initial version of the bill treated *any* intentional or knowing violation of a permit, environmental law or rule—regardless of its severity—as a felony violation.[15]

Opposition to Senate Bill 88 centered upon what many believed to be its overly broad language and the unlimited discretion vested in prosecutors to enforce the proposed law. A diverse group of Oregonians—including the Association of Oregon Industries (AOI), municipal government officials, labor representatives, prosecuting attorneys, and several senators—voiced opposition to the bill, concerned that its broad scope might have harsh consequences beyond what the bill's sponsors intended.[16] The AOI argued that Senate Bill 88's broad language not only allowed technical violations to be prosecuted as felonies, but that the bill contained no provisions discouraging prosecutors from doing so.[17] Consequently, the opposition feared overzealous and inappropriate utilization of the enhanced criminal authority and feared that citizens would lack adequate notice as to what acts would actually be prosecuted as felony

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[14] *Id.*

[15] S.B. 88, 67th Leg. Assem. (Or. 1993) (*see, e.g.,* Section 2(1)(d) (proposing that a person commits the felony offense of unlawful air pollution if the person intentionally or knowingly violates any provision of a permit or rule issued pursuant to ORS 468A.310)).

[16] *See* Oregon Environmental Crimes Act: Hearing on S. 88 and S. 912 Before the S. Comm. on Agriculture and Natural Resources, 67th Sess. (Or. 1993) (hereafter "Hearings (Mar. 19, 1993)") (statement of Tom Lindley, Chairman, Environmental Crimes Task Force for AOI) (warning that the legislation, as initially proposed, "would make felons of Oregon citizens and businesses even when they are attempting in all good faith to fully comply with environmental laws")); (statement of Jan Buetz, Deputy City Attorney for the City of Portland) (expressing "concern[] about the potential broad application" of SB 88)); (statement of Brad Witt, Oregon AFL-CIO) ("[W]e are concerned that our members who are working with and around various hazardous wastes and sources of pollution in the normal course of their employment could be inappropriately convicted of felony crimes.")).

[17] *Id.* (statement of Jim Whitty, Associated Oregon Industries).

violations.[18] For example, the AOI voiced its concern that the OECA would not afford citizens adequate notice of what specific behavior constituted a crime, stating, "What is or is not a felony ought not to be left to the prosecutor who says I'll know it when I see it."[19] Based on these concerns, the AOI formed its own task force to draft alternative legislation, which became Senate Bill 912.[20]

In its proposal, the AOI recommended several changes to restrict the OECA's reach. For example, Senate Bill 912 proposed maximum prison sentences of one year and one day, created an environmental audit privilege, and required prosecutors to secure DEQ approval before charging a crime under the OECA.[21] Although the interested parties reached agreement on most of the AOI's proposed amendments, the limits on prosecutorial discretion remained the main source of contention among the drafters of Senate Bills 88 and 912 and threatened to derail passage of any legislation on the issue. Specifically, an impasse resulted when the ODAA declared its "violent" opposition to any legislation requiring written permission from the DEQ before alleged offenders could be prosecuted.[22]

After much debate, the parties reached an "eleventh hour compromise,"[23] agreeing to add a provision (now codified at ORS 468.961) relating to the formation of specific prosecutorial

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[18] *Id*. (statement of Tom Lindley).

[19] *Id*.

[20] *Id.* (statement of Jim Whitty).

[21] S.B. 912, 67th Leg. Assem. (Or. 1993).

[22] Hearings (Mar. 19, 1993), *supra* note 16 (statement of John Bradley, Deputy District Attorney, Multnomah County); *see also* Gregory A. Zafiris, Limiting Prosecutorial Discretion Under the Oregon Environmental Crimes Act: A New Solution to an Old Problem, 24 ENVTL. L. 1673, 1678 (1994).

[23] Hearings (Mar. 19, 1993), *supra* note 16 (statement of Tom Lindley); *see also* Zafiris, *supra* note 22, at n.31 (describing interview with Holly Duncan, Oregon DEQ, Sept. 9, 1993).

guidelines for charging environmental felonies.[24] The parties hailed this provision as a means by which to allow for fair and effective prosecution of environmental crimes by giving citizens and industry the ability to look at the specific factors that a district attorney in any given county would consider in determining "when they may or may not be prosecuted."[25] As described in greater detail below, the legislature left it to the individual district attorneys to "adopt written guidelines for filing felony criminal charges" and set forth a non-exhaustive list of factors to be included in these guidelines.[26]

B. The OECA's Major Provisions

As enacted, the OECA contained five major parts, as described more fully below:

1. Six Environmental Felonies

The OECA established six new environmental felonies: 1) Unlawful Disposal, Storage or Treatment of Hazardous Waste (First Degree);[27] 2) Unlawful Transport of Hazardous Waste (First Degree);[28] 3) Unlawful Air Pollution (First Degree);[29] 4) Unlawful Water Pollution (First Degree);[30] 5) Environmental Endangerment;[31] and 6) Supplying False Information to an Agency.[32]

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[24] *See* Zafiris, *supra* note 22, at 1679.

[25] Hearings (Mar. 19, 1993), *supra* note 16 (statement of John Bradley).

[26] ORS 468.961(2).

[27] ORS 468.926. A violation of that statute is a Class B felony, *see* ORS 468.926(2), punishable by a maximum term of imprisonment of 10 years, *see* ORS 161.605(2), and a fine of up to $250,000 for a first offense, *see* ORS 161.625(c).

[28] ORS 468.931. Violators are subject to the same penalties as outlined in note 27, *supra*.

[29] ORS 468.939. Violators are subject to the same penalties as outlined in note 27, *supra*.

[30] ORS 468.946. Violators are subject to the same penalties as outlined in note 27, *supra*.

To sustain a felony conviction under any of those statutes, the government must prove (in addition to the elements unique to each statute) that the actor "knowingly" committed the act.[33] Furthermore, with respect to all of the offenses except Supplying False Information, the government must also prove that (1) the act violated a statute, rule, standard, license, permit, or order;[34] and (2) the act recklessly caused substantial harm to human health or the environment, or was done in knowing disregard of the law.[35]

2. Five Misdemeanor Offenses

The OECA also created five misdemeanor offenses: 1) Unlawful Disposal, Storage or Treatment of Hazardous Waste (Second Degree);[36] 2) Unlawful Transport of Hazardous Waste

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[31] ORS 468.951. For a first conviction, individual defendants may be punished by imprisonment of not more than 15 years, a fine of not more than $1 million, or both. ORS 468.951(2)(a). Corporate defendants may be punished by a fine of not more than $2 million. ORS 468.951(2)(b).

[32] ORS 468.953. A violation of that statute is a Class C felony, *see* ORS 468.953(2), punishable by a maximum term of imprisonment of 5 years, *see* ORS 161.610(3), and a fine of up to $125,000, *see* ORS 161.625(d).

[33] *See* ORS 468.926(1); ORS 468.931(1); ORS 468.939(1); ORS 468.946(1); ORS 468.951(1)(a); ORS 468.953(1)(a)-(c). "Knowingly" is defined to mean "acting with an awareness that the conduct of the person is of a nature so described or that a circumstance so described exists," ORS 161.085(8), or acting "with a conscious purpose to avoid knowledge of a conduct or a circumstance." ORS 468.920(1)(b).

[34] *See* ORS 468.926(1); ORS 468.931(1); ORS 468.939(1); ORS 468.946(1); ORS 468.951(1)(a).

[35] *See* ORS 468.926(1)(a)-(b); ORS 468.931(1)(a)-(b); ORS 468.939(1)(a)-(b); ORS 468.946(1)(a)-(b). To prove Environmental Endangerment, the government must prove that the defendant knowingly committed one of the other enumerated environmental felonies *and* that, as a result, another person was placed in imminent danger of death or suffered serious physical injury. *See* ORS 468.951(1)(a)-(b).

[36] ORS 468,922. A violation of that statute is a Class B misdemeanor, *see* ORS 468.922(2)(a), punishable by a maximum term of imprisonment of 6 months, *see* ORS 161.615(2), and a fine of up to $10,000, *see* ORS 468.922(2)(b).

(Second Degree);[37] 3) Unlawful Air Pollution (Second Degree);[38] 4) Unlawful Water Pollution (Second Degree);[39] and 5) Refusal to Produce Material Subpoenaed by the DEQ Commissioner.[40] The primary difference between the misdemeanor offenses and their felony counterparts is that the former do not require proof that the acts in question recklessly caused substantial harm to human health or the environment or were done in knowing disregard of the law.[41]

3. Three Affirmative Defenses

With the exception of the crimes of Environmental Endangerment, Supplying False Information to an Agency, and Refusal to Produce Material Subpoenaed by the DEQ Commissioner, each of the above-described offenses is subject to three affirmative defenses:

- "Bypass" is defined as a "temporary discharge . . . under circumstances in which the defendant reasonably believed that the discharge was necessary to prevent loss of life, personal injury or severe property damage, or to minimize environmental harm."[42]
- "Upset" means "an unexpected occurrence in which there is unintentional and temporary violation . . . because of factors beyond the reasonable control of the regulated person or entity."[43]

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[37] ORS 468.929. Violators are subject to the same penalties as outlined in note 36, *supra*.

[38] ORS 468.936. Unlawful air pollution in the second degree is punishable solely by a fine of up to $10,000. *See* ORS 468.936(2).

[39] ORS 468.946. Unlawful water pollution in the second degree is punishable by a fine of up to $25,000 or imprisonment for not more than one year, or both. *See* ORS 468.943(2).

[40] ORS 468.956 (1993). A violation of that statute is a Class A misdemeanor, *id.*, punishable by a maximum term of imprisonment of 1 year, *see* ORS 161.615(1), and a fine of up to $6,250, *see* ORS 161.635(a).

[41] In addition, to be guilty of second-degree water pollution, one need only act "with criminal negligence" in violating an applicable statute, rule, standard, license, permit, or order. ORS 468.943(1).

[42] ORS 468.959(2)(a).

- In addition, it is an affirmative defense that the defendant (1) "[d]id not cause or create the condition or occurrence that constitutes the offense"; (2) reported the event to the relevant authorities "as soon as practicable after the defendant discovered it"; and (3) "[t]ook reasonable steps to correct the violation."[44]

4. The Environmental Audit Privilege

In passing the OECA, the legislature sought "to encourage owners and operators of facilities . . . both to conduct voluntary internal audits of their compliance programs and management systems and to assess and improve compliance."[45] To further that goal, the OECA established an "audit privilege," whereby internally created "Environmental Audit Reports" are inadmissible in any civil or administrative proceeding (subject to specified exceptions).[46]

5. Establishment of Prosecutorial Guidelines

As discussed above, significant concerns were raised during the legislative process with regard to the facial breadth of the OECA and the possibility of over-enforcement in the absence of some limitations on prosecutorial discretion. The legislature addressed those concerns by requiring "the district attorney of each county [to] adopt written guidelines for filing felony criminal charges under [the OECA],"[47] and providing that:

> [p]rior to or in conjunction with the filing of felony charges . . . the district attorney or the Attorney General shall file a certification with the court that the guidelines . . . have been applied and that, in the opinion of the district attorney or

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[43] ORS 468.959(2)(b). To establish the affirmative defense of bypass or upset, the defendant must also prove that the defendant immediately reported the incident, submitted all relevant documentation to the authorities, and took appropriate corrective action. ORS 468.959(3).

[44] ORS 468.959(4).

[45] ORS 468.963.

[46] *Id.*

[47] ORS 468.961(2).

Attorney General, as the case may be, the criminal charges are being filed in accordance with the guidelines.[48]

In crafting their guidelines, district attorneys must consider the specific criteria enumerated by the legislature, as set forth in the OECA.[49] Additionally, "to promote consistency and uniformity in prosecutorial policies," the Attorney General, after allowing an appropriate opportunity for public comment, was required to adopt model guidelines, considering and applying the factors set forth by the legislature in the OECA.[50] To fulfill their obligations, district attorneys may—but need not—choose to adopt (in writing) the Attorney General's model guidelines for use in their individual counties in lieu of developing their own set of guidelines.[51]

II. POTENTIAL DEFENSES AND CHALLENGES TO CHARGES UNDER THE OECA

The specific defenses that one might raise in the face of environmental criminal allegations will obviously depend on the facts and circumstances of each particular case. An exhaustive discussion of all such defenses is obviously beyond the scope of this paper. However, several types of defenses/challenges may be broadly applicable. Several of those defenses/challenges are discussed below.

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[48] ORS 468.961(4).

[49] *Id*. The criteria listed in ORS 468.961(2)(a)-(j) were modeled after the federal sentencing guidelines. *See Oregon Environmental Crimes Act: Hearing on S. 912 Before the H. Comm. on Judiciary,* 67th Sess. (Or. 1993) (hereafter "Hearings (June 23, 1993)") (statement of Tom Lindley, on behalf of Associated Oregon Industries).

[50] ORS 468.961(1). The Attorney General adopted those guidelines in 1994. *See* OAR 137-095-0020.

[51] ORS 468.961(3).

A. Statutory Elements

As discussed in greater detail earlier in this paper, most of the OECA's felony offenses require the government to prove, *inter alia*, that (1) the act in question violated a specific statute, rule, standard, license, permit, or order;[52] and (2) the act recklessly caused substantial harm to human health or the environment, or was done in knowing disregard of the law.[53]

With respect to the former, defendants should parse the charging instrument's language closely to determine the specific permit, license, etc., that was allegedly violated. Even if the other elements of the offense are proven beyond a reasonable doubt—*e.g.,* even if the state is able to prove that the defendant knowingly discharged harmful materials into the environment, etc.—a defendant may be able to avoid conviction if it can be shown that the discharge was not a violation of the particular permit, license, etc. cited in the charging instrument.

With regard to the second element, the OECA imposes a stringent *mens rea* requirement for felony offenses. As noted, the government must prove either that the act (1) *recklessly* caused *substantial harm* to human health or the environment or (2) was done in *knowing disregard of the law*.[54]

> "Substantial harm to human health or the environment" means:
>
> > (a) *Physical injury* . . . to a human being or demonstrable substantial risk of serious physical injury . . . to a human being; or

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[52] *See* ORS 468.926(1); ORS 468.931(1); ORS 468.939(1); ORS 468.946(1); ORS 468.951(1)(a).

[53] *See* ORS 468.926(1)(a)-(b); ORS 468.931(1)(a)-(b); ORS 468.939(1)(a)-(b); ORS 468.946(1)(a)-(b).

[54] *See* ORS 468.926(1)(a)-(b); ORS 468.931(1)(a)-(b); ORS 468.939(1)(a)-(b); ORS 468.946(1)(a)-(b).

> (b) *Substantial damage* to wildlife, flora, aquatic or marine life, to habitat or to livestock or agricultural crops.[55]

In short, "reckless" conduct cannot support a felony environmental charge unless some substantial, tangible harm results.

No such showing is necessary if the state can prove that the act "was done in knowing disregard of the law." But that extraordinarily high *mens rea* standard—which does not appear in any other provision of Oregon law—may create its own difficulties for the government. In numerous other statutes, the legislature has proscribed knowing *violations* of the law.[56] Indeed, the crime of second-degree air pollution, discussed above, requires proof that the defendant "knowingly violate[d]" a statute, permit, rule or order.[57] But the legislature expressly chose different language—"knowing *disregard* of the law"—in defining the requisite *mens rea* for environmental felonies. Thus, "knowing disregard" must mean something different from "knowing violation."[58] Black's defines "disregard" as "[t]o treat as unworthy of regard or notice; to take no notice of; to leave out of consideration; to ignore; to overlook; to fail to observe."[59] Thus, to prove a felony violation, the state may be required to prove not only that the

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[55] ORS 468.920(2) (emphasis added).

[56] *See, e.g.*, ORS 162.405 (defining crime of official misconduct in the second degree); ORS 196.990 (unlawful removal from or filling of waters of the state); ORS 323.480 (cigarette tax violations); ORS 466.995 (handling of hazardous waste and hazardous materials).

[57] ORS 468.936(1).

[58] *See generally Davis v. Campbell*, 327 Or. 584, 587, 965 P.2d 1017 (1998) (In interpreting the meaning of specific statutory language, "the court examines the provision in context, 'which includes [among other considerations] other provisions of the same statute and other related statutes.'" (quoting *PGE v. Bureau of Labor & Indus.*, 317 Or. 606, 610-11, 859 P.2d 1143 (1993)); *see also Hoffman for and on Behalf of N.L.R.B. v. Joint Council of Teamsters No. 38*, 230 F. Supp. 684, 691 (C.D. Cal. 1964) (recognizing that "the very use of two separate words is an indication . . . of some sort of different meaning to be ascribed to each of them").

[59] Black's Law Dictionary 472 (6th ed. 1990).

defendant knew the relevant law and knew that he was violating that law, but also that he "ignored" the law, *i.e.*, that he treated it as "unworthy of regard or notice."[60] In other words, the defendant who takes reasonable steps to comply with the law—*i.e.*, who does not "ignore" it—may have a defense to a felony charge even if the defendant knows that discharges are ongoing.[61]

Numerous other portions of the statutes present challenges for the government in presenting its case. For example, to convict a defendant of first-degree water pollution, the state must prove that the defendant discharged "wastes."[62] "'Wastes' means sewage, industrial wastes, and all other liquid, gaseous, solid, radioactive or other substances which will or may *cause pollution or tend to cause pollution* of any waters of the state."[63] "Pollution," in turn,

> means such alteration of the physical, chemical or biological properties of any waters of the state, including change in temperature, taste, color, turbidity, silt or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive or other substance into any waters of the state, which will or tends to, either by itself or in connection with any other substance, *create a public nuisance or* which will or tends to *render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational or other legitimate beneficial uses or to livestock, wildlife, fish or other aquatic life or the habitat thereof.*[64]

In other words, to prove that "wastes" were discharged, the state must prove either that the discharges (1) were somehow harmful, detrimental or injurious to the environment or

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[60] *See generally* Hearings (Mar. 19, 1993), *supra* note 16 (statement of Tom Lindley) (making clear that drafters sought to avoid "mak[ing] felons of Oregon citizens and businesses *even when they are attempting in all good faith to fully comply* with environmental laws" (emphasis added)).

[61] Of course, if that behavior is deemed to be "reckless" and the discharges result in substantial harm to human health or the environment, the defendant may be implicated on the alternative ground set forth at ORS 468.926(1)(a).

[62] ORS 468.946(1).

[63] ORS 468B.005(9) (emphasis added).

[64] ORS 468B.005(5) (emphasis added).

(2) amounted to a "public nuisance." Working with qualified experts, the defense may well be able to cast doubt on those conclusions in many instances. Many other provisions of the applicable statutes contain terms that similarly pose significant proof hurdles for the government.[65]

B. Affirmative Defenses

As noted above, the OECA provides three affirmative defenses (upset, bypass and self-reporting) for most offenses delineated in the OECA.[66] To succeed on any of those affirmative defenses, the *defendant* has the burden of proving the defense by a preponderance of the evidence.[67]

C. Constitutional Challenges Relating to the Prosecutorial Guidelines

As described in detail above, a provision requiring the establishment and application of written prosecutorial guidelines was an absolutely critical prerequisite to the passage of the OECA. But by taking the unprecedented step of leaving it to individual district attorneys to define and announce the specific conditions under which felony environmental charges might be brought in their counties, the legislature may have opened the door to a number of constitutional challenges to the OECA.

1. *Ex Post Facto* and Due Process Concerns

The U.S. Constitution's *Ex Post Facto* clause and the Fifth and Fourteenth Amendment's Due Process clauses protect citizens against retroactive application of penal legislation and

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[65] *See, e.g.*, ORS 468.922, 468.926, 468.929, 468.931 ("hazardous waste"); ORS 468.939 ("air contaminant").

[66] *See* ORS 468.959.

[67] *See* ORS 161.055(2).

arbitrary changes in the law.[68] "[T]he notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties is fundamental to our concept of constitutional liberty."[69] Article I, section 21 of the Oregon Constitution also requires that "[n]o ex post facto law . . . shall ever be passed," guarding both against the lack of fair warning about the effects of criminal statutes and the abuse of governmental power in the form of retroactive action against particular targeted "groups or individuals."[70] Oregon courts have construed the state and federal ex post facto constitutional provisions without distinguishing them.[71]

"Fair warning" not only requires notice as to what conduct falls within a statute's technical reach, but also what conduct will "give rise to criminal penalties."[72] The fact that citizens require advance notice of what conduct could lead to felony prosecution was not lost on either side of the OECA debate. In fact, Multnomah County Deputy District Attorney John Bradley recognized that specific guidance was necessary, in the form of the prosecutorial guidelines, to give citizens and businesses fair notice of what type of conduct might actually lead to felony prosecution under the OECA.[73] Because a retroactive application of penal legislation is

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[68] *Lynce v. Mathis*, 519 U.S. 433, 439-40 & n.12 (1997).

[69] *Marks v. U.S.*, 430 U.S. 188, 191 (1977).

[70] *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266-67 (1994).

[71] *See, e.g.*, State v. Wille, 317 Or. 487, 501-02, 858 P.2d 128 (1993).

[72] *Marks*, 430 U.S. at 191.

[73] *Oregon Environmental Crimes Act: Hearing on S. 912 Before the S. Comm. on Judiciary,* 67th Sess. (Or. 1993) (hereafter "Hearings (May 18, 1993)") (statement of John Bradley, Deputy District Attorney, Multnomah County) (stating that the guidelines were necessary so "industry can look at the guidelines and say, you know, this is what the prosecutor is going to be looking for. This is when I could be prosecuted.…[I]t really gives people in each community some assurances to when they may or may not be prosecuted.").

prohibited, a felony environmental charge may be subject to challenge if the acts at issue predate the district attorney's adoption of written guidelines.[74]

2. Impermissible Delegation of Legislative Authority

Throughout the hearings on the OECA, the legislature and those who drafted the legislation made clear that felony charges should be brought only in response to "egregious, intentional violations" causing "extensive damage" and "posing serious health threat[s] or serious intentional and knowing violations resulting in major environmental damage."[75] However, the legislature failed to draft that limiting language into the statute itself. Instead, the legislature improperly delegated to the district attorneys and the Attorney General the task of adopting written guidelines imposing such limitations.

Article IV, section 1 of the Oregon Constitution provides that the legislative power, "except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and House of Representatives." Further, pursuant to Article III, section 1 of the Oregon Constitution, "no person charged with official duties under one of the three separate departments (executive, legislative or judicial) shall exercise any of the functions of another, except as in this Constitution expressly provided." Oregon courts have interpreted these provisions as placing judicially enforceable limits on the extent to which the legislature may properly delegate its legislative power to other government bodies. Specifically, the Oregon Supreme Court has held that, because the law-making power is entrusted to the legislature, an act

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[74] *See, e.g., Marks*, 430 U.S. at 190-97. In *Marks*, at the time of the charged conduct, the government was required to satisfy a stringent standard to sustain a valid conviction. The standard was later relaxed and applied to the defendant. The U.S. Supreme Court held that this retroactive application of what conduct would give rise to criminal penalties was a violation of the Due Process Clause.

[75] *See e.g.,* Hearings (Mar. 8, 1993), *supra* note 12 (statement of Fred Hansen).

leaving the legislative halls "must be complete and not contemplate that some other department of government or an agency will complete it."[76]

Legislation is complete when it "contains a full expression of legislative policy and sufficient procedural safeguards to protect against arbitrary application."[77] The OECA arguably fails to satisfy either of these requirements. First, although the bill's sponsors and the legislature made clear their desire to impose significant limitations on the types of cases that prosecutors could indict as felonies, the legislature assigned the task of defining those limitations to the district attorneys and Attorney General. Thus, the OECA was not a "full expression of legislative policy" when it left the legislative halls.

Second, the legislature did not prescribe "sufficient procedural safeguards to protect against arbitrary application."[78] Specifically, if a district attorney brings charges that do *not* satisfy the established prosecutorial guidelines, the aggrieved defendant has no apparent right of appeal or other legal recourse. As a result, district attorneys are effectively permitted to engage in the "willy-nilly prosecution" of conduct that the legislature purportedly sought to avoid by

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[76] *Foeller v. Hous. Auth. of Portland*, 198 Or. 205, 264, 256 P.2d 752 (1953).

[77] *State v. Self*, 75 Or. App. 230, 236-37, 706 P.2d 975 (1985); *see also*, *Warren v. Marion County*, 222 Or. 307, 314, 353 P.2d 257 (1960) (stating the primary test for determining whether a legislative delegation exceeds constitutional boundaries is "whether the procedure established for the exercise of the power furnishes adequate safeguards to those who are affected by the administrative action").

[78] *Self*, 75 Or. App. at 237, 706 P.2d 975. The sole safeguard contemplated by the OECA relates to the effect of a district attorney's failure to comply with the requirement that he certify that the guidelines were applied and that the case at hand warrants prosecution under those guidelines. The Court of Appeals has suggested that such an omission would properly be the subject of a pretrial motion challenging the indictment. *Oregon v. Stevens Equipment Co.*, 165 Or. App. 673, 681-82 & n.6, 998 P.2d 1278 (2000).

requiring the adoption and application of strict written guidelines.[79] Oregon's constitutional limits on delegation are designed, in part, to guard against precisely such conduct.

3. Vagueness Issues

a) Article I, Section 20 (Privileges and Immunities)

Vagueness challenges in Oregon implicate two separate sections of Article I of the Oregon Constitution.[80] Section 20 addresses the "equality of privileges and immunities of citizens," and provides that "no law shall be passed granting to any citizen or class or citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."[81] In *State v. Stevens Equipment Company*,[82] the court held that the mere presence of prosecutorial discretion "does not necessarily present any inherent section 20 problems, so long as the exercise of discretion 'adheres to sufficiently consistent standards to represent a coherent systematic policy.'"[83] And when "discretion is reflected in internal rules or guidelines, this of course serves to facilitate consistent practices."[84] However, the Oregon Supreme Court has left open the possibility of a section 20 challenge, if a defendant could establish that criteria within a county's guidelines were not "sufficiently consistent standards to represent a coherent, systematic

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[79] Hearings (May 18, 1993), *supra* note 73 (statement of John Bradley, explaining that the need for prosecutorial guidelines arose from "the fear that prosecutors might just kind of willy-nilly go out and prosecute people for conduct that people just simply have no way of knowing [is illegal]").

[80] *See, e.g.*, *State v. Graves*, 299 Or. 189, 195, 700 P.2d 244 (1985).

[81] OR. CONST. art I, § 20.

[82] 165 Or. App. 673, 998 P.2d 1278 (2000).

[83] *Id.* at 683, 998 P.2d 1278 (quoting *State v. Buchholz*, 309 Or. 442, 446-47, 788 P.2d 998 (1990)).

[84] *State v. Freeland*, 295 Or. 367, 378, 667 P.2d 509 (1983).

policy."[85] Thus, a successful challenge under section 20 may have to focus on how the county-by-county definition of the statute's "real" conduct leads to certain citizens enjoying privileges and immunities that do not belong equally to all citizens of the state.[86]

b) Article I, Section 21

Pursuant to Article I, section 21 of the Oregon Constitution, the "terms of a criminal statute must be sufficiently explicit to inform those who are subject to it of what conduct on their part will render them liable to its penalties."[87] Otherwise, potential defendants face an unacceptable risk of arbitrary or unequal application and uncontrolled discretion.[88]

With respect to the OECA, because the legislature did not enact any of the limitations on prosecutorial discretion it contemplated, but instead left this task to the district attorneys, the real "scope" of the law was left undefined and the felony provisions of the OECA are thus impermissibly vague. Further, the requirement for guidelines to be established by district attorneys and the Attorney General—the very individuals whose discretion was sought to be constrained—arguably creates an unacceptable risk of "standardless and unequal application of the criminal law."[89]

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[85] *Id.* at 375, 667 P.2d 509.

[86] This might be accomplished, for example, by showing that one county's guidelines produce a lenient practical scope not enjoyed by citizens in other counties.

[87] *Graves*, 299 Or. at 195, 700 P.2d 244.

[88] *State v. Krueger*, 208 Or. App. 166, 170, 144 P.3d 1007 (2006); *State v. Robertson*, 293 Or. 402, 408, 649 P.2d 569 (1982).

[89] *Graves*, 299 Or. at 197, 700 P.2d 244.

4. Violation of Article I, Section 21's "Taking Effect" Clause

Another potential challenge to the OECA relies on Article I, section 21 of the Oregon Constitution, which provides that "[no] law [shall] be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution."[90] Oregon courts have rendered an act void when it authorizes the making of laws the taking effect of which depends on persons outside of the legislature. For example, in *Van Winkle v. Fred Meyer*,[91] the Oregon Supreme Court declared a law void when the law purported to regulate the price of ice cream only if individuals outside of the legislative body agreed to regulate the prices. Absent such an agreement, the law could not be enforced.[92] The court stated that such a scheme, whereby persons wholly outside of the legislature crafted the specific terms of the law, constituted "a plain violation of the Constitution."[93] Similarly, the OECA provides that no felony charges for violations can be filed unless and until the district attorney for the relevant county adopts written guidelines governing the prosecution of such cases. Accordingly, the "taking effect" of the OECA was "made to depend upon" these district attorneys—persons "wholly outside of the Legislature."

III. CONCLUSION

Oregon's Environmental Crimes Act is the vehicle through which the state pursues individuals and companies that it views as the most egregious environmental offenders. Those who drafted that legislation, and the legislature itself, expressed serious concerns about the

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[90] OR. CONST. art I, § 21.

[91] 151 Or. 455, 49 P.2d 1140 (1935).

[92] *Id*. at 463, 49 P.2d 1140.

[93] *Id*. at 470, 49 P.2d 1140.

potential breadth of the OECA and the possibility of over-criminalization absent some significant constraints on prosecutors. To address those concerns, the legislature imposed strict *mens rea* requirements and required the Attorney General and individual district attorneys to implement guidelines that would alert the public to the type of conduct that might actually be prosecuted as felonies under the OECA. As a result, defendants and their counsel have available to them a number of defenses and challenges that may apply in numerous factual scenarios. It is critical for counsel practicing in this area to understand fully the provisions of the OECA and how the facts of each individual case fit within that statutory scheme.