

WETLANDS REFORM AND THE CRIMINAL ENFORCEMENT RECORD: A CAUTIONARY TALE*

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*See how the Fates their gifts allot,
For A is happy—B is not.*¹

Marinus Van Leuzen was a pretty lucky man. Van Leuzen owned a waterfront lot. Because the lot contained wetlands, local officials informed him that it could not be developed without a permit from the Corps of Engineers. Notwithstanding this advice, Van Leuzen raised the elevation of the site by about three feet and built a pole house. Unfazed by repeated warnings that his construction activity was illegal, Van Leuzen added a shell driveway, a concrete deck and sidewalks. He installed a septic system, sodded the lawn and added more fill.² Van Leuzen's development of the site in clear violation of the Clean Water Act³ triggered a lengthy criminal investigation that culminated in high level discussions at the Justice Department about whether he should be prosecuted for filling wetlands without a permit. To Van Leuzen's good fortune, the criminal case was closed without further action and the matter was referred for civil enforcement.⁴

John Pozsgai had far worse luck. Pozsgai owned and operated a truck repair business. In order to expand his business, Pozsgai bought an adjacent lot that his lawyer described as a neighborhood dumpsite.⁵ Because the entire

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1. SIR WILLIAM S. GILBERT & SIR ARTHUR SULLIVAN, *THE MIKADO*, act 2.

2. See *United States v. Van Leuzen*, 816 F. Supp. 1171 (S.D. Tex. 1993).

3. See 33 U.S.C. §§ 1311(a), 1319(c)(2) (1994). Although Van Leuzen could have legally constructed the pole house if he had obtained a permit from the Corps, he would have had to comply with whatever terms and conditions the permit imposed. See *EPA's Criminal Enforcement Program: Hearing Before the Subcomm. on Oversight and Investigations of the House of Representatives Comm. on Energy and Commerce*, 102d Cong. 48 (1992) [hereinafter *1992 Hearings*] (U.C. Memorandum to U.C. Members from the Honorable John D. Dingell, Chairman, Sept. 9, 1992) [hereinafter *Dingell Memorandum*].

4. See U.S. DEP'T OF JUSTICE, REPORT TO THE ASSOCIATE ATTORNEY GENERAL: INTERNAL REVIEW OF THE DEPARTMENT OF JUSTICE ENVIRONMENTAL CRIMES PROGRAM 193-209 (Mar. 10, 1994) [hereinafter *INTERNAL REVIEW*]. Van Leuzen ultimately was required to restore the land and pay a civil penalty. See *Van Leuzen*, 816 F. Supp. at 1171.

5. See *Status of the Nation's Wetlands and Laws Related Thereto: Hearings Before the*

tract was legally classified as wetlands, local authorities notified Pozsgai that he could not develop the land without a permit from the Corps. Equally unfazed by repeated warnings that his construction activities were illegal, Pozsgai filled and graded the site in preparation for building a garage. To Pozsgai's misfortune, a lengthy criminal investigation of his case culminated in his indictment,⁶ conviction⁶ and three-year prison term for violating the Clean Water Act.⁷

Ironically, each case came under the glare of congressional scrutiny in its own right. Van Leuzen's first came to light in congressional oversight hearings convened to investigate allegations that management in the Justice Department's Environmental Crimes Section was in a state of disarray. Van Leuzen's was one of six environmental cases that were criminally investigated and, after discussions among high-level Justice Department officials, were dropped as criminal matters. Congressional investigators cited the six decisions as examples of inappropriate declinations to prosecute, and of the Justice Department's antipathy toward its environmental criminal enforcement program.⁸ The government's refusal to pursue Van Leuzen's case even fueled the belief that the Justice Department had an unwritten rule against prosecuting wetlands violators.⁹

In the meantime, a successful media campaign orchestrated by several conservative groups made Pozsgai a cause célèbre of the property rights

Subcomm. on Water Resources of the House of Representatives Comm. on Public Works and Transportation, 101st Cong. 1098-99 (1991) (testimony of Paul D. Kamenar) [hereinafter *Wetlands Hearings*].

6. A Justice Department spokesman said that Pozsgai's case was the first wetlands prosecution whose outcome was determined by a jury. *See Developer to Spend Three Years in Jail, Pay \$202,000 Fine for Illegally Filling Wetlands*, 20 ENV'T REP. (BNA) 579 (July 21, 1989) [hereinafter *Developer to Spend Three Years in Jail*].

7. *See United States v. Pozsgai*, 757 F. Supp. 21 (E.D. Pa. 1991). His sentence was reported to be the longest ever imposed for an environmental crime as of that point in time. *See Wetlands Hearings*, *supra* note 5, at 949 (testimony of Paul D. Kamenar). Pozsgai was also sentenced to pay a \$200,000 fine.

8. *See 1992 Hearings*, *supra* note 3, at 9-10; *see also Developer to Spend Three Years in Jail*, *supra* note 6, at 579; *EPA's Criminal Enforcement Program: Hearing Before the Subcomm. on Oversight and Investigations of the House of Representatives Comm. on Energy and Commerce*, 103d Cong. 2 (1993) [hereinafter *1993 Hearings*] (opening statement of Mr. Dingell). The Justice Department vigorously defended its decisions not to prosecute as appropriate exercises of prosecutorial discretion. *See INTERNAL REVIEW*, *supra* note 4, at 172-302.

9. *See 1992 Hearings*, *supra* note 3, at 47-48; *see also ENVIRONMENTAL CRIMES PROJECT, GEORGE WASHINGTON UNIVERSITY (NAT'L LAW CTR.), CRIMINAL ENVIRONMENTAL PROSECUTION BY THE U.S. DEP'T OF JUSTICE: PRELIMINARY REPORT 6*, 22 (1992). The Justice Department defended its decision not to prosecute Van Leuzen as principled and fair. *See INTERNAL REVIEW*, *supra* note 4, at 206-09; *see also Carol E. Dinkins & Thomas R. Bartman, Criminal Enforcement of Wetlands Protection Law*, 25 ENV'T REP. (BNA) 1320, 1323 (Nov. 4, 1994) (noting that the Department of Justice's internal investigation effectively refuted the claim that it had an unwritten policy against prosecuting wetlands violators).

movement.¹⁰ At House oversight hearings on the status of wetlands and wetlands regulation, Pozsgai's prosecution was described as an example of "enforcement overkill"¹¹ that bordered on the "incomprehensible."¹² Critics charged that the government pursued Pozsgai "as if he were Public Enemy No. 1," even though his crime was minor.¹³ Pozsgai was portrayed as the victim of an absurd wetlands enforcement policy¹⁴ that irrationally imprisoned "senior citizens whose only crime was to realize the American dream of owning and developing their own property."¹⁵ Needless to say, conservative journalists eagerly joined in the cause.¹⁶

Pozsgai was only one of several wetlands violators who achieved notoriety through criminal prosecution. A media blitz orchestrated by the Fairness to Landowners Committee, for example, generated more than four thousand petitions and letters to President Bush on behalf of William Ellen, a marine construction project manager.¹⁷ Ellen was convicted of illegally filling more than eighty acres of wetlands on a large tract of land that was being developed as a commercial hunting preserve. Notwithstanding that Ellen was not his constituent and that the sentence was a modest six months, Senator David Pryor sought a presidential pardon for Ellen, calling his case "a prime example of the strange and twisted consequences that can result from a bureaucracy out of touch with reality."¹⁸ The Ellen prosecution prompted conservative writers to label wetlands regulators and enforcement officials as "Bureaucratic Enviro-Nazis"¹⁹ and led property rights advocates

10. See *1992 Hearings*, *supra* note 3, at 47 (Dingell Memorandum). The Washington Legal Foundation represented Pozsgai on appeal. See *Wetlands Hearings*, *supra* note 5, at 950 (testimony of Paul D. Kamenar).

11. *Wetlands Hearings*, *supra* note 5, at 950 (testimony of Paul D. Kamenar).

12. *Id.* at 954 (remarks of Rep. Arlan Strangeland).

13. *Id.* at 1104 (testimony of Paul D. Kamenar). Pozsgai was a Hungarian immigrant who fled the 1956 Uprising. Conservative organizations that attacked the government's prosecution of Pozsgai likened diligent environmental enforcement to a Stalinist dictatorship. See *1992 Hearings*, *supra* note 3, at 47 (Dingell Memorandum).

14. See *Wetlands Hearings*, *supra* note 5, at 1096 (testimony of Paul D. Kamenar) (claiming that the wetlands enforcement policy was subject to "the whim and caprice of uncontrolled regulators").

15. *Id.* at 1107 (testimony of Paul D. Kamenar).

16. See, e.g., James J. Kilpatrick, *Courts All Wet in Pozsgai Case*, THE CINCINNATI ENQUIRER, Jan. 25, 1994, at A06 (describing Pozsgai's prosecution as "patently absurd").

17. See *Wetlands: Bush Yet to Rule on Pardon Request for Jailed Virginia Man, Pryor Aide Says*, DAILY ENV'T REP. 239, at D3 (Dec. 11, 1992) [hereinafter *Bush Yet to Rule*]. The Fairness to Landowners Committee was an 11,000 member grass roots organization formed for the purpose of bringing rationality into wetlands regulation. See *id.*

18. *Id.* Senator Pryor explained that his motive for intervening in Ellen's behalf was fear that farmers and developers who were his own constituents in Arkansas could face similar problems. See *id.*

19. Walter E. Williams, Editorial, *When the Enviro-Nazis Gain the Upper Hand*, THE CINCINNATI ENQUIRER, Nov. 29, 1992, at H03 [hereinafter *Enviro-Nazis*].

to complain that something is terribly wrong when the government wants to jail a mere “dirt mover”²⁰ while murderers and rapists are being released due to prison overcrowding.²¹

In view of the extensive publicity that these and similar prosecutions received,²² it should come as no surprise that when Congress considered a Clean Water Act reauthorization bill in 1995, wetlands regulation reform was high on the agenda. Responding to calls to inject “balance and common sense” into water pollution laws,²³ supporters of regulatory reform vowed to replace “oppressive wetlands regulations”²⁴ conceived by environmental “extremists” with a simplified law that would preserve the “best” wetlands while at the same time protecting the rights of property owners.²⁵ The Clean Water Act Amendments of 1995 would have accomplished all that and more. Dubbed by detractors as the “dirty water bill,”²⁶ the amendments would have resulted in the loss of protection for at least half of the nation’s existing wetlands,²⁷ eliminated the Environmental Protection Agency’s (“EPA”) authority to enforce wetlands regulations,²⁸ abolished all administrative enforcement of wetlands regulations²⁹ and made criminal enforcement of

20. *Bush Yet to Rule*, *supra* note 17, at D3.

21. See *Enviro-Nazis*, *supra* note 19, at H03; see also *Wetlands Hearings*, *supra* note 5, at 953 (testimony of Paul D. Kamenar) (law enforcement resources would be better spent on prosecuting rapists and drug dealers than on investigating and prosecuting relatively minor environmental violations).

22. In response to the wetlands prosecution of Ocie Mills and his son, *see infra* note 51, members of the John Birch Society conducted a letter-writing campaign that raised about \$3000 for the Mills’ legal defense. See *Stubborn Polluters Sent to Jail*, ST. PETERSBURG TIMES, Sept. 3, 1989, at 6B [hereinafter *Stubborn Polluters*].

23. *Bush Yet to Rule*, *supra* note 17, at D3.

24. *Water Pollution: Focus Shifts to Senate Following Passage of Sweeping CWA Rewrite Bill in House*, DAILY ENV’T REP. 96, at D11 (May 18, 1995) (quoting Senator J. Bennett Johnston’s aide).

25. See *Wetlands: Four House Members Issue Defense of Clean Water Act Rewrite Provisions*, DAILY ENV’T REP. 88, at D4. As Pozsgai’s lawyer succinctly summed the issue up, “there are wetlands and there are other so-called wetlands.” *Wetlands Hearings*, *supra* note 5, at 951 (testimony of Paul D. Kamenar).

For a cogent commentary on the use of anecdotal evidence to support legislative initiatives, see David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 IND. L.J. 799 (1998).

26. *The Clean Water Act Amendments of 1995: Hearings on H.R. 961 Before the Subcomm. on Water Resources of the House Comm. on Transportation and Public Infrastructure*, 104th Cong. (1995), available in 1995 WL 76953, Federal Document Clearing House (testimony of Steven N. Moyer) [hereinafter *Testimony of Steven N. Moyer*].

27. See *The Clean Water Act Amendments of 1995: Hearings on H.R. 961 Before the Senate Comm. on Rules*, 104th Cong. (1995) (testimony of Rep. Robert A. Borski), available in 1995 WL 283183, Federal Document Clearing House.

28. The bill would have reposed enforcement authority exclusively in the Corps of Engineers.

29. The bill’s civil enforcement procedures would have required the following steps: (1) issuance of a compliance order to the violator by the Corps of Engineers; (2) notifying the violator of the compliance order; (3) waiting for the outcome of an appeal if the violator disputed the determination that he was not in compliance; (4) filing civil suit within 60 days of a decision denying the appeal or, if

wetlands regulations to prevent environmental harm literally impossible. The bill would have forbidden initiating a criminal prosecution until after the violator had disobeyed a compliance order and the government could show that the violation had caused "actual" (and perhaps irreversible) environmental "degradation."³⁰ Notably, proof of actual degradation of the environment is not a prerequisite for criminal enforcement of any other environmental law.

What are the dynamics of the wetlands criminal enforcement program? Are wetlands prosecutions, as critics insist, classic examples of a system out of control? Or do they reflect reasoned judgments about enforcement priorities? What makes wetlands regulation and enforcement such a highly charged issue?

The furor over the wetlands enforcement program can be best understood when placed in its statutory context. Apart from concerns about unreasonable government interference with private property rights,³¹ and about ambiguity³² and complexity³³ found in water pollution laws, the fundamental bone of contention is the breathtaking reach of wetlands regulations.³⁴ The Clean Water Act defines the term "navigable waters" as "waters of the United States, including the territorial seas."³⁵ While regulations promulgated by the Corps of Engineers and EPA define waters of the United States³⁶ to include

there was no appeal, filing suit within 150 days from the date of notification. *See* H.R. REP. NO. 104-112, § 803 (1995) (inserting new §§ 404(k)(1)-(3)).

30. *See* H.R. 104-961, § (k)(5) (1995). The bill did not define actual degradation of the environment.

31. Property rights activists claim that government regulation of privately owned property constitutes an uncompensated "taking" of the property. *See* *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). *See generally* James J. S. Johnson et al., *Bogged Down Trying to Define Federal Wetlands*, 2 TEX. WESLEYAN L. REV. 481 (1996); Nancie G. Marzulla, *State Private Property Rights Initiatives As a Response to "Environment Takings"*, 46 S.C. L. REV. 613 (1995). Environmentalists view wetlands preservation as essential to flood control, water quality and wildlife habitats. *See* Ted Williams, *The Wetlands-Protection Farce*, AUDUBON, Mar. 13, 1995, at 30; Testimony of Steven N. Moyer, *supra* note 26.

32. *See* Kilpatrick, *supra* note 16, at A06 (calling the Clean Water Act "a model of legislative ambiguity").

33. *See* Richard J. Lazarus, *Meeting The Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2471 (1995) (observing that highly technical and exacting factual inquiries are needed to determine whether a tract of land is a wetland).

34. *Cf.* *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997) (invalidating 33 C.F.R. § 328.3(a)(3) (1986) on the ground that the Corps of Engineers exceeded its congressional authorization under the Clean Water Act by defining "waters of the United States" to include intrastate waters whose degradation or destruction could affect interstate or foreign commerce).

35. 33 U.S.C. § 1362(7) (1994).

36. *See* 33 C.F.R. § 328.3(a) (1986) (Army Corps definition); 40 C.F.R. § 230.3(s) (1980) (EPA definition).

bodies of water that would be recognized as such in common parlance,³⁷ they also include wetlands that are adjacent to traditional waters, thus taking “a quantum leap onto land.”³⁸ In consequence, a property owner could run afoul of wetlands regulations not only by filling in marshes, swamps and bogs, but by dumping dirt into a dry arroyo or ditch as well.³⁹ As one court put it:

In a reversal of terms that is worthy of *Alice in Wonderland*, the regulatory hydra which emerged from the Clean Water Act mandates . . . that a landowner who places clean fill dirt on a plot of subdivided dry land may be imprisoned for the statutory felony offense of “discharging pollutants into the navigable waters of the United States.”⁴⁰

Thus, the highly publicized convictions of Pozsgai and Ellen (and Van Leuzen’s near miss) not only raise the spectre of a vigorous criminal enforcement program under which large numbers of criminal cases are processed—they also focus the mind on the prospect that innocent homeowners and unwitting entrepreneurs may be criminally prosecuted for violating regulations that forbid developing a site that, to the untrained eye, could not conceivably be considered legally protected wetlands.⁴¹

As logical as these intuitive inferences may seem, in reality they are common misperceptions. Despite estimates that suggest a high level of criminal enforcement activity,⁴² a look at the enforcement record reveals

37. “Waters of the United States” include lakes, rivers and streams, for example. 33 C.F.R. § 328.3(a)(3) (1986).

38. *United States v. Mills*, 817 F. Supp. 1546, 1551 (N.D. Fla. 1993). The definition includes “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.” 33 C.F.R. § 328.3(b); 40 C.F.R. § 230.3(t).

39. *Cf. Wilson*, 133 F.3d at 258 (holding erroneous a jury instruction that defined waters of the United States to include adjacent wetlands having no direct or indirect surface connection to other waters of the United States).

40. *Mills*, 817 F. Supp. at 1548 (emphasis in original).

41. See Kilpatrick, *supra* note 16, at A06 (noting that under current regulations, “water is defined as land, and land is defined as water,” that the term “adjacent” means far away,” and that the concept of navigable waters has been stretched to include ditches, creeks and arroyos that “haven’t seen even a rowboat in years”). Or, to quote Pozsgai’s lawyer again, there is “no way” that Pozsgai’s property could qualify “as any kind of wetland.” *Wetlands Hearings*, *supra* note 5, at 950 (testimony of Paul D. Kamenar).

42. Compare Roger J. Marzulla, *Specific Wetland Criminal Issues*, in ENVIRONMENTAL CRIMINAL LIABILITY 221 (Donald A. Carr ed., 1995) (stating that between January 1990 and May 1992, 47 corporations and individuals were prosecuted for wetlands violations) with Todd Shields, *Developer Convicted of Destroying Wetlands*, WASH. POST, Mar. 1, 1996, at C01 (a spokesman for the Justice Department’s Environmental Crimes Section said that *United States v. Wilson*, which resulted in the 1996 conviction of Wilson and his two companies, was the twenty-sixth criminal wetlands

surprisingly few wetlands prosecutions to date.⁴³ An exhaustive search of available sources of information revealed only twenty criminal prosecutions for wetlands violations.⁴⁴ And as the following discussion demonstrates, these violations share remarkably similar traits that reveal vulnerable fault lines in current criticisms of the wetlands enforcement program.

Critics of the Pozsgai prosecution cite it as evidence that “[t]he government means business . . . when it comes to prosecuting the little guy.”⁴⁵ But a simple look at who gets caught in the criminal enforcement net suggests quite the opposite. In the nineteen wetlands prosecutions for which

prosecution in the last decade) and Mark Platte, *Swap Meet Owner Pleads Guilty to Filling Wetlands*, L.A. TIMES, Mar. 21, 1992, at B1 (stating that only 13 criminal prosecutions for wetlands violations had been brought to date). Although it is not entirely clear, estimates of the level of criminal enforcement activity that tend to be on the high side may include some civil enforcement actions in the total count. See Marzulla, *supra*, at 221 n.1. As wetlands prosecutions often have multiple defendants, moreover, calculations based on the total number of defendants rather than the total number of prosecutions may also create the impression that there is a higher level of criminal enforcement activity than may actually be the case. See *id.* at 221.

43. See Dinkins & Bartman, *supra* note 9, at 1323 (“[c]onsidering the currently substantial public visibility of wetlands protection as an environmental concern, the comparatively low number of wetlands convictions seems surprising”); Platte, *supra* note 42, at 1 (characterizing criminal wetlands prosecutions as rare). According to a Justice Department spokesman, Pozsgai’s case was the sixth wetlands prosecution the government had pursued. See *Developer to Spend Three Years in Jail*, *supra* note 6.

Hard pressed to explain why wetlands prosecutions are so few and far between, commentators posit several plausible reasons: (1) uncertainty about applicable regulatory standards and the “potentially technical nature” of the evidence needed to prove the case; (2) public controversy over successful wetlands prosecutions; and (3) the ongoing political debate about the proper scope of wetlands protection. See Dinkins & Bartman, *supra* note 9, at 1323. They also observe that a high percentage of convictions for wetlands violations are appealed, presumably because of the lack of legal precedent and attendant uncertainties about applicable legal standards. See *id.*

44. The data base includes wetlands prosecutions initiated under the Clean Water Act, 33 U.S.C. §§ 1311(a), 1319(c)(2) (1994). The data was gathered from a number of sources. Printed sources include U.S. EPA Office of Enforcement of Environmental Criminal Prosecutions (Nov. 1992) (containing summaries of prosecutions instituted during Fiscal Years 1983-1992); EPA Office of Enforcement and Compliance Assurance, Enforcement and Compliance Assurance Accomplishments Report FY 1995 (July 1996); EPA Office of Enforcement, Enforcement Accomplishments Report FY 1994 (May 1995); EPA Office of Enforcement, Enforcement Accomplishments Report FY 1993 (April 1994); EPA Office of Enforcement, Enforcement Accomplishments Report FY 1992 (April 1993). Additional cases were located by searching the LEXIS Genfed courts file and the WESTLAW Allfeds file using the search terms “Clean Water Act” & “Wetlands.” Information about the cases was supplemented by reference to published and unpublished judicial opinions, indictments and informations and related documents obtained through the clerks of court, the NEXIS electronic data base and other miscellaneous sources.

The data base excludes wetlands cases brought under the Wildlife Refuge Act, 16 U.S.C. § 668dd(c) (1994). These prosecutions typically involve federal easements containing wetlands that provide habitat for wildlife. See, e.g., *United States v. Johansen*, 93 F.3d 459 (8th Cir. 1996); *United States v. Vesterso*, 828 F.2d 1234 (8th Cir. 1987). Enforcement in these cases is initiated by the Fish and Wildlife Service rather than the Corps of Engineers.

45. *Wetlands Hearings*, *supra* note 5, at 1104 (testimony of Paul D. Kamenar).

there is sufficient information to classify the defendants,⁴⁶ eleven defendants were corporate entities or partnerships that developed wetlands commercially. Eight of the twenty individual defendants were officers of those corporations who had operational responsibility for the development. Nine of the remaining defendants were contractors, commercial developers or professional engineers.⁴⁷ Thus, with three exceptions, all of the defendants were experienced in some facet of commercial real estate development and were (or should have been) knowledgeable about restrictions on developing sites containing wetlands.

William Ellen exemplifies this profile. Ellen operated a business that specialized in the design of, and acquisition of permits for, construction projects involving wetlands and subaqueous areas.⁴⁸ He had a bachelor of science and engineering degree and had been a staff environmental engineer with a state agency. While holding that position, he had responsibility for reviewing the regulation of wetlands projects. He later formed his own company to specialize in the design of wetlands construction projects. As project supervisor for the commercial hunting preserve development, Ellen was directly responsible for acquiring environmental permits and complying with state and federal environmental regulations. Yet despite his extensive experience, specific project responsibilities and knowledge that the development site contained wetlands, Ellen failed to obtain a single permit.

Of the three defendants whose profiles differed from those described above, two (including Pozsgai) were business owners who developed property containing wetlands for the purpose of maintaining or expanding their businesses. Thus, with one lone exception,⁴⁹ all of the cases revolved

46. There were 31 defendants in these cases.

47. One of the engineers, James Brackenrich, was a former state senator who chaired the senate's committee on natural resources. See *EPA: Former State Legislator Sentenced in First West Virginia Wetlands Prosecution*, M2 PRESSWIRE, June 17, 1996; *Former West Virginia State Legislator Pleads Guilty to Clean Water Act Violation*, ENVTL. LABORATORY WASH. REP., May 13, 1996. Brackenrich had been fined twice before for storing chemicals in a leaking tank and allowing raw sewage from one of his businesses to leak into a limestone cavern. See Paul Owens, *Brackenrich to Keep Job—Former Senator's Jail Sentence Won't Affect the Highway Job*, CHARLESTON DAILY MAIL, June 21, 1996, at 1A; *Ex-Lawmaker's Attorney Says Appeal is Possible*, CHARLESTON DAILY MAIL, June 12, 1996.

48. See *United States v. Ellen*, 961 F.2d 462, 463 (4th Cir. 1992).

49. The exceptional case is the prosecution against Ocie Mills and his son Carey. See *Mills v. United States*, 36 F.3d 1052 (11th Cir. 1994); *United States v. Mills*, No. CR-88-03100-WEA (N.D. Fla. 1988) (indictment). While Ocie Mills, a retired contractor, fits the profile described above, Carey's background is unknown. The case is exceptional because the Mills were prosecuted for developing two lots as a homesite for Carey. Notwithstanding the lack of evidence of economic motive, however, the offense characteristics in the Mills prosecution are remarkably similar to Pozsgai's case. See *infra* text accompanying notes 60-63. Most notably, the previous land owners received a cease and desist order from the Corps, the Mills purchased the property with full knowledge of its designation as wetlands and of the resulting implications for unrestricted development, and they

around developing wetlands for commercial purposes. Unlike Van Leuzen, who sought to enhance his enjoyment of his waterfront lot, those who were prosecuted were economically motivated to violate the law.

The inference that commercial purpose or economic motive is relevant in deciding whether to prosecute wetlands violators is consistent with the record in Van Leuzen's case. Although some officials involved in the decisionmaking process disagreed about whether his violation should be treated as a criminal or civil matter, one factor that militated against criminal prosecution was the belief that the case was too small to be worth prosecuting.⁵⁰ The Assistant United States Attorney to whom the matter was assigned urged caution in selecting the first wetlands case for criminal prosecution in her district. Observing that past practice had been to rely on civil remedies for wetlands violations, she noted that guidelines for deciding whether to pursue a case civilly or criminally were needed to avoid the appearance of being "arbitrary or unfair."⁵¹ Those sentiments also had been echoed by an Assistant Attorney General who recommended forbearance in bringing criminal charges in wetlands cases until prosecutors found "a worthy subject[—]i.e., a developer.[']"⁵²

Thus, it seems safe to say that the wetlands criminal enforcement program is aimed primarily at commercial actors who seek to profit from their violations. The perception that the government singles out the unsophisticated "little guy" for wetlands prosecutions is simply not true.

The offense profiles of the cases in the data base provide even more striking evidence of why they were considered appropriate targets for prosecution. They demonstrate that defendants were selected for criminal prosecution when there was strong evidence not only of culpability in a legal or technical sense, but of actual awareness of wrongdoing as well. Defendants in five cases hired (and sometimes fired) one or more professional consultants who warned them that the property contained

continued to fill in the site without a permit in defiance of two additional cease and desist orders issued to them. A government lawyer characterized the Mills as "blatant [and] flagrant violators," and a Corps of Engineers official placed them "near the top of the list in stubbornness." *Stubborn Polluters*, *supra* note 22. An EPA official said that "Mills was adamant" about taking on federal officials about the wetlands violation. H. Jane Lehman, *Trials and Tribulations of Landowners*, L.A. TIMES, Oct. 18, 1992, at K2; *see also* Marzulla, *supra* note 42, at 227 & n.54. Thus, factually, the Mills' offense was comparable to the other wetlands offenses in the criminal enforcement data base. *See infra* text accompanying notes 53-71.

In addition, like Pozsgai and Ellen, Mills became a cause célèbre of the right—this time, the John Birch society. Supporters wrote letters to the editor and raised about \$3000 to defray the Mills' legal expenses. *See Stubborn Polluters*, *supra* note 22.

50. *See* INTERNAL REVIEW, *supra* note 4, at 201 & n.272.

51. *Id.* at 200 n.270.

52. *Id.* at 201.

wetlands and could not legally be developed without approval from the Corps. More telling still, defendants in a dozen cases had received one or more verbal warnings from regulators that the development was illegal. And in ten of the cases, the defendants ignored one or more written cease and desist orders directing them to stop further development immediately.

Several of these cases distinguish themselves from the rest of the pack. In one, a defendant who received cease and desist orders attempted to bribe an official to unlawfully issue a permit.⁵³ In another, the putative defendant filed suit to enjoin the government's criminal investigation.⁵⁴ In two others, the defendants' probation was revoked because they continued to develop wetlands illegally without a permit.⁵⁵ But the grand prize goes to the defendant in *United States v. Bieri*.⁵⁶ Bieri, a contractor, filled in the same site three different times after restoring it twice on orders from the Corps.⁵⁷ Worse still, Bieri flaunted his lawbreaking to gain a competitive edge. In his discussions with potential customers, Bieri exaggerated the amount of time it takes to obtain a permit and said that he could finish the job sooner because he would not delay a project to apply for one.⁵⁸

The unsung examples are legion, but let us return to the sung heroes of the wetlands reform movement. Once again, William Ellen fits the profile. Ellen hired a civil engineer who told him that the project site contained wetlands and that a permit was required. Four to five months later, Corps officials toured the property with Ellen and pointed out which areas were wetlands. On a follow-up visit, Corps officials actually marked off the wetlands area by tying survey ribbons on trees and bushes. Yet despite these and other unmistakable warnings, Ellen refused to stop the work because of

53. See *United States v. Pasquariello*, No. 89-6196-CR-ZLOCH(S)(S)(S) (S.D. Fla. 1991) (superseding indictment). See also *Dinkins & Bartman*, *supra* note 9, at 1322.

54. See *Hartford Assoc. v. United States*, 792 F. Supp. 358 (D.N.J. 1992) (holding that the court has no power to enjoin threatened criminal proceedings). Hartford Associates subsequently pled guilty to violating the Clean Water Act. EPA Office of Enforcement, Enforcement Accomplishments Report FY 1993, at 3-83 (Apr. 1994).

55. See *United States v. Holland*, 874 F.2d 1470, 1472-74 (11th Cir. 1989); *United States v. Bieri*, No. 87-CR-20030-BC-01 (E.D. Mich. 1990) (judgment including sentence upon probation violation); see also 1 CHRISTOPHER HARRIS ET AL., ENVIRONMENTAL CRIME § 2.54, at 2-151 (1995) [hereinafter, HARRIS ET AL., ENVIRONMENTAL CRIME]. The probation violation in *Bieri* led to Bieri's pleading guilty to another Clean Water Act violation. See *Bieri*, No. 87-CR-20030-BC-01.

56. *United States v. Bieri*, No. 87-CR-20030-M-BC (E.D. Mich. 1987) (criminal complaint) (affidavit of John Konik). Bieri was one of the defendants whose probation was revoked for committing additional Clean Water Act violations. See *supra* note 55 and accompanying text.

57. See *Bieri*, No. 87-CR-20030-M-BC (E.D. Mich. 1987) (information). Bieri initially applied for a permit following an early warning from the Corps, but later abandoned the application and continued the work despite posted stop work signs, cease and desist orders and warning letters. See *id.*

58. His competitors complained that they lost business because of this tactic.

contractual deadlines.⁵⁹

And what about John Pozsgai, the small businessman who was simply trying to realize the American dream of owning and developing his own land? Was he unfairly singled out for prosecution? Heed the rest of this cautionary tale. Before he purchased the fourteen-acre tract, Pozsgai hired an engineering firm to determine whether the land was suitable for expansion of his truck repair business. The engineering consultant advised him by letter that it was not. The entire site constituted wetlands and could not be developed without a permit from the Corps. While he was still considering purchasing the site, a Corps of Engineers biologist also informed him that he could not fill the land without a permit. As negotiations to buy the property continued, Pozsgai hired a second engineering consultant to evaluate the site, was again told that the property was wetlands and was again warned that any site preparation would require prior approval from the Corps. Ever the optimist, Pozsgai hired yet a third engineering consultant, who confirmed that the tract was protected wetlands. After receiving the three consultants' reports and the notice from the Corps, Pozsgai turned adversity into advantage by renegotiating the purchase price downward by \$32,000—and then began filling in the site.⁶⁰

Following this negotiating coup, Corps of Engineers officials repeatedly warned Pozsgai that he was violating the law. Yet despite the warnings, which included at least two cease and desist letters,⁶¹ Pozsgai relentlessly filled in the land. Even after the United States Attorney filed a civil action and obtained a temporary restraining order (“TRO”) against him, Pozsgai remained undeterred. Two days after the issuance of the TRO, a video camera installed by the EPA on nearby property recorded the dumping of twenty-five truckloads of debris onto the land and showed Pozsgai operating a bulldozer to level the fill. Shortly thereafter, the court held Pozsgai in contempt.⁶²

Like their counterparts in other wetlands prosecutions then, Pozsgai's and Ellen's violations were neither casual nor inadvertent. They were committed in flagrant disregard of clearly stated rules of the game.⁶³

59. *See* *United States v. Ellen*, 961 F.2d 462, 466-67 (4th Cir. 1992); *United States v. Ellen*, No. CRS-90-0215 (D. Md. 1990) (indictment). Ellen told his civil engineer that he would not apply for permits until some of the work was completed because he did not want the project delayed.

60. *See* *United States v. Pozsgai*, 999 F.2d 719, 721-22 (3d Cir. 1993).

61. The previous owners, from whom Pozsgai purchased the land, had also received a cease and desist letter, and Pozsgai admitted that local officials had shown him that letter. *See id.* at 722.

62. *See id.* at 722-23.

63. The government's decision not to prosecute Van Leuzen should not be accepted as conclusive on the issue of his culpability. His many confrontations with Corps officials made the

The trait of flagrant disregard of authority becomes manifest in other offense characteristics as well. Many wetlands violations that resulted in criminal prosecution were aggravated by acts of misrepresentation, concealment and obstruction. Defendants lied to the Corps of Engineers about wetlands on property they were developing.⁶⁴ They falsely promised regulators that they would come into compliance, but at the same time instructed their workers to proceed apace.⁶⁵ They lied to purchasers of property about the nature of the work being performed and the regulated status of the property,⁶⁶ and erected physical barriers to conceal illegal construction activity from public view.⁶⁷ One defendant even threatened his environmental consultant, ordering him to destroy an unfavorable report on the status of the property and not to communicate the contents to regulatory authorities.⁶⁸ Although in this particular regard Ellen and Pozsgai were not the worst of the lot, their crimes were compounded by acts of misrepresentation and concealment as well.⁶⁹

permit requirements clear. But Van Leuzen testified at his civil trial that notwithstanding his receipt of a lawful order from the government, "if it was inconvenient, he was free to simply disregard it." *United States v. Van Leuzen*, 816 F. Supp. 1171, 1173 (S.D. Tex. 1993). He essentially told a representative of the enforcement section of the Corps of Engineers that he was "old and could do what he wanted to," and he even "bragged" to some people that he was "getting away with it." *Id.* at 1174. Van Leuzen had also had previous disputes with the Corps about work that was performed without a permit. *See id.* at 1178. Thus, Van Leuzen easily fits the pattern of flagrant disregard of authority.

64. *See, e.g.*, *United States v. Wilson*, No. C.R.A.W.-95-0390 (D. Md. 1995) (amended indictment) (defendant caused company to deny knowledge that wetlands were on property in question).

65. *See, e.g., id.* (defendant caused employees to tell Corps that company would take necessary steps to bring project into compliance and prevent future violations while he was directing continued efforts to drain and fill wetlands); *United States v. Suarez*, No. CR 92-00036 (D. Guam 1992) (indictment) (defendant twice promised Corps representative that he would remove illegal fill, but on both occasions failed to do so and continued to add more fill).

66. *See, e.g., Wilson*, No. C.R.A.W.-95-0390 (defendants used false affidavits to obtain inaccurate expert opinion letters about regulated status of property before selling it for nearly \$2.5 million).

67. *See, e.g., United States v. Pasquariello*, No. 89-6196-CR-ZLOCH (S)(S)(S) (S.D. Fla. 1991) (superseding indictment) (defendant tried to conceal construction activity by ringing a lake with huge tanks; he also told employees to use a fill method that would keep floating material submerged and to take coffee breaks when inspectors were on the scene).

68. *See, e.g., United States v. Rapanos*, No. 93-CR-20023-BC (E.D. Mich. 1993) (superseding indictment) (defendant was charged with using intimidation and threats to persuade consultant to withhold and destroy or conceal wetlands report from law enforcement authorities).

69. On at least one occasion, Pozsgai falsely told Corps of Engineers agents that he had stopped work on the property. *See United States v. Pozsgai*, 999 F.2d 719, 723 (3d Cir. 1993). Ellen canceled several regularly scheduled Corps of Engineers inspections to postpone discovery of his continued illegal activity. *See United States v. Ellen*, No. CRS-90-0215 (D. Md. 1990) (indictment).

The potential seriousness of environmental harm that could flow from the illegal acts may be another relevant factor in the decision whether wetlands violations should be criminally prosecuted. That offense characteristic is much more difficult to gauge from available records, however. In some

*Things are seldom what they seem,
Skim milk masquerades as cream.*⁷⁰

What lessons can be learned from this cautionary tale? It presents the available details of the wetlands criminal enforcement record in virtually the entire universe of wetlands prosecutions. What does the empirical evidence tell us about the use of criminal prosecution as an enforcement tool?

First, it is abundantly clear that criminal prosecution for wetlands violations is the exception rather than the rule. Public relations campaigns notwithstanding to the contrary, the criminal enforcement record reflects sometimes remarkable restraint. The details of the record reveal that the decision to prosecute normally follows repeated efforts by Corps and other officials to obtain compliance through persistent but relatively informal administrative steps over a substantial period of time.⁷¹ Criminal prosecution seems to be viewed as a measure of last, rather than first, resort. Stated differently, the criminal enforcement record is consistent with highly selective enforcement decisions that reserve criminal prosecution for the rare

cases, the potential for serious harm seems obvious—for example, bulldozing three acres of wetlands as part of a \$500 million Galleria retail, office and hotel development, *see United States v. Bill L. Walters Cos.*, No. 88-CR-375 (D. Colo. Dec. 22, 1988) (information); filling in more than 80 acres of wetlands that are part of a 3000 acre site to be developed as a commercial hunting preserve, *see Ellen*, No. CRS-90-0215; bulldozing a five-acre tract of wetlands on a shopping mall development site containing more than 20 acres of wetlands, *see United States v. Marathon Dev. Corp.*, 867 F.2d 96 (1st Cir. 1989); *United States v. Marathon Dev. Corp.*, No. C.R.87-129-MC (D. Mass. 1987) (superseding indictment); clearing and filling wetlands on part of a 175 acre site to make it more attractive to a shopping mall developer who has an option on the property, *see United State v. Rapanos*, No. 93-CR-20023-BC (E.D. Mich. 1993) (indictment); developing five parcels containing wetlands that are part of an 8,000 acre planned residential community, *see United States v. Wilson*, No. C.R.A.W.-95-0390 (D. Md. 1995) (indictment); and constructing a 375 mile commercial pipeline that crosses more than 500 rivers, streams and wetlands in a two-state area, *see United States v. Mango*, No. 96-CR-327 (RSP) (S.D.N.Y. 1996) (indictment). *See also Ken Ward, Jr., Ex-Senator Sentenced to Jail Term*, THE CHARLESTON GAZETTE, June 12, 1996 (defendant was sentenced to jail for destroying part of West Virginia's largest wetland).

William Ellen's case, which involved the commercial hunting preserve, fits this profile. In other cases, the potential for serious environmental harm is more difficult to assess. In Pozsgai's case, for example, we know only that he was filling in a 14 acre site that he claimed had been used as a neighborhood dumpsite. *See Wetlands Hearings*, *supra* note 5, at 1098-99 (testimony of Paul D. Kamenar). The Corps of Engineers and his environmental consultants determined that it contained wetlands. Beyond this, we know little about the characteristics of the land. It was reported, however, that Pozsgai's wetland filling activity caused neighboring land to flood during rainstorms. Louis J. Schiffer, Luncheon Address, *reprinted in AMERICAN LAW INSTITUTE, REMARKS AND ADDRESSES AT THE 74TH ANNUAL MEETING*, 48, 57 (May 21, 1997).

70. SIR WILLIAM S. GILBERT & SIR ARTHUR SULLIVAN, H.M.S. PINAFORE, act 2.

71. Efforts to bring William Ellen into compliance spanned a period from August, 1987 through March, 1989, for example. *See United States v. Ellen*, 961 F.2d 462, 463-64 (4th Cir. 1991). John Pozsgai disregarded officials' efforts to halt his illegal conduct from April, 1987 through September, 1988. *See United States v. Pozsgai*, No. CR 88-00450 (E.D. Pa. 1988) (indictment).

(but aggravated) case.

A second lesson flows from the first. The case studies reveal recurring patterns of flagrant and repeated violations committed under circumstances that leave no room for doubt about the violator's culpability. The decision to prosecute more often than not follows repeated civil and administrative efforts to bring the violator into compliance. Thus, no matter how technical or complex wetlands regulations may be, criminal liability for wetlands violations is not a trap for the unwary. The criminal wetlands cases are (or should become) notorious for the wealth of evidence of actual culpability. The defendants had all been warned that they were violating the law. Nonetheless, they all chose to ignore the warnings, and in many instances took affirmative steps to cover their tracks. The picture that emerges is one of a cast of characters who are, on the whole, an uncommonly colorful lot. Defiant, deceitful and largely unrepentant, their violations bespeak disdain for regulatory authority rather than a failure to comprehend arcane and technical regulations. They obstinately refused to conform their conduct to the law.

A third and related lesson is that those who are prosecuted for wetlands violations are scarcely unsophisticated innocents. On the contrary, they are almost exclusively knowledgeable economic actors. They are businesses and experienced businessmen whose economic stake can provide a powerful incentive to ignore wetlands regulations that could delay, impede or even prevent a lucrative commercial development. They seem to view the possibility of a civil fine or restoration order and the minimal risk of criminal prosecution as costs of doing business—nothing more, nothing less.

In sum, the cautionary tale boils down to this. Anecdotal narratives about environmental criminal enforcement policies and records are suspect. Their often distorted pictures of reality can lead to exaggerated claims about the existence or dimensions of problematic criminal enforcement issues. Uncritically accepted as true, those claims can provide a seemingly credible basis for misguided proposals that have the potential to do more harm than good. In the case of wetlands criminal enforcement, the anecdotal narrative would have us believe that the government is shooting wildly from the hip, with little rhyme or reason. After studying the criminal enforcement record, the best that can be said is that no matter how sincere the narrator, the narrative is utterly uninformed.