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Rhode Island to apply for a Geographic Location Determination under existing CMZA regulations, which gives a coastal state the right to veto the activities of private parties seeking permits in offshore waters for various activities, including offshore construction, if the state finds under the CZMA’s federal consistency program that those activities would be inconsistent with the enforceable policies of the state’s coastal zone management program.

In effect, Rhode Island used the extensive research done for the Ocean SAMP in both state and federal waters to justify extending the state’s influence over extensive federal waters abutting its state waters, and to increase protection of state waters and the goals and policies of its state coastal zone management plan. Private parties seeking permits for designated activities in the federal waters of the Ocean SAMP study area must now convince Rhode Island that those activities are not inconsistent with the state’s coastal zone management policies.

In essence, new ocean planning techniques were used to exploit existing provisions of federal coastal zone regulations to zone offshore state waters, to facilitate the development of offshore alternative energy facilities in record time, and to increase the influence of Rhode Island over federal permitting of private parties (and federal entities to a lesser extent) in abutting federal waters.

Other states may have much to learn from the Rhode Island ocean zoning blueprint.

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New Enforcement Policy Targets Individuals

Irma S. Russell, Isaac W. Straub, and Traci Hayes

On September 9, 2015, the U.S. Department of Justice (DOJ) announced a new emphasis on prosecuting individuals connected with corporate violations. This policy is not directed at a particular area of law, and it does not focus on environmental laws per se. The prevalence of organizational actors in the environmental arena and the significant criminal sanctions imposed by environmental laws mean that this development deserves attention in the environmental context. Lawyers practicing in the areas of environmental, energy, and natural resource law should have a solid working knowledge of corporate governance as well as the substantive area of law. The significance of organizational entities to the U.S. economy and to environmental practice can hardly be overstated. In fact, the impact of corporations on the economy is one reason for the new policy. Every lawyer practicing in the environmental area will represent or deal with organizational entities, including corporations, limited liability companies, nonprofit organizations, and tribal entities. Accordingly, lawyers practicing in the areas of environment, energy, and resources should be
aware of the new DOJ focus on pursuing individuals for corporate wrongdoing. The general principle at work in the policy is that people are accountable for their actions under the law, and individuals can be subject to prosecution for their actions—even when they act on behalf of an organizational entity. The DOJ memorandum is entitled Individual Accountability for Corporate Wrongdoing, available at www.justice.gov/cia/file/169036/download. The new policy became effective upon its issuance. The memorandum directs federal prosecutors to make prosecution of individual corporate employees a priority in "any investigation of corporate misconduct." Id. at 2. In the policy memo, the DOJ announces its determination that corporate fraud and other corporate misconduct detrimentally affects the stability of the country's financial economy. Thus, the memo finds that DOJ needs a new focus on individuals responsible for corporate decisions and acts that violate the law. The memorandum indicates that prosecutors should no longer afford corporations any cooperation credit until they have provided information relating to the individuals involved in the conduct at issue. Among the memo directives, attorneys representing the government in both criminal and civil actions are to focus on individual wrongdoing from the beginning of any investigation, regardless of the corporation's ability to pay. Government lawyers should communicate with one another regularly throughout both criminal and civil investigations. Individual liability should not be released with the resolution of corporate liability, and DOJ attorneys are instructed to refrain from resolving a corporate investigation without considering ongoing individual investigations and to document their reasons when they decide not to pursue individuals. The DOJ memorandum emphasizes that the policies increase scrutiny of high-level executives and put pressure on corporations to turn over evidence against their employees, in both criminal and civil proceedings. The memorandum, called "the Yates Memo" for Deputy Attorney General Sally Yates, notes the fact that corporations can commit crimes only through "flesh-and-blood people." Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (Sept. 10, 2015) (Yates Remarks). The steps outlined in the memorandum are intended to deter future illegal activity and promote corporate behavior change. The DOJ also may require a company's continued cooperation in actions against relevant individuals even after the company has resolved the matter. Deputy Attorney General Yates told the New York Times that the DOJ won't be accepting a company's cooperation when they just offer up the vice president in charge of going to jail." Matt Apuzzo and Ben Proess, Justice Department Sets Sights on Wall Street Executives, the New York Times, Sept. 10, 2015, at A1. Deputy Attorney General Yates explained that corporate ignorance of violations is not an excuse, stating that "If [companies] want any cooperation credit, they will need to investigate and identify the responsible parties, then provide all non-privileged evidence implicating those individuals," Yates Remarks, supra. The DOJ memorandum makes clear that prosecutions will focus on individual conduct as soon as cases are brought and that the announced policy applies to both criminal and civil investigations into corporate wrongdoing. Id. While the Yates memo provides specific directives, it is unclear how the DOJ will proceed to implement the directives. The DOJ has stated it will revise the Principles of Federal Prosecution of Business Organizations contained in the U.S. Attorneys’ manual. Covington, DOJ Issues New Guidance on Pursuing Individual Accountability for Corporate Wrongdoing (Sept. 11, 2015). Accordingly, examining past DOJ memoranda on this topic offers some useful insights on the future. The Yates memo follows a long line of memoranda indicating the prosecution of individuals for corporate wrongdoing. McGuire Woods, Unpacking the Yates Memo: What’s New in the DOJ Policy Really Means (Sept. 11, 2015). The memorandum could cause prosecutors to proceed more vigorously in their pursuit of individuals for corporate offenses in order to satisfy the policy goal of preventing misconduct. Id. On the other hand, Yates has acknowledged that the policy changes may present challenges such as a reduction in corporate cooperation and even fewer settlements. Yates Remarks, supra. An increased number of jury trials is also a possibility. The new emphasis on prosecutions of individuals may have dramatic consequences for individuals in the environmental arena even though the DOJ memorandum does not single out violations of environmental statutes or regulations. As with law generally, there is no exemption from this approach for corporate counsel. The goal of the attorney-client privilege is to protect client information. In the situation in which the corporate client is cooperating with the prosecution, the privilege would not protect the lawyer. Similarly, the work-product doctrine seems to offer little protection to lawyers in such circumstances. The doctrine operates to protect clients rather than counsel, and once the corporation decides to cooperate with the prosecution it would be within its rights to turn over documents that indicate legal reasoning and advice. Environmental laws typically include both civil and criminal penalties. Under the EBSA, for example, criminal violations carry significant penalties. See 16 U.S.C. §1540. In addition to the revocation of licenses or permits related to the import or export of fish, wildlife, or plants, the penalties the possibility of a fine of up to $25,000 imprisonment for up to six months, or both. See 16 U.S.C. §1540(b). Violations of environmental laws by corporations take many forms in addition to the typical exceedances of discharge permit levels. For example, in 2013, Wal-Mart pled guilty to violating the Clean Water Act and paid more than $81 million in penalties for illegal disposal of hazardous materials in Bentonville, Arkansas, in violation of the Federal Insecticide, Fungicide, and Rodenticide Act. The DOJ charged Wal-Mart with improperly handling pesticide products returned to stores by customers. See DOJ, Wal-Mart Pleads Guilty to Federal Environmental Crimes, Admits Civil Violations and Will Pay More Than $81 Million, (May 28, 2013). How the new DOJ policy would have affected the prosecution of that case cannot be known, of course. The recent Volkswagen diesel emissions scandal presents a striking example of corporate violations of environmental laws. Volkswagen has admitted that more than 600,000 vehicles illegally circumvented EPA inspection, causing higher levels of pollution than allowed under U.S. law. Federal prosecutors have filed a civil complaint against the company, but so far no criminal charges have been filed, and no individuals appear to face consequences from the violations as this article is written. Although criminal charges may be brought at a later time against Volkswagen executives, the current filings in the case provide no example of the goals or policy expressed in the Yates Memo. The suit against Volkswagen was filed just
two weeks after Sally Yates' announcement of intentions to prosecute corporate executives. To date, DOJ has entered civil claims only and has named the corporation rather than individuals. Justice Department officials contend that the civil suit is the first step in an ongoing investigation of the scandal and does not preclude criminal charges. Environmental groups suggest that the Justice Department should take more drastic measures against Volkswagen. Coral Davenport and Danny Hakim, U.S. Sues Volkswagen in Diesel Emissions Scandal, The New York Times (Jan. 4, 2016).

Volkswagen's CEO Matthias Mueller now contends that the emissions scandal was the result of software solutions that did not comply with U.S. law and says Volkswagen did not intentionally lie to the EPA. Sonari Glinton, 'We Didn't Lie,' Volkswagen CEO Says Of Emissions Scandal, NPR (Jan. 11, 2016 4:38 PM ET). Mueller recently met with the EPA and continues to discuss a solution "to bring Volkswagen vehicles into compliance with U.S. emissions standards." Volkswagen also released a statement saying it will continue to comply with the demands of regulators. Alan Katz and Jennifer Doblin, VW Meeting with EPA on Diesel Emissions Ends After 11 Days, Bloomberg Business (Jan. 13, 2016 11:59 AM CST).

A less-publicized case presents a contrast in the area of detecting and prosecuting violations that compromise air act mandates. In January of 2016, the DOJ announced that a New Jersey court imposed a twenty-year sentence and $56 million fine on Joseph Purando for fraudulently receiving biodiesel tax credits by double-dipping in a federal incentives program. The DOJ press release notes that it is "sending a clear message that EPA and its partners will prosecute serious offenders." DOJ, New Jersey Man Sentenced in Indiana to 20 Years for Biodiesel Fraud Scheme (Jan. 8, 2016).

Critics of the Yates memorandum have noted possible unintended consequences of the policy. Daniel P. Chung, Gibson, Dunn & Crutcher LLP, Individual Accountability for Corporate Wrongdoing, available at http://corpgov.law.harvard.edu/2015/09/21/individual-accountability-for-corporate-wrongdoing/. For example, some speculate that large scale investigations may lead to more employee refusals to cooperate, leading to failed investigations. Id. Additionally, critics charge that the policy of targeting individual wrongdoers in corporate settings is substantially the same as the earlier policies and no new methods or techniques for meeting the standard of beyond a reasonable doubt are given. See Dorsey, The Yates Memo: A New DOJ Investigative Approach (Sept. 21, 2015), available at www.dorsey.com/newsources/publications/client-alerts/2015/09/the-yates-memo-a-new-doj-investigative-approach. Another speculation is that executives may be less likely to cooperate for fear of implicating themselves. See McGuire Woods, supra.

While the effects of the DOJ policy statement are not clear, all environmental lawyers should review the policy to learn the risks involved for their clients and for themselves. Ms. Russell is a professor of law who is the Edward A. Smith/Missouri Chair in Law, the Constitution, and Society at the University of Missouri-Kansas City School of Law and a member of the National Resources & Environment editorial board. She may be reached at russels@umkc.edu.
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Clean Power: A Federal Plan for Indian Country?
Dean B. Stagge

The Clean Power Plan (CPP), the Obama administration's initiative to use the authority of the U.S. Environmental Protection Agency (EPA) under the Clean Air Act (CAA) to regulate emissions of carbon dioxide (CO₂) from existing fossil fuel-fired electric utility generating units (EGUs), was published as a final rule on October 23, 2015. 80 Fed. Reg. 64,661. In keeping with the cooperative federalism approach of the CAA, the CPP provides for implementation through state plans, subject to EPA approval.

On the same date, EPA published two related rulemaking documents addressing other aspects of reducing CO₂ emissions from power plants—one final rule and one proposed rule. The other final rule sets performance standards for CO₂ emissions from new coal- and natural gas-fired EGUs. 80 Fed. Reg. 64,509 (Oct. 23, 2015) (New EGU Rule). The proposed rule sets out model rules for emissions trading programs and also serves as a proposed rule for a federal plan to be adopted by EPA for any state that does not adopt an approvable state plan. 80 Fed. Reg. 64,965 (Federal Plan proposed rule).

This complex set of rules is designed to help bring about a fundamental change in how our national economy generates and uses electricity, and in how we meet our demands for energy through efficiency measures. My focus is on how these rules will apply on Indian reservations where there are no EGUs—all but three reservations. Given the complexity of these rules and the word limit for this article, I make no pretense of offering a comprehensive treatment of the issues. Nor do I comment on the likelihood that the CPP will withstand litigation challenging it or will survive following the coming presidential election.

The CAA authorizes EPA to treat Indian tribes like states and, where such treatment is "inappropriate or administratively infeasible," also authorizes EPA to implement the CAA in Indian country directly. 42 U.S.C. § 7601(d). Each of the three CPP rulemaking documents discusses EPA's efforts to seek input from tribes, but there are implications for Indian country that do not appear to have received sufficient consideration. According to EPA's analysis, the benefits of the CPP will substantially outweigh the costs, and there will be a substantial net gain in jobs. 80 Fed. Reg. at 64,927–36 (Oct. 23, 2015). Unfortunately, there are no mechanisms in the rules to ensure that the people of Indian country will realize a fair share of the benefits. Rather, with respect to Indian reservations where there are no existing EGUs, the CPP leaves it to the states to decide whether and how to include Indian reservations in their plans. For a number of reasons, this is not likely to work very well.

In the absence of federal legislation dealing with the climate crisis, the CPP draws on EPA's authority under section 111 of the CAA, 42 U.S.C. § 7411. That section authorizes EPA to regulate stationary sources that emit pollutants not otherwise controlled under either of two main programs for stationary sources, i.e., National Ambient Air Quality...