TOXIC INTENT:
ENVIRONMENTAL HARM, CORPORATE CRIME, AND THE CRIMINAL ENFORCEMENT OF FEDERAL ENVIRONMENTAL LAWS IN THE UNITED STATES

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List of Acronyms

AHERA Asbestos Hazard Emergency Response Act
AOCs administrative orders of consent
API American Petroleum Institute
APPS Act to Prevent Pollution From Ships
ARP Acid Rain Program
BACT best available control technology
BCF bromochlorodifluoromethane
BJS Bureau of Justice Statistics
BP British Petroleum
CAAA Clean Air Act
CAFÉ Corporate average fuel economy
CAFOs concentrated animal feeding operations
CERCLA Comprehensive Environmental Resource, Compensation, and Liability Act
CFCs chlorofluorocarbons
CID Criminal Investigation Division
CO carbon monoxide
COPD chronic obstructive pulmonary disease
CWA Clean Water Act
CWSRF Clean Water State Revolving Funds
DMRs discharge monitoring reports
DOJ U.S. Department of Justice
ECS Environmental Crimes Section
EPA U.S. Environmental Protection Agency
ENRD Environment and Natural Resources Division
EPCRA Emergency Planning and Community Right-To-Know Act
FBI Federal Bureau of Investigation
FIFRA Federal Insecticide, Fungicide, and Rodenticide Act
FWS U.S. Fish and Wildlife Service
FY fiscal year
HAPs hazardous air pollutants
HCFCs hydrochlorofluorocarbons
LAER lowest achievable emission rate
LEV low emission vehicles
MACT  maximum achievable control technology
MBTA  Migratory Bird Treaty Act
NAAQS national ambient air quality standards
NESHAPs national emission standards for hazardous air pollutants
NHTSA National Highway Transportation Safety Administration
NO\textsubscript{x} nitrogen oxide
NOAA National Oceanic and Atmospheric Administration
NPDES national pollutant discharge elimination system
NPL national priorities list
NSPS new source performance standards
NSR new source review
O\textsubscript{3} ozone
OCEFT Office of Criminal Enforcement, Forensics, and Training
OECA Office of Enforcement and Compliance Assurance
OEE Office of Environmental Enforcement
OPPT Office of Pollution and Prevention
PBBs polybrominated biphenyls
PCBs polychlorinated biphenyls
PEER Public Employees for Environmental Responsibility (PEER)
PM particulate matter
POTWs publicly owned treatment works
PRASA Puerto Rico Aqueducts and Sewer Authority
PRPs potentially responsible parties
PSD prevention of significant deterioration
RCRA Resource Conservation and Recovery Act
RGGI Regional Greenhouse Gas Initiative
RIBITS Regulatory In-Lieu Fee and Bank Tracking System
RICO Racketeer Influenced and Corrupt Organizations Act
ROVs remotely operated underwater vehicles
SARA Superfund Authorization and Reorganization Act
SEPs supplemental environmental projects
SIPs state implementation plans
SO\textsubscript{2} sulfur dioxide
SO\textsubscript{x} sulfur oxide
TCEQ Texas Commission on Environmental Quality
TSCA Toxic Substances Control Act
VOCs volatile organic compounds
Introduction

This book is intended to help readers better understand how the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Justice (DOJ) have historically investigated and prosecuted serious violations of federal environmental law in the United States. When thinking about the relationship between environmental law, crime, policing, and prosecution, the Deepwater Horizon case may come to mind, where a major multinational corporation saved billions of dollars through a pattern of criminal malfeasance that killed and injured numerous individuals, brought untold suffering to their families, caused people to lose their livelihoods, wrought economic damages to state and local governments, and permanently polluted many of the environments in the country in which they operated.¹ Whether it is a corporation knowingly engaging in patterned criminal behaviors that kill people or cases of midnight dumping, protecting the environment requires acknowledging that numerous companies and individuals may be committed to willfully breaking the law.² Environmental crimes cause more damage than street crime in the United States but are often not conceptualized in such a way by the mass public and most of these stories go untold.³ Enhancing statutory penalties, developing environmental law enforcement, and professionalizing prosecutorial resources over the past four decades has been undertaken to deter and punish actions that negatively impact humans, animals, and the natural environmental in the United States, but the scope of these efforts remains unclear.⁴

The value of this book lies in developing a broader empirical and conceptual understanding of how federal environmental laws are enforced in the United States through a criminal process. We provide the broadest empirical study to date of the investigation and prosecution of federal environmental crimes in the United States. We systematically collect data on all environmental crimes investigated by EPA that were successfully prosecuted from 1983 to 2019. This approach gives us 2,588 cases to analyze in order to draw out the larger picture of how the criminal enforcement apparatus has evolved over its lifecycle, including what types of crimes are investigated and prosecuted, who commits such crimes, how federal prosecutors use criminal provisions in major environmental statutes to prosecute offenders, and ultimately the patterns in how guilty parties are punished. Through such an analysis we can glean the evolution of the use of criminal enforcement tools for the environment, as well as how environmental law has evolved alongside of and because of these efforts and develop a broader framework for understanding criminal enforcement.

We draw on our own experience for context, as we acted for years as participant observers in a lengthy federal environmental crime prosecution. That case and experience taught us how environmental investigations begin, how task forces are assembled, how agencies work with one another, how prosecutors bring charges and try complex cases, the process of legal defense, the role of the greater community in prosecutions, and the politics of sentencing and appeals. Through our own experiences, but primarily through building a systematic database of criminal investigations and prosecutions, we are able to provide the broadest overview of the evolution of this process to date.

This project locates itself between the legal, public policy, and environmental/green criminology literatures. To be more exacting, we find the

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5. The case was *United States v. CITGO Petroleum Corp.*, 908 F. Supp. 2d 812 (S.D. Tex. 2012). The case was unique in that prosecutors worked to include community members near CITGO’s refinery as victims under the federal Crime Victims’ Rights Act. (18 U.S.C. §3771). We played a role in the initial investigation, prosecution, and orchestrating an appeal to the U.S. Court of Appeals for the Fifth Circuit to have victims recognized under the Act. This became the first federal prosecution that recognized an environmental justice community as victims of a corporate environmental crime in the United States, but was eventually overturned on appeal. For background, see Suzie Canales et al., *Risk Assessment or Risk Acceptance: An Activist’s Perspective on Why the EPA’s Attempts to Achieve Environmental Justice Have Failed and What They Can Do About It*, 5 ENVTL. JUST. 59-62 (2012); Melissa L. Jarrell et al., *How to Encourage Conflict in the Environmental Decision-Making Process: Imparting Lessons From Civic Environmentalism to Local Policymakers*, 18 LOCAL ENV’T 184-200 (2013); Joshua Ozymy & Melissa L. Jarrell, *Implementing a Partial Buyout of an Environmental Justice Community*, 10 ENVTL. JUST. 43-50 (2017); Joshua Ozymy & Melissa Jarrell, *Righting and “Writing” Wrongs: A Postmortem on a Decade of Environmental Justice Activism in Corpus Christi, Texas*, 11 ENVTL. JUST. 23-31 (2019).
book’s intellectual legacy and fit between Kathleen Brickey’s work that was one of the first to bridge criminal law and environmental law, particularly her book *Environmental Crime: Law, Policy, Prosecution* and Joel Mintz’s *Enforcement at the EPA: High Stakes and Hard Choices* and related work, which provides a detailed historical and organizational analysis of the founding, work, and struggles of EPA’s Criminal Investigation Division (EPA-CID) to build a cohesive and valuable organization with inconsistent budgetary support and consistent political opposition.\(^6\) We are also responding to the green criminology literature that has studied the deterrent effect of criminal sanctioning on environmental offenders, particularly corporate and white collar offenders.\(^7\) With these three literatures, we have a solid understanding of how criminal law developed alongside environmental law, how environmental crimes are policed, how they are prosecuted, and the effects of these efforts on deterring crime.\(^8\) What we lack from all three literatures is a systematic empirical accounting of what EPA-CID and DOJ’s Environmental Crimes Section (ECS) have more or less accomplished in the roughly 37 years since the criminal enforcement apparatus was institutionalized. It is the task of arduously collecting, analyzing, and understanding this phenomenon that we have dedicated ourselves.

Chapter 1 lays the foundations for the following chapters, where we delve into major environmental statues to show charging and sentencing patterns

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and extrapolate general themes for how prosecutors have used criminal provisions in these laws for about four decades. We approach these systematically and comprehensively, beginning with the Clean Air Act (CAA) in Chapter 2. This is followed by the Clean Water Act (CWA) in Chapter 3 and both the Resource Conservation and Recovery Act (RCRA) and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) also known as Superfund in Chapter 4. Chapter 5 analyzes the criminal enforcement of the Toxic Substances Control Act (TSCA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).9 Exploring the application and enforcement of environmental law through a criminal process using these major acts helps provide the larger picture of how we enforce regulations on air, water, hazardous waste, chemical substances, toxic dumps, chemical spills, and other environmental problems.10 Chapter 6 creates a general framework from the broader themes that emerge from the prosecu-

9. CAA, 42 U.S.C. §85. An analysis of toxicity in the air begins with the Air Pollution Control Act of 1955 (Pub. L. No. 84-159), which was the first major federal effort to identify and control air pollution. While weak, it acknowledged air pollution as a national problem. The CAA of 1963 (Pub. L. No. 88-206) started the process of research methods to control air pollution. The National Emissions Standards Act of 1965 (Pub. L. No. 89-272) set vehicle emissions standards. The CAA Extension of 1970 (Pub. L. No. 91-604) represents the first time the federal government took the lead in regulating air pollution. CWA, 33 U.S.C. §1251. The Federal Water Pollution Control Act Amendments of 1972 (Pub. L. No. 92-500), formed the basis for the CWA, which gives EPA the authority to regulate discharges into the waterways of the United States including rivers, estuaries, and wetlands. Amended in 1977 and 1987, with the Water Quality Act, EPA was given authority to develop a regulatory framework for such discharges. CERCLA, 2 U.S.C. §11001. CERCLA empowers EPA to create a fund to clean up hazardous waste that has no responsible parties or to find responsible parties to fund the cleanup and remediation of hazardous waste sites. CERCLA can act as a companion to the Agency’s authority under RCRA and other statutes. RCRA, 42 U.S.C. §82. RCRA establishes a national framework for hazardous waste control. It gives EPA authority over hazardous and solid waste from cradle-to-grave. This authority allows EPA to develop standards for landfills, remediation in ground or surface water, and the operation of disposal facilities for solid and hazardous waste. TSCA, 15 U.S.C. §1261. TSCA authorizes EPA to regulate and manage chemical substances. This provides authority over manufacturing, use, distribution, importation, and exportation of a range of substances. FIFRA, 7 U.S.C. §136. FIFRA is the culmination of a series of laws meant to establish the quality and integrity of pesticides in the United States. This effort began as a truth-in-labeling mandate and evolved to consider risks to public health. EPA is allowed to set tolerances for pesticides so there is “reasonable certainty of no harm” and maximum residue limits for pesticides in food.

10. There are other major federal environmental laws passed in this era of rapid innovation in environmental protection that are germane to the content herein but, based on the low number of prosecutions, do not merit their own chapters; however, they are discussed in each chapter as appropriate. Some that bear mention include: Safe Water Drinking Act (SWDA), 42 U.S.C. §300f, which authorizes EPA to set water quality standards for public water systems and injection wells, but not bottled water or smaller private wells, and allows for the development of maximum containment levels to determine the threshold for some substances in drinking water; Endangered Species Act (ESA), 16 U.S.C. §1531, which creates a framework for conservation of threatened plants, animals, and their habitats and requires federal agencies to consider the impacts of their actions on listed species; and the National Environmental Policy Act (NEPA), 42 U.S.C. §4321, which requires environmental impact assessments for actions of federal agencies (a companion statute, the Environmental Quality Improvement Act (42 U.S.C. §4371), creates the President’s Council on Environmental Quality connecting the executive branch to environmental issues).
tions analyzed in the previous chapters. Chapter 7 examines the possibilities for expanding the scope of the criminal enforcement of these laws and explores the challenges to advancing that cause now and in the future.

The United States lies at a critical juncture where the public has slowly developed a greater conscious awareness that we have and continue to orchestrate the rapid onslaught of climate change.\(^{11}\) This realization and the subsequent effects that are already upon us and are likely irreversible or worse than our imaginations can bear, will cause the greatest shift in the way we view and interact with the natural environment since industrialization. Like the 1970s, where the modern Prometheus was revealed as a sickened and pitiful creature of a poisoned environment, the rapid onslaught of major environmental change that will seem incremental but will in the end become totalizing and will force us to reorient our society in ways we can yet conceive.

Managing this shift will exact a terrible environmental and financial cost and require a collective will that goes beyond our historical-cultural picture of progress through individual will, determination, and mastery, to achieve ascendant consumption. Companies and individuals will not go willingly, and the federal and state governments are ill-equipped to manage this shift in cooperative federalism, particularly as rapidly escalating debt and demographic shifts will prevent us from prioritizing environmental concerns and will lessen the federal government’s hold on the states. Managing climate change will require not only a change in focus and laws and regulations, but enforcement. For this shift to work, we must better understand how we manage serious environmental crimes and learn to better prevent them or if not, to punish effectively.