ENVIRONMENTAL LAW

Lewis & Clark Law School

VOLUME 46 WINTER 2016 NUMBER 1

EDITOR'S NOTE

ARTICLES

Water law scholars have long supported water markets for addressing critical water needs, especially in arid regions like the western United States, and that support seems to be growing among policymakers as well. But translating academic theories about water markets to the field has proved challenging. To be sure, water can be transferred from one use to another use in all western states, but water markets in those states are not presently capable of providing prospective buyers with a reliable source of water when and where they need it. The reasons are myriad, but are primarily related to the high transaction costs and significant lead times needed to consummate transfers. Under the current system, no municipal water supplier in the western United States can guarantee its customers the water they demand if they are forced to rely on the availability of water on the open market.

Remarkably, Australia has managed to adapt its water rights system in such a way that water markets have flourished. The water rights regime in the western United States is different in some significant ways from the Australian system, and thus it is unrealistic to think that the western states can duplicate Australia's experience and success. But there are important lessons to learn from an Australian transfer system that has cut approval times for temporary transfers to less than five days and for permanent transfers less than twenty days.

One way for western states to make progress towards developing functioning water markets is to cabin the scope of a marketing program so that it has a better chance of garnering the support of affected parties, and in particular the farmers who will be selling their

ESSAYS

The nation is experiencing a white collar crime boomlet, if not a wave, of offenses that harm public health, jeopardize worker and consumer safety, and threaten the environment. Some big cases have settled and others are being tried. Still others are under investigation, including the notorious Volkswagen (VW) "defeat device" case that continues to make news almost every day. Stung by criticism that too-big-to-fail banks escaped criminal prosecution for the 2008 market crash that continues to cause misery in the country, the Department of Justice has pledged to indict individual corporate executives whenever possible. It has yet to deliver on that promise, but unless Republicans retake the White House and carry through on pledges to further dismantle the regulatory state, every account of high-profile corporate malfeasance will speculate about criminal implications.

These developments do not represent an idiosyncratic emergence of a handful of rogue corporations and executives even as their competitors studiously avoid running afoul of the law. Instead, a relentless campaign against big government has produced weak to nonexistent enforcement as well as widespread corporate disdain for regulatory requirements. Without any question, criminal law is the last resort. It closes the barn door after the horses have run free, leaving the aftermath of an incident to be ameliorated at great cost, often over periods of several years. Environmental laws were enacted because of similar flaws in the tort system with the goal of preventing injury rather than merely compensating it. Good regulation enforced aggressively to prevent harm is always a better choice. But congressional conservatives and their industry allies have embarked on a highly successful strategy of starving and badgering the agencies—even the Environmental Protection Agency, the strongest and most rebellious among them—into quiescence. In the vacuum that remains, criminal prosecutions, especially of individual senior executives, have a better potential to deter violations than the broken regulatory system.

This Essay explores, contrasts, and compares the two most prominent criminal cases that have emerged in the last several years: the $4 billion criminal settlement with British Petroleum that resulted from the Deepwater Horizon blowout and oil spill and the VW cheat device scandal. The similarities between the two cases are chilling. They suggest that until and unless the regulatory state is not just revived but greatly strengthened, a result that does not seem foreseeable in the near-term, criminal prosecution is the best hope for people who believe that the government must redouble its efforts to preserve natural resources and protect the public health.