Today's Supreme Court decision relating to identity theft, *Flores-Figueroa v. United States*, may indirectly make it more difficult to prosecute environmental crimes. The decision suggests that the prosecutor might have to prove additional facts about the defendant's state of mind in an environmental case, such as awareness that a given chemical is on a prohibited list or that the company doesn't have the required permits. Of course, this creates an incentive for companies to impede information flow and for employees to maintain a state of blissful ignorance about legal compliance.

Here's the background: A federal criminal statute forbidding "[a]ggravated identity theft" imposes a mandatory consecutive 2-year prison term upon individuals convicted of certain other crimes if, during (or in relation to) the commission of those other crimes, the offender "*knowingly* transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U. S. C. §1028A(a)(1) (emphasis added). The question is whether the statute requires the Government to show that the defendant knew that the "means of identification" he or she unlawfully transferred,possessed, or used, in fact, belonged to "another person." The Court concluded that it does.

Justice Breyer's opinion for the Court stresses the rules of English usage: "In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence."

Justice Breyer indicates that this is also a principle of statutory interpretation:

> The manner in which the courts ordinarily interpret criminal statutes is fully consistent with this ordinary English usage. That is to say courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word "knowingly" as applying that word to each element.

Apparently, this isn't an absolute rule. Breyer's opinion suggests that statutory context or purpose, as well as legislative history, might sometimes dictate a contrary result. Justice Breyer concludes, however, that in this specific case: "we cannot find indications in statements of its purpose or in the practical problems of enforcement sufficient to overcome the ordinary meaning, in English or through ordinary interpretive practice, of the words that it wrote."

Why does this create problems for environmental law? A number of environmental statutes make it a crime to knowingly discharge certain materials without a permit. A number of lower courts say that the defendant must know that the material is hazardous but not that a

permit is lacking. A contrary rule invites companies to create information walls – the lawyers don't apply for the permits but aren't criminally liable since they aren't disposing of material; the operations people dispose of the material but aren't informed either way about whether there's a permit. So no one has criminal responsibility, whereas the company that sets up a good information system then risks criminal liability for violations. Under similar statutes that punish violations of permit conditions, operating personnel have a similar incentive to avoid learning what the permit actually says.

Maybe the environmental statutes are distinguishable based on context, legislative history or purpose – but the government will need strong arguments in light of *Flores –Figuera*.