JURY INSTRUCTIONS IN ENVIRONMENTAL CRIMES CASES

Advanced Environmental Crimes Seminar

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Most of what follows is from the Department of Justice Environmental Crimes Section's Environmental Crimes Manual (Volume 3), as well as other Assistant U.S. Attorneys. Volume 3 of the Environmental Crimes Manual, like the rest of the manual, may be accessed at ECS's website: http://10.173.2.12/ecs.

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CLEAN WATER ACT

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1. GENERAL INSTRUCTIONS

The Purpose of the Act

The purpose of the Federal Water pollution Control Act or Clean Water Act, 33 U.S.C. § 1251 et seq., "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

Authority:

33 U.S.C. § 1251(a)

Harm Not an Element of Crime

The government is not required to prove that the discharge of pollutants caused any damage or harm in order to establish the criminal offense charged under the Clean Water Act.

Authority:

Minnehaha Creek Watershed District v. Hoffman, 597 F.2d. 617, 627 (8th Cir. 1979)

Comment:

Charges substantively identical to the model above, but varying from it only in minor changes to sentence structure, were given in the following cases:

United States v. West Indies Transport, Inc. (D.V.I., CR. NO. 1993/0195), aff'd., 127 F.3d 299, cert. denied, 118 S.Ct. 700 (1998); United States v. Linden Beverage Co. (W.D. Va., Cr. No. 94-122-H), rev'd. on unrelated grounds, 131 F.3d 137 (4th Cir. 1997); United States v. Eidson (M.D. Fla., 92-94-CR-T-15A), aff'd., 108 F.3d 1336 (11th Cir. 1997), cert. denied, 118 S.Ct. 248 (1997); United States v. Sinskey (D.S.D., CR 96-40010), aff'd., 119 F.3d 712 (8th Cir. 1997).

In the context of a failure to report the discharge of a "harmful quantity" of oil under 33 U.S.C. § 1321(b)(5), the following instruction was given in United States v. M/G Transport Services (S.D. Ohio, CR-1-95-18), 173 F.3d 584 (6th Cir. 1999):

> The government is not required to prove that the alleged discharge of a harmful quantity of oil caused any damage or harm to the environment in order to establish the offense.

2. DEFINITIONS (STATUTORY AND REGULATORY)

Meaning of "Pollutant"

The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

Authority:

33 U.S.C. § 1362(6)

United States v. Pozsgai, 999 F.2d 719, 725 (3d Cir. 1993), cert. denied, 510 U.S. 1110 (1995) (concrete rubble, cinder block, cleared and redeposited vegetation are pollutants); United States v. Schallom, 998 F.2d 196 (4th Cir. 1993); United States v. M/G Transport Services (S.D. Ohio, CR-1-95-18), 173 F.3d 584 (6th Cir. 1999); Avoyelles Sportsman League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983) (redeposit of land clearing materials is a pollutant).

Comment:

Given in its entirety in United States v. West Indies Transport, Inc. (D.V.I., CR. NO. 1993/0195), aff'd., 127 F.3d 299, cert. denied, 118 S.Ct. 700 (1998), with the additional two sentences (where the issue was whether barges that had been grounded and effectively turned into shore facilities still were covered by the vessel sewage exemption):

> However, the definition of "pollutant" does not include sewage from vessels. Sewage from structures of other non-vessels, however, is a pollutant.

The court then instructed on the meaning of "sewage":

> The term "sewage" means human body waste and the waste from toilets and other receptacles intended to receive or retain body waste.

See also United States v. Eidson (M.D. Fla., 92-94-CR-T-15A), aff'd., 108 F.3d 1336 (11th Cir. 1997), cert. denied, 118 S.Ct. 248 (1997); United States v. Suarez (D. Guam, CR-92-00036 AWT)
United States v. Linden Beverage Co. (W.D. Va., Cr. No. 94-122-H), rev'd. on unrelated grounds, 131 F.3d 137 (4th Cir. 1997)
United States v. Sinskey (D.S.D., CR 96-40010), aff'd., 119 F.3d 712 (8th Cir. 1997); United States v. Normand (M.D. La., Cr. No. 97-20-A-M1).

In Linden Beverage Co., supra, the court added a paragraph that clarifies the application of the definition to some non-specific parameters often covered by NPDES permits:

> In this context carbonaceous biochemical oxygen demand [CBOD], total nitrogen, and residual chlorine are pollutants.

"Garbage" is one of the pollutants identified in 33 U.S.C. § 1362(6). In M/G Transport Services, supra, the court gave an instruction defining "garbage", which is taken from

the Coast Guard regulations in 33 C.F.R. § 151.05 (implementing the Act to Prevent Pollution from Ships, 33 U.S.C. § 1901 et seq.):

> The term "garbage" means all kinds of victual, domestic, and operational waste, excluding fresh fish and parts thereof, generated during the normal operation of a vessel and liable to be disposed of continuously or periodically, except dishwater and gray water.

The M/G court also gave an instruction on the definition of "operational waste", taken from the same regulatory source:

> "Operational waste" means all cargo-associated waste, maintenance waste, cargo residues, and ashes and clinkers from shipboard incinerators and coal-burning boilers.

Meaning of "Discharge of a Pollutant"

The term "discharge of a pollutant" means any addition of any pollutant to navigable waters from any point source.

Authority:

33 U.S.C. § 1362(12)
Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617, 626-27 (8th Cir. 1979).
Given in United States v. Linden Beverage Co. (W.D. Va., Cr. No. 94-122-H), rev'd. on unrelated grounds, 131 F.3d 137 (4th Cir. 1997)
Given in United States v. Sinskey (D.S.D., CR 96-40010), aff'd., 119 F.3d 712 (8th Cir. 1997)
Given in United States v. M/G Transport Services (S.D. Ohio, CR-1-95-18), 173 F.3d 584 (6th Cir. 1999)

Comment:

In the case of a discharge beyond the "territorial seas", the term means "any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft."

Meaning of "Point Source"

The term "point source" means any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

Authority:

33 U.S.C. § 1362(14)
United States v. Pozsgai, 999 F.2d 719, 726 n.6 (3d Cir. 1993), cert. denied, 510 U.S. 1110 (1995) (dump trucks and bulldozers are point sources)
United States v. Law, 979 F.2d 977, 979-980 (4th Cir. 1992), cert. denied, 507 U.S. 1030 (1993)
United States v. Earth Sciences, 599 F.2d 368, 373 (10th Cir. 1979) ("the concept of point source was designed to further [the Clean Water Act] scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States")
Avoyelles Sportsman League v. Marsh, 715 F.2d 897, 922 (5th Cir. 1983) (bulldozers and backhoes are point sources)
United States v. Tull, 615 F. Supp. 610, 622 (E.D. Va 1983)
United States v. Weisman, 489 F. Supp. 1331, 1337 (M.D. Fla 1980) (bulldozers and dump trucks are point sources)
United States v. Oxford Royal Mushroom Products, Inc., 487 F.Supp. 852 (E.D. Pa. 1980)
United States v. Holland, 373 F. Supp. 665, 668 (M.D. Fla. 1974)
Given in its entirety in United States v. M/G Transport Services (S.D. Ohio, CR-1-95-18), 173 F.3d 584 (6th Cir. 1999)

Comment:

Given in an abbreviated version of the statutory definition tailored to the facts of the case by omitting the types of point sources in the statutory definition that were not germane to the case:

> *United States v. Eidson, (M.D. Fla. 92-94-CR-T-15A), aff'd., 108 F.3d 1336 (11th Cir. 1997), cert. denied, 118 S.Ct. 248 (1997)*
> *United States v. Linden Beverage Co. (W.D. Va., Cr. No. 94-122-H), rev'd. on unrelated grounds, 131 F.3d 137 (4th Cir. 1997)*
> *United States v. Suarez (D. Guam, CR-92-00036 AWT)*
> *United States v. Sinskey (D.S.D., CR 96-40010), aff'd., 119 F.3d 712 (8th Cir. 1997)*
> *United States v. Normand (M.D. La., Cr. No. 97-20-A-M1)*
> *United States v. Tomlinson (W.D. Wash., CR98-84WD)*

The instruction may include a sentence focusing upon particular types of devices that are not expressly included in the statutory definition, but that other courts have concluded fall within the definition, such as the following:

> Bulldozers, backhoes, and dump trucks which discharge pollutants are point sources.

In United States v. West Indies Transport, Inc. (D.V.I., CR. NO. 1993/0195), aff'd., 127 F.3d 299, cert. denied, 118 S.Ct. 700 (1998), the court gave the following instruction:

> The definition of the term "point source" includes a pipe or vessel or other floating craft from which pollutants may be discharged.

Meaning of "Navigable Waters" and "Waters of the United States"

The term "navigable waters" means the waters of the United States, including the territorial seas, and "waters of the United States" means:

1. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

2. All interstate waters including interstate wetlands;

3. All impoundments of waters otherwise defined as waters of the United States;

4. Tributaries of waters identified above;

5. The territorial seas;

6. Wetlands adjacent to waters (other than waters which are themselves wetlands) identified above as waters of the United States.

Waters of the United States may be manmade or "artificial".

Waters of the United States, including wetlands, do not need to be "navigable-in-fact", that is, boats need not be able to navigate on them. Federal jurisdiction over non-tidal waters of the United States extends to the ordinary high water mark in the absence of adjacent wetlands; to the limit of the adjacent wetlands when adjacent wetlands are present, and to the limit of the wetlands when the water of the United States consists only of wetlands.

Authority:

33 U.S.C. § 1362(7)
40 C.F.R. §§ 110.1, 117.1, 122.2(a), (c)(1), (c)(3), and

(d), and 232.2
33 C.F.R. §§ 328.3(a), 328.4(c)
United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985);
United States v. Pozsgai, 999 F.2d 719 (3d Cir. 1993), cert. denied, 510 U.S. 1110 (1994)
Weiszmann v. District Engineer, 526 F.2d 1302, 1303-1305 (5th Cir. 1976)
United States v. Ashland Oil & Transportation Co., 504 F.2d 1317, 1321 (6th Cir. 1974)
Track 12, Inc. v. District Engineer, 618 F. Supp. 448, 450 (D. Minn. 1985)
United States v. Oxford Royal Mushroom Products, Inc., 487 F.Supp. 852, 854-855 (E.D.Pa. 1980)
United States v. Holland, 373 F. Supp. 665, 673 (M.D. Fla. 1974)

Comment:

For the convenience of users, the definition above includes the waters covered by 33 C.F.R. § 328.3 (but not any of its exclusions and not those waters covered by 33 C.F.R. § 328.3(a)(3), which are discussed below). However, it is not meant to be used in its entirety in every case. Rather, prosecutors should be tailor the definition to omit types of waters that are not involved in their cases and highlight those that are. The last paragraph of the model may be appropriate only for a wetlands case.

The version above refers to manmade or artificial waters, which may or may not be "waters of the United States". Presumably, if a prosecutor has gotten as far as the jury instruction stage, he or she has thoroughly considered regulations and agency interpretations that affect whether a manmade or artificial water is a "water of the United States".

In the case of Solid Waste Agency of Northern Cook County v. Corps of Engineers, 531 U.S. ___, 2001 LW 15333 (January 9, 2001), the Supreme Court held that 33 C.F.R. § 328.3(a)(3) could not be used to assert jurisdiction over non-navigable, isolated, intrastate waters used for habitat

by migratory birds. That provision reads as follows:

> All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters (i) which are or could be used by interstate or foreign travelers for recreational or other purposes; (ii) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) which are used or could be used for industrial purposes by industries in interstate commerce.

Whether 33 C.F.R. 328.3(a)(3) (and the corresponding provisions in the other regulatory definitions cited under "authority", above) otherwise remains viable is not yet clear. The court left intact federal jurisdiction over traditionally navigable waters, their tributaries, and wetlands adjacent to either of those types of waters.

Note that the Fourth Circuit has struck down the Corps of Engineers regulation 33 C.F.R. 328.3(a)(3) at least insofar as it extends federal jurisdiction to wetlands on the basis of potential interstate commerce connections. United States v. Wilson, 133 F.3d 251, 255-257 (4th Cir. 1998). Note that similar definitions appear in other regulations under the statute. See, e.g., 40 C.F.R. § 122.2.

In United States v. M/G Transport Services (S.D. Ohio, CR-1-95-18), 173 F.3d 584 (6th Cir. 1999), and in United States v. West Indies Transport, Inc. (D.V.I., CR. NO. 1993/0195), aff'd., 127 F.3d 299, cert. denied, 118 S.Ct. 700 (1998), the courts gave an instruction that simply recited the definition in 33 U.S.C. § 1362(7):

> The term "navigable waters" means the waters of the United States, including the territorial seas.

The instruction given in United States v. Eidson (M.D. Fla., 92-94-CR-T-15A), aff'd., 108 F.3d 1336 (11th Cir.

1997), cert. denied, 118 S.Ct. 248 (1997), on the other hand, involving discharges into a man-made drainage ditch or canal, incorporated much of what is in the model instruction:

> The term "waters of the United States" means all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; and all other waters such as intrastate lakes, streams, intermittent streams, mud flats, or wetlands, the use degradation or destruction of which could affect interstate or foreign commerce. This term also includes tributaries of any of the above-mentioned waters. Waters of the United States may be man-made or artificial so long as they meet the definition that has been provided.

See also United States v. Linden Beverage Co. (W.D. Va. Cr. no. 94-122-H), rev'd. on unrelated grounds, 131 F.3d 137 (4th Cir. 1997); , was of a somewhat different format:

> The term navigable waters means the waters of the United States, and may include non-navigable streams such as Manassas Run.
>
> In order for Manassas Run to constitute a water of the United States as defined by the Clean Water Act, you must find beyond a reasonable doubt any one of the two facts present: (1) that Manassas Run is a tributary of the Shenandoah River, which is a river that is or could be used by interstate or foreign travelers for recreational or other purposes; or (2) that Manassas Run is or could be used for industrial purposes by industries engaged in interstate commerce, or is a tributary of any river that is or could be used by such industries.

See also United States v. Tomlinson (W.D. Wash., CR98-84WD); United States v. Pedro Rivera (D.P.R., Cr. No. 95-84(HL)), rev'd. on unrelated grounds, 131 F.3d 222 (1st Cir. 1997).

Meaning of "Territorial Seas"

The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

Authority:

33 U.S.C. § 1362(8)

Comment:

Note that, while the term "inland waters" is not defined in 33 U.S.C. § 1362, it is defined in 33 U.S.C. § 1321(a)(16) as "those waters of the United States lying inside the baseline from which the territorial sea is measured and those waters outside such baseline which are a part of the Gulf Intracoastal Waterway."

Given in United States v. West Indies Transport, Inc. (D.V.I., CR. NO. 1993/0195), aff'd., 127 F.3d 299, cert. denied, 118 S.Ct. 700 (1998):

> "Territorial seas" are defined as that portion of the sea that extends three miles seaward from ordinary low water. Krum Bay and Krause Lagoon are navigable waters of the United States.

Meaning of "Contiguous Zone"

The term "contiguous zone" means the entire zone established or to be established by the United States under Article 24 of the Convention of the Territorial Sea and the Contiguous Zone; in other words, from where the "territorial sea" ends at three miles out to

12 miles from the line of ordinary low water or the baseline.

Authority:

33 U.S.C. § 1362(9)
15 U.S.T. 1606, Article 24(2)

Comment:

The instruction given in United States v. Pedro Rivera (D.P.R., Cr. No. 95-84(HL)), rev'd. on unrelated grounds, 131 F.3d 222 (1st Cir. 1997), read as follows:

> The "contiguous zone" means ocean waters between approximately three and twelve miles from the shoreline.

Meaning of "Ocean"

The term "ocean" means any portion of the high seas beyond the contiguous zone.

Authority:

33 U.S.C. § 1362(10)

Comment:

Note that "ocean waters" for purposes of the Ocean Dumping Act begin from the baseline from which the territorial seas are measured; thus, it includes the territorial seas and the contiguous zone. See 33 U.S.C. § 1402(b).

3. MENTAL STATE

A. Knowing Conduct

Meaning of "Knowingly"

An act is done knowingly if the defendant is (1) aware of the act and (2) does not act or fail to act through ignorance, mistake, or accident. The government is not required to prove that the defendant knew that his acts or omissions were unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

It is not necessary for the Government to prove that the defendant knew that a particular act or failure to act was a violation of the Clean Water Act or that the defendants had any specific knowledge of the particular permit limits or regulatory requirements imposed under the Clean Water Act.

Authority:

Ninth Circuit Instruction 5.06 (recommended by Eighth Circuit Model Instruction 7.03 Committee Comments)
Fifth Circuit Pattern Jury Instruction 1.21 (1990)
Sand, Instruction Nos. 36-9, 36-15 and 3A-2 (modified)
United States v. International Minerals & Chem. Corp., 402 U.S. 558, 560-564 (1971)
United States v. Sinskey, 119 F.3d 712 (8th Cir. 1997)
United States v. Hopkins, 53 F.3d 533, 537-541 (2d Cir. 1995), cert. denied, 516 U.S. 1072 (1996)
United States v. Weitzenhoff, 35 F.3d 1275, 1283-1286 (9th Cir. 1993), cert. denied, 513 U.S. 1128 (1995)

Comment:

A more compact version that captures the basics of the

instruction above was given in United States v. Sinskey (D.S.D., CR 96-40010), supra:

> An act is done knowingly if the defendant is aware of the nature of his acts, performs them intentionally, and does not act or fail to act through ignorance, mistake, or accident. The government is not required to prove that the defendant knew his acts violated the Clean Water Act or the Clean Water Act permit. You may consider evidence of a defendant's words, acts, or omissions, along with all other evidence, in deciding whether the defendant acted knowingly. [Modified slightly to remove references to the particular case.]

Note that in United States v. Ahmad, 101 F.3d 386 (5th Cir. 1996), a key issue was to what elements of the offense the "knowingly" mental state applied. Prosecutors should review the discussion of the Ahmad decision in relation to an unpermitted discharge offense, infra.

Sinskey, supra, in turn read Ahmad as limited to a mistake-of-fact defenses and clearly embraced the International Minerals rationale in a permit violation case. 119 F.3d at 716-17. In United States v. Wilson, 133 F.3d 251, 260-65 (4th Cir. 1997), an unpermitted wetland fill case, the court treated the "knowingly" standard as requiring only factual knowledge even though it did not consider the pollutant in that case to be of the obnoxious type envisioned by International Minerals. Unfortunately, as will be discussed later in relation to the elements of an unpermitted discharge offense, Wilson is written in a manner that may allow defendants to introduce mistake-of-law defenses in the guise mistake-of-fact evidence. (Note that in an unreported district court ruling on a motion in limine the court in United States v. Mango (N.D.N.Y., 96-CR-327, Aug. 21, 1997) treated wetland permit violations as specific intent crimes requiring evidence of knowledge of the permit.)

Hamling v. United States, 418 U.S. 87, 123-24 (1974), states in part:

> *It is constitutionally sufficient that the prosecution*

show that a defendant had knowledge of the contents of the material he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. (Emphasis added).

In United States v. Hopkins (D. Conn., 3:93CR260(EBB)), aff'd., 53 F.3d 533(2d Cir. 1995), cert. denied, 516 U.S. 1072 (1996), the court gave the following willful blindness instruction:

> One may not willfully or intentionally remain ignorant of a fact material or important to his conduct to escape the consequences of criminal law. If you find beyond a reasonable doubt that the defendant was aware that there was a high probability [of a fact], but he deliberately and consciously avoided confirming this fact so that he could deny knowledge if apprehended, then you may treat this deliberate avoidance as the equivalent of knowledge, unless you find the defendant actually believed [the fact not to be true]. A showing of negligence, mistake or even foolishness on the part of the defendant is not enough to support an inference of knowledge.

Knowledge - Individual and Organizational Defendants

With regard to organizational defendants such as a partnership, its knowledge is the state of mind and the sum of the knowledge of all of its employees and agents. That is, the partnership's knowledge is the totality of what all of the employees and agents knew with the scope of their employment. You may use the sum of what the separate employees and agents of each partnership knew when determining each partnership's knowledge. As with individuals, knowledge is usually established by surrounding facts and circumstances as of the times the acts in question occurred, of the events took

place, and the reasonable inferences to be drawn from them.

Authority:

United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir. 1987).

Knowledge of Legal Definitions

While the defendant must have known that the substance discharged was [industrial wastes], he need not have known that [industrial waste] was defined as a "pollutant" under the Clean Water Act.

Likewise, while the defendant must have known the substance was discharged from a [vessel] into the [Mississippi River], he need not have known that a [vessel] was defined as a "point source" under the Act or that the term "waters of the United States" includes the [Mississippi River].

Authority:

Given in United States v. Normand (M.D. La., Cr. No. 97-20-A-M1)

"Responsible Corporate Officer"

A person may be found guilty of [violation] as a "responsible corporate officer" if the government proves beyond a reasonable doubt:

1. that he had knowledge of the facts that gave rise to the violation, that is, [describe factual basis of the violation];

2. that he had the authority and capacity to prevent [the violation]; and

3. that he failed to prevent [the violation].

Authority:

33 U.S.C. § 1319(c)(6)
42 U.S.C. § 7413(c)(6)
United States v. Iverson, 162 F.3d 1015, 1022-1025 (9th Cir. 1998)(case under FWPCA, which has specific "responsible officer" provision)
United States v. MacDonald and Watson Waste Oil Co., 933 F.2d 35, 51-55 (1st Cir. 1991)(case under RCRA, which has no such specific provision).

Comment:

Essentially identical "responsible corporate officer" provisions are included in the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c)(6), and the Clean Air Act, 42 U.S.C. § 7413(c)(6). The Resource Conservation and Recovery Act does not have such a provision; however, the same result can be reached under case law stemming from United States v. Dotterweich, 320 U.S. 277 (1943), and United States v. Park, 421 U.S. 658 (1975), provided there is evidence of the defendant's knowledge of the facts that gave rise to the violation. United States v. MacDonald and Watson Waste Oil Co., 933 F.2d 35, 51-55 (1st Cir. 1991),

In United States v. Iverson, 162 F.3d 1015, 1025 (9th Cir. 1998), in response to the defendant's argument that the government had to prove that he had specific responsibility for the acts giving rise to the discharge, the court said that "a person is a 'responsible corporate officer' if the person has the authority to exercise control over the corporation's activity that is causing the discharges. There is no requirement that the officer in fact exercise such authority or that the corporation expressly vest a duty in the officer to oversee the activity."

B. Negligent Conduct

Meaning of "Negligently"

Negligence is the failure to use reasonable care. Reasonable care is that amount of care that a reasonably prudent person would use in similar circumstances. Negligence may consist of doing something which a reasonably prudent person would not do or it may consist of failing to do something which a reasonably prudent person would do. A reasonably prudent person is not the exceptionally cautious or skillful individual, but a person of reasonable and ordinary carefulness.

Authority:

Given in United States v. Hanousek (D. Alaska, No. A96-0040-CR(JMF)), aff'd., 176 F.3d 1116 (9th Cir. 1999), cert. denied, 258 U.S. 1102 (2000).

Comment:

In the only case to date that has yielded an opinion on the issue of the negligent mental state, United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999), the court of appeals ruled that negligence within the context of 33 U.S.C. § 1319(c)(1) means simple negligence, not some elevated form of negligence. The Supreme Court denied certiorari in Hanousek, although two justices filed a dissent to that denial. 258 U.S. 1102.

Some courts may want to apply what they consider to be a higher standard (e.g., gross negligence) when criminal liability is at issue; however, the scant history of the negligence standard, 33 U.S.C. § 1319(c)(1), indicates that the Hanousek decision is correct, that Congress intended no more than simple negligence. See Committee Print, "A Legislative History of the Federal Water Pollution Control Act Amendments of 1972," Congressional Research Service of the Library of Congress, Serial No. 93-1 (1973), vol. 1, at

530 (Statement of Rep. Harsha).

The following instruction was given in United States v. Hoflin (W.D. Wash. CR 85-82T), 880 F.2d 1033 (9th Cir. 1989):

> A negligent act is distinguished from one which is intentional or willful. Negligence does not require awareness on the part of the actor. A person acts "negligently" when he acts with a careless disregard of he consequences of his acts that would not be shown by a careful person under the circumstances. A willful act, however, is a knowing act by a person who intends the natural and probable consequences of his acts.
>
> The term "reasonable care" is a relative one. In deciding whether reasonable care was exercised in a given case, the conduct in question must be viewed in the light of all the surrounding circumstances, as shown by the evidence of the case.

The instruction below was given in United States v. Leon McKemy (D. Md., Cr. No. JFM-97-0086):

> The term "negligently" as used in Section 1319(c)(1)(A) means doing some act which a reasonably prudent person would not do, or failing to do something which a reasonably prudent person would do, when prompted by considerations which ordinarily regulate the conduct of human affairs. It is, in other words, the failure to use ordinary care under the circumstances in the management of one's person or property, or of the agencies under one's control.
>
> In the present case, if you find that M & M Fuel Company or Leon "Mac" McKemy failed to exhibit the care in maintaining his equipment that a reasonable person would, then you should find him negligent. Or, if you find that he did not exercise the care a reasonable person would in responding to the oil spill to prevent it from entering the waters of the United States, then you should find that he acted negligently.

The negligence instruction given in United States v. Pedro Rivera (D.P.R., Cr. No. 95-84(HL)), rev'd. on unrelated grounds, 131 F.3d 222 (1st Cir. 1997), read as follows:

> The term "negligently" means failure to use reasonable care. Reasonable care is the care that a reasonably careful person would use under similar circumstances. Negligence may consist of doing something that a reasonably careful person would not do under similar circumstances or failure to do something that a reasonable person would do under similar circumstances.
>
> Negligence does not require awareness on the part of the actor. A person acts negligently when he acts with careless disregard of the consequences of his acts that would not be shown by a careful person under the circumstances. A knowing act, however, is an act by a person who realizes what he is doing.
>
> The term "reasonable care" is not an absolute term, but a relative one. That is to say, in deciding whether reasonable care was exercised in a given case, the conduct in question must be viewed in light of all the surrounding circumstances as shown by the evidence of the case.

4. SURFACE WATER DISCHARGE VIOLATIONS

A. Permit-related Violations

The Permit Requirement

The Federal Water Pollution Control Act or Clean Water Act prohibits all discharges of pollutants into the waters of the United States except in compliance with a permit.

Authority:

33 U.S.C. §§ 1311(a) and 1342

Comment:

This same brief description would apply whether the case involved a discharge without a National Pollutant Discharge Elimination System (NPDES) permit under 33 U.S.C. § 1342 or in violation of such an NPDES permit and whether it involved a discharge of dredged or fill material without a Section 404 permit under 33 U.S.C. § 1344 or in violation of such a permit. All of those violations stem from the basic prohibition in 33 U.S.C. § 1311(a) and the criminal provisions in 33 U.S.C. § 1319(c).

B. Discharge Without an NPDES Permit

Discharge Without a Permit

Sections 1311(a) and 1319(c)[(1)/(2)](A) of Title 33, United States Code, provide that it is unlawful for any person to [negligently/knowingly] discharge a pollutant into a water of the United States without a permit issued by either the Environmental Protection Agency or by a State.

Authority:

33 U.S.C. §§ 1311(a), 1319(c)[ ](A), and 1342

United States v. M/G Transport Services (S.D. Ohio, CR-1-95-18), 173 F.3d 584 (6th Cir. 1999).

Elements of the Offense and Mental State

Introduction:

Knowing unpermitted pollutant discharges in violation of 33 U.S.C. § 1311(a) and prosecuted under 33 U.S.C. § 1319(c)(2)(A) are among the most common subjects of criminal environmental enforcement.

Comment:

As a starting point, the government must prove knowledge of the nature of the pollutant discharged and of the discharge into water. Those are essential facts that make the act unlawful, and the Supreme Court stated in Bryan v. United States, 524 U.S. 184, 193 (1998)(footnote omitted), that "unless the text of the statute dictates a different

result, the term 'knowing' merely requires proof of knowledge of the facts that constitute the offense." See also Rogers v. United States, 522 U.S. 252 (1998)(plurality opinion); Staples v. United States, 511 U.S. 600 (1994); United States v. International Minerals & Chemical Corp., 402 U.S. 558 (1971). As with other federal crimes using the "knowing" mental state standard, the government must prove a defendant's knowledge of the facts that make his action unlawful, not his knowledge of the law itself; a mistake of fact defense is preserved, but a mistake of law defense is not permitted. Under these cases the government should not have to prove that a defendant knew of the applicable statutory definitions, that is, that a material met the legal definition of a "pollutant", that a conveyance met the legal definition of a "point source", or that a water body or wetland met the legal definition of a "navigable water" or a "water of the United States", all of which are matters of law, not of fact.

Therefore, what remains is whether the United States also must prove a defendant's factual knowledge of the point source, water of the United States, and permit status elements. In the first alternative instruction below all three of those elements are treated as not requiring proof of knowledge.

The two appellate decisions that have dealt with the elements of unpermitted discharge crimes in relation to mental state are United States v. Ahmad, 101 F.3d 386 (5th Cir. 1996), and United States v. Wilson, 133 F.3d 251 (4th Cir. 1997).

United States v. Ahmad

In Ahmad, which involved both an unpermitted discharge into a water of the United States and an unlawful discharge into a sewer, the court reviewed an unpermitted discharge jury instruction in which the word "discharged" appeared with the word "knowingly" as one element, while "pollutant" appeared as a separate element without the word "knowingly." 101 F.3d at 389. The narrow issue actually before the court was whether the instructions given in that

case made it clear that the defendant must know the nature of the material being discharged, that is, that it was gasoline and not just water.

Unfortunately, the Ahmad court went beyond that narrow issue, misreading Staples v. United States, supra, on its way to concluding that the crimes at issue were not "public welfare offenses", and saying, "With the exception of purely jurisdictional elements, the mens rea of knowledge applies to each element of the crimes." 101 F.3d at 391; emphasis added. The court gave no hint as to which elements it considered to be "purely jurisdictional". Despite that lack of clarity, though, a sound jury instruction, consistent with Ahmad in light of other pertinent case law, on the elements of an unpermitted pollutant discharge should not place an undue burden on prosecutors.

Permit Element

With respect to the lack of a permit both Staples and Bryan make it clear that the government need not prove that the defendant knew about the legal requirement of having a permit. An NPDES permit is a legal requirement equivalent to a gun registration, and the Supreme Court left no doubt that "a defendant need not know that his weapon is unregistered". 511 U.S. at 609 and 524 U.S. 192-193; see also Rogers, 522 U.S. at 258.

Not requiring proof of knowledge of the permit requirement or status is consistent with the position taken by the three circuit courts that have reviewed permit violation convictions. See United States v. Sinskey, 119 F.3d 712 (8th cir. 1997); United States v. Hopkins, 53 F.3d 533, 537-41 (2d Cir. 1995), cert. denied, 516 U.S. 1072 (1996); United States v. Weitzenhoff, 35 F.3d 1275, 1283-1286 (9th Cir. 1993), cert. denied, 513 U.S. 1128 (1995). The Ahmad court distinguished Weitzenhoff and Hopkins as mistake of law rulings, 101 F.3d at 390-91, but did not question their conclusions that permits and their conditions and limitations are matters of law, a defendant's knowledge of which the government is not required to prove. Thus, the Ahmad court's comment on proving knowledge of all but jurisdictional elements must be read in light of Bryan, Rogers, and Staples, and in the context of its also having accepted the Second and Ninth Circuits' views on the permit as a matter of law not requiring proof of knowledge.

Water of the United States and Point Source Elements

The "navigable water" or "water of the United States" element of an unpermitted discharge crime under 33 U.S.C. § 1319(c)(2)(A) provides the constitutional basis for the exercise of federal authority over what otherwise would fall under the jurisdiction of individual states. (State jurisdiction over water pollution abatement is specifically recognized and preserved in 33 U.S.C. §§ 1251(b) and 1370.) It reflects a decision by Congress to exercise federal jurisdiction over what clearly is a federal interest, the

protection of the Nation's waters from pollution. The pollution of those waters is not made more culpable, though, by the fact that they may fall within federal jurisdiction; hence there is no hazard that an innocent defendant may be ensnared in a federal prosecution. The essence of the crime remains simply the discharge of pollutants into the water, and polluting the water is not "apparently innocent conduct". Liparota v. United States, 471 U.S. 419, 426 (1985); Bryan, 524 U.S. at 195. Accordingly, this element is jurisdictional only and does not go to the essence of the crime. In these circumstances, there should be no requirement that the government prove a defendant's knowledge of the facts that bring a particular water within the jurisdictional reach of "navigable waters" or "waters of the United States". This is no different from knowledge of the interstate element of a mail fraud crime.

The "point source" element may present a somewhat different situation from the "water of the United States" element. In most cases there is abundant evidence that the defendant knew of the conveyance from which the discharge occurred -- the pipe, ditch, hose, or truck. Wilson said the government must prove such knowledge, but did not focus upon the element. In other prosecutions the instructions have not included knowledge of the point source, and that issue has not been raised on appeal. Thus, treatment of it is not a settled matter.

In a sense the "point source" is an adjunct to the "water of the United States". In the FWPCA Congress decided that federal regulatory jurisdiction - and, therefore, criminal enforcement jurisdiction - under the Commerce Clause would extend to pollutant discharges into all "waters of the United States", but only if they came from "point sources". Regulation of non-point sources was left to the states, if they chose to undertake it just as the decision as to whether to regulate waters that are not "waters of the United States" is left to the states. (Certainly Congress has the power to regulate pollutant discharges from other than point sources and to criminalize such discharges. It has been doing so for more than a century under the Refuse

Act of 1899, 33 U.S.C. § 407, which has no point source requirement and which includes a clause covering materials placed on the banks where they may be washed into navigable waters, regardless of their source.) As with the "waters of the United States", whether or not a pollutant comes from a "point source" does not materially affect whether or not the receiving waters are contaminated.

The situation, therefore, is similar to that in DeBiasi, 712 F.2d at 790-791, in which the Second Circuit determined that the government did not have to prove defendant's knowledge of the $1,000 threshold for federal credit card fraud. Congress exercised its Commerce Clause jurisdiction to criminalize credit card fraud, but then limited that jurisdiction to cases exceeding that threshold. (Note that the court assumed state courts could handle cases involving lesser amounts without determining whether all states actually did have statutes that would cover the same activities.) There are other federal crimes for which Congress similarly has imposed thresholds that limit federal jurisdiction, but for which courts have not required knowledge of those thresholds. See, e.g., Ninth Circuit Manual of Model Jury Instruction for theft of government property, 18 U.S.C. § 641, embezzlement, 18 U.S.C. § 656, interstate transportation or receipt of stolen goods, 18 U.S.C. §§ 2314 and 2315. Moreover, for a basic false statement crime under 18 U.S.C. § 1001 materiality is a jury question, but the United States is not required to prove the defendant's knowledge of materiality.

Knowledge Requirements in Light of Ahmad

In sum, "point source" should be viewed as a jurisdictional element, and the first alternative instruction below does not require proof of defendant's knowledge of it (although the option of adding a knowledge requirement for that element also is provided). However, the law on the issue is not settled. Obviously, the more conservative instruction would be less susceptible to reversal on appeal. If a prosecutor has sufficient evidence of "point

source" knowledge and/or as a tactical decision, he or she may choose to accept an instruction requiring such knowledge; however, a prosecutor choosing that course should make it clear on the record that this instruction was given out of an abundance of caution and does not represent a concession by the United States.
Under Ahmad an instruction following the pattern set out in the first alternative at the end of this discussion should be acceptable to the Fifth Circuit and most other circuits for unpermitted discharge cases. There is no disagreement that the government must show factual knowledge of the pollutant, the discharge, and the entry into water. (Because the path of a discharge may be indirect, as it was in Ahmad, prosecutors may include instructions focusing special attention on circumstantial evidence, reasonable inferences, and/or a defendant's being responsible for the natural consequences of his or her action.) The first alternative does not require knowledge of the point source; however, as discussed above, that requirement is debatable and the alternative provides for the option of including such knowledge. Assuming that the water of the United States element is jurisdictional, knowledge of it need not be proven. Finally, treatment of the permit element as a matter of law not requiring proof of knowledge appears to be consistent with both Ahmad and prevailing Supreme Court case law.

United States v. Wilson

The Fourth Circuit's opinion in United States v. Wilson, supra, is the law in that circuit, and the second alternative jury instruction at the end of this discussion is designed to comply with its holdings. However, under prevailing law it is not an entirely sound opinion. The discussion below and in Chapter 9B of Volume 1 of this Manual may assist prosecutors to resist its application outside the Fourth Circuit.

Wilson involved the filling of wetlands without a Corps of Engineers Section 404 permit, and is directly relevant here because discharging without a Section 402 (33 U.S.C. § 1342) NPDES permit or without a Section 404 (33 U.S.C. § 1344) Corps permit is essentially the same crime: discharge of a pollutant into a water of the United States without a permit. There is no indication that Congress intended any variation in elements depending upon whether a crime involved the NPDES or the Section 404 program.

The Wilson court divided the unpermitted discharge crime into six elements:

1. *discharge*
2. *of a pollutant*
3. *from a point source*
4. *into a wetland [a water body in a non-wetlands case]*
5. *that qualifies as a water of the United States*
6. *without a permit*

This is somewhat different from the configurations often used by prosecutors, particularly in its separation of the pollutant's entry into water from the status of that water as a "water of the United States".

Regarding those six elements, the Fourth Circuit said that the government must "prove the defendant's knowledge of the facts meeting each essential element of the substantive offense and not the fact that defendant knew that his

conduct was illegal". Id. at 264. As the Ahmad discussion, above, points out, the government's need to prove knowledge of the first, second, and fourth elements is undisputed. However, case law outside the Fourth Circuit indicates that knowledge of the third, fifth, and sixth elements is not required.

The legal status "water of United States" — the heart of the fifth Wilson element — may derive from any of several different factors that trigger Commerce Clause authority, among them tributary connections to commercially navigable waters or historical usage in interstate commerce. See, e.g., 40 C.F.R. § 122.2. The Fourth Circuit says the government must prove "that the defendant was aware of the facts establishing the required link between the wetland and waters of the United States". While this may be the law of the circuit, it is contrary to prevailing case law on "jurisdictional elements", a defendant's knowledge of which need not be proven by the government. The Wilson court's view of the law would put a premium on ignorance and indifference in an area where Congress clearly intended that people be accountable for their actions.

In describing the sixth element of its Wilson formulation, the court said that the United States must prove "that the defendant knew he did not have a permit." 133 F.3d at 264. Trying to straddle the tension between mistake of law and mistake of fact, the panel then elaborated on its view:

> *The last requirement does not require the government to show that the defendant knew that permits were available or required. Rather, it, like the other requirements, preserves the availability of a mistake of fact [defense] if the defendant has something he mistakenly believed to be a permit to make the discharges for which he is being prosecuted. [Id.]*

The flaw in that reasoning is that whether or not the "something" the defendant had constituted an NPDES or Section 404 permit is a matter of law. Thus, a defendant's mistaken belief as to its nature would be a mistake of law,

not a mistake of fact.

Jury Instruction Alternatives in Light of Wilson, Ahmad, and Other Relevant Case law

There are several variations on the unpermitted discharge instruction that can be derived from the Wilson decision and from the other case law discussed above. The instruction adopted in a particular case will depend upon how the trial court (and the circuit) views the interplay among those cases and the statutory provisions relevant here. Obviously, the more conservative the instructions adopted, the less risk of reversal on appeal - but the greater the burden upon the government. Again, users should read Chapter 9B of Volume 1 of the Environmental Crimes Manual when they are preparing their proposed instructions, and they may benefit from consultation with the Environmental Crimes Section during that process. Note that here and in Chapter 9B the analysis relies upon ordinary principles of construction generally applicable to federal criminal statutes. It does not rely upon the "public welfare offense" doctrine, which was not treated favorably as applied to felonies in Staples, 511 U.S. at 606-12, or by the two justices dissenting from the denial of certiorari in the water pollution case of United States v. Hanousek, 258 U.S. 1102 (2000).

Two of the alternatives for an unpermitted discharge violation are set out below, using a common basic framework. That framework sets out the elements of the offense before addressing the relationship of the "knowing" mental state factor to those elements. It also includes an abbreviated explanation of the legal meaning of "knowing" action and a portion on what the United States is not required to prove. The second alternative is the more conservative, essentially tracking the Fourth Circuit's Wilson approach. The "water" as used in these alternatives may, of course, be a wetland. In both versions three of the elements - discharge, pollutant, and water - are joined together in the first item simply to read more sensibly.

Alternative 1 (knowledge of jurisdictional and

legal elements not required)

In order to convict a person of discharging a pollutant into a water of the United States without a permit, the Government must prove each of the following elements beyond a reasonable doubt:

1. On or about the date charged in the indictment the defendant discharged a pollutant into a water;

2. The pollutant was discharged from a point source;

3. The water was a water of the United States; and

4. The discharge was unpermitted.

The government must prove beyond a reasonable doubt that the defendant acted knowingly, that is,

a. the defendant committed the discharge deliberately and not as the result of ignorance, mistake, or accident;

b. the defendant knew the identity or at least the nature of the material discharged; and

c. the defendant [in the case of a non-wetland discharge] knew that the pollutant was discharged into a water;

OR

the defendant [in the case of a wetland discharge] knew the physical characteristics of the property into which the

pollutant was discharged that identify it as a wetland, such as the presence of water and water-loving vegetation;

The Government is not required to prove the defendant's knowledge of the law, that is, that the material came within the legal definition of "pollutant"; that the conveyance came within the legal definition of "point source"; that the water came within the legal definition of "water of the United States"; or that a permit was required for the discharge. Neither is the government required to prove the defendant's knowledge of any connections between the receiving water body [or wetland] and any other water body or that the defendant knew his actions were unlawful or that they violated the Federal Water Pollution Control Act [or Clean Water Act].

If a prosecutor chooses to include knowledge of the point source, the following language may be inserted, perhaps as item c or d under what the government must prove:

c/d. the defendant knew that the discharge was from a discernible, confined, and discrete conveyance, such as [whatever point source was involved in the case]; and

Alternative 2 (derived from Wilson)

This version is intended to be entirely compatible with the Wilson decision as it may be applied by courts in the Fourth Circuit (as long as Wilson remains the law there) or by courts elsewhere that may accept the Wilson view.

In order to convict a person of discharging a pollutant into a water of the United States without a permit, the Government must prove each

of the following elements beyond a reasonable doubt:

1. On or about the date charged in the indictment the defendant discharged a pollutant into a water;

2. The pollutant was discharged from a point source;

3. The water was a water of the United States; and

4. The discharge was unpermitted.

The government must prove beyond a reasonable doubt that the defendant acted knowingly, that is,

a. the defendant committed the discharge deliberately and not as the result of ignorance, mistake, or accident;

b. the defendant knew the identity or at least the nature of the material discharged;

c. the defendant knew that the discharge was from a discernible, confined, and discrete conveyance, such as [whatever point source was involved in the case]; and

d. the defendant [in the case of a non-wetland discharge] knew that the pollutant was discharged into a water;

OR

the defendant [in the case of a wetland discharge] knew the physical characteristics of the property into which the pollutant was discharged that identify it as a wetland, such as the presence of water and water-loving vegetation;

e. the defendant was aware of the facts establishing that the water is a jurisdictional water of the United States [for example, establishing the link between the water and other waters of the United States]; and

f. the defendant knew, as a factual matter, that he did not have a permit for the discharge. This does not mean that the defendant can claim as a defense to the crime charged that he did not know that a permit was required or available. Ignorance of the law is no excuse. It would be a defense, however, if he mistakenly believed, as a factual matter, that there was a permit for the discharge.

The Government is not required to prove the defendant's knowledge of the law, that is, that the material came within the legal definition of "pollutant"; that the conveyance came within the legal definition of "point source"; that the water came within the legal definition of "water of the United States"; or that a permit was required for the discharge. Neither is the government required to prove that the defendant knew his actions were unlawful or that they violated the Federal Water Pollution Control Act [or Clean Water Act].

Note that Wilson does not require the court to give the instruction in subparagraph (e), that is, requiring proof of defendant's knowledge of the water of the United States connection, if the defendant's conduct would be prohibited under both state and federal law. See 133 F.3d at 264, footnote.

The foregoing discussion is intended to help prosecutors understand the issues associated with unpermitted discharge instructions. However, there is no certainty as to how trial courts will view these issues. Therefore, the

framework above is designed to allow a prosecutor to deal flexibly with the views adopted by a particular trial court. There are, of course, a variety of ways in which the same thoughts may be expressed, and jury instructions are to be read as a whole, not in isolation, in assessing whether they properly inform the jury; see, e.g., Martin v. Ohio, 480 U.S. 228, 234 (1987).

C. Discharge in Violation of an NPDES Permit

Discharge in Violation of a Permit

Sections 1311(a) and 1319(c)[(1)/(2)](A) of Title 33, United States Code, provide that it is unlawful for any person to [negligently/knowingly] discharge a pollutant into a water of the United States in violation of a condition and limitation that implements [one of the statutory provisions identified in 33 U.S.C. § 1319(c)(1) or (2)) in a National Pollutant Discharge Elimination System (NPDES) permit issued by the Environmental Protection agency or by an authorized state.

Authority:

33 U.S.C. §§ 1311(a), 1319(c)[ ], and 1342

Delegated NPDES Program

The Clean Water Act creates a joint federal and state permitting program for those who discharge pollutants into the waters of the United States. In summary, it authorizes the United States Environmental Protection Agency to grant authority to state environmental agencies to issue permits required by federal law before someone may discharge pollutants into waters of the United States. The Environmental Protection Agency has granted authority to the State of [_____] to issue permits under the Clean Water Act.

Authority:

Given in United States v. West Indies Transport, Inc. (D.V.I., CR. NO. 1993/0195), aff'd, 127 F.3d 299, cert. denied, 118 S.Ct. 700 (1998)

Elements of the Offense

In order to convict a person of discharging in violation of a permit, the Government must prove each of the following elements beyond a reasonable doubt:

1. On or about the date charged in the indictment the defendant violated a condition or limitation of a federal or state NPDES permit;

2. The permit condition or limitation violated by the defendant implemented [one or more of the statutory sections identified in Section 1319(c)(2)(A) of Title 33, United States Code]; and

3. The defendant acted knowingly, that is,

[in the case of a discharge violation]

a. The defendant committed the discharge deliberately and not as the result of ignorance, mistake, or accident;

b. The defendant was aware of [specify the facts or conduct that constituted the permit violation, e.g., that the pH was less than 5 or that the concentration of cadmium was greater than 0.69 milligrams per liter].

[in the case of a non-discharge violation]

a. The defendant committed the violation deliberately and not as a result of ignorance, mistake, or accident;

b. The defendant was aware of the facts that constituted the permit violation.

The Government is not required to prove the defendant's knowledge of the law, that is, the defendant's knowledge of the permit, of the conditions and limitations of the permit, or that the [discharge, act, omission] violated the permit.

Authority:

33 U.S.C. § 1311(a), 1319(c)[ ], and 1342
United States v. Sinskey, 119 F.3d 712 (8th cir. 1997)
United States v. Weitzenhoff, 35 F.3d 1275, 1283-1286 (9th Cir. 1993), cert. denied, 513 U.S. 1128 (1995)
United States v. Hopkins, 53 F.3d 533, 537-541 (2d Cir. 1995), cert. denied, 516 U.S. 1072 (1996)

Comment:

The instruction above is for the knowing felony version of the violation, the parallel negligent permit violation being a misdemeanor. It should be accompanied by other instructions that, as matters of law, (1) the permit involved is an NPDES permit issued by EPA or by an authorized state and (2) the permit actually did cover the discharge in question and (3) describing what the actual condition or limitation in the permit was.

The Supreme Court has made it clear that a "knowing" mental state standard "requires proof of knowledge of the facts that constitute the offense." Bryan v. United States, 524 U.S. 184, 193 (1998); see also Rogers v. United States, 522 U.S. 252 (1998)(plurality opinion); Staples v. United States, 511 U.S. 600 (1994); United States v. International Minerals & Chemical Corp., 402 U.S. 558 (1971). For an NPDES permit violation not involving a discharge, that may mean evidence of knowledge that discharge monitoring reports were not submitted, for example. For a discharge-related violation, it may mean evidence of knowledge of

facts such as the pH or the concentrations of certain pollutants in the permittee's effluent.

In the real world the courts have made it clear that the government need not prove knowledge of the law in terms of permit provisions, but the question arises as to whether the government must show exact quantitative knowledge of the permit exceedances in every case or whether it is sufficient to prove only the defendant's general quantitative knowledge of the discharge. If the will of Congress - that knowing permit violations be prosecuted criminally - is to be carried out, then the answer must be general knowledge, not specific and exact quantitative knowledge.

The instruction below, given in an actual case, says only "that the defendant acted knowingly." While a court may interpret that to mean that all of the actions taken by the defendant that constituted the offense were undertaken deliberately, the instruction probably would involve less risk of reversal if it explained what knowing action means and if that final clause tracked the pattern language above requiring factual knowledge.

The following instruction was given in United States v. Hopkins (D. Conn., 3:93CR260(EBB), supra:

> In order to sustain its burden of proof for the crime of violating a permit condition or limitation . . . the government must prove the following three elements beyond a reasonable doubt:
>
> 1. that the defendant violated a condition or limitation for a permit issued by [EPA or a state] pursuant to the Clean Water Act in the manner alleged in the indictment;
>
> 2. that the permit conditions that you find have been violated implemented one or more of the sections of the Clean Water Act set forth in the indictment; and

3. that the defendant acted knowingly.

Despite that weakness (which could be cured), the Hopkins instruction on elements is valuable because of the other instructions that accompanied it. The court went on to instruct the jury, as a matter of law, that the permit at issue had been issued by the state pursuant to the Clean Water Act, and that they were to determine as a matter of fact whether the permit's conditions had been violated by the defendant. The court also instructed the jury that, as a matter of law, the conditions alleged to have been violated did implement sections of the Act.

The following language was proposed in one case to address the issues of concentration of the pollutant (the concentration being in excess of the permit's limitation) and the defendant's knowledge as to both identification as a "pollutant" and knowledge of the permit limitation:

> The government is required to prove discharging, the nature of what was discharged and the quality of the discharge (such as low pH or concentration above 1 mg/l) that exceeded the permit condition. The government is not required to prove that the defendant knew the material being discharged was defined as a "pollutant" under the Clean Water Act. Further, the government is also not required to prove that the defendant had knowledge of the permit or specific permit requirement or that the discharges at issue violated a permit condition.

Regulatory Limitations Applicable to this Case [Example]

The permit limitations applicable to this case are those set out in permit number _____. Those limitations prohibit the daily discharge of wastewater from [the facility] which contains more than _____ milligrams per liter of _____.

Authority:

NPDES Permit Number _____, Part _____

Comment: *This is a sample instruction for identifying the permit limitation violated.*

5. WETLANDS VIOLATIONS

Meaning of "Dredged Material"

The term "dredged material" means material that is excavated or dredged from waters of the United States.

Authority:

33 C.F.R. §§ 323.2(c) and 40 C.F.R. § 232.2

Comment: *For the regulatory definition of "discharge of dredged material" see 40 C.F.R. § 232.2 and 33 C.F.R. § 323.3(d).*

Meaning of "Fill Material"

The term "fill material" means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body.

Authority:

33 C.F.R. § 323.2(e)

The term "fill material" means any "pollutant" which replaces portions of the "waters of the United States" with dry land or which changes the bottom elevation of a water body for any purpose.

Authority:

40 C.F.R. § 232.2

Comment: *Two versions are presented here because the definitions of the term under Corps of Engineers regulations (Title 33) and EPA regulations (Title 40) are not identical. The former speaks of "material", replacing an aquatic area, and "primary purpose", while latter refers to "pollutant", replacing portions of waters of the United States, and "any purpose". Also, the Corps definition excludes pollutants discharged into water primarily for the purpose of disposal, saying that such discharges fall under the NPDES program in 33 U.S.C. § 1342.*

For the regulatory definition of "discharge of fill material" see 40 C.F.R. § 232.2 and 33 C.F.R. § 323.3(f).

Meaning of "Wetlands"

The term "wetlands" means 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.

Authority:
33 C.F.R. § 328.3(b)
40 C.F.R. § 230.3(t)
Given in United States v. Suarez (D. Guam, CR-92-00036 AWT)

Meaning of "Adjacent"

The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are "adjacent wetlands".

Authority: 40 C.F.R. §230.3(b)
33 C.F.R. §328.3(c)

Comment: *The terms "bordering, contiguous, or neighboring" are not defined in the regulation.*

6. PRETREATMENT VIOLATIONS

A. Violation of Federal Standard

Operation in Violation of a Pretreatment Standard

Section 1317(d) and 1319(c)[(1)/(2)](A) of Title 33, United States Code, provide that it is unlawful for any person to introduce a pollutant into a publicly owned treatment works in violation of an applicable pretreatment standard.

Authority:

33 U.S.C. §§ 1317(d) and 1319(c)[](A)

Comment:

Note that this same instruction applies to a local (or state) pretreatment prohibition, limitation, or pollutant parameter treated as a federal pretreatment standard under 33 U.S.C. § 1317(d) pursuant to 40 C.F.R. § 403.5(d) or 403.10.

Elements of the Offense

In order to convict a person of introducing a pollutant into a publicly owned treatment works in violation of an applicable pretreatment standard, the Government must prove each of the following elements beyond a reasonable doubt:

1. On or about the date charged in the indictment the defendant discharged a pollutant;

2. The pollutant was discharged into a publicly-owned treatment works;

3. The discharge violated [description of applicable standard]; and

4. The defendant acted knowingly, that is,

a. the defendant committed the discharge deliberately and not as a result of ignorance, mistake, or accident;

b. the defendant was aware of the facts that constituted the pretreatment violation, that is,

(1) the defendant knew the identity or the nature of the material discharged; and

(2) the defendant knew that the discharge was into a sewer.

The Government is not required to prove defendant's knowledge of the law, that is, that the material fell within the legal definition of "pollutant"; that the sewer fell within the legal definition of a "publicly-owned treatment works"; or that the discharge was subject to a pretreatment standard.

Authority:

33 U.S.C. §§ 1317(d) and 1319(c)[ ](A); 40 C.F.R. § [ ]

Comment:

The government should not be required to prove a defendant's knowledge of the specific quantitative characteristics of a discharge. See the discussion under elements of an NPDES permit violation offense, supra.

The third element above will vary depending upon the pretreatment standard violated by the defendant. For example, in a case involving a violation of 40 C.F.R. §

403.5(b)(1) (e.g., discharge of a flammable solvent), it would read as follows:

> The discharge created a fire or explosion hazard in the POTW.

In the case of categorical pretreatment standard violation, on the other hand, it would address that standard:

> The discharge was [at a concentration of _____ **OR** was at a pH level of_____] beyond the limitations established in the pretreatment regulations for [that particular industry].

Under the "knowing" mental state standard as described in Bryan, supra, the defendant would have to know the character of whatever was discharged even though the government would not be required to prove his knowledge of the regulation setting the discharge limitation. General knowledge that the discharge is above the limitation (or below in the case of an acidic pH) should be sufficient whether or not the government can show that the person knew a precise number. For example, if a supervisor were told "we're way over our cyanide limit", that should be sufficient even if he was not told the actual concentration in milligrams per liter.

Regulatory Limitations Applicable to this Case [Example]

The pretreatment regulations applicable to this case are those that apply to the electroplating industry. Those regulations prohibit the daily discharge of wastewater from an electroplating facility which contains more than 1.9 milligrams of cyanide per liter.

Authority:

40 C.F.R. §413.14(c)

Dilution Prohibition

A facility that is subject to pretreatment standards under the Clean Water Act may not use dilution of its waste as a substitute for approved treatment in order to achieve compliance with applicable pretreatment standards.

Authority:

40 C.F.R. §403.6(d)

Meaning of "Publicly Owned Treatment Works"

The term "publicly owned treatment works" (often abbreviated "POTW") means a sewage treatment plant that is owned by a state or municipality. This definition includes any devices and systems used in the treatment of municipal sewage or industrial wastes of a liquid nature. It also includes any sewers, pipes, and other means of conveyance if they convey wastewater to a publicly owned treatment plant.

Authority:

33 U.S.C. § 1292(2)(A)
40 C.F.R. § 403.3(o)

Meaning of "Pretreatment"

The term "pretreatment" refers to a reduction in the amount of pollutants, the elimination of pollutants, or the alteration of the nature of pollutant properties in wastewater prior to discharging, or otherwise introducing, such pollutants into a publicly-owned treatment works.

Authority:

40 C.F.R. § 403.3(q)

Meaning of "Sewer System"

The term "sewer system" means any sewers, pipes, and other conveyances that convey wastewater to a publicly owned treatment works.

Authority:

40 C.F.R. §403.3(o)

Meaning of "Approved Pretreatment Program"

The term "approved pretreatment program" means a program administered by a POTW that meets the criteria established by regulation and that has been approved by the United States Environmental Protection Agency or by a state.

Authority:

40 C.F.R. § 403.3(d) or 403.10

B. Violation of Local or State Requirement

Violation of an Approved Pretreatment Program Requirement

Section 1319(c)[ ](A) of Title 33, United States Code, makes it a crime for a person to [knowingly/negligently] violate any requirement imposed in a pretreatment program approved under Section 1342(a)(3) or 1342(b)(8)of Title 33, United States Code.

Authority:

33 U.S.C. § 1319(c)[ ](A)

Meaning of "Pretreatment Requirement"

The term "pretreatment requirement" means any substantive or procedural requirement related to pretreatment, other than a National Pretreatment Standard, that is imposed on an industrial user.

Authority:

40 C.F.R. § 403.3(r)

Elements of the Offense

In order to convict a person of violating a requirement imposed in an approved pretreatment program, the Government must prove each of the following elements beyond a reasonable doubt:

1. On or about the date charged in the indictment the defendant discharged a pollutant;

2. The pollutant was discharged into a publicly-owned treatment works;

3. The discharge violated [description of applicable requirement]; and

4. That requirement was part of an approved pretreatment program.

5. The defendant acted knowingly, that is,

a. the defendant committed the discharge deliberately and not as a result of ignorance, mistake, or accident;

b. the defendant was aware of the facts that constituted the pretreatment violation, that is,

(1) the defendant knew the identity or the nature of the material discharged; and

(2) the defendant knew that the discharge was into a sewer.

The Government is not required to prove defendant's knowledge of the law, that is, that the material fell within the legal definition of "pollutant"; that the public sewer fell within the legal definition of a "publicly-owned treatment works"; or that the discharge was subject to the approved pretreatment requirement.

Authority:

33 U.S.C. § 1319(c)[ ](A)

Comment:

The government should not be required to prove a

defendant's knowledge of the specific quantitative characteristics of a discharge. See the discussion under elements of an NPDES permit violation offense, supra.

7. FALSIFICATION/TAMPERING

A. General

Overview of the Relationship Between Permits and DMRs

Clean Water Act permits, which are known as National Pollutant Discharge Elimination System ("NPDES") permits, impose limitations on the amount of pollutants that can be discharged from a facility. These limitations are called discharge or effluent limitations.

The Clean Water Act requires individuals and companies that have been issued permits to monitor their discharges to determine whether they comply with the pollutant discharge limitations set forth in their permits. Individuals and companies that have been issued permits must regularly collect discharge samples and test those samples for pollutants that are covered by the permits. The samples must be representative of the volume and nature of the monitored discharge. In other words, the samples must accurately reflect the type and volume of pollutants discharged from the permitted facility. All test results must be recorded in laboratory logs. These provisions of a Clean Water Act permit are called monitoring requirements.

In addition, the Clean Water Act requires the permit holder to report the laboratory tests of the discharge samples to the United States Environmental Protection Agency on a regular basis. These reports are known as Discharge Monitoring Reports, commonly referred to as "DMRs". The monitoring results summarized

in a Discharge Monitoring Report include the quantity or concentration levels for each of the pollutants covered by the permit.

Authority:

33 U.S.C. §§ 1251(a), 1252(a), 1311(a), 1342
40 C.F.R. §§ 122.41(j), (k), (l)
United States v. Brittain, 931 F.2d 1413, 1414-1417 (10th Cir. 1991)

B. False Information

Making a False Statement, etc.

Section 1319(c)(4) of Title 33, United States Code, provides, in part, that any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the Clean Water Act commits a crime.

Authority:

33 U.S.C. § 1319(c)(4)

Elements of the Offense

In order to convict a person of making a false statement [or representation or certification] in a report [etc.] required to be filed [or maintained] under the Clean Water Act, the Government must prove each of the following elements beyond a reasonable doubt:

1. On or about the date charged in the indictment the defendant knowingly made or caused to be made a false statement [or representation or certification];

2. The statement [or representation or certification] was made or caused to be made in a report [etc.] required to be filed [or maintained] under the Clean Water Act;

3. The statement [or representation or certification] was material; and

4. At the time he made the statement [or representation or certification] the defendant knew it was false.

A statement is "false" if untrue when made and then known to be untrue by the person making it or causing it to be made.

A statement is "material" if it could have influenced the decisions or activities of the government agency involved.

Authority:

33 U.S.C. § 1319(c)(4)
Eighth Circuit Model Instruction Number 3.09
Ninth Circuit Model Jury Instruction Number 8.20
Devitt & Blackmar § 54.14 (modified)
United States v. Little Rock Sewer Commission, 460 F. Supp. 6 (E.D. Ark. 1978)

Comment:

Some issues, such as knowledge of the falsity and materiality, may be treated in separate instructions. For points common to other types of fraud/falsification crimes, prosecutors may rely upon model or pattern instructions for their respective circuits.

In United States v. Linden Beverage Co. (W.D. Va., Cr. No. 94-122-H), rev'd. on unrelated grounds, 131 F.3d 137 (4th Cir. 1997), the following instruction was given:

> The crime of making a false statement has three essential elements:
>
> 1. that on or about the date alleged in the indictment the defendant made a false material statement, representation, or certification;
>
> 2. that the statement, representation, or certification was placed on a report or other documentation required to be filed or maintained under the Clean Water Act; and
>
> 3. that at the time the defendant made the statement, representation, or certification he knew the statement was false.

Meaning of "Report or Document Required to be Filed or Maintained"

With respect to the second element that the government must prove beyond a reasonable doubt, namely that the statements or representations be made in reports or documents required to be filed or maintained under the Clean Water Act, as a matter of law, the discharge monitoring reports are reports that are required to be filed under the Clean Water Act.

Authority:

33 U.S.C. §§ 1314(i)(A) and (B), 1318, 1342
40 C.F.R. §§ 122.41(h), (i), (j), (k) and (l)

Comment:

This is an example of a common type of falsification, DMRs, combined in a single instruction with a failure to maintain required documents violation. There are a variety of other types of documents that could be falsified or not maintained to which this format could be adapted.

Meaning of "Materiality"

A false statement is material if it has a natural tendency to influence, or is capable of influencing, the decision of the agency or agencies to which it is required to be submitted. It is not necessary that the statement did, in fact, influence that decision.

Authority:

United States v. Brittain, 931 F.2d 1413 (10th Cir. 1991)

United States v. Greber, 760 F.2d 68 (3d Cir.), cert. denied, 474 U.S. 988 (1985)

Comment: *These are slightly different versions of a "materiality" instruction:*

> A statement or representation is "material" if it has a natural tendency to influence or is capable of influencing the actions or decision of the agency to which it is addressed.
>
> ***OR***
>
> An omission is "material" if the information withheld would have had a natural tendency to influence or would have been capable of influencing the actions or decisions of the agency from which the information was withheld.

Authority:

United States v. Gaudin, 515 U.S. 506, (1995) (citing Kungys v. United States, 485 U.S. 759, 770 (1988))

Users may wish to include in the instruction an additional sentence drawn from United States v. Service Deli, 151 F.3d 938, 941 (9th Cir. 1998):

> The false statement need not have actually influenced the agency and the agency need not rely on the information in fact for it to be material.

Knowledge of False Statement

Comment:

In one case the proposed instruction included the following two paragraphs on the mental state standard applicable to the knowledge of falsity element along with the authorities cited to support that position:

> Knowledge, as used in these instructions to describe the alleged state of mind of the defendant, means that in making the alleged false statement or representation, the defendant was conscious and aware of his/her action and omission, realized what he was doing, and did not act because of ignorance, mistake, or accident.
>
> However, it is not necessary for the Government to prove that the defendant knew that a particular act or failure to act was a violation of law or that the defendant had any specific knowledge of the regulatory limitations imposed under the Clean Water Act.

Authority:

United States v. International Minerals & Chem. Corp., 402 U.S. 558, 562-564 (1971)
United States v. Hopkins, 53 F.3d 533, 537-541 (2d Cir. 1995), cert. denied, 516 U.S. 1072 (1996)
United States v. Weitzenhoff, 35 F.3d 1275, 1284 (9th Cir. 1993), cert. denied, 513 U.S. 1128 (1995)
United States v. Dee, 912 F.2d 741 (4th Cir. 1990), cert. denied, 499 U.S. 919 (1991)
United States v. Hayes International Corp., 786 F.2d 1499, 1503 (11th Cir. 1986)
United States v. Corbin Farm Service, 444 F. Supp. 510 (E.D. Cal. 1978), aff'd, 578 F.2d 259 (9th Cir. 1978)
United States v. Frezzo Bros., Inc., 546 F. Supp. 713, 720 (E.D. Pa. 1982), aff'd, 703 F.2d 62 (3d Cir.), cert. denied, 464 U.S. 829 (1983)

B. Tampering, etc.

Rendering Inaccurate a Monitoring Device or Method

Section 1319(c)(4) of Title 33, United States Code, provides, in part, that any person who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under the Clean Water Act commits a crime.

Authority:

33 U.S.C. § 1319(c)(4)

Elements of the Offense

In order to convict a person of falsifying, tampering with, or rendering inaccurate a monitoring device or method required under the Clean Water Act, the Government must prove each of the following elements beyond a reasonable doubt:

1. On or about the date charged in the indictment the defendant falsified, tampered with, or rendered inaccurate a monitoring device or method;

2. The monitoring device or method was required to be maintained under the Clean Water Act; and

3. The defendant acted knowingly, that is, the defendant committed the act deliberately and not as a result of ignorance, mistake, or accident.

Authority:

33 U.S.C. § 1319(c)(4)

Comment:

The statutory provision describes several different types of environmental crimes, and the instruction can be tailored to whichever one is at issue.

In United States v. Hopkins (D. Conn., 3:93CR269(EBB)), 53 F.3d 533, 537-41 (2d Cir. 1995), cert. denied, 516 U.S. 1072 (1996), the court gave the following instruction:

> Count One of the indictment alleges that the defendant violated Title 33 of the United States Code, Section 1319(c)(4), which provides that any person who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under Chapter 26 of Title 33 of the United States Code, also known as the Clean Water Act, shall be guilty of an offense against the United States.
>
> In order to sustain its burden of proof that the defendant committed this crime, the government must prove three elements beyond a reasonable doubt:
>
> 1. that the defendant falsified, tampered with, or rendered inaccurate a monitoring device or method;
>
> 2. that the defendant acted knowingly; and
>
> 3. that the monitoring device or method was required to be maintained pursuant to the Clean Water Act.
>
> As I just mentioned, the second element that the government must prove beyond a reasonable doubt in Count One was that the defendant acted knowingly. To act knowingly means to do an act voluntarily and intentionally, and not because of mistake, accident, or ignorance of fact.

In United States v. Sinskey (D.S.D., CR 96-40010) the court rearranged these elements slightly:

The crime of rendering inaccurate a monitoring method required under the Clean Water Act has three essential elements, which are:

1. a monitoring method was required to be maintained under the Clean Water Act:

2. on or about the date charged, the defendant rendered inaccurate the monitoring method or the defendant voluntarily and intentionally caused the monitoring method to be rendered inaccurate; and

3. the defendant acted knowingly.

8. Discharge of Oil or Hazardous Substance

A. Definitions

Meaning of "Oil"

The term "oil" means oil of any kind or in any form including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil.

Authority:

33 U.S.C. § 1321(a)(1)

Comment:

The instruction given in United States v. Pedro Rivera (D.P.R., Cr. No. 95-84(HL)), rev'd. on unrelated grounds, 131 F.3d 222 (1st Cir. 1997), read as follows:

> "Oil" is defined as meaning oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, and oil refuse.

Meaning of "Hazardous Substance"

The term "hazardous substance" means any substance designated as hazardous under 33 U.S.C. § 1321(b)(2).

Authority:

33 U.S.C. §§ 1321(a)(14) and 1321(b)(2)
40 C.F.R. § 116.4

Comment:

The substances that are designated hazardous for purposes

of 33 U.S.C. § 1321(b)(2) are listed in 40 C.F.R. § 116.4.

Meaning of "Discharge"

The term "discharge" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, or dumping.

Authority:

33 U.S.C. § 1321(a)(2)
40 C.F.R. § 116.3
Given in United States v. Pedro Rivera (D.P.R., Cr. No. 95-84(HL)), rev'd. on unrelated grounds, 131 F.3d 222 (1st Cir. 1997)

Comment:

Note that this instruction is drawn directly from the first part of the statutory definition, which is followed by explanations of NPDES-related activities that are not included within the definition, and that it applies only to 33 U.S.C. § 1321. Note, also, that it differs from the definition of "discharge of a pollutant" in 33 U.S.C. § 1362(12), which is applicable to other parts of the statute, including discharges covered by 33 U.S.C. §§ 1311(a), 1342, and 1344.

Meaning of "Such Quantities As May Be Harmful" [Oil]

The term "such quantities as may be harmful" means the quantity of oil that may be harmful to the public health and welfare or the environment of the United States, and it includes a quantity of oil that violates applicable water quality standards or that causes a film or sheen upon, or discoloration of, the surface of the water or causes a sludge or emulsion to be deposited beneath the surface of the water or upon the adjoining shoreline.

Authority:

40 C.F.R. § 110.3

Comment:

The following instruction was given in United States v. Pedro Rivera (D.P.R., Cr. No. 95-84(HL)), rev'd. on unrelated grounds, 131 F.3d 222 (1st Cir. 1997):

> "A harmful quantity of oil" is defined to include any discharge of oil that causes a film or sheen upon or discoloration of the surface of the water or adjoining shorelines.

Note that the phrase actually used in the statute, 33 U.S.C. § 1321(b)(3), is "such quantities as may be harmful", not "harmful quantity".

33 U.S.C. § 1321(b)(4)
40 C.F.R. §§ 110.3 and 110.4
Chevron, U.S.A., Inc. v. Yost, 919 F.2d 27, 30-31 (5th Cir. 1990)
Orgulf Transport Co. v. United States, 711 F. Supp. 344, 347 (W.D. Ky. 1989)

Meaning of "Such Quantities As May Be Harmful" [Hazardous Substance]

The term "such quantities as may be harmful" means the quantity of a particular substance designated as hazardous under Section 116.4 of Title 40, Code of Federal Regulations, the discharge of which is prohibited under Section 1321(b)(3) of Title 33, United States Code, and which must be reported under Section 1321(b)(5), United States Code.

Authority:

33 U.S.C. § 1321(b)(3) and (5)
40 C.F.R. §§ 116.4, 117.1(a), and 117.3

Comment:

"Such quantities as may be harmful"(often referred to as the "harmful quantity" or "reportable quantity") for each designated hazardous substance is set out in 40 C.F.R. § 117.3.

Meaning of "Vessel"

The term "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel.

Authority:
33 U.S.C. § 1321(a)(3)

Comment:

This definition is drawn directly from the statute. The public vessel (defined in 33 U.S.C. § 1321(a)(4)) exception clause may be omitted. In United States v. West Indies Transport, Inc. (D.V.I., CR. NO. 1993/0195), aff'd., 127 F.3d 299, cert. denied, 118 S.Ct. 700 (1998), the court gave the following instruction:

> The term "vessel" means every description of watercraft used or capable of being used as a means of transportation on navigable waters.

Meaning of "Owner or Operator"

The term "owner or operator" means, in the case of a vessel, any person owning, operating, or chartering by demise, such vessel; in the case of an onshore or offshore facility, any person owning or operating such facility.

Authority:

33 U.S.C. § 1321(a)(6)

Comment:

The statutory provision also extends to ownership and operation of an abandoned offshore facility.

Meaning of "Onshore Facility"

The term "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land.

Authority:

33 U.S.C. § 1321(a)(10)

Meaning of "Offshore Facility"

The term "offshore facility" means any facility of any kind located in, on, or under any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel.

Authority:

33 U.S.C. § 1321(a)(11)

Meaning of "Sheen"

The term "sheen" means an iridescent appearance on the surface of water.

Authority:

40 C.F.R. § 110.1

Meaning of "Sludge"

The term "sludge" means an aggregate of oil or oil and other matter of any kind in any form other than dredged spoil having a combined specific gravity equivalent to or greater than water.

Authority:

40 C.F.R. § 110.1

B. Prohibition Against Discharge

Discharge Prohibition

The Clean Water Act provides, in pertinent part, in Section 1321(b)(3) of Title 33 of the United States Code, that the discharge of oil or hazardous

substances into or upon the navigable waters of the United States in such quantities as may be harmful is prohibited.

Authority:

33 U.S.C. §1321(b)(3)
Given in United States v. M/G Transport Services (S.D. Ohio, CR-1-95-18), 173 F.3d 584 (6th Cir. 1999)

Comment:

The statute goes on to describe other areas beyond the navigable waters of the United States to which the prohibition applies.

C. Failure to Report

Failure to Report a Discharge

Section 1321(b)(5) of Title 33, United States Code, provides in that any person in charge of a vessel or of an onshore or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in such quantities as may be harmful, immediately notify the appropriate agency of the United States Government of such discharge. Failure to give such notification is a crime.

Authority:

33 U.S.C. § 1321(b)(3) and (5)

Comment:

Given almost verbatim in United States v. M/G Transport Services (S.D. Ohio, CR-1-95-18) 173 F.3d 584 (6th Cir. 1999).

Elements of the Offense

In order to convict a person of failing to notify of the discharge of a reportable quantity of [oil/a hazardous substance], the Government must prove each of the following elements beyond a reasonable doubt:

1. On or about the date charged in the indictment the defendant was a person in charge of a vessel or of an onshore or offshore facility;

2. A quantity of [oil/a hazardous substance] that may be harmful was discharged from that vessel or onshore or offshore facility;

3. The oil or hazardous substance was discharged into a navigable water of the United States [or other specified area].

4. the defendant knew the identity or the nature of the material discharged;

5. the defendant knew that the amount of the material discharged was [**in the case of oil:** enough to cause a film or sheen, etc.; **or in the case of a hazardous substance:** [_____] or more pounds]; and

6. The defendant failed to immediately notify the appropriate agency of the United States Government of that discharge as soon as he had knowledge of the discharge.

The Government is not required to prove the defendant's knowledge of the law, that is, that the material fell within the legal definition of ["oil"/"hazardous substance"]; that the water fell within the legal definition of "navigable water of the United States"; or that [_____] was the reportable

quantity for [_____].

Authority:

33 U.S.C. § 1321(b)(5)

Comment:

The government should not be required to prove a defendant's knowledge of the specific quantitative characteristics of a discharge. See the discussion under elements of an NPDES permit violation offense, supra.

In United States v. M/G transport Services (S.D. Ohio, CR-1-95-18) 173 F.3d 584 (6th Cir. 1999), the following instruction was given:

> Before you can find the defendant guilty [of failure to report an oil spill] you must find the United States has proven each and every one of the following elements by legal evidence beyond a reasonable doubt.
>
> 1. The defendant [ ] was a person in charge of the [ ] vessel [ ];
>
> 2. The oil was discharged in harmful quantity from the [ ] vessel [ ];
>
> 3. Into a navigable water of the United States;
>
> 4. The defendant had knowledge of the discharge;
>
> 5. The defendant, as soon as he had knowledge of the discharge, failed to notify the appropriate federal agency of that discharge.

While "knowledge of the discharge" can be interpreted to include the nature of the material and the general amount discharged, it probably is safer to be more specific about those elements.

Meaning of "Appropriate Agency of the United States Government"

The term "appropriate agency of the United States Government" means the National Response Center operated by the United States Coast Guard in Washington, D.C.

Authority:

40 C.F.R. § 110.6

Comment:

Note that 40 C.F.R. § 110.6 also provides for alternative notification to EPA or Coast Guard officials for the appropriate geographical area.

"Person In Charge"

A "person in charge" may be either a natural person or a corporation or other organization, and there may be more than one person in charge of a particular vessel or facility.

Authority:

United States v. Apex Oil Co., 530 F.2d 1291 (8th Cir. 1976)
United States v. Carr, 880 F.2d 1550 (2d Cir. 1989)
(construing the equivalent CERCLA reporting requirement, 42 U.S.C. § 9603(b), and specifically discussing 33 U.S.C. § 1321(b)(5))

D. Violation of Discharge Prohibition

Discharge of Harmful Quantity of Oil/Hazardous Substance

Section 1321(b)(3) of Title 33, United States Code, states in part that the discharge of oil or hazardous substances into or upon the navigable waters of the United States [or other specified areas] in such quantities as may be harmful is prohibited. The [knowing/negligent] violation of that prohibition is a crime.

Authority:

33 U.S.C. §§ 1319(c)[ ](A) and 1321(b)(3)

Elements of the Offense

In order to convict a person of discharging a harmful quantity of [oil/a hazardous substance], the Government must prove each of the following elements beyond a reasonable doubt:

1. On or about the date charged in the indictment the defendant discharged oil or a hazardous substance;

2. The amount of oil or hazardous substance discharged was a quantity deemed harmful by federal regulation; and

3. The oil or hazardous substance was discharged into a navigable water of the United States [or other specified area].

4. The defendant acted knowingly, that is,

   a. the defendant committed the discharge deliberately and not as the result

of ignorance, mistake, or accident;

b. the defendant knew the identity or the nature of the material discharged;

c. the defendant knew that the amount of the material discharged was [**in the case of oil**: enough to cause a film or sheen, etc.; **or in the cases of a hazardous substance**: [_____] or more pounds]; and

d. the defendant knew that the material discharged entered a body of water.

The Government is not required to prove the defendant's knowledge of the law, that is, that the material fell within the legal definition of ["oil"/"hazardous substance"]; that the water fell within the legal definition of "navigable water of the United States"; or that [_____] was the harmful quantity for [_____].

Authority:

33 U.S. §§ 1321(b)(3) and 1319(c)(2) [(1)]

Comment:

The government should not be required to prove a defendant's knowledge of the specific quantitative characteristics of a discharge. See the discussion under elements of an NPDES permit violation offense, supra.

Regarding navigable water element, see discussion under elements of the offense for an unpermitted surface water pollutant discharge, supra.

Note that there is no "point source" requirement as there is for discharges subject to the prohibition in 33 U.S.C. § 1311(a).

9. KNOWING ENDANGERMENT

Knowing Endangerment

Section 1319(c)(3)(A) of Title 33, United States Code, states in part that any person who knowingly violates [a specified provision], and who knows at the time that he thereby places another person in imminent danger of death of serious bodily injury, commits a crime.

Authority:

33 U.S.C. § 1319(c)(3)(A)

Elements of the Offense

The Indictment charges that on or about [date], the defendant did knowingly [commit a predicate offense], knowing at the time that his conduct thereby placed another person in imminent danger of death or serious bodily injury, in violation of Title 33, United States Code, Section 1319(c)(3).

In order to find the defendant guilty of the crime of knowing endangerment, you first must find that the government has proven, beyond a reasonable doubt, that the defendant [committed the predicate offense]. In other words, you first must find that the government has met its burden on all of the elements of [the predicate offense], namely:

[list elements of the predicate offense]

In addition, in order to find the defendant guilty of knowing endangerment, you must find that the government has proven, beyond a reasonable doubt, one additional element, specifically, that at the time of

committing the [predicate offense], the defendant knew that [his/her] conduct thereby placed another person in imminent danger of death or serious bodily injury.

Authority:

33 U.S.C. § 1319(c)(3)(A)

Comment:

Ordinarily the predicate offense would be charged in a separate count, to which this instruction could make reference. However, since the predicate offense would be a lesser included of knowing endangerment, the enhanced felony could be charged alone without having the predicate offense separately charged.

Rarely has knowing endangerment been charged in a water pollution case. However, an almost identical provision appears in the resource Conservation and Recovery Act, 42 U.S.C. § 6928(e). Therefore, you are referred to that section and chapter.

Knowledge of Endangerment

In determining whether a defendant who is an individual knew that his conduct placed another person in imminent danger of death or serious bodily injury, the defendant is responsible only for actual awareness or actual belief that he possessed, and knowledge possessed by a person other than the defendant himself may not be attributed to the defendant.

However, in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information.

Authority:

33 U.S.C. § 1319(c)(3)(B)(i)

Meaning of "Serious Bodily Injury"

For the purposes of knowing endangerment, the term "serious bodily injury" means bodily injury involving any of the following: unconsciousness; extreme physical pain; protracted and obvious disfigurement; protracted loss or impairment of the function of a bodily member, organ, or mental faculty; or any bodily injury involving a substantial risk of death.

Authority:

33 U.S.C. § 1319(c)(3)(B)(iv)
Given in United States v. Freeman (E.D. Mo., 4:92CR273 JCH)(in substance, although with the criteria in slightly different order)(RCRA case)
Given in United States v. Elias (D. Idaho, CR 98-070-E-BLW)(in substance, although with the criteria in slightly different order)(RCRA case)

Meaning of "Imminent Danger"

The term "imminent danger" means the existence of a condition or combination of conditions which could reasonably be expected to cause death or serious bodily injury unless the condition is remedied.

Authority:

United States v. Protex Industries, Inc., 874 F.2d 740, 744 (10th Cir. 1989) (dealing with corresponding RCRA knowing endangerment provision, 42 U.S.C. § 6928(e))

Actual Injury Not Required

For the purposes of knowing endangerment, it is *not* necessary for the Government to prove that death or serious bodily injury actually occurred. The Government must prove only that the defendant knew that his actions placed someone in imminent *danger* of death or serious bodily injury. Imminent danger means that existence of a condition which could reasonably be expected to cause death or serious physical harm unless the condition is remedied. While the danger must be an immediate result of the conduct, the existing danger may involve a harm which may not ultimately ripen into death or serious bodily injury for a lengthy period of time, if at all.

Authority:

United States v. Protex Industries, Inc., 874 F.2d 740, 744 (10th Cir. 1989)
5 U.S. Code Cong. & Admin. News 5038 (1980)
Freedman Coal Mining Co. v. Interior Board of Mine Operators, 504 F.2d 741 (9th Cir. 1974)
Eastern Associated Coal Corp. v. Interior Board of Mine

Operators, 491 F.2d 177 (4th Cir. 1974)
Environmental Defense Fund v. EPA, 548 F.2d 998, 1005 (D.C. Cir. 1976)
EDF v. EPA, 465 F.2d 528, 540 (D.C. Cir. 1972)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,
Criminal No. 99-CR-20060-BC

v.

Judge David M. Lawson

MICHAEL J. KUHN,

Defendant.
_____/

Lesser Offense, Order of Deliberations, Verdict Form - Count One

(1) As I explained to you earlier, the charge of knowingly disposing of sewage sludge in a manner that it would result in pollutants from the sewage sludge entering a navigable water except as in compliance with a Clean Water Act permit, as alleged in Count One, includes the lesser charge of negligently disposing of sewage sludge in a manner that it would result in pollutants from the sewage sludge entering a navigable water except as in compliance with a Clean Water Act permit.

(2) If you find the defendant not guilty of

the charge in Count One, or if after making every reasonable effort to reach a unanimous verdict on that charge, you find that you cannot agree, then you must go on to consider whether the government has proved the lesser charge of negligently disposing of sewage sludge in a manner that it would result in pollutants from the sewage sludge entering a navigable water except as in compliance with a Clean Water Act permit.

(3) If you decide that the government has proved this lesser charge beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the verdict form. If you decide that the government has not proved this lesser charge beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. Your foreperson [Each of you] should then sign the form, put the date on it and return it to me.

Sixth Circuit Pattern Criminal Jury Instruction 8.07 (modified).

Introduction to the Clean Water Act

All four counts of the indictment accuse the defendant of violations of the Federal Water Pollution Control Act, which is also commonly known as the Clean Water Act.

The Clean Water Act is codified at Title 33, United States Code, Sections 1251 through 1387. The purpose of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

33 U.S.C. §§ 1251 through 1387

33 U.S.C. § 1251(a)

Count One: Elements

Sections 1319(c)(2)(A) and 1345(a) of the Clean Water Act provide, in part, that any person who knowingly disposes of sewage sludge resulting from the operation of a treatment works as defined by the Clean Water Act (including the removal of in-place sewage sludge from one location and its deposit at another location) in any manner such that the disposal would result in any pollutant from such sewage sludge entering the navigable waters commits a crime.

Count One of the indictment alleges that, from on or about August 23, 1996, to on or about August 30, 1996, the defendant did knowingly cause the removal and disposal of in-place sewage sludge resulting from the operation of the Bay City Wastewater Treatment Plant from one location and its deposit at another location, and thereby, without a permit, caused a pollutant to from that sewage sludge to enter the navigable waters, in violation the Clean Water Act. In particular, the indictment alleges that the defendant knowingly caused the cleaning of portions of the Bay City Wastewater Treatment Plant in such a way that sewage sludge, a pollutant, was removed from certain containers and disposed of improperly so that the sewage sludge flowed into the Saginaw River without a permit.

For you to find the defendant guilty of this crime, you must be convinced the government has proved each and every one of the following elements beyond a reasonable doubt:

First, that on or about alleged dates, the defendant caused the disposal of sewage sludge. The term "disposal" includes the removal of in-place sewage sludge from one location and its deposit at another location.

Second, that the sewage sludge resulted from the operation the Bay City Wastewater Treatment Plant.

Third, that the Bay City Wastewater Treatment Plant is a "treatment plant" as defined under the Clean Water Act.

Fourth, that the disposal was performed in such a way that it would result in any pollutant from such sewage sludge entering the Saginaw River. You do not need to find that the sludge pollutants actually entered the Saginaw River; rather, you need only find that the disposal was done in such a way that the sewage sludge would eventually enter the Saginaw River.

Fifth, that the Saginaw River is a navigable water.

Sixth, that the disposal of the sludge was not authorized by a permit issued under the Clean Water Act.

Seventh, that the defendant acted "knowingly," which means that:

(1) the defendant knew the material to be sewage sludge;

(2) the defendant knew he was causing the disposal of the sewage sludge in such a manner it would result eventually in a pollutant from the sewage sludge entering the Saginaw River; and

(3) the defendant caused the disposal deliberately and not as the result of ignorance, mistake, or accident.

If you are convinced that the government has proved all these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Sixth Circuit Pattern Jury Instruction 2.02 (modified)

33 U.S.C. §§ 1345(a), 1319(c)(2)(A), 1342

Authorities cited in "Mistake-of-Law Not A Defense" Instruction

Regarding "knowingly":

Ninth Circuit Instruction 5.06 (recommended by Eighth Circuit Model Instruction 7.03 Committee Comments)

Fifth Circuit Pattern Jury Instruction 1.21 (1990)

Sand, Instruction Nos. 36-9, 36-15 and 3A-2 (modified)

Count Two: Elements

Sections 1319(c)(2)(A) and 1311(a) provide, in part, that any person who knowingly discharges a pollutant without a Clean Water Act permit or in violation of a Clean Water Act permit commits a crime.

Count Two of the indictment alleges that, from on or about August 23, 1996, to on or about August 30, 1996, the defendant did knowingly cause the discharge of a pollutant from a point source into a navigable water of the United States without compliance with the permit requirements of the Clean Water Act. In particular, the indictment alleges that the defendant knowingly caused sewage sludge to be discharged from a ditch into the Saginaw River in violation of the Clean Water Act.

For you to find the defendant guilty of this crime, you must be convinced the government has proved each and every one of the following elements beyond a reasonable doubt:

First, that on or about alleged dates, the defendant caused the discharge of pollutants.

Second, that the discharge was performed through a point source.

Third, that the discharge was made to the Saginaw River

Fourth, that the Saginaw River is a navigable water.

Fifth, that the discharge was not authorized by a permit issued under the Clean Water Act.

Sixth, that the defendant acted "knowingly," which means that:

(1) the defendant knew the general nature of the material being discharged;

(2) the defendant knew he was causing the addition of the material to the Saginaw River through a point source;

(3) the defendant caused the discharge deliberately and not as the result of ignorance, mistake, or accident.

If you are convinced that the government has proved all these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Sixth Circuit Pattern Jury Instruction 2.02 (modified)

33 U.S.C. §§ 1311(a), 1319(c)(2)(A), 1342

40 C.F.R. § 122.21

Authorities cited in "Mistake-of-Law Not A Defense" Instruction

Regarding "knowingly":

Ninth Circuit Instruction 5.06 (recommended by Eighth Circuit Model Instruction 7.03 Committee Comments)

Fifth Circuit Pattern Jury Instruction 1.21 (1990)

Sand, Instruction Nos. 36-9, 36-15 and 3A-2 (modified)

Meaning of "Pollutant"

As used in my instructions for both Counts One and Two, the term "pollutant" includes any of the following: solid waste, sewage, garbage, sewage sludge, chemical wastes, biological materials, heat, rock, sand and industrial, municipal, and agricultural waste discharged into water.

The term "sewage sludge" means solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in a treatment works.

33 U.S.C. § 1362(6)

40 C.F.R. § 503.9(w)

Meaning of "Navigable Waters"

As used in my instructions for both Counts One and Two, the term "navigable waters" includes any of the following:

1. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce.

2. All interstate waters including interstate wetlands.

3. All other waters, including intrastate lakes, rivers, streams (including intermittent streams) the use, degradation or destruction of which could affect interstate or foreign commerce, including any such waters (1) which are or could be used by interstate or foreign travelers for recreational or other purposes; (2) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (3) which are used or could be used for industrial purposes by industries in interstate commerce.

33 U.S.C. § 1362(7)

40 C.F.R. § 122.2 (definition of "waters of the United States")

Meaning of "Treatment Plant"

As used in my instructions concerning Count One, the term "treatment works" means any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature, including:

(A) intercepting sewers, outfall sewers, sewage collection systems, pumping, power, and other equipment, and their appurtenances;

(B) extensions, improvements, remodeling, additions, and alterations thereof;

(C) elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and

(D) any land that is used for ultimate disposal of residues resulting from such treatment works.

In addition, the term "treatment works" includes any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste, including storm water runoff, or industrial waste, including any waste in combined storm water and sanitary sewer systems.

33 U.S.C. § 1292(2)

Meaning of "Discharge of a Pollutant"

As used in my instructions concerning Count Two, the term "discharge of a pollutant" and the term "discharge of pollutants" each means any addition of any pollutant to navigable waters from any point source.

33 U.S.C. § 1362(12)

Meaning of "Point Source"

As used in my instructions concerning Count Two, the term "point source" means any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure or container from which pollutants are or may be discharged.

33 U.S.C. § 1362(14)

Count Three: Elements

Section 1319(c)(4) of the Clean Water Act provides, in part, that any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the Clean Water Act commits a crime.

Count Three of the indictment alleges that, on or about June 9, 1997, the defendant did knowingly cause false material statements and representations to be made in records required to be maintained under the Clean Water Act. In particular, the indictment alleges that the defendant knowingly caused an employee of the Bay City Wastewater Treatment Plant under his supervision to materially falsify the records of the treatment plant regarding test results obtained on influent samples from the Bay City Wastewater Treatment Plant on or about May 3, 1997.

For you to find the defendant guilty of this crime, you must be convinced the government has proved each and every one of the following elements beyond a reasonable doubt:

First, that on or about alleged dates, the defendant caused a false statement or representation to be made in a record.

Second, that the statement or representation concerned test results obtained from influent samples from the Bay City Wastewater Treatment Plant done on or about May 3, 1997.

Third, that the false statement or representation was material.

Fourth, that the record was required to be maintained under the CWA.

Fifth, that the defendant acted "knowingly," which means that:

(1) the defendant knew that the statement or representation was false;

(2) the defendant knew he was causing the false statement or representation to be made in the record; and

(3) the defendant deliberately caused the false statement or representation to be made and not as the result of ignorance, mistake, or accident.

If you are convinced that the government has proved all these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Sixth Circuit Pattern Jury Instruction 2.02 (modified)

33 U.S.C. § 1319(c)(4)

Count Four: Elements

Count Four of the indictment alleges that, on or about June 10, 1997, the defendant did knowingly make a false material statement, representation and certification in a discharge monitoring report filed under the Clean Water Act. In particular, the indictment alleges that the defendant knowingly filed with the Michigan Department of Environmental Quality a discharge monitoring report with attachments containing materially false information regarding the content of the influent to the Bay City Wastewater Treatment Plant found in testing done on or about May 3, 1997.

For you to find the defendant guilty of this crime, you must be convinced the government has proved each and every one of the following elements beyond a reasonable doubt:

First, that on or about alleged dates, the defendant knowingly filed with the Michigan Department of Environmental Quality a discharge monitoring report with attachments that contained a false statement, representation or certification.

Second, that the false statement, representation or certification related to the content of the influent to the Bay City Wastewater Treatment Plant found in testing done on or about May 3, 1997.

Third, that the false statement, representation or certification was material.

Fourth, that the defendant acted "knowingly," which means that:

(1) the defendant knew that the statement, representation or certification was false;

(2) the defendant knew he was filing the discharge monitoring report with the Michigan Department of Environmental Quality; and

(3) the defendant deliberately caused the false statement, representation or certification to be made and not as the result of ignorance, mistake, or accident.

If you are convinced that the government has proved all these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Sixth Circuit Pattern Jury Instruction 2.02 (modified)

33 U.S.C. § 1319(c)(4)

Meaning of "Materiality"

As used in my instructions for both Counts Three and Four, a false statement is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the agency or agencies to which it is required to be submitted or under whose authority is required to be maintained. It is not necessary that the statement did, in fact, influence that decision.

Neder v. United States, 527 U.S. 1, 16 (1999)

United States v. Brittain, 931 F.2d 1413 (10th Cir. 1991)

United States v. Greber, 760 F.2d 68 (3d Cir.), cert. denied, 474 U.S. 988 (1985)

Mistake-of-Law Not A Defense

The government is not required to prove that the defendant knew that his acts or omissions were unlawful. Therefore, it is not necessary for the government to prove that the defendant knew that a particular act or failure to act was a violation of the Clean Water Act or even that the defendant had any knowledge of the Clean Water Act requirements he is accused of violating.

In other words, ignorance of the law is no excuse. It is not a valid defense that the defendant mistakenly believed he was acting lawfully while performing the acts or omissions that constitute the alleged crimes.

Thus, with respect to Counts One and Two, the government is not required to prove that the defendant was aware he was violating the law or of the requirement to obtain a Clean Water Act permit in order to lawfully perform such acts or omissions.

Likewise, with respect to Counts Three and Four, the government is not required to prove that defendant was aware that the submission of false statements to the Michigan Department of Environmental Quality was illegal.

United States v. International Minerals & Chem. Corp., 402 U.S. 558, 560-564 (1971)

United States v. Kelley Technical Coatings, 157 F.3d 432, 439, n.4 (6th Cir. 1998)

United States v. Sinskey, 119 F.3d 712 (8th cir. 1997)

United States v. Hopkins, 53 F.3d 533, 537-541 (2d Cir. 1995)

United States v. Weitzenhoff, 35 F.3d 1275, 1283-1286 (9th Cir. 1993)

Harm Not an Element of Crime

The government is not required to prove that any of the defendant's alleged crimes resulted in actual harm to human health or the environment in order to establish the offense charged under the Clean Water Act.

Authorities cited in "United States' Motion In Limine To Exclude Evidence Concerning Lack of Actual Harm," filed on October 23, 2000

Definition of Lesser Offense - Count One

If you find the defendant not guilty of Count One, or if after making every reasonable effort to reach a unanimous verdict on that charge, you find that you cannot agree, then you must go on to consider whether the government has proved the lesser charge that the defendant negligently disposed of sewage sludge resulting from the operation of a treatment works in a manner that would result in any pollutant from such sewage sludge entering the navigable waters.

The difference between these two crimes is that to convict the defendant of the lesser charge of acting with negligence, the government does not have to prove that the defendant acted "knowingly" as I have previously defined that term with respect to Count One. Acting "knowingly" is an element of the greater charge, but not the lesser charge.

For you to find the defendant guilty of the lesser charge, the government must prove each and every one of the following elements beyond a reasonable doubt:

First, that on or about alleged dates, the defendant caused the disposal of sewage sludge. The term "disposal" includes the removal of in-place sewage sludge from one location and its deposit at another location.

Second, that the sewage sludge resulted from the operation the Bay City Wastewater Treatment Plant.

Third, that the Bay City Wastewater Treatment Plant is a "treatment plant" as defined under the Clean Water Act.

Fourth, that the disposal was performed in such a way that it would result in any pollutant from such sewage sludge entering the Saginaw River. You do not need to find that the sludge pollutants actually entered the Saginaw River; rather, you need only find that the disposal was done in such a way that the sewage sludge would eventually enter the Saginaw River.

Fifth, that the Saginaw River is a navigable water.

Sixth, that the disposal of the sludge was not authorized by a permit issued under the Clean Water Act.

Seventh, that the defendant acted "negligently," which means that he failed to use that degree of care which an ordinarily careful person would use under the same or similar circumstances. The degree of care used by an ordinarily careful person depends upon the circumstances which are known or should be known and varies in proportion to the result that the person reasonably should foresee. In deciding whether the

defendant was negligent you must determine what that person knew or should have known and the result that should reasonably have been foreseen.

If you are convinced that the government has proved all these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any of these elements, then you must find the defendant not guilty of this charge.

Sixth Circuit Pattern Criminal Jury Instruction 2.03 (modified)

Eighth Circuit Model Civil Jury Instruction 7.09 (modified)

United States v. Hanousek, 176 F.3d 1116, 1120-21 (9th Cir. 1999).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	No. 00 CR 699
5.		)
	)	Hon. Ruben Castillo
RONALD SNOOK		)

Note: In Count One, the defendant was charged with conspiring to violate the Clean Water Act by failing to report wastewater violations to the Metropolitan Water Reclamation District of Greater Chicago (MWRD). In Counts

Two through Six, the defendant was charged with knowingly and willfully falsifying, concealing and covering up material facts in a matter within the jurisdiction of the United States, in that he intentionally engaged in a scheme to refrain from reporting wastewater violations to the MWRD as required under the Clean Water Act.

The crimes alleged in this case involve wastewater reporting requirements under the Clean Water Act.

Under the Clean Water Act, it is illegal to discharge pollutants to the waters of the United States without a permit from either the United States Environmental Protection Agency (which I will refer to as the "EPA") or a State agency that is authorized to implement an EPA permit program, such as the Illinois Environmental Protection Agency. By "waters of the United States" I am referring to waterways such as lakes, rivers or streams, including their tributaries.

Local governments often need to obtain a Clean Water Act permit because they own wastewater treatment plants that discharge pollutants to the waters of the United States. These facilities are known as "publicly owned treatment works," or more commonly by their acronym "POTW."

The Clean Water Act requires the EPA to develop standards regulating the introduction of

pollutants to POTWs. These standards are known as "pretreatment" standards because they set limits on the amount and type of pollutants that significant industrial users and others can introduce to a POTW.

Based on EPA requirements, the MWRD developed and implemented an Ordinance which was approved by EPA. In addition, the MWRD issued to Clark an individual permit, also known as a Discharge Authorization, regulating the introduction of pollutants into its sewer system. Under the Clean Water Act, the MWRD Ordinance and Clark's Discharge Authorization, Clark was not allowed to introduce into the MWRD sewer system any wastewater that contained Fats, Oils and Greases (FOG) in excess of 100 milligrams per liter of wastewater.

Limits were also placed on the extent of how acidic or caustic Clark's wastewater could be. The acidic or caustic content of wastewater is measured by determining a "pH" value. Under the Clean Water Act, the MWRD Ordinance and Clark's Discharge Authorization, Clark was not allowed to introduce into the

MWRD sewer system any wastewater that exhibited a pH of less than 5.0 or greater than 10.0.

Goals of the Act:

33 U.S.C. § 1251(a)

NPDES Structure / State Delegation:

33 U.S.C. § 1342

33 U.S.C. § 1318(a)
40 C.F.R. Part 122
33 U.S.C. § 1362(7)
40 C.F.R. § 122.3 (definition of "waters of the United States")

Definition of POTW:

40 C.F.R. § 403.3(o)
33 U.S.C. § 1292(2)(A)

Pretreatment Regulations:

33 U.S.C. § 1317(b)

40 C.F.R. § 403.3(q)

Requirement for an approved POTW Pretreatment Program:

40 C.F.R. § 403.8(a)
40 C.F.R. § 403.3(c)

Required Elements of POTW's Approved Pretreatment Program:

40 C.F.R. § 403.8(f)(1)(iii)
40 C.F.R. § 403.12
40 C.F.R. § 403.12(g)(2)

In this case, the alleged goal of the conspiracy was to fail to notify the MWRD of certain wastewater violations. In order to find the defendant guilty of the conspiracy the government needs to establish the elements I have previously instructed you

about, however, the government need not prove that the defendant was aware that failure to report a wastewater violation was illegal and was a violation of the Clean Water Act. The government also need not prove that the defendant had any specific knowledge of the statutory, regulatory, or permit requirement imposed under the Clean Water Act requiring the reporting of wastewater violations.

GOVERNMENT INSTRUCTION NO. ___

18 U.S.C. § 371

33 U.S.C. § 1319(c)(2)(A)

Memorandum Opinion and Order of June 8, 2001

United States v. Sinskey, 119 F.3d 712 (8th Cir. 1997)

United States v. Hopkins, 53 F.3d 533 (2d Cir. 1995)

United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1994)

United States v. Wilson, 133 F.3d 251, 261 (4th Cir. 1997)

United States v. Metalite Corporation, 2000 WL 1234389 (S.D. Ind. July 28, 2000)

United States v. Rhoad, 36 F.Supp.2d 792 (S.D. Ohio 1998)

United States v. Mango, 96 CR 327, 1997 WL 222367 (N.D.N.Y. May 1, 1997).

Title 33, United States Code, Section 1319, provides in relevant part:

> A person violates the law if he knowingly violates (1) any requirement imposed in an EPA-approved pretreatment program or (2) any pretreatment requirement developed by the EPA under Section 1317 of the Clean Water Act.

GOVERNMENT INSTRUCTION NO.

33 U.S.C. § 1319(c)(2)(A) (modified)

33 U.S.C. § 1317(b) (modified)

40 C.F.R. § 403.12

Under the Clean Water Act, a "person" is defined to include both individuals and corporations.

GOVERNMENT INSTRUCTION NO. ___

33 U.S.C. § 1362(5)

A statement is material if it had the effect of influencing the action of the EPA or the MWRD, or was capable or had the potential to do so. It is not necessary that the statement actually have influenced the EPA or the MWRD, so long as it had the potential or capability to do so.

GOVERNMENT INSTRUCTION NO. ___

Seventh Circuit Committee (1999) (18 U.S.C. § 1001) (modified)

The United States Environmental Protection Agency is a part of the executive branch of the government of the United States, and the reporting of violations of pretreatment standards are within the jurisdiction of that branch. This is true even if the reporting was supposed to be made to the MWRD.

GOVERNMENT INSTRUCTION NO. ___

Seventh Circuit Committee (1999) (18 U.S.C. § 1001) (modified)

United States v. Wright, 988 F.2d 1036 (10th Cir. 1993)

United States v. Ross, 77 F.3d 1525, 1544-1545 (7th Cir. 1996)

The government is not required to prove that any of the alleged crimes or the alleged fats, oils, and greases, or pH violations caused any damage or harm to human beings, the MWRD or the environment in order to establish any of the charged offenses.

GOVERNMENT INSTRUCTION NO. ___

18 U.S.C. §§ 371, 1001

33 U.S.C. §§ 1319(c)(2)(A), 1317

Minnehaha Creek Watershed District v. Hoffman, 597 F.2d. 617, 627 (8th Cir. 1979)

American Mining Congress v. U.S. Army Corps of Engineers, 951 F. Supp. 267, 275 (D.D.C. 1997)

When the word "knowingly" is used in the Clean Water Act, it means a person or corporation was aware of the nature of their acts, performed them intentionally, and did not act or fail to act through ignorance, mistake or accident. The government need not prove, however, that the person or corporation was aware that failure to report a wastewater violation was illegal and was a violation of the Clean Water Act. The government also need not prove that the person or corporation had any specific knowledge of the statutory, regulatory, or permit requirement imposed under the Clean Water Act requiring the reporting of wastewater violations.

GOVERNMENT INSTRUCTION NO. ___

18 U.S.C. § 2

33 U.S.C. § 1319(c)(2)(A)

Memorandum Opinion and Order of June 8, 2001

Concerning Clean Water Act Mens Rea Requirements:

United States v. Sinskey, 119 F.3d 712 (8th Cir. 1997)

United States v. Hopkins, 53 F.3d 533 (2d Cir. 1995)

An act is done willfully if done voluntarily and intentionally, and with the intent to do something the law forbids.

The person need not be aware of the specific law or rule that his conduct may be violating.

GOVERNMENT INSTRUCTION NO. ___

Seventh Circuit Committee (1999) (18 U.S.C. § 1001) (modified)

United States v. Bryan, 524 U.S. 184

To sustain a charge of violation of the Clean Water Act, the government must prove each of the following propositions beyond a reasonable doubt:

First, that "Clark" was a person as defined under the Clean Water Act;

Second, that Clark violated either (1) a requirement of an EPA-approved pretreatment program or (2) a pretreatment requirement developed by the EPA under Section 1317 of the Clean Water Act;

Third, Clark did so knowingly.

GOVERNMENT INSTRUCTION NO.

33 U.S.C. § 1319(c)(2)(A) (modified)