SELECTED DECISIONS IN
ENVIRONMENTAL CRIMINAL CASES

and

SELECTED ENVIRONMENTAL CRIMINAL CASES
APPLYING THE FEDERAL SENTENCING GUIDELINES

Cumulative Update

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THE CLEAN AIR ACT

United States v. Yi, 704 F.3d 800 (9th Cir. 2013). Defendant's conviction for knowingly violating asbestos work practice standards was upheld on appeal. Evidence demonstrated that Defendant had reason to believe that ceilings in a condominium complex he purchased contained asbestos but he claimed to have not read documents and test results confirming the presence of asbestos. The court held that the jury was properly instructed that it could find that Defendant acted knowingly if it found that he acted in deliberate ignorance of the presence of asbestos. The court also upheld a nine-level increase in the offense level under the Sentencing Guidelines for creating a substantial likelihood of death or serious bodily injury because the work crew hired to remove the asbestos were exposed without any protective equipment.

United States v. Hailey, No. 1:11-cr-540 (D. Md. June 25, 2012) (unpublished). Defendant was convicted of eight counts of wire fraud, thirty-two counts of money laundering, and two counts of violating the Clean Air Act (CAA). The convictions stem from Defendant's scheme to sell $9 million in renewable fuel credits which he fraudulently claimed were produced by his company. Though the company was registered with the U.S. Environmental Protection Agency (EPA) as a bio-diesel fuel producer, it did not actually produce the fuel. Over a twenty-one month period, Defendant sold over 35 million "renewable identification numbers" to brokers and oil companies, receiving at least $9 million in profits while producing no actual renewable fuel.

United States v. Fillers, 2012 U.S. Dist. LEXIS 8469 (E.D. Tenn. Jan. 25, 2012) (E.D. Tenn., *motion for acquittal denied*, ***United States v. Fillers,*** 2012 U.S. Dist. LEXIS 26873, Mar. 1, 2012; *motion for new trial denied*, ***United States v. Fillers,*** 2012 U.S. Dist. LEXIS 70346, May 21, 2012). Several Defendants were convicted of conspiracy to violate the CAA, making false statements with regard to the violations, and obstruction of justice. All of the charges related to the demolition of a factory in Chattanooga, Tennessee. The Government presented evidence demonstrating that over the course of one year, Defendants illegally demolished the plant, which contained large amounts of asbestos. The asbestos was "scattered in open debris piles and left exposed to the elements" in the surrounding neighborhood. Emissions from the disposal affected business, residences, and a day-car center in the vicinity of the former plant. The Government also presented evidence that the Defendants obstructed justice by falsifying documents and lying to federal authorities in order to conceal these activities.

United States v. Desnoyers. The Government appealed the decision of the lower court to vacate Defendant's conviction for conspiracy to violate the CAA. The Second Circuit vacated the grant of acquittal and remanded with instructions to reinstate the jury verdict and resentence the Defendant. Defendant argued that the Government had not sufficiently proven that one of the projects he was involved in fell under the CAA asbestos removal regulations. The court held that as Defendant was charged with a multiple-objective conspiracy, which included mail fraud, and the evidence presented at trial went to both the CAA conspiracy charge and the mail fraud charge, the jury verdict must stand. The court reasoned that the Government had presented sufficient evidence of mail fraud and, under *Griffin v. United States*, 502 U.S. 46 (1991), a jury verdict on a multi-count indictment "'charging several acts in the conjunctive'" must stand if there is sufficient evidence to prove any one of the charges. In addition, the court stated that the jury had not been misled about the CAA's coverage because it had not been asked to "apply incorrect legal principles or definitions" but rather asked to make a factual finding as to which of the eight properties Defendant worked on was covered by the CAA.

United States v. Gordon-Smith, et al., No. 6:08-cr-06019-CJS (W.D.N.Y. Sept. 28, 2011) (unpublished). Defendant and his company knowingly exposed both workers and nearby public areas to asbestos when they demolished a nearby hospital site. The workers, who lacked any asbestos removal training, did not receive the necessary protective clothing or respirators for conducting the demolition. They claimed that asbestos fell on them “like snow” during the demolition, and that the asbestos was allowed to flow through drains and holes in the building to public areas. When the employees complained to the Occupational Safety and Health Administration (OSHA), Defendant made false statements to the inspector investigating the claims and denied that his company was violating the CAA. Defendant and his asbestos abatement company were found guilty of violating the CAA’s asbestos work practice standards and of failing to provide required notices to the Environmental Protection Agency (EPA) prior to the commencement of the asbestos removal projects.

United States v. Yi et al., No. 2:10-cr-00793-PA (C.D. Cal. June 7, 2011). (unpublished). Through their real estate company, Defendants purchased an apartment complex and hired workers to scrape the ceilings of the apartment building during the renovation process, but they did not tell the workers that asbestos was present. As a result, workers were exposed to harmful asbestos and asbestos was released into the surrounding air. Defendants were convicted of violating the CAA’s asbestos work practice standards and conspiracy.

United States v. Fillers, No. 09-CR-144, 2010 WL 3655868 (E.D. Tenn. Sept. 14, 2010) (unpublished). Defendants removed asbestos from a textile plant and hid the total amount of asbestos from investigators in order to avoid federal regulation and were

indicted for conspiracy to violate the CAA and defraud the United States as well as violations of statutes related to asbestos removal. In their motion to strike various counts from the indictment, Defendants argued that they could not be charged with conspiracy to commit a violation of the CAA and conspiracy to defraud the United States when that alleged fraudulent conduct itself violated the CAA. Defendants relied on *United States v. Minarik*, 875 F.2d 1186 (6th Cir. 1989), to claim that they could not be charged with "both a conspiracy to defraud and a conspiracy to commit a substantive offense." The court held that Defendants could be charged with both conspiracy to violate the CAA and conspiracy to defraud because the Government had not changed theories of prosecution or been ambiguous and had instead given specific details regarding how Defendants impeded investigations. Because Defendants had engaged in multiple actions over time to mislead authorities, such as filing false notifications with Air Pollution Control and conducting incomplete surveys, and those actions violated clear duties under federal law, their case was factually distinguishable from *Minarik.*

Defendants also argued that the counts for failure to comply with the asbestos work standards under 42 U.S.C. §7413(c) and 18 U.S.C. §2(a) were not chargeable offenses because the indictment did not address the exceptions for legal removal in 40 C.F.R. §61.145(c). The court found that the indictment closely followed the language in 40 C.F.R. §61.145(c), thus clearly stating an offense, and that the Government did not have allege that Defendants did not meet the exceptions. Defendants also moved to consolidate all counts of the indictment for violations of the National Emission Standards for Hazardous Air Pollutants (NESHAPs) by reason of multiplicity. The court denied the motion and reasoned that while the criminality of each violation of a NESHAP rested on 42 U.S.C. §7401, each violation charged was based on specific and "logically distinct behavior" by Defendants. The court also denied Defendants' motion to strike various portions of the counts relating to violations of NESHAPs for surplusage. The court rejected Defendants' arguments that language about the dangers of asbestos and the proximity of a day care center in the indictment was surplusage because the possible prejudicial effect of such language was not enough to constitute surplusage if the Government intended to prove the information at trial. As the Government did plan to call witnesses from the day care center, the language was not surplusage.

United States v. Starnes, 583 F.3d 196 (3d Cir. 2009). Defendants were convicted, *inter alia*, of knowingly violating EPA work-practice standards for handling and disposal of asbestos-containing material. *See* 40 C.F.R. §§61.145, 61.150. On appeal, Defendant (Starnes) argued that the district court erred in denying his motion for judgment of acquittal because the evidence presented at trial was insufficient to permit the jury to conclude that he was "owner or operator" of the asbestos abatement project. The court noted that the EPA defines the term "owner or operator of a demolition or renovation activity" as "any person who owns, leases, operates, controls, or supervises the facility being demolished or renovated . . . ." 40 C.F.R. §61.141. Additionally, the court explained that it previously held, in the civil context, that a "non-owner can still be an operator if he or she has significant or substantial or real control and supervision of a project." Here, Defendant was brought onto the asbestos abatement project by the co-

defendant to provide oversight of air quality monitoring. The evidence showed that Defendant 1) recruited someone to collect air samples at the site, 2) recruited someone to be manager of the project, and 3) told several workers at the site about the work they would be doing. As a result, the court affirmed the conviction, holding that Defendant was an operator of the project within the meaning of the CAA. *See* 42 U.S.C. §7412.

Defendant challenged his sentencing enhancement under U.S.S.G. §3B1.1(a) "for being 'an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive.'" Defendant argued that the District Court's finding that he "involved" a third party in criminal activity was insufficient to justify the third party as a culpable "participant." Defendant also argued that he was not an "organizer" of the criminal activity because he was a "consultant" or "advisor" rather than the "general contractor." The court upheld the sentence, noting that a "participant," under §3B1.1 is a person who is criminally responsible whether or not they have been convicted. The court also noted that the District Court did not give any weight to Defendant's title in assessing whether or not he was an organizer.

Defendant challenged his sentencing enhancement under U.S.S.G. §3B1.3 for abuse of a "position of trust." In deciding whether a defendant holds a position of trust, the courts consider: "1) whether the position allows the defendant to commit a difficult-to-detect wrong; 2) the degree of authority which the position vests in [the] defendant vis-à-vis the object of the wrongful act; and 3) whether there has been reliance on the integrity of the person occupying the position." The court upheld the sentence enhancement, noting that Defendant had significant authority over the project, and that others relied on him to accurately monitor and honestly report asbestos levels.

United States v. Fernandes, 618 F. Supp. 2d 62 (D.D.C. 2009). Defendant was an employee of the EPA and was responsible for reviewing Notification Forms for new or re-labeled fuel additives in accordance with the CAA. On June 30, 2006, Defendant was indicted for submitting false Notification Forms because he failed to disclose his financial connection with the companies submitting the forms. After an investigation began, Defendant traveled to India for unrelated matters. On March 2, 2009, Defendant filed a motion to dismiss on speedy trial grounds because the Government failed to seek extradition or demonstrate that extradition would have been futile. The court granted the motion to dismiss because the government did not pursue defendant with reasonable diligence, and the 23-month delay between indictment and arrest violated Defendant's 6th Amendment right to a speedy trial.

United States v. BP Products N. America, Inc., 610 F. Supp. 2d 655 (S.D.Tex. 2009). Defendants BP Products North America, Inc. (BP) pled guilty to felony violations of the CAA arising from an explosion at a Texas City refinery plant that killed 15 and injured at least 170 workers. The Risk Management Plan regulations under the CAA required BP to implement written procedures to maintain the integrity of process

equipment and to inform contractors of the risks involved when it performed a restart of a raffinate splitter. BP admitted to knowingly violating these regulations. The Government agreed to a accept a plea agreement which stipulated a $50 million fine, 3 years of probation, and compliance with both an OSHA Settlement Agreement and an order imposed by the Texas Commission on Environmental Quality. The victims of the explosion objected to the court's acceptance of the plea agreement because they wanted to participate in court hearings, and they believed the sentence was too lenient.

The court held that the plea agreement would be accepted and the fine was not too low. BP pled to the highest offense that could be charged based on the evidence. The court reasoned that a criminal fine is not intended as victim compensation, and BP will spend far more on settling multiple civil cases. Furthermore, this fine will be the largest criminal fine imposed against a single corporation under the CAA, and it will be the largest criminal fine imposed for a fatal industrial accident.

United States v. W.R. Grace, 597 F. Supp. 2d 1143 (D. Mont. 2009). A mine operator and his current and former employees were indicted for conspiracy to violate the CAA and to defraud the United States, wire fraud, and obstruction of justice regarding the alleged release of asbestos-contaminated vermiculite from the mine. Defendants moved for partial dismissal, and the District court granted the motion to dismiss the CAA count and to exclude certain evidence. On appeal by the Government, the Ninth Circuit affirmed in part, reversed in part, and remanded the case. The issues were mainly evidentiary regarding expert witness testimony. On remand, the district court granted in part and denied in part the Government's motion for reconsideration. To the extent the Government sought to add updated environmental sampling results or reports the motion was denied, but in all other respects it was granted. The court ruled expert testimony about the risk posed from outdoor exposure to airborne asbestos fibers was admissible, but that expert opinions regarding historical testing by the mine operator were inadmissible. Expert testimony regarding a medical screening program which examined the exposure of area residents to asbestos was inadmissible. The Government was, however, entitled to rely on new studies not included in the original disclosure of expert reliance materials, but not if the evidence was obtained during interlocutory appeals.

*(For discussion of the Crime Victim Rights Act in the related case 597 F. Supp. 2d 1157 (D. Mont. 2009) see **page XX** in the Crime Victim Rights Act section.)*

United States v. Tucker, No. 1:09-CR-57, 2009 U.S. Dist. LEXIS 114606, 71 Env't. Rep. Cas. (BNA) 1433 (W.D. Mich. Dec. 9, 2009) (unpublished). A federal grand jury indicted Defendant on four counts of violating the CAA (asbestos) and three counts of violating the Toxic Substances Control Act (PCBs). Defendant was president of a demolition company hired to demolish a kiln-drying building whose roof panels contained asbestos. The government moved in limine to prevent the Defendant from introducing evidence that Defendant was unaware of or misunderstood the regulations

governing the handling and disposal of asbestos and PCBs; that the roof panels on the kiln-drying building were in an unstable condition such that pre-demolition removal of the panels would prevent a safety risk; and that Defendant believed that he was not required to wet the asbestos after removing it because air temperatures were below 30 degrees Fahrenheit. The court held that because Defendant's ignorance or mistake of law was not a defense, any evidence probative of whether he understood the law was not relevant or admissible; that evidence that the Defendant was concerned about the dangers of complying with pre-demolition removal requirements was admissible because it was relevant to Defendant's claim that he sought and received permission to demolish the kiln-drying building before removing the asbestos-containing material; and that because the air temperature was not a defense, evidence that it was below 32 degrees Fahrenheit was not relevant or admissible.

United States v. Tucker, No. 1:09-CR-57, 2009 U.S. Dist. LEXIS 114607, 71 Env't Rep. Cas. (BNA) 1430 (W.D. Mich. Dec. 9, 2009) (unpublished). Defendant filed a motion in limine to prevent the Government from introducing, *inter alia*: evidence of the government's samples and the related test results on two grounds: (1) that the samples are not representative [relying on US v. San Diego Gas & Electric], and (2) that the Government failed to follow the procedures required by the NESHAP regulations in performing tests on the samples. The court held that evidence of asbestos samples taken from the work site and subsequent tests conducted were admissible even though the samples were taken from the debris of the roof panels and the method for determining how much asbestos the material contained was not followed with precision.

United States v. Tucker, No. 1:09-CR-57, 2009 U.S. Dist. LEXIS 114609, 71 Env't Rep. Cas. (BNA) 1435 (W.D. Mich. Dec. 9, 2009) (unpublished)**.** Defendant was indicted for four counts of violating NESHAP standards relating to asbestos under the CAA and three counts of violating the Toxic Substances Control Act. Defendant filed a motion to dismiss the first four counts. The Defendant raised four issues: 1) whether the counts should be dismissed because all of the samples taken from the roof had been lost or destroyed; 2) whether they should be dismissed because the Government could not prove that the combined amount of regulated asbestos-containing material was at least 160 square feet[1]; 3) whether they should be dismissed because the asbestos regulations were unconstitutionally vague; and 4) whether they should be dismissed under the doctrine of entrapment by estoppel. The court held that: 1) the destruction of the asbestos samples, although "potentially useful" to the defendant, did not violate due process because they were not of "material exculpatory" value to the defendant, and the government did not destroy them in bad faith; 2) the charges regarding the 160 square feet requirement would not be dismissed because the requirement would be satisfied if the jury decided that the 49,000 square foot transite roof at issue had "a high probability

[1] The asbestos regulations apply only if the combined amount of regulated asbestos-containing material is 160 square feet or more. *See* 40 C.F.R. § 61.145(a)(1)(i).

of becoming crumbled, pulverized, or reduced to powder" when removed with a hydraulic excavator; 3) the regulations were not void for vagueness; and 4) that whether elements for entrapment by estoppel (Defendant claimed that Michigan NESHAP inspector approved his plan by phone, but did not recall the name of that inspector) were satisfied, was a question for the jury.

United States v. Washington, No. 4:09-CR-523 CAS, 2009 WL 3335122 (E.D. Mo. Oct. 15, 2009) (unpublished). Defendant was charged, *inter alia*, with five counts of violating the CAA and two counts of bankruptcy fraud. The violations were alleged to have been committed by the Defendant in his capacity as president of the Board of Directors of the Northeast Ambulance and Fire Protection District. The bankruptcy fraud offenses were alleged to have been committed by the defendant in his private and unofficial capacity. The Government contended that the CAA and bankruptcy violations all related to similar allegations of falsehood by the defendant, but the court held that the charges were not properly joined under Rule 8(a) of the Federal Rules of Criminal Procedure. Defendant moved to dismiss or sever the counts. The court granted motion to sever but denied the motion to dismiss.

United States v. Desnoyers, No. 1:06-CR-494-DNH, 2009 U.S. Dist. LEXIS 83935 (N.D.N.Y. Sept. 14, 2009) (unpublished). Defendant was convicted of a multi-objective conspiracy to violate the CAA, and to commit mail fraud. Defendant filed a motion for acquittal that was granted. The Government moved for reconsideration. The court denied the Government's motion. The court noted that because seven of the eight asbestos abatement projects listed in Count One were not subject to the federal CAA, the jury had to consider a legally impossible theory of guilt and might have convicted the Defendant based upon any one of these seven legally impossible theories.

United States v. Salvagno, 343 F. App'x 702 (2d Cir. Aug. 28, 2009) (unpublished). Defendant was convicted of conspiracy to violate RICO, the CAA, and the Toxic Substances Control Act, as well as violations of the CAA. On appeal, the court affirmed the convictions, holding that Defendant's claims that his Sixth Amendment rights were violated by a conflict of interest with his trial counsel, and by a conflict of interest at his sentencing were without merit.

United States v. Salvagno, 344 F. App'x 660 (2d Cir. Aug. 28, 2009) (unpublished). Defendant was convicted of conspiracy to violate RICO, the CAA, and the Toxic Substances Control Act, as well as violations of the CAA. On appeal, the court affirmed the convictions, holding that Defendant's Sixth Amendment right to conflict-free counsel was not violated.

United States v. Desnoyers, 2009 U.S. Dist. LEXIS 52081 (N.D.N.Y. June 10, 2009) (unpublished). Defendant Mark Desnoyers worked as an asbestos abatement air monitor. On September 18, 2008, he was convicted of various CAA violations including conspiracy to violate the CAA, of mail fraud, and of making material false statements to Special Agents of the EPA. Defendant moved for judgment of acquittal, or alternatively, for a new trial. The court granted the motion for judgment of acquittal with regard to the charge of conspiracy to violate the CAA. The court reasoned that the indictment applied this charge to Defendant's conduct during the course of eight different asbestos abatement projects, but only one project was subject to the CAA. At trial, the Government misled the jury to believe the CAA requirements applied to all the projects, thus potentially causing juror confusion and prejudice. However, the court denied Defendant's motion for acquittal regarding the other charges and denied the motion for a new trial. The court reasoned that Government witness testimony was sufficient evidence of Defendant's CAA violations. The court further reasoned with respect to mail fraud that the non-applicability of the CAA to certain of his asbestos projects did not preclude his conviction for sending fraudulent air samples through the mail. Finally, the court rejected Defendant's contention that he should be acquitted of the false statement conviction in regard to statements he made in connection to projects not covered by the CAA. Rather, the court held that any criminal investigation conducted by federal law enforcement qualifies for federal jurisdiction.

United States v. W.R. Grace, 526 F.3d 499 (9th Cir. 2008) (unpublished). The court granted the government en banc appeal to resolve two issues. First, the court examined whether a §3731 certification adequately established appellate jurisdiction. The court overruled its holding in *Loud Hawk* and instead joined with sister circuits in holding that a certification merely stating that the appeal is not being taken for delay and that the evidence is substantial proof of a fact material in the proceeding is sufficient for purposes of establishing jurisdiction. The second issue was whether the district court had the authority to require the government to produce a final witness list a year before trial and to preclude witnesses not disclosed by the deadline. The court overruled its decision in *Hicks* and held that the district court is within its authority to impose and enforce such deadlines, because the rules, while not necessarily mandating the production of witness lists in such a fashion, do not expressly preclude this action.

United States v. W.R. Grace, 526 F.3d 499 (9th Cir. 2008). On interlocutory appeal, the Third Circuit held that the district court had exceeded its authority by precluding the use of certain expert and non-expert witnesses and scientific studies in the government's case-in-chief. The Third Circuit found jurisdiction to hear the government's appeal under 18 U.S.C. §3731 because the government had demonstrated that the excluded evidence provided "substantial proof of a fact material" to the indictment.

Relying on Fed. R. Civ. P. 16 and its legislative history, the appellate court held that the district court had no authority to order the government to provide a list of non-expert witnesses to the defense prior to trial. Accordingly, the district court could not penalize the government for failing to disclose non-expert witnesses by the court's deadline. The district court did, however, have the power to order the government to provide the defense with a list of expert witnesses (and the studies experts would rely on) by a deadline. Because exclusion of expert testimony is a "drastic remedy," the issue was remanded to the district court with the instruction that it could exclude the expert testimony only if the government's failure to comply with the deadline was "willful and motivated by a desire to obtain a tactical advantage."

United States v. Alghazouli, 517 F.3d 1179 (9th Cir. 2008). The defendant was convicted of four counts of violating 28 U.S.C. §554 for illegally importing R-12 freon. The counts were premised on his violation of 40 C.F.R. §82.4, a regulation which he argued was not a law. The court held that the term "law" in §554 did not include all regulations, but only those regulations with an enabling statute specifying that violation of the regulation is a crime. Since the CAA specifically provides that violating §82.4 is a crime, a violation of the regulation is a violation of the law under §554. The defendant also disputed the jury instructions. The defendant wanted the jury to be instructed that knowledge under CAA regulation 82.4(m), §7413(c)(1) was that the acts were unlawful, and not mere knowledge of the facts constituting the crime. The court held that knowledge under §7413(c)(1) was only knowledge of the facts. The defendant last argued that the district court failed to properly apply the factors enumerated in 18 U.S.C. §3553(a). The court disagreed, holding that the district court discussed the factors listed in §3553(a) and applied these factors to the defendant's case.

United States v. BP Products N. America, Inc., 2008 U.S. Dist. LEXIS 12893 (S.D. Tex. Feb. 21, 2008) (unpublished). An explosion occurred at a BP refinery, and many people were injured and killed. The government filed a sealed ex parte motion asking the court to keep the plea negotiations with BP from the press and the victims, until a plea was agreed on. At that point, the victims were to be given time to comment and be heard. BP was to plead guilty to two violations of the CAA, pay $50 million in fines and be on supervised release for three years. The victims asked the court to reject the plea agreement and alleged violations of the Crime Victims' Rights Act (CVRA), namely that they were denied the right to confer, and were not treated fairly. The court held that the right to confer does not mean that the victims get to approve or disapprove a proposed plea in advance of the government's decision. Furthermore, the right to confer about a proposed plea is subject to multiple-victim provisions. The ex parte motion was therefore allowed, particularly since there were so many victims involved, and confidentiality was paramount. The asserted violations were found insufficient to reject the plea agreement.

United States v. W.R. Grace, 493 F.3d 1119 (9th Cir. 2007), *rev'd en banc*, 526 F.3d 499 (9th Cir. 2008). The government appealed a district court order limiting the government's presentation of witnesses at trial to those listed on an agreed upon discovery date. The court determined that a §3731 certificate alone was not adequate to confer appellate jurisdiction. The government was required to prove whether the excluded evidence was substantial proof of a material fact. Since the government adequately proved this, the court determined they had appellate jurisdiction to hear the appeal. The court followed its previous ruling in *Hicks* and found that the district court had errored by not allowing the government to add witnesses after the imposed deadline.

United States v. DiMaio, 255 F. App'x 537 (2d Cir. 2007). Defendant appealed his sentence of 42 months imprisonment for one count of violating the CAA. He argued the sentence was unreasonable because the district court did not consider whether he was similarly situated with his codefendants, and it did not take his codefendants' sentences into account. A court can consider similarities and differences among codefendants, but is not required to under 18 U.S.C. §3553(a)(6). Since the district court did carefully consider the §3553(a) factors, the sentence was reasonable.

United States v. Dykes, 244 F. App'x 296 (11th Cir. 2007). The defendant was demolishing a hotel when he discovered asbestos. He failed to file notice as required under the CAA, and was sentenced to 24 months in prison. The defendant appealed the sentence as unreasonable, arguing that the district court should have accepted his *Alford* plea, even though he would not admit to criminal knowledge. The court rejected this argument, ruling that the defendant had no absolute right to have his plea accepted. Furthermore, the defendant argued that the district court erred in applying the supervisory enhancement for his sentence, as well as an obstruction of justice enhancement. The court held that these enhancements were reasonable, and were not impermissible double counting as they were separate notions relating to sentencing. The district court also did not have to state explicitly on the record that it considered the sentencing factors. The court affirmed the sentence.

United States v. Hayes, 219 F. App'x 114 (3d Cir. 2007). The Third Circuit vacated defendant's conviction and remanded for a new trial because the trial court erroneously excluded exculpatory evidence. Defendant had been convicted of conspiring to violate the CAA by falsifying reports to EPA regarding the oxygen content of reformulated gasoline. The trial court excluded statements from defendant's subordinates indicating that defendant never asked them to falsify reports. It likewise excluded statements by the defendant instructing subordinates to comply with the CAA. Citing Fed. R. Evid. 404(b), the trial court had characterized the statements as "truly character evidence." The Third Circuit disagreed, holding that the evidence was proffered for the permissible purpose of proving defendant's intent during the conspiracy period.

United States v. Citgo Petroleum Corp., 2007 U.S. Dist. LEXIS 93908 (S.D. Tex. Dec. 21, 2007) (unpublished). An original indictment was filed, the third count charging the defendants with violation of the CAA. The defendants filed a motion to dismiss the CAA charge of the indictment, which was granted by the court. The government then filed a superseded indictment, to which the defendants filed the instant motion to dismiss. The government argued that under 18 U.S.C. §3288, they were permitted to return a new indictment within six months. Section 3288 allows for a new indictment, as long as the indictment was for a felony charge, and was dismissed after the period prescribed by the applicable statute. However, a new indictment is not permitted when the reason for dismissal was the failure to file the indictment within the period prescribed by the applicable statute of limitations or some other reason that would bar a new prosecution. The government argued that they changed the statutory citation in the indictment, but since the original indictment was dismissed for a failure to file within the statute of limitations, and not a mere miscitation, the motion to dismiss was granted.

United States v. Atl. States Cast Iron Pipe Co., 2007 U.S. Dist. LEXIS 56562 (D.N.J. Aug. 2, 2007) (unpublished). A jury convicted the defendant company and four supervisory employees of various offenses in connection with violations of the CWA and CAA. The defendants moved for acquittal or a new trial by asserting various legal points. The defendants argued that the jury should have been instructed on the concept of recklessness and that recklessness alone was insufficient to support "knowing" violations. The court found that such instructions were not necessary, as there were no cases to support this proposition, and the defendants did not argue this throughout the trial. The court noted that she had granted defendants' request for an instruction on the lesser included offense of CWA negligence. The court also found no prosecutorial misconduct, as alleged by the defendants. The defendants also argued that the inconsistent verdicts against the various defendants could not stand. The court disagreed, finding that inconsistency is only a problem when the two convictions are mutually exclusive, which was not the issue in the present case. The defendants further contended that there was duplicity within the conspiracy count in the indictment. The court disagreed, noting that there are multiple object conspiracies, and so to have a charge with more than one object is allowable. The defendants also claimed that the prosecution failed to produce sufficient evidence, and the jury's verdict was against the weight of the evidence produced. The court only granted acquittal on three counts, one of which was uncontested by the government in briefing. For two of the counts for which acquittal was granted, the jury had returned a guilty verdict, which required the court to conditionally determine whether any motion for new trial should be granted if the judgment of acquittal is later vacated or reversed. The court determined that the motion for new trial should be granted for those counts. Lastly, the court denied the defendants' motion for a new trial.

United States v. CITGO Petroleum Corp., 2007 U.S. Dist. LEXIS 27986 (S.D. Tex. April 16, 2007) (unpublished). Defendant's inadvertent disclosure of privileged documents relating to its benzene emissions constituted a partial waiver of confidentiality. The government was entitled to use the documents because defendant disclosed the documents on two occasions and waited a year to file a motion to compel their return. However, because the disclosures were inadvertent, defendant had not waived its privilege with regard to all benzene-related communications.

United States v. W.R. Grace, 455 F. Supp. 2d 1113 (D. Mont. 2006). The court had previously dismissed "with prejudice" a knowing endangerment object of a conspiracy charge under CAA due to the government's failure to allege an act in furtherance of the conspiracy. *See infra, United States v. W.R. Grace*, 434 F. Supp. 2d 879 (D. Mont. 2006). The government's subsequently obtained superseding indictment was not precluded by the "with prejudice" language, which the court acknowledged was a mistake; the court had not intended to resolve any factual issues on their merits. However, the superseding indictment was barred by the statute of limitations because neither the original nor the superseding indictment alleged acts within the five year limitations period.

United States v. W.R. Grace, 455 F. Supp. 2d 1133 (D. Mont. 2006). The court denied defendants' pretrial motion to exclude evidence of non-visible asbestos emissions. Construing the meaning of CAA §743(c)(5)(A)'s criminal knowing endangerment provision, the court held that defendants could raise an affirmative defense to a CAA violation by arguing that defendants' asbestos emissions were not visible. However, as an affirmative defense, the burden was on the defense to prove at trial that the government's evidence was derived from non-visible emissions.

United States v. W.R. Grace, 455 F. Supp. 2d 1203 (D. Mont. 2006). EPA conducted a risk assessment study for the purposes of determining whether a CERCLA cleanup was warranted at defendants' facility. Prosecutors sought to introduce the CERCLA assessment at defendants' trial for a CAA violation. Defendants contended that a CERCLA assessment was not relevant to determining whether the defendants' actions posed an "imminent danger" within the meaning of the CAA §7413(c)(5)(A). Defendants further asserted that EPA's CERCLA risk assessment methodology did not comport with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995). The court held that the study and expert testimony that relied on the study were admissible evidence at defendants' trial for violations of CAA.

United States v. W.R. Grace, 429 F. Supp. 2d 1207 (D. Mont. 2006). Defendants, a vermiculite mine operator and both current and former employees, were charged with a

number of offenses, including conspiracy to violate the CAA. Defendants moved to dismiss conspiracy charges, arguing that the indictment was duplicitous and that the "knowing endangerment" provision of the CAA required proof that the accused knew his actions were unlawful at the time of the offense. The district court held that the conspiracy indictment could be read in such a way that it charged a single offense and was not duplicitous, and held that the "knowing endangerment" provision did not require the defendant knew his actions were unlawful at the time he committed them. Additionally, the court held that the emissions clause of the CAA did not represent a prerequisite to criminal liability but set forth an affirmative defense for those releases that did not exceed emissions standards where such standards existed.

United States v. Thorn, 446 F.3d 378 (2d Cir. 2006). Defendant was the owner of an asbestos abatement company which employed about 700 people and undertook over 1,000 asbestos removal projects during the 1990s. Defendant was found guilty by a jury of nine counts of CAA violations and as a money laundering conspiracy charge. The government's evidence revealed Defendant's "rip and run" scheme, where employees would take on asbestos abatement jobs and, without proper containment or clean-up, dispose of the asbestos with no regard to required safety procedures. The scheme also involved preparation of false reports by independent monitoring companies; these false reports were mailed to customers to assure them that the asbestos abatement was completed in a safe and thorough manner.

The District Court applied downward departures on two grounds prior to sentencing Defendant. The Second Circuit found that a nine-level sentence increase for substantial likelihood of death or serious bodily injury was warranted, as well as a sentence increase for abuse of position of trust. The court also held that Defendant was not entitled to downward departures based either on the nature and extent of the risk of bodily injury or on the grounds that the seriousness of his criminal history was overrepresented. In remanding for resentencing, the court noted that Defendant had "demonstrated a repeated willingness to persist in illegal asbestos removal activities" and that accordingly he fell within Criminal History Category II. (See also: "Selected Federal Cases Applying the Federal Sentencing Guidelines.)

United States v. Riecke, 2006 U.S. Dist. LEXIS 57966 (N.D. Tex. Aug. 17, 2006) (unpublished). The court denied defendant's motion to dismiss a count of the indictment charging him with violating 18 U.S.C. §1001—"knowingly and willfully mak[ing] false statements in any matter within the jurisdiction of the United States government." Defendant argued that since the charges stemmed illegal asbestos releases, CAA §7413(c)(2), which criminalizes false statements in CAA matters, preempted §1001. Noting that both sections could apply to the defendant's actions, the court held that the prosecutor had discretion to charge the defendant under either section.

United States v. Rubenstein, 403 F.3d 93 (2d Cir. 2005). After jury trial, Defendants were convicted of violating, and conspiring to violate, various asbestos work-practice standards established pursuant to the CAA. On appeal, the Second Circuit affirmed both convictions, holding that there is no good faith defense to criminal liability under the CAA; the Government must only show that the Defendants knew that the material being removed was asbestos. The Court also held that even if a good faith defense existed, it would not apply to Defendants' situation given that Defendants were "sufficiently worldly" to own real estate, negotiate for removal of asbestos from that real estate, and receipt of multiple notifications regarding the dangers of asbestos and the regulations pertaining to its removal. (See also: "Selected Federal Cases Applying the Federal Sentencing Guidelines.)

United States v. Shaw, 150 F. App'x 863 (10th Cir. 2005) (unpublished). Defendant, owner and operator of an environmental consulting firm, was convicted by a jury of knowingly engaging in a scheme to falsify, conceal, or cover up the presence of asbestos at the Shallow Water Refinery, which was owned by one of Defendant's clients; Defendant was found not guilty on the CAA- and CERCLA-related counts. The district court denied the government's request for a two-level enhancement to Defendant's sentence for "more than minimal planning" under the USSG. Defendant appealed, arguing that the government may only prosecute false statements on forms required under the CAA as part of a CAA violation charge. The Tenth Circuit rejected this argument, affirming the conviction and reversing the denial of the two-level enhancement. The court held that prosecution under a general statute prohibiting false statements, rather than the CAA itself, was appropriate even for statements made on forms required by the CAA. The "Notifications of Demolition and Renovation" forms that Defendant had submitted to the government required disclosure of various matters related to the presence and demolition of asbestos, Defendant had a duty to disclose truthful information to the EPA and was therefore criminally liable under 18 U.S.C. 1001. The court also rejected Defendant's statute of limitations argument, holding that the statute of limitations began to run only at the conclusion of Defendant's entire scheme to falsify, conceal, or cover up the presence of asbestos.

United States v. USA Remediation Services, Inc., 2005 WL 906490 (W.D.N.Y. April 18, 2005) (unpublished). Defendants were charged with CAA and federal conspiracy crimes after the allegedly improper removal of asbestos from a Westinghouse facility. Remediation challenged the Report & Recommendation (R&R) of the magistrate on the grounds that the CAA does not provide adequate notice that violations of Work Practice Standards (WPS) will subject the violator to criminal liability. The District Court rejected Defendant's argument and adopted the R&R in full, noting that a 1977 amendment to the CAA expressly authorized inclusion of work practice standards, including the WPS for asbestos as codified in C.F.R. §61.145(a)(1)(I) & (c)(3), within the criminal enforcement provisions of the CAA.

United States v. Tyler Pipe Co., No. 6:05-cr-29 (E.D. Tex. Mar. 22, 2005). Defendant violated the CAA by razing a furnace and building a new one without applying for the necessary permit. As part of the plea deal, Defendant pled guilty to two felony violations of the CAA, paid a $4.5 million fine, and agreed to invest twelve million dollars in updated air emission control equipment.[2]

United States v. Motiva Enterprises, No. 1:05-cr-21 (D. Del. Mar. 17, 2005). Defendant, an oil refining and retailing company, stored spent sulfuric acid containing flammable hydrocarbons in a storage tank designed to hold only fresh sulfuric acid. Defendant also failed to conduct adequate review and engineering analysis. Ultimately the tank exploded, killing one worker, injuring eight others, and releasing sulfuric acid into the Delaware River and the air. Defendant pled guilty to violations of the CAA and CWA; as part of the plea agreement, Defendant paid a ten million dollar criminal fine.

United States v. Salvagno, 306 F. Supp. 2d 268 (N.D.N.Y. 2004). Defendants were charged with racketeering; conspiring to violate the CAA and TSCA; and violating substantive provisions of CAA and TSCA for running a fraudulent asbestos abatement service.[3] Defendants moved to have descriptions of state criminal violations stricken from the conspiracy indictments as prejudicial surplusage. The court denied the motion, stating that the state law violations were overt acts in furtherance of the conspiracies to violate CAA and TSCA.

Defendants also moved to dismiss the substantive CAA charges on the grounds that the indictment did not set forth key elements of the crime. The court noted that an indictment need only state the elements of the offense; provide notice to the defendant of what charges he must be prepared to defend; and not subject the defendant to double jeopardy. Without elaborating how the indictment conformed to the standard, the motion was denied without prejudice, subject to renewal based on the evidence presented at trial.

Lastly, defendants moved for an evidentiary hearing to exclude certain disclosures made by a co-conspirator who was cooperating with the government. Defendants alleged that the cooperating conspirator had acquired the incriminating material while he was a party to a joint defense agreement. The court denied the motion, observing that none of the divulged information "ha[d] any indicia of attorney-client privilege or work product privilege."

United States v. Peters, 349 F.3d 842 (5th Cir. 2003). Defendants were convicted of knowingly operating a defective and damaged wastewater tank in violation of the

[2] Steven P. Solow, *The State of Environmental Crime Enforcement: An Annual Survey*, ENV'T REP. (BNA), Mar. 3, 2006, at 465.

[3] The court's discussion of defendants' RICO charges is omitted from this summary.

CAA, making a false writing as to material matters within the jurisdiction of the EPA, and conspiracy to make a false writing. On appeal, defendants argued that the lower court erred by allowing the wastewater tank conviction to stand even though the government provided no evidence that Defendants did not qualify under a regulatory exception. The Fifth Circuit disagreed, holding that it was Defendants' burden to prove applicability of a regulatory exception as an affirmative defense to counts charging CAA violations.

However, the court reversed the decision and remanded the case due to an ex parte discussion between the judge and foreperson. In the ex parte discussion, the judge expressed his "hope" for a verdict, which could have impressed an obligation on the foreman to obtain a verdict. Further, the judge verbally defined "overt act" to the foreperson, which presented the danger that the foreperson may have misstated the judge's definition to his fellow jurors.

United States v. Ho, 311 F.3d 589 (5th Cir. 2002). Defendant's conviction for improperly removing asbestos-containing materials in violation of the CAA was upheld, but his sentence was vacated and remanded for being too lenient. The court rejected defendant's constitutional challenge to CAA §§7412(h) (work practice standards for handling asbestos) and 7414(a) (reporting requirements for asbestos work). Citing *Lopez* and *Morrison*,[4] the court concluded that the laws were legitimate exercises of Congress's Commerce Clause powers because asbestos removal is an intrastate commercial activity that, when aggregated, can substantially affect interstate commerce.

According to the appellate court, defendant's sentence should have been increased six levels because the district court's finding that there was no continuing release of asbestos was "clear error." Further, the district court had erred by not imposing a four-level enhancement for an "otherwise extensive" criminal organization under USSG §3B1.1(a). The appellate court held that "otherwise extensive" does not refer to the nature of the organization; it simply means that there were more than five participants.

United States v. Price, 314 F.3d 417 (9th Cir. 2002). The Ninth Circuit held that the Double Jeopardy Clause did not bar defendant's prosecution for CAA violations. Under the separate sovereign doctrine, defendant's state-imposed civil penalty did not preclude federal prosecution for the same criminal acts.

United States v. Dipentino, 242 F.3d 1090 (9th Cir. 2001). Defendants appealed their conviction for improperly removing asbestos-containing materials in violation of the CAA. Defendants argued that the district court had constructively amended the indictment by instructing the jury on a work practice standard that they were not charged

[4] United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000).

with violating in the indictment. They argued that this error violated their Fifth Amendment right to be tried only on the charges included in the grand jury's indictment. The appellate court agreed and concluded that defendants suffered prejudice and reversed the convictions and remanded the cases to the district court. The government's appeal of the sentences imposed was dismissed as moot.

United States v. Pearson, 274 F.3d 1225 (9th Cir. 2001). The court upheld the defendant's conviction under the CAA, 42 U.S.C. §§7412(f)(4) & (h) and 7413 (c)(1), for failing to properly supervise the removal of asbestos from a heating plant. The district court properly held that a "supervisor" is one who exercises significant and substantial control, rather than the employee with the highest level of authority. The government was not required to show that the defendant was included in the definition of "owner or operator" under 42 U.S.C. §7413(h); the burden was on the defendant to show he was excluded. The district court did not abuse its discretion by denying the defendant's request for an evidentiary hearing, as the defendant was afforded the opportunity to present objections to the pre-sentencing report during the sentencing hearing. The district court was also acting within its discretion when it enhanced the defendant's sentence under U.S.S.G. §2Q1.2(b)(1)(B), an increase of four levels for releasing asbestos "into the environment" and an increase of nine levels for the "likelihood of death or serious bodily injury," after drawing inferences from witness testimony. This manner of sentencing did not violate *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 2362-63 (2000). "Statutory maximum" refers to the maximum term set by Congress, not the maximum term established by the sentencing guidelines.

United States v. Weintraub, 273 F.3d 139 (2d Cir. 2001). The court upheld the conviction of the defendant for violating the CAA and for conspiring to so violate while engaged in the demolition of a building containing asbestos. The defendant was only required to have knowledge of the facts and circumstances that comprised the violation of the CAA, not specific knowledge that his conduct violated the CAA. Therefore, defendant's knowledge that the substance involved was asbestos was sufficient to warrant his conviction, regardless of whether or not he knew that the asbestos in question was of the type that would trigger the work-practice standard regulating asbestos.

In re Grand Jury Subpoena, 220 F.3d 406 (5th Cir. 2000). After the corporation (Koch Industries) produced their attorney's work product documents to a grand jury, the grand jury subpoenaed two employees from an environmental consulting firm to testify as to their communications with the corporation's attorney. The attorney moved to quash the subpoenas, and to have the documents returned to him because they represented his work product. The Fifth Circuit, in a case of first impression, had to decide whether the rule that "an innocent attorney may invoke the work product privilege even if a prima facie case of fraud or criminal activity has been made as to the client" applies to "an in-

house attorney who seeks to invoke the work product privilege in order to oppose a grand jury subpoena that his employer saw fit to waive." The court found that it lacked jurisdiction over the attorney's request to have the documents returned to him because there was no evidence that they were intended for the attorney/author's eyes alone. Although the court held that it would have had jurisdiction over the motion to quash the subpoenas (based on the reasoning of *Fine)*, because the district court did not abuse its discretion in finding that the evidence established a prima facie case of fraud or criminal activity, appellant's motion to quash was properly denied.

United States v. Bragg, 207 F.3d 394 (7th Cir. 2000). Defendants used untrained men recruited from homeless shelters to remove asbestos and were subsequently charged with several CAA violations. First, the court of appeals found that the trial court properly imposed upon all defendants a two level upward adjustment pursuant to U.S.S.G. §3A1.1(b)(1) because the crimes involved vulnerable victims (homeless men) and it was irrelevant whether the defendants targeted the men because they were vulnerable. Second, the court found that the trial court properly imposed a four level upward adjustment upon one defendant pursuant to U.S.S.G. §3B1.1(a) because of his leadership role in the conspiracy to violate the CAA. Lastly, the court found that the trial court properly imposed upon two defendants a three level upward adjustment pursuant to U.S.S.G. §3B1.1(b) because of their roles as "managers or supervisors" in the criminal activity.

United States v. Hunter, 193 F.R.D. 62, 2000 U.S. Dist. LEXIS 2048, 50 Env't Rep. Cas. (BNA) 1158 (N.D.N.Y. 2000). Defendant was convicted of seven counts of violating the CAA that stemmed from his removal of asbestos from a building. The court of appeals, citing *United States v. Itzkowitz*, No. 96-CR-786 (JG), 1998 WL 812573 (E.D.N.Y. May 13, 1998) (not reported), upheld defendant's conviction because the CAA crimes for which he was convicted were crimes of general rather than specific intent, and aiding and abetting under 18 U.S.C. §2 does not require proof of willfulness if the substantive statute does not require such proof.

In re Grand Jury Subpoena, 190 F.3d 375 (5th Cir. 1999). Corporate appellant (Koch Industries) operated a plant in Texas and was issued a subpoena by a federal grand jury to produce all documents relating to their compliance with, and reporting benzene under the CAA. In complying with this request, corporate appellant inadvertently produced the work-product of its attorney. The district court had found that the attorney-client privilege had been waived and ordered an in camera inspection of all evidence being withheld under a claim of privilege. In responding to this request, corporate appellant inadvertently attached a memorandum that they also claimed was protected by the attorney-client privilege. The appellate court determined that it did not have jurisdiction over the attorney's claim (that the materials produced were his work product

and ought to be returned to him) because the *Perlman* doctrine only created an immediately appealable order when the third party did not have any interest in the case. Here, the corporate appellants had an interest in the case.

To have jurisdiction over corporate appellant's claims the court needed to find that (1) counsel had produced the documents in direct contradiction to the wishes of his client and (2) that an immediate appeal would not impede the progress of a grand jury; or (3) the documents were stolen or seized; or (4) a disinterested third party controlled the fate of the documents disclosed. Since none of these factors were present, the court refused jurisdiction. Finally, the court determined that the best remedy for the district court's error (of not returning the in camera documents to the appellants and allowing them the opportunity to either produce them or stand in contempt) was to correct it by granting mandamus. The district court was ordered to return the documents to the appellants.

United States v. Ellis, 172 F.3d 864 (4th Cir. 1999). The defendant, owner of a ship demolition business, was convicted of removing asbestos without notifying officials under the CAA and for unpermitted discharges under the Clean Water Act. Despite the defendant's claims of improper jury instructions, ineffective counsel, and prosecutorial misconduct, the court upheld the sentence of 31 months imprisonment, three years of probation and a $50,000 fine.

United States v. Potter, 71 F. Supp.2d 543 (E.D.Va. 1999). Potter was charged with improper disposal of regulated asbestos-containing material and failure to notify the EPA of an asbestos removal project in violation of the CAA. The district court denied Potter's pretrial motion to suppress evidence gathered by the government during warrantless searches of defendant's rented storage trailer. The court found that first, the defendant lacked a legitimate expectation of privacy in the trailer, and second, the government agents reasonably believed that they had consent to conduct the searches from the person that actually *owned* the trailer.

United States v. Shurelds, 173 F.3d 430 (6th Cir. 1999) (unpublished). Defendant was sentenced to 51 months in prison, after improperly overseeing the removal of asbestos from an abandoned department store. The court denied defendant's claim that the criminal provisions in the CAA, 42 U.S.C. §§7401-7471q, were unconstitutionally vague. Appellant's preferred course of action would have been to invoke the affirmative defense available in 42 U.S.C. §7413(h) (that he was carrying out his normal activities under the direction of his employer), but this defense was unavailable on appeal. Finally, the defendant's sentence was properly enhanced under U.S.S.G. §2Q1.2(b)(1)(B) for a release of asbestos into the environment, and under

U.S.S.G. §3B1.1(c) an increase of four levels because he was an organizer or leader of a criminal activity that involved five or more persons.

United States v. Burrell, 101 F.3d 692, 44 Env't Rep. Cas. (BNA) 1284 (3d Cir. 1996) (unpublished table decision). A handyman's conviction for removing asbestos in violation of the CAA was reversed and remanded. The defendant was not a "person" for purposes of the statute. The application of U.S.S.G. §2Q1.2(b)(4) to increase the offense level for removing asbestos without a permit was not warranted. It was only the city, and not the EPA, which required defendant to have a permit for asbestos removal. Thus, there was no federal basis for applying this section of the sentencing guidelines.

United States v. Louisiana Pacific Corp., 908 F. Supp. 835 (D. Colo. 1995). The court granted in part and denied in part defendant's motion to dismiss counts of an indictment alleging violations of the monitoring and reporting requirements of the CAA. In granting a portion of the motion, the court held that reporting requirements resting only on oral communications between the Colorado Department of Health and the defendants did not become part of the state implementation plan and were thus not federally enforceable through criminal charges against the defendants for knowingly making false statements.

In order to be federally enforceable, the reporting requirements had to be part of the state implementation plan or incorporated into the defendant's EPA-issued operating permit. On the other hand, monitoring and reporting requirements imposed on defendants by the Colorado Dept. of Health pursuant to its authority under state law and its state implementation plan permitting program and the authority delegated to it by the CAA, were a legitimate basis for federal criminal charges because the state requirements were not more stringent than federal law.

United States v. Louisville Edible Oil Products, Inc., 926 F.2d 584 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 177 (1991). Louisville Edible Oil Products, a manufacturer of salad oils, was charged in a federal indictment with violating both the CAA and CERCLA. The defendant had already been subjected to large fines by a local environmental enforcement agency. It argued that these fines constituted criminal punishment for the same conduct underlying the federal indictments, and that the latter were therefore barred under the double jeopardy clause analysis of *United States v. Halper*, 490 U.S. 435 (1989), which held that a civil fine following a criminal prosecution can trigger double jeopardy protection if the fine is punitive in nature and aimed at the same conduct. The Sixth Circuit rejected this argument, holding that the local enforcement agency was not acting as a "tool" for the EPA and that therefore, local and EPA punishments for the same conduct were allowable as the actions of separate sovereigns, which are not barred by the double jeopardy clause. The court also rejected

an argument that indictment under both the CAA and CERCLA for the same conduct constituted double jeopardy because each indictment required proof of separate elements and hence represented two offenses.

Adamo Wrecking Company v. United States, 434 U.S. 275 (1978). The Supreme Court held that a criminal defendant prosecuted under the 1970 CAA was not foreclosed from challenging the U.S. Environmental Protection Agency's (EPA's) authority to promulgate work practice standards as substitutes for emissions standards for hazardous air pollutants. The Act was subsequently amended to empower EPA to promulgate work practice standards as well as emissions standards.

CERCLA

United States v. Sauseda, 596 F.3d 279 (5th Cir. 2010)**.** Defendant was convicted of aiding and abetting both the attempt to manufacture methamphetamine and the possession of a chemical to manufacture methamphetamine. *See* 18 U.S.C. §2; 21 U.S.C. §841. Defendant's sentence was enhanced under Sentencing Guideline §2D1.1(b)(10)(A)(i), which states that a base-level offense should be increased by two levels if it involved "an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance." Comment 19 of §2D1.1 states that (b)(10)(A) applies if "the conduct for which the defendant is accountable . . . involved any discharge, emission, release, transportation, treatment, storage, or disposal violation" covered by the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6928(d) or the Comprehensive Environmental Response, Compensation and Liability Act" (CERCLA), 42 U.S.C. §9603(b), or 49 U.S.C. §5124. On appeal, Defendant argued that the Government's evidence – officer testimony of a strong odor and pungent fumes coming from Defendant's residence – did not prove that he *unlawfully* released a toxic substance. The Fifth Circuit vacated the sentence, holding that "for the toxic-emission enhancement to be applicable, the Government was required to prove, by a preponderance of the evidence, that [Defendant] violated one of the listed statutes in Comment 19."

United States v. Strackbein, 344 F. App'x 994 (5th Cir. Sept. 29, 2009) (unpublished)**.** Defendant was convicted of attempted manufacture of methamphetamine and possession of a firearm in relation to a drug-trafficking crime. Defendant's sentence was enhanced under U.S.S.G. §2D1.1(b)(10)(A)(ii), which states that a base-level offense should be increased by two levels if it involved "the unlawful transportation, treatment, storage, or disposal of a hazardous waste." Defendant contended that the Government failed to prove that anhydrous ammonia was a "hazardous waste" or that Defendant's storage in propane tanks was unlawful. Comment 19 to §2D1.1 states that (b)(1)(A)

applies if the conduct involved any storage covered by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The Fifth Circuit upheld the sentence enhancement, stating that ammonia is listed in the hazardous material table of substances regulated by CERCLA, and that the presentence report provided that anhydrous ammonia was a "toxic substance" that Defendant stored in an "unapproved container." Because Defendant did not introduce evidence to rebut the report, the district court was free to adopt it and rely on its factual findings.

Goldman v. United States, No. 96-CV-344, 2000 U.S. Dist. LEXIS 15315 (N.D.N.Y. Sept. 26, 2000) (unpublished). Petitioner sought habeas corpus relief from an order of restitution entered as part of his sentence for conviction for knowingly disposing of hazardous waste without a permit in violation of RCRA and CERCLA. Petition was sentenced to a term of imprisonment and also ordered to make restitution for the damages caused by his illegal conduct. On appeal, the petitioner requested that the restitution be vacated. While a writ of error coram nobis may be used to challenge a restitution order, it is an extreme measure with its own set of requirements. Because petitioner's §2255 proceeding sought only to have the restitution of judgment vacated and did not attack the legality of his prison sentence or seek release from custody, the statutory remedy under §2255 was unavailable to petitioner. *See*, Order of restitution previously imposed by this court, *United States v. Goldman*, 1993 U.S. Dist. LEXIS 2199, 91-CR-59; the conviction was affirmed by the Second Circuit Court of Appeals, *United States v. Laughlin*, 10 F.3d 961 (2d Cir. Dec. 1, 1993).

United States v. Bestfoods, 524 U.S. 51 (1998). Applying general principles of corporate law in a civil case, the Court held that parent corporations are not liable for the actions of their subsidiary unless the parent exercises control over the operation of the violating facility or over the environmental aspects of the operation. A parent corporation may also be held liable if the corporate veil can be pierced.

United States v. Freter, 31 F.3d 783 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 646 (1994). The Ninth Circuit upheld a conviction under CERCLA explaining that the "federally permitted release" exception to the reporting requirement under 42 U.S.C. §9603(b)(3) is not an element of the crime, but rather, is an affirmative defense. Thus, to invoke the defense, the defendant must go forward with sufficient evidence to raise the exception as an issue. Only after the defendant has satisfied the burden of production must the prosecution prove the inapplicability of the defense beyond a reasonable doubt.

United States v. Gaind, 31 F.3d 73 (2d Cir. 1994). The Second Circuit upheld a conviction for conspiracy to submit false statements to the EPA regarding a Superfund

site, rejecting defendant's "plain error" appeal claiming a miscarriage of justice because the prosecutor had repeatedly asked the defendant if employees whose testimony contradicted with the defendant's were "mistaken." The court distinguished between asking a witness whether a previous witness who gave conflicting testimony was mistaken" and asking whether the previous witness was "lying" which requires the current witness to condemn the prior witness as a purveyor of a deliberate falsehood. The court also explained that testimony regarding "truth-telling" provisions in cooperation or nonprosecution agreements with government witnesses are admissible after the credibility of the witness has been challenged. This includes testimony on direct examination if the defense's opening statement challenges the witness' credibility.

United States v. Buckley, 934 F.2d 84 (6th Cir. 1991). Defendant failed to convince the Sixth Circuit to overturn his conviction before a District Court for violations of CAA and CERCLA provisions concerning the release of asbestos. The Sixth Circuit found that to support a conviction under CERCLA, the defendant only had to know of the release of more than one pound of asbestos; he did not have to know of the notification requirement under CERCLA or of the legal status of asbestos. Similarly, under the CAA, the court found the government had to prove defendant's knowledge of the emissions themselves, but not knowledge of the statute or of the hazards that the emissions pose.

United States v. Bogas, 920 F.2d 363 (6th Cir. 1990). The Court of Appeals remanded for resentencing after concluding that the District Court erred when it failed to increase the defendant's Sentencing Guidelines offense level for a "release of a hazardous substance into the environment" and for causing a "cleanup requiring a substantial expenditure." The Court of Appeals found substantial evidence to support both factors.

United States v. Carr, 880 F.2d 1550 (2d Cir. 1989). Affirming the CERCLA conviction of a civilian maintenance foreman at a military installation, the Court of Appeals held that the Act's requirements for persons "in charge of a facility" apply to low-level employees who are in a position to detect, prevent, or abate the release of a hazardous substance into the environment.

United States v. Greer, 850 F.2d 1447 (11th Cir. 1989). Overturning the District Court's order granting judgment of acquittal for the defendant, the Court of Appeals held that the evidence adduced at trial was sufficient to convict the defendant for unlawful disposal of a hazardous waste and failure to report such disposal under CERCLA.

FIFRA

United States v. White, 766 F. Supp. 873 (E.D. Wa. 1991). A federal district court held that a corporate officer may not be held criminally liable under RCRA or FIFRA solely because his employees acted illegally. The court concluded that an oversight position alone, without actual knowledge of the acts, could not support a conviction for the knowing violation of either law.

United States v. Orkin Exterminating Co., Inc., 688 F. Supp. 223 (W.D. Va. 1988). FIFRA's delegation of enforcement authority to qualified States did not divest the Attorney General of his authority to bring criminal charges under the Act against an exterminator who caused the deaths of two customers.

United States v. Corbin Farm Service, 444 F. Supp. 510 (E.D. Ca. 1978) *aff'd*, 578 F.2d 259 (9th Cir. 1978). The Defendant was charged with unlawfully using a pesticide in a manner inconsistent with its label that warned against use on fields where waterfowl are "known to repeatedly feed." Rejecting the defendant's void-for-vagueness attack on the statute, the court held that conviction under FIFRA could be maintained upon a showing of general rather than specific intent.

THE CLEAN WATER ACT

United States v. Pruett, No. 11-30572, 2012 U.S. App. LEXIS 9769 (5th Cir. 2012). Defendants owned and operated twenty-eight wastewater treatment facilities in northern Louisiana. Though NPDES permits for the effluent discharges at these wastewater treatment facilities were obtained, Defendant failed to collect samples from these facilities; regularly submit test results; or keep records of discharges. Defendants' alleged activities violated 33 U.S.C. §§1311(a), 1342, and 1319(c)(2)(A) of the CWA.

Though Defendants conceded that the Government presented sufficient evidence proving that violations of the CWA occurred, Defendants argued that the Government did not present sufficient evidence to prove intent. The Government relied on *United States. v. Aggarwal*, 17 F.3d 737, 740 (5th Cir. 1994), which says "[t]he intent necessary to support a conviction can be demonstrated by direct or circumstantial evidence that allows an inference of unlawful intent, and not every hypothesis of innocence need be excluded." The court found sufficient evidence to prove Defendant had knowingly violated the CWA. With regard to the effluent and records violations, the Government further relied on *United States v. Greuling*, No. 95-50705, 1996 WL 460109 (5th Cir. 1996), to argue Defendant's similar knowledge of the industry and his experience in the

field was sufficient to satisfy intent requirements. Defendant had worked in the industry since 1986 and was very familiar with permitting and record-keeping requirements.

United States v. Tuma et al., No. 5:11-cr-00031-TS (W.D. La. Mar. 22, 2012). Defendant was convicted by a jury in the Western District of Louisiana of three counts of CWA felony violations related to the discharge of wastewater into the Red River and into the POTW in Shreveport. He was also found guilty of obstruction of justice and conspiracy in relation to his obstruction of an EPA inspection by inventing an equipment malfunction in order to prevent the EPA agent from collecting effluent samples.

United States v. Vierstra, 803 F. Supp. 2d 1166 (D. Idaho 2011). Defendant was charged with three counts of negligently violating the CWA for discharging process wastewater from a concentrated animal feeding operation into a local canal in Idaho. Defendant moved for dismissal, arguing that the man-made canal was not within the CWA's jurisdiction. The Court disagreed, ruling that the canal was a "water of the United States" under the CWA, and that "federal CWA jurisdiction attaches, whether the channel is carrying water or dry." Relying on *Rapanos v. United States*, 547 U.S. 715 (2006), the court determined the canal met both the "relatively permanent" and "significant nexus" standards to be considered a water of the United States because it was a tributary that connected to the Snake River, a navigable water. The court noted the "seasonal, [] recurring, regular, perennial, and substantial" nature of the river's flow to determine that is was "relatively permanent" within the *Rapanos* definition.

Defendant also argued that discharges into a dry creek bed were not violations of the CWA because there was no evidence that the pollutants were carried downstream because the creek bed was dry. The court rejected Defendant's argument, holding that the creek bed was a "water of the United States" and therefore within the purview of the CWA.

United States v. United Water Envtl. Servs., No. 2:10-cv-217, 2011 WL 3751301 (N.D. Ind. Aug.24, 2011). Defendants were charged with twenty-six counts of violations of the Clean Water Act (CWA), including conspiracy to defraud the Government by hampering the functions of EPA. Defendants were also charged with violating the CWA for tampering with a monitoring method required by the CWA.

Defendants moved to dismiss the case against them, arguing the indictment was insufficient because the acts it charged were not illegal. Defendants argued that "because, as the parties agree, it is not a crime to raise the level of chlorine added to the effluent and it is not a crime to take a grab sample, it cannot be a crime to raise the chlorine before taking the sample and lower it afterward unless it is alleged that the conduct was undertaken with consciousness of wrongdoing, in furtherance of, or to

conceal other violations." The court denied the motion, determining that the question of whether or not Defendants actually tampered with the monitoring method was a question of fact that the jury had to decide.

United States v. Agosto-Vega, 617 F.3d 541 (1st Cir. 2010). Defendants Agosto and his brother used their employees and a truck registered to their car dealership to drain raw sewage from a housing development and empty it into storm drains leading to a nearby creek basin. Defendants were convicted of conspiracy to violate the Clean Water Act (CWA) and for aiding and abetting the discharge of raw sewage into United States waters. *See* 33 U.S.C. §1311 and §1319(c)(2)(A). On appeal of their convictions, Defendants argued that the public, namely their family members, should have been allowed into the courtroom during jury selection and that their Sixth Amendment rights to a public trial had been denied. The court agreed that under *Presley v. Georgia*, 131 S. Ct. 721 (2010), the public should have been admitted. The court therefore vacated the convictions and granted the motion for a new trial.

Defendant Agosto also challenged the sufficiency of the evidence for his conviction under the CWA, arguing that the Government had not proven he knew of the discharges made by truck. The court disagreed and held that the circumstantial evidence sufficient supported a finding of a knowing violation. The court reasoned that as Agosto was an experienced businessman who had instructed employees to take care of the sewage problem and provided them with a truck and as several eye witnesses had seen the truck dumping sewage into the drains, a jury could reasonably find that Agosto knew of the truck's activities. Defendants also argued that the Government had failed to prove that the creek was "a water of the United States" under the CWA, but the court held that the Government had shown that the creek was significantly connected to other bodies of water, meeting the standards in *Rapanos v. United States*, 547 U.S. 715 (2006).

United States v. Panyard, 403 F. App'x 17 (6th Cir. 2010) (unpublished). Defendant was convicted of violating the Clean Water Act (CWA) and appealed the district court's denial of his motion for acquittal. The Sixth Circuit affirmed the denial of acquittal, agreeing with the district court that the federal government has jurisdiction to prosecute for knowingly violating pretreatment requirements in permits issued by the state under the CWA. The court stated that the CWA plainly incorporates state permit requirements in making it a federal crime to "knowingly violate [] . . . any permit condition or limitation" in a permit under §1342, which authorizes states to issue discharge permits. 33 U.S.C. §1319(c)(2)(A). The court also found the evidence produced by the Government sufficient for a jury to convict for knowingly rendering a monitoring method inaccurate: the Government presented evidence that Defendant ordered tanks full of wastewater to be filled with water from a fire hydrant when inspectors came to the site to take samples. In addition, the court rejected Defendant's argument that the Government could not prosecute him for falsifying discharge logs required by the state, again because the CWA makes violations of state permit

requirements a federal crime. The court also found sufficient evidence for the conviction for falsifying the logs based on the testimony of an employee and found that the false logs were material in influencing local inspectors because inspectors testified that they reviewed the logs as part of making enforcement decisions.

United States v. DHS, Inc., No. 09-00242-KD-C, 2010 WL 4053537 (S.D. Ala. Oct. 14, 2010) and *United States v. DHS, Inc.*, No. 09-00242-KD-C, 2010 WL 4053043 (S. D. Ala. Oct. 14, 2010). Defendant DHS Inc. was convicted of knowing violations of the Clean Water Act (CWA) and of mail fraud and filed a motion for a new trial based on the court's answer to a jury question. At the same trial, Defendant Gregory Smith was convicted of negligent violation of the CWA and moved separately for a new trial based on a jury instruction. Defendant DHS Inc. argued that the court gave an incorrect instruction to the jury on corporate liability and then incorrectly answered a jury question by not addressing scope of employment. The court denied the motion for a new trial, finding that the weight of the evidence supported the convictions and that the jury instruction and answer were not grounds for a new trial. Defendant Smith argued that the court failed to give the jury an instruction on criminal negligence using the Model Penal Code definition and only instructed the jury on simple negligence. The court found this argument to be without merit and denied the motion for a new trial.

United States v. Wrigley, No. 04CR60 LG-JMR, 2010 WL 2802161 (S. D. Miss. July 14, 2010), *subsequent history for* United States v. Lucas, *supra*. Defendants filed motions under 28 U.S.C. §2255 for review of their sentence calculations. Defendants contended that the loss calculation to victims should be recalculated after the decisions in *United States v. Goss*, 549 F.3d 1013 (5th Cir. 2008) and *United States v. Klein*, 543 F.3d 206 (5th Cir. 2008), and that the intended loss calculation should be reduced by the fair market value of the property under USSG §2B1.1, app. n.3(D) and USSG §2F.1, app. n.8(a). The court denied the motions because motions under §2255 must raise constitutional mistakes, not arguments that the Sentencing Guidelines were misapplied. The court went on to note that *Goss* and *Klein* were factually distinguishable and would not have changed the court's calculation of the sentences.

United States v. House of Raeford Farms, Inc., No. 1:09-cr-395, 2010 U.S. Dist. LEXIS 52566 (M.D.N.C. May 27, 2010). Defendants, owners and operators of a poultry processing plant, were charged in a superseding indictment with 14 counts of knowing violations of the Federal Water Pollution Control Act (or the CWA), pursuant to 33 U.S.C. §1319(c)(2)(A). The indictment alleged that Defendants routinely allowed thousands of gallons of untreated water to overflow to its flow equalization basin. The indictment also alleged that Defendants discharged untreated water directly into the sewer to prevent the basin from overflowing. The court denied Defendants' motion to dismiss, holding, inter alia, that Congress clearly intended to regulate pollutant discharges

into sewer systems and had the constitutional authority to do so. The court also denied Defendants' double jeopardy claim, holding that although the city already punished defendants with criminal fines, under the dual sovereigns doctrine, separate sovereigns may prosecute the same crime without violating the Constitution's Double Jeopardy Clause.

United States v. DHS, Inc., No.1:09-cr-242-WS, 2010 U.S. Dist. LEXIS 48407 (S.D. Ala. May 14, 2010)**.** The Government filed an amended motion in limine seeking exclusion of evidence and argument that Defendant's alleged illegal grease dumping did not harm the environment or the Mobile Area Water and Sewer System (MAWSS). The Government argued that evidence of harm – including in the form of obstruction to its system or interference with its treatment process and operations – was not an element of any prosecution, and therefore, evidence of the absence of harm was irrelevant. Defendant argued that it would defend against a charge for violation of 40 C.F.R. §403.5(b)(3) (also a violation of 33 U.S.C. §1319(c)(2)(A)) by attempting to show that the amount introduced into the system did not obstruct water flow or that, if it did, it did not cause or contribute to a disruption of the system resulting in a statutory, regulatory, or permit violation. Defendant also argued that evidence that the amount of grease actually introduced did not obstruct the water was also relevant to whether the Defendant conspired to introduce that amount. The court, agreeing with the Defendant's arguments, denied the Government's motion in that regard.

United States v. Barron, No. CR-09-043-N-BLW, 2010 U.S. Dist. LEXIS 28048 (D. Idaho Mar. 24, 2010). The Government filed a motion in limine requesting that the court exclude evidence and argument that the Defendant received any approvals by any federal, state, or local agency without specific authority to issue permits for the discharge of dredge or fill materials under the Clean Water Act. The court denied the motions, holding that it needed more explanation from the Government as to why it wanted to exclude the evidence.

United States v. Holden, 557 F.3d 698 (6th Cir. 2009). Defendants operated a wastewater treatment facility according to a discharge permit issued by the Tennessee Department of Environment and Conservation (TDEC), pursuant to EPA authorization. The permit imposed strict limits on the amount of pollutants the facility could discharge. When the reported levels of the plant's pollutant outflow did not vary according to its inflow, the TDEC and EPA performed an audit of the plant, which revealed great disparities between the plant's reports and the levels of fecal coliform in the outflow. Defendants were convicted in the U.S. District court for the Middle District of Tennessee of knowingly falsifying and concealing facts from the EPA through false reporting, and of falsifying documents with intent to impede an EPA investigation of possible violations of the Clean Water Act.

The issues on appeal were mainly evidentiary. The court ruled evidence regarding prior evaluations of the facility when the evaluator discovered similarly incomplete and implausible data was also admissible. To satisfy the elements of falsifying and concealing facts in a matter within EPA jurisdiction, a representation must be factual, false or fraudulent, material, made knowingly and willfully by the defendant, and pertain to an activity within the jurisdiction of a federal agency. The appellate court determined the evidence in this case was sufficient to demonstrate those five elements, and therefore affirmed the conviction.

United States v. Hagerman, 555 F.3d 553 (7th Cir. 2009). Defendants Derrik Hagerman and his corporation Wabash Environmental Technologies (WET) operated an industrial wastewater treatment facility. WET had a permit to release treated wastewater into the Wabash River. The permit required WET to periodically test wastewater samples to ensure compliance with the pollutant limitations and to provide monthly reports to the state. Defendants were convicted on ten counts of making materially false statements in the reports filed under the Clean Water Act. The judge sentenced Hagerman to 60 months in prison, and both WET and Hagerman to pay restitution to the EPA for the expense of cleaning up the pollution they caused. Defendants appealed the conviction, and Hagerman also challenged his prison sentence as unreasonably long. On appeal, Defendants challenged the admissibility of electronic spreadsheets recording test results as evidence of prior bad acts. The court rejected this argument because the spreadsheets found in Hagerman's office were highly relevant to disproving Hagerman's assertion that he never received the test results reported in the spreadsheets. Defendants further contended that the regulations did not define the testing methods, and therefore the jury instructions about using EPA-approved testing methods were incorrect. The court rejected this argument as well, reasoning that the language in the corporation's discharge permit required reporting of test results using the methods approved in EPA regulations. The appellate court affirmed the district court's judgment, including the sentencing.

Affirming the Sentencing Guidelines section—2007 WL 4616923 (S.D. Ind. Dec. 28, 2007); 525 F. Supp. 2d 1058 (S.D. Ind. 2007)

United States v. Washington Metropolitan Area Transit Authority, No. RWT-09-557, 2009 U.S. Dist. LEXIS 107481 (D. Md. Nov. 9, 2009) (unpublished). The Government filed a criminal complaint against Defendant for violation of the Clean Water Act. *See* 33 U.S.C. §§1317(d), 1319(c)(1)(A). The file was sealed without a court order. The court directed the clerk to advise the Government that a motion should be filed for the file to remain under seal. The Government filed a motion to seal the entire file, noting it was "at the request of the Defendant" and the basis for it was "avoiding unnecessary publicity prior to the date of the plea hearing." The court denied the motion, stating that the Defendant was a public agency, and that sealing the case file could not be supported in this matter. The court noted that the typical reason for sealing a file is that public access might interfere with an arrest of a defendant, a reason not applicable to this case.

United States v. Comprehensive Envtl. Solutions, Inc., 2009 U.S. Dist. LEXIS 54921 (E.D. Mich. June 29, 2009) (unpublished). Defendant CESI operates an industrial waste treatment, storage and disposal facility under a permit from the Detroit Water and Sewerage Department (DSWD). The permit requires a multi-step process for treatment of liquid wastes. On June 17, 2002, federal law enforcement agents raided the facility suspecting the illegal dumping of millions of gallons of untreated industrial liquid into the sewers. The four employees who were arrested pled guilty or were convicted by a jury of multiple violations of the Clean Water Act. On July 12, 2007, a grand jury then indicted CESI with Clean Water Act violations, making false statements, and obstruction of justice, and multiple related counts. On September 4, 2008, CESI signed a plea agreement with the Government which would result in five years probation, community service, and a significant financial penalty. The court sentenced Defendant CESI in accordance with the Plea Agreement, and allowed the Government to file a judgment lien against Defendant's property because of CESI's financially uncertain condition.

United States v. Panyard, 2009 WL 37377 (E.D. Mich. Jan. 7, 2009) (unpublished). Defendant Michael Panyard was an employee of an industrial waste treatment and disposal center that did not comply with pre-treatment regulations. Defendant had other employees dilute or replace the facility's wastewater discharge stream to give a false impression of compliance. On October 21, 2008, Defendant was convicted of violating the Clean Water Act by tampering with a sampling device, bypassing pretreatment requirements, rendering monitoring devices inaccurate, making false statements, and conspiracy. Defendant filed a motion for judgment of acquittal, contending the federal government lacked jurisdiction and failed to provide sufficient evidence. The court denied the motion because the Clean Water Act specifically preserves federal authority over violations of any requirement imposed in a pretreatment program. In addition, the court found the evidence was sufficient to support the conviction particularly because of the testimony of two employees stating that whenever agency officials visited the site, Defendant instructed them to fill the tanks to be tested with water from a nearby fire hydrant as a substitute waste stream.

On April 23, 2009, Defendant was sentenced to 15 months detention. The court had found Defendant's sentencing Guideline range to be 27 to 33 months based on a Total Offense Level of 18 and a Criminal History Category of 1, but lowered the sentence because of his personal characteristics and low risk of recidivism. *United States v. Panyard*, 2009 WL 1099257 (E.D. Mich. Apr. 23, 2009).

United States v. Spain, 591 F. Supp. 2d 970 (N.D. Ill. 2008). Defendant James Spain owned and operated Crown Chemical, which produces various cleaning chemicals. Spain pled guilty to discharging industrial wastewater with abnormally high or low pH levels into the sewer system in violation of the Clean Water Act. The parties agreed the

2007 Sentencing Guidelines are controlling but disagreed as to which section should apply in this case. In determining which section, the Defendant argued that the court should only look to the facts in the indictment and plea agreement. The Government, however, argued the court should also consider Defendant's relevant conduct. Therefore, Defendant proposed using U.S.S.G. §2Q1.3, which applies to the mishandling of environmental pollutants and has a base level of six. The Government contended the court should use §2Q1.2, which applies to the mishandling of hazardous or toxic substances and has a base level of eight. The Government based that analysis on EPA surveillance which revealed the wastewater discharges were below 2.0pH and above 12.5 pH, and therefore constituting hazardous waste. The plea agreement and indictment, however, gave no indication of hazardous waste being involved.

The court reasoned that the general rule is to determine the base offense level according to the "offense of conviction," which is generally the offense pled to or charged in the indictment. Regarding plea agreements, any fact stipulated to may also be considered as long as the defendant agrees to the fact or pleads guilty accordingly. The court declined to look to relevant conduct in determining which section of the Guidelines to apply, but reasoned relevant conduct may be considered in determining the applicable range within the appropriate Guideline section. Therefore, the court held that in determining which Guideline section to use, only the facts in the indictment and plea agreement would be considered. Because Spain was not indicted for and did not plead to discharging hazardous waste, the court determined §2Q1.3 was the applicable section and assigned Spain a base offense level of six.

The Government further contended that a six-level increase should apply. The court determined that an increase under §2Q1.3(b)(1) was warranted because of the long duration of repetitive discharge of pollutants into the environment. Noting a distinction between environmental contamination and environmental harm, however, the court ordered a decrease of two levels because no actual harm occurred. Thus, the court increased Spain's offense level by four levels instead of six. Relying on *United States v. Chau,* the court ruled against a further increase under §2Q1.3(b)(4) for permit violations because Spain's permit was not enforceable under the CWA. *Citing United States v. Chau*, 293 F.3d 96 (3d Cir. 2002). Therefore, the court concluded that Spain's base level offense was six under U.S.S.G. §2Q1.3, with an increase of four under §2Q1.3(b)(1). The recommended sentencing range under the Guidelines was 10-16 months.

United States v. Robison, 521 F.3d 1319 (11th Cir. 2008); 521 F. Supp. 2d 1247 (N.D. Ala. 2007); 505 F.3d 1208 (11th Cir. 2008). The Eleventh Circuit reversed the convictions of the defendants for violations of the CWA. The court held that under *Rapanos* the jury was not properly instructed at the trial court level. The court found that the narrowest reading of *Rapanos* should apply, which would be Kennedy's "significant nexus" test. Since "significant nexus" was not mentioned to the jury, this was erroneous. Two judges dissented from denial on a request for rehearing en banc, arguing that reading *Rapanos* for the narrowest decision was inappropriate, since the opinions were not reconcilable and instead set forth two different criteria. Furthermore, even if the

"significant nexus" test was applied, the dissenters felt it was harmless error. The trial judge to whom the case was remanded wrote an opinion explaining why he was redirecting the case to another judge. He questioned whether Kennedy's ruling in *Rapanos* was controlling, whether the "narrowest" reading test was applicable, and whether the double jeopardy clause barred another trial.

United States v. Ursitti, 543 F. Supp. 2d 971 (C.D. Ill. 2008). The issue in this case was whether the government's amended information related back to the original information, or whether it did not, causing the action to be barred by the statute of limitations. The government charged the defendant with three counts of negligently violating the CWA in an information. The government amended the information, after the statute of limitations had run, to delete the words "aided and abetted", as those words inaccurately suggested a knowing violation when the charges were for negligence. A statutory citation was also removed. The defendant argued that with the words "aided and abetted" included, there was no such crime as the one alleged, and the amended information could not relate back to a nullity. The court held that the information did relate back, because the words "aided and abetted" were mere surplusage that did not affect the sufficiency of the information to charge the defendant. Furthermore, the court held that a citation's omission is not grounds to dismiss an indictment.

United States v. Lucas, 516 F.3d 316 (5th Cir. 2008), *cert. denied*, 129 S.Ct. 116 (2008). The defendants sold house lots and designed septic systems on wetlands, but represented the lots as dry. The systems failed, causing waste discharges, and the government charged the defendants with CWA violations. The defendants appealed the jury conviction. The defendants first contended that the property was not subject to the CWA, and that the jury instructions could have incorrectly lead the jury to believe that they could find the defendants guilty even if there was no significant nexus. The court found that the jury instructions clearly stated this element of the crime. The defendants further contended that the evidence was insufficient for the jury to conclude that the CWA had jurisdiction, as the wetland was not a "water of the United States". The court disagreed, holding that the evidence presented at trial was sufficient under any of the three *Rapanos* standards. Lastly, the defendants contended that CWA jurisdiction as applied to wetlands was constitutionally vague. However, the evidence presented showed that men of common intelligence would have been alert to the possibility that the lands were wetlands, and the agency warned the defendants also. The defendants argued that the indictment was insufficient, because the regulation excludes septic tanks which are not point sources or treatment works, but the court held that the septic systems were point sources, and thus the indictment was sufficient. The defendants further contended that the trial court's denial of acquittal was unconstitutional. The trial court initially ruled for an acquittal but changed this decision prior to any further proceedings, and as such it was not a final judgment. Therefore, the court held that double jeopardy did not apply.

United States v. Cota, 2008 U.S. Dist. LEXIS 85199 (N.D. Cal. Oct. 7, 2008) (unpublished). Defendant moved to transfer the case to the Eastern District of California because of the allegedly prejudicial publicity about the oil spill in the San Francisco Bay area newspapers. The court denied Defendant's motion for change of venue, holding the publicity was mostly factual, not editorial, and was not inflammatory enough to justify transfer in venue. The court, however, granted Defendant's motion for special jury selection procedures. The court denied Defendant's motion to sever the charges from those pending against co-defendant Fleet Management, Inc. , 2009 WL 412976 (N.D. Cal. Feb. 17, 2009) (unpublished). On December 29, 2008, co-defendant Fleet Management filed a subpoena *decus tecum* for documents from the California Board of Pilot Commissioners along with two other entities in accordance with Federal Rule of Criminal Procedure 17. The state of California moved to quash the subpoena, and Defendant Cota joined the motion. The court granted California's motion because establishing another proximate cause of the collision, which was the reason Fleet sought the documents, was not a viable theory for Fleet's defense and therefore was irrelevant.

United States v. Rosenblum, 2008 U.S. Dist. LEXIS 67280, 68 Env't Rep. Cases (BNA) 1580 (D. Minn. Aug. 29, 2008). Defendant Keith Rosenblum is President and Chief Executive Officer of a metal finishing business (Eco), and Defendant Martin Meister was the plant manager. A jury convicted Rosenblum of one count of conspiracy to defraud the United states, two counts of violating discharge permit conditions by failing to make required notifications, and ten counts of negligent violation of the Clean Water Act (CWA). Meister was convicted of eight counts of negligent violation of the CWA. Both defendants filed separate motions for judgment of acquittal or for a new trial based on insufficient evidence. The court denied the motions for both defendants, reasoning there was sufficient evidence to allow a reasonable jury to convict them. In regard to Rosenblum, the court reasoned that internal Eco documents and employee testimony showed that Eco changed wastewater discharge while being monitored by the Metropolitan Council Environmental Services (MCES); that before and after testing Eco had cyanide levels in excess of Eco's permit; and that Rosenblum was aware of violations and even reprimanded an employee for reporting an increase in cyanide levels to MCES. Such knowing failure to report discharge violations is the very conduct the CWA prohibits. With regard to Defendant Meister, the court looked to employee testimony of conversations demonstrating Meister's knowledge of pollutant discharge violations and of failing to report such violations.

United States v. Cota, 2008 U.S. Dist. LEXIS 65911, 67 Env't Rep. Cases (BNA) 2010 (N.D. Cal. July 21, 2008). Defendant John J. Cota was piloting the container ship called *Cosco Busan* on November 7, 2007 when it struck a tower of the Bay Bridge and discharged over 50,000 gallons of heavy fuel oil into the water. The government charged Defendant with negligently operating the ship, negligently discharging the fuel oil through failing to take actions to avoid the collision, and causing the death of migratory birds resulting from the discharge. On April 22, 2008, a grand jury indicted Defendant

for two counts of making false statements on a Coast Guard form, one count of discharging oil into navigable waters in violation of the Clean Water Act (CWA), and one count of violating the Migratory Bird Treaty Act. The manager of the vessel, Fleet Management Inc. was named as a co-defendant.

Defendant moved to sever the false statement counts from the other counts. The court granted the motion to sever because the counts were not similar enough to permit joinder. Defendant also moved to dismiss the Clean Water Act count because he was facing criminal liability under a public welfare statute without a finding of *mens rea*. The court denied Defendant's motion. Citing *Staples v. United States*, the court found that he should have been aware of the "potentially harmful or injurious item" under his control, and that Congress intended criminal penalties for persons acting with ordinary negligence in violating the CWA. 511 U.S. 600, 607 (1994). The court also refused to dismiss the false statement counts on a jurisdictional basis because defendant held a federal pilot's license and was subject to federal examination requirements, which therefore gave the Coast Guard authority to request the forms.

United States v. Hanson, 2008 U.S. Dist. LEXIS 26351 (D. Minn. Mar. 31, 2008) (unpublished). The defendant was convicted in 2004 of multiple violations of the CWA and was serving his one year term of supervised release. He brought a pro se motion to vacate, set aside, or correct his sentence under 28 U.S.C. §2255, claiming that two key government witnesses committed perjury. The defendant failed to directly appeal the issue, and this is generally a procedural default that bars the defendant from raising the issue in a §2255 motion. To be excused from this procedural default rule, the defendant must show both a cause to excuse the default and actual prejudice from the alleged errors. The defendant claimed that attorney error was his cause for not raising the issue on direct appeal. In order to have attorney error be the justification for this claim, the performance must have been constitutionally ineffective. Since Hanson could not show that his counsel's performance was below an objective standard of reasonableness, he could not show cause and thus procedurally defaulted.

United States v. Rosenblum, 2008 WL 582356 (D. Minn. Mar. 3, 2008) (unpublished); 2008 WL 608297 (D. Minn. Jan. 16, 2008) (not reported); 2008 WL 4969140 (D. Minn. Dec. 21, 2007) (not reported). The defendants were the owner and manager of a metal finishing business and were charged with failing to comply with their NPDES permit. The defendants not only failed to contact the state environmental service when pollutants went over acceptable amounts, but also shut down the cyanide system on the days the state service came to the plant. The first defendant filed a motion to suppress evidence, arguing that the government directed witnesses not to speak with defense counsel. However, the court denied this motion as the defendant failed to produce any evidence in support of this claim. The defendant further argued that the government was in possession of documents protected by attorney client privilege. The court recognized that the privilege can be waived, and by not asserting the privilege, by turning the

documents over to the government, the defendant in this case had waived it. The same defendant argued that his constitutional due process rights were infringed because the government failed to apprise him of the criminal nature of the investigation. The court found that the correct analysis was under *Grunewald*, and the defendant in this case could not show that he was prejudiced, even if the government had concealed the fact of its criminal investigation. The magistrate judge denied the defendant's motion to dismiss for lack of subject matter jurisdiction, which the district judge affirmed, but through a different analysis. Instead of examining the POTW under the *Rapanos* "significant nexus" test, the correct analysis was in the separate statutory provision for POTWs under the CWA. Since the regulation of POTWs is reasonably related to Congress's authority to protect interstate waterways, the regulation is within Congress's authority under the Commerce Clause, and the motion to dismiss was denied. The second defendant argued that certain statements he gave should be suppressed, as he was under de facto arrest at the time and should have been given Miranda warnings. The court found that under the totality of the circumstances, the defendant was not arrested and a reasonable person would have felt free to leave, so Miranda warnings were unnecessary.

United States v. Moses, 496 F.3d 984 (9th Cir. 2007). The defendant rerouted and reshaped the flow of three rivers without a permit, although he was consistently warned by the government against this activity. He was convicted for violating the CWA, and appealed. His arguments on appeal were that the river was seasonal, so it was not a water of the United States. Since much of his reconstruction involved moving the earth when the water was not flowing, he argued this was not the discharge of pollutants. The court held that even an intermittent waterway was one of the United States, and the fact that the pollutants were discharged when the river was dry was immaterial. The court noted that this analysis was in agreement with Kennedy's plurality opinion in *Rapanos*, an opinion the court found to be the controlling rule of law. The court also found the defendant's characterization of his massive reconstructive work as an "incidental fallback" to be ludicrous. The defendant's conviction was affirmed.

United States v. Cooper, 482 F.3d 658 (4th Cir. 2007). The appeals court upheld defendant's conviction for discharging partially treated human waste into a stream without a permit. The trial court had not erred when it allowed evidence of defendant's three-hundred Virginia Department of Environmental Quality violations to be introduced. The evidence proved that defendant knew the discharges were occurring and was therefore admissible under Fed. R. Evid. 404(b).

Likewise, the trial court had not erred when it denied defendant's motion for acquittal for lack of evidence. The government did not have to present evidence proving that defendant knew that the stream was a "water of the United States." The stream's status as a "water of the United States" is the threshold for federal jurisdiction, and mens rea requirements do not apply to jurisdictional elements of an offense.

United States v. Opare-Addo, 486 F.3d 414 (8th Cir. 2007). Defendant was convicted on nine of ten counts for dumping untreated industrial waste into a sewer. Although the jury's verdict of acquittal on one count makes the verdict appear inconsistent, the appellate court will not inquire into the thought processes of the jury members; the sole inquiry is whether the evidence supports the convictions. Because the evidence supported the conclusion that the defendant was actively involved in directing discharges and had taken steps to prevent discovery of them, the convictions were upheld.

United States v. Lippold, 2007 U.S. Dist. LEXIS 80513, 66 Env't Rep. Cases (BNA) 1832 (C.D. Ill. Oct. 31, 2007). The defendant was indicted for violating the CWA, as the defendant had illegally dumped boron contaminated water into streams. The defendant filed a motion to dismiss, arguing that the terms in the CWA, "waters of the United States" and "pollutant", were so vague that they violated the Due Process Clause of the Fifth Amendment. The court examined the vagueness on an as-applied basis. The court found that where there are judicial explanations of prohibited conduct, a court must reject a void for vagueness challenge. The term "waters of the United States" has been sufficiently interpreted judicially, to at the very least include permanently flowing streams, and under Seventh Circuit analysis, include intermittent waters as well. Even following Justice Kennedy's plurality opinion in *Rapanos*, as long as the government could establish that the streams the defendant polluted possessed a significant nexus to the main river, a conviction would not violate due process. Courts have also held that groundwater contaminated by industrial waste constitutes a "pollutant" under the CWA. The defendant's motion to dismiss was denied.

Rapanos v. United States, 547 US 715 (2006). Defendant had been convicted of backfilling a fifty-four acre wetland without a dredge and fill permit. The land, which contained "sometimes saturated soil," was connected to permanent bodies of water via manmade drains and ditches. A four-justice plurality of the Court interpreted the CWA's definition of "waters of the United States," announcing a two-part test for determining whether a wetland is "waters." First, the wetland must contain relatively permanent standing or flowing of water. Second, the water must have a continuous surface connection to a navigable waterway. The case was remanded to determine whether defendant's land satisfied the definition of "waters."

Justice Kennedy concurred in the judgment but not in the plurality's opinion, arguing for a "significant nexus" test. In order for the Army Corps of Engineers to exercise jurisdiction over a wetland, it must be proven that the wetland "significantly affect[s] the chemical, physical, and biological integrity of other waters more readily understood as 'navigable.'" For example, a wetland may have a "significant nexus" to a

nearby navigable-in-fact waterway due to "pollutant filtering, flood control, and runoff storage."

United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006). Defendant's conviction for discharging dredge material without a permit was remanded to the Seventh Circuit in light of the *Rapanos* decision, *supra*. The court explained that Justice Kennedy's concurring opinion in *Rapanos* provided the "narrowest ground to which a majority of Justices would have assented if forced to choose." The case was remanded back to the district court with instruction to follow Justice Kennedy's concurrence in *Rapanos*.

United States v. Hubenka, 438 F.35 1026 (10th Cir. 2006). The Tenth Circuit court declined defendant's invitation to join the Fifth Circuit in questioning the constitutionality the Army Corps of Engineer's exercise of jurisdiction over non-navigable tributaries that are not adjacent to navigable waters.[5] Instead, the court sided with the Sixth and Fourth Circuits in affording *Chevron* deference to the Corps' assertion of jurisdiction over remote tributaries of navigable waterways. Accordingly, the court held that defendant was properly convicted of violating the CWA for using a bulldozer to build dikes in a non-navigable stream without a dredge and fill permit.

United States v. Lippold, 2006 U.S. Dist. LEXIS 46915, 63 Env't Rep. Cases (BNA) 1364 (C.D. Ill. July 11, 2006). Defendant sought to exclude evidence under Fed. R. Evid. 404(b) of his failure to remove waste ash from a work site as ordered by Illinois EPA. The waste ash mixed with rainwater, which defendant pumped into a drainage ditch. The drainage ditch overflow reached a waterway via a pipe. The court denied the motion, holding that under the "intricately related" doctrine, the failure to remove the ash was admissible because it "complete[d] the story" of the CWA violation.

United States v. Lippold, 2006 U.S. Dist. LEXIS 47049 (C.D. Ill. July 11, 2006). The government's motion to prohibit the introduction of "harm-related" evidence was granted. Since harm is not an element of the offense—discharging pollutants without an NPDES permit—introducing harm-related evidence could mislead and confuse the jury. The defendant was therefore prohibiting from arguing that his conduct did not cause harm to the environment or human health.

[5] The court cites the Fifth Circuit's discussion in *In re Needham*, 354 F.3d 340, 345 n.8 (5th Cir. 2003). Defendant's argument relies in large part on the Court's "SWANCC" decision, *Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), in which the Corps' "migratory bird rule" was invalidated.

United States v. Moses, 2006 U.S. Dist. LEXIS 34612 (D. Id. May 25, 2006) (unpublished). The court denied defendant's motion for a new trial, holding that defendant's counsel was not ineffective and that the evidence was sufficient. The ineffective assistance of counsel claim was without merit; defense counsel's failure to assert that defendant's actions were covered by nationwide permits was not prejudicial to defendant because there was no "reasonable probability" that a jury would have concluded that the actions were permitted. Further, the evidence was sufficient because a bulldozer can be a point source; defendant's use of the bulldozer to move thousands of cubic yards of dirt and gravel in a streambed to create dykes constitutes a discharge of pollutants from a point source. Lastly, the court concluded that defendant's assertion that there was no water in the streambed at the time was inconsequential because "there is no requirement that there be water in the streambed at the time of the discharge."[6]

United States v. Hajduk, 396 F. Supp.2d 1216 (D. Colo. 2005). During their trial for violations of the CWA and RCRA, Defendants, a chrome plating business and its operations manager, moved to suppress evidence and information gathered by the federal government. Defendants argued that the evidence and information were obtained through warantless searches and were inadmissible on Fourth Amendment grounds. The District Court of Colorado denied the motion, holding that Defendants did not have an objectively reasonable expectation of privacy in its wastewater headed irretrievably towards public sewer line. While the court did find that Defendants had an objectively reasonable expectation of privacy in their external sampling box located on company property, Defendants effectively consented to search of the sampling box by agreeing to place it outside of their facility. Moreover, Defendants' agreement to terms of municipal permit for wastewater discharge constituted consent for authorities to search and inspect as provided for in the permit, which called for Defendants to allow credentialed authorities to "enter the premises" and have access to any records required by the permit. Finally, the declined to deem all businesses subject to regulation under the RCRA, TCSA, or CERCLA part of a "closely regulated industry," noting that to do so would significantly loosening the warrant requirements of the Fourth Amendment.[7] (See also: "Solid Waste Disposal Act.)

United States v. Ortiz, 427 F.3d 1278 (10th Cir. 2005). Defendant, operator of a chemical distillation facility, was convicted after a jury trial of violating the CWA by negligently discharging a pollutant into the Colorado River by flushing the pollutants down the toilet. In response to Defendant's motion, the District Court granted acquittal. The Tenth Circuit reversed and reinstated the jury's verdict, holding that the National Pollution Discharge Elimination System (NPDES) provision of the CWA "criminalizes any act of ordinary negligence that leads to the discharge of a pollutant into the navigable

[6] *But see Rapanos, supra.*

[7] *See* New York v. Burger, 482 U.S. 691 (1987), creating an exception to general prohibition on warrantless administrative searches of commercial property for businesses that are in "closely regulated industries" under the rationale that in such industries, there is no objectively reasonable expectation to privacy.

waters of the United States," even if the responsible individual does not know that the pollutant's path terminates in protected water. The court further noted that given investigators' earlier warnings that black discharge with strong odor was coming from his facility, and in light of the investigators' inquiries regarding how Defendant disposed of wastewater, Defendant failed to act as an ordinarily prudent person would by continuing to flush the wastewater down his toilet.

United States v. Cooper, No. 04-cr-00006 (W.D. Va., *sentence entered* Sept. 7, 2005). Defendant, owner of a trailer park, was charged with criminal violations of the CWA for operating a sewage lagoon without the required permit after waste from the lagoon was discharged into nearby waterways. Defendant was sentenced to twenty-seven months in prison and fined $270,000.[8]

United States v. Daisey, No. 09-CR-134 (D. Del., *sentence entered* Apr. 28, 2005). Defendant headed a facility for docking and maintaining dredge boats, and routinely directed an employee to discharge wastewater contaminated with oil and antifreeze into wetlands connected to the Broadkill River. As part of a plea deal, Defendant was sentenced to six months in prison and two years probation.[9]

United States v. Evergreen International, S.A., No. CR-05-238 (C.D. Cal., Apr. 4, 2005). Defendant, a Taiwanese shipping company, agreed to pay $25 million as part of a plea agreement, representing the largest sentence ever imposed against a shipping company in an oil-water separator case.[10] The criminal fine of $15 million was to be divided among the five judicial districts involved, and the remaining $10 million directed to environmental community service projects.[11] Defendant pled guilty to twenty-four felony counts and one misdemeanor, including one negligent violation of the CWA after admitting that its crew members on a number of Evergreen vessels routinely discharged wastewater contaminated with oil, bypassing pollution control equipment in violation of various statutes. The guilty plea also included an admission of falsifying records, illegally disposing of equipment, and ordering individual employees to lie about the discharges.

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[8] Solow, *supra* note 2.
[9] Solow, *supra* note 2.
[10] U.S. Department of Justice, Environment & Natural Resources Division, *Summary of Litigation Accomplishments, Fiscal Year 2005,* http://www.usdoj.gov/enrd/ctopics.htm (updated May 12, 2006). *See also* Press Release, U.S. Department of Justice, Evergreen to Pay Largest-Ever Penalty for Concealing Vessel Pollution (Apr. 4, 2005) *available at* http://www.usdoj.gov/opa/pr/2005/April/05_ enrd_159.htm.
[11] U.S. Environmental Protection Agency, *Compliance and Enforcement Annual Results: FY 2005 Criminal Enforcement Highlights* (Mar. 23, 2006), http://www.epa.gov/compliance/resources /reports/endofyear/eoy2005/2005criminalhighlights.html.

United States v. Phillips, 367 F.3d 846 (9th Cir. 2004). The Ninth Circuit upheld the district court's pretrial ruling that, as a matter of law, the creek where the alleged CWA violations occurred was a water of the United States.[12]

Defendant's sentence was vacated and remanded. The district was instructed to include all CERCLA-related cleanup expenses in determining whether USSG §2Q1.3(b)(3)'s "substantial expenditure" enhancement should apply. The fact that the pollutants were not created by the defendant, who disturbed old mine tailings, was immaterial to the expense analysis. An enhancement under USSG §3C1.1, obstruction of justice, was also warranted by defendant's *unsuccessful* attempts to influence a witness. Due to the PROTECT Act, the district court's heartland downward departure should be reviewed de novo. [13] Noting that the district court had improperly relied on internal agency memoranda and legislative history, the Ninth Circuit held that a prior state indictment resulting in a negotiated fine was not proper grounds for a heartland departure. Lastly, under USSG §5E1.1, the district court should have concluded that the government could be a victim for restitution purposes and determined whether EPA's investigation costs were recoverable from defendant.

United States v. Snook, 366 F.3d 439 (7th Cir. 2004). Defendant's conviction, arising from the selective reporting wastewater test results, was affirmed. Evidence proffered to prove that defendant did not know selective reporting was illegal was properly excluded; the "knowing violation" provision of CWA §1319(c)(2)(A) required the government to prove that defendant had knowledge of the underlying facts, not that he knew the actions were illegal. Prosecutorial statements at closing argument such as, "and what is defendant's response?"; "I've heard nothing that backs up those representations"; and that the government's arguments were "basically uncontroverted" were permissible under the 5th Amendment because they referred to the defendant's case, not defendant's refusal to testify at trial.

A two-level sentence enhancement for abusing a position of trust was likewise upheld. Noting that the CWA is "public-welfare" legislation and that the victims of CWA violations are the public, the court held that defendant occupied a position of trust in his role as environmental manager of a petroleum refinery.

United States v. Templeton, 378 F.3d 845 (8th Cir. 2004). Defendants, owners and operators of a tavern housed on board a moored towboat, were convicted in the Eastern district of Missouri of knowingly discharging raw sewage, and conspiring to

[12] The district judge cited an earlier case, *United States v. Buday*, 138 F. Supp. 2d 1282 (D. Mont. 2001), in which the judge had decided that the creek in question was a jurisdictional water.

[13] More specifically, 18 U.S.C. § 3742(e)(4). Previously, heartland departures were reviewed under an abuse of discretion standard.

discharge raw sewage, into the Mississippi River in violation of the CWA. On appeal the Eighth Circuit reversed, holding that because the towboat could be unbolted and would float on its own, it was "capable of [use] as a means of transportation on the navigable waters" and therefore fit the CWA's definition of a "vessel." Because the CWA excludes "sewage from vessels" from the definition of a "pollutant," discharge of sewage from the towboat was not subject to criminal liability under the statute.

United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003), *vacated*, 126 S. Ct. 2208 (2006). Interpreting the Court's *SWANCC* decision,[14] the Sixth Circuit held that defendant's wetlands were "waters of the United States." Reversing the lower court and reinstating defendant's conviction, court held that the nexus between wetlands owned by Defendant and navigable waters—via a manmade drain—was sufficient to establish jurisdiction under CWA.

United States v. Interstate General Co., 39 F. App'x 870 (4th Cir. 2002) (unpublished). The Fourth Circuit affirmed the rejection of defendant's petition for writ of error *coram nobis*. Construing the *SWANCC*[15] decision narrowly—confining it to the invalidation of the Migratory Bird Rule—the court held that there had been no "fundamental or significant change in the law" regarding the government's jurisdiction over wetlands. Thus, the appellate court would not review the district court's determination that the wetlands in question were waters of the United States.

United States v. Overholt, 307 F.3d 1231 (10th Cir. 2002). Defendant was convicted on two counts of discharging a pollutant into United States waters in violation of the CWA, as well as conspiracy. Defendant appealed his conviction arguing that there was insufficient evidence to convict him of the alleged CWA violation because the Government did not prove that the oily substance he dumped down the hillside entered the "waters of the United States." The Circuit Court affirmed his conviction, holding that sufficient evidence existed for the jury to find that the spill entered Keystone Lake, a water of the United States.

Additionally, Defendant the sentence enhancement for his role as an "organizer or leader of a criminal activity." The court agreed that in order to apply sentencing enhancement U.S.S.G. §3B1.1(a) the sentencing court should have made a specific finding of fact pursuant to Fed. R. Crim. P. 32(c)(1), but held Defendant could not invoke this rule because he did not controvert the assertion that he was an organizer or leader.

[14] Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001).
[15] *Id*.

United States v. Buday, 138 F. Supp. 2d 1282 (D. Mont. 2001). The Supreme Court ruling in *Solid Waste Agency* that the Clean Water Act definition of "navigable waters" including seasonal ponds and wetland not adjacent to any navigable streams or tributaries was over inclusive, called into question defendant's guilty plea. Defendant created berms that were destroyed by a flood and caused discharged dredge to flow into a creek. The creek was not itself a navigable water but was a tributary of a navigable-in-fact waterway. In light of *Solid Waste*, the court asked the parties to submit supplemental briefs on whether the U.S. had jurisdiction to prosecute Buday. The court found that Congress intended to regulate the discharge of pollutants into all waters including tributary waters like the Fred Burr Creek which may eventually lead to waters affecting interstate commerce under the Clean Water Act, and upheld the guilty plea.

United States v. Chemetco, Inc., 274 F.3d 1154 (7th Cir. 2001). The defendant had had a secret pipe built into their smelting factory, so that they might discharge pollutants via the pipe into a ditch tributary. After having pled guilty to discharging pollutants in violation of the CWA, the court held that the number of days the defendant violated the Act was a sentencing factor under §309(c) and not an element of the offense that had to be proven beyond a reasonable doubt. Since the CWA does not have a prescribed statutory maximum penalty, the district court was not bound by *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000) (holding that any fact that increases the penalty for a crime beyond the statutory maximum must be proved beyond a reasonable doubt.)

United States v. Hong, 242 F.3d 528 (4th Cir. Va. 2001). Hong was charged with 13 counts of negligently violating pretreatment requirements "as a responsible corporate officer" within the meaning of the CWA. The magistrate judge imposed a total fine of $1.3 million for all counts and sentenced Hong to 36 months imprisonment. Hong appealed his conviction and sentence. Hong argued that the government failed to prove he was a responsible corporate officer who could be held responsible for improper discharges he did not order to occur or personally participate in. The court upheld the conviction and found that under the CWA, "there is no requirement that the responsible corporate officer in fact exercise authority over the corporation's activities or that the corporation expressly vest a duty in the officer to oversee the activity."

United States v. Interstate General Co., 152 F. Supp. 2d 843 (D. Md. 2001). After the Fourth Circuit reversed defendants' convictions and ordered a new trial (*United States v. Wilson*, 133 F.3d 251 (4th Cir. 1991), finding that the court erred in its instructions to the jury on the definition of "waters of the United States" under the Clean Water Act, the parties entered into a plea agreement. The court denied defendant's

motion for a writ of coram nobis.[16] The Court found that the alleged change in the law in a recent Supreme Court case, *Solid Waste Agency of Northern Cook County v. United States Army Corp of Engineers*, 531 U.S. 159 (2001), did not make the defendants' convicted conduct outside the scope of the CWA. The court denied the motion to vacate the consent decree for the same reason.

United States v. Knott, 256 F.3d 20 (1st Cir. 2001). The U.S. prosecuted defendant corporation and controlling shareholder for Clean Water Act violations pursuant 33 U.S.C.S. §1319 (c)(2)(a). The court reversed the district court's award of attorney fees to defendant corporation finding that the government's prosecution was not "vexatious, frivolous, and in bad faith" pursuant the Hyde Amendment, 18 U.S.C.S. §3006A. On appeal, the court found that the Hyde Amendment places the burden of proof on the defendant to demonstrate that the government's position was objectively deficient either lacking legal merit or factual foundation and a showing that the government's conduct objectively manifests maliciousness or an intent to harass or annoy. The standard applied by the district court that "vexatious" conduct can be shown by showing that the charged brought by the U.S. were ultimately determined to be without either evidentiary or legal foundation did not comport with Congressional intent. The court upheld the district court's determination that the controlling shareholder defendant was not eligible for a similar award because his net worth exceeded the statutory limit.

United States v. Kuhn, 165 F. Supp. 2d 639 (N.D. Mich. 2001). The court held that the defendant could not be convicted under both 33 U.S.C. §1345(a) and 33 U.S.C. §1311(a) for the sole act of pumping sewage sludge into a ditch without violating the Double Jeopardy Clause. The court so found because Count One did not include any proof of fact not included in Count Two, and Count Two did not include any proof of fact not included in Count One. Defendant's other claim of Double Jeopardy was dismissed, as the court determined that producing a falsified report and later certifying the validity of that report were two separate, criminal acts.

United States v. Mills, 221 F.3d 1201 (11th Cir. 2001). Defendants filed a writ of error coram nobis following their conviction for discharging pollutants and unlawfully excavating a canal in the waters of the U.S. in violation of the Clean Water Act, 33 U.S.C. §1251. The basis of the petition was that the jury had improperly considered extrinsic evidence. The district court concluded that defendants had not introduced a recognizable basis for relief. On appeal, the government argued that in federal criminal cases, coram nobis relief was limited to errors of the most fundamental character. Defendants contended coram nobis relief was available where no other relief was

[16] Coram nobis is a criminal procedure tool to correct errors of fact only. A writ of coram nobis is to be used in circumstances that compel a course of action to achieve justice.

available and sound reasons existed for failure to seek earlier relief. The court held that allegations of newly discovered evidence were not cognizable in a petition for coram nobis. (*See United States v. Mills*, 817 F, Supp. 1546 (N.D. Fla. 1993), *aff'd* 36 F.3d 1052 (11th Cir. 1994) *cert. denied,* 514 U.S. 1112, S. Ct. 1966 (1994).

United States v. Colvin, 246 F.3d 676 (9th Cir. 2000). Defendant contended that the district court erred by refusing to give jury instruction on affirmative defenses of necessity and exemption and by denying motions for judgment for acquittal and a new trial. The record lacked any factual support for the argument that defendant had no legal alternative to violating the CWA one of the requirements of the necessity defense. Colvin also did not cite to any evidence that he discharged fill material for the purpose of maintenance of a "serviceable structure" such as a dike or bridge that would qualify for the emergency reconstruction exemption from the permit requirement for discharging pollutants. The court of appeals affirmed the conviction under the Clean Water Act (CWA); the district court did not abuse its discretion. The court affirmed the second defendant's aiding and abetting convictions, since the government had introduced evidence that the second defendant directed trucks where to dump waste and accepted freight bills from the truck drivers who dumped the waste.

United States v. Dilworth, CR No. 97-75-FR, 2000 U.S. Dist. LEXIS 14050 (D. Or. Sept. 14, 2000) (unpublished). Defendant was found guilty of violating the Federal Water Pollution Control Act and making false statements to conceal his violations. The U.S. Court of Appeals for the Ninth Circuit affirmed defendant's conviction and the sentence imposed. Defendant then filed motions to vacate, set aside, or correct sentence, to extend time to file petition, and an ex parte motion for disclosure of the character of the court. The court held that motion for relief was not filed timely, subject matter jurisdiction was proper over the charges filed against the defendant, and no facts existed which required a hearing.

United States v. Metalite Co., NA 99-008-CR-B/N, 2000 U.S. Dist. LEXIS 11507, 51 Env't Rep. Cases (BNA) 1950 (S.D. Ind. July 8, 2000). Defendants were indicted for knowingly discharging and causing the discharge of pollutants into waters without a permit. Defendants moved to dismiss arguing that the indictment was insufficient, because it failed to charge that they acted with specific intent in violating the Clean Water Act and that the government's delay in seeking an indictment resulted in prejudice to their defense. The court held that the language of the CWA offered no evidence that Congress intended to create a specific intent standard for the crime of "knowingly violating" the CWA's provisions or an exception to the rule that "ignorance of the law is no defense'' and that the indictment included the correct scienter requirement. None of the five Circuit Court opinions that address the issue of the CWA's mens rea requirement has held that a defendant must know he is violating the law to be

convicted of a knowing violation of the CWA under §1319(c)(2)(A). Defendants alleged that the government's investigation began in 1992 and culminated in the execution of a warrant in 1994, yet the government did not seek an indictment until 1999. The alleged prejudice arose from the death in 1997 of a Metalite employee (and potential witness) and from defendant's claimed inability to prepared a defense using comparative samples of soil and water. The government countered that the investigation began in 1994, not 1992, and that the indictment complied with the statute of limitations. The court held that defendants failed to prove "actual and substantial" prejudice caused by the alleged delay in the indictment.

Washington v. Lundgren, 94 Wn. App. 235, 971 P.2d 948 (Wash. Ct. App. 1999). The defendant, the sole owner and officer of a sewage treatment plant, was found to have exercised hands on control of the facility by informing the Washington Department of Ecology of the discharge of raw sewage and negotiating with Ecology and nearby homeowners for a solution. The appeals court held that where the defendant had actual control and knowledge, the "responsible corporate officer" doctrine could be used to find the sole owner and officer personally liable for the discharge of raw sewage into Puget Sound.

United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999). During a realignment of a railroad track, a backhoe operator punctured an exposed oil pipeline leading to the discharge of 5,000 gallons of oil into a nearby river. The defendant's position, as an employee of the railroad and supervisor of the realignment, required him to be responsible for the "safe and efficient . . . construction" of railroad projects. The court held that ordinary negligence would suffice for criminal penalties under the CWA where the defendant was sentenced for negligently discharging oil into a navigable waterway.

United States v. Mango, 199 F.3d 85 (2d Cir. 1999). The court of appeals reversed the district court's dismissal of several indictment counts against the defendants for violating the terms of the discharge permit they were granted in order to build a natural gas pipeline. The court used principles of statutory construction to interpret 33 U.S.C. §1344, which gives permit-issuing authority to the Secretary of the Army "acting through the Chief of Engineers." In so doing, the court found that it was reasonable for the Secretary of the Army to: a) delegate his permit-issuing authority to district engineers and their designees; and, b) set permit conditions that are reasonably related, either directly OR indirectly, to the discharge of dredged or fill material.

United States v. M/G Transport Services, Inc., 173 F.3d 584 (6th Cir. 1999). The defendants, a company operating tow boats on the Mississippi, Ohio, and Tennessee Rivers, were charged with violating the CWA because they discharged ash and bilge slop

(a combination of water, oil, grease and other bilge materials). The court reversed the district court's ruling that charges of failure to get a permit had to be dismissed because the defendants could not have received a permit for their actions. Due process was not implicated in this case because the defendant could have obtained a permit, just not for the quantity being illegally dumped.

United States v. TGR Corp, 171 F.3d 762 (2d Cir. 1999). The defendant, TGR Corporation, was convicted of knowingly discharging a pollutant into navigable waters, violating the Clean Water Act. The court held that a non-navigable stream, used as part of a storm-water system, is a water of the United States, because it is not a man-made body of water.

United States v. Johnson, Crim. Action No. 98-276, 1999 U.S. Dist. LEXIS 12380 (E.D. La. August 6, 1999) (unpublished)**.** Eleven defendants, three individuals and eight corporations, owned and operated wastewater treatment systems. Defendants were charged with 31 criminal violations of the CWA.. Individual defendant Johnson filed a motion for lack of jurisdiction and conflict of counsel regarding alleged co-conspirators' appointed receiver-trustee. The district court used the standard applied to joint representation cases to analyze this situation, namely, whether representation of one client is materially limited by the attorney's responsibilities to another client or third party. Finding that Mr. Schott's interests were not necessarily aligned with the government and that Johnson did not prove collusion of interest, the court denied Johnson's motion.

United States v. Johnson, Crim. Action No. 98-276, 1999 U.S. Dist. LEXIS 12018 (E.D. La. Aug. 2, 1999). Corporate defendant Cox filed a motion to sever, claiming: a) it could not prepare a defense because Carolyn Cox, its owner and officer, was incapacitated; and, b) the government violated its Sixth Amendment right to counsel when another corporation in possession of Cox's assets was taken over by a bankruptcy trustee. The district court denied Cox's motion because the incapacitation of Ms. Cox should not be an obstacle to Cox's defense. Moreover, the government did not deprive Cox of its assets; the subsidiary that went bankrupt deprived Cox of its assets.

United States v. Iverson, 162 F.3d 1015 (9th Cir. 1998). The defendant, a founder and the President of a chemical production company, personally discharged and ordered employees to discharge wastewater illegally. Responding to the defendant's claim that the district court erred in describing the "responsible corporate officer" doctrine in the jury instructions, the court held that a person is a "responsible corporate officer" under the Clean Water Act not only where the person actually exercises control,

but also where the person had the authority to exercise control over the activity causing the violation.

United States v. Mango, 997 F. Supp. 264 (N.D.N.Y. 1998). In response to the defendants' motion to dismiss the government's indictment under §404 of the Clean Water Act (CWA), the court held that the Secretary of the Army lacks the authority to further subdelegate his permit issuing power to his District Engineers. Because the section 404 permit in question was not issued by the Secretary of the Army, that permit could not serve as the basis for the criminal prosecution of the defendants. The defendants also argued for the dismissal of the government's counts that were based on violations of technical construction guidelines and procedures that appear in the appendices of FEIS. The defendants argued that the government could not hold them criminally liable under the CWA for conduct relating to the construction of its natural gas pipeline. The court overruled the defendants' argument and held that Congress' delegation to the Corps of the authority to define criminal conduct under the CWA was appropriate and sufficient to supply the notice to the defendants that the Constitution requires.

United States v. Moore, 135 F.3d 771 (4th Cir. 1998). The court upheld defendant's conviction for knowingly violating a Clean Water Act discharge permit issued for a residential subdivision sewage treatment plant. Defendant appealed on three issues including the court's error in excluding evidence of Moore's financial condition. Defendant had sought to enter into evidence his financial records in an attempt to show that he was financially unable to operate the sewage treatment plant. He argued that the evidence should go to his state of mind in that he had no option but to abandon the sewage treatment plant. The Fourth Circuit affirmed the district court's ruling of not entering the records into evidence, stating that the defendant's financial ability to maintain the plant was not relevant as to whether the defendant acted intentionally.

United States v. Eidson, 108 F.3d 1336 (11th Cir. 1997). The Eleventh Circuit upheld defendants' CWA convictions by broadly interpreting "navigable waters" under 33 U.S.C. §1362(7) to include a drainage ditch. One defendant's admission of another discharge prior to the one for which they were convicted, was sufficient to support an increase in the offense level pursuant to U.S.S.G. §2Q1.2(b)(1)(A)(1993). The preliminary investigation and cleanup estimate provided an adequate basis for a U.S.S.G. §2Q1.2(b)(3) offense level increase if "cleanup required a substantial expenditure." On the other hand, a finding that the criminal activity was "otherwise extensive" under U.S.S.G. §3B1.1 was not supported by the record, which indicated only one other similar discharge. Furthermore, a U.S.S.G. §2F1.1(b)(1)(I)(1993) increase was not warranted

because there was no factual basis from which to conclude that customers' losses were the result of defendant's fraudulent wastewater disposal practices.

United States v. Hartsell, 127 F.3d 343 (4th Cir. 1997). Officers of the defendant company were convicted of numerous violations of the Clean Water Act (CWA), 33 U.S.C. §1311 *et seq*., including conspiracy, knowingly violating pretreatment standards, and tampering with a monitoring device. On appeal, the defendants argued that the CWA applied only to "navigable waters" and that their discharges into the public sewer system were not into a navigable waterway, thus the federal courts lacked the power to hear such a case. The Fourth Circuit held that the CWA clearly provides for regulation of discharges into public sewer systems and other non-navigable waters. The defendants also argued that the CWA was unconstitutionally vague. In response to this argument, the Court of Appeals held that the CWA plainly and explicitly provides for the promulgation of regulations which limit or prohibit the discharge of pollutants into publicly owned treatment works. The Court of Appeals also found no merit to the defendants' claims that the permits issued to them were unnecessarily strict and arbitrary and that the search of their facilities was conducted pursuant to an invalid search warrant.

United States v. Sinskey, 119 F.3d 712 (8th Cir. 1997). The Court of Appeals affirmed the defendants' convictions for criminal violations of the Clean Water Act. Both defendants were found guilty of knowingly rendering inaccurate a monitoring method required to be maintained under the CWA in violation of 33 U.S.C. §1319(c)(4), and one of the defendants was found guilty of knowingly discharging a pollutant into waters of the United States in amounts exceeding the CWA permit limitations, in violation of 33 U.S.C. §1319(c)(2)(A). Defendants challenged the jury instructions that stated that in order to find the defendants guilty of acting "knowingly", the proof had to show that he was "aware of the nature of his acts, perform[ed] them intentionally, and [did] not act or fail to act through ignorance, mistake, or accident." The Court of Appeals disagreed, finding that "knowingly" applied to the underlying conduct prohibited by the statute. The government is not required to prove that the defendant knew that his act violated either the CWA or the permit, but merely that the defendant was aware of the conduct that resulted in the permit's violation.

United States v. West Indies Transport, Inc., 127 F.3d 299 (3d Cir. 1997). The Third Circuit upheld the district court's finding that the defendants conduct did constitute discharge of a pollutant from a point source in violation of the Clean Water Act (CWA), 33 U.S.C. §1251 et seq. The CWA regulates discharges of pollutants from a "point source." The defendants argued that their conduct did not constitute discharge of a pollutant from a "point source." The defendants severed concrete and rebar from their barge and dropped it into a bay and a lagoon and conducted sandblast operations on a floating barge that projected sand chip residue into the bay. The Court of Appeals found

that Congress intended a broad definition of "point source" and deliberate amputation of a portion of a vessel did not destroy its suitability as a "point source." The defendants also argued on appeal that they did not violate 33 U.S.C. §§1311(a) and 1319(c)(2)(A) by discharging untreated sewage into a bay from a barge used to house their workers because the barge was a "vessel" and as such is not regulated by the CWA. The Third Circuit found that there was sufficient evidence for the trier of fact to conclude that the barge was not a vessel within the meaning of the Clean Water Act.

United States v. Wilson, 133 F.3d 251 (4th Cir. 1997). The district court convicted the defendants of felony violations of the Clean Water Act (CWA) for knowingly discharging fill and excavated material into wetlands of the United States without a permit. The Fourth Circuit reversed and remanded for a new trial after it held that 33 C.F.R. §328.3(a)(3) (defining waters of the United States to include those waters whose degradation "could affect" interstate commerce) was unauthorized by the CWA as limited by the Commerce Clause and is, therefore, invalid. The court also found that the district court's instruction that "waters of the United States" included adjacent wetlands even without a direct or indirect surface connection to other waters of the United States, intolerably stretched the ordinary meaning of the word "adjacent" and the phrase "waters of the United States" to include wetlands remote from any interstate or navigable waters. In addition, the court found that the district court erred in instructing the jury that sidecasting was prohibited by the CWA because sidecasting is not prohibited by the CWA. Finally, the court held that the Clean Water Act, 33 U.S.C. §1319(c)(2)(A) requires the government prove the defendants' knowledge of facts meeting each essential element of the substantive offense but it need not prove that the defendant knew his conduct to be illegal.

United States v. Ahmad, 101 F.3d 386 (5th Cir. 1996). The jury instruction, which was unclear as to which elements "knowingly" referred to, was reversible error. The primary defense was that defendant thought he was discharging water, and not gasoline, in violation of the CWA. Under §1319(c)(2)(A), the jury should have been instructed that a conviction requires the defendant to commit each element of the offense "knowingly." The Fifth Circuit also rejected the government's contention that CWA violations fall under the exception for public-welfare offenses.

United States v. Hopkins, 53 F.3d 533 (2d Cir. 1995). The Second Circuit upheld defendant's conviction where the jury was instructed that "conscious avoidance" of the high probability that employees of defendant's company were tampering with wastewater samples satisfied the "knowledge" requirement of §§1 3 19(c)(2)(A) and (c)(4) of the Clean Water Act. The court went on to explain that the government is only required to prove general intent, i.e. that a defendant knows of the nature of his acts and performs

them intentionally, but not specific intent, i.e. that he knows those acts violate the CWA or any particular provision of that law.

United States v. Liquid Sugars, 158 F.R.D. 466 (E.D. Cal. 1994). Although log notes underlying test results are not discoverable under Fed. R. Crim. P. 16(a)(1)(D), they are discoverable under Fed. R. Crim. P. 16(a)(1)(C) if defendant can make a showing of "materiality." Evidence is material if it will "play an important role in uncovering admissible evidence aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal." Thus, documents regarding chain of custody, lab bench sheets, testing procedures, calibration standards, lab prep logs, instruments and equipment and methodologies are discoverable, whereas lab certification, general audit reports general log books are merely speculative impeachment requests. Furthermore, a state agency is an arm of the federal government for prosecution purposes only if the agency's documents are within the government's possession or control. In this case, the Department of Justice, EPA and any entity providing test results were part of the government for discovery purposes.

United States v. Mills, 817 F. Supp. 1546 (N.D. Fla. 1993), *aff'd* 36 F.3d 1052 (11th Cir. 1994), *cert. denied*, 514 U.S. 1112, 115 S. Ct. 1966 (1994). Defendants appealed their convictions under the Clean Water Act based on the argument that the Congress had unconstitutionally delegated its authority to the Army Corps of Engineers by allowing the Corps to define "waters of the United States" to include "wetlands." The District Court rejected this argument, basing its holding on the case of *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), which upheld the authority of the Corps to regulate wetlands.

United States v. Aerolite Chrome Corp., 990 F.2d 1261 (without opinion), 1993 WL 79471 (9th Cir. 1993) (unpublished table decision). Officer of corporation was acquitted of eleven counts of knowingly discharging pollutants in violation of pretreatment standards, but corporation was convicted of identical charges. The Ninth Circuit held that there is no rule of consistency in cases such as this one, so that "a corporation may be convicted of the same crime of which its only agent has been acquitted."

United States v. Curtis, 988 F.2d 946 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 177 (1993). The Ninth Circuit upheld a Clean Water Act conviction, holding that the fuels division director at a naval air station meets the definition of "person" under the Clean Water Act and that the Act contains no exceptions for federal employees acting within the scope of their employment.

United States v. Gratz, 1993 WL 19733 (E.D. PA. 1993) (unpublished). In this unpublished opinion, the district court held that even though the defendant poured chemical pollutants down a storm water drain, the discharge should be subject to provisions relating to point sources and not provisions regarding storm water discharges that, at the time of the indictment, did not require a permit. The defendant was therefore convicted of, among other things, an unlawful discharge of pollutant into the waters of the United States without a permit, according to §§1311 and 1319 of the Clean Water Act.

United States v. Plaza Health Laboratories, Inc., 3 F.3d 643 (2d Cir. 1993), *cert. denied*, *United States v. Villegas*, 62 U.S.L.W. 3693 (1994). Defendant had deposited numerous vials of human blood from his blood-testing laboratory into the Hudson River, and he was convicted of knowingly discharging pollutants from a point source into a navigable river in violation of the Clean Water Act. The Second Circuit reversed the convictions, holding that a human being cannot be a "point source" under the Clean Water Act.

United States v. Weitzenhoff, 1 F.3d 1523 (9th Cir. 1993), *amended on denial of rehearing*, 35 F.3d 1275 (9th Cir. 1993). Managers of permitted sewage treatment plant were convicted for felony violations of the Clean Water Act by allowing discharge of waste activated sludge directly into the ocean without treatment. The court initially explained that the criminal provisions of the CWA are designed to protect the public at large and as such fall within the category of public welfare legislation. In upholding the convictions, the court held that the offense of "knowing violation" of a permit condition does not require that defendant know of the permit or its requirements, but only a general intent, i.e. that he knowingly engage in conduct that results in a permit violation. The court distinguished this case from *United States v. Speach*, 968 F.2d 795, on the grounds that the defendants here were the permittees and thus were clearly in the best position to know their own permit status. Five judges vigorously dissented from the motion for rehearing *en banc*, arguing that a knowing violation of a permit must include specific intent, i.e. knowledge by the violator that his conduct violates the permit. The court also held that permitting expert testimony as to the requirements of the permit was an impermissible delegation of the court's duty to instruct the jury on applicable law, but that this error was harmless since there was no factual dispute as to the conduct violating the permit conditions.

Hartford Associates v. United States, 792 F. Supp. 358 (D.N.J. 1992), *appeal dism'd*, 981 F.2d 1247 (3d Cir. 1992). The plaintiffs attempted to enjoin the United States government from investigating or prosecuting plaintiffs for Clean Water Act

violations. The District Court held that it was without authority to issue such an injunction.

United States v. Ellen, 961 F.2d 462 (4th Cir. 1992), *cert. denied*, *Ewell v. Murray*, 62 U.S.L.W. 3773 (1994). The Fourth Circuit upheld the conviction and sentencing of defendant, William Ellen, for knowingly violating Clean Water Act regulations pertaining to the illegal fill of wetlands. The court rejected defendant's claims that uncertainty over the scope of the definition of wetlands deprived him of Due Process and violated the Ex Post Facto clause in the Constitution. The court also denied the defendant's challenge to the District Court's application of the U.S. Sentencing Guidelines.

United States v. Borowski, 977 F.2d 27 (1st Cir. 1992). Employees of the defendant's company were continuously exposed to hazardous substances in the dumping of the substances down sink drains without any pretreatment. This conduct violated EPA pretreatment standards as soon as the substances entered the publicly-owned sewer system. The Clean Water Act makes it a felony to violate the EPA standards with knowledge of resulting endangerment to another person. Because the employees were put in danger before the hazardous substances reached the publicly-owned sewage system, i.e., before the EPA violations actually occurred, and not as a result of those violations, the 1st Circuit vacated the convictions, holding that a Clean Water Act "knowing endangerment" prosecution cannot be premised on danger that occurs before the hazardous materials reach a publicly-owned sewer or treatment center.

United States v. Goldfaden, 959 F.2d 1324 (5th Cir. 1992) (Goldfaden I). The Fifth Circuit vacated and remanded a district court's sentencing of the defendant after the court found that the Government breached the plea agreement. The Fifth Circuit stated that the government, by recommending sentencing guideline levels, breached its agreement to make no recommendation as to defendant's sentence. The defendant had been convicted of violating the Clean Water Act by discharging hazardous and industrial waste into the Dallas sewer system without a permit.

United States v. Law, 979 F.2d 977 (4th Cir. 1992), *cert denied*, 113 S. Ct. 1844 (1992). The Fourth Circuit affirmed the conviction of a defendant, the owner of a coal preparation plant, for the knowing discharge of pollutants into the waters of the United States without a permit. The court rejected the defendant’s argument that because his plant did not, at the time he owned it, generate the pollutants discharged from its point source and because the pollutants came from the subsurface of defendant’s property when defendant only owned the surface, defendant was not liable for the discharge. In so

holding, the court distinguished the situation where pollutants already exist in the waters of the United States and that water is merely diverted.

United States v. Mitchell, 966 F.2d 92 (2d Cir. 1992). The Second Circuit reversed a pretrial suppression ruling by a district court that held that the government obtained inculpatory statements from defendants in violation of their Miranda rights and through trickery and deception. The district court had stated that EPA criminal investigators improperly questioned the defendants, who were responsible for conducting water quality tests for a local water system. *See U.S. v. Mitchell*, 763 F. Supp. 1262 (D. Vt. 1991). The Second Circuit disagreed, holding that the questioning was not coercive and that the defendants freely made the incriminating statements.

United States v. Rutana, 932 F.2d 1155 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 300 (1994) (Rutana I). The Sixth Circuit, following a government appeal, reversed a district court's downward departure from the sentencing guidelines. The Sixth Circuit found that the fact that incarcerating a defendant might cause his employees to lose their jobs was not sufficiently unusual to warrant a downward departure from the guidelines. The defendant had pleaded guilty to 18 counts of knowingly discharging of pollutants into a public sewer system in violation of the Clean Water Act.

United States v. Boldt, 929 F.2d 35 (1st Cir. 1991). The First Circuit affirmed defendant's conviction for violating the Clean Water Act by authorizing the discharge of industrial wastewater containing excessive metals. The court found that the Clean Water Act does not recognize a defense of economic or business necessity, and that the question of whether the only solution to noncompliance was plant closure was not an issue for the jury.

United States v. Brittain, 931 F.2d 1413 (10th Cir. 1991). The Tenth Circuit upheld the conviction of defendant, an Oklahoma sewage treatment plant supervisor, for making false statements and negligently allowing pollutants to be discharged in violation of the Clean Water Act. The court rejected the defendant's argument that he was not a responsible corporate officer, instead finding that he, by failing to report permit violations, caused the offenses he was charged with to occur. In dicta, the court stated that the acts of subordinates could be "imputed" to a responsible corporate officer.

United States v. Poszgai, 757 F. Supp. 21 (E.D. Pa. 1991), *aff'd in part mem. and rev'd in part mem.*, 947 F.2d 938 (3d Cir. 1991). The Third Circuit ruled that a $200,000 fine imposed on the defendant, an individual, for wetlands violations of the Clean Water

Act must be reconsidered. The court found that the sentencing court failed to consider defendant's financial resources and that the indictment may have exaggerated the actual extent of the offense by treating one continuous violation as 40 separate counts. The Third Circuit and the Supreme Court had previously refused to review the three-year jail term imposed on defendant. The defendant had been convicted of 40 counts of depositing non-toxic fill on land that he owned in the face of repeated cease and desist orders and in violation of the Clean Water Act.

United States v. Wells Metal Finishing, Inc., 922 F.2d 54 (1st Cir. 1991). The First Circuit rejected defendant's challenges to the enhancement of his sentence under the federal sentencing guidelines. The court held that the government proved that improperly treated wastewater, discharged by defendant's corporation, disrupted a public utility and justified an upward departure. The court also dismissed defendant's argument that the sentencing judge failed to make adequate findings on disputed factual questions regarding the disruption. The First Circuit stated that a court may make implicit findings on disputed facts by accepting the government's recommendations at sentencing. The defendant and his company were found guilty on 19 counts of knowingly discharging excessive amounts of zinc and cyanide into a city sewer system in violation of the Clean Water Act.

United States v. Alley, 755 F. Supp. 771 (N.D. Ill. 1990). In challenging their convictions for illegal discharge of pollutants into a public water system, the defendants argued that the Administrator of the EPA had acted outside the scope of his authority in the method of regulating discharges from electroplating firms and that certain pretreatment regulations were unconstitutional. The District Court held that it was statutorily prohibited from examining the scope of the EPA Administrator's authority (that question being specifically reserved in the statute for circuit courts only) and that the regulation in question was constitutionally valid under several alternative constitutional grants of power to Congress.

United States v. Ashland Oil Inc., 705 F. Supp. 270 (W.D. Pa. 1989). On motion to dismiss by defendant, the District Court held that alleged perjury before the grand jury by state law enforcement and fire officials regarding the defendant's permit did not warrant dismissal.

United States v. Holland, 874 F.2d 1470 (11th Cir. 1989). Maritime contractor had pled guilty in previous action to eight Clean Water Act violations. In this case, the 11th Circuit upheld a District Court finding that defendant had violated his probation by engaging in unauthorized dredging and bulkheading, unauthorized filling of wetlands, and supervision of construction of unauthorized "T" dock. The court also upheld a

special condition on the contractor's continued probation prohibiting him from engaging in maritime contracting for two years.

United States v. Marathon Development Corporation, 867 F.2d 96 (1st Cir. 1989). The defendants were charged with violating the Clean Water Act for filling in federally protected wetlands without obtaining proper State permits, and entered a conditional guilty plea. The Court of Appeals rejected arguments that provisions in the Clean Water Act allowing States to impose more stringent water quality standards than developed by Federal agencies violate equal protection.

United States v. Frezzo Brothers Inc., 546 F. Supp. 713 (E.D. Pa. 1982), *aff'd*, 703 F.2d 62 (3d Cir. 1983), *cert. denied*, 464 U.S. 829 (1983) (Frezzo II). The District Court held, and the Court of Appeals affirmed, that specific intent was not required to sustain a conviction for willfully or negligently[17] dumping pollutants into navigable waters of the United States without a permit.

United States v. Distler, 671 F.2d 954 (6th Cir. 1981), *cert. denied*, 454 U.S. 827 (1981). In the first conviction involving violation of the pretreatment requirements of Clean Water Act, the defendants were found guilty of discharging toxic wastes into the Ohio River by way of the sewer systems. In upholding the convictions, the Court of Appeals approved the admission into evidence of expert testimony regarding the "fingerprinting" matching of oil samples through gas chromatography and flame photometric detectors.

United States v. Oxford Royal Mushroom, 487 F. Supp. 852 (E.D. Pa. 1980). The term "navigable waters of the United States" as used in the Clean Water Act does not require that the waters be navigable in fact. Nor are the terms unconstitutionally vague.

United States v. Olin Corp., 465 F. Supp. 1120 (W.D. N.Y. 1979). The corporation and three employees were charged with violations of the Clean Water Act for false statements made to EPA in voluntarily submitted reports recording the daily mercury content of discharges into the Niagara River. The Court held that the false reporting provision of the Act was applicable only to persons under a specific duty to file

[17] Under the 1986 amendment to the Clean Water Act, the willful requirement was changed to knowing, and a separate subsection for negligent violations of the Act was added. See, 33 U.S.C. § 1319(c)(1)(A) and (c)(2)(A).

reports or maintain records under the Act and was, therefore, inapplicable to the defendants in this case.

United States v. Hudson Farms, Inc., 12 Env't Rep. Cases (BNA) 1444 (E.D. Pa. 1978). Denying motions to dismiss an indictment, the District Court held, inter alia, that there was nothing constitutionally defective in the Clean Water Act's providing both civil and criminal penalties for the same conduct, nor was it duplicitous to charge the defendant with "willful" and "negligent" violations of the Act. The two terms merely connote different methods of committing a single offense rather than two separate offenses.

United States v. Little Rock Sewer Comm., 460 F. Supp. 6 (E.D. Ark. 1978). A public entity responsible for operation of a sewage treatment facility was charged with knowingly filing false discharge monitoring statements in violation of the Clean Water Act. The District Court held that the entity may be held criminally liable on the basis of the knowledge of a high-level employee vested with broad supervisory authority.

United States v. Hamel, 551 F.2d 107 (6th Cir. 1977). Affirming the defendant's conviction for willfully discharging a pollutant into navigable waters, the Court of Appeals held that gasoline is a "pollutant" within the meaning of the Clean Water Act even though the definition for pollutant did not include oil or oil products.

United States v. Ouelette, 11 Env't Rep. Cas. (BNA) 1350 (E.D. Ark 1977). In a companion case to *Little Rock Sewer Committee*, the District Court held that the Government did not have to prove specific intent to violate the Act, only that false statements had been knowingly made.

Apex Oil Company, v. United States, 530 F.2d 1291 (8th Cir. 1976), *cert. denied*, 429 U.S. 827 (1976). The corporate defendant was charged with failing to notify an appropriate agency of the United States of a known oil spill. The Court of Appeals held that a corporation can be a "person in charge" within the meaning of the Clean Water Act, and further held that a low-level corporate employee's knowledge may be imputed to the corporation for purposes of criminal liability under the Act.

United States v. Phelps Dodge Corp., 391 F. Supp. 1181 (D. Ariz. 1975). The definition of "navigable waters" or "waters of the United States" under the Clean Water Act encompasses any waterways within the United States and includes normally dry arroyos through which water may flow on its way to other bodies of water.

United States v. Ashland Oil and Transportation Co., 504 F.2d 1317 (6th Cir. 1974). Upholding the constitutionality of the Clean Water Act, the Court of Appeals held that the Act's prohibition against discharges of pollutants into navigable waters of the United States applied as well to discharges into non-navigable tributaries of navigable streams. The Court also held that the Government need not prove that the discharged pollutant ultimately reached navigable waters in order to sustain the conviction of the defendant for failing to notify appropriate government agencies of a discharge.

RIVERS AND HARBORS ACT

United States v. Gurley, 384 F.3d 316 (6th Cir. 2004). The EPA filed a complaint alleging that Defendant had failed to adequately respond to the agency's information request pursuant to §104(e) of CERCLA in connection with an investigation of a landfill formerly owned by Defendant. Defendant argued that a criminal action brought under the 1970 Rivers and Harbors Act against him for allegedly dumping waste in the Mississippi River effectively barred the EPA from bringing the current CERCLA §104(e) action against him. The district court disagreed, granting summary judgment for the government. In affirming the lower court's decision, the Sixth Circuit held that the doctrine of *res judicata* did not apply because Defendant had not been a named party in the previous suit, and so could be sued in his individual capacity in a subsequent action.

United States v. West Indies Transport., Inc., 127 F.3d 299 (3d Cir. 1997). The defendants appealed their conviction for violating the Rivers and Harbors Act, 33 U.S.C. §403. They argued that the government did not prove that they knowingly built a pier, wharf, or any other structure in violation of 33 U.S.C. §403. The Court of Appeals affirmed the district courts finding that the defendants intentionally built a large dock in violation of the Rivers and Harbors Act by stringing together derelict barges for loading activities, repairs and the housing of employees. The defendants also argued that the district court erred by not instructing the jury that it must find that the defendants built a structure outside harbor lines, or where no lines have been established. The Court held that because the district court followed the defendants' proposed jury instruction, the court's instruction did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. Therefore, there was no plain error.

United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655 (1973). The Act bars all discharges of pollutants into the navigable waters of the United States and not only those forms of pollution that constitute obstructions to navigation. However, the Army Corps of Engineers' long-standing prior practice of limiting

enforcement to only navigation-obstructing discharges entitled the defendant to raise reliance as an affirmative defense to charges of violating the statute.

SOLID WASTE DISPOSAL ACT AND THE RCRA

United States v. Exec. Recycling Co., 2012 U.S. Dist. LEXIS 169679, No. 11-cr-376-WJM (Nov. 29, 2012) (unpublished). Defendant was charged with exporting hazardous waste (cathode ray tubes) from Colorado without filing an export notification with EPA. The court held that federal regulations provided the requirements for international exports of hazardous waste. However, because Colorado is authorized to implement the RCRA hazardous waste program within its boundaries, the state's definition of hazardous waste was controlling.

United States v. We Lend More, Inc., No. 11-cr-3327-MMA (S.D. Cal. Mar. 1, 2012) (unpublished). Defendant, a pawn shop, and its owner were convicted of various environmental crimes under the Resource Conservation and Recovery Act (RCRA) stemming from their disposal of hazardous wastes at a landfill. Defendant and the company allegedly dumped potassium cyanide and concentrated nitric acid which, if combined during disposal, could create a deadly hydrogen cyanide gas. Defendants were found guilty of violations of the RCRA for unlawful transportation of hazardous waste, unlawful disposal of hazardous waste, and transportation of hazardous waste without a manifest.

United States v. Wyman, No. 2:09-cr-00577-GHK (C.D. Cal. Nov. 15, 2011). A fire broke out at Defendant's home and the fire department was alerted. As the fire burned, various explosions occurred within the home. During the clean-up of the fire, discovery of hazardous material necessitated seven separate calls to the Los Angeles Police Department Bomb and Arson Squad. Defendant was found to have been storing a "large cache" of industrial solvents, thousands of rounds of corroded ammunition, highly reactive lead-tainted waste from shooting ranges, as well as gunpowder and military M6 cannon powder. Defendant did not have a permit to store any of the chemicals or materials. A jury convicted Defendant of willful violation of the RCRA for unlawfully storing ignitable hazardous waste on his property.

United States v. Sauseda, 596 F.3d 279 (5th Cir. 2010). *See entry under CERCLA, supra.*

United States v. Reis, 366 F. App'x 781 (9th Cir. 2010) (unpublished). Defendant, Chairman and CEO of MR3 Systems, Inc. (MR3), was convicted for violation of the Resource Conservation and Recovery Act (RCRA). On appeal, Defendant contended that the Government could convict Defendant, as an individual, or MR3, but not both. The Court affirmed Defendant's conviction, noting that both Defendant and MR3 qualified as "persons" under RCRA, 42 U.S.C. §6903(15), and that the Government proved each element of the crime with respect to the Defendant as an individual.

United States v. Southern Union Co., 630 F.3d 17 (1st Cir. 2010) *rev'd* 132 S. Ct. 2344 (2012). Defendant appealed the district court's denial of acquittal and argued that Rhode Island's regulation of CESQGs (conditional exemption for small quantity generators) could not be enforced by the Environmental Protection Agency (EPA) in a federal criminal prosecution under the RCRAwhen the state program is broader than the federal program. Defendant interpreted 40 C.F.R. §271.1(i) as providing that any state rule that is not "required" by federal law "necessarily imposes 'a greater scope of coverage.'" The court declined to adopt this interpretation, concluding that Defendant's reading "vitiates the clear distinction between 'more stringent' and 'greater in scope,' collapsing the two terms into one." The court also reasoned that the EPA's interpretation should be deferred to as it was reasonable and not arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. §706(1)(A). Defendant also argued that even if the EPA's reading was accepted, state regulation of CESQGs is "additional coverage" under 40 C.F.R. §271.1 and not a "more stringent" requirement because CESQG regulation expands coverage to new entities. The court disagreed with this interpretation of the regulations and stated that 40 C.F.R. §261.5 already provided for federal regulation of CESQGs. The court concluded that it does not "expand the universe of regulated entities to subject already-regulated entities to fuller regulation" by the state.

With regard to their sentences, Defendants also claimed that the decision in *Aprendi v. New Jersey*, 530 U.S. 466 (2000), applied to criminal fines. Defendant argued that the district court at sentencing should not have imposed a fine greater than that for a one day violation of RCRA because Defendant had submitted evidence that for some days listed in the indictment it had properly recycled mercury and thus the factual issue of the number of days for the violation had to be submitted to the jury under *Aprendi*. *Aprendi*, 530 U.S. at 490. The court, relying on dicta in *Oregon v. Ice*, 555 U.S. 160 (2009), held that *Aprendi* did not apply to statutory criminal fines, which are historically the province of the judge to assess and not the jury. The court did note, however, that if *Aprendi* did apply, it would remand for resentencing because the jury did not specifically determine the number of days for the violation. In addition, the court rejected Defendant's argument that the $18 million fine imposed was an abuse of discretion, finding the fine reasonable.

United States v. Hoffman, No. 5:09-cr-00216, 2010 U.S. Dist. LEXIS 33414, 71 Env't Rep. Cases (BNA) 2190 (S.D. W. Va. Apr. 5, 2010). Defendant was charged with

knowingly treating, storing, or disposing of hazardous waste without a permit, as required by RCRA. *See* 42 U.S.C. §6928(d)(2)(A). The indictment alleged that Defendant operated an electroplating business at various locations and that in the course of business, used a variety of materials, "including acids, solvents, and heavy metals, and generated hazardous wastes" at certain locations. Defendant was criminally prosecuted previously for violating other provisions of the Clean Water Act. Additionally, the company for which Defendant served as president, was also criminally prosecuted for violations of the Clean Water Act. Defendant filed three motions in limine – two to exclude other bad acts evidence at trial, and one to prohibit the Government from introducing any legal opinion testimony at trial. The court granted Defendant's motions, holding that any probative value from Defendant's first conviction was substantially outweighed by the danger of unfair prejudice; that Defendant's prior conviction was not admissible for the purpose of determining whether he was a "person" under RCRA; that the plea agreement in Defendant's prior case was not relevant to this case; and that FRE 704 did not allow for opinion testimony that "state[d] a legal standard or drew a legal conclusion by applying law to the facts."

United States v. Evertson, 320 F. App'x 509 (9th Cir. 2009). Defendant Evertson was convicted by a jury in the District of Idaho of one count of violating the Hazardous Materials Transportation Uniform Safety Act (HMTUSA), and of two counts of violating the RCRAbecause he knowingly stored materials that he knew to be hazardous waste in violation of the statutes. On appeal, Defendant challenged the conviction, the jury instructions, and his sentence. The appellate court affirmed the RCRA conviction, holding there was sufficient evidence because Defendant's storage process was untested and failed within a year, he admitted to his sister and the FBI the process was unsuccessful, and he left the materials in storage for over two years with incorrect contact information after leaving Idaho. The court further held that because an RCRA offense does not require intent to dispose of materials, criminal liability can be triggered simply by improper storage. The court found the jury instructions on the "willfulness" requirement of the HMTUSA were proper because the HMTUSA does not require actual knowledge of the specific regulations violated, but only requires knowledge that the conduct was unlawful.

Defendant was sentenced to concurrent terms of twenty-one months' imprisonment on each count, and ordered to pay $421,049.00 in restitution. The court vacated the sentence in part upon finding the district court erred in ordering restitution as part of the sentence instead of as a condition of supervised release.

United States v. Southern Union Co., 643 F. Supp. 2d 201 (D.R.I. 2009). Defendant stored mercury-sealed regulators in one of its facilities, but did not renew its contract with its environmental services company to ensure proper reclamation of the liquid mercury. Three youths broke into the facility, removed several containers of liquid mercury, and spilled it throughout the building, the grounds, and a nearby apartment

complex. Defendant was found guilty of knowingly storing hazardous waste without a permit in violation of RCRA. *See* 42 U.S.C. §6928(d)(2). Defendant moved for judgment of acquittal, challenging the EPA's determination that Rhode Island permit requirements for the treatment of CESQGs (conditional exemption for small quantity generators) were more stringent. Defendant argued the Rhode Island requirements were broader in scope and, therefore, unenforceable by the EPA. The court denied Defendant's motion holding that Rhode Island's conditional exemption was more stringent and therefore enforceable by the federal government.

The court explained that RCRA can authorize states to enact their own hazardous waste management programs. The federal government is barred from enforcing state requirements that are "greater in scope" of coverage than federal regulations, but it can enforce state regulations that are "more stringent." The court stated that the plain meaning of 40 C.F.R. §271.1(i) was clear – "where an approved State program has a greater scope of coverage than required by Federal law, the additional coverage is not part of the Federally approved program." Rule 5.00 of the Rhode Island Rules and Regulations for Hazardous Waste Management state that the Rhode Island "decision not to recognize the federal CESQG federal exemptions did not create a greater scope of coverage than the federal program." Instead, it "layer[ed] on additional requirements that CESQGs might not otherwise be subjected to under the federal program."

United States v. Texas Oil and Gathering, Inc., 2009 WL 890555 (S.D. Tex. Mar. 31, 2009) (unpublished). Defendants were indicted for violating the Resource Conservation and Recovery Act by their unauthorized disposal of hazardous waste, resulting in an explosion at the facility in Alvin, Texas. In defining "hazardous," a determinative property of the material is ignitability. The indictment alleged that Defendants disposed of waste having a flashpoint below 60 degrees Celsius without a permit to do so. The Government sought to prove this charge by introducing evidence from samples of the waste taken by EPA chemists who tested its ignitability. Defendants filed a Motion to Exclude evidence offered by the EPA's expert witnesses because the witnesses failed to comply with EPA protocol in taking samples of the waste, and because the expert's conclusions did not meet the Daubert reliability standards. The court denied Defendant's Motion to Exclude, holding the Daubert factors were helpful but not dispositive. The court rejected Defendant's arguments regarding EPA protocol and chain of custody.

United States v. Moeller, 2009 WL 902392 (D. Kan. Mar. 31, 2009) (unpublished). Defendant Moeller and his business, Midwest Surplus Group, Inc., were charged in a three-count indictment for violations of the RCRAbecause of his improper and unlawful handling, storage, and transportation of paint. Both parties objected to the pre-sentencing report (PSR). The Government argued to increase Defendant's base offence level for being the organizer, leader, or supervisor in criminal activity. The Government based this argument on allegations that Defendant directed his employees to handle and

transport paint waste after the Kansas Department of Health and Environment had identified it as hazardous. The court overruled the Government's objection for lack of sufficient evidence showing Moeller supervised a criminally responsible participant because there was no demonstration that any named employee knew Moeller's operations were unlawful.

Defendant objected to a PSR enhancement for leaking stored waste paint because there was no testing to prove the spilled paint contaminated the environment. The court sustained the objection in part, holding the RCRA standard assumed any hazardous discharge contaminated the environment, but also listed several mitigating factors regarding this particular contamination. Defendant also objected to the regulatory PSR enhancement for cleanup that was not ordered by a federal agency. The court sustained the objection, holding that the cleanup Defendant did was part of correcting a business practice rather than cleaning up contamination.

United States v. Texas Oil and Gathering, Inc., 2009 WL 742616 (S.D. Tex. Mar. 20, 2009) (unpublished). The EPA obtained a search warrant for the Texas Oil and Gathering facility, BSLR Operating, Ltd. On June 11, 2003, ten law enforcement vehicles arrived at the facility to conduct a search and asked questions of the employees. Texas Oil and Gathering filed a motion to suppress statements made by employees during the search because they had been interrogated without having been read *Miranda* warnings. The court denied the Motion to Suppress, finding that the oil facility employees were not in custody during the FBI's search.

United States v. Calkins, 276 F. App'x 607 (9th Cir. 2008). The defendant appealed his sentence of restitution that was imposed after he pled guilty to storing hazardous waste without a permit in violation of RCRA. The court affirmed the district court's order. Since the defendant entered a plea agreement, he waived any argument that the district court abused its discretion in determining his sentence. Furthermore, the district court under the Sentencing Reform Act of 1984 had legal

doubt the facts necessary to impose restitution. Instead, a judge can find those facts by a preponderance of the evidence.

United States v. Barken, 412 F.3d 1131 (9th Cir. 2005). Defendant, president of a family-owned chrome plating and metal finishing business, was convicted in the Central District of California of unlawfully transporting and disposing of hazardous materials without a permit in violation of the RCRA. Defendant had entered into an agreement with a company that was going out of business to take the other company's excess chemical supplies at no cost; finding those supplies of no use, defendant disposed of them without a permit. The Ninth Circuit affirmed the conviction, holding that the government's destruction of some evidence (including drums in which the materials were

found and chemical samples from those drums) was not prejudicial to the Defendant given that "adequate substitutes" existed for the missing non-testimonial evidence. The court also held that Defendant's arrest of state charges arising out of the same conduct five years earlier did not support a claim of undue delay under Fed. R Crim. P. 48(b); such a period of delay "comes into play only after a defendant has been placed under arrest" for federal charges.

United States v. Hajduk, 396 F. Supp.2d 1216 (D. Colo. 2005). *See entry under CWA, supra*.

United States v. Wasserson, 418 F.3d 225 (3d Cir. 2005). Defendant, former president and CEO of a Philadelphia-based commercial laundry and dry cleaning products supplier, was found guilty by a jury for various RCRA violations related to permitless transportation and disposal of hundreds of containers of chemicals. In response to Defendant's motions, the trial court granted acquittal on Count Three (causing, aiding and abetting the disposal of hazardous waste without a permit). The Third Circuit reversed the acquittal and reinstated the jury verdict, noting that any and all of the offenses listed in the RCRA can give rise to aiding and abetting liability under 18 U.S.C. §2. The Third Circuit reaffirmed that an indictment need not specify charges of aiding and abetting to support conviction for aiding and abetting, and held that under the RCRA a generator of hazardous waste can be found guilty of the separate offenses of (1) transporting waste without a permit, and (2) disposing of waste without a permit.

United States v. Union Foundry Co., No. 2:05-cr-00299 (N.D. Ala., *plea entered* Sept. 6, 2005). Defendant allowed workers to illegally treat hazardous waste without the permit required by the RCRA. Criminal RCRA charges were brought after a plant worker was killed in an accident involving a conveyor belt that did not meet OSHA standards. Defendant pled guilty to the environmental criminal charges; as part of the plea agreement, Defendant will pay a criminal fine of $3.5 million and will complete a $750,000 community service project.[18]

United States v. Wasserson, 2004 U.S. Dist. LEXIS 1246 (E.D. Pa. 2004) (unpublished). Finding that the error was not harmless, the court awarded defendant a new trial because the jury instructions that were actually delivered to the jury differed from the instructions agreed to by the parties. Defendant was also acquitted of violating RCRA §6928(d)(2)(A) (disposing of hazardous waste) because defendant generated—but did not dispose of —the waste. The court refused to acquit the defendant of two additional charges; even though the government had not proved that defendant knew of

[18] Solow, *supra* note 2.

the lack of a RCRA permit and other violations, it had proved that defendant was "willfully blind" and that "the defendant himself was subjectively aware of the high probability of the fact in question."

United States v. Elias, 269 F.3d 1003 (9th Cir. 2001), *cert. filed* Aug. 4, 2002. The court upheld the defendant's sentence of 204 months in prison for ordering his employees to clean out a tank containing cyanide-sludge without the necessary safety equipment, but overturned the $6.3 million owed in restitution. The defendant was properly charged under RCRA and not Idaho State law. Congress did not intend that by authorizing a State's hazardous waste program "in lieu of a Federal program" they would preempt federal regulation entirely. EPA can still exercise civil and criminal enforcement powers in States with hazardous waste programs. The court also found that a single soil sample, which was taken near the waste tank and contained cyanide, was sufficient evidence of an uncontrolled discharge. A RCRA violation occurs if (1) a sample contains hazardous material, and (2) that material has not been properly disposed of (which may be inferred from the location of the sample). Finally, the order for $6.3 million in restitution was overturned because 18 U.S.C. §3663 only authorizes restitution for violations of Title 18. Although Counts II and III against the defendant had been brought under both 18 U.S.C. §2 and 42 U.S.C. §6928(d)(2)(a), the "mention of [18 U.S.C. §2] does not bring the restitution order within the ambit of 18 U.S.C. §3663."

United States v. Hansen, 262 F.3d 1217 (11th Cir. 2001). The court upheld the conviction of the defendants for conspiring to commit environmental crimes and for violating the CWA, RCRA, CERCLA and ESA during the operation of an industrial plant in Brunswick, Georgia. The defendants were convicted for knowing endangerment under RCRA, as the jury found that the defendants knew the conditions at the chemical plant posed a serious threat to the employees. The government only needed to prove that the defendants had knowledge of the general hazardous character of the chemical, and that the chemical had the potential to be harmful to humans or the environment. In this case, an official had been informed by NIOSH that the plant's employees suffered from high mercury exposure; employees were suffering from skin and respiratory illnesses; internal memos and reports indicated the dangers; and employees complained and refused to work in certain 'wastewater' areas of the plant.

The government was not required to prove that the material was hazardous within the meaning of RCRA by EPA testing. If there is no sampling of the actual wastes, the government may prove that a material is hazardous under RCRA through inventories, internal memoranda, hazardous waste logs, and trial testimony (Solid Waste Disposal Act §1004(5), as amended by 42 U.S.C.A. §6903(5)). Here, the wastewater logs and testimony from former employees provided sufficient evidence for the jury to determine that the wastewater was hazardous. The court also held that the bankruptcy of the plant's parent corporation did not insulate the defendants from complying with environmental regulatory statutes.

The court's instructions on "responsible corporate officers" were properly limited to RCRA violations, and did not permit the jury to convict the defendants on the basis of their corporate positions instead of their individual liability. The court made clear that RCRA counts "require[d] proof that each defendant 'knew' of the violations' potential for harm and danger." Finally, the district court acted within its discretion when it declined, pursuant to U.S.S.G. §5K2.0, to make a downward departure from the sentencing guidelines. Since the district court understood its discretionary authority pursuant to U.S.S.G. §5K2.0, its decision was not reviewable on appeal.

United States v. Hines, 210 F.3d 390 (10th Cir. 2000). Defendants were convicted of illegally storing, dumping, and transporting hazardous waste in violation of RCRA. Defendants challenged the convictions, alleging that the government failed to prove they "knowingly" committed environmental crimes. The court of appeals affirmed. First, the government does not have to prove the defendants knew the material was "hazardous," rather, §6928 (d) only requires the government to prove the defendants knew that the material being handled was potentially harmful to humans or the environment. Second, the government does not have to prove that the defendants knew they were breaking the law. Lastly, the government can use circumstantial evidence to prove any guilty knowledge on the part of the defendants.

United States v. Flanagan, 126 F. Supp. 2d 1284 (C.D. Cal. Dec. 15, 2000). The indictment alleged that the defendants treated and stored hazardous wastes without authorization or a permit from the EPA as required by RCRA. Defendants moved to dismiss the indictment for lack of federal subject matter jurisdiction, argued that authorization of California's hazardous waste program prevented federal criminal enforcement power. The U.S. argued that authorization of California's hazardous waste program did not affect its criminal enforcement power in the federal courts or proscribe its authority to charge criminal violations of the RCRA. The court found that it had jurisdiction and that by authorizing a state program in lieu of a federal program under 42 U.S.C.S. §6926(b), Congress did not intend to preempt federal regulation entirely. The EPA's authorization of a state program did not strip the Department of Justice of its power to enforce federal criminal violations. The indictment was sufficient even though it referenced the EPA's authority to administer a permit program instead of the State of California's.

United States v. Cunningham, 194 F.3d 1186 (11th Cir. 1999). The court of appeals affirmed Cunningham's convictions for illegally transporting and disposing of hazardous waste in violation of RCRA. The court found the following: (1) that the trial court did not err in refusing to allow the defendant to question one of the witnesses, Stillwell, about his opinion as to whether RD-344 was a hazardous waste. Defendant failed to establish the scientific reliability of Stillwell's testimony pursuant to Daubert vis

a vis the harmlessness of RD-344; (2) that the trial court did not err in admitting EP toxicity test results even though that test was replaced by the TCLP test in 1991; (3) that the trial court did not err when it failed to remind the jury that the defendant only needed to possess a good faith belief that RD-344 was being recycled when it clarified for the jury the definition of "recycling" because the jury did not ask for a clarification of the good faith defense; and (4) that the trial court did not err when it refused the defendant's proposed definition of "reclaimed materials" because the court gave the jury a clear and concise definition.

United States v. Fiorillo, 186 F.3d 1136 (9th Cir. 1999). Defendants were charged with "knowingly storing" and "knowingly transporting" hazardous materials under RCRA for the unpermitted storage of corrosive materials that they had contracted to dispose. The Ninth Circuit held that while the defendants did not cause the waste to be transported, they did take "responsibility for and carried out the transportation of" the hazardous waste from the generators site to their storage facility. Thus, the defendants' convictions were affirmed.

United States v. Hill, 1998 U.S. App. LEXIS 5478 (9th Cir. March 18, 1998) (unpublished decision). Defendant was convicted of transportation of hazardous waste to an unpermitted facility and storage of hazardous waste without a permit in violation of 42 U.S.C. §§6928(d)(1) and (2). On appeal, Defendant argued that he did not have the requisite intent to be convicted under 42 U.S.C. §6928(d) because he believed that he would not need a permit. The court upheld the lower court's conviction and held that section 6928(d)(1) simply requires knowledge that the facility does not have a permit, and that hazardous waste is being transported and stored there.

United States v. Henry, 136 F.3d 12 (1st Cir. 1998). The defendants were convicted for conspiracy to violate 42 U.S.C. §6928(d)(1) which prohibits the transport of hazardous waste to a facility that does not have a permit to receive such waste. On appeal, the First Circuit upheld the district court's definition of hazardous waste as solid waste that contains lead in concentrations greater than five parts per million or cadmium in concentrations greater than one part per million. The defendants also argued that the district court improperly participated in the direct examination of a government witness. The court held that the judge's questioning was nothing more than an effort to clarify testimony that falls directly within the scope of the district court judge's right and responsibility to manage the progress of the trial.

United States v. Kelly, 167 F.3d 1176 (7th Cir. 1998). The Seventh Circuit denied the defendant's appeal that the jury instruction received at the trial court was inadequate because it did not separate "hazardous waste" into two components,

"hazardous" and "waste." The court said the jury was only required to find that the defendant knowingly transported a "hazardous waste" as defined by RCRA, not that he knew the material was "hazardous" and that he knew the material was "waste."

United States v. Johnson, 886 F. Supp. 1057 (W.D.N.Y. 1995). In denying defendants' motion to dismiss, the court held that water was not solid waste under RCRA, and therefore waste consisting of a mixture of the listed hazardous waste and steam was still a listed hazardous waste for RCRA purposes. The "mixture" rule, which was found invalid in 1991 because the EPA did not comply with the notice and comment requirements of the Administrative Procedures Act, did not apply to the same listed hazardous waste distilled by steam because it applies only to mixtures of listed hazardous wastes and non-hazardous solid wastes.

United States v. Patel, 1995 LEXIS 4552,1995 WL 170354 (N.D.N.Y. 1995) (unpublished). The District Court for the Northern District of New York upheld a conviction for the storage of hazardous wastes without a permit in violation of 42 U.S.C. §6928(d)(2)(a). The defendant argued on appeal that the prosecution improperly argued the evidence to the jury and that without the misargued testimony, the evidence was not sufficient to uphold the conviction. On close examination of the prosecutor's statement in context, the court determined that the testimony was not misargued. Regardless, the court remarked that additional evidence adduced at trial, independent of the testimony in question, was sufficient to convict.

United States v. Wagner, 29 F.3d 264 (7th Cir. 1994). The Seventh Circuit upheld appellant's conviction under the RCRA by concluding that knowledge of a permit requirement is not an element of the offense of unpermitted storage of hazardous waste under 42 U.S.C. §6928(d)(2)(A).

United States v. Bentley-Smith, 2 F.3d 1368 (5th Cir. 1993). Defendants, one of whom was program coordinator for the Louisiana Department of Agriculture's pesticide waste program, were convicted of conspiring to transport and transporting hazardous materials. The Fifth Circuit upheld the convictions, holding that evidence that the program coordinator knew that twelve drums contained waste and was attempting to dispose of the drums when he arranged for their transportation was sufficient to justify the conviction even though the defendant claimed that he thought the drums contained usable material that was being returned to its manufacturer.

United States v. Heuer, 4 F.3d 723 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1190 (1994). Management employees were convicted of the storage, transportation and disposal of hazardous waste after the employer closed one propellant-producing facility, opened another, and transported wastes from the first facility to the second for disposal. Convictions for disposal reversed because, the court held, there was no express provision or "implied condition" in the second facility's permit that only wastes generated at that facility be disposed of at the facility.

United States v. Laughlin, 10 F.3d 961 (2d Cir. 1993), *cert. denied*, *Goldman v. United States*, 114 S. Ct. 1649 (1994). The owner of a railroad tie treating business was convicted under RCRA and CERCLA for disposing of hazardous wastes without a permit and failing to report the new release of a hazardous substance. Court upheld convictions, holding that the RCRA offense of knowing release of a hazardous substance without a permit does not require that (1) defendant had knowledge of lack of permit or (2) defendant have knowledge that the specific substance was listed under RCRA, but merely that defendant have a general awareness that he is performing acts proscribed by the statute.

United States v. Recticel Foam Co., 858 F.Supp. 726 (E.D. Tenn. 1993). In this opinion by a magistrate judge, the court granted a motion to dismiss several counts of an indictment. The case involved the post-use mixture of an FOO2 listed hazardous waste spent solvent and two non-hazardous wastes. The court concluded that the hazardous waste listing for spent halogenated solvents did not include post-use mixtures of spent solvents and non-hazardous solid wastes; instead, these types of mixtures were intended to be governed by the now invalid mixture rule. However, the court held that the invalidation of the mixture rule because of its faulty promulgation was retroactive, therefore, the waste at issue could not be regulated under the federal mixture rule even though the events in this case occurred prior to the rule's invalidation. Although the state of Tennessee had a similar mixture rule, it was held to be broader than the federal rules of RCRA, so the Tennessee rule could not be enforced through a federal criminal prosecution. The court also found that EPA's "contained-in" policy, under which

hazardous waste listings would apply to mixtures of a listed hazardous waste and another material, was only intended to regulate mixtures of a listed waste and environmental media, such as soil or water, which would have not been subject to the mixture rule. Additionally, the mixed waste did not have any hazardous characteristics, and mixing listed and non-hazardous wastes was not deemed to be illegal. Thus the mixture at issue did not qualify as hazardous waste, and the EPA had no continuing jurisdiction over the waste for purposes of a criminal prosecution under RCRA.

United States v. Self, 2 F.3d 1071 (10th Cir. 1993). Defendant was convicted of RCRA violations for illegal storage and disposal of hazardous waste. The disposal charge was based on his diversion of a shipment of natural gas condensate bound for a waste disposal facility to a retail gas station, where the shipment was blended with gasoline and sold to the public as automotive fuel. The Tenth Circuit reversed most of the disposal convictions, holding as a matter of law that natural gas condensate which is burned for energy recovery does not meet the RCRA definition of "hazardous waste" and rejecting the government's argument that the blending with automotive fuel was a "sham" method of energy recovery. However, the court upheld the RCRA conviction for falsification of the operating log at the destination disposal facility. The court also upheld the storage convictions, holding that, where testimony supported the characterization of the waste as hazardous, the absence of reliable test data and the presence of some conflicting evidence did not render the evidence legally insufficient. The court also held that the defendant's knowledge of prior illegal storage provided sufficient circumstantial evidence of his knowledge of the storage in question to support the jury's conviction.

United States v. Dean, 969 F.2d 187 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1852 (1993). The Sixth Circuit rejected several contentions by the defendant that his conviction on five counts of violating RCRA was improper. The Court, following *Hoflin*, *infra*, and rejecting *Johnson & Towers*, *infra*, held that the defendant did not have to know of RCRA's permit requirement to be convicted of disposing of hazardous waste without a permit. Further, the Court stated that RCRA criminal provisions covered all "persons," not merely "owners and operators." The defendant, the production manager for a metal stamping facility, had ordered several drums of hazardous waste buried in a pit concealed behind the manufacturing plant.

United States v. Goodner Brothers Aircraft, Inc., 966 F.2d 380 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 967 (1993). The Eighth Circuit, specifically relying on the D.C. Circuit's nullification of the RCRA "mixture rule" in *Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1991), reversed and remanded the defendants' convictions for illegal disposal of hazardous wastes and failure to file for a permit to handle hazardous wastes under RCRA. The defendants, an aircraft repainting corporation and its owner, had been convicted of illegally disposing of paint remover, including methylene chloride, a listed hazardous waste, mixed with paint and water. The Eighth Circuit ruled that the trial court's jury instruction that defined hazardous wastes to include listed hazardous wastes mixed with other substances was improper. The appellate court rejected government arguments that the *Shell Oil* decision applied only prospectively.

United States v. Goldsmith, 978 F.2d 643 (11th Cir. 1992). Defendant was convicted of transporting hazardous waste to an unpermitted facility and of storing hazardous waste without a permit. On appeal, the Eleventh Circuit held that a jury instruction that the offense required knowledge that the material in question had the potential to be harmful to others or to the environment was sufficient to inform the jury of the RCRA knowledge requirement.

United States v. Slade, 980 F.2d 27 (1st Cir. 1992). Slade, a convicted defendant in *United States v. MacDonald & Watson Waste Oil Co.*, *supra*, moved for a new trial, arguing that her misunderstanding about the significance of soil-sample labels constituted new evidence. The First Circuit held that the claim was being raised for the first time on appeal, and hence was of no merit.

United States v. Speach, 968 F.2d 795 (9th Cir. 1992). The Ninth Circuit reversed the conviction of the defendant, the president of a company that treated waste effluent discharged from an electroplating businesses, for the unlawful transport of hazardous waste. The defendant, who did not appeal his conviction on eleven counts of unlawful storage of hazardous waste, argued that the government had to prove that he knew the facility to which he transported hazardous waste had no RCRA permit. The Ninth Circuit, distinguishing its earlier decision in *United States v. Hoflin*, *infra*, accepted this argument and stated that the plain meaning of RCRA did not require such knowledge.

United States v. Baytank, 934 F.2d 599 (5th Cir. 1991). The Fifth Circuit upheld the conviction of a chemical storage and transfer company for violating RCRA. The court found that the government need not prove that the defendant knew that the wastes it stored were defined as hazardous under RCRA. The Fifth Circuit also reversed the trial court's granting of judgments of acquittal after the jury's guilty verdicts for Clean Water Act and CERCLA violations against Baytank and three of its corporate officials. It also reversed the trial court's similar action with regard to RCRA charges against two of the individual defendants. The Circuit Court, however, reluctantly upheld the trial court's conditional granting of a new trial to the three individuals.

United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35 (1st Cir. 1991). The First Circuit affirmed the RCRA convictions of two employees, while vacating the RCRA conviction of the owner of a waste oil disposal corporation. The First Circuit found sufficient evidence to support the inference that the two employees knew the waste was regulated under RCRA. However, the Court limited the application of the responsible corporate officer doctrine by disallowing jury instructions that allowed the

jury to find the owner guilty without finding that he had the required knowledge of the violation.

United States v. Sellers, 926 F.2d 410 (5th Cir. 1991). The Fifth Circuit upheld defendant's conviction for knowingly and willfully disposing of a hazardous waste without obtaining a permit. The court found that under the facts of the case it was not plain error for the jury instruction on the elements of RCRA to omit the requirement of proof that defendant knew the substance he disposed of was potentially hazardous or dangerous to persons or the environment. The Fifth Circuit then denied defendant's arguments that the District Court incorrectly applied the U.S. Sentencing Guidelines.

United States v. Dee, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991). Affirming convictions for unpermitted disposal of hazardous wastes, the Court of Appeals held that Federal employees working at Federal facilities were "persons" subject to the criminal provisions of RCRA, and were not protected by sovereign immunity. The Court also held that knowing violations of RCRA did not require showing of specific intent to violate the Act or regulations promulgated thereunder.

United States v. Jude, 914 F.2d 249 (4th Cir. 1990), *aff'd without published opinion*, 31 ERC 2033. The Fourth Circuit affirmed the district court's rejection of defendant's motion to reduce his fine. The defendant, the chief executive officer of a lumber and pressure treating company, had pled guilty to one count of transporting hazardous wastes without a manifest and had been sentenced to three years probation and a $75,000 fine. The Fourth Circuit, discovering no extraordinary circumstances warranting review of the district court's decision, found the fine well within the statutory maximum for the defendant's crimes.

United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990). Rejecting the analysis in *United States v. Johnson & Towers, Inc., infra*, the Court of Appeals held that reading general intent into the "knowing" requirement in RCRA was consistent with the express language of the Act as well as its overriding concern with human health and protection of the environment.

United States v. Pandozzi, 878 F.2d 1526 (1st Cir. 1989). The First Circuit upheld the conviction of defendant, a foreman and truck driver for MacDonald & Watson Waste Oil Co., for perjury before a grand jury. Defendant had stated before the grand jury that he had never disposed of liquid wastes through storm sewers and storm drains. A jury did not believe defendant and convicted him for perjury. The First Circuit rejected

a number of challenges to this conviction, chief among them that the government failed to turn over to defendant documents favorable to the defendant before trial. The court found that none of the documents could have changed the outcome of the trial. *See also United States v. MacDonald and Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991).

United States v. Protex Industries, Inc., 874 F.2d 740 (10th Cir. 1989). The defendants appealed their convictions under the "knowing endangerment" provisions of RCRA. The Court of Appeals held that prolonged exposure to chemicals that may cause impairment of mental faculties was sufficient to establish risk of serious bodily injury. In addition, the Court approved the District Court's jury instruction defining "imminent danger" as the combination of conditions "which could reasonably be expected to cause death or serious bodily injury", thereby rejecting the defendant's contention that the Act required showing causation of such injuries with "substantial certainty".

United States v. Hayes International Corp., 786 F.2d 1499 (11th Cir. 1986). The defendant was prosecuted for unlawful transportation of hazardous wastes. In affirming the conviction, the Court of Appeals held it was no defense that the defendant did not know that the waste was hazardous waste within the meaning of the Act, or that the defendant was ignorant of the permit requirements for transporting such material.

United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984), *cert. denied, Angel v. United States*, 469 U.S. 1208 (1985). To sustain a conviction against a defendant for knowing disposal of a hazardous waste without a permit, the government must prove that the defendant knew it was required to have a permit and that the defendant also knew it did not possess a permit. However, the Court also stated that such knowledge may be inferred from the conduct of responsible corporate officials.

TOXIC SUBSTANCES CONTROL ACT

United States v. Tucker, No. 1:09-CR-57, 2009 U.S. Dist. LEXIS 114606 (W.D. Mich. Dec. 9, 2009); ***United States v. Tucker***, No. 1:09-CR-57, 2009 U.S. Dist. LEXIS 114607 (W.D. Mich. Dec. 9, 2009); ***United States v. Tucker***, No. 1:09-CR-57, 2009 U.S. Dist. LEXIS 114609 (W. D. Mich. Dec. 9, 2009). *See entry under CAA, supra.*

United States v. Salvagno, 306 F. Supp. 2d 268 (N.D.N.Y. 2004). *See entry under CAA, supra*. *See also* ***United States v. Salvagno***, 343 F. App'x. 702 (2d Cir. 2009) (unpublished) and ***United States v. Salvagno***, 344 F. App'x. 660 (2d Cir. 2009) (unpublished), *under CAA, supra.*

United States v. Pacific Hide & Fur Depot, Inc., 768 F.2d 1096 (9th Cir. 1985). The individual and corporate defendants appealed their convictions under TSCA arising out of the unlawful disposal of electrical transformers containing the toxic substance polychlorinated biphenyl (PCB). Overturning the convictions, the Court of Appeals held it was improper to instruct the jury on the doctrine of deliberate avoidance, where the evidence did not support the inference that the defendants had purposely contrived to avoid learning all of the facts in order to create a defense to a subsequent prosecution.

United States v. Ward, 676 F.2d 94 (4th Cir. 1982), *cert. denied,* 459 U.S. 835 (1982). The defendants were convicted of unlawful disposal of oil laced with PCB's in violation of TSCA. In affirming the conviction, the Court of Appeals found that evidence consisting of chemical analyses of soil samples indicating a wide range of levels of PCB contamination was sufficient to support a jury finding that oil sprayed onto the soil had contained at least 500 parts per million (ppm) of PCB's.

MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT (OCEAN DUMPING ACT)

United States v. Reilly, 33 F.3d 1396 (3d Cir. 1994). The Third Circuit upheld the defendants convictions for violating 33 U.S. C. §1411 (a) of the Marine Protection, Research and Sanctuaries Act (Ocean Dumping Act) for knowingly transporting, or causing to be transported, material for the purposes of dumping it into ocean waters and also for making false declarations under oath in violation of l8 U.S.C. §1623(a). The court found that a radiotelegram of instructions to dump ash at sea from the defendant's operative to coastal operators were admissible as evidence over hearsay objections, as were the radiotelegram statements from the coastal operators relaying the instructions to the vessel from which the material was dumped. The court also found that the prosecutor in his closing argument did not improperly prejudice the defendants by referring to their testimony as "lies" because the prosecutor was merely making a fair comment on the evidence adduced at trial.

United States v. Reilly, 827 F. Supp. 1076 (D. Del. 1993). The District Court of Delaware denied the defendant's motion to dismiss one count of violating 33 U.S.C. §141 1 (a) of the Marine Protection, Research and Sanctuaries Act (Ocean Dumping Act) for knowingly transporting, or causing to be transported, material for the purposes of dumping it into ocean waters. The court found that the prosecution in an Ocean Dumping Act case must only prove general intent, i.e. that the defendant consciously does the acts constituting the offense, but not specific intent, i.e. that he knows those acts violate the Ocean Dumping Act, to satisfy the knowledge element of the offense.

ACT TO PREVENT POLLUTION FROM SHIPS

United States v. Fleet Mgmt. Ltd., 332 F. App'x 753 (3d Cir. 2009). After conducting a *Daubert* hearing, the District Court denied the government's motion *in limine* and excluded the report and testimony of the government's expert witness. The witness would have offered testimony that Fleet Management's ship, the Valparaiso Star, discharged oil-contaminated bilge water and sludge into the sea in January, 2007 in violation of the Act to Prevent Pollution from Ships (APPS). On appeal, the government challenged the District Court's reasoning regarding the reliability of the witness' opinions. The appellate court affirmed the exclusion of the witness' testimony because the witness failed to address possible alternative causes of the oily discharge, and eliminating alternative causes is the basis for the "differential diagnosis" methodology the expert claimed to rely upon.

United States v. Ionia Mgmt., 555 F.3d 303 (2d Cir. 2009). Defendant ship management company was convicted of violating the Act to Prevent Pollution from Ships (APPS) by its failure to maintain an oil record book, conspiracy, falsifying records in a federal investigation, and obstruction of justice. Though Defendant was a foreign company, its ship routinely and purposely discharged oily waste water into the ocean while in U.S. waters, using a hose designed to bypass the oily water separator required by U.S. law to clean the waste. On appeal, Defendant contended it was not responsible for its crew's actions and that a foreign ship was not subject to the APPS requirements.

The appellate court affirmed the district court's denial of Defendant's motion for acquittal, holding Defendant could be held criminally liable for the actions of its crew, and holding the APPS requirement to maintain an oil record book applies even to foreign ships upon entering U.S. waters. The APPS is the U.S. law executing the MARPOL conventions, and keeping accurate oil record books (ORB) is necessary to carry out the goals of MARPOL and the APPS. These laws require ships to use a special oily water separator to filter and trap most of the oil. All oil transfer operations, including discharges of bilge water and other oily waste, must be recorded in an ORB that is available for inspection. The record book requirements apply to U.S. ships regardless of location, and they also apply to any foreign ships when in U.S. waters or ports. The court held this requirement complies with international law, which allows prosecution for record book offenses. The court also affirmed the district court's imposition of a $4.9 million fine as reasonable.

United States v. Jho, 534 F.3d 398 (5th Cir. 2008). The district court dismissed criminal charges against the defendants, a chief engineer and shipping company, for

violating the record book requirement of the APPS. The government appealed the decision, and the Fifth Circuit reversed and remanded the case. The district court held that the criminal conduct occurred outside U.S. waters, and as such, was outside the jurisdiction of the APPS. The Fifth Circuit disagreed. Under the APPS, the criminal act is not actually making the false entries in the record book, but rather is the mere act of entering a port with a false book. Furthermore, the district court found that prosecution of the oil book offenses would violate principles of international law, as prohibited by 33 U.S.C. §1912. The Fifth Circuit disagreed. First, the court noted that unless the U.S. surrendered jurisdiction to prosecute under the APPS, then the charges would stand. The district court also relied on the Third United Nations Convention on the Law of the Sea (UNCLOS). The Fifth Circuit first noted that the U.S. is not a party to UNCLOS, as the Senate has not ratified the treaty. As such, the international law referred to in §1912 incorporates UNCLOS only to the extent that UNCLOS reflects customary international law. Since UNCLOS, in the court's view, broadens the traditional authority given to a port state, it does not infringe on the authority granted by the APPS. Lastly, the court looked to the defendants' argument that the eight counts constituted a multiplicitous indictment, because the same offense conduct was charged in each count. The government contended that each port entry was a distinct criminal act. Since the district court did not consider the issue, the record was not sufficiently developed to allow the Fifth Circuit to determine how many counts could properly be charged, and the court left the issue to the district court to address.

United States v. Overseas Shipholding Group, Inc., 547 F. Supp. 2d 75 (D. Mass. 2008). The district court issued an order granting whistleblower awards pursuant to APPS, and ordered that any legal fees in excess of $10,000 be approved by the court. The attorney for two whistleblowers sought fees in excess of $10,000 pursuant to a thirty-three percent contingency agreement. The court found the contingency fee excessive, and granted fees of $50,000, which were at the outer limits of reasonableness. While the court did not hold that APPS specifically precluded the award of fees, the criminal nature of the statute meant that recovery would be obtained mainly through the efforts of the government, and not a private attorney. Furthermore, the fee was out of proportion to the work performed, no special expertise was used, and the clients were not necessarily at liberty to negotiate the contract.

United States v. Fleet Management Ltd., No. 07-279, 2007 WL 2463364 (Aug. 28, 2007) (unpublished). The defendants, a shipping company, captain, and chief engineer, were charged with failing to maintain an accurate record book, conspiracy, false statements and obstruction of justice. The defendants' motion to depose witnesses unavailable at trial was granted, as the witnesses were in India and unwilling to travel. This witness testimony was material to the trial, as they were the only two able to testify as to whether the ship's occupants illegally discharged oil into the ocean. The motion for the government to pay the deposition expenses was denied, as the government only acceded to the witnesses' requests to return home, and did not deport them. The court

suppressed evidence obtained from computer hard drives on the ship, because the information was obtained through a general warrant that was invalid on its face. The warrant authorized the seizure of "any and all data", and the court found the inclusion of the terms "including, but not limited to" to impose no actual limitation on the warrant. Since there was no limitation on the data the government could seize, the warrant was too general. The government also argued that a few witnesses be deposed as they were unavailable for the purposes of Rule 15, to which the court agreed.

United States v. Ionia Management, 498 F. Supp. 2d 477 (D. Conn. 2007); other dispositions found at 537 F. Supp. 2d 324 (D. Conn. Mar. 13, 2008) (holding that the defendant's fine would not be set aside because the defendant did not show any explanation or authority as to why it did not comply with the fine or why it wasn't applicable); 537 F. Supp. 2d 321 (D. Conn. Mar. 7, 2008) (setting a payment schedule for the defendant); 537 F. Supp. 2d 321 (D. Conn. 2008) (denying the defendant's motion to modify the fine); 2008 U.S. Dist. LEXIS 23803 (D. Conn. Jan. 29, 2008) (not reported) (ordering that the defendant continue the terms of probation with the same conditions, and postponing additional sanctions for violating probation until after a Special Master was appointed); 526 F. Supp. 2d 319 (D. Conn. 2007) (denying defendant's motion for a new trial); 499 F. Supp. 2d 170 (D. Conn. Aug. 15, 2007) (denying defendant's motion for a continuance); 2007 U.S. Dist. LEXIS 58016 (not reported) (D. Conn. Aug. 9, 2007) (denying defendant's motion for an order to take Rule 15 depositions of crewmembers); 2007 U.S. Dist. LEXIS 56577 (not reported) (D. Conn. Aug. 3, 2007) (granting defendant's motion for disclosure of the federal agents' rough notes). The defendant ship company and its second engineer were charged with failure to maintain an oil record book, as well as failure to use an oily water separator, both violations of the APPS. The defendant filed a motion to dismiss. The defendant first contended that jurisdiction did not exist, arguing that the APPS cannot criminalize acts occurring outside the waters of the United States. The defendant argued that Third United Nations Convention on the Law of the Sea (UNCLOS) precluded criminal prosecution, but the court found that the presentation of a false record book to the U.S. Coast Guard was a domestic crime. The defendant also argued that the Paperwork Reduction Act (PRA) barred any penalty under the APA. The court denied the motion, holding that jurisdiction did exist, because the crime was not the pollution itself, or even the time the entry in the book was made, but rather the misrepresentation that occurred in port. The court held that the PRA was not enacted to allow the administering agency to abrogate any duty imposed by Congress, and therefore the APPS controls over the PRA. Lastly, the defendants contended that the indictment was multiplicitous, but the court held that since the different counts required proof of different elements, this was not the case.

United States v. Maritime Navigation Agency, Ltd., 2007 U.S. Dist. LEXIS 56747 (M.D. Fla. July 19, 2007) (unpublished). The court denied the defendant's motion to dismiss charges of an APPS violation. Defendant's ship was discharging oil into international waters without using the required pollution prevention equipment. The

ship's oil record book not only failed to disclose the discharges, but also contained false information about quantities of waste on board. Jurisdiction existed because the ship entered into a U.S. port while maintaining the alleged false book; the location of the ship when the entries were made was irrelevant. The court also refused to accept the argument that the Paper Reduction Act (PRA) protected the defendants from prosecution under APPS. Not only does the PRA not protect those knowingly making false statements, but as an agency regulation, it does not abrogate duties imposed by Congress.

United States v. Jho, 465 F. Supp. 2d 618 (E.D. Tex. 2006). Criminal charges against defendant for violating APPS were dismissed. Under the "law of the flag" rule—long-standing customary international law codified by the United Nations Conference on the Law of the Sea (UNCLOS)[19]—a ship is considered sovereign territory of country whose flag it bears. Therefore, the United States does not have jurisdiction to prosecute a foreign-flagged ship for APPS violations that occur outside of U.S. territorial waters.

United States v. Stickle, 454 F.3d 1265 (11th Cir. 2006). The appellate court rejected defendant's claim that the trial court lacked venue. Although the *locus delicti* of the crime was the high seas, the last known address of one of the joint offenders was in the court's jurisdiction. Also, a co-conspirator made a misleading statement to the FBI—an act in furtherance of the conspiracy—in the jurisdiction. The government properly proved these facts by a preponderance of the evidence; venue is not an element of the offense and therefore not subject to the reasonable doubt standard.

The court proceeded to uphold defendant's conviction for knowingly discharging diesel-contaminated wheat into the South China Sea without an oil monitoring and discharge control system. Defendant's U.S.-flagged vessel was originally built as an oil tanker, but it was inspected and certified as a freight vessel for the purpose of transporting wheat. Accordingly, defendant's actions were subject to 33 C.F.R. §151.10, which applies to "a ship other than an oil tanker," rather than the more liberal oil discharge rules applicable to oil tankers.

United States v. Fujitrans Corp., CR 04-469-KI, CR 04-531-KI (D. Ore. Feb. 3, 2005). Defendant, a Japanese shipping company, pled guilty to four felony charges for violating the Act to Prevent Pollution from Ships (APPS). Defendant's employees admitted illegally discharging oily waste into the sea using a bypass hose; the same investigation led to criminal cases in both Oregon and California. As part of the plea agreement, Defendant was ordered to pay criminal fines totaling more than $1.3 million and $660,000 to the National fish and Wildlife Foundation and the United States National

[19] UNCLOS was signed by the President, but it has never been ratified by Congress. The court applied it nonetheless, citing APPS § 1912. Section 1912 states: "Any action taken under this chapter shall be taken in accordance with international law."

Park Service. The agreement also included three years' probation and a requirement that Defendant design and fully implement and environmental compliance program.[20]

United States v. Stickle, 355 F. Supp. 2d 1317 (S.D. Fla. 2004). Defendants were charged with discharging and causing to be discharged from a ship more than 40 gross tons oil of an oily mixture (approximately 442 metric tons of diesel-contaminated fuel) into the sea without the use of an oil discharge monitoring and control system in violation of the APPS. Defendants moved to dismiss, arguing improper venue and claiming that 33 C.F.R. §151.10(a) was unconstitutionally vague. The district court denied the motion to transfer noting that Defendants' were not entitled to a transfer on the ground that a jury in another district would have been more sympathetic to defendants. The court further found no basis to apply the rule of lenity or to dismiss the indictment.

United States v. Apex Oil Co., 132 F.3d 1287 (9th Cir. 1997). The oil residue the defendants discharged from tanker ships is not considered "cargo-related oil residue" under the Act to Prevent Pollution from Ships. The "rule of lenity" required the Ninth Circuit to dismiss the charges because it was unclear whether the regulations were applicable to the type of oil residue the defendants discharged.

THE LACEY ACT

United States v. Place, 693 F.3d 219 (1st Cir. 2012). Defendant bought and sold whale teeth and narwhal tusks without permits even though he had been warned by colleagues, buyers, and an online auction website that such transactions were unlawful. His felony Lacey Act convictions for knowing violations of the Convention on International Trade in Endangered Species of Wild Flora and Fauna were upheld on appeal. The court rejected Defendant's argument that the jury instructions should have included lesser included misdemeanor Lacey Act offenses, which criminalize violations for which a defendant should have known were unlawful. The court noted that the evidence demonstrated that Defendant was aware of that his transactions required permits.

United States v. Dupont, No. 10-140-BAJ (M.D. La. Jan. 12, 2012). Defendant owned and operated a hunting outfitting company specializing in alligator hunts throughout the state of Louisiana. Alligators are listed as an endangered species and are protected by the Lacey Act, the Endangered Species Act, and U.S. Fish and Wildlife

[20] Press Release, U.S. Coast Guard, Japanese Transportation Company Pleads Guilty to Felony Charges (June 26, 2005), *available at* http://www.piersystem.com/external/index.cfm?cid=21&fuseaction=EXTERNAL.docview&documentID=62152.

Service regulations promulgated by the state of Louisiana. Defendant was accused of "knowingly transporting, selling, receiving and acquiring American Alligators on three separate occasions."

Defendant argued in his motion to dismiss that the guided trips did not constitute a "sale" under the Lacey Act because they were services that he donated with the knowledge that they would be sold at auctions. Defendant further argued that because he did not receive any remuneration or consideration in return. The court denied Defendant's motion to dismiss and he was convicted at trial.

United States v. Bruce, Nos. 09-6075, 2011 WL 1877732 (6th Cir. 2011) (unpublished)**.** Defendants Billy Bruce, Pamela Salyers, and William Salyers were convicted for conspiracy to violate the Lacey Act. The Salyerses purchased undersized freshwater washboard mussels from Bruce, processed them, and then sold them in violation of state law regulating the size of mussel that may be harvested. Defendant Pamela Salyers appealed her conviction on the ground that the Government had presented insufficient evidence to prove she knew of or voluntarily joined the conspiracy. The court found the testimony of an undercover agent who had sold illegal mussels to Pamela Salyers while she worked in her husband's business and of two employees who had assisted her in keeping small mussels off of receipts to be sufficient evidence to prove knowledge.

At sentencing, Defendant Pamela Salyers was sentenced to 12 months and one day and ordered to pay restitution of $50,000, jointly and severally with William Salyers and another defendant, and Defendant William Salyers was sentenced to 20 months and ordered to pay restitution of $50,000, jointly and severally with Pamela Salyers and another defendant. In appealing her sentence, Pamela Salyers argued that the sentence was unreasonable because she eventually cooperated with the investigation and because the district court failed to properly consider the factors in 18 U.S.C. §3553(a). The court dismissed these arguments, finding that she had not submitted any evidence of her cooperation and that the district court judge had applied the §3553(a) factors to give her a sentence "well below" the applicable range.

Defendant William Salyers appealed his sentence on the ground that he should not have been ordered to pay restitution when there was no identifiable victim. He argued that state agencies do not qualify as victims under the Mandatory Victims Restitution Act (MVRA). The court disagreed and stated that under *Ratliff v. United States*, 999 F.2d 1023, 1027 (6th Cir. 1993), the government can be a victim for restitution purposes. As the mussels were taken from the waters of several states, the states had "a property interest . . . and [were] entitled to compensation for their loss."

United States v. Delaney, 795 F. Supp. 2d 125 (D. Mass. 2011). Defendant was convicted of a felony violation of the Lacey Act for the false labeling of fish, as well as a

misdemeanor count of false labeling under the Food, Drug, and Cosmetic Act (FDCA). Defendant labeled $8,000 worth of frozen Pollock fillets as cod loins, which sell for approximately one dollar per pound more than Pollock. Defendant also mislabeled approximately $203,000 worth of frozen fish fillets from China as products of Canada, Holland, Namibia and the United States.

Following the conviction, Defendant moved for a judgment of acquittal, arguing that the meaning of "fish or wildlife" within the Lacey Act "does not include animals that spent their entire lives in captivity and which never lived in the wild." Def.'s Mot. J. of Acquittal at 2. The court, however, rejected that argument, stating that the Lacey Act's definition of "wild" would include fish such as the ones that Defendant mislabeled, and therefore denied his motion for judgment of acquittal.

United States v. Bengis, 631 F.3d 33 (2d Cir. 2011). The Government appealed the district court's order denying restitution to South Africa after Defendants were convicted of smuggling South African rock lobsters in violation of the Lacey Act. The Second Circuit held that under the Mandatory Victims Restitution Act (MVRA), the removal of the lobsters was "an offense against property" because South Africa had a property right in the lobsters. As South African law granted the government the right to seize and sell illegally harvested lobsters and keep the proceeds, the court reasoned that Defendants' smuggling operation prevented the South African government from profiting as it ordinarily would have and that this "entitlement to the revenue from the lobsters that were taken illegally does constitute 'property.'" Additionally, the court held that South Africa was a "victim" under the MVRA because its property interest in the lobsters meant it was "directly harmed" by Defendants' criminal actions. In considering the appropriate amount of restitution, the court remanded to the district court and instructed it to multiply the number of illegally obtained lobsters by the market price for lobsters at the time to determine the amount lost by South Africa.

United States v. Manghis, No. 08-cr-10090-NG, 2011 WL 2110212 (D. Mass. May 26, 2011). Defendant, a nationally recognized artist skilled in etching, imported sperm whale teeth and elephant ivory for his artworks. He was convicted of conspiracy to smuggle and of knowingly importing ivory and sperm whale teeth into the United States under 18 U.S.C. §545 and of making false statements to federal investigators. He appealed these convictions and moved for a new trial, raising several arguments. Defendant contended that the Government had failed to show his intent to smuggle since he did not know about the Convention on International Trade in Endangered Species (CITES) or of any required documentation for his imports.

Defendant also argued there was insufficient evidence to convict him of conspiracy or of knowing violations of importation laws because he was only a buyer and not an importer. The court rejected this argument, finding that Defendant was responsible for bringing the teeth and ivory into the U.S. because he had personally ordered the supplies on eBay and directly negotiated further purchases with a Ukrainian seller. The court emphasized that the knowledge required for conviction was knowledge

that Defendant was breaking the law, not just knowledge of the imports. Defendant argued that he believed his acts were legal because he was importing antique items over 100 years old and had been told this was legal at an art conference. He also argued that he relied on a middle man in the transaction to comply with all documentation. The court found these arguments unconvincing, based on Defendant's emails to various sellers and other publicly available information Defendant had admitted to reading stating that imports such as his must be declared.

Additionally, Defendant argued that his conviction should be voided because he should have been allowed to raise a lesser-included offense defense under the Lacey Act and because he was charged under a general smuggling statute, 18 U.S.C. §545, rather than the more specific Lacey Act. He contended that the Lacey Act creates a misdemeanor violation with a negligence mens rea standard for violations of CITES and is thus a lesser-included offense[21] of the smuggling statute, which requires knowledge. The court held that the lesser-included offense theory was not available because the misdemeanor provision of the Lacey Act is a lesser offense for the felony provision of the Lacey Act and not for 18 U.S.C. §545. The court went on to hold that Defendant was properly charged under the smuggling statute, and not the Lacey Act, because the Lacey Act was intended to "coexist and complement" existing anti-smuggling laws, leaving the Government free to choose to bring smuggling charges.

United States v. Foiles, No. 10-CR-30100, 2011 WL 1752187 (C.D. Ill. May 6, 2011). Defendant filed a motion to dismiss his indictment under the Lacey Act, arguing that he should have been charged under the Migratory Bird Treaty Act (MBTA). Defendant was charged with conspiracy to violate the Lacey Act after leading a series of hunts in which he helped hunters take more duck and geese than the set bag limits. Defendant argued that the MBTA was "the more specific statute," but the court agreed with the magistrate judge's reasoning that "when two criminal statutes apply to the same conduct, the Government has the discretion to elect the statute under which to proceed." *See United States v. Foiles,* No. 10-CR-30100, 2011 WL 1750120 (C.D. Ill. March 29, 2011) (Magis. Judge Report and Recommendation). The court denied the motion to dismiss the indictment and adopted the magistrate judge's Report and Recommendation.

United States v. Place, No. 09-10152-NMG, 2010 WL 4449601 (D. Mass. Nov. 5, 2010); ***United States v. Place,*** **7**57 F. Supp. 2d 60 (D. Mass. Nov. 5, 2010); ***United States v. Place,*** 746 F. Supp. 2d 308 (D. Mass. Oct. 12, 2010). ***Note: There are three opinions for* United States v. Place *combined into one summary.*** Defendant was involved in a conspiracy to buy and sell sperm whale teeth and was indicted on five counts of violating the Lacey Act. The Government filed a motion *in limine* to admit into

[21] Defendants are entitled to lesser-included offense instructions to the jury when: "(1) the lesser offense is included in the offense charged; (2) a contested fact separates the two offenses; and (3) the evidence would permit a jury rationally to find the defendant guilty of the lesser offense and acquit him of the greater." United States v. Boidi, 568 F.3d 24, 27 (1st Cir. 2009).

evidence eBay and PayPal records and emails to prove that Defendant knew he was buying and selling sperm whale teeth in violation of federal law. Defendant opposed the records as inadmissible, but the court held that the records and emails could be admitted under Federal Rule of Evidence 404(b), to prove Defendant's "intent, knowledge or absence of mistake" and that any prejudicial effect was outweighed by probative value.

Defendant was also indicted for additional counts for smuggling and moved to dismiss these additional counts by reason of duplicity. Duplicity " 'is the joining in a single count of two or more distinct and separate defenses.'" (quoting *United States v. Verrecchia*, 196 F.3d 294, 297 (1st Cir. 1999)). The harm to the defendant is that "a jury may find a defendant guilty on a count without having reached a unanimous verdict" on any particular offense. The indictment counts at issue used only the language of the second paragraph of 18 U.S.C. §545, but the Government argued that it would try to prove a violation of either paragraph of §545, leading the court to "assum[e]" the counts were duplicitous. Because duplicity is a pleading rule and does not warrant dismissal of the entire indictment, the court denied Defendant's motion and ordered the Government to specify in the indictment which paragraphs of §545 it intended to rely on in its prosecution.

Then, Defendant moved to dismiss three counts of the indictment as barred by the statute of limitations. The counts charged Defendant with violations of the Lacey Act between February 2004 and April 2004, and Defendant was indicted on May 13, 2009. The Lacey Act has a five year statute of limitations, and Defendant argued that his waiver of the statute of limitations was invalid because he did not have counsel at the time and was coerced by attorneys at the Environmental Protection Agency (EPA). The court held that the waiver agreement Defendant had signed and sent to the EPA was valid because Defendant had adequate time to find counsel, did not, and was not coerced into signing by time pressure or misled by EPA attorneys.

United States v. Eisenberg, 496 F. Supp. 2d 578 (E.D. Penn. 2007). The defendant pled guilty to violations of the Lacey Act, ESA and the Marine Mammal Protection Act (MMPA). As part of his plea agreement, he agreed to pay a $150,000 fine, which was $60,000 more than the three acts combined allowed. The government contended that the defendant was subject to a higher fine under 18 U.S.C. §3571, the Criminal Fine Enforcement Act of 1984 (CFEA) (also commonly known as the Alternative Fines Act), which trumped the lower fees in the statutes. Since the court was looking to determine whether the CFEA implicitly repealed the others, the court examined the legislative history to see if the repeal was intended. The plain language of the CFEA increased the maximum fine for all previously passed legislation, which included the Lacey Act and the MMPA. However, because the ESA was amended after passage of the CFEA to have an increased fine of its own, this had to be honored to give the amendment any effect. Furthermore, a newer, more specific statute usually controls over an older, more general statute. Accordingly, the higher fines were justified for both the Lacey Act and the MMPA. However, only the lower fine required by the ESA could

be imposed. The total allowable fines, however, still exceeded $150,000, so the court was within its power to sentence the defendant to that amount.

United States v. Bengis, 2006 U.S. Dist. LEXIS 91089 (S.D.N.Y. Dec. 19, 2006) (unpublished). Defendants had been convicted of smuggling South African rock lobsters into the United States in violation of the Lacey Act. The United States government requested that the court order the defendants to pay restitution to the South African government under the Mandatory Victims Restitution Act (MVRA).

In his recommendation, the magistrate judge urged the district court to reject the restitution request. The magistrate determined that although a sovereign power could be "victim" under MVRA, South Africa was not a victim because there was no "offense against [its] property;" South African law does not vest ownership of marine life in the government.

THE MIGRATORY BIRD TREATY ACT

United States v. Citgo Petroleum Corp., 893 F. Supp. 2d 841 (S.D. Tex. 2001). Defendant moved to vacate its conviction for violating the Migratory Bird Treaty Act (MBTA) on the grounds that it was engaged in an innocent commercial activity during which migratory birds were unintentionally harmed. The birds died after landing in large open tanks filled with oil. Defendant had been convicted of CAA violations for its failure to cover the tanks and had been aware birds dying in the tanks in the past. The court rejected the motion, holding that the deaths were reasonably foreseeable and that Defendant did nothing to prevent them.

United States v. Khanh Vu, Case No. V-11-31, 2011 WL 2173690 (S.D. Tex. June 1, 2011). Defendants, Khanh Vu and Seaside Aquaculture, Inc., were indicted for violating the MBTA) after killing 90 brown pelicans without a permit. The Government sought to force Seaside Aquaculture to post a $360,000 bond, roughly half of the restitution the Government's experts considered appropriate for the MBTA violation. Defendants filed a motion to reduce the bond. Defendants first argued that restitution was unavailable under the MBTA because 18 U.S.C. §3663 does not explicitly list a violation of the MBTA as a violation eligible for restitution, and the MBTA does not list restitution as a penalty. *See* 16 U.S.C. §707(a). The court rejected this argument, noting that under *United States v. Love*, 431 F.3d 477 (5th Cir. 2001), there are two possible sources for authority for restitution: 18 U.S.C. §3556 and 18 U.S.C. §3583. Section 3583 authorizes restitution under §3563(b)(2), which the *Love* court interpreted as covering offenses beyond those in the Mandatory Victims Restitution Act (MVRA) and Victim

and Witness Protection Act (VWPA). The court also held that the government can be a "victim" for the purposes of restitution and was in fact a victim in the case at hand because the government would need to "expend funds to rectify the environmental harm" caused by Defendants. The court concluded that restitution was likely to be available if Defendants were convicted but reduced the bond to $50,000.

United States v. Foiles, No. 10-CR-30100, 2011 WL 1752187 (C.D. Ill. May 6, 2011). *See Lacey Act Section, supra.*

United States v. Andrus, 383 F. App'x. 481 (5th Cir. 2010) (unpublished). Defendants appealed their convictions for violating the Migratory Bird Treaty Act (MBTA) after killing certain migratory birds. Defendants argued that the Government had failed to show they knew the field where they hunted the birds was baited because it appeared to be harvested. The court found the field did not appear harvested based on witness testimony to the contrary. The court also concluded that Defendants had a duty under the MBTA, as interpreted in *United States v. Delahoussaye*, 573 F.2d 910, 912 (5th Cir. 1978), to inspect the field to see if it was baited and, as they had conducted no such inspection, affirmed their convictions.

United States v. Apollo Energies, Inc., No. 09-3037, 2010 WL 2600502 (10th Cir. June 30, 2010). Defendants were convicted of taking or possessing migratory birds in violation of the MBTA after their use of "heater-treaters" in the processing of crude oil resulted in the killing of hundreds of birds. *See* 16 U.S.C. §703. On appeal, Defendants first argued that "taking or possessing" protected birds was not a strict liability crime. The court disagreed, relying on its decision in *United States v. Corrow*, 119 F.3d 796 (10th Cir. 1997), where it broadly held that all "misdemeanor violations under §703 are strict liability crimes." Second, Defendants argued that the MBTA failed to provide adequate notice of statutorily prohibited acts. The court disagreed, holding that the MBTA was not unconstitutionally vague because it specifically listed the types of conduct that were criminal, such as "pursue, hunt, *take*, capture [and] kill . . . ." Moreover, the court stated that those terms were capable of definition without turning to the subjective judgment of government officers. Third, Defendants argued that MBTA failed to provide adequate notice of prohibited predicate acts that were several steps removed from bird deaths or takings. The court disagreed, accepting the decision in *United States v. Moon Lake Electric Ass'n, Inc.*, 45 F. Supp. 2d 1070 (D. Colo. 1999), where the District Court held that "proximate cause [was] an 'important and inherent limiting feature' to the MBTA, and that liability would attach where the injury 'might be reasonably anticipated or foreseen as a natural consequence of the wrongful act.'" Applying the above principles to Defendants' claims, the court affirmed Defendant's (Apollo's) conviction holding that it had notice of the "heater-treater" issue because it failed to cover the heater-treater's exhaust pipes as suggested by the Fish & Wildlife Service after a December 2005 inspection. The court also affirmed Defendant's (Walker's) conviction, holding that, although dead birds were found in another cavity of the Defendant's heater-treater, once he was alerted of the protected birds' proclivity to crawl into a heater-treater's exhaust pipe, it was reasonably foreseeable that protected

birds would become trapped in the other cavities of a heater-treater. Finally, the court reversed Defendant's (Walker's) other conviction, holding that, at the time, he did not have notice of problems with dead birds in heater-treaters because 1) he did not receive a letter from the Fish and Wildlife Service regarding the problem, 2) he was not a member of the trade association to which the Service advertised it, and 3) he was not aware of the one television report or newspaper article that addressed it.

United States v. Chevron, No. 09-CR-0132 (W.D. La. Oct. 30, 2009) (unpublished). Defendant was charged with one count of violating the MBTA after discovering that thirty-five brown pelicans had been entrapped and died on its oil rig, between the inner wall of its caisson and outer wall of its wellhead. At Defendant's plea hearing, the Magistrate Judge refused to accept Defendant's plea of guilty, questioning whether or not the facts showed that Defendant was guilty of "taking" brown pelicans. The Judge ordered the Government to file a memorandum of law addressing the sufficiency of the factual basis to support the plea. The Government argued that MBTA was a strict liability statute. The court disagreed, stating that it was clear that the provisions of MBTA were designed to deal with persons who hunt or trap migratory game birds. Additionally, the court stated that Defendant did not have fair warning that its uncovered caisson, required to protect its wellhead, exposed it to criminal prosecution if certain birds became trapped in it and died. The court concluded that the facts filed at the hearing were insufficient to support Defendant's guilty plea.

United States v. Ray Westall Operating, Inc., No. CR 05-1516-MV (D.N.M. Feb. 25, 2009) (unpublished). Defendant was convicted by a Magistrate Judge for taking migratory birds in violation of the MBTA. *See* 16 U.S.C. §703. After an unknown person removed part of the netting wire covering Defendant's evaporation pit at his oil production site, thirty-four protected migratory birds were later found dead in the pit. The Magistrate Judge concluded that the MBTA "imposed liability for unintended bird deaths resulting from indirect conduct if such conduct proximately caused the birds' deaths." On appeal to the district court, Defendant argued that the word "kill," as it appears in §703, refers to conduct directed at birds, rather than acts or omissions that have an incidental effect. The Government argued that the legislative history – particularly quotes from three Congressmen – indicated that the prohibition on killing migratory birds was broad and sweeping. The court found that the statute was ambiguous, and that the general policy of US conventions with other countries, as implemented in the MBTA amendments, was to "protect and preserve migratory birds, by regulating conduct directed toward migratory birds, primarily hunting and taking of nests and eggs." The court reversed the conviction, holding that Congress intended only to prohibit conduct directed toward protected birds.

United States v. WCI Steel, Inc., 2006 U.S. Dist. LEXIS 55593 (N.D. Ohio 2006) (unpublished). Defendant was acquitted of "unlawful take" of migratory birds in violation of the MBTA. The government had not presented sufficient evidence to rule

out natural causes for the deaths of birds found in and around defendant's waste treatment lagoons.[22]

MISCELLANEOUS

United States v. Aguilar, No. 12-2047, 2013 U.S. App. LEXIS 9894 (10th Cir. May 17, 2013) (unpublished). Defendant, a member of a federally recognized Indian tribe, appealed his conviction for taking a bald eagle without a permit in violation of the Bald and Golden Eagle Protection Act, in part, because it impermissibly burdened his practice of religion. The court upheld the conviction on the grounds that the requirement to obtain a permit for taking a bald eagle was not an impermissible burden on Defendant's religious practices.

United States v. Target Ship Mgmt Pte, Ltd., No. 11-368-KD-N (S.D. Al. May 17, 2012). Defendant, the former captain of a Panama-flagged cargo ship was convicted by a jury on two counts of obstruction of justice for interfering with the United States Coast Guard inspection of his vessel. Witnesses testified that Defendant instructed the ship's officers to discharge hundreds of plastic pipes formerly containing an insecticide from the ship into the ocean. Discharges of this nature are prohibited under the International Convention to Prevent Pollution from Ships (MARPOL). The disposal of the pipes was not recorded in the ship's garbage record book. The book, which therefore contained incomplete data, was knowingly given to Coast Guard authorities during an inspection at the port of Mobile, Alabama.

United States v. King, 660 F.3d 1071 (9th Cir. 2011). Defendant, the manager of a large farming and cattle operation in southern Idaho, was convicted in district court of violations of the Safe Drinking Water Act (SDWA). Defendant was also convicted of making a materially false statement to an Idaho agricultural inspector regarding the injection of surface fluids into irrigation wells. Defendant's violations of the SDWA occurred when he instructed farm workers to inject excess surface fluids from the farm into deep irrigation wells on his property without a permit. On appeal, Defendant argued that Idaho's permitting requirement for injection wells is not part of Idaho's "applicable underground injection program," so his failure to obtain the correct permits was not a violation of the SDWA. Defendant also argued the Government had to prove that the injection of the fluids "implicated' or pertain[ed] to an underground source of drinking water" by demonstrating that it would have an adverse impact. The Government, however, argued it only had to prove that Defendant willfully failed to comply with the SDWA requirements when it injected water into a well more than eighteen feet deep without a permit.

[22] In lengthy dicta, the court discussed the meaning of "take" under the MBTA and reviewed the caselaw . The court noted that some courts require an action "directed at" migratory birds to constitute a "take," while others apply a strict liability standard. The meaning of take was not at issue in the case, however, so the court did not state its opinion matter.

The Court of Appeals for the Ninth Circuit affirmed the district court's conviction, holding that the SDWA did not require the government to prove that Defendant's injection of water would have an adverse impact on an underground source of drinking water. The Ninth Circuit also held that the SDWA did not exceed Congress' authority under the Commerce Clause.

United States v. Wilgus, 638 F.3d 1274 (10th Cir. 2011). Defendant, a non-Native American who practiced Native American religions, was convicted of possessing bald and golden eagle feathers in violation of the Bald and Golden Eagle Protection Act (Eagle Act), 16 U.S.C. §668. The Eagle Act prohibits the possession of feathers or parts of bald and golden eagles but allows possession of the feathers "for the religious purposes of the Indian tribes" when an eagle feather permit is applied for and obtained. The district court, applying the Religious Freedom Restoration Act (RFRA), held that the Government had failed to show that the Eagle Act was not "the least restrictive means" of advancing its compelling interests in promoting Native American culture and in protecting eagles and that the law therefore unduly burdened religious freedom. The court vacated the conviction.

On appeal, the Tenth Circuit reversed. The court determined that the Government had asserted two compelling interests: the protection of bald and golden eagles and the promotion of the culture and history of federally recognized Native American tribes. In deciding if the Eagle Act presented "the least restrictive means" of furthering these compelling interests, the court reasoned that the government was required to balance its two compelling interests in structuring the Act and chose appropriate means of doing so by using applications for permits for Native American religious use. The court rejected the suggested alternatives of opening the permit process to all people who practice Native American religions or allowing the tribes to give feathers to non-members because these alternatives presented significant enforcement problems.

United States v. Canal Barge Co., 631 F.3d 347 (6th Cir. 2011). The Government appealed the lower court's grant of acquittal in the Western District of Kentucky. Defendants had been convicted of violating the Ports and Waterways Safety Act (PWSA) for willfully failing to notify the Coast Guard of a benzene leak onboard a vessel. The district court then granted a motion for acquittal based on improper venue.

Addressing the question of venue, the circuit court vacated the district court's decision and held that Defendants' failure to notify was "a continuing offense" under the PWSA. The court read the regulation promulgated under the PWSA, 33 C.F.R. §160.215, which creates the duty to "immediately notify," as meaning that "the obligation to report starts immediately when the relevant actor has the relevant knowledge, and continues at least until a report is made or the Coast Guard otherwise becomes aware of the condition." The court read the word "immediately" as "simply . . . preclud[ing] a defense that the duty was discharged by giving notice several hours [or days] after the

hazard was discovered." The barge in this case had continued moving after the leak began and reached Kentucky, bringing the unreported hazardous condition into the jurisdiction of the Western District of Kentucky. The court rejected Defendants' argument that *United States v. Toussie*, 397 U.S. 112 (1970), applied because *Toussie* involved a question of whether an offense was complete or continuing with regard to a statute of limitations and not venue. The court distinguished a question of venue from one of statute of limitations because a continuing offense in the context of a statute of limitations is "more serious." In the venue context, a continuing offense only exposes a defendant to prosecution in more than one district.

A dissenting opinion disagreed with the court's conclusion that failure to "immediately notify" was a continuing offense and found that the majority's interpretation of 33 C.F.R. §160.215 rendered the regulation "nonsensical." The dissenting judge stated she could not "make linguistic sense of the majority's conclusion that a failure to *immediately* notify the nearest Coast Guard station can be an offense that is perpetual and ongoing." (emphasis in original).

United States v. Beckman, et al., No. 2:10-cr-04021-NKL (W.D. Mo. Dec. 1, 2011). Defendant, the former mayor of Stover, Missouri, and another defendant, the former superintendent of the Public Works Department, were found guilty of activities related to submission of falsified drinking water samples in violation of the Safe Drinking Water Act (SDWA). Defendant submitted samples that included a falsified sampling location and samples that had been treated with chlorine before they were tested. Defendant knew of the submission of the false samples, and was convicted of lying to federal officials regarding this knowledge. Both were convicted of violations of the SDWA.

In re Grand Jury Proceeding Related to M/V Deltuva, 752 F. Supp. 2d 173 (D. P. R. 2010). Defendant Lithuanian Shipping Company (LSC), a public Lithuanian company, was investigated by a federal grand jury for illegal oil leaks and falsifying log books to hide the leaks. The grand jury issued a subpoena requiring LSC to appear before it and produce documents related to the oil spill. Defendant LSC moved to quash the subpoena and argued that LSC was an instrumentality of Lithuania and immune from subpoena under the Foreign Sovereignties and Immunities Act (FSIA). The Government responded that LSC's ship, the M/V Deltuva, was not entitled to sovereign immunity under the FSIA and that the FSIA did not apply in criminal investigations. The court denied the motion to quash the subpoena and concluded that although the Supreme Court and federal courts of appeals had not yet spoken on whether the FSIA applies in criminal cases, it would follow the reasoning in *United States v. Hendron*, 813 F. Supp. 973 (E.D.N.Y. 1993) and hold that the FSIA does not apply in criminal actions.

United States v. Peterson, 632 F.3d 1038 (8th Cir. 2010). Defendant Alvin Peterson was convicted of two misdemeanor violations of 16 U.S.C. §§668dd(c) and (f)(2) for draining wetlands on land his parents had conveyed to the United States Fish and Wildlife Service in a federal wetlands easement. Defendant appealed the conviction for one section of land and argued that the Government had failed to show that the land was covered by the easement when conveyed in 1966 and that Defendant had knowledge of the easement's coverage. The court rejected Defendant's arguments as to the existence of the wetlands when the easement was conveyed because the Government presented photographic evidence from 1966 showing wetlands on the section in question. The court also found that the text of the conveyance covered all of the wetlands on the Petersons' land. As to Defendant's knowledge, the court concluded that the Government had adequately shown Defendant knew of the easement based on a map of the easement Defendant had signed and Defendant's prior convictions for draining wetlands.

United States v. San Diego Gas & Electric Co., 319 F. App'x 628 (9th Cir. Mar. 17, 2009). Defendants were charged with criminal violations of asbestos NESHAP (National Emission Standards for Hazardous Air Pollutants) work practice standards promulgated by the EPA during Defendants' removal of over nine miles of asbestos-containing gas pipeline. A jury convicted Defendants of various violations of the asbestos NESHAP work standards. On August 22, 2007, Defendants filed motions for acquittal and, in the alternative, for a new trial. On December 7, 2007, the District Court for the Southern District of California granted Defendants' motion for a new trial on all counts. *See United States v. San Diego Gas & Electric Co*., 2007 WL 4326773 (S.D. Cal. Dec. 7, 2007). The Government appealed the grant of a new trial, contending the district court erred in concluding the asbestos samples in the investigation were not representative or not tested properly. On appeal, the court held it could not say the district court abused its discretion given the complexity of the issues and the district judge's better position to evaluate evidence and witnesses. The Government further contended that the district court erred in granting a new trial based on inconsistent verdicts. The appellate court rejected this argument, reasoning that the district court did not grant a new trial only because of inconsistencies in jury deliberations, but because of confusing and prejudicial evidence. Therefore, the appellate court held the district court did not abuse its discretion and affirmed the grant of a new trial.

United States v. San Diego Gas & Electric Co., Nos. 06-cr-0065 DMS, 07-cr-0484 DMS, 2009 WL 4824489 (S.D. Cal. Aug. 31, 2009) (unpublished). Defendants were originally found guilty by a jury for various violations of the asbestos NESHAP work practice standards. (A violation of the NESHAP work practice standards constitutes a violation of the CAA. *See* 42 U.S.C. §§7412(c) and (e).) However, after the verdict, the trial judge granted defendant a new trial based on concerns of whether the asbestos samples were representative. The Government unsuccessfully appealed the New Trial Order. See *United States v San Diego Gas & Electric*, 319 F. App'x 628 (9th Cir. 2009).

In a pre-trial proceeding before the retrial, the Government moved for the court to admit 27 samples of asbestos containing material in support of its criminal prosecution of Defendants. The court denied the motion, stating that the Government failed to establish that any of the samples were representative, or that it tested any representative samples in accordance with NESHAP's specified test method. Even if the samples were deemed to be relevant, the court held that the probative value of such evidence was substantially outweighed by the danger of unfair prejudice, confusion of issues, and misleading the jury.

United States v. Co., 2008 U.S. Dist. LEXIS 96343 (W.D. Ky. Nov. 24, 2008) (unpublished). In June 2005, the crew of the M/V Hagestad, a barge owned by Canal Barge Company, discovered benzene leaking from a crack in the barge's tank. They stopped the leak temporarily but did not contact the U.S. Coast Guard. The barge continued to travel until a week later the leak started again. The indictment charged the company, the port captain, the pilot, and the captain of the barge with one count of conspiracy to violate the Ports and Waterways Safety Act, one count of violating the Ports and Waterways Safety Act, and one count of negligent violation of the Clean Water Act. The jury acquitted Defendants of the conspiracy and Clean Water Act counts, but convicted Defendants of knowingly and willfully failing to immediately notify the Coast Guard Marine Safety Office of a hazardous condition in violation of the Ports and Waterways Safety Act **(**PWSA).

Defendants filed a motion for judgment of acquittal, claiming venue was not proper in the Western District of Kentucky. The court granted the motion for judgment of acquittal based on lack of venue, reasoning that the duty to notify the Coast Guard accrued on the Mississippi River when the crew first became aware of the leak, outside the Western District of Kentucky. Furthermore, the PWSA does not require interstate transportation as an element of the offense. Defendants also claimed the Government failed to prove the Coast Guard was not notified, failed to prove the elements of knowledge and willfulness, and failed to prove a reportable quantity of benzene entered the Mississippi River. The court denied the judgment of acquittal on all these grounds. The court reasoned that the Government presented sufficient evidence through the testimony of the Coast Guard officials, log entries, and the testimonies of the barge's pilot and captain regarding their knowledge of the leak. Also, nothing in the PWSA requires a reportable quantity of benzene be released to constitute a violation.

Defendants also filed a motion for a new trial, contending that the evidence did not support a finding of a hazardous condition. The court denied the motion, reasoning that the witness testimony presented sufficient evidence that benzene is a known human carcinogen and is very explosive. The court further rejected Defendants' claim of cumulative errors during trial and found that a rational trier of fact could have found Defendants guilty of knowingly and willfully failing to report a hazardous condition to the Coast Guard.

United States v. Beattle, No. 3:05-cr-00205 (D. Conn. Dec. 5, 2005). Defendant, owner of a water sports equipment retailer, pled guilty to knowingly and willfully violating the Hazardous Materials Transportation Act by failing to perform the required hydrostatic testing before requalifying compressed gas cylinders. Defendant was sentenced to six months of probation and a $1,000 fine.

United States v. Seaboard Marine Ltd., No. 04-20455-CR (S.D. Fla., May 5, 2005). Defendant, a shipping company, was hired to transport chemicals in a shipping container and failed to identify the materials as hazardous cargo on required transport forms. En route, the containers began to leak, and was later found abandoned. Defendant was fined $304,000, given three years of probation, and ordered to implement a hazardous materials compliance program.[23]

N.R. Acquisition Corp. v. United States, 82 Fed. Cl. 590 (Fed. Cl. May 14, 2002). The court held that simply because a company's subcontractor had been convicted of violating numerous environmental laws under the CWA and the CAA, liability for these acts was not automatically imputed to the company. The subcontractor had, while decommissioning a navy ship, dumped asbestos, PCB contaminants, and other hazardous materials into the harbor. The court denied both parties' motions to dismiss and indicated that whether the 'fraud upon the government' that had been performed by the subcontractor would be imputed to the company would turn on the company's knowledge of, and involvement in, the fraudulent conduct.

Burke v. EPA, 127 F. Supp. 2d 235 (D.D.C. 2001). Plaintiff brought suit seeking injunctive and declaratory relief under the Administrative Procedure Act (APA) challenging the EPA's decision to debar him from contracting with the federal government and from participating in federal assistance, loans and benefit programs for five years due to a conviction for violating the Clean Water Act. The APA holds that the reviewing court shall hold unlawful an agency action that is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. In evaluating debarment under this highly deferential standard, the court's inquiry is limited to determining whether the agency examined the facts and articulated a satisfactory explanation for its decision showing a rational connections between the facts found and the decision made. The court found that the EPA properly evaluated plaintiff's criminal offense in light of his company's fraud and deceit and that substantial evidence supported its decision. The five-year debarment was upheld.

[23] Solow, *supra* note 2.

United States v. White, 270 F.3d 356 (6th Cir. 2001). The court upheld the convictions (under 18 U.S.C.A. §1001) of two employees who had falsified monthly turbidity reports produced for the Ohio County Water District. Defendants argued that the EPA lacked jurisdiction over the water reports, and therefore the defendants could not be convicted under §1001. The court held that although the Division of Water received the falsified reports they were required by the federal Safe Drinking Water Act. The EPA retained statutory enforcement authority over the local monitoring system and given the federal interest in ensuring safe drinking water for all U.S. residents, the reports were related to central matters of the EPA. As a result, EPA retained jurisdiction over the reports. Finally, defendants' sentences were properly increased by two levels pursuant to §3B1.3 because they had used a "special skill" in facilitating "the commission or concealment of the offense." Determining that the general public may be considered the victim of a government employee's offense, the court concluded that one of the defendants was also subject to the abuse-of-trust enhancement in the federal sentencing guidelines pursuant to §3B1.3.

United States v. Unser, 165 F.3d 755 (10th Cir. 1999). The court upheld the defendant's conviction for operating a motor vehicle within a National Forest Wilderness Area under 16 U.S.C.S. §551 and C.F.R. §261.16(A), holding that the element of *mens rea* was not required in a "public welfare offense."

United States v. Boynes, 149 F.3d 208 (3rd Cir. 1998). The Coast Guard took a sample of a brown discharge from the defendant's ferry. The vessel broke down soon after and the Coast Guard ordered the vessel to dry-dock. The Coast Guard then boarded and searched the vessel in dry-dock. The court held that a warrant is not necessary when searching a vessel in dry-dock in the British Virgin Islands.

United States v. Royal Caribbean, 11 F. Supp. 2d 1358 (S.D. Fla. 1998). Royal Caribbean Cruise Ltd. was charged under 18 U.S.C. §1001 for failing to disclose, during a Coast Guard inspection of the ship's Oil Record Book in Miami, Florida, an alleged discharge of oil in Bahamian waters. The U.S. Coast Guard had observed the discharge (using infrared technology) while the ship was in Bahamian waters. The court rejected the defendant's argument that §1001 was preempted by the "more specific" Act to Prevent Pollution from Ships (APPS). Nothing in Congress' enactment of APPS indicated their unambiguous intent to repeal other false statement laws. Similarly, neither MARPOL nor UNCLOS barred the United States' prosecution. The court held that regardless of whether the United States had jurisdiction over the cruise ship's alleged misconduct on the high seas, it had jurisdiction to prosecute the "knowing use or

presentation of false writing" offense, which was committed in a domestic port and was actionable under U.S. domestic law.

United States v. Varlack Ventures, Inc., 149 F.3d 212 (3rd Cir. 1998). Defendant was indicted for violations of the CWA after a Coast Guard officer boarded the vessel, took samples of oil from the vessel's bilge and hull, and further investigated an oil discharge. Defendant filed a motion to suppress evidence obtained during the boardings because the evidence was obtained without a warrant. The Third Circuit reversed the trial court, holding that the Coast Guard was justified in searching because there was a reasonable suspicion of criminal activity.

United States v. Rapanos, 115 F.3d 367 (6th Cir. 1997). The Court of Appeals found that the trial court abused its discretion in granting a new trial to a Defendant whom a jury found guilty of discharging pollutants into wetlands in violation of 33 U.S.C. §1311(a) (1988). The Defendant had been clearing his heavily wooded property of trees and shrubs and eradicating wetlands by filling them with sand, and refused to allow Department of Natural Resources (DNR) officials to inspect the land without a search warrant. The new trial was granted because the government had introduced testimony about the Defendant's assertion of his alleged Fourth Amendment rights. The Court of Appeals reversed the granting of the motion for a new trial because Defendant had not shown that DNR officials intended to do anything but make a visual inspection of his property (an "open field). There was no unreasonable search for Fourth Amendment purposes, therefore, and the prosecution's questions did not constitute a prejudicial comment on the Defendant's assertion of a constitutional privilege.

United States v. Rivera, 131 F.3d 222 (1st Cir. 1997) (en banc) (unpublished). The First Circuit found that the plain language of 46 U.S.C. §10908 permitted the prosecution of the defendant without a prior finding of unseaworthiness. However, the Court reversed the defendant's conviction because it found that the government's evidence, which showed that the parting of a tow wire *could* pose a serious risk to human life, was inadequate to prove that the defendant violated section 10908 by sending a vessel to sea knowing that its unseaworthy condition was *likely* to endanger life.

United States v. Royal Caribbean Cruises, Ltd., 24 F. Supp. 2d 155 (D. P. R. 1997). Addressing the defendant's claim that the Coast Guard had violated Fourth Amendment protections against search and seizure, the court held that the searches conducted by the Coast Guard, in this case, did not trigger the warrant requirement of the Fourth Amendment because they were objectively reasonable and minimally intrusive. The court also addressed Royal Caribbean's assertion that the United Nations Law of the Sea Convention of 1982 (UNCLOS) precludes additional charges and penalties especially since the defendants already paid an administrative penalty for the discharge of oil.

UNCLOS restricts penalties for foreign flag ships and crewmembers for violation of national laws designed to reduce marine pollution to monetary penalties. The court held that the government was not estopped from pursuing criminal charges against the defendants, although they are limited to seeking monetary penalties.

United States v. Rivera, No. 96-2188, 1997 U.S. App. LEXIS 9585 (1st Cir. May 1, 1997). **NOTE**: Conviction reversed by ***United States v. Rivera***, 131 F.3d 222 (1st Cir. 1997) (en banc). The court affirmed defendant's conviction for "knowingly" sending an unseaworthy vessel to sea, under 46 U.S.C. §10908. The defendant managed a tugboat which caused an oil spill while towing a barge due to the deteriorated condition of its tow wire. The record revealed that the defendant was experienced and had been informed of the unsafe condition of the tow wire, which was enough for a rational jury to determine beyond a reasonable doubt that the defendant possessed the requisite statutory knowledge.

United States v. Wright, 988 F.2d 1036 (E.D. Okl. 1993). Defendant was convicted of making a false written report within the jurisdiction of the EPA, pursuant to 18 U.S.C. §1001, after he filed falsified drinking water reports with the Oklahoma State Department of Health. Despite the fact that the EPA had granted primary enforcement authority over the drinking water reports to the state of Oklahoma, the EPA retained jurisdiction under §1001. Since the Safe Drinking Water Act expressly authorizes the EPA to instigate enforcement proceedings, the reports fell within the EPA's jurisdiction. That EPA has an active role in assuring state compliance with national water standards simply reinforces the conclusion that the EPA retained jurisdiction over the reports. Finally, the EPA's jurisdiction over the matter was not dependent upon the defendant's awareness of that jurisdiction.

SELECTED ENVIRONMENTAL CRIMINAL CASES APPLYING THE FEDERAL SENTENCING GUIDELINES

United States v. Yi, 704 F.3d 800 (9th Cir. 2013). *See CAA, supra.*

United States v. Butler, 694 F.3d 1177 (10th Cir. 2012). Defendants were convicted of Lacey Act violations for operating guided deer hunts for clients in violation of state law. For the purpose of determining the offense level under U.S.S.G. §2Q2.1, the district court assessed the market value of the deer as the cost paid by the participants in the guided hunts. On appeal, the Tenth Circuit held that this method of determined

market value was incorrect. Rather, the market value determination must "be the price of the animal itself, not the price of an expedition to hunt the animal."

United States v. Wrigley, No. 04CR60 LG-JMR, 2010 WL 2802161 (S. D. Miss. July 14, 2010). *See Clean Water Act, supra.*

United States v. Starnes, 583 F.3d 196 (3d Cir. 2009). *See CAA, supra.*

United States v. Atl. States Cast Iron Pipe Co., 627 F. Supp. 2d 180 (D.N.J. 2009). On April 26, 2006, after a seven-month trial, a jury convicted the following defendants for multiple violations of the Clean Water Act, the CAA, OSHA-related offenses, and obstruction of justice: the Atlantic States Cast Iron Pipe Company, John Prisque, Scott Faubert, Jeffrey Maury, and Craig Davidson. Specific violations included routinely discharging petroleum-contaminated water and paint into storm drains leading to the Delaware River; burning excessive hazardous waste; systematically altering accident scenes during OSHA investigations; concealing serious worker injuries from investigators and routinely lying to them; and maintaining a dangerous workplace that contributed to serious and even fatal injuries of multiple workers. The company and each defendant were convicted of the main conspiracy count in a 34-count indictment, and each defendant was also sentenced individually.

The Atlantic States Cast Iron Pipe Co. was convicted of a total of 32 of the 34 counts, including five counts of making materially false statements to state and federal agencies as well as OSHA; four counts of obstructing OSHA investigations; twenty-two counts of violating the Clean Water Act; and one count of violating the CAA. The company was sentenced to pay a fine of $8 million and to serve 48 months "monitored" probation, during which it must submit biannual reports to the court.

John Prisque, the plant manager, was convicted of three counts of OSHA violations in relation to investigation of worker injuries. The counts included conspiracy and felony obstruction of justice by altering an object with intent to obstruct OSHA investigatons. Prisque's obstructive conduct involved instructing a foreman to lie to OSHA investigators, making false statements regarding a forklift injury and fatality of employee Coxe, and participating in an elaborate series of steps to prevent OSHA from discovering that the electrical safety mechanism on a cement mixer had been bypassed under his direction. The base offense level was 12. The court ordered a 3-level enhancement because Prisque's hindrance of investigations caused OSHA to undertake extensive investigations and unnecessary expenditure.

Regarding the Clean Water Act, Prisque was convicted of conspiring to knowingly violate the CWA through discharging "a pollutant" in the form of petroleum-contaminated wastewater, and of making false statements to the EPA related to the CWA

violations. The court ruled the most applicable offense guideline was Section 2Q1.3, and that the base offense level for each CWA offense was 6. The court ordered a 4-level enhancement under Subsection (b)(4) because the discharges from the cement pit were in violation of the Atlantic States water permits. The Court additionally found the evidence supported an overall 4-level role adjustment for Prisque because of his active participation in a primary leadership role in the criminal activities at issue and in his multiple conspiracy convictions. Regarding the CAA, Prisque was convicted of knowingly violating the Atlantic States air permit requirements by causing over 55 gallons per day of waste paint to be burned from February to August, 2003. The base offense level for CAA offenses is 6. The court found that evidence of increased CO emissions from burning waste paint requires an adjustment and accordingly ordered a 6-level enhancement for Prisque for the ongoing, repetitive emission. The court ordered a 4-level enhancement for violating the permit. The Court ordered a further 2-level upward role adjustment for abuse of a position of private trust in relation to Atlantic States workers through his management position. Prisque received other adjustments based on the multiple counts of the crimes he engaged in, and the court calculated his total adjusted offense level at 27. Prisque was sentenced to 70 months in prison and payment of a Special Assessment fee of $525.00.

Scott Faubert, the human resources manager and safety director, was convicted on two counts of felony obstruction of OSHA in the Coxe investigation, on one count for making false statements to OSHA in the Marchan investigation, and for conspiracy to obstruct OSHA in both. The Court found the evidence supported an overall 3-level enhancement for his supervisory role and active participation in criminal activities, as well as a 3-level enhancement for substantial interference with the administration of justice by concealing facts about the forklift and its driver when it ran over employee Coxe. The Court ordered a further 2-level upward role adjustment for abuse of a position of private trust in relation to Atlantic States workers through his position of management, and another 2-level enhancement for perjury. Faubert's total adjusted offense level was 22. Faubert was sentenced to 41 months in prison and ordered to pay a Special Assessment of $400.

Jeffrey Maury, the maintenance superintendent, was convicted on one count of felony obstruction of OSHA in relation to the Marchan injury investigation, and one count of making false statements to the FBI. The court ordered a 3-level enhancement for substantial interference with the administration of justice by concealing facts about the Coxe forklift injury. Maury was convicted on seven counts of violating the Clean Water Act, including conspiracy to violate the CWA by knowingly discharging petroleum-contaminated wastewater, and of false statement felony counts related to the illegal discharge. The court determined the most applicable offense guideline was Section 2Q1.3, and that the base offense level for each CWA offense was 6. The court found ample evidence linking Maury to ongoing cement pit discharges in aiding, abetting, commanding or willfully causing them; and of jointly undertaking the reasonably foreseeable conduct of others in furtherance of the scope of criminal activity. Therefore, the court found that Maury's relevant conduct warranted further enhancements under Subsection (b)(1)(A). Because of Maury's supervisory role of unknowing participants in criminal activity, the Court applied another 3-level role adjustment, and

another 2-level enhancement for perjury. After other enhancements for his participation in CWA offenses, his total adjusted offense level was 21. Maury was sentenced to 30 months in prison.

Craig Davidson**,** the finishing department superintendent, was convicted on one count of making false statements, and on sixteen counts of violating the Clean Water Act, including conspiracy to violate the CWA by the unpermitted discharge of petroleum-contaminated wastewater, and of false statement felony counts related to the illegal discharge. The court ruled the most applicable offense guideline was Section 2Q1.3, and the base offense level for each CWA offense was 6. Because he received multiple convictions for repetitive wastewater discharges from a cement pit, the court ordered a 6-level enhancement under Subsection (b)(1)(A). The court also ordered a 3-level supervisory role adjustment for Davidson because of his active participation in criminal activity and supervisory role. After the other enhancements related to his aggravating role, Davidson's adjusted offense level was 19. Davidson was sentenced to 6 months in prison and payment of a Special Assessment of $575.00.

(For discussion of Crime Victim Rights Ac, see related case 612 F. Supp. 2d 453 (D.N.J. 2009) in Crime Victim Rights Act section.)

United States v. Hagerman, 2007 WL 4616923 (S.D. Ind. Dec. 28, 2007) (unpublished); 525 F. Supp. 2d 1058 (S.D. Ind. 2007). The defendant was the president and principal owner of an industrial wastewater treatment facility and destroyed evidence of effluent levels that were above the amounts allowed by permit. He then falsified monitoring reports. A jury convicted him of knowingly making false statements. The court sentenced him to sixty months imprisonment. The court determined that a full six level enhancement of his sentence was justified because the discharges were ongoing, continuous and voluminous. The upward adjustment to the defendant's sentence for obstruction of justice was also justified, because he not only destroyed records, but he also persuaded an employee to sign a false statement and committed perjury at trial. The court found his role as a father and leader irrelevant due to the seriousness of the crimes, and determined that just because there was a lack of evidence of environmental harm did not mean there was no harm. Furthermore, the government could have proceeded on more than the ten counts it did, so the sentence could account for this fact as well. In a separate proceeding, the court denied his motion for a stay of his sentence pending appeal, because the issues presented for appeal were not so close that the appeal could go either way.

United States v. Abrogar, 459 F.3d 430 (3rd Cir. 2006). The Third Circuit vacated defendant's sentence which included a six-level enhancement for a continuing release of pollutants. Defendant was arrested in a U.S. port and convicted of failing to

maintain an accurate oil record book in violation of APPS §1908(a). The book concealed improper oil discharges at sea that violated international treaties. Since defendant was on a foreign-flagged ship, his involvement in oil discharges outside of U.S. territorial waters was not subject to U.S. jurisdiction. No crime was committed until he entered U.S. waters with an inaccurate oil record book. The pollution discharges, which precede the violation of U.S. law, did not occur "during the commission of;" "in preparation for;" or "in the course of" the charged offence. Therefore, the discharges were not "relevant conduct" to the crime of maintaining an inaccurate record book.

United States v. Hillyer, 457 F.3d 347 (4th Cir. 2006). The Fourth Circuit vacated defendant's sentence because the trial court granted defendant an unwarranted downward departure for aberrant behavior. Defendant, a foreman on a bridge-building project, violated CWA permits by dredging material from the bottom of the sound. The dredging occurred on multiple occasions at night using tugboats with their lights turned off. Thus, the violations could not be classified as a single occurrence that is "spontaneous and seemingly thoughtless"—the standard for aberrant behavior. Additionally, the trial judge's references to the defendant's age; restitution paid by defendant's employer; and lack of permanent environmental harm are not proper factors to consider for a departure under the guidelines.

United States v. Singleton, 2006 U.S. Dist. LEXIS 18804 (E.D. Mich. 2006) (unpublished). The district court reevaluated defendant's sentence on remand from the Sixth Circuit with instruction to comport the sentence with *United States v. Booker*, 543 U.S. 220 (2005). Noting the sentencing guidelines were only advisory after *Booker*, the court determined that defendant's six-level sentence enhancement for a "continuing release of hazardous substances" was fair and appropriate. Accordingly, the court re-imposed the original sentence.

United States v. Kuhn, 351 F. Supp. 696 (E.D. Mich. 2005). On remand from the Sixth Circuit, the district court reinstated defendant's sentence, which included a four-level downward departure. The court justified the departure by citing USSG §5K2.0(c)'s provision for multiple circumstances that make the case "exceptional." The defendant's extensive community involvement and long employment history, combined with the fact that the one-time illegal discharge he authorized was "prompted by a desire to make the . . . waste water treatment plant more efficient," merited the conclusion that the defendant was outside the heartland of offenders contemplated by the guidelines.

United States v. Dillon, 339 F. Supp. 2d 1155 (D. Kan. 2004). Defendant was charged with knowingly storing hazardous waste in violation of 42 U.S.C. §6928(d)(2)(A), knowingly storing hazardous waste and thereby placing another person

in imminent danger of death or serious bodily injury, in violation of 42 U.S.C. § 6928(e), and making a materially false statement within the jurisdiction of the EPA. Defendant pled guilty to knowingly storing hazardous waste and in exchange the government agreed to dismiss the remaining counts. At the conclusion of the sentencing hearing, the court sentenced the defendant to a sixty (60) month term of imprisonment. Defendant, *pro se*, moved to vacate, set aside, or correct sentence arguing that the court's finding of facts, which enhanced the defendant's sentence to the maximum statutory level, violated his Sixth Amendment right to a jury trial as set forth in *Blakely v. Washington*, 542 U.S. 296 (2004). In denying the motion, the district court concluded that, if *Blakely* does apply to the federal sentencing guidelines, it applies only to cases pending on direct appeal. Although the court ruled that at the present time defendant's claim is premature, it also reasoned that Defendant could renew his claim in the event the Supreme Court held *Blakely* to have retroactive application.

United States v. Knopfle, 93 F. App'x 111 (9th Cir. 2004) (unpublished). Defendant's conviction for unlawful discharges of oil into a lake were affirmed but his sentences was vacated and remanded. Dismissal of corporate co-defendant did not constitute a constructive amendment or fatal variance of the indictment, and therefore the conviction was valid. A two-level downward departure for acceptance of responsibility was appropriate even though defendant continued to protest the fact that he "knowingly" discharged the oil. It was sufficient that defendant took prompt action to minimize the damage, helped with the clean-up, and expressed contrition. However, defendant would not be able to serve his sentence in community confinement because USSG §5C1.1 includes a minimum term of imprisonment, and imprisonment and community confinement are not "fungible."

United States v. Perez, 366 F.3d 1178 (11th Cir. 2004). Defendant's sentence for dumping solid waste in a landfill without a permit was affirmed. A four-level enhancement under USSG §2Q1.3(b)(1)(A) for a repeated discharge was appropriate even though the prosecutor had not introduced evidence of "actual environmental contamination"; if discharges of a pollutant are proved, then the law assumes environmental contamination. A further four-level enhancement for a "discharge without a permit" was not "double counting." Contrary to the defendant's assertion, the base offense level set by USSG §2Q1.3 applies to offenses that do not involve permits, so the enhancement for a violation involving a permit does not twice punish the defendant for not obtaining a permit.

United States v. Phillips, 367 F.3d 846 (9th Cir. 2004). *See entry under CWA, supra*.

United States v. Snook, 366 F.3d 439 (7th Cir. 2004). *See entry under CWA, supra.*

United States v. Sunday, 66 F. App'x 167 (10th Cir. 2003) (unpublished). Defendant pled guilty to two counts of improperly disposing of hazardous waste, pursuant to a plea agreement in which the government agreed to request a three-level downward departure based on defendant's substantial assistance. At the sentencing hearing when the government moved for the downward departure, the district court denied the motion, ruling that Defendant had done nothing more than take responsibility for his acts. The district court further noted that no prosecutions had been brought based on defendant's information, and emphasized that it considered defendant's conduct "totally reprehensible." Defendant and the government moved for reconsideration but the district court denied the motion as untimely. In affirming, the Tenth Circuit held that the purported "motion for reconsideration" was subject to the strict requirements for a motion for modification. The court further ruled that the strict dictates of Rule 35 cannot be evaded by styling the motion as one for reconsideration, and the district court did not commit legal error by ruling that the government's motion was untimely.

United States v. Thorn, 317 F.3d 107 (2d Cir. 2003). The sentence imposed on defendant for violating CAA provisions concerning asbestos removal and conspiring to commit money laundering was vacated and remanded for resentencing. The district court had failed to impose a nine-level sentence increase under USSG §2Q1.2(b)(2). The increase was warranted because there was a "substantial likelihood" that defendant's employees would experience death or serious bodily injury in the form of mesothelioma, asbestosis, and lung scarring. The trial court's failure to find a "substantial likelihood" of death or serious bodily injury was clear error given the uncontested testimony of a prosecution expert that many of defendant's seven-hundred workers were virtually certain to develop asbestosis and mesothelioma. The Third Circuit also instructed the trial court to determine on remand whether defendant's status as an asbestos abatement contractor "imbued [him] with the characteristics of a position of trust," which would merit a further two-level sentence enhancement.

On the money laundering charge, the court remanded the issue to determine whether the government had established that the amount laundered was greater than the $900,000 alleged in the indictment, which was proven beyond a reasonable doubt to the jury. If the judge were to determine by a preponderance of the evidence that the laundered amount was in excess of the two-million dollar threshold, the holding of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), would not prevent a two-level sentence increase because the enhanced sentence still would be less than the statutory maximum.

United States v. Chau, 293 F.3d 96 (3d. Cir. 2002). Defendant's sentence for violating the CAA and obstructing justice was vacated and remanded. The appellate court upheld a six-level enhancement for a continuous discharge of asbestos because the

evidence supported the "reasonable inference" that environmental contamination occurred. A "full-blown scientific study" was not necessary; evidence proving that "some asbestos became exposed to the air" was sufficient. A four-level enhancement for a "cleanup requir[ing] a substantial expenditure" was upheld because the $200,000 spent by the government to clean the site was substantial. A two-level enhancement for being an "manager . . . of criminal activity" was likewise upheld. Defendant's use of his handyman for the cleanup work was sufficient to qualify defendant as a manager. A further four-level enhancement for "disposal without a permit" was not upheld; CAA §7413(c)(2) requires *notice* of asbestos cleanup work, and disposing of asbestos without "notice" is not the same as disposing without a "permit." Although the City of Philadelphia required a permit for the work, the "permit" contemplated by USSG §2Q1.2(b)(4) refers to a federal permit.

United States v. Ho, 311 F.3d 589 (5th Cir. 2002). *See entry under CAA, supra.*

United States v. Technic Services, Inc., 314 F.3d 1031 (9th Cir. 2002). Defendants were convicted of violating CAA and CWA in connection with an asbestos removal project. In upholding a six-level enhancement for repetitive discharge of pollutants, the Ninth Circuit noted that the enhancement will only be imposed if "some amount of a pollutant in fact contaminated the environment." Actual contamination will, however, be inferred from evidence of an ongoing discharge, such as defendant's practice of washing asbestos down a drain.

The appellate court vacated a two-level enhancement for an abuse of a position of public or private trust. The court stated that a position of trust must be "established from the perspective of the victim," and that the victim of CAA and CWA violations is the public. In contrast to many government employees, private government contractors do not necessarily occupy positions of trust for the public—even when they are employed for dangerous tasks that may affect the public.[24] The court did, however, remand the case to determine if the defendant occupied a position of private trust in relation to his employees.

United States v. Chemetco, Inc., 274 F.3d 1154 (7th Cir. 2001). The defendant had had a secret pipe built into their smelting factory, so that they might discharge pollutants via the pipe into a ditch tributary. After having pleaded guilty to discharging pollutants in violation of the CWA, the court held that the numbers of days the defendant violated the Act was a sentencing factor under §309(c) and not an element of the offense that had to be proven beyond a reasonable doubt. Since the CWA does not have a prescribed statutory maximum penalty, the district court was not bound by *Apprendi v.*

[24] The court noted that the First Circuit came to the opposite conclusion in *United States v. Gonzalez-Alvarez*, 277 F.3d 73 (1st. Cir. 2002).

New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000) (holding that any fact that increases the penalty for a crime beyond the statutory maximum must be proved beyond a reasonable doubt.)

United States v. Hansen, 262 F.3d 1217 (11th Cir. 2001). The court upheld the conviction of the defendants for conspiring to commit environmental crimes and for violating the CWA, RCRA, CERCLA and ESA during the operation of an industrial plant in Brunswick, Georgia. The defendants were convicted for knowing endangerment under RCRA, as the jury found that the defendants knew the conditions at the chemical plant posed a serious threat to the employees. The government only needed to prove that the defendants had knowledge of the general hazardous character of the chemical, and that the chemical had the potential to be harmful to humans or the environment. In this case, an official had been informed by NIOSH that the plant's employees suffered from high mercury exposure; employees were suffering from skin and respiratory illnesses; internal memos and reports indicated the dangers; and employees complained and refused to work in certain 'wastewater' areas of the plant.

The government was not required to prove that the material was hazardous within the meaning of RCRA by EPA testing. If there is no sampling of the actual wastes, the government may prove that a material is hazardous under RCRA through inventories, internal memoranda, hazardous waste logs, and trial testimony (Solid Waste Disposal Act §1004(5), as amended by 42 U.S.C.A. §6903(5)). Here, the wastewater logs and testimony from former employees provided sufficient evidence for the jury to determine that the wastewater was hazardous. The court also held that the bankruptcy of the plant's parent corporation did not insulate the defendants from complying with environmental regulatory statutes.

The court's instructions on "responsible corporate officers" were properly limited to RCRA violations, and did not permit the jury to convict the defendants on the basis of their corporate positions instead of their individual liability. The court made clear that RCRA counts "require[d] proof that each defendant 'knew' of the violations' potential for harm and danger." Finally, the district court acted within its discretion when it declined, pursuant to U.S.S.G. §5K2.0, to make a downward departure from the sentencing guidelines. Since the district court understood its discretionary authority pursuant to U.S.S.G. §5K2.0, its decision was not reviewable on appeal.

United States v. Pearson, 274 F.3d 1225 (9th Cir. 2001). The court upheld the defendant's conviction under the CAA, 42 U.S.C. §§7412(f)(4) & (h) and 7413 (c)(1), for failing to properly supervise the removal of asbestos from a heating plant. The district court properly held that a "supervisor" is one who exercises significant and substantial control, rather than the employee with the highest level of authority. The government was not required to show that the defendant was included in the definition of "owner or operator" under 42 U.S.C. §7413(h); the burden was on the defendant to show he was

excluded. The district court did not abuse its discretion by denying the defendant's request for an evidentiary hearing, as the defendant was afforded the opportunity to present objections to the pre-sentencing report during the sentencing hearing. The district court was also acting within its discretion when it enhanced the defendant's sentence under U.S.S.G. §2Q1.2(b)(1)(B), an increase of four levels for releasing asbestos "into the environment" and an increase of nine levels for the "likelihood of death or serious bodily injury," after drawing inferences from witness testimony. This manner of sentencing did not violate *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 2362-63 (2000). "Statutory maximum" refers to the maximum term set by Congress, not the maximum term established by the sentencing guidelines.

United States v. White, 270 F.3d 356 (6th Cir. 2001). The court upheld the convictions (under 18 U.S.C.A. §1001) of two employees who had falsified monthly turbidity reports produced for the Ohio County Water District. Defendants argued that the EPA lacked jurisdiction over the water reports, and therefore the defendants could not be convicted under §1001. The court held that although the Division of Water received the falsified reports they were required by the federal Safe Drinking Water Act. The EPA retained statutory enforcement authority over the local monitoring system and given the federal interest in ensuring safe drinking water for all U.S. residents, the reports were related to central matters of the EPA. As a result, EPA retained jurisdiction over the reports. Finally, defendants' sentences were properly increased by two levels pursuant to §3B1.3 because they had used a "special skill" in facilitating "the commission or concealment of the offense." Determining that the general public may be considered the victim of a government employee's offense, the court concluded that one of the defendants was also subject to the abuse-of-trust enhancement in the federal sentencing guidelines pursuant to §3B1.3.

United States v. Bragg, 207 F.3d 394 (7th Cir. 2000). Defendants used untrained men recruited from homeless shelters to remove asbestos and were subsequently charged with several CAA violations. First, the court of appeals found that the trial court properly imposed upon all defendants a two level upward adjustment pursuant to U.S.S.G. §3A1.1(b)(1) because the crimes involved vulnerable victims (homeless men) and it was irrelevant whether the defendants targeted the men because they were vulnerable. Second, the court found that the trial court properly imposed a four level upward adjustment upon one defendant pursuant to U.S.S.G. §3B1.1(a) because of his leadership role in the conspiracy to violate the CAA. Lastly, the court found that the trial court properly imposed upon two defendants a three level upward adjustment pursuant to U.S.S.G. §3B1.1(b) because of their roles as "managers or supervisors" in the criminal activity.

United States v. Kelly, No. 99-5327, 2000 U.S. App. LEXIS 34043, 52 Env't Rep. Cases (BNA) 1056 (6th Cir. Dec. 28, 2000). Defendant was convicted of 20 misdemeanor violations of FIFRA, 7 U.S.C.S. §136 et. seq. Despite the U.S. Sentencing Guideline's range for sentencing, the district court granted defendant's request for a downward departure pursuant to Guidelines §5K 2.0. The government appealed, and the court found that the district court abused its discretion and reversed and remanded to the district court for resentencing. When considering a departure from the Guidelines, the court should consider aspects of the case which take it outside the "heartland" of cases; the fact that Kelly was convicted of multiple misdemeanors did not distinguish his case from the "heartland" of cases. The Guidelines contemplated the possibility of multiple misdemeanor convictions and how to address them. Thus, the nature of his crimes was insufficient to merit a downward departure from the Guidelines. Defendant's lack of knowledge of serious harm and his alleged ignorance of the law were not appropriate bases for the reduced sentence.

United States v. LeBlanc, 169 F.3d 94 (1st Cir. 1999). The court held that counts reflecting similar harms should be grouped together under USSG §3D1.2 (d) and the highest offense level applicable to any single count should be used as the base offense level. Where the defendant pled guilty to six counts of violating federal customs statutes and eight counts of violating the CAA, the CAA violations provide the higher base offense level and are therefore controlling.

United States v. Merino, 190 F.3d 956 (9th Cir. 1999). Defendant pleaded guilty to the unlawful storage and transportation of hazardous waste under 42 U.S.C. §§6298(d)(1) and (2). Defendant argued on appeal that his base offense level should not have been increased by four levels under U.S.S.G. §2Q1.2(b)(3), because the cleanup required as a result of his activities did not qualify as a "substantial expenditure." In a case of first impression, the court agreed that within the context of the sentencing guideline, which speaks of the disruption of public utilities or requiring the evacuation of a community, a five-figure cleanup bill was not a "substantial expenditure."

United States v. Shurelds, No. 97-6265, 1999 U.S. App. LEXIS 3521, 48 Env't Rep. Cases (BNA) 1597 (6th Cir. 1999). Defendant was sentenced to 51 months in prison, after improperly overseeing the removal of asbestos from an abandoned department store. The court denied defendant's claim that the criminal provisions in the CAA, 42 U.S.C. §§7401-7471q were unconstitutionally vague. Appellant's preferred course of action would have been to invoke the affirmative defense available in 42 U.S.C. §7413(h) (that he was carrying out his normal activities under the direction of his employer), but this defense was unavailable on appeal. Finally, the defendant's sentence was properly enhanced under U.S.S.G. §2Q1.2(b)(1)(B) for a release of asbestos into the

environment, and under U.S.S.G. §3B1.1(c) (an increase of four levels) because he was an organizer or leader of a criminal activity that involved five or more persons.

United States v. Van Loben Sels, 198 F.3d 1161 (9th Cir. 1999), rehearing denied, 207 F.3d 192 (9th Cir. 1999). The United States appealed the sentence imposed upon the defendant for illegally discharging wastewater contaminated with benzene into a POTW. The district court had not upwardly adjusted defendant's base offense level six levels pursuant to U.S.S.G. §2Q1.1(b)(1)(A) because the government failed to prove that the CWA violations resulted in contamination of the POTW's effluent. In reversing and remanding for re-sentencing, the court of appeals, citing *United States v. Ferrin*, 994 F.2d 658, (9th Cir. 1993), held that if a reasonable inference of contamination can be made from the evidence alone, and the district court in Van Loben Sels had also found that the defendant had discharged hazardous material into the environment, then the sentencing upgrade is justified.

United States v. Henry, 136 F.3d 12 (1st Cir. 1998). The defendant, convicted of conspiracy to violate 42 U.S.C. §6928(d)(1), which prohibits the transportation of hazardous waste to a facility that does not have a permit to receive such waste, argued on appeal that the district court erred when it chose U.S.S.G. §2F1.1 as a guideline to follow instead of U.S.S.G. §2Q1.2. Section 2Q1.2 governs such environmental offenses as the unlawful transportation of hazardous materials and the mishandling of hazardous or toxic substances. Section 2F1.1 deals with fraud and deceit. The First Circuit held that the district court did not err in applying the guidelines under §2F1.1 because there was no indication that the defendant had embarked on a crusade to engage in committing environmental crimes. Rather, it was clear that the defendant's objective was to make money and in the process he engaged in an environmental crime.

United States v. Sain, 141 F.3d 463 (3d Cir. 1998). Defendant was convicted of fraud in violation of the Major Fraud Act of 1988 in connection with his contract with the Army to build and operate a waste-water treatment plant. The defendant argued that the court erred when it increased his offense level by two points based on his special skill as a professional engineer. The Court of Appeals upheld the district court's decision because it found that without his special skills, the defendant would not have been able to commit the fraud.

United States v. Hill, 1998 U.S. App. LEXIS 5478 (9th Cir. March 18, 1998) (unpublished). Defendant was convicted of transporting hazardous waste to an unpermitted facility and storing hazardous waste without a permit in violation of 42 U.S.C. §§6928(d)(1) and (2). Defendant argued, on appeal, that his base offense level should not have been increased by four levels for transporting or storing hazardous waste

without a permit under U.S.S.G. 2Q1.2(b)(4) without a corresponding downward departure of two levels under Note 8. The Court of Appeals held that the decision was discretionary and thus unreviewable.

United States v. West Indies Transport., Inc., 127 F.3d 299 (3d Cir. 1997). The Third Circuit upheld the district court's assessment of six level enhancements for ongoing, continuous, or repetitive discharge of a pollutant under U.S.S.G. §2Q1.3(b)(1)(A). The defendants argued that the enhancements should be reduced because the raw human sewage that they dumped into navigable waters was "fully biodegradable." The Court of Appeals affirmed the enhancement because it found that untreated human sewage fell within the clear meaning of "pollutant" under §2Q1.3(b)(1)(A). The defendants also contended that restitution is not authorized for Title 33 offenses and should not have been ordered. The Court of Appeals found no error because the defendants were also charged with violations of 18 U.S.C. §2. Restitution was proper as it is authorized for a violation of 18 U.S.C. §2.

United States v. Eureka Laboratories Inc., 103 F.3d 908 (9th Cir. 1996). The trial court did not err in imposing a $1.5 million fine for CERCLA violations, even though it jeopardized defendant-corporation's viability. Under U.S.S.G. §8C3.3(a), a fine reduction is required only if defendant's ability to make restitution to the victims would be impaired. It does not prevent a court from imposing a fine that could potentially put the defendant out of business. Although U.S.S.G. §5E1.2 allows the sentencing court to reduce a fine in consideration of an individual's ability to pay, this section does not apply to organizational defendants. 18 U.S.C. §3572 (a)(2) does not preclude imposing a fine on a corporation with "dependent" employees.

United States v. Gist, 101 F.3d 32 (5th Cir. 1996). Defendant's RCRA charges do not constitute a "single group" for sentencing purposes under U.S.S.G. §3D1.2 because the counts involved violations at two different facilities with different identifiable victims. Furthermore, the counts charging the defendant with discharging toxic substances from different facilities at different times should not be grouped together, despite the application of U.S.S.G. §2Q1.2(b)(1)(A) specific offense characteristics.

United States v. Jarrell, 103 F.3d 121 (4th Cir. 1996) (unpublished table decision), 43 Env't Rep. Cas. (BNA) 1766. The sentencing court can increase the offense level pursuant to both U.S.S.G. §§2Q1.3(b)(1) (an ongoing, continuous, or repetitive discharge), 2Q1.3(b)(4) (discharge without a permit or in violation of a permit), even though they are each determined by the same set of facts and considerations. Under U.S.S.G. §3D1.2(d), the discharges to which defendant did not plead guilty are relevant for the purposes of determining the specific offense level. Thus, it was proper to group the other discharges to which the defendant did not plead guilty with the discharge for which he was convicted.

United States v. King, 915 F. Supp. 244 (D. Kan. 1996). A two level reduction in the base offense level was warranted when the harm resulting from the offense was minimal, the amount of pollution discharged was not vast, and the duration of the offense was short. A two level reduction in a base offense level for acceptance of responsibility is not warranted when the defendant admitted guilt only after the Government presented its case to the jury and when the defendant said he admitted guilt only to avoid jail time. The court affirmed a two level increase in the base offense level for obstruction of justice when the defendant attempted to have an employee lie and falsely take responsibility for the defendant's actions. Additionally, in calculating an appropriate sentence, the court is not limited to considering allegations contained in the indictment, but may also consider allegations that a defendant obstructed justice and may treat them as relevant conduct.

United States v. Catucci, 55 F.3d 15 (1st Cir. 1995). The First Circuit upheld an upward adjustment of four levels under U.S.S.G. §2QI.2(b)(1)(A) for ongoing, continuous or repetitive discharge where the defendant was liable for two discharges which by "mere happenstance" were released on separate days. The court noted that guideline interpretations are reviewed de novo whereas relevant factual findings are reviewed for clear error and accorded due deference. The court also explained that failure to raise an "aberrant behavior" claim for downward adjustment in sentence waives the rights to such a claim.

United States v. Hart, 61 F.3d 917 (10th Cir. 1995). In this unpublished opinion, the Tenth Circuit affirmed the district court's holding that dismissed counts which alleged RCRA dumping offenses were relevant conduct for sentencing purposes for Clean Water Act violations. Both courts rejected the defendant's claim that using relevant conduct in calculating his sentence violated his Due Process rights because he was being punished for conduct that had not been proven beyond a reasonable doubt. The courts also rejected a claim that the district court's compulsion of the government, over the government's repeated objections, to present evidence regarding counts that the government had dropped as a result of a plea bargain violated the Separation of Powers.

United States v. Murphy, 65 F.3d 758 (9th Cir. 1995). The Ninth Circuit affirmed the defendant's convictions and sentence under the CAA and CERCLA for the illegal disposal of asbestos, holding that a district court generally does not have the authority to grant a downward departure from the U.S. Sentencing Guidelines absent a motion from the government. The court would only be permitted to grant a downward departure if the government's refusal to file such a motion stemmed from an unconstitutional motive, such as racial discrimination, or another arbitrary reason not rationally related to a legitimate government interest.

United States v. Pizzuto, 1995 U.S. App. LEXIS 29242 (4th Cir. 1995) (unpublished). After the defendant agreed to plead guilty to three counts in exchange for the dismissal of two others, the district court permitted the conduct charged in the dismissed claims to constitute relevant conduct for sentencing purposes under 2Q1.2(b)(1)(A), justifying a six-level increase in the sentence. Citing *United States v. Williams*, 880 F.2d 804, 805 (4th Cir. 1989), where it held that dismissed charges may be considered in a sentence calculation, the Fourth Circuit affirmed.

United States v. Schmidt, 47 F.3d 188 (7th Cir. 1995). The Seventh Circuit rejected an appeal by two men challenging the district court's application of the United States Sentencing Guidelines. The men pleaded guilty to violations of the Clean Water Act and intentional storage of hazardous waste without a permit. Their plea agreement included a waiver of the right to appeal the sentence imposed by the district court. Although the government did not rely on the waivers on appeal, the court determined that the defendants waived their right to appeal because: (1) they knowingly and voluntarily entered into the agreement, (2) the district court did not rely on constitutionally impermissible factors in determining the sentence, (3) the district court judge fully explained the effect of the waiver to the defendants, and (4) the defendants were educated, had experience in the business world, and were represented by highly qualified counsel. In a footnote, the court stated that it would have affirmed the sentences on the merits as well. The dissent argued that the appeal should have been reviewed on the merits because the government failed to rely on the waivers.

United States v. Liebman, 40 F.3d 544 (2d Cir. 1994). The Second Circuit held that if the defendant's record-keeping offense, of failure to immediately inform appropriate U.S. authorities of the release of asbestos, reflected a desire to conceal a substantive environmental offense, then the defendant's sentence was properly enhanced six levels above the base offense level for the ongoing and repetitive discharge of a hazardous substance. Additionally, the district court was entitled to infer the existence of environmental contamination for purposes of a six level sentence enhancement requiring

"actual environmental contamination" if the defendant conceded that a release of asbestos occurred, since the release of a hazardous or toxic substance into the environment ordinarily results in contamination.

United States v. Freeman, 30 F.3d 1040 (8th Cir. 1994). The Eighth Circuit reaffirmed that the standard of proof for sentencing is lower than the trial standard and thus an acquittal of a charge at trial does not preclude a court from enhancing a sentence based on that same charge. The court also declined to decide whether the government must show actual environmental contamination to justify a sentencing increase under U.S.S.G. §2QI.2(b)(1)(B).

United States v. Rutana, 18 F.3d 363 (6th Cir. 1994) (Rutana II). On second appeal by United States of the trial court's sentencing of the defendant, the Sixth Circuit remanded again for resentencing based on the application of a four level increase in the defendant's offense level for a discharge that disrupted a public utility. The evidence showed that highly acidic and alkaline wastewater discharges from a facility partially owned by the defendant resulted in bacteria kills at the waste water treatment plant and caused wastewater treatment plant employees to suffer burns while sampling the wastewater.

United States v. Suarez, 15 F.3d 1094 (9th Cir. 1994). The Sixth Circuit, following an appeal by the United States, vacated defendant's sentence and remanded for resentencing. The appellate court found that the trial court was required to apply either a six level increase under U.S.S.G. §2Q1.3(b)(1)(A) for an "ongoing, continuous or repetitive discharge" or a four level increase under U.S.S.G. §2Q1.3(b)(1)(B) "if the offense otherwise involved a discharge" since defendant was convicted of an offense involving a discharge of a pollutant to the environment.

United States v. Ferrin, 994 F.2d 658 (9th Cir. 1993). On appeal by the United States, the Ninth Circuit found that a guilty plea for illegal disposal of hazardous waste does not automatically warrant an offense level increase for a discharge into the environment. While under RCRA, illegal disposal occurs if the waste may enter the environment, U.S.S.G. §2Q1.2(b)(1) requires actual environmental contamination.

United States v. Goldfaden, 987 F.2d 225 (5th Cir. 1993) (Goldfaden II). The Fifth Circuit rejected defendant's appeal of his resentencing. The court stated that an upward adjustment under U.S.S.G. §2Q1.3(b)(4) for disposal without a permit applies where the defendant could not have obtained a permit because he used equipment that

could not be permitted. The court also stated that defendant's perjured testimony justified a two level increase for obstruction of justice under U.S.S.G. §3C1.1.

United States v. Schallom, 998 F.2d 196 (4th Cir. 1993), *cert. denied* 114 S.Ct. 277 (1993). The Fourth Circuit upheld defendant's conviction under the Clean Water Act for illegal discharge of a pollutant. The appellate court then found that the defendant, a site superintendent at a bridge repair site, caused an ongoing or continuous discharge warranting a six level offense level increase when he ordered excess cement-like mixture dumped into a river.

United States v. Strandquist, 993 F.2d 395 (4th Cir. 1993). The Fourth Circuit upheld the trial court's sentencing of defendant to five months imprisonment for discharging raw sewage into the Chesapeake Bay from a marina. The circuit court upheld a five level enhancement for an "ongoing, continuous, or repetitive" discharge under U.S.S.G. §2Q1.3(b)(1)(A), stating that no actual environmental contamination is required for the increase. Additionally, the court rejected the defendant's argument that to apply the increase, a single offense must result in an ongoing or repetitive discharge. Instead, the court agreed with the government and allowed multiple offenses to be grouped together to apply the enhancement.

United States v. St. Angelo, 993 F.2d 229 (4th Cir. 1993). The Fourth Circuit affirmed the defendant's twenty-one month sentence for unlawful disposal of hazardous waste under RCRA. The court found that the trial court properly applied a four level increase under U.S.S.G. §2Q1.2(b)(4) for the disposal of hazardous waste without a permit. The court rejected defendant's argument that as a small quantity generator he was not required to obtain a permit to store the waste. The court found that the defendant disposed of the waste in addition to storing it, justifying the four level increase.

United States v. Dean, 969 F.2d 187 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1852 (1993). The Sixth Circuit affirmed the trial court's enhancement of defendant's sentence under U.S.S.G. §3B1.1(b) for his role as a manager or supervisor of criminal activity involving five or more participants. The court found "participants", as used in §3B1.1(b) included those on an equal footing or superior to the defendant and not merely subordinates.

United States v. Ellen, 961 F.2d 462 (4th Cir. 1992), *cert. denied*, *Ewell v. Murray*, 62 U.S.L.W. 3773 (1994). The Fourth Circuit rejected defendant's claim that U.S.S.G. §2Q1.3 was inconsistent with the Guideline's enabling legislation, since its

application mandated jail time for a first time offender not convicted of a violent crime. The court held that wetland violations under the Clean Water Act were serious offenses that justified jail time, in this case, six months imprisonment. The court also rejected defendant's argument that adjusting his offense level upward for a continuing discharge without a permit under U.S.S.G. §2Q1.3(b)(4) constituted impermissible double counting since such discharges were elements of his offense of conviction. The court found that the Guidelines are explicit when they prohibit double counting and that no such prohibition was noted here.

United States v. Goldfaden, 959 F.2d 1324 (5th Cir. 1992) (Goldfaden I). On appeal by the defendant, the Fifth Circuit vacated defendant's sentence and remanded to the district court for resentencing, holding that the government violated the plea agreement with defendant by advocating the use of various Guideline sections when it had agreed to make "no recommendation" as to defendant's sentence. Additionally, the appellate court found that the trial court improperly applied a base offense level of eight under U.S.S.G. §2Q1.2 for the mishandling of "hazardous or toxic substances" since the defendant's offense of conviction was for the discharge of industrial waste, which should have been considered "other environmental pollutants" under U.S.S.G. §2Q1.3. The court rejected defendant's arguments that no enhancement could apply under U.S.S.G. §2Q1.2(b)(1) without actual environmental contamination and that enhancement for a discharge without a permit constituted double counting where defendant's offense of conviction involved discharge without a permit.

United States v. Goldsmith, 978 F.2d 643 (11th Cir. 1992). The Eleventh Circuit rejected defendant's argument that he should receive a two level reduction under U.S.S.G. §2Q1.2(b)(4). The defendant, convicted under RCRA for illegal transportation and storage of hazardous wastes and sentenced to twenty-three months imprisonment, argued that the reduction was warranted because he was not involved in the actual dumping of the wastes and that the illegal activity resulted in little environmental harm. The court disagreed, finding that the 35 drums involved contained hazardous materials that posed a serious fire hazard. The court also rejected defendant's argument that he should not have received a two level increase as an organizer, leader, manager or supervisor in criminal activity under U.S.S.G. §3B1.1(c), since the men he supervised were not charged with any criminal activity.

United States v. Irby, 944 F.2d 902 (4th Cir. 1991). The Fourth Circuit affirmed the trial court's sentencing of the defendant to 33 months imprisonment. The court rejected the defendant's argument that actual environmental contamination was required under U.S.S.G. §2Q1.3 to increase his offense level for a discharge of a pollutant into the environment. The court also affirmed the district court's two level increase under

U.S.S.G. §3B1.1(c) since the defendant supervised an employee whom he directed to illegally discharge raw sewage.

United States v. Paccione, 949 F.2d 1183 (2d Cir. 1991). The Second Circuit denied defendants' appeal of their sentences for convictions of violations of RICO and mail fraud. While defendants were sentenced under U.S.S.G. §2F1.1 for an offense involving fraud or deceit, the court upheld the trial court's determination that it could substantially depart upward, under U.S.S.G. §5K2.0, to take into account the harm defendants caused to the environment.

United States v. Rutana, 932 F.2d 1155 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 300 (1994) (Rutana I). The Sixth Circuit reversed the district court's downward departure from the Guidelines and remanded for resentencing. The court held that the fact that incarcerating the defendant might cause another business he owned to fail, thus costing jobs, was not a proper reason to depart from the Guidelines. Additionally, the court found that a downward departure from the guidelines to achieve conformity among co-defendants is not appropriate where there is a basis for disparity. In this case, the defendant pleaded guilty to a knowing violation of the Clean Water Act while his co-defendants pleaded guilty to negligent violations.

United States v. Sellers, 926 F.2d 410 (5th Cir. 1991). The Fifth Circuit rejected defendant's appeal of his sentence of 41 months imprisonment for the knowing discharge of hazardous wastes in violation of RCRA. The Court found that a four level increase under U.S.S.G. §2Q1.2 for the discharge of a hazardous substance was justified since actual environmental contamination could be inferred from a leaking barrel.

United States v. Wells Metal Finishing, Inc., 922 F.2d 54 (1st Cir. 1991). The First Circuit affirmed defendant's sentence of 15 months imprisonment. The appellate court found that the trial court was justified in enhancing defendant's offense level by two under U.S.S.G. §2Q1.2 (b)(3) for disrupting a public utility where the evidence showed that wastewater from a facility owned by the defendant caused the local sewage treatment plant to spend an additional $1,000 to $10,000 per month to compensate for damages caused by zinc and cyanide in the wastewater.

United States v. Bogas, 920 F.2d 363 (6th Cir. 1990). On appeal by the government, the Sixth Circuit vacated defendant's sentence and remanded for resentencing. Defendant, the Commissioner of the Cleveland Hopkins International Airport, had ordered employees to bury drums of paint in a pit at the end of a runway.

The court found that the offense level should be increased under U.S.S.G. §2Q1.2(b)(1) since there was environmental contamination, though no actual harm, and that the offense level should be further increased under U.S.S.G. §2Q1.2(b)(3) since the clean-up of the pit required a substantial, six-figure, expenditure.

United States v. Mills, 904 F.2d 713 (11th Cir. 1990). The Eleventh Circuit affirmed, without opinion, the trial court's enhancement of defendants' offense levels for a discharge into the environment. The defendants had argued that actual environmental contamination was required to enhance the offense level for a discharge without a permit and that allowing the enhancement permitted double-counting since a discharge without a permit was an element of the underlying Clean Water Act offense. Defendants were sentenced to 21 months imprisonment.

United States v. Poszgai, 897 F.2d 524 (3d Cir. 1990). The Third Circuit affirmed, without opinion, defendant's sentence of 36 months imprisonment. The defendant had argued that allowing the trial court to enhance his offense level for a discharge without a permit would lead to double-counting since the permitless discharge was an element of the offense of which he was convicted.

THE CRIME VICTIMS RIGHTS ACT AND THE MANDATORY VICTIMS RESTITUTION ACT

United States v. Bruce, Nos. 09-6075, 09-6114, 09-6116, 2011 WL 1877732 (6th Cir. 2011) (unpublished). *See Lacey Act, supra.*

United States v. Bengis, 2006 U.S. Dist. LEXIS 91089 (S.D.N.Y. Dec. 19, 2006); ***United States v. Bengis***, 631 F.3d 33 (2d Cir. 2011). *See Lacey Act, supra.*

United States v. Khanh Vu, No. V-11-31, 2011 WL 2173690 (S.D. Tex. June 1, 2011). *See Migratory Bird Treaty Act, supra.*

United States v. W.R. Grace, 597 F. Supp. 2d 1157 (D. Mont. 2009). A mine operator and his current and former employees were indicted for conspiracy to violate the CAA and to defraud the United States, wire fraud, and obstruction of justice regarding the alleged release of asbestos-contaminated vermiculite from the mine. The district court granted Defendant's motion to exclude certain Government lay witnesses under

Fed. R .Evid. 615. The Government and Government witnesses moved to accord rights under the Crime Victim Rights Act to the witnesses in question as victim witnesses. The Act gives crime victims the right to not be excluded from court proceedings and prevents courts from excluding victims from testifying as witnesses. The court denied the Government's motion because the witnesses in question were not "victims' within the meaning of the Crime Victim Rights Act.

To be a "victim" for purposes of the Act, a person must be exposed to an imminent risk of harm or be "directly and proximately harmed as a result of the commission of a federal offense." (citing 18 U.S.C. §3771(e)). The Government did not demonstrate how the witnesses were directly and proximately harmed within the statute of limitations. Furthermore, the Government did not show how the *actus reus* of the crime, releasing hazardous air pollutants, was connected to selling land to the witnesses in a way that put them in imminent danger. Thus, the court ruled there were no crime victims in this case as Congress has defined the term "crime victim," and accordingly denied the Government's motion as well as the witnesses' Motion to Assert Rights under the Crime Victim Rights Act.

United States v. Atl. States Cast Iron Pipe Co., 612 F. Supp. 2d 453 (D.N.J. 2009). An industrial company operating a cast iron pipe foundry and four of its employees were charged with a 35-count indictment after incidents in which other employees sustained serious or fatal injuries while at work. After an eight-month jury trial, Defendants were convicted on April 26, 2006, of multi-object conspiracy related to various violations of the Clean Water Act and the CAA, and various OSHA related charges including obstruction of OSHA proceedings and false statements. Following the conviction, the Government filed a motion seeking to set a sentencing date. In its motion the Government asserted that six of the injured employees qualified as crime victims under the Crime Victim Rights Act (CVRA) because of the OSHA-related convictions in the case. One of them died and at least two suffered permanent injuries. The court denied the Government's motion insofar as it sought to afford CVRA rights to the six workers in the sentencing proceedings because the workers were not "statutory crime victims" under the CVRA of the offenses of the conviction.

The definition of "crime victim" in the CVRA requires a federal criminal offense. The Government, however, based its assertion of CVRA rights on the OSHA-related offenses in the indictment were all civil violations rather than criminal. The only criminal liability OSHA provides is for employers, not employees or supervisors, and even for employers there are no available criminal charges for non-fatal injuries sustained by workers. Furthermore, the statutory definition of crime victim requires the harm to be directly and proximately caused by the criminal conduct established by the prosecution. The conduct for which Defendants were convicted was based on false statements made during OSHA investigations occurring *after* the workers had been injured, and therefore the conduct prosecuted could not have caused the injuries. If the Government focused the CVRA argument on the conspiracy conviction instead, then Defendants' conduct would have affected all workers who sustained any injury during the course of the

conspiracy, but the court ruled that was too broad to meet the "direct and proximate harm" requirements for CVRA status.

In re Dean, 527 F.3d 391 (5th Cir. 2008). The victims of a BP refinery explosion filed petition for a writ of mandamus after the district court denied their request to reject the plea agreement. The court found that there was a violation of the Crime Victim's Rights Act (CVRA), because there were not enough victims to make notifying and conferring impracticable. Therefore, the government should have conferred with the victims before reaching a plea agreement with the company. The CVRA was passed to allow victims the right to confer with the prosecutor before a plea agreement is reached, and this is not an infringement on the government's independent prosecutorial discretion. Although the CVRA was violated, the court denied the writ of mandamus. The court held that the writ was not appropriate under the circumstances, because the district court did hear all of the victims before the plea was to be accepted by the court, even though the victims were not heard before the plea was reached.