

JURY INSTRUCTIONS IN ENVIRONMENTAL CRIMES CASES

**Advanced Environmental Crimes Seminar
May 14, 2002**

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

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CLEAN WATER ACT

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GENERAL INSTRUCTIONS

The Purpose of the Act

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

Authority:

33 U.S.C. § 1251(a)

Harm Not an Element of Crime

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

Authority:

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

Comment:

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

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

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

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

2. DEFINITIONS (STATUTORY AND REGULATORY)

Meaning of "Pollutant"

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

Authority:

33 U.S.C. § 1362(6)

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

Comment:

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

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

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

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

See also United States v. Eidson (M.D. Fla., 92-94-CR-T-15A), aff'd., 108 F.3d 1336 (11th Cir. 1997), cert. denied, 118 S.Ct. 248 (1997); United States v. Suarez (D. Guam, CR-92-00036 AWT)

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

United States v. Sinskey (D.S.D., CR 96-40010), aff'd., 119 F.3d 712 (8th Cir. 1997); United States v. Normand (M.D. La., Cr. No. 97-20-A-M1).

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

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

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

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

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

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

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

Meaning of "Discharge of a Pollutant"

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

Authority:

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

Comment:

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

Meaning of "Point Source"

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

Authority:

33 U.S.C. § 1362(14)

United States v. Pozsgai, 999 F.2d 719, 726 n.6 (3d Cir. 1993), cert. denied, 510 U.S. 1110 (1995) (dump trucks and bulldozers are point sources)

United States v. Law, 979 F.2d 977, 979-980 (4th Cir. 1992), cert. denied, 507 U.S. 1030 (1993)

United States v. Earth Sciences, 599 F.2d 368, 373 (10th Cir. 1979) ("the concept of point source was designed to further [the Clean Water Act] scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States")

Avoyelles Sportsman League v. Marsh, 715 F.2d 897, 922 (5th Cir. 1983) (bulldozers and backhoes are point sources)

United States v. Tull, 615 F. Supp. 610, 622 (E.D. Va 1983)

United States v. Weisman, 489 F. Supp. 1331, 1337 (M.D. Fla 1980) (bulldozers and dump trucks are point sources)

United States v. Oxford Royal Mushroom Products, Inc., 487 F.Supp. 852 (E.D. Pa. 1980)

United States v. Holland, 373 F. Supp. 665, 668 (M.D. Fla. 1974)

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

Comment:

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

United States v. Eidson, (M.D. Fla. 92-94-CR-T-15A), aff'd., 108 F.3d 1336 (11th Cir. 1997), cert. denied, 118 S.Ct. 248 (1997)

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

United States v. Suarez (D. Guam, CR-92-00036 AWT)

United States v. Sinskey (D.S.D., CR 96-40010), aff'd., 119 F.3d 712 (8th Cir. 1997)

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

United States v. Tomlinson (W.D. Wash., CR98-84WD)

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

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

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

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

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

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

1. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
2. All interstate waters including interstate wetlands;
3. All impoundments of waters otherwise defined as waters of the United States;
4. Tributaries of waters identified above;
5. The territorial seas;
6. Wetlands adjacent to waters (other than waters which are themselves wetlands) identified above as waters of the United States.

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

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

Authority:

33 U.S.C. § 1362(7)

40 C.F.R. §§ 110.1, 117.1, 122.2(a), (c)(1), (c)(3), and

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

Comment:

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

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

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

by migratory birds. That provision reads as follows:

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

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

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

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

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

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

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

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

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

The term navigable waters means the waters of the United States, and may include non-navigable streams such as Manassas Run.

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

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

Meaning of "Territorial Seas"

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

Authority:

33 U.S.C. § 1362(8)

Comment:

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

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

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

Meaning of "Contiguous Zone"

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

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

Authority:

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

Comment:

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

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

Meaning of "Ocean"

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

Authority:

33 U.S.C. § 1362(10)

Comment:

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

3.

MENTAL STATE

A. Knowing Conduct

Meaning of "Knowingly"

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

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

Authority:

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

Comment:

A more compact version that captures the basics of the

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

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

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

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

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

It is constitutionally sufficient that the prosecution

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

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

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

Knowledge - Individual and Organizational Defendants

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

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

