

GJ#13  
FILED  
AHM/ROP, AUG 2004

04 JUL 28 PM 5:28

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

U.S. DISTRICT COURT  
N.D. OF ALABAMA

UNITED STATES OF AMERICA

CR-04-PT-0199-S SUPERSEDING

v.

MCWANE, INC., JAMES DELK, MICHAEL  
DEVINE, CHARLES "BARRY" ROBISON,  
and DONALD BILLS,

Defendants.

Title 18, United States Code, Section 371  
Title 18, United States Code, Section 1001  
Title 18, United States Code, Section 1505  
Title 33, United States Code, Section 1311  
Title 33, United States Code, Section 1319  
Title 18, United States Code, Section 2

**SUPERSEDING INDICTMENT**

The United States Grand Jury in and for the Northern District of Alabama, sitting in  
Birmingham, charges as follows:

**INTRODUCTION**

**A. Background**

At all times material to this Superseding Indictment:

1. Defendant MCWANE, INC. (MCWANE) is a Delaware corporation headquartered in  
Birmingham, Alabama. Defendant MCWANE operated iron foundries that manufactured cast  
iron pipe, fittings, valves, and hydrants in each of the country's major market areas.
2. Defendant MCWANE, by and through a division called McWane Cast Iron Pipe  
Company, manufactured ductile cast iron pipe for the water and sewer industry at its facility in  
Birmingham, Alabama ("the Birmingham facility"). The manufacturing process utilized by  
defendant MCWANE involved melting ferrous scrap metal in a water-cooled cupola furnace.

Molten metal was centrifugally cast into pipe in water-cooled machines. The cast iron pipe was then annealed, cleaned, tested, cement lined, painted, and bundled for shipment.

3. Avondale Creek entered the Birmingham facility from the south, flowed north through the eastern portion of the property, and then west along the northern boundary. The creek exited the property near the northwest property corner and intersected Village Creek approximately 1000 feet northwest of the Birmingham facility.

4. At various dates alleged in this Superseding Indictment, defendant JAMES DELK held different positions with defendant MCWANE, including Assistant General Manager and General Manager, and beginning at a time unknown to the Grand Jury but no later than January 1996 and continuing to a time unknown to the Grand Jury, defendant JAMES DELK was the Assistant General Manager at the Birmingham facility, and beginning at a time unknown to the Grand Jury and continuing to in or about January 2001, defendant JAMES DELK was the Vice President-General Manager at the Birmingham facility.

5. From on or about January 26, 1998 to on or about February 11, 2000, defendant MICHAEL DEVINE was the Plant Manager at the Birmingham facility, with overall responsibility for day-to-day operations of the facility.

6. Defendant CHARLES "BARRY" ROBISON was the Vice President of Environmental Affairs for defendant MCWANE, beginning at a time unknown to the Grand Jury but no later than 1993, and was responsible for, among other things, compliance with environmental regulations. As Vice President for Environmental Affairs, defendant "CHARLES "BARRY" ROBISON was responsible for environmental matters for defendant MCWANE.

7. Defendant DONALD BILLS was the Plant Engineer at the Birmingham facility, beginning in or about November 1998, and his responsibilities included compliance with environmental regulations.

#### **B. Clean Water Act**

8. The Federal Water Pollution Control Act, commonly known as the Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et seq.*, was enacted by Congress to restore and maintain the chemical, physical, and biological quality of the Nation’s waters. 33 U.S.C. § 1251(a). In addition, the CWA was enacted to prevent, reduce, and eliminate water pollution in the United States and to conserve the waters of the United States for the protection and propagation of fish and aquatic life and wildlife, recreational purposes, and the use of such waters for public drinking water, agricultural, and industrial purposes. 33 U.S.C. § 1252(a).

9. The CWA prohibits the discharge of any pollutant into waters of the United States, except in compliance with a permit issued pursuant to the CWA under the National Pollutant Discharge Elimination System (“NPDES”) by the United States Environmental Protection Agency (“EPA”) or an authorized state. 33 U.S.C. §§ 1311(a), 1342.

10. The term “discharge of a pollutant” is defined as the addition of any pollutant to navigable waters, meaning the waters of the United States, from any point source. 33 U.S.C. § 1362(12). Avondale Creek is a water of the United States within the meaning of 33 U.S.C. § 1362(7) and 40 C.F.R. § 122.2. A point source is defined by the CWA as any discernible, confined and discrete conveyance from which pollutants are discharged, for example a pipe, ditch, or channel. 33 U.S.C. § 1362(14).

11. The term “pollutant” is defined as, among other things, solid waste, chemical waste, and industrial waste discharged into water. “Petroleum-contaminated wastewater,” which is

wastewater containing petroleum-based substances, such as hydraulic fluid and water soluble oil, is a pollutant under the CWA. 33 U.S.C. § 1362(6).

12. Alabama's NPDES program, which is administered by the Alabama Department of Environmental Management ("ADEM"), was approved by the EPA on October 19, 1979. *See* 44 Fed. Reg. 61452 (October, 25, 1979).

13. On September 29, 1993, ADEM issued NPDES Permit AL0001791 to defendant MCWANE (also referred to as "the Permit"). The effective date for the Permit was October 1, 1993, and the expiration date was September 30, 1998. Pursuant to ADEM Administrative Code, Chapter 335-6-6-.06 and Part II.E.1.a. (Page 8) of the Permit, if the permittee submits an application for a renewed permit, and that application is pending, then the permit remains in effect. Defendant MCWANE submitted an application for a renewed permit on or about February 4, 1998, which was thereafter received by ADEM, and that application was pending, and therefore the existing permit remained in effect during time periods relevant to this Superseding Indictment.

14. Defendant MCWANE's Birmingham facility generated various types of process wastewater, including the following:

a. The Scrubber Clarifier: The melting of scrap metal, primarily shredded steel from scrap automobiles, occurred in a furnace known as a "cupola." Through in or about 2002, air pollution in the cupola was removed by a wet scrubber, which generated sludge containing metals (including lead and cadmium), as well as wastewater contaminated with this sludge, in a tank called the "Scrubber Clarifier."

b. The 18 and 20-Foot "Basements": There were two main pipe manufacturing operations at the Birmingham facility. The 18-foot casting operation produced larger pipes and

was lubricated by a milky-white mixture of water and water soluble oil called "traverse water." The 20-foot casting operation made smaller pipes and was lubricated with a dark-colored hydraulic oil. Both casting operations leaked copious amounts of oil into large concrete pits called "basements" located under the casting machines. Water was also added to these basements. The 18-foot basement was considerably larger than its 20-foot counterpart, and thus had significantly more storage capacity. The contents from the 20-foot basement were routinely pumped to the 18-foot basement.

c. The "Cement Ponds": After the pipes were manufactured, they were lined with cement. Both the 18 and 20-foot casting operations produced wastewater from this cement lining process, which was initially stored in open, outdoor concrete pits called "cement ponds."

d. The "5 & 6 Pond": Another place that water collected was the "5 & 6 Cooling Pond," or "5 & 6 Pond," so named because it was initially constructed to hold cooling water for the Number 5 and 6 Casting Machines. The 5 & 6 Pond also received wastewater from the 18-foot basement, and was located near one of several storm drains at the facility.

e. The "Test Presses": There were two "test presses" at the Birmingham facility. These test presses applied water pressure to the pipe to test for leaks. In this process, the chemical potassium permanganate was added to release gas from the pipe and reduce the chance of "bubbling" or "blistering." Process wastewater, containing potassium permanganate and other contaminants, was generated by the testing of pipe at the Birmingham facility.

15. A "Creek Clarifier" was located at the edge of Avondale Creek at the Birmingham facility. If operated correctly, the Creek Clarifier was designed to receive process wastewater from several sources at the Birmingham facility including, but not limited to, the Scrubber Clarifier, the 18 and 20-foot Basements, and the 5 & 6 Cooling Pond, and treat it by introducing

chemicals into the wastewater and using a drag chain to remove solids from the process wastewater.

16. Under NPDES Permit AL0001791, defendant MCWANE was permitted to discharge only “treated process wastewater” from the Creek Clarifier outfall, designated as Discharge Serial Number (“DSN”) 001 (“Creek Clarifier Outfall (DSN001)”). “Process wastewater” was defined as: “any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, by-product, or waste product.” See “EPA Application Form 1-General Information” Consolidated Permits Program, at Section D (Glossary), page 1-9. The discharge must be limited and monitored as specified in Part I.A, page 1 of the Permit. The monitoring required under the Permit included various daily and monthly measurements of the discharge as well as various discharge sampling requirements, including “grab” and “composite” samples, as set forth in the Permit. Specific discharge limits were contained in the Permit for various “effluent characteristics” or pollutants. See NPDES Permit AL0001791, Part I.A, page 1, and Part III, page 14 (defining “pollutant” in part as “those effluent characteristics specified in Provision I.A of this permit”). The “effluent characteristics” containing specific discharge limits included, but were not limited to: (1) pH, which is an expression of the intensity of the basic or acidic condition of a liquid; (2) Total Suspended Solids (“TSS”), which is a measure of the suspended solids in wastewater; (3) Oil & Grease; (4) Lead, Total Recoverable; and (5) Zinc, Total Recoverable. The Permit, at Part III.H.6, page 13, stated that: “[d]aily maximum . . . means the highest value of any individual sample result in a day.” The Permit at Part I.C, pages 3-4, required monthly reporting to ADEM of the monitoring results (Discharge Monitoring Reports),

along with a detailed certification and signature of a “responsible official” or “duly authorized representative” as defined in the Alabama Administrative Code.

17. Under NPDES Permit AL0001791, defendant MCWANE was not authorized to discharge any process wastewater from any of its storm water outfalls, designated as DSN002 through DSN020. Rather, defendant MCWANE was permitted only to discharge “storm water runoff from industrial activity” from these outfalls. Further, the Permit required this storm water to be monitored for various “effluent characteristics” and contained a daily maximum for “Oil and Grease.” The DSN002 storm water outfall was 36" in diameter and served as a drain for nine (9) paved acres of a manufacturing area within the Birmingham facility. The DSN003 storm water outfall was 12" in diameter and served as a drain for .65 acres of a manufacturing area within the Birmingham facility.

18. Under NPDES Permit AL0001791, Part II D.1.c, page 8, defendant MCWANE was not authorized to discharge a pollutant from a source not specifically identified in the permit application and not specifically included in the description of an outfall in the Permit.

19. The Clean Water Act prohibits a “person” from knowingly violating certain specified sections of the Clean Water Act, including sections 1311, 1318 and 1321(b)(3) or “any permit condition or limitation implementing such sections in a permit issued under section 1342 of this title by the Administrator or by a State.” 33 U.S.C. § 1319(c)(2). A “person” includes a corporation, individual and “any responsible corporate officer.” 33 U.S.C. § 1319(c)(6); 33 U.S.C. § 1362(5).

**COUNT 1:**  
**Conspiracy**  
**[18 U.S.C. § 371]**

20. The allegations of Paragraphs 1 through 19 are incorporated by reference as if fully set forth herein.

**Objects of the Conspiracy**

21. Beginning at a time unknown to the Grand Jury, but no later than in or about 1996, and continuing thereafter until in or about 2001, in the Northern District of Alabama and elsewhere,

MCWANE, INC.,

JAMES DELK, MICHAEL DEVINE,

CHARLES "BARRY" ROBISON, and DONALD BILLS

the defendants, did knowingly and willfully combine, conspire, confederate and agree with each other and others known and unknown to the Grand Jury, to commit the following offenses against the United States and the laws thereof:

A. To knowingly discharge and cause the discharge of a pollutant from a point source into the waters of the United States, in violation of a permit, contrary to Title 33, United States Code, Sections 1311(a) and 1319(c)(2)(A) and Title 18, United States Code, Section 2; and

B. To defraud the United States, that is, to hamper, hinder, impede, impair, and obstruct by craft, trickery, deceit, and dishonest means, the lawful and legitimate functions of the EPA in enforcing federal environmental laws and regulations, in violation of Title 18, United States Code, Sections 371 and 2; and



C. To knowingly and willfully make materially false, fictitious, and fraudulent statements and representations in matters within the jurisdiction of the EPA, an agency of the executive branch of the Government of the United States, in violation of Title 18, United States Code, Sections 1001 and 2; and

D. To corruptly influence, obstruct, and impede, and endeavor to influence, obstruct, and impede, the due and proper administration of law under which a pending proceeding is being had before the EPA, an agency of the United States, in violation of Title 18, United States Code, Sections 1505, 1515(b), and 2.

22. The purpose of the conspiracy was to enrich defendants MCWANE, JAMES DELK, MICHAEL DEVINE, CHARLES "BARRY" ROBISON, DONALD BILLS, and their co-conspirators by maximizing the production of cast iron pipe at the Birmingham facility, without concern for environmental pollution.

**Means and Methods of the Conspiracy**

23. Among the means and methods employed by defendants MCWANE, JAMES DELK, MICHAEL DEVINE, CHARLES "BARRY" ROBISON, DONALD BILLS, and their co-conspirators to carry out the conspiracy and effect its unlawful objects were those set forth in Paragraphs 24 through 28 below.

24. Defendants MCWANE, JAMES DELK, MICHAEL DEVINE, CHARLES "BARRY" ROBISON, DONALD BILLS, and their co-conspirators caused process wastewater to be discharged from storm water outfall DSN002 into Avondale Creek in violation of NPDES Permit AL0001791.

25. Defendants MCWANE, JAMES DELK, MICHAEL DEVINE, CHARLES "BARRY" ROBISON, DONALD BILLS, and their co-conspirators caused process wastewater to

be discharged from the Creek Clarifier Outfall (DSN001) into Avondale Creek in violation of NPDES Permit AL0001791.

26. Defendants MCWANE, JAMES DELK, MICHAEL DEVINE, CHARLES “BARRY” ROBISON, DONALD BILLS, and their co-conspirators caused process wastewater to be discharged via overflows from the Creek Clarifier into Avondale Creek in violation of NPDES Permit AL0001791.

27. Defendants MCWANE, JAMES DELK, MICHAEL DEVINE, CHARLES “BARRY” ROBISON, DONALD BILLS, and their co-conspirators caused process wastewater and paint to be discharged from storm water outfall DSN003 into Avondale Creek in violation of NPDES Permit AL0001791.

28. Defendants MCWANE, JAMES DELK, MICHAEL DEVINE, CHARLES “BARRY” ROBISON, DONALD BILLS, and their co-conspirators took steps to conceal from ADEM and EPA the discharges referred to in Paragraphs 24 through 27, and took steps to mislead and hinder enforcement efforts of ADEM and EPA by providing false and misleading information through verbal statements, letters, permit applications, and reports.

29. In order to permit continuation and prevent detection of the conduct referred to in Paragraphs 24 through 28, defendants MCWANE, JAMES DELK, MICHAEL DEVINE, CHARLES “BARRY” ROBISON, DONALD BILLS, and their co-conspirators lied to and obstructed government officials conducting investigations into activities at the Birmingham facility.

### **Overt Acts**

30. In furtherance of the conspiracy and in order to effect the objects thereof, defendants MCWANE, JAMES DELK, MICHAEL DEVINE, CHARLES "BARRY" ROBISON, DONALD BILLS, and their co-conspirators committed the following overt acts, among others, in the Northern District of Alabama and elsewhere:

i. **Wastewater Discharged from Storm Water Outfall DSN002 to Avondale Creek**

**Overt Act Number 1:** Beginning at a time unknown to the Grand Jury, but no later than in or about 1996, and continuing at least through in or about 2001, defendant MCWANE, and its co-conspirators, employees of defendant MCWANE, caused process wastewater to be discharged from storm water outfall DSN002 into Avondale Creek in violation of NPDES Permit AL0001791.

**Overt Act Number 2:** On or about January 10, 1996, defendant MCWANE, and its co-conspirators, employees of defendant MCWANE, caused to be discharged into Avondale Creek process wastewater via storm drains and other conveyances that drained into storm water outfall DSN002 in violation of NPDES Permit AL0001791.

**Overt Act Number 3:** On or about May 21 and May 27, 1998, defendant MCWANE discharged process wastewater into a storm drain that drained into storm water outfall DSN002.

**Overt Acts Number 4 through 20:** Despite a May 27, 1998 memorandum from defendant CHARLES "BARRY" ROBISON to defendant JAMES DELK, in which defendant CHARLES "BARRY" ROBISON informed defendant JAMES DELK of the discharges referred to in the preceding Overt Act, acknowledged that these discharges did not comply with defendant MCWANE's "water permits," and warned defendant JAMES DELK that:

Permanganate overflowing to storm sewer. Spray basin and cooling tower overflowing to storm sewer on both days of inspection. Entire area extremely oily. Equipment malfunctions resulting in a bypass of the wastewater treatment system are subject to permit reporting requirements. McWane's permit does not authorize this discharge. Even if it was authorized, it would be subject to sampling and reporting requirements. **This must be corrected immediately and plans to prevent a reoccurrence should be developed.** For your information, a copy of your permit with pertinent sections highlighted is attached. [Emphasis in original];

on or about the below listed dates, defendant MCWANE and its co-conspirators, employees of defendant MCWANE, discharged process wastewater from storm water outfall DSN002 in violation of NPDES Permit AL0001791:

Overt Act Number	Date
4	October 7, 1998
5	October 16, 1998
6	October 21, 1998
7	November 16, 1998
8	November 23, 1998
9	January 12, 1999
10	January 27, 1999
11	January 28, 1999
12	February 2, 1999
13	February 10, 1999
14	April 12, 1999
15	May 30, 1999
16	July 27, 1999
17	May 10, 2000
18	July 24, 2000
19	July 25, 2000

**Overt Act Number 21:** On or about June 22, 1998, defendant MCWANE discharged process wastewater to the main storm sewer that drained into storm water outfall DSN002, which was documented by defendant CHARLES "BARRY" ROBISON.

**Overt Act Number 22:** On or about July 31, 1998, defendant MCWANE discharged process wastewater from storm water outfall DSN002, which was documented by defendant CHARLES "BARRY" ROBISON.

**Overt Act Number 23:** On or about October 21, 1998, defendant CHARLES "BARRY" ROBISON had a discussion with defendant JAMES DELK regarding a discharge of process wastewater from storm water outfall DSN002.

**Overt Act Number 24:** On or about October 21, 1998, defendant MCWANE employee WWW, a Project Engineer with responsibilities including environmental and regulatory compliance, wrote a memorandum documenting a discharge of process wastewater from storm water outfall DSN002, copies of which were sent to defendants JAMES DELK, MICHAEL DEVINE and CHARLES "BARRY" ROBISON.

**Overt Act Number 25:** In or about 1999, defendant JAMES DELK used a portable pump to pump water from the 18-foot casting basement to a storm drain that drained to storm water outfall DSN002 .

**Overt Act Number 26:** On or about January 2, 2001, defendant MCWANE and its co-conspirators caused the discharge of process wastewater from storm water outfall DSN002, which resulted in a coating on the creek bed of Avondale Creek, and this coating on the creek

bed was documented by defendant MCWANE employee WWW, who also notified defendants JAMES DELK and DONALD BILLS in writing about the coating.

**Overt Act Number 27:** During the course of the conspiracy, the exact dates being unknown to the Grand Jury, defendant JAMES DELK directed defendant MCWANE Maintenance Supervisor Donald Harbin to dispose of process wastewater from the 5 & 6 Cooling Pond to a storm drain that drained to storm water outfall DSN002.

ii. **Efforts to Deceive, Mislead and Avoid Detection Regarding Wastewater Discharged from Storm Water Outfall DSN002 to Avondale Creek**

**Overt Act Number 28:** On or about June 27, 1996, defendant MCWANE Supervisor XXX told an ADEM employee that there had been no discharges from storm water outfall DSN002 in the past year.

**Overt Act Number 29:** In or about May 1998, defendants MCWANE, CHARLES "BARRY" ROBISON, JAMES DELK, and their co-conspirators failed to report permit violations, namely discharges of process wastewater from storm water outfall DSN002, contrary to NPDES Permit AL0001791.

**Overt Act Number 30:** In or about July 1998, defendants MCWANE and CHARLES "BARRY" ROBISON, and their co-conspirators failed to report a permit violation, namely a discharge of process wastewater from storm water outfall DSN002, contrary to NPDES Permit AL0001791.

**Overt Act Number 31:** On or about October 21, 1998, an ADEM employee observed a discharge of process wastewater from storm water outfall DSN002 at the Birmingham facility, and defendant MCWANE Supervisors XXX and YYY told the ADEM employee that they did

not have an explanation for the discharge, when, in fact, Supervisors XXX and YYY were aware that the discharge was the result of wastewater being discharged by defendant MCWANE.

**Overt Act Number 32:** In a December 30, 1998 letter to ADEM, defendant CHARLES "BARRY" ROBISON falsely stated, in reference to the October 21, 1998 inspection, that "McWane personnel were surprised, when on October 21, your inspectors informed them of the discharge" and also falsely stated that the October 21, 1998 inspection "brought this condition to our attention" when, in fact, defendant CHARLES "BARRY" ROBISON and other employees of defendant MCWANE were aware of the discharge of process wastewater from storm water outfall DSN002 prior to the ADEM inspection of October 21, 1998.

**Overt Act Number 33:** On or about February 10, 1999, in response to comments made by an ADEM employee who had observed a discharge of process wastewater from storm water outfall DSN002 at the Birmingham facility, defendant MCWANE Supervisor YYY, at the direction of defendant MICHAEL DEVINE, told the ADEM employee that the discharge was the result of the facility test flushing fire hydrants when, in fact, defendant MICHAEL DEVINE and Supervisor YYY were aware that this statement was false and the discharge was the result of process wastewater being discharged by defendant MCWANE.

**Overt Act Number 34:** On or about May 19, 2000, defendant CHARLES "BARRY" ROBISON wrote a letter to ADEM, a copy of which was sent to defendant DONALD BILLS, that contained statements regarding storm water outfall DSN002 that were designed to mislead and hinder ADEM.

**Overt Act Number 35:** During the course of the conspiracy, the exact dates being unknown to the Grand Jury, in an effort to conceal evidence of discharges from storm water

outfall DSN002, employees of defendant MCWANE discharged process wastewater into storm drains at night and on weekends.

**Overt Act Number 36:** During the course of the conspiracy, the exact dates being unknown to the Grand Jury, in an effort to conceal evidence of discharges from storm water outfall DSN002, employees of defendant MCWANE discharged process wastewater when it was raining.

**Overt Act Number 37:** On or about January 2, 2001, defendant DONALD BILLS wrote a letter to ADEM, copies of which were sent to defendants JAMES DELK and CHARLES "BARRY" ROBISON, that contained statements regarding storm water outfall DSN002 that were designed to mislead and hinder ADEM.

**Overt Act Number 38:** In or about January 2001, defendants MCWANE, JAMES DELK, DONALD BILLS, and their co-conspirators failed to report a permit violation relating to the discharge of process wastewater from storm water outfall DSN002, contrary to NPDES Permit AL0001791.

iii. **Wastewater Discharged from the Creek Clarifier Outfall (DSN001) to Avondale Creek**

**Overt Act Number 39:** On various occasions from in or about February 1999 to in or about 2000, defendants JAMES DELK and MICHAEL DEVINE directed employees of defendant MCWANE to discharge process wastewater from the Creek Clarifier Outfall (DSN001) into Avondale Creek in violation of NPDES Permit AL0001791.

**Overt Act Number 40:** On or about May 26, 1999, defendants MCWANE, JAMES DELK and MICHAEL DEVINE caused a discharge of process wastewater from the Creek



Clarifier Outfall (DSN001) to Avondale Creek in violation of NPDES Permit AL0001791, including in violation of the discharge limitation for the "Oil and Grease" effluent characteristic.

**Overt Act Number 41:** In or about March 2000, defendant MCWANE Maintenance Supervisor Donald Harbin directed an employee of defendant MCWANE to wait until after dark and then "knock the valve off" the Creek Clarifier, causing the contents of the Creek Clarifier, which consisted of thousands of gallons of process wastewater, to be discharged into Avondale Creek.

**Overt Act Number 42:** During the course of the conspiracy, the exact dates being unknown to the Grand Jury, defendants JAMES DELK and MICHAEL DEVINE rejected recommendations and advice from an employee of defendant MCWANE to make improvements to the Creek Clarifier and the Creek Clarifier wastewater treatment process that would have reduced the amount of contamination in the process wastewater discharge from the Creek Clarifier Outfall (DSN001).

**Overt Act Number 43:** On various occasions between 1999 and 2001, the exact dates being unknown to the Grand Jury, defendant MCWANE, and its co-conspirators, employees of defendant MCWANE, failed to properly and adequately treat the process wastewater in the Creek Clarifier prior to discharging the wastewater to Avondale Creek.

**Overt Act Number 44:** On various occasions between 1999 and 2001, the exact dates being unknown to the Grand Jury, defendant MCWANE, and its co-conspirators, employees of defendant MCWANE, failed to properly and adequately operate and maintain the Creek Clarifier prior to discharging the wastewater to Avondale Creek.

iv. **Efforts to Deceive, Mislead and Avoid Detection Regarding Wastewater Discharged from the Creek Clarifier Outfall (DSN001) to Avondale Creek**

**Overt Act Number 45:** On or about March 9, 1999, defendant DONALD BILLS on behalf of defendant MCWANE, submitted to ADEM a monthly report regarding the discharge from the Creek Clarifier Outfall (DSN001) for February 1999, entitled "ADEM DISCHARGE MONITORING REPORT," which stated: "NO DISCHARGES THIS MONTH" when, in fact, during this time period, defendant MCWANE discharged process wastewater from the Creek Clarifier Outfall (DSN001).

**Overt Act Number 46:** On or about August 17, 2000 and September 15, 2000, defendant CHARLES "BARRY" ROBISON, on behalf of defendant MCWANE, caused documents to be sent to the EPA, via private overnight mail, which included the false and misleading statement discussed in the preceding Overt Act.

**Overt Act Number 47:** In or about March 1999, in an effort to avoid detection of the discharge of process wastewater from the Creek Clarifier Outfall (DSN001), defendant MCWANE Maintenance Supervisor Donald Harbin instructed an employee of defendant MCWANE to discharge process wastewater from the Creek Clarifier Outfall (DSN001) in the evening.

**Overt Act Number 48:** In or about March 1999, in an effort to avoid detection of the discharge of process wastewater from the Creek Clarifier Outfall (DSN001), defendant MCWANE Maintenance Supervisor Donald Harbin instructed an employee of defendant MCWANE, whom Donald Harbin had previously directed to discharge process wastewater from the Creek Clarifier Outfall (DSN001), not to tell other employees about this activity.

**Overt Act Number 49:** Shortly after a May 26, 1999 inspection by an ADEM employee wherein permit violations regarding the Creek Clarifier Outfall (DSN001) were observed and communicated to defendant MCWANE employee ZZZ, a meeting was held among employee ZZZ and defendants JAMES DELK and MICHAEL DEVINE in which: (1) these defendants falsely assured employee ZZZ that the discharges from the Creek Clarifier Outfall (DSN001) were “legal,” and (2) defendant MICHAEL DEVINE said that the ADEM employee “didn’t know what he was talking about.”

v. **Wastewater Discharged to Avondale Creek via Overflows of the Creek Clarifier**

**Overt Act Number 50:** Beginning at a time unknown to the Grand Jury, but no later than 1996, and continuing at least through in or about 2001, defendant MCWANE and its co-conspirators discharged process wastewater by causing and allowing it to overflow the Creek Clarifier and enter Avondale Creek in violation of NPDES Permit AL0001791.

**Overt Act Number 51:** On or about July 31, 1998, defendant MCWANE and its co-conspirators discharged process wastewater and solids into Avondale Creek from an overflow of the Creek Clarifier.

vi. **Process Wastewater and Paint Discharged from Storm Water Outfall DSN003 to Avondale Creek**

**Overt Act Number 52:** On or about June 22, 1998, defendant MCWANE and its co-conspirators discharged process wastewater from storm water outfall DSN003 into Avondale Creek in violation of NPDES Permit AL0001791.

**Overt Act Number 53:** In or about June 1999, defendant MCWANE and its co-conspirators discharged process wastewater and paint from storm water outfall DSN003 to Avondale Creek in violation of NPDES Permit AL0001791.

**vii. Other Efforts to Deceive, Mislead and Avoid Detection Regarding Wastewater Discharged to Avondale Creek**

**Overt Act Number 54:** On or about February 3, 1998, defendant CHARLES "BARRY" ROBISON, on behalf of defendant MCWANE, submitted to ADEM a permit application, which contained an attachment that stated: "Due to internal efforts there has been no discharge from this source in the past years," which was misleading insofar as it failed to indicate that process wastewater had been discharged from overflows of the Creek Clarifier and out of storm water outfall DSN002.

**Overt Act Number 55:** From in or about January 1998 to in or about March 2000, defendant MCWANE, through Supervisor YYY, generated "Daily SWPP and Monthly SPCC Inspections" forms, which included notations that the status of certain inspection items including, "Scrubber Clarifier for Overflow & Containment" and "Creek Bank Clarifier for Overflow & Containment" were "OK," when, in fact, the vast majority of the purported inspections were never conducted and the status of "OK" was a false description of the status of inspection items.

**Overt Act Number 56:** On or about August 17, 2000 and September 15, 2000, defendant CHARLES "BARRY" ROBISON, on behalf of defendant MCWANE, caused documents to be sent to the EPA, via private overnight mail, which included the false and misleading statements discussed in the preceding Overt Act.

**Overt Act Number 57:** In or about January 1999, defendant MCWANE generated a "Storm Water Pollution Prevention and Best Management and Practices Plan," which included various false and misleading statements, including the false representation that "water is recycled, not discharged."

**Overt Act Number 58:** On or about August 17, 2000 and September 15, 2000, defendant MCWANE, through defendant CHARLES "BARRY" ROBISON, caused documents to be sent to the EPA, via private overnight mail, which included the false and misleading statements discussed in the preceding Overt Act.

**Overt Act Number 59:** On or about March 18, 1999, defendant JAMES DELK and counsel for defendant MCWANE met with representatives from ADEM, at which meeting representatives of defendant MCWANE made statements regarding the discharges from storm water outfall DSN002, including the assertion that: (1) an employee who was about to retire was responsible for failing to respond to the problem, (2) defendant JAMES DELK gave the matter his immediate attention when he learned of the problem; and (3) there was a "round the clock effort to fix the problem" once it was called to their attention.

**Overt Act Number 60:** On or about March 26, 1999, counsel for defendant MCWANE sent a letter to ADEM, a copy of which was sent to defendant JAMES DELK, which memorialized the March 18, 1999 meeting referred to in the preceding Overt Act, and stated in part that: "From both our perspectives, I think the most important information that was provided is that McWane's underlying water discharge problem is solved," when, in fact, employees of defendant MCWANE were continuing, and did continue, to discharge process wastewater in violation of NPDES Permit AL0001791.

**Overt Act Number 61:** On or about May 19, 1999, shortly after ADEM had documented a discharge by defendant MCWANE of process wastewater from one of the Birmingham facility's buildings into a pooled area, defendant DONALD BILLS falsely told an ADEM employee: (1) that he did not know how the pooled wastewater got in that location, and (2) that he did not know the location of the nearest storm drain inlet.

**Overt Act Number 62:** On or about April 25 through 27, 2000, EPA conducted a Compliance Sampling Inspection at the Birmingham facility, and during that inspection, defendant MCWANE and its co-conspirators, employees of defendant MCWANE, including defendant DONALD BILLS, claimed that “there is sufficient recycling of wastewater that the facility normally would not have a discharge” when, in fact, on numerous occasions prior to this inspection, process wastewater was discharged to Avondale Creek from the Creek Clarifier Outfall (DSN001), overflows from the Creek Clarifier, and storm water outfall DSN002.

**Overt Act Number 63:** On or about April 25 through 27, 2000, defendant MCWANE and its co-conspirators, employees of defendant MCWANE, violated NPDES Permit AL0001791 regarding the monitoring and testing of process wastewater discharges, including provisions of the Permit concerning: (1) facilities and equipment, (2) sample handling and preservation, (3) laboratory methodology and data quality assessment, and (4) quality assurance and data documentation.

**Overt Act Number 64:** During the course of the conspiracy, the exact date being unknown to the Grand Jury, after defendant MCWANE Maintenance Supervisor Donald Harbin notified defendant JAMES DELK that a water sample from the Creek Clarifier was in violation of defendant MCWANE’s NPDES Permit AL0001791, defendants JAMES DELK and MICHAEL DEVINE directed Donald Harbin that they needed a “clean” sample to submit to ADEM and directed Donald Harbin to collect a false water sample for such a submission, which Donald Harbin did.

In violation of Title 18, United States Code, Section 371.

**COUNT 2-11:**  
**Clean Water Act**  
**[33 U.S.C. §§ 1311(a) and 1319(c)(2)(A);**  
**18 U.S.C. § 2]**

31. Paragraphs 1 through 19 are incorporated by reference as if fully set forth herein.

32. In or about the months listed below, in the Northern District of Alabama,

MCWANE, INC.,

JAMES DELK and MICHAEL DEVINE,

the defendants, did knowingly discharge and cause the discharge of a pollutant from a point source into the waters of the United States, by discharging process wastewater from storm water outfall DSN002 into Avondale Creek, in violation of discharge limitations, that is the discharge was limited to "Storm water runoff from industrial activity," in violation of NPDES permit AL0001791, under Title 33, United States Code, Section 1342:

Count Number	Month
2	May 1999
3	June 1999
4	July 1999
5	August 1999
6	September 1999
7	October 1999
8	November 1999
9	December 1999
10	January 2000
11	February 2000

In violation of Title 33, United States Code, Sections 1311(a) and 1319(c)(2)(A) and Title 18, United States Code, Section 2.



**COUNTS 12-22:**  
**Clean Water Act**  
**[33 U.S.C. §§ 1311(a) and 1319(c)(2)(A);**  
**18 U.S.C. § 2]**

33. Paragraphs 1 through 19 are incorporated by reference as if fully set forth herein.

34. In or about the months listed below, in the Northern District of Alabama,

MCWANE, INC. and JAMES DELK,

the defendants, did knowingly discharge and cause the discharge of a pollutant from a point source into the waters of the United States, by discharging process wastewater from storm water outfall DSN002 into Avondale Creek, in violation of discharge limitations, that is the discharge was limited to "Storm water runoff from industrial activity," in violation of NPDES permit AL0001791, under Title 33, United States Code, Section 1342:

Count Number	Month
12	March 2000
13	April 2000
14	May 2000
15	June 2000
16	July 2000
17	August 2000
18	September 2000
19	October 2000
20	November 2000
21	December 2000

Count Number	Month
22	January 2001

In violation of Title 33, United States Code, Sections 1311(a) and 1319(c)(2)(A) and Title 18, United States Code, Section 2.

**COUNT 23:**  
**Clean Water Act**  
**[33 U.S.C. §§ 1311(a) and 1319(c)(2)(A);**  
**18 U.S.C. § 2]**

35. Paragraphs 1 through 19 are incorporated by reference as if fully set forth herein.

36. On or about May 26, 1999, in the Northern District of Alabama,

MCWANE, INC.,

JAMES DELK and MICHAEL DEVINE,

the defendants, did knowingly discharge and cause the discharge of a pollutant from a point source into the waters of the United States, by discharging process wastewater from the Creek Clarifier Outfall (DSN001) into Avondale Creek, in violation of the Daily Maximum discharge limitation for an effluent characteristic, that is Oil & Grease, contained in NPDES permit AL0001791, under Title 33, United States Code, Section 1342.

In violation of Title 33, United States Code, Sections 1311(a) and 1319(c)(2)(A) and Title 18, United States Code, Section 2.

**COUNT 24:**  
**False Statement**  
**[18 U.S.C. §§ 1001 and 2]**

37. Paragraphs 1 through 19 are incorporated by reference as if fully set forth herein.

38. On or about August 17, 2000 and September 15, 2000, in the Northern District of Alabama,

MCWANE, INC. and CHARLES "BARRY" ROBISON,

the defendants, in a matter within the jurisdiction of the United States Environmental Protection Agency ("EPA"), an agency of the executive branch of the Government of the United States, did knowingly and willfully make a materially false, fictitious, and fraudulent statement and representation that is, the defendants certified that documents submitted on or about August 17, 2000 and September 15, 2000, to EPA pursuant to a request under the Clean Water Act, Title 33, United States Code, Section 1318, including "Daily SWPP and Monthly SPCC Inspections" forms, were "true, accurate, and complete," when in truth and in fact, as defendants MCWANE and CHARLES "BARRY" ROBISON then well knew and believed, certain "Daily SWPP and Monthly SPCC Inspection" forms included in the submission to EPA were false.

In violation of Title 18, United States Code, Section 1001 and Title 18, United States Code, Section 2.

**COUNT 25:**  
**Obstruction of Justice**  
**[18 U.S.C. §§ 1505 and 2]**

39. Paragraphs 1 through 19 are incorporated by reference as if fully set forth herein.

40. On or about April 25 through April 27, 2000, in the Northern District of Alabama,

MCWANE, INC.,

the defendant, did corruptly obstruct, impede, and endeavor to influence, obstruct, and impede the due and proper administration of the law under which a pending proceeding was being had before the United States Environmental Protection Agency, an agency of the United States, by providing the following false and misleading information to the United States Environmental Protection Agency, to wit: that there is sufficient recycling of wastewater that the facility normally would not have a discharge.

In violation of Title 18, United States Code, Section 1505 and 1515(b), and Title 18, United States Code, Section 2.

### ADDITIONAL ALLEGATIONS

41. With respect to each count of the Superseding Indictment with which they are charged:

(a) JAMES DELK, CHARLES "BARRY" ROBISON and MICHAEL DEVINE were each leaders and organizers of a criminal activity that involved five or more participants and was otherwise extensive; and

(b) DONALD BILLS was a manager and supervisor of a criminal activity that involved five or more participants and was otherwise extensive.

42. With respect to Counts 1 through 23 of the Superseding Indictment, the offenses involved violations of a permit.

43. With respect to Counts 1 through 23 of the Superseding Indictment, the offenses involved ongoing, continuous, and repetitive discharges, releases, and emissions of toxic substances into the environment.

44. With respect to Counts 1 through 23 of the Superseding Indictment, the offenses involved mishandling of toxic substances.

45. With respect to Counts 1 and 7 through 22 of the Superseding Indictment, JAMES DELK and MCWANE, INC. had previously engaged in similar misconduct established by a civil adjudication and failed to comply with an administrative order.

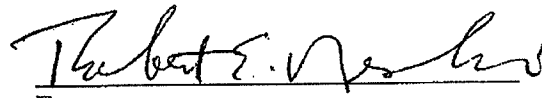
46. With respect to Counts 1 through 23 of the Superseding Indictment, the offenses involved large quantities of discharges and releases of toxic pollutants occurring over the course of several years that caused considerable and actual harm to the environment and posed a considerable risk.

47. With respect to Counts 1 and 24 of the Superseding Indictment, CHARLES "BARRY" ROBISON used a special skill in a manner that significantly facilitated the commission and concealment of the offense.


48. With respect to Count 1 of the Superseding Indictment, DONALD BILLS used a special skill in a manner that significantly facilitated the commission and concealment of the offense.

49. With respect to Count 24 of the Superseding Indictment, CHARLES "BARRY" ROBISON and MCWANE, INC. willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation and prosecution of the offense, and the obstructive conduct related to (i) the offense and any relevant conduct and (ii) a closely related offense.


A TRUE BILL.

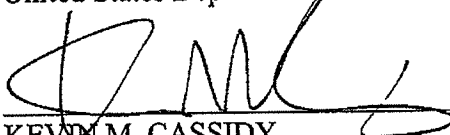
  
Foreperson

ALICE H. MARTIN  
United States Attorney  
Northern District of Alabama

  
ROBERT O. POSEY  
Assistant United States Attorney  
Northern District of Alabama

THOMAS L. SANSONETTI  
Assistant Attorney General  
Environment and Natural Resources Division  
United States Department of Justice

  
CHRISTOPHER J. COSTANTINI  
Senior Trial Attorney  
Environmental Crimes Section  
United States Department of Justice

  
KEVIN M. CASSIDY  
Trial Attorney  
Environmental Crimes Section  
United States Department of Justice