FILED
2005 Feb-23 PM 04:10
U.S. DISTRICT COURT
N.D. OF ALABAMA

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

UNITED STATES OF AMERICA,	)	
	)	
v.	)	**CR-04-PT-0199-S**
	)	**2:04-cr-199-RBP-RRA**
MCWANE, INC., JAMES DELK,	)	
MICHAEL DEVINE,	)	
CHARLES "BARRY" ROBISON,	)	
DONALD BILLS	)	
	)	
Defendants.	)	

UNITED STATES' SUBMISSION OF PROPOSED SUBSTANTIVE JURY INSTRUCTIONS STATING THE ESSENTIAL ELEMENTS

Comes now the United States, in compliance with this Court's February 15, 2005 Order (ct. doc. 193), and submits "proposed substantive jury instructions with reference to all counts, stating the essential elements that the Government must prove to establish guilt as to each count." The Court added that these instructions "will form the basis for later discussion of jury charges" and that "[t]here is no need to submit, at this stage, general procedural type instructions; only instructions addressing what must be proved as to essential elements."

UNITED STATES' REQUESTED JURY INSTRUCTION NO. 1

General Conspiracy Charge

Title 18, United States Code, Section 371, makes it a separate federal crime or offense for anyone to conspire or agree with someone else to do something which, if actually carried out, would amount to another federal crime or offense. So, under this law, a "conspiracy" is an agreement or a kind of "partnership" in criminal purposes in which each member becomes the agent or partner of every other member.

In order to establish a conspiracy offense it is not necessary for the Government to prove that all of the people named in the indictment were members of the scheme; or that those who were members had entered into any formal type of agreement; or that the members had planned together all of the details of the scheme or the "overt acts" that the indictment charges would be carried out in an effort to commit the intended crime.

Also, because the essence of a conspiracy offense is the making of the agreement itself (followed by the commission of any overt act), it is not necessary for the Government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

What the evidence in the case must show beyond a reasonable doubt is:

First: That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment;

Second: That the Defendant, knowing the unlawful purpose of the plan, willfully joined in it;

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the methods (or "overt acts") described in the indictment; and

Fourth: That such "overt act" was knowingly committed at or about the time alleged in an effort to carry out or accomplish some object of the conspiracy.

An "overt act" is any transaction or event, even one which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy.

A person may become a member of a conspiracy without knowing all of the details of the unlawful scheme, and without knowing who all of the other members are. So, if a Defendant has a general understanding of the unlawful purpose of the plan and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict that Defendant for conspiracy even though the Defendant did not participate before, and even though the Defendant played only a minor part.

Of course, mere presence at the scene of a transaction or event, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not, standing alone, establish proof of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of one, does not thereby become a conspirator.

Source: Eleventh Circuit Pattern Jury Instructions 13.1 (2003)

18 U.S.C. § 371

United States v. Horton, 646 F.2d 181, 186 (5th Cir. 1981)

UNITED STATES' REQUESTED JURY INSTRUCTION NO. 2

Multiple Objects

In this instance, with regard to the alleged conspiracy, the indictment charges that the Defendants knowingly and willfully combined, conspired, confederated and agreed 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;

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;

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; 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.

It is charged, in other words, that Defendants conspired to commit four separate, substantive crimes or offenses.

In such a case it is not necessary for the Government to prove that the Defendants under consideration willfully conspired to commit all of those substantive offenses. It would be sufficient if the Government proves, beyond a reasonable doubt, that the Defendants willfully conspired with

someone to commit one of those offenses; but in that event, in order to return a verdict of guilty, you must unanimously agree upon which of the two offenses the Defendants conspired to commit.

Source: Eleventh Circuit Pattern Jury Instructions 13.2 (2003)

18 U.S.C. § 371

Count One of the Superseding Indictment

United States v. Ballard, 663 F.2d 534, 544 (5th Cir. 1981)

UNITED STATES' REQUESTED JURY INSTRUCTION NO. 3

Pinkerton Instruction

In some instances a conspirator may be held responsible under the law for a substantive offense in which he or she had no direct or personal participation if such offense was committed by other members of the conspiracy during the course of such conspiracy and in furtherance of its objects.

So, in this case, with regard to Counts 2-25, and insofar as the Defendants McWane, Robison, Delk and Devine are concerned, if you have first found any of those Defendants guilty of the conspiracy offense as charged in Count One of the superseding indictment, you may also find: (1) Defendants McWane, Delk and Devine guilty of Counts 2-11; (2) Defendants McWane and Delk guilty of Counts 12-22; (3) Defendants McWane, Delk and Devine guilty of Count 23; (4) Defendants McWane and Robison guilty of Count 24 ; and (5) Defendant McWane guilty of Count 25, even though such Defendant did not personally participate in such offense if you find, beyond a reasonable doubt:

First: That the offense charged in such Count was committed by a conspirator during the existence of the conspiracy and in furtherance of its objects;

Second: That the Defendant under consideration was a knowing and willful member of the conspiracy at the time of the commission of such offense; and

Third: That the commission of such offense by a co-conspirator was a reasonably foreseeable consequence of the conspiracy.

Source: Eleventh Circuit Pattern Jury Instructions 13.5 (2003)

Superseding Indictment

Pinkerton v. United States, 328 U.S. 640 (1946)

United States v. Alvarez, 755 F.2d 830, 848 n. 22 (11th Cir. 1985)

UNITED STATES' REQUESTED JURY INSTRUCTION NO. 4

Conspiracy to Defraud United States

Title 18, United States Code, Section 371, makes it a federal crime or offense for anyone to conspire or agree with someone else to defraud the United States or any of its agencies. To "defraud" the United States means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery.

Source: Eleventh Circuit Pattern Jury Instructions 13.6 (2003)

18 U.S.C. § 371

Count One of the Superseding Indictment.

UNITED STATES' REQUESTED JURY INSTRUCTION NO. 5

Purpose of the Clean Water 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."

Source: 33 U.S.C. § 1251(a)

UNITED STATES' REQUESTED JURY INSTRUCTION NO. 6

Harm is not an Element Under the Clean Water Act

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.

Source: *Minnehaha Creek Watershed District v. Hoffman*, 597 F.2d. 617, 627 (8th Cir. 1979). The following charge was 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*, 522 U.S. 899, 1004 (1997):

> The government is not required to prove that a specific amount of pollutant has been discharged or that the alleged discharge of pollutants caused any damage or harm to the environment in order to establish the offense charged in Count One.

UNITED STATES' REQUESTED JURY INSTRUCTION NO. 7

Overview of Clean Water Act (Permits and DMRs)

The Federal Water Pollution Control Act or Clean Water Act, 33 U.S.C. §§ 1251 et seq., prohibits all discharges of pollutants into the waters of the United States except in accordance with, among other things, a permit. The purpose of the Clean Water Act is to restore and maintain the quality of the nation's waters. The Clean Water Act 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 use.

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

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

In addition, the Clean Water Act requires the permit holder to report, on a regular basis, the laboratory tests of the discharge samples to the United States Environmental Protection Agency.

These reports are known as Discharge Monitoring Reports, commonly referred to as "DMRs". The monitoring results summarized in a Discharge Monitoring Report include the quantity or concentration levels for each of the pollutants covered by the permit.

Source: 33 U.S.C. §§ 1251(a), 1252(a), 1311(a), 1342

40 C.F.R. §§ 122.41(j), (k), (l)

United States v. Brittain, 931 F.2d 1413, 1414-17 (10th Cir. 1991)

UNITED STATES' REQUESTED JURY INSTRUCTION NO. 8

Delegated NPDES Program

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

Source: 44 Fed. Reg. 61452 (October 25, 1979)

Given in *United States v. West Indies Transport, Inc.* (D.V.I., CR. NO. 1993/0195), *aff'd.,* 127 F.3d 299 (3d Cir. 1997), *cert. denied*, 522 U.S. 1052 (1998).

In *United States v. Lapteff* (E.D. Va., No. 3:03CR78), the court gave the following instruction relating to state permitting:

> The Federal Water Pollution Control Act, commonly known as the Clean Water Act, prohibits all discharges of pollutants into the waters of the United States except in compliance with an NPDES permit.
>
> The Clean Water Act creates a joint federal and state permitting program for those who discharge pollutants into waters of the United States. In summary, it authorizes the United States Environmental Protection Agency to grant authority to state environmental agencies to issue permits required by federal law before a person may discharge pollutants into waters of the United States. The Environmental Protection Agency has granted authority to the Commonwealth of Virginia, Department of Environmental Quality, to issue permits under the Clean Water Act.

You are hereby instructed, as a matter of law, that the permit involved in this case was an NPDES permit issued by the Commonwealth of Virginia pursuant to the Clean Water Act.

UNITED STATES' REQUESTED JURY INSTRUCTION NO. 9

Discharge in Violation of an NPDES Permit

Section 1319(c)(2)(A) of Title 33, United States Code, provides that it is unlawful for any person to knowingly discharge a pollutant into a water of the United States in violation of a condition and limitation that implements Section 1311 of Title 33 United States Code, in a National Pollutant Discharge Elimination System (NPDES) permit issued by the Environmental Protection agency or by an authorized state.

Source: 33 U.S.C. §§ 1311; 1319(c)(2)(A); and 1342

In *United States v. Lapteff* (E.D. Va., No. 3:03CR78) the court gave the following instruction relating to violation of a permit:

> Section 1319(c)(2)(A) of Title 33, United States Code, provides that it is unlawful for any person to knowingly violate a permit condition or limitation of a National Pollutant Discharge Elimination System ("NPDES") permit issued by the Environmental Protection Agency or by an authorized state, which condition or limitation implements one or more specified provisions of the Clean Water Act.

UNITED STATES' REQUESTED JURY INSTRUCTION NO. 10

Elements of the Offense of Discharging in Violation of Permit

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

1. On or about the date charged in the indictment the Defendant violated a condition or limitation of a federal or state NPDES permit;
2. The permit condition or limitation violated by the Defendant implements Section 1311 of Title 33 United States Code; and
3. The Defendant acted knowingly, that is,
    a. The Defendant committed the discharge deliberately and not as the result of ignorance, mistake, or accident;
    b. The Defendant was aware of the facts or conduct that constituted the permit violation.

The Government is not required to prove the Defendant's knowledge of the law, that is, the Defendant's knowledge of the permit, of the conditions and limitations of the permit, or that the discharge violated the permit.

Source: 33 U.S.C. §§ 1311; 33 U.S.C. § 1319(c)(2)(A); and 1342

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

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

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

UNITED STATES' REQUESTED JURY INSTRUCTION NO. 11

Meaning of "Pollutant"

The term "pollutant" includes solid waste, chemical wastes, heat, rock, sand, and industrial waste discharged into water.

Source: 33 U.S.C. § 1362(6)

Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983) (redeposit of land clearing materials is a pollutant)

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)

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).

Given in its entirety in *United States v. Perez* (S.D. Fla., No. 01-8100-CR-RYSKAMP).

*United States v. Eidson (*M.D. Fla., 92-94-CR-T-15A), *aff'd.*, 108 F.3d 1336 (11th Cir. 1997), *cert. denied*, 522 U.S. 899, 1004 (1997).

UNITED STATES' REQUESTED JURY INSTRUCTION NO. 12

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.

Source: 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).

Given in *United States v. Perez* (S.D. Fla., No. 01-8100-CR-RYSKAMP).

UNITED STATES' REQUESTED JURY INSTRUCTION NO. 13

Meaning of "Point Source"

The term "point source" includes any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, and discrete fissure, from which pollutants are or may be discharged.

Source: 33 U.S.C. § 1362(14)

United States v. Pozsgai, 999 F.2d 719, 726 n.6 (3d Cir. 1993), (dump trucks and bulldozers are point sources).

United States v. Law, 979 F.2d 977, 979-980 (4th Cir. 1992)

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 Sportsmen's League, Inc. 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).

Given in *United States v. Perez* (S.D. Fla., No. 01-8100-CR-RYSKAMP)(adding that dump trucks and bulldozers are point sources).

UNITED STATES' REQUESTED JURY INSTRUCTION NO. 14

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.

Source: 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)

_____ *Weiszmann v. District Engineer*, 526 F.2d 1302, 1303-1305 (5th Cir. 1976)

_____*United States v. Ashland Oil & Transportation Co.*, 504 F.2d 1317, 1321 (6th Cir. 1974)

_____*Track 12, Inc. v. District Engineer*, 618 F. Supp. 448, 450 (D. Minn. 1985)

_____*United States v. Oxford Royal Mushroom Products, Inc.*, 487 F.Supp. 852, 854-855 (E.D.Pa. 1980)

_____*United States v. Holland*, 373 F. Supp. 665, 673 (M.D. Fla. 1974)

UNITED STATES' REQUESTED JURY INSTRUCTION NO. 15

Clean Water Act: "Knowingly" Explained

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 Defendants 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.

Source: *Bryan v. United States,* 524 U.S. 184, 193 (1998)

United States v. International Minerals & Chem. Corp., 402 U.S. 558, 562-64 (1971)

United States v. Hopkins, 53 F.3d 533, 537-41 (2d Cir. 1995).

United States v. Weitzenhoff, 35 F.3d 1275, 1283-86 (9th Cir. 1993)

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

United States v. Frezzo Bros., Inc., 546 F. Supp. 713, 720 (E.D. Pa. 1982), *aff'd,* 703 F.2d 62 (3rd Cir.), *cert. denied*, 464 U.S. 829 (1983)

UNITED STATES' REQUESTED JURY INSTRUCTION NO. 16

Knowledge - Individual and Organizational Defendants

With regard to an organizational defendant such as a corporation, its knowledge is the state of mind and the sum of the knowledge of all of its employees and agents. That is, the corporation's knowledge is the totality of what all of the employees and agents knew within the scope of their employment. You may use the sum of what the separate employees and agents knew when determining the corporation's knowledge. As with individuals, knowledge is usually established by surrounding facts and circumstances as of the times the acts in question occurred, and the reasonable inferences to be drawn from them.

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

United States v. T.I.M.E.-D.C., Inc., 381 F.Supp. 730 (W.D. Va. 1974)

UNITED STATES' REQUESTED JURY INSTRUCTION NO. 17

Clean Water Act: "Responsible Corporate Officer"

With regard to the Clean Water Act counts in the indictment, that is counts 2-23, a person may be found guilty as a "responsible corporate officer" if the government proves beyond a reasonable doubt:

1. that he had knowledge of the facts that gave rise to the violation;
2. that he had the authority and capacity to prevent the violation; and
3. that he failed to prevent the violation.

Source: 33 U.S.C. § 1319(c)(6)

42 U.S.C. § 7413(c)(6)

United States v. Iverson, 162 F.3d 1015, 1022-1025 (9th Cir. 1998)(case under FWPCA, which has specific "responsible officer" provision).

United States v. MacDonald and Watson Waste Oil Co., 933 F.2d 35, 51-55 (1st Cir. 1991)(case under RCRA, which has no such specific provision).

United States v. Hong, 242 F.3d 528 (4th Cir. 2001)

UNITED STATES' REQUESTED JURY INSTRUCTION NO. 18

Regulatory Limitations and Conditions Applicable to this Case

The permit limitations applicable to this case are those set out in permit number AL0001791. That permit contains several provisions that are relevant to the charges made in the indictment.

You are hereby instructed that 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." Under the Permit, the discharge had to be limited and monitored. The monitoring required by 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. The "effluent characteristics" for which there were 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 specific daily maximum discharge limitation for Oil & Grease is 15 milligrams per liter. Daily maximum means the highest value of any individual sample result in a given day.

The Permit required monthly reporting to the Alabama Department of Environmental Management (ADEM) of the monitoring results on documents called "Discharge Monitoring Reports," along with a detailed certification and signature of a "responsible official" or "duly authorized representative."

In the event that McWane's discharge did not comply with any limitation in the Permit, it was required to submit a written report describing the violation in the next month's Discharge Monitoring Report, after becoming aware of the occurrence of such noncompliance. The written report is required to be provided on a "Noncompliance Notification Form" (which was provided with the Permit), and must include the following information:

1. A description of the discharge and cause of noncompliance;

2. The period of noncompliance, including exact dates and times or, if not corrected, the anticipated time the noncompliance is expected to continue; and

3. A description of the steps taken and/or being taken to reduce or eliminate the noncomplying discharge and to prevent it recurrence.

Under the Permit, 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.

Under the Permit, 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.

Source: NPDES Permit Number AL0001791

EPA Application Form 1-General Information" Consolidated Permits Program, at Section D (Glossary), page 1-9

In *United States v. Lapteff* (E.D. Va., No. 3:03CR78) the court gave the following instructions relating to both effluent limitations and other permit conditions:

> The NPDES/VPDES permit alleged to have been violated in this case contained several provisions that are relevant to the charges made in the indictment.
>
> You are hereby instructed that Part I of the permit, referenced in Count I of the Indictment, imposed effluent limitations and monitoring requirements for several effluent characteristics, including solids and total residual chlorine. The permit states that there shall be no discharge of floating solids in other than trace amounts. The permit states that the total residual chlorine concentration in the final effluent after dechlorination shall be non-detectable, and one of the procedures authorized by the permit to measure the effluent for such concentration is the DPD Colorimetric.
>
> Further, Part I, Section C of the permit referenced in Count I of the Indictment, provided that noncompliance with the Christchurch School's Operations and Maintenance Manual shall be deemed a violation of the permit. Section C also required the permittee to employ or contract an operator who holds a Class IV license issued by the Commonwealth of Virginia. In Chapter 4, the Manual stated that the operation of the wastewater treatment facilities required a Class IV licensed operator four (4) hours each day and described the duties to be performed by the operator.
>
> In addition, the Christchurch School's Operations and Maintenance Manual (Manual) provided in Chapter 3, that when sludge accumulations present operational problems or reduction in treatment efficiency, the deposits must be removed.
>
> Further, Part II, Section A of the permit, referenced in Counts 1, 10 and 11 of the Indictment, required that samples and measurements taken as required by the permit shall be representative of the monitored activity.

Part II, Section B of the permit, referenced in Counts 1, 10, and 11 of the Indictment, required that records of monitoring include: (a) the date, exact place, and time of sampling or measurements; (b) the individual(s) who performed the sampling or measurements; (c) the date(s) and time(s) analyses were performed; (d) the individual(s) who performed the analyses; (e) the analytical techniques or methods used; and (f) the results of such analyses. The permittee was required to retain records of all monitoring information and copies of all reports required by this permit for a period of at least three years from the date of the sample, measurement, and report.

Part II, Section C of the permit, referenced in Counts 1, 10, and 11 of the Indictment, required that the permittee submit the results of monitoring required by the permit not later than the tenth day of the month after the monitoring takes place. Monitoring results shall be reported to the Department fo Environmental Quality on a Discharge Monitoring Report.

Part II, Section Q of the permit, referenced in Counts 1, 10 and 11 of the Indictment, required the permittee at all times to properly operate and maintain all facilities and systems of treatment and control which were installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance includes such things as effective plant performance, adequate staffing, and adequate laboratory and process controls, including appropriate quality assurance procedures.

UNITED STATES' REQUESTED JURY INSTRUCTION NO. 19

False Statements to Federal Agency

Title 18, United States Code, Section 1001, makes it a federal crime or offense for anyone to willfully make a false or fraudulent statement to a department or agency of the United States.

A Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First:	That the Defendant made the statement, as charged;
Second:	That the statement was false;
Third:	That the falsity related to a material matter;
Fourth:	That the Defendant acted willfully and with knowledge of the falsity; and
Fifth:	That the false statement was made or used in relation to a matter within the jurisdiction of a department or agency of the United States, as charged.

A statement is "false" when made if it is untrue and is then known to be untrue by the person making it. It is not necessary to show, however, that the government agency was in fact deceived or misled.

The United States Environmental Protection Agency, is an "agency of the United States," and the filing of documents with that agency in response to a request under the Clean Water Act is a matter within the jurisdiction of that agency.

The making of a false statement is not an offense unless the falsity relates to a "material" fact. A misrepresentation is "material" if it has a natural tendency to affect or influence, or is capable of affecting or influencing, the exercise of a government function. The test is whether the

false statement has the capacity to impair or pervert the functioning of a governmental agency. In other words, a misrepresentation is material if it relates to an important fact as distinguished from some unimportant or trivial detail.

Source: Eleventh Circuit Pattern Jury Instructions 36 (2003)

18 U.S.C. § 1001

Count 24 of the Superseding Indictment.

United States v. Calhoon, 97 F.3d 518, 523 (11th Cir. 1996)(enumeration of the elements of the offense).

Arthur Pew Const. Co. v. Lipscomb, 965 F.2d 1559, 1576 (11th Cir. 1992)(misrepresentation for purposes of § 1001 must be deliberate, knowing and willful, or at least have been made with a reckless disregard of the truth and a conscious purpose to avoid telling the truth.

United States v. Gaudin 515 U.S. 506 (1995) (materiality of a false statement under this section is a jury question, and that failure to submit the question of materiality to the jury constitutes reversible error); *United States v. Klais*, 68 F.3d 1282, 1283 (11th Cir. 1995) (recognizing holding in *Gaudin); United States v. Grizzle*, 933 F.2d 943, 948 (11th Cir. 1991); *United States v. Herring*, 916 F.2d 1543, 1547 (11th Cir. 1990); *United States v. Gafyczk*, 847 F.2d 685, 691 (11th Cir. 1988).

The "exculpatory no" doctrine as an exception to the scope of the offense (*see United States v. Payne*, 750 F.2d 844, 861 (11th Cir. 1985)) was repudiated by the Supreme Court in *Brogan v. United States*, 522 U.S. 398 (1998).

UNITED STATES' REQUESTED JURY INSTRUCTION NO. 20

Obstruction of proceedings before agencies

Title 18, United States Code, Section 1505, makes it a federal crime or offense for anyone to obstruct or impede a pending proceeding before a department or agency of the United States.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant acted corruptly, meaning that he acted with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information;

Second: That the Defendant obstructed, impeded or endeavored to influence, obstruct, or impede the due and proper administration of the law;

Third: That there was a pending proceeding before a department or agency of the United States.

It is not necessary that the defendant's conduct be successful, as you may convict one who 'endeavors' to obstruct such a proceeding.

The United States Environmental Protection Agency, is an "agency of the United States."

Source: 18 U.S.C. § 1505

18 U.S.C. § 1515(b)

United States v. Price, 951 F.2d 1028, 1031 (9th Cir. 1991)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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