IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
v.	:	CRIMINAL NO. S 90-0215
WILLIAM B. ELLEN,	:	
Defendant	:	

: : : : : : :

JURY INSTRUCTIONS

FILED ENTERED
LODGED RECEIVED
JAN 8 1991
AT BALTIMORE
CLERK U.S. DISTRICT COURT
DISTRICT OF MARYLAND
BY CRIMINAL DEPUTY

I certify that these are the instructions given by me, in substance, if not in haec verba, at the conclusion of the captioned case this date.

USDJ
11/8/90

COURT'S INSTRUCTION NO. 1

(Introduction)

Members of the Jury:

You will soon leave the courtroom and begin discussing this case in the jury room.

As I told you earlier, the government has accused the defendant, William B. Ellen, with knowingly discharging pollutants into waters of the United States without a permit. But these are only charges. The defendant is presumed to be innocent. Therefore, you may find him guilty only if you are convinced, beyond a reasonable doubt, that he committed these crimes as charged. If you are not convinced beyond a reasonable doubt that he committed these crimes as charged, you must find him not guilty.

During the course of the trial, you received all the evidence that you may properly consider to decide this case. Your decision in this case must be based solely on the evidence presented here at trial. Do not be concerned about whether evidence is "direct evidence" or "circumstantial evidence." You should consider all the evidence that was presented to you.

At times during the trial, you saw lawyers make objections to questions asked by other lawyers, and to answers given by witnesses. This simply meant that the lawyers were requesting that I make a decision on a particular rule of law. Do not draw any conclusion from such objections or from my rulings on the objections. These only related to the legal questions that I had

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JJDS
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to determine and should not influence your thinking. When I sustained an objection to a question, the witness was not allowed to answer it. Do not attempt to guess what the answer might have been had I allowed the question to be answered. Similarly, when I told you not to consider a particular statement, you were told to put that statement out of your mind, and you may not refer to that statement in your deliberations.

Let me emphasize that a lawyer's question is not evidence. At times, a lawyer on cross-examination may have incorporated into a question a statement which assumed certain facts to be true and asked the witness if the statement was true. If the witness denies the truth of a statement, and if there is no evidence in the record proving that the assumed fact is true, then you may not consider the fact to be true simply because it was contained in the lawyer's question. In short, questions are not evidence; answers are.

Sometimes in the trial, I have asked questions of the witnesses. When I asked questions, that did not indicate that I had any opinion whatever about the facts in the case.

It is my job to decide what rules of law apply to the case. I have explained some of these rules to you in the course of the trial and before it, and I will explain others to you before you go into the jury room. This is my job; it is not the job of the lawyers. So, while the lawyers may have commented during the trial on some of these rules, you are to be guided only by what I say about them. You must follow all of the rules as I explain

them to you. You may not follow some and ignore others. Even if you disagree or do not understand the reasons for some of the rules, you are bound to follow them all.

If you decide that the government has proved beyond a reasonable doubt that William B. Ellen is guilty of the crime as charged, it will also be my job to decide what the punishment will be. You should not try to guess what the punishment might be. It should not enter into your consideration or discussions at any time.

The decision you reach in the jury room, whether guilty or not guilty, must be unanimous. You must all agree. Your deliberations will be secret. You will never have to explain your verdict to anyone.

Sand, Siffert, Laughlin and Reiss, Modern Federal Jury Instructions, Nos. 2-2, 2-8, 5-3 (modified)

Government's No. 1

Defendant's Nos. 1, 3, 8

Federal Judicial Center, Pattern Jury Instructions, No. 9, at 14-15 (1981)

COURT'S INSTRUCTION NO. 2

(Jury to Consider Only This Defendant)

You are about to be asked to decide whether the accused, William B. Ellen, is guilty or not guilty. Your verdict should be based solely upon the evidence or lack of evidence as to the accused, in accordance with my instructions and without regard to the guilt or innocence of other people.

Sand, Instruction 2-18

COURT'S INSTRUCTION NO. 3

(Sympathy)

Under your oath as jurors you are not to be swayed by sympathy. You are to be guided solely by the evidence in this case, and the crucial, hard-core question that you must ask yourselves as you sift through the evidence is: Has the government proven the guilt of the defendant beyond a reasonable doubt?

It is for you alone to decide whether the government has proven that the defendant is guilty of the crimes charged solely on the basis of the evidence and subject to the law as I charge you. It must be clear to you that once you let fear or prejudice, or bias or sympathy interfere with your thinking there is a risk that you will not arrive at a true and just verdict.

If you have a reasonable doubt as to the defendant's guilt, you should not hesitate for any reason to find a verdict of acquittal. But on the other hand, if you should find that the government has met its burden of proving the defendant's guilt beyond a reasonable doubt, you should not hesitate because of sympathy or any other reason to render a verdict of guilty.

Sand, Instruction 2-12

Government's No. 3

COURT'S INSTRUCTION NO. 4

(Presumption of Innocence and Burden of Proof)

Although the defendant has been indicted, you must remember that an indictment is only an accusation. It is not evidence. The defendant has pled not guilty to each count of the indictment.

As a result of the defendant's plea of not guilty, the burden is on the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant for the simple reason that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

The law presumes the defendant to be innocent of all the charges against him. I therefore instruct you that the defendant is to be presumed by you to be innocent throughout your deliberations until such time, if ever, you as a jury are satisfied that the government has proven him guilty beyond a reasonable doubt.

The defendant begins the trial here with a clean slate. This presumption of innocence alone is sufficient to acquit a defendant unless you as jurors are unanimously convinced beyond a reasonable doubt of his guilt, after a careful and impartial consideration of all the evidence in this case. If the government fails to sustain its burden, you must find the defendant not guilty.

This presumption was with the defendant when the trial began

and remains with him even now as I speak to you and will continue with the defendant into your deliberations unless and until you are convinced that the government has proven his guilt beyond a reasonable doubt.

Sand, Instruction 4-1
Government's No. 6
Defendant's No. 5

COURT'S INSTRUCTION NO. 5

(Reasonable Doubt)

In a criminal case, the burden is at all times upon the government to prove guilt beyond a reasonable doubt. The law does not require that the government prove guilt beyond all possible doubt; proof beyond a reasonable doubt is sufficient to convict. This burden never shifts to the defendant, which means that it is always the government's burden to prove each of the elements of the crimes charged beyond a reasonable doubt.

If, after fair and impartial consideration of all the evidence you have a reasonable doubt, it is your duty to acquit the defendant. On the other hand, if after fair and impartial consideration of all the evidence you are satisfied of the defendant's guilt beyond a reasonable doubt, you should vote to convict.

Sand, Instruction 4-2 (modified)

Defendant's No. 6

United States v. Moss, 756 F.2d 329, 333 (4th Cir. 1985)

COURT'S INSTRUCTION NO. 6

(Role of the Jury; Testimony, Exhibits, & Stipulations)

Your role is to pass upon and decide the fact issues that are in the case. You, the members of the jury, are the sole and exclusive judges of the facts. You pass upon the weight of the evidence; you determine the credibility of the witnesses; you resolve such conflicts as there may be in the testimony, and you draw whatever reasonable inferences you decide to draw from the facts as you have determined them.

I shall later discuss with you how to pass upon the credibility - or believability - of the witnesses.

In determining the facts, you must rely upon your own recollection of the evidence. What the lawyers have said in their opening statements, in their closing arguments, in their objections, or in their questions is not evidence. In this connection, you should bear in mind that a question put to a witness is never evidence. It is only the answer which is evidence. Nor is anything I may have said during the trial or may say during these instructions with respect to a fact matter to be taken in substitution for your own independent recollection. What I say is not evidence.

The evidence before you consists of the answers given by witnesses - the sworn testimony they gave, as you recall it - and the exhibits that were received in evidence.

The evidence does not include questions. Only the answers are evidence. But you may not consider any answer that I

directed you to disregard or that I directed struck from the record. Do not consider such answers.

You may also consider the stipulations of the parties as evidence.

You should consider the evidence in light of your own common sense and experience, and you may draw reasonable inferences from the evidence.

Anything you may have seen or heard about this case outside the courtroom is not evidence and must be entirely disregarded.

Since you are the sole and exclusive judges of the facts, I do not mean to indicate any opinion as to the facts or what your verdict should be. The rulings I have made during the trial are not any indication of my views of what your decision should be as to whether or not the guilt of the defendant has been proven beyond a reasonable doubt.

I also ask you to draw no inference from the fact that upon occasion I asked questions of certain witnesses. These questions were only intended for clarification or to expedite matters and certainly were not intended to suggest any opinions on my part as to the verdict you should render or whether any of the witnesses may have been more credible than any other witness. You are expressly to understand that the court has no opinion as to the verdict you should render in this case.

As to the facts, ladies and gentlemen, you are the exclusive judges. You are to perform the duty of finding the facts without bias or prejudice as to any party.

Sand, Instructions 2-3 & 5-4

Government's No. 2, 8

Defendant's Nos. 2, 9

COURT'S INSTRUCTION NO. 9

(Direct and Circumstantial Evidence)

There are two types of evidence which you may properly use in deciding whether the defendant is guilty or not guilty.

One type of evidence is called direct evidence. Direct evidence is where a witness testifies to what he or she saw, heard, or observed. In other words, when a witness testifies about what is known of his or her own knowledge by virtue of his or her own senses - what the witness sees, feels, touches, or hears - that is called direct evidence.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. There is a simple example of circumstantial evidence which is often used.

Assume that when you came into the courthouse this morning the sun was shining and it was a nice day. Assume that the courtroom curtains were drawn and you could not look outside.

As you were sitting here, someone walked in with an umbrella which was dripping wet. Somebody else then walked in with a raincoat which was also dripping wet.

Now, you cannot look outside of the courtroom and you cannot see whether or not it is raining. So you have no direct evidence of that fact. But, on the combination of facts which I have asked you to assume, it would be reasonable and logical for you to conclude that it had been raining.

That is all there is to circumstantial evidence. You infer on the basis of reason and experience and common sense from an

established fact the existence or the nonexistence of some other fact.

Circumstantial evidence is of no less value than direct evidence; for, it is a general rule that the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant, the jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all of the evidence in the case.

Sand, Instruction 5-2
Government's No. 7
Defendant's No. 7

COURT'S INSTRUCTION NO. 10

(Inference Defined)

During the trial you have heard the attorneys use the term "inference," and in their arguments they have asked you to infer, on the basis of your reason, experience, and common sense, from one or more established facts, the existence of some other fact.

An inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact which you know exists.

There are times when different inferences may be drawn from facts, whether proved by direct or circumstantial evidence. The government asks you to draw one set of inferences, while the defense asks you to draw another. It is for you, and you alone, to decide what inferences you will draw.

The process of drawing inferences from facts in evidence is not a matter of guesswork or speculation. An inference is a deduction or conclusion which you, the jury, are permitted to draw - but are not required to draw - from the facts which have been established by either direct or circumstantial evidence. In drawing inferences, you should exercise your common sense.

So, while you are considering the evidence presented to you, you are permitted to draw, from the facts which you find to be proven, such reasonable inferences as would be justified in light of your experience.

Here again, let me remind you that, whether based upon direct or circumstantial evidence, or upon the logical,

reasonable inferences drawn from such evidence, you must be satisfied of the guilt of the defendant beyond a reasonable doubt before you may convict.

Sand, Instruction 6-1
Government's No. 11

COURT'S INSTRUCTION NO. 11

(Number of Witnesses and Uncontradicted Testimony)

The fact that one party called more witnesses and produced more evidence than the other does not mean that you should necessarily find the facts in favor of the side offering the most witnesses. By the same token, you do not have to accept the testimony of any witness who has not been contradicted or impeached, if you find the witness not to be credible. You also have to decide which witnesses to believe and which facts are true. To do this, you must look at all the evidence, drawing upon your own common sense and personal experience.

The government is not required to prove the essential elements of the offense charged by any particular number of witnesses. The testimony of a single witness may be sufficient to convince you beyond a reasonable doubt of the existence of an essential element of the offense charged, if you believe that the witness has truthfully and accurately related what in fact happened.

In a moment, I will discuss the criteria for evaluating credibility; for the moment, however, you should keep in mind that the burden of proof is always on the government and the defendant is not required to call any witnesses or offer any evidence, since he is presumed to be innocent.

Sand, Instruction 4-3 (modified)

COURT'S INSTRUCTION NO. 12

(Witness Credibility - General Instruction)

You have had an opportunity to observe all of the witnesses. It is now your job to decide how believable each witness was in his or her testimony. You are the sole judges of the credibility of each witness and of the importance of his or her testimony.

It must be clear to you by now that you are being called upon to resolve various factual issues, in the face of the very different pictures painted by the government and the defense which cannot be reconciled. You will now have to decide where the truth lies, and an important part of that decision will involve making judgments about the testimony of the witnesses you have listened to and observed. In making those judgments, you should carefully scrutinize all of the testimony of each witness, the circumstances under which each witness testified, and any other matter in evidence which may help you to decide the truth and the importance of each witness' testimony.

Your decision whether or not to believe a witness may depend on how that witness impressed you. Was the witness candid, frank, and forthright? Or, did the witness seem as if he or she was hiding something, being evasive or suspect in some way? How did the way the witness testified on direct examination compare with how the witness testified on cross-examination? Was the witness consistent in his or her testimony or were there contradictions? Did the witness appear to know what he or she was talking about and did the witness strike you as someone who

was trying to report his or her knowledge accurately?

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you, the jury, to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; an innocent misrecollection, like a failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

How much you choose to believe a witness may be influenced by the witness' bias. Does the witness have a relationship with the government or the defendant which may affect how he or she testified? Does the witness have some incentive, loyalty, or motive that might cause him or her to shade the truth; or, does the witness have some bias, prejudice, or hostility that may have caused the witness - consciously or not - to give you something other than a completely accurate account of the facts to which he or she testified?

Even if the witness was impartial, you should consider whether the witness had an opportunity to observe the facts about which he or she testified. You should also consider the witness' ability to express himself or herself. Ask yourselves whether the witness' recollection of the facts stand up in light of all other evidence.

In other words, what you must try to do in deciding

credibility is to size a person up in light of his or her demeanor, the explanations given, and in light of all the other evidence in the case, just as you would in any important matter where you are trying to decide if a person is truthful, straightforward, and accurate in his or her recollection. In deciding the question of credibility, remember that you should use your common sense, your good judgment, and your experience.

In making up your mind and reaching a verdict, do not make any decisions simply because there were more witnesses on one side than on the other. Do not reach a conclusion on a particular point just because there were more witnesses on one side for that point. Your job is to think about the testimony of each witness you heard and decide how much you believe of what he or she had to say. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side. Because a defendant need not present any witnesses or other evidence, you must remember that it is still up to the government to prove guilt beyond a reasonable doubt, no matter how many witnesses it produces.

Sand, Instruction 7-1 (modified)
Federal Judicial Center, Pattern Jury Instructions # 23, at 30 (1981)
Government's No. 12
Defendant's No. 10

COURT'S INSTRUCTION NO. 13

(Bias and Hostility)

In connection with your evaluation of the credibility of the witnesses, you should specifically consider evidence of resentment or anger which some government witnesses may have toward the defendant.

Evidence that a witness is biased, prejudiced, or hostile toward the defendant requires you to view that witness' testimony with caution, to weigh it with care, and subject it to close and searching scrutiny.

Sand, Instruction 7-2

Defendant's No. 11

COURT'S INSTRUCTION NO. 14

(Law Enforcement Witness)

You have heard the testimony of law enforcement officials. The fact that a witness may be employed by the federal government as a law enforcement official does not mean that his or her testimony is necessarily deserving of more or less consideration or greater or lesser weight than that of an ordinary witness.

At the same time, it is quite legitimate for defense counsel to try to attack the credibility of a law enforcement witness on the grounds that his or her testimony may be colored by a personal or professional interest in the outcome of the case.

It is your decision, after reviewing all the evidence, whether to accept the testimony of the law enforcement witnesses and to give to that testimony whatever weight, if any, you find it deserves.

Sand, Instruction 7-16

Defendant's No. 15

COURT'S INSTRUCTION NO. 15

(Expert Witness)

You have heard the testimony from a witness who is qualified as an expert. An expert is allowed to express his or her opinion on those matters about which he or she has special knowledge and training. Expert testimony is presented to you on the theory that someone who is experienced in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing the expert's testimony, you may consider the expert's qualifications, opinions, and reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness' testimony. You may give the expert testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept a witness' testimony merely because he or she is an expert. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case rests solely with you.

The charts or summaries prepared by expert witnesses, and admitted in evidence, are received for the purpose of explaining facts disclosed by testimony, documents, and/or stipulations which are in evidence in the case. Such charts or summaries are not in and of themselves proof of any facts. If such charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, the jury should disregard them.

In other words, such charts or summaries are used only as a matter of convenience. You are to consider them only to the extent that you find that they are fair and accurate summaries of facts and figures as shown by the evidence in the case.

Sand, Instruction 7-21

Devitt & Blackmar, § 15.23

Government's Nos. 31, 32

COURT'S INSTRUCTION NO. 16

(Impeachment by Prior Inconsistent Statement)

You have heard evidence that a witness made a statement on an earlier occasion which counsel argues is inconsistent with the witness' trial testimony. Evidence of a prior inconsistent statement is not to be considered by you as affirmative evidence bearing on the defendant's guilt. Evidence of the prior inconsistent statement was placed before you for the more limited purpose of helping you decide whether to believe the trial testimony of the witness who contradicted himself or herself. If you find that the witness made an earlier statement that conflicts with his or her trial testimony, you may consider that fact in deciding how much of his or her trial testimony, if any, to believe.

In making this determination, you may consider whether the witness purposely made a false statement or whether it was an innocent mistake; whether the inconsistency concerns an important fact, or whether it had to do with a small detail; whether the witness had an explanation for the inconsistency, and whether that explanation appealed to your common sense.

It is exclusively your duty, based upon all the evidence and your own good judgment, to determine whether the prior statement was inconsistent, and if so how much, if any, weight is to be given to the inconsistent statement in determining whether to believe all or part of the witness' testimony.

Sand, Instruction 7-19

COURT'S INSTRUCTION NO. 17

(Informal Immunity of Government Witness)

You have heard the testimony of a witness who has been promised that in exchange for testifying truthfully, completely, and fully, he will not be prosecuted for any crimes which he may have admitted either here in court or in interviews with the prosecutors. This promise was not a formal order of immunity by the court, but was arranged directly between the witness and the government.

The government is permitted to make these kinds of promises and is entitled to call as witnesses people to whom these promises are given. You are instructed that you may convict a defendant on the basis of such a witness' testimony alone, if you find that his testimony proves the defendant guilty beyond a reasonable doubt.

However, the testimony of a witness who has been promised that he will not be prosecuted should be examined by you with greater care than the testimony of an ordinary witness. You should scrutinize it closely to determine whether or not it is colored in such a way as to place guilt upon the defendant in order to further the witness' own interests; for, such a witness, confronted with the realization that he can win his own freedom by helping to convict another, has a motive to falsify his testimony.

Such testimony should be received by you with suspicion and you may give it such weight, if any, as you believe it deserves.

Sand Instruction 7-9

Defendant's No. 13

COURT'S INSTRUCTION NO. 18

(Improper Consideration of Defendant's Right Not to Testify)

The defendant did not testify in this case. Under our Constitution, he has no obligation to testify or to present any other evidence because it is the prosecution's burden to prove the defendant guilty beyond a reasonable doubt. That burden remains with the prosecution throughout the entire trial and never shifts to the defendant. The defendant is never required to prove that he is innocent.

You may not attach any significance to the fact that the defendant did not testify. No adverse inference against him may be drawn by you because he did not take the witness stand. You may not consider this against the defendant in any way in your deliberations in the jury room.

Sand, Instruction 5-21

COURT'S INSTRUCTION NO.19

(Admission of Defendant)

There has been evidence that the defendant made certain statements in which the government claims he admitted certain ~~facts~~ matters.

In deciding what weight to give the defendant's statements, you should first examine with great care whether each statement was made and whether, in fact, it was voluntarily and understandingly made. I instruct you that you are to give the statements such weight as you feel they deserve in light of all the evidence.

Sand Instruction 5-19

Government's No. 34

COURT'S INSTRUCTION NO. 20

(Indictment Is Not Evidence)

With these preliminary instructions in mind, let us turn to the charges against the defendant, as contained in the indictment. I remind you that an indictment itself is not evidence. It merely describes the charges made against the defendant. It is an accusation. It may not be considered by you as any evidence of the guilt of the defendant.

In reaching your determination of whether the government has proved the defendant guilty beyond a reasonable doubt, you may consider only the evidence introduced or lack of evidence.

You will be given a copy of the indictment for your reference.

Sand, Instruction 3-1

Government's No. 4

Defendant's No. 4

COURT'S INSTRUCTION NO. 21

(Establish Each Element Beyond Reasonable Doubt)

Unless the government proves beyond reasonable doubt that the defendant has committed every element of the offense with which he is charged, you must find him not guilty.

Devitt & Blackmar, Instruction 11.15

COURT'S INSTRUCTION NO. 22

(Separate Offenses)

The indictment contains a total of six counts. Each count charges the defendant with a different crime. You must consider each count separately and return a separate verdict of guilty or not guilty for each. Whether you find the defendant guilty or not guilty as to one ~~offense~~ should not affect your verdict as to any other ~~offense charged~~.

Sand, Instruction 3-6

Defendant's No. 16

COURT'S INSTRUCTION NO. 23

(Variance - Dates)

While we are on the subject of the elements, I should draw your attention to the fact that it does not matter if the indictment charges that a specific act occurred on or about a certain date, and the evidence indicates that, in fact, it was on another date. The law only requires a substantial similarity, between the dates alleged in the indictment and the date established by testimony or exhibits.

Sand, Instruction 3-12

Government's No. 5

COURT'S INSTRUCTION NO. 24

(The Indictment)

The Indictment in this case charges the defendant with six counts of violating the Federal Water Pollution Act, Title 33, United States Code, Section 1319(c)(2), commonly known as the Clean Water Act. Section 1319(c)(2)(A) provides, in relevant part, that "any person who knowingly violates section 1311 . . . of this title" is guilty of an offense against the United States.

Section 1311(a) of the statute provides that "except as in compliance with this section and [sections 1342 and 1344] of this title, the discharge of any pollutant by any person [is] unlawful."

Section 1342 of the statute establishes a permit system which requires that any person who discharges pollutants from a point source must have a permit. Section 1344 of the statute establishes a permit system which requires any person who discharges dredged or fill material into navigable waters of the United States to have a permit.

In other words, anyone who knowingly discharges pollutants into waters of the United States without a permit is guilty of an offense against the United States.

In order to prove the defendant guilty of any of the charges set forth in the Indictment, the government must prove, with respect to each count, and beyond a reasonable doubt, each of the following elements:

That on or about the dates set forth in the Indictment, the

defendant knowingly

(1) discharged a pollutant

(2) from a point source

(3) into waters of the United States

(4) without a permit.

33 U.S.C. §§ 1311, 1319(c)(2)(A), 1342, 1344

Government's No. 15

Defendant's No. 17

COURT'S INSTRUCTION NO. 25

(Discharge of a Pollutant)

The term "discharge of a pollutant" is defined in the Clean Water Act as "any addition of any pollutant to the waters of the United States from any point source."

33 U.S.C. § 1362 (7), (12)

Government's No. 16

Defendant's No. 17

COURT'S INSTRUCTION NO. 26

(Pollutant)

The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, chemical wastes, biological materials, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal and agricultural waste discharged into waters of the United States.

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 under the Federal Clean Water Act. This statute prohibits the discharge of any pollutants except in compliance with a permit.

33 U.S.C. § 1362(7), (12)

33 U.S.C. §§ 1311(a) and 1344

Government's Nos. 16, 24

Defendant's No. 17

COURT'S INSTRUCTION NO. 27

(Discharge of Fill Material)

The term "fill material" is defined as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody."

The term "discharge of fill material" is defined as "the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary to the construction of any structure . . . requiring rock, sand, dirt or other material for its construction; site-development fills for recreational, industrial, commercial, residential and other uses . . . ."

33 C.F.R. § 323.2(e), (f)

Government's No. 18

COURT'S INSTRUCTION NO. 28

(Point Source)

The term "point source" means any discernible, confined, and discrete conveyance including any container, rolling stock, or vessel from which pollutants may be discharged.

33 U.S.C. § 1362(14)

Government's No. 19

Defendant's No. 17

COURT'S INSTRUCTION NO. 29

(Waters of the United States)

The term "waters of the United States" includes:

1. 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

2. All interstate waters including interstate wetlands; and

3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, wet meadows, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce including any such waters from which fish or shellfish are or could be taken and sold in interstate or foreign commerce. Moreover, all impoundments of waters otherwise defined as waters of the United States; and

4. Wetlands adjacent to waters otherwise identified as waters of the United States.

33 C.F.R. § 328.3(a); 40 C.F.R. § 230.3(s)
Government's No. 20
Defendant's No. 17

COURT'S INSTRUCTION NO. 30

(Wetlands)

The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

40 C.F.R. § 230.3(t)

Government's No. 21

Defendant's No. 17

COURT'S INSTRUCTION NO. 31

(Adjacent Waters)

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

40 C.F.R. § 230.3(b)

Government's No. 22

COURT'S INSTRUCTION NO. 32

(Permit)

In order to establish the fourth element of the offense, that is the absence of a permit, the government must show that the defendant did not have, at the time of the alleged ~~filling~~ Spread Sheets, a written permit issued by the United States Army Corps of Engineers to discharge pollutants into the waters of the United States. No State agency is authorized by federal law to issue a permit for or otherwise excuse or authorize actions which are violation of federal law.

33 U.S.C. § 1311(a)

Government's No. 23

COURT'S INSTRUCTION NO. 33

(Knowingly)

You have been instructed that in order to sustain its burden of proof, the government must prove that the defendant acted knowingly. This requirement applies to all four elements of the offense. A person acts knowingly if he acts intentionally and voluntarily, and not because of ignorance, mistake, accident, or carelessness. Whether the defendant acted knowingly may be proven by the defendant's conduct and by all of the facts and circumstances surrounding the case.

Sand, Instruction Nos. 3A-1, 3A-3 (modified)
Government's No. 21 (modified)
Defendant's No. 25, 26 (modified)

COURT'S INSTRUCTION NO. 33B

(Determination of Knowledge)

In determining whether the defendant possessed the requisite knowledge, you should consider ~~all of the information available to the defendant from whatever source. This would include~~ all of the information that you find was available to the defendant, any information that you find was obtained by the defendant, and any information that you find was communicated to the defendant from any person, including public officials.

COURT'S INSTRUCTION NO. 34

(Knowledge, Willfulness, & Intent)

Knowledge, willfulness, and intent involve the state of a person's mind. It has often been said to juries that the state of one's mind is a fact as much as the state of one's digestion. Accordingly, this is a fact you are called upon to decide.

Medical science has not yet devised an instrument which can record what was in one's mind in the distant past. Rarely is direct proof available to establish the state of one's mind. This may be inferred from what one says or does: words, actions, and conduct, as of the time of the occurrence of certain events.

The intent with which an act is done is often more clearly and conclusively shown by the act itself, or by a series of acts, than by words or explanations of the act uttered long after its occurrence. Accordingly, intent, willfulness, and knowledge are usually established by surrounding facts and circumstances, including statements and explanations, as of the time the acts in question occurred, or the events took place, and the reasonable inferences to be drawn therefrom.

Sand, Instruction 6-17

Government's No. 1 and 9 (modified)

COURT'S INSTRUCTION NO. 35

(Using Motive for Intent)

Proof of motive is not a necessary element of the crime with which the defendant is charged.

Proof of motive does not establish guilt, nor does want of proof of motive establish that the defendant is innocent.

If the guilt of the defendant is shown beyond a reasonable doubt, it is immaterial what the motive for the crime may be - or whether any motive be shown, but the presence or absence of motive is a circumstance which you may consider as bearing on the intent of the defendant.

Sand, Instruction 6-18

Government's No. 30

COURT'S INSTRUCTION NO. 37

(Willfully Causing an Act To Be Done)

As a general rule, whatever any person is legally capable of doing, that person can do through another as his or her agent. So, if the acts or conduct of an employee or other agent are willfully ordered or directed, or willfully authorized or consented to by the accused, then the law holds the accused responsible for such acts or conduct the same as if personally done by the accused.

"Willfully" means to act knowingly and purposely, with an intent to do something that the law forbids, that is to say, with bad purpose to disobey or to disregard the law. The defendant's conduct was not "willfull" if it was due to negligence, inadvertance, or mistake.

Devitt & Blackmar, § 12.07

Government's No. 28

Defendant's No. 20

COURT'S INSTRUCTION NO. 38

(Aiding and Abetting)

Under the aiding and abetting statute, it is not necessary for the government to show that a defendant himself physically committed the crime with which he is charged in order for you to find the defendant guilty.

A person who aids or abets another to commit an offense is just as guilty of that offense as if he committed it himself.

Accordingly, you may find a defendant guilty of the offense charged if you find beyond a reasonable doubt that the government has proved that another person actually committed the offense with which the defendant is charged, and that the defendant aided or abetted that person in the commission of the offense.

As you can see, the first requirement is that you find that another person has committed the crime charged. Obviously, no one can be convicted of aiding or abetting the criminal acts of another if no crime was committed by the other person in the first place. But if you do find that a crime was committed, then you must consider whether the defendant aided or abetted the commission of the crime.

In order to aid or abet another to commit a crime, it is necessary that the defendant willfully and knowingly associate himself in some way with the crime, and that he willfully and knowingly seek by some act to help make the crime succeed.

Participation in a crime is willful if action is taken voluntarily and intentionally, or, in the case of a failure to

act, with the specific intent to fail to do something the law requires to be done; that is to say, with a bad purpose either to disobey or to disregard the law.

The mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that the crime is being committed, or the mere acquiescence by a defendant in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting. An aider and abettor must have some interest in the criminal venture.

The government must prove beyond a reasonable doubt that the defendant personally knew of and authorized the actions that constitute the offense and that he personally intended that such actions be performed. In other words, you may not find the defendant guilty of any offense that you may find was committed, merely because you may find the the defendant was considered the project manager.

To determine whether the defendant aided or abetted the commission of the crime with which he is charged, ask yourself these questions:

Did he participate in the crime charged as something he wished to bring about?

Did he associate himself with the criminal venture knowingly and willfully?

Did he seek by his actions to make the criminal venture succeed?

If he did, then the defendant is an aider and abettor, and

therefore guilty of the offense. If, on the other hand, your answers to series of questions "no," then the defendant is not an aider and abettor, and you must find him not guilty.

Sand Instruction 11-2

Government's No. 29

Defendant's No. 19, Supplemental No. 2

COURT'S INSTRUCTION NO. 39

(Punishment)

The question of possible punishment of the defendant is of no concern to the jury and should not, in any sense, enter into or influence your deliberations. The duty of imposing sentence rests exclusively upon the Court. Your function is to weigh the evidence in the case and to determine whether or not the defendant is guilty beyond a reasonable doubt, solely upon the basis of such evidence. Under your oath as jurors, you cannot allow a consideration of the punishment which may be imposed upon the defendant, if he is convicted, to influence your verdict, in any way, or, in any sense, enter into your deliberations.

Sand, Instruction 9-1

Government's No. 1

COURT'S INSTRUCTION NO. 40

(Communications with Court)

Upon retiring to the jury room, Ms. James will be your foreperson, that is, the person who will preside over your deliberations and who will be your spokesperson here in Court.

You are about to go into the jury room and begin your deliberations. If during those deliberations you want to see any of the exhibits, they will be sent to you in the jury room upon request.

Your requests for exhibits - in fact any communication with the Court - should be made to be in writing, signed by your foreperson, and given to one of the marshals. I will respond to any questions or requests you have as promptly as possible, either in writing or by having you return to the courtroom so that I can speak with you in person. In any event, do not tell me or anyone else how the jury stands on the issue of the defendant's guilt until after a unanimous verdict is reached.

Sand, Instruction 9-3
Fifth Circuit, Basic Pattern Jury Instructions, # 12B, at 29 (1978)

COURT'S INSTRUCTION NO. 41

(Duty to Consult and Need for Unanimity)

The government, to prevail, must prove the essential elements by the required degree of proof, as already explained in these instructions. If it succeeds, your verdict should be guilty as to that count; if it fails, it should be not guilty. To report a verdict, it must be unanimous.

Your function is to weigh the evidence in the case and determine whether or not the defendant is guilty as to each count, solely upon the basis of such evidence.

Each juror is entitled to his or her opinion; each should, however, exchange views with his or her fellow jurors. That is the very purpose of jury deliberation - to discuss and consider the evidence; to listen to the arguments of fellow jurors; to present your individual views; to consult with one another; and to reach an agreement based solely and wholly on the evidence - if you can do so without violence to your own individual judgment.

Each of you must decide the case for yourself, after consideration, with your fellow jurors, of the evidence in the case.

But you should not hesitate to change an opinion which, after discussion with your fellow jurors, appears erroneous.

However, if, after carefully considering all the evidence and the arguments of your fellow jurors, you entertain a conscientious view that differs from the others, you are not to

yield your conviction simply because you are outnumbered.

Your final vote must reflect your conscientious conviction as to how the issues should be decided.

Sand, Instruction 9-7

COURT'S INSTRUCTION NO. 3C

(Lesser Included Offense)

The law permits the jury to find the accused guilty of any lesser offense which is necessarily included in the crime charged in the indictment, whenever such a course is consistent with the facts found by the jury from the evidence in the case, and with the law as given in the instructions of the Court.

So, if the jury should unanimously find the accused "Not Guilty" of Counts 1, 2, and 4 of the indictment, then the jury must proceed to determine the guilt or innocence of the accused as to any lesser offense which is necessarily included in those counts.

Counts 1, 2, and 4 of the indictment charge the defendant with the crime of knowingly discharging a pollutant in violation of Title 33, United States Code, Sections 1311 and 1319(c)(2)(A). The counts necessarily include the lesser included offense of negligently discharging a pollutant in violation of Sections 1311 and 1319(c)(1)(A). Section 1319(c)(1)(A) provides, in relevant part, that "[a]ny person who negligently violates section 1311 . . . of this title" is guilty of an offense against the United States.

Negligence is doing something that a person using ordinary care would not do, or not doing something that a person using ordinary care would do. Ordinary care means that caution, attention or skill a reasonable person would use under similar circumstances.

The jury will bear in mind that the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of any lesser offense which is necessarily included in any crime charged in the indictment; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Devitt and Blackmar, § 18.05 (modified)
Defendant's Supplemental Instruction December 28, 1990

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JAN 3 1991

AT BALTIMORE
CLERK U.S. DISTRICT COURT
DISTRICT OF MARYLAND
BY CRIMINAL DEPUTY

JFB:dam:ellen.jy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA *

v. * CRIMINAL NO. ~~S-90-0216~~ S-90 0216

WILLIAM B. ELLEN *

...oo0oo...

GOVERNMENT'S REQUESTED INSTRUCTIONS TO THE JURY

The United States of America, by its attorneys, Breckinridge L. Willcox, United States Attorney for the District of Maryland, Jane F. Barrett and Ethan L. Bauman, Assistant United States Attorneys for said District, requests this Honorable Court to instruct the jury in the above-captioned case in accordance with the proposed instructions annexed hereto, in addition to, but not in limitation of, its usual instructions in a criminal case. The government further requests this Honorable Court, in accordance with Rule 30 of the Federal Rules of Criminal Procedure, to inform counsel of its proposed actions upon the requested instructions prior to counsels' argument to the jury.

Respectfully submitted,

Breckinridge L. Willcox
United States Attorney

By: Jane F. Barrett
Jane F. Barrett
Assistant United States Attorney

Ethan L. Bauman
Assistant United States Attorney

GOVERNMENT'S REQUESTED INSTRUCTION NO. 25

In order to find the defendant Ellen guilty of Counts One and Two, and Counts Four through Seven, the government must prove that the defendant acted knowingly.

An act is done "knowingly" if done voluntarily and intentionally, and not because of ignorance, mistake, accident, or other innocent reason.

The element of knowledge can seldom be shown by direct evidence. Usually, it is established from all the facts and surrounding circumstances. In determining the issue of knowledge, therefore, you may consider any statement made or act done by the defendant and you may scrutinize the entire conduct of the defendant at or near the time of the alleged offense.

For purposes of this case, the government must prove beyond a reasonable doubt that the defendant knew that land clearing and land filling activities were being done in areas of the Tudor Farms property that were or could be wetlands. However, the government need not establish that the defendant Ellen knew with certainty that these areas were in fact regulated by law as wetlands.

It is not necessary for the government to prove that the defendant knew a particular act or failure to act was a violation of law or that the defendant acted with any federal law in mind.

Adopted from Sand, Instructions 6-21

Devitt & Blackmar, Federal Jury Practice and Instructions, Vol. 2, §§ 14.10; 14.13

GOVERNMENT'S REQUESTED INSTRUCTION NO. 26

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. As I have said, it is entirely up to you to decide what facts to find from the evidence.

Devitt & Blackmar, Federal Jury Practice and Instructions, §14.13

GOVERNMENT'S REQUESTED INSTRUCTION NO. 27

Like intent, knowledge ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's knowledge from the surrounding circumstances. You may consider any statement made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.

The element of knowledge may be satisfied by inferences drawn from proof that the defendant deliberately closed his eyes to what would otherwise have been obvious to you. You may infer knowledge if you find beyond a reasonable doubt that the defendants refused to be enlightened or refused to take notice.

Stated another way, the defendant's knowledge may be inferred from a willful blindness to the existence of a fact. It is entirely up to you as to whether you find any deliberate closing of the eyes and the inferences to be drawn from any such evidence. When dealing with regulated activity, a person acts knowingly if he willfully fails to ascertain whether a permit is required.

What a person does is frequently more indicative of his true state of mind than what he says.

Adapted from United States v. Ciampaglia, 628 F.2d 632, 642 (1st Cir. 1980)