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U.S. Department of Justice

ENVIRONMENTAL CRIMES SEMINAR

Attorney General's Advocacy Institute
Office of Legal Education
Executive Office for United States Attorneys
United States Department of Justice

July 27-29, 1993
Buffalo, New York

U.S. Department of Justice

United States Attorney
Western District of New York

68 Court Street, Room 502
Buffalo, New York 14202

(716) 846-4811

July 27, 1993

All Attendees of the
Advanced Environmental
Crimes Conference
Buffalo, N.Y.

Dear Attendees:

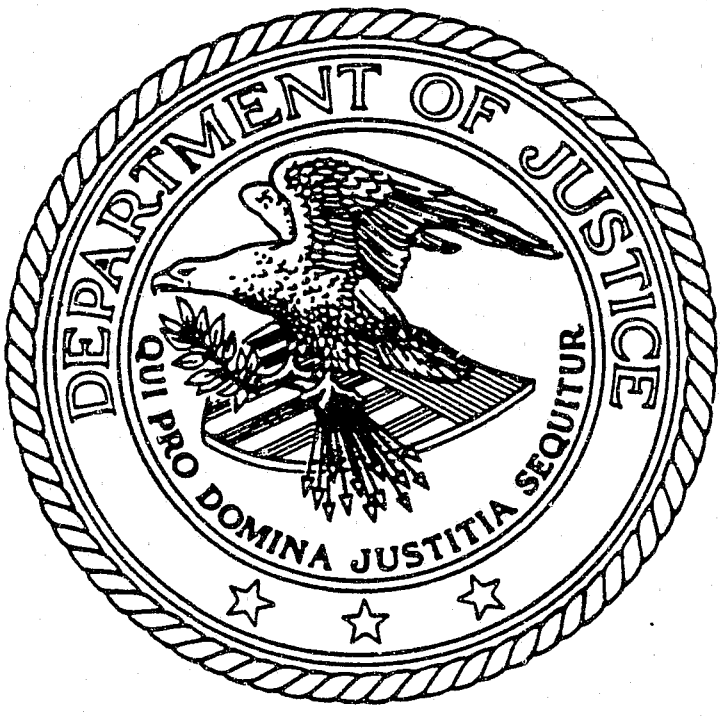
In early January 1993, a small planning group was formed to conceive an agenda for the more experienced environmental prosecutor. This program is a direct result of those efforts. I would like to thank **MICKI BRUNNER** (AUSA, WDWA), **PATRICK FLACHS** (AUSA, EDMO), **DAVID TALIAFERRO** (Asst. Reg. Counsel, EPA/Region V), **GREGORY LINSIN** (Trial Attorney, USDOJ/ECS) and **MICHAEL MARTIN** (Special Agent, Bur. Land Mngmt.) for their hard work and innovative thinking. In addition, my sincere appreciation goes to **CAROL DIBATTISTE**, who as Director of the Office of Legal Education, gave us the freedom to structure the course based upon our collective practical experience. However, in the final analysis the true success of this course rests with those lecturers who have taken the time not only to speak but also to prepare the extensive materials which make up the course manual.

Very truly yours,

BY: MARTIN J. LITTLEFIELD
Assistant U.S. Attorney

U. S. Department of Justice
Executive Office for United States Attorneys
Office of Legal Education

Environmental Crimes



July 1993

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[1] This segment does not include RCRA.

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AGENDA

JULY 27: TUESDAY MORNING SESSION (#1)

	8:30 A.M.	WELCOMING REMARKS
SEGMENT 1A	9:00 A.M.	GENERAL UPDATE AND REVIEW OF ENVIRONMENTAL STATUTES REGULATIONS AND CASELAW (EXCLUDING RCRA).
	10:30 A.M.	BREAK
SEGMENT 1B	10:45 A.M.	RCRA: CURRENT ISSUES, REGULATIONS AND DEFENSES
	12:00 P.M.	LUNCH

JULY 27: TUESDAY AFTERNOON SESSION (#2)

BREAKOUTS

** THE ENTIRE AFTERNOON WILL BE DEVOTED TO BREAKOUT SESSIONS ADDRESSING SPECIALIZED TOPICS. EACH BREAKOUT WILL BE PRESENTED TWICE AND EACH WILL LAST 1½ HOURS.

1:30 - 3:00

SEGMENT 2A — BREAKOUT A: GOVERNMENT LANDS, GOVERNMENT FACILITIES AND NATIVE AMERICAN LANDS.

SEGMENT 2B — BREAKOUT B: SPECIAL WATER ISSUES - SPILLS, OCEAN DUMPING AND WETLANDS

SEGMENT 2C — BREAKOUT C: SEWER DISCHARGE AND TREATMENT PLANTS

SEGMENT 2D — BREAKOUT D: ASBESTOS CASES

3:00 P.M. BREAK

3:15 - 4:45

THE SAME BREAKOUT SCHEDULE WILL BE REPEATED. ATTENDEES WILL SWITCH SEGMENTS.

5:30 - 7:00 RECEPTION

JULY 28: WEDNESDAY MORNING SESSION (#3)

SEGMENT 3A	8:30 A.M.	ENVIRONMENTAL/FRAUD CASES - **THE COMPLEX PAPER TRAIL:** INVESTIGATION AND LITIGATION SUPPORT
	10:00 A.M.	BREAK
SEGMENT 3B	10:15 A.M.	INVESTIGATING THE CORPORATION AND ITS MANAGEMENT; THE CORPORATE ATTORNEY; ETHICAL CONSIDERATIONS
SEGMENT 3C	11:45 A.M.	DISCOVERY AND UNIQUE ISSUES ASSOCIATED WITH PROSECUTING REGULATORY OFFENSES
	12:30 P.M.	LUNCH

JULY 28: WEDNESDAY AFTERNOON SESSION (#4)

SEGMENT 4A	2:00 P.M.	BANKRUPTCY AND ENVIRONMENTAL CRIMES
	3:30 P.M.	BREAK
SEGMENT 4B	3:45 P.M.	SCIENCE FOR LAWYERS INCLUDING SAMPLING CONCERNS AND ANALYTICAL TECHNIQUES AND LIMITATIONS; EXPERT WITNESSES - FINDING, USING AND FUNDING
	5:30 P.M.	ADJOURNMENT

JULY 29: THURSDAY MORNING SESSION (#5)

SEGMENT 5A	8:30 A.M.	COMMON PLEA AGREEMENT PROBLEMS AND RECURRENT SENTENCING ISSUES
	9:45 A.M.	BREAK
SEGMENT 5B	10:00 A.M.	THE DEFENSE PERSPECTIVE ON CORPORATE INVESTIGATIONS/PROSECUTIONS
	11:45 A.M.	CLOSING REMARKS

SPEAKER LIST

PRESENTER/ADDRESS	TOPIC	SESSION/DATE	COMMENTS
Paul Rosenzweig (Topic Coordinator) Trial Attorney Environmental Crimes Section USDOJ 601 Pennsylvania Avenue NW Washington, D.C. 20004 (202)272-9850 Fax: (202)272-4389 (LINSIN)	OVERVIEW	7/27/27 9:00 - 10:30 1 A 1	
Herbert Johnson Trial Attorney Environmental Crimes Section USDOJ 601 Pennsylvania Avenue NW Washington, D.C. 20004 (202)272-9846 Fax: (202)272-4389 (LINSIN)	OVERVIEW	7/27/93 9:00 - 10:30 1 A 2	
Peter Murtha (Topic Coordinator) Trial Attorney Environmental Crimes Section USDOJ 601 Pennsylvania Avenue NW Washington, D.C. 20004 (202)272-9860 Fax: (202)272-4389 (BRUNNER)	RCRA	7/27/93 10:45-12:00 1 B 1	
Benjamin A. Hagood Assistant U.S. Attorney P.O. Box 978 Charleston, So. Carolina 29402 (803)727-4381 Fax: (803)727-4443 (BRUNNER)	RCRA	7/27/93 10:45-12:00 1 B 2	

PRESENTER/ADDRESS	TOPIC	SESSION/DATE	COMMENTS
Frederick Petti (Topic Coordinator) Assistant U.S. Attorney U.S. Courthouse 230 North First Street Suite 4000 Phoenix, AZ (602)514-7500 Fax: (602)514-7693 (MARTIN)	INDIAN LANDS	7/27/93 1:30-3:00 3:15-4:45 2 A 1 BRKOUT	
David Kubichek Assistant U. S. Attorney U.S. Courthouse 11 South Wolcott, Room 138 Casper, WY 82601 (307)261-5434 Fax: (307)261-5471 (MARTIN)	GOVTLAND	7/27/93 1:30-3:00 3:15-4:45 2 A 2 BRKOUT	
Jane Barrett Assistant U.S. Attorney 820 U.S. Courthouse 101 West Lombard Street Baltimore, MD 21201-2692 (410)962-2458 Fax: (410)962-3124 (MARTIN)	FEDERAL FACILITIES	7/27/93 1:30-3:00 3:15-4:45 2 A 3 BRKOUT	
James Morgulec (Topic Coordinator) Trial Attorney Environmental Crimes Section USDOJ 601 Pennsylvania Avenue NW Washington, D.C. 20004 (202)272-9895 Fax: (202)272-4389 (LINSIN)	WATERS	7/27/93 1:30-3:00 3:15-4:45 2 B 1 BRKOUT	
Chris McAliley Assistant U.S. Attorney 155 South Miami Avenue Miami, FL 33130 (305) 536-4471 (LINSIN)	WATERS	7/27/93 1:30-3:00 3:15-4:45 2 B 2 BRKOUT	

PRESENTER/ADDRESS	TOPIC	SESSION/DATE	COMMENTS
David Taliaferro (Topic Coordinator) Office of Regional Counsel 3-CT USEPA Region V 77 West Jackson Chicago, IL 60604 (312)886-0815 Fax: (312)886-0747	SEWERS	7/27/93 1:30-3:00 3:15-4:45 2 C 1 BRKOUT	
Richard Welch Assistant U.S. Attorney 1107 McCormack Federal Building U.S. Post Office & Courthouse Boston, Mass 02109 (617) 223-9460 Fax: (617)223-9481 (TALIAFERRO)	SEWERS	7/27/93 1:30-3:00 3:15-4:45 2 C 2 BRKOUT	
Brendan O'Brien Special Agent, CID U.S. EPA, Region I 1 Congress Street Boston, Mass. 02203 (617)565-3059 Fax: (617)565-4978 (TALIAFERRO)	SEWERS	7/27/93 1:30-3:00 3:15-4:45 2 C 3 BRKOUT	
James Howard (Topic Coordinator) Trial Attorney Environmental Crimes Section USDOJ 601 Pennsylvania Avenue NW Washington, D.C. 20004 (202)272-9862 Fax: (202)272-4389 (LINSIN)	ASBESTOS	7/27/93 1:30-3:00 3:15-4:45 2 D 1 BRKOUT	
Ronald Sarachan Assistant U.S. Attorney 3310 U.S. Courthouse Independence Mall West 601 Market Street Philadelphia, PA 19106 (215) 451-5200 Fax: (LINSIN)	ASBESTOS	7/27/93 1:30-3:00 3:15-4:45 2 D 2 BRKOUT	

PRESENTER/ADDRESS	TOPIC	SESSION/DATE	COMMENTS
Lisa Pollisar (Topic Coordinator) Lisa Pollisar Chief, Litigation Support Group U.S. Department of Justice Environment Division P.O. Box 685 Washington, D.C. 20044 (202)616-3354 Fax: (202)616-3531 (FLACHS)	PAPER CASES	7/28/93 8:30-10:00 3 A 1	
Paula Smith Chief, Evidence Audit Quality Assurance Section USEPA/NEIC Building 53, Box 25227 Denver Federal Center Denver, CO 80225 (303) 236-5147 Fax: (303) 236-5116 (FLACHS)	PAPER CASES	7/28/93 8:30-10:00 3 A 2	
John O'Connor Price Waterhouse 1801 K Street NW Washington, D.C. 20006 (202) 296-0800 Fax: (202) 566-3918 (FLACHS)	PAPER CASES	7/28/93 8:30-10:00 3 A 3	
Eric Nagle (Topic Coordinator) Trial Attorney Environmental Crimes Section USDOJ 601 Pennsylvania Avenue NW Washington, D.C. 20004 (202)272-9894 Fax: (202)272-4389 (MJL)	CORPORA-TIONS	7/28/93 10:15-11:45 3 B 1	

PRESENTER/ADDRESS	TOPIC	SESSION/DATE	COMMENTS
Theodore Greenberg Chief, Money Laundering Section Criminal Division, USDOJ 1400 New York Avenue Suite 8400 Washington, D.C. 20005 (202)514-1758 Fax: (202)616-1344 (MJL)	CORPORA-TIONS	7/28/93 10:15-11:45 3 B 2	
Ken Fimberg Assistant U.S. Attorney 1961 Stout Street Denver, CO 80294 (303)844-4273 (MJL)	CORPORA-TIONS	7/28/93 10:15-11:45 3 B 3	
Melanie Pierson (Topic Coordinator) Asst. U. S. Attorney Southern District of California 5-N-19 U.S. Courthouse 940 Front Stret San Diego, California 92189 Phone: (619) 557-5685 FAX: (619) 557-5551 (BRUNNER)	DISCOVERY	7/28/93 11:45-12:30 3 C 1	
Steve Katzman (Topic Coordinator) Assistant U.S. Attorney Central District of California 1100 U.S. U.S. Courthouse 312 North Spring Street Los Angeles, CA 900012 (213) 894-2434 Fax: (213) 894-6269 (FLACHS)	BANKRUPTCY	7/28/93 2:00-3:30 4 A 1	
Patrick Flachs Assistant U.S. Attorney Eastern District of Missouri U.S. Court and Custom House St. Louis, MO 63101 (314) 539-2200 Fax: (314) 539-2309 (FLACHS)	BANKRUPTCY	7/28/93 2:00-3:30 4 A 2	

PRESENTER/ADDRESS	TOPIC	SESSION/DATE	COMMENTS
David Taliaferro (Topic Coordinator) Office of Regional Counsel 3-CT USEPA Region V 77 West Jackson Chicago, IL 60604 (312)886-0815 Fax: (312)886-0747	SCIENCE	7/28/93 3:45-5:30 4 B 1	
Eric Nottingham NEIC, U.S. EPA Building 53 Denver Federal Center Denver, CO 80225 (303) 236-5132 Fax: (303) 236-2395 (TALIAFERRO)	SCIENCE	7/28/93 3:45-5:30 4 B 2	
Jane Barrett Assistant U.S. Attorney 820 U.S. Courthouse 101 West Lombard Street Baltimore, MD 21201-2692 (410)962-2458 Fax: (410)962-3124 (TALIAFERRO)	SCIENCE	7/28/93 3:45-5:30 4 B 3	
Charles DeMonaco (Topic Coordinator) Assistant Chief, Environmental Crimes Section, USDOJ 601 Pennsylvania Avenue NW Washington, D.C. 20004 (202)272-9879 Fax: (202)272-4389 (LINSIN)	SENTENCING	7/29/93 8:30-9:45 5 A 1	
Craig Benedict Asst. U. S. Attorney Northern District of New York 100 South Clinton Street Syracuse, NY 13261 (315) 423-5165 Fax: (315)423-5399 (LINSIN)	SENTENCING	7/29/93 8:30-9:45 5 A 2	

PRESENTER/ADDRESS	TOPIC	SESSION/DATE	COMMENTS
Eileen Zimmer, Esq. Corporate Finance Unit Anti-Trust Division, USDOJ Judiciary Center Building 555 Fourth Street NW Room 11-834 Washington, D.C. 20001 (202) 307-5791 Fax: (202) 307-3372 (LINSIN)	SENTENCING	7/29/93 8:30-9:45 5 A 3	
Thomas Genovese, Esq. (Topic Coordinator) Chemical Waste Management 3001 Butterfield Road Oak Brook, IL 60521 (708)572-8835 Fax: (708)572-0203 (MJL)	DEFENSE PERSPEC-TIVE	7/29/93 10:00-11:45 5 B 1	
Benjamin Sharp, Esq. Perkins Coie 607 14th Street Suite 800 Washington, D.C. 20005 (202)628-6600 Fax: (202)434-1690 (MJL)	DEFENSE PERSPEC-TIVE	7/29/93 10:00-11:45 5 B 2	

NOTES/COMMENTS

NOTES/COMMENTS

AN OVERVIEW OF RECENT DEVELOPMENTS WHICH (MAY) EFFECT ENVIRONMENTAL PROSECUTIONS

Herbert Johnson
Paul Rosenzweig
Environmental Crimes Section
U.S. Department of Justice
June, 1993

Reported Decisions in Environmental Crimes Cases
(Chronological by Statute)[1]

THE CLEAN AIR ACT

United States v. Buckley, 934 F.2d 84 (6th Cir. 1991). The Sixth Circuit affirmed the conviction of Buckley and construed the "knowing" provision of the Clean Air Act consistently with the interpretation given it in other public welfare statutes as a general intent crime.

United States v. Louisville Edible Oil Products, Inc., 926 F.2d 584 (6th Cir. 1991), aff'g, 773 F. Supp. 15 (W.D.K.Y. 1990), cert. denied, 112 S.Ct. 177 (1991). On interlocutory appeal from a denial of defendant's motion to dismiss on Double Jeopardy grounds, the Court agreed with the United States that prior civil penalties paid to state enforcement authorities did not bar a subsequent federal criminal prosecution under the Halper doctrine.

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

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA)

United States v. Boqas, 920 F.2d 363 (6th Cir. 1990), rev'g, 731 F. Supp. 242 (N.D. Oh. 1990). The court of appeals remanded for resentencing after concluding that the district court erred when it failed to increase the defendant's Sentencing Guidelines offense level for a "release of a hazardous substance into the environment" and for causing a "cleanup requiring a substantial expenditure". The court of appeals found substantial evidence to support both factors.

United States v. Carr, 880 F.2d 1550 (2d Cir. 1989). Affirming the

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[1] Editors Notes: 1) This listing contains only published cases. A growing number of unreported cases exists which, depending upon local practice, might be a useful source of additional legal support; 2) Cases listed without citation or decision reflect pending matters on appeal. Those with descriptions only reflect cases decided, but for which citations have not yet been published; 3) This list was last updated on May 5, 1993.

CERCLA conviction of civilian maintenance foreman at a military installation, the court of appeals held that the Act's requirements for persons "in charge of a facility" apply to low-level employees who are in a position to detect, prevent or abate the release of a hazardous substance into the environment.

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

FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT (FIFRA)

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

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

FEDERAL WATER POLLUTION CONTROL ACT (CLEAN WATER ACT)

United States v. Weitzenhoff, F.2d (9th Cir. 1993).

United States v. Wright, F.2d (10th Cir. 1993).

United States v. Aerolite, F.2d (9th Cir. 1993).

United States v. Curtis, F.2d (9th Cir. 1993). Court rejected defendant's argument that, as federal employee acting in the scope of his employment, he was immune from prosecution. Following U.S. v. Dee, infra.

United States v. Law, 979 F.2d 977 (4th Cir. 1992). Court rejected argument that CWA applies only to generators (as opposed to dischargers) of pollutants since defendant's waste treatment system was a point source within the meaning of the law and not, itself, a water of the United States.

United States v. Borowski, 977 F.2d 27 (1st Cir. 1992). The court reversed a conviction for knowing endangerment under the pretreatment provisions of the CWA. It concluded that those provisions only applied to "down stream" endangerees who were endangered after the completion of the criminal act and not to employees of the illegal disposer.

United States v. Ellen, 961 F.2d 462 (4th Cir.), cert denied, 113 S.Ct. 217 (1992). The court upheld a conviction for filling a wetlands as within the regulatory ambit of the CWA under the variety of proposed and adopted regulations defining a wetland. The court also rejected a "double-counting" argument for discharge and without a permit factors in Sentencing Guidelines and rejected the Government's appeal for a guidelines enhancement due to special skill as engineer.

United States v. Rutana 932 F.2d 1155 (6th Cir. 1991). The court of appeals remanded for resentencing after concluding that the district court could not depart downward from the guidelines range based upon the likely failure of defendant's business if he were sentenced to imprisonment or the "harshness" of the fine imposed.

United States v. Brittain, 931 F.2d 1413 (10th Cir. 1991). The Court defined a false "material" statement under CWA as one capable of influencing an enforcement action by EPA. It also said that defendant was a "person" for purpose of the CWA, as a "responsible corporate officer" of the sewer system.

United States v. Boldt, 929 F.2d 35 (1st Cir. 1991). The Court affirmed defendants conviction, rejecting his contentions that: 1) the evidence was insufficient; 2) improper impeachment evidence was used; 3) improper closing argument was made; 4) the court did not give an economic necessity instruction; and 5) the court improperly set the amount of mandatory jail time.

United States v. Wells Metal Finishing, Inc., 922 F.2d 54 (1st Cir. 1991). Guidelines enhancement for disruption of a public utility supported by the evidence.

United States v. Holland, 874 F.2d 1470 (11th Cir. 1989). Following initial CWA guilty plea in 1984, defendant was placed on probation. Thereafter, he again violated the CWA by various illegal discharge activities as part of his maritime construction business. The district court revoked probation and sentenced defendant to 6 months imprisonment. On appeal the Court affirmed the revocation and the imposition of a special further condition of probation that defendant not engage in the maritime construction business for two years following release from prison.

United States v. Marathon Development Corporation, 867 F.2d 96 (1st

Cir. 1989). The defendants were charged with violating the Clean Water Act for filling in federally-protected wetlands without obtaining proper state permits, and entered conditional guilty plea. The court of appeals rejected arguments that provisions in the Clean Water Act allowing states to impose more stringent water quality standards than developed by federal agencies violate equal protection.

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

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

United States v. Frezzo Brothers Inc., 461 F.Supp. 266 (E.D.Pa. 1978), aff'd, 602 F.2d 1123 (3d Cir. 1979), cert denied, 444 U.S. 1074 (1980) ("Frezzo I"). The court of appeals approved, inter alia, the district court's responsible corporate officer jury instruction.

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

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

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

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

United States v. Villegas, 784 F. Supp. 6 (E.D.N.Y. 1991), appeal pending, F.2d. (2nd Cir. 1993). Construes the CWA definition of a point source to include discharge from a hand. Reverses defendant's knowing endangerment conviction because the knowing endangerment provision requires specific knowledge of the potential harm envisioned, here the likelihood of hepatitis-laden vials breaking on a beach and infecting people.

United States v. Pozsgai, 757 F. Supp. 21 (E.D.Pa. 1991). Court rejected defendant's motion for reduction of sentence and reaffirmed sentence of three years imprisonment, five years probation and a $200,000 fine.

United States v. Ashland Oil Inc., 705 F.Supp. 270 (W.D.Pa. 1989). The Court rejects motion to dismiss CWA/Refuse Act indictment for prosecutorial misconduct in the presentation of allegedly perjurious testimony to the grand jury.

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

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

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

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

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

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

RIVERS AND HARBORS ACT

United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655 (1973). The Act bars all discharges of pollutants into the navigable waters of the United States and not only those forms of pollution that constitute obstructions to navigation. However, the Army Corps of Engineers' long-standing prior practice of limiting enforcement to only navigation-obstructing discharges entitled the defendant to raise reliance as an affirmative defense to charges of violating the statute.

United States v. White Fuel Corp., 498 F.2d 619 (1st Cir. 1974). Refuse Act does not require showing of knowing or negligent conduct. It is a strict liability offense. Court reserves judgment on whether same reasoning would apply to individual defendant subject to incarceration.

United States v. Mobil Oil Corp., 464 F.2d 1124 (5th Cir. 1972). Conviction under Refuse Act based solely on facts obtained from exploiting corporations notification of discharge to Coast Guard reversed. Corporation is "person in charge" of facility and therefore entitled to immunity provisions for notification.

SAFE DRINKING WATER ACT

United States v. Mitchell, 966 F.2d 92 (2nd Cir. 1992), rev'g, 763 F. Supp. 1262 (D.Vt. 1991). Holds that EPA Special Agent did not violate Miranda or due process requirements in interviewing witnesses in their own home when he clearly displayed credentials identifying himself as a criminal agent.

SOLID WASTE DISPOSAL ACT, AS AMENDED BY RESOURCE CONSERVATION AND RECOVERY ACT (RCRA)

United States v Goldfaden, F.2d (5th Cir. 1993)

United States v. Goldsmith, 978 F.2d 643 (11th Cir. 1992). The court explicitly followed Hoflin and Greer in construing knowledge in a storage/disposal case and held that the failure to depart under the guided departure provisions of 2Q1.2, Application Note 5, was not clear error.

United States v. Dean, 969 F.2d 187 (6th Cir. 1992). The Court adopted an interpretation of knowingly for RCRA consistent with that of the Dee and Hoflin courts. It also rejected application of the CWA point source exclusion to the charged conduct, rejected a challenge to the indictment on the grounds that the defendant was not responsible for securing a permit and thus not liable for the illegal disposal and rejected multiplicity and duplicity challenges to the indictment.

United States v. Speach, 968 F.2d 795 (9th Cir. 1992). The Court followed Hayes and distinguished Hoflin by requiring proof of knowledge of the permit status of the facility to be proven in a 6928(d)(1) transportation to an unpermitted facility charge.

United State v. Goodner Brothers Aircraft, Inc., 966 F.2d 380 (8th Cir. 1992). Determines that the result in Shell Oil mandates that the mixture rule is void ab initio and that reliance on it in prosecution requires reversal of conviction. Also concludes that federal government cannot enforce state regulations in authorized state. Determines that CERCLA hazardous substance instruction, with no reference to mixture rule, is legally sufficient and not effected by vacatur of mixture rule.

United States v. Goldfaden, 959 F.2d 1324 (5th Cir. 1992). Government's promise to make no recommendation regarding sentencing is violated when the government makes a submission to the Probation Office suggesting a specific guideline range.

United States v. Paccione, 949 F.2d 1183 (2nd Cir. 1991).

Affirming the conviction and sentence of defendants for mail fraud and RICO charges the court of appeals held that the district court had not abused its discretion in departing upward from the guidelines range for the fraud offenses to take into account the extensive environmental damage caused by the fraud. The court pretermitted the question of whether the guidelines mandated that the fraud guideline range be increased to reflect such harm.

United States v. Baytank (Houston), Inc., 934 F.2d 599 (5th Cir. 1991). In multiple holdings related to RCRA, CWA and CERCLA the court: a) adopted the general intent standard for RCRA and CWA; b) reversed the district court's grant of a new trial to the corporate defendant based upon insufficiency of the evidence; and c) affirmed the new trial grant as to individual defendants based upon potential jury confusion.

United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35 (1st Cir. 1991). The court of appeals, in multiple holdings related to RCRA and CERCLA: a) rejected the broadest form of the "responsible corporate officer" doctrine, while affirming its applicability as an inferential tool; and b) defined the reportable quantity for a mixture of a hazardous substance and a solid as RQ for the hazardous substance itself.

United States v. Sellers, 926 F.2d 410 (5th Cir. 1991). Affirming conviction and sentence of defendant on grounds that unobjected to jury instruction was not plain error and that sentence was within guidelines range and did not warrant departure.

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

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

Kiesel Co., Inc. v. Householder (In the Matter of the Search of 4801 Flyer Ave), 879 F.2d 385 (8th Cir. 1989). The court reversed a decision of the district court ordering the return of seized property because of a constitutionally overbroad warrant. The court held, first, that the district court lacked jurisdiction to

order such a return absent a showing of callous disregard for the fourth amendment and, second, that on the merits the warrant was not overbroad as it described a pervasive pattern of criminal activity.

United States v. Pandozzi, 878 F.2d 1526 (1st Cir. 1989). Perjury prosecution connected to McDonald & Watson case. Defines materiality broadly in grand jury context as any information or statements related to environmental crimes.

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

In the Matter of the Search of 949 Erie Street, 824 F.2d 538 (7th Cir. 1987). The court dismissed an appeal from the denial of a motion for the return of property prior to indictment, reasoning that such a motion will be subsumed in a motion to suppress and be appealable post-verdict.

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

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

United States v. Laughlin, 768 F.Supp. 957 (N.D.N.Y. 1991). Government not required to prove defendant knew that a permit was required by law for storage and disposal of waste or that he knew that company did not have permit.

United States v. White, 766 F.Supp. 873 (E.D.Wash. 1991)

("Puregro"). The district court held, inter alia, that: RCRA was not unconstitutionally vague; that the EPA's failure to comply with the sampling provisions of 42 USC 6927 did not bar prosecution; that RCRA storage is a continuing offense; that the responsible corporate officer doctrine did not apply to RCRA; and that the knowing endangerment charges should be severed.

TOXIC SUBSTANCES CONTROL ACT (TSCA)

United States v. Craven, F.2d (5th Cir.)

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

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

OVERVIEW OF STATUTORY CHANGES AND DEVELOPMENTS IN CASELAW REGARDING ENVIRONMENTAL CRIMINAL PROSECUTIONS

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General

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ATTORNEY-CLIENT WORK PRODUCT

THE EFFECT OF FAILURE TO COMPLY WITH THE PAPERWORK REDUCTION ACT ON ENVIRONMENTAL CRIMINAL CASES[1]

by PAUL S. ROSENZWEIG, Trial Attorney, ECS

The Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520, prohibits federal agencies from imposing information reporting requirements on the public without the approval of the Office of Management and Budget (OMB) and requires that all reporting provisions display a current OMB control number. The Environmental Protection Agency has at times failed to promptly renew its information request approvals and has published information reporting requirements without a proper control number.

To ensure that agencies comply with the PRA, Congress included the Public Protection Provision, 44 U.S.C. § 3512, which states:

> Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency [1] if the information request was made after December 31, 1981, and [2] does not display a current control number assigned by the Director, or [3] fails to state that such a request is not subject to this chapter.

Thus, the potential effect of the PRA on criminal cases is fairly clear. Consider, for example, the criminal charge of failing to maintain certain RCRA records on file, or file them with the EPA. 42 U.S.C. 6928(d)(4). A defendant charged with failure to comply with an ICR may rely on section 3512 as a complete defense to the imposition of a penalty, provided that an ICR falls within the scope of the PRA and the agency failed to comply with the PRA. Given the EPA's recent revelations concerning their failure to renew ICR approvals, the Public Protection Provision could undermine many enforcement actions.

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THIS PRELIMINARY DRAFT DOES NOT NECESSARILY REFLECT THE VIEWS OF THE DEPARTMENT OF JUSTICE.

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[1] Editors Note: This is a substantially shortened version of an excellent and extensive memorandum done by attorneys in the Environmental Enforcement Section and the Policy, Legislation and Special Litigation Section of the Environment Division. Copies of the full memorandum are available at your request from the Conference coordinator, or directly from me.

I. The Scope of the PRA

A. The Definition of ICR

In general, an ICR is an identical information request to any ten people. Thus, it probably includes, for example, the requirement that all generators of hazardous waste file a Part A application.

B. Submission of Samples or Physical Objects

The OMB implementing regulations confirm that sampling and physical objects fall outside the scope of the PRA. 5 C.F.R. § 1320.7(j)(2). An exception for the submission of samples implies that at least some minimal requirement to provide basic source/chain-of-custody information (which outfall the sample is from, when the sample was taken, etc.) must also fall within this exception. A contrary interpretation of the physical object exception would essentially render that exception meaningless.

C. The Conduct of an Investigation

The PRA contains an exemption for information gathered during the course of an investigation or pending case. 44 U.S.C. § 3518. Courts have interpreted this exclusion as applying to subpoenas and other ad hoc collections of information. Phillips Petroleum Co. v. Lujan, 963 F.2d 1380, 1387 (10th Cir. 1992) (document requests issued to lessee of federal land during "audit" fell within the exception); United States v. Saunders, 951 F.2d 1065, 1067 (9th Cir. 1991)(IRS summons to taxpayer during tax evasion investigation not subject to PRA); Londsdale v. United States, 919 F.2d 1440, 1445 (10th Cir. 1990)(tax summons exempt from PRA); United States v. Burdett, 768 F. Supp. 409, 413 (E.D. NY 1991)("Congress did not intend the Act to impair prosecutors in their duty to bring criminals to justice."), aff'd, 962 F.2d 228 (2d Cir. 1992). Furthermore, one court has extended the conduct of investigation exception to the underlying form used during the investigation. United States v. Particle Data, Inc., 634 F. Supp. 272, 275 (N.D. Ill. 1986) (PRA did not apply to IRS summons; subpoena form did not require an OMB control number).

II. Judicially Created Exemptions to the PRA

A. Statutorily-Based ICRs

The PRA sought to control agency-imposed paperwork burdens. To the extent that Congress explicitly imposes a reporting requirement, however, the PRA simply does not apply. The Public Protection Provision, therefore, would not serve as a defense to enforcement actions premised on statutorily-based reporting requirements. United States v. Hicks, 947 F.2d 1356, 1359-60 (9th Cir. 1991); United States v. Kerwin, 945 F.2d 92 (5th Cir. 1991); United States v. Wunder, 919 F.2d 34, 38 (6th Cir 1990); United

States v. Burdett, 768 F. Supp. 409, 412 (E.D.N.Y. 1991), aff'd, 962 F.2d 228 (2d Cir. 1992); United States v. Karlin, 762 F. Supp. 911, 912 (D. Kansas 1991); see also United States v. Dawes, 951 F.2d 1189, 1192 (10th Cir. 1991) (mentioning exception with approval, but relying on alternate grounds).[2]

Although to date this exception to the PRA has arisen only in tax cases in which the tax code explicitly requires the filing of tax returns, the reasoning upon which this exception is premised is equally applicable to other express statutory reporting requirements. For example, one such statutory reporting requirement is found in section 3010 of RCRA, which requires that any generator or transporter of hazardous wastes -- as defined by the Administrator under section 3001 -- "shall file with the Administrator . . . a notification stating the location and general description of such activity."[3]

B. Disclosure Requirements

In Dole v. United Steelworkers of America, 110 S. Ct. 929, 933-34 (1990), the Supreme Court created a distinction between disclosure rules -- which require that information be made available to the public -- and ICRs -- which result in information being supplied to an agency. The Court held that "[d]isclosure rules present none of the problems Congress sought to solve through the [PRA]," Id. at 935; therefore, such rules were outside the scope of the PRA and were not subject to OMB review. Id. at 937. Relying on the PRA's clear expression of congressional intent to exclude disclosure rules from the scope of the PRA, the Court refused to defer to OMB's interpretation of the PRA as found in 5 C.F.R. § 1320.7(c)(2). Dole, 110 S. Ct. at 938.

Steelworkers suggested, as a second basis for its holding, that reporting requirements which constitute a substantive regulatory choice by an agency -- as opposed to pure information gathering -- are not subject to the PRA. The Court reasoned that "[a]n agency charged with protecting employees from hazardous chemicals has a variety of regulatory weapons from which to choose." Id. at 933. For example, the agency can ban certain substances, prescribe certain safety procedures, or alert users of dangers through the use of disclosure rules. Where an agency

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[2] Furthermore, if Congress had intended the Public Protection Provision to repeal statutory reporting requirements that existed prior to the PRA, it would have done so explicitly. See Morton v. Mancari, 417 U.S. 535, 549 (1974) (repeals by implication not favored); Hicks, 947 F.2d at 1359.

[3] Section 3010, in contrast to the tax code provisions at issue in the above cases, refers to regulations to the hazardous waste regulations promulgated by the EPA Administrator, thus, leaving the agency with a degree of discretion.

elects a particular substantive, regulatory option, the Court implied that this choice is not subject to OMB review under the PRA. Section 3518(e) confirms the substantive choice exception to the PRA by stating that nothing in the PRA increases or decreases the authority of OMB "with respect to the substantive policies and programs of departments, agencies and offices." 44 U.S.C. § 3518(e).

C. The Fraud Exception and Exclusionary Rule

In the leading case of United States v. Weiss, 914 F.2d 1514 (2d Cir. 1990), cert. denied, 111 S. Ct. 2888 (1991), the court concluded that the public protection provision only shields from penalty the "failure . . . to provide information," but not "knowingly providing false information." Id. at 1521. In that case, defendants made false representations of material facts on Medicare and Medicaid claims. Although the underlying forms displayed a control number, a related agency manual had not been submitted to OMB for approval. The court assumed without deciding that the manual was an "information collection request," but upheld the conviction based on the false representations. The court analogized to cases holding that those who attempt to circumvent a statute may not attack the act's constitutionality. See also, United States v. Sasser, 974 F.2d 1544 (10th Cir. 1992); United States v. Matsumoto, 756 F. Supp. 1361 (D. Haw. 1991)

2. Exclusionary Rule

The fraud cases establish by implication that the public protection provision does not afford a remedy akin to the exclusionary rule. If information compelled by an "illegal" request may form the basis of a fraud prosecution, the PRA clearly does not require the exclusion of all improperly obtained evidence. Indeed, the Matsumoto court found that a PRA violation did not provide a fraud defendant with any remedy comparable to the exclusionary rule. 756 F. Supp. at 1365. The court noted that the rationale behind the exclusion of unconstitutionally obtained evidence -- the deterrence of future government conduct -- is not applicable in the PRA context. The court distinguished the rationale of the Public Protection Provision, which was intended "to shield the public from being bombarded with unauthorized forms," and was not aimed at "deterrence of the government." Id.

By analogy, as long as a defendant answers a request, the information so provided may be used in an enforcement proceeding against him. The PRA likely affords no protection if the defendant actually responds to the "illegal" request.

D. A Technical Or Harmless Error Response by an Agency

No PRA cases to date sanction a harmless error analysis in response to a claim of failure to comply with the PRA, but there may be an argument to be made. The viability of this argument will depend on the context. The strongest argument for harmless error would be in a case in which an ICR initially was approved, the

approval and control number lapsed but the ICR subsequently was assigned a new number by OMB (without change to the underlying requirement). Arguably, the goal of the PRA would be met in such a situation: the public was protected from undue paperwork burdens because OMB initially cleared the request and subsequently reviewed it and found it to be in compliance with the statute. At this point, the court would have to weigh the public interest in enforcing the substantive requirement versus the need to adhere to the formalities of the PRA, and it might be persuaded that the former should control.

The scenario in which this argument is least likely to prevail would be a situation in which an ICR was never approved by OMB. In such a circumstance, it would be hard to argue that an agency's failure to comply with the PRA was "harmless error."

A middle scenario would be where OMB assigned a control number, but the agency failed tó seek renewal of OMB approval. Even though the regulations require the agency seek renewal, where the agency failed to do so, we might still argue harmless error.[4]

III. Application of PRA to Permit Requirements

There are several arguments that permits and the requirements contained in them are not subject to the PRA. First, permits generally are individualized documents; therefore, each permit (and the information requested therein) would not contain identical questions that go to ten or more persons. Accordingly, permits would not be subject to the PRA.

Second, permit requirements often have a statutory basis. The PRA will not shield a party from complying with a statutory requirement.

Third, it may be argued that a permit (and the reporting requirements in it) constitute a substantive regulatory choice by the agency and one which cannot be undermined by OMB. See Steelworkers, 110 S. Ct. at 933-34; but see Action Alliance, 930 F.2d 77.

Of course, with pre-printed form permits, parties may argue that the permits themselves are identical in nature. The response to this is that the differences in the underlying permits controls and not the similarities in the forms.

IV. Application of PRA to Independent State Regulations

In many instances, we enforce ICRs contained in regulations adopted by the states. The relevant issue in this situation is whether the PRA applies to state information collection requests

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[4]As an additional argument in this scenario, see discussion, supra (OMB inaction leads to implied approval).

where the state program is fully authorized and the state is exercising its own sovereign authority.[5] Although there is no caselaw on this issue, a strong argument can be made that the PRA does not apply to these state ICRs.

The PRA prohibits an agency from conducting or "sponsoring" the collection of information before the agency first tries to meet the goals of the Act and obtains a control number from OMB. 44 U.S.C. § 3507. The Act does not define "sponsor." The legislative history suggests that the term was meant to prevent agencies from circumventing the PRA by simply contracting with others to collect the information. S. Rep. No. 930, 96th Cong., 2d Sess. 46 (1980), reprinted in, 1980 U.S.C.C.A.N 6286 (emphasis added). Congress, by extending the PRA to federally sponsored information requests, arguably meant only to reach those circumstances where the party acts on behalf of and at the request of an agency.

OMB, however, appears to have expanded the jurisdiction of the PRA. The regulations define "sponsor," more broadly. 5 C.F.R. 1320.7(r).[6] In contrast to Congress' stated intent, the implementing regulations apply the PRA to all cooperative agreements and grants where an agency requires the other party to collect information, even if incidental to the agreement, and not just in those instances which the legislative history suggests appropriate -- where the principal purpose is the collection of information. This is troublesome because many states may accept grant monies from the government or be parties to cooperative agreements which require them to collect information.

V. Defensive Use of the PRA: Affirmative Defense or Jurisdictional Bar?

It is probable that a court would find that the PRA's Public Protection Provision, 44 U.S.C. § 3512, provides an affirmative defense to civil enforcement that must be raised in the trial court to prevent waiver. Authority on the nature of the Public Protection defense is sparse. However, the few courts that have reached the issue in the civil context have found that the PRA is an affirmative defense that must be raised in the trial court on pain of waiver.

The most apposite case is United States v. Farley, 1992 U.S.

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[5] This section only addresses arguments made under the PRA; it does not cover constitutional or other issues which may also support this conclusion.

[6] The definition of "person" includes state, territorial and local governments. 5 C.F.R. 1320.7(n). The definition in section 1320.7(r) also encompasses "a collection of information undertaken by a recipient of a federal grant," if the collection is done at the request of the agency or if the grant requires agency approval for the collection or collection procedures.

App. LEXIS 20598 (9th Cir. Aug. 26, 1992) (reported as table case without published opinion at 972 F.2d 1344).[7] There, the United States brought a civil action for damages and injunctive relief against a miner, Farley, who occupied U.S. Forest Service land. The district court found that Farley failed to comply with his National Forest Service "plan of operation" for his mining claim. In the district court, Farley pointed to the failure of the United States to include "the budget reduction number on the bottom of any of the things they sent." Id. at *5. Farley's sole argument on appeal was that the Paperwork Reduction Act "affects the judgment." Id. at *2.

The Ninth Circuit held that the PRA is an affirmative defense.[8] As it was not properly raised in the trial court, the court found that "the defense is waived and we will not consider it for the first time on appeal." Id. at *4 (citing Rule 8(c)).

The Farley court relied on an earlier Ninth Circuit case, Navel Orange Admin. Comm. v. Exeter Orange Co., 722 F.2d 449, 453-54 (9th Cir. 1983), for the proposition that the PRA creates a "raise or waive" affirmative defense. In Navel Orange, an agency created by statute to regulate the market for oranges in the Southwest, brought an administrative enforcement action to collect unpaid assessments from an orange handler. On appeal, the orange handler contended that the PRA excused him for failing to file certain reports. The Ninth Circuit held that "a defendant in an enforcement action cannot raise affirmative defenses which have not been finally determined in a [statutorily mandated] administrative proceeding." Id. at 454. Although the court's holding concerned exhaustion of administrative remedies, the court assumed that the PRA created an affirmative defense.

However, the only case supporting an argument that the PRA is jurisdictional, United States v. Hatch, 919 F.2d 1394 (9th Cir. 1990), arose in a criminal context and has been weakened by two subsequent decisions in the Seventh and Ninth Circuits, and held inapplicable in the civil context by another court in the Ninth Circuit.

In Hatch, the court reversed the conviction of a miner who was charged with failure to file a plan of operations with the National Forest Service, on the ground that the operating plan forms failed to carry an OMB control number. The defendant raised the PRA defense in a post-conviction motion in the district court. The court was therefore confronted with the issue of whether the defense was a "permissive pretrial matter" or a "jurisdictional

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[7]The case is unpublished. A Ninth Circuit "notice" states that the case "may not be cited to or by the courts of this Circuit except as provided by the 9th cir. R. 36-3."

[8]The Appellate Section of the Central District of California argued the case. They are sending us the briefs in Farley.

matter." Id. at 1397. The court held that "[s]ince the Forest Service did not comply with the PRA and since therefore Hatch cannot be subject to any penalty, the information failed to charge an offense." Id. at 1398. Under Fed. R. Crim. P. 12(b)(2), failure to charge an offense can be raised "at any time during the pendency of the proceedings." This holding arguably implies that the district court lacked jurisdiction to impose a penalty on the defendant.

The Seventh Circuit, however, affirmed a tax evasion conviction in Salberg v. United States, 969 F.2d 379 (7th Cir. 1992), finding that a PRA challenge does not implicate jurisdiction. Defendant in that case contended that "the district court lacked jurisdiction to penalize him because the form 1040 and corresponding instruction books and regulations do not comport with the requirements of the PRA." Id. at 384. Importantly, defendant argued that the issue could not be waived because it was "jurisdictional." Id. The court stated that "we seriously doubt that this claim is jurisdictional," and reasoned that the underlying criminal tax evasion statute provided the court with jurisdiction. The court concluded, "[r]egardless of the PRA claim, a district court is not divested of jurisdiction it clearly had at the time of conviction to entertain a federal prosecution of an individual accused of a federal crime." Id.

Similarly, the recent Ninth Circuit case of United States v. Amundsen, 1992 U.S. App. LEXIS 14967 (9th Cir. June 19, 1992) (reported as table case without opinion at 967 F.2d 592)[9] makes clear that failure to comply with the PRA does not affect the jurisdiction of the court. In Amundsen, a criminal tax fraud case, defendants alleged that the IRS failed to publish a notice of delegation in the Federal Register or comply with the PRA. The court held that a failure to publish as required by the Federal Register Act, 44 U.S.C. § 1501 et seq. and the Administrative Procedures Act, 5 U.S.C. § 552, does "not create a jurisdictional issue, but rather relate[s] to the lawfulness of the actions taken by the IRS." Id. at *2. Likewise, the alleged failure to comply with the PRA "is irrelevant to the jurisdictional issue." Id. Amundsen therefore bolsters the argument that a PRA violation does not deprive the court of the ability to adjudicate the case.

[9]The case is unpublished. A Ninth Circuit "notice" states that the case "may not be cited to or by the courts of this Circuit except as provided by the 9th cir. R. 36-3."

RCRA UPDATE

I. DEFENSES RAISED IN PAST RCRA PROSECUTIONS

II. RECYCLING: A VIABLE DEFENSE?

III. THE MIXTURE RULE'S DEMISE AND ITS IMPACT ON PENDING CASES (U.S. v. RECTICEL FOAM, ET AL.)

IV. THE TCLP TEST EXPLAINED

DATED: BUFFALO, N.Y. JULY, 1993

Defenses Raised in Past RCRA Prosecutions

The following chart lists some of the defenses that have been raised in RCRA prosecutions over the last several years, and includes the case name, the name of the prosecutor(s) and an extremely brief summary of the thrust of the government's response. The emphasis is on cases where the defense or issue has actually been litigated and responsive pleadings exist. This chart is intended as nothing more than a handy reference, and a way to help prosecutors from "reinventing wheels" already labored over by their colleagues.

Obviously, this chart is not exhaustive, and particularly may not incorporate the experiences of Assistant United States Attorneys handling their own cases exclusively. (It also does not attempt to cover two critical potential defenses, criminal intent and recycling, that will be covered elsewhere in the Advance Environmental Conference manual.) Hopefully, through comments received at this conference, this chart will be able to incorporate the experience of additional prosecutors and otherwise be made more useful.

The following prosecutors have cases referenced on the chart:

Attorney	Office	Phone number
Jane Barrett	USAO/Baltimore	(410) 962-4822
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Ken Fimberg	USAO/Denver	(303) 844-2081
Bonnie LePard	ECS	(202) 272-9856
Jim Morgulec	ECS	(202) 272-9895
Peter Murtha	ECS	(202) 272-9860
Bruce Pasfield	ECS	(202) 272-9853
Lisa Rivera	EPA/Dallas	(214) 655-6600
Paul Rosenzweig	ECS	(202) 272-9850
Mark Webb	USAO/Ft. Smith, Ark.	(501) 783-5125
Claire Whitney	ECS	(202) 272-9861
Gordon Young	USAO/Houston	(713) 229-2600

RCRA Defenses[1]

Defenses	Case(s) litigated	Attorney	Responses
Duplicity (charging multiple days in single count)	Baytank, 934 F.2d 599, 608 (5th Cir. 1991)	Flachs, Rosenzweig & Young	Show: (1) actions are single continuing scheme; (2) no dble jprdy; (3) no prejudicial evidentiary rulings; and (4) no chance of non-unanimous verdict.
Duplicity (storage and disposal in single count)	Dean, 969 F.2d. 187, 195 (6th Cir. 1992)	Blackwell, Rosenzweig	Disposal and storage are simply two possible means of violating single statutory provision
"Empty containers" (waste came from and thus is not regulated)	Applied Coating, Cr-H-92-214 (S.D. Tex. 1992)	Herm, Rivera & Young	Show not all wastes were removed that could be removed from drums by pouring, pumping, aspirating, etc.

[1]Prepared by Peter J. Murtha, Trial Attorney, Environmental Crimes Section.

Issues	Case(s) Litigated	Attorney	Responses
Export (crime not consummated when foreign customs refused entry)	Sbicca, 92-0610-R (S.D. Cal.)	Pierson	constructive entry
Federal employees are not "persons" within RCRA	Dee, 912 F.2d 741, 744 (4th Cir. 1990)	Barrett	Defts convicted as individuals; not as government
Federal enforcement of state permits is not authorized	MacDonald & Watson, 933 F.2d 35, 43 (1st Cir. 1991)	Morgulec, Whitney	Section 3008 was meant to allow federal enforcement within authorized states
Knowing endanger-ment/"serious bodily injury" too vague	Protex, 874 F.2d 740, 743 (10th Cir. 1989)	Fimberg	Psychoorganic syndrome causing reversible loss of mental faculties sufficient
Lack of environmental harm	Goodner Bros., 966 F.2d 380, 384 (W.D. Ark.) Brittingham Cr-3-92-032-R (N.D. Tex 1992)	Fiachs, Webb Clardy, LePard & Murtha	(1) File motion in limine: relevancy of enviro risk, not harm; (2) if lack of harm allowed in, prove dangerousness of waste and potential for harm through regulators; (3) if allowed in, consider showing cost of clean-up

Case(s) Litigated	Attorney	Responses
Mistake of law/advice of counsel	Hawaiian Western Steel (not charged)	Rosenzweig	(1) Attack reasonableness of reliance; (2) Deft failed to fully disclose
Mistake of fact/Subjective belief waste not hazardous			(1) Argue belief not reasonable (or believable) (2) willful blindness instruction
Mixture rule	Recticel Foam Cr.-2-92-78 (E.D. Tenn.)	Blackwell, Rosenzweig	Mixture rule unnecessary to show hazardous waste ("HW"); HW is "contained in"
	Goodner Bros.	Flachs, Webb	
Multiplicity (charging disposal and illegal transportation in separate counts)	Brittingham	Clardy, LePard & Murtha	Charges require proof of separate elements
Multiplicity (charging handling of same type of HW in separate counts)	Dean at 196	Blackwell, Rosenzweig	Congress intended separate punishments for factually distinct behavior

Defenses	Case(s) Litigated	Attorney	Responses
Permit (cannot be charged with illegal handling even though particular HW not covered by permit)	MacDonald & Watson at 46	Morgulec, Whitney	HWs vary enormously and require different kinds of facilities to ensure safe handling
Point source exemption to RCRA definition of "solid waste"	Dean at 194	Blackwell, Rosenzweig	"Point source" is narrowly construed; only covers actual discharge from holding pond, etc. to CWA "waters"
RCRA is void for vagueness	Recticel White, 766 F. Supp. 873, 882 (E.D. Wash. 1991)	Rosenzweig N/A	(1) Regs set explicit standard, (2) in specific case, essence of regs understood by def't
Regulatory estoppel (EPA, state or local "approval")	Recticel Foam	Blackwell, Rosenzweig	(1) Deft can't show reasonable reliance (2) State and local can't estop feds

Issues	Case(s) Litigated	Attorney	Responses
Samples disposed of prior to trial	Lopez, 92-0675-T (S.D. Cal.)	Pierson	(1) No reason to believe results would be different; (2) no bad faith by gov't
Samples not taken (proof that waste is hazardous through circumstantial evidence)	Baytank at 615 Aspen Aviation, 92-20014-04 (W.D. Ark.)	Flachs, Rosenzweig & Young Pasfield, Webb	Records (drum inventory, waste log, photos) and testimony sufficient
Sample results not promptly provided to defend-ant/splits not provided	Protex at 745	Fimberg	Failure to provide results cannot affect defendant's past conduct
Samples not representative/EPA protocol not followed	Applied Coatings	Herm, Rivera & Young	Establish validity of sampling through EPA/NEIC experts
Subsequent remediation (no lasting harm, no "foul")	Brittingham Aerolite Chrome Corp., CR-N-90-6-HDM (D. Nev. 1990)	Clardy, LePard & Murtha Murtha	(1) File motion in limine on relevancy; evidence doesn't relate to elements; (2) if remediation allowed in, use costs to show extensiveness of violation

RCRA INVESTIGATIONS AND PROSECUTIONS

RECYCLING ISSUES

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Dated: July, 1993 Buffalo, N.Y.

RECYCLING REGULATIONS[1]

I. INTRODUCTION

The "recycling" of a material does not necessarily render it exempt from RCRA regulation. The term "recycling" is really a point of departure - and not a conclusion - in determining whether a material is subject to RCRA regulation.

The term "recycled" or "recycling" or "recyclable" appears in various places in 40 CFR Subchapter I. In each instance the type of material and the manner of recycling ultimately determines whether the material is a solid waste and thus subject to RCRA regulation. Most recycled wastes are deemed solid wastes and thus subject to RCRA regulation.

II. MATERIALS THAT ARE SOLID WASTES WHEN RECYCLED

The general definition section of part 261 defines recycling. "A material is 'recycled' if it is used, reused, or reclaimed." § 261.1(c)(7). Each of these terms is defined further. "A material is 'used or reused' if it is either: employed as an ingredient in an industrial process to make a product; or employed in a particular function or application as an effective substitute for a commercial product. § 261.1(c)(5). A material is "reclaimed" if it is processed to recover a useable product, or if it is regenerated. §261.1(c)(4).

The definition of "solid waste," 40 CFR § 261.2 and particularly subsection (c), distinguishes between materials that are solid wastes when recycled and those that are not solid wastes when recycled. Four recycling activities are defined: use constituting disposal, burning for energy recovery, reclamation and speculative accumulation.

The definition also distinguishes among five types of materials: spent materials, sludges, by-products, commercial chemical products and scrap metal. Sludges and by-products are further categorized as either listed or characteristic.

Table 1 of the definition cross references each of the four recycling activities with the various types of materials. With only four exceptions, each material is defined as a solid waste, and is thus potentially subject to RCRA regulation, when recycled in one of the specified ways.

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[1] Outline prepared by Ben A. Hagood, Jr., Assistant U.S. Attorney, P.O. Box 978, Charleston, SC, 29402. (803) 727-4378.

The definition includes not only materials that are recycled in one of the specified ways but also those that are accumulated, stored or treated before being recycled in one of the specified ways.

Let's look at each of these recycling activities and types of materials a little more closely.

A. RECYCLING ACTIVITIES

1. USE CONSTITUTING DISPOSAL. This activity involves the direct placement of hazardous materials or products derived from hazardous materials onto the ground. Both the hazardous material and the product itself remain a solid waste. Some examples are fertilizers, cements and asphaltic compounds. Commercial chemical products, if listed in § 261.33, are not solid wastes if they are applied to the land that is their ordinary manner of use. 40 CFR § 261.2(c)(1).

2. ENERGY RECOVERY OR FUEL. Materials that are burned to recover energy or used to produce a fuel are solid wastes. Fuels that contain the listed materials are also solid wastes. This does not include commercial chemical products that are fuels. 40 CFR § 261.2(c)(2).

3. RECLAMATION. A material is reclaimed if it is processed to recover a useable product or regenerated. Examples are recovery of lead values from spent batteries and regeneration of spent solvent. § 261.1(c)(4). Materials that are reclaimed are solid wastes unless they are characteristic sludges or by-products or commercial chemical products. 40 CFR § 261.2(c)(3).

4. SPECULATIVE ACCUMULATION. This activity includes accumulating materials before recycling them. All of the listed materials, except commercial chemical products, are solid wastes if accumulated speculatively before recycling. However, a material is not accumulated speculatively - and thus not a solid waste - if: the material is potentially recyclable, has a feasible means of being recycled, and at least 75% of the material is actually recycled during the calendar year. § 261.1(c)(8); § 261.2(c)(4).

B. TYPES OF MATERIALS

1. SPENT MATERIALS: materials that have been used and as a result of contamination can no longer serve the purpose for which they were produced without further processing. § 261.1(c)(1). Examples: spent solvents, activated carbon, catalysts, acids, pickle liquor, foundry sands, lead-acid batteries, potliners, wastewater.

2. SLUDGES: any solid, semi-solid, or liquid wastes generated from a waste water treatment plant (except for treated effluent), water supply treatment plant, or air pollution control facility. § 260.10; § 261.1(c)(2). Examples: baghouse dusts, wastewater treatment sludges, flue dusts.

3. BY-PRODUCTS: materials that are not one of the primary products of a production process and not solely or separately produced by the production process. Does not include co-products that are produced for the general public's use and ordinarily used in the form produced by the process. § 261.1(c)(3). Examples: mining slags, distillation column bottoms, drosses.

4. COMMERCIAL CHEMICAL PRODUCTS: commercial chemical products and intermediates, off-specification variants, spill residues and container residues that are listed in 40 CFR § 261.33.

5. SCRAP METAL: bits and pieces of metals parts or metal pieces that may be combined together with bolts or soldering which when worn or superfluous can be recycled. § 261.1(c)(6). Examples: bars, turnings, rods, sheets, wire, radiators, scrap automobiles, railroad box cars.

Under Table 1, only 4 combinations of recycling activities and types of material are not solid wastes: characteristic sludges, characteristic by-products and commercial chemical products that are reclaimed, and commercial chemical products that are accumulated speculatively. Every other material when recycled in one of the 4 specified ways is defined as a hazardous waste. Of course, the usual analysis for determining if a solid waste is a hazardous waste will determine if the recycled material is regulated as a hazardous waste.

III. RECYCLING ACTIVITIES THAT ARE NOT SUBJECT TO RCRA REGULATION

A. MATERIALS THAT ARE NOT SOLID WASTE WHEN RECYCLED.

§ 261.2(e) defines materials that are not solid wastes when recycled in a particular manner.

1. USE OR REUSE OF SECONDARY MATERIALS AS INGREDIENTS IN INDUSTRIAL PROCESSES TO MAKE A PRODUCT PROVIDED THAT NOT BEING RECLAIMED. This activity involves the direct use of a secondary material without prior reclamation. Example: using chemical industry stillbottoms as feedstock.

2. USE OR REUSE AS EFFECTIVE SUBSTITUTES FOR COMMERCIAL PRODUCTS. This involves direct use of a material as a product rather than a raw material ingredient. Examples: using hydrofluorsilicic acid, which is an air emission control dust, to fluoridate drinking water.

3. RETURN TO ORIGINAL PROCESS FROM WHICH GENERATED WITHOUT BEING RECLAIMED. This activity is known as "closed loop recycling." Materials qualify for this exclusion if they are a substitute for raw material feedstock and the process uses raw materials as a principal feedstock. Examples: returning spent electrolyte from primary copper production to the copper production process from which it came; resmelting of emission control dusts in the primary metal smelting furnace that originally generated them.

In each case the material involved is not considered a hazardous waste.

B. EXCEPTIONS

However, § 261.2(e)(2) provides four important exceptions to these three exclusions:

1. Used in a manner constituting disposal or used to produce products that are applied to the land.

2. Burned for energy recovery, used to produce a fuel, or contained in fuels.

3. Accumulated speculatively.

4. Certain inherently waste-like materials.

In other words, a material that is used as an effective substitute for commercial products would normally not be a sold waste. However, if the material was used to produce a product such as a fertilizer that was applied to the land then the material is classified as a solid waste.

IV. OTHER RECYCLING REGULATIONS

A. VARIANCES

The regulations define circumstances in which recycled materials that ordinarily would be considered solid wastes may be eligible for case by case variances (40 CFR 260.30):

1. Materials that are accumulated speculatively without sufficient amounts being recycled.

2. Materials that are reclaimed and then reused within the original primary production process in which they were generated.

3. Materials that have been reclaimed but must be reclaimed further before the materials are completely recovered.

260.31 and 260.33 detail criteria and procedures for evaluating variances.

B. INHERENTLY WASTE LIKE MATERIALS

261.2(d) defines certain materials as solid wastes when they are recycled in any manner.

C. OTHER EXCLUSIONS

§ 261.4(a) lists certain materials that are excluded from the definition of solid wastes. These include pulping liquors that are reclaimed in a pulping liquor recovery furnace and reused in the pulping process, spent sulfuric acid used to produce virgin sulfuric acid, and spent wood preserving solutions reclaimed and reused for their original intended purpose. and reused in

D. CLOSED LOOP EXCLUSION

§ 261.4(a)(8) lists as a specific exclusion closed loop recycling. This excludes from the definition of solid waste secondary materials that are reclaimed and returned to the original

process where they were generated if they are reused in the production process, they are only stored in tanks for less than twelve months, the entire process is closed by pipes or other comparable means, and the reclamation does not involve controlled flame combustion. The exclusion does not apply if the reclaimed material is used to produce a fuel or a product used in a manner constituting disposal.

V. REGULATORY REQUIREMENTS FOR RECYCLABLE MATERIALS.

A. GENERALLY

Hazardous wastes that are recycled are defined as "recyclable materials." § 261.6(a). In most cases recyclable materials are, prior to being recycled, subject to the general hazardous waste management requirements. These requirements include the standards of Part 262 applicable to generators, of Part 263 applicable to transporters, and of part 264 to owners and operators of treatment, storage and disposal facilities.
§§ 261.6(a)(1), (b), and (c)(1).

Owners or operators of facilities that recycle recyclable materials but do not store them are only subject to the notification requirements of RCRA and certain regulations dealing with the use of manifests and manifest discrepancies. § 261.6(c)(2).

The useful products produced by recycling generally are not defined as wastes and therefore are not subject to RCRA regulation.

B. STANDARDS FOR THE MANAGEMENT OF SPECIFIC HAZARDOUS WASTES AND MANAGEMENT FACILITIES

Certain types of recyclable materials are not subject to the typical regulatory standards applicable to generators, transporters or owner/operators, but are subject to a lesser set of controls under part 266, which provides specific standards for the management of each type of waste. § 261.6(a)(2). The specific type of recyclable materials and the applicable management standards are as follows:

1. RECYCLABLE MATERIALS USED IN A MANNER CONSTITUTING DISPOSAL. Part 266 Subpart C.
   Recyclable materials that are applied to or placed on the land either with or without mixing with other materials are "materials used in a manner that constitutes disposal." Products - such as

If it goes on land, must pass the test.

commercial fertilizers - that are produced for the general public's use, contain recyclable materials, and are used in a manner constituting disposal are not subject to regulation if they meet the land disposal restrictions (land ban regulations). Fertilizers using K061 hazardous waste are exempt from regulation. 40 CFR § 266.20.

2. USED OIL BURNED FOR ENERGY RECOVERY. Part 266 Subpart E.

3. RECYCLABLE MATERIALS UTILIZED FOR PRECIOUS METAL RECOVERY. Part 266 Subpart F.

4. SPENT LEAD-ACID BATTERIES BEING RECLAIMED. Part 266 Subpart G.

5. HAZARDOUS WASTES BURNED IN BOILERS AND INDUSTRIAL FURNACES. Part 266 Subpart H.

C. RECYCLABLE MATERIALS NOT SUBJECT TO REGULATION.

§ 261.6(a)(3) lists certain recyclable materials that are not subject to the regulations applicable to generators, transporters or owner/operators. These are summarized below.

1. Industrial ethyl alcohol that is reclaimed.

2. Used batteries or cells returned to a battery manufacturer for regeneration.

3. Used oil that is recycled in some other manner than being burned for energy recovery.

4. Scrap metal.

5. Fuels from certain refining of oil-bearing hazardous wastes if from normal practices.

VI. LEGITIMATE RECYCLING OR SHAM RECYCLING?

Inherent in the above definitions and analyses of recycling activities is the notion that the material is legitimately recycled and not merely treated or disposed of under the guise of recycling. "Sham recycling" is not defined in the regulations but is generally used to mean the improper treatment of waste rather than legitimate recycling.

EPA has discussed sham recycling criteria in various preambles (see 50 FR 638-9, 648-9, January 4, 1985, and 53 FR 526-7, January 8, 1988) and in guidance to the Regions. The question of whether the activity is sham recycling involves assessing the intent of the owner or operator by evaluating circumstantial evidence. The determination rests on whether the secondary material is "commodity like" - does it truly have value as a raw material or product - and does the recycling process (and ancillary storage) pose greater environmental risks than the analogous raw material or product.

EPA has mentioned certain criteria for determining whether a particular recycling activity is sham or legitimate. These criteria include:

1. similarity of the secondary material to an analogous raw material or product;

2. the degree of processing required to produce a finished product;

3. the value of the secondary material;

4. whether there is a guaranteed market for the end product;

5. whether the secondary material is handled in a manner consistent with the raw material it replaces;

6. other relevant factors, including whether toxic constituents present in the secondary material are necessary for the product or are merely present s contaminants.

EPA has provided this guidance on sham recycling to provide an objective way of defining whether a recycling process is subject to regulation under 261.2 or 261.6, whether it is excluded from EPA authority or whether it merits reduced regulatory controls.

Even legit recycl -- transp issues --
Sham recycl -- not specifically characterizing.

VII. DISCUSSION ISSUES

1. Fact Patterns
   a. United States v. Stoller Chemical Co., Inc, et. al.
   b. United States v. Recticel Foam Corporation, et. al.
2. Regulatory analysis
3. Charging Decisions

VIII. REFERENCES AVAILABLE

1. Federal Register preambles.
2. "RCRA Implementation Study Update: The Definition of Solid Waste." USEPA, Solid Waste and Emergency Response (OS-305), EPA530-R-92-021, July 1992.
3. "Guidance Manual on the RCRA Regulation of Recycled Hazardous Wastes." Prepared by Industrial Economics, Inc. March 1986. Reproduced by U.S. Department of Commerce, National Technical Information Service, Springfield,

IX. EXCERPTS FROM BRIEF IN RESPONSE TO MOTION TO DISMISS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. CR-2-92-78
	)	Jarvis/Murrian
RECTICEL FOAM CORPORATION (also known as Foamex L.P.), STEVE MURPHY, CHET MEYERS, O. E. ("GENE") FOX, ELDON HALL, JIM VAN HOOSER and STEVE CANSLER	)	

B. Factual Background

The United States proffers that it will establish the following facts at trial:[2] Initially, we incorporate by reference the factual background in Section I.C of our Response to the Mixture Rule Motion. That factual proffer details how Recticel's hazardous wastes were generated and collected in drums.

The factual dispute relevant to this motion deals with what happens to the drums at Plant Number One[3] after they are full. Following collection some of the drums of waste were "reclaimed" by

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[2] The mere fact that defendants required 4 pages to set forth their "undisputed" facts demonstrates the prematurity of their motion. This Court cannot rule on this issue without establishing a firmer factual basis than that provided by defendants. The United States' response is not designed to provide a comprehensive factual recital of its evidence, since we deem that impossible at this juncture, but merely to provide a working framework within which to argue this motion.

[3] As defendants acknowledge (Memorandum at 4), the cut and drain reprocessing occurred only at Plant Number One. Hence those counts relating to conduct outside of Plant Number One are not implicated by this motion.

a method known as "cut and drain." Drums containing the waste were suspended above a collection devise consisting of a funnel-like half-barrel and a filter screen. Beneath the collection devise was a receiving drum. A sharp instrument was used to puncture the full drum, allowing the liquid waste to pass through the filter screen to the receiving drum. An electric saw would then be used to remove the bottom of the suspended drum so that the remaining contents of the drum would fall on the filter screen. Liquid soaked solids from the filter screen, residual liquids and those solids remaining in the suspended drum were dumped onto a concrete pad, absorbed with oil dry (a dirt-like substance commonly used to soak up oil from spills) and recollected in another drum or a plastic bag. The waste absorbents and liquids were regularly dispose of in a garbage dumpster for disposal at a non-hazardous waste landfill.

During this process employees were seldom provided with proper protective gear. Splashes or spills of the hazardous waste frequently came into contact with workers' skin, and workers were regularly exposed to the fumes from the wastes.

The nominal purpose of this activity was to recollect the liquids for reuse in the production process. Defendants assert (Memorandum at 2) that the United States "well knows" that these liquids were so reused.

The United States "knows" no such thing. We dispute defendants' self-serving characterization of the facts as false. The evidence the United States will present at trial will

demonstrate: 1) That the recollected liquid wastes were often unsuitable for reuse in the production process; 2) That drums of liquid waste went unreused for periods of time in excess of two years -- rebutting any suggestion that they were actually reusable or intended for reuse; 3) That substantial quantities of liquid waste were disposed of in the garbage dumpster at Plant Number One after "reprocessing;" 4) That liquid wastes were disposed of into the Plant Number One dumpster prior to and without any "reprocessing;" and 5) That employees of Recticel were instructed by Recticel supervisors to overstate the number of drums effectively reused, thereby falsely enhancing the appearance of successful recycling.

In short, the "recycling" was a sham and simply did not occur as defendants would have this Court believe. To the contrary, it was (at best) an ineffective, half-hearted effort, which defendants knew was unsuccessful. At worst, it became a mendacious attempt to mislead state and federal regulators and conceal illegal activity.

II. Argument

We begin by demonstrating that defendants' motion is premature and cannot be decided at this juncture. Thereafter, we discuss why defendants' legal argument is flawed, requiring denial of their motion even on the factual basis they proffer.

A. Sufficiency Of The Indictment

We fully discussed the law on the sufficiency of an indictment in Section II.A of our Response to defendants' Mixture Rule Motion,

and incorporate that discussion by reference here.

We add only the following brief point -- as should be evident from the proffer of the United States, the factual disputes regarding this issue are large. The United States asserts that the alleged recycling did not occur, or if it occurred did so with so little frequency or success as to render the entire "recycling" exercise a sham. Given the extremity of this factual dispute we do not see how the Court can sensibly resolve the issue pre-trial. At a minimum, resolution must await the close of the United States' case-in-chief and/or submission to the jury.

B. The Legal Basis For The Charges

Defendants' motion raises the question of whether the drummed material collected after the production process may be characterized as waste at all or whether it is more properly thought of as an in-process stream which is being used as an ingredient in further production. In the language of the RCRA this question is whether the material at issue is a "solid waste." The United States submits that, even under defendants' proffered facts (that is, assuming arguendo that all liquid waste was reprocessed and subsequently reused), the regulatory structure makes it clear that the liquid is, in fact, a solid waste.

1) Solid Waste Defined

The relevant regulatory provisions are the solid waste

definitions at 40 CFR 261.2; Tenn. Rule 1200-1-11-.02(1)(b).[4] These define a solid waste as "any discarded material." 40 CFR 261.2(a)(1); Tenn. Rule 1200-1-11-.02(1)(b)(1)(i).[5] A discarded material is any material which is abandoned, recycled or considered inherently waste-like. 40 CFR 261.2(a)(2); Tenn. Rule 1200-1-11-.02(1)(b)(1)(ii)(emphasis supplied). The noteworthy initial point to be made is that "recycled" materials are within the definition of "discarded" materials and hence within the broad definition of solid waste.

The first inquiry in the analysis is which of these three categories (abandoned, recycled or inherently waste-like) is applicable to the waste in question.[6] "Abandoned" means disposed of, burned, incinerated or accumulated, stored or treated (but not recycled) before or in lieu of being abandoned by disposal, burning or incineration. 40 CFR 261.2(b); Tenn. Rule 1200-1-11-.02(1)(b)(2). Disposal, of course, bears its statutorily defined

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[4] In Section II.B.3 of our Response to defendants' Mixture Rule Motion we established that Tennessee regulations are the applicable law for this case. However, with respect to the regulations at issue in this motion (ie. those defining solid waste) the language of both the federal and state regulations is identical. Thus, the analysis we provide here does not turn on the Court's decision relating to the choice of law issue.

[5] This broad definition is restricted by two caveats; that an express variance has not been granted (none has here) and that the waste does not meet one of several specific exclusions in 261.4(a) (or the state equivalent -.02(1)(d)). Defendants do not contend that any of these exclusions apply.

[6] We agree with defendants (Memorandum at 10) that this waste is not on the list of inherently waste-like materials contained in 40 CFR 261.2(d); Tenn Rule 1200-1-11-.02(a)(b)(4).

meaning of any spilling, leaking, discharge, deposit or placement on the land, etc. 42 USC 6903(3); 40 CFR 260.10; Tenn. Rule 1200-1-11-.01(2)(a). As we made clear in our factual proffer, we believe this definition applies to defendants' waste. To the extent that the waste in question is disposed of, rather than "reprocessed," it is plainly "abandoned" as the regulations define that term and is clearly solid waste.

Under defendants' assumed facts, the term "recycling" has a direct bearing on this case and its interpretation forms the crux of the regulatory question. "Recycling" under the regulations means that a material is "used, reused or reclaimed." 40 CFR 261.1(c)(7); Tenn. Rules 1200-1-11-.02(1)(a)(3)(vii).

Each of those terms is further defined. A material is "reclaimed" if it is processed to recover a usable product or if it is regenerated. 40 CFR 261.1(c)(4); Tenn. Rules 1200-1-11-.02(1)(a)(3)(iv). It is "used or reused" if it is employed as an ingredient in an industrial process, but only if its distinctive components are not recovered as separate end products. 40 CFR 261.1(c)(5)(i); Tenn. Rules 1200-1-11-.02(1)(a)(3)(v)(I). One may debate which of these two subdefinitions (reclamation or use/reuse) is the more applicable, but as demonstrated further the distinction is irrelevant to the regulatory definitions in this case.

In any event, defendants appear to concede that their waste is facially "recycled' in that it is reprocessed for use in the production process -- indeed, that is the primary basis for their

motion. Their contention, however, is that under the further definitions of "recycling" their recycling does not involve "solid waste" and they are exempt from regulation. That position is in error.

2) Recycling Defined

The regulations relating to recycling begin by declaring a material is solid waste (and therefor subject to regulation) if it is recycled, or accumulated, stored or treated prior to recycling, as specified in the provisions of 40 CFR 261.2(c)(1) through (c)(4) which incorporate by reference 40 CFR Part 261, Table 1; see also Tenn. Rules 1200-1-11-.02(1)(b)(3)(i) through -.02(1)(b)(3)(iv). [Table 1 is included as an exhibit to defendants' Memorandum.] Under its provision, most recycled wastes are deemed solid wastes.

The provisions of Table 1 and their attendant definitions identify four distinct subcategories of recycling -- use in a manner constituting disposal; burning for energy recovery; reclamation; and speculative accumulation. We agree with defendants that, on their assumed facts, the reclamation provision, 261.2(c)(3), is the most nearly apt in this situation.[7]

Under this subcategory, Table 1 conclusively identifies the waste (which we contend is both "spent material" and a "byproduct") as solid waste. In column 3, of Table 1, both spent materials and

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[7] Under the United States factual proffer use in a manner constituting disposal, 40 CFR 261.2(c)(1); Tenn. Rule 1200-1-11-.02(1)(b)(3)(i), and speculative accumulation, 40 CFR 261.2(c)(4); Tenn. Rule 1200-1-11-.02(1)(b)(3)(iv) are potentially applicable to the disposal and storage of the wastes, respectively.

byproducts are marked with an asterisk ("*") defining them as solid waste even if recycled through reclamation.

Defendants challenge this assertion on two grounds: First, they argue that their waste is not of the type defined in the regulations (Memorandum at 14-17) -- that is, not "spent material" or "byproduct". Second they argue that their process is not "reclamation" (Memorandum at 17-21). Both contentions are wrong.

i) Spent Material and Byproduct -- The waste material in question meets two definitions of materials that are discarded solid wastes when recycled -- spent material and byproducts.

a) Spent Material -- The waste in question is a "spent material," that is a material which has been used and as a result of contamination can no longer serve the purpose for which it was produced without reprocessing. 40 CFR 261.1(c)(1); Tenn. Rule 1200-1-11-.02(1)(a)(3)(i). This conclusion follows from the plain meaning of the terms "used," "contaminated" and "reprocessing."

Defendants contend (Memorandum at 16) that their "Foam Chemicals" have not been "used" prior to collection in the drums. Yet even their own factual basis and argument refute these contentions. First, they describe a flush process stream whereby the chemicals are derived from the "purging" of the mixing head. How defendants can contend that such purging does not constitute a use of the chemicals is beyond our comprehension. Surely the flow of chemicals through the head at the time of the purging is not a purposeless action -- else why would it be done? Rather, it is,

even under defendants' fact pattern a clear "use" of the chemicals for a reason, that is to purge the mixing head. To argue otherwise is to ignore the common meaning of the word "use." See Webster's Ninth New Collegiate Dictionary (defining "use" as "to put into action: avail oneself of: employ . . . to carry out an . . . action by means of; utilize").

Second, the very interpretive language which defendants cite makes clear that only "unreacted raw materials are not subject to RCRA jurisdiction." 50 Fed Reg. 614, 624 (January 24, 1985) (cited in Memorandum at 16). Yet only 10 pages earlier (Memorandum at 6-7) defendants acknowledge that the continued "residual foaming reaction" creates solid chucks in the waste barrels. This residual reaction makes clear that the foam chemical waste is not solely unreacted raw materials. Therefore, under the interpretive EPA language on which defendants rely, the reacted materials in the drums are "used."

Nor is defendants' argument that the wastes are not "contaminated" (Memorandum at 16-17) any less fanciful. If the wastes are not contaminated (at a minimum with residual reaction foam pieces) then why is filtration necessary? Since filtration is necessary the waste is contaminated in the unfiltered state -- i.e., "made unfit for use by the introduction of undesirable elements." See Webster's Ninth New Collegiate Dictionary.

Nor can defendants sensibly claim that the waste does not require reprocessing prior to use -- their own actions in filtering

the waste are inconsistent with that position. The word "process" (which is undefined in the statue or regulations) should also be given its natural English meaning -- "a series of actions or operations conducing to an end; esp. a operation or treatment esp. in manufacture." See Webster's Ninth New Collegiate Dictionary. The "cut and drain" method of filtration was a crude, but effective, process for the filtering of the waste. The United States knows of no requirement that the process be a particularly sophisticated one and sees no warrant for engrafting such a requirement onto the regulatory language.[8]

b) Byproducts -- If the waste is not a spent material, it is surely a "by product," namely a material that is not one of the primary products of a production process and is not solely or separately produced by the production process. 40 CFR 261.1(c)(3); Tenn. Rule 1200-1-11-.02(1)(a)(3)(iii). More specifically, it is (as expressly defined in 40 CFR Part 261, Table 1) a "by product listed in 40 CFR Part 261.31." Section 261.31 is the one which contains the F-list for hazardous waste, including the waste illegally disposed of -- F002 waste.[9] Thus, the waste in question

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[8] In addition to the arguments we make here, we rely as well on those relating to "spent solvents" which are contained in Section II.B.1 of our Response to defendants' Mixture Rule Motion, which we incorporate here by reference.

[9] The equivalent Tennessee regulatory definitions (which are textual and not tabular) identify as solid wastes materials which are reclaimed and are "by-products listed in subparagraphs (4)(b) or (c) of this Rule." Tenn. Rule 1200-1-11-.02(1)(b)(3)(iii)(III). Of course, subpart (4)(b) -- ie., Tenn. Rule 1200-1-11-.02(4)(b) -- is the parallel Tennessee list of F-listed wastes and includes F002

also meets the byproduct definition.

c) Summary -- The crucial point to recognize is that under either possible definition (spent material or by product) a reclaimed waste is always deemed a solid waste subject to regulation. As a matter of regulatory construction there is no good argument that the waste in question is not solid waste.

ii) Reclamation -- As a final attempt to evade the clear import of the regulations defendants claim (Memorandum at 18-21) that their material is not "reclaimed" but is only "incidentally processed."[10]

a) Regulatory Definitions -- Once again, however, the very language defendants rely upon contains the seeds of their refutation. EPA defined reclamation as "regeneration [involving] process[ing] to remove contaminants in a way that restores [the wastes] to their original condition." 50 Fed. Reg 613, 633 (January 4, 1985). This is precisely the purpose of defendants filtration -- to restore the waste chemicals to their original uncontaminated condition.[11] For defendants to claim that the

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waste.

[10] We note that this argument would seem to be inconsistent with the argument made earlier the materials were not "spent" because they did not require reprocessing at all. Here defendants seem to admit that some reprocessing is necessary, but argue that it is of a minimal nature. This concession, alone, would seem to be dispositive of the "spent material" issue we addressed earlier in this response.

[11] None of the examples of incidental processing which defendants cite (Memorandum at 20) involves restoration to an original condition. All involve minor alteration in the physical

filtration process was merely a convenient separation method (Memorandum at 21) is to concede the need for such a process in the first place and to contradict their, almost simultaneous, assertion that the filtration was "unnecessary." How that necessity can be squared with a claim that no reclamation occurs is baffling. Cf. 50 Fed. Reg at 639 (incidental processing is steps which "are not necessary to material recovery").

b) Other Authority -- By limiting their analysis to this one set of EPA preamble language defendants conveniently ignore other sources of interpretive assistance which make clear that this type of reclamation involves solid wastes subject to regulation.

(i) Other Regulations -- Defendants' reclamation stands in marked contrast to the type of reclamation expressly excluded from the definition of solid waste. In 40 CFR 261.4 and Tenn. Rule 1200-1-11-.02(1)(d)(1) the regulations provide a specific list of exclusions from the solid wastes definition. Of those 10 exclusions one, 40 CFR 261.4(a)(8); Tenn. Rule 1200-1-11-.02(1)(d)(1)(viii)(I), involves reclamation. It excludes "materials which are reclaimed and returned to the original process or processes in which they were generated where they are reused in the production process." In order to fall within this exclusion the secondary materials must have been stored in tanks and the "entire process through completion of reclamation is closed by being entirely connected with pipes or other comparable enclosed

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or chemical state of the materials.

means of conveyance." Id. Recticel's process does not meet this "complete enclosure" requirement and the exclusion is therefore inapplicable.

However, the mere statement of the exclusion is instructive. First, as a matter of regulatory construction the presence of this exclusion implies that no exclusion exists for reclamation in "non-closed loop" systems. The doctrine is expressio unius est exclusio alteris -- the expression of one thing implies the exclusion of the other.

Second, it explains by example why an exclusion for defendants' process does not (and should not) exist. The regulation of waste is ultimately premised on the "potential hazard to human health or the environment when improperly" handled. 42 USC 6905(B) (defining hazardous waste); see also 48 Fed. Reg 14472-74 (April 4, 1983)(EPA regulates recycling activities which pose potential for harm equivalent to that of treatment or disposal). In a closed loop system, EPA might fairly presume that no significant additional exposure to the potential for harm will exist either for humans or the environment. In an open loop system, such as defendants', the contrary presumption is valid -- the openness of the loop poses a danger.[12]

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[12] Of course, the allegations of the indictment bear this potential out. Through exposure during the "cut and drain" defendants' employees were exposed to potential injury and in fact injured. For defendants now to claim that this activity was a beneficial recycling consistent with the principles of RCRA, they must stand RCRA on its head.

(ii) Later Interpretive Efforts -- Defendants' argument also ignores EPA's own later elaboration on the meaning of reclamation and the recycling rules. In January, 1988 EPA issued proposed interpretive rules in response to the court decision of American Mining Congress v. EPA, 824 F.2d 1177 (D.C. Cir. 1987) ("AMC I"). See 53 Fed Reg. 518 (1988).[13] In particular, EPA concluded that it had authority to regulate recycling activities which involved some "element of discard." Id. at 520. Even defendants must concede that there was some element of discard in their process -- namely disposal of the solids and liquids removed by the filtration process.

EPA determined that spent materials which require some processing to be restored to usable condition are, by definition, not directly usable in on-going manufacturing processes and consequently remained subject to regulation. Id. at 522. EPA acknowledged only one exception to this principle -- where a true closed loop reclamation process existed and there was no element of disposal or storage involved. Id. It reached a similar conclusion regarding by-products which are listed as hazardous wastes. Id. at 520-21, 523.

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[13] We acknowledge that these proposed rules have not yet been finalized, although EPA anticipates issuing a final rule in the near future. Nonetheless, they give evidence of the interpretation which the EPA put on AMC I and the recycling regulations and provide Recticel with ample notice of this interpretation. It is offered not as binding authority, but for its persuasive value which is at least as great as the many internal EPA interpretive memoranda relied upon by defendants in their various motions.

Finally, the EPA expressly considered and rejected an interpretation of AMC I that would exempt from regulation all on-site recycling activities, including those in an open loop. Id. at 524. In doing so, one of the examples EPA gave as a regulable recycling activity (the distillation of spent degreasing solvent) is closely parallel to the situation at Recticel. Both involve removal of the spent solvent from the production process to an on-site reclamation unit (distillation in the example, filtration in this case) and regeneration of the solvent into a usable form. In both circumstances a "useless waste [is] restored through treatment to a usable condition." Id. Accordingly, the EPA interpretive effort fully supports the application of regulations to activities at Recticel. Cf. AMC I, 824 F.2d 1187 n.14 (acknowledging that waste which must be distilled prior to reuse is "consistent with an everyday reading of the term 'discarded'").

(iii) Case Law -- Finally, the case law on the recycling issue, though not directly on point, is supportive of the position the United States advocates. In American Petroleum Institute v. EPA, 906 F.2d 729 (D.C. Cir. 1990)("API"); and American Mining Congress v. EPA, 907 F.2d 1179 (D.C. Cir. 1990)("AMC II") the D.C. Circuit elaborated on the meaning of EPA's recycling regulations.

First, in API the court was faced with EPA's decision not to regulate the land disposal of slag which results from the treatment of K061 dust. EPA, relying on AMC I, concluded that K061 was not

waste once it entered the reclamation facility and that it therefore could not regulate the slag derived from that waste. Citing language from AMC I[14] the court reversed. It concluded that reclamation of K061 was not part of an "'ongoing manufacturing or industrial process' 'within the generating industry'" but, rather "part of a mandatory waste treatment plan prescribed by EPA." 906 F.2d at 741 (emphasis in original). The court concluded that EPA had discretion to regulate K061 waste as solid waste, if it deemed that consistent with RCRA.[15]

An identical interpretation was adopted by the court in AMC II. The mining industry challenged regulations relating to six wastes generated by primary metal smelters. Three of these wastes

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[14] The AMC I court said, in a passage which the court itself emphasized, that

> [t]o fulfill these purposes EPA need not regulate 'spent' materials that are recycled and reused in an ongoing manufacturing or industrial process. These materials have not yet become part of the waste disposal problem; rather, they are destined for beneficial reuse or recycling in a continuous process by the generating industry itself.

824 F.2d at 1186 (emphasis in original) (footnote omitted).

[15] The court also emphasized that EPA's regulation could extend to processes which produced something of value, namely, reclaimed metals. It expressly disavowed "a reading of the statue that would prevent EPA from regulating processes for extracting valuable products from discarded materials that qualify as hazardous waste." Id. at 741 n.16 (emphasis in original), citing, AMC I, 824 F.2d at 1187 n.14. Thus, the permissible definition of solid waste turns on whether it may be deemed discarded prior to reuse, not on what the product of the reuse is. Any discarded material, even if beneficially reused, has "become part of the waste disposal problem," AMC I, 824 F.2d at 1186, and is therefore subject to regulation.

were sludges generated in impoundments from the collection of wastewater during smelting operations. Typically, these sludges have comparatively high metals content and they may, in certain circumstances, be reclaimed. The court read AMC I to exclude from regulation "only materials 'destined for immediate reuse in another phase of the industry's production process' . . . and that 'have not yet become part of the waste disposal problem'" AMC II, 907 F.2d at 1186 (emphasis in original) (footnote omitted), quoting AMC I, 824 F.2d at 1185, 1186; see also, AMC I, 824 F.2d at 1184 ("materials retained for immediate reuse"); id. at 1190 (materials "passing in a continuous stream or flow from one production process to another"); cf. API, 906 F.2d at 741 (asserting that waste which must be treated prior to reuse has been discarded).[16] The court expressly rejected the contention that "potential reuse of a material prevents the agency from classifying it as 'discarded'." AMC II, 907 F.2d at 1186, citing, API, 906 F.2d at 740-41.

In the context of these decisions, the standards by which a waste may be excluded from regulation as a "solid waste" are very limited and quite clear. The waste in question must be: 1) recycled and reused in an immediate, ongoing, or continuous

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16 "Treatment" means any method, technique or process . . . designed to change the physical . . . character or composition of any hazardous waste so as to . . . render such waste . . . amenable to recovery." 42 USC 6903(27). Even if the cut and drain method is not reprocessing, it is a physical process (that is, filtration) which renders the waste amenable to recovery. Hence, the charges of Count Five of the indictment, relating to treatment, may not be dismissed, even if the Court completely accepts defendants factual and legal premises.

production process; and 2) destined for a beneficial reuse.

The situation presented by defendants' factual proffer is virtually indistinguishable from that identified in AMC II. There, as here, the waste at issue was temporarily accumulated in separate containers (storage ponds rather than drums) for a period of time prior to reclamation in the industrial process. They were not retained for immediate reuse, nor did they pass in a continuous stream or flow from one production process to another. They were not necessarily destined for reuse and, as AMC II and API make clear, the mere potential for reuse did not prevent EPA from classifying the waste as discarded. AMC II, 907 F.2d at 1186; API, 906 F.2d at 740-41. Similarly, Recticel's reprocessing (even under their own factual proffer) was neither immediate, ongoing, nor part of a continuous production process.

3) Summary -- As the language of the regulations make clear, defendants' waste, even under their own factual premises, is reclaimed spent material and byproduct. Other regulations, interpretive language and case law support this conclusion.

Such waste is clearly defined as solid waste in Part 261, Table 1 and the parallel Tennessee rules. Since the waste is spent material and by-product which is reclaimed, even under defendants' factual proffer, their motion to dismiss is wholly without merit and should be denied.[17]

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17 Because we believe defendants' arguments legally insufficient, the United States intends, at the charging conference, to ask the Court to reject any theory of defense

Respectfully Submitted,

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X. Attachments

4. Table 1 (p. 29 of regs)

5. RCRA Implementation Study Update
   a. Appx A - 2 page case law summary
   b. Appx E - memo on sham recycling

6. 2 Sham FR cites

7. Exhibit 1 - worksheet from guidance manual - p. 1-25.

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instructions proffered by defendants premised on their alleged "recycling" activities.

United States Environmental Protection Agency | Solid Waste and Emergency Response (OS-305) | EPA530-R-92-021 July 1992

EPA

RCRA Implementation Study Update:

The Definition of Solid Waste

The Circuit Court of Appeals for the District of Columbia Circuit has addressed the regulatory definition of solid waste in three principal cases.

The first case, American Mining Congress v. EPA (AMC I), 824 F. 2d 1177 (D.C. Cir. 1987), held that EPA's jurisdiction did not extend to some cases involving continuous processing of a material by either a single plant or possibly within a generating industry. 824 F. 2d at 1193. EPA's interpretation of that decision can be found in the January 8, 1988 proposed revisions to the definition of solid waste (53 FR 519).

Decisions in two more recent cases further clarified the scope of the Agency's jurisdiction. The first case is American Petroleum Institute v. EPA (API), 906 F. 2d 729 (D.C. Cir. 1990). That case addressed EPA's authority to regulate an air pollution control dust from primary steel production in electric arc furnaces (K061), when the dust is used as a feedstock in a secondary industrial process. The case also addresssed EPA's authority to regulate the residue from the secondary process.

In the First Third Land Disposal Restrictions Rule (53 FR 33162-64 and 31198-99) EPA had indicated that RCRA jurisdiction did not apply to the K061 waste when placed in a high temperature metals recovery unit, because the waste was not significantly different from the analogous raw materials that would otherwise be placed in the furnace. The K061 waste was considered "indigenous" to the high temperature metals recovery unit. Under the Agency's approach, the K061 waste would lose its status as a regulated hazardous waste when it entered the furnace; therefore, the residues from the reclamation process would not be derived from the treatment of a hazardous waste. Thus, a treatment standard of "no land disposal" was promulgated for the residues from high temperature metals recovery of K061 waste.

The API court, however, held that the recycling was not conducted as part of an "ongoing manufacturing or industrial process" within "the generating industry. . . ", and therefore could be within the scope of Subtitle C. The first American Mining Congress decision thus did not apply. Since the only reason the Agency had given for not providing a treatment standard rested on an unduly restrictive view of its jurisdiction, the court remanded the issue with instructions that the first American Mining Congress decision did not bar regulation of the slag from the recycling process. 906 F. 2d at 940-42.

The second recent case is American Mining Congress v. EPA AMC II, 907 F. 2d 1179 (D.C. Cir. 1990). The court there found that EPA's assertion of RCRA jurisdiction over certain mineral processing wastes was correct, and rejected petitioners' claim that the materials were not "discarded". The petitioners claimed that sludges from wastewaters that are stored in surface

impoundments and that may at some time in the future be reclaimed are not "discarded". The court rejected this claim, stating that the holding of AMC I was that "only materials that are destined for immediate reuse in another phase of the industry's ongoing production process and and that have not yet become part of the waste disposal problem" are not solid wastes. 907 F. 2d at 1186. Moreover, the court held that the term "discarded" in the statutory definition of solid waste was ambiguous and therefore within the Agency's discretion to interpret.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 26 1989

OFFICE OF
SOLID WASTE AND EMERGENCY RESPO

MEMORANDUM

SUBJECT: F006 Recycling

FROM: Sylvia K. Lowrance, Director
Office of Solid Waste (OS-300)

TO: Hazardous Waste Management Division Directors
Regions I-X

It has come to the attention of EPA Headquarters that many of the Regions and authorized States are being requested to make determinations on the regulatory status of various recycling schemes for F006 electroplating sludges. In particular, companies have claimed that F006 waste is being recycled by being used as: (1) an ingredient in the manufacture of aggregate, (2) an ingredient in the manufacture of cement, and (3) feedstock for a metals recovery smelter. The same company may make such requests of more than one Region and/or State. Given the complexities of the regulations governing recycling vs. treatment and the definition of solid waste, and the possible ramifications of determinations made in one Region affecting another Region's determination, it is extremely important that such determinations are consistent and, where possible, coordinated.

Two issues are presented. The first issue is whether these activities are legitimate recycling, or rather just some form of treatment called "recycling" in an attempt to evade regulation. Second, assuming the activity is not sham recycling, the issue is whether the activity is a type of recycling that is subject to regulation under sections 261.2 and 261.6 or is it excluded from our authority.

With respect to the issue of whether the activity is sham recycling, this question involves assessing the intent of the owner or operator by evaluating circumstantial evidence, always

a difficult task. Basically, the determination rests on whether the secondary material is "commodity-like." The main environmental considerations are (1) whether the secondary material truly has value as a raw material/product (i.e., is it likely to be abandoned or mismanaged prior to reclamation rather than being reclaimed?) and (2) whether the recycling process (including ancillary storage) is likely to release hazardous constituents (or otherwise pose risks to human health and the environment) that are different from or greater than the processing of an analogous raw material/product. The attachment to this memorandum sets out relevant factors in more detail.

If the activity is not a sham, then the question is whether it is regulated. If F006 waste is used as an ingredient to produce aggregate, then such aggregate would remain a solid waste if used in a manner constituting disposal (e.g., road-base material) under sections 261.2(c)(1) and 261.2(e)(2)(i) or if it is accumulated speculatively under section 261.2(e)(2)(iii). Likewise, the F006 "ingredient" is subject to regulation from the point of generation to the point of recycling. The aggregate product is, however, entitled to the exemption under 40 CFR 266.20(b), as amended by the August 17, 1988, Land Disposal Restrictions for First Third Scheduled Wastes final rule (see 53 FR 31197 for further discussion). However, if the aggregate is not used on the land, then the materials used to produce it would not be solid wastes at all, and therefore neither those materials nor the aggregate would be regulated (see section 261.2(e)(1)(i)).

Likewise, cement manufacturing using F006 waste as an ingredient would yield a product that remains a solid waste if it is used in a manner constituting disposal, also subject to section 266.20(b). There is an additional question of whether the cement kiln dust remains subject to the Bevill exclusion. In order for the cement kiln dust to remain excluded from regulation, the owner or operator must demonstrate that the use of F006 waste has not significantly affected the character of the cement kiln dust (e.g., demonstrate that the use of F006 waste has not significantly increased the levels of Appendix VIII constituents in the cement kiln dust leachate). [**NOTE: This issue will be addressed more fully in the upcoming supplemental proposal of the Boiler and Industrial Furnace rule, which is pending Federal Register publication.**]

For F006 waste used as a feedstock in a metals recovery smelter, the Agency views this as a recovery process rather than use as an ingredient in an industrial process and, therefore, considers this to be a form of treatment that is not currently regulated (see sections 261.2(c) and 261.6(c)(1)). Furthermore, because this is a recovery process rather than a production process, the F006 waste remains a hazardous waste (and must be

managed as such prior to introduction to the process), and the slag from this process would normally be considered a "derived from" F006 waste. However, for primary smelters, the slag may be considered subject to the Bevill exclusion provided that the owner or operator can demonstrate that the use of F006 waste has not significantly affected the hazardous constituent content of the slag (i.e., make a demonstration similar to the one discussed above for the cement kiln dust). [NOTE: In the supplemental proposal of the Boiler and Industrial Furnace rule noted above, the Agency will be proposing a definition of "indigenous waste" based on a comparison of the constituents found in the waste to the constituents found in an analogous raw material. Should the F006 waste meet the definition of an "indigenous waste," the waste would cease to be a waste when introduced to the process and the slag would not be derived from a hazardous waste.]

Also, you should be aware that OSW is currently reevaluating the regulations concerning recycling activities, in conjunction with finalizing the January 8, 1988 proposal to amend the Definition of Solid Waste. While any major changes may depend on RCRA reauthorization, we are considering regulatory amendments or changes in regulatory interpretations that will encourage on-site recycling, while ensuring the protection of human health and the environment.

Headquarters is able to serve as a clearinghouse to help coordinate determinations on whether a specific case is "recycling" or "treatment" and will provide additional guidance and information, as requested. Ultimately, however, these determinations are made by the Regions and authorized States. Attached to this memorandum is a list of criteria that should be considered in evaluating the recycling scheme. Should you receive a request for such a determination, or should you have questions regarding the criteria used to evaluate a specific case, please contact Mitch Kidwell, of my staff, at FTS 475-8551.

Attachment

CRITERIA FOR EVALUATING WHETHER A WASTE IS BEING RECYCLED

The difference between recycling and treatment is sometimes difficult to distinguish. In some cases, one is trying to interpret intent from circumstantial evidence showing mixed motivation, always a difficult proposition. The potential for abuse is such that great care must be used when making a determination that a particular recycling activity is to go unregulated (i.e., it is one of those activities which is beyond the scope of our jurisdiction). In certain cases, there may be few clear-cut answers to the question of whether a specific activity is this type of excluded recycling (and, by extension, that a secondary material is not a waste, but rather a raw material or effective substitute); however, the following list of criteria may be useful in focusing the consideration of a specific activity. Here too, there may be no clear-cut answers but, taken as a whole, the answers to these questions should help draw the distinction between recycling and sham recycling or treatment.

(1) Is the secondary material similar to an analogous raw material or product?

- Does it contain Appendix VIII constituents not found in the analogous raw material/product (or at higher levels)?
- Does it exhibit hazardous characteristics that the analogous raw material/product would not?
- Does it contain levels of recoverable material similar to the analogous raw material/product?
- Is much more of the secondary material used as compared with the analogous raw material/product it replaces? Is only a nominal amount of it used?
- Is the seondary material as effective as the raw material or product it replaces?

(2) What degree of processing is required to produce a finished product?

- Can the secondary material be fed directly into the process (i.e., direct use) or is reclamation (or pretreatment) required?
- How much value does final reclamation add?

(3) What is the value of the secondary material?

- o Is it listed in industry news letters, trade journals, etc.?
- o Does the secondary material have economic value comparable to the raw material that normally enters the process?

(4) Is there a guaranteed market for the end product?

- o Is there a contract in place to purchase the "product" ostensibly produced from the hazardous secondary materials?
- o If the type of recycling is reclamation, is the product used by the reclaimer? The generator? Is there a batch tolling agreement? (Note that since reclaimers are normally TSDFs, assuming they store before reclaiming, reclamation facilities present fewer possibilities of systemic abuse).
- o Is the reclaimed product a recognized commodity? Are there industry-recognized quality specifications for the product?

(5) Is the secondary material handled in a manner consistent with the raw material/product it replaces?

- o Is the secondary material stored on the land?
- o Is the secondary material stored in a similar manner as the analogous raw material (i.e., to prevent loss)?
- o Are adequate records regarding the recycling transactions kept?
- o Do the companies involved have a history of mismanagement of hazardous wastes?

(6) Other relevant factors.

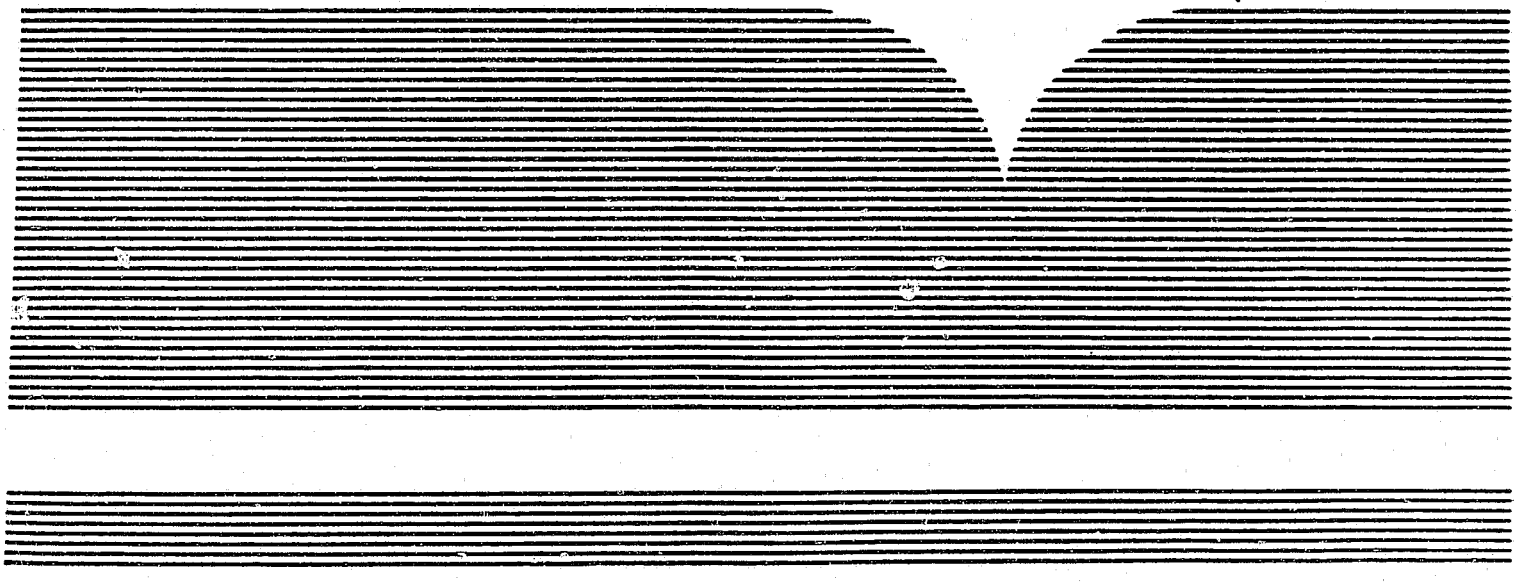
- o What are the economics of the recycling process? Does most of the revenue come from charging generators for managing their wastes or from the sale of the product?
- o Are the toxic constituents actually necessary (or of sufficient use) to the product or are they just "along for the ride."

These criteria are drawn from 53 FR at 522 (January , 1988); 52 FR at 17013 (May 6, 1987); and 50 FR at 638 (January 4, 1985).

GUIDANCE MANUAL ON THE RCRA REGULATION OF RECYCLED HAZARDOUS WASTES

Industrial Economics, Incorporated
Cambridge, MA

Mar 86



U.S. DEPARTMENT OF COMMERCE
National Technical Information Service
NTIS

Exhibit 1

Description of Activity:

Questions:

1. Is the material that is recycled a secondary material?

   ( ) yes ( ) no

   If yes, go on to question (2).
   If no, the material is not a solid waste.

2. Is the material hazardous? (A material is hazardous if it is listed under 40 CFR 261.30-33 or exhibits one of the characteristics of a hazardous waste given in 40 CFR 261.20-24, and is not specifically excluded from the definition of hazardous waste under 40 CFR 261.4(b)?

   ( ) yes ( ) no

   If yes, go on to question (3).
   If no, the material is not a solid waste.

3. Is the material specifically excluded from the definition of solid waste under 40 CFR 261.4(a) (see the list in Exhibit 3)?

   ( ) yes ( ) no

   If yes, the material is not a solid waste.
   If no, go on to question (4).

4. Is the material inherently waste-like (see the list in Exhibit 4?.

   ( ) yes ( ) no

   If yes, the material is a solid waste. See applicable regulations, below..
   If no, go on to question (5).

5. Does the activity serve a beneficial use?

   ( ) yes ( ) no

   If yes, go on to question (6).
   If no, the activity is not recycling, and the material is a solid waste. See applicable regulations, below.

6. Is there a feasible means for recycling the waste?

( ) yes ( ) no

If yes, go on to question (6a).
If no, go on to question (6b).

6a. Is at least 75 percent of the material recycled within one calendar year?

( ) yes ( ) no

If yes, go on to question (7).
If no, go on to question (6b).

6b. Is the material a commercial chemical product that exhibits a hazardous waste characteristic or is listed as a hazardous waste in 40 CFR 261.33?

( ) yes ( ) no

If yes, go on to question (7).
If no, the practice is speculative accumulation, and the material is a solid waste. See applicable regulations, below.

7. Is the material placed on the ground or used in a product that is placed on the ground?

( ) yes ( ) no

If yes, go on to question (7a).
If no, go on to question (8).,

7a. Is the material a commercial chemical product that exhibits a hazardous waste characteristic or is listed in 40 CFR 261.33 that is produced for application to the land?

( ) yes ( ) no

If yes, the material is not a solid waste.
If no, the activity results in use constituting disposal and the material is a solid waste. See applicable regulations, below.

8. Is the material used as a fuel or used to produce a fuel?

( ) yes ( ) no

If yes, go on to question (8a).
If no, go on to question (9).

8a. Is the material a commercial chemical produce that exhibits a hazardous waste characteristic or is listed in 40 CFR 261.33 and that is produced to be burned as fuel?

( ) yes ( ) no

If yes, the material is not a solid waste.
If no, the activity results in burning for energy recovery, and the material is a solid waste. See applicable regulations, below.

9. Is the material used or reused

( ) as an ingredient in an industrial process to make a new product without intermediate reclamation (regeneration or recovery of materials),

( ) as an effective substitute for commercial products in a particular function or application, or

( ) As a substitute for raw material feedstock in the primary production process from which it was generated, without being first reclaimed (a closed-loop process)?

If any of the above apply, the activity is use or reuse, and the material is not a solid waste.
If none of the above apply, go on to question (10).

10. Is the material regenerated or are materials with value recovered from the original material?

( ) yes ( ) no

If yes, the activity is reclamation. Go on to question (10a).
If no, please review the definition of activities in this manual and reconsider your answers, or call the RCRA hotline for assistance.

10a. Is the material

( ) a hazardous waste listed under 40 CFR 261.31 or 261.33 (this provision <u>excludes</u> commercial chemical products, which are listed under 40 CFR 261.33),

( ) a spent material exhibiting one of the characteristics of a hazardous waste given in 40 CFR 261.20-24, or

( ) a scrap metal?

If any of the above apply, the material is a solid waste. See applicable regulations, below.
If none of the above apply, go on to question (10b).

10b. Is the material

( ) either a sludge or a by-product that exhibits one of the characteristics of a hazardous waste given in 40 CFR 261.20-24, and that is not listed under 40 CFR 261.31-32, or

( ) a commercial chemical product listed under 40 CFR 261.33?

If any of the above apply, the material is not a solid waste.

If none of the above apply, please review the definitions of activities in this manual and reconsider your answers, or call the RCRA Hotline for assistance.

Applicable Regulations

1. Is the process exempt from regulation (see the list in Exhibit 6)?

( ) yes ( ) no

If yes, the material is not regulated.
If no, the material is regulated. See item (2), below.

COPY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
KNOXVILLE

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. CR-2-92-78
	)	Jarvis/Murrian
RECTICEL FOAM CORPORATION (also known as Foamex L.P.), STEVE MURPHY, CHET MEYERS, O. E. ("GENE") FOX, ELDON HALL, JIM VAN HOOSER and STEVE CANSLER	)	

EXCERPT

RESPONSE

Comes now the United States of America, by and through the United States Attorney for the Eastern District of Tennessee, and in response to Recticel's "Motion To Dismiss Counts 1-12 On The Ground That The Materials Described In The Indictment Do Not Constitute A Hazardous Waste"[1] states:

Defendants' argument is flawed for two reasons. First, it assumes a factual situation which is not yet established. The United States disputes many aspects of defendants' self-serving factual description. Second, even if one assumes, arguendo, that the facts alleged by defendants are true, the legal conclusions drawn therefrom by defendants are incorrect. In response the United States makes two arguments: 1) As the indictment is facially sufficient and factual issues remain in dispute, the Court must deny this motion pending factual development at trial; 2) Since defendants' legal argument is without merit their motion may be denied at this juncture even if one assumes as true the facts asserted by defendants.

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[1] No defendant having objected to this motion it is deemed adopted by all defendants.

I. Regulatory And Factual Background

As an introduction to this issue, we begin by summarizing the applicable regulations and case law. Thereafter, we provide a responsive factual summary which contradicts defendants' submission in several key respects.

A. The Statutory and Regulatory Framework of RCRA

The Resource Conservation and Recovery Act ("RCRA") was added to the Solid Waste Disposal Act in 1976. 42 U.S.C. 6901 through 6992. The statute established a "cradle to grave" regulatory system to monitor and control the generation, transportation, treatment, storage and disposal of hazardous waste. Regulations promulgated by the Environmental Protection Agency ("EPA") pursuant to RCRA define hazardous waste, set treatment, storage, transportation and disposal requirements and implement a permit system for facilities handling hazardous waste. 40 CFR Parts 260 through 272; Tenn. Rules 1200-1-11-.01 to 1200-1-11-.10. The stated purpose of RCRA is the protection of human health and the environment. 42 U.S.C. 6902.

A business or facility that generates, transports, treats, stores or disposes of hazardous waste must notify EPA of these activities. Once notified, EPA must issue an identification number to the facility. It is illegal for a facility to treat, store, dispose of, transport or offer hazardous waste for transport without an EPA identification number. E.g., 40 CFR 262.12 and 264.11; Tenn. Rule 1200-1-11-.03(1)(c)(1) and -.06(2)(b).

In order to legally treat, store or dispose of hazardous waste, a facility must obtain a permit from the EPA or an

authorized state program.[2] These permits are developed by EPA or the state for each individual facility. The requirements in each permit are designed for a particular facility and tailored to the specific types of hazardous waste the facility is to handle.

Once a timely RCRA hazardous waste treatment, storage and disposal ("TSD") permit application has been submitted, the facility qualifies for interim status. 42 U.S.C. 6925(e). Interim status allows the facility to operate pending the approval of the permit application under standards contained in 40 CFR Part 265. Interim status generally continues until the permit is granted or denied, unless an operator fails to meet certain minimum statutory conditions.

It is illegal for a facility to treat, store or dispose of hazardous waste without a permit or interim status. It is illegal to transport hazardous waste to a facility not specifically permitted to accept it or which does not have interim status . 42 U.S.C. 6928(d). See United States v. McDonald and Watson Oil Co., 933 F.2d 35 (1st Cir. 1991).

There are two methods of identifying hazardous waste under RCRA. Hazardous wastes are defined by a particular

[2] The Resource Conservation and Recovery Act allows EPA to authorize a state to implement its own hazardous waste program, provided the state program is equivalent to and no less stringent than the federal program. 42 U.S.C. 6926. The State of Tennessee received RCRA enforcement authority on February 5, 1985. We expand on the significance of this in Section II.B.3 of this response.

characteristic,[3] or by listing. In this case, the government has charged the defendants with violations involving listed hazardous wastes.

Listed hazardous wastes are solid wastes[4] specifically named by EPA as hazardous wastes in the Code of Federal Regulations. Listed hazardous wastes include spent[5] material such as solvents and solvent blends used for degreasing, wastes generated in particular processes and spilled or otherwise discarded chemicals not used for their intended purpose. 40 CFR 261.31, 261.32, 261.33; Tenn. Rules 1200-1-11-.02(4)(b), -.02(4)(c), -.02(4)(d).

Relevant to this case, a waste may be hazardous if, using the test method specified in the regulations, a representative sample contains a halogenated solvent. For example, F002 is a listed waste which is defined as:

> The following spent halogenated solvents: . . . Methylene Chloride, 1,1,1,-Trichloroethane [and] Trichlorofluromethane; all spent solvent mixtures/blends containing, before use, a

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[3] Characteristic hazardous wastes are substances that are ignitable, corrosive, reactive or toxic. 40 CFR 261.21 to 261.24; Tenn. Rules 1200-1-11-.02(3)(b) to -.02(3)(e).

[4] "Solid waste" is defined as any discarded material not specifically excluded from that category under the regulations. 40 CFR 261.2(a)(1); Tenn. Rules 1200-1-11-.02(1)(b)1. Defendants have elsewhere challenged the characterization of the waste in question as a "solid waste." See Motion To Dismiss Counts One and Three Through Six On The Grounds That The Materials At Issue Are Not A Solid Waste Or, In The Alternative, That The Relevant Regulations Are Void For Vagueness As Applied In This Case (hereafter referred to as the "Solid Waste Motion"). We have addressed that contention in a separate response.

[5] A "spent material" is any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing. 40 CFR 261.1(c)(1); Tenn. Rule Section 1200-1-11-.02(1)(a)3(i).

total of ten percent or more (by volume) of one or more of the above halogenated solvents.

40 CFR 261.31; Tenn. Rules 1200-1-11-.02(4)(b). A waste may also be hazardous if it is identified as a discarded commercial chemical product. Two such hazardous wastes are waste U080, Methylene Chloride and waste U223, Toluene Diisocyanate. 40 CFR 261.33; Tenn. Rules 1200-1-11-02(4)(d). These "F" and "U" listings are sometimes called "subpart D" listings, after the subpart of Section 261 in which they are found.

B. Regulatory and Judicial Background of the Hazardous Waste Definitions and the Mixture Rule

The definition of a hazardous waste is not based solely on the listings of the waste. A broad definition section incorporates these lists. 40 CFR 261.3; Tenn. Rules 1200-1-11-.02(1)(c). To begin with, the regulations make clear that a solid waste becomes hazardous waste as soon as it meets the criteria for being listed in subpart D. 40 CFR 261.3(b)(1); Tenn. Rules 1200-1-11-.02(1)(c)(2)(i). Moreover, the regulations provide that: "Unless and until it meets the criteria of paragraph (d) . . . [a] hazardous waste will remain a hazardous waste." 40 CFR 261.3(c)(1)(emphasis supplied); see also Tenn. Rules 1200-1-11-.02(1)(c)(3)(i). Then, in the only provision for "exiting" the regulatory structure, the regulations provide that:

> Any solid waste described in paragraph (c) . . . is not a hazardous waste if . . . [i]n the case of a waste which is listed waste under subpart D, contains a waste listed under subpart D or is derived from a waste listed in subpart D, it also has been excluded . . . under 260.20 and 260.22 of this chapter.

40 CFR 261.3(d)(2);[6] see also Tenn. Rules 1200-1-11-.02(1)(c)(4)(ii). These general rules, which embody a "continuing jurisdiction" over hazardous waste make plain a single overarching principle -- that hazardous waste remains hazardous until properly treated or disposed of. One cannot simply avoid regulation by combining the waste with other materials.

The regulatory definition of hazardous waste also elaborates on this principle, specifying that hazardous waste includes the entire "mixture" of substances which are "mixtures" of hazardous waste and non-hazardous solid waste. 40 CFR 261.3(a)(2)(i), (iii) and (iv); Tenn. Rules 1200-1-11-.02(1)(c)(1)(ii). Specifically, in the part applicable to Recticel's waste, the federal regulation states that "A solid waste . . . is a hazardous waste if . . [i]t is a mixture of solid waste and one or more hazardous wastes listed in subpart D." 40 CFR 261.3(a)(2)(iv). Thus, the "mixture rule" is, in effect, a rule of inclusion -- it commands a generator of hazardous waste to treat the entire mixture of solid waste as hazardous after mixing the hazardous waste with other non-hazardous solid wastes. In other words, it makes the solid waste portion of the mixture legally "hazardous." Tennessee has adopted an identically worded mixture rule. Tenn. Rule 1200-1-11-.02(1)(c)(1)(ii)(IV).

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[6] Sections 260.20 and 260.22 and their parallel State provisions, allow for de-listing by petition -- that is, by express request to and authorization from either EPA or the State of Tennessee. They are not applicable here.

In Shell Oil v. EPA, 950 F.2d 741 (D.C. Cir. 1991), the mixture rule was challenged both on procedural and substantive grounds. Pretermitting the substantive issues, id. at 752, the court held that in adopting the mixture rule, EPA had not complied with the notice and comment provisions of the Administrative Procedures Act. The Court therefore vacated and remanded the federal mixture rule. Subsequently, in United States v. Goodner Brothers Aircraft, Inc., 966 F.2d 380 (8th Cir. 1992), the Eighth Circuit concluded that the effect of Shell Oil was to void the federal mixture rule ab initio.

Following these decisions, the Administrator of the EPA repromulgated the mixture rule, 57 Fed. Reg. 7630 (1992), concluding that Shell Oil did not void the mixture rule ab initio.

C. Factual Background

The United States proffers that it will establish the following facts at trial:[7] Foam production involved the mixing of several chemicals transported through separate lines to a foam production head. The chemical mixture was then sprayed onto a conveyer belt where it hardened into foam buns (at Plant One) or was sprayed directly into a mold (at Plant Three). Methylene Chloride (MeCl), 1-1-1 Trichloroethane ("TCA") and Trichlorofluro-

[7] The mere fact that defendants required 5 pages to set forth their "undisputed" facts demonstrates the prematurity of their motion. This Court cannot rule on this issue without establishing a firmer factual basis than that provided by defendants. The United States' response is not designed to provide a comprehensive factual recital of its evidence, since we deem that impossible at this juncture, but merely to provide a working framework within which to argue this motion.

methane ("TCF") were used as "blowing agents" to create the foam's loft and density. Toluene Diisocyanate (TDI) was used as a reactant in the formulation as an ingredient in the chemical reaction to produce foam. The blowing agents do not, themselves, react with the foam producing chemicals -- they function principally as evaporants which, during production, create microscopic air-spaces that effect the softness or hardness of the foam produced.

There are two sources of hazardous waste in the process -- waste foam and chemicals from the production head ("flush") and waste chemicals from the filters in the chemical lines which feed the production head.

1) Flush -- The production heads regularly became clogged with foam pieces, as the chemical mixture often hardened into foam while in the mixing head. Different chemicals were used to clean the production head and remove the clogs, most commonly MeCl and a nonhazardous substance known as Polyol[8] -- though the other freon chemicals, TCA and TCF were sometimes used.[9] At Plant Number One, Polyol was the "company preferred" cleaning agent -- however, it was much less effective than MeCl, and MeCl was typically used between 10% and 50% of the time. Because each cleaning of the production head (which typically occurred 3-4 times per shift)

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[8] Polyol is, along with TDI, one of the primary process ingredients in the production of foam.

[9] As defendants acknowledge (Memorandum at 9) at Plant Three the flush was always comprised solely of MeCl. No other chemical was ever used.

involved the use of 5-10 gallons of flushing agent, the residue from numerous cleanings would be collected in a single 55-gallon drum. The drum sat below the production line until it was filled and moved outdoors. By slight contrast, at Plant Number Three, where only MeCl was used as a cleaning agent, the waste MeCl and foam was collected in cardboard boxes before disposal.

The United States will establish that the reason MeCl was more effective than Polyol as a cleaning agent was because of MeCl's solvent properties -- it acted chemically to solubilize (that is, dissolve) the clogging foam pieces and carry them to the receiving drums. By contrast, Polyol's cleansing properties will be proven to be solely mechanical -- it cleaned the mixing head merely through the force by which it pushed through the mixing head.[10]

The United States' evidence will show that MeCl (and TCA and TCF) were used for two distinct purposes -- as process ingredients known as blowing agents and as solvents for cleaning purposes. Conceptually, defendants might as well have used two different chemicals. Because the applicable regulations define the hazardous waste based primarily on their means of generation -- that is, the way in which they are used -- this distinction is directly germane to the question before this Court. Yet it is one which defendants' factual recitation completely ignores.

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[10] The process we describe herein is, roughly, congruent with that which defendants refer to as flush. They also identify two other waste streams -- pre-flush and drainage. The United States does not contend that these waste streams are hazardous waste -- even though they are accumulated in the same drums. We explain this distinction more fully below in our discussion of the spent solvent listing.

2) Filter Waste -- In addition to waste chemicals derived from the cleaning of the production head, wastes were also created when unused chemicals were removed from the production line prior to use during the course of cleaning the filters in the feed lines. The testimony will be that these pure waste chemicals were routinely disposed of by dumping the chemicals into the 55-gallon drums situated below the production line.[11]

Eventually waste foam and liquid chemicals from the production head and filters would be "reprocessed" and/or discarded in a garbage dumpster for disposal in a non-hazardous waste landfill.

II. Argument

The precise issue before this court is how defendants' spent solvent waste should be characterized under the regulatory definition of hazardous waste. Contrary to defendants' argument the proper characterization of the waste foam and chemicals collected from the production head in 55-gallon drums is not dependent on Shell Oil Co. v. EPA, 950 F.2d 741 (D.C. Cir. 1991), United States v. Goodner Brothers Aircraft, Inc., 966 F.2d 380 (8th Cir. 1992) or the "mixture rule." After Shell Oil and Goodner Brothers, defendants contend the federally enacted "mixture rule" (40 CFR § 261.3(a)(2)(iv)) is not applicable to define hazardous waste for the purposes of criminal prosecution. Recticel thus seeks to exclude the spent solvent waste generated at Plants 1, 2,

[11] Defendants' motion completely ignores this fourth waste stream that was a source of waste. As we explain more fully below, it is this waste stream that is the basis for all charges relating to the "U" listed wastes.

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and 3 from regulation as mixture rule waste that no longer meets the definition of hazardous waste.

For the reasons that follow, defendants are wrong.[12] We begin by demonstrating that defendants' motion is premature and cannot be decided at this juncture. Thereafter, we discuss why defendants' legal argument is flawed. Neither Shell Oil, Goodner Brothers, nor the mixture rule is directly applicable to this case. As we demonstrate, this Court should deny defendants' motion even on the factual basis they proffer.

A. Sufficiency Of The Indictment

When a defendant challenges his indictment, the court will liberally construe the indictment in favor of its sufficiency, and unless there is prejudice, there will be no reversal unless the indictment cannot be reasonably held to construe a crime. United States v. Vanover, 888 F.2d 1117, 1120 (6th Cir. 1989). An indictment is sufficient "if it, first, contains the elements of the offense charged and fairly informs the defendant of the charges against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117 (1974); see also United States v. Mahoney, 949 F.2d 899, 903 (6th Cir. 1991); Vanover, 888 F.2d at 1120; United States v. Sturman, 951 F.2d 1466, 1478 (6th Cir. 1991)(stating that both the Fifth and Sixth

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[12] Defendants repeatedly assert that the United States has "shifted grounds" in its prosecution and is now attempting to rescue this case with "post-hoc" arguments. This bald assertion is made without a scintilla of evidence and merits no response.

Amendment requirements are met if the indictment satisfies the two elements stated in Hamling).

As a general rule, an indictment is sufficient if it sets forth the wording of the statute that adequately states the elements of the charged offense. See Hamling, 418 U.S. at 117; United States v. Paulino, 935 F.2d 739, 750 (6th Cir. 1991). Under the standards of this Circuit, the indictment clearly alerts the defendants to the charges against them if it contains "a plain, concise and definite written statement of the essential facts constituting the offense charged." Mahoney, 949 F.2d at 904. This the indictment provides.[13]

The indictment is sufficient -- and that is all it need be. "The use of a 'bare bones' information -- that is one employing the statutory language alone -- is quite common and entirely permissible so long as the statute sets forth fully, directly and clearly all essential elements of the crime to be punished." United States v. Crow, 824 F.2d 761, 762 (9th Cir. 1987); accord Miller v. Stagner, 757 F.2d 988, 994 (9th Cir. 1985); see also United States v. Tobin Packing Co., 362 F. Supp. 1127, 1129 (N.D. N.Y. 1973) (Refuse Act indictment consisting of general allegation that corporate defendant caused refuse to be deposited in navigable waters was sufficient). Indeed, for purposes of judging the sufficiency of an indictment, "[t]he allegations of the indictment

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[13] Indeed, defendants' principal complaint about the indictment's language is that it contains too much information. See Recticel's "Motion To Strike Gratuitous Lecture On The Law" and "Motion To Dismiss Count One Of The Indictment."

- . . -

are presumed to be true." United States v. Buckley, 689 F.2d 893, 897 (9th Cir. 1982).

Apparently, defendants contest the United States theory of liability, under which it alleges the waste in question is hazardous. But, the government's theory of liability is not an element of the offenses, and "[t]he Government has no obligation to include in an indictment an allegation which is not an element of the offense charged." United States v. Adamo, 534 F.2d 31, 36 (3rd Cir. 1976).

Defendants, however, argue that under their assumed set of facts they will be entitled to acquittal. Even if true, however, (and we contest this, of course) they are not entitled to a summary adjudication at this stage of the proceedings. The appropriate time in a criminal proceeding to debate the application of the law to the facts is after the government has presented its evidence. It is at that juncture that the defendant is entitled to argue that the evidence cannot sustain a conviction, and to move for a judgment of acquittal. Fed. R. Cr. P. 29. Should that motion be denied, the defendant has another opportunity to argue the applicable law: when the Court formulates the charge to the jury. Finally, the defendant may argue to the jury that the law, as enunciated by the Court in the charge, does not permit a conviction under the evidence presented. Unlike civil cases, there is no simply provision in criminal cases for summary judgment before trial. On this basis alone defendants' motion must be denied.

B. The Legal Basis For The Charges

Even under defendants' presumed facts, their motion is without merit. There are four bases for characterizing the spent solvent waste at issue as hazardous, notwithstanding the decisions in Shell Oil and Goodner Brothers:

(1) The federal and state mixture rules are not necessary to the definition of hazardous waste in cases involving "spent solvents." The definition of "spent solvent" under federal and state regulations necessarily contemplates the mixture of the solvent with a contaminant. The listing itself, and not the mixture rule, is what makes the waste a hazardous waste;

(2) State and Federal regulations promulgated under RCRA regulate hazardous waste contained in a matrix of non-hazardous material;

(3) The federal government does not, strictly speaking, apply the federal mixture rule to identify hazardous wastes generated in "authorized" states. At the time of the crimes alleged in this indictment, the applicable law was the independently-adopted "mixture rule" of the State of Tennessee. The federal government is authorized to apply the mixture rule properly promulgated by the State of Tennessee as part of that state's authorized RCRA enforcement program. Therefore, the question of the status of the federal mixture rule is irrelevant to this case; and

(4) The Goodner Brothers decision was in error and this Court should conclude that Shell Oil did not vacate the federal mixture rule retroactively.

1. Solvent Waste Clearly Falls Within The Definition Of Hazardous Waste

Under both federal and state laws and regulations, the United States submits that the mixture rule is simply not necessary to establish that spent solvent are hazardous waste.[14] Spent solvents

[14] We establish in Section II.B.3 that Tennessee law is the applicable law. However, since the language relevant to the first two parts of our argument (II.B.1 and II.B.2) is identical under both federal and Tennessee regulations, our discussion here does not turn on that analysis. Thus, the Court may decide this motion without deciding the choice-of-law question if it wishes.

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are, by their very definition, mixtures of a solvent and a contaminant. Thus, the definition of spent solvents as hazardous is not dependent on the mixture rule and the decision of Shell Oil is immaterial to resolution of the defendants' motion.

i) The Language of the Regulation -- Pursuant to regulation,

> A "spent material" is any material that has been used and as a result of contamination can no longer serve the purpose for which is was produced without processing.

40 CFR 261.2(c)(1); Tenn. Rules 1200-1-11-.02(1)(a)(3)(iii).

The waste generated by the Recticel plants fits the definition of spent material.[15] It has been used to clean the production heads, and as a result of contamination can no longer be used for its solvent properties. In this case, the "contamination" of the solvent results primarily when it is used to clean the production equipment. The contaminants are Polyol and foam pieces, the material the MeCl solvent is employed to dissolve. The spent solvent generated at Recticel is not "mixed" with a solid waste in the manner contemplated by the mixture rule. The solvent is contaminated by a non-hazardous material in the process of becoming spent. Therefore, by definition, F002 spent solvent waste is a hazardous waste totally independent of the mixture rule vacated in Shell Oil. Shell Oil does not affect F002 spent solvent waste listings and is therefore not relevant to the wastes generated by these defendants.

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[15] The argument we make here parallels and supplements our discussion of "spent material" in Section II.B.2.i.a of our Response to defendants' Solid Waste Motion, which we incorporate herein by reference.

Indeed, defendants acknowledge (Memorandum at 33) that a material is "contaminated" under the regulations if it is no longer "fit for use without being . . . reprocessed." 50 Fed. Reg 53315, 53316 (Dec. 31, 1985). They also acknowledge that the "post-use mixture" had to be filtered prior to reuse because it contained material that had "solidified prematurely." See Memorandum at 34 n.19. This characterization of the contaminant as material solidified prematurely is false -- the true contents were pieces of foam that had previously solidified in the production head during the production process and which defendants sought to dissolve and remove from the head through the use of a solvent.

But, even if defendants' facts were taken as true, it is incredible that defendants would contend that the necessity for filtering the wastes prior to reuse did not constitute a "reprocessing." The waste mixture is plainly not "fit for use" as is. Even under defendants' factual scenario the solvents in the mixture are clearly "spent" as that term is defined in the regulations.

ii) The Regulatory Structure -- This interpretation -- that spent solvents are, by definition, a combination of wastes -- is supported by EPA's regulatory construction of the hazardous waste lists.

For every waste listed by EPA, the EPA also lists the constituents of the waste which are the basis for its determination that the waste is potentially hazardous to human health and the environment. Methylene Chloride, 1,1,1-trichloroethane and

Trichlorofluromethane are listed in Part 261, Appendix VII and Tenn Rules 1200-1-11-.02, Appendix .02/D as bases for listing F002 spent solvent as a hazardous waste. They are also listed as hazardous constituents in Appendix VIII and Appendix .02/E. An F002 spent solvent waste is therefore hazardous waste because of its potential to be toxic. 40 CFR § 261.31(a); Tenn. Rules 1200-1-11-.02(4)(b). The spent solvent meets the definitional requirements of the regulations.

More importantly, in the F listings themselves, wastes are expressly designated as hazardous even though comprised of mixtures. If a waste exhibits a particular hazardous characteristic, it is given a hazard code. F002 is given the code "T" for Toxic Waste because it is deemed toxic to humans and the environment. 40 CFR 261.30; Tenn. Rules 1200-1-11-.02(4)(a)(2). In a footnote to the listing, the federal regulation expressly states that codes "(I,T) should be used to specify mixtures containing ignitable and toxic constituents." 261.31(a) n* (emphasis added).[16] Thus, the very definition of spent solvents says that such hazardous wastes include mixtures with toxic F002 constituents in them.

iii) Administrative Decisions -- EPA's interpretation of its own regulations is entitled to deference, Chevron U.S.A. v. NRDC, 467 U.S. 837, 844 (1983); Wayside Farm, Inc. v. HHS, 863 F.2d 447,

[16] There is no equivalent of this footnote in the Tennessee Rules. However, this lacuna does not alter the substantive analysis and the clear effect of the express language of the regulations adopted by the state.

451 (6th Cir. 1988), and this interpretation of the F002 hazardous waste listing has been recently adopted by the Environmental Appeals Board.[17] In In Re Cypress Aviation, Inc., (Env. App. Bd., RCRA (3008) No. 92-1, Nov. 17, 1992) (copy attached as Exhibit A), appeal pending sub nom., Cypress Aviation, Inc. v. EPA, (M.D. Fla. No. 92-1958-CIV-T-99B) the EAB considered petitioner's motion for reconsideration in light of Shell Oil.

In Cypress Aviation, the petitioner generated paint stripping wastes containing F002 solvents. The waste mixture in question contained "wastewater, dissolved paint, paint chips, and spent solvent (the paint stripper). The spent solvent originally contained more than 10% and as much as 62-67% methylene chloride." Cypress' waste mixture was identical, as a matter of law, and the spent solvent was nearly identical chemically to that generated by Recticel.

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[17] The Environmental Appeals Board was established on March 1, 1992. 57 Fed. Reg. 5320 (Feb. 13, 1992). It is the appellate authority for administrative actions within the EPA. As such its decisions are entitled to substantial deference as the authoritative interpretation by an agency of its own regulations. Commonwealth of Mass. v. Nuclear Regulatory Commission, 856 F.2d 378 (1st Cir. 1988); see also Chevron U.S.A. v. NRDC, 467 U.S. 837, 844 (1983); Wayside Farm, Inc. v. HHS, 863 F.2d 447, 451 (6th Cir. 1988). Appeal may be taken from the EAB to the district courts pursuant to the Administrative Procedures Act, 5 U.S.C. 701-706 and 28 U.S.C 1331.

Contrary to defendants' assertion, the decisions of the Board are not a "convenient litigating position" of EPA (Memorandum at 39). In fact, the EAB is an independent judicial body within EPA, akin to the NLRB, which (as in the cases cited) may reject EPA's litigating position.

The EAB had no trouble concluding that F002 spent solvents waste listings are not affected by the mixture rule. The Board reasoned:

> [T]he presence of the spent solvent makes the "waste mixture" an F002 hazardous waste under 261.31. . . . This section specifies that F002 wastes include "all spent solvent mixtures/blends containing before use a total of ten percent or more (by volume) of [methylene chloride] ***." In essence, the definition of F002 wastes by its own terms renders some "spent solvent mixtures" hazardous wastes. The Shell Oil mandate did not affect this provision.

Cypress Aviation at 5; see also id. at 5 n.10 ("In other words, the Shell Oil mandate affected only the portions of 261.3 that contain the 'mixture' and 'derived from' rules, and did not affect the portion of 261.3 that defines hazardous waste as wastes specifically listed in 261.31.").

iv) The Preamble Language and Interpretive Documents -- Defendants primary argument is that the foregoing analysis ignores the allegedly contrary language in EPA's regulatory preamble language and other interpretive documents. But, as even the language cited by defendants makes clear, (see e.g. Memorandum at 16-17, quoting 50 Fed. Reg. 53316), the EPA interpretive languages makes a distinction between hazardous and non-hazardous waste based on the manner in which the waste is generated -- process waste not used as a solvent is different from waste created through solvent use. If the waste is the product of a process stream (as the streams defendants identify as "pre-flush" and "drainage" are) it is not a hazardous waste. If it is the product of "solvent use" it is a hazardous waste.

Conceptually it is convenient to think of Recticel as using two different chemicals -- one as a blowing agent and one as a cleaning agent. Since the uses are different it is no surprise that the legal characterization is different. What defendants seek to do is obscure the distinction in usage and conflate the two circumstances -- in effect, taking advantage of the fortuity that the solvent they use to clean the mixing head is the same as the chemical used as a blowing agent.

To begin, we reiterate the basic factual dispute between defendants and the United States -- defendants contend that the use of MeCl and the freons at most served only some "incidental solvent function" (Memorandum at 30). This is false -- far from being incidental, the use of MeCl to clean the production heads was expressly for the purpose of utilizing its solvent properties. It is precisely those solvent properties -- cleaning the production head by dissolving foam pieces -- which rendered it a superior cleaning agent to Polyol.

However, even if the solvent properties are only "incidental" defendants' concession to that effect is dispositive. To cite the language upon which defendants rely, though emphasizing a more significant passage, solvent use is use:

> to solubilize (dissolve) or mobilize other constituents. For example, solvents used in degreasing, cleaning, fabric scouring, as dilutents, extractants, reaction and synthesis media and similar uses are covered under the listing (when spent).
>
> On the other hand, process wastes where solvents were used as reactants or ingredients in the formulation of commercial chemical products are not covered by the listing.

50 Fed. Reg. at 53316 (emphasis supplied); see also 51 Fed. Reg 40606 (only solvents used for their solvent properties are hazardous wastes).

In this case the determination of whether the wastes are hazardous or not turns exclusively on how they were used prior to discard. When waste is created as a result of use as an "ingredient in the formulation of ... product" it is not an F-listed solvent hazardous waste. However, when waste is created because the solvent is used to solubilize (that is, dissolve) a clog in a production head it is being used expressly for its solvent purposes and the result is an F-listed solvent hazardous waste. Every one of the many memoranda cited by defendants in their brief makes this distinction -- the only solvent waste which is non-hazardous is that which is waste actually used in the production process. E.g. Background Listing Document at 81; Memorandum from John Skinner to James Scarbrough (June 3, 1985) [both attached as Exhibits to defendants' Memorandum].

In other words, defendants contend that, merely because it is possible to use MeCl as a process ingredient, wastes containing MeCl are not hazardous wastes. But this argument is not persuasive -- even defendants acknowledge that MeCl has been used for solubilizing, cleaning and mobilizing foam from a clogged head, and that it is not always used as a process ingredient. Therefore the MeCl was used as a solvent and is hazardous waste. Defendants cannot escape regulation merely by holding out the possibility of some other use for MeCl. A gun may be lawfully used in self-

defense -- that possibility does not mean that a gun which is actually used in a contract murder is lawfully used.

v) Summary -- The concept of a spent solvent expressly contemplates a combination of the solvent with a contaminant. Arguments about the "mixture rule" are not germane to its characterization as a hazardous waste. Because the spent solvent waste meets both the federal and state regulatory definition of hazardous waste, the vacatur and remand of the federal "mixture rule" in Shell Oil does not effect its classification.[18]

[18] We treat, briefly, here the "U"-listed wastes which the indictment alleges were to be disposed of. As defendants acknowledge (Memorandum at 31), "U" listings apply to unused chemicals in their pure or commercial grade which are discarded. 40 CFR 261.33. They do not apply to chemicals which have been through the production process. As our factual recitation makes clear, however, the "U"-listings charged for MeCl and TDI are based upon the disposal of unused chemicals which are removed from the production feed lines during filter cleaning prior to use. These chemicals squarely meet the definition of the "U" listings.

2. RCRA Regulates Hazardous Waste Contained-In Other Materials

The United States has long taken the position that listed hazardous waste remains hazardous until delisting. One application of this principle (which is sometimes referred to as the "continuing jurisdiction principle") is that materials containing listed hazardous waste are subject to RCRA regulation, without regard to the "mixture" rule. Section 261.3 contains the rules for defining hazardous waste. The definition begins:

> (a) A solid waste, as defined in § 261.2, is a hazardous waste if:
>
> (1) It is not excluded from regulation as a hazardous waste under § 261.4(b) [which is not applicable in this case]; and
>
> (2) It meets any of the following criteria:
>
> * * * *
>
> (ii) It is listed in subpart D and has not been excluded from the lists in subpart D under §§ 260.20 and 260.22 of this chapter.
>
> * * * *
>
> (c) Unless and until it meets the criteria of paragraph (d):
>
> (1) A hazardous waste will remain a hazardous waste.
>
> (d) Any solid waste described in paragraph (c) of this section is not a hazardous waste if it meets the following criteria:
>
> * * * *
>
> (2) In the case of a waste which is a listed waste under subpart D, contains a waste listed under subpart D, or is derived from a waste listed in subpart D, it also has been excluded from paragraph (c) under §§ 260.20 and 260.22 of this chapter.

261.3 (emphasis added);[19] see also Tenn. Rules 1200-1-11-.02(1)(c). None of these provisions, which we referred to as the "general framework rules or principles," was affected by Shell Oil.

Thus, the general framework provisions of RCRA regulation apply to hazardous waste separate and apart from the "mixture" rule vacated in Shell Oil. In explaining the application of this principle in the context of the Land Ban disposal prohibitions, the Agency stated:

> Thus, residues from managing First Third wastes, listed California list wastes, and spent solvents and dioxin wastes are all considered to be subject to the prohibitions for the underlying hazardous wastes. As explained above, this result stems directly from derived-from rule in 40 CFR 261.3(c)(2), or in some cases because the waste is mixed with or otherwise contains the listed waste. The underlying principle stated in all of these provisions is that listed wastes remain hazardous until they are delisted.

53 Fed. Reg. 17586 (May 17, 1988) (emphasis added).

In the final publication of the general framework rules, the Agency further clarified this application of the listed hazardous waste regulations:

> In addition, the Agency clarified the applicability of the treatment standards to residues resulting from types of management other than treatment. Examples are contaminated soil or leachate derived from managing the waste. In these cases, the mixture is deemed to be the listed waste, either because of the derived-from rule, the mixture rule [40 CFR 261.3(a)(2)(iv)], or because the listed waste is contained in the matrix [see e.g., 40 CFR 261.3(d)(2), 40 CFR

[19] As noted earlier, sections 260.20 and 260.22 provide for de-listing by petition and are not applicable here.

261.33(d), RCRA section 3004(e)(3)]. Thus, the prohibition for the particular listed waste applies to this type of waste.

53 Fed. Reg. 31142 (August 17, 1988) (emphasis added).

The most frequent application of these rules has occurred in the context of the regulation of mixtures of listed hazardous wastes and non-waste materials (e.g., soil, groundwater). Read literally, the mixture rule would not apply to such situations because it is limited to mixtures of listed waste and non-hazardous solid wastes. EPA has, however, used the general framework principles as the basis for regulation of these materials. The EPA interprets the hazardous waste listing rules to regulate mixtures of listed wastes and other materials because the materials "contain" the listed waste and thus must be managed as hazardous waste so long as the mixture continues to "contain" the listed waste. See e.g. 57 Fed. Reg. 986 (January 9, 1992); 53 Fed. Reg. 31147 (August 17, 1988); 53 Fed. Reg. 17586 (May 17, 1988); see also Memorandum from Marcia E. Williams, Director, Office of Solid Waste to Patrick Tobin, Director, Waste Management Division, Region IV, "RCRA Regulatory Status of Contaminated Ground Water", November 13, 1986 ("contaminated ground water cannot be considered a hazardous waste via the mixture rule. ...Nevertheless, ground water contaminated with hazardous waste leachate is still subject to regulation since it contains a hazardous waste") (copy attached as Exhibit B).[20]

[20] Ms. Williams is the same authority cited by defendants in their own brief. See Memorandum at 11.

The regulation of these mixtures derives not from the specific rules such as the "mixture rule", but rather from the more general principles and provisions embodied in these rules. See 53 Fed. Reg. 17586 (May 17, 1988) (regulation of contaminated media is based on general principles that "listed wastes remain hazardous until they are delisted"); Chemical Waste Management v. EPA, 869 F.2d 1526, 1538-39 (D.C. Cir. 1989) ("Chem Waste").[21]

Similarly, the Agency determined that mixtures of listed hazardous wastes and certain wastes excluded from hazardous waste regulation (e.g. mining wastes) would be subject to regulation as hazardous waste regardless of the applicability of the mixture or derived-from rules. These wastes "would continue to be subject to regulation because the 'mixture' would 'contain' listed hazardous waste, subject to regulation unless delisted." 54 Fed. Reg. 36623 (September 1, 1989). This regulation would, since the specific rules did not apply, be based on the more general framework principles.[22]

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[21] These Agency preamble statements are consistent with the contemporaneous Agency correspondence. See e.g. Memorandum from Marcia E. Williams, Director, Office of Solid Waste to David Stringham, Chief, Solid Waste Branch, Region V, "Regulatory Interpretation With Respect to Leaks, Spills, and Illegal Discharges of Listed Wastes to Surface Waters", January 23, 1986 ("application of the mixture rule is not dispositive of the issue of whether the mixture of hazardous waste and another substance is regulated. A part [sic] from the mixture rule, the mixture of a hazardous waste and non-waste material is still subject to Subtitle C control.") (copy attached as Exhibit C).

[22] Similarly, EPA also regulates the hazardous waste "components" of mixtures of certain radioactive materials excluded from RCRA jurisdiction and hazardous wastes. See e.g. 52 Fed. Reg. 37045-46 (September 23, 1988) (noting that "any matrix containing a RCRA hazardous waste...and a radioactive waste subject to the AEA

The United States' longstanding application of the general framework rules for hazardous waste identification as a basis for regulation of mixtures and residues, apart from the specific mixture rule, has been squarely addressed and upheld by the D.C. Circuit Court of Appeals. In Chem Waste, the D.C. Circuit sustained EPA's interpretation that contaminated media were regulated as hazardous waste in part based on the general framework rules. The Court found that the regulation of these wastes was reasonably based on the framework rules:

> The agency's rule, adopted in 1980, provides that "[a] hazardous waste will remain a hazardous waste" until it is delisted. [footnote omitted]. See 40 C.F.R. 261.3(d)(2) .... The agency's position is that hazardous waste cannot be presumed to change character when it is combined with an environmental medium, and that the hazardous waste restriction therefore continue to apply to waste which is contained in soil or groundwater. Certainly the EPA's position appears plausible on its face....
>
> Clearly,...the EPA's current treatment of contaminated soil is entirely consistent with the 1980 preamble's insistence that hazardous wastes will ordinarily be presumed to remain hazardous.

Chem Waste, 869 F.2d at 1539.

The Court went on to explain that the Agency's approach was also consistent with the specific mixture and derived-from rules established in 1980. Id. Noting that these specific rules were,

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is a radioactive mixed waste. Such wastes are subject to RCRA hazardous waste regulations."). These "mixed wastes" are not subject to the specific mixture rule because the mixture rule governs only mixtures of solid waste with listed hazardous waste and source, special nuclear and byproduct materials are not "solid wastes" under Section 1004(27) of RCRA. 42 USC 6903(27). EPA's regulation of these materials is thus, again, an application of the more general framework rules for hazardous waste identification.

however, inapplicable to the wastes at issue in the case, the Court found that these rules and interpretations together formed

> a coherent regulatory framework. It is one application of a general principle, consistently adhered to, that a hazardous waste does not lose its hazardous character simply because it changes form or is combined with other substance.

Id. The Court found that the general principles established in the regulations provided a basis for regulation of mixtures and residues, apart from the specific mixture and derived-from rules. The specific rules are consistent with, but only an application of, the more general principle embodied in the regulation that a "hazardous waste remains a hazardous waste".

In the first, and to our knowledge only, federal case construing the general framework rules after Shell Oil, the Court agreed with the interpretation which the United States urges today. United States. v. Bethlehem Steel Corp., (N.D. Ind., Civ. No. H90-326. March 19, 1993) (copy attached as Exhibit D).[23] In Bethlehem Steel the Court faced a challenge to an enforcement action based upon the argument that, after Shell Oil and the vacatur of the mixture rule, mixtures of defendant's listed F006 waste with other non-hazardous wastes were non-hazardous.

The Court began its analysis by acknowledging that it was required to defer to the EPA's interpretation of its own regulations. Id. at 15 (citing Chem Waste, 869 F.2d at 1538-39). Beyond this, however, the Court reasoned that defendants' position was:

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[23] We append only an excerpt of the relevant portions of this lengthy opinion. If the Court wishes, we will provide a complete copy of the opinion.

> untenable because '[i]f wastes could become non hazardous simply by being mixed with other wastes, there would be a tremendous incentive simply to dilute hazardous wastes to avoid regulation. Potentially large quantities of hazardous waste could escape regulation.'

Id. at 15 (quoting Gaba, The Mixture and Derived From Rules Under RCRA: Once a Hazardous Waste Always a Hazardous Waste?, 21 Env. Law Rptr. 10033 (1991)).

The Bethlehem court then reviewed the basis for EPA's listing of F006 waste (relying, much as we urge here, on the language of the regulation and the explanatory language which accompanied the promulgation of the regulation) and concluded that defendant's waste fell plainly within the listing. The Court then recognized that:

> EPA has long had the policy that once hazardous wastes are listed as hazardous, they are presumed to remain hazardous. . . . [T]he general rule [is] that 'a hazardous waste does not lose its hazardous character simply because it changes for or is combined with other substances.' Chemical Waste Management, 869 F.2d at 1539. See also 45 Fed Reg. 33,095-96 (1980). The mixture rule was derived from this general principle.

Id. at 18. Accordingly, the Court agreed with the United States that the vacatur of the mixture rule did not alter the general framework principles. Applying those principles listed hazardous waste (such as the F002 waste at issue here) remains hazardous until delisted, even if it is combined with other non-hazardous solid waste.

This interpretation has also been adopted by EPA in its administrative decisions after Shell Oil. In In the Matter of Chem-Met Services, Inc., (Docket No. RCRA-V-W-011-92, Feb. 23,

1993) (copy attached as Exhibit E), the administrative law judge agreed with the Agency's position that EPA has the authority to regulate mixtures and "derived from" residues without relying on the specific provisions of the "mixture and derived-from" rules. The order relied instead on section 261.3(c) & (d) and the heading to 261.32 (waste from non-specific sources), which states that wastes listed as hazardous and not delisted or excluded under 260.20 & 260.22, remain hazardous waste.[24]

Chem Met filed a motion to dismiss contending, inter alia, that the treatment residues were "derived from" hazardous wastes, and therefore were not hazardous under the Shell Oil decision. The Court denied the motion to dismiss, relying on the fact that K086 waste is listed as a hazardous waste from a specific source under 261.32, that it has not been excluded and/or delisted under 260.20 and 260.22; and that the invalidation of the "derived-from" rule did not affect this result. The court particularly noted that the prefatory language to the 261.32 list, provides that "the following wastes listed are hazardous and remain so until excluded." The court also noted that this language was reinforced

[24] The Chem-Met case involved residues "derived from" the treatment of K086 waste. Under the land disposal ban, 40 CFR Part 268, certain treatment standards had to be met prior to the K086 waste being sent to a land disposal unit; EPA alleged that the treatment standards were not met and thus the land ban restrictions of the Part 268 were violated.

by 261.3(c) and (d) -- which provide that until excluded a hazardous waste remains a hazardous waste.[25]

The United States' interpretation of the general framework principles does not attempt to negate the Shell Oil/mixture rule decision or suggest that the mixture rule was an unnecessary regulation. The continuing jurisdiction principle means only that the hazardous waste portion of the mixture is subject to regulation -- you cannot hide waste or change its character by mixing it into a pile of non-hazardous waste. If, hypothetically, the hazardous waste portion could be separated from the mixture, the remaining non-hazardous solid waste would no longer be regulated. By contrast the mixture rule was a rule of inclusion -- all waste mixed with hazardous waste became hazardous itself, even if it were later separated from the initial hazardous components and retained no hazardous constituents.

In the case of the Recticel F002 spent solvent waste, the material treated or disposed of is a spent solvent waste because the waste contains spent solvents. The general framework principles provide an independent basis for characterizing the waste stream at issue as a hazardous waste.

3. The Tennessee Mixture Rule Is The Applicable Law

For the reasons we have discussed, the vacatur and remand of the mixture rule did not change the fact that defendants' waste is hazardous waste under federal and state regulations. However, even

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[25] F002 waste is listed in 40 CFR 261.31 which, of course, bears identical prefatory heading.

prior to 1990, was known as the Tennessee Department of Health and Environment.

The Tennessee mixture rule was in effect at the time of defendants conduct (at least, that conduct after February 1985),[26] operated in lieu of the federal law and (to the best of the United States' knowledge) has never been challenged in any court of law.

The provisions of Section 6926 of RCRA allows the United States to enforce the authorized state rules that have been federally approved, in lieu of the independent federal rules. Lutz v. Chromatex Inc., 718 F. Supp. 413, 425 (M.D.Pa. 1989) (civil action under federal RCRA regulations fails to state a claim in authorized state where state rules supersede federal rules); Thompson v. Thomas, 680 F.Supp. 1, 3 (D.D.C. 1987) (Wisconsin RCRA regulations supersede federal regulations). The State of Tennessee rules therefore replace federal law and provide the applicable regulatory framework against which to measure defendants' unlawful conduct.

The federal government retains the authority, however, to bring enforcement actions even in a delegated state and apply state laws and regulations. Wycoff Co. v. EPA, 796 F.2d 1197 (9th Cir.

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[26] The United States acknowledges that, in so far as the conspiracy alleged in Count One relates to certain conduct which occurred prior to this date, it may not rely on the independent state rule as a basis for prosecution. However, the arguments make in II.B.1, B.2 and B.4, support prosecution under the federal law applicable prior to February 1985. More importantly, not all overt acts of a conspiracy need be illegal -- thus, since subsequent criminal conduct of the conspiracy after 1985 clearly fell within the strictures of the Tennessee rule, the earlier acts' illegality (or lack thereof) is not material to the validity of the conspiracy charge.

1987); United States v. Environmental Waste Control, Inc., 698 F. Supp. 1422, 1435-38 (N.D. Ill. 1988) and 710 F. Supp. 1172, 1184-87 (N.D. Ill. 1989), aff'd, 917 F.2d 327 (7th Cir. 1990); United States v. Allegan Metal Finishing Co., 696 F. Supp. 275, 282 (W.D. Mich. 1988); United States v. Rogers, 685 F. Supp. 201 (D. Minn. 1987); United States v. T&S Brass and Bronze Works, Inc., 681 F. Supp. 314 (D. S.C. 1988); United States v. Conservation Chemical Co., 660 F. Supp. 1236 (N.D. Ind. 1987); cf. 42 USC 6926(d) (actions taken by an authorized State have same force and effect as those by Administrator of EPA).

The EAB faced the question of which regulations apply in an administrative action brought following the Shell Oil decision. In In Re: Hardin County, OH, (Env. App. Bd., RCRA(3008) No. 91-6, Nov. 6, 1992) (copy attached as Exhibit F) the Environmental Appeals Board concluded that the state mixture rules were the applicable law in authorized states. In Hardin County, the petitioner sought dismissal of an administrative action in reliance on Shell Oil and Goodner. The presiding officer at the initial hearing agreed with the petitioner and, in essence, adopted the reasoning embodied in defendant Recticel's brief. On appeal EPA asked the EAB to determine that Shell Oil did not apply retroactively.

The EAB, however, did not reach that issue. Relying on RCRA section 3006 (42 U.S.C. 6926), the EAB concluded that federal regulations do not apply in an authorized state -- only the authorized state regulations apply. Hardin County at 3-4 & n.3 (citing 40 CFR 264.1(f) and 265.1(c)(4)). It then reasoned that

RCRA specifically allows the United States to apply state regulations in an authorized state. "[W]henever [the United States] brings an enforcement action in an authorized State [it] is enforcing State law because the authorized state program is a 'requirement" of RCRA." Hardin County at 4 (citing United States v. T&S Brass and Bronze Works, Inc., 681 F. Supp. 314 (D. S.C. 1988)).

As the EAB therefore concluded, "during the period of Ohio's . . . authorization . . the only hazardous waste regulations applicable to Hardin County were Ohio's which were operating in lieu of the federal regulations." Hardin County at 5. In so holding, the EAB expressly rejected the applicability of Shell Oil to state mixture rules in authorized states. Id. at 6 ("Shell Oil . . . is obviously not determinative if the federal mixture rule is not implicated in this case").[27]

Consistent with the ruling of the EAB, the United States submits that the independent Tennessee mixture rule, which was in force from February 1985 to the present, is the law applicable to defendants' conduct -- operating "in lieu of" federal regulations.

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[27] Because the record on appeal was unclear, the EAB remanded the case for determination of the exact dates of the offenses alleged against Hardin County. It instructed the administrative judge below to apply state law to offenses which occurred while Ohio was an authorized state and to apply federal law to those which occurred while Ohio was not authorized.

That mixture rule has never been challenged and fully supports these charges.[28]

4. Shell Oil Did Not Vacate The Mixture Rule Retroactively

Finally, if this Court is convinced that the federal mixture rule is the applicable law and that its status must be decided to resolve this matter, we respectfully submit that Goodner Brothers was wrongly decided. To the contrary, Shell Oil did not act retroactively to vacate the mixture rule.

The Eighth Circuit incorrectly interpreted the D.C. Circuit's opinion by not affording full meaning to the Shell Oil Court's concern over "discontinuity in the regulation" of hazardous waste. Shell Oil, 950 F.2d at 752 (emphasis added). The Eighth Circuit speculated in Goodner that the D.C. Circuit's concern in Shell Oil with "discontinuity" could refer to the practical effect of invalidating the rules "rather than referring to the legal force of the mixture rule." Goodner Brothers, 966 F.2d at 384. However, as the Administrator noted in EPA's published interpretation of Shell Oil, 57 Fed. Reg. at 7630-7631, the D.C. Circuit's concern with discontinuity was aimed at "discontinuity in the regulation of hazardous wastes." Shell Oil, 950 F.2d at 752 (emphasis added). "Regulation" necessarily involves more than simply "practical

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[28] We acknowledge that the Goodner Brothers case cursorily rejected this view of the choice of law question. 966 F.2d at 385. However, the summary treatment of the issue appears to be dicta and completely ignores and fails to cite or distinguish any of the applicable statutes, regulations or case law upon which we rely. The Court appeared to simply conclude that federal cases require federal law -- a simplistic approach at odds with the careful federalism embodied in RCRA. For this reason, we strongly urge this Court to reject the Goodner dicta on this issue.

effects." It involves specific legal effects, including the authority to enforce violations of such regulations.

The Goodner court disregarded the fact that the mixture rule undeniably had legal force and continuing effect for more than ten years. The Shell Oil court expressly acknowledged that it "did not stay the rules, which have remained in effect." 950 F.2d at 746 (emphasis added). By reinstating the mixture and derived-from rules, EPA retained such legal force and prevented the discontinuity from posing the dangers that the D.C. Circuit was concerned about. 57 Fed. Reg. at 7630 (reinstating such rules "maintains without interruption the legal framework for the regulation of hazardous waste originally established under RCRA in 1980.")

The continuing legal force of the mixture and derived-from rules is also evident in the Shell Oil court's decision to vacate and remand such rules.[29] Although a court's vacatur alone generally means that the vacated rule is void ab initio (absent contrary language), a decision only to remand a rule in some cases may even leave the challenged rule in effect and enforceable. E.g., The Fertilizer Institute v. EPA, 935 F.2d 1303, 1312 (D.C. Cir. 1991). Even where a remanded rule is no longer in effect,

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[29] The Shell Oil court itself was inconsistent in the terms it used to describe the effect of its decision. 950 F.2d at 745 (stating that the rules are "remanded to the Administrator" without mentioning any vacatur); id., at 752 (stating that the rules are "set aside and remanded"); id. (stating that "we vacate [the rules] on procedural grounds"); and id., at 765 (stating in the opinion's Conclusion that "we vacate these rules and remand them to the Agency").

such a remand alone does not disturb the legal force and effect of the rule retroactively. By combining these two concepts of vacating and remanding, and by explicitly stating its concern over discontinuity while recognizing that the rules have remained in effect, the Shell Oil court was invalidating the rules prospectively and inviting EPA to cure the procedural defect. Had the Shell Oil court intended to vacate the rules both prospectively and retroactively, there would have been nothing to remand to EPA. The Eighth Circuit in Goodner erroneously interpreted Shell by overlooking this important distinction.

5) Summary -- For each of the four foregoing reasons, defendants' motion, even on their own set of facts, is meritless and should be denied.[30]

C. Void For Vagueness

Defendants also raise a challenge to the regulations as void for vagueness. This seems clearly an afterthought to the substance of defendants' motion. Nonetheless, a brief response is appropriate.[31]

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[30] Because we believe defendants' arguments legally insufficient, the United States intends, at the charging conference, to ask the Court to reject any theory of defense instructions proffered by defendants premised on the mixture rule.

[31] Facial challenges to the validity of the regulations may not be brought in this Court. See 42 USC 6976(a)(1). We make this argument at length in our Response to defendants' Motion to Dismiss on the Grounds That RCRA is an Unconstitutional Delegation of Authority, and refer the Court to that brief for an elaboration of the issue. Thus, defendants challenge may only be heard to the extent it raises an "as applied" challenge.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
841 Chestnut Building
Philadelphia, Pennsylvania 19107

March 22, 1991

Benjamin Bryant
Assistant United States Attorney
P.O. Box 1239
Huntington, W. Va. 25714

RE: RCRA TCLP Test

Dear Ben,

This is in response to your recent question concerning the applicability of the new RCRA Toxicity Characteristic Leaching Procedure (TCLP) test and whether state inspectors should be using it or the former Extraction Procedure test. The answer depends on who generated the waste and when.

Our story begins in 1984 when Congress enacted the Hazardous and Solid Waste Amendments (HSWA) to RCRA. In Section 3001(g) and (h), 42 U.S.C. Section 6921(g) and (h), Congress directed EPA to review the EP Toxicity test and to add new hazardous waste characteristics, including toxicity. EPA promulgated the Toxicity Characteristic regulation, including the TCLP test, March 29, 1990, pursuant to that statutory directive. 55 Fed. Reg. 11798 et. seq.

Pursuant to Section 3006(g) of RCRA, 42 U.S.C. Section 6926(g), regulations promulgated pursuant to HSWA simultaneously become part of both the federal hazardous waste program and the federally-authorized state program. Thus, in West Virginia, the TC rule became part of the authorized hazardous program on the effective date of the rule. As you know, the federal government enforces the federally authorized program, not the federal regulations, in those states which have obtained authorization to operate a hazardous waste program in lieu of the federal program.

Unfortunately, the TC rule affects the state's federally authorized program at different times because it becomes effective in stages. The rule became effective six months after promulgation (September 29, 1990) for large quantity generators (more than 1,000 kilograms per month). The rule takes effect March 29, 1991 for small quantity generators (100-1,000 kg per month). The new rule reaffirms EPA's position that determination of whether a solid waste is a hazardous waste is to be made at the point of generation. 55 Fed. Reg. 11830.

Consequently, I believe the following scenario exists for determining whether a waste is a hazardous waste under the EP Toxicity and TCLP procedures. For any waste generated prior to September 29, 1990, the EP Toxicity test clearly was the procedure to use. Between that date and March 29, 1991, a mixed situation exists. If a large quantity generator produced the waste, then the TCLP test applies. If a small quantity generator produced the waste, then the EP Toxicity test applies. The TCLP procedure should be used for all material generated after March 29, 1991.

The two-stage implementation strategy assumes that you are dealing with facilities which manage their waste properly. Unfortunately, we usually deal with exactly the reverse situation. Therefore, the varied effective dates may prove to be very messy when you are investigating dumping, etc., or long-standing storage problems. For example, suppose DNR discovers drums in a field March 27, 1991. You probably will not know whether a large or small quantity generator produced the waste or when it was produced. Consequently, which test applies?

Similar problems will exist with wastes discovered after the final March 29, 1991, deadline, when the new test is supposed to govern everything. Since the TCLP procedure will bring much more material into the category of hazardous waste, you may come across material that was non-hazardous under EP Toxicity when generated, but qualifies as hazardous under TCLP when discovered. Since its classification as hazardous waste is supposed to be made at the point of generation, a good argument can be made that this material was not hazardous waste and the dumping was not illegal. (Two caveats: if it qualifies under EP Toxicity or as a listed hazardous waste, you have no problems. Even if it doesn't, any failure to report the release of the waste may violate CERCLA if you can establish reportable quantities). The bottom line in both these examples is that you may need to have samples analyzed under both tests for some time to come in order to know which one to use after obtaining information about who generated it and when.

This analysis carries several implications for RCRA criminal enforcement. First, it would seem to me that we need to know whether a large or small quantity generator produced the waste in order to determine which test to apply. We may also need to know when it was generated because that is when it is supposed to be classified as hazardous or non-hazardous waste. One certainly can argue that a waste generated prior to applicability of the TCLP (and not otherwise covered by EP Toxic or a listed waste) is not a hazardous waste.

I hope my response clarifies the situation somewhat (but in the world of RCRA, detailed analysis rarely helps). I am sending this to DOJ to make sure they agree, but I believe I am correct. Please call me if you want to discuss this further.

Sincerely,

Martin Harrell
Associate Regional Counsel

cc: Bob Boodey (3CE00)
Jim Morgulec, DOJ
Bill Early (3RC30)

Environmental Protection Agency | and Emergency Response Washington DC 20460 | EPA/530-SW-89-045 March 1990

Office of Solid Waste

EPA

Environmental Fact Sheet

TOXICITY CHARACTERISTIC RULE FINALIZED

The final Toxicity Characteristic rule adds 25 organic chemicals to the eight metals and six pesticides on the existing list of constituents regulated under RCRA. The rule also establishes regulatory levels for the new organic chemicals listed, and replaces the Extraction Procedure leach test with the Toxicity Characteristic Leaching Procedure. Generators must comply with this regulation within six months of the date of notice in the Federal Register; *small quantity generators must comply within one year.*

BACKGROUND

On June 13, 1986, the Environmental Protection Agency (EPA) proposed to revise the existing toxicity characteristic, one of four characteristics used by the Agency to identify hazardous waste to be regulated under Subtitle C of the Resource Conservation and Recovery Act (RCRA). The proposed rule was designed to refine and broaden the scope of the RCRA hazardous waste regulatory program, and to fulfill specific statutory mandates under the Hazardous and Solid Waste Amendments of 1984.

Under current regulations, EPA uses two procedures to define wastes as hazardous: *listing* and *hazardous characteristics*. The listing procedure involves identifying industries or processes that produce wastes that pose hazards to human health and the environment. The second procedure involves identifying properties or "characteristics" that, if exhibited by any waste, indicate a potential hazard if the waste is not properly controlled. Toxicity is one of four characteristics that must be considered when identifying a waste as hazardous. The others are ignitability, reactivity, and corrosivity.

The proposed version of the new rule added 38 new substances to the Toxicity Characteristic list; 13 of these constituents are not included in the final version due to technical difficulties in establishing appropriate regulatory levels. EPA bases all regulatory levels for hazardous chemicals on health-based *concentration thresholds* and a *dilution/attenuation factor* specific to each chemical. A concentration threshold

indicates how much of the chemical adversely affects human health, while the dilution/attenuation factor indicates how easily the chemical could seep (or "leach") into ground water. The levels set in the Toxicity Characteristic (TC) rule were determined by multiplying the health-based number by a dilution/attenuation factor of 100.

The introduction of the TC rule in 1986 generated extensive public comment on a variety of issues. The TC involves a new "modeling" approach, a mathematical computer model, to simulate what happens to hazardous waste in a landfill. Results from the Toxicity Characteristic Leaching Procedure (TCLP), a new test that is part of the TC rule, are more reproducible than results from the old Extraction Procedure (EP) leach test, and the new test is easier to run.

Following the 1986 proposal, EPA published several supplemental notices in an effort to evaluate and incorporate public comments before finalizing the rule.

ACTION

EPA is finalizing the regulatory levels for 25 of the 38 constituents of concern that were identified in the proposed Toxicity Characteristic rule. Regulatory levels for the remaining 13 constituents will be proposed at a later date.

A waste may be a "TC waste" if any of the chemicals listed below are present in waste sample extract or leachate resulting from application of the TCLP to that waste. If chemicals are present at or above the specified regulatory levels, the waste *is* a "TC waste," and is subject to all RCRA hazardous waste requirements. Regulatory levels established under the EP toxicity characteristic remain the same, but require application of the new test.

Waste generators who have already notified the Agency that they generate other hazardous wastes and who have obtained an EPA identification number for their facility are not required by this rule to notify EPA that they now generate a "TC waste." Facilities that are permitted to treat, store, or dispose of hazardous waste, however, may require new or modified permits to handle "TC waste," and should contact their EPA Regional office for more information.

Implementation of the TC rule will initially be the responsibility of EPA's Regional offices. State hazardous waste programs must modify their regulations to reflect the requirements of the TC rule before they can be authorized for implementation.

The following constituents are now regulated under the Toxicity Characteristic rule. Waste generators must determine the levels present in their waste sample extract or leachate, based either on their knowledge of their processes or by application of the TCLP.

New Constituents/Regulatory levels	Old EP Constituents/Regulatory levels
Benzene . . . 0.50 mg/l	Arsenic . . . 5.0 mg/l
Carbon tetrachloride . . . 0.50 mg/l	Barium . . . 100.0 mg/l
Chlordane . . . 0.03 mg/l	Cadmium . . . 1.0 mg/l
Chlorobenzene . . . 100.0 mg/l	Chromium . . . 5.0 mg/l
Chloroform . . .6.0 mg/l	Lead . . . 5.0 mg/l
m-Cresol . . . 200.0 mg/l*	Mercury . . . 0.2 mg/l
o-Cresol . . . 200.0 m g/l	Selenium . . . 1.0 mg/l
p-Cresol . . . 200.0 mg/l	Silver . . . 5.0 mg/l
1,4-Dichlorobenzene . . . 7.5 mg/l	Endrin . . . 0.02 mg/l
1,2-Dichloroethane . . . 0.50 mg/l	Lindane . . . 0.4 mg/l
1,1-Dichloroethylene . . . 0.70 mg/l	Methoxychlor . . . 10.0 mg/l
2,4-Dinitrotoluene . . .o.13 mg/l**	Toxaphene . . . 0.5 mg/l
Heptachlor (and its hydroxide) . . . 0.008 mg/l	2,4-Dichlorophenoxycetic acid . . 10.0 mg/l
Hexachloro-1,3-butadiene . . . 0.5 mg/l	2,4,5-Trichlorophenoxypropionic acid . . . 1.0 mg/l
Hexachlorobenzene . . .0.13 mg/l**	
Hexachloroethane . . . 3.0 mg/l	
Methyl ethyl ketone . . . 200.0 mg/l	
Nitrobenzene . . . 2.0 mg/l	
Pentachlorophenal . . . 100.0 mg/l***	
Pyridine . . . 5.0 mg/l**	
Tetrachloroethylene . . . 0.7 mg/l	
Trichloroethylene . . . 0.5 mg/l	
2,4,5-Trichlorophenol . . . 400.0 mg/l	
2,4,6-Trichlorophenol . . . 2.0 mg/l	
Vinyl chloride . . . 0.20 mg/l	

Many Underground Storage Tank (UST) sites are regulated under Subtitle I of RCRA. The Toxicity Characteristic rule will not apply to UST petroleum-contaminated media and debris regulated under Subtitle I until the Agency completes a number of studies of the impacts of the TC on these wastes. During the study period, UST sites will continue to be regulated under Subtitle I of RCRA.

Listed wastes, unlike characteristic wastes such as a "TC waste," can be removed from EPA's lists of hazardous wastes through a process called

* If o-,m-, and p-Cresol concentrations cannot be differentiated, the total cresol concentration is used. The regulatory level for total cresol is 200.0 mg/l.

** Quantitation limit is greater than the calculated regulatory level. The quantitation limit, therefore, becomes the regulatory level.

*** The Agency will propose a new regulatory level for this constituent, based on the latest toxicity information.

delisting. Delisting determinations are made on a case-by-case, site-specific basis. Although it is not discussed in the preamble to the TC rule, the guidance for submitting delisting petitions will be modified in the near future to reflect the replacement of the EP leach test with the Toxicity Characteristic Leaching Procedure. Notification of the effective date for this change will appear in a future *Federal Register* notice.

CONCLUSION

Based on consideration of 12 affected industries, EPA estimates that the Toxicity Characteristic rule will bring a significant volume of additional wastewaters, solid waste, and sludge under the control of its hazardous waste regulations. The rule will bring a large number of waste generators under Subtitle C regulation for the first time, and many treatment, storage, and disposal facilities will require new or modified permits to handle "TC waste."

The Agency strongly encourages industry to reduce the generation of all hazardous wastes through pollution prevention and waste minimization practices. For information and publications on pollution prevention options, contact the toll-free RCRA Hotline number listed below.

TC Impact on Used Oil Regulation

Used oil that is disposed of, rather than recycled or burned for energy recovery, is regulated as a hazardous waste under Subtitle C if it exhibits any of the four characteristics described above. The Toxicity Characteristic rule adds a number of substances to the toxicity list that may bring previously "nonhazardous" used oil under Subtitle C regulation.

Currently, hazardous used oil that is recycled by being burned for energy recovery is minimally regulated under RCRA (a variety of administrative requirements must be met). Used oil that is recycled in any other way is currently exempt from Subtitle C regulation. These regulations for recycled oil are not affected by the Toxicity Characteristic rule. The Agency is currently determining how best to regulate used oil, and is working to develop standards to ensure proper management of used oil that may pose a threat to human health or the environment.

CONTACT

EPA is distributing information materials to trade associations representing those industries potentially affected by the Toxicity Characteristic rule. These materials describe constituents of concern specific to each affected industry, and include compliance guidelines for newly regulated generators. To order copies of these materials, a copy of the *Federal Register* notice, or for further information, contact the RCRA Hotline Monday through Friday, 8:30 a.m. to 7:30 p.m. EST. The national toll-free number is (800) 424-9346; for the hearing impaired, the number is TDD (800) 553-7672. In Washington, D.C., the number is (202) 382-3000 or TDD (202) 475-9652.

NATIVE AMERICAN LANDS
Outline

I. JURISDICTION

A. State Jurisdiction Over Indian Lands

1. Generally, states lack jurisdiction to regulate Indian lands.

2. Test: "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983).

3. State's interest in environment has been held insufficient interest to allow regulation. State of Washington Department of Ecology v. U.S. E.P.A., 725 F.2d 1465 (4th. Cir. 1985) (Resource Conservation and Recovery Act does not authorize states to regulate Indians or Indian lands).

4. In 1953, Congress passed 28 U.S.C. § 1360, granting full civil and criminal jurisdiction over Indian lands to five states (California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin (except the Menominee Reservation). All other states were allowed the opportunity to assume jurisdiction.

5. Arizona assumed jurisdiction with respect to air and water pollution. A.R.S. § 36-1801 (renumbered as §49-561) and A.R.S. § 36-1865 (repealed).

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lands. In Bryan v. Itasca Country, 426 U.S. 373 (1976), the Court held that section 1360 permits state courts to adjudicate civil disputes on reservations, but it does not similarly extend to state civil regulatory control.

7. In 1968, Congress passed 25 U.S.C. § 1321 (the Indian Civil Rights Act). The Act provides that from that date forward no state can assume either civil or criminal jurisdiction without the consent of the involved tribes.

B. Federal Jurisdiction Over Indian Lands

1. Indian lands are defined in 18 U.S.C. § 1151 to include federal reservations (including fee land, see United States v. John, 437 U.S. 634 (1978)), dependent Indian communities (see United States v. Levesque, 681 F.2d 75 (1982)), and Indian allotments to which title has not been extinguished (see United States v. Ramsey, 271 U.S. 467 (1926)).

2. The Federal Enclaves Act, 18 U.S.C. § 1152, extends federal criminal law on to Indian Lands. There are two broad exceptions: (i) the Act does not extend to "offenses committed by one Indian against the person or property of another Indian"; and (ii) the Act does not extend where an Indian "has been punished by the local law of the tribe."

3. The Major Crimes Act, 18 U.S.C. § 1153, extended exclusive federal jurisdiction to the crimes named in the Act (murder, manslaughter, kidnaping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a

felony under section 661). It does not matter if the Indian or non-Indian.

4. The Assimilative Crimes Act, 18 U.S.C. § 13, fills the gaps in federal criminal law by providing for the applicability of state criminal statutes to crimes which, although committed within federal enclaves, are not punishable under federal law.

5. This scheme of felony jurisdiction depends in general on three factors: (i) subject matter; (ii) locus; and (iii) person. Where both offender and victim are non-Indian, then there is only state jurisdiction. Where offender is non-Indian and victim is Indian, then 18 U.S.C § 1152 permits federal prosecution, although state may still prosecute. Where Offender is Indian and victim is non-Indian, then both 18 U.S.C. § 1153 and § 1152, with the aid of 18 U.S.C. § 13 if necessary, permit federal prosecution. If both offender and victim are Indian, then federal prosecution is permitted only if a listed crime under 18 U.S.C. § 1153, otherwise can only be prosecuted in tribal court.

6. In general, federal environmental statutes apply to activities on Indian lands. In Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960) the Court held that federal laws of general application apply to activities on Indian lands. In Davis v. Morton, 469 F.2d 593 (10 Cir. 1972), the Tenth Circuit held that NEPA applies to approval by Secretary of Interior of leases of Indian lands.

7. RCRA applies to Indian lands. 42 U.S.C. § 6903(b) defines Indian tribes as municipalities subject to the Act. In State of Washington Department of Ecology v. U.S.E.P.A., 752 F.2d 1465 (9th Cir. 1985), the Ninth Circuit held that RCRA applies

to Indians and Indian lands.

8. The Clean Water Act applies to Indian lands. 33 U.S.C. § 1377(e) treats tribes as states under the Act. In addition, the EPA is given direct enforcement and regulatory authority over navigable waters until tribes have their own plans approved.

C. Tribal Jurisdiction

1. Tribes can impose their own environmental regulations on their lands.

2. Recent federal government environmental provisions treat Indian tribes as states in an attempt to give tribes more autonomy and responsibility in environmental matters.

3. In the interim, EPA regulates environmental matters on Indian lands.

II. INVESTIGATORS

A. FBI

1. The FBI has investigative jurisdiction over violations of 18 U.S.C. §§ 1152 and 1153.

B. EPA

1. The EPA has investigative jurisdiction over violations of federal environmental laws.

2. The EPA will not investigate if the offending business is owned by the tribe.

C. Tribal or BIA

1. Frequently by the time either the FBI or EPA arrives on the reservation some investigation will have been undertaken by tribal or BIA police.

2. U.S. Attorneys are encouraged and authorized to accept investigative reports directly from tribal or BIA police and prepare a case for prosecution without the aid of either the FBI or EPA.

3. The ability of tribal and BIA police varies from reservation to reservation, and U.S. Attorneys are free to ask either the FBI or the EPA to investigate.

PUBLIC LAND LAWS

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PUBLIC LAND LAWS

I. Introduction

Among the most precious treasures owned in common by all Americans are the vast tracts of land administered by the federal government as National Forests, National Parks, National Recreation Areas, National Grasslands, or as otherwise unspecified "public lands" under the management of the Bureau of Land Management of the United States Department of Interior. Although the greatest percentage of these lands are located in the states west of the Missouri River, there nevertheless exist a substantial number of National Forests, National Parks, and other "public lands" in the eastern United States as well. Wherever they are located, they share several common and important attributes. They serve as places of refuge for our increasingly precious fish and wildlife resources, and they provide recreational opportunities ranging from hunting and fishing to bird watching, rafting, back packing, hiking, nature-watching, and general sight-seeing. They often contain invaluable scientific, historical, archaeological, or paleontological resources. And they can be important economic resources as well, particularly in the West, where such lands are used for oil and gas production, mining, livestock grazing, and forestry. These lands thus comprise an important part of our natural heritage, and only our good stewardship will ensure that they can be passed along to future generations for their enjoyment and enrichment.

Unfortunately, many of the attributes that make these lands so special also make them vulnerable to abuse. Especially in the western United States but quite probably everywhere else as well, these lands are not located in or closely adjacent to large urban areas. More often than not, solitude and the absence of human visitors at any given time is the rule rather than the exception. Thus, for individuals or businesses who are so inclined, these lands provide inviting targets for the clandestine dumping and disposal of both hazardous and non-hazardous wastes, and for the commission of other resource-related offenses such as theft of archeological and paleontological resources, and commercial hunting.

A major part of this conference is on the laws and regulations pertaining to the unlawful treatment, storage, transportation, and disposal of hazardous wastes. For

purposes of this session, it is sufficient to note that those laws, including RCRA and CERCLA, are every bit as applicable to these public lands as they are to any other lands. Thus, in regard to cases involving clearly provable violations of RCRA, CERCLA, or any of the other traditional environmental laws, those laws should be looked to as bases for prosecution.

However, it is probable that cases will arise elsewhere, as several have in Wyoming, where either individuals or businesses will have mishandled and improperly disposed of solid wastes on publicly-owned lands under circumstances where a successful prosecution under RCRA or CERCLA would be either impossible (i.e., where the wastes are not hazardous as defined in EPA regulations), or very difficult (i.e., where the wastes involved may have very low concentrations or quantities of "hazardous" waste, but where substantial volumes of bad, but technically non-hazardous, wastes are involved), or simply unfair or undesirable (i.e., where the conduct involved may technically violate RCRA or CERCLA, but nonetheless may not justify a felony conviction, or where it may be desirable in the context of plea negotiations to have available a less serious charge in order to secure the cooperation or testimony of a co-defendant). The several "public land" laws and their implementing regulations, which we will discuss today, may provide some useful alternatives in the context of these kinds of cases.

The purpose of these materials and the presentation which accompanies them is to sensitize you as a federal prosecutor to the options you may have available to you whenever an "environmental" offense has occurred on public lands. The outline that follows addresses the most common forms of publicly-owned lands in the United States, and the specific federal laws and regulations pertaining to those lands. However, this outline does not purport to be exhaustive.

Federal agencies other than those noted below may also have some limited land management responsibilities and may, as a result, have comparable statutory or regulatory authorities. The point is, if you have what appears to be an environmental problem of criminal dimensions on publicly-owned land, and the agency charged with management responsibility for that land is not one of those discussed below, do not despair. If you look, and if you consult with that agency's counsel, you may well find a regulation or statute you can use as a basis for prosecution even if RCRA, CERCLA, or any of the other more traditional environmental statutes do not quite fit either your facts or your prosecution goals.

II. National Forest Lands

A. The National Forest system was originally created under the administration of President Theodore Roosevelt. It is administered by the United States Forest Service, United States Department of Agriculture. The lands included within the system are these:

1. All National Forests (a list, taken from 36 C.F.R. § 200, is attached as Appendix 1).

2. National Grasslands (a current list, from 36 C.F.R. § 213, is attached as Appendix 2).

3. National Recreation Areas administered by the U.S. Forest Service. Examples are:

   a. Whiskeytown - Shasta - Trinity National Recreation Area (California).

   b. Sawtooth National Recreation Area (Idaho).

   c. Hell's Canyon National Recreation Area (Idaho).

4. National Wild and Scenic River System components within Forest Service jurisdiction.

B. The primary statutory provision providing for separate law enforcement authority over national forest system lands is 16 U.S.C. § 551:

§ 551 Protection of national forest; rules and regulations

The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471 of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any

violation of the provisions of this section, sections 473 to 478 and 479 to 482 of this title or such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both. Any person charged with the violation of such rules and regulations may be tried and sentenced by any United States magistrate specially designated for that purpose by the court by which he was appointed, in the same manner and subject to the same conditions as provided for in section 3401(b) to (e) of Title 18.

The regulations pursuant to which violations of 16 U.S.C. § 551 may be prosecuted are found in 36 C.F.R. § 261. In general terms, these regulations are divided into three parts.

1. General Prohibitions (36 C.F.R. §§ 261.1 through 261.21).

2. Prohibitions in areas designated by order (36 C.F.R. §§ 261.80 through 261.88).

3. Prohibitions in regions (36 C.F.R. §§ 261.70 through 261.79).

The "general prohibition" regulations are the ones most pertinent here, and are applicable throughout the entire system. Among the specific regulations which may provide a basis for a criminal prosecution for an "environmental offense" are these:

1. § 261.9 Property: The following are prohibited:

(a). damaging any national feature or other property of the United States;

x x x

(f). using any pesticide except for personal use as an insect repellant or as provided by special use authorization for other minor uses;[1]

[1] This prohibition would be applicable, for example, where a grazing lease holder used pesticides to kill sage brush on Forest Service range without prior authority.

(g). digging in, excavating, disturbing, injuring, destroying, or in any way damaging any prehistoric, historic, or archaeological resource, structure, site, artifact, or property;

(h). removing any prehistoric, historic, or archaeological resource, structure, site, artifact, or property;

(i). excavating, damaging, or removing any vertebrate fossil or removing any paleontological resources for commercial purposes without a special use authorization.

2. § 261.11 Sanitation: The following are prohibited:

a. possessing or leaving refuse, debris, or litter in an exposed or unsanitary condition;

b. placing in or near a stream, lake, or other water any substance which does or may pollute a stream, lake, or other water;

c. failing to dispose of all garbage, including any paper, can, bottle, sewage, waste water or material, or rubbish either by removal from the site or area, or by depositing it into receptacles or at places provided for such purposes;

d. dumping of any refuse, debris, trash or litter brought as such from private property or from land occupied under permit, except, where a container, dump or similar facility has been provided and is identified as such, to receive trash generated from private lands or lands occupied under permit.

Obviously, one or more of the above regulatory prohibitions would apply to an unauthorized disposal of solid or hazardous waste on National Forest land.

Penalties: under 16 U.S.C. § 551, 6 months imprisonment and $500.00 fine.

However, under 18 U.S.C. § 3571, this fine is increased as follows:

1. For organizations: $10,000 fine

2. For individuals: $5,000 fine

or

3. Two times the pecuniary gain to the defendant, or two times the pecuniary loss to a person other than defendant, (i.e., Forest Service. 18 U.S.C. § 3571(d)).

   This might include pecuniary value of natural resource damages caused by the offense, if they are substantial (i.e., Exxon Valdez case), and may also include any pecuniary loss resulting from Government clean-up of the site.

III. National Park Service Lands

A. The lands administered by the National Park Service, United Stated Department of the Interior, include the following:

1. National Parks
2. National Monuments
3. National Battlefields
4. National Historic Sites
5. National Parkways
6. National Seashores
7. National recreation Areas
8. National Lakeshores
9. National Preserves
10. National Memorials
11. National Scenic Rivers
12. National Historic Parks
13. National Military parks
14. National Cemeteries
15. Alaska Parks

It would be helpful indeed if all of these different enclaves were governed by a single, uniform set of rules and regulations, and, for the most part, they are, particularly with respect to the kinds of conduct that are prohibited and could give rise to a prosecution. However, the penalties available for any particular violation will in many instances depend upon the specific type of area upon or within which the violation was committed. In addition, many, if not most, of the individual parks, monuments, areas or sites under the jurisdiction of the National Park Service are also governed by their own special laws and regulations that supplement, and occasionally contain exceptions to, the laws and regulations of general applicability which otherwise cover all Park Service enclaves. Thus, before making any final judgments about whether or how to charge an environmental or resource-related offense on park lands within your district, it is always necessary to review any special statutes or regulations applying to the particular park land at issue to ensure that no special rules exist which might affect the manner in which the general Park Service prohibitions apply to your specific case.

B. General Rules and Regulations.

The general prohibitions established by the Park Service to govern activities on Park Service lands are contained in 36 C.F.R. §§ 1 through 5. For purposes of this conference, the following prohibitions of these regulations are most significant.

1. § 2.14(c) prohibits the following:

   a. disposing of refuse in other than refuse containers;

   b. using government refuse receptacles or other refuse facilities for dumping household, commercial, or industrial refuse, brought as such from private or municipal property, except in accordance with conditions established by the superintendent;

c. draining refuse from a trailer or other vehicle, except in facilities provided for such purpose; or

d. polluting or contaminating park areas waters or water courses.

2. § 5.6 prohibits the following:

a. use of commercial vehicles on roads within park areas, when such use is not connected with operations of park area, unless in case of emergency where superintendent may grant permission to use such roads.

3. § 2.1 prohibits:

a. digging or disturbing fossils or paleontological resources;

b. digging or disturbing archeological or cultural resources.

4. § 2.34 prohibits:

a. creating or maintaining a hazardous or physically offensive condition in park areas.

C. Specific, Supplemental Rules.

In addition to these prohibitions of general application, specific, supplemental rules are set forth in 36 C.F.R. § 7 for individual Park Service areas in the United States; supplemental regulations for National Cemeteries are set forth in § 12; and supplemental and special regulations for National Park Service Units in Alaska are set forth in § 13.

D. Penalties.

Unlike the general prohibitions set forth in §§ 1 through 5, which apply for the most part across the board for all Park Service lands, the penalties that apply to violations of these prohibitions specifically depends upon the nature of the Park Service enclave at issue.

1. National Military Parks, Battlefields, Monuments, Memorials, or Cemeteries.

In June, 1933, certain specific National Military Parks, Battlefields, Monuments, Memorials, and Cemeteries were transferred from the jurisdiction of the War Department to that of the National Park Service, U.S. Department of the Interior. The specific enclaves covered by this transfer of jurisdiction are listed at the note following 5 U.S.C. § 901. The list is set forth also in Appendix 3 to this outline. For violations of any of the general prohibitions found in 36 C.F.R. §§ 1 through 5, the penalties are:

a. imprisonment: three months;
b. fine: $10,000 (organizations), $5,000 (individuals), or two times the pecuniary loss or gain (18 U.S.C. § 3571). See 36 C.F.R. § 1.3(b).

2. National Historic Sites.

The prohibitions contained in §§ 1 through 5 of 36 C.F.R. are generally applicable to conduct on National Historic Sites under the administration of the National Park Service. However, for those specific National Historic Sites and areas delineated in 16 U.S.C. § 461 (See Appendix 4), the penalties for violations are these:

a. imprisonment: none;

b. fine: $10,000 (organizations); $5,000 (individuals); or two times the pecuniary loss or gain (18 U.S.C. § 3571).

3. All other National Park Service Enclaves.

For all other components of the National Park Service System, however they may be denominated (i.e., parks, monuments, memorials, etc.), penalties for violations of the general prohibitions set forth in 36 C.F.R. §§ 1 through 5 are as follows:

a. imprisonment: six months (see 16 U.S.C. § 3);
b. fine: $10,000 (organizations); $5,000 (individuals); or two times the pecuniary loss or gain (18 U.S.C. § 3571).

IV. Public Lands

A. By far, the largest block of land in public ownership is the "public lands" administered by the Bureau of Land Management, United States Department of the Interior. Comprising by some estimates as much as one third of the entire land mass of the United States, see e.g., Public Land Law Review Commission, One Third of the Nation's Land (1970), and Lujan v. National Wildlife Federation, 497 U.S. 871 (1990), these lands are located primarily west of the Missouri River and in Alaska.

They are possessed by enormous variety in terms of their topographic, geologic, climatic, and ecological features, and run the gamut from the Mohave Desert in California, to the vast sagebrush plains in Wyoming, to the rain forests in Oregon and Washington, to the Alpine Meadows and craggy peaks in Alaska. Until very recently, those lands were perhaps the most maligned and least appreciated of all the land in public ownership in the United States. Although they have always been economically valuable as sources of oil and gas and hard rock minerals, and as places to graze livestock "on the cheap," it is only in the last two decades that the Government has begun to recognize that which the general public in the West has known all along; i.e., that, apart from their value for minerals or forage, these "public lands" are extraordinarily important as fish and wildlife habitat, as sources of important scientific and cultural information in regard to their archeological and paleontological resources, and for recreation (particularly fishing, hunting, sight-seeing, camping, and "wildlife watching").

Unfortunately, these lands are also especially vulnerable to abuse. They are, more often than not, remote from any significant population centers. Moreover, their very vastness virtually guaranties that a human visitor, whether his purpose be good or ill, will

be able to carry on his business without being observed or detected by anyone, much less by a law enforcement official. Thus it is that in Wyoming and many other western states with large tracts of "public lands," criminal conduct involving the unlawful disposal of both hazardous and non-hazardous wastes, the theft of archeological and paleontological resources, and the commercial poaching of wildlife, among others, goes on largely undetected and thus largely unprosecuted. In Wyoming, for just one example, "public lands" comprise almost thirty-three percent of the entire state. BLM, which administers these lands, has just four rangers to patrol and protect all of it. Thus, when significant, resource-related criminal acts on or affecting these lands are detected and successfully investigated, it is important that they be prosecuted vigorously.

B. The Federal Land Policy and Management Act (FLPMA).

1. FLPMA is the "organic act" for the Bureau of Land Management, whose mission it is to manage and protect the "public lands." FLPMA established a policy in favor of retaining these lands in public ownership for multiple use management. 43 U.S.C. § 1701. The principal enforcement provisions are set forth in 43 U.S.C. § 1733(a). That provides as follows:

> The Secretary shall issue regulations necessary to implement the provisions of this Act with respect to the management, use, and protection of the public lands, including the property located thereon. Any person who knowingly and willfully violates any such regulation which is lawfully issued pursuant to this Act shall be fined no more than $1,000 or imprisoned no more than twelve months, or both. Any person charged with a violation of such regulation may be tried and sentenced by an United States magistrate designated for that purpose by the court by which he was

appointed, in the same manner and subject to the same conditions and limitations as provided for in section 3401 of Title 18.

In addition, the Act provides a civil enforcement mechanism whereby injunctive or other appropriate relief might be secured:

43 U.S.C. § 1733(b):

(b) **Civil actions by Attorney General for violations of regulations; nature of relief; jurisdiction**

At the request of the Secretary, the Attorney General may institute a civil action in any United States district court for an injunction or other appropriate order to prevent any person from utilizing public lands in violation of regulations issued by the Secretary under this Act.

2. The penalties available to punish criminal violations of FLPMA are:

a. imprisonment: one year;

b. fine: $100,000 (individual); $200,000 (organization); or two times pecuniary loss or gain (18 U.S.C. § 3571).

C. FLPMA Regulations.

Obviously, given the text of the statute, what constitutes a criminal violation of FLPMA can be determined only in reference to the Secretary's regulations which implement it. BLM's regulations under FLPMA are located in Title 43, Code of Federal Regulations. Those regulations are divided into parts along "program" lines. Thus, regulations governing leases, permits, and easements are located at § 2920; those relating to grazing are found at § 4140; those relating to recreation are set forth in § 8365; and so forth. However, it is important to note that specific prohibitions set forth in any one of these or any other subparts are not (unless otherwise explicitly indicated) exclusively applicable only to public land users whose

particular interest in the public lands falls within the parameters of that subpart. Thus, for example, prohibitions set forth in the subpart on recreation (§ 8365) may be applied to all users of public lands, not just recreational users.

1. Subpart 2920 - Leases, Permits, and Easements

The general purpose of these regulations is to establish procedures for processing proposals for non-federal uses of public lands. For law enforcement purposes, the most significant regulations under this part are set forth at § 2920.1-2.

Section 2920.1-2(a) provides that:

> (a) Any use, occupancy, or development of the public lands, other than casual use as defined in § 2920.0-5(k) of this title, without authorization under the procedures in § 2920.1-1 of this title, shall be considered a trespass.

Causal use is defined in § 2920.0-5(k):

> (k) Casual use means any short term non-commercial activity which does not cause appreciable damage or disturbance to the public lands, their resources or improvements, and which is not prohibited by closure of the lands to such activities.

Thus, any use of the public lands (defined in § 2829,950(g) as all lands and interests in lands administered by the Bureau of Land Management, (except Outer Continental Shelf lands and land held for the benefit of Indians, Aluets and Eskimos), except for non-commercial, short term activities that do not cause appreciable damage or disturbance, constitutes a trespass and is prohibited unless authorized by the secretary.

Section 2920.1-2(e) provides:

> (e) Any person who knowingly and willfully violates the regulations in this part by using the public lands without the authorization required by this part, in addition to the civil penalties provided for in this part, may be subject to a fine of not more than $1,000 or imprisonment of not more than 12 months, or both under subpart 9262 of this title.[2]

2. In addition to § 2920, FLPMA regulations contain other, more specific prohibitions that can be used as a basis for prosecution in appropriate circumstances. For example, under the Range Management regulations at § 4140 (prohibited acts), the following acts are prohibited on the public lands:

   a. cutting, burning, spraying, or removing vegetation without authorization (includes use of pesticides to kill vegetation); and

   b. littering.

3. Under the wild horse and burro regulations, the following are prohibited:

   a. removing or attempting to remove wild horses or burros from public lands without authority;

   b. selling or attempting to sell a wild horse or burro or its remains, without authority;

   c. Commercially exploiting wild horses or burros.[3]

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[2] As noted above, the applicable fine for this violation is set forth in 18 U.S.C. § 3571.

[3] These regulations are also adopted pursuant to the Wild Horse and Burro Act, 16 U.S.C. § 1331 et seq. A significant enforcement problem in states with populations of wild horses and burros is the illegal capturing of these animals for sale, ultimately, to manufacturers of pet foods and other products.

4. Under the FLPMA recreation regulations, 43 C.F.R. § 4365, the following are among the activities prohibited:

   a. disposal of both non-flammable and flammable trash except in specifically designated facilities (§ 8365.1-1);

   b. disposal of any household, commercial, or industrial waste brought as such from private or municipal property (Id.);

   c. willfully defacing, destroying, or removing any scientific, cultural, archeological, or historic resource (§ 8365.1-5).[4]

5. FLPMA's law enforcement regulations summarize and collect most--but not all--of the various use prohibitions at 43 C.F.R. § 9260.

D. In Wyoming, we have prosecuted--or are investigating with an eye towards prosecuting--several cases involving, among other things, violations of FLPMA. The most notable of these cases is Pacific Enterprises Oil Company (USA) ("PEOC"). This oil company operated a large number of oil and gas wells on public lands in central Wyoming. Beginning in at least 1988, its employees were directed to dispose of various kinds of oil field waste by either burying it on public lands, or, in the case of some drums of discarded oil field chemicals, pumping it down shut-in water injection wells. During the course of our investigation, we conducted searches that turned up the following:

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[4] Covered in this prohibition are all paleontological resources (fossils) with the exception of common invertebrate fossils. Theft of vertebrate fossils, particularly those of dinosaurs and other mesozoic vertebrates, is an increasingly serious enforcement issue on public lands in the west. A fully articulated dinosaur fossil, for example, can be worth hundreds of thousands--if not millions--of dollars on the open market. Theft of these resources for their commercial value deprives us not only of invaluable scientific data, but also of treasures we own in common and which we and our children should all be able to enjoy and learn from.

1. scrap oil field pipe and scrap building materials and refuse (including large quantities of asbestos) from old shop buildings which had been torn down, all of which had been illegally buried in an excavation on public land;

2. a discarded heater-treater (a cylindrical piece of oil field equipment about 40' long, 10' in diameter) buried on public land;

3. seventy-five drums containing waste oil field chemicals, only a very small portion of which was hazardous under EPA regulations but all of which was environmentally dangerous, illegally buried on public land;

4. fifty-three crushed chemical drums, some containing small amounts of chemicals, buried on public land;

5. six chemical drums containing both hazardous and non-hazardous chemical wastes, buried on public land; and

6. hazardous and non-hazardous chemical wastes which had been illegally pumped into shut-in water injection wells.

In addition, we also learned through informants that, at several locations on several different occasions, waste oil field chemicals had been illegally sprayed on roads located on public lands.

As a result of our investigation, conducted jointly by BLM law enforcement and EPA, PEOC ultimately pleaded guilty to eight separate FLPMA violations. It paid a $1.6 million fine, and deeded to the United States 1,000 acres of land along the Green River in Utah by way of restitution. Only two of these counts could arguably have been prosecuted under RCRA, and even in those instances, the quantity of "hazardous" waste--compared to the quantity of non-hazardous solid wastes--was relatively minor.

Thus, through the use of FLPMA, we were able to turn what was a relatively minor RCRA case into a truly significant prosecution with substantial penalties and public benefits. Also, while PEOC had arguable (though not necessarily compelling) defenses in regard to the

potential RCRA counts we had (i.e., that the waste involved was legally exempt from RCRA under the "Bensten Amendment" because it was oil field waste), it of course had no defense to the FLPMA counts. PEOC had no permission to do any of these things, and what it had done was certainly not "casual use."

V. Title 18 Provisions Applicable to Public Lands

In addition to the specific public land laws and regulations noted above, there are also several provisions in Title 18 that, in appropriate cases, can be used to prosecute serious public land-related offenses.

A. 18 U.S.C. § 1361.

Whoever willfully injures or commits any depredation of any property of the United States, or of any department or agency thereof, or any property which has been or is being manufactured or constructed for the United States, or any department or agency thereof, shall be punished as follows:

> If the damage to such property exceeds the sum of $100, by a fine of not more than [$250,000, or, in the case of an organization [$500,000], or by imprisonment for not more than ten years, or both; if the damage to such property does not exceed the sum of $100, by a fine of not more than [$100,000, or, in the case of an organization, $200,000], or by imprisonment for not more than one year, or both.

"Property of the United States," for purposes of this section, is essentially all-inclusive, and appears to encompass virtually every form of tangible property imaginable. For purposes of this conference, it includes at least archaeological and paleontological on federal lands, see United States v. Austin, 902 F.2d 743 (9th Cir.), cert. denied, 498 U.S. 874 (1990), and United States v. Jones, 607 F.2d 269 (9th Cir. 1979), cert.

denied, 444 U.S. 1083 (1980)[5]; timber and forest resources on federal lands, see Magnolia Motor and Logging Co. v. United States, 264 F.2d 950 (9th Cir.), cert. denied, 361 U.S. 815 (1959), and United States v. Manes, 420 F. Supp. 1013 (D. Ore. 1976), aff'd, 549 F.2d 809 (9th Cir. 1977)[6]; cactus, see United States v. Baldwin, 607 F.2d 1295 (9th Cir. 1979); wild horses or burros, see United States v. Tomlinson, 574 F. Supp. 1531 (D. Wyo. 1983); and indeed land itself, see Magnolia Motor and Logging Co., 264 F.2d at 953 n.13. For purposes of determining whether an offense is a felony or misdemeanor under this section, value of damages at issue can be calculated on the basis of the cost required to repair or restore. United States v. Eberhardt, 417 F.2d 1009 (4th Cir. 1969), cert. denied 397 U.S. 909 (1970).

Section 1361 has yet to be used in an "environmental" case. However, there appears to be no reason why it would not cover the dumping, burying, or otherwise unlawfully disposing of solid waste on federal land without authorization under circumstances where a prosecution under RCRA or CERCLA would not be possible or appropriate. As suggested above, the cost to the Government of cleaning up and restoring the land at issue to its original condition would be the measure of the damages involved, and thus the measure of whether the prosection could be for a felony violation of this section.

This section could be especially useful where the federal land at issue does not appear to be governed by

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[5] See also Archaeological Resources Protection Act, 16 U.S.C. § 470aa et seq., which specifically protects archaeological relics and artifacts from willful theft or destruction. Penalties are set forth at § 470ee(d), and are a one year term of imprisonment, a fine of $100,000 (or $200,000 for an organization, or twice any provable pecuniary loss or gain under 18 U.S.C. § 3571(d)), or both. For second or subsequent convictions, the penalties are five years imprisonment, $250,000 fine ($500,000 for an organization), or both. This Act does not cover paleontological resources.

[6] Unlawful injury to or theft of timber resources on federal land can also be prosecuted under 18 U.S.C. §§ 1852 or 1853, both misdemeanors carrying one year terms of imprisonment, $5,000 fines (or $10,000 for an organization, or twice the pecuniary loss or gain under 18 U.S.C. § 3571(d)), or both.

any other prohibitory federal regulations (i.e., Bureau of Reclamation land).

B. 18 U.S.C. § 641.

This is the general theft of Government property offense. It provides that:

> whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, coveys, or disposes of any . . . thing of value of the United States or of any department or agency thereof . . . , or
>
> whoever receives, conceals or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined, or converted,
>
> shall be fined not more than [$250,000], or imprisoned for not more than ten years, or both; but if the value of such property does not exceed $100, he shall be fined not more than [$100,000], or imprisoned for not more than one year, or both.

Section 641 is often used in conjunction with § 1361, where the offense conduct involves both damage to and theft of valuable public land resources, such as timber, see United States v. Henderson, 721 F.2d 276 (9th Cir. 1983), and Magnolia Motor and Logging Co. 264 F.2d at 950; archaeological resources, see United States v. Jones, 607 F.2d at 269; and wild horses and burros on public lands, see cf. United States v. Tomlinson, 574 F. Supp at 1531. It could as well apply to paleontological resources (fossils), or any other valuable public resources.

C. Other Public Land Statutes in Title 18.

Sections 1851 through 1864 sets forth an array of additional, largely (but not exclusively) misdemeanor provisions relating to coal (§ 1851); timber (§§ 1852-55), fires (§ 1856); fences and livestock (§ 1857); surveys and survey works (§§ 1858-59); bid rigging or

fraud in regard to the sale or purchase of public lands (§ 1860-61); trespass on National Forest lands (§ 1863); and the placing of hazardous or injurious devices on federal land (§ 1864).

D. Charging Options.

Obviously, given the wide array of statutes noted above, it will often be the case that, for any one occurrence of putatively criminal conduct, more than one could arguably apply. The general rule is that, where conduct violates more than one criminal statute, the Government may prosecute under either statute so long as it does not discriminate against any class of defendants. United States v. Batchelder, 442 U.S. 114, 124 (1979); United States v. Jones, 607 F.2d at 269 (affirming right of Government to prosecute theft and destruction of archaeological resources under 18 U.S.C. §§ 641 and 1361, rather than under Antiquities Act, 16 U.S.C. § 433).

AO 93 (Rev 5/85) Search Warrant

United States District Court

DISTRICT OF MARYLAND

In the Matter of the Search of
(Name, address or brief description of person or property to be searched)
Fort George G. Meade, Maryland
Waste Water Treatment Plant Administration
Bulding #9581
State Road 198

SEARCH WARRANT

CASE NUMBER: 90-0038

TO: Special Agent Gregory B. Groves and any Authorized Officer of the United States
Federal Bureau of Investigation

Affidavit(s) having been made before me by Special Agent Gregory B. Groves (Affiant) who has reason to believe that ☐ on the person of or ☒ on the premises known as (name, description and/or location)
The Fort George G. Meade, Maryland Waste Water Treatment Plant Administration Building #9581. Including but not limited to the laboratory, Instrument control Center, office of John Thomas, office of Rich Pond, all desks, filing cabinets, or other areas capable of storing or concealing documents. Further described in Attachment A.

in the State and District of Maryland there is now concealed a certain person or property, namely (describe the person or property)
documents which are evidence of violations of Federal environmental laws.*/ More particularly described in Attachment B.

*/ 33 U.S.C. Sections 1311, 1319(c) and 18 U.S. C. Section 1001

I am satisfied that the affidavit(s)*/ and any recorded testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant. */ This warrant incorporates by reference the Affidavit of Special Agent Gregory B. Groves.

YOU ARE HEREBY COMMANDED to search on or before July 31, 1990 (Date)
(not to exceed 10 days) the person or place named above for the person or property specified, serving this warrant and making the search (in the daytime — 6:00 A.M. to 10:00 P.M.) ~~(at any time in the day or night as I find reasonable cause has been established)~~ and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to me (U.S. Judge or Magistrate) as required by law.

July 23, 1990 4:35 pm at Baltimore, Md
Date and Time Issued City and State

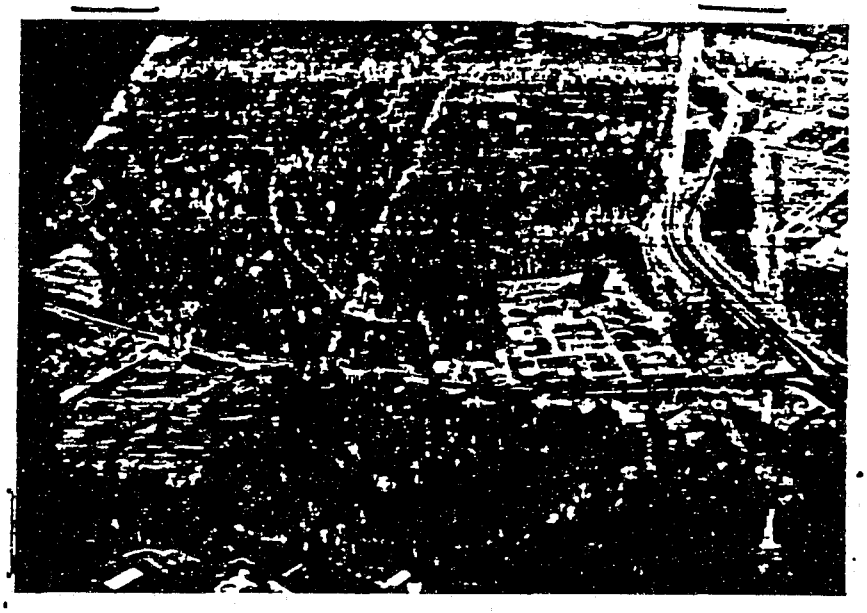
CATHERINE C. BLAKE
U.S. MAGISTRATE
Name and Title of Judicial Officer

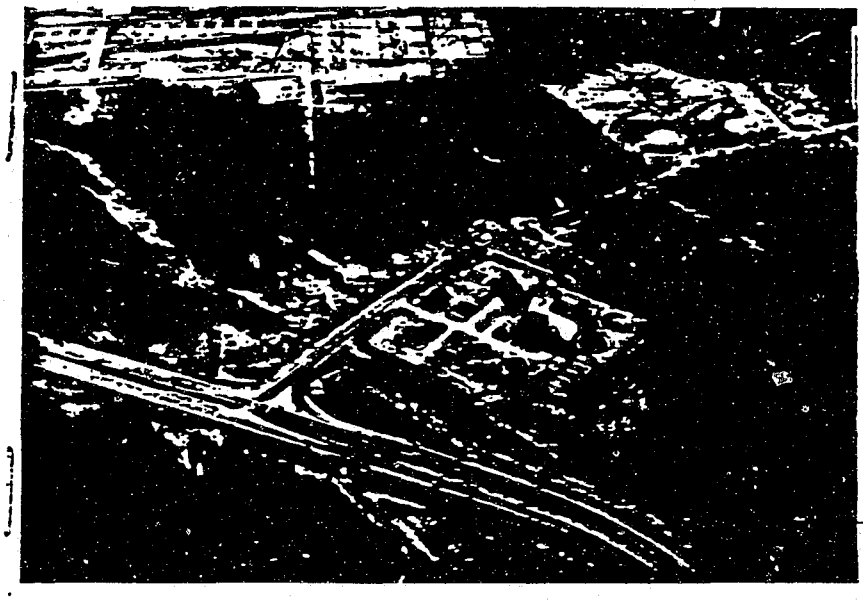
Catherine C Blake
Signature of Judicial Officer

ATTACHMENT A

PREMISES TO BE SEARCHED

Building 9581 is located on the northeast side of State Road 198. Building 9581 is within the chain link fenced area known as the Fort George G. Meade, Maryland Waste Water Treatment Plant. The treatment plant and Building 9581 are north of the Little Patuxent River and south of State Road 32. The entrance to the Waste Water Treatment Plant is approximately one tenth of a mile south of State Road 32 on the northeast side of State Road 198. The Waste Water Treatment Plant and Building 9581 are shown in the attached aerial photograph taken on June 12, 1990. Building 9581 is a tan block building which is one level on the front and two levels on the rear. It has two tall silos attached to its south side.





ATTACHMENT B

PROPERTY TO BE SEIZED

Books, records, files, reports, correspondence, ledgers, calendars, appointment books, including written, typed and/or computerized materials including, but not limited to the following:

1. Documents containing the names, addresses and telephone numbers of all Fort Meade Waste Water Treatment Plant (WWTP) employees, the job descriptions or other material defining the nature and scope of each employees responsibilities and records which show time and attendance for each employee, including time cards or other such records reflecting employment history, such records to include those of former employees.

2. Files and documents demonstrating the orders and purchases of lime, ferric chloride, all other chemicals and supplies for use in operating the Ft. Meade WWTP.

3. Supply order forms and inventories for equipment, supplies, chemicals and all other materials used in the laboratory which is part of the Ft. Meade WWTP.

4. Correspondence between employees of the Ft. Meade WWTP and employees of State or Federal Environmental or Occupational Safety and Health agencies, which correspondence may relate to any environmental problems at the Ft. Meade WWTP, past and present or which may relate to incidents regarding the operation of the Ft. Meade WWTP.

5. Daily operator log sheets, daily operations logs, daily lab sheets, monthly log sheets, discharge monitoring reports and results of analysis conducted by U.S. Army employees, Commonwealth Labs or any other laboratory that analysed samples for the Ft. Meade WWTP.

6. All reports, studies and audits conducted by any agency or business regarding the characteristics of the National Security Agency (NSA) influent to the Ft. Meade WWTP, and discharges from the Ft. Meade WWTP outfalls 001 and 001A. All correspondence generated by employees of the U.S. Army, NSA, or any other agency as a result of any of the aforementioned reports, studies and audits.

7. All records, reports, and data used to prepare records and reports as required by the Ft. Meade WWTP National Pollutant Discharge and Elimination System (NPDES) Permit, including records of all Ft. Meade WWTP monitoring information including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation. The referenced records are to include the date, exact place, time and individuals who performed the sampling or measurement, dates that samples were analyzed, names of individuals who performed the analysis. The analytical technique or methods used and the results of such analysis.

8. For non-computerized documents, the time period covered by this warrant is April 15, 1985 forward. April 15, 1985 is the effective date of the facility's first National Pollutant Discharge Elimination System permit.

9. All computerized data or information in any form whatsoever (e.g., hardcopy, on disks, in computer hard drive) relating or referring to the operation of the Ft. Meade Wastewater Treatment Plant. (The warrant authorizes the searching authorities to off-load in its entirety, all computerized data or information from the computer system located in Building 9581).

10. This warrant further authorizes the searching authorities to photograph all office areas and the laboratory area to preserve conditions as observed at the time of the search.

Sealed 7/23/90
Work Copy

United States District Court

DISTRICT OF MARYLAND

In the Matter of the Search of
(Name, address or brief description of person or property to be searched)
Fort George G. Meade, Maryland
Waste Water Treatment Plant Administration
Building #9581
State Road 198

APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT

CASE NUMBER: 90-0030 B

I Gregory B. Groves being duly sworn depose and say:

I am a(n) Special Agent, Federal Bureau of Investigation and have reason to believe
Official Title

that ☐ on the person of or ☒ on the premises known as (name, description and/or location)

The Fort George G. Meade, Maryland Waste Water Treatment Plant Administration Building #9581. Including but not limited to the laboratory, Instrument Control Center, office of JOHN THOMAS, office of RICH POND, all desks, filing cabinets, or other areas capable of storing or concealing documents. Further described in Attachment A.

in the Judicial District of MARYLAND

there is now concealed a certain person or property, namely (describe the person or property)

documents which are evidence in violations of Federal environmental laws. More particularly described in Attachment B.

which is (give alleged grounds for search and seizure under Rule 41(b) of the Federal Rules of Criminal Procedure)
property that constitutes evidence of the commission of offenses.

in violation of Title 33 United States Code, Section(s) 1311, 1319 (c) and 18 USC 1001

The facts to support the issuance of a Search Warrant are as follows:

See attached Affidavit of Special Agent Gregory B. Groves, Federal Bureau of Investigation.

Continued on the attached sheet and made a part hereof. ☒ Yes ☐ No

Gregory B. Groves
Signature of Affiant

Sworn to before me, and subscribed in my presence

July 23, 1990 at Baltimore, Md.
Date City and State

CATHERINE C. BLAKE
U.S. MAGISTRATE
Name and Title of Judicial Officer

Catherine C. Blake
Signature of Judicial Officer

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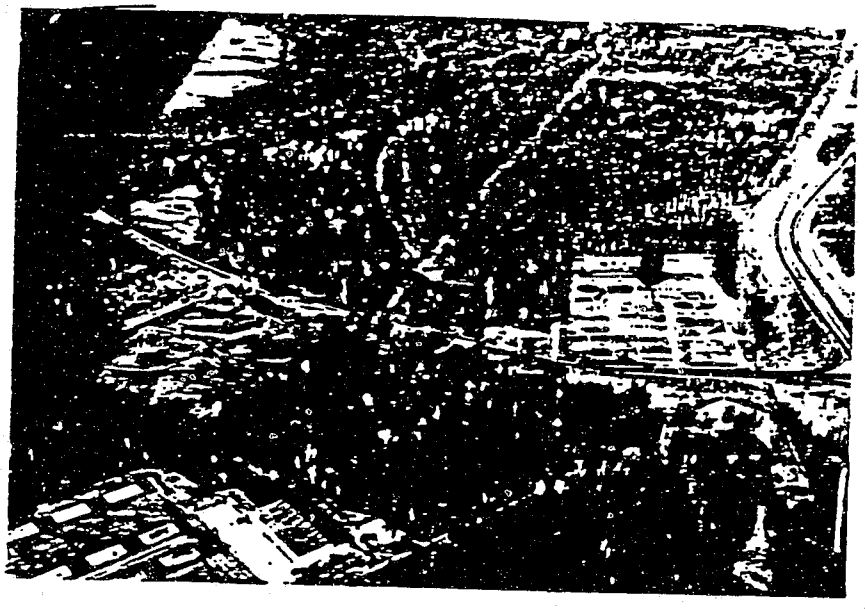

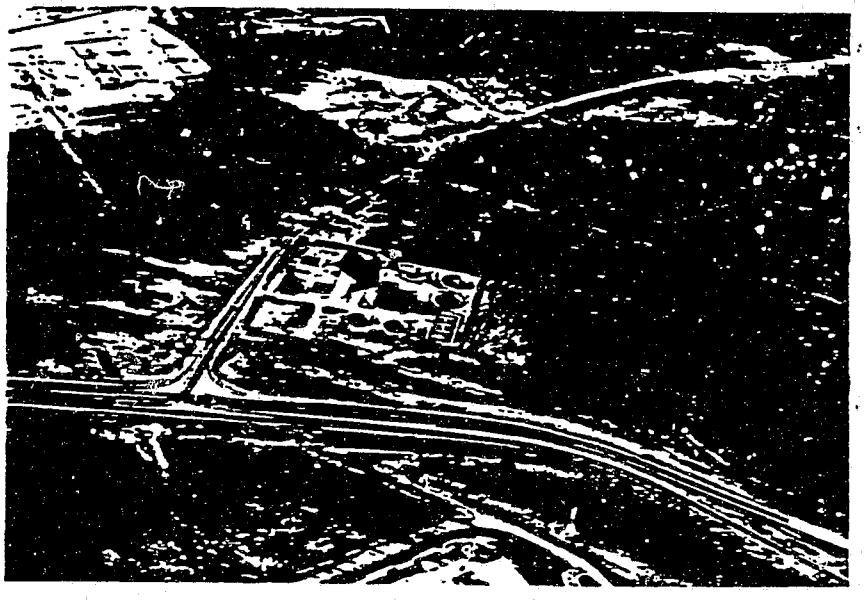

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PROPERTY TO BE SEIZED

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2. Files and documents demonstrating the orders and purchases of lime, ferric chloride, all other chemicals and supplies for use in operating the Ft. Meade WWTP.

3. Supply order forms and inventories for equipment, supplies, chemicals and all other materials used in the laboratory which is part of the Ft. Meade WWTP.

4. Correspondence between employees of the Ft. Meade WWTP and employees of State or Federal Environmental or Occupational Safety and Health agencies, which correspondence may relate to any environmental problems at the Ft. Meade WWTP, past and present or which may relate to incidents regarding the operation of the Ft. Meade WWTP.

5. Daily operator log sheets, daily operations logs, daily lab sheets, monthly log sheets, discharge monitoring reports and results of analysis conducted by U.S. Army employees, Commonwealth Labs or any other laboratory that analysed samples for the Ft. Meade WWTP.

6. All reports, studies and audits conducted by any agency or business regarding the characteristics of the National Security Agency (NSA) influent to the Ft. Meade WWTP, and discharges from the Ft. Meade WWTP outfalls 001 and 001A. All correspondence generated by employees of the U.S. Army, NSA, or any other agency as a result of any of the aforementioned reports, studies and audits.

7. All records, reports, and data used to prepare records and reports as required by the Ft. Meade WWTP National Pollutant Discharge and Elimination System (NPDES) Permit, including records of all Ft. Meade WWTP monitoring information including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation. The referenced records are to include the date, exact place, time and individuals who performed the sampling or measurement, dates that samples were analyzed, names of individuals who performed the analysis. The analytical technique or methods used and the results of such analysis.

8. For non-computerized documents, the time period covered by this warrant is April 15, 1985 forward. April 15, 1985 is the effective date of the facility's first National Pollutant Discharge Elimination System permit.

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10. This warrant further authorizes the searching authorities to photograph all office areas and the laboratory area to preserve conditions as observed at the time of the search.

AFFIDAVIT

Your affiant is Special Agent GREGORY B. GROVES of the Federal Bureau of Investigation (FBI), Baltimore Division, Baltimore, Maryland. The information set forth in this Affidavit was determined as a result of my investigation, related by a Maryland State Police Trooper and provided by other persons who provided information to affiant as hereinafter noted. This Affidavit is made in support of application for a search warrant for all areas within the Fort Meade Waste Water Treatment Plant (WWTP) Administration Building 9581, including but not limited to the Laboratory, the Instrument Control Center, the office of JOHN THOMAS, the office of RICH POND and all storage areas, desks, filing cabinets, briefcases, and all other areas capable of storing or concealing documents.

As noted, I am a Special Agent of the Federal Bureau of Investigation assigned to the Baltimore Division. I am assigned to investigate Environmental Crime and in this capacity I have conducted numerous investigations involving violations of the Clean Water Act, including illegal discharges of pollutants to navigable waters of the United States, and the review of records which are required by the Clean Water Act permit system known as, The National Pollutant Discharge Elimination System (NPDES).

The Clean Water Act, 33 U.S.C. 1251 et seq. as amended establishes a regulatory control program for limiting discharges of pollutants into the waters of the United States. The primary tool for limiting water pollution is the issuance of permits under the National Pollutant Discharge Elimination System. NPDES

permits contain, in addition to effluent limitations, reporting and record keeping provisions. NPDES permitees are required to sample, analyze and report periodically as set forth in their permit. All sample taking and analysis of samples is to be done according to approved procedures. NPDES permitees are required to keep all records used in NPDES reports for three years. Reports filed pursuant to NPDES permits are known as Discharge Monitoring Reports (DMRs).

The Search Warrant Application and this Affidavit are predicated upon violations of the false statements aspects of the Clean Water Act in that it is alleged that since 1987, records and reports required to be maintained and submitted by the Fort Meade WWTP have been knowingly falsified and monitoring devices or methods required to be maintained under the Clean Water Act have been knowingly rendered inaccurate by the Fort Meade Waste Water Treatment Plant superintendent.

PROBABLE CAUSE

In November, 1989, the FBI, Baltimore, Maryland, received information from LARRY GRASSO, Trooper First Class, Maryland State Police, assigned to the Maryland Attorney General's Environmental Crimes Section, that he was investigating allegations that records and reports required by the National Pollutant Discharge and Elimination System (NPDES) permit at Fort George G. Meade Waste Water Treatment Plant (WWTP) had been falsified beginning in November, 1988 through March, 1989. GRASSO told me that he had interviewed a number of past and present emplcyees of the Ft. Meade WWTP who told him that RICH POND, the Plant Superintendent, had knowledge of the falsifications. GRASSO wrote in a report that LYNNE BOWLES, former Fort Meade WWTP lab technician, told him that RICH POND was promoted from a foreman position to Plant Superintendent during December 1987.

During December, 1989, I interviewed MARLENE PATILLO, Performance Audit Inspector, Maryland Department of the Environment (MDOE). PATILLO's job with the MDOE is to audit reports, records and laboratory procedures to verify waste water treatment plant compliance with NPDES permits. PATILLO conducted a performance audit inspection of the Ft. Meade WWTP on November 17, 1988, at the request of FRANK CIURCA, Compliance Evaluation Inspector, MDOE, due to CIURCA's suspicion that required testing was being done improperly.

After her November 17, 1988, audit inspection, PATILLO wrote "the analytical procedures were being performed improperly;

the laboratory did not have a chemist currently employed and there was strong suspicion that the tests were not actually being performed at all." PATILLO told affiant, the NPDES permit for Ft. Meade WWTP requires testing for ammonia, total phosphorous, organics, metals, Biological Oxygen Demand (BOD_5), fecal coliform, total suspended solids, chlorine and dissolved oxygen. According to PATILLO, some of the tests were being conducted by COMMONWEALTH LABS in Virginia for Ft. Meade. However, the Ft. Meade lab was reportedly doing its own analysis for BOD, fecal coliform, total suspended solids, phosphorous, chlorine and dissolved oxygen.

PATILLO noted that on November 17, 1988, the general appearance of the Ft. Meade WWTP laboratory was of equipment that hadn't been used in a while, dirty glassware, and everything having remained untouched. Based on her visual observations, and expertise in auditing laboratories for compliance with NPDES permit requirements, PATILLO concluded that required tests were not being performed, therefore, any reports could be being falsified.

PATILLO returned to the Ft. Meade WWTP on the evening of November 21, 1988, and proceeded to the laboratory. She checked the BOD incubator and found an insufficient number of sample bottles. Without the correct number of bottles the test results are invalid. PATILLO observed that the fecal coliform bath was not on but petri dishes were on top of the incubator showing no growth. PATILLO noted in her report that these same petri dishes had been on top of the incubator on her November 17,

1988 inspection. According to PATILLO, valid tests for BOD and fecal coliform would not result from procedures she observed on November 21, 1988. After her November 17 and November 21, 1988 inspections, she wrote no site complaints but decided to check again later to confirm or deny her suspicions that test result records were being falsified.

During March, 1989, PATILLO received a note from CIURCA wherein he expressed concern again about the Ft. Meade WWTP because data sheets for tests were missing from the WWTP. Failure to retain such records is a violation of the NPDES permit. Also, during March 1989, Mr. MING LIANG JIANG, Division of Municipal Compliance, MDOE, told PATILLO that he received an anonymous call that reported falsification of data by Mr. RICH POND.

On April 7, 1989, PATILLO performed another inspection of the Ft. Meade WWTP. Required reports were in order but required laboratory sheets, which are back up documentation for completed tests and which must be retained in the laboratory, were missing. During the April 7, 1989 inspection, an employee at the Ft. Meade WWTP took PATILLO aside and whispered that she was about two weeks too late indicating that something had recently been amiss with required records or procedures. PATILLO did not have an opportunity to question the employee further. During the April 7, 1989 inspection she spoke privately with JOHN THOMAS, who was the newly assigned Utilities Branch Chief, Department of Engineering and Housing (DEH), U.S. Army, Ft. Meade. JOHN THOMAS was RICH POND's supervisor at WWTP. PATILLO

told JOHN THOMAS that she suspected test data was being falsified. JOHN THOMAS told her that he had the same suspicions since no equipment or supplies were being used from week to week in the laboratory. JOHN THOMAS told her that due to his suspicions he was currently doing the tests himself and trying to hire a chemist.

After the April 7, 1989 inspection, PATILLO wrote no site complaints about her findings because it appeared that JOHN THOMAS was performing the required tests and taking care of the problems.

While performing performance audit inspections at other facilities after April 7, 1989, PATILLO began to hear from past Ft. Meade WWTP employees that RICH POND reported numbers for fecal coliform and BOD_5 tests that were not done and that samples collected at Ft. Meade and the National Security Agency (NSA) were poured out and replaced with tap water prior to being sent to contract laboratories for analysis.

On October 3, 1989, PATILLO prepared a summary of her inspection results at the Ft. Meade WWTP and noted allegations that she had heard regarding falsification of data by RICH POND. PATILLO referred the matter to the Maryland Attorney General's Environmental Crimes Section.

On July 19, 1990, I interviewed ANDRE LYNNE BOWLES, former chemist helper at the Ft. Meade WWTP from April 1985 through August 1988. During this interview BOWLES said she originally worked in the Ft. Meade WWTP and analyzed samples that were either brought to the lab by plant operators or were

gathered by BOWLES and the lab chemist, MICHAEL ROUSE. While ROUSE was employed there was no problem with keeping lab supplies which were necessary. During approximately August, 1987, ROUSE went to work at NSA and was never replaced with another chemist. BOWLES conducted all the lab analysis by herself when ROUSE left. During approximately December, 1987, RICH POND was promoted to Plant Superintendent and she began having difficulty getting lab equipment, supplies and chemicals that were needed to properly analyze samples. BOWLES recalled times when she filled out requisition forms and several days later found the forms still sitting on POND's desk.

BOWLES told me about an occasion when her ammonia analysis kept producing figures outside of the parameters allowed in the NPDES permit for Ft. Meade. It was an unusual occurrence so she kept re-running this sample. Finally she concluded that tests were valid and that the Ft. Meade WWTP was not in compliance for ammonia content. BOWLES reported her findings on the Daily Log Sheet and the Monthly Operating Report. BOWLES recalls that FRANK CIURCA, the State of Maryland Inspector, came through the lab and noticed the ammonia violation. CIURCA asked to see all the paperwork for all tests BOWLES ran but she could only produce the last set because she had thrown the others away. She recalled POND saying to CIURCA that he did not know why the ammonia figures were out of line. She recalled CIURCA asking POND if he was out of lime and POND said no. BOWLES said she did not tell CIURCA the real reason the ammonia violation occurred was that lime, a necessary chemical additive in the waste water

treatment process, was solidified in its storage area and could not be used. According to BOWLES, RICH POND knew there was a problem with the lime.

BOWLES told me that she suspected RICH POND of sabotaging the lab equipment. She recalled having problems with the spectrometer but could not repair it because the spare parts she kept in a laboratory drawer were missing. Subsequently, BOWLES could not conduct phosphorous test for about a week so she traveled to the Ft. Meade Water Plant and ran the tests there. She recalled that RICH POND said one day that he would search for the spare parts. POND went to a drawer where grease and rags were kept and immediately found the spectrometer parts and repaired the equipment. BOWLES suspected POND of hiding the spare parts so BOWLES could not repair her lab equipment.

BOWLES told me that she quit her job in August, 1988 because she refused to work for POND any longer. Prior to leaving she left the lab refrigerator with a months supply of material for phosphorus analysis. BOWLES said upon her departure that this was all of the material on hand for the phosphorus tests. After the one month supply was used, no tests could be done without more supplies.

On June 14, 1990, I interviewed BRUCE EDWARD WHITAKER who was employed by the Ft. Meade WWTP as a plant operator from June, 1987 to October, 1988. During October, 1988, WHITAKER quit his job because RICH POND tried to get him to falsify reports required by the plants NPDES permit. In the course of his employment WHITAKER entered data into the computer from daily

operations sh. ts and operator lab data sheets. He also made entries on the monthly log sheet. RICH POND in turn used the computerized data to prepare Discharge Monitoring Reports. WHITAKER recalled that chlorine residuals were to be taken as a grab sample three times each day, analyzed and the data entered in the operators log book, the daily log sheet and the monthly operator report (MOR). Grab samples are individual single dip samples collected over a period of time not to exceed fifteen minutes. According to WHITAKER, the sampling and analysis was being done on the 4:00 p.m. to 12:00 midnight shift and on the midnight to 8:00 a.m. shift, but not on the day shift. This meant WHITAKER had no numbers to report for the day shift. WHITAKER said POND told him to take either one of the readings from one of the other shifts or just make up a number. WHITAKER refused to falsify data and quit his job. He returned to work as a plant operator in March, 1989, after getting assurances from GEORGE CUNNINGHAM, Operations Chief, DEH, that the new Branch Chief, JOHN THOMAS, would straighten things out.

WHITAKER recalled that after LYNNE BOWLES quit her laboratory technician job at the Ft. Meade WWTP the laboratory "Spec 20" meter was broken. The meter was to be used while conducting analysis for ammonia and phosphorus. The meter was out of service until approximately May, 1989, but WHITAKER continued to receive ammonia and phosphorus test results on operator lab data sheets. Approximately one month after BOWLES was gone, WHITAKER observed that he no longer received operator lab data sheets but he discovered that ammonia and phosphorus

numbers were mysteriously entered into the computer. The computer, an IBM PC, was in RICH POND's office at the Ft. Meade WWTP, Building 9581.

Beginning in March, 1989, WHITAKER started putting lines on his daily operator sheets to keep RICH POND from entering data after the fact. Daily sheets are routinely stored in the Motor Control Center at the Ft. Meade WWTP building 9581.

WHITAKER told affiant that during March, 1989, he learned that the National Security Agency (NSA) 24 hour composite samples required by the NPDES permit were being collected as grab samples. Operators JIM WILLIAMS and WES MILLS were directed by POND to take grab samples, however, the samples were reported as being composite samples. The samples were analyzed for metals by COMMONWEALTH LABs in Virginia.

WHITAKER told me that during Spring or early Summer 1989, U.S. Army employees from Aberdeen Proving Ground, Maryland, were conducting a study of the NSA waste water effluent. JOHN THOMAS, Branch Chief, DEH, confided to WHITAKER that Aberdeen employees noticed that the COMMONWEALTH LABS numbers for metals were different from the numbers on the Discharge Monitoring Reports submitted by RICH POND. NSA officials met with JOHN THOMAS regarding the incident. JOHN THOMAS said POND had falsified the NSA report. WHITAKER told me that THOMAS told him he should not tell anyone about the incident. THOMAS said POND had to write a letter to NSA explaining what happened.

WHITAKER told me that after LYNNE BOWLES quit during the Summer, 1988, valid fecal coliform test were not run at the

Ft. Meade WWTP. WHITAKER personally observed that chemicals necessary for fecal coliform analysis were not in supply at the Building 9581 lab. WHITAKER reported his observation to JOHN THOMAS, Branch Chief, during March or April, 1989.

On July 9, 1990, BRUCE WHITAKER told me that as of March, 1990, the IBM PC computer in RICH POND's office at Building 9581 housed approximately five years of data regarding the operation of the Ft. Meade WWTP. WHITAKER also reported that a multi volume operations manual that details the procedures to be followed for the proper operation of the Ft. Meade WWTP is stored in the Building 9581 Control Room. Other records including lab data sheets, daily operator log sheets, daily operation logs, discharge monitoring reports and monthly operating reports are stored in filing cabinets in RICH POND's office, JOHN THOMAS' office, the laboratory and the Control Room. The daily operations log is a green hardback book. Through the years several volumes of the daily operations log have been filled and are stored in Building 9581.

On April 11, 1990, the Maryland Department of the Environment sent a notice of violation to Colonel ALBERT COLAN, Jr., Director, Ft. Meade, Directorate of Engineering and Housing. The notice cites improper monitoring in accordance with permit requirements. The letter accompanying the notice of violation describes a March 30, 1990 inspection at the Ft. Meade WWTP by MARLENE PATILLO, which revealed that no testing had been performed for the week of March 26, 1990 through March 30, 1990, for total suspended solids, BOD_5, nutrients or fecal coliform.

The reason given for the lack of testing required by the NPDES permit was that the operator trained to perform lab analysis was on vacation.

REQUEST FOR WARRANT

Based on the foregoing information, your affiant has reason to believe that records required to be kept and reports required to be submitted to the State of Maryland and the U.S. Environmental Protection Agency, as specified in the Ft. Meade NPDES permit, have been falsified by RICH POND, Superintendent, Ft. Meade WWTP or others at the direction of POND. Your affiant has reason to believe that other yet unknown persons have knowledge of the falsifications. These falsifications constitute violations of the Clean Water Act, Title 33, U.S.C Section 1319(c)(4) and Title 18, U.S.C. Section 1001. Your affiant believes that evidence of these crimes is present in Building 9581 at the Ft. Meade WWTP in the form of documents and computerized records.[1] Therefore, in order to permit a determination of the nature and extent of such crimes it is requested that a warrant be issued permitting authorized representatives of the Federal Bureau of Investigation and the U.S. Environmental Protection Agency to enter the premises of the Ft. Meade WWTP Administration Building #9581, and search for documents and computerized materials. The scope of the search should include all areas of Building 9581 including but not limited

[1] Based on my interviews of potential witnesses, the only activities occurring in Building 9581 relate to wastewater treatment; therefore, I do not anticipate that the search will uncover any documents or physical items unrelated to wastewater treatment.

to laboratory, Instrument Control Center, office of JOHN THOMAS, office of RICH POND, all desks, filing cabinets, or other areas capable of concealing or storing documents.

Your affiant requests that authorized personnel executing the search warrant be authorized to photograph all office areas and the laboratory area to preserve conditions as observed at the time of search.

It is my understanding that the Ft. Meade computer and data therein is used in the operation of the Ft. Meade WWTP. Since seizure of the computer might impede the continued operation of the WWTP, it is requested that authorization be given to off-load all computerized data onto hardcopy and/or disks. This will allow WWTP operators to continue using the computer during the daily operations at the WWTP. For non-computerized documents, it is requested that the time period covered by this warrant be April 15, 1985 forward. April 15, 1985 is the effective date of the facility's first National Pollutant Discharge Elimination System permit.

Gregory B. Groves
Special Agent
Federal Bureau of Investigation

Sworn and subscribed before me this 23rd day of July, 1990.

U.S. Magistrate

UNITED STATES of America,
Plaintiff-Appellee,

v.

William DEE; Robert Lentz; Carl Gepp, Defendants-Appellants.

No. 89-5606.

United States Court of Appeals,
Fourth Circuit.

Argued Feb. 8, 1990.

Decided Sept. 4, 1990.

Defendants were convicted in the United States District Court for the District of Maryland, John R. Hargrove, J., of multiple violations of criminal provisions of Resource Conservation and Recovery Act (RCRA). On appeal, the Court of Appeals, Sprouse, Circuit Judge, held that: (1) Federal employees working at federal facility

were "persons" subject to criminal provisions of RCRA, and (2) evidence was sufficient to support convictions.

Affirmed.

1. Health and Environment ⇐37

Federal employees working at federal facility were "persons" subject to criminal provisions of Resource Conservation and Recovery Act (RCRA); employees were charged as individuals, rather than as agents of government. Solid Waste Disposal Act, § 1004(15), as amended, 42 U.S.C.A. § 6903(15).

2. Officers and Public Employees ⇐121

Sovereign immunity does not attach to individual government employees so as to immunize them from prosecution for their criminal acts.

3. Health and Environment ⇐37

Defendants "knowingly" violated criminal provisions of Resource Conservation Recovery Act (RCRA), even if they did not know that violation of RCRA was a crime or that regulations existed listing and identifying chemical wastes as hazardous wastes under RCRA, where there was evidence that defendants were aware that they were dealing with hazardous chemicals, and that materials handled by defendants were "wastes," within meaning of RCRA. Solid Waste Disposal Act, § 3008(d), as amended, 42 U.S.C.A. § 6928(d).

4. Criminal Law ⇐1173.2(2)

Failure to instruct that defendants, charged with having violated criminal provisions of Resource Conservation and Recovery Act (RCRA), had to know that chemicals they were handling were hazardous was harmless in light of overwhelming evidence that defendants were aware that they were dealing with hazardous chemicals. Solid Waste Disposal Act, § 3008(d), as amended, 42 U.S.C.A. § 6928(d).

5. Health and Environment ⇐41

Finding that dimethyl polysulfide was hazardous waste, within meaning of criminal provisions of Resource Conservation and Recovery Act (RCRA), was sufficiently supported by evidence that its "flash point" was less than 140° F. Solid Waste Disposal Act, § 3008(d), as amended, 42 U.S.C.A. § 6928(d).

6. Health and Environment ⇐41

Finding that defendant violated criminal provisions of Resource Conservation and Recovery Act (RCRA) was sufficiently supported by evidence that he was in charge of operations at government plant and originally ordered placement of hazardous chemicals in storage shed, that he repeatedly ignored warnings about hazardous condition of chemicals that were improperly stored, and that he undertook no actions to comply with RCRA in storage and disposal of chemicals; negligent and inept storage of hazardous wastes was punishable as crime under RCRA. Solid Waste Disposal Act, § 3008(d), as amended, 42 U.S.C.A. § 6928(d).

7. Health and Environment ⇐41

Finding that defendants engaged in unpermitted treatment and disposal of hazardous wastes, in violation of criminal provisions of Resource Conservation and Recovery Act (RCRA), was sufficiently supported by evidence that they had ordered dumping of hazardous wastes onto the ground and incineration of methyl chloride.

8. Health and Environment ⇐25.5(5.5)

Resource Conservation and Recovery Act (RCRA) prohibits unpermitted disposal of hazardous wastes, regardless of concentration of wastes after disposal. Solid Waste Disposal Act, § 3008(d), as amended, 42 U.S.C.A. § 6928(d).

9. Health and Environment ⇐41

Conviction for unpermitted storage of hazardous wastes, in violation of Resource Conservation and Recovery Act (RCRA), was sufficiently supported by evidence that defendants were responsible for maintenance of facility, that they were aware of hazardous condition of chemical storage there, and that they failed to ensure that hazardous wastes were managed in accordance with RCRA; though defendants claimed to have inherited the problem, their criminal culpability arose solely from their

own ongoing failur :omply with RCRA during period they ·ere responsible for facility. Solid Waste Disposal Act, § 3008(d), as amended, 42 U.S.C.A. § 6928(d).

Michael A. Brown, Washington, D.C., Richard Melvin Karceski, White & Karceski, Baltimore, Md., argued (George A. Breschi, Dinenna, Mann & Breschi, Towson, Md., William A. Hahn, Jr., Durkee, Thomas & Hahn, Baltimore, Md., on brief), for defendants-appellants.

Jane F. Barrett, Asst. U.S. Atty., Baltimore, Md., argued (Breckinridge L. Willcox, U.S. Atty., Veronica M. Clarke, Asst. U.S. Atty., Baltimore, Md., on brief), for plaintiff-appellee.

Before SPROUSE and CHAPMAN, Circuit Judges, and WARD, Senior District Judge for the Middle District of North Carolina, sitting by designation.

SPROUSE, Circuit Judge:

William Dee, Robert Lentz, and Carl Gepp (hereafter collectively "defendants") appeal the judgment of the district court entered after a jury trial finding them guilty of multiple violations of the criminal provisions of the Resource Conservation and Recovery Act ("RCRA" or "the Act"), 42 U.S.C. §§ 6901 *et seq.*[1] We affirm.

I

RCRA provides a comprehensive scheme for regulating storage, treatment and disposal of hazardous waste, requiring that it be managed to prevent leakage, spillage, hazardous chemical reactions, and migration of toxins into the soil, water, or air. In addition to administrative provisions, the Act creates criminal liability for persons who knowingly handle hazardous waste without a RCRA permit. 42 U.S.C. § 6928(d).[2]

The defendant engineers were civilian employees of the United States Army assigned to the Chemical Research, Development, and Engineering Center at Aberdeen Proving Ground in Maryland. All the defendants were involved in development of chemical warfare systems. Gepp, a chemical engineer, was responsible for operations at and maintenance of the Pilot Plant;[3] Dee and Lentz were Gepp's superiors. Counts One through Three of the superseding indictment charged the defendants with violating the Act by illegally storing, treating and disposing of hazardous wastes at the Pilot Plant. Count Four focused on violations alleged to have occurred at the "Old Pilot Plant",[4] a separate building complex that was closed in 1978.[5]

Aberdeen Proving Ground acquired an umbrella RCRA permit for management of hazardous waste materials at the Proving Ground. Under the permit, three separate areas at Aberdeen were designated for storage of hazardous wastes; however, the permit did not allow storage, treatment, or disposal of hazardous wastes at the Pilot Plant or the Old Pilot Plant. Aberdeen in 1982 promulgated a regulation, APG 200-2, that established "policies and procedures for management and disposal of solid and hazardous waste materials at Aberdeen Proving Ground" and mandated compliance with all federal, state, interstate, and local regulations, specifically referencing both the RCRA statute and RCRA regulations.

1. The district court suspended each defendant's sentence and placed each on probation for three years with a condition of 1,000 hours of community service work.

2. Paraphrased, the portion pertinent to this case reads: "Any person who knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter without a RCRA permit shall, upon conviction, be subject to fine and/or imprisonment." 42 U.S.C. § 6928(d)(2)(A).

3. The Pilot Plant complex included a four-story laboratory building, an administrative building, and storage sheds.

4. The Old Pilot Plant included a laboratory building, an office building, scrubbing towers and a storage area.

5. A fifth count charged defendants with violation of the Clean Water Act. 33 U.S.C. §§ 1251 *et seq.* The jury could not reach a verdict with respect to this count.

APG 200–2 directed all tenant organizations, such as the Center, to report any waste material "suspected to be toxic, carcinogenic, caustic, ignitable, or reactive" by filling out a form known as a "hard card." Upon receipt of the hard card, designated Aberdeen organizations were responsible for transporting hazardous wastes to the permitted [6] storage areas. APG 200–2 was specific and thorough, listing various individual chemicals and classes of chemicals that were likely to be hazardous, and reiterating that hazardous wastes were to be managed in accordance with all applicable laws.

In 1982, the Center issued a standard operating procedure, which in 1984 was reissued as a regulation known as CRDCR 710–1. It required identification of all RCRA wastes and directed that they be handled in accordance with the turn-in procedures of APG 200–2. Waste chemicals were defined as "those substances which have deteriorated to the point where they are no longer usable, are contaminated, or cannot be stored safely."

As heads of their respective departments, defendants were responsible for ensuring that the provisions of APG 200–2, CRDCR 710–1, and RCRA were fulfilled within their departments, and that their subordinates were aware of and in compliance with those regulations. Defendants admitted knowledge of APG 200–2, CRDCR 710–1, and RCRA.

II

[1, 2] The defendants first contend that they are immune from the criminal provisions of RCRA because of their status as federal employees working at a federal facility. Because 42 U.S.C. § 6928(d) defines those liable as "any person who" knowingly violates the Act, and because neither the United States nor an agency of the United States is defined as a person, defendants maintain they cannot be "persons" in the sense contemplated by § 6928(d). They assert that by reason of their employment by the federal government they are entitled to its sovereign immunity, meaning they are immune from this criminal prosecution.

There is simply no merit to this suggestion. The Act defines "person" as

> an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body.

42 U.S.C. § 6903(15). The definition begins with an inclusion of "an individual" as a person. The defendants, of course, were indicted, tried, and convicted as individuals, not as agents of the government. Suffice it to say that sovereign immunity does not attach to individual government employees so as to immunize them from prosecution for their criminal acts. *O'Shea v. Littleton*, 414 U.S. 488, 503, 94 S.Ct. 669, 679, 38 L.Ed.2d 674 (1974); *cf. Butz v. Economou*, 438 U.S. 478, 506, 98 S.Ct. 2894, 2910, 57 L.Ed.2d 895 (1978) ("all individuals, whatever their position in government, are subject to federal law"). Even where certain federal officers enjoy a degree of immunity for a particular sphere of official actions, there is no general immunity from criminal prosecution for actions taken while serving their office. *United States v. Hastings*, 681 F.2d 706, 710–12 (11th Cir.1982) ("A judge no less than any other man is subject to the processes of the criminal law"), *cert. denied*, 459 U.S. 1203, 103 S.Ct. 1188, 75 L.Ed.2d 434 (1983); *United States v. Diggs*, 613 F.2d 988, 1001 (D.C.Cir.1979) ("Article I, § 5 does not immunize a member of Congress from the operations of the criminal laws"), *cert. denied*, 446 U.S. 982, 100 S.Ct. 2961, 64 L.Ed.2d 838 (1980). *See generally United States v. Isaacs*, 493 F.2d 1124, 1142–44 (7th Cir.) ("Criminal conduct is not part of the necessary functions performed by public officials"), *cert. denied*, 417 U.S. 976, 94 S.Ct. 3184, 41 L.Ed.2d 1146 (1974).[7]

6. In regulatory parlance and as used in this opinion, "permitted" means an activity for which a valid permit has been issued. Conversely, "unpermitted" means the activity is not authorized by the facility's permit, or that the facility does not have a permit.

7. Because defendants were prosecuted as individuals, their argument as to the scope of Con-

III

[3, 4] Defendants next contend that they did not "knowingly" commit the crimes proscribed by RCRA. *See* 42 U.S.C. § 6928(d). They claim that there was insufficient evidence to show that they knew violation of RCRA was a crime; also, that they were unaware that the chemicals they managed were hazardous wastes.

The Supreme Court has repeatedly rejected similar arguments in cases involving regulation of dangerous materials, applying the familiar principle that "ignorance of the law is no defense." *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 563, 91 S.Ct. 1697, 1701, 29 L.Ed.2d 178 (1971); *United States v. Freed*, 401 U.S. 601, 607–10, 91 S.Ct. 1112, 1117–19, 28, L.Ed.2d 356 (1971); *United States v. Dotterweich*, 320 U.S. 277, 280–81, 64 S.Ct. 134, 136–37, 88 L.Ed. 48 (1943); *United States v. Balint*, 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604 (1922). We agree with the Eleventh Circuit that this time-honored rule applies to prosecutions under RCRA. *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1502–03 (11th Cir. 1986); *see also United States v. Hoflin*, 880 F.2d 1033, 1036–39 (9th Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 1143, 107 L.Ed.2d 1047 (1990); *cf. United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 669 (1984), *cert. denied*, 469 U.S. 1208, 105 S.Ct. 1171, 84 L.Ed.2d 321 (1985). "[W]here, as here ..., dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *International Minerals*, 402 U.S. at 565, 91 S.Ct. at 1701.

Therefore, the government did not need to prove defendants knew violation of RCRA was a crime, nor that regulations existed listing and identifying the chemical wastes as RCRA hazardous wastes. However, we agree with defendants that the knowledge element of § 6928(d) does extend to knowledge of the general hazardous character of the wastes. Among its jury instructions, the district court included one that advised:

> The government must prove beyond a reasonable doubt that each defendant knew that the substances involved were chemicals. However, the government need not establish that the defendants knew that these chemicals were listed or identified by law as hazardous waste....

While these statements are correct, it was error to instruct the jury that defendants had to know the substances involved were chemicals, without indicating that they also had to know the chemicals were hazardous. *See Hoflin*, 880 F.2d at 1039; *Johnson & Towers*, 741 F.2d at 668; *compare United States v. Greer*, 850 F.2d 1447, 1450 (11th Cir.1988) (jury instructed that defendant had to know the chemical waste had potential to harm others or the environment). However, we think the error was harmless. The record reflects overwhelming evidence that defendants were aware they were

gress's waiver of immunity under 42 U.S.C. § 6961 is inapposite. The same may be said of their reliance on *California v. Walters*, 751 F.2d 977 (9th Cir.1984), which involved an attempt by the City of Los Angeles to prosecute a federal agency and its administrator under California hazardous waste law. The Ninth Circuit held that, although 42 U.S.C. § 6961 directs federal agencies to comply with state hazardous waste laws, Congress did not intend to waive the United States' sovereign immunity to criminal sanctions.

Walters does not apply here for two reasons. First, unlike the case *sub judice*, *Walters* involved an action against a federal agency and its administrator in his official capacity. The *Walters* court expressly warned: "Our decision is compelled by the parties' agreement that the action is essentially one against the United States. Our holding in this case does not necessarily apply in all cases to prosecutions against federal officers or federal agencies." *Id.* at 979.

Second, *Walters* involved an attempt by a state to enforce state law against a federal agency and its officer. In certain circumstances, federal officers may avoid criminal prosecution by a state when the alleged crime arose from performance of federal duties. *Cunningham v. Neagle*, 135 U.S. 1, 75–76, 10 S.Ct. 658, 672, 34 L.Ed. 55 (1890); *Morgan v. California*, 743 F.2d 728, 731 (9th Cir.1984). The supremacy clause concerns which give rise to *Neagle*-type immunity are not implicated in this case, which involves prosecution for federal crimes by the federal government.

dealing with hazardous chemicals. *See Pope v. Illinois*, 481 U.S. 497, 501–03, 107 S.Ct. 1918, 1921–22, 95 L.Ed.2d 439 (1987); *Rose v. Clark*, 478 U.S. 570, 576–79, 106 S.Ct. 3101, 3105–106, 92 L.Ed.2d 460 (1986) (conviction should stand if the reviewing court can confidently say that no rational juror, if properly instructed, could have found for defendant).[8] Contrary to defendants' assertions, the evidence also clearly established that the materials they handled were "wastes" as that term is used in the statute.[9]

IV

In addition to the preceding general challenges to their convictions, defendants raise issues specific to each count.

Count One charged defendants with unpermitted storage and disposal of a hazardous waste—dimethyl polysulfide—at the Pilot Plant from June 1983 to August 1984. Gepp and Lentz were found guilty of this count.

Dimethyl polysulfide is a chemical the Center had considered as a component for a binary chemical weapon.[10] During the 1970s, the Center produced dimethyl polysulfide at the Pilot Plant and also purchased some from chemical companies. In 1980, 200 canisters of dimethyl polysulfide were brought to the Pilot Plant from Fort Sill, Oklahoma, because they were leaking. All the dimethyl polysulfide was stored on the fourth floor of the Pilot Plant. Included were batches that had tested to be "bad" or "off-spec."

By 1981, the chemical weapon program which would have used the dimethyl polysulfide was cancelled. No more dimethyl polysulfide was produced, and no projects which would use dimethyl polysulfide were planned. In May 1983, a safety inspector warned Lentz and Gepp that the roof of the Pilot Plant might collapse and that they should move the dimethyl polysulfide, but no action was taken. Four months later, a corner of the Pilot Plant did collapse, crushing several drums so that dimethyl polysulfide spilled and drained into the floor drains.

For the next several months, employees complained frequently to Lentz and Gepp about noxious odors from the dimethyl polysulfide, but not until the spring of 1984 did Gepp direct employees to move the containers of dimethyl polysulfide outside and to fill out hard cards on them. Gepp did not turn in the hard cards to the proper Aberdeen office until August 1984.

[5] Defendants contend that dimethyl polysulfide is not a hazardous waste. It is not a listed hazardous waste,[11] but the government's theory at trial was that the dimethyl polysulfide handled by defendants came within the definition of a "characteristic" hazardous waste, because its "flash point" was less than 140° F.[12] Defendants argue that there was insufficient evidence to prove that dimethyl polysulfide had a flash point of less than 140° F, because a defense witness testified that he had conducted tests on dimethyl polysulfide which indicated flash points of 154° to 163° F. Cross-examination of the witness, however, reflected irregularities in his testing procedures. Additionally, the government introduced the following evidence: a Material Safety Data Sheet supplied by a manufacturer of dimethyl polysulfide indicating a flash point of 104° F; testimony by the person who had transported the dimethyl polysulfide from Fort Sill that he had seen a Material Safety Data Sheet listing the

8. We find no merit to the other contentions raised by the defendants in connection with the district court's instructions. As a whole, the instructions "fairly and adequately state[d] the pertinent legal principles involved." *See Hogg's Oyster Co. v. United States*, 676 F.2d 1015, 1019 (4th Cir.1982).

9. Defendants' self-serving argument that materials were not wastes until they declared them wastes is without merit. Furthermore, the evidence demonstrated that defendants considered some if not all of the chemicals listed under each count to be wastes because they ordered their disposal.

10. Binary weapons make use of two chemicals, neither of which is lethal by itself, but which combine to form a lethal agent.

11. *See* 40 C.F.R. Part 261, Subpart D.

12. *See* 40 C.F.R. § 261.21.

flash point as 124 F. and the "hard card" which Gepp filled out on the dimethyl polysulfide listing the flash point as being between 61° and 100° F. In our view this evidence easily supports the jury verdict which implicitly found that dimethyl polysulfide was a characteristic hazardous waste. *Cf. Greer*, 850 F.2d at 1452 (evidence sufficient to support jury's conclusion that waste material was 1,1,1 trichloromethane).

Defendants also contend the dimethyl polysulfide was not a "waste" because it was still usable, *i.e.*, that it was not prudent to discard it because it conceivably could be of value to the weapons program at some time in the future. This argument is controverted by the fact that the defendants disposed of the dimethyl polysulfide in 1984.[13]

Count Two charged defendants with unpermitted storage and disposal of hazardous wastes at the Pilot Plant compound from June 1983 to April 1986. Only Gepp was convicted of the violations alleged in this count.

The United States Coast Guard had developed a program called the Chemical Hazard Response Information System (CHRIS) project. As part of the project, the Coast Guard contracted with the Center to study various hazardous chemicals in order to develop a manual for effectively responding to spills of those chemicals. At Gepp's direction, many excess and leftover CHRIS chemicals were placed in a shed in the Pilot Plant complex. Others were stored at various locations about the Pilot Plant.

On a number of occasions from 1980 to 1986, Gepp was informed by employees and safety inspectors that there were problems with the stored CHRIS chemicals, including corrosion and breakage of containers, leaks and spills, generation of fumes, and proximity of incompatible chemicals. Gepp either made no response to these warnings or merely told staff to clean it up as best they could. Finally, in 1986, the commander of the Center ordered operations at the Pilot Plant halted and the complex cleaned up. Hundreds of different chemicals were removed and taken to the Aberdeen hazardous waste storage facility.. Other chemicals had to be destroyed by detonation because they were too unstable to be transported.

[6] Gepp concedes that the chemicals were hazardous and that there was no use for them, but he asserts there was "little evidence" that he directed the storage or disposal operations. The government's evidence, however, shows that Gepp was in charge of operations at the Pilot Plant and that Gepp originally ordered the placement of leftover CHRIS chemicals in the storage shed. Gepp repeatedly ignored warnings about the hazardous condition of the CHRIS chemicals and other chemicals that were improperly stored about the Pilot Plant. He undertook no actions to comply with RCRA in the storage and disposal of the chemicals prior to the 1986 cleanup.

Defendants assert there was insufficient evidence that management of the CHRIS chemicals was an environmental crime, because " 'Sloppy' storage procedures is [sic] not a crime." They are simply wrong. Negligent and inept storage of hazardous wastes is one of the evils RCRA was designed to prevent, and § 6928(d) makes such egregious conduct a crime.

Count Three charged defendants with unpermitted treatment and disposal of hazardous wastes at the Pilot Plant from June 1983 to March 1986.[14] Lentz and Gepp were found guilty on this count.

Several sumps which collected materials from laboratories were located in the Pilot Plant. Periodically, the contents of the sumps were pumped to "neutralization

13. It is perhaps worth noting that RCRA does not require disposal of hazardous wastes. Prudent retention of a waste in the hope it will someday be a treasure is permissible if it is stored in accordance with a RCRA permit. *See* 40 C.F.R. § 261.2(e)(2)(iii).

14. Count Two involved storage and disposal of leftover CHRIS chemicals at the Pilot Plant. Count Three involved separate treatment and disposal of other chemicals at the Pilot Plant.

tanks." [15] Between June 1983 and March 1986, numerous hazardous waste chemicals were dumped into the sumps at Gepp's direction. Additionally, at the direction of Gepp and Lentz, drums containing hazardous waste chemicals were cleaned by dumping the chemical onto the ground at the Pilot Plant, then rinsing the drum with acetone, alcohol or water, and dumping the rinsate onto the ground. Also, a Pilot Plant incinerator which was not permitted for incineration of hazardous waste was used to dispose of methyl chloride, which is a listed hazardous waste.

Lentz and Gepp contend that any disposal of hazardous wastes into the Pilot Plant sumps was exempt from the requirements of RCRA. The definition of solid waste excludes mixtures of domestic sewage and other wastes which go to a "publicly-owned treatment works." 40 C.F.R. § 261.4(a). The Pilot Plant sumps fed into neutralization tanks that were connected to a sewer system that fed into a sewage treatment plant. Defendants therefore claim disposal into the Pilot Plant sumps was exempt from regulation under RCRA.

[7, 8] Defendants have not pointed to evidence in the record establishing the factors of a § 261.4(a) exclusion.[16] However, we need not decide the issue, because defendants do not dispute that the government proved other unpermitted treatment and disposal of hazardous wastes at the Pilot Plant—dumping of wastes on the ground and incineration of methyl chloride.[17]

Count Four charged defendants with unpermitted storage and disposal of hazardous wastes at the Old Pilot Plant from June 1983 to August 1986. Lentz and Dee were found guilty on this count.

The Old Pilot Plant had been used for bench-scale laboratory experiments. Operations there ceased in 1978, with chemicals left in storage in various buildings. Beginning in 1981, when they became responsible for the Old Pilot Plant, Lentz and Dee were warned on several occasions by safety inspectors that improper storage of chemicals at the Old Pilot Plant was creating a hazard and that the chemicals should be removed in accordance with APG 200-2. Although Lentz had an employee draft a cleanup plan for the Old Pilot Plant in 1983, hazardous waste chemicals remained in storage there until 1986. Dee and Lentz admitted at trial that they were aware of the storage problems at the Old Pilot Plant; Dee stated he did not consider cleanup of the building a priority.

[9] Lentz and Dee contest their convictions under Count Four claiming that they could not "inherit an environmental crime." This argument borders on the frivolous. The indictment charged defendants with unpermitted storage of hazardous wastes at the Old Pilot Plant from June 1983 to August 1986. There is substantial evidence in the record that during this time period defendants were responsible for maintenance of the Old Pilot Plant, that they were aware of the hazardous condition of chemical storage there, and that they failed to ensure that the hazardous wastes were managed in accordance with RCRA. Defendants may have inherited an environmental problem, but their criminal culpability arises solely from their own ongoing failure to comply with RCRA during

15. The tanks were able to neutralize simple acids and bases, but did not provide treatment for other types of hazardous waste.

16. To come within this exclusion, the wastes from the Pilot Plant would have to mix with sanitary wastes from residences prior to entering the sewage treatment facility. *See Comite Pro Rescate De La Salud v. Puerto Rico Aqueduct & Sewer Auth.*, 888 F.2d 180, 184–86 (1st Cir.1989) (domestic sewage exclusion requires that the sanitary waste come from residences as opposed to bathrooms used by workers), *cert. denied*, — U.S. —, 110 S.Ct. 1476, 108 L.Ed.2d 613 (1990). Furthermore, the sewage plant would have to be a "publicly owned treatment works," as that term is defined by RCRA. *See* 40 C.F.R. § 260.10.

17. We also need not reach appellants' argument that RCRA chemicals were not detected at "hazardous levels" in the sumps. We note, however, that RCRA flatly prohibits unpermitted disposal of hazardous wastes. The concentration of the wastes after disposal has no bearing on whether the disposal was illegal.

the period they were responsible for the Old Pilot Plant.

V.

In view of the above, the judgment of the district court is

AFFIRMED.

JFB:dam:POND.IND

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*
	*
v.	* CRIMINAL NO. _____
	* (Clean Water Act, 33 U.S.C.
RICHARD A. POND	* Section 1319(c); Theft of
	* Government Property, 18 U.S.C.
	* Section 641; Aiding and
	* Abetting, 18 U.S.C. Section 2)
	*

..ooOoo..

INDICTMENT

The Grand Jury for the State and District of Maryland charges that:

1) At all times pertinent to this indictment, Fort George G. Meade (hereinafter "Fort Meade") was a United States Army facility located in Anne Arundel County, Maryland.

2) At all times pertinent to this indictment, the Fort Meade Directorate of Facilities Engineering (also known as the Directorate of Engineering and Housing) operated a waste water treatment plant which processed domestic, commercial and industrial waste water generated at Fort Meade and the National Security Agency (hereinafter "NSA") complex.

3) At all times pertinent to this indictment, the Federal Water Pollution Control Act, Title 33, United States Code, Section 1251 et. seq, prohibited the discharge of any pollutants into the waters of the United States except in accordance with, among other things, the terms and conditions of a national pollutant discharge elimination system (hereinafter "NPDES") permit.

4) At all times pertinent to this indictment, Fort Meade held NPDES Permit Number MD0021717, issued by the United States Environmental Protection Agency (hereinafter "EPA"), for the operation of a waste water treatment plant.

5) At all times pertinent to this indictment, the Fort Meade waste water treatment plant discharged into the Little Patuxent River which is a navigable water of the United States as defined in Title 33, United States Code, Section 1362(f).

6) At all times pertinent to this indictment, the discharges from the NSA complex were to be sampled at an internal monitoring point designated as outfall 001A before the NSA discharges entered the Fort Meade waste water treatment plant.

7) At all times pertinent to this indictment, the discharges from the Fort Meade waste water treatment plant were to be sampled at outfall 001, which outfall discharges into the Little Patuxent River.

8) At all times pertinent to this indictment, the term "grab sample" refers to a sample taken at a discrete point in time that reflects the characteristics of a waste stream at the precise point in time the sample is taken.

9) At all times pertinent to this indictment, the term "24-hour composite sample" refers to a sample that is taken over a twenty four hour time period in order to reflect characteristics of a waste stream over that entire time period.

10) At all times pertinent to this indictment, it was a condition of the Fort Meade NPDES permit that any samples and

measurements taken were to be representative of the volume and nature of the monitored discharge. To accomplish this requirement, the permit specified certain sampling and monitoring procedures which were to be followed, including, among other things, that:

a) A grab sample was to be taken twice per week to measure the fecal coliform of the effluent from the treatment facility; and that

b) A twenty-four (24) hour composite sample was to be taken twice a month to measure the effluent being discharged from the NSA into the Fort Meade waste water treatment plant; and that

c) Discharge Monitoring Reports, which are self-monitoring reports submitted by the permittee, were to be submitted to the EPA and the State of Maryland Department of the Environment. These reports were to accurately record the sampling performed and the analytical results obtained throughout a given month of the discharges from both internal monitoring point 001A and outfall 001.

11) At all times pertinent to this indictment the EPA and the State of Maryland Department of the Environment relied on the information contained in the Discharge Monitoring Reports to assess the impact of the discharges from the Fort Meade waste water treatment plant on the Little Patuxent River and to determine whether Fort Meade was complying with the conditions of its NPDES permit.

12) At all times pertinent to this indictment, RICHARD A. POND was the superintendent of the Fort Meade waste water treatment plant and was responsible for overseeing all activities of the waste water treatment plant including ensuring that all of the sampling and analysis required by the NPDES permit was done in accordance with the permit conditions.

13) At all times pertinent to this indictment, RICHARD POND was responsible for submitting Discharge Monitoring Reports to the State of Maryland, Department of the Environment in accordance with the permit conditions.

14) At times pertinent to this Indictment, RICHARD POND directed employees to take grab samples at the NSA internal monitoring point 001A.

15) At times pertinent to this Indictment, fecal coliform analyses were not performed of the waste water effluent as required by the permit but nonetheless analytical results for fecal coliform were reported on Discharge Monitoring Reports.

CHARGE

From on or about September, 1988 to on or about March 1989, in the State and District of Maryland,

RICHARD A. POND

did knowingly cause a violation of a permit condition contained in a NPDES permit issued under Title 33 United States Code, Section 1342, by the EPA to Fort Meade in that the defendant caused grab samples to be taken of the effluent discharged by the NSA at internal monitoring point 001A in violation of the NPDES permit

which required that twenty-four hour composite samples be taken of this effluent.

33 U.S.C. §1319(c)(2)
18 U.S.C.§ 2

COUNT TWO

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraph 1 through 15 of Count One are realleged and incorporated herein as if fully set forth in this Count of the Indictment.

On or about November 30, 1988 in the State and District of Maryland,

RICHARD A. POND

the defendant, did knowingly make and use and cause to be made and used a false material statement, representation and certification in any application, record, report, plan or other document filed or required to be maintained pursuant to the provisions of Chapter 26 of Title 33, United States Code, Section 1251 et. seq, and the regulations issued pursuant to said Chapter, in that, in a Discharge Monitoring Report sent to the EPA and the State of Maryland, Department of the Environment, the defendant falsely stated and represented that twenty-four hour composite samples were taken of the NSA effluent in accordance with the conditions of the NPDES permit whereas in truth and in fact, as he then well knew, said statement was false.

33 U.S.C. § 1319 (c)(4)
18 U.S.C. § 2

COUNT THREE

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraph 1 through 15 of Count One are realleged and incorporated herein as if fully set forth in this Count of the Indictment.

On or about DECEMBER 29, 1988 in the State and District of Maryland,

RICHARD A. POND

the defendant, did knowingly make and use and cause to be made and used a false material statement, representation and certification in any application, record, report, plan or other document filed or required to be maintained pursuant to the provisions of Chapter 26 of Title 33, United States Code, Section 1251 et. seq, and the regulations issued pursuant to said Chapter, in that, in a Discharge Monitoring Report sent to the EPA and the State of Maryland, Department of the Environment, the defendant falsely stated and represented that twenty-four hour composite samples were taken of the NSA effluent in accordance with the conditions of the NPDES permit whereas in truth and in fact, as he then well knew, said statement was false.

33 U.S.C.§ 1319 (c)(4)
18 U.S.C. § 2

COUNT FOUR

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraph 1 through 15 of Count One are realleged and incorporated herein as if fully set forth in this Count of the Indictment.

On or about DECEMBER 29, 1988 in the State and District of Maryland,

RICHARD A. POND

the defendant, did knowingly make and use and cause to be made and used a false material statement, representation and certification in any application, record, report, plan or other document filed or required to be maintained pursuant to the provisions of Chapter 26 of Title 33, United States Code, Section 1251 et. seq, and the regulations issued pursuant to said Chapter, in that, in a Discharge Monitoring Report sent to the EPA and the State of Maryland, Department of the Environment, the defendant falsely stated and represented that fecal coliform analyses of the Fort Meade waste water treatment plant effluent had been performed in accordance with the conditions of the NPDES permit whereas in truth and in fact, as he then well knew, said statement was false.

33 U.S.C.§ 1319 (c)(4)
18 U.S.C. § 2

COUNT FIVE

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraph 1 through 15 of Count One are realleged and incorporated herein as if fully set forth in this Count of the Indictment.

On or about January 29, 1989 in the State and District of Maryland,

RICHARD A. POND

the defendant, did knowingly make and use and cause to be made and used a false material statement, representation and certification in any application, record, report, plan or other document filed or required to be maintained pursuant to the provisions of Chapter 26 of Title 33, United States Code, Section 1251 et. seq, and the regulations issued pursuant to said Chapter, in that, in a discharge monitoring report sent to the EPA and the State of Maryland Department of the Environment, the defendant falsely stated and represented that twenty-four hour composite samples were taken of the NSA effluent in accordance with the conditions of the NPDES permit whereas in truth and in fact, as he then well knew, said statement was false.

33 U.S.C. § 1319 (c)(4)
18 U.S.C. § 2

COUNT SIX

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraph 1 through 15 of Count One are realleged and incorporated herein as if fully set forth in this Count of the Indictment.

On or about January 29, 1989 in the State and District of Maryland,

RICHARD A. POND

the defendant, did knowingly make and use and cause to be made and used a false material statement, representation and certification in any application, record, report, plan or other document filed or required to be maintained pursuant to the provisions of Chapter 26 of Title 33, United States Code, Section 1251 et. seq, and the regulations issued pursuant to said Chapter, in that, in a discharge monitoring report sent to the EPA and the State of Maryland Department of the Environment, the defendant falsely stated and represented that fecal coliform analyses of the Fort Meade waste water treatment plant effluent had been performed in accordance with the conditions of the NPDES permit whereas in truth and in fact as he then well knew, said statement was false.

33 U.S.C. § 1319 (c)(4)
18 U.S.C. § 2

COUNT SEVEN

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraph 1 through 15 of Count One are realleged and incorporated herein as if fully set forth in this Count of the Indictment.

On or about March 28, 1989 in the State and District of Maryland,

RICHARD A. POND

the defendant, did knowingly make and use and cause to be made and used a false material statement, representation and certification in any application, record, report, plan or other document filed or required to be maintained pursuant to the provisions of Chapter 26 of Title 33, United States Code, Section 1251 et. seq, and the regulations issued pursuant to said Chapter, in that, in a Discharge Monitoring Report sent to the EPA and the State of Maryland, Department of the Environment, the defendant falsely stated and represented that the fecal coliform analyses of the Fort Meade waste water treatment plant effluent had been performed in accordance with the terms of the NPDES permit whereas in truth and in fact, as he then well knew, said statement was false.

33 U.S.C. § 1319 (c)(4)
18 U.S.C. § 2

COUNT EIGHT

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraph 1 through 15 of Count One are realleged and incorporated herein as if fully set forth in this Count of the Indictment.

On or about April 27, 1989 in the State and District of Maryland,

RICHARD A. [illegible]OND

the defendant, did knowingly make and use and cause to be made and used a false material statement, representation and certification in any application, record, report, plan or other document filed or required to be maintained pursuant to the provisions of Chapter 26 of Title 33, United States Code, Section 1251 et. seq, and the regulations issued pursuant to said Chapter, in that, in a Discharge Monitoring Report sent to the EPA and the State of Maryland, Department of the Environment, the defendant falsely stated and represented that twenty-four hour composite samples were taken of the NSA effluent in accordance with the conditions of the NPDES permit whereas in truth and in fact, as he then well knew, said statement was false.

33 U.S.C. § 1319 (c)(4)
18 U.S.C. § 2

COUNT NINE

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraph 1 through 15 of Count One are realleged and incorporated herein as if fully set forth in this Count of the Indictment.

On or about April 27, 1989 in the State and District of Maryland,

RICHARD A. POND

the defendant, did knowingly make and use and cause to be made and used a false material statement, representation and certification in any application, record, report, plan or other document filed or required to be maintained pursuant to the provisions of Chapter 26 of Title 33, United States Code, Section 1251 et. seq, and the regulations issued pursuant to said Chapter, in that, in a Discharge Monitoring Report sent to the EPA and the State of Maryland, Department of the Environment, the defendant falsely stated and represented that fecal coliform analyses had been performed in accordance with the conditions of the NPDES permit whereas in truth and in fact, as he then well knew, said statement was false.

33 U.S.C. § 1319 (c)(4)
18 U.S.C. § 2

COUNT TEN

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraph 1 through 15 of Count One are realleged and incorporated herein as if fully set forth in this Count of the Indictment.

2. At all times material to this Indictment, the Parkway Manor Motel, (also known as the Parkway Inn) was a privately owned and operated motel located in Jessup, Maryland, which had a waste water treatment plant for the treatment of domestic sewage generated by the motel.

3. At all times material to this Indictment, RICHARD A. POND was employed as the waste water treatment plant operator for the Parkway Manor Motel.

4. At all times material to this Indictment, RICHARD A. POND was responsible for operating the plant, taking samples, a ensuring that the samples were analyzed.

5. At all times material to this Indictment, RICHARD A. POND used, and caused to be used, the Fort Meade waste water treatment analytical laboratory supplies and equipment to perform analysis of samples from the Parkway Inn.

6. At times material to this Indictment, RICHARD A. POND caused an employee of the United States to analyze effluent samples taken from the Parkway Inn at the Fort Meade laboratory during official working hours.

From on or about December, 1989 to on or about July, 1990, in the State and District of Maryland,

RICHARD A. POND

the defendant, did knowingly convert to his own use and the use of another, without authority, a thing of value of the United States Army, a department of the United States, namely, analytical supplies, equipment and the time of government personnel, having a value of greater than $100.00.

18 U.S.C. § 641
18 U.S.C. § 2

BRECKINRIDGE L. WILLCOX
United States Attorney

A TRUE BILL:

Foreperson

VMC:mts
IND-1121
USAO #86-02534

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	CRIMINAL NO. HAR-88-0211
	*	
v.	*	Treatment, Storage and Disposal of Hazardous Wastes, 42 U.S.C. § 6928(d); Water Pollution, 33 U.S.C. §§1311 (a) and 1319(c); Aiding and Abetting, 18 U.S.C. § 2)
WILLIAM DEE	*	
ROBERT LENTZ	*	
and	*	
CARL GEPP	*	

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SUPERSEDING INDICTMENT

Introduction

The Grand Jury for the District of Maryland charges that:

1. At times pertinent to this Indictment, the Aberdeen Proving Ground (APG) was a Test and Evaluation Command installation within the United States Army Materiel Command. It consisted of offices, directorates and tenant activities.

2. At all times pertinent to this Indictment, APG was located in Baltimore County and Harford County, Maryland and was divided into two areas: the Aberdeen area and the Edgewood area. The total area of APG was over 79,000 acres. Approximately 17,000 acres of land were in the Aberdeen area and approximately 13,000 acres were in the Edgewood area; the remaining area was water.

3. At all times pertinent to this Indictment, the Gunpowder River, Bush River, and Canal Creek were navigable waters of the United States as defined in Title 33, United States Code, Section 1362(F).

4. At all times pertinent to this Indictment, all federal facilities were required by Executive Order 12088 to comply with all applicable state and federal environmental laws.

5. At times pertinent to this Indictment, the Chemical Research and Development Center (CRDC) was the primary tenant and main activity at the Edgewood area of APG. In or about 1985, the name of the tenant was changed from CRDC to Chemical Research, Development and Engineering Center (CRDEC). For purposes of this Indictment, this tenant organization is referred to as CRDC, unless otherwise noted.

6. At times pertinent to this Indictment, there were nine Directorates within CRDC, one of which was the Munitions Directorate. The Munitions Directorate was known as the Munitions Division prior to 1985. For purposes of this Indictment, it will be referred to as the Munitions Directorate.

7. At all times pertinent to this Indictment, the main mission of the Munitions Directorate was to manage exploratory, advanced, and engineering development, manufacturing technology, and industrial engineering programs for deterrent chemical material.

8. At all times pertinent to this Indictment, the Munitions Directorate was a generator of hazardous waste and could only store the waste it generated for a period not to exceed 90 days from the date of generation.

9. At all times pertinent to this Indictment, APG Regulation 200-2 assigned responsibilities and established policies and procedures for the management and disposal of solid and hazardous waste materials at APG. This regulation applied to

all elements of the APG Command, relevant command activities and organizations, and to all users of APG facilities.

10. At all times pertinent to this Indictment, Standard Operations Procedure (SOP) No. 710-1 set forth the policies, responsibilities and procedures for control of laboratory chemicals and waste chemical material.

11. At all times pertinent to this Indictment, APG and all tenants were authorized to store hazardous waste only at the APG Hazardous Waste Storage Facility: Buildings E5864, E5866 and E5850.

12. At all times pertinent to this Indictment, **WILLIAM DEE** was either the Chief of the Munitions Division or the Director of the Munitions Directorate, CRDC.

13. At all times pertinent to this Indictment, **ROBERT LENTZ** was either Chief of the Producibility, Engineering and Technology Branch, Munitions Division, or Chief of the Producibility, Engineering and Technology Division, Munitions Directorate, CRDC.

14. At all times pertinent to this Indictment, **CARL GEPP** was Chief of the Process Technology Branch (or Section) of the Producibility, Engineering and Technology Division (or Branch), of the Munitions Directorate, CRDC and the plant manager of the Pilot Plant, Building E5625.

The Pilot Plant - Building E5625 Compound

15. At all times pertinent to this Indictment, Building E5625, known as the "Pilot Plant", was operated by the Munitions Directorate at the Edgewood area of APG.

16. At all times pertinent to this Indictment, the Pilot Plant Compound consisted of Building E5625, the Pilot Plant, Building E5627, the administration building, Building E5633, a storage shed, and the surrounding land, all located behind a security fence. At times pertinent to this Indictment, a conex container was also located in this compound.

17. At all times pertinent to this Indictment, there was a purported toxic waste neutralization system at the Pilot Plant. The purpose of this system was to neutralize toxic liquid waste with a pH of 12 or higher to a pH of 6 to 8 by the addition of sulfuric acid and to release the neutralized liquid to the sanitary sewer.

18. At all times pertinent to this Indictment, the toxic waste neutralization system was designed to detoxify certain military chemical surety material including lethal and incapacitating chemical warfare agents but was not capable of treating solvents and certain other hazardous waste.

19. At times pertinent to this Indictment, the Pilot Plant was in poor physical condition and its sanitary waste system, toxic waste system, caustic system and piping were in a deteriorated condition.

20. At times pertinent to this Indictment, CRDC safety inspectors issued notices of violations to the Munitions Directorate reporting the improper storage of excess chemicals, incompatible storage of chemicals, storage of unknown wastes and the failure to properly turn in wastes generated at the Pilot Plant complex.

Charge

21. From on or about June, 1983 to on or about August, 1984, in the State and District of Maryland,

WILLIAM DEE
ROBERT LENTZ
and
CARL GEPP

did knowingly store and dispose of, and did knowingly cause to be stored and disposed of, hazardous waste, to wit: waste dimethyl polysulfide (NM) at the Pilot Plant, Building E5625, without interim status or a permit as required by Title 42, United States Code, Sections 6925 and 6926.

42 U.S.C. § 6928(d)(2)(A)
18 U.S.C. § 2

COUNT TWO

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through 20 of Count One are realleged and incorporated herein as if fully set forth in this count of the Indictment.

2. At times pertinent to this Indictment, the United States Coast Guard initiated the Chemical Hazardous Response Information System (CHRIS) Project and contracted with the United States Army to test hazardous chemicals. These CHRIS reagents were compounds that were known to be hazardous and they were given to CRDC because of CRDC's alleged "unique ability" to safely handle hazardous materials in the laboratory. The purpose of the CHRIS project was to assist the Coast Guard in implementing effective hazardous spill response plans for potential chemical spills on navigable waters of the United States.

3. At times pertinent to this Indictment, numerous chemical reagents were sent to the Pilot Plant and were distributed to various sites for testing as part of the CHRIS Project.

4. At times pertinent to this Indictment, excess CHRIS chemicals were placed into Building E5633, a storage shed within the Pilot Plant compound, and other Pilot Plant compound locations. There were no temperature or ventilation controls in this shed and containers of chemicals placed there froze, broke, and were severely corroded.

5. From or about June, 1983 to on or about April 2, 1986, in the State and District of Maryland,

WILLIAM DEE
ROBERT LENTZ
and
CARL GEPP

did knowingly store and dispose of, and did knowingly cause to be stored and disposed of, hazardous waste, to wit, the following:

1,2-dichloropropane	acrolein
aniline	arsenic pentoxide
arsenic trioxide	benzene
chloroform	cresol
crotonaldehyde	cyclohexane
dimethylcarbamoyl chloride	ether (ethyl ether)
ethyl acetate	ethyl methacrylate
ethylene dichloride	furfural
hexachlorocyclopentadiene	hydrazine
lead acetate	maleic acid hydrazide
nitric acid	nonene
parathion	phosphoric acid
picric acid	potassium cyanide
potassium chromate	pyridine
sodium cyanide	sodium hydride
sulfamic acid	sulfur monochloride
tetramethylethylenediamine	toluene
trans-1,2-dichloroethylene	trichloroethane
trichloroethylene	trichlorosilane
hydrochloric acid	hydrofluoric acid
hexamethyl disiloxane	1,2-dichloroethane
cyclohexanone	acetonitrile
sodium hydroxide	carbon tetrachloride
chlorobenzene	

at various locations within the Pilot Plant compound, without interim status or a permit as required by Title 42, United States Code, Sections 6925 and 6926.

42 U.S.C. § 6928(d)(2)(A)
18 U.S.C. § 2

COUNT THREE

And the Grand Jury for the District of Maryland further charges that:

1. The allegations contained in paragraphs 1 through 20 of Count One are realleged and incorporated herein as if fully set forth in this count of the Indictment.

2. At times pertinent to this Indictment, Pilot Plant employees were directed to dump waste chemicals into the toxic sumps at the Pilot Plant, Building E5625.

3. From on or about June, 1983 to on or about March, 1986, in the State and District of Maryland,

WILLIAM DEE
ROBERT LENTZ
and
CARL GEPP

did knowingly treat and dispose of, and did knowingly cause to be treated and disposed of, hazardous waste, to wit, the following:

1,2-dichlorobenzene	1,3,5-trimethylbenzene
1,4-dichlorobenzene	benzene
acetone	chloroform
chlorobenzene	dimethyl disulfide
cyclohexane	ethylbenzene
ethanol	methyl chloride
m-xylene	methyl cyclohexane
p-xylene	methyl sulfide
methyldichlorophosphine oxide	methylene chloride
nitrobenzene	o-xylene
2-propanol	propyl ether
tetrachloroethene	trichloroethene
(trifluoromethyl) benzene	

at the Pilot Plant, Building E5625, without interim status or a permit as required by Title 42, United States Code, Sections 6925 and 6926.

42 U.S.C. § 6928(d)(2)(A)
18 U.S.C. § 2

COUNT FOUR

And the Grand Jury for the District of Maryland further charges that:

1. The allegations contained in paragraphs 1 through 14 of Count One are realleged and incorporated herein as if fully set forth in this count of the Indictment.

2. At all times pertinent to this Indictment, the Building E3640 area consisted of Building E3640, referred to hereafter as the "old pilot plant"; Building E3641, which contained caustic scrubbing towers; Building E3642, a storage area; Building E3643, an office building; Building E3646, an overseas shipping container under a roof that was used for chemical storage, and the surrounding land.

3. At all times pertinent to this Indictment, the old pilot plant area was under the direction and control of the Munitions Directorate.

4. On or about 1978, all operations in the old pilot plant were ceased and all personnel were transferred to other areas.

5. At times pertinent to this Indictment, safety surveys were conducted at the old pilot plant area and numerous chemicals were identified as being improperly stored and presenting a potential hazard.

6. At times pertinent to this Indictment, drums containing hazardous wastes were stored in a drum storage rack outside the old pilot plant and these drums were corroded and deteriorated.

7. From on or about June, 1983 to on or about August, 1986, in the State and District of Maryland,

WILLIAM DEE
ROBERT LENTZ
and
CARL GEPP

did knowingly store and dispose of, and did knowingly cause to be stored and disposed of, hazardous waste, to wit, the following:

arsenic trioxide
arsenic pentoxide
caustic scrubber waste
cycloheptatriene
denatured ethanol
methyldichlorophosphine oxide
diethylaminoethanol
diisopropylamino ethanol
dimethyl disulfide
glycolic acid
hydrochloric acid
mercury
dimethyl polysulfide
sodium amide
sulfuric acid

at the old pilot plant area, without interim status or a permit as required by Title 42, United States Code, Sections 6925 and 6926.

42 U.S.C. § 6928(d)(2)(A)
18 U.S.C. § 2

COUNT FIVE

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through 20 of Count One are realleged and incorporated herein as if fully set forth in this count of the Indictment.

2. At all times pertinent to this Indictment, the Federal Water Pollution Control Act, Title 33, United States Code, Section 1251 et seq., prohibited the discharge of any pollutant into the waters of the United States except in accordance with, among other things, the terms and conditions of a National Pollutant Discharge Elimination System (hereinafter "NPDES") permit.

3. At all times pertinent to this Indictment, a storage tank, which contained sulfuric acid, was located inside a diked area outside the Pilot Plant, Building E5625.

4. At all times pertinent to this Indictment, the containment dike surrounding the sulfuric acid tank was in a deteriorated condition and incapable of containing an acid spill.

5. From on or about September 17, 1985 to on or about Spetember 18, 1985, in the State and District of Maryland,

WILLIAM DEE
ROBERT LENTZ
and
CARL GEPP

did negligently discharge and did cause to be negligently discharged, pollutants, namely sulfuric acid, from a point source into Canal Creek, a navigable water of the United States, without a NPDES permit.

33 U.S.C. § 1311(a) and 1319(c)(1)
18 U.S.C. § 2

BRECKINRIDGE L. WILLCOX
United States Attorney

A TRUE BILL:

Foreperson

SPECIAL WATER ISSUES: WETLANDS

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for the

ADVANCED ENVIRONMENTAL CRIMES CONFERENCE
Buffalo, New York
July 27-29, 1993

I. INTRODUCTION

Perhaps no area of federal environmental criminal law has attracted more criticism and, in some quarters, outrage, than the enforcement of regulations promulgated by EPA and the Army Corps of Engineers (Corps) relating to wetlands. The most interesting and disturbing aspect of the controversy is its apparent symmetry, i.e., the relatively even balance -- when measured in decibels -- between those who complain that regulations are being enforced unfairly and overzealously, and those who, conversely, argue that efforts to protect wetlands are not vigorous enough. There is little point in addressing the merits of the various arguments in detail here. Several of the underlying reasons for the controversy will become apparent in the discussion that follows. It suffices to say that the debate may well rage on until the scope of enforcement relating to wetlands is defined

more concisely.[1] In the meantime, prosecutors are left to work with a statutory and regulatory framework that, while controversial, nevertheless has proven to be an effective tool in environmental criminal enforcement.

II. OVERVIEW

Because the definition of a wetlands violation requires considerable cross-referencing among statutory and regulatory

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[1]For example, the term "wetlands" is not defined in the Clean Water Act, 33 U.S.C. § 1362, nor is it mentioned in any of the statutory provisions that serve as a basis for prosecution. 33 U.S.C. §§ 1311, 1319. Indeed, the word scarcely appears anywhere within the entire statutory framework of the Act. But see, 33 U.S.C. § 1344(g) (the term "wetlands" is mentioned -- but not defined -- in connection with the state administration of permit programs).

As discussed in detail below, in order to sustain a prosecution under the statute, the prosecutor is required to apply regulatory definitions of certain terms under statutory definitions of others. Thus, for purposes of establishing a "discharge of a pollutant," a land-locked swamp or marsh must be considered a "navigable water," 33 U.S.C. § 1362(7), 33 C.F.R. § 328.3(a). Similarly, "fill material," no matter how clean, must be considered a "pollutant," even though both terms are defined in a statute or regulation, and neither references the other. 33 U.S.C. § 1362(6); 33 C.F.R. § 323.3(e).

One district court judge, in the course of upholding convictions for wetlands violations, recently complained that:

> In a reversal of terms that is worthy of Alice in Wonderland, the regulatory hydra which emerged from the Clean Water Act mandates in this case that a landowner who places clean fill dirt on a plot of subdivided dry land may be imprisoned for the statutory felony offense of "discharging pollutants into navigable waters of the United States."

United States v. Ocie Mills, 1992 U.S. Dist. LEXIS 21166 (March 31, 1993). While lawyers and judges have had little trouble engaging in these definition gymnastics, the terminology may appear puzzling to juries.

provisions, it is worthwhile to briefly review the framework on which wetlands cases are based. Section 301 of the Federal Water Pollution Control Act, Pub. L. No. 92-500 § 2, 86 Stat. 816, 844 (1972) (Clean Water Act or CWA), 33 U.S.C. § 1311(a), provides, in relevant part:

> Except as in compliance with this section and section . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

Section 404, CWA, 33 U.S.C. § 1344, and regulations promulgated pursuant to it, sets forth the 404 permit program. With enumerated exceptions, the provision generally requires that a person obtain a permit prior to any discharge of dredge or fill material into waters of the United States. Id. This permit program is administered by the U.S. Army Corps of Engineers (Corps), and is enforced by both the Corps and EPA. 33 C.F.R. § 323; 40 C.F.R. § 230.

Section 309, CWA, 33 U.S.C. § 1319(c)(2)(A), which, together with section 1311(a), is applicable to criminal violations, provides, in relevant part that:

> Any person who knowingly violates section 1311, [or other specifically enumerated sections] . . . of this title . . . shall be [guilty of a criminal offense].[2]

In order for the government to prove a defendant guilty of

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[2]Section 1319(c)(1)(A) is identical to section 1319(c)(2)(A), save that the word "knowingly" is replaced by the word "negligently." Negligent violations of the Clean Water Act are misdemeanors.

the offense charged, it must prove each of the following elements beyond a reasonable doubt:

1. That the defendant is a "person" within the meaning of the Clean Water Act;
2. That the defendant knowingly (or negligently)
3. Discharged pollutants or caused others to discharge pollutants;
4. From a point source;
5. Into navigable waters (i.e., waters of the United States);
6. Without a permit.

33 U.S.C. §§ 1311, 1319(c), 1344.

A. Persons

Section 502, CWA, 33 U.S.C.§ 1362(5), defines the term "person" to include, inter alia, any individual, corporation, partnership, or association. The definition of "person" under the Clean Water Act also specifically includes "responsible corporate officers," 33 U.S.C. § 1319(c)(6), although the term is not defined in the statute. See, United States v. Brittain, 931 F.2d 1413 (10th Cir. 1991); United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35 (1st Cir. 1991); United States v. Johnson and Towers, Inc., 741 F.2d 662 (3d Cir. 1984), cert. denied, 469 U.S. 1208 (1985); United States v. Frezzo Brothers,

Inc., 461 F. Supp. 266 (E.D. Pa. 1978), aff'd, 602 F.2d 1123, 1130 n. 11 (3rd Cir. 1979), cert. denied, 444 U.S. 1074 (1980).[3]

B. Knowing

In cases involving felony violations of the Clean Water Act, the government must show that the defendants knowingly committed or caused the commission of the acts charged. "An act is done 'knowingly' if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason." 1 Devitt and Blackmar, Federal Practice and Jury Instructions, § 14.04 (3d ed. 1977). Similarly, an omission or failure to act is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or other innocent reason. Id. at § 14.05.

Stated another way, the government need only prove that a defendant intended to commit or cause the commission of acts that constitute the violation. "Willfulness," or proof that the defendant specifically intended to commit an act that the law forbids, is not required under the statute. 33 U.S.C. § 1319(c). In practice, however, the government usually has brought felony prosecutions involving wetlands violations in circumstances where the defendants were explicitly and repeatedly warned by regulatory personnel or others that a permit was required.

C. Discharge of Pollutants From a Point Source

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[3]As the above cases suggest, the term "responsible corporate officer" generally refers to individuals who: (1) have supervisory authority within an organization that is involved in unlawful conduct; (2) they exercise responsibility over conduct that gives rise to violations; and (3) they have actual or direct knowledge of the violations.

In order to prevail, the government must show that a defendant "discharged a pollutant from a point source" within the meaning of the Clean Water Act. 33 U.S.C. § 1311, 1319(c). For convenience, the discussion of these two essential elements (the first being "discharge of a pollutant" and the second being "from a point source") will be considered together.

The term "pollutant" is defined as including, inter alia, "dredged spoil, solid waste, . . . rock, sand, [and] cellar dirt . . . discharged into water." 33 U.S.C. § 1362(6). The term has also been defined to include various fill materials, including dirt, construction debris and, most significantly, indigenous material found within the wetlands themselves. See Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 922-25 (5th Cir. 1983); United States v. M.C.C. of Florida, Inc., 772 F.2d 1501, 1505-05 (11th Cir. 1985), vacated on other grounds, 481 U.S. 1034 (1987), remanded, 848 F.2d 1133 (11th Cir. 1988), 863 F.2d 802 (11th Cir. 1989); United States v. Huebner, 752 F.2d 1235 (7th Cir. 1985); United States v. Sinclair Oil Co., CV 88-278-BLG-JFB (D. Mont.) (Memorandum and Order, December 21, 1990); See also, United States v. Bradshaw, 541 F.Supp. 880 (D. Md. 1981); ; In the Matter of Alameda County Assessor's Parcel, 672 F.Supp. 1278 (N.D. Cal. 1987).

The term "fill material" is defined as:

> [A]ny material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an [sic] water body. The term does not include any pollutant discharges into water

> primarily to dispose of waste, as that activity is regulated under Section 402 of the Clean Water Act.[4]

33 C.F.R. §323.2(m).

The term "discharge of pollutant" is defined as "any addition of any pollutant to navigable waters from a point source." 33 U.S.C. § 1362(12). The term "point source" is defined as:

> [A]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feed operation, or vessel or other floating craft from which pollutants are or may be discharged.

33 U.S.C. § 1362(14). Courts have consistently held that earth moving equipment, such as bulldozers, may constitute point

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[4]The definition quoted above is found in regulations promulgated by the Corps. EPA also has its own slightly different definition. It defines "fill material" as:

> [A]ny pollutant which replaces portions of the "waters of the United States" with dry land or which changes the bottom elevation of a water body for any purpose.

40 C.F.R. § 232.2(i). It should noted that the Corps definition appears to contain an element of intent, inasmuch as the material must be "used for the primary purpose" of replacing an aquatic area with dry land, or of altering the bottom elevation of a water body. The definition raises a question as to whether unlawful "negligent" filling of wetlands in violation of 404 permit requirements set forth in section 1344, 33 U.S.C., is possible. In any event, the regulation explicitly provides that "fill material" does not include material discharged for the purpose of disposing of waste. Discharges of this type are subject to NPDES permit requirements set forth in Section 402, CWA, 33 U.S.C. § 1342. Prosecutors in a given case should determine, prior to indictment, the nature of the discharge involved, i.e., whether it is to fill or dispose of waste, and the permit program that is applicable.

sources under the Clean Water Act. United States v. Larkin, 657 F. Supp. 76, 78 n.2 (W.D. Ky. 1987); 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). The term has been given the broadest possible definition to include any identifiable conveyance. United States v. Earth Science, 599 F.2d 368 (10th Cir. 1979).

D. **The Pollutants Were Discharged Into "Navigable" Waters of the United States**

The term "navigable waters" is defined to mean "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The term "waters of the United States" is not defined by statute. It is, however, defined by regulation to include, inter alia:

> (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; (2) all interstate waters, including interstate wetlands; (3) all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce, . . . (5) tributaries of waters [named above] . . . and (7) wetlands adjacent to waters (other than waters that are themselves wetlands) . . . [identified in this section].

33 C.F.R. §328.3(a); 40 C.F.R. § 230.3(s).

Regulations also define the terms "wetlands" and "adjacent" as follows:

> The term "wetlands" means those areas that are inundated or saturated by surface or groundwater 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.

33 C.F.R. § 328.3(b).

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

33 C.F.R.§328.3(7).

E. The Discharge of Pollutants was Undertaken Without a Permit

The final element which must be proven is that the defendant did not have a permit for the work that was undertaken. Section 404(f), CWA, 33 U.S.C. § 1344(f), the statutory provision which requires that a permit be obtained prior to any discharging or filling in waters of the United States, sets forth circumstances when permits are and are not required. It provides, inter alia, that:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

Id.[5]

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[5]Regulations promulgated by the Corps further specify what is meant by the "impairment" of "flow or circulation." Title 33, C.F.R. § 323.4 (c) provides, in pertinent part, that:

> Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired

(continued...)

III. SPECIAL ISSUES: DEFENSES LIKELY TO BE RAISED

Federal prosecutions charging wetlands violations generally will follow the outline presented above. The following are among the most troublesome issues likely to be encountered in a wetlands case. For practical reasons, they are characterized herein as prospective defenses:

1. The conduct that forms the basis for the charges was not undertaken in "wetlands;"

2. The work undertaken by the defendant in wetlands did not involve "filling," i.e., the discharge of a pollutant (fill material) into waters;

3. The work that was undertaken by the defendant in wetlands: (a) was not in or adjacent to "waters of the United States," (b) did not affect "waters of the United States," or (c) was not otherwise subject to federal jurisdiction;

4. The defendant received "approval" from a government representative or agency, and the prosecution therefore is estopped from proceeding;

5. The defendant had an automatic "nationwide permit" for work that was undertaken; and finally,

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[5](...continued)
by such alteration. For example, a permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill material into waters of the United States in conjunction with construction of dikes, drainage ditches or other works or structures used to effect such conversion. A conversion of a Section 404 wetland to a non-wetland is a change in use of an area of waters of the United States.

6. The defendant received, or should have received, an after-the-fact permit from the Army Corps of Engineers for work that was undertaken.

Prosecutors are advised to consider the applicability of each of these issues prior to return of an indictment.

A. The Conduct at Issue Was Not Undertaken in "Wetlands"

The persuasiveness of this argument will vary dramatically depending on the pertinent facts. In instances where a watery swamp-like area adjacent to a river or stream is involved, a defendant may have difficulty arguing that the area is not a "wetland." In such circumstances, the defense is unlikely to be raised, and even less likely to be successful. However, one of the problems that has plagued both civil and criminal wetlands enforcement is that not all "wetlands" that are subject to federal regulation look especially "wet" all of the time. As noted above, the term "wetlands" is defined under Army Corps of Engineers regulations to include "those areas that are inundated or saturated by surface or groundwater 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." 33 C.F.R. § 328.3(b). This legal definition, the one that the jury will consider in weighing the facts, is broad enough to include areas that do not at least initially fit the layman's definition of the term.

In practice, prosecutors typically will use one or more qualified Corps, EPA, Fish and Wildlife Service, or state agency experts to testify that, based on on-site observations and studies of soil coloration, hydrology, flora, fauna, and other criteria, the area in question in fact was a "wetland," within the regulatory definition, at the time the work was undertaken. The expert's opinion will be based on the application of criteria set forth in the Department of the Army's Corps of Engineers Wetlands Delineation Manual (1987) (Manual).[6]

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[6]Prior to 1989, various federal agencies, including the Army Corps of Engineers, EPA, the Fish and Wildlife Service, and the Soil Conservation Service, used somewhat different criteria to determine whether a given area was a wetland subject to federal regulation. To resolve inconsistencies, an interagency committee was formed to establish a single set of criteria that would be used by all federal agencies. The result was what became known as the "1989 Manual." See, Federal Interagency Committee for Wetland Delineation, Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989). In the months and years immediately following publication, a political battle was waged over whether the criteria set forth in the new Manual was overinclusive. In an apparent effort to squelch controversy, the Corps was ordered to disregard the 1989 Manual and resume use of the 1987 Manual, pending further review by the National Academy of Sciences. EPA subsequently adopted the 1987 Manual as well, and it continues to be used at the present time. Per Hazel Groman, Wetlands Division, EPA, May 14, 1993.

Fortunately, prosecutors need not be over concerned by questions regarding which manual, the 1987 Corps Manual, a 1988 manual published by EPA, (see EPA, Wetland Identification and Delineation Manual (1988)), or the 1989 interagency version, was in place at the time a wetlands violation occurs. In United States v. Ellen, 961 F.2d 462 (4th Cir.), cert. denied, 113 S.C. 217 (1992), the court held that the 1989 Manual used by an expert at trial was interpretive "guidance" only, not "law," and that criteria from the manual could be used to demonstrate that violations occurred prior to its publication.

Despite the favorable holding in Ellen, prosecutors should be wary of the varying interpretations found in the manuals. A case

(continued...)

Use of this expert testimony, together with evidence of the warnings that prospective defendants typically receive (and then ignore) from state or Corps personnel prior to charges being brought, should be enough to persuade a jury that a defendant should be prosecuted for filling a "wetland," even in circumstances where the area in question looks more like a damp forest or a grassy meadow than a swamp.

B. The Work at Issue Did Not Involve "Filling," i.e., the Discharge of a Pollutant (Fill Material) Into Waters

One of the most frustrating aspects of the enforcement of regulations designed to protect wetlands is that, as currently written, they effectively protect wetlands from some, but not all, forms of destruction. Statutory and regulatory provisions work best in circumstances where a prospective defendant, without a permit, places dirt, sand, rock, or other "fill" material in a wetland area, with the intention of leaving it there permanently, for the purpose of elevating the ground level, so as to make an area that was low and swampy, high and dry. In such circumstances, there clearly has been a "discharge" of a pollutant -- in this case "fill material," into waters of the

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[6](...continued)
could arise where the defendant argues that he relied in good faith on one or another of the various publications in determining that the work he undertook did not require a 404 permit. Alternatively, a defendant could seek to introduce all the various manuals into evidence during expert testimony in an effort to promote confusion regarding wetland identification and delineation criteria.

United States, and no issue arises as to whether "filling" in fact occurred.

Prosecution becomes more problematic in circumstances where the defendant engages in other unpermitted activities that still result in the destruction of wetland areas. For example, while a permit is required to place fill material in an area to elevate the ground level and make it "dry," no permit is required to drain an area, thereby making it dry, even though the ultimate result, destruction of the wetland, is the same. This anomaly exists because there is no statutory or regulatory rule that prohibits a developer from excavating a ditch or channel through a wetland (as long as there is no significant "side casting" of peat or soil into the wetland) that results in the drainage of water from the area.[7]

Similarly, no rule prohibits unpermitted excavation of swamps, peat bogs, and the like, for conversion into lakes and ponds, provided that no significant "discharges" of dredged fill material occur during the excavation process. Destruction of the wetland may be complete, a sterile lake or pond may be created where a wetland once thrived, but no permit is required, and no prosecution is possible.

Corps, Fish and Wildlife Service, and EPA regulatory personnel have endeavored to protect wetlands from drainage or

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[7]No permit is required for de minimis discharges, i.e., incidental soil movement, that occurs during normal dredging operations. Such de minimis discharges are specifically excluded from the definition of "discharge of dredged material." 33 C.F.R. § 323.2(d).

lake construction, despite the "loopholes" described above, by making optimal use of proscriptions against unpermitted filling that exist in the regulations. In practice, the removal of peat and vegetation from a wetland usually is achieved through use of bulldozers and other heavy equipment in the regulated area. The peat and vegetation are pushed into piles in the wetland, prior to their removal. Regulatory personnel, and federal prosecutors, have argued that the piles created during unpermitted excavation, "land-clearing" processes, and channelization are "discharges of fill material" that may form the basis for a violation. E.g., United States v. Ramagosa, Cr. No. 3:CR-91-079 (M.D. Pa. 1992).

Authority in support of this proposition is strong enough to be useful, but is far short of unequivocal. The principal case supporting the "redeposit" theory is Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983). In Avoyelles, the court held that the term "discharge" covers the redepositing of soil and vegetation in wetlands such as occurs during "mechanized landclearing" activities. However, the court specifically withheld judgment concerning whether a "discharge" occurred in circumstances where peat and vegetation are temporarily redeposited in the course of removing them entirely from the wetland area. Id. at 923.[8] No published opinion has specifically confronted this issue.

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[8]The court stated, "plaintiffs' witnesses testified that material that would not burn was buried. Since the landclearing activities involved the redeposit of materials, rather than their mere removal, we need not determine today whether mere removal may constitute a discharge under the CWA." Id. at 923.

The question also has been addressed by Regulatory Guidance Letters, (RGLs), issued by the Corps in March, 1985, and in July, 1990. See, U.S. Army Corps of Engineers, Regulatory Guidance Letters, No. 85-4 (March 29, 1985), and No. 90-5 (July 18, 1990). The 1985 RGL essentially adopted the Avoyelles decision, complete with all of its ambiguities. It held that redepositing of materials in federally regulated wetlands required a permit if the activity involved burying vegetation or debris, filling in sloughs or low areas, leveling the land, or "side casting" of materials into regulated areas during ditch construction. Id. According to the 1985 RGL, however, a permit would be required only when the district commander determined that the activity at issue was "designed to replace aquatic areas with dry land or to raise the bottom elevation of a water body." Id. This latter caveat appeared to suggest that if the overall objective of a project was excavation, as would be the case in lake construction, then perhaps a permit was not required, even though there might significant discharges into wetlands during the course of construction.[9]

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[9]On July 2, 1985, however, the Corps's North Atlantic Division issued a memo entitled, "Interim Guidance on the Regulation of Peat Mining Operations." Memorandum to North Atlantic Division from Colonel Robert W. Hatch, Assistant Director of Civil Works, Atlantic, U.S. Army Corps of Engineers (July 2, 1985). This memo, in substance, recognized that side casting of peat into wetlands during ditch construction, stockpiling of peat in wetlands prior to removal, and discharge of fill material in wetlands for temporary or permanent haul roads required a 404 permit. This Interim Guidance appeared to reach "temporary" filling activities not specifically covered in the March, 1985 RGL discussed above.

The July 1990 RGL went beyond Avoyelles and expanded the scope of activities occurring in wetlands for which a 404 permit is required. The RGL provided, in essence, that any "landclearing activities using mechanized equipment such as backhoes or bulldozers with sheer blades, . . . constitute point source discharges and are subject to section 404 jurisdiction when they take place in wetlands which are waters of the United States." From the Corps's perspective at least, this last RGL appears to have closed the loopholes addressed earlier.

From a federal prosecutor's perspective, however, the issue is still unsettled, and may cause problems in criminal prosecutions now being contemplated. On June 16, 1992, the Corps and EPA proposed new regulations that would "clarify that mechanized landclearing, ditching, channelization, and other excavation activities involve discharges of dredged material and when performed in waters of the United States will be regulated under section 404 of the CWA . . ." 57 Fed. Reg. 26894 (June 16, 1992). The proposed regulations, which have not been made final, amend the definitions of "discharge of dredged material" found in 33 C.F.R. § 323.2, and 40 C.F.R. § 232.2. Id. Although EPA's and the Corps's attempts to deal with the issue are laudable and necessary, the proposed regulations may create problems with respect to violations that occurred prior to their issuance. The chief concern is that a defendant now may argue that the proposed regulations constitute an admission by the Corps and EPA that existing regulations do not include side-casting, and other types

of temporary piling in wetlands. Needless to say, the issue will not be free from controversy until cases may be brought based on final regulations that explicitly include this type of conduct within the scope of activities requiring a 404 permit.[10]

A second, less controversial method used by regulatory personnel to protect wetlands in cases involving drainage and excavation is to focus attention on aspects of the project that involve placement of permanent fill. Where lake or pond construction is undertaken, for example, the project might also involve construction of berms in wetlands around the perimeter, and dams (in wetlands and streams) to block or limit the drainage of water from a site. Such permanent construction may well constitute filling activity for which a permit is required.[11]

C. The Wetlands Not in or Adjacent to Navigable "Waters of the United States" are Not Subject to Federal Jurisdiction

Defendants in several cases have argued, in circumstances where the wetlands in question are not especially "wet," or immediately adjacent to waters that are navigable in fact (such as major rivers and lakes), that the government does not have jurisdiction over the violations in question because there is no impact on navigable waters, and therefore no impact on interstate

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[10]It is useful to note, however, that EPA and the Corps state that the proposed changes are intended to "clarify" rather than change the law. 57 Fed. Reg. at 26894. Of course, the government also may rely on RGL 90-5, which is noted in the preamble to the proposed regulations. 57 Fed. Reg. at 26895.

[11]Prosecutors are warned, however, that relatively small fills may be subject to nationwide permits that do not require a complete 404 permit application. See, III.E. infra.

commerce. Although arguments claiming that the government lacks jurisdiction for this reason may have some appeal on a superficial level, the law on the question is well settled, at least in circumstances where the wetlands in question are "adjacent" to other waters.

The governing principle in this regard may be stated as follows: Whenever wetlands into which fill is discharged are adjacent to or feeders of (1) navigable waters, or (2) tributaries that ultimately run into navigable waters, then the filling becomes subject to federal jurisdiction.

Initially, the Army Corps of Engineers defined "waters of the United States" subject to federal jurisdiction as those bodies of waters which were navigable in fact, a definition which relied on traditional notions of navigability. However, the District Court for the District of Columbia struck down this restrictive definition in 1975, finding the Congress "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution" when it enacted the Clean Water Act. Natural Resources Defense Council [NRDC] v. Calloway, 392 F. Supp. 685 (D.D.C. 1975). Since then, a long line of cases has found that Congress intended to extend its jurisdiction under the Act to the maximum extent permitted under the Constitution, including the regulation of non-navigable tributaries (that lead to navigable waters) and wetlands. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985) (wetlands adjacent to lake are subject to federal

jurisdiction); Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990), cert. denied, 111 S. Ct. 1089 (1991); United States v. Lambert, 695 F.2d 536 (11th Cir. 1983); Deltona Corp. v. United States, 657 F.2d 1184, 1186 (Ct. Claims 1981) ("In other words, the intent was to cover, as much as possible, all waters of the United States, instead of just some"); United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979); United States v. Ashland Oil and Transportation Co., 504 F.2d 1317 (6th Cir. 1974) (Congress has the authority to regulate discharges of pollutants into non-navigable tributaries of navigable waters).

Following NRDC, 392 F. Supp. at 685, in 1975, the Corps issued new regulations expanding the scope of "waters of the United States." Today, the Corps defines "waters of the United States" to include, among other things:

> (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; (2) All interstate waters including interstate wetlands; (3) All other waters such as . . . wetlands . . . , the use, degradation or destruction of which could affect interstate commerce . . . ; (5) Tributaries of waters identified in paragraphs (a)(1-4) of this section; (7) Wetlands adjacent to waters (other than waters that themselves are wetlands) identified in paragraphs (a)(1) through (6) of this section.

33 C.F.R. § 328.3(a).[12]

In light of the Supreme Court's ruling in Riverside Bayview, and other cases cited above, no legal question exists regarding the government's authority to regulate "adjacent" wetlands.

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[12]EPA adopted an identical definition. 40 C.F.R. § 230(s).

Thus, wetlands are subject to government regulation when they are adjacent to tributaries of waters which are, have been, or may be used in interstate or foreign commerce, 33 C.F.R. § 328.3(a); 40 C.F.R. § 230.3(s), or when they are adjacent to tributaries of waters, the use, degradation or destruction of which may affect interstate commerce. Id.

Despite the unambiguous and highly favorable caselaw in this area, the question of whether specific violations are within the ambit of federal jurisdiction may still be problematic in cases where the wetlands are adjacent only to relatively minor tributaries, or perhaps even "tributaries of tributaries." The potential problem lies in the government's burden of proof: it must establish beyond a reasonable doubt, usually to a jury, that the discharges occurred in "waters of the United States." 33 U.S.C. §§ 1311, 1319. Although the government's proof in a given case may readily satisfy the legal requirement, i.e., that the wetlands are "adjacent" to waters that ultimately connect to true navigable waters, the defense is still free to argue the remoteness of such a connection to a jury, and to claim, in essence, that it is unreasonable for the government, in a criminal prosecution, to place someone in jail for filling semi-dry wetlands, located on private property, miles from any readily recognizable waterway, on the theory that this area somehow constitutes "waters of the United States."

Such an argument, which might best be characterized as an indirect plea by the defense for jury nullification, is most

effectively rebutted by emphasizing the connection of the various waters on maps, aerial photographs, and the like.[13] Succinct jury instructions setting forth the broad scope of federal jurisdiction also are critical.

It has also been argued, based on EPA and Corps regulations, that intrastate wetlands that are "isolated" -- i.e., not "adjacent" -- to tributaries or other waters of the United States, still may be subject to federal regulation if their use, degradation, or destruction "could affect interstate commerce." 33 C.F.R. § 328.3(a); 40 C.F.R. § 230.3(s). Hoffman Homes Inc. v. EPA, 961 F.2d 1310 (7th Cir. 1992), vacated, 975 F.2d 1554 (7th Cir. 1992). In Hoffman Homes, a civil case, the court held that federal jurisdiction did not extend to nonadjacent wetlands. Id. In reaching its decision, the court rejected EPA's argument that an isolated wetland is subject to federal jurisdiction because migratory birds potentially could land on the area. 975 F.2d at 1320. The decision, however, has since been vacated, and its status is uncertain.

Although isolated wetlands that could potentially affect interstate commerce are within the definition of "waters of the

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[13]It might also be helpful to introduce expert testimony regarding the importance of wetlands for purposes of flood control and water purification. However, inasmuch as the environmental harm of filling in wetlands is not an element of the offense, such testimony may be limited. It may, moreover, "open the door" to arguments by the defense that the filling in question was not harmful to the environment, or that the filling was, for some reason, "beneficial." An empirical battle of experts over the relative merits of work on a particular project may serve to needlessly complicate an otherwise straight-forward prosecution.

United States" outlined in Corps and EPA regulations, 33 C.F.R. § 328.3(a); 40 C.F.R. § 230.3(s), and therefore could -- theoretically at least -- serve as a basis for prosecution, prosecutors are advised to proceed with caution. If a decision is made to pursue such a case, it is advisable to obtain persuasive evidence of a connection with interstate commerce -- such as verifiable recreational use by out-of-state residents.

D. **The Defendant Received "Approval" From a Government Representative or Agency, and the Prosecution Therefore is "Estopped" from Prosecuting the Violation**

Defendants may endeavor to construct what is sometimes referred to as an "entrapment by estoppel" argument. In essence, the defendants argue that the charged violations should be dismissed because (1) some government agency or representative "affirmatively" misled them into believing that the work they undertook did not require a permit; or (2) the government misled them by failing to act. As a tactical matter, a defendant may recite these two allegations as though they are interchangeable, with inaction alone serving as a kind of affirmative approval for their activity. There is, however, for purposes of this type of argument, a highly significant difference between the two.

It is well settled that in both civil and criminal contexts, "courts invoke the doctrine of estoppel against the government with great reluctance." United States v. Browning, 630 F.2d 694, 702 (10th Cir. 1980) (estoppel argument in criminal case that defendant was misled by government agent rejected). As a general matter, in order for such an argument to succeed, in a criminal

context, a defendant must show, at a minimum, that he was (1) affirmatively misled; (2) by a government agent or agency with real (or at least apparent) authority over the conduct at issue; and (3) that he engaged in the unlawful conduct in reasonable or good faith reliance on the inaccurate representation. See, e.g., United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655, 670-75 (1973); United States v. Tallmadge, 829 F.2d 767, 773-775 (9th Cir. 1987).

The first requirement -- that the defendant be affirmatively misled -- is especially important. See, e.g., United States v. Manning, 787 F.2d 431, 437 (8th Cir. 1986) (court upheld conviction in criminal prosecution for aiding and abetting killing of migratory birds by aid of baiting, finding that the defendant failed to show "affirmative misconduct" by the agent or "reasonable reliance" on agent's apparently inaccurate statements). Mere inaction or delay on the part of the government is not sufficient to defeat criminal prosecution. See, e.g., United States v. City of Menominee, 727 F. Supp. 1110, 1121 (W.D. Mi. 1989) (in civil suit charging violations of the Clean Water Act, the court held that, "[a]t the very minimum, estoppel must rest on affirmative misconduct of the government" -- "[m]ere inaction by USEPA in the face of known NPDES permit violations is not affirmative misconduct upon which equitable estoppel will lie"); United States v. Arkwright, Inc., 690 F. Supp. 1133, 1142-43 (D.N.H. 1988).

Similarly, a defendant must establish that he relied on the misrepresentation and -- more important -- that the reliance was reasonable. United States v. Boccanfuso, 882 F.2d 666 (2d Cir. 1989); Tallmadge, 829 F.2d at 774 (citing United States v. Timmons, 464 F.2d 385, 386-87 (9th Cir. 1972)). In United States v. Lansing, 424 F.2d 225, 227 (9th Cir. 1970), for example, the court held that to establish the defense of "official misleading" (yet another name for entrapment by estoppel), the defendant must establish "that his reliance on the misleading information was reasonable -- in the sense that a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries." Similarly, in City of Menominee, 727 Supp. at 1122, the court, in rejecting the defendant's argument that U.S. EPA's inattention and inaction led them to believe that its unlawful discharges were permitted, stated that "[defendant] as a matter of law had a duty to make some inquiry. . . "

In general, the cases that support dismissal of an indictment based on government "approval" or entrapment by estoppel, usually have required an affirmative misrepresentation by a representative of the government with real or apparent authority over the matter at issue. United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655 (1973); Cox v. Louisiana, 379 U.S. 559 (1965); Raley v. Ohio, 360 U.S. 423 (1959); United States v. Tallmadge, 829 F.2d 767 (9th Cir. 1987); United States v. Brady, 710 F. Supp. 290 (D. Colo. 1989). In

Cox, Raley, Tallmadge, and Brady, the defendants were explicitly told, by persons of authority, upon whom the defendants could reasonably rely, that the conduct in question was permissible. In Pennsylvania Industrial Chemical Corp., 411 U.S. at 675, the Court explicitly remanded the case back to the district court to determine whether the defendant was "affirmatively misled" by Corps regulations. None of the cases support dismissal based on vague inferences or government "inaction" alone.

Despite relatively favorable caselaw in this area, federal prosecutors are warned that the "entrapment by estoppel" argument is common in wetlands cases, and that the argument *may* have considerable jury appeal in circumstances where a federal, state, or local government representative, who might reasonably be relied upon, has told a defendant that the work he plans to undertake -- or has undertaken -- does not require a permit. Prosecutors may rebut this line of defense most effectively by emphasizing whatever warnings the defendant might have received, from any source, concerning the work at issue.

E. No 404 Permit Application Was Required Because the Defendant Had a "Nationwide Permit" for the Work that was Undertaken

Corps regulations, see, 33 C.F.R. § 330, establish what are, in essence, automatic or semi-automatic permits for specified types of fill activity. If a project is undertaken that fits within one of the nationwide permit provisions enumerated in the regulations, id. at Appendix A, the person undertaking the

project is subject to fewer, if any, permit requirements.[14] There are some 40 different categories of activities that are subject to nationwide permits. Id.

A defendant in a criminal case may argue that no 404 permit was required for work undertaken because the work fit within one of the nationwide permit exceptions -- and no detailed permit application was required.[15] Needless to say, prosecutors should always check, prior to indictment, to insure that work which will form the basis for criminal charges is not somehow exempted by one or more nationwide permit provisions.

Investigators and prosecutors also should not immediately assume that no criminal action is possible if the activity in question might be subject to a nationwide permit. It is worthwhile to carefully study the pertinent regulatory provisions because, although no complete 404 permit may be required in a given case, it is possible, even likely, that notification to the Corps or "water quality certification" from the state is required. See 33 C.F.R. § 330.4.

For example, one of the provisions most likely to be claimed by a defendant as applicable in a wetlands case is Nationwide

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[14]See also, 33 C.F.R. § 325.5(c)(2). Corps provisions relating to nationwide permits are authorized by Section 404(e), CWA, 33 U.S.C. § 1344(e).

[15]Nationwide permit exceptions include, inter alia, aids to navigation, certain structures in artificial canals, maintenance of structures or fill previously placed, oil and gas structures, certain types of road crossings, "minor" discharges of fill material, "minor" dredging activities, and the like. 33 C.F.R. § 330, App. A.

Permit 26 (NWP 26), 33 C.F.R. § 330, App. A, which applies to "Headwaters and Isolated Waters." Under NWP 26, a person may discharge fill into wetlands without a permit, provided the discharge "causes the loss or substantial adverse modification" of 10 acres or less. 33 C.F.R. § 330. App. A (26).

However, in order for an individual to avail himself of the provision, he must provide notification to the Corps if the discharge would cause the loss of more than one acre, and a "delineation of [the] affected special aquatic sites [i.e., of the wetland areas affected]." Id. State water quality certification, pursuant to section 401, CWA, 33 U.S.C. § 1341, also is usually required. 33 C.F.R. § 330.4(c). If the individual fails to meet the limited NWP requirements that are applicable, the NWP does not apply to the work in question. Thus, filling 9 acres, to use one example, without any notification to the state or federal government may result in a violation even though NWP 26 applies to discharges affecting less than 10 acres.

F. The Defendant Received an After-the-Fact Permit From The Corps for Work that was Undertaken

Historically, one of the most frustrating aspects of criminal enforcement relating to wetlands has been the occasional willingness, by the Corps and various state agencies, to provide "after the fact" permits for work in wetlands that was initially and unlawfully undertaken without a permit.

In theory at least, an after-the-fact permit should not affect a criminal prosecution for filling wetlands without a

permit, largely because the gravamen of the offense is that at the time the work was undertaken, the defendant did not have a permit. In support of this proposition, it may be argued that the operational goal of enforcement under the Clean Water Act is not simply to prevent all discharges of pollutants into waters of the United States, but rather to foreclose all unpermitted discharges into such waters. The statutory and regulatory system on its face is designed to compel those who desire to discharge pollutants to seek and obtain formal approval prior to doing so. §§ 301, 404 CWA, 33 U.S.C. §§ 1311(a), 1344. The Corps recognized the emphasis on enforcement of a permit program in establishing its own regulations pursuant to the Act. It provided, in its policy statement regarding enforcement, that:

> Enforcement, as part of the overall regulatory program of the Corps, is based on a policy of regulating the waters of the United States by discouraging activities that have not been properly authorized and by requiring corrective measures, where appropriate, to ensure those waters are not misused and to maintain the integrity of the program. [emphasis added]

33 C.F.R. § 326.2.

In practice, however, the granting of an after-the-fact permit most certainly jeopardizes -- if it does not completely eliminate -- any prospect for successful prosecution. This assertion is true because an after-the-fact permit amounts to an admission, by the government agency responsible for regulating work in wetlands, that a prospective defendant would have been granted a permit prior to any work, if only he had applied for

one.[16] In this context, the felony violation the government is endeavoring to prove may be viewed as little more than a paperwork glitch, not unlike the late filing of a tax return.

In order to ensure that an after-the-fact permit is not issued in connection with a violation that is the subject of an investigation, Corps personnel with responsibility over the geographic area in question should be notified at the outset of a case -- if they are not already involved in the matter -- that no after-the-fact permit application should be considered. Corps regulations provide that:

> (ii) No permit application will be accepted in connection with a violation where the district engineer determines that legal action is appropriate (§ 326.5(a)) until such legal action has been completed.
>
> * * *
>
> (iv) No permit application will be accepted nor will the processing of an application be continued when the district engineer is aware of enforcement litigation that has been initiated by other Federal, state, or local regulatory agencies, unless he determines that concurrent processing of an after-the-fact permit application is clearly appropriate.

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[16]As an aside, it is worth noting that the prosecution in any federal wetlands case in all likelihood will rely on factual and expert testimony by one or more Corps representatives. One question a Corps representative is likely to be asked is whether the prospective defendant would have been granted a permit if he had applied for it prior to undertaking any work. The correct response is that the question cannot be answered, inasmuch as the permit application may have required, inter alia, careful study of the site prior to any work, consultation with other government agencies, and public notice and comment. 33 C.F.R. § 325.

33 C.F.R. 326.3(e)(1).[17]

The regulations further provide that EPA "has independent enforcement authority under the Clean Water Act for unauthorized discharges," and that "the district engineer should normally coordinate with EPA to determine the most effective and efficient manner by which resolution of a section 404 violation can be achieved." 33 C.F.R. § 326.2. In addition, Corps regulations state that:

> In all cases where the district engineer is aware that EPA is considering enforcement action, he should coordinate with EPA to attempt to avoid conflict or duplication. Such coordination applies to interim protective measures and after-the-fact permitting, as well as to appropriate legal enforcement actions.

33 C.F.R. § 326.3(g).

As set forth above, the Corps's own regulations provide that the granting of after-the-fact permits for significant unpermitted filling activity should occur, if at all, only in very exceptional circumstances, and only after consultation and

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[17]Defendants in at least one case argued that the Corps's refusal to process an after-the-fact permit application was a denial of due process. United States v. Ramagosa, Cr. No. 3:CR-91-079 (M.D.Pa. 1992). Among other things, the defendants argued that there was no rational basis for determining when approval of an after-the-fact permit was appropriate, and that other developers, similarly situated, had received such permits. The government successfully responded that the Corps's treatment of other after-the-fact applications submitted by other persons for other sites is irrelevant, because the Corps was not under a "duty" to treat each application exactly the same. As the Fifth Circuit noted in rejecting a selective prosecution argument in a wetlands case, the Corps is not bound "to deal with all cases at all times as it has dealt with some that seem comparable." Joseph G. Moretti, Inc. v. Hoffman, 526 F.2d 1311, 1313 (5th Cir. 1976) (quoting FCC v. WOKO, Inc., 329 U.S. 223, 228 (1946).

coordination with EPA. Such coordination should minimize the possibility that a permit will be granted after-the-fact, in connection with work that is the subject of a civil or criminal investigation or action.

In part because of controversies surrounding after-the-fact permitting, the U.S. Army Corps of Engineers historically has not enjoyed a favorable reputation in the environmental enforcement community. It must be remembered, however, that until recently, environmental enforcement was not part of the Corps's primary mission. Its principal function was not to protect wetlands, but rather to ensure that projects undertaken in wetlands, or other waters of the United States, were accomplished in a sound and proper manner. Personal experience suggests that the Corps's emphasis is changing.[18] Today there are Corps representatives who are dedicated to the protection of wetlands, and who are well-trained in wetlands identification, delineation, and permit evaluation. These personnel can provide invaluable assistance in a criminal prosecution, both as fact witnesses and as experts.

IV. CONCLUSION

As the above discussion shows, ambiguities in the Clean Water Act, and regulations promulgated pursuant to it, can raise troublesome issues for a prosecutor in a prospective wetlands case. Nevertheless, courts, perhaps sympathetic to the intent behind the relevant statutes and regulations, have generally

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[18]The proposed regulations noted earlier, see infra at III.B., provide one example of the Corps's growing awareness of environmental concerns.

adopted interpretations of these provisions that support Corps and EPA enforcement in this area.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	CRIMINAL NO. 89-144-N
	)	
v.	)	Violations:
	)	Water Pollution
WELLS METAL FINISHING INC.,	)	33 U.S.C. §§ 1317(b) and (d)
and	)	33 U.S.C. § 1319(c)(2)
JOHN WELLS,	)	18 U.S.C. § 2.
	)	
Defendants	)	

INDICTMENT

The Grand Jury charges that:

I. INTRODUCTION

1. At all times material to this Indictment, defendant WELLS METAL FINISHING INC. (hereinafter "WELLS") operated a metal finishing facility located at the Foot of Crosby Street in Lowell, Massachusetts (hereinafter "the Lowell facility"). WELLS was, and currently is, a Massachusetts corporation.

2. At all times material to this Indictment, WELLS' Lowell facility plated various metals, such as chromium and zinc, onto computer components.

3. At all times material to this Indictment, defendant JOHN WELLS was the President and sole owner of WELLS.

4. At all times material to this Indictment, WELLS discharged from the Lowell facility at least 14,400 gallons per operating day, on average, of industrial process wastewater generated from its metal finishing operations. These wastewaters contained significant levels of total cyanide and zinc, a toxic

metal, and were discharged into the public sewer system, which conveyed these wastewaters to the City of Lowell's publicly owned treatment works ("POTW"). This sewage treatment plant (also known as a POTW) in turn discharges into the Merrimack River, which is a source of drinking water for communities such as Lowell, Massachusetts, and Lawrence, Massachusetts.

II. FAILURE TO TREAT ADEQUATELY INDUSTRIAL WASTEWATER DISCHARGED TO TREATMENT WORKS/LEVELS OF TOTAL CYANIDE AND ZINC

Counts 1 through 19: Knowing Violation of Clean Water Act

5. The Grand Jury realleges and incorporates herein paragraphs one through four of this Indictment.

6. Section 307(b) of the Federal Water Pollution Control Act, Title 33, United States Code, Section 1317(b) (commonly referred to as the Clean Water Act), requires the Administrator of the United States Environmental Protection Agency ("EPA") to establish national pretreatment standards for companies, manufacturers, and other "non-domestic sources." The Clean Water Act and its regulations require these "non-domestic sources" to pretreat wastewater before it is discharged into a publicly owned treatment works, in order to limit certain types of pollutants which are not susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works. Pursuant to this requirement, the Administrator of EPA established general pretreatment standards at Title 40, Code of Federal Regulations, Part 403 (the "Part 403 regulations"), which

regulate all non-domestic sources discharging into public sewer systems, and national pretreatment standards at Title 40, Code of Federal Regulations, Part 433 (the "Part 433 regulations"), which regulate the metal finishing industry.

7. A metal finishing company such as WELLS is a "non-domestic" source which is subject to these pretreatment requirements.

8. The Part 433 regulations require companies performing certain metal finishing operations, such as WELLS, to comply with the effluent standards established for pollutants such as metals and total cyanide. In particular, the regulations prohibit a metal finisher from discharging into a public sewer wastewater which contains levels of total cyanide and toxic metals, such as zinc, in excess of the limits set forth in the regulations.

9. The WELLS facility in Lowell was a metal finishing source, namely a new source metal finisher, within the meaning of Title 40, Code of Federal Regulations, Parts 403 and 433. The applicable regulation, Title 40, Code of Federal Regulations, Section 433.17, sets the limit for total cyanide at 1.20 mg/l and for zinc at 2.61 mg/l.

10. The wastewater discharged by WELLS and JOHN WELLS from the WELLS facility in Lowell to the public sewer contained pollutants, namely total cyanide and zinc, in amounts which were greatly in excess of the permissible levels set for these pollutants in the applicable regulations.

11. As early as January 1987, and on other occasions thereafter, WELLS and JOHN WELLS were notified by the City of Lowell that the wastewater discharges from the WELLS Lowell facility contained levels of pollutants that were in excess of the limits set by EPA in the Part 433 regulations.

12. On or about the dates set forth below, in the District of Massachusetts, defendants WELLS and JOHN WELLS did knowingly discharge pollutants, that is, wastewaters containing impermissibly high levels of total cyanide and zinc, from the Lowell facility into the City of Lowell publicly owned treatment works, in violation of the national pretreatment standards for the metal finishing industry, as follows:

Count	Date	Cyanide (mg/l)	Zinc (mg/l)
1	February 24, 1987	--	14.00
2	March 19, 1987	--	12.00
3	August 27, 1987	--	11.00
4	September 14, 1987	--	41.50
5	January 8, 1988	1.35	8.0
6	July 13, 1988	19.30	26.0
7	July 28, 1988	12.30	14.0
8	September 20, 1988	12.00	6.0
9	November 28, 1988	4.00	19.6
10	November 29, 1988	4.50	14.8
11	November 30, 1988	7.25	22.0
12	December 1, 1988	12.00	16.4
13	January 18, 1989	7.00	19.0
14	January 19, 1989	5.15	13.1
15	February 21, 1989	20.80	13.0
16	February 22, 1989	--	8.6
17	February 23, 1989	--	8.9
18	February 24, 1989	--	10.0
19	February 28, 1989	8.10	15.1

All in violation of Title 33, United States Code, Sections 1317(b) and (d), and 1319(c)(2), and Title 40, Code of Federal

Regulations, Section 433.17, and Title 18, United States Code, Section 2.

A TRUE BILL

Foreperson of the Grand Jury

Assistant United States Attorney

DISTRICT OF MASSACHUSETTS June 1, , 1989

Returned into the District Court by the Grand Jurors and filed.

Deputy Clerk

(EXCERPTS)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
v.	)	CRIMINAL NO. 89-144-N
WELLS METAL FINISHING, INC. and JOHN WELLS,	)	
Defendants.	)	

GOVERNMENT'S REQUEST FOR JURY INSTRUCTIONS

The United States of America, pursuant to Rule 30, Federal Rules of Criminal Procedure, submits the following requests for instruction to the jury.

The United States respectfully requests leave to file such additional proposed jury instructions as may become necessary or appropriate during the course of the trial.

Respectfully submitted,

WAYNE A. BUDD
United States Attorney

By: Richard E. Welch
RICHARD E. WELCH III
Assistant U.S. Attorney

Date: December 7, 1989

CERTIFICATE OF SERVICE

I, Richard E. Welch III, Assistant U.S. Attorney, certify that on this date I served the Government's Request for Jury Instructions by causing a copy to be hand delivered to Maurice R. Flynn, III, Esq., 88 Broad Street, Boston, MA.

Richard E. Welch
RICHARD E. WELCH III

INSTRUCTION NO. 5

Clean Water Act

The Indictment charges the defendants with knowing violations of the federal Clean Water Act. This statute makes it a crime for a person or corporation to knowingly introduce pollutants into a sewer system or publicly owned treatment works in violation of the federal pretreatment standards which have been set for the particular industry.

33 U.S.C. §1319(c)(1)(A) and 33 U.S.C. §1316.

INSTRUCTION NO. 6

Elements of Crime

In order to prove either of the defendants guilty of the Clean Water Act offenses charged in the Indictment, the government must prove beyond a reasonable doubt each and every one of the following elements:

(1) the defendant is a person who knowingly

(2) discharged, or caused to be discharged, a pollutant

(2) into a public sewer system or publicly owned treatment works;

(3) which pollutant contained concentrations of certain toxic metals beyond the limits set forth in the pretreatment regulations for that particular industry.

33 U.S.C. §1319(c)(2)(A); 33 U.S.C. §1316; 40 C.F.R. §433.17.

INSTRUCTION NO. 7

Regulatory Limits Applicable to this Case

The pretreatment regulations applicable to this case are those that apply to the metal finishing industry. Those regulations prohibit the daily discharge of wastewater from a metal finishing facility which contains more than 2.61 milligrams per liter of zinc or more than 1.20 milligrams per liter of cyanide. I instruct you, as a matter of law, that these are the pretreatment limits that apply to this case.

40 CFR §433.17.

INSTRUCTION NO. 8

Person

Under the federal Clean Water Act, the definition of "person" specifically includes corporations and individual corporate officers. You are instructed to find that Wells Metal Finishing, Inc. and John Wells are "persons" for purposes of the Clean Water Act.

33 U.S.C. §1362(5).

INSTRUCTION NO. 9

"Pollutant"

The term "pollutant" is defined in the Clean Water Act to include any "chemical or industrial waste discharged into water." For purposes of the Clean Water Act, the term "pollutant" includes any wastewater generated by an industry. If you find that the defendants caused wastewater to be discharged from the Wells metal finishing facility into the sewer system, then you must find that the defendants discharged pollutants into the sewer system.

33 U.S.C. §1362(6).

INSTRUCTION NO. 10

Sewer System

The term "sewer system" means any sewers, pipes, drains, and other conveyances which convey wastewater to a sewage treatment plant.

INSTRUCTION NO. 11

Publicly Owned Treatment Works

The term "publicly owned treatment works" means a sewage treatment plant which is owned by a city or a town. This definition includes any devices and systems used in the treatment of municipal sewage or industrial wastes of a liquid nature. It also includes any sewers, pipes, and other conveyances conveying wastewater to a publicly owned treatment plant.

40 C.F.R. 403.3(o).

INSTRUCTION NO. 12

Day of Violation

Each day that a defendant illegally discharges pollutants into the public sewer system is a separate violation under the Clean Water Act. The Indictment in this case alleges that the defendants violated the Clean Water Act on or about nineteen different days; each of those dates constitutes a separate count in the Indictment.

INSTRUCTION NO. 15

Harm Not an Element of Crime

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

INSTRUCTION NO. 16

Elements of Crime as Applied to This Case

Therefore, in regard to the specific allegations in this case, the United States must prove that the defendants knowingly discharged industrial wastewater from the Wells metal plating facility into the sewer system of the City of Lowell on or about the dates set forth in Counts 1 through 19 of the Indictment and that the discharged wastewater contained more than 2.61 milligrams per liter of zinc or 1.2 milligrams per liter of cyanide.

40 CFR §433.17.

INSTRUCTION NO. 17

Knowingly

An act is done "knowingly" if the defendant realized what he was doing and did not act through ignorance, mistake, or accident. You may consider the evidence of the defendants' acts and words, along with all the other evidence, in deciding whether a defendant acted knowingly.

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

United States v. International Minerals & Chem. Corp., 402 U.S. 558, 562-64 (1971) ("knowing" in environmental prosecution means only intentially and voluntarily and not specific knowledge of existing law or of intent to break it).; United States v. Johnson & Towers, Inc., 741 F.2d 662, 668-69 (3rd Cir. 1984), cert. denied, 469 U.S. 1208 (1985) (in proving "knowing" violation, need not prove defendant had knowledge of statute forbidding conduct).
United States v. Hayes International Corp., 786 F.2d 1499, 1503 (11th Cir. 1986); United States v. Corbin Farm Service, 444 F. Supp. 510 (E.D.Cal. 1978), aff'd, 578 F.2d 259 (9th Cir. 1978), approved in del Junco v. Conover, 682 F.2d 1338, 1342 (9th Cir. 1982), cert. denied, 103 S.Ct. 786 (1983) (quoting from Corbin Farm: "word knowingly in penalty section of Federal pesticides law refers to awareness of facts, not awareness of law"); 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) (government need not prove in CWA prosecution that defendant specifically intended to violate statute).

INSTRUCTION NO. 19

Corporate Liability

One defendant, Wells Metal Finishing, Inc., is a corporation. A corporation can act only through its agents, that is, its employees, officers or other authorized representatives. Therefore, it is responsible for the acts of all its agents performed in the course of their employment.

You may find the corporation guilty only if you find that the government has proved beyond a reasonable doubt that the crime was committed by an agent of the corporation, and in addition one of the following elements:

(1) That the agent or agents who committed the crime were authorized by the corporation to do the acts charged, or

(2) That the agent or agents at the time were performing duties for the corporation even though the acts charged may not have been specifically authorized by the corporation.

New York Central and Hudson River Railroad v. United States, 212 U.S. 481 (1909), United States v. Hilton Hotels Corp., 467 F.2d 1000, 1007 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973).

INSTRUCTION NO. 20

Collective Knowledge

In determining whether the corporate defendant knowingly discharged pollutants into the City of Lowell sewer, you must look at the Wells Metal Finishing, Inc. as a whole. As such, its knowledge is the sum of the knowledge of all of the employees and officers of the company. That is, the company's knowledge is the totality of what all of the employees and officers knew within the scope of their employment.

United States v. Bank of New England, 821 F.2d 844, 855-56 (1st Cir.), cert. denied, 108 S.Ct. 328 (1987).

INSTRUCTION NO. 23

Responsible Corporate Officer

The Federal Clean Water Act places criminal sanctions on "responsible corporate officers," in addition to holding liable those who cause, or aid and abet, or knowingly allow, discharges of polutants with impermissibly high levels of certain chemicals. Not every corporate officer is a "responsible" officer or one in a "position of authority" upon whom Congress has placed this burden of vigilance and foresight. A "responsible" corporate officer, or one in a "position of authority" for criminal purposes, has been defined as one who has a responsible share in the furtherance of the transaction or occurrence which the statute forbids. Another way of defining this is as follows: if a corporate officer has the responsibility, and authority equal to that responsibility, to devise whatever measures are necessary to ensure compliance with the Clean Water Act, then he is a responsible corporate officer.

Thus, if you find that Wells Metal Finishing, Inc. is criminally responsible for discharges of pollutants in violation of the law, and you find beyond a reasonable doubt that defendant John Wells had, by virture of his position in the corporation, the power to prevent or correct such a violation, and if you find that he failed to exercise that power to prevent or correct the wrongdoing, then you may find him guilty. You should consider

the question of whether Mr. Wells is a "responsible corporate officer" only if you have found the corporation guilty as charged and only after you have considered if he caused, aided and abetted, or knowingly allowed discharges of pollutants in violation of the law. Thus, there are ~~four~~ three theories of liability upon which Mr. Wells may be found responsible, if the evidence shows that responsibility beyond a reasonable doubt:

1. If he knowingly caused, counseled, or induced others to discharge pollutants in violation of the law; or

2. If he willfully blinded himself to the illegal discharge of pollutants and refused to take notice of these violations;

3. If he aided and abetted others to discharge pollutants in violation of the law; or

4. You find the corporation guilty, based on the acts of its agents and employees, and you also find Mr. Wells was a "responsible corporate officer."

33 U.S.C. §1319(c)(3); United States v. Frezzo Brothers ("Frezzo I"), 461 F. Supp. 266 (E.D.Pa. 1978) (instruction very similar given October 19, 1978, by the Honorable Raymond Broderick), aff'd, 602 F.2d 1123, 1130 n.11 (3d Cir. 1979) (approving instruction), cert. denied, 444 U.S. 1074 (1980); United States v. Oxford Royal MUshroom Products, 487 F. Supp. 852 (E.D.Pa. 1980). See also United States v. Park, 421 U.S. 658, 665 n.9, 672-74 (1975); United States v. Gulf Oil Corp., 408 F. Supp. 450, 470-72 (W.D.Pa. 1975); United States v. Y. Hata and Co., Inc., 535 F.2d 508, 509-512 (9th Cir.), cert. denied, 429 U.S. 828 (1976); United States v. Ayo-Gonzalez, 536 F.2d 652, 661-62 (5th Cir. 1976), cert. denied, 429 U.S. 1072 (1977).

ENVIRONMENTAL FRAUD CASES

THE COMPLEX PAPER TRAIL

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ENVIRONMENTAL/FRAUD CASES

THE COMPLEX PAPER TRAIL:

INVESTIGATION AND LITIGATION SUPPORT

JULY 28; WEDNESDAY; 8:30 am to 10am

SECTION I (3A1) Introduction and Background

A. What is litigation support? What support is available?

Litigation support is a term of art used to describe a wide range of services and products that help attorneys to acquire, screen, analyze, and organize evidentiary and other documents/records to conduct investigations and to prepare for and conduct trials.

DOJ and EPA currently have programs where government specialists work with investigatory/legal teams to define information management requirements and then manage contractor-provided and government investigation/case support.

Generally, litigation support involves the use of computers to automate indexing and retrieval and other processes, but non-automated support is also frequently provided.

Broadly speaking, litigation support is available to help with:

Document Acquisition: screening, researching and interviewing, organizing, scanning, microfilming, copying, numbering, etc.

Database Creation: screening for relevance, database design, document indexing, data entry, database loading, etc.

Database Utilization: database searching and retrieval, legal research and analysis, case document center operations, clerical and word processing support, etc.

(NOTE: "Database" used here may mean a collection of documents which have been organized manually or may mean a computer database.)

Specialized Services: auditor and financial analysis, technical and scientific services, translation/interpreter, etc.

Pre-trial and Trial: set and operation of trial support centers, trial graphics, etc.

Management and Control: requirements analysis and design; project planning, scheduling, staffing, and reporting; quality control; financial management; problem identification and troubleshooting, etc.

The exigencies of litigation do not allow for contracting on a case-by-case basis so DOJ and EPA contract for a full range of services through multi-year contracts which are then activated by issuing task orders/work assignments for specific investigation/case support.

B. Where can you find litigation support for your investigation/case?

The Environment and Natural Resources Division (ENRD) has a Litigation Support Group (LSG) which is in place to provide support to, primarily, ENRD cases. If you have a case or investigation which involves ENRD attorneys, you and they can request assistance from the LSG.

Call Lisa Polisar on 202-616-3354.

The Executive Office for U.S. Attorneys (EOUSA) has a new litigation support program. If you have a case which does not involve ENRD attorneys, you can request assistance from that program.

Call Gale Deutsch on 202-501-8215.

The National Enforcement Investigation Center (NEIC) of EPA has a Computer Investigations Team which is in place to provide assistance to investigations/cases where EPA is a party.

Call Paula Smith on 303-236-5122.

C. Why and When to use litigation support?

In a large document case, it will be impossible for you to go through every page and look at every document yourself. You must get comfortable with a computer and contractors processing documents and finding documents for you. (If you can see, feel, and touch all the evidence yourself, you probably don't need support.)

For smaller document cases, computerization may be useful in order to correlate, sum, or otherwise link information/data. An example might be a database of waste manifests which would calculate the number of barrels/quantity of X, transported to site Q by company Y.

Litigation support is frequently useful when one or more of the following apply:

large volumes
short timeframes
multiple parties
protracted litigation/attorney turnover
complex issues, complex data manipulation needed
the other side is using automated tools
support needs exceed in-house capacity

Three different types of computer databases can typically be created:

Document/Database Inventory: categories of information are extracted from a document (i.e. who wrote the document, the date) and are placed in a database to represent the actual document. Best for locating all documents written by X, sorting to produce a chronological listing of all documents, etc.

Full Text: to allow for full text searching through the entire text of a document. Best for interview, deposition, and trial transcripts, to locate where X is mentioned.

"Statistical": databases which allow for adding quantities, which can track and correlate information such as phone numbers, etc.

Databases can be used as:

* an investigative tool
* a tracking device
* in evidence

D. Early involvement in case planning by litigation support personnel is KEY (pre-search warrant):

Questions you will be asked will focus on:

- what do you have or will you get?
  - volumes
  - types of media
  - condition of media
  - processing priorities/importance
- what do you need to know/show/prove?
- what is your timetable?
- what other resources do you have?

SECTION II (3A2) Litigation Support and Computer Forensics

A. The Value of Electronic Information

- value of a diskette
- computer capacity

B. Working Through a Typical Case

1. Pre-Search Warrant

Discuss issues with litigation and computer professionals upfront to set up information (electronic and paper) seizure strategies as well as interview strategies with crime-site computer personnel.

2. During Search Warrant

Help with seizing computers and automated information.

Search warrant database.

ID key computer personnel.

Interview computer personnel.

3. Post Search Warrant

Information extraction.

Document inventories.

Grand jury requirements.

Recovering erased files.

Full text scan and search.

Evidence audit.

Tape transcription.

Sample profiles.

Waste transaction databases.

Mass balance analysis.

4. Trial Support

Paralegal support

Courtroom Exhibits

Electronic search and reporting.

C. Networking and Other Resources

SECTION III (3A3), Investigative Accounting

ENVIRONMENTAL FRAUD CASES THE COMPLEX PAPER TRAIL

I. *WHAT IS INVESTIGATIVE ACCOUNTING*

- A structured approach to examining financial transactions in support of criminal and/or civil investigations.

The concept of investigative accounting has become increasingly popular over the last several years with the tremendous growth of white collar and other financial crimes. The S&L and insider trading scandals brought to the forefront the magnitude and complexity of financial crimes. Many of these cases were significantly strengthened by detailed review, analysis and documentation of financial transactions throughout a network of banks and other institutions.

II. *WHY IS INVESTIGATIVE ACCOUNTING IMPORTANT TO ENVIRONMENTAL CRIME INVESTIGATIONS?*

Similar to other areas of criminal activity, there are numerous financial aspects to environmental investigations. Federal investigators and AUSA's often identify fraud within companies under government scrutiny for other issues. Financial crimes ranging from misapplication of funds to tax fraud are not uncommon, and therefore require resources within investigative teams to identify and package complex financial issues for AUSA's handling the case. The benefits of such resources often go beyond examining and documenting transactions already known to the investigation -- It's quite common when reviewing detailed financial information, to identify new issues as well as additional evidence for issues already under investigation. This often results in clarifying motives, the extent of resources taken or misapplied, and who ultimately received the funds or other assets involved.

III. *WHAT TYPES OF INVESTIGATIVE ACCOUNTING SERVICES ARE AVAILABLE?*

While investigative accounting services tend to be tailored to every situation, we have listed a few general categories and some examples of each below.

- Transaction Analysis
- Financial Statement Analysis
- Computer Assisted Fraud

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- Damage Calculation/Theories
- Interview Preparation
- Professional Reports
- Trial Assistance

A. Transaction Analysis

One of the most cumbersome and often time-consuming aspects of financial crime investigations is the documentation and analysis of financial transactions. Whether it's analyzing hundreds of individual checks or understanding the complexities of a particular business arrangement, transaction analysis is a substantial but necessary undertaking to prove what really happened. Some common examples of transaction analyses include:

- Determining and documenting the amount of funds paid to persons and/or entities involved in a particular transaction.
- Analyzing financial transactions for reasonableness.
- Examining accounting treatment for particular accounts or transactions.

The benefits to the government when performing these tasks are substantial -- complex financial issues are no longer unknown; they are examined and explained in a manner which can be understood by persons with or without a financial background. The AUSA and/or investigators would receive a summary of the transaction, its impact, the work performed (basis), and cross-referenced detail supporting numbers and statements included in the summary.

B. Financial Statement Analysis

Analysis of the subject's financial statements (personal or business) can be a powerful tool for identifying whether revenues were recorded, whether they remain in the company, and whether certain accounts appear reasonable based on the type and size of the entity. Investigative accounting techniques in this area could lead to transaction analysis for particular areas of the company, but would serve to narrow the focus, making the review as efficient and effective as possible.

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C. Computer Assisted Fraud

Recognizing that many financial crimes are either committed through computers or later utilize computers to process their transactions, it's important for the prosecution team to include individuals experienced and knowledgeable in this area. There are numerous investigative techniques, many accounting or financial-related, which can be used on an individual's or company's computer system to extract and summarize critical information. Some examples where techniques such as these can be helpful include:

- Extraction of financial information which was purged prior to agents conducting a search warrant.

- Compiling financial information for multiple years without re-input of voluminous data -- this can be done efficiently by the computer while preserving the data integrity (no risk of re-input error).

- Sorting receipt and disbursement registers to generate reports showing detail of payments received by the subject entity or a summary of persons/entities paid by the subject entity for several years.

D. Damage Calculation/Theories

Determining the amount of damages to be awarded in any type of case is often times the most complex element of debate. Whether the government is calculating damages or is refuting damages, obtaining specialized support early in the process can be a valuable resource. During the initial stages, this type of support can assist in the following ways:

- Developing defendable damage theories
- Analyzing damage theories provided by opposing parties.

Once the damage theories have been agreed upon the next stage will be determining damage amounts. In this stage, AUSA's can require specialized personnel to perform the following:

- Calculate the amount of damages to be awarded to the government.

- Analyze calculations and assumptions used by opposing parties if the government is required to pay damages.

E. Interview Preparation

While personnel in traditional litigation support haven't played a large role in the interviewing process, this is an area where financial expertise can truly contribute to investigators and prosecutors in complex paper cases. Outlining key financial areas, the issues involved, and the documentation necessary to solidify a point, are just some of the areas where an accounting expert can prepare investigators and prosecutors to get the most from a witness. Further, these people can also contribute a great deal by attending interviews where witnesses will be asked about important financial aspects of the case. Without such expertise, it's very difficult for investigators or AUSA's to respond with follow-up questions when the witness uses technical jargon or refers to particular regulatory guidance. While these support persons can play a "background" role in the interview setting, they are well postured to serve law enforcement well by identifying areas of questioning or points which may not have been answered correctly.

F. Professional Reports

A thorough report summarizing what was found for a particularly complex area, the basis for such findings, and an analysis of what it means, can be an extremely valuable tool for investigators and prosecutors facing a large caseload. Having a specialist in a particular area do the detail, summarize (with references to specific supporting information) and present findings to law enforcement officials, creates a situation where the prosecutor not only can make an evaluation whether to pursue a given area, but also has an excellent tool from which he can question witnesses and prepare certain aspects of the case. Reports of this nature also provide structure to areas which tend to be difficult for non financial people to organize.

G. Trial Assistance

Specialists who provide investigative accounting support to prosecutors during the investigation can provide added assistance during the actual trial. In addition to being called upon to testify to procedures performed and results achieved, litigation support specialists can also assist the AUSA in final

preparation for the case, responding to claims made during the trial, and providing graphic support depicting complex relationships (financial or other).

IV. *BENEFITS OF INVESTIGATIVE ACCOUNTING SUPPORT*

Since "paper trail" cases can be complex and cumbersome, obtaining specialists in investigative accounting can prove to be invaluable during an investigation. These specialists can augment efforts of federal investigative bodies and serve them by approaching tasks in a structured manner, delivering quality products, and maintaining the same level of security over information as law enforcement assigned to the case.

A. Structured Approach

Investigators trained in auditing and knowledgeable of the areas being investigated can assist the prosecution team in determining an approach and specific procedures to be performed for financial aspects of the case. This will ensure the team will be operating in an efficient manner and resources are deployed in those areas with the highest priority. Specialists in the accounting field are accustomed to working within tight deadlines and will have little adjustment to the pressure of a trial or trial preparation setting.

B. Resource Opportunities

The specifics of a case may involve several different aspects where specialist involvement is required. Requirements can range from transaction or document analysis to valuation and damage calculations. International accounting firms are diversified to an extent where they have the resources to provide leaders in multiple professions from one source. Moreover, because these firms can often call upon several offices if necessary, they can accommodate large needs without much notice.

C. Professional Recognition

Although defense counsel will be obliged to challenge assistance provided by litigation support specialists, the use of reputable, internationally recognized and experienced specialists, provides additional depth to the government's case.

ENVIRONMENTAL FRAUD CASES
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V. *ALTERNATIVES AVAILABLE TO PROSECUTORS*

If while investigating the financial aspects of environmental crime it has been determined that investigative accounting support is needed, the prosecutor and/or investigators have a variety of sources to solicit support.

- FBI
- IRS
- GAO
- Inspector General
- Other

VI. *EFFECTIVENESS OF THE LITIGATION SUPPORT SPECIALIST*

Obtaining outside litigation support can supplement the knowledge and skill of federal agents and prosecutors involved with the case. Combining the investigative skills of federal agents and prosecutors with the financial and accounting skills of specialists can make for a very effective investigative team.

The essential elements of making this relationship work are:

- Begin with the overall objective of the financial aspect of the case. Are we trying to uncover tax schemes associated with the environmental case? Are we trying to document the diversion of funds? Are we trying to uncover illicit payments?

- Isolate and clearly identify the specific areas of expertise that are needed to fill in the knowledge and experience gaps. i.e. accounting, tax, economics, valuation, damage analysis, financial record reconstruction, transaction analysis and documentation.

- Determine the best source for the expertise required. This will include determining whether the expertise should be from within the federal government or from outside specialists.

- Clearly identify the responsibilities of specialists and federal agents for maximum utilization of expertise and skills.

VII. *TIMING - WHEN SHOULD THE DECISION BE MADE*

Timing of the decision to use outside specialists can have an impact on the extent and amount of assistance that can be provided. Like any structured approach, creating a plan showing objectives and related needs is essential. Consider the following guidelines when determining the timing of specialist involvement:

- What are my specialist needs (what will be their objectives)?
- When do I need results from the specialist?
- How long do I think it may take for them to fulfill their responsibilities (you may want to have a brief meeting to see if both parties are close in estimates)
- What type of product to I want from the specialist? (e.g. report, letter, verbal advice, etc..)
- Should I get the specialist involved on the front-end to assess preliminary financial evidence?
- What will be the division of responsibilities between specialists and federal agents assigned to the case?

VIII. *QUALIFICATIONS OF THE SPECIALIST*

Obviously, the most important factor involved when acquiring the services of specialists is the qualifications of the firm and/or individual. Generally, the following areas should be considered when analyzing the qualifications of a prospective specialist:

A. Professional Certifications

Are the specialized recognized in their profession through appropriate certifications, i.e. Certified Public Accountant (CPA), Certified Fraud Examiner (CFE). This will obviously vary depending upon the discipline being requested.

B. Relevant Experience

Has the specialist demonstrated their involvement and experience in the discipline being requested? In addition, does the specialist have experience assisting the government in criminal investigations? Certainly, those who have such experience have demonstrated they understand the security aspects of law enforcement engagements and recognize that information (verbal or written) is maintained in absolute confidence.

C. Reputation of Firm and Individual

To minimize credibility concerns, the AUSA should ensure the reputation of the specialist firm has not been compromised in the past. It's also beneficial to become generally familiar with the internal standards of quality imposed at the firm, and to ensure that the persons involved in the particular case have undergone all appropriate training.

IX. *OTHER FACTORS TO CONSIDER WHEN USING LITIGATION SUPPORT*

A. Cost Benefit

The size and implications of a particular investigation should be considered when deciding to use outside specialists. For investigations which are directed primarily for recoveries and where the net cost to the government will be assessed, it's important to consider whether it will be cost/beneficial to employ outside specialists. Alternatively, if the potential recoveries are large, the government should also assess the cost benefit of hiring specialists who can perform a particular component of the case in a given period of time.

5/7/93 SEGMENT 3B

INVESTIGATING AND PROSECUTING CORPORATIONS AND THEIR OFFICIALS

Eric W. Nagle, Trial Attorney
Environmental Crimes Section

I. BASICS OF CORPORATE CRIMINAL LIABILITY

General federal rule: Corporations are liable for crimes of their employees and agents acting within the scope of their employment with the intent to benefit the corporation.

> New York Central and Hudson R.R. Co. v. United States, 212 U.S. 481 (1909); United States v. Automated Medical Labs., Inc., 770 F.2d 399, 406 (4th Cir. 1985); United States v. Ingredient Technology, 698 F.2d 88, 99 (2d Cir. 1983); United States v. Cincotta, 689 F.2d 238, 241-42 (1st Cir.), cert. denied 459 U.S. 991 (1982); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir.), cert. denied, 409 U.S. 1125 (1973); C.I.T. Corp. v. United States, 150 F.2d 85, 88-90 (9th Cir. 1945); Egan v. United States, 137 F.2d 369, 379-80 (8th Cir. 1943).

II. EMPLOYEES AND AGENTS

A. Corporations may be held liable even for acts of low level employees.

> Standard Oil of Texas v. United States, 307 F.2d 120, 127 (5th Cir. 1962) ("the corporation may be criminally bound by the acts of subordinate, even menial employees"); United States v. Basic Construction Co., 711 F.2d 570, 572 (4th Cir.) (corporation criminally bound by acts "perpetrated by two relatively minor officials"), cert. denied, 464 U.S. 956 (1983); United States v. Bank of New England, N.A., 821 F.2d 844, 855-57 (1st Cir. 1987) (acts of bank tellers), cert. denied, 484 U.S. 943 (1988); United States v. T.I.M.E.-D.C., Inc., 381 F. Supp. 730, 738 (W.D. Va. 1974) (acts of truck drivers and dispatchers); see also St. Johnsbury Trucking Co. v. United States, 220 F.2d 393 (1st Cir. 1955) (acts of shipping clerk).

B. Statements of any employee are binding as admissions against the organization. Fed. R. Evid. 801(d)(2)(D).

C. Most corporate prosecutions rest on misconduct of the company's own employees, but it is possible to convict a corporation for acts of non-employee agents.

United States v. Bi-Co Pavers, Inc., 741 F.2d 730, 737-38 (5th Cir. 1984); Manual of Model Jury Instructions for the Ninth Circuit, { 5.10 (West 1985); Restatement (Second) of Agency { 217D (1958).

III. SCOPE OF EMPLOYMENT

"Scope of Employment" is broadly interpreted: It goes beyond conduct actually authorized to conduct within the apparent authority of the employee or agent.

New York Central, 212 U.S. at 493-94 ("A corporation is held responsible for acts not within the agent's corporate powers strictly construed, but which the agent has assumed to perform for the corporation when employing the corporate powers actually authorized"); Bi-Co Pavers, Inc., 741 F.2d at 737 (scope includes "the authority which outsiders would normally assume the agent to have, judging from his position with the company and the circumstances surrounding his past conduct."); Hilton Hotels, 467 F.2d at 1004; Kathleen Brickey, Corporate Criminal Liability { 3.01 at 90 (2d Ed. 1992) ("scope of employment is a term of art signifying little more than that the employee's crime must be committed in connection with his performance of some job-related activity.")

IV. INTENT TO BENEFIT COMPANY

A. Most courts have required proof that the employee was acting with intent to benefit the corporation. Typically, even a mixed motive to benefit both the corporation and the employee is sufficient.

Automated Medical Labs., 770 F.2d at 407; United States v. Gold, 743 F.2d 800, 823 (11th Cir. 1984); United States v. Cincotta, 689 F.2d 238, 242 (1st Cir.) ("a

corporation may not be held strictly accountable for acts that could not benefit the stockholders"), cert. denied, 459 U.S. 991 (1982).

B. Not necessary to prove that employee's conduct actually benefitted corporation.

Standard Oil Co. of Texas, 307 F.2d at 128.

C. Some courts have rejected the "benefit" element of corporate liability.

Old Monastery Co. v. United States, 147 F.2d 905, 908 (4th Cir.) ("We do not accept benefit as a touchstone of corporate criminal liability; benefit, at best, is an evidential, not an operative, fact."), cert. denied, 326 U.S. 734 (1945).

V. ACTIONS CONTRARY TO INSTRUCTIONS OR POLICY

A. A corporation may be held liable for crimes by employees even when committed contrary to express instructions or company policy.

United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989) (company's compliance program "however extensive, does not immunize the corporation from liability when its employees, acting within the scope of their authority, fail to comply with the law"); Automated Medical Labs., 770 F.2d at 407; United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1090 (5th Cir.), cert. denied, 437 U.S. 903 (1978); Hilton Hotels, 467 F.2d at 1004.

B. Only the Ninth and Sixth Circuits have held that a company's compliance policies may insulate it from criminal liability for employee misconduct. Such policies must be vigorously enforced.

United States v. Beusch, 596 F.2d 871, 878 (9th Cir. 1979) (compliance policy may be considered in determining whether employees was acting to benefit corporation); Holland Furnace Co. v. United States, 158 F.2d 2, 5 (6th Cir. 1946).

V. COLLECTIVE KNOWLEDGE

A. A few courts have held that a corporation's "knowledge" consists of the collective knowledge of all of its employees, so that a corporation may be convicted even if no single employee had a culpable state of mind. The law in this area is not yet well-developed.

United States v. Bank of New England, 821 F.2d 844, 855 (1st Cir.), cert. denied, 484 U.S. 943 (1987); Inland Freight Lines v. United States, 191 F.2d 313, 315 (10th Cir. 1951); United States v. T.I.M.E.-D.C., Inc., 381 F. Supp. 730, 738 (W.D. Va. 1974).

B. Some courts have rejected "collective knowledge" corporate liability for specific intent offenses, where no single individual possessed the intent to violate the law.

United States v. LBS Bank-New York Inc., 757 F. Supp. 496, 501 n. 7 (E.D. Pa. 1990); First Equity Corp. v. Standard & Poor's Corp., 690 F. Supp. 256, 260 (S.D.N.Y. 1988).

VI. SPECIAL PROBLEMS IN CORPORATE LIABILITY

A. Liability of Parent Corporations for Crimes by Subsidiaries

While there is limited authority in the criminal context, it is possible to convict a parent corporation for crimes of a subsidiary. The strongest case for doing so is where the subsidiary can be shown to be the "agent" of the parent. It is worth citing the substantial body of law holding parent corporations civilly liable for actions of subsidiaries.

Criminal cases: National Dairy Products Corp. v. United States, 350 F.2d 321, 327 (8th Cir. 1965) (affirming criminal antitrust conviction of parent for conduct of subsidiary that was dominated by parent); United States v. Johns-Manville Corp., 231 F. Supp. 690, 698 (E.D. Pa. 1964) (parent can be convicted for antitrust violation by subsidiary where subsidiary acted as agent of parent); United States v. Exxon Corp. and Exxon Shipping Co., No. A90-015 CR (D. Alaska 1990) (order of Oct. 29, 1990, at 6-7, denying motions to dismiss, holding subsidiary can be agent of parent in CWA prosecution); Commonwealth v.

Beneficial Finance Co., 360 Mass. 188, 288-89, 275 N.E. 2d 33, 91 (1971) (parent liable for crimes of subsidiary where both operated as a "single, integral, mutually supporting entity").

Civil cases: Anderson v. Abbott, 321 U.S. 349, 362-63 (1943) ("There are occasions when the limited liability sought to be obtained through the corporation will be qualified or denied....It has often been held that the interposition of a corporation will not be allowed to defeat a legislative policy"); Phoenix Canada Oil Co. v. Texaco, Inc., 842 F.2d 1466, 1477-78 (3d Cir. 1988) (subsidiary may be agent of parent); Crowe v. Hertz Corp., 382 F.2d 681, 688 (5th Cir. 1967) (same); Pacific Can Co. v. Hewes, 95 F.2d 42, 45-46 (9th Cir. 1938) (same); United States v. Reserve Mining Co., 380 F. Supp. 11, 17 (D. Minn. 1974) (holding parent corporations subject to injunction under Clean Water Act for violations by jointly-owned subsidiary);

B. Successor Corporation Liability

A successor corporation may be convicted for crimes committed by a dissolved predecessor. Courts typically rely on state statutes governing "winding up" of businesses to hold that corporate existence is continued for purposes of legal liabilities.

Melrose Distillers Inc. v. United States, 359 U.S. 271, 273 (1959); United States v. Alamo Bank of Texas, 880 F.2d 828, 830 (5th Cir.), cert. denied, 493 U.S. 1071 (1990); United States v. Mobile Materials, Inc., 776 F.2d 1476, 1479 (10th Cir.), cert. denied, 493 U.S. 1043 (1990).

C. Independent Contractors

In most cases, a corporation will not be liable for crimes committed by independent contractors. In exceptional cases, it may be possible establish liability by proving that the contractor was the corporation's agent, subject to its direction and control.

United States v. Georgetown University, 331 F. Supp. 69, 72 (D.D.C. 1971) (university not liable under Refuse Act for spill caused by independent contractor); United States v. Outboard Marine Corp., 549 F. Supp. 1032 (N.D. Ill. 1982) (corporation not liable under Refuse Act for

selling products to others, who illegally discharged them); but see United States v. Parfait Powder Puff Co., 163 F.2d 1008 (7th Cir.), cert. denied, 332 U.S. 851 (1948) (corporation liable for criminal violations of Food, Drug and Cosmetic Act that were caused by independent contractor, who improperly packaged cosmetics).

D. Non-corporate Entities

It is possible to charge non-corporate entities, such as partnerships, that are not considered "persons" under the common law. 1 U.S.C. § 1 defines "person" to include partnerships, firms, companies, and associations for purposes of all federal statutes, unless "the context indicates otherwise." RCRA and the Clean Water Act define "person" to include, not only corporations, but also partnerships, associations, municipalities, and states. 42 U.S.C. § 6903(15); 33 U.S.C. § 1362(5).

United States v. A & P Trucking Co., 358 U.S. 121, 123-24 (1958) (partnership may be prosecuted for criminal violation of Interstate Commerce Act); Western Laundry and Linen Rental Co. v. United States, 424 F.2d 441, 443 (9th Cir.), cert. denied, 400 U.S. 849 (1970) (applying 1 U.S.C. § 1 to hold partnership subject to criminal prosecution under Sherman Act).

VII. LIABILITY OF CORPORATE OFFICIALS

A. Direct liability: Defendant himself did the prohibited act, and had the requisite intent.

B. 18 U.S.C. § 2--Aiding and Abetting: Defendant "aids, abets, counsels, commands, induces or procures," or "willfully causes" a prohibited act. Scienter is at least that of substantive offense. Some cases suggest that § 2 liability may require proof of specific intent to violate law; others merely require that aider share requisite intent of principal.

C. 18 U.S.C. § 371--Conspiracy: Defendant agrees with another that an offense will be committed. Agreement may be tacit, and may be shown by proof that defendant stood to gain from offense. Most pattern instructions for § 371 appear to impose a specific intent standard.

D. Responsible Corporate Officer Doctrine

1. What RCO Is, and What it Is Not

This doctrine is widely misunderstood. It does not permit conviction of corporate officials who had no knowledge of the violation, except under a few strict liability statutes, and under the misdemeanor provision of the CWA. RCO does permit conviction of a defendant who took no affirmative act to cause the violation, but who knew of the violation and had the power to prevent it. In short, RCO is a doctrine of omissions liability, imposing an affirmative duty on managers to stop violations that they know about. RCO is not a substitute for proof of knowledge under RCRA.

2. Elements of RCO liability:

a. Defendant had authority over part of business in which offense occurred.

b. Defendant had requisite scienter under substantive statute. (E.g., under RCRA, defendant knew of waste disposal. Under CWA negligent misdemeanor, defendant failed to exercise due care in supervising employees who discharged pollutants.)

c. Defendant failed to prevent violations by those under his authority.

3. Statutory Authority for RCO

CWA and CAA both define "person" to include responsible corporate officers. 33 U.S.C. { 1319(c)(6); 42 U.S.C. { 7413(c)(6). Under other statutes, application of the RCO doctrine must rest on case law alone.

4. Case Law

RCO case law is sparse, and most deals with strict liability crimes such as Food & Drug offenses. United States v. Park, 421 U.S. 658, 673-74 (1975)

(president of grocery store chain can be guilty of strict liability violation of Food & Drug Act even where he had no knowledge of violation, if he was in a responsible relationship to the violation); United States v. Dotterweich, 320 U.S. 277, 284 (1943) (company official lacking knowledge of Food & Drug Act violation can be convicted because the "offense is committed by all who do have a responsible share in the furtherance of the transaction which the statute outlaws.")

Two cases make clear that, under RCRA, the government must prove that a responsible officer knew of the violations. United States v. MacDonald and Watson Waste Oil Co., 933 F.2d 35, 52 (1st Cir. 1991) (vacating RCRA conviction where RCO instruction permitted conviction based on defendant's position and knowledge of violations of "the type" alleged in indictment, without proof that defendant knew of specific violations at issue); United States v. White, 766 F. Supp. 873, 895 (E.D. Wash. 1991) (defendant cannot be convicted under RCRA based solely on proof that he was a responsible officer who "should have known" of violations; proof of actual knowledge required).

In United States v. Brittain, 931 F.2d 1413, 1419 (10th Cir. 1991), the court took a much broader view of the reach of the RCO doctrine under CWA, stating that the objectives of the Act

> outweigh hardships suffered by "responsible corporate officers" who are held criminally liable in spite of their lack of "consciousness of wrongdoing."... Under this interpretation a "responsible corporate officer," to be held criminally liable, would not have to "willfully or negligently" cause a permit violation. Instead, the willfulness or negligence of the actor would be imputed to him by virtue of his position of responsibility.

However, application of the RCO doctrine was not actually before the Brittain court, and hence this statement must be viewed as dicta. It is safe to assume that the MacDonald and Watson view of RCO is likely to prevail.

VIII. PROVING CORPORATE OFFICIALS' KNOWLEDGE

A. Inferring Knowledge Based on Position or Type of Business

This is simply a specific application of the rule that knowledge, like any other element, may be proved through circumstantial evidence. A number of courts have held that, in determining what defendant knew, the jury may consider the defendant's position in an organization, and the type of business the defendant worked in. This concept is often confused with the RCO doctrine, but it is conceptually distinct: It is a rule of evidence, not liability. It is important to remember that defendant's position of responsibility is not a substitute for knowledge, but only evidence of knowledge.

United States v. International Minerals & Chemical Corp., 402 U.S. 558, 565 (1971) (where dangerous substances are involved, probability of regulation is so great that anyone aware he is dealing with them is presumed to be aware of regulation); United States v. Baytank, 934 F.2d 599, 616-17 (5th Cir. 1991) (in RCRA case, jury was permitted to find defendants' knowledge where they were "intimately versed in and responsible for" company's operations); United States v. Johnson & Towers, Inc., 741 F.2d 662, 670 (3d Cir.) (under RCRA, government must prove defendant knew a permit was required, but jury may infer such knowledge "as to those individuals who hold the requisite responsible positions with the corporate defendant."), cert. denied, 469 U.S. 1208 (1985); United States v. Hayes International Corp., 786 F.2d 1499, 1504 (11th Cir. 1986) (under RCRA, jury may consider various circumstances, including existence of regulatory scheme and low disposal price, to infer defendants' knowledge of lack of permit).

B. Willful Blindness

Defendant's conscious effort to avoid knowledge of a violation may serve as a substitute for actual knowledge. However, mere recklessness or negligence is insufficient.

United States v. Jewell, 532 F.2d 697 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976); United States v. Pacific Hide & Fur Depot, Inc., 768 F.2d 1096, 1098 (9th Cir. 1985) (liability for knowing violation of TSCA may rest on willful blindness, but it is not enough that defendant was mistaken, recklessly disregarded the truth, or negligently failed to inquire); United States v.

Cincotta, 689 F.2d 238, 243 & n.2 (1st Cir.), cert. denied, 459 U.S. 991 (1982) ("if someone refuses to investigate an issue that cries out for investigation, we may presume that he already 'knows' the answer"); United States v. Reed, 790 F.2d 208, 211 (2d Cir.), cert. denied, 479 U.S. 954 (1986); United States v. Williams, 685 F.2d 319, 321-22 (9th Cir. 1982); Griego v. United States, 298 F.2d 845, 849 (10th Cir. 1962).

IX. INVESTIGATIVE CONTACTS WITH CORPORATE EMPLOYEES

A. Efforts by Corporate Counsel to Limit Investigations

Corporate counsel may assert that any investigatory communication by a government attorney with an employee of the organization would violate DR 7-104 of the ABA Code of Professional Responsibility. Counsel may purport to represent both the organization and all of its employees simultaneously, a claimed multiple representation which presents a host of ethical issues. More often, counsel will state that he or she represents only the organization, but that a communication with any employee constitutes a communication with the organization.

Clearly, counsel for an organization should not enjoy complete control over the access of government investigators to employees of the organization. See United States v. Western Electric Co., 1990-2 Trade Cas. (CCH) ¶ 69,148 (D.D.C. 1990) (a corporation "has no right to decide for its employees whether its interests are in conflict with theirs when the Department [of Justice] seeks their testimony in the course of an investigation of law violations"); Wright by Wright v. Group Health Hospital, 103 Wash. 2d 192, 200, 691 P.2d 564, 569 (1984) ("It is not the purpose of the rule to protect a corporate party from the revelation of prejudicial facts"). Such a rule would effectively preclude law enforcement investigations of corporations, or indeed of wholly criminal organizations. See In re Criminal Investigation No. 13, 82 Md. App. 609, 616-17, 573 A.2d 51, 55 (1990).

B. The Ethical Rule on Contacts With Represented Parties

DR 7-104(A)(1) of the ABA Code of Professional Responsibility (and Rule 4.2 of ABA Model Rules of

Professional Conduct) prohibits an attorney from communicating with a "party" known to be represented by counsel unless the attorney has counsel's consent or the communication is "authorized by law."

C. Application of Ethical Rule to Law Enforcement Investigations

Courts have almost uniformly approved contacts by government agents and attorneys with persons who are known to be represented by counsel, as long as the requirements of the Constitution are met. See, e.g., United States v. Ryans, 903 F.2d 731, 740 (10th Cir.), cert. denied, 111 S. Ct. 152 (1990); United States v. Dobbs, 711 F.2d 84, 86 (8th Cir. 1983); United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir.), cert. denied, 464 U.S. 852 (1983); United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir.), cert. denied, 452 U.S. 920 (1981); United States v. Lemonakis, 485 F.2d 941, 955-56 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974); but see United States v. Lopez, No. 91-10274, slip op. (9th Cir. March 17, 1993) (prosecutor violated ethical rule by communicating with represented defendant in absence of counsel, despite defendant's waiver before magistrate of 6th amendment objection).

D. Pre-indictment Communications Generally Not Restricted

Every federal court to consider the issue, save one, has concluded that investigatory, non-custodial communications with represented persons prior to the attachment of the right to counsel do not violate DR 7-104. E.g., United States v. Ryans, 903 F.2d 731, 739 (10th Cir.) ("We are not convinced that the language of the rule calls for its application to the investigative phase of law enforcement"), cert. denied, 111 S. Ct. 152 (1990); United States v. Sutton, 801 F.2d 1346, 1365-66 (D.C. Cir. 1986) (DR 7-104 "was never meant to apply to [pre-indictment, non-custodial] situations such as this one"); United States v. Dobbs, 711 F.2d 84, 86 (8th Cir. 1983) (DR 7-104 "does not require government investigatory agencies to refrain from any contact with a criminal suspect because he or she previously had retained counsel"); United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir.) (DR 7-104 does not prohibit prosecutors from using undercover informants to communicate with represented persons prior to indictment), cert. denied, 464 U.S. 852 (1983); United States v. Jamil, 707 F.2d 638 (2d Cir. 1983)

(prosecutor's use of undercover informant in pre-indictment, non-custodial setting to communicate with represented person does not violate DR 7-104); United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir.), cert. denied, 452 U.S. 920 (1981); United States v. Weiss, 599 F.2d 730, 739 (5th Cir. 1979) (DR 7-104 does not prohibit prosecutors from engaging in investigatory communications); but see United States v. Hammad, 858 F.2d 834, 840 (2d Cir. 1988) (pre-indictment communications may be improper if accompanied by "misconduct" on the part of the government); see also Comment to ABA Model Rule 4.2 (notwithstanding the use of the term "party," the rule does not require that a person be a "party to a formal legal proceeding").

E. Corporation's Right to Counsel Same as Individual's

Although the issue is not settled, at least two courts have held that a corporation has a Sixth Amendment right to effective assistance of counsel. See American Airways Charters, Inc. v. Regan, 746 F.2d 865, 873 n.14 (D.C. Cir. 1984) (corporation has general "right to retain counsel"); United States v. Rad-O-Lite of Philadelphia, 612 F.2d 740, 743 (3d Cir. 1979) (dicta) (corporation has Sixth Amendment right to effective assistance of counsel). To be safe, a corporation should be treated as if the right to counsel exists and attaches at the initiation of adversary judicial criminal proceedings.

F. Former Employees May Always be Contacted

The ABA Standing Committee on Ethics and Professional Responsibility has determined that the prohibition on communications with represented parties does not extend to former employees of an opposing corporate party. Formal Opinion 91-359 (March 22, 1991). See United States v. Western Electric Co., 1990-2 Trade Cas. (CCH) ¶ 69,148 (D.D.C. 1990) (the claim that former employees were represented by corporate counsel was a "bald attempt by the company to shield itself and its management from investigation of possible wrongdoing"); Hanntz v. Shiley, Inc., 766 F. Supp. 258 (D.N.J. 1991) (collecting cases); Shearson Lehman Bros., Inc. v. Wasatch Bank, 139 F.R.D. 412, 418 (D. Utah 1991); Action Air Freight, Inc. v. Pilot Air Freight Corp., 769 F. Supp. 899, 903-04 (E.D. Pa. 1991); Sherrod v. Furniture Center, 769 F. Supp. 1021, 1022 (W.D. Tenn. 1991); Dubois v. Gradco Systems, Inc., 136 F.R.D. 341, 345-46 (D. Conn. 1991); Curley v.

Cumberland Farms, Inc., 134 F.R.D. 77, 82-83 (D.N.J. 1991); Polycast Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 628 (Mag., S.D.N.Y. 1990); Amarin Plastics, Inc. v. Maryland Cup Corp., 116 F.R.D. 36, 40-41 (D. Mass. 1987); Porter v. Arco Metals Co., 642 F. Supp. 1116, 1118 (D. Mont. 1986).

G. Current Employees: Unclear Which Ones Constitute a "Party"

DR 7-104 generally prohibits ex parte communications with a "party" represented by counsel.

> When a corporation is a party to the suit, however, the term "party" suddenly becomes ambiguous. . . . Since a corporation is an artificial entity, it is often impossible to point to any one person or thing that represents the corporation. . . . The fundamental conundrum is this: If the corporation is a faceless entity run by agents and employees, and yet the agents and employees are not the corporation, then who or what is a "party" under DR 7-104(A)(1)?

Comment, Ex Parte Communications with Corporate Parties: The Scope of the Limitations on Attorney Communications with One of Adverse Interest, 82 Nw. U. L. Rev. 1274, 1275 (1988); see In re FMC Corp., 430 F. Supp. 1108, 1110 (S.D. W. Va. 1977).

Most courts and commentators to address the issue have agreed that there are some individuals within any organization who are sufficiently identified with the organization so that communications with them should be treated as the functional equivalent of a communication with the organization for purposes of DR 7-104. There is substantial disagreement, however, as to the appropriate standard to be applied to determine the propriety of communications with current corporate employees. At least four different standards have been articulated by the courts:

> First, some courts have adopted a control group standard, which permits attorneys to interview any employees who are not in the corporation's control group. Second, two bar associations have developed the scope of employment test, which forbids attorneys from interviewing any employees about matters within the scope of their employment.

> Third, one court has developed a balancing test that requires the court to balance the important policy considerations for the particular case. Finally, several courts have adopted the "managing-speaking agent" or "alter ego" test, which essentially permits attorneys to interview nonmanagerial employees.

Comment, at 1275-76.

The proposed DOJ rules adopt a version of the "control group" test, in which communications with employees who are not within the control group of the corporation are not considered communications with the organization. See, e.g., District of Columbia Rule of Professional Conduct 4.2, Comment 3; Fair Automotive Repair, Inc. v. Car-X Service Systems, Inc., 128 Ill. App. 3d 763, 771, 471 N.E. 2d 554, 560-61 (1984). Section 77.13(b) provides that a communication with a current employee shall be considered a communication with the organization only if the employee is a "controlling individual," as defined, and the controlling individual is not represented by separate counsel with respect to the subject matter of the communication. Section 77.13(c) defines a "controlling individual" as "a current employee who has the authority to make binding decisions concerning the representation of the organization by counsel."

H. The DOJ Rules on Communications With Represented Persons

In November, 1992, DOJ published a proposed rule to delineate what contacts with represented persons are "authorized by law." 57 Fed. Reg. 54737 (Nov. 20, 1992). The rule closely follows the approach of the "Thornburgh Memorandum" of June 8, 1989. As of the writing of this outline, the proposed rule was under review by the Attorney General.

Until the DOJ rule is final, prosecutors must consult the law in their own circuits. It should not be presumed that compliance with the proposed rule or the Thornburgh Memorandum will insulate a prosecutor from disciplinary action by a state bar.

For questions about the status of the rule, call Philip Baridon or Steve Zipperstein, Office of Policy & Management Analysis, DOJ Criminal Division, 202-514-2659. That office can also provide a detailed legal memorandum on the subject.

DISCOVERY AND OTHER ISSUES UNIQUE TO CRIMINAL PROSECUTION OF REGULATORY OFFENSES

In investigating and prosecuting environmental cases, valuable information can be found in the files of the Environmental Protection Agency (EPA) and state and local regulatory agencies. The records may indicate, for example, that: (1) the target has been the subject of civil or administrative proceedings; (2) inspectors have warned the target in the past; (3) the chemicals in question have been on the premises for some period of time; (4) correspondence or telephone memos exist which document statements of the target; or (5) regulators have offered their opinion to the target that the conduct under investigation was legal.

The best way to obtain such information is to have the case agent review the agency's files and cull what is needed for the prosecution, making an index of other documents available. If resources or agency policy do not allow for that option, the next best alternative is to write a letter to the agency, detailing the request for records (don't forget to ask for inspectors' notes). The letter can be converted to a grand jury subpoena if the agency is not forthcoming or there is reason to believe the agency may inform the target of the request for records. Contact all federal, state and local regulatory agencies that may have had contact with the target (don't forget the local fire department and state fish and game wardens). Don't assume that because the instant case is a hazardous waste case, that the Air Pollution board has no relevant information.

RULE 16

Possession of these documents (and sometimes just knowledge of their existence) can trigger discovery obligations under Rule 16 of the Federal Rules of Criminal Procedure. Rule 16(a)(1)(A) requires the government to disclose "any relevant written or recorded statements made by the defendant which are within the possession, custody or control of the government, the existence of which is known or by the existence of due diligence may become known to the attorney for the government." This means any document written or signed by the defendant (for example, correspondence or permit applications) must be disclosed, as well as any taped statements of the defendant, no matter the origin of the statement (federal, state or local files) so long as the existence of the statement should be known to the prosecutor and the statement is in the custody or control of the U.S. government. This includes statements that are offered only in rebuttal for purposes of impeachment, United States v. Caldwell, 543 F.2d 1333 (DC Cir. 1975), reh'g denied, cert. denied, 423 U.S. 1087, 96 S. Ct. 877 (1976).

The language about "due diligence" requires a prosecutor to make a good faith inquiry as to the existence of such statements. The government is not excused from the obligations of Rule 16 by the fact that the item to be disclosed is in the possession of another agency. See United States v. Gillings, 568 F.2d 1307, 1310 (9th Cir.), cert. denied, 436 U.S. 919, 98 S. Ct. 2267 (1978) [violations of Rule 16 even when the prosecutor learned of the existence of the tape the previous day, where the tape was in the possession of IRS]; United States v. Bailleaux, 685 F.2d 1105, 1113 (9th Cir. 1982), reh'g denied [possession of tape by FBI triggers Rule 16 obligation]; United States v. Bryant, 439 F.2d 642, 650 (DC Cir. 1971) [duty of disclosure includes investigatory agencies]; United States v. Jensen, 608 F.2d 1349, 1357 (10th Cir. 1979) [government has duty of interagency disclosure under Rule 16]; United States v. James, 495 F.2d 434, 436 (5th Cir. 1974), cert. denied, 419 U.S. 899 [due diligence requires Assistant United States Attorneys (AUSA) to be aware of recorded statements in possession of investigative agencies].

So far, courts have not extended the "due diligence" requirement beyond a search of federal agencies, (see United States v. Gatto, 763 F.2d 1040, 1047-1049 (9th Cir. 1985), if "due diligence requirement exists, only extends to records of federal agency) but none of the reported cases involved a joint federal/state or local investigation. Statements known to the government but within the control of a foreign government have been held to be outside of the requirements of Rule 16, where the U.S. government did not participate in obtaining the statement. United States v. Cotroni, 527 F.2d 708, 712 (2d Cir. 1975), cert. denied, 426 U.S. 906 (1976). Similarly, tapes in the possession of a state agency need not be disclosed, if the tapes are beyond the custody or control of the U.S. United States v. Harris, 738 F.2d 1068, 1072 (9th Cir. 1984); Beavers v. United States, 351 F.2d 507, 509 (9th Cir. 1965). Note that the "due diligence" requirement of Rule 16(a)(1)(A) applies only to the written or recorded statements made by the defendant himself, and not to memorializations of oral statements of the defendant by others.

The government is required to disclose any written record which contains reference to a relevant oral statement of the defendant which was in response to "interrogation by a person known to the defendant to be a government agent," made either before or after arrest, without regard to whether the government intends to use the statement at trial. The government also must disclose the substance of any unrecorded oral statements made by the defendant to a person known to be a government agent, if the government intends to use the statement at trial. Thus, an oral statement intended only for use as impeachment must nonetheless be disclosed, but an oral statement not intended for any use at trial that is not exculpatory need not be disclosed.

A regulatory inspector, who questions the defendant in the course of his civil or administrative duties, would likely be considered to be a "government agent" within the meaning of Rule 16(a)(1)(A), which means that the substance of the statement should be disclosed. In the context of an IRS investigation, the court has granted discovery of all statements made by the defendant to any representative of the IRS. United States v. Kageyama, 252 F. Supp. 284, 285 (D. HI 1966). Another court has found that Rule 16 requires the disclosure of the substance of the defendant's statements to an employee of the government. United States v. Brighton Bldg. and Maintenance Co., 435 F. Supp 222, 232 (ND IL ED 1977), aff'd, 598 F.2d 1101, cert. denied, 444 U.S. 840, 100 S. Ct. 79. The Tenth Circuit, in United States v. Mitchell, 613 F.2d 779, 781 (10th Cir. 1979), cert. denied, 445 U.S. 919, 100 S. Ct. 1283 (1980), has extended the meaning of "government agent" to include state employees, holding that a state probation officer is a "government agent" within the meaning of Rule 16(a)(1)(A).

The government must also disclose to the defendant his grand jury testimony. If the defendant is a corporation, the corporation is entitled, upon request, to copies of the grand jury testimony of its employees who are (or were at the time of the offense) able to legally bind the defendant in respect to the conduct under investigation. Because a corporation is criminally liable for the acts of its employees, within the scope of their employment, done for the benefit of the corporation, virtually all employee grand jury testimony will probably be discoverable. A good rule of thumb is that if the government will be arguing that the employee's statements or conduct gave rise to liability on the part of the corporation, that employee's grand jury testimony is discoverable.

Discovery of documents and tangible objects is covered by Rule 16(a)(1)(C), which requires the government to disclose such items which are within the custody or control of the government if: (1) the items would be material to the preparation of the defense; (2) are intended for use by the government in its case in chief; or (3) were obtained from or belong to the defendant. This section of Rule 16 contains no language requiring "due diligence" on the part of the government, nor any language about whether the existence of the item is known to the attorney for the government. However, the courts have decided that the scope of the government's obligation under Rule 16(a)(1)(C) turns on the extent that the attorney for the government had knowledge of and access to the documents. United States v. Bryan, 868 F.2d 1032 (9th Cir. 1989). The government attorney is presumed to have knowledge and access to anything within the possession, custody or control of any federal agency participating in the same investigation of the defendant. Id. See also, United States v. Scruggs, 583 F.2d 238 (5th Cir. 1978), reh'g en banc denied, United States v. Bryant, 439 F.2d 642, 650 (DC Cir. 1971). The government may not avoid disclosure by leaving the evidence with others. United States v. Robertson, 634 F. Supp. 1020, 1023-1025 (EDCA 1986).

The government, however, need only turn over those records actually in its possession. The fact that the records disclosed to the defense are incomplete is not a violation if the records disclosed were all the records the government possessed. United States v. Adkins, 741 F.2d 744, 747 (5th Cir. 1984), reh'g denied. The government has no duty to obtain documents from the state which it is aware of but are in the control of the state. United States v. Chavez-Vernaza, 844 F.2d 1368, 1375 (9th Cir. 1988), en banc. State grand jury material is not in the custody or control of the U.S. so it need not be disclosed. United States v. Guerrerio, 670 F. Supp. 1215, 1219 (SDNY 1987). Impeachment material sought in the state Dept. of Correction file is in the control of the state and need not be disclosed. United States v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991). Documents in the possession of a foreign country need not be disclosed if they are not in the possession of the attorney for the government. United States v. Friedman, 593 F.2d 109, 120 (9th Cir. 1979). A presentence report need not be disclosed as it is a document of the court or probation, and not within the custody and control of the government. United States v. Trevino, 556 F.2d 1265, 1270-1272 (5th Cir. 1977), reh'g denied. An address book in the possession of the county police need not be disclosed if not in the possession or control of the U.S. Thor v. United States, 574 F.2d 215, 220-221 (5th Cir. 1978). Rule 16(a)(1)(C) provides for inspection of property in the control of the government, but there is no comparable provision allowing inspection of property in the control of third parties. United States v. Armstrong, 621 F.2d 951, 954 (9th Cir. 1980), reh'g denied (denying inspection of bank premises).

One discovery problem that may occur in hazardous waste cases is the instance in which the defense requests samples of the hazardous waste to conduct independent analysis, and the waste has already been disposed of or not enough waste remains to conduct a proper analysis. In such a case, the defense may claim that they have been denied the right to due process. The Supreme Court, in Arizona v. Youngblood, 488 U.S. 51 (1988) established a two part test that the defendant must meet before a violation of due process is established. First, the defendant must show that the evidence in question is potentially exculpatory (and its exculpatory value must have been apparent before the evidence was destroyed), and second, the defendant must show that the government acted in bad faith in disposing of the evidence. See also, California v. Trombetta, 467 U.S. 479, 488-489 (1984) (no violation of due process to destroy breathalyzer samples where destruction was not a calculated effort to circumvent disclosure requirements but instead, pursuant to normal practice and no reason to expect that the evidence would play a significant role in the defense). Plenty of similar authority is available in the form of narcotics cases. United States v. Donaldson, 915 F.2d 612 (9th Cir. 1990). But see Alabama v. Gingo, 605 S.2d 1237 (Ala, 1992), cert. denied, ___ U.S. ___ (1993), in which the Alabama court suppressed analytical results from samples that were destroyed, without a showing of bad faith, finding that the loss or destruction of the evidence was so

critical to the defense as to make the criminal trial fundamentally unfair.

Rule 16(a)(1)(D) requires the government to disclose the results or reports of scientific tests which are within the possession, custody or control of the government, the existence of which is known or by the exercise of due diligence may become known to the attorney for the government. The test results must be either material to the defense or intended for use in the government's case in chief. Rule 16 is satisfied by disclosure of the lab reports - log notes and protocols or other internal documents need not be disclosed. United States v. Iglesias, 881 F.2d 1519, 1523 (9th Cir. 1989), cert. denied, 493 U.S. 1088 (1990). There is no requirement to produce test results offered in rebuttal. United States v. DiCarlantonio, 870 F.2d 1058, 1063 (6th Cir. 1989), reh'g denied, cert. denied, 493 U.S. 933 (1989). There is no error in failing to disclose the results of an undocumented field test, either. United States v. Glaze, 643 F.2d 549, 552 (8th Cir. 1981), reh'g denied.

BRADY v. MARYLAND

Not only do discovery obligations arise from Rule 16, they also exist by virtue of the Jencks Act (18 U.S.C. § 3500 et seq.) and a variety of Supreme Court cases, most notably Brady v. Maryland, 373 U.S. 83 (1963). Brady requires the government to disclose potentially exculpatory material to the defense. While the language of Brady places the obligation on the "prosecutor," the courts have interpreted Brady in much the same way as Rule 16, requiring that exculpatory material within the custody or control of the government, including the federal investigative agencies, be disclosed. United States v. Bailleaux, 685 F.2d 1105, 1113 (9th Cir. 1982), reh'g denied. But items in the custody or control of state or local agencies are not within the purview of Brady. United States v. Dominquez-Villa, 954 F.2d 562, 566 (9th Cir. 1992) (personnel files of state law enforcement officers); United States v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991) (state Department of Corrections file); United States v. Guerrerio, 670 F. Supp. 1215, 1219 (SDNY 1987) (state grand jury transcripts); United States v. Horsley, 621 F. Supp. 1060, 1066 (WDPA 1985) (city personnel files); United States v. Trevino, 556 F.2d 1265, 1270-1272 (5th Cir. 1977), reh'g denied (presentence report); United States v. Higginbotham, 539 F.2d 17, 21 (9th Cir. 1976) (photos of local police department).

THE JENCKS ACT

The Jencks Act covers the disclosure of statements of witnesses other than the defendant. While, by law, no court can order the production of Jencks material in advance of the witness' testimony at trial [18 U.S.C. § 3500(a)], in practice, most judges

encourage the government to provide Jencks materials somewhat in advance of trial so there is no need for a continuance to allow the defense to review the material, as anticipated in 18 U.S.C. § 3500(c). The Jencks Act requires the government, upon request, to provide to the defense a copy of any statement of the witness in the possession of the United States which relates to the subject matter to which the witness has testified after the witness has testified on direct examination. 18 U.S.C. § 3500(b). If the government believes that less than the entire statement in its possession relates to the subject matter of the testimony, the government is to deliver the entire statement to the court and the court is to excise the unrelated portions. 18 U.S.C. § 3500(c). In practice, the courts usually ask the government to handle the redaction, but it is good practice, if a redacted statement is disclosed, to provide the court with a copy of the full statement, even if no request is made for the same.

The Jencks Act defines a statement as something falling into one of three categories: (1) grand jury testimony; (2) a written statement made by the witness and signed or otherwise adopted or approved by him; and (3) a stenographic, mechanical, electrical or other recording or transcription thereof which is a substantially verbatim recital of an oral statement of the witness recorded contemporaneously with the making of the oral statement.

The Ninth Circuit has held that for purposes of Jencks, a statement is in the possession of the United States when it is in the possession of the prosecutor. United States v. Polizzi, 801 F.2d 1543, 1552 (9th Cir. 1986); United States v. Durham, 941 F.2d 858, 860-861 (9th Cir. 1991). The rest of the world takes the larger view that the United States encompasses the prosecutor and the investigating federal agencies. United States v. Cagnina, 697 F.2d 915, 922-923 (11th Cir.), cert. denied, ____ U.S. ____, 104 S. Ct. 175 (1983); United States v. Bermudez, 526 F.2d 89, 100 (2d Cir. 1975), cert. denied, 425 U.S. 970, 96 S. Ct. 2166 (1976); United States v. Smith, 433 F.2d 1266, 1269 (5th Cir.), reh'g denied, cert. denied, 401 U.S. 977, 915 S. Ct. 1206 (1970).

The circuits are also divided on the issue of witness statements from state, local and foreign governments. Statements in the possession of a foreign government are not Jencks because they are not in the possession of the United States. United States v. Friedman, 593 F.2d 109, 120 (9th Cir. 1979). The most that Jencks requires is a good faith effort to obtain statements of prosecution witnesses in the possession of a foreign government, in the case of a joint U.S./foreign investigation. United States v. Paternina-Vergara, 749 F.2d 993, 997-998 (2d Cir. 1984), cert. denied, 469 U.S. 1217, 105 S. Ct. 1197 (1985). A witness's testimony before the bankruptcy court is not Jencks if not in the possession of the prosecutor. United States v. Hutcher, 622 F.2d 1083, 1088 (2d Cir.), cert. denied, 449 U.S. 875, 101 S. Ct. 218 (1980). The prior testimony of a witness at a state trial and a suppression hearing in another district are not Jencks, where

neither transcript is in the possession of the prosecutor because one transcript is in the possession of the state and the other was not transcribed so was in the possession of the court. United States v. Cagnina, 697 F.2d 915, 922-923 (11th Cir.), cert. denied, __ U.S. ___, 104 S. Ct. 175 (1983). Statements in the possession of the local police are not Jencks if not also in the possession of the prosecutor. United States v. Smith, 433 F.2d 1266, 1269 (5th Cir.), reh'g denied, cert. denied, 401 U.S. 977, 915 S. Ct. 1206 (1970); United States v. Bermudez, 526 F.2d 89, 100 (2d Cir. 1975), cert. denied, 425 U.S. 970, 96 S. Ct. 2166 (1976). Similarly, statements in the possession of the state are not generally Jencks if not in the possession of the prosecutor. Beavers v. United States, 351 F.2d 507, 509 (9th Cir. 1965); United States v. Molt, 772 F.2d 366, 371 (7th Cir. 1985).

However, there is one case in the Tenth Circuit, United States v. Heath, 580 F.2d 1011, 1018 (10th Cir. 1978), reh'g denied, cert. denied, 439 U.S. 1075, 99 S. Ct. 850 (1977), which the Supreme Court declined to review, which holds that the statements of a witness to state officers fall within Jencks. In Heath, there was close cooperation between state and local officers and the prosecutor assumed responsibility before the court for obtaining any statements in the possession of the state. The Tenth Circuit stated that the prosecutor may not stand on the technicality that he does not have actual possession of the statements, noting that it was difficult to believe that the prosecutor, in preparing the case, did not ask the state officers about written statements.

THE FREEDOM OF INFORMATION ACT

In addition to the regular avenues of discovery already discussed, the defense may attempt to obtain information through the use of a Freedom of Information Act request. The Freedom of Information Act [5 U.S.C. § 552(b)(7)] exempts from disclosure "records or information compiled for law enforcement purposes," to the extent that the production of such records could reasonably be expected to interfere with enforcement proceedings. Materials gathered for law enforcement purposes but not originally created for that purpose are deemed "compiled for law enforcement purposes" under the Freedom of Information Act. John Doe Agency v. John Doe Corp., 110 S. Ct. 471 (1989). On occasion, the agency producing the records for the target may produce records which it had failed to produce for the prosecution.

There are a number of things that can be done to protect the government's enforcement interests. When the records are initially obtained from the agency, the agency can be notified that it is the government's position that the production of the records to others during the pendency of the investigation could interfere with the enforcement effort. It is important to ensure that such notice is communicated to the appropriate parties within the agency, including the Regional Counsel's Office in the case of the EPA. In

the event that the records are disclosed (for instance, a state agency may be subject to a more liberal state statute), the government should request a copy of the records which have been produced for the target, in order to avoid uneven disclosure problems.

ESTOPPEL

A frequent claim in environmental cases is that the conduct which is the subject of the investigation was approved by the regulatory authority at an earlier date. This is an affirmative defense, grounded in due process, which is known as "entrapment by estoppel." Entrapment by estoppel is unintentional entrapment which occurs when a defendant is mistakenly misled by an official into believing that his conduct is lawful. All the circuits recognize this defense in some form. United States v. Government Development Bank, 725 F. Supp. 96 (D. Puerto Rico, 1989); United States v. Boccanfuso, 882 F.2d 666 (2d Cir. 1989); United States v. Schmitt, 734 F. Supp. 1035 (EDNY, 1990); United States v. Asmar, 827 F.2d 907 (3rd Cir. 1987); Federal Deposit Insurance Corp. v. Jones, 846 F.2d 221 (4th Cir. 1988); United States v. Walker, 653 F. Supp. 818 (SDWV, 1987); Moody v. United States, 783 F.2d 1244 (5th Cir. 1986); United States v. City of Menominee, Michigan, 727 F.2d 1110, (WDMI, 1989); Matter of Larson, 862 F.2d 112 (7th Cir. 1988); United States v. Schoenborn, 860 F.2d 1448 (8th Cir. 1988); United States v. Tallmadge, 829 F.2d 767 (9th Cir. 1987); Watkinds v. United States Army, 875 F.2d 699 (9th Cir. 1989); Penny v. Guiffrida, 897 F.2d 1543 (10th Cir. 1990); Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411 (10th Cir. 1984); Federal Deposit Insurance Corp. v. Harrison, 735 F.2d 408 (11th Cir. 1984); ATC Petroleum v. Sanders, 860 F.2d 1104 (DC Cir. 1988); Henry v. United States, 870 F.2d 634 (Fed Cir. 1989).

Because this is an affirmative defense, the defendant bears the burden of proving the traditional elements of estoppel: (1) the party estopped had knowledge of the relevant facts; (2) the party asserting estoppel was ignorant of the relevant facts; (3) the party asserting estoppel reasonably relied, to his detriment, on the conduct of the other party; and (4) the party estopped knew the other party would rely on the information. Two additional elements generally must be proven by a defendant when the government is the party estopped: (1) the government act must constitute affirmative misconduct; and (2) the public interest must not be unduly damaged by imposition of estoppel. Inaction or tacit acquiescence by the government is not enough for a showing of affirmative misconduct. Mere inaction by the regulators in the face of permit violations does not constitute affirmative misconduct. United States v. Amoco Oil, 580 F. Supp. 1042 (WDMO 1984); United States v. Tull, 615 F. Supp. 610 (DC VA, 1983) aff'd, 769 F.2d 182 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987).

Some of the case law seems to indicate that the standards for reasonable reliance are much higher in the case of regulated industries in the health and safety area. Emery Mining Co. v. Secretary of Labor, 744 F.2d 1411 (10th Cir. 1984). United States v. Louisiana Pacific Corp., 682, F. Supp. 1122 (D. CO. 1987). Some courts recognize the defense in cases where the propriety interest (i.e., property) of the government is involved but not where the sovereign interest is involved. This is a good argument for the government in environmental cases if the court will accept the distinction.

The Supreme Court first allowed the defense in an environmental case in United States v. Pennsylvania Chemical Corp., 411 U.S. 655 (1973). In that case, the defendant claimed that the Army Corps of Engineers should be estopped from prosecuting the firm under the Rivers and Harbors Act because the company was affirmatively misled by the Corps' interpretation of regulations. The Supreme Court held it was error not to permit the defendant to present evidence relevant to that defense, and remanded the case for a determination by the trier of fact as to whether there was any reliance, and if so, was it reasonable. A subsequent Supreme Court case, Heckler v. Community Health Services, 467 U.S. 51 (1984), makes it clear that the standard of "reasonable reliance" is much higher when the government is a party, stating that it is a "general rule that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law."

Although a defendant may have a very difficult time sustaining the burden of proof with respect to this affirmative defense, such a defense may affect a jury considering the issue of criminal intent. The most effective response by the government is to show that the government employee who allegedly blessed the conduct did not possess critical facts, which would have altered his evaluation of the situation (preferably facts that were withheld by the defendant).

The EPA frequently provides legal opinions regarding their interpretation of regulations. A prosecutor must be aware of any such position papers that may affect an investigation. If the issue is not clear cut and there is no written EPA position paper covering the regulation in question, it is a good practice to request a written interpretation, fact specific to the instant case, from the EPA Regional Counsel's Office. Before such a response can be released, the review process within the EPA should ensure that the interpretation offered is consistent nationwide, as well as with prior EPA interpretation.

PARALLEL PROCEEDINGS

Because of the health and safety concerns implicit in environmental crimes, cases often proceed simultaneously on the

criminal and civil/administrative levels. Parallel civil/administrative and criminal proceedings involve issues of: (1) an individual's 5th Amendment right against self-incrimination; (2) 4th Amendment search and seizure problems; (3) discovery; (4) due process; and (5) double jeopardy.

In Standard Sanitary Manufacturing Co. v. United States, 226 U.S. 20, (1912), the Supreme Court heard the claim of a corporation, involved in a civil suit with the government, whose officers (criminal targets) had invoked their 5th Amendment rights and refused to testify at the civil trial (and the government, the plaintiff, refused to grant them immunity), and the court denied a stay of the civil proceedings. The company claimed this denied them the benefit of the officers' testimony during the pendency of the parallel proceedings. The Supreme Court held that a stay was not mandatory in such a situation, but available only at the discretion of the trial court.

More recently, in United States v. Kordel, 397 U.S. 1 (1970), the corporate defendant argued that the government should not benefit from civil discovery when it contemplates criminal prosecution based on the same conduct. The Supreme Court reasoned that the corporate officers could have invoked the 5th Amendment and did not, so they could not attack their criminal convictions on that ground. The Court also rejected the claim that the parallel proceedings denied the defendants due process, or required the exercise of the supervisory powers of the court. The Court, in dicta, listed circumstances that might merit intervention by the courts or a reversal on due process grounds: (1) where the government has brought a civil action solely to obtain evidence for its criminal prosecution; or (2) the government has failed to advise the defendant in a civil proceeding that it contemplates his criminal prosecution; or (3) where the defendant is without counsel or reasonably fears adverse pretrial publicity or other unfair injury.

An otherwise proper administrative inspection is not made unconstitutional by virtue of the fact that it was foreseeable that evidence would also be obtained for the criminal case. New York v. Burger, ____ U.S. ____, 107 S. Ct. 2636 (1987). Evidence of a criminal violation found in plain view during the course of a valid administrative search cannot be suppressed, even if one of the purposes of the search is to obtain evidence of a criminal violation, according to Judge Posner in United States v. Nechy, 827 F.2d 1161 (7th Cir. 1987). See also, United States v. Gel Spice Co., 773 F.2d 427 (2d Cir. 1985).

The Double Jeopardy Clause, which prohibits multiple punishments for the same conduct, was held to bar an additional civil sanction after a criminal conviction, to the extent that such civil sanction was characterized not as remedial but as a deterrent or retribution. United States v. Halper, ___ U.S. ___, 109 S. Ct.

1892 (1989). This principle has been held to apply to a criminal action which follows a civil action, whose penalty was punitive in nature. United States v. Mayers, 897 F.2d 1126 (11th Cir. 1990), cert. denied, 111 S. Ct. 178 (1990). This principle does not apply to cases involving separate sovereigns (i.e., state and federal governments) if one is not acting as a tool of the other. United States v. Louisville Edible Oil Products, 926 F.2d 584 (6th Cir. 1991).

The Department of Justice, Land and Natural Resources Division in 1987 published guidelines for parallel proceedings. The Department of Justice guidelines indicate that the criminal proceeding should be brought and resolved before any civil action, unless: (1) the violations are ongoing or of such concern to health and environment to call for an injunction or cost recovery; (2) the defendant is dissipating his assets; (3) there is only a marginal relationship between the civil and criminal cases; or (4) there is a statute of limitations problem with the civil case. The guidelines suggest that, whenever possible, evidence should be obtained through other means besides the grand jury, to facilitate the sharing of information with the civil side. Civil information can be shared with the prosecution so long as there was a good faith civil basis for obtaining the information and any inspection undertaken was limited to its normal administrative scope.

The EPA also has written guidelines discussing how agency employees are to conduct themselves if they are involved in a potential parallel proceeding. There are particular procedures to be followed in obtaining approval for parallel proceedings. The guidelines make it clear that no EPA employee should ever represent to a target that the information gathered will be used for only civil purposes. EPA criminal investigators are prohibited from directing the actions of civil or administrative personnel, and any time they accompany a civil inspector they are required to identify themselves to the target as a criminal investigator. EPA inspectors gathering information from a potential criminal target should volunteer that criminal, as well as civil and administrative enforcement options are available to the government, if parallel proceedings have been requested or approved.

BANKRUPTCY: A BASIC OVERVIEW

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I. THE BANKRUPTCY PROCESS

A. Purpose - The purpose of bankruptcy is two fold. First it is to provide an honest individual a "fresh start". Second is to provide and orderly distribution or reorganization to insure an maximum return of the debtor's assets and that all creditors in the same class are treated equally.

B. There are five types of bankruptcy cases: Chapters 7, 9, 11, 12, and 13

1. Chapter 7 is a liquidation. This is the most common form of bankruptcy. A trustee is automatically appointed and it is his job to marshall all the assets, if there are any, for distribution to creditors. All the property of the debtor becomes part of the bankruptcy estate upon the filing of a Chapter 7 bankruptcy.

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[1] This outline reflects the personal opinions and observations of the authors. It should not be construed as reflecting any official opinion of the Department of Justice, the Office of the United States Trustee, or the United States Attorney for the Central District of California.

2. Chapter 9 is for the adjustment of debts of a municipality and will not be discussed here.
3. Chapter 11 is a reorganization. The debtor becomes a debtor in possession and stays in control of the assets of the bankruptcy estate. A trustee is not appointed unless a problem arises, such as an allegation of fraud or mismanagement by the debtor. The majority of business bankruptcies are filed as Chapter 11. The goal is to propose and confirm a plan of reorganization that is voted on by the creditors.
4. Chapter 12 is for the adjustment of the debts of a family farmer with regular income and, like Chapter 9, will not be discussed here.
5. Chapter 13 is for the adjustment of debts of an individual with regular income. Only those individuals with unsecured debt of less than $100,000 and secured debt of less than $350,000 are eligible to file Chapter 13. If the debt is higher, and the individual wishes to reorganize a Chapter 11 must be filed. In a Chapter 13 proceeding, a plan is filed that usually pledges a portion of future earnings to pay creditors a percentage of what they are owed. A standing Chapter 13 trustee is appointed in all Chapter 13 cases. However, only those assets committed by

the debtor to repay creditors comes under the trustee's control.

C. The effect of a bankruptcy filing: "The Automatic Stay" - The filing of a bankruptcy petition pursuant to any of the above chapters activates the automatic stay provisions of 11 U.S.C. § 362, which acts as an injunction against most actions against the debtor. Absent bankruptcy court approval, which is called relief from the automatic stay, the automatic stay stops most types of civil actions against the debtor, including lawsuits, foreclosures, garnishments, and execution of a judgement. The automatic stay does not apply to the commencement or continuation of a criminal proceeding against the debtor.

D. Formal first meeting of creditors - About four to six weeks after any chapter bankruptcy petition is filed, a first meeting of creditors will be scheduled pursuant to 11 U.S.C. § 341(a). At that meeting, the debtor is questioned under oath about his assets and if in Chapter 11, his tentative plans for reorganization. Creditors will have a limited opportunity to examine the debtor at this meeting.

E. Bar dates - There are specific timetables which creditors must follow to assert a claim in a bankruptcy. If the debtor is an individual, the notice setting the 341(a) hearing will set a date by which you

must file a claim or file a discharge or dischargeability action (discussed below). This will ordinarily be a very short time frame within which to file such complaints. In a reorganization, the debtor will ask the court to set a bar date, at which all creditors who were listed in the petition or filed a proof of claim will receive notice.

F. Request for special notice - In order to keep better informed about what is going on in the bankruptcy, be sure to file a request for special notice, which entitles you to receive notice of many of the debtor's actions, such as the sale of property, the assumption or rejection of leases, etc.

G. Discharge of debts - At the end of the bankruptcy, the debtor is discharged from liability for debts listed in the bankruptcy. Upon receiving a discharge in bankruptcy, all the unsecured debts of the debtor are discharged. If the debtor is an individual who is not in Chapter 13, some debts may be excepted from discharge pursuant to 11 U.S.C. § 523.

II. THE ROLE OF THE OFFICE OF THE UNITED STATES TRUSTEE

A. How created - The Office of the United States Trustee was originally created as part of a pilot program as a part of the Department of Justice. Before the current bankruptcy code went into effect in 1979, bankruptcy judges were involved in the administration of

bankruptcy. When the administrative functions of the bankruptcy judges were eliminated in the new code, the U.S. Trustee's Office was created to fill the void. In 1986, the program became permanent and is now in full operation in all districts throughout the United States.

B. Function - The purpose of the United States Trustee is to oversee the effective administration of bankruptcy estates. The U.S. Trustee's Office is the enforcer of the bankruptcy laws and rules. The mandatory and discretionary duties of the United States Trustees are set out in 28 U.S.C. § 586. Among the functions carried out by the U.S. Trustee are the following.

1. To establish, maintain and supervise the Chapter 7 and 11 panel trustees.
2. To serve as a trustee in a case when required by the code to do so.
3. To supervise the administration of Chapter 7, 11, and 13 cases.
4. Monitor the progress of bankruptcy cases and take appropriate action to prevent undue delay in case progress.
5. Monitor and comment on Chapter 11 plans and disclosure statements.
6. Monitor and comment on Chapter 12 and 13 plans.

7. Take action to ensure that all required reports, schedules, and statements are timely filed.
8. Appoint and than monitor creditors committees.
9. As discussed more fully below, notify the U.S. Attorney of suspected bankruptcy crime.
10. Monitor and comment on applications for employment and compensation.
11. Move for the appointment of trustees and examiners, or comment on such motions.
12. Move for the termination of the appointment of a trustee.
13. Move to dismiss a Chapter 11 case or to convert it to a Chapter 7 liquidation.
14. Move to dismiss a Chapter 7 case for substantial abuse.
15. File an action to object to or revoke the debtor's discharge.
16. Last, the U.S. Trustee is permitted to raise, appear, and be heard on any issue in a bankruptcy case or proceeding, except that the U.S. Trustee can not propose a plan.

C. <u>There are 21 regional offices of the U.S. Trustee, countrywide, plus the Executive Office in Washington, D.C.</u> There are three regions in California: Region 15 covers the Southern District of California and is located in San Diego; region 16 covers the Central

District of California and is located in Los Angeles; and region 17 covers the Northern and Eastern Districts of California and is located in San Francisco. The regions all have several field offices. For instance, in addition to the Los Angeles office, the Central District region has offices in Santa Ana and San Bernadino. Overall, the U.S. Trustee is charged with ensuring that the bankruptcy system runs smoothly and according to law. It is also charged with spotting criminal activity and referring such matters to the U.S. Attorney.

III. PLEADINGS FILED TO COMMENCE A BANKRUPTCY CASE.

A. Voluntary petition - includes the name(s) of the debtor, all other names used in last 6 years, social security number, address, and debtor's attorney, if any.

B. Rule 104 statement - local bankruptcy rule 104 requires debtor to list all prior related bankruptcies filed.

C. List of 20 largest creditors (for Chapter 11 only) - includes name address and creditor, whether if claim is disputed by debtor and amount of claim.

D. Schedules and statement of affairs - must be filed within 15 days after bankruptcy is filed, unless the bankruptcy court grants an extension.

1. Schedules - includes list of:

i) real property, including liens and market value;

ii) personal property, from cash to wearing apparel, furs, jewelry, interests in pensions, patents, stocks, etc. (very descriptive);

iii) secured creditors, unsecured creditors;

iv) executory contracts and unexpired leases;

v) employer income and other income; and

vi) expenses.

2. Statement of financial affairs - a very descriptive and exhaustive questionnaire. Includes questions regarding income, payment to creditors, lawsuits repossessions, transfers, gifts, safe deposit boxes, prior address, location of financial records, all creditors who received a financial statement from debtor within two years prior to bankruptcy, dates of inventories, partners, officers and directors, etc.

E. Operating report and interim statement (Chapter 11 only).

1. Operating report - a monthly statement of income and expenses.

2. Interim statement - a listing of cash activity, including receipts and all disbursements, including payee of each check and its purpose.

F. Real property questionnaire.

G. Setting insider compensation.

IV. IMPORTANT EVENTS WHICH MAY INDICATE FRAUDULENT ACTIVITY

A. Dismissal or conversion from Chapter 11 to Chapter 7 - Applies where the debtor has failed to comply with the requirements of the bankruptcy code. Dismissal of the case may occur where the debtor failed to file the necessary papers or filed the bankruptcy in bad faith (i.e. debtor transfers a property to a partnership on the eve of foreclosure and that partnership has no other assets or purpose.)

Conversion applies if the debtor is not operating at a profit fails to file a plan of reorganization or engages in conduct which constitutes negligence, mismanagement or outright fraud.

B. Appointment of a trustee - Applies where there is evidence of mismanagement or fraud during the Chapter 11 proceeding. The trustee takes over management of the company and custody of the business assets, banks and records.

C. Motion for relief from the automatic stay - Applies where there is no equity or a property and the property is not necessary for reorganization, or for cause, including fraudulent conduct by the debtor.

D. Discharge and dischargeability actions -

1. Revocation of discharge (11 U.S.C. § 727). The civil counterpart to the criminal bankruptcy fraud statute of 18 U.S.C. § 152. Under a lawsuit pursuant to this section, a debtor will be denied a discharge from all his debts if he:
   i) fraudulently concealed, transferred, etc. property of the estate 1 year prior to the bankruptcy or after the bankruptcy was filed;
   ii) concealed, destroyed, falsified, etc. the debtor's financial records;
   iii) fraudulently made a false claim, account; and
   iv) withheld information from officer of bankruptcy estate.
2. Non dischargeability of a particular debt (11 U.S.C. § 523). A successful lawsuit under this section will result in only a particular debt or type of debt from being dischargeable, examples of a non dischargeable debt include a debt acquired:
   i) by false pretenses, false representation or actual fraud;
   ii) fraudulent use of a writing that is materially false;
   iii) by embezzlement or larceny; and
   iv) willful and malicious injury.

E. Preference actions - In order to assure fair treatment to all creditors, the code provides that any creditors

who is transferred property on account of an antecedent debt is subject to having that property brought back into the bankruptcy for the benefit of all creditors if the transfer was made within 90 days of the filing of the bankruptcy or 1 year if the transferee is an insider. A transfer would include the recording of a judgment lien.

CHAPTER 7

VOLUNTARY PETITION
BC §301
FRBP 1002

SCHEDULES, STATEMENT OF AFFAIRS, LIST OF EQUITY HOLDERS AND ALL ASSET/ LIABILITY MUST BE FILED W/IN 15 DAYS. FRBP 1007

PETITION/SCHEDULES/STMT OF AFFAIRS ARE TO BE SIGNED UNDER PENALTY OF PERJURY. FRBP 1008

CLERK'S OFFICE ISSUES NOTICE OF CREDITORS MTG (BC §341), BAR DATES FOR FILING PROOFS OF CLAIM. FRBP 2002, 2003. THE DEBTOR MUST APPEAR. BC §343

U.S. TRUSTEE APPTS CH 7 TRUSTEE TO SERVE. BC §701 TRUSTEE MUST BE BONDED. FRBP 2008, 2010

CREDITORS MAY ELECT A TRUSTEE. FRBP 2003(e) BC §702

DEBTOR PROCEEDS TO DISCHARGE. BC §727. CREDITOR MAY OBJECT TO THE DISCHARGE ENTIRELY OR THE DISCHARGE OF A PARTICULAR DEBT.

TRUSTEE MARSHALLS PROPERTY OF THE ESTATE, INVESTIGATES FINANCIAL AFFAIRS, EXEMPTIONS, MAKES DISTRIBUTIONS & FILES FINAL REPORT. BC §704

TRUSTEE MAY OPERATE BUSINESS ONLY W/COURT PERMISSION. BC §721

TRUSTEE MAKES DISTRIBUTION OF ESTATE PURSUANT TO PRIORITY SCHEME. BC §726

TRUSTEE SUBMITS CANCELLED CHECKS TO CLERK, CASE IS CLOSED AND ARCHIVED. CLERK'S OFFICE MAINTAINS DOCKET SHEET.

CHAPTER 11

VOLUNTARY PETITION
BC §301
FRBP 1002

DEBTOR-IN-POSSESSION (BC §1101) MUST FILE SCHEDULES AND STATEMENT OF AFFAIRS WITHIN 15 DAYS (FRBP 1007). DEBTOR MUST LIST ALL ASSETS AND LIABILITIES.

CLERK'S OFFICE ESTABLISHES BAR DATES, U.S. TRUSTEE SETS MTG OF CREDITORS (BC §341). DEBTOR MUST MAIL NOTICE TO ALL CREDITORS. (FRBP 2002, 2003.)

THE U.S. TRUSTEE MAILS ADMIN GUIDELINES TO DEBTOR OR HIS ATTY W/IN 3 DAYS OF FILING. DEBTOR THEN HAS 10 DAYS TO CLOSE BANK ACCTS AND OPEN "DIP" ACCTS, PROVIDE PROOF OF INSURANCE. DEBTOR MUST ATTEND A DEBTOR INTERVIEW AT WHICH OPERATING REPORTS AND OTHER REQUIREMENTS ARE DISCUSSED.

DEBTORS' ATTY MUST FILE A STMT OF RETAINER RECEIVED, SOURCE OF PAYMENT, AND AMT PROMISED TO BE PAID (FRBP 2016) WHICH MUST BE FILED BEFORE FIRST MTG OF CREDITORS.

DEBTORS' ATTY MUST SEEK COURT PERMISSION TO BE EMPLOYED (BC §327 FRBP 2014).

U.S. TRUSTEE CONDUCTS FIRST MTG OF CREDITORS (BC §341) AND FORMATION OF UNSECURED CREDITORS' COMMITTEE (BC §1102).

CREDITORS' COMMITTEE MAY HIRE PROFESSIONALS (BC §1103). PROFESSIONALS SUBJECT TO SAME RULES RE: COMPENSATION AS DEBTOR'S COUNSEL (FRBP 2014, 2016, 2017, BC §327).

DEBTOR HAS EXCLUSIVE RIGHT TO FILE PLAN FOR 120 DAYS AFTER FILING (BC §1121). COMMITTEE SHOULD ASSIST IN THE REORGANIZATION EFFORT (BC §1103).

IF THE DEBTOR HAS MISMANAGED THE ESTATE, OR IF IT IS IN THE BEST INTEREST OF CREDITORS, THE COURT MAY APPOINT A CH 11 TRUSTEE (BC §1104), OR CONVERT THE CASE TO CH 7 OR DISMISS (BC §1112).

COURT CONFIRMS A PLAN OF REORGANIZATION AND DEBTOR PAYS CREDITORS PURSUANT TO THAT PLAN. (BC §§1129, 1140).

DURING THE CH 11, THE DEBTOR FILES OPERATING REPORTS MONTHLY. BC §704 FRBP 2015.

BANKRUPTCY FRAUD WARNING SIGNS

1. *Concealment of assets.*
2. *Serial bankruptcy cases.*
3. *Failure to keep usual business records.*
4. *Incomplete or missing books and records.*
5. *Conduct contrary to ordinary business or industry practices and standards.*
6. *Unusual depletion of assets shortly before the bankruptcy filing.*
7. *Recent departure of debtor's officers, directors or general partners.*
8. *Unanswered questions or incomplete information on debtor's schedules and statement of financial affairs.*
9. *Frequent amendments to schedules, statement of financial affairs and monthly operating reports.*
10. *Inconsistencies between recent financial statements, tax returns and debtor's schedules and statement of financial affairs.*
11. *Absence of knowledgeable officers to testify at the Section 341 meeting.*
12. *Inability to contact principals of debtor at debtor's stated business location.*
13. *Creditor or employee complaints concerning the debtor's integrity or business operations.*
14. *Frequent dealings in cash, rather than recorded transactions.*
15. *Sudden depletion of inventory post-petition without plausible explanation.*
16. *Inflated salaries, payment of bonuses or cash withdrawals by officers, directors, shareholders or other insiders.*

BANKRUPTCY TERMS

ABANDONMENT *– The process of severing a bankruptcy estate's interest in property. Under the Code, the bankruptcy court may permit the trustee to abandon any property of the estate that is burdensome or of inconsequential value to the estate.*

Affirmative Act – Trustee may actively abandon or a party in interest may request abandonment. The trustee may abandon to the debtor or to a party with a possessory interest. Notice of hearing is required.

Administrative Abandonment – If the property is put on the schedule, but it is not administered by the trustee (sold, etc.) then it is abandoned to the debtor upon closing of the estate.

ADEQUATE PROTECTION *– A secured creditor, under the Code, is allowed to have its interest "adequately protected." This arises when the property is depreciating, losing value, or in some cases, when the accrued interest on the defaulted loan is diminishing the equity in the property. The court may award the creditor some protection against the loss of value rather than modifying the automatic stay.*

ADVERSARY PROCEEDING *– A lawsuit within the bankruptcy case in which one party seeks affirmative relief from another, (e.g. recover money or property, determine the validity of a lien, obtain an injunction). The adversary case is assigned its own case number and a separate docket sheet is maintained.*

AUTOMATIC STAY *– An injunction that arises by operation of bankruptcy law once a debtor has filed a voluntary petition for bankruptcy, or an order for relief has been entered. The stay stops all debt collection activities, harassment, and foreclosure as well as commencement or continuation of proceedings, against the debtor and/or the estate's property. Any willful violation of the stay gives the debtor actual damages, attorneys' fees, and some times punitive damages. Creditors may ask the bankruptcy court to modify the automatic stay to permit them to pursue other collection remedies such as completing a foreclosure action on real property.*

CLOSING OF ESTATE *– After an estate has been fully administered and the trustee has been discharged from his/her duties, the court shall close the case. Once the case is closed, the automatic stay is no longer in effect.*

CREDITOR *– Person who has a claim against the debtor and/or property of the debtor at the time a bankruptcy case filed.*

DEBTOR *– The person or entity that files a voluntary petition or who has an order of relief entered against it after an involuntary petition is filed.*

DEBTOR-IN-POSSESSION *– A debtor becomes a debtor-in-possession (DIP) upon filing a Chapter 11 petition. A debtor-in-possession remains in full control of all its assets and is charged with all the duties and responsibilities of a case trustee (fiduciary) to maximize the assets of the estate for the benefit of creditors.*

DISCHARGE *– Court order which extinguishes the debtor's liability on his pre-petition debts. A discharge in a Chapter 7 case is granted by operation of law 60 days after the first date set for the Section 341 meeting of creditors unless otherwise ordered by the court.*

DISCLOSURE STATEMENT *– In a Chapter 11 case an approved disclosure statement must accompany the plan of reorganization. The disclosure statement must contain "adequate information" concerning the affairs of the debtor to allow the creditors to make an informed judgment about the plan.*

DISTRIBUTION ORDER *– An order usually prepared by the case trustee and entered by the court authorizing the case trustee to pay creditors the amounts listed in the order.*

ESTATE *– A bankruptcy estate is created upon the filing of the case. It generally consists of all the debtor's interests in any property at the time the case is filed.*

EXAMINER *– An examiner may be appointed in a Chapter 11 case to investigate the financial affairs of the debtor. An examiner does not replace the debtor-in-possession as does a Chapter 11 trustee.*

MONTHLY OPERATING REPORTS – All debtors-in-possession or Chapter 11 trustees must file the monthly operating reports required by the U.S. Trustee for the region where the case is pending. Generally, the reports include a cash receipts and disbursement journal, profit and loss statement and balance sheet analysis.

NO ASSET CASE – A no asset case is one where there is no equity in the debtor's assets available to pay unsecured creditors because all of the debtor's assets are exempt, fully encumbered by secured liens, or have little value.

"NOTICE AND HEARING" – Based upon what is reasonable under the circumstances, notice and an opportunity to respond to proposed action by a debtor-in-possession or trustee is given to the parties in interest and the United States Trustee.

PLAN OF REORGANIZATION – The debtor's payment proposal in a Chapter 11 case to its creditors. The plan with a court approved disclosure statement is submitted to creditors for their approval. Creditors have the right to vote to accept or reject the plan.

PREFERENCE – A prepetition transfer made by or for the debtor to a creditor on a pre-existing debt may be a preference. The trustee may, unless there is an exception, avoid the transfer. The transfer must take place within 90 days of filing, or within one year if it is made to or for the benefit of an insider.

PROPERTY OF THE ESTATE – At the time the debtor files bankruptcy, all legal or equitable interests of the debtor become proper[illegible]tate. It is from this estate that the trustee will liquidate assets [illegible] creditors.

PROOF OF CLAIM – The document a creditor or equity security holder files with the bankruptcy court to assert a right of payment from the bankruptcy estate.

180 DAY REPORTS – Each Chapter 7 trustee must submit to the [illegible]ed States Trustee an interim report on each asset case that was [illegible]n at the beginning of the reporting period. The interim repor[illegible]onsists of the Estate Property Record and Report and a the Cash Receipts and Disbursements Record.

UNITED STATES TRUSTEE – *A component of the Department of Justice charged with the administration of all bankruptcy cases. 28 U.S.C. §586. The United Sates Trustee has a statutory right to appear and be heard on any issue in any bankruptcy case. 11 U.S.C. §307.*

UNSECURED CREDITORS COMMITTEE – *Appointed in Chapter 11 cases by the United States Trustee. The committee is comprised of creditors willing to serve who generally hold the largest claims and whose claims are representative of the type of unsecured debt in the case.*

CRIMINAL BANKRUPTCY FRAUD

A Summary of Existing Law

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April 5, 1993

Venue may be proper in the district in which the bankruptcy proceeding is located, making the district within which the actual concealment of assets took place immaterial. United States v. Schireson, 116 F.2d 881, 884 (3d Cir. 1940); United States v. Brimberry, 779 F.2d 1339, 1345 (8th Cir. 1985); United States v. Martin, 408 F.2d 949, 953 (7th Cir.), cert. denied, 396 U.S. 824 (1969).

C. Specific Intent Requirements
[See also "Jury Instructions" at VII]

Every offense under sections 152, 153 & 155 requires a "knowing and fraudulent" intent. Offenses under section 154 require a "knowing" intent. Offenses under section 152 which cover conduct before the bankruptcy is filed require the prosecution to show the defendant was "in contemplation of bankruptcy." Certain paragraphs of section 152 require an intent to "defeat the provisions of title 11".

Defendant's knowledge and intent may be ascertained from circumstantial evidence. United States v. Martin, 408 F.2d 949, 954 (7th Cir.), cert. denied, 396 U.S. 824 (1969).

"Persons whose intention is to shield their assets from creditor attack while continuing to derive the equitable benefit of those assets rarely announce their purpose. Instead, if their intention is to be known, it must be gleaned from inferences drawn from a course of conduct." United States v. Goodstein, 883 F.2d 1362, 1370 (7th Cir. 1989), cert. denied, 110 S. Ct. 1305, quoting In re May, 12 B.R. 618, 627 (N.D.Fla. 1980).

1. "Fraudulently"

Fraudulently means with intent to deceive. United States v. Diorio, 451 F.2d 21, 23 (2d Cir. 1971).

"An act is done fraudulently if done with intent to deceive or cheat any creditor, trustee or bankruptcy judge." Pattern Jury Instructions of the District Judges Association of the Fifth Circuit, No. 2.10 (1990).

"To act with 'intent to defraud' means to act knowingly and with the intention or the purpose to deceive or cheat. An "intent to defraud" is accompanied, ordinarily, by a desire or a purpose to bring about some gain or benefit to oneself or some other person or by a desire or a purpose to cause some loss to some person." 1 Devitt & Blackmar, Federal Jury Practice and Instructions, § 16.07 (4th ed. 1992).

The jury can infer fraudulent intent from the hurried formation of a new company after the debtor company has

order to have remaining inventory seized. United States v. Ayotte, 385 F.2d 988, 991 (6th Cir. 1967).

Evidence was sufficient to show that the defendant contemplated the debtor's bankruptcy where defendant was aware of debtor's cash flow problems when debtor was unable to pay off notes on properties which were in foreclosure and defendant made efforts to get payment from debtor for his legal fees prior to declaration of bankruptcy. United States v. Butler, 704 F. Supp 1338, 1347 (E.D.Va. 1989).

Circumstanstial evidence showing that arson was committed in furtherance of a bankruptcy fraud conspiracy and testimony of co-conspirator that "I'm going to take a dive and I've got to cover up my inventory losses" is sufficient to show transfers were made in contemplation of bankruptcy. United States v. Davis, 623 F.2d 188, 195 (1st Cir. 1980).

D. Penalties

The statutory punishment for violations of sections 152 and 153 are up to five years imprisonment and a maximum fine to $250,000.[1]

The statutory penalty for a violation of section 154 is a maximum fine of $5,000.

The statutory penalty for a violation of section 155 is up to one year imprisonment and a maximum fine of $100,000.

III. 18 U.S.C. § 152

A. Concealment of Assets

18 U.S.C. § 152, ¶¶ 1 & 7, reads as follows:

"Whoever knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any case under title 11, any property belonging to the estate of a debtor; or . . .

Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against him or any other person or corporation, or with the intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or

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[1] Note that all fines are increased from the original statutory maximum by 18 U.S.C. § 3571.

Jackson, 836 F.2d 324 (7th Cir. 1987); United States v. Cherek, 734 F.2d 1248, 1254 (7th Cir. 1984).

18 U.S.C. § 152 "requires a bankrupt to disclose the existence of assets whose immediate status in bankruptcy is uncertain. Even if the asset is not ultimately determined to be property of the estate under the technical rules of the Federal Bankruptcy Code, section 152 properly imposes sanctions on those who preempt a court's determination by failing to report the asset." United States v. Cherek, 734 F.2d 1248, 1254 (7th Cir. 1984); United States v. Jackson, 836 F.2d 324, 330 (7th Cir. 1987); United States v. Beard, 913 F.2d 193, 197 (5th Cir. 1990).

The statute does not specify that only property that is ultimately determined to be the property of a bankrupt estate will be considered concealed for purposes of prosecution. United States v. Martin, 408 F.2d 949, 953 (7th Cir. 1969).

It is a question of fact for the jury to determine whether assets are property of the debtor and belong to the bankruptcy estate. United States v. Weinstein, 834 F.2d 1454 (9th Cir. 1987).

Where, however, the law is uncertain as to whether the debtor really would be receiving property, such uncertainty may be relevant in determining whether the defendant had a knowing and fraudulent intent in not disclosing the potential asset. United States v. Collins, 424 F. Supp. 465 (E.D.Ky. 1977)(suspended member of police department did not disclose that he could receive back wages if he was reinstated; evidence held insufficient to show fraudulent intent since law was uncertain as to whether defendant could receive such back wages for the period he was suspended).

c. Broad Definition of "Property"

Money or cash as well as any other property is included in the prohibition against transferring "property" under section 152. United States v. Wernikove, 206 F. Supp. 407 (E.D.Pa.

Transfer of ownership and control of a corporation without notice to creditors or bankruptcy court approval could be deemed fraudulent transfer of estate property. United States v. Goodstein, 883 F.2d 1362, 1369 (7th Cir.), cert. denied, 110 S. Ct. 1305 (1989).

Assets can't be considered concealed until a bankruptcy is actually filed. United States v. Schireson, 116 F.2d 881, 883 (3rd. Cir. 1941); United States v. Yassar 114 F.2d 558 (3rd. Cir. 1940).

An indictment charging a conspiracy to transfer assets is not defective where it does not refer to concealment because Congress' intent is best served by prohibiting either transfer or concealment of bankruptcy assets. United States v. Switzer, 252 F.2d 139, 142 (2d Cir.), cert. denied, 357 U.S. 922 (1958).

"Transfers or conceals" is to be read in the disjunctive so that proof of either in conjunction with the other elements of the offense is sufficient to sustain conviction. Concealment is not a necessary element of a prohibited transfer. Burchinal v. United States, 342 F.2d 982, 985 (10th Cir. 1965).

Although making a false oath is also a separate offense, it may also constitute a concealment. Burchinal v. United States, 342 F.2d 982, 985 (10th Cir.), cert. denied, 382 U.S. 843 (1965).

The absence of records pertaining to the sale of an asset of the bankruptcy estate and the defendant's failure to account for the absence of such records is highly probative evidence that the defendant concealed the asset. United States v. Turner, 725 F.2d 1154, 1157-58 (8th Cir. 1984).

Clandestine removal of manufacturing equipment in the still of the night is not lawful even for a debtor-in-possession where it is not in the ordinary course of business. The fact that the defendant-debtor had not yet received notice that his Chapter 11 had been converted to a Chapter 7 was irrelevant to the fraudulent concealment charge. United States v. Gigli, 573 F. Supp. 1408, 1414 (W.D.Pa. 1983).

Classic "bustouts" or planned bankruptcies where goods are moved out the back door with the plan of filing for bankruptcy can be charged as concealed asset conspiracies. They are usually charged as concealments "in contemplation of bankruptcy". See e.g., United States v. Ayotte, 385 F.2d 980 (6th Cir. 1967), vacated on other grounds, 394 U.S. 310 (1967); United States v. Micciche, 525 F.2d 544 (8th Cir 1975).

The manner of concealment need not be set out in the indictment. United States v. Comstock, 161 F. 644 (C.C.D.R.I., 1908).

The return of a concealed asset or the proceeds thereof. United States v. Klupt, 475 F.2d 1015, 1018 (2d Cir. 1973).

The assets in question were ultimately used to pay the debtor's creditors. United State v. Klupt, 475 F.2d at 1018-1019.

That the defendant did not profit from a concealment of an asset. United States v. Weinstein, 834 F.2d 1454, 1462 (9th Cir. 1987).

That it was ultimately unsuccessful and that all of the concealed property was ultimately recovered for the benefit of the estate. United States v. Mathies, 350 F.2d 1963 (3d Cir. 1965).

That an injustice led to the bankruptcy filing (e.g., a lien put on debtor's house). Likewise, it is not a defense to assert that defendant did not realize the fruits of his fraudulent acts. United States v. Key, 859 F.2d 1257, 1260 (7th Cir. 1988).

That creditors have actual knowledge of the location of the assets in question. United States v. Zimmerman, 158 F.2d 559, 560 (7th Cir. 1946).

That the concealment did not injure the creditors. United States v. O'Donnell, 539 F.2d 1233, 1237 (9th Cir.), cert. denied, 429 U.S. 960 (1976).

The jury rejected defendants' advice of counsel defense where although the debtors claimed that they relied on their attorney's advice that money should be hidden in order to pay creditors in full, there was evidence that the debtors did not believe the advice was legal and that the diverted monies were not used to pay creditors, but instead funded a lavish life style. United States v. Levine, 970 F.2d 681, 685 (10th Cir.), cert. denied, 113 S.Ct. 289 (1992).

4. Statute of Limitations

18 U.S.C. § 3284 - Concealment of bankrupt's assets:

"The concealment of assets of a debtor in a case under title 11 shall be deemed to be a continuing offense until the debtor shall have been finally discharged or a discharge denied, and the period of limitations shall not begin to run until such final discharge or denial of discharge."

2. What Is A False Statement?

The term "false statement" means a statement or an assertion which is known to be untrue when made or when used. The term false statement can also mean any knowing omission of fact made with the intent to deceive or to conceal. Devitt, Blackmar & O'Malley, 2 Federal Jury Practice and Instructions, § 24.08 (4th. Ed. 1990).

Statements that are literally true but materially misleading can be considered false oaths for purposes of § 152. United States v. Schafrick, 871 F.2d 300 (2nd Cir. 1989). But See, Bronston v. United States, 409 U.S. 352, 359 (1973)(A non-responsive truthful answer was held to be insufficient for perjury prosecution because even though it was misleading, it was not false.)

"A debtor's failure to disclose an interest in certain corporate assets in an affidavit annexed to its statement of affairs has been held to constitute a false oath." United States v. Diorio, 451 F.2d 21 (2d Cir. 1971), cert. denied, 405 U.S. 955 (1972).

The offense of making a false oath is completed at the time the false schedule is sworn to and filed, regardless of a subsequent disclosure. United States v. Young, 339 F.2d 1003, 1004 (7th Cir. 1964).

3. Materiality of the Statement

The false statement must be made with respect to a material matter. United States v. O'Donnell, 539 F.2d 1233, 1237 (9th Cir.), cert. denied, 429 U.S. 960 (1976).

The indictment must set forth all the essential elements constituting the offense, thus a failure to allege materiality in a false statement prosecution renders the indictment defective. Meer v. United States, 235 F.2d 65, 67 (10th Cir. 1956).

The materiality of a false statement in a bankruptcy fraud prosecution is a question of law to be decided by the court, not the jury. United States v. Key, 859 F.2d 1257, 1261 (7th Cir. 1988); United States v. Metheany, 390 F.2d 559 (9th Cir. 1968).

Misstatements as to defendant's social security number and past names are material. United States v. Phillips, 606 F.2d 884, 886 (9th Cir. 1979), cert. denied, 444 U.S. 1024 (1980).

1169, 1170 (5th Cir.), cert. denied, 479 U.S. 964 (1986)(filing a false document with the bankruptcy court).

Section 1001 also does not require proof of an intent to defraud. United States v. Vaughn, 797 F.2d 1485, 1490 (9th Cir. 1986).

D. Filing A False Claim Against the Estate

18 U.S.C. § 152, ¶ 4, reads as follows:

"Whoever knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney. . . shall be fined. . . and imprisoned. . . ."

1. Elements

(1) That bankruptcy proceedings had been commenced;
(2) That defendant presented or caused to be presented a proof of claim in the bankruptcy;
(3) That the proof of claim was false as to a material matter;
(4) That the defendant knew the proof of claim was false and acted knowingly and fraudulently.

United States v. Overmyer, 867 F.2d 937, 949 (6th Cir.), cert. denied, 110 S.Ct. 60 (1989).

2. What is a Claim?

A claim filed in a bankruptcy proceeding is a legal document submitted to the court by a creditor of the person or entity that has filed bankruptcy. The claim can be asserted by a creditor whether or not it is reduced to judgment, whether the claim is liquidated, unliquidated, fixed, contingent, mature, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. United States v. Connery, 867 F.2d 929, 934 (6th Cir. 1989).

3. Good Faith Defense

Good faith is a defense to this charge. The filing of a false claim is not a crime where there was a good faith belief in its accuracy. United States v. Connery, 867 F.2d 929, 934 (6th Cir. 1989).

3. Lack of Success No Defense

Where the defendant in a prosecution under this paragraph was rebuffed by the buyer he was attempting to bribe, and therefore acted as he had originally planned and did not forbear in any way as proposed, he is still guilty of this violation. United States v. Weiss, 168 F. Supp 728, 730 (W.D. Penn. 1958).

G. Concealment/Destruction or Withholding of Documents

18 U.S.C. § 152, ¶¶ 8 & 9, read as follows:

"Whoever, after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information, including books, documents, records, and papers relating to the property or financial affairs of a debtor . . ."
Whoever, after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court entitled to its possession, any recorded information, including books, documents, records, and papers relating to the property or financial affairs of a debtor . . . [shall be fined . . . or imprisoned. . . .]"

1. Elements

To sustain the charge that a person withheld [or concealed or destroyed] records after the filing of a case in bankruptcy, the government must prove:
(1) that a bankruptcy proceeding existed;
(2) that the defendant withheld from the trustee entitled to its possession books, documents, records, or papers; [or that the defendant concealed, destroyed or mutilated the documents]
(3) that such documents related to the property or financial affairs of the debtor;
(4) that the defendant withheld the documents knowingly and fraudulently.

Devitt & Blackmar, 2 Federal Jury Practice and Instructions, §§ 48.14 & 48.15 (1990 Supplement)(deleted in later editions).

2. Scope

Documents or information relating to the financial affairs of a debtor includes anything that would provide the names and locations of possible sources of funds or assets or means of reorganization of the estate. United States v.

3. Charging Multiple False Statements

Separate monthly accounting entries which are false can constitute separate counts of bankruptcy fraud under section 152. United States v. Montilla Ambrosiani, 610 F.2d 65, 68 (1st Cir. 1979); Bins v. United States 331 F.2d 390, 393 (5th Cir.), cert. denied, 379 U.S. 880 (1964).

IV. 18 U.S.C. § 153 - Embezzlement by a Trustee or Officer

18 U.S.C. § 153 reads as follows:

"Whoever knowingly and fraudulently appropriates to his own use, embezzles, spends, or transfers any property or secretes or destroys any document belonging to the estate of a debtor which came into his charge as trustee, custodian, marshal, or other officer of the court, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

A conviction was upheld under section 153 where the trustee embezzled money from the estate on a weekly basis for over a year. United States v. Rodriguez Estrada, 877 F.2d 153 (1st Cir. 1989). See also United States v. Ivers, 512 F.2d 121, 124 (8th Cir. 1975); United States v. Lynch, 180 F.2d 696, 699 (7th Cir.), cert. denied, 339 U.S. 981 (1950).

The statute reaches all property that the court officer receives by reason of his or her position, regardless of whether it is ultimately determined to be property of the estate. Meagher v. United States, 36 F.2d 156 (9th Cir. 1929).

V. 18 U.S.C. § 154 - Adverse Conduct by Officers or Trustees

18 U.S.C. § 154 reads as follows:

"Whoever, being a custodian, trustee, marshal, or other officer of the court, knowingly purchases, directly or indirectly, any property of the estate of which he is such officer in a case under title 11; or

Whoever being such officer, knowingly refuses to permit a reasonable opportunity for the inspection of the documents and accounts relating to the affairs of estates in his charge by parties in interest when directed by the court to do so--

Shall be fined not more than $500, and shall forfeit his office, which shall thereupon become vacant."

No cases appear to have been reported under this paragraph.

VIII. SENTENCING

A. Applicable Sentencing Guidelines

1. § 2F1.1 - Fraud and Deceit
2. § 2J1.3 - Perjury or Subornation of Perjury
3. § 2B4.1 - Bribery

Fraud guideline was applied instead of the perjury guideline because statutory index specified fraud guideline and since defendant's conduct constituted fraud, he could be sentenced under the higher offense. United States v. Beard, 913 F.2d 193, 197 (5th Cir. 1990). (Statutory Index has been changed since this decision to include perjury guideline as well as fraud, but reasoning of case should still be good law where it is essentially a fraud offense.)

B. Amount of Loss

The value of the concealed asset was used to measure the attempted loss in United States v. Beard, 913 F.2d 193, 196 (5th Cir. 1990), even though part of the money had been returned to the estate.

The amount of money that was in the bank account concerning which defendant made a false statement is the proper measurement of attempted loss, even though the account was closed prior to bankruptcy and this was a false statement and not a concealed asset conviction. United States v. Nazifpour, 944 F.2d 472, 474 (9th Cir. 1991).

A finding that the losses inflicted by the defendants were in excess of $2 million was supported by evidence that debtors embezzled in excess of $400,000 from the employees' profit and pension sharing plans and then concealed those monies from their creditors, and that defendants' fraud prevented creditors from exercising rights to collateral worth $1.7 million at time defendants declared their insolvency. United States v. Levine, 970 F.2d 681 (10th Cir. 1992).

The present value of the employment agreement with debtor's principle arising from sale of debtor corporation could not be a part of intended loss for determining offense level since future earnings of principle from personal service were not part of estate. United States v. Edgar, 971 F.2d 89 (8th Cir. 1992).

It is possible for intended loss from bankruptcy fraud to be less than value of concealed property for guidelines purposes where an individual debtor or sole owner of a corporation is the party who benefits from the concealment,

4. Organizer Or Leader Of Criminal Activity

Where defendants organized the conspiracy, consulted two other attorneys before hiring present attorneys, terminated their long-term CPA, introduced the liquidator to the attorneys, directed the bookkeeper to turn proceeds over to defendants, instructed the collector to send monies to defendants' home, and contacted pension plan broker with directions to convert assets, a four-level increase in the offense level for a defendant who organized or led criminal activity that involved five or more participants is authorized under section 3B1.1. United States v. Levine, 970 F.2d 681, 691 (10th Cir.), cert. denied, 113 S.Ct. 289 (1992).

5. Disruption of A Governmental Function

Section 5K2.7 permits an increase above the guideline range if the defendant's conduct resulted in a significant disruption of a governmental function. The court found that an increase based on this provision is not proper with a conviction for perjury before the grand jury because interference with a government function is inherent in that offense. United States v. Barone, 913 F.2d 46, 51 (2d Cir. 1990).

6. Upward Departures

Court permissibly departed upward in sentencing a bankruptcy trustee for embezzlement because of the impact of trustee's crime upon the integrity of the institution of bankruptcy trustee and the potential loss of confidence in the system. United States v. Fousek, 912 F.2d 979 (8th Cir. 1990).

The defendants' conduct in a concealed asset prosecution in selling farm equipment under aliases not listed in the bankruptcy petition, and receiving rental payments for a rented house through a numbered bank account could be considered aggravating factors warranting departure from the guidelines sentence. The court justified the upward departure based on "activity of a somewhat similar nature [to the concealment charge], though not resulting in criminal charges but intimating a deep attachment to the obtaining of money or property at the expense of others, thereby signaling the unlikelihood of rehabilitation without strong measures." United States v. Snover, 900 F.2d 1207, 1210 (8th Cir. 1990).

as to invoke privacy concerns. If the act of producing personal records would be incriminating, the debtor need not produce them. It is the act of authentication through the production, rather than the contents or nature of the document, which must be incriminating. Butcher v. Bailey, 753 F.2d 465 (6th Cir.), cert. denied, 473 U.S. 925 (1985).

B. Miranda Warnings

There is no need to give Miranda-type warnings to a debtor in a bankruptcy hearing before questioning him or her under oath. United States v. Jackson, 836 F.2d 324, 326 (7th Cir. 1987). Miranda warnings only apply if the individual is in custody. United States v. Miranda, 384 U.S. 436 (1966).

Defendant's ignorance at the time his deposition was taken in the course of the civil proceedings that he might later be charged with a crime cannot prevent the deposition from being introduced at the criminal trial. United States v. Ballard, 779 F.2d 287 (5th Cir.), cert. denied, 475 U.S. 1109 (1986).

X. RICO/MONEY LAUNDERING PREDICATE

A. 18 U.S.C. §§ 1956 & 1957 - "an offense under section 152" is a specified unlawful activity for purposes of the money laundering statutes. See, e.g., United States v. Levine, 970 F.2d 681, 686 (10th Cir. 1992)(money laundering conviction upheld where bankruptcy fraud was specified unlawful activity).

B. 18 U.S.C. § 1961 - "any offense involving fraud connected with a case under title 11" is a "racketeering activity" for RICO purposes. By definition, all bankruptcy fraud crimes are connected to a case under title 11. See, e.g., United States v. Butler, 704 F. Supp 1338 (E.D.Va. 1989)(RICO conviction containing bankruptcy fraud predicate).

C. Prosecutions involving bankruptcy fraud predicate acts include: United States v. Weisman, 624 F.2d 1118 (2d Cir.), cert. denied, 449 U.S. 871 (1980)(money skimming operation); United States v. Hewes, 729 F.2d 1302 (11th Cir.), cert. denied, 469 U.S. 1110 (1984) (planned bustout).

XI. ATTORNEY-CLIENT PRIVILEGE/DISQUALIFICATION

A. Waiver of Attorney-Client Privilege By Trustee

The court-appointed bankruptcy trustee may waive the attorney client privilege of the debtor for communications prior to the declaration of bankruptcy. Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 353 (1985).

Congress has been clear in not allowing the debtor's directors the right to assert the corporation's attorney-client privilege against the trustee. Commodity Futures Trading Commission v. Weintraub 471 U.S. 343, 350 (1985)

Corporate officers cannot assert an individual attorney-client privilege to prevent disclosure of corporate communications with corporation's counsel after the corporation's privilege was waived by the trustee. Matter of Bevill, Bresler & Schulman Asset Management Corporation, 805 F.2d 120, 125 (3rd Cir. 1986).

Where the bankrupt corporation had neither directors nor officers, the trustee could require, over the objection of the sole stockholder, the former law firm of the bankrupt corporation to disclose information and documents otherwise within the privilege since the trustee has the power to invoke or waive the privilege. OPM Leasing Services, Inc. v. Weisman, 670 F.2d 383, 386 (2d Cir. 1982).

Individual officers and directors of insolvent savings and loan association did not have separate attorney-client relationship with association's law firm, although the firm had given directors and officers advice regarding their duties, responsibilities, and potential personal exposure. Officers have no privilege where communications between firm and officers occurred while the latter were acting in their official capacities and where counsel advised directors that he could only provide general legal advice to them as a group and that they were free to retain separate counsel. Oldmark v. Westside Bancorporation, Inc., 636 F. Supp 552 (W.D.Wash. 1986). See also In the Matter of Michigan Boiler and Engineering Co., 87 B.R. 465 (Bankr. E.D. Mich. 1988) (Where firm was representing solely corporate debtor, attorney client privilege not available to protect from disclosure to bankruptcy trustee entries made in documents by law firm personnel of statements made by officers of corporate debtor concerning corporate matters).

3. Trustee Should Maintain Records

Loss of records or destruction of records by the trustee may create problems in a later prosecution. The quality of the government's conduct and the prejudice to the accused are factors that will determine whether the conviction is reversed. United States v. Weinstein, 834 F.2d 1454 (9th Cir. 1987)(records accidentally destroyed when trustee changed offices); United States v. Feldman, 425 F.2d 688 (3d Cir. 1970)(after recommending prosecution, trustee destroyed records without giving notice to debtor).

4. Payment of Creditor Expenses

11 U.S.C. § 503(b)(3)(C) of the Bankruptcy Code allows for the reimbursement of creditor's expenses and attorney's fees incurred in prosecuting a bankruptcy crime. The expenses which the bankruptcy court can allow are the actual, necessary expenses incurred by a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor.

B. Parallel Proceedings

1. Civil Parties Are Not Agents of Criminal Case

The trustee should never be asked to use the bankruptcy proceedings solely to develop evidence for the criminal case, but information which he develops in the normal discharge of his responsibilities can be freely provided to the criminal investigation. See generally, S.E.C. v. Dresser Industries, 628 F.2d 1368 (D.C. Cir., en banc) cert. denied, 449 U.S. 993 (1988).

However, it is well settled that the prosecution may use evidence obtained in a civil proceeding in a subsequent criminal action unless the defendant shows that to do so would violate his constitutional rights or depart from the proper administration of criminal justice. For example, the civil suit must not be brought in bad faith. United States v. Unruh, 855 F.2d 1363, 1374 (9th Cir. 1987), cert. denied, 488 U.S. 974 (1988).

(5) the interest of the public in the pending civil and criminal litigation.

The case for staying the civil proceedings is much weaker where there has been no indictment at the time of the stay request. Federal Sav. and Loan Ins. Corp. v. Molinaro, 889 F.2d 899, 902 (9th Cir. 1989).

Because public policy gives priority to the public interest in law enforcement, a court must give substantial weight to it in balancing the policy against the right of a civil litigant to a reasonable prompt determination of his civil claims or liabilities. Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963).

4. Protective Orders

Some circuits allow civil parties to enter into protective orders which deny criminal authorities access to evidence developed in the civil case. See, e.g., Minpeco S.A. v. Conticommodity Services, Inc., 832 F.2d 739, 742 (2d Cir. 1987). Other circuits refuse to uphold such orders to prevent enforcement of a grand jury subpoena. In re Grand Jury Subpoena, 836 F.2d 1468 (4th Cir.), cert. denied, 487 U.S. 1240 (1988).

5. Collateral Estoppel Of Prosecution Not Allowed

A discharge in bankruptcy does not preclude the subsequent prosecution of a debtor for bankruptcy fraud under the doctrine of collateral estoppel where the fraud issue had not been actually decided by the bankruptcy court, and the only adjudication necessary to discharge was approval of a settlement agreement as an acceptable compromise in interests of estate and its creditors. United States v. Tatum, 943 F.2d 370, 380 (4th Cir. 1991).

Given the procedural constraints unique to bankruptcy procedure, the difference in issues between the bankruptcy proceeding and the criminal prosecution, the difference in the parties to the two suits and the important federal interest in the enforcement of the criminal laws, the court declined to invoke collateral estoppel to bar the criminal prosecution arising out of actions taken in bankruptcy proceedings. United States v. Rodriguez-Estrada, 877 F.2d 153, 157-58 (1st Cir. 1989).

Abandonment of the asset by the trustee in the course of the civil administration of the estate does not bar a later prosecution for the concealment of the asset. United States v. Grant, 971 F.2d 799, 806 (1st Cir. 1992)(en banc).

SAMPLING AND ANALYTIC EVIDENCE

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Getting sampling and analytical information into evidence without a stipulation may involve multiple witnesses and numerous documents, and can be surprisingly complex. The outline below focusses on problem areas associated with the various steps in proving up an analysis. Supporting cites can be found in the sources listed below.

SAMPLING PERSONNEL

Was the sampler trained and experienced in taking these samples?

Did the sampler use clean collecting containers and properly calibrate any measuring devices?

Was the sample taken using the correct procedure? Many sampling procedures require that a "representative" sample be taken. This usually means that the sample must be taken from the middle of the flow, or, for sampling the contents of barrels, that all layers of the contents should be included in the sample.

Was the particular type of sample required to be either chemically or thermally preserved (refrigerated), and was that done?

Were splits of the sample offered to the target, or did the target have an opportunity to take their own samples? Splits are required to be offered in some civil investigations under EPA statutes such as RCRA. Splits are not required to be provided in executing criminal search warrants, although defendants often argue the government should have provided one. A decision should be made whether to do so at the time of the warrant.

Was a chain of custody form filled out for each sample?

ANALYTIC WITNESSES

Was the analyst trained and experienced in performing these analyses?

Was the U.S. EPA-approved analytic procedure used? If not, the procedure actually used may have to be proven up as scientifically reliable. Even worse, if the correct method was not used, the substance may not be provably regulated at all. This problem most often arises in RCRA sampling.

Was there a holding time for the sample? Many types of samples must be analyzed within a certain time because the constituents

evaporate or degrade. If the holding time was exceeded, the analysis may still be usable if the constituents we're looking for would have decreased, but still show a violation.

How did the analyst record the results? Typically, the lab analyst notes his result on a sheet of paper, which is then collected with any other analyses conducted. A final lab report is assembled by another person. Thus, the analyst may not be able to identify the final lab report, since they never saw it. You will often need to obtain the analyst's original notes to prove up the analytic work they did.

Was the analytic equipment calibrated? Were proper quality control and quality assurance (QA/QC) methods used to document that the equipment gave a correct answer? Usually, QA/QC consists of periodically running known (spiked) samples through the equipment, as a check on accuracy. The documentation of this process often appears on the original analysis record.

CHAIN OF CUSTODY

Since samples are fungible, evidence must be offered that the sample taken was the same one that was analyzed, and that the sample was not contaminated or altered in between. A chain of custody sheet should accompany each sample taken, and include the names of everyone who handled the sample from the sampler at least through to the analyst. If you want to introduce the samples themselves into evidence, rather than just the numerical results, the chain of custody may be required to continue on to the present.

As mentioned above, many people other than the sampler and the chemist conducting an analysis may have handled a sample. A lab employee may routinely add a preservative to a sample, rather than have the sampler do it. Or the sample may have to be divided up to provide enough separate portions for different analyses, and to provide splits. There is usually a central custodian receiving the sample back when not in use. Such handling should be identified, ideally on the chain of custody sheet.

While everyone who had custody or control over the sample will have to be identified, not all may have to testify. For so-called "minor" links in the chain, there are some exceptions.

For example, a court may allow someone to testify that they observed evidence while it was in another person's possession, and not require the possessor to testify himself. For example, a witness could testify that he saw how a sample was taken, even though the actual sampler does not testify. Similarly, a lab supervisor could testify that an analysis was conducted while he observed the entire procedure, and the actual analyst would not have to testify.

Postal employees need not be called if the package was sealed with evidence tape before mailing, and remained sealed upon receipt.

Lab employees who handle but do not open a sample package may not have to testify, if they are identified, the lab routinely handled samples in that manner, and there is no reason to believe tampering occurred.

Lab employees who merely have access to common sample storage areas do not need to testify if there is no indication they would have handled the particular samples.

The general rule for admissability of chain of custody evidence is contained in Fed. R. Evid. 901: evidence sufficient to support a finding that the matter in question is what its proponent claims. Under the federal rule, this standard is a prima facie test, a relatively low threshhold. Many courts continue to refer to the former standard, which required a "reasonable probability" to support admission. In cases involving analytic evidence, courts have stated that the evidence must be adequate, but not infallible. Finally, it should be noted that challenges to the chain of custody go to the weight, not the admissability of the evidence.

EVIDENTIARY PROCEDURE

The sheer number of samples handled by labs often results in witnesses who have little or no memory of a particular sample. This means that the documentary trail can be crucial both to identify which personnel did the work and to refresh their memory. Often, the lab witnesses will have no memory of the analytic work they performed, and the documents themselves will have to be offered as past recollection recorded under Fed R. Evid 803(5).

Some hardy souls argue that sampling evidence can be admitted as either public records or business records under Fed. R. Evid. 803. The law on this issue varies widely among the Circuits, and there are a host of objections to admitting highly technical lab data based solely on the relatively easy threshhold elements of these exceptions.

No matter which theory for admissability is used, the crucial documents to obtain are the chain of custody records, the original notes recorded by the analyst, and the QA/QC records, in addition to the final lab report.

CRIMINAL DISCOVERY

Query whether the documents used to support admission of the sampling evidence are government exhibits subject to discovery prior to trial, or witness statements which need to be turned over to the defense only after the witness has testified.

DESTRUCTION OF EVIDENCE

The government has an affirmative obligation to preserve critical evidence subject to expert interpretation. This means that ordinarily, samples must be preserved after analysis. But this obligation does not mean that the loss of a sample ruins a case. Samples may be used up in the analyses procedure, and courts have held that that situation does not offend due process. Limited storage capacities or simply mistake may also cause a sample to be destroyed or lost. The Supreme Court has said that bad faith must be shown to support a due process claim.

SOURCES

Gianelli, Chain of Custody and the Handling of Real Evidence, 20 Amer. Crim L. Rev 527 (1983)

Imwinklreid, Evidentiary Foundations, 2nd Ed. (1989)

McCormick, Evidence, West Pub., 2nd Ed. 1972

Laboratory Support of Environmental Criminal Investigations

Effective communications between criminal investigators and any laboratory personnel involved in a criminal investigation is essential to insure the success of the investigation. Often investigators and scientists do not seem to speak a common language. The investigator wants to know "what is this stuff" or "is this stuff hazardous"; while the scientists want to know "which tests do you want run". This potential for misunderstanding must be recognized and overcome. This may require some effort by both the investigators and the scientists. Often the samplers or inspectors who are in contact with both the scientists in the laboratory and the investigators attempt to bridge this gap. If all of the parties are experienced in this type of investigation this may work fine, but it also has the possibility of introducing a third set of misunderstandings to an already complicated situation.

Part one of this chapter will list some of the background information that should be shared between the investigators and the scientists. Part two outlines some common laboratory practices. Part three summarizes the most frequently performed analyses in environmental chemistry. And the fourth part reviews the testing required by the major environmental laws.

Background Information

Many of the criminal investigators come from law enforcement background and instinctively operate on a "need-to-know" basis. Sometimes, they will not share information with laboratory scientists which they do not feel that the scientists need to know. However sometimes a chemist may note a characteristic of a sample he is analyzing that might help the case if the chemist knows some of the background of the investigation. Conversely, the investigator does not always understand exactly what a chemical test will or will not prove. For instance, if an investigator submits a sample for "pesticides" analyses many environmental laboratories will screen it for only the eighteen chlorinated pesticides that were on the "Priority Pollutant" list and were carried over to Method 608 issued under the Clean Water Act. Most of these pesticides are no longer

registered for use in the United States. The other thousands of pesticides that are registered for use in this country will not be analyzed for. The chemist should know this, but the criminal investigator might not. The same is true of "metals" analyses. If an investigator submits a sample for "metals" analyses, he may receive results for just the total concentrations of RCRA metals present or the EP Toxicity concentrations of the RCRA metals or the total amounts of whatever metals the particular laboratory has their spectrometer calibrated to detect.

The only way to avoid these types of problems is to share as much background information as is practical. The minimum amount of background information that should be given to the laboratory scientists is the following:

1.) What do you think the suspect did?

Is this an unpermitted discharge case? Are these samples from an abandoned warehouse? Are they from buried drums?

2.) What laws do you think might have been broken?

RCRA, CWA, TSCA, FIFRA or CERCLA? This can determine which methods the scientists will use in their analyses. CWA requires the use of specific methods and RCRA, sometimes, requires certain quality control techniques.

3.) What occurred on site?

Was a metal plating operation located here? Which metals were plated? Was this a transformer repair facility?

4.) Where are the samples from and what do they represent?

It is important for the analyst to know if the sample bottle he receives is meant to represent only itself or some larger population of potential samples. For instance, if samples are taken from visibly contaminated areas in order to show that a spill of lead has occurred on that spot, the sample needs to be treated in a different manner than one taken from a waste pile in order to show that the waste in the pile is a hazardous substance. In the first case, the proper analysis would be total lead; in the second case, the analysis would be EP Toxicity analysis for lead. Also in the second case, the analyst

and whoever took the samples will have to establish that the sample is representative of the entire pile.

5.) Information found during the sampling that might affect the analyses?

Were there any labels on the drums which were sampled and what did they say? Were any Materials Safety Data Sheets found on site and what chemicals were listed there?

6.) Are there important deadlines associated with the case?

Is the statue of limitations about to run out? Does something have to be proven before site reclamation work begins?

Common Laboratory Procedures

1.) Receipt of samples

Samples must always be kept under custody. The chain of custody must be documented such that it can be reconstructed if necessary. Custody is usually documented on a Chain of Custody Sheet which records the number of samples, the type of sample containers, the date and time of sampling, who had custody and when custody was transferred. Each sample needs to be individually tagged or otherwise identified.

When samples are received in the laboratory they are checked against the Chain of Custody sheet. Any deviations are noted and the sheet is signed and dated by the person accepting custody. The person accepting custody can be either a Sample Custodian or an individual assigned to that particular project. Samples must then be stored in a limited access area. Whoever has access to the samples becomes a potential witnesses even if they did not participate in the analyses. They may be required to testify that they did not in any way tamper with the samples.

Industrial waste samples do not need to be stored in refrigerators. Percent levels of hazardous constituents will not be significantly reduced by storage at room temperature until analyses. However, if it is necessary to analyze for trace levels of environmental pollutants, the samples should be stored near freezing.

Holding times are given in SW-846 and the Clean Water Act methods. These apply both to the types of parameters that are inherently unstable over time, such as BOD and pH, as well as trace levels of parameters that will rapidly degrade in certain matrices, such as organic compounds in water. However when the trace types of parameters exceed their holding times, the presence of any of the analytes are at a minimum level. For instance if two surface water samples are not analyzed for six months after collection then analyzed for BOD, which has a holding time under the Clean Water Act of 2 days, and mercury, which has a holding time of 28 days, the BOD result will be completely worthless because the BOD is inherently unstable and can vary unpredictably from the level it was when sampled. The mercury result, on the other hand, can be considered a minimum because the mercury level in the sample can only decrease with time.

2.) Hazardous waste determinations

Industrial wastes can be analyzed under the following scheme in order to determine if they meet the characteristic definitions of hazardous waste as given under RCRA.

a.) Phase separation - Many potentially hazardous waste samples contain more than one phase. Often the phases are oil over water or oil over water over a solid. Except for toxicity characteristic determinations, these phases can only be analyzed after separation. The various phases are weighed during separation and their physical characteristics recorded. Often phases that are less than 10% of the sample by weight are ignored. For TCLP or EP Toxicity a representative sample of the entire waste must be analyzed, during the extraction procedures themselves a phase separation takes place before analysis.

b.) Ignitability - If the sample or a significant phase of the sample is a nonaqueous liquid, the RCRA characteristic that it is most likely to possess is the characteristic of ignitability. This is also one of the quickest tests to perform. First the determination must be made if the sample is a liquid. If this is not obvious, a testing procedure ("the paint filter test") is given in SW-846. If it is a liquid, perform a flashpoint determination. If the flashpoint is less than 60° Centigrade, the sample has the characteristic of Ignitability if it does not qualify for the alcohol exemption. To determine if it does, the sample must be analyzed for either water content and/or alcohol.

c.) Corrosivity - First, determine if the sample is a liquid. Then determine if it is aqueous by performing a water content analysis. If

it is aqueous, determine the pH. If it is not aqueous and is still suspected of being corrosive, perform the coupon test.

d.) Reactivity - Either solid or liquid samples can be reactive. The two most likely constituents that might make samples reactive are cyanide and sulfide. Procedures are given in SW-846 to determine the amounts of these constituents that might be released if the pH is lowered to 2. The guidelines for the amounts of "releasable" cyanide and sulfide that are hazardous are 250 and 500 mg/Kg respectively.

e.) Toxicity Testing (either EP or TCLP) - These tests must be performed on representative portions of the sample.

If a sample does not possess one of the RCRA characteristics, it may be necessary to attempt to determine its constituents in order to determine if it is similar to any of the wastes that would be expected from the disposal of listed hazardous substances. This can involve the determination of semi-volatile organics, volatile organics and elemental constituents. This can be extremely difficult and time consuming and may not always be successful since there are no accurate and reliable methods of analyses for many compounds including many common polymers used in plastics and paints.

3.) Environmental analyses

There are two types of environmental samples. One type, is a water, soil, sediment, or other environmental matrix sample taken to show that a release of a hazardous substance has occurred. This type of analysis can require many of the same tests as identifying hazardous constituents. The other type is samples taken to show a violation of a standard such as a NPDES permit.

4.) Storage and disposal

All samples should be stored until all legal proceedings are completed. It should be understood that environmental samples may degrade over the months or years that legal proceedings may last. However, even if the sample completely evaporates, the empty sample container should be retained as evidence.

Frequently Performed Analyses

1.) Metals

Metals analyses are measurements of the amount of a particular element in a sample. A more scientifically correct name for this type of analysis is "elemental" since many nonmetallic elements such as arsenic can also be determined by these techniques.

Before instrumental analysis can proceed the elements of interest must usually be dissolved in a liquid. This process is called "digestion" and is usually accomplished by boiling the sample in acids. Digestion may not be necessary for water samples if the elements are already dissolved in the water. However, it is always possible that even clear appearing water samples may contain small particles to which the elements are attached.

The three types of detectors most often used for elemental analyses are:

Atomic Absorption Spectrometer (AA) - In this instrument the sample is burned and the wavelengths of light that is absorbed by the sample are analyzed to determine if a particular element is present. Only one element can be determined at a time with this instrument.

Inductively Coupled Argon Plasma Optical Emissions Spectrometer (ICP-OES) - In this instrument the sample is reduced to its elemental constituents by an argon plasma torch at about 10,000 degrees. The light that is emitted from the sample is then analyzed for wavelengths that are characteristic of certain elements. This instrument can measure twenty or more elements at a time, but is more susceptible to interferences from other elements present in the sample than AA analysis. It also requires more sophisticated processing of data than AA analysis.

X-ray Spectrometry - These instruments bombard the sample with x-rays then measure the wavelengths of the light emitted by the sample. The elemental constituents of solids can be measured by this technique, but it must be remembered that the x-ray absorption only occurs on the surface exposed to the x-rays, therefore the sample must be completely homogeneous for this technique to be used in any sort of a quantitative manner. While these instruments are very fast and can analyze up to 80 elements simultaneously,

their detection limits are usually much higher than those from AA or ICP-OES.

2.) Organics

Organic compounds usually must be transferred from the sample matrix, such as soil or water, to a solvent, such as hexane or methylene chloride, before analysis. This process is called "extraction" and can involve a variety of techniques, such as Soxhlet extractions and continuous liquid/liquid extractions. The exceptions are volatile compounds that can be removed from their sample matrix by bubbling gas through the sample, this technique is called "purge and trap". Four types of instruments are most commonly used for organics analyses:

Gas Chromatograph (GC) - This is the basic separation tool of environmental organic chemistry. After the sample has been extracted into a solvent, a portion of the solvent is injected into a heated port where the organic compounds are vaporized. The now gaseous compounds are carried by a gas, the "carrier gas", through a heated column which is either packed with materials or in which the inner walls are lined with a material that allows different compounds to travel through the column at different speeds. The time it takes for the compound to travel the length of the column is characteristic of that compound, this is called the "retention time" because it is the amount of time the compound is retained in the column.

GCs can be equipped with different detectors some of which are only sensitive to certain types of compounds others are more universal in their response to organic compounds. The most common detectors are: the flame ionization detector (FID) which is sensitive to almost all organic compounds, the electron capture detector (ECD) which is extremely sensitive to compounds containing chlorine such as PCBs and many pesticides and generally very insensitive to nonchlorinated compounds, and the Hall electrolytic conductivity detector (HECD) which is sensitive, though less so than an ECD, only to halogenated compounds, most of which are chlorinated.

The output of a GC is a chromatogram which is a strip chart of the detector response against time. When the detector responds to a particular compound a "peak" will be traced on the chart.

Gas Chromatograph/Mass Spectormeter (GC/MS) - This hybrid instrument is a GC with a mass spectrometer for a detector. After a particular compound has passed through the GC column, it is

shattered by impact with a high energy electron. This creates ions which are sorted by mass then detected. The graphic representation of the ratios of the different masses created is called a mass spectrum and it is characteristic of a particular compound. The mass spectrums can be compared by computer to a library of over 40,000 different organic compounds. The "goodness" of this match must be judged by a chemist with a certain amount of expertise before the compound can be considered identified.

High Pressure Liquid Chromatography (HPLC) - This technique is similar to gas chromatography but instead of a carrier gas carrying the compound through the column a liquid carrier is used. This eliminates the need for volatilizing the sample in a heated injector port which allows for the analysis of nonvolatile organic compounds, such as resins, and compounds that break apart when heated.

The drawback to HPLC compared to GC is the relative insensitivity of the detectors. The most common detector is the ultraviolet (UV) detector which passes UV light through the sample and records when certain selected wavelengths are absorbed.

Infrared Spectrometry (IR) - This technique is most suited for pure or relatively pure samples. A portion of the sample is placed in a beam of infrared light and the wavelengths that are absorbed are recorded as a spectrum which can be compared to standard reference spectra. This technique is very quick and straightforward but it usually lacks a separation technique. Therefore, if more than one compound is present in the sample the spectra for each compound is superimposed over the others making the spectra difficult to interpret.

3.) Pesticides/PCBs - These determinations are often considered separately from general organic compound analyses. They are usually performed on a GC with an ECD or a HECD detector. "Pesticides" is a misleading title for this type of analyses. Usually the determination is only performed for the eighteen chlorinated pesticides on the priority pollutant list, these have mostly been banned from use in the United States.

4.) Herbicides - This generic test title usually refers to determinations of the three most famous chlorophenoxy acid herbicides, 2,4-D, 2,4,5-T and silvex.

5.) Identification/Compositional - Depending upon the type of compounds present and their purity, the full range of analytical chemistry determinations may be required to identify all the "chemicals" present in a sample. Frequently, this may simply not be possible within the rational bounds of time and resources. Usually complete compositional analysis is not necessary, the major components can often be identified by class such as "hydrocarbons" instead of by individual compounds like "2-methyl-3-ethyltoluene", etc.

6.) Water quality parameters - These are traditional measures of how clean water is. Most NPDES permits rely on these measures as the criteria for measuring the water quality of streams, rivers and lakes. These are tests for classes of pollutants such as suspended solids or phosphate compounds that can cause excess biological growth. Most were developed before the GC and the GC/MS made possible the relatively easy identification of individual organic compounds in waters.

7.) Asbestos - Bulk asbestos is determined by polarized light microscopy. The fibers in the sample are counted under a microscope. The percentage of asbestos fibers compared to the total number of fibers is necessarily an estimate and depends upon the experience and skill of the analyst.

Testing Required by the Environmental Laws

Resource Conservation and Recovery Act (RCRA)

The basic RCRA question is "Is this hazardous?" If this is what you need to know, communicate this question to the laboratory personnel in those words. The scientist may know enough about RCRA to have no further need for any additional instructions. If he does not understand the RCRA regulations, he will probably reply with something like, "Which tests do you want performed?" This will put the burden back on the investigator to try to make an informed guess as to the RCRA characteristic or listing that might make the substance hazardous. If the investigator has a good idea of what type of violation may have occurred, he might be able to answer, "This is paint waste from abandoned drums. Therefore I need

flashpoint, then if it has a flashpoint less than 60°C, percent water, alcohols if it is aqueous, and an identification of the major components. If it doesn't have a flashpoint less than 60°C, check for the presence of chlorinated solvents by volatile organic analyses and the presence of lead or chromium by total metals analyses, then EP toxicity testing if the levels are high enough."

Ideally when laboratory personnel are familiar with this type of testing, the investigator should only have to say, "I think this is paint waste from abandoned drums, is it hazardous?" and the scientist would know which analyses to perform. What follows is a list of the chemical tests that need to be performed to prove the most common RCRA violations if a nonideal situation arises and the investigator is required to tell the scientist what to do.

D001 Characteristic of Ignitability

There are four categories of wastes that can be ignitable.

1.) "It is a liquid, other than an aqueous solution containing less than 24% alcohol by volume and has flash point less than 60°C as determined by a Pensky-Martens Closed Cup Tester, ... or a Setaflash Closed Cup Tester .... "

The methods to be used for the flashpoint testing are given for the Pensky-Martens and the Setaflash Testers. These are both methods from the American Society of Testing and Materials (ASTM). The Pensky-Martens procedure is time consuming and requires, at least, 40 ml of sample per analysis. The Setaflash procedure is much faster and only requires about 2 ml of sample per determination but is not applicable for more viscous samples.

Aside from the flashpoint testing itself several other procedures may be required to prove Ignitability. If the liquid is multiphased or the substance is one or more liquid phases over a solid phase it must be phase separated and each liquid phase tested separately.

Another test that may be required is one showing that the substance is a liquid. Often this does not require analytical proof if the substance flows freely and conforms to the shape of the container. If there is doubt about whether a sludge is a liquid or a solid there is a paint filter test given in the RCRA methods manual entitled "Test Methods for Evaluating Solid Waste" and commonly

referred to as "SW-846" which determines the presence of free liquids.

The other test or tests that might be required is to check for the alcohol exemption. To qualify for this exemption the substance must be aqueous, therefore Karl-Fischer moisture analyses can determine the percent water. If no water is present it is not an aqueous solution. If water is the major solvent present it may be necessary to determine that no "alcohol" is present. After review of the background documents it seems obvious that in this context "alcohol" means the compound ethanol and not nondrinkable alcohols such as methanol and isopropanol. In the instance that ethanol is present at under 24 percent and it is the only nonaqueous compound present, the substance may be exempt. However, if other compounds are also present in high enough concentrations to cause the substance to have a flashpoint of less than 60°C, it does not seem that the exemption should apply.

Once a liquid has been shown to exhibit the characteristic of Ignitability, the investigator and/or the prosecutor often requests that the major components that give the substance this characteristic be identified. If the substance is a uniform, single phased liquid this identification can be performed by a simple infrared (IR) determination. If it is a mixture a more time consuming gas chromatographic (GC) or gas chromatographic/mass spectral (GC/MS) determination may be required.

2.) "It is not a liquid and is capable ... of causing fire through friction, absorption of moisture or spontaneous chemical changes and, when ignited, burns so vigorously and persistently that it creates a hazard."

Substances such as matches met this definition. Two tests that might be required to prove this definition would be identification by such means as diffraction X-ray analysis and observation of the reaction when a small amount of the substance is placed in water. There is no required testing under this definition, however chemical expertise would probably be required.

3.) "It is an ignitable compressed gas as defined in 49CFR173.300 and as determined by the test methods described in that regulation ...."

49CFR173.300 states, "The term 'compressed gas' shall designate any material or mixture having in the container an absolute pressure exceeding 40 p.s.i. at 70°F or, ..., having an absolute pressure exceeding 104 p.s.i. at 130°F; or any liquid flammable material having a vapor pressure exceeding 40 p.s.i. absolute at 100°F as determined by ASTM Test D-323." It then goes on to define "flammable compressed gas" by referring to methods from the Bureau of Explosives.

Since these methods require specialized equipment to test pressurized gas cylinders this type of analysis would probably best be performed in a laboratory that specializes in DOT type of analysis.

4.) "It is an oxidizer as defined in 49CFR173.151."

49CFR173.151 states that, "An oxidizer ... is a substance such as a chlorate, permanganate, inorganic peroxide, or a nitrate, that yields oxygen readily to stimulate the combustion of organic matter."

Tests that might be required to prove this definition are mainly identification tests by instrumental or colormetric methods. No specific testing requirements are required.

D002 Characteristic of Corrosivity

There are two categories of wastes that can be corrosive.

1.) "It is aqueous and has a pH less than or equal to 2 or greater than or equal to 12.5, as determined by a pH meter using an EPA test method .... The EPA test method for pH is specified

Two determinations are required here. One, that it is "aqueous" and, two, the pH using a meter. There are two possible complications. One, is if the sample is oily or contains other organics. The oil or organic compounds can coat the electrode probe of the pH meter and make an adequate determination impossible. The other is if no or a small amount of water is present. The aqueous requirement is in the regulation because pH is a meaningless term except in an aqueous solution. Also, neither acid nor base will significantly corrode metal containers if an oxygen source such as water or methanol is not present to allow disassociation of the acid or base, but only a small amount of water need be present for corrosion to begin. Therefore, the presence of water as the most significant solvent present should be adequate to meet the "aqueous"

requirement of this regulation. The amount of water present can be determined by Karl Fischer titration.

2.) "It is a liquid and corrodes steel ... at a rate greater than 6.35 mm (0.25 inch) per year ... as determined by the test method ..."

This test requires weighing a steel coupon, placing it in the sample for a period of time, then reweighing it to see how much it has corroded. This regulation is how nonaqueous or oily samples can be classified as corrosive. One drawback to performing this test is that it can require as much as a gallon of sample.

D003 Characteristic of Reactivity

There are eight categories of waste that can be reactive.

1.) "It is normally unstable and readily undergoes violent change without detonating."

No tests will probably be necessary under this definition, however expert chemically opinion probably will be.

2.) "It reacts violently with water."

Identification by IR or a technically sophisticated technique like X-ray diffraction might be necessary under this definition along with an observation of the resulting reaction when a small portion of the sample is mixed with water.

3.) "It forms potentially explosive mixtures with water."

Like the first and second definitions of Reactivity, this definition will require mostly identification of the material.

4.) "When mixed with water, it generates toxic gases, vapors or fumes in a quantity sufficient to present a danger to human health or the environment."

Once again, this definition requires mostly identification of the material and expert opinions. However, in this case not only the expert opinion of a chemist is required, but perhaps also that of a toxicologist or a medical doctor.

5.) "It is a cyanide or sulfide bearing waste which, when exposed to pH conditions between 2 and 12.5, can generate toxic gases, vapors or fumes in a quantity sufficient to present a danger to human health or the environment."

The major difference between this definition and the fourth is that there are tests for the determination of releasable cyanide and releasable sulfide given in SW-846. These tests allow the determination of the amount of cyanide and sulfide which is released at pH 2. The guidance documents associated with reactivity state that if a waste contains over 500 mg/L of releasable hydrogen sulfide or 250 mg/L of releasable hydrogen cyanide, it would generate a quantity sufficient to present a danger to human health or the environment. This statement would probably need to be supported by the expert opinion of a toxicologist or a medical doctor.

6.) "It is capable of detonation or explosive reaction if it is subjected to a strong initiating source or if heated under confinement."

7.) "It is readily capable of detonation or explosive decomposition or reaction at standard temperature and pressure."

8.) "It is a forbidden explosive as defined in 49CFR173.51, or a Class A explosive as defined in 49CFR173.53 or a Class B explosive as defined in 49CFR173.88"

Probably the only testing needed to be performed under these three definitions is identification. Most laboratories will not be equipped to test for detonation or explosion. The Forbidden Explosives defined in 49CFR173.51 include such things as nitroglycerin, loaded firearms, fireworks containing yellow or white phosphorous and toy torpedoes. The Class A Explosives defined in 49CFR173.53 includes some blasting caps, some ammunition, and bombs. The Class B Explosives defined in 49CFR173.88 "as those explosives which in general function by rapid combustion rather than detonation and include some explosive devices such as special fireworks, flash powders, some pyrotechnic signal devices and liquid or solid propellant explosives which include some smokeless powders."

D004 through D043 Characteristics of EP Toxicity and TCLP Toxicity

The EP test was revised and renamed as the TCLP test on September 25, 1990. Waste from before that date are regulated by the EP test, after that date by the TCLP test. The EP test regulated 13 elements and pesticides, the TCLP expanded this list to 40 elements, pesticides and various organic compounds.

There is only one definition of EP Toxicity. It is "A solid waste exhibits the characteristic of EP toxicity if, using the test methods described in Appendix II ..., the extract from a representative sample of the waste contains any of the contaminants ... at a concentration equal to or greater than the respective value given .... Where the waste contains less than 0.5 percent filterable solids, the waste itself, after filtering, is considered to be the extract for the purposes of this section."

The EP Toxicity test is given in Appendix II of 40CFR261. This test like the TCLP is designed to mimic what happens to a waste in a landfill. It is designed to determine if toxic substances will leach from the landfill over a period of time. To determine this the waste is placed in a jar with 20 times its weight in water and the pH is adjusted to 5 (which is the approximate pH of rain) and shaken for 24 hours. After 24 hours the water is analyzed to determine if any of the listed toxic substances are present. This EP extract simulates leachate from a landfill in which wastes were buried.

The TCLP test enlarges the EP test by adding 26 organic compounds including some volatile compounds such as benzene. It also reduces the shaking time to 18 hours. To capture the volatile compounds a zero headspace extraction device must be used if the volatile organic compounds are to be determined since the jars used for EP extraction would allow the volatile compounds to escape. Though the pH of the extracting liquids are approximately the same for both extractions, the actual volume of acid is greater in the TCLP extraction and would tend to allow the TCLP to extract more metals out of certain matrices than the EP extraction.

It is important to note that liquid samples need not be EP or TCLP extracted since if they were placed in a landfill they themselves would become part of the leachate directly without relying on rain to carry them into the groundwater.

Once the wastes have been EP or TCLP extracted it is necessary to analyze the samples. Appendix II says the following about analytical procedures for EP determinations.

"The test methods for analyzing the extract are as follows:

1. For [all of the EP components]: Test Methods for the Evaluation of Solid Waste, Physical/Chemical Methods....

2. For all analyses, the methods of standard addition shall be used for quantification of species concentration."

The SW-846 methods that are mandated for EP extract analyses are constantly changing in order to conform to new scientific advances and the regulatory publishing schedule of the agency. Whoever analyzes these types of samples must be sure that the methods which have been officially accepted as adequate for these types of analyses are used. In general the elemental constituents are analyzed by atomic absorption spectrometry, the pesticides by electron capture/gas chromatography, and the organic compounds by gas chromatography/mass spectrometry.

For TCLP determinations, Appendix II says, "Compare the analyte concentrations in the TCLP extract with the levels identified in the appropriate regulations."

Therefore, no methods are mandated for TCLP determinations.

F-Listed Wastes from Non-specific Sources and K-Listed Wastes from Specific Sources

Many different types of analyses may be required to identify components that are similar to what would be expected in wastes from these sources. It is important to remember that chemical analyses by themselves usually can not prove that a waste is a F-listed or K-listed waste. For example F001 is defined as: "The following spent halogenated solvents used in degreasing...." The chemical analyses can prove that the various solvents are present but it is extremely difficult to prove that they are "spent" or that they have been used in "degreasing". The analyses may show that the waste is consistent with "spent" waste used in "degreasing", but the investigator will probably need additional evidence to prove it. This could be something as simple as the words "Spent degreasing solvent" written on the side of the drum from which the waste was taken or testimony from a witness who was present when the drum was filled.

P-Listed Acutely Hazardous and U-Listed Hazardous Commercial Chemical Products, Manufacturing Chemical Intermediates or Off-Specification Commercial Chemical Products or Manufacturing Chemical Intermediates

Analyses for these compounds can require almost all of the techniques available for chemical identification. The problem with trying to prove that a waste is P or U listed is found in a comment in 40CFR261.33. It states that these lists refer "to a chemical substance which is manufactured or formulated for commercial or manufacturing use which consists of the commercially pure grade of the chemical, any technical grades of the chemical that are produced or marketed, and all formulations in which the chemical is the sole active ingredient."

If a commercial grade of a substance is found, it is impossible for the chemical analyses alone to show that the substance is a waste. Obviously a drum of the commercial grade of a chemical has some commercial value. A second problem caused by this comment is the phrase "sole active ingredient". A commercial product containing only the hazardous substance chlordane is a potential U-listed waste while if it is mixed with the acutely hazardous heptachlor the waste is not regulated at all under the commercial chemical product listings (it might well be under TCLP however).

Recycling Exemption and Waste Oils

40CFR261.6 gives a list of exemption for recycling. It includes one of the most common environmental problems, used oil. It states the following:

"The following recyclable materials are not subject to the requirements of this section but are regulated under ...Parts 270 and 124 of this chapter:

(i) Recyclable materials ....

(ii) Hazardous wastes burned for energy recovery in boilers and industrial furnaces ....

(iii) Used oil that exhibits one or more of the characteristics of hazardous waste and is burned for energy recovery in boilers and industrial furnaces ....

(iv) Recyclable materials from which precious metals are reclaimed ....

(v) Spent lead-acid batteries that are being reclaimed

40CFR266 states that used oil may be used for energy recovery if it meets a set of specifications. These all limits on arsenic, cadmium, chromium, lead, flashpoint, and total halogens (this is a rebuttable presumption, if it can be shown that no significant amount of hazardous substances contribute to this level).

The investigator needs to alert the analyst when there is a possibility that the waste under investigation may qualify for this exemption. The oil can then be checked to determine if it meets these specifications through testing for the metals, flash point and total chlorine contain as well as solvent analysis if necessary.

Toxic Substances Control Act

The laboratory requirements of this law are mostly limited to the analyses of polychlorinated biphenyls (PCBs). PCBs are a family of chlorinated organic compounds which were widely used for many years in electrical and hydraulic equipment. The attribute of PCBs that make them an environmental threat is their extreme persistence. PCB analyses are usually performed by gas chromatography using an electron capture detector or a Hall electrolytic conductivity detector. Any item that contains over 50 mg/Kg of PCB could well be regulated (there are numerous exemptions and special situations) under 40CFR761.

TSCA contains many other provisions, but they do not usually require laboratory analyses.

Clean Water Act

Violations of two portions of the Clean Water Act often require laboratory support of criminal investigations. One portion is the Nation Pollution Discharge Elimination System (NPDES) and the other is the pretreatment requirements for discharge to Publicly Owned Treatment Works (POTWs).

Under NPDES any point source discharge into the waters of the United States requires a permit. Violations of this law can occur either when a suspect is discharging without a permit or is violating the limitations given in the permit. 40CFR122 states that, "The NPDES program requires permits for the discharge of `pollutants' from any 'point source' into 'waters of the United States.'" It then defines "pollutant" to mean "dredged spoil, solid waste, incinerator

residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical waste, biological materials, radioactive materials ..., heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."

This definition allows the laboratory to find nearly anything in an unpermitted discharge, almost everything the laboratory finds could be considered a pollutant.

Violations of permits are usually harder to prove. Most permits are written for water quality parameters such as oil and grease and total suspended solids. The methods that the permittees are required to use for these analyses are given in 40CFR136. It seems logical that these same methods should be used by laboratories trying to prove violations of the permits.

Pretreatment standards are discharge limits put on groups of industries, such as electroplaters of common metals, that discharge to POTWs. The limits are designed to ensure that the POTWs are allowed to function as intended and that the discharges of the POTWs themselves do not pollute the environment. There is one important nationally prohibited discharge that covers all of the groups of industries. In 40CFR403.5 under national pretreatment standards specific prohibitions discharges, it states that, "the following pollutants shall not be introduced into a POTW; but in no case Discharges with pH lower than 5.0, unless the works is specifically designed to accommodate such Discharge"; this is included in the regulations in order to prevent damage to sewer pipes and workers who have to come in contact with the discharge. Analytical methods for pretreatment violations are not specified in the regulations.

To: Micki Brunner
From: Bruce Johnson
Date: August 12, 1988

ISSUE

Whether it is necessary, in presenting evidence of laboratory results, for each testing scientist to testify or whether the supervising scientist only may testify summarizing his subordinates' results.

DISCUSSION

There is little case law directly on point on this issue, and what case law there is, is conflicting and unclear. The question as considered by the courts is whether the use of such hearsay evidence falls within a hearsay exception and whether it violates the sixth amendment confrontation clause.

In Ohio v. Roberts, 448 U.S. 56, (1980), the Supreme Court created a test to determine when the confrontation clause allows hearsay evidence to be heard. If a hearsay declarant is not present for cross-examination the prosecutor must show,(1) that the declarant is unavailable, and (2) that the evidence bears adequate indicia of reliability. Id, at 66. However if the utility of trial confrontation is remote, a demonstration of unavailability is not required. Id, at 65 n.7. The issue in Roberts was whether a declarant's prior testimony was admissible. In a later case, the Court reaffirmed that Roberts cannot be read to state that no out of court statement can be introduced without a showing that the declarant is unavailable. United States v. Inadi, 475 U.S. 387, 394 (1986).

The Ninth Circuit considered these cases in United States v. Bernard S., 795 F.2d 749 (9th Cir. 1986), when it addressed the issue of whether in a trial for assault, the victims medical records may be admitted without the Doctor who prepared them testifying. The court first found that this evidence was hearsay which fit into the business records exception of the hearsay rule. It left unresolved the issue of whether the unavailability test of Roberts applies to hearsay statements admitted under the business records exception. Since this evidence was only of peripheral significance, a showing of unavailability was not required.

In United States v. DeWater, 846 F.2d 528 (9th Cir. 1988), the court considered whether the admission of an intoxilyzer test violated defendant's right to confront an adverse witness. Finding that "the performance of the tests is clearly within the regularly conducted business of the police department," the court held that the evidence fit under the public records and reports exception to the hearsay rule. F.R.E. DeWater, 846 F.2d at 530. Citing Roberts, the court held that when the evidence falls within a firmly rooted hearsay exception, the court need not consider the reliability prong of confrontation clause issue.

DeWater and Bernard S. both concerned the admission of scientific results into trial without the person who conducted the tests testifying. DeWater concerned intoxilyzer tests done by police department personnel. In Bernard S. it was medical tests performed by a physician and presented into evidence by the custodian of records of the hospital. Following these rulings it would seem that laboratory tests done by government labs are admissible under the public records and reports exception to the hearsay rule; or if these tests are done by a commercial laboratory they fall into the business records exception to the hearsay rule.

> "Justification for the public records and reports exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently or the record. Further justification lies in the reliability factors underlying records of regularly conducted activities generally."

DeWater, 846 F.2d at 530. See also, United States v. Wilmer, 799 F.2d 495 (9th Cir. 1986).

Support for the business record exception is found in United States v. Bell, 785 F.2d 640 (8th Cir. 1986). There The Eighth Circuit found admissible a lab report of defendant's urinalysis even though the testing chemists were not present. The report was considered a regular business report of a company whose business it is to conduct such tests, and as such was reliable. The court weighed, in making its decision, the fact that the laboratory and chemists were in California while the hearing was in Arkansas.

The best case for support of the use of a supervising scientist is Reardon v. Manson, 806 F.2d 39 (2nd Cir. 1986). In this case defendants were accused of marijuana and cocaine offenses. Evidence of the nature of the drugs was introduced by a supervising toxicologist of the Connecticut Department of Health. The testing chemists did not testify. The court, citing Roberts and Inadi, held that the confrontation clause was not violated by the prosecution's failure to produce the hearsay declarants (the testing chemists) for cross-examination because the utility of trial confrontation would be remote and of little value to the jury or defendant, and because sufficient indicia of reliability were present.

The court found the utility of trial confrontation to be remote because "the production of the chemist who performed the test rarely leads to any admissions helpful to the party challenging the evidence." Reardon, 806 F.2d at 41, 42.

Turning to the issue of the reliability of the evidence, the court stated that given that the chemists informed the supervisor immediately of the test results and that they had used standard

testing procedures, there was no realistic possibility that their statements were based upon faulty recollection. Moreover, since they had no motive to jeopardize their careers by falsifying results, and since the supervisor directly checked their results the evidence was reliable.

CONCLUSION

It is not clear yet whether in The Ninth Circuit, a supervising scientist may testify in place of his subordinates who actually performed the laboratory tests. Lab reports may be considered business records or public records, depending on what type of agency performs the tests, and may fit into the business and public record exceptions to the hearsay rule. The DeWater court held that when the evidence falls into such exceptions it passes the confrontation test. After DeWater, it seems that laboratory test results may be presented by the lab supervisor without fear of violating the confrontation clause.

The Ninth Circuit may be persuaded by The Second Circuit's ruling in Reardon v. Manson, supra, that such testimony does not violate the confrontation clause because there is little utility in having the actual testing chemist testify, as long as the evidence is reliable. The reliability can be shown if; standard testing procedures are use, the supervisor is informed immediately of the test results, and the supervisor checks the test results.

Salt Lake City Seminar

SUGGESTED QUESTIONS TO QUALIFY CHEMIST

Q. Mr. Slovinsky, where are you currently employed?

Q. What is your position there.

Q. Please describe your educational background.

Q. Have you received any additional training or taken any additional courses?

Q. Can you describe your professional experience since you received your degree? (i.e. other jobs)

Q. Do you belong to any professional societies?

Q. Have you ever written and had published any literature on the subject of your specialty?

Q. Have you received any awards or professional honors?

Q. During the course of your professional career, have you been called upon from time to time to perform analysis on samples using gas chromatography and mass spectroscopy? **[or have you analyzed samples to determine their flash point/corrosivity/ etc.]**

Q. Approximately how many times have you performed those types of analyses?

Q. During the course of your career, have you been called up to analyze samples of suspected hazardous waste or samples suspected of containing hazardous constituents?

Q. Approximately how many times?

Q. Have you previously had occasion to testify in court as an expert in the field of analytical chemistry?

Q. On how many occasions have you so testified?

Q. Mr. Slovinsky, can you describe briefly or explain briefly what gas chromatography is ? **[or the specific analytical procedure used in your case]**

A. Gas chromatography is a technique that is used to separate chemicals for analysis.

Q. What about mass spectroscopy?

A. Mass spectroscopy is a technique that is used to

detect the chemicals that come out of the gas chromatograph and to provide information about the structure. In other words, a fingerprint of the particular chemical that comes out of the gas chromatograph.

Q. Are these analytical procedures you have described generally accepted as by experts in the field of analytical chemistry as reliable?

YOUR HONOR, I OFFER MR. SLOVINSKY AS AN EXPERT IN THE FIELD OF ANALYTICAL CHEMISTRY WITH A SPECIALTY IN THE FIELD OF HAZARDOUS WASTE ANALYSIS.

SUGGESTED QUESTIONS - INTRODUCTION OF ANALYTICAL REPORT OF DATA

Q. I would like to direct your attention to Government's Exhibits 147, 148 and 149 for identification - Do you recognize these?

A. Yes, I do. These are three sets of analysis reports that I wrote.

Q. Are these the results that relate to the samples that were taken and identified in Government's Exhibit 138 -- the chain of custody form?

A. Yes, they are.

Q. Can you tell the members of the jury what types of analysis was performed on these samples?

A. Any liquid portions of the samples were analyzed for pH. We also analyzed the samples for organic constituents by gas chromatography and mass spectrometry.

Q. Are the analytical tests you used for these samples generally relied on by the scientific community as reliable methods for determining the organic constituents of a material?

A. Yes.

Q. Your Honor, I move government exhibits 147, 148 & 149 into evidence.

Q. Mr. Slovinsky, specifically with respect to Government's Exhibit 147, I would like to direct your attention to the table one chart. Can you tell us what table one is and what it refers to?

A. Table one is a summation of the physical description and some of the analytical findings we obtained on the samples.

Q. Now, with respect to table two of the same exhibit, what is table two?

A. Table two is a listing of the volatile organic constituent results that we obtained on these samples.

Q. And with respect to sample number XXX which was taken from sump number 1G, can you tell us what the sample looked like when you got it?

A. My physical description as contained in the report was that it was essentially a two layered system. In other words, we had a top layer of a liquid and a lower layer of a solid and the top layer of the liquid appeared to be a red opaque non-viscous, meaning it wasn't any thicker than water. And the bottom layer was a dark brown wet powder.

Q. For sump 1G, can you identify the compounds that you found as a result of your volatile organic analysis?

A. Yes, I can. Acetone; chlorobenzene... etc.
[He lists the chemicals which are specifically identified in the indictment]

SUGGESTED QUESTIONS FOR USE OF SUMMARY CHART WITH CHEMIST

Q. I would like to show you Government Exhibit 151 for identification -- can you identify this?

A. This is a summary chart of the wastes that are listed in count three of the indictment.

Q. Did you participate in the preparation of this chart?

A. Yes I did - I reviewed the laboratory analysis which have been introduced as exhibits 147, 148, 149 and 150 and determined which of the compounds are regulated as RCRA wastes and what type of hazardous waste they are. This exhibit summarizes that data and also depicts what type of hazardous waste the sample was found to contain.

Q. In reference to determining the hazardous waste type, can you tell us what type of reference materials you used?

A. Basically, I used the federal regulations for RCRA to determine that.

Q. Mr. Slovinsky, with reference to the second column, the hazardous waste type, can you tell us what it means when you use the term "listed?"

A. Yes. These are compounds that are numerically listed in alphabetical order in the regulations.

Q. Are you also familiar with the "F" listed wastes in the regulations?

A. Yes.

Q. What are F listed wastes?

A. Actually there are a list of hazardous wastes from nonspecific sources that are designated by the regulations, in the RCRA regulations.

Q. With respect to the term "F 002 spent halogenated solvent" do you know what that refers to?

A. Halogenated solvents in any type of industrial process where the material is used, it may be no longer useable for the original intent and so it then is no longer useable and must be discarded.

Q. And what about the terms, when you use the term corrosive, reactive, toxic or ignitable, what do those refer to?

A. These refer to characteristics as defined by the regulations, and they would fall under one of the four characteristics that you mentioned.

Q. Could you explain to us what a corrosive waste would be?

A. A corrosive waste would be a material that would have a pH greater than 12.5 or less than 2. Less than 2 would mean that it would be a very acidic compound. Greater than 12.5 would mean that it would be a very basic compound.

Q. What about the term reactive, what does that mean?

A. Generally reactive refers to compounds that will react violently with water. It can contain sulfide or cyanide bearing wastes or are spontaneously combustible or can be readily detonated.

Q. And the term EP toxic?

A. EP toxic is a specific reference to a test method that has been designed to determine if certain chemicals will leach. That is, enter ground water when they are subjected to normal conditions associated with ground water. In other words, a pollutant that would easily become, if it were placed in contact with well water, ground water, surface water, would go into solution and contaminate the water.

Q. Now, what about ignitability, what does that refer to?

A. Ignitability refers to the flammability properties of chemicals. By definition, that would mean any chemical that would flash at a temperature less than 140 degrees Fahrenheit. And by flash I mean if it were subjected to a source of ignition that you would have a flash or a flame from that particular compound.

Q. When you say a source of ignition, can you give us examples of what would be a source?

A. Matches, cigarettes, anything, lightning perhaps even.

Q. Your Honor, I move Government Exhibit 151 into evidence.

SUGGESTED QUESTIONS TO USE WHEN YOU DON'T HAVE A PHYSICAL SAMPLE BUT DO HAVE OTHER EVIDENCE THAT A PARTICULAR CHEMICAL WAS TREATED/STORED/ DISPOSED.

Q. With respect to the characteristic waste that are identified in count two, how did you determine whether those waste were in fact characteristic, what did you use?

A. The basic way that these were determined to be characteristic was to consult literature to determine that these particular compounds would indeed from the literature references exhibit these characteristics.

Q. Can you tell us what references you used?

A. The references that I used were common references that we use in our laboratory every day and most other chemists or libraries would use to reference the properties of chemicals.

One of them would be the Merck Index.

Another one would be the CHRIS manual, the Chemical Hazard Response Information System manual by the Coast Guard.

And a third that we used was a computerized data base. And that data base is from the national library of medicine and it's the Hazardous Substances Data Bank from that particular data base.

Q. Are these references that you just referred to routinely and commonly accepted in your profession as reliable sources?

A. Yes, they are.

Glossary

Accuracy - A Quality Assurance term. It means the extent to which a measured value differs from the true value. The best practical measure of accuracy is usually a matrix spike. If the recovery of a matrix spike of phenol, for example, is 30% that means that only 30% of a certain amount of phenol which was added to the sample was detected. The inference can be made from this that the value measured by the original test is also only 30% of the true value.

Acid - A chemical substance that in water will disassociate to form hydrogen ions. If an aqueous solution has a pH less than 7, it is acidic. If the pH of an aqueous waste is less than 2 it is corrosive under RCRA.

Aliphatic Compounds - Hydrocarbon compounds which do not contain ringed aromatic structures such as benzene rings.

Aqueous - Pertaining to, similar to, containing, or dissolved in water.

Aroclor - Monsanto's trade name for PCB containing products, see Polychlorinated Biphenyls.

Aromatic - An organic chemical that contains cyclic structures called conjugated rings. Six carbon benzene rings are the most common. Examples are benzene itself, toluene, naphthalene and benzo(a)pyrene.

Asbestos - A group of magnesium silicate minerals which occur in fibrous form. It has been widely used as insulation in building materials. The inhalation of asbestos has been proven to be the cause of the lung disease asbestosis as well as the cause of a particular type of cancer, mesothelioma. Under CERCLA it has a reportable quantity of one pound if it is friable, which means that it is capable of being crushed by the force that can be exerted by hand.

Atom - The basic building blocks of all compounds. It is the smallest division of a substance that can be achieved without nuclear reactions. Atoms are composed of protons, neutrons and electrons. All atoms of one element have the same number of protons but may vary in weight due to different numbers of neutrons, for instance a

chlorine atom always has 17 protons but may have 18 or 20 neutrons for an overall molecular weight of 35 or 37.

Atomic Absorption Spectrometer - A common laboratory instrument that measures the concentration of a metal by quantitating the amounts of characteristic wavelengths of light absorbed by a sample.

Base - A chemical substance that will react with an acid to form a salt and water. If an aqueous solution has a pH greater than 7, it is basic. If the pH of an aqueous waste is greater than 12.5, it is corrosive under RCRA.

Bias - A quality assurance term. Any systematic factor that affects accuracy. For instance, if acetone is detected in all samples for a particular project including the blanks, the results from the project will have a positive bias for acetone unless they are corrected appropriately. This is a common situation for many of the volatile solvents such as acetone and methylene chloride that are often used in laboratories.

Biochemical Oxygen Demand (BOD) - A water quality parameter. It is a test designed to measure the quality of dissolved oxygen required to stabilize the decomposable organic matter in a sample by aerobic biochemical action over five days. The results are given in mg/liter of oxygen. This is one of the parameters most often found in NPDES permits. This test is highly dependent upon the skill and experience of the operator. Divergent results on the same samples can easily be obtained even by an experienced analyst.

Blanks - Quality assurance measures. Blanks are used to find bias in sample analyses. There are several different kinds of blanks, each one designed to detect bias at a different point in the analysis. Bottle blanks are empty sample bottles from the same lot or lots used for sample collection, they detect any contamination from the bottles. Equipment blanks are the final rinsates from the equipment cleaning process in the field, they detect potential cross contamination between samples. Trip blanks are usually only used for volatile organics analyses. They are VOA sample bottles filled with organics free water in the laboratory, shipped to the field, then returned to the laboratory in the same container as the VOA samples. They are designed to show if the VOA samples could have become contaminated during shipping. Field blank is an imprecise term that is often used for either bottle, equipment or trip blanks. Laboratory

or analytical blanks are analyses which use the exact same reagents and procedures as the sample analyses but without any sample present. They check for any contamination that may have been introduced in the laboratory. Instrument blanks are analyses performed on an instrument without introducing any sample, they are designed to show if the instrument is introducing any bias into the measurement process.

B/N/A (Base/Neutral/Acid) - The set of compounds that are targets for the Clean Water Act Method 625 and the Resources Conservation and Recovery Act SW-836 Method 8250.

Carcinogen - Any agent that produces cancer.

Chlorinated Hydrocarbons - Any organic compound composed of carbon, hydrogen and chlorine. The term is usually used for semi-volatile chlorinated pesticides, such as DDT, and PCBs.

Chlorinated Solvents - One of the most common classes of hazardous wastes. Often used in degreasing and dry cleaning operations. The most common are: tetrachloroethene also called tetrachloroethylene, perchloroethene, or perc; trichlroethene also called trichloroethylene or TCE; and 1,1,1-trichloroethane also called TCA or methylchloroform.

Compound - A substance consisting of atoms and ions of two or more different elements in definite proportions, and usually having properties unlike those of its constituent elements.

Dry Weight - Environmental soil and sediment sample results can either be reported on an as received (wet weight) basis or on the basis of the sample weight assuming no water was present in the sample (dry weight). Usually environmental samples are reported on a dry weight basis because the amount of water in an environmental sample is heavily dependent upon the climatic conditions on the day of sampling. Theoretically, a dry weight basis result should be the same whether the sample was taken during a thunder storm or in the middle of a drought. Wet weight results will vary with when and how the samples were taken.

Element - A substance composed of atoms having an identical number of protons.

EP Toxicity - Extraction Procedure Toxicity. One of the four characteristic tests under RCRA until it was replaced by the TCLP Toxicity test on September 25, 1990. It is designed to simulate what happens to an industrial waste when it is buried in a landfill. It is designed to designate a waste as hazardous if liquid that would be generated as rain water passes over the waste, called leachate, would contain toxic levels of certain chemicals. This is done by first filtering the sample to separate it into liquid and solid portions. In a landfill the liquid would drain directly into the ground water, so the concentrations of the chemicals in the liquid is measured directly for comparison to the toxic levels. The solid portion is shaken with 20 times its weight in dilute acetic acid. This acetic acid extract is then analyzed for the toxic levels of the chemicals.

Extract - The media that contains the compounds of interest after they have been removed from the original sample matrix. For example B/N/A compounds are extracted from water samples with methylene chloride, at the end of the analysis the methylene chloride that contains the target compounds is the extract. The extract media must be compatible with the instrumentation to be used for the analyses.

Flashpoint - The temperature at which a flame spreads over the surface of a liquid sample. If a sample of a waste has a flashpoint of less than 60°Centigrade (140°Ferenheit), the waste may have the RCRA characteristic of Ignitability.

Gas Chromatograph - The basic instrument used for the separation of organic compounds from each other in environmental chemistry. Compounds are separated in a column and can be identified by the length of time they take to pass through the column, the retention time. The output is a series of peaks which occur when each compound is detected.

Gas Chromatograph/Mass Spectrometer - A gas chromatograph with a specialized detector that breaks up the molecules of organic compounds and identifies the compounds by the patterns of ions that are created.

Halogens - Five very reactive, closely related elements; fluorine, chlorine, bromine, iodine, and astatine.

Holding Times - The amount of time that the sample will have the same characteristic as when it was sampled. After the holding time has passed the sample may in some way change such that the concentration of the analyte is different than when the sample was taken.

Hydrocarbons - Compounds that contain only hydrogen and carbon atoms. Oil is mostly hydrocarbons.

Inductively Coupled Argon Plasma Optical Emissions Spectrometer (ICP-OES) - An analytical instrument capable of quantitating the concentrations of over twenty different elements per analysis by measuring the light given off by the sample while it is being burned in an argon plasma torch.

Infrared Spectrometer - An instrument that measures the amount of infrared light absorbed by a sample. It gives a characteristic pattern, called a spectrum, which may be used to identify percentage levels of fairly pure compounds.

Inorganic Chemistry - The chemistry of all of the elements except carbon when it is involved with organic life or the products of organic life.

Ions - Atoms or molecules that carry a charge. For instance water is made up of the union of an atom of hydrogen with a positive charge, a hydrogen ion, and a molecule of oxygen and hydrogen with a negative charge, a hydroxide ion. Common table salt contains a positive sodium ion and a negative chloride ion.

Isomers - Compounds that have the same ratio of elements but are arranged differently. For instance 1,2-dichlorobenzene is an isomer of 1,4-dichlorobenzene. They can have very different chemical properties and degrees of toxicity even though both have six carbon, four hydrogen and two chlorine atoms.

Isotopes - Atoms of the same element that have the same number of protons but different numbers of neutrons. For instance, Uranium which always has 92 protons may have 146 neutrons for a molecular weight of 238 or 143 neutrons for a molecular weight of 235. Uranium 235 is much more radioactive than the 238 isotope.

Milligrams/Kilogram (mg/Kg) or Milligrams/Liter (mg/L) - A mg/Kg is always a part per million, a mg/L is a part per million if the matrix is predominately water. A thousand parts per million is the same as 0.1% by weight, one part per million is the same as 0.0001% by weight. One part per million (mg/Kg or mg/L) is the same as one thousand parts per billion (ug/Kg or ug/L). A ug/g is the same as a mg/Kg.

Microgram/Kilogram (ug/Kg) or Microgram/Liter (ug/L) - A ug/Kg is always a part per billion, a ug/L is a part per billion if the matrix is predominately water. One part per billion is 0.0000001% by weight. A thousand parts per billion is the same as one part per million.

Molecule - The smallest division of a compound. A grouping of atoms that are bonded together to make up a specific chemical. For instance, vinyl chloride is a chemical that has molecules consisting of six atoms, two of carbon, three of hydrogen and one of chlorine.

NPDES (National Pollution Discharge Elimination System) - The permit system set up under the Clean Water Act.

Organic Chemistry - The chemistry of carbon compounds. Usually those compounds from living or once living organisms. These compounds include petroleum products and the plastics and polymers made from them.

PCBs (Polychlorinated Biphenyls) - A class of extremely stable chemicals widely used in the electrical industry. A biphenyl molecule is two joined benzene rings, from one to ten atoms of chlorine can be present on the ring structures to produce PCBs. Production of PCBs is now banned in the United States, but over the last sixty years they have they have spread throughout the environment of the entire planet. All PCBs manufactured in the United States were produced by Monsanto and sold under the trade name of Aroclor. Other manufactures used Aroclors in their products which were then resold under various trade names such as Pyranol and Turbinol. PCB's are regulated under the Toxic Substances Control Act (TSCA)

Pesticides - A compound designed to be toxic to a pest including insects (insecticides), plants (herbicides), fungi (fungicides) and rodents (rodenticides). Pesticides are regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) and under the

Resources Conservation and Recovery Act (RCRA). Many insecticides and rodenticides which are designed to kill various animals are extremely toxic to both human and other nontarget animals.

pH - A scale that expresses the concentration of hydrogen ions in a water sample. It is an inverted logarithmic scale which means that the higher the pH the lower the concentration of hydrogen ions and that at a pH of 3 there are 10 times as many hydrogen ions present as at a pH of 4. A pH of 7 is neutral, at that concentration of hydrogen ions there are exactly enough hydroxide ions present to balance the number of hydrogen ions. A pH greater than 7 means that the sample is alkaline or basic and that there are more hydroxide ions present than hydrogen ions, a pH of less than 7 means that the sample is acidic and the number of hydrogen ions is greater than the number of hydroxide ions.

PNA (Polynuclear Aromatics) - Molecules that are made up of two or more fused benzene rings. Often found in coal tars, fuel oils and cigarette smoke. Some are carcinogens.

Precision - A quality assurance term. It is an expression of how close the measured values are to each other. The best practical measure of precision is field and laboratory replicates. From three or more replicates the standard deviation of a measurement can be calculated.

Quality Assurance - The overall program by which a laboratory produces data of a known quality. Quality control must be a part of this program.

Quality Control - The specific steps that are taken as a part of a quality assurance program to measure the accuracy, precision and bias associated with any data.

Solids - A series of determinations to determine water quality. They include suspended, dissolved and settleable solids. The determination for suspended solids is often in NPDES permits.

Solvents - Chemicals, usually organic compounds, used to dissolve other chemicals. Some common paint solvents are methyl ethyl ketone (MEK), petroleum spirits, and various alcohols. Some common degreasing solvents are the chlorinated solvents, toluene and acetone.

Spectrometer - A scientific instrument used to measure a spectrum, usually of light or mass.

SW-846 - The RCRA methods manual. It's full name is "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods". There are three editions.

Standard Deviation - A measurement of quality control. It is a measure of how scattered a set of results are around the average.

TCLP Toxicity (Total Contaminate Leaching Procedure Toxicity) - The determination which replaced and enlarged the EP Toxicity Test as of September 25, 1990. It increased the number of compounds regulated. See EP Toxicity.

Volatile Organic Compounds (VOAs) - The target set of chemicals for the CWA Method 624 and the RCRA SW-846 Method 8240.

Wet Weight - See Dry Weight

V. Enforcement and Related Environmental Cases Addressing Technical Issues

A. Sampling Issues

1. RCRA Cases

   a. *F & K Plating Co. v. Thomas* , Docket No. 87-2425-R (W.D. Okla, April 17, 1989) (unpublished opinion) (Upheld *In re F&K Plating Co.*, Docket No. RCRA VI-427-H, Appeal No. 86-1A (January 13, 1988), 1988 RCRA LEXIS 17. Three samples held to be sufficient to establish EP Toxicity even though SW-846 guidance was not followed and despite the absence of a sampling plan).

2. TSCA Cases

   a. *Yaffe Iron & Metal Co., Inc. v. EPA* 774 F. 2d 1008 (10th Cir. 1985) (Upheld finding of Agency that samples were representative for purpose of determining whether oil in tanks was a PCB mixture (i.e. greater 500 ppm concentration). See *In re Yaffe Iron & Metal Co., Inc.*, TSCA Docket No. VI-IC (March 27, 1981) *aff'd* TSCA Appeal No. 81-2 (August 9, 1982)).

   b. *In re Boliden Metech*, Docket No. TSCA-I-87-1097 (June 20, 1989), 1989 TSCA LEXIS 3, *aff'd*, TSCA Appeal No. 89-3, 1990 TSCA LEXIS 16 (Failure to strictly adhere to sample preservation and handling guidelines (e.g. refrigeration and holding times) excused because PCB concentrations were well over regulatory threshold.)

   c. *In re Robert Ross & Sons, Inc.*, Docket No. TSCA-V-C-008 (February 1, 1982) *aff'd* on other grounds, TSCA Appeal No. 82-4 (April 4, 1984) 1984 TSCA LEXIS 27, (ALJ found that PCB samples were not representative and held for respondent. On appeal the Judicial Officer found that representative samples were not required, yet was unable to find respondent liable because sample analysis was poorly documented and not credible.)

3. CERCLA Cases

a. *Kent County v U.S. EPA*, 963 F.2d 391 (D.C. Cir. 1992) (Sampling of monitoring well could not be used as basis for decision to list site on National Priorities List because procedures were not followed and this failure materially affected the analytical results).

b. *Eagle - Pitcher Industries v. U.S. EPA*, 822 F.2d 132 (D.C. Cir. 1987) (Use of drinking water standards in lieu of taking background samples to determine arsenic concentrations upheld in area where significant mining activity had tainted groundwater).

B. Analytical Issues

1. RCRA Cases

a. *F & K Plating Co. v. Thomas, supra,* (Court upheld EPA, finding that there was "substantial evidence" showing that analysis was in accordance with EP toxicity procedures. This result was reached despite minor deviations from the EP Method.)

b. *In re Hoechst Celanese Corp.*, RCRA Permit No. SCD 097631691, RCRA Appeal No. 87-13 (February 28, 1989), 1989 RCRA LEXIS 3 (Administrator held, in permit appeal, that Region IV could not require use of SW-846 test methods without explanation as to why those methods were necessary. Opinion recognizes that SW-846 is merely a guidance document for most purposes and not "an inflexible regulatory requirement").

2. Other Cases

a. *Donner Hanna Coke Corp v. Costle,* 464 F Supp. 1295 (W.D. NY 1979) EPA denied access to facility for inspection under Clean Air Act denied because test method proposed by Agency, for use at this facility to measure opacity, differed substantially from promulgated method).

b. *In re Boliden Metech, supra*, (Validity of EPA test procedure upheld even though it may not be the "best available technique").

c. *In re Robert Ross & Sons, Inc., supra*, (EPA analysis of PCB's upheld initially, but on appeal analysis was deemed not credible).

VI. Recent RCRA Cases Supported by NEIC at Trial

Since all of these cases were tried, defendants typically challenged every aspect of our technical evidence until it became obvious that continuing was futile or even self-defeating. As a result, most cases involved numerous issues related to sampling and analysis, as well as the interpretation of the analytical data. Other distinguishing features of these cases are described parenthetically. The cases involve the improper management of hazardous wastes (treatment, storage, disposal or transportation) and are all criminal except for the Interstate Lead case.

a. U.S. V. Brittingham (N.D. Tex., 1993) (Involved disposal of waste generated by large tile manufacturer/ EP Toxic for lead).

b. U.S. v. Goldman (N.D.N.Y. 1992) (Creosote waste from railroad tie treatment).

c. U.S. v. Lopez (S.D. Cal. 1992) (Spent solvents).

d. U.S. v. Ekotek (D. Utah 1992) (Waste "recycler" convicted RCRA counts based upon mismanagement of waste "drips" from natural gas pipelines as well as solvents and other wastes).

e. U.S. v. Bird (D. Utah 1992) (EP Toxic wastes (arsenic, cadmium) from gallium recovery operation).

f. U.S. v. Goodner (W.D. Ark. 1991) (Spent solvents, paint waste from aircraft refinisher).

g. U.S. v. St. Angelo (D. Md. 1991) (Spent solvents, paint waste from furniture refinisher).

h. U.S. v. Sanchez Enterprises, Inc. (E.D. Tenn. 1991) (Spent solvents, paint waste, chromic acid wastes and wastewater sludges from metal fabricator).

i. U.S. v. Enviro-Analysts, Inc. (E.D. Wisc. 1991) (Laboratory fraud case based, in substantial part, upon defendants actions which caused clients to violate RCRA by submitting false reports).

j. U.S. v. Speach (C.D. Cal. 1990) (Electroplating waste).

k. U.S. v. Dee (D. Md. 1989) (Civilian chemical engineers involved in the research and development of exotic weapons for military applications convicted of improperly managing solvent wastes, etc.).

l. U.S. v. Interstate Lead Co. (N.D. Ala., 1988) (Data from numerous sources, including the generator/defendant, indicated slag from smelter was EP Toxic for lead. Defendant challenged all data, including its own, asserting that the samples taken were not representative. Expert testimony, based in part upon a statistical analysis, was required to establish samples were representative for purpose of analyzing EP Toxicity).

m. U.S. v. Protex (D. Colo. 1987) (Wide range of wastes generated by drum recycling operations as a part of a concrete construction materials manufacturing business. Knowing endangerment conviction was obtained).

How to Obtain and Interpret Corporate Financial Data.

July 29, 1993 Presentation

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Corporate Finance Unit

I. ***Introduction***

A. Function
B. Staff Expertise
C. Previous ENR Assistance
D. How To Obtain Assistance
contact: Gerald Hellerman, Chief
Corporate Finance Unit
202-307-5791

II. ***Types of Assistance***

Analysis of financial and corporate issues including:

A. Ability to Pay Analyses
1. Determine amount (while maintaining viability).
2. Structure payments, applying interest.
3. Suggest sources of funds for penalties, etc.
4. Assist in negotiating and wording agreement.

B. Corporate Control Analysis
"Piercing the Corporate Veil"
1. Assist in discovery
- interrogatories
- document requests
- depositions
- interviews
- expert testimony.

C. Analysis of Bankruptcy Reorganization Plans.

III. ***Information Needed***

A. Public Information Sources. (See Attachment.)

B. Company Document Requests. (See Attachment.)

C. Interviews, Depositions. (See Attachment.)

D. Financial Statement of Debtor Forms.
(See Attachment.)

IV. *Other Issues*

A. Probation Office Reports.

B. Tax Deductibility.

*V. **Summary***

Corporate Finance is here to provide support through the following ways:

A. Conducting financial analyses.
B. Developing interrogatories and document requests.
C. Reviewing and analyzing financial documents.
D. Assisting and conducting financial interviews.
E. Assistance during litigation involving financial issues. Includes:
   - attendance at depositions,
   - writing affidavits, and
   - expert testimony.

SELECTED SOURCES OF CORPORATE INFORMATION

SOURCES OF INFORMATION

1. **Dun & Bradstreet Report -**
   Call Antitrust librarian or EPA.
   Available for public and private companies. Must have the full name of the company and the address. Provides:
   a. Recent events.
   b. Summary of financial information.
   c. List of officers and directors with some personal background.
   d. Ownership information.
   e. Business summary.

2. **Moody's Industrial Reports -**
   Available only for publicly-owned companies that are traded over the New York or American Exchanges or Over the Counter. Provides:
   a. Business Summary.
   b. Financial Statements.
   c. Major Developments.
   d. Officers and directors.
   e. State of incorporation.

   Standard & Poor's has similar publications. Check Antitrust library and Main Justice library.

3. **SEC Filings** - including annual reports (10K's), quarterly reports (10Q's). Available only for publicly-owned companies. Provides:
   a. Detailed business description.
   b. Detailed financial information including financial statements.
   c. Names and locations of subsidiaries and divisions.
   d. Descriptions of acquisitions and divestitures.

   SEC filings can be obtained from Lexis/Nexis and from the Securities and Exchange Commission through the public reference room or in writing at the following address:

   Mr. Vernon Miller, Branch Chief
   Records Management
   Room 1C15
   Securities and Exchange Commission
   450 Fifth Street, N.W.
   Washington, D.C. 20549.
   202-272-7200
   Fax 202-272-7050

4. **State and local filings** - such as incorporation papers, name changes, liquidation filings, annual reports, amendments to any filings. Call the Secretary of State's office, corporation records department. Most provide copies free of charge but if the copy is to be certified, a nominal fee is charged. Provides:
   a. Dates of incorporation.
   b. Brief business description.
   c. Officers and directors.
   d. May give limited financial information.

5. **Public Data Bases -**

   a. Compustat Data Base - Provides financial information on publicly-owned companies.
      Corporate Finance has access to this data base.

   b. Lexis/Nexis - Can obtain SEC filings, brokers' reports, some state filings on companies.

FINANCIAL VIABILITY ANALYSIS

SAMPLE DOCUMENT REQUEST

Financial Viability Requests for Production of Documents

1. Provide audited financial statements for 19xx through 19xx (unaudited for year-to-date if audited not available). Such statements are to include all accompanying footnotes, accounting explanations and supporting schedules (schedule of general and administrative expenses, schedule of corporate overhead expense, schedule of operating expenses), if available.

2. Provide copies of federal tax returns for 19xx through 19xx.

3. Provide copies of any recent market appraisals and/or valuation studies (including liquidation studies) performed on any or all assets of XYZ Co. Include insurance amounts for each asset insured.

4. Provide:
   a. schedule of outstanding uncompleted contracts, listing total dollar amount of each, dollar amount or percentage billed, and estimated time of completion.
   b. most recent aging of receivables report.
   c. most recent aging of payables report.
   d. recent cash flow statements.
   e. recent cash flow projections.
   f. budgets and/or projections of future profitability (if any), for 19xx and 19xx. Include schedule of debt repayments.
   g. projections of capital expenditures for 19xx and 19xx.

5. Provide all reports provided to major lender within the past six months. Provide all correspondence, if any, with lenders concerning attempts at obtaining additional credit and capital. Provide only such correspondence that has occurred within the past two years.

6. Provide copies of all current loan agreements.

FINANCIAL VIABILITY ANALYSIS

SAMPLE INTERVIEW OR DEPOSITION OUTLINE

General Financial Condition
Areas for Discussion

I. General Organizational Structure -
1. Organization of company, ownership.
2. Affiliated transactions of division with other divisions, shareholder or other affiliates of company/division.
3. Separate reporting, separate financials (unaudited?).
4. Any valuations performed by business segment, other segments?
5. Overhead and allocation methodology, services performed by headquarters/parent.
6. Guarantees by the company/shareholder for financings.

II. Financial Condition

A. Balance Sheet

1. Assets - types, age, necessity of additions to in past few years. Condition of Property, Plant and Equipment.
2. Decline in cash, cash investments, present cash position, restricted cash, etc.
3. Collectibility of receivables, type, bad debt experience.
4. Accounts payable - stretching - how many days out 60/90/120? Do any suppliers require COD payment?
5. PPE, land, market value of, how determined? Additions, value of real estate, any unused?
6. Any guarantees from parent/major shareholder?
7. Specific questions regarding the financial statements.
8. Any unusual transactions, write-offs, restructurings, recapitalizations, shareholder loans?
9. Auditors - qualified opinion, management letters.
10. Any unnecessary non-operating assets - ability to sell?
11. Any refunds from income taxes expected, when?
12. Cash surrender value of life insurance?
13. Contingent liabilities?
14. Any large declines in asset values, transfers?

B. Income Statement

1. Future outlook, projections. (How often do they meet projections?)..
2. Why did sales decline from the previous year?
3. Direct Expenses - why increase, ability to cut?
4. Salaries - wage structure (unions), list officers' salaries.
5. What does miscellaneous income consist of?
6. Describe cost cutting methods company has taken, if any, any lay-offs, reduction in G&A, composition of overhead, corporate allocations, any extraordinary expenses expected?

7. Any dividends paid recently?
8. Any discontinued operations, why?
9. Backlogs, contracts in progress, amounts, inability to perform contracts - reasons.
10. % of production used internally by other operations?
11. Any write-offs.
12. Contracting - % from government, debarrment, bonding problems?
13. Pension plan - overfunded, underfunded?
14. Employee profit sharing plans, is company contributing?

C. Sources and Uses/Cash Flow

1. Cash flows, current cash position.
2. Additions to debt.
3. Issuance of equity, common, shareholder contribution?
4. Capital expenditures- future expansion plans, ability to limit, ability to lease equipment rather than purchase?
5. Market value of assets.
6. Liquidation value of assets.
7. Cash needs for company.
8. Equipment sales, any unused equipment.
9. Any non-operating assets - market value?

D. Financing

1. Lines of credit
   a. List, secured or unsecured (collateral).
   b. Terms, when up for renewal, renewed annually?
   c. Amounts drawn down.
   d. Which bank.
   e. Reason for the bank discontinuing or requiring security?
   f. Any specifics cited by bank for discontinuing or with regard to financial condition?
   g. Any other banks contacted, any offers?
   h. Ability to obtain additional credit?
   i. Ability to borrow against receivables, inventories - % company can borrow against.
   j. Is the same bank providing this?
   k. Any increased reporting or audits conducted or required by bank.
   l. Ability to obtain from affiliate?
   m. When was last request made for funds?
   n. Covenants, waivers, expect any changes, additional defaults.

2. Long Term Debt
   a. Describe.
   b. Collateral, terms.
   c. Ability to obtain additional, last request.
   d. Any loan covenants, is the company in violation of any, any increased covenants placed upon the company with the increased debt level or revoking of credit lines, expect any additional defaults, why?
   e. Ability to renegotiate, refinance debt, last bank presentation.

f. How much additional debt do they think they can support?
g. Reports provided to bank, provide copies, any projections, what do they show?
h. Unencumbered assets.
i. Interest expense.
j. Name of bank official, can we contact?

3. Ability to raise equity (name of last investment bank that helped raise equity), IPO possibility, any additional shareholder contributions possible?

4. Probability that banks will call in loans, on what is this based?

FINANCIAL STATEMENT OF DEBTOR FORMS

1. Name *(Debtor)* _____ Type (1-For Profit ( ) (2-Not for Profit ( )

2. Business Addresses _____
Street City State

Note: Attach schedule of all business addresses

3. Foreign _____ Domestic _____

4. State-Incorporation _____ Date-Incorporation _____
License to do business in _____

5. Name Registered Agent _____

6. Address Registered Agent _____ Phone _____

7. Names and Addresses of Principal Stockholders. Indicate the ownership of 75% of the stock of the Corporation. Number of Shares Owned by each.

(1) _____

(2) _____

(3) _____

(4) _____

(5) _____

(6) _____

(7) _____

(8) _____

8. (A) Names and Addresses of Current Officers and Number of Shares Held by Each. Term Expires on _____)

(1) _____

(2) _____

(3) _____

(4) _____

(5) _____

(B) Names and Addresses of Current Members of Board of Directors. Term Expires on _____

(1) _____

(2) _____

(4) _____

(5) _____

9. (A) Registration on National or Local Stock Exchange(*s*). (*Give details, including date of Registration and/or delisting.*)

(1) _____

(2) _____

(3) _____

(B) Total authorized Shares of each type issued and present market value per share on each type of stock.

(1) _____

(2) _____

(3) _____

(4) _____

(C) Total outstanding shares of each type stock currently being held as Treasury Stock.

_____

_____

_____

_____

(D) Total outstanding shares of each type of stock. Amount of bonded debt and principal bondholders.

_____

_____

_____

_____

10. List States and Municipalities to which taxes have been paid and/or are being paid. Describe nature and amount of such taxes, state most recent year of payment thereof and whether tax payments are current.

_____

_____

_____

_____

_____

_____

11. Has this Corporation filed United States Corporate Income Tax Returns during the last 3 years. Yes. ( ) No. ( )
To what U.S. Office(s)
What Years?

Are Federal Taxes Current? Yes. ( ) No. ( )

12. Name and Address of
(a) Corporation's Independent Certified Public Accountants

(b) Corporate Attorney(s) retained by Corporation From _____ to _____

13. Does this Corporation have a Profit and Loss Statement and Balance Sheet for the most recent calendar or fiscal year and for specified past years. Past Years ( ) ( ) ( ). If (*Yes*) submit one copy of each. Submit audited documents if available.

14. Does this Corporation maintain bank accounts: Give names and addresses of Banks, Savings and Loan Associations, and other such entities, within the United States or located elsewhere. Indicate name and number of accounts and balances.

Balance

(A) Checking Account(s)

(B) Savings Account(s)

(C) Other Account(s)

(D) Savings & Loan Associations or Other such Entities

(E) Trust Account(s)

(F) Other Account(s)

all commercial paper, negotiable or non-negotiable, in which the Corporation has any interest whatsoever, presently in transit or in the possession of any banking institution. Describe such paper and the Corporation's interest therein, and state its present location. List all accounts and loans receivable in excess of $300 and specify if due from an officer, stockholder, or director.

16. From personal knowledge as President, Vice President, or Chairman of the Board for the last taxable year, indicate in round figures:

(A) Gross Income $_____

(B) Expenses (*Fixed & Current*) $_____

(C) Gross Profit (*or Loss*) $_____

(D) Net Profit After Taxes $_____

(E) (*List approximate totals*):

Payables: $_____ Receivables: $_____

17. Is this Corporation presently:

(A) Active
(*Answer No if inactive but still in existence*) Yes ( ) No ( )

(B) Void and/or Terminated by State authority Yes ( ) No ( )

(C) Otherwise dissolved Yes ( ) No ( )

1. Date _____

2. By whom _____

3. Reason _____

18. List corporate salaries to and/or drawings of the following personnel for the last three taxable years:

Position (*Inc. officers*)	Specify Year (Year) 1.	(Year) 2.	(Year) 3.
President			
Chairman/Board			
Secretary			
Treasurer			

(B) List five most highly compensated employees or officers other than above, describe position and set forth salary and/or bonus for last three taxable years.

	Specify Year		
	(Year) 1.	(Year) 2.	(Year) 3.
1.			
2.			
3.			
4.			
5.			

(C) Describe the nature of the compensation paid to the persons listed in (*A*) and (*B*) above and set forth any stock options, pensions, profit sharing, royalties, or other deferred compensation rights of said persons.

19. List Corporate commercial activity (*fields of activity resulting in income*) Prime:

1. _____
2. _____
3. _____
4. _____

20. List all other supplementary fields of activity in which this Corporation is engaged, either directly, through subsidiaries, or affiliates, stating the name(*s*) and state(*s*) of incorporation of such subsidiaries or affiliates.

Has this Corporation at any time been the subject of any proceeding under the provisions of any State Insolvency Law, or the Federal Bankruptcy Act, As Amended? If so, supply the following information as to each such proceeding:

(A) Date (*Commencement*) _____

(B) Date (*Termination*) _____

(C) Discharge or other disposition, if any, and operative effect thereof: _____

_____

_____

_____

_____

(D) State Court _____ County Federal Court _____ District

(E) Docket No. _____

22. (A) List all Real Estate, and Personalty of an estimated value in excess of $500.00, owned or under contract to be purchased by this Corporation and where located:

_____

_____

_____

_____

_____

(B) List and describe all judgments, recorded and unrecorded:

(1) Against the Corporation

_____

_____

_____

_____

_____

(2) In favor of the Corporation

_____

_____

_____

_____

_____

(C) List and describe all encumbrances against Real Estate owned by the Corporation: (*including but not limited to mortgages and liens*)

(D) List and describe all other encumbrances (*including but not limited to Security Interest, whether perfected or not*) against any such personalty owned by the Corporation as is listed in 22(A) above.

(E) List and describe location of Real Estate, including Real Estate being purchased under contract, with name and address of Seller and contract price:

23. List all Life insurance, now in force on any or all officers, Directors, and/or "key" employees, setting forth face amounts, names of life insurance companies and policy numbers where this Corporation has an "insurable interest," and/or is paying the premium or part of same. Where applicable indicate under which policy(*s*) this Corporation is a Beneficiary, type policy(*s*), yearly premium, and location of policy(*s*).

all transfers of any of all assets (*Real, Personal and each over $500.00*) made by this Corporation, OTHER THAN IN THE ORDINARY COURSE OF BUSINESS, during the last three (*3*) calendar years and state to whom transfer was made. Describe compensation paid by recipient and to whom.

25. Is this Corporation a party in any law suit now pending? ( ) Yes (*Give details below.*) ( ) No

26. Please list names and addresses of any person or other business entity, holding funds in escrow or in trust for this Corporation, or any of its subsidiaries or affiliates.

27. Additional Remarks: _____

28. Verification and Affidavit.

With knowledge of the penalties for false statements provided by 18 U.S. Code 1001 (*$10,000 fine and/or 5 years imprisonment*) and with knowledge that this financial statement is submitted by me as a responsible officer of this Corporation to affect action by the U.S. Department of Justice, I hereby certify that I believe I completely understand the above statement, and that the same is a true and complete statement of all corporate income and assets, real and personal, whether held in the Corporate name or otherwise.

Date: _____

_____
AFFIANT (*Officer*)

_____
(*List Corporate Position*)

_____
Age (*Next Birthday*)

_____
NOTARY PUBLIC

My Commission Expires _____.

(Submitted for Government Action on Claims Due the United States)

(NOTE: Use additional sheets where space on this form is insufficient or continue on reverse side of pages.)

Authority for the solicitation of the requested information is one or more of the following: 5 U.S.C. 301, 901 (see Note, Executive Order 6166, June 10, 1933); 28 U.S.C. 501, *et seq.*; U.S. 31 U.S.C. 951, *et seq.*; 44 U.S.C. 3101; 4 CFR 101, *et seq.*; 28 CFR 0.160, 0.171 and Appendix to Subpart Y.

The principal purpose for gathering this information is to evaluate your capacity to pay the Government's claim or judgment against you. Routine uses of the information are established in the following U.S. Department of Justice Case File Systems published in Vol. 42 of the Federal Register: Justice/CIV-001 at page 53321; Justice/TAX-001 at page 15347; Justice/USA-005 at pages 53406-53407; Justice/USA-007 at pages 53408-53410, Justice/CRIM-016 at page 12774. Disclosure of the information is voluntary. If the requested information is not furnished, the U.S. Department of Justice has the right to such disclosure of the information by legal methods.

Your Social Security account number is helpful for identification, but you are not required to indicate it if you do not desire to do so.

1. Name *(debtor)*	2. Birth Date *(mo. day, yr.)*	3. Social Security No.
4. Home Address		5. Phone No.
6. Name of Spouse *(give address if different from yours)*		7. Date of Birth *(mo. day, year)*

Debtor Employment Data

8. Occupation	9. How Long in Present Employment?

10. Present Employer's Name	Address	Phone No.

11. Other Employment–Within Last Three Years

Employer's Name	Address	Phone No.	Employment Dates

12. Present Monthly Income

Salary or Wages $ _____ Commissions $ _____ Other *(state source)* $ _____ Total $ _____

Spouse's Employment Data

13. Occupation	14. How Long in Present Employment?

15. Spouse's Present Employer's Name	Address	Phone No.

16. Other Employment–Within Last Three Years

Employer's Name	Address	Phone No.	Employment Dates

17. Present Monthly Income

Salary or Wages $ _____ Commissions $ _____ Other *(state source)* $ _____ Total $ _____

Dependents

18. Total Number	Relationship	Age	Relationship	Age	Relationship	Age	19. Total Monthly Income of Dependents *(except spouse)*
							$ _____

FORM OBD-500

Financial Data

20. What Period Did You Last File a Federal Income Tax Return	21. Where Filed	22. Amount of Gross Income Reported

23. Fixed Monthly Expenses

Rent	Food	Utilities	Interest
Debt Repayments *(Including installments)*	Other *(specify)*		
Total Fixed Monthly Charges			

24. Loans Payable

Owed To	Purpose & Date of Loan	Original Amount	Present Balance

25. Assets and Liabilities

Assets	*(Fair market value)*	Liabilities	
Cash	$	Bills Owed *(grocery, doctor, lawyer, etc.)*	$
Checking Accounts *(show location)*		Installment Debt *(car, furniture, clothing, etc.)*	
		Taxes Owed	
		Income	
Savings Accounts *(show location)*		Other *(itemize)*	
Motor Vehicles		Loans Payable *(to banks, finance Co. etc.)*	
Year Make/License No.		Judgments You Owe	
		Real Estate Mortgages	
Debts Owed to You *(give name of debtor)*		Other Debts *(itemize)*	
Judgments Owed to You			
Stocks, Bonds and Other Securities *(itemize)*			
Household Furniture and Goods			
Items Used In Trade or Business			
Other Personal Property *(itemize)*			
Real Estate			
Total Assets	$	Total Liabilities	$

	How Owned *(jointly, individually, etc.)*	Date Acquired	Cost	Unpaid Amount of Mortgage

27. Real Estate Being Purchased Under Contract

Address			Name of Seller
Contract Price	Principal Amount Still Owing	Next Cash Payment Due *(date)*	Amount *(of next payment due)*

28. Life Insurance Policies

Company	Face Amount	Cash Surrender Value	Outstanding Loans

29. All Real and Personal Property Owned by Spouse and Dependents Valued in Excess of $200 *(List each item separately)*

30. All Transfers of Property Including Cash *(by loan, gift, sale, etc.)* That You Have Made Within the Last Three Years *(items of $300 or over)*

Date	Amount	Property Transferred	To Whom

31. Are You a Party In Any Law Suit Now Pending? ☐ Yes, Give Details Below ☐ No

32. Are You a Trustee, Executor, or Administrator? ☐ Yes, Give Details Below ☐ No

33. Is Anyone Holding any Moneys on Your Behalf? ☐ Yes, Give Details Below ☐ No

34. Is There Any Likelihood You Will Receive an Inheritance? ☐ Yes, From Whom? ☐ No

35. Do You Receive, or Under any Circumstances, Expect to Receive Benefits, From any Established Trust, From a Claim for Compensation or Damages, or From a Contingent or Future Interest In Property of any Kind?

☐ Yes, Explain Below ☐ No

With knowledge of the penalties for false statements provided by 18 United States Code 1001 *($10,000 fine and/or five years imprisonment)* and with knowledge that this financial statement is submitted by me to affect action by the U.S. Department of Justice, I certify that I believe the above statement is true and that it is a complete statement of all my income and assets, real and personal, whether held in my name or by any other.

Date

Signature

*U.S. Government Printing Office : 1990 - 262-220/06775

U.S. Department of Justice

Environment and Natural Resources Division

Washington, D.C. 20530

MEMORANDUM

To: Charles A. DeMonaco
Assistant Chief
Environmental Crimes Section

From: Erik R. Barnett EB
Law Clerk
Environmental Crimes Section

Subject: Tax Consequences of a Plea Agreement Involving Fines and Restitution

Date: May 14, 1993

At your request I've reviewed the law and certain policy statements regarding the tax consequences of fines and restitution.

I. FINES

Fines are not deductible. The following briefly reviews the law that supports this conclusion.

The general prohibition on the deduction of fines resulting from the imposition of criminal or civil penalties is codified in Internal Revenue Code Section 162(f), "No deduction shall be allowed under subsection (a) for any fine or similar penalty paid to a government for the violation of any law."

Section 162(f) codified the decision of the Supreme Court in Tank Truck Rental, Inc. v. Commissioner, 356 U.S. 30 (1958). The Court held that fines imposed for violations of laws were not deductible as an "ordinary and necessary" business expense since to allow the deduction would frustrate public policy by "reducing the 'sting' of the penalty" imposed. Id. at 35.

The application of Section 162(f) is not affected by whether the penalty was imposed as a result of a plea agreement or conviction after trial. See Treas. Reg. § 1.162-21(b)(1)(i) ("Fine or similar penalty includes any amount paid pursuant to a conviction or plea of guilty in any criminal proceeding.").

Note: The Treasury Regulations specifically note that "fine or similar penalty" does not include compensatory damages paid to a government. Treas. Reg. § 1.162-21(b). Therefore, taxpayers can deduct payments which are characterized as "liquidated damages." The amount paid by the taxpayer, therefore, represents only the government's attempt to recoup lost revenue. See Middle Atlantic Distributors, Inc. v. Commissioner, 72 T.C. 1136 (1979).

II. RESTITUTION

In summary, the deductibility of restitution payments which result from civil or criminal penalties is often determined by whether the payments are characterized as:

1. A penalty imposed for purposes of enforcing the law and as punishment for violation of the law. These payments are non-deductible under 162(f).

OR:

2. A penalty imposed to encourage prompt compliance with a requirement of the law, or as a remedial measure to compensate another party for expenses incurred as a result of the violation

See Southern Pacific Transportation Co. v. Commissioner, 75 T.C. 497, 646-654 (1980).

While this is the general rule, there is a split among the circuits in applying this test to cases involving similar facts:

Second Circuit: Stephens v. Commissioner, 905 F.2d 667 (2d Cir. 1990).

This is the most recent case to consider whether restitution is deductible. The Court of Appeals held that restitution paid by the taxpayer to the company he had defrauded was deductible since the payment "was more compensatory than punitive in nature." Id. at 673. The panel rejected the government's contention that to allow the taxpayer a deduction for payment he was required to make in lieu of criminal punishment would frustrate public policy. While this argument had swayed the Supreme Court in Tank Truck the Second Circuit was not moved. The panel noted that the taxpayer had incurred a prison sentence and a fine, and determined that public policy would not be frustrated by allowing the deduction. Id. at 671.

Most significant, perhaps, about the Second Circuit's decision was its literal interpretation of the language of Section 162(f). Recall that the prohibition on the deduction of a fine or penalty is activated if the payee is "a government." Since the payee in Stephens was a private company, the court refused to apply the statutory limitation on deductions.

Another difference between Stephens and other judicial opinions involving restitution is that the appellate court's analysis focused on Section 165(c)(2) and not Section 162(f). The court determined that the payment was a loss incurred during a transaction entered into for profit. Therefore, the payment was not covered by Section 162 which covers deductions for expenses, not losses. However, the appellate panel's distinction has minimal significance since the court noted that the analysis in determining whether a deduction is allowed is the same under Section 162 or Section 165. Id. at 670.

Ninth Circuit: Waldman v. Commissioner, 88 T.C. 1384 (1987), aff'd per curiam, 850 F.2d 611 (9th Cir. 1988).

In Waldman the Tax Court considered the deductibility of restitution paid by a taxpayer to his crime victims after a California state conviction for grand theft. In applying the test from Southern Pacific Transportation Co., supra, the Tax Court found that under California state law the purpose of restitution was the rehabilitation of the criminal and deterrence of future criminal conduct and therefore the payments were not compensatory and not deductible. Id. at 1389. In addition the Tax Court noted that the state court had exercised complete control over the ultimate disposition of the taxpayer's restitution payments and had threatened the defendant with the imposition of a prison sentence if the restitution payments lagged at any time. Id.

The involvement of the state court in the payment of restitution by Waldman to his victims provided the appellate panel with a basis for holding that the literal language of Section 162(f)--"any fine or similar penalty **paid to a government**" did not foreclose ruling in favor of the Commissioner. The Tax Court declared that the Code Section did not require that a government actually "pocket the fine or similar penalty to satisfy" this provision of the Internal Revenue Code. Id.

Note: At least one author has criticized the Waldman decision for its focus on the laws of one state, making it difficult for other courts to apply the reasoning to cases in other jurisdictions. See Evan Slavitt, An Overview of the Tax Implications of Environmental Litigation, 20 ELR 10547, 10549 (1990).

Sixth Circuit: Bailey v. Commissioner, 756 F.2d 44 (6th Cir. 1985).

The appellate panel in Bailey also applied the Southern Pacific Transportation Co. test and determined that the restitution paid by Bailey in lieu civil fines was punishment for his violations of federal law. Having applied the test and determined that the restitution was not compensatory, the court concluded that the payments were non-deductible under §162(f).

III. SUMMARY

As discussed above, there is a split among the circuits regarding the tax consequences of restitution.

It appears that the most troubling concern for the government after Stephens is the wording of Section 162. Specifically, the statutory requirement that the payments be to "a government" in order to deny the taxpayer a deduction. In addition, many taxpayers carefully word their agreements to pay restitution to reflect the "compensatory" nature of the payments, thereby enabling them to take a deduction.

MEMORANDUM

Subject: Background Materials on Deductibility of Payments Stemming from Illegal or Improper Conduct

You have asked us to provide you with some background information relating to the tax treatment of business-related outlays that flow out of illegal or improper conduct. The bulk of the administrative pronouncements and case law developments in this general area have centered on Sections 162 and 165 of the Internal Revenue Code, the two principal provisions which permit the deduction of the types under consideration. Section 162 generally permits taxpayers to deduct the "ordinary and necessary" expenses incurred in a "trade or business." Section 165, on the other hand, permits taxpayers to deduct the "losses" they incur in "transactions entered into for profit." These general rules of deductibility are subject to specific limitations for certain outlays that Congress has deemed should not be deductible based on public policy grounds. Set forth below is a discussion of this taxing scheme, including the specific limitations on deductibility.

A. In General

It has long been established that income from illegal businesses is fully taxable under Section 61 of the Code, which defines "gross income" as "all income from whatever source derived." James v. United States, 366 U.S. 213, 218 (1961). This rule was first articulated in United States v. Sullivan, 274 U.S. 259, 263 (1927), where the Court held that a bootlegger was taxable on gains from his illicit traffic in liquor.

Since income from illegal sources is taxable, a blanket bar on the deduction of ordinary and necessary expenses of illegal businesses would be tantamount to imposing a tax on gross receipts or gross income. The Supreme Court has held that the federal income tax is not to be used "as a sanction against wrongdoing." Commissioner v. Tellier, 383 U.S. 687, 691 (1966) (allowing the taxpayer a deduction for legal fees incurred in unsuccessfully defending against criminal securities fraud charges). And, for example, in Commissioner v. Sullivan, 356 U.S. 27, 28 (1958), the Court held that the taxpayers, who were operating illegal bookmaking establishments in Chicago could nevertheless deduct rent and employees' wages from gross income, even though the acts of the employees were violative of Illinois law and "the payment of rent for the use of the premises for the purpose of bookmaking was also illegal under that law." As the Court explained its decision (id. at 29):

> If we enforce as federal policy the rule espoused by the Commissioner in this case, we would come close to making this type of business taxable on the basis of its gross receipts, while all other business would be taxable on the basis of net income. If that choice is to be made, Congress should do it.

Furthermore, as the Supreme Court pointed out in Lilly v. Commissioner, 343 U.S. 90, 94 (1952), "[t]here is no statement in the act, or in its accompanying regulations, prohibiting the deduction of ordinary and necessary business expenses on the ground that they violate or frustrate 'public policy'." In Lilly, the Court allowed the deduction of payments made by opticians to physicians prescribing eyeglasses, pointing out that, although the payments were ethically questionable, they were not illegal and, therefore, violated no sharply defined public policy.

In certain limited circumstances, however, the Supreme Court has denied deductions for otherwise ordinary and necessary business expenses on public policy grounds. For example, in Tank Truck Rentals, Inc v. Commissioner, 356 U.S. 30, 33-34 (1958), the Supreme Court held that the deduction of expenses which are ordinary and necessary business expenses is nevertheless barred "if the allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof." Accordingly, the Court upheld the disallowance of fines paid by a trucking company for violations of state maximum weight laws on the grounds that "[where] a taxpayer has violated a federal or a state statute and incurred a fine or penalty he has not been

permitted a tax deduction for its payment." Id. at 34, quoting from Commissioner v. Heinenger, 320 U.S. 467, 473 (1943). The justification for this position, as explained long ago by Judge Learned Hand, is that "when acts are condemned by law and their commission is made punishable by fines or forfeitures, to allow these to be deducted from the wrongdoer's gross income, reduces, and so in part defeats, the prescribed punishment." Jerry Rossman Corp. v. Commissioner, 175 F. 2d 711, 713 (2d Cir. 1949).

B. Section 162

As stated above, Section 162 generally permits taxpayers to deduct the "ordinary and necessary" expenses incurred in a "trade or business." As also stated above, this rule is currently subject to various limitations.

As part of the Tax Reform Act of 1969, Congress codified the holding of Tank Truck by explicitly barring deduction of fines and penalties paid to a government for the violation of any law (Section 162(f)). As the legislative history underlying this provision indicates, it was intended to codify the "court decisions that deductions are not to be allowed for fines or similar penalties paid to a government for the violation of any law." H. R. Conf. Rep. No. 91-782, 91st Cong., 1st Sess. 331 (1969). At this time, Congress also denied a deduction for a portion of treble damage payments under the antitrust laws (Section 162(g)), for illegal payments to government officials (Section 162(c)(1)), and for other unlawful bribes or kickbacks (Section 162(c)(2)). In 1971, Congress extended the limitations on deductibility contained in Section 162 to kickbacks, rebates and bribes under Medicare and Medicaid (Section 162(c)(3)). Finally, as part of the Tax Equity and Fiscal Responsibility Act of 1982, Congress denied a deduction for any ordinary and necessary business expense if it is incurred in connection with drug trafficking (Section 280E).

The provisions set forth in the Code disallowing deductions on specific public policy grounds are intended to be all inclusive. S. Rep. No. 91-552, 91st Cong., 1st Sess. 274 (1969). A trade or business expense deduction which does not fall within these provisions is allowable. For example, an employer's payment of back wages under Title VII to an employee against whom it has discriminated is a deductible expense.

1. Fines or similar penalties

Section 162(f) provides that no deduction is allowable "for any fine or similar penalty paid to a government for the violation of any law." As stated above, Section 162(f) was

intended to codify the prior court decisions which disallowed on public policy grounds the deduction of fines and penalties resulting from statutory violations.

Section 162(f) disallows a deduction for payments made with respect to criminal as well as civil violations, and with respect to amounts paid in settlement of such a liability (E.g., Adolf Meller Co. v. United States, 600 F. 2d 1360 (Ct. Cl. 1979)). Specifically, the legislative history underlying Section 162(f) states, in part, that the statute "is to apply in any case in which the taxpayer is required to pay a fine because he is convicted of a crime (felony or misdemeanor) in a full criminal proceeding in an appropriate court." S. Rep. No. 91-552, 91st Cong., 1st Sess. 274. Moreover, it has been held that Section 162(f) disallows the deduction of federal civil penalties imposed for purposes of enforcing the law and as punishment for violations thereof. Southern Pacific Transp. Co. v. Commissioner, 75 T.C. 497, 646-654 (1980); see also Treas. Regs. on Income Tax (26 C.F.R.), Sec. 1.162-21(b)(1).

The Treasury Regulations provide, however, that the term "fine or similar penalty" does not include "compensatory damages paid to a government." Section 1.162-21(b). This provision has allowed taxpayers to deduct amounts denominated as "liquidated damages" where the Government is attempting to recover "only reimbursement for lost revenue and other damages." E.g., Middle Atlantic Distributors, Inc. v. Commissioner, 72 T.C. 1136 (1979), acq. in result only, 1980-1 Cum. Bull. 1 ("liquidated damages" paid in settlement of civil suit seeking to recover value of liquor fraudulently removed from customs warehouse without payment of duty were deductible); Grossman & Sons, Inc. v. Commissioner, supra, 48 T.C. 15, 29 (1987) (amounts paid in settlement of Government's claim for damages for breach of contract and for penalties under False Claims Act were deductible because there was no evidence that the Government was "attempting to exact a penal sanction"). See also Mason & Dixon Lines, Inc. v. United States, 708 F. 2d 1043, 1047 (6th Cir. 1983), a highly questionable decision in light of the Supreme Court's decision in Tank Truck Rentals, Inc. v. Commissioner, supra, where the taxpayer was allowed deductions for "liquidated damages" imposed for violations of maximum weight laws, on the ground that the statute had "the earmarks of a provision for civil compensatory damages."

Recently, Section 162(f) has formed the basis for denial of deductions of fines or similar penalties imposed for violations for the anti-pollution laws. For example, in Colt Industries, Inc. v. United States, 880 F. 2d 1311 (Fed. Cir. 1989), the court concluded that civil penalties imposed upon the taxpayer pursuant

to a consent decree arising from proceedings brought against it for violations of the Clean Air Act and the Clean Water Act constituted "fines or similar penalties" within the meaning of Section 162(f). See also True v. United States, 894 F. 2d 1197 (10th Cir 1990) (no deduction allowed for oil spill penalty imposed by the Clean Water Act). However, a deduction was allowed in S & B Restaurant, Inc. v. Commissioner, 73 T.C. 1226 (1980), for payments to the Pennsylvania Clean Water Fund for amounts approximating the fees that would have been payable for processing sewage where the state would have opposed the taxpayer's construction of its own sewage treatment facilities because this would have duplicated the function of a planned municipal sewage treatment system.

2. Treble damage payments under federal antitrust laws

Section 162(g) denies a deduction for two-thirds of any damage award or settlement under Section 4 of the Clayton Act (15 U.S.C. Sec. 15) which is based on the same or "any related violation" of the antitrust laws of which the taxpayer has been convicted or has pled guilty or nolo contendre.* The denial of the deduction is limited to the "penal" two-thirds of the judgment, and the remaining one-third is deductible "on the grounds that it represents a restoration of the amount already owing to the other party." S. Rep. No. 91-552, supra, at 274. Section 162(g) was intended to overrule Rev. Rul. 64-224, 1954-2 Cum. Bull. 52, where the IRS had ruled that amounts paid in satisfaction of treble damage claims arising from violations of the Clayton Act were fully deductible as ordinary and necessary business expenses. Id. at 273. See generally Wilberding, "New Tax Considerations Injected into Antitrust Damage Proceedings," 19 Kan. L. Rev. 441 (1971).

The IRS defines "related violation" for this purpose in 26 C.F.R. Sec. 1.162-22 as follows:

> a violation of the Federal antitrust laws is related to a subsequent violation if (1) with respect to the subsequent violation the United States obtains both a judgment in a criminal proceeding and an injunction

---

* Section 4 of the Clayton Act provides in pertinent part that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

against the taxpayer, and (2) the taxpayer's actions which constituted the prior violation would have contravened the injunction if such injunction were applicable at the time of the prior violation.

The IRS appears to use the concept of "related violation" primarily to deny deductibility of damages based on conduct that is part of the same antitrust conspiracy of which a taxpayer was convicted, but that was not specified within the four corners of the indictment.

The requirement that there be a conviction or plea of guilty or nolo contendere in a related case was intended to limit the preclusion of the deduction to those cases presenting "'hard-core violations' where intent has been clearly proved in a criminal proceeding." S. Rep. No. 91-552, supra, at 274.

The Tax Court has recently allowed a taxpayer to allocate amounts paid to class action plaintiffs between nondeductible payments stemming from taxpayer's plea of nolo contendere to a charge of engaging in a conspiracy to fix the prices of folding cartons, and deductible payments attributable to allegations that the taxpayer had also engaged in a conspiracy (but without being subjected to criminal charges) to fix the prices of milk cartons. Federal Paper Board Co. v. Commissioner, 90 T.C. 1011 (1988).

3. Bribes, kickbacks and similar payments

Section 162(c)(1) of the Code denies a deduction for payments to government officials or employees of any government, if the payment constitutes an illegal bribe or kickback or, in the case of a payment to an official or employee of a foreign government, if the payment is unlawful under the Foreign Corrupt Practices Act of 1977. The Government has the burden of proving that the payment is illegal or violates the Foreign Corrupt Practices Act by clear and convincing proof. The legislative history of the measure states that "[i]n the case of illegal payments to government officials it is believed that the offense is sufficiently contrary to public policy as not to require the denial of the deduction to be preceded by the criminal conviction." S. Rep. No. 91-552, supra, at 274-275.

Section 162(c)(2) provides that no deduction is allowable for any payment made, directly or indirectly, to any person, if the payment constitutes an illegal bribe, illegal kickback, or other illegal payment under any law of the United States or that of any state which subjects the payor to a criminal penalty or the loss of license or privilege to engage in a trade or business, provided that the state law is generally enforced. The

Government bears the burden of proving by clear and convincing evidence that the payment constitutes an illegal bribe, kickback or other payment. Prior to the enactment of Section 162(c), illegal payments were sometimes disallowed under the "frustration of public policy" doctrine. E.g., Coed Records, Inc. v. Commissioner, 47 T.C. 422 (1967) (no deduction allowed for illegal payments to disc jockeys to give preference to records promoted by the taxpayer).

The Commissioner's attempt to invoke Section 162(c)(2) against a liquor wholesaler who secretly provided, as an added consideration for sales, extra liquor to some of its customers in violation of California law providing for minimum prices, failed in Max Sobel Wholesale Liquors v. Commissioner, 630 F. 2d 670 (9th Cir. 1980). There, the Commissioner contended that Section 162(c)(2) precluded the taxpayer from including the value of the extra liquor in its cost of goods sold, thereby increasing the taxpayer's gross and taxable income. The Ninth Circuit rejected this contention. Although the court conceded that Section 162(c)(2) would have precluded the taxpayer from claiming the value of the extra liquor as a business expense, the inclusion of added consideration for the sale is not a business expense deductible under Section 162(a) but, rather, is an "above the line" adjustment of the selling price. The court concluded that Congress did not intend to change the definition of gross income in enacting Section 162(c)(2). And, recently, in Brizell v. Commissioner, 93 T.C. No. 16 (1989), the Tax Court held that kickbacks paid by printing company to purchasing agents of its customers were ordinary and necessary expenses of the business. In the court's view, deduction was not precluded by Section 162(c)(2) because, even though such kickbacks might have been illegal under commercial bribery statutes, the IRS failed to prove that the payments had not been extorted from the taxpayer.

Section 162(c)(3), added in 1971, precludes the deduction of any kickback, rebate or bribe by physicians, suppliers, and other providers of goods or services in connection with Medicare and Medicaid, including payments for the referral of clients, patients or customers. Unlike bribes or kickbacks disallowed under Sections 162(c)(1) and (2), the payment need not be unlawful in order for the deduction to be denied.

C. Section 165

Section 165 permits taxpayers to deduct the "losses" they incur in "transactions entered into for profit." This provision has not been limited statutorily but rather continues to be subject to the judicial gloss that taxpayers are precluded from enjoying the benefit of tax deductions for losses when to do so

would conflict with a sharply defined public policy. Rev. Rul. 77-126, 1977-1 Cum. Bull. 48. No deduction has been allowed, for example, to individuals involved in drug trafficking for forfeiture of contraband, equipment and profits. E.g., Wood v. United States, 863 F. 2d 417 (5th Cir. 1989); Holt v. Commissioner, 69 T.C. 75 (1977), aff'd per curiam, 611 F. 2d 1160 (5th Cir. 1980); Holmes Enterprises, Inc. v. Commissioner, 69 T.C. 114 (1977). Similarly, loss deductions have been denied for contraband seized during raids on illegal gambling establishments (Farris v. Commissioner, 54 T.C.M. (P-H) par. 85,436 (1985); Hopka v. United States, 195 F. Supp 474 (N.D. Iowa 1961)); to a loan shark for loans rendered uncollectible by the confiscation of records (Wagner v. Commissioner, 30 B.T.A. 1099 (1034)); to bootleggers for the cost of confiscated whiskey (Fuller v. Commissioner, 213 F. 2d 102 (10th Cir. 1954)); and to would-be counterfeiters bilked by con men whom they thought were their co-conspirators (Mazzei v. Commissioner, 61 T.C. 497 (1974); Richey v. Commissioner, 33 T.C. 272 (1959)).

D. Payments in Restitution

As already noted, income from a illegal activities is fully taxable under Section 61 of the Code, notwithstanding that the taxpayer may eventually be called upon to make restitution. James v. United States, supra. In keeping with the attempt to tax only net income, a restitutionary payment made by a criminal to his victim is ordinarily deductible as a loss in a transaction entered into for profit. McKinney v. United States, 574 F. 2d 1240 (5th Cir. 1978), cert. denied, 439 U.S. 1072 (1979); Rev. Rul. 65-254, 1965-2 Cum. Bull. 50; See James v. United States, supra, 365 U.S. at 220.

The courts have taken a somewhat different view, however, regarding the deductibility of payments made in restitution if they are imposed in connection with the taxpayer's punishment for a crime. Some courts have held that no deduction is allowable for payments comprising part of a taxpayer's punishment, even if they could be considered restitutionary in nature. In Waldman v. Commissioner, 88 T.C. 1384 (1987), aff'd per curiam, 850 F. 2d 611 (9th Cir. 1988), a court ordered fine paid to charity in lieu of the government was determined not to be deductible. There, the taxpayer pled guilty to one count of conspiracy to commit grand theft in connection with his loan brokerage activities. He was sentenced to prison, but the sentence was suspended on the condition that he make restitution to his victims. The Tax Court held that the restitution payment constituted a nondeductible fine or similar penalty under Section 162(f). Similarly, in Bailey v. Commissioner, 756 F. 2d 44 (6th Cir. 1985), the taxpayer was fined for violating the terms of a consent decree,

but was allowed to apply the funds toward the settlement of his potential liabilities in a class action suit. Because the payment was traceable to the taxpayer's liability for the fine, the court concluded that it constituted a "fine or similar penalty," even though it was not paid to a government.

On the other hand, taxpayers have argued, with some success, that restitutionary payments are deductible notwithstanding the fact that the taxpayer's obligation to make the payment arises from the sentencing context. In Stephens v. Commissioner, ___ F. 2d ____ (2d Cir. June 11, 1990), the Second Circuit determined that a loss deduction under Section 165 for a restitutionary payment made by the taxpayer as a condition of the suspension of a prison sentence was not barred on public policy grounds. The court of appeals concluded that allowing the deduction "would not severely and immediately frustrate a sharply defined national or state policy," even though the restitution was a condition of probation, because the obligation to pay was "primarily a remedial measure to compensate another party not a 'fine or similar penalty'." The court reasoned that to preclude a deduction for the restitutionary payment, when the proceeds of the crime had been previously taxed, would result in a "double sting," violating the principle that "the federal income tax is a tax on net income, not a sanction against wrongdoing." Although the Second Circuit distinguished Waldman and Bailey on factual grounds, it questioned the soundness of those decisions to the extent that they hold that payments made to the victim of the crime come within the scope of Section 162(f), since such payments are not made "to a government" as specified in the statute. A similar result was reached in Spitz v. United States, 432 F. Supp. 148 (E.D. Wis. 1977), where a taxpayer convicted of theft was allowed a deduction for a restitutionary payment ordered as a condition of his probation, on the ground that the payment was not a "fine."

MISCELLANEOUS RECEIPTS ACT

Title 31, United States Code, Section 3302

APPOINTMENTS CLAUSE

United States Constitution, Article II, Section 2, Clause 2
See, Buckley v. Valeo, 424 U.S. 1, 137-143 (1976)

§ 3302. Custodians of money

(a) Except as provided by another law, an official or agent of the United States Government having custody or possession of public money shall keep the money safe without—

(1) lending the money;

(2) using the money;

(3) depositing the money in a bank; and

(4) exchanging the money for other amounts.

(b) Except as provided in section 3718(b) of this title, an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.

(c) A person having custody or possession of public money, including a disbursing official having public money not for current expenditure, shall deposit the money without delay, but not later than the 30th day after the custodian receives the money, in the Treasury or with a depositary designated by the Secretary of the Treasury under law. The Secretary or a depositary receiving a deposit shall issue duplicate receipts for the money deposited. The original receipt is for the Secretary and the duplicate is for the custodian.

(d) An official or agent not complying with subsection (b) of this section may be removed from office. The official or agent may be required to forfeit to the Government any part of the money held by the official or agent and to which the official or agent may be entitled.

(e) An official or agent of the Government having custody or possession of public money shall keep an accurate entry of each amount of public money received, transferred, and paid.

(f) When authorized by the Secretary, an official or agent of the Government having custody or possession of public money, or performing other fiscal agent services, may be allowed necessary expenses to collect, keep, transfer, and pay out public money and to perform those services. However, money appropriated for those expenses may not be used to employ or pay officers and employees of the Government.

(Pub.L. 97–258, Sept. 13, 1982, 96 Stat. 948; Pub.L. 97–452, § 1(10), Jan. 12, 1983, 96 Stat. 2468.)

U.S. DEPARTMENT OF JUSTICE
OFFICE OF JUSTICE PROGRAMS
OFFICE OF THE COMPTROLLER
ACCOUNTING DIVISION

REQUEST FOR INFORMATION REGARDING GOODS AND SERVICES RECEIVED

TO:	NAME OF PAYEE
(1) M. Lively VIJ Rm 806	Aspen Sys Corp
(2) Ray Herman OC Rm. 542	INVOICE NUMBER 90-C-005
	INVOICE AMOUNT $477,835.97

PAYMENT FOR THE SUBJECT INVOICE IS BEING WITHHELD PENDING RECEIPT OF THE INFORMATION REQUESTED BELOW.

- ☐ INDICATE APPLICABLE PURCHASE ORDER OR CONTRACT NO.
- ☐ COMPLETE NO. 6 COPY OF PURCHASE ORDER OR PARTIAL DELIVERY REPORT, INDICATING THAT GOODS OR SERVICES HAVE BEEN RECEIVED.
- ☐ INDICATE ACCOUNTING CLASSIFICATION CODE TO BE CHARGED.
- ☐ INDICATE DOCUMENT CONTROL NUMBER TO BE USED.
- ☐ CERTIFICATION THAT LONG DISTANCE TELEPHONE CALLS WERE FOR OFFICIAL BUSINESS.
- ☑ SIGNATURE ON THE INVOICE THAT GOODS AND SERVICES HAVE BEEN RECEIVED.
- ☐ SPECIAL APPROVAL OF _____
- ☑ OTHER

Forward to Rm 543

PLEASE RETURN A COPY OF THIS FORM WITH YOUR RESPONSE

ANY CHANGE MADE ON THE INVOICE OR PURCHASE ORDER AFFECTING THE AMOUNT TO BE PAID MUST BE INITIALED.

PREPARED BY:	DATE
M. Williams Rm 970	1-25-94

OJP FORM 1220/1 (REV. 3-87)

ORIGINAL: RECIPIENT'S COPY