

87

1

Criminal Sanctions Applicable To
Federal Water Pollution Control Measures

By

Jerald Clive Thompson

B.S. May 1980, Arizona State University
J.D. May 1983, Arizona State University

AD-A243 351



A Thesis submitted to

The Faculty of

The National Law Center

of The George Washington University
in partial satisfaction of the requirements
for the degree of Master of Laws

September 30, 1991

91-17888



Thesis directed by
Arnold Winfred Reitze, Junior
Professor of Law

91 1213 171

REPORT DOCUMENTATION PAGE

Form Approved
OMB No. 0704-0188 *Ua*

Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0188), Washington, DC 20503.

1. AGENCY USE ONLY (Leave blank)	2. REPORT DATE September 30, 1991	3. REPORT TYPE AND DATES COVERED THESIS/DISSERTATION	
4. TITLE AND SUBTITLE Criminal Sanctions Applicable to Federal Water Pollution Control Measures		5. FUNDING NUMBERS	
6. AUTHOR(S) Jerald Clive Thompson, Major		8. PERFORMING ORGANIZATION REPORT NUMBER AFIT/CI/CIA-91-087	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) AFIT Student Attending: George Washington University		10. SPONSORING / MONITORING AGENCY REPORT NUMBER	
9. SPONSORING / MONITORING AGENCY NAME(S) AND ADDRESS(ES) AFIT/CI Wright-Patterson AFB OH 45433-6583		11. SUPPLEMENTARY NOTES	
12a. DISTRIBUTION / AVAILABILITY STATEMENT Approved for Public Release IAW 190-1 Distributed Unlimited ERNEST A. HAYGOOD, Captain, USAF Executive Officer		12b. DISTRIBUTION CODE	
13. ABSTRACT (Maximum 200 words)			
14. SUBJECT TERMS			15. NUMBER OF PAGES 108
			16. PRICE CODE
17. SECURITY CLASSIFICATION OF REPORT	18. SECURITY CLASSIFICATION OF THIS PAGE	19. SECURITY CLASSIFICATION OF ABSTRACT	20. LIMITATION OF ABSTRACT

TABLE OF CONTENTS

I. INTRODUCTION 1

II. THE RIVERS AND HARBORS APPROPRIATIONS ACT OF 1899. . . 8

 A. The Refuse Act 8

 B. Excavation of Traditional Navigable Waters . . . 12

III. THE FEDERAL WATER POLLUTION CONTROL ACT. 15

 A. History of the Criminal Provisions of the Clean Water Act. 15

 B. Operation of the Clean Water Act 20

 1. The General Proscription - The Illegality of Pollutant Discharges Except in Compliance with the Law 21

 2. Technology Based Controls 24

 3. Water Quality Related Effluent Limitations. 24

 4. National Standards of Performance 25

 5. Effluent Limitations for Certain Toxic Pollutants. 25

 6. Pretreatment Standards. 26

 7. Aquaculture Programs. 27

 8. National Pollutant Discharge Elimination System. 27

 9. Permits for Dredged or Fill Material. 28

 10. Oil and Hazardous Substance Liability - Discharges in "Harmful Quantities". 30

III.	THE FEDERAL WATER POLLUTION CONTROL ACT (continued)	
	B. Operation of the Clean Water Act (continued)	
	11. Records and Reports; Inspections	32
	12. Disposal or Use of Sewage Sludge	33
	C. Operation of the Criminal Provisions of the Clean Water Act.	33
	1. Direct Discharges Into a Body of Water Without a Permit or in Violation of a Permit	36
	2. Discharges Into a Sewer System in Violation of the Pretreatment Standards.	37
	3. Filling in Wetlands Without a Permit or in Violation of a Permit	40
	4. Falsification of Information.	45
	5. Knowing Endangerment.	47
IV.	THE UNITED STATES SENTENCING GUIDELINES.	50
	A. History of the Guidelines Pertaining to Environmental Crimes	54
	B. Operation of the Guidelines Under Federal Water Pollution Control Measures	59
	C. Organizational Defendants.	91
V.	CONCLUSIONS.	105

TABLES

1.	Provisions of the Clean Water Act Which Regulate the Discharge of Pollutants Into Waters of the United States.	23
----	--	----

I. INTRODUCTION

Overkill or not enough? Two decades ago, Congress realized that a system of civil remedies alone, devoid of any lasting punitive consequences, was inadequate to insure compliance with environmental protection statutes. Other than the Rivers and Harbors Act of 1899,¹ which was designed to protect navigation,² Federal criminal sanctions were not applicable to water pollution offenses. The Federal Water Pollution Control Act, more commonly known as the Clean Water Act ("CWA"),³ was twenty-four years old before Federal criminal enforcement of its provisions was allowed.⁴ But since the early 1970's, the criminal provisions of the CWA have been strengthened, the United States Department of Justice has beefed up its environmental enforcement efforts, and environmental polluters have been prosecuted. This Federal effort is now approaching overkill.

¹Rivers and Harbors Appropriation Act of 1899, ch. 425, 30 Stat. 1121 (codified as amended at 33 U.S.C. §§ 401-418 (1989)).

²See infra notes 30-35 and accompanying text.

³33 U.S.C. §§ 1251-1387 (1989).

⁴The only criminal sanctions for water pollution offenses were provided by the states. See, e.g., Cal. Water Code § 13387 (Deering 1977); Md. Env't Code Ann. § 4-417 (1987).

It was 1854 when Thoreau wrote of Walden:

A lake is the landscape's most beautiful and expressive feature. It is earth's eye, looking into which the beholder measures the depth of his own nature. The fluviatile trees next the shore are the slender eyelashes which fringe it, and the wooded hills and cliffs around are its overhanging brows.⁵

In 1931, Justice Holmes observed that "a river is more than an amenity, it is a treasure."⁶ Later, in 1962, Rachel Carson wrote Silent Spring, warning that the activities of man posed a threat to the environment.⁷ As the 1960's unfolded, the works of these and other philosophers provided some of the voices for an increasingly popular "environmental movement."

The movement had reached full stride by April 22, 1970, when the first "Earth Day" was celebrated.⁸ Earth Day, and the concern for the planet's natural resources that it symbolized, helped encourage Federal lawmakers to take a fresh look at the national environmental protection laws.

The "politically correct" sentiment of the 1970's, was that the Nation's water resources were as worthy of Federal protection from the dangers of pollution, as its business

⁵H. Thoreau, Walden; or, Life in the Woods 193 (Heritage Press ed. 1939) (1854).

⁶New Jersey v. New York, 283 U.S. 336, 342 (1931).

⁷R. Carson, Silent Spring (1962).

⁸April 22, 1970, was an unofficial national day of recognition and concern for the environment. To many it marked the beginning of the "environmental movement." See Glenn, The Crime of "Pollution": The Role of Federal Water Pollution Criminal Sanctions, 11 Am. Crim. L. Rev. 835 (1973).

resources were from the dangers of monopolies. When the Clean Water Act was reviewed by Congress in 1972, the Government explicitly made water pollution a "Federal crime."⁹ During the ensuing nineteen years, Federal criminal enforcement efforts of the CWA and other environmental statutes has steadily increased.

The effort began, as it must, with the authorization of Federal criminal enforcement. Between 1970 and 1980, several environmental statutes, including the CWA, the Clean Air Act¹⁰ and the Solid Waste Disposal Act,¹¹ contained criminal provisions. Yet, during that ten year period only twenty-five cases were prosecuted.¹²

The statutes were amended and strengthened in the late 1970's and early 1980's, and criminal enforcement efforts increased. In January of 1981, the Environmental Protection Agency ("EPA") established an Office of Criminal Enforcement.¹³ An Environmental Crimes Section was established within the Department of Justice's Lands and

⁹See infra p. 17.

¹⁰42 U.S.C. §§ 7401-7642 (1989), as amended by Act of Nov. 15, 1990, Pub. L. No. 101-549, 104 Stat. 2399.

¹¹42 U.S.C. §§ 6901-6992k (1989).

¹²1 Practice Under the New Federal Sentencing Guidelines 291 (P. Bamberger 2d ed. 1990) [hereinafter Bamberger].

¹³Id. at 292.

Natural Resources Division the following year.¹⁴ During the 1980's, the Government secured 569 indictments and 447 convictions; collected over twenty-six million dollars in fines; and obtained sentences amounting to more than 271 years of prison time. Nearly sixty-two percent of the indictments¹⁵ and over fifty-seven percent of the convictions¹⁶ were obtained during the last three fiscal years of the decade.¹⁷

These efforts are continuing to increase as the 1990's unfold. The Environmental Crimes Section has grown from a small unit with only a handful of prosecutors, and now employs twenty-six attorneys.¹⁸ During fiscal year 1990 alone, the Government obtained 134 indictments, a thirty-three percent increase over the previous year. Seventy-eight percent of the indictments were against corporations and their top officers. Ninety-five percent of the indictments obtained by the

¹⁴1 U.S. Dep't of Justice Env't and Natural Resources Div. Env'tl. Crimes Section, Environmental Crimes Manual I-3 (rev. ed. 1991) [hereinafter ECS Manual].

¹⁵352 of 569.

¹⁶256 of 447.

¹⁷Bamberger, supra note 12, at 292. See also Fromm, Commanding Respect: Criminal Sanctions for Environmental Crimes, 21 St. Mary's L.J. 821, 864 (1990).

¹⁸ECS Manual, supra note 14, at I-4.

Government resulted in convictions, and over half of the defendants were actually sent to prison.¹⁹

Prosecutions, however, do not always equate to a reduction in crime. As Assistant Attorney General Richard Stewart was announcing the success of the 1990 criminal enforcement efforts, the Department of Justice was unable to offer any statistics on whether the increase in enforcement has had an effect on the amount of environmental crime.²⁰ There may have been a reduction in the number of environmental crimes committed, or there may have been an increase.

The problem with criminal enforcement measures is to determine when a criminal statutory scheme reaches the point of diminishing returns. Whether a guarantee of "prison for polluters" constitutes overkill, or whether it fails to go far enough, is the basic issue discussed in this paper.

Congress is currently in the process of deciding which issues to address in the reauthorization of the CWA.²¹ If history is a guide, reauthorization will result in criminal

¹⁹1990 Record Year for Criminal Enforcement of Environmental Violators, Justice Announces, [Nov.-Apr.] 21 Env't Rep. (BNA) No. 30, at 1397 (Nov. 23, 1990). The remaining criminals were the recipients of probation and/or suspended sentences.

²⁰Id.

²¹See Non-Point Source Pollution Problem Called Pivotal Reauthorization Issue, [May-Oct.] 21 Env't Rep. (BNA) No. 47, at 2087 (Mar. 22, 1991). See also S. 1081, 102nd Cong., 1st Sess. § 13, 137 Cong. Rec. S5,899 (1991).

penalties that are more stringent than those existing today.²² Prior to the imposition of stronger sanctions however, the Legislature needs to take a step back and look at the entire forest it has cultivated since 1972. The Clean Water Act is only one of several trees in that forest. The Legislature must consider the entire criminal statutory scheme applicable to water pollution control. The recent Oil Pollution Act of 1990,²³ which amends the CWA,²⁴ the Rivers and Harbors Act of 1899,²⁵ and the United States Sentencing Guidelines²⁶ are some of the other trees. Each of these legal networks interact with each other to form a complete

²²Compare Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816, 860 (limiting first offender penalties to a fine of not more than \$25,000.00 per day of violation, or imprisonment for one year, or both) with Water Quality Act of 1987, Pub. L. No. 100-4, § 312, 101 Stat. 7, 43 (authorizing a maximum penalty for a first offender of a fine of up to \$250,000.00 or imprisonment for fifteen years, or both, for a conviction under the "knowing endangerment" provisions).

²³Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484.

²⁴The Oil Pollution Act of 1990's criminal provisions relating to oil spills are contained in §§ 309 and 311 of the Clean Water Act. 33 U.S.C. §§ 1319 and 1321 (1989).

²⁵Rivers and Harbors Appropriation Act of 1899, ch. 425, 30 Stat. 1121 (codified as amended at 33 U.S.C. §§ 401-418 (1989)).

²⁶See United States Sentencing Commission, Guidelines Manual (Nov. 1990) (containing the current Guidelines) [hereinafter Guidelines Manual].

criminal regulatory scheme applicable to the pollution of inland waters.²⁷

Criminal penalties for water pollution are authorized by both the Clean Water Act and the Rivers and Harbors of 1899. Each statute contains criminal provisions, and each provides a formidable tool for the implementation of criminal penalties. Together, the two laws cover almost any conceivable activity associated with inland water pollution.²⁸

The criminal penalties are implemented by the United States Sentencing Guidelines. The manner in which the Guidelines operate in the field of environmental crimes, reveals a regulatory scheme that all but assures that someone convicted of polluting the water resources of the Nation will be incarcerated.²⁹

²⁷Waters extending seaward of the coast for three miles, and all waters inside that boundary. See 33 U.S.C. § 1362(8) (1989) (defining the reach of the "territorial seas"). See also 33 U.S.C. § 1362(7) (defining "navigable waters").

²⁸Several other statutes provide Federal criminal penalties for polluting waters beyond the shoreline. See Outer Continental Shelf Lands Act, Pub. L. No. 212, ch. 345, 67 Stat. 462 (1953) (codified as amended at 43 U.S.C. §§ 1331-1356 (1989)); Marine Protection Research and Sanctuaries Act of 1972 (MPRSA or Ocean Dumping Act), Pub. L. No. 92-532, 86 Stat. 1052 (codified as amended at 33 U.S.C. §§ 1401-1445 (1989)); Act to Prevent Pollution from Ships, Pub. L. No. 96-478, 94 Stat. 2297 (1980) (codified as amended at 33 U.S.C. §§ 1901-1912 (1989)); Shore Protection Act of 1988, Pub. L. No. 100-688, tit. IV, 102 Stat. 4154 (codified as amended at 33 U.S.C. §§ 2601-2623 (1989)).

²⁹See infra notes 185-340 and accompanying text.

Congress may not need to venture much further in the area of criminal sanctions for water pollution offenses. At this point, efforts should turn to enforcement, rather than the authorization of additional penalties. The challenge is to avoid overkill.

II. THE RIVERS AND HARBORS APPROPRIATION ACT OF 1899

A. THE REFUSE ACT.

In 1888, Congress was not concerned with the pollution of the Nation's waters. The Legislature was concerned with a Supreme Court holding that there was no Federal common law which prohibited the placement of "obstructions" into navigable rivers without the express consent of Congress.³⁰ The legislative response, in 1890, was to pass a statute which would control the emptying into navigable waters of "waste of any kind . . . which shall tend to impede or obstruct navigation."³¹ Four years later, the statute was amended. Another list was added protecting the navigable waters from "matter of any kind other than that flowing from streets, sewers, and passing therefrom in a liquid state."³²

³⁰Willamette Iron Bridge Company v. Hatch, 125 U.S. 1, 8 (1888).

³¹Rivers and Harbors Appropriation Act of 1890, ch. 907, § 6, 26 Stat. 426, 453.

³²Rivers and Harbors Appropriation Act of 1894, ch. 299, § 6, 28 Stat. 338, 363.

The two lists were consolidated in Section 13 of a portion of the Rivers and Harbors Act of 1899 known as the Refuse Act.³³ The Act makes it a criminal offense to "throw, discharge, or deposit," from any source, "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States."³⁴ The crime

³³Rivers and Harbors Appropriation Act of 1899 § 13, 33 U.S.C. § 407 (1989). § 13, together with § 16, 33 U.S.C. § 411 (1989), are often referred to as the Refuse Act.

³⁴The entire text of 33 U.S.C. § 407 (1989) is as follows:

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharge, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: Provided, That nothing herein contained shall extend to, apply to or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: And provided further, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit

(continued...)

is labelled a misdemeanor, but the statute requires a minimum penalty of a fine of \$500.00, or a jail term of thirty days. The maximum penalty could include a fine of up to \$500,000.00 and incarceration for up to one year.³⁵ While designed to be a barrier to the obstruction of navigable waters, the language of the Act, and the ease with which it may be applied, make the Refuse Act an ideal law for water pollution criminal enforcement.

There is no need to prove mens rea under the Act by the actual offender, although one who aides, abets, authorizes or instigates a violation must act "knowingly."³⁶ All a prosecutor needs to prove under the statute is:

- (1) A person or corporation;
- (2) Threw, discharged, deposited, or caused to be thrown, discharged or deposited;

³⁴(...continued)
the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

³⁵Rivers and Harbors Appropriation Act of 1899 § 16, 33 U.S.C. § 411 (1989). The statute authorizes a fine of only \$2,500.00. Today, however, the fine could reach \$500,000.00 if a death resulted, 200,000.00 if no death was involved, or twice the amount of damages, whichever amount is greater. See 18 U.S.C. § 3571 (1989).

³⁶Rivers and Harbors Appropriation Act of 1899 § 16, 33 U.S.C. § 411 (1989); United States v. White Fuel Corporation, 498 F.2d 619 (1st Cir. 1974).

- (3) From a ship, barge, or other floating craft of any kind, or from the shore, or manufacturing establishment, or mill of any kind;
- (4) Any refuse matter of any kind or description whatever;³⁷
- (5) Into any navigable water or tributary.³⁸

Use of the Refuse Act to enforce criminal sanctions is limited by two considerations. First, the Act is applicable only to waters that fit traditional concepts of navigability.³⁹ Application may also be limited by the relatively small penalties.

Historically, Section 13 of the Refuse Act became the first criminal enforcement weapon available to the Federal government, despite its initial design to protect navigation.⁴⁰ Conveniently, its provisions are as applicable today as they were at the turn of the Century.⁴¹ The statute reaches any polluter and any pollutant.

³⁷"Any refuse matter" includes any pollutant. See United States v. Standard Oil Company, 384 U.S. 224 (1966).

³⁸ECS Manual, supra note 14, at VII-130.

³⁹Under the Clean Water Act, "navigable waters" means "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (1989). Under the Rivers and Harbors Act of 1899, the concept of "navigable waters" is limited to only those waters that are "navigable in fact," or are subject to the "ebb and flow of the tide." 40 C.F.R. § 122.3 (1990). See also The Daniel Ball, 77 U.S. (10 Wall.) 557 (1871).

⁴⁰United States v. Republic Steel Corporation, 362 U.S. 482, 485-492 (1960).

⁴¹See, e.g., United States v. Pennsylvania Industrial Chemical Corporation, 411 U.S. 655 (1973).

While a fine may be written off by a polluter as the "cost of doing business," there are very few polluters willing to go to jail for thirty days, let alone for one year. This is the key when attempting to strike the proper balance between the crime and the punishment. In the area of water pollution, defendants are often white-collar criminals for whom the avoidance of jail is the significant objective.⁴² The Refuse Act alone may provide all of the deterrent necessary for the polluters it reaches.

B. EXCAVATION OF TRADITIONAL NAVIGABLE WATERS.

In addition to Section 13 of the 1899 Act, Section 10 provides penalties for anyone who would "excavate or fill" or in any manner "alter or modify the course, . . . condition, or capacity" of any "port, . . . lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States . . ."⁴³ A polluter who thus "fills" any navigable water of the United States, if fined, faces a minimum fine of \$500.00. Unlike the Refuse Act, if a polluter is jailed under Section 10, there is no mandatory minimum sentence. Maximum fines and sentences

⁴²ECS Manual, supra note 14, at IV-9.

⁴³Rivers and Harbors Appropriation Act of 1899 § 10, 33 U.S.C. § 403 (1989).

remain at \$500,000.00 and one year, and either or both punishments are authorized.⁴⁴

The filling of wetlands, one of the most pressing of all environmental issues, is subject to regulation under Section 404 of the Clean Water Act.⁴⁵ The dredging of waters adjacent to those wetlands is covered by Section 10 of the 1899 Act. The two statutes work well together in the situation where spoil is dredged from the bottom of a water body and redeposited elsewhere in order to create fast land. In such a situation, the dredging activities may be prosecuted under the Rivers and Harbors Act of 1899, while the fill activities are condemned by the Clean Water Act.⁴⁶

Section 10 also requires minimal elements of proof, although a showing of scienter may be necessary. Like the Refuse Act, Section 10 contains very few elements of proof:

- (1) A person or corporation;
- (2) Excavated or altered the course, condition, or capacity of any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel;
- (3) Of any navigable water of the United States;
- (4) Without a permit.⁴⁷

⁴⁴Id. at § 12, 33 U.S.C. § 406 (1989).

⁴⁵33 U.S.C. § 1344 (1989). See infra notes 95-96 and accompanying text.

⁴⁶See ECS Manual, supra note 14, at VII-127.

⁴⁷Id. at VII-128.

Section 10 is also limited to traditional concepts of navigability.⁴⁸ However, despite the plain language of the statute, which requires no showing of scienter, one U.S. District Court has held that a "knowing" violation must be shown.⁴⁹

When it examines the entire water pollution enforcement scheme, if Congress begins the examination with the assumption that any amount of prison time will provide the necessary deterrence for water polluters, then the Legislature really needs to look no further than this ninety-two year old appropriations act. Enforcement of the Act's criminal provisions can result in up to one year of imprisonment, and prosecution is simplified by the absence of having to prove scienter. Section 10 prohibits any alteration to navigable waters, and the Refuse Act prohibits placement of any pollutant into those waters. Overlapping and complimenting the Rivers and Harbors Act of 1899, however, is another statute with its own criminal measures and a much more expansive reach - the Clean Water Act.

⁴⁸See supra note 39. See also United States v. Appalachian Power Company, 311 U.S. 377 (1940).

⁴⁹United States v. Commodore Club, Inc., 418 F. Supp. 311, 319-21 (E.D. Mich. 1976).

III. THE FEDERAL WATER POLLUTION CONTROL ACT

A. HISTORY OF THE CRIMINAL PROVISIONS OF THE CLEAN WATER ACT.

The primary purpose behind the enactment of the Rivers and Harbors Act of 1899 was to enhance the Federal power to protect the navigability of the Nation's waters.⁵⁰ Pollution control was an afterthought. When Congress began to directly address the issue of the "abatement of stream pollution" in 1948, it did so in separate legislation designed to "recognize, preserve, and protect the primary responsibilities and rights of the States in controlling water pollution."⁵¹ In the eyes of the national political leadership, water pollution was a "State problem," while navigation concerns belonged exclusively to the Federal Government.

The 1948 Water Pollution Control Act thus provided nothing in the way of Federal powers to impose criminal sanctions on polluters. The Act was a limited Federal program. The Surgeon General was authorized to work with the States in addressing the problem of water pollution. If State enforcement efforts against a polluter proved unsuccessful, then the affected State could petition the Attorney General to bring a suit on behalf of the United States to "secure

⁵⁰See supra notes 30-35 and accompanying text.

⁵¹Water Pollution Control Act, ch. 758, § 1, 62 Stat. 1155 (1948) (emphasis added).

abatement of the pollution" in an action based in nuisance.⁵² Absent such a petition, the Federal Government remained uninvolved in the process.

The Water Pollution Control Act Amendments of 1956 continued this process of limiting Federal enforcement to a series of conferences and meetings.⁵³ If these statutes had any effect, it was to assure polluters that the effect of their activities would be a lot of talk by people representing Federal, State and local agencies. State enforcement actions were to be "encouraged," and except in limited circumstances, were not to be displaced by Federal actions.⁵⁴ If the Surgeon General learned that pollution was taking place, then he could "call promptly a conference of the State water pollution control agencies."⁵⁵ If the conference failed to result in the abatement of the pollution within six months, then the Secretary of Health, Education, and Welfare could "call a public hearing."⁵⁶ If the public hearing failed, then the Attorney General could be petitioned to bring an abatement action.⁵⁷ Changes in 1966⁵⁸ and 1970⁵⁹ similarly

⁵²Id. at § 2(d)(4).

⁵³Water Pollution Control Act Amendments of 1956, Pub. L. No. 660, ch. 518, 70 Stat. 498.

⁵⁴Id. at § 8(b).

⁵⁵Id. at § 8(c).

⁵⁶Id. at § 8(e).

⁵⁷Id. at § 8(f).

failed to push the Federal water pollution program into a more aggressive stance.

Congressional attitudes changed by 1972. The Legislature finally recognized the "poor enforcement performance" taking place under the earlier water pollution control acts. Congress compared the water pollution control measures with the enforcement mechanisms of the Clean Air Act of 1970,⁶⁰ and dusted off the Rivers and Harbors Act of 1899. Two years after the first Earth Day, Congress decided that the "enforcement presence of the Federal government shall be concurrent with the enforcement powers of the States."⁶¹ In order to "encourage compliance" with the provisions of the new Act, Federal criminal penalties were now authorized for use against water polluters.⁶²

Under the new Section 309(c), criminal penalties could be imposed upon any person who "willfully or negligently" discharged any pollutant, except in compliance with the statute. Any "point source" that discharged pollutants in

⁵⁸(...continued)

⁵⁸Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246.

⁵⁹Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91.

⁶⁰Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676.

⁶¹S. Rep. No. 92-414, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 3668, 3729-3730.

⁶²Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816, 860.

excess of effluent limitations was also subject to the "willfully or negligently" provisions, as was any person in an "industrial category" that discharged pollutants in excess of "national standards of performance." The sanctions extended to any person who discharged "toxic" pollutants in excess of effluent limitations, and any person who discharged pollutants in violation of "pretreatment standards." Any "owner or operator" who failed to establish and maintain required records, make required reports, install or use required monitoring equipment, sample effluent as required or provide whatever information the Administrator required was subject to prosecution, as well as any person who violated any "permit condition."⁶³

The penalties for violating these "willful or negligent" violations demonstrated a Congressional desire for more stringent controls. A first offender, if fined, faced a minimum fine of \$2,500.00, and a maximum fine of \$25,000.00 "per day of violation." The first offender could also be sentenced to incarceration for up to one year in prison instead of, or in addition to, the fine. If jailed instead of fined there was no minimum term. A second offender, on the other hand, faced a maximum fine of \$50,000.00 "per day of violation," and incarceration for up to two years, or both.

⁶³Id. at § 309(c)(1). Most of these provisions still apply today.

The second offender was not subject to any minimum fine or jail term.⁶⁴

A different penalty was authorized for one who made any false statement, representation or certification in any application, record, report, plan or other document required by the Act; or who falsified, tampered with or "knowingly" rendered inaccurate any monitoring device or method required by the Act. Such an offender could be sentenced to a "fine of not more than \$10,000.00, or by imprisonment for not more than six months, or by both."⁶⁵ A "person," for any of the criminal provisions, could be an individual, a corporation, a partnership, an association, a State, a municipality, a commission, a political subdivision of a State, an interstate body⁶⁶ or "any responsible corporate officer."⁶⁷

In 1977, the list of offenders was expanded to include any person who discharged pollutants in violation of a permit issued by a State.⁶⁸ In all other respects the law remained the same. However, the criminal provisions, as well as the rest of the statutory decrees, were extensively revised in

⁶⁴Id. at § 309(c)(1).

⁶⁵Id. at § 309(c)(2).

⁶⁶Id. at § 502(5).

⁶⁷Id. at § 309(c)(3).

⁶⁸Clean Water Act of 1977, Pub. L. No. 95-217, § 67(c)(2)(C), 91 Stat. 1566, 1606.

1987.⁶⁹ Together with the Oil Pollution Act of 1990, which relates to oil spills,⁷⁰ the Water Quality Act of 1987 contains the primary regulatory scheme that applies today. Combined with the Rivers and Harbors Act of 1899, these are the Federal water pollution control measures that make up the current criminal regulatory scheme.⁷¹

B. OPERATION OF THE CLEAN WATER ACT.

The Clean Water Act is a series of overlapping and complementary provisions that together propose to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁷² The basic command of the Act is that the discharge of a pollutant into a water of the United States must meet certain standards. These include Effluent Limitations, or Technology Based Controls; Water Quality Related Effluent Limitations; National Standards of

⁶⁹Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7.

⁷⁰Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484.

⁷¹There are several other criminal statutes which may be used in environmental prosecutions. E.g., 18 U.S.C. § 2 (1989) (Aiding and Abetting); 18 U.S.C. § 371 (1989) (Conspiracy); 18 U.S.C. §§ 1621-1623 (1989) (Perjury). Environmental crimes were recently added to the "money laundering" provisions of 18 U.S.C. § 1956(c)(7) (1989). Crime Control Act of 1990, Pub. L. No. 101-647, tit. XIV, § 1404, 104 Stat. 4789, 4835. See also U.S. Atty's Manual, 5-11.103 (1988). The Rivers and Harbors Act of 1899 and the CWA, however, provide the most direct prohibitions applicable to water pollution.

⁷²33 U.S.C. § 1251(a) (1989).

Performance; Toxic and Pretreatment Effluent Standards; and, if applicable, standards applicable to Aquaculture Programs. The standards applicable to a given polluter are set forth in a permit issued by the Environmental Protection Agency under the National Pollutant Discharge Elimination System, or in a permit issued by the United States Army Corps of Engineers if the permittee is involved in dredge or fill operations. The specific provisions of the CWA which prescribe these standards are discussed below.

1. **The General Proscription - The Illegality of Pollutant Discharges Except in Compliance with the Law.**

The basic command of the Act is set forth in Section 301(a):

Except as in compliance with this Section [General Proscription and Technology Based Controls] and Sections 302 [Water Quality Related Effluent Limitations], 306 [National Standards of Performance], 307 [Toxic and Pretreatment Effluent Standards], 318 [Aquaculture], 402 [National Pollutant Discharge Elimination System], and 404 [Permits for Dredged or Fill Material] of this title, the discharge of any pollutant by any person shall be unlawful.⁷³

⁷³33 U.S.C. § 1311(a) (1989) (emphasis added).

A "pollutant" under the statute is defined as:

"[D]redged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."⁷⁴

A "person" may be "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body,"⁷⁵ or, for purposes of the criminal provisions, "any responsible corporate officer."⁷⁶ The "discharge of a pollutant" means "any addition of any pollutant to navigable waters"⁷⁷ from any point source," or "any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source

⁷⁴33 U.S.C. § 1362(6) (1989). A "pollutant" does not include:

(A) "sewage from vessels" within the meaning of [33 U.S.C. § 1322]; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

Id.

⁷⁵33 U.S.C. § 1362(5) (1989).

⁷⁶33 U.S.C. § 1319(c)(6) (1989). See infra note 183.

⁷⁷See supra note 39.

other than a vessel or floating craft."⁷⁸ A "point source" is "any discernible, confined and discrete conveyance."⁷⁹ The framework of Section 301(a) is summarized in Table 1.

TABLE 1		
PROVISIONS OF THE CLEAN WATER ACT WHICH REGULATE THE DISCHARGE OF POLLUTANTS INTO WATERS OF THE UNITED STATES		
CWA	33 U.S.C.	Provision
\$ 301	\$ 1311	Technology Based Controls.
\$ 302	\$ 1312	Water Quality Related Effluent Limitations.
\$ 306	\$ 1316	National Standards of Performance.
\$ 307	\$ 1317	Toxic and Pretreatment Effluent Standards.
\$ 318	\$ 1328	Aquaculture.
\$ 402	\$ 1342	National Pollutant Discharge Elimination System.
\$ 404	\$ 1344	Permits for Dredged or Fill Material.

⁷⁸33 U.S.C. § 1362(12) (1989).

⁷⁹33 U.S.C. § 1362(14) (1989). Point sources do not include agricultural stormwater discharges or return flows from irrigated agriculture. Id.

2. Technology Based Controls.

Under the Act, most water pollution is controlled by specific "end of pipe" technology which is applied to each source of pollution. Section 301(b) of the statute establishes the level of control required for each type of pollutant or source of pollution.⁸⁰ These controls are referred to as "Technology Based Controls."

An example of a Technology Based Control is that a source discharging certain "toxic" pollutants must install equipment that will control the discharge with the "best available technology," considering economic factors.⁸¹ In other words, a "person" who desires to discharge a "toxic" pollutant into a "water of the United States" must first treat the pollutant with the best technology available which is economically feasible.

3. Water Quality Related Effluent Limitations.

In addition to "end of pipe" controls, under Section 302 of the Clean Water Act⁸² the Environmental Protection Agency is permitted to look at the quality of individual bodies of water. If the Agency determines that the Technology Based Controls are not sufficient to protect "public health, public

⁸⁰33 U.S.C. § 1311(b) (1989).

⁸¹33 U.S.C. §§ 1311(b)(2)(A) and 1311(b)(2)(C) (1989).

⁸²33 U.S.C. § 1312 (1989).

water supplies, agricultural and industrial uses," or the "propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities" in or on any specific body of water, then the Agency may prescribe different, more stringent effluent standards for the point sources discharging pollutants into that water.⁸³

4. National Standards of Performance.

Section 306⁸⁴ requires the Agency to establish effluent limitations for particular industrial categories, such as textile mills, electroplating operations and grain mills.⁸⁵ The limitations prescribed apply to each point source within a given category, in addition to the Technology Based Controls and Water Quality Related Effluent Limitations. Thus, any given point source has to meet three separate standards, (a) Technology Based Controls; (b) Water Quality Related Effluent Limitations; and (c) National Standards of Performance.

5. Effluent Limitations for Certain Toxic Pollutants.

A fourth standard applies only to "toxic" pollutants. These pollutants are regulated under Section 307⁸⁶ of the Act

⁸³33 U.S.C. § 1312(a) (1989).

⁸⁴33 U.S.C. § 1316 (1989).

⁸⁵33 U.S.C. § 1316(b)(1)(A) (1989).

⁸⁶33 U.S.C. § 1317(a) (1989).

due to their toxicity, persistence, and degradability. The Clean Water Act also considers the potential presence in water of organisms affected by one or more of these pollutants, the importance of the affected organisms, and the nature and extent of the effect of the pollutant on the organism.⁸⁷ These pollutants are regulated as "toxic" pollutants.

6. Pretreatment Standards.

If the "toxic" pollutants are of the type than can damage any treatment works, or avoid any treatment by the facility at all, then special treatment is required by the Act.⁸⁸ These particular pollutants can often destroy the organisms that break down municipal sewage, or are unaffected by those organisms. In order to protect against that threat, the Environmental Protection Agency sets "pretreatment standards" which are designed to neutralize the pollutant.⁸⁹ The "pretreatment" takes place before the waste stream is introduced into any publicly owned treatment works. The introduction of any pollutant into a sewer system or publicly owned treatment works in a manner which causes personal injury or property damage, or in a manner which causes the treatment works to violate a Water Quality Related Effluent Limitation

⁸⁷Id.

⁸⁸33 U.S.C. § 1317(b) (1989).

⁸⁹Id.

or permit condition, is forbidden to both point and non-point sources.⁹⁰

7. Aquaculture Programs.

Under certain controlled conditions, specific pollutants may be discharged from an approved aquaculture program under Section 318.⁹¹ The program may be administered and supervised by either the Federal government or a State.⁹² The program itself, as well as the specific pollutants involved, must be included in the National Pollutant Discharge Elimination System.

8. National Pollutant Discharge Elimination System.

Each of the standards, limitations or treatment requirements applicable to any specific point source are set out in a "polluter's permit." The National Pollutant Discharge Elimination System, or "NPDES" permit program, established in Section 402,⁹³ is the heart of the entire statute. Each polluter knows exactly what he may or may not discharge into a body of water based on a permit issued by the

⁹⁰33 U.S.C. §§ 1319(c)(1)(B); 1319(c)(2)(B) (1989).

⁹¹33 U.S.C. § 1328 (1989).

⁹²33 U.S.C. § 1328(c) (1989). Approval of such programs has rarely, if ever, been sought.

⁹³33 U.S.C. § 1342 (1989).

Environmental Protection Agency or a State.⁹⁴ The permit system insures that the standards required by the Technology Based Controls, the Water Quality Related Effluent Limitations, the National Standards of Performance, the Effluent Limitations for Certain Toxic Pollutants, the Pretreatment Standards, and the Aquaculture requirements are met. Any discharge of any pollutant without a NPDES permit violates the General Proscription.

9. Permits for Dredged or Fill Material.

Any person who wishes to fill any wetlands must obtain a permit from the Army Corps of Engineers under Section 404 of the Clean Water Act.⁹⁵ Along with Section 10 of the Rivers and Harbors Act of 1899, Section 404 provides the primary Federal protection for the Nation's wetlands.⁹⁶

Each of the Clean Water Act provisions described above may be enforced through Federal criminal sanctions. Certain other provisions of the Act are also subject to Federal criminal enforcement under Section 309(c).⁹⁷ These provisions are discussed below. All of the criminally enforceable provisions of the Act are listed in Table 2.

⁹⁴States are permitted to operate their own programs if the program has been approved by EPA. 33 U.S.C. § 1342(b) (1989).

⁹⁵33 U.S.C. § 1344 (1989).

⁹⁶See supra notes 45-46 and accompanying text.

⁹⁷33 U.S.C. § 1319(c) (1989).

TABLE 2

PROVISIONS OF THE CLEAN WATER ACT
SUBJECT TO CRIMINAL SANCTIONS

I. "Negligent" or "Knowing" Violations.

CWA	33 U.S.C.	Provision
§ 301	§ 1311	Technology Based Controls.
§ 302	§ 1312	Water Quality Related Effluent Limitations.
§ 306	§ 1316	National Standards of Performance.
§ 307	§ 1317	Toxic and Pretreatment Effluent Standards.
§ 308	§ 1318	Records and Reports; Inspections.
§ 311(b)(3)	§ 1321(b)(3)	Oil and Hazardous Substance Liability - Discharges in "Harmful Quantities."
§ 318	§ 1328	Aquaculture.
§ 405	§ 1345	Disposal or Use of Sewage Sludge.
§ 402	§ 1342	National Pollutant Discharge Elimination System - Permit Condition or Limitation Implementing Such Provisions.
§ 402(a)(3)	§ 1342(a)(3)	National Pollutant Discharge Elimination System - National Pretreatment Program Requirements.
§ 402(b)(8)	§ 1342(b)(8)	National Pollutant Discharge Elimination System - State Pretreatment Program Requirements.
§ 404	§ 1344	Permits for Dredged or Fill Material.
§ 309	§ 1319	Introduction into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance in such a manner that the person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works.

TABLE 2 (Continued)

II. "Knowing Endangerment" Violations.		
CWA	33 U.S.C.	Provision
§ 301	§ 1311	Technology Based Controls.
§ 302	§ 1312	Water Quality Related Effluent Limitations.
§ 303	§ 1313	Water Quality Standards and Implementations Plans.
§ 306	§ 1316	National Standards of Performance.
§ 307	§ 1317	Toxic and Pretreatment Effluent Standards.
§ 308	§ 1318	Records and Reports; Inspections.
§ 311(b)(3)	§ 1321(b)(3)	Oil and Hazardous Substance Liability - Discharges in "Harmful Quantities."
§ 318	§ 1328	Aquaculture.
§ 405	§ 1345	Disposal or Use of Sewage Sludge.
§ 402	§ 1342	National Pollutant Discharge Elimination System - Permit Condition or Limitation Implementing Such Provisions.
§ 404	§ 1344	Permits for Dredged or Fill Material.

10. Oil and Hazardous Substance Liability - Discharges in "Harmful Quantities."

The Oil Pollution Act of 1990⁹⁸ and Section 311 of the Clean Water Act⁹⁹ are designed to protect the nation's waters from oil spills characterized by the Exxon Valdez tragedy.¹⁰⁰

⁹⁸Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484.

⁹⁹33 U.S.C. § 1321 (1989).

¹⁰⁰The Exxon Valdez was an oil tanker that ran aground in the Prince William Sound area of Alaska in March of 1989, (continued...)

Under the two statutes, the discharge of oil or "hazardous substances" in such quantities as "may be harmful" is prohibited.¹⁰¹ A "harmful quantity" is one "which may be harmful to the public health or welfare or the environment of the United States, including but not limited to fish, shellfish, wildlife, and public and private property, shorelines, and beaches."¹⁰² This amount has been defined as a quantity that will "[c]ause a sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines."¹⁰³

The primary deterrence under the statutes stems from the virtually unlimited amount of civil damages. Natural resource damages are recoverable,¹⁰⁴ including the costs of restoring the resources, any diminution in value, and the costs of assessing the damages.¹⁰⁵ While these costs were already

¹⁰⁰(...continued)
spilling some eleven million gallons of oil into the sensitive ecosystem. See United States v. Exxon Corp., No. A90-015 CR (D. Alaska Mar. 1, 1991).

¹⁰¹33 U.S.C. § 1321(b)(3) (1989). "Hazardous substances" are designated in 40 C.F.R. § 116 (1990).

¹⁰²33 U.S.C. § 1321(b)(4) (1989), as amended by Oil Pollution Act of 1990 § 4202 (emphasis added).

¹⁰³40 C.F.R. § 110.3(b) (1990).

¹⁰⁴33 U.S.C. § 2702 (1989), as amended by Oil Pollution Act of 1990 § 1002(b)(2)(A).

¹⁰⁵33 U.S.C. § 2706 (1989), as amended by Oil Pollution Act of 1990 § 1006(d)(1).

recoverable as restitution,¹⁰⁶ Congress explicitly tasked the President to promulgate regulations for the assessment of these natural resource damages by August 18, 1992.¹⁰⁷ Additional deterrence stems from the provisions which permit the discharge of any "harmful quantity" of any oil or hazardous substance, to be criminally prosecuted if either a "knowing," or "negligent," or "knowing endangerment" violation of the Clean Water Act.¹⁰⁸

11. Records and Reports; Inspections.

In order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," that is, to carry out the objective of the Clean Water Act,¹⁰⁹ every owner or operator of every point source is required to "establish and maintain" reports; "make" those reports; install, use and maintain monitoring equipment; and sample effluent as required by the Environmental Protection Agency.¹¹⁰ EPA may establish any or all of these requirements to assist in the development of any standard, or

¹⁰⁶See infra notes 362-366 and accompanying text.

¹⁰⁷33 U.S.C. § 2706 (1989), as amended by Oil Pollution Act of 1990 § 1006(e)(1).

¹⁰⁸33 U.S.C. § 1319(c) (1989), as amended by Oil Pollution Act of 1990 § 4301(c).

¹⁰⁹See supra note 72 and accompanying text.

¹¹⁰33 U.S.C. § 1318(a)(4)(A) (1989).

to determine whether any person is in violation of the Act.¹¹¹

12. Disposal or Use of Sewage Sludge.

The final provision of the Clean Water Act of importance for criminal enforcement purposes is Section 405,¹¹² pertaining to sewage sludge. Section 405 provides that no sewage sludge from any treatment works may be disposed of without a NPDES permit.¹¹³

C. OPERATION OF THE CRIMINAL PROVISIONS OF THE CLEAN WATER ACT.

The "willfully or negligently" provisions that existed after 1972¹¹⁴ were replaced in 1987 by three different criminal provisions. Under the current statute, the different levels of criminal liability depend on whether the violation of the Act was "negligent,"¹¹⁵ or "knowing,"¹¹⁶ or under such

¹¹¹33 U.S.C. § 1318(a) (1989).

¹¹²33 U.S.C. § 1345 (1989).

¹¹³33 U.S.C. § 1345(a) (1989). The Sewage Sludge provisions overlap the General Proscription since "sewage sludge" is a listed pollutant. See 33 U.S.C. § 1362(6) (1989). One of the reasons for treating sewage sludge differently is to authorize grants and studies to find useful uses of the wastes in this category. See 33 U.S.C. § 1345(g).

¹¹⁴See supra notes 60-67 and accompanying text.

¹¹⁵33 U.S.C. § 1319(c)(1) (1989).

¹¹⁶33 U.S.C. § 1319(c)(2) (1989).

circumstances that the violator not only acted "knowingly," but at the time of the act also "knew" that he "thereby place[d] another person in imminent danger of death or serious bodily injury."¹¹⁷

In order to show that the offender acted "knowingly," it is not necessary to show that he knew the discharges were prohibited, or that the materials discharged were "pollutants."¹¹⁸ It is similarly irrelevant whether the accused "knew" the affected waters were "waters of the United States," or even that he "knew" he was required to obtain a permit.¹¹⁹ All that need be shown in order to prove that the accused acted "knowingly," is that he knew the general character and nature of the materials he was discharging.¹²⁰

¹¹⁷33 U.S.C. § 1319(c)(3) (1989).

¹¹⁸See e.g., United States v. Greer, 850 F.2d 1447 (11th Cir. 1988). See also Hansen, "Knowing" Environmental Crimes, 16 Wm. Mitchell L. Rev. 987 (1990).

¹¹⁹United States v. International Minerals, 402 U.S. 558 (1971); United States v. Hamel, 551 F.2d 107 (6th Cir. 1977); United States v. Frezzo Brothers, Inc., 461 F. Supp 266 (E.D. Pa. 1978), aff'd, 602 F.2d 1123 (3rd Cir. 1979), cert. denied, 444 U.S. 1074 (1980), same case later, 546 F. Supp. 713 (E.D. Pa. 1980), rev'd, 642 F.2d 59 (3rd Cir. 1981), decision after remand, 546 F. Supp. 713 (E.D. Penn. 1982), aff'd, 703 F.2d 62 (3rd Cir. 1982), cert. denied, 464 U.S. 829 (1983).

¹²⁰See Hamling v. United States, 418 U.S. 87, 123-124 (1974):

It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the material he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials
(continued...)

In the words of one court, the "word knowingly in the penalty section of [a similar environmental statute] refers to awareness of facts, not awareness of law."¹²¹

As far as the scienter requirement for "negligent" violations is concerned, there is nothing in the Act or its legislative history to indicate that the term "negligent" refers to anything other than simple negligence.¹²² A conviction for "negligently" violating the statute exposes the accused to punishment that may include fines and/or incarceration. If fined, there must be a minimum fine of \$2,500.00 per day of violation, or a maximum fine of \$25,000.00 per day of violation.¹²³ If incarcerated, there is no minimum jail term required, but the maximum period of imprisonment is one year. Subsequent offenders may be fined up to \$50,000.00 per day of violation (no minimum), or imprisonment for up to two years, or both.¹²⁴

¹²⁰(...continued)
would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law.

¹²¹United States v. Corbin Farm Service, 444 F. Supp. 510 (E.D. Cal. 1978), aff'd, 578 F.2d 259 (9th Cir. 1978).

¹²²See United States v. Brittain, No. 90-6202 (10th Cir. Apr. 30, 1991).

¹²³But see supra note 35.

¹²⁴33 U.S.C. § 1319(c)(1) (1989). Interestingly, by setting a minimum fine for a first offender but not a recidivist, the habitual criminal could end up with a fine of less than \$2,500.00 for a negligent offense.

A "knowing" violation, on the other hand, leads to a potential penalty of roughly twice that of the "negligent" offender. A person convicted of a first offense "knowing" violation, if fined, faces a minimum fine of \$5,000.00 per day of violation, or a maximum fine of \$50,000.00 per day of violation. Alternatively, or in addition to the fine, a person convicted of violating the statute "knowingly," may be sentenced to a maximum of three years in jail. A subsequent offender may be fined up to \$100,000.00 per day of violation (again, no minimum), or imprisoned for up to six years, or both.¹²⁵

The majority of criminal prosecutions have involved the following types of violations:

- (1) Direct Discharges Into a Body of Water Without a Permit or in Violation of a Permit;
- (2) Discharges Into a Sewer System in Violation of the Pretreatment Standards;
- (3) Filling in Wetlands Without a Permit or in Violation of a Permit; and
- (4) Falsification of Information.¹²⁶

1. Direct Discharges Into a Body of Water Without a Permit or in Violation of a Permit.

Any person seeking to discharge a pollutant directly into the waters of the United States must obtain a NPDES permit from either the Administrator of the Environmental Protection

¹²⁵33 U.S.C. § 1319(c)(2) (1989).

¹²⁶ECS Manual, supra note 14, at VII-103.

Agency, or from a state agency authorized by the EPA.¹²⁷ Without such a permit, the discharge of any pollutant by any person is illegal.¹²⁸ In order for a permitted discharge to be lawful, the terms of the permit must be complied with.

The elements of proof for a NPDES permit violation prosecution are:

- (1) A person;
- (2) "Knowingly" or "negligently;"
- (3) Discharged through a point source;
- (4) A pollutant;
- (5) Into a water of the United States;
- (6) Without a permit or in violation of a permit.¹²⁹

2. Discharges Into a Sewer System in Violation of the Pretreatment Standards.

Just as Section 301 decrees that "the discharge of any pollutant by any person shall be unlawful [except as in compliance with the Act],"¹³⁰ Section 307 states:

¹²⁷United States v. Hoflin, 880 F.2d 1033, 1035 n.1 (9th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1143 (1990) (citing E.P.A. v. California ex rel. State Water Resources Control Board, 426 U.S. 200, 205-08 (1976)).

¹²⁸See supra notes 93-94 and accompanying text. See also United States v. Frezzo Brothers, Inc., 461 F. Supp. 266 (E.D. Pa. 1978).

¹²⁹ECS Manual, supra note 14, at VII-110.

¹³⁰33 U.S.C. § 1311(a) (1989).

After the effective date of any effluent standard or prohibition [Effluent Limitations for Certain Toxic Pollutants] or pretreatment standard promulgated under this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.¹³¹

Four types of pretreatment standards may be prosecuted under the Clean Water Act, three of which were promulgated by EPA.

"General Prohibitions" regulate pollutants that may "pass-through" a sewage system without adequate treatment, and pollutants that may cause an "interference" with the operation of the treatment works. These "General Prohibitions" apply to all discharges, regardless of the source, and regardless of whether they have an NPDES permit.¹³²

The second type of pretreatment standard also applies to all discharges, regardless of the source. These are "Specific Prohibitions" which outlaw the introduction into a treatment work of flammable, explosive, viscous and corrosive materials that can damage the system.¹³³

The third type of pretreatment standard is similar to the National Standards of Performance.¹³⁴ These are "Categorical

¹³¹33 U.S.C. § 1317(d) (1989). The limitations on "toxic" pollutants will be prescribed in the NPDES permit of a source. Violations will generally be prosecuted under the permit provisions, rather than separately.

¹³²40 C.F.R. § 403.5(a)(1) (1990).

¹³³40 C.F.R. § 403.5(b) (1990).

¹³⁴See supra notes 84-85 and accompanying text.

Standards" which have been developed for and applied to specific categories of industries.¹³⁵

The fourth type of pretreatment standard that may be enforced under the criminal provisions of Section 307, are standards developed under State and local programs. These standards may be enforced by the Federal government under regulations that allow them to be "treated" as if they were "Federal" standards.¹³⁶ Additionally, State pretreatment standards may be included in a State's "approved" NPDES program, which can also be enforced by Federal officials.¹³⁷

The elements of an offense for violating these pretreatment standards are:

- (1) A person;
- (2) "Knowingly" or "negligently;"
- (3) Operated a source [thereby discharged into a sewer system];
- (4) In violation of a pretreatment standard;
- (5) After the effective date of that standard.¹³⁸

The same rules apply for "knowing" and "negligent" violations of the pretreatment standards that apply to permits.¹³⁹ The

¹³⁵E.g., 40 C.F.R. § 405.94 (1990) (pretreatment standards for the dairy products processing industry.

¹³⁶40 C.F.R. § 403.5(d) (1990).

¹³⁷Compare 33 U.S.C. §§ 1319(c)(1)(A) and 1319(c)(2)(A) (1989) with 33 U.S.C. §§ 1342(a)(3) and 1342(b)(8) (1989).

¹³⁸ECS Manual, supra note 14, at VII-112.

¹³⁹See supra notes 118-122 and accompanying text.

same penalties are also involved.¹⁴⁰ Some of the more recently reported cases have involved the violation of pretreatment standards.¹⁴¹

3. Filling in Wetlands Without a Permit or in Violation of a Permit.

The breadth of the Clean Water Act extends the farthest under Section 404.¹⁴² Section 404 protects the Nation's wetlands, which includes virtually any land that is "wet." The extent of this reach is outlined in a series of regulatory and statutory definitions.

Section 404 applies to the "navigable waters,"¹⁴³ a term that encompasses "the waters of the United States, including the territorial seas."¹⁴⁴ The "territorial seas" extend seaward from the ordinary low water mark of the coast for three miles.¹⁴⁵ "Waters of the United States" includes all "waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of

¹⁴⁰See supra notes 123-125 and accompanying text.

¹⁴¹See United States v. Boldt, 929 F.2d 35 (1st Cir. 1991); United States v. Wells Metal Finishing, Inc., 922 F.2d 54 (1st Cir. 1991).

¹⁴²33 U.S.C. § 1344 (1989).

¹⁴³33 U.S.C. § 1344(a) (1989).

¹⁴⁴33 U.S.C. § 1362(6) (1989).

¹⁴⁵33 U.S.C. § 1362(8) (1989).

the tide."¹⁴⁶ These waters also include all interstate waters, including interstate "wetlands;"¹⁴⁷ all intrastate waters, the use, degradation or destruction of which could affect interstate or foreign commerce;¹⁴⁸ impoundments of these waters;¹⁴⁹ and tributaries of these waters.¹⁵⁰ The term "waters of the United States" also includes all "wetlands" adjacent to those waters.¹⁵¹ The term "wetlands" means:

Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.¹⁵²

In short, Section 404 applies to just about any land that is naturally "wet."¹⁵³

¹⁴⁶33 C.F.R. § 328.3(a) (1990); 40 C.F.R. § 122.2 (1990).

¹⁴⁷33 C.F.R. § 328.3(b) (1990).

¹⁴⁸Examples include waters which could be used by interstate or foreign travellers for recreational purposes, 33 C.F.R. § 328.3(a)(3)(i) (1990); waters from which fish or shellfish could be taken and sold in interstate commerce, 33 C.F.R. § 328.3(a)(3)(i) (1990); and waters which could be used by industries in interstate commerce, 33 C.F.R. 328.3(a)(3)(iii) (1990).

¹⁴⁹33 C.F.R. § 328.3(a)(4) (1990).

¹⁵⁰33 C.F.R. § 328.3(a)(5) (1990).

¹⁵¹33 C.F.R. § 328.3(a)(7) (1990).

¹⁵²33 C.F.R. § 328.3(b) (1990).

¹⁵³These definitions apply to all of the provisions of the Clean Water Act. 33 U.S.C. § 1362 (1989). They are discussed (continued...)

Before any "dredged or fill material" may be placed into any of these "waters of the United States," including these "wetlands," the discharger must obtain a permit from the Army Corps of Engineers.¹⁵⁴ This requirement extends to "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an [sic] waterbody."¹⁵⁵ Factors considered in determining whether the material involved is "fill material," include the purposes of the discharge; whether the discharge results from construction-type activities, such as road construction; whether the discharge causes a physical loss or physical modification to the waters; and whether the discharge is heterogeneous in nature, and of the type normally associated with sanitary landfill discharges.¹⁵⁶ These factors are important for distinguishing the discharge of "fill material" under Section 404, from the discharge of a "pollutant" under section 402.¹⁵⁷ A permit is required under one of these

¹⁵³(...continued)
here because this is where the extent of the Act reaches beyond what one usually considers to be "waters," and extends to any land that meets the definition of "wetlands."

¹⁵⁴33 U.S.C. § 1344(a) (1989).

¹⁵⁵33 C.F.R. § 323.2(e) (1990).

¹⁵⁶Water Pollution Control; Memorandum of Agreement on Solid Waste, 51 Fed. Reg. 8,871, 8,872 (1986).

¹⁵⁷The Corps of Engineers exempts from the definition of "fill material" any "pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under [33 U.S.C. § 1342 (1989)] of the Clean Water Act." 33
(continued...)

statutes before any material whatsoever may be placed into a "water of the United States."

The discharge of any "fill material," without the permit required by Section 404, is prohibited by the General Proscription.¹⁵⁸ In order to prosecute an offender for violating these provisions, the Department of Justice would have to prove the following elements:

- (1) A person;
- (2) "Negligently" or "knowingly;"
- (3) Discharged "fill material;"
- (4) From a point source;
- (5) Into a "water of the United States," including any adjacent wetland;
- (6) Without a permit or in violation of a permit.¹⁵⁹

One of the more egregious cases prosecuted under the Clean Water Act involved the filling of wetlands in violation

¹⁵⁷(...continued)
C.F.R. § 323.3(e) (1990). EPA defines "fill material" as any "pollutant" which replaces portions of "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) (1990) (emphasis added). The distinction is important only for deciding whether a permit from EPA under the NPDES program is needed, or if the applicant must obtain the permit from the Corps of Engineers under Section 404. The conflict was resolved by a Memorandum of Agreement between the two agencies that enumerated the different factors. Water Pollution Control; Memorandum of Agreement on Solid Waste, supra note 151.

¹⁵⁸33 U.S.C. § 1311(a) (1989). "Except as in compliance with . . . section[] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful."

¹⁵⁹See ECS Manual, supra note 14, at VII-116.

of Section 404. The case was United States v. Pozgai.¹⁶⁰ John Pozgai learned during the purchase of a tract of land that the property he was about to buy contained Federally protected "wetlands." Regardless, he completed the purchase and began to deposit "fill material" into the "wetlands" without a permit. In April of 1987, Pozgai was told by the Army Corps of Engineers that he must obtain a permit prior to any additional filling. Pozgai did not obtain the permit, and continued to fill the wetlands. In September of 1987, the accused was issued a "Cease and Desist" order. Pozgai did not cease or desist, and continued to fill the wetlands. A "Notice of Violation" was issued in early December 1987, followed by a second NOV on December 17, 1987. Pozgai continued to fill the wetlands. On August 24, 1988, a Temporary Restraining Order was issued, and Pozgai reacted as before - he continued to fill the wetlands.¹⁶¹

Pozgai was convicted of fourteen counts for activities which occurred before the Sentencing Guidelines took effect, and twenty-six counts for activities affected by the Guidelines. He was sentenced to three years of imprisonment for the pre-Guidelines offenses, and to a concurrent twenty-seven months of jail time under the Guidelines charges. Pozgai was also sentenced to one year of Supervised Release, following his imprisonment; five years of probation; and fines

¹⁶⁰757 F. Supp. 21 (E.D. Pa. 1991).

¹⁶¹Id. at 21.

totalling \$200,000.00. The Court reasoned that "it's hard to visualize a more stubborn violator of the laws that were designed to protect the environment."¹⁶²

4. Falsification of Information.

Under the Clean Water Act, the Environmental Protection Agency has a great deal of power in the area of information gathering. The Agency may require any person subject to the Act to submit reports, use monitoring equipment and sample effluent.¹⁶³ These reports, monitoring devices and samples, if false, are subject to prosecution under Title 18 of the United States Code:¹⁶⁴

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.¹⁶⁵

¹⁶²Id. at 22.

¹⁶³See supra notes 109-111 and accompanying text.

¹⁶⁴See United States v. Brittain, No. 90-6202 (10th Cir. Apr. 30, 1991).

¹⁶⁵18 U.S.C. § 1001 (1989).

A complementary provision which covers the same reports, monitoring devices and samples, is found in Section 309¹⁶⁶ of the CWA itself:

Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$20,000 per day of violation, or by imprisonment of not more than 4 years, or by both.¹⁶⁷

Whether a prosecution must be maintained under Section 309 for the reports, monitoring devices and samples required under the CWA, or whether the prosecution may proceed under Title 18 in order to take advantage of the higher maximum permissible penalty, is unclear. One court has permitted prosecution under Title 18 when the reports submitted were not expressly required by the Act, but only by the Agency charged with overseeing compliance.¹⁶⁸ However, since all of the information sought should fall within the parameters of being

¹⁶⁶33 U.S.C. § 1319(c)(4) (1989).

¹⁶⁷Id.

¹⁶⁸United States v. Olin Corporation, 465 F. Supp. 1120, 1131 (W.D.N.Y. 1979).

"under the Act,"¹⁶⁹ the court's distinction is not persuasive. The more reasonable argument is that it is a matter of prosecutorial discretion to choose which statute to proceed under.¹⁷⁰

The elements of the offense under either statute are:

- (1) A person;
- (2) Knowingly;
- (3) Made a false material statement, representation, or certification in any application, record, report, plan or other document filed or required to be maintained;

or

Falsified, tampered with, or rendered inaccurate any monitoring device or method required to be maintained.¹⁷¹

5. Knowing Endangerment.

The "knowing endangerment" provisions of the Clean Water Act were added in 1987.¹⁷² The concept was based on a similar provision that had been added in 1980 to the Solid Waste Disposal Act, which is better known as the Resource

¹⁶⁹Id. See also 33 U.S.C. § 1318 (1989) (discussing the particular requirements).

¹⁷⁰ECS Manual, supra note 14, at VII-122.

¹⁷¹Id. at VII-123. Negligent violations are still subject to prosecution under 33 U.S.C. § 1319(c)(1)(A) (1989).

¹⁷²Water Quality Act of 1987 § 312.

Conservation and Recovery Act, or "RCRA."¹⁷³ While there are some differences in the language of the two statutes, the differences were designed to "reflect intervening prosecutorial experience;" eliminate any unique "state of mind" requirements under the Clean Water Act; and eliminate the "potential for misunderstanding" that "invites unnecessary litigation" caused by RCRA's "special rules."¹⁷⁴ Thus, any authorities applicable to the "knowing endangerment" provisions of RCRA, are equally informative on the operation of the Clean Water Act.¹⁷⁵

A "knowing endangerment" violation requires that the accused "knowingly"¹⁷⁶ committed one of the enumerated predicate acts,¹⁷⁷ "and who knows at that time that he thereby places another person in imminent danger of death or

¹⁷³42 U.S.C. §§ 6901-6992k (1989). The "knowing endangerment" provisions of RCRA were added by the Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, § 13(5), at § (e), 94 Stat. 2334, 2340.

¹⁷⁴S. Rep. No. 50, 99th Cong., 1st Sess., at 29-30 (1985). See also H.R. Conf. Rep. No. 1004, 99th Cong., 2d Sess. 133-134 (1986).

¹⁷⁵See, e.g., United States v. Protex Industries, Inc., 874 F.2d 740 (10th Cir. 1989).

¹⁷⁶See supra text accompanying notes 118-121.

¹⁷⁷The enumerated predicate acts under the knowing endangerment offenses are similar to, but not identical to, the "negligent" and "knowing" offenses. The most glaring difference is that water quality standards for intrastate waters, established under 33 U.S.C. § 1313 (1989), are enforced by the "knowing endangerment" provisions, but not the others. Compare 33 U.S.C. § 1319(c)(1)(A) and 33 U.S.C. § 1319(c)(2)(A) (1989) with 33 U.S.C. § 1319(c)(3)(A) (1989).

serious bodily injury."¹⁷⁸ There are only three elements of the completed offense:

- (1) A person;
- (2) Knowingly committed a specified predicate offense;
- (3) And knew at the time that he thereby put another person in imminent danger of death or serious bodily injury.¹⁷⁹

"Serious bodily injury" is "bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental facility."¹⁸⁰ The term includes psychoorganic syndrome and the increased risk of contracting cancer.¹⁸¹

Under the "knowing endangerment" provision, a person is criminally responsible only for their "actual awareness" or "actual belief." Additionally, "knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant."¹⁸² These

¹⁷⁸33 U.S.C. § 1319(c)(3)(A) (1989).

¹⁷⁹ECS Manual, supra note 14, at VII-121.

¹⁸⁰33 U.S.C. § 1319(c)(3)(B)(iv) (1989).

¹⁸¹United States v. Protex Industries, Inc., 874 F.2d 740, 742 (10th Cir. 1989).

¹⁸²33 U.S.C. § 1319(c)(3)(B)(i) (1989).

rules eliminate the use of the "responsible corporate officer" doctrine from the knowing endangerment provisions.¹⁸³

A conviction under the knowing endangerment provision carries a maximum permissible sentence of a fine of \$250,000.00 and imprisonment for up to fifteen years for a first offender. If a corporation is the defendant, then a fine of \$1,000,000.00 is authorized. The fine and term of imprisonment may be doubled for a subsequent conviction.¹⁸⁴

IV. THE UNITED STATES SENTENCING GUIDELINES

The fact that Congress has authorized sever penalties for those who pollute the Nation's waters, does not necessarily mean that those penalties will be imposed. This observation is particularly applicable in environmental crimes, where the accused is unlikely to be in the class of persons most commonly regarded as "criminal." Quite the contrary, when dealing with an environmental criminal, it is quite probable

¹⁸³The "responsible corporate officer" doctrine applies to the enforcement of public welfare statutes such as the Clean Water Act. Essentially, the doctrine holds that if the defendant had "authority" with respect to the conditions that formed the basis of the alleged violations, then scienter need not be proven. The courts have placed "the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." United States v. Dotterweich, 320 U.S. 277 (1943). See also United States v. Park, 421 U.S. 658 (1975).

¹⁸⁴33 U.S.C. § 1319(c)(3)(A) (1989). The severity of the punishment does not explain why a prosecutor would ever proceed under the knowing endangerment provisions, rather than under the attempted murder provisions of 18 U.S.C. § 1113 (1989), where the maximum punishment could extend to twenty years of imprisonment.

that the courts will be dealing with an upstanding member of the community.¹⁸⁵ Environmental criminals are often the type of offenders that courts will generally be most sympathetic to, and will try diligently to keep out of jail.¹⁸⁶ Regardless of the sympathy generated for a defendant, in order for an authorized penalty to have any meaning, there must be a clear understanding of what the punishment is supposed to achieve, and a firm assurance that the punishment will be used.

The ultimate aim of criminal law, and of punishment in particular, is the control of crime.¹⁸⁷ However, over the years, criminal theorists have offered several "purposes" to be served by the imposition of criminal sanctions on circumscribed antisocial conduct, above and beyond the control of crime. In the 1950's these reasons included expiation (wipe the slate clean), retribution, deterrence and rehabilitation.¹⁸⁸ More recently, the terms deterrence, incapacitation, just punishment and rehabilitation have been

¹⁸⁵See, e.g., United States v. Rutana, 932 F.2d 1155 (6th Cir. 1991) (Part owner and Chief Executive Officer of a metal finishing corporation); and United States v. Brittain, No. 90-6202 (10th Cir. Apr. 30, 1991) (City Public Utilities Director).

¹⁸⁶See, e.g., United States v. Bogas, 731 F. Supp. 242 (E.D. Ohio 1990), rev'd, 922 F.2d 363 (6th Cir. 1990).

¹⁸⁷Guidelines Manual, supra note 26, at 1.3.

¹⁸⁸Gardiner, The Purposes of Criminal Punishment, 21 Mod. L. Rev. 117, 117-129 (1958).

offered as "purposes."¹⁸⁹ In 1989, imprisonment for the purpose of rehabilitating the defendant was labelled "inappropriate" by Congress,¹⁹⁰ and the primary remaining "purpose" of sentencing became deterrence. In other words, what the punishment is supposed to achieve is deterrence of the individual offender from committing any additional crimes, and deterrence of others who know of the crime and the punishment (general deterrence).

Deterrence depends on two factors. First and foremost, is the certainty of detection. The second factor is the knowledge that punishment will ensue once caught.¹⁹¹ As Cicero said, "The greatest incitement to sin is the hope of not being punished."¹⁹² It was this factor that pushed Congress into authorizing Federal criminal enforcement of the Clean Water Act in 1972,¹⁹³ and into expanding the criminal sanctions since. Section 10 of the Rivers and Harbors Act of 1899 prohibits any type of dredging from navigable waters. The Refuse Act prohibits any type of discharge into navigable waters. The Clean Water Act prohibits any type of discharge into any water of the United States without a permit. While

¹⁸⁹Guidelines Manual, supra note 26, at 1.1.

¹⁹⁰28 U.S.C. § 994(k) (1989).

¹⁹¹Gardiner, supra note 188, at 123-126.

¹⁹²"Maximam inlecebram esse peccandi impunitatis spem." Cicero, Pro Milone, ch. 16, sec. 43 (52 B.C.).

¹⁹³See supra notes 60-62 and accompanying text.

the net has been expanded, Federal criminal enforcement efforts have multiplied.¹⁹⁴ It would be a gross overstatement to say that all water polluters are almost certain to be caught, however, the tools to catch those polluters are in hand.

The second element of deterrence is the severity of punishment, according to the philosophers.¹⁹⁵ The value of strong punishment is rationalized along the following lines:

There is much argument pro and con about Deterrence. But this much can hardly be controverted. Every rational person places a high value on his freedom. When we take it away from an offender, or in a few extreme cases execute him, such action by organized society cannot but tend to influence others who may contemplate similar acts. People dread and hate complete deprivation of liberty - their most precious possession next to life itself. This is proved over and over again by the painfully laborious efforts and high hazards incurred by prisoners in trying to escape.¹⁹⁶

Regardless of the validity of these arguments, they have been adopted by the Congress of the United States, and, more importantly for today's criminals, by the United States Sentencing Commission. The Guidelines are the assurance that the authorized punishments will be used.

¹⁹⁴See supra notes 13-20 and accompanying text.

¹⁹⁵Gardiner, supra note 188, at 121-123.

¹⁹⁶F. Wilkinson, *The Realities of Crime and Punishment* 9 (1972).

A. HISTORY OF THE GUIDELINES PERTAINING TO ENVIRONMENTAL CRIMES.

The United States Sentencing Guidelines were produced by the Sentencing Reform Act of 1984.¹⁹⁷ The primary goal of the Act was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system.¹⁹⁸ To achieve this goal, Congress sought to instill "honesty" in the sentencing process. The Legislature was concerned with the confusion and implicit deception that existed in the pre-Guidelines system, whereby a court would impose a sentence of imprisonment, but a parole commission would determine the amount of time that an offender actually spent in jail. The system often resulted in a substantial reduction in the amount of time an offender was actually incarcerated, with most criminals only serving one-third of the time deemed appropriate for their acts by a court.¹⁹⁹

In order to achieve this "honesty," and in order to satisfy the perceived "purposes" of sentencing, Congress established the United States Sentencing Commission to:

[P]rovide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining

¹⁹⁷Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1837, 1987 (codified as amended at 28 U.S.C. §§ 991-998 (1989)).

¹⁹⁸Guidelines Manual, supra note 26, at 1.2.

¹⁹⁹Id.

sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.²⁰⁰

The Commission was to implement this Congressional decree through the establishment of the United States Sentencing Guidelines.²⁰¹

The Commission revealed its first set of proposed rules on October 1, 1986, with the publication of a "preliminary draft."²⁰² This "preliminary draft" failed to include any Guidelines applicable to violations of either the Rivers and Harbors Act of 1899 or the Clean Water Act. The Commission explained that "time constraints" and the need to "solicit further advice on certain offenses" precluded the inclusion of every offense that would be addressed in the "final" guidelines. The Commission also stated that "categories of offenses" would be published for certain offenses, including "Public Health and Pollution" and "General Regulatory Offenses" as soon as possible.²⁰³

The omission of environmental crimes in general, and water pollution crimes in particular, was remedied four months

²⁰⁰28 U.S.C. § 991(b)(1)(B) (1989). For a complete description of the background and statutory mission of the United States Sentencing Commission, see Guidelines Manual, supra note 26, at 1.1-1.10.

²⁰¹28 U.S.C. § 994(a)(1) (1989).

²⁰²Preliminary Draft of Sentencing Guidelines for United States Courts, 51 Fed. Reg. 35,080 (1986).

²⁰³Id. at 35,088.

later, on February 6, 1987, with the publication of "proposed guidelines."²⁰⁴ The Commission described the status of environmental crimes:

Violations of the nation's environmental and conservation laws frequently arise from an economic motive. The nature of the damage and harm caused to public health, safety, and the environment is often intangible, and, therefore, difficult to measure empirically. Sentences should reflect the seriousness of the offense and provide just and sure punishment in order to deter those who disregard the public's health and safety. Sentences should also promote respect for the nation's environmental and conservation laws, remove the economic incentive giving rise to such acts, and protect the marketplace for those who do comply with the laws.²⁰⁵

Water pollution offenses were placed under Part Q, "Offenses Involving the Environment," in the "proposed guidelines."²⁰⁶ Five Guidelines were listed for "environmental" crimes, three of which applied to water pollution. Section Q211 applied to the " Mishandling of Hazardous or Toxic Substances or Pesticides; Record Keeping, Tampering, and Falsification," and carried a base offense level of nine.²⁰⁷ A base offense level of nine, for a first

²⁰⁴Proposed Sentencing Guidelines for United States Courts, 52 Fed. Reg. 3,920 (1987). See also United States Sentencing Commission, Revised Draft Sentencing Guidelines (Jan. 1987).

²⁰⁵United States Sentencing Commission, Revised Draft Sentencing Guidelines, 119 (Jan. 1987).

²⁰⁶Id.

²⁰⁷Id. at § Q211. The "base offense level" is the starting point in the computation of an appropriate sentence. (continued...)

offender without any other considerations, translated into a jail term of between four and ten months.²⁰⁸ Section Q211 applied to offenses involving "toxic" pollutants.²⁰⁹

The second water pollution offense under the "proposed guidelines," was Section Q214, "Mishandling of Other Environmental Pollutants; Record Keeping, Tampering, and Falsification."²¹⁰ This section, which applied to all water pollution offenses other than those involving "toxic" pollutants or oil spills, carried a base offense level of six.²¹¹ A base offense level of six, for a first offender without any other considerations, translated into a jail term of up to six months.²¹²

The "proposed guidelines" also contained an oil spill provision, "Failure to Comply with Notification Requirements After Release of Hazardous Substance or Oil."²¹³ If the substance was oil, the base offense level was six. If the

²⁰⁷(...continued)

See infra notes 232-243 and accompanying text. The level is adjusted up or down depending on several factors.

²⁰⁸Id. at 10.

²⁰⁹See supra notes 86-87 and accompanying text.

²¹⁰Id. at § Q214.

²¹¹Id.

²¹²Id. at 10.

²¹³Id. at § Q215.

substance was "hazardous," however, the base offense level was nine.²¹⁴

The first set of Guidelines having the force of law were published on May 13, 1987,²¹⁵ and took effect on November 1, 1987.²¹⁶ "Offenses Involving the Environment" remained under Part Q,²¹⁷ albeit with substantial modifications. False reports prosecuted under Title 18²¹⁸ were to be sentenced according to Section 2F1.1.²¹⁹ The provisions that took effect on November 1, 1987, have not been amended. However, on May 16, 1991, new Guidelines applicable to organizational defendants were published. These new Guidelines will take effect on November 1, 1991,²²⁰ and they will effect environmental polluters.

²¹⁴Id.

²¹⁵Sentencing Guidelines for United States Courts, 52 Fed. Reg. 18,046 (1987).

²¹⁶Sentencing Reform Act of 1984 §§ 235(a)(1)(B)(i)-(ii), 98 Stat. at 2031 (directing the United States Sentencing Commission to submit the initial Guidelines to Congress within thirty months of October 12, 1984 [April 12, 1987], and establishing that the initial Guidelines would be effective six months later, [November 1, 1987]).

²¹⁷U.S.S.G. Part Q.

²¹⁸See supra notes 163-171 and accompanying text.

²¹⁹U.S.S.G. § 2F1.1.

²²⁰Amendments to the Sentencing Guidelines for United States Courts, 56 Fed. Reg. 22,762, 22,786-22,797 (1991).

B. OPERATION OF THE GUIDELINES UNDER FEDERAL WATER POLLUTION CONTROL MEASURES.

The appropriate sentence for a given individual defendant is determined by the application of a nine-step system.²²¹ That system is discussed in detail below.

Step 1: The first step consists of determining the applicable offense Guideline section from Chapter Two of the Guidelines Manual.²²² The applicable offense Guideline section is listed by cross-reference to the statute violated in Appendix A of the Guidelines Manual.²²³ The relevant portions of Appendix A are reproduced in Table 3.

"Knowing endangerment" offenses are sentenced under Section 2Q1.1.²²⁴ All remaining water pollution offenses are sentenced according to Section 2Q1.2,²²⁵ if the pollutant was "toxic" or "hazardous," or Section 2Q1.3²²⁶ if any other pollutant was involved. A "toxic" pollutant is a pollutant

²²¹U.S.S.G. § 1B1.1.

²²²U.S.S.G. § 1B1.1(a). See also United States v. Cambra, No. 90-50442 (9th Cir. May 15, 1991); United States v. Bogas, 731 F. Supp. 242 (N.D. Ohio 1990), rev'd, 920 F.2d 363 (6th Cir. 1990).

²²³Guidelines Manual, supra note 26, at Appendix A.

²²⁴U.S.S.G. § 2Q1.1.

²²⁵U.S.S.G. § 2Q1.2.

²²⁶U.S.S.G. § 2Q1.3.

TABLE 3

APPENDIX A - STATUTORY INDEX

INTRODUCTION

This index specifies the guideline section or sections ordinarily applicable to the statute of conviction. If more than one guideline section is referenced for the particular statute, use the guideline most appropriate for the nature of the offense conduct charged in the count of which the defendant was convicted. If, in an atypical case, the guidelines section indicated for the statute of conviction is inappropriate because of the particular conduct involved, use the guideline section most applicable to the nature of the offense conduct charged in the count of which the defendant was convicted. (See § 1B1.2.)

If the offense involved a conspiracy or an attempt, refer to § 2X1.1 as well as the guideline for the substantive offense.

For those offenses not listed in this index, the most analogous guideline is to be applied. (See § 2X5.1.)

The guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction. (See § 1B1.9.)

<u>Statute</u>	<u>Guideline</u>
18 U.S.C. § 1001	2F1.1
33 U.S.C. § 403	2Q1.3
33 U.S.C. § 406	2Q1.3
33 U.S.C. § 407	2Q1.3
33 U.S.C. § 411	2Q1.3
33 U.S.C. §§ 1319(c)(1), (c)(2), (c)(4)	2Q1.2, 2Q1.3
33 U.S.C. § 1319(c)(3)	2Q1.1
33 U.S.C. § 1321	2Q1.2, 2Q1.3
33 U.S.C. § 1342	2Q1.2, 2Q1.3

listed under Section 307 of the Clean Water Act,²²⁷ while a "hazardous" pollutant is one listed under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA").²²⁸

²²⁷33 U.S.C. § 1317(a). See supra notes 86-87 and accompanying text.

²²⁸U.S.S.G. § 2Q1.2, comment. (n.3). CERCLA is codified at 42 U.S.C. §§ 9601-9675 (1989). The "hazardous substances" and their "reportable quantities" are contained in 40 C.F.R. § 302.

The category of water pollution offenses set out in the Guidelines, with the exception of "knowing endangerment" offenses, differ from similar categories established by Congress. Under the Guidelines, water pollution offenses belong to one category if the pollutant is a "toxic" or "hazardous" substance, or to another category if any other, "generic" pollutant is involved. Congress, in Title 18, has classified these offenses as anything from a Class A Misdemeanor to a Class B Felony, as depicted in Table 4.

By classifying offenses on the basis of the pollutant involved, the Commission has obliterated the distinction between felonies and misdemeanors. Congress classifies any offense arising under the Rivers and Harbors Act of 1899, or a first time "negligent" violation under the Clean Water Act, as a "Class A Misdemeanor."²²⁹ A second "negligent" offense under the Clean Water Act, a first time "knowing" offense, or any falsification of information offense would be classified by Congress as a "Class E Felony."²³⁰ A second "knowing" offense is classified as a "Class D Felony."²³¹ However, under the Guidelines, the misdemeanors are mixed with the felonies.

²²⁹18 U.S.C. § 3559(a)(6) (1989).

²³⁰18 U.S.C. § 3559(a)(5) (1989).

²³¹18 U.S.C. § 3559(a)(4) (1989).

TABLE 4

CLASSIFICATIONS OF WATER POLLUTION OFFENSES

UNDER 18 U.S.C. § 3559

Offense	Statute	Classification
Unpermitted discharge into navigable waters, or discharge in violation of a permit condition under the Refuse Act.	33 U.S.C. §§ 407; 411	Class A Misdemeanor
Unpermitted excavation of navigable waters, or excavation in violation of a permit condition under the Rivers and Harbors Act of 1899.	33 U.S.C. §§ 403; 406	Class A Misdemeanor
"Negligent" violation of the Clean Water Act, first offense.	33 U.S.C. §§ 1319(c)(1); 1342(a)(3); (b)(8)	Class A Misdemeanor
"Negligent" violation of the Clean Water Act, subsequent offense; or "knowing" violation of the Clean Water Act, first offense.	33 U.S.C. §§ 1319(c)(1); (c)(2); 1342(a)(3); (b)(8)	Class E Felony
"Knowing" violation of the Clean Water Act, subsequent offense.	33 U.S.C. §§ 1319(c)(2); 1342(a)(3); (b)(8)	Class D Felony
"Knowing endangerment" under the Clean Water Act, first offense.	33 U.S.C. §§ 1319(c)(3)(A); 1342	Class C Felony
"Knowing endangerment" under the Clean Water Act, subsequent offense.	33 U.S.C. §§ 1319(c)(3)(A); 1342	Class B Felony
False statement under the Clean Water Act.	33 U.S.C. § 1319(c)(4)	Class E Felony
False statement under Title 18, U.S.C.	18 U.S.C. § 1001	Class D Felony
Discharge of oil or hazardous substance in "harmful quantities;" or failure to notify appropriate officials of such discharge.	33 U.S.C. §§ 1321(b)(3); (b)(5)	Class D Felony

Step 2: After the applicable offense Guideline has been determined, the second step of the process consists of determining the appropriate base offense level, and applying any appropriate specific offense characteristics.²³² Both the base offense level and the specific offense characteristics are listed under the applicable Guideline section.

The base offense level is a beginning computation point. It is adjusted up or down, depending on the specific offense characteristics that apply to the crime. This adjustment allows for differences between similar crimes.

For a "knowing endangerment" offense under the Clean Water Act,²³³ the base offense level is twenty-four, and there are no specific offense characteristics.²³⁴ For all other water pollution crimes, the base offense level for "toxic" pollutants is eight,²³⁵ while the base offense level for other pollutants is six.²³⁶

²³²U.S.S.G. § 1B1.1(b). See also United States v. Wilson, 900 F.2d 1350 (9th Cir. 1990); United States v. Rutter, 897 F.2d 1558 (10th Cir. 1990).

²³³See supra notes 172-184 and accompanying text.

²³⁴U.S.S.G. § 2Q1.1. While there are no specific offense characteristics listed for a "knowing endangerment" violation, if a death results from the criminal activity, an upward departure from the Guidelines may be warranted. U.S.S.G. § 2Q1.1, comment. (n.1).

²³⁵U.S.S.G. § 2Q1.2(a).

²³⁶U.S.S.G. § 2Q1.3(a).

"Toxic" pollution and "generic" pollution share many of the same specific offense characteristics. However, in some cases, different values are assigned. In the case of either a "toxic" pollutant or a "generic" pollutant, an "ongoing, continuous, or repetitive" discharge or release into an affected water results in an upward adjustment of six levels to the base offense level.²³⁷ For example, if the release of a "generic" pollutant was ongoing, then the offense level would be adjusted to twelve. The Guidelines are compared in Table 5.

If the pollution involved a discharge or release that was not "ongoing, continuous, or repetitive," (i.e., a single episodic event), then the offense level is increased only by four levels. This adjustment also applies regardless of whether the pollutant was "toxic" or "generic."²³⁸ Other specific offense characteristic adjustments that do not depend on whether the pollutant was "toxic" or "generic" include whether the offense resulted in the disruption of a public utility, the evacuation of a community, or if the cleanup required a "substantial expenditure" (increase by four

²³⁷U.S.S.G. § 2Q1.2(b)(1)(A); U.S.S.G. § 2Q1.3(b)(1)(A).

²³⁸U.S.S.G. § 2Q1.2(b)(1)(B); U.S.S.G. § 2Q1.3(b)(1)(B). The adjustments for a discharge or release, regardless of their ongoing, continuous or repetitive nature, assume that there is "actual environmental contamination." U.S.S.G. § 2Q1.2, comment. (n.5); U.S.S.G. § 2Q1.3, comment. (n.4). But see United States v. Bogas, 920 F.2d 363, 367-369 (6th Cir. 1990) (holding that any discharge or release is sufficient, regardless of "actual" contamination).

TABLE 5		
COMPARISON OF U.S.S.G. §§ 2Q1.2 AND 2Q1.3		
	Type of Pollutant	
	Toxic	Generic
Base Offense Level	8	6
Specific Offense Characteristics		
Ongoing, continuous, or repetitive discharge, release, or emission into the environment.	+6	+6
Discharge, release, or emission into the environment that was <u>not</u> ongoing, continuous, or repetitive.	+4	+4
Offense resulted in substantial likelihood of death or serious bodily injury.	+9	+11
Offense resulted in disruption of public utilities, or evacuation of a community, or the cleanup required substantial expenditures.	+4	+4
Offense involved a disposal or discharge without a permit or in violation of a permit condition.	+4	+4
Offense involved simple recordkeeping or reporting violation.	-2	N/A

levels);²³⁹ and whether the discharge was without a permit or in violation of a permit condition (increase by four levels);²⁴⁰

There is a difference in the treatment of "toxic" or "generic" offenses when the offense "resulted in a substantial likelihood of death or serious bodily injury." In the case of a "toxic" pollutant, the offense level is increased by nine

²³⁹U.S.S.G. § 2Q1.2(b)(3); U.S.S.G. § 2Q1.3(b)(3).

²⁴⁰U.S.S.G. § 2Q1.2(b)(4); U.S.S.G. § 2Q1.3(b)(4).

levels,²⁴¹ while the increase for all other pollutants is eleven levels.²⁴² The differentiation between this specific offense characteristic results in an equalization between offenses. A single discharge of a pollutant that resulted in a substantial likelihood of death or serious bodily injury, without any other factors, will have an offense level of twenty-one, regardless of whether the pollutant was "toxic" or otherwise. If the discharge was "ongoing, continuous, or repetitive," the offense level will be twenty-three.

The distinction between "toxic" and "generic" pollution is also equalized in the case of a "simple recordkeeping or reporting violation only." In such a case, the offense level for "toxic" pollutants is decreased by two levels, while there is no offset for "generic" pollutants.²⁴³ Thus, for a recordkeeping or reporting violation, without any discharge, the offense level will be six, regardless of whether the reporting or recordkeeping requirement involved "toxics."

Certain conclusions may be made about Step 2:

(1) All "knowing endangerment" offenses will generally emerge from Step 2 with an offense level of twenty-four.

(2) Once the base offense level has been determined and the specific offense characteristics applied, the level for a

²⁴¹U.S.S.G. § 2Q1.2(b)(2).

²⁴²U.S.S.G. § 2Q1.3(b)(2).

²⁴³U.S.S.G. § 2Q1.2(b)(6).

"toxic" pollutant will generally be two levels higher than if a "generic" pollutant was involved.

(3) Any discharge into the environment will have a minimum offense level of ten ("generic") or twelve ("toxic"). Since the statutes primarily prohibit unpermitted discharges, or discharges in violation of a permit, the minimum offense level will almost always be fourteen ("generic") or sixteen ("toxic").

(4) Any "ongoing, continuous, or repetitive" discharge will usually have a minimum offense level of sixteen ("generic") or eighteen ("toxic").

(5) There will be no distinction between pollutants if the offense "resulted in a substantial likelihood of death or serious bodily injury," or if the offense "involved a simple recordkeeping or reporting violation only."

(6) Any discharge resulting in a "substantial likelihood of death or serious bodily injury," will usually have a minimum offense level of twenty-five.

(7) Simple recordkeeping or reporting violations will always have an offense level of six.

Step 3: The third step in the process involves the application of adjustments for the accused's role in the

offense and for obstructing or impeding the investigation or prosecution.²⁴⁴

The accused's role in the offense, which is summarized in Table 6, may result in an increase or decrease in the offense

TABLE 6	
ADJUSTMENTS FOR THE ACCUSED'S ROLE IN THE OFFENSE	
Role	Adjust.
Accused was an "organizer" or "leader" of an activity that involved five or more participants, or was "otherwise extensive."	+4
Accused was a "manager" or "supervisor" of an activity that involved five or more participants, or was "otherwise extensive."	+3
Accused was an "organizer, leader, manager <u>or</u> supervisor" in an activity that involved fewer than five participants and was not "otherwise extensive."	+2
Accused abused a position of public or private trust in a manner that significantly facilitated the commission or concealment of the offense.	+2
Accused used a special skill in a manner that significantly facilitated the commission or concealment of the offense (may not be used if the sentence adjusted for the accused's role as an "organizer, leader, manager or supervisor").	+2
Accused's role in the offense was "minimal."	-4
Accused's role in the offense was greater than "minimal" but less than "minor."	-3
Accused's role in the offense was "minor."	-2

level. If the criminal activity involved five or more

²⁴⁴U.S.S.G. § 1B1.1(c). In Step 3 the Guidelines also provide for "victim related" adjustments. However, these adjustments would rarely, if ever, apply to a water pollution offense. See U.S.S.G. Ch.3, Pt.A.

participants, or was "otherwise extensive,"²⁴⁵ the offense level may be increased if the accused was an "organizer or leader," or if he was a "manager or supervisor." The distinction between the two groups will be based on a number of factors, including the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning and organizing the offense, the nature and scope of the activity, and the degree of control and authority exercised over others.²⁴⁶ If the accused was an "organizer or leader," the offense level is increased by four.²⁴⁷ If a "manager or supervisor," the increase is three levels.²⁴⁸

There may also be an upward adjustment if the accused was an organizer, leader, manager or supervisor in a small criminal activity.²⁴⁹ When less than five people are

²⁴⁵"Otherwise extensive" refers to all people who were involved, either knowingly or unknowingly, in the criminal endeavor. The example supplied by the Commission is a fraud involving three participants that used the unknowing services of many outsiders. U.S.S.G. § 3B1.1, comment. (n.2). Unknowing participants in a water pollution offense could include treatment plant operators or transporters of hazardous substances.

²⁴⁶U.S.S.G. § 3B1.1, comment. (n.3).

²⁴⁷U.S.S.G. § 3B1.1(a).

²⁴⁸U.S.S.G. § 3B1.1(b).

²⁴⁹U.S.S.G. § 3B1.1(c). See United States v. Rutter, 897 F.2d 1558 (10th Cir. 1990).

involved, or the activity is not "otherwise extensive," then the adjustment is an increase of two levels.²⁵⁰ While simply recruiting and instructing an accomplice will satisfy the requirements for supervision,²⁵¹ the accomplice must also be criminally responsible.²⁵² In other words, if the "accomplice" is an undercover officer, then the adjustment is not proper.

There may also be a downward adjustment, if the accused's role in the offense was criminally culpable, but negligible. If the accused can be classified as a "minimal" participant, then there may be a downward adjustment of four levels.²⁵³ A "minimal" participant is one who is "plainly among the least culpable of those involved in the conduct of a group."²⁵⁴ An example would include one who lacks knowledge of the scope and structure of the enterprise and of the activities of others

²⁵⁰U.S.S.G. § 3B1.1(c).

²⁵¹See United States v. Rutter, supra note 249.

²⁵²See Amendments to the Sentencing Guidelines for United States Courts, supra note 220, at 22,785.

²⁵³U.S.S.G. § 3B1.2(a).

²⁵⁴U.S.S.G. § 3B1.2, comment. (n.1).

involved.²⁵⁵ The adjustment for "minimal" participation is intended to be used infrequently.²⁵⁶

If the accused was a "minor" participant, then there may be a downward adjustment of two levels.²⁵⁷ A "minor" participant is one who is less culpable than most other participants, but whose role could not be described as "minimal."²⁵⁸ Anyone whose role in the offense is greater than "minimal," but less than "minor," may receive a downward adjustment of three levels.²⁵⁹

The accused's role in the offense may also be the basis for an upward departure if he abused a "position of public or private trust," or if he used a "special skill." The adjustment is two levels, and the abuse of the position of trust, or the use of the special skill, must have "significantly facilitated" the commission or concealment of the offense.²⁶⁰

²⁵⁵Id. Other examples provided by the Commission to illustrate the concept of a "minimal" participant include someone who played no other role in a very large drug smuggling operation than to off-load part of a single marijuana shipment; or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs. U.S.S.G. § 3B1.2, comment. (n.2).

²⁵⁶U.S.S.G. § 3B1.2, comment. (n.2).

²⁵⁷U.S.S.G. § 3B1.1(b).

²⁵⁸U.S.S.G. § 3B1.2, comment. (n.3).

²⁵⁹U.S.S.G. § 3B1.2.

²⁶⁰U.S.S.G. § 3B1.3.

The abuse of a position of public or private trust must have contributed in some substantial way to facilitating the crime, and not merely have provided an opportunity that could as easily have been afforded to other persons.²⁶¹ An example could be the commander of a military installation who is sworn to "well and faithfully discharge the duties" of his office.²⁶² If the accused satisfies this criteria, then the adjustment may be made in addition to any adjustment for being an "organizer, leader, manager or supervisor."²⁶³

The "use of a special skill" adjustment, however, may not be employed if the accused's sentence qualifies for adjustment under the provisions relating to being an "organizer, leader, manager or supervisor."²⁶⁴ A "special skill" is a skill that is not possessed by members of the general public. It will usually require substantial education, training or licensing, such as in the case of lawyers or chemists.²⁶⁵ The most obvious example would be a firm's environmental engineer.

The Guidelines also provide an adjustment for obstructing or impeding the administration of justice. Under this

²⁶¹U.S.S.G. § 3B1.3, comment. (n.1). An example provided by the Commission is an embezzlement by an ordinary bank teller. The teller would not be subjected to the adjustment.

²⁶²5 U.S.C. § 3331 (1989).

²⁶³U.S.S.G. § 3B1.3.

²⁶⁴Id.

²⁶⁵U.S.S.G. § 3B1.3, comment. (n.2). It would also include pilots, doctors, accountants, and demolition experts.

provision, there may be an upward adjustment of two levels if the accused willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution or sentencing of the offense.²⁶⁶ This adjustment would be proper if the accused produced a false or altered record; concealed evidence, or directed another person to conceal the evidence; or provided a "materially false" statement to an inspector.²⁶⁷ A "materially false" statement would be one that, if believed, would tend to influence or affect the issue under determination.²⁶⁸ Thus, lying to an EPA inspector would satisfy the criteria for this adjustment.

Step 4: Step 4 in the Guidelines process applies to convictions for multiple offenses. If there are multiple counts, then Steps 1 through 3 are to be repeated for each count of which the accused stands convicted. The Guidelines then require that the offenses be grouped and adjusted in order to guard against overcharging by an overaggressive prosecutor.²⁶⁹ Step 4 consists of aligning the counts resulting in conviction into distinct "Groups of Closely -

²⁶⁶U.S.S.G. § 3C1.1.

²⁶⁷See U.S.S.G. § 3C1.1, comment. (n.3).

²⁶⁸U.S.S.G. § 3C1.1, comment. (n.5).

²⁶⁹U.S.S.G. § 1B1(d). See also Guidelines Manual, supra note 26, at 1.8.

Related Counts," or "Groups;"²⁷⁰ determining the offense level applicable to each Group;²⁷¹ and determining the "combined offense level" applicable to all of the Groups taken together.²⁷²

A Group will contain all counts involving "substantially the same harm."²⁷³ Counts involve "substantially the same harm" if "the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior."²⁷⁴ It would also include a situation in which the defendant is convicted of multiple counts of discharging toxic substances from a single facility.²⁷⁵

Since most water pollution offenses, other than record keeping offenses, will involve a "discharge, release or emission of a pollutant" that either is, or is not, "ongoing, continuous or repetitive,"²⁷⁶ then most of the offenses will be placed into one Group under Step 4. However, discharges from multiple facilities would constitute individual Groups, as would offenses relating to falsification of reports.

²⁷⁰U.S.S.G. § 3D1.1(a)(1).

²⁷¹U.S.S.G. § 3D1.1(a)(2).

²⁷²U.S.S.G. § 3D1.1(a)(3).

²⁷³U.S.S.G. § 3D1.2.

²⁷⁴U.S.S.G. § 3D1.2(d).

²⁷⁵U.S.S.G. § 3D1.2, comment. (n.6).

²⁷⁶See U.S.S.G. §§ 2Q1.2(b)(1) and 2Q1.3(b)(1).

Once the individual Groups have been established, the offense levels for each of the offenses within the Group, established under Steps 1 through 3, are added together. The aggregate quantity will be the offense level applicable to the Group.²⁷⁷ Take for example a case involving two separate discharges resulting in a "substantial likelihood of death or serious bodily injury."²⁷⁸ The offenses would be placed into the same Group under Step 4, and the Group offense level would be fifty.

If multiple Groups are involved, the highest Group offense level will be used as the baseline for determining the "combined offense level." The number of additional Groups, when compared to the baseline Group, and their offense levels are used to determine "Units." If the second Group has an offense level that is within four levels of the baseline, then one "Unit" is assigned.²⁷⁹ If the second Group has an offense level that is five to eight levels less serious than the baseline, then one-half of a "Unit" is assigned.²⁸⁰ If the second Group is nine or more levels less serious than the baseline, then there are no more adjustments.²⁸¹

²⁷⁷U.S.S.G. § 3D1.3(b).

²⁷⁸See supra notes 241-242 and accompanying text.

²⁷⁹U.S.S.G. § 3D1.4(a).

²⁸⁰U.S.S.G. § 3D1.4(b).

²⁸¹U.S.S.G. § 3D1.4(c).

The number of "Units" are then used to determine if there should be an adjustment in the offense level. Only one "Unit" does not result in any increase in the baseline offense level. Conversely, five or more "Units" will increase the baseline offense level by five levels. No more than five levels may be added to the baseline.²⁸² The number of "Units," when added to the baseline, determine the "combined offense level."²⁸³

Step 5: After the combined offense level has been determined under Step 4, it is necessary to adjust the level downward for any "acceptance of responsibility" demonstrated by the defendant.²⁸⁴ The offense level may be adjusted downward by two levels at this point, if the accused "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct."²⁸⁵

The adjustment for accepting responsibility is determined by a number of factors. A plea of not guilty does not necessarily require that there be no adjustment;²⁸⁶ and a plea of guilty does not automatically entitle the accused to the benefit of the adjustment.²⁸⁷ Factors to be considered

²⁸²U.S.S.G. § 3D1.4.

²⁸³U.S.S.G. § 3D1.5.

²⁸⁴U.S.S.G. § 1B1.1(e).

²⁸⁵U.S.S.G. § 3E1.1(a).

²⁸⁶U.S.S.G. § 3E1.1(b).

²⁸⁷U.S.S.G. § 3E1.1(c).

include voluntary termination or withdrawal from criminal conduct or association; voluntary payment of restitution prior to the adjudication of guilt; voluntary and truthful admission to authorities of involvement in the offense and related conduct; voluntary surrender to authorities promptly after commission of the offense; voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense; voluntary resignation from the office or position held during the commission of the offense; and the timeliness of the accused's conduct in manifesting the acceptance of responsibility.²⁸⁸

At the conclusion of Step 5, the accused will have an assigned offense level of some number between one and infinity. This number will define the vertical axis upon which to determine the accused's Guideline range.

Step 6: The horizontal axis upon which the accused's Guideline range will be determined is defined in Step 6. Step 6 is based on the accused's prior involvement in the criminal justice system, and is referred to as the "criminal history category."²⁸⁹

The accused's criminal history category is based on "criminal history points" which can range from "zero" to "thirteen or more." The points are determined on the basis of

²⁸⁸U.S.S.G. § 3E1.1, comment. (n.1).

²⁸⁹U.S.S.G. § 1B1.1(f).

prior convictions in the federal system, fifty state systems, the District of Columbia, territories, and foreign, tribal, and military courts.²⁹⁰ The value of each adjustment is based on any prior sentence, as shown in Table 7.

TABLE 7	
CRIMINAL HISTORY CATEGORY	
Criminal History	Value
No prior criminal history.	0
Prior sentence of imprisonment exceeding thirteen months (each sentence counted).	+3
Prior sentence of imprisonment of sixty days - thirteen months (each sentence counted).	+2
Any other prior sentence (each sentence counted; no more than four points total).	+1
Accused committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.	+2
Accused committed the instant offense less than two years after release from imprisonment of sixty days or more, or while in imprisonment or escape status of a sentence to imprisonment for sixty days or more (if two points are added for committing the offense while under any criminal justice sentence, then only one point is added under this provision).	+2

For each prior sentence of imprisonment exceeding thirteen months, three points are added.²⁹¹ For each sentence to imprisonment of sixty days through thirteen months, two points are added.²⁹² Any other prior sentence,

²⁹⁰U.S.S.G. §4A1.1, comment. (backg'd.).

²⁹¹U.S.S.G. § 4A1.1(a).

²⁹²U.S.S.G. § 4A1.1(b).

regardless of whether imprisonment was included, results in a one point addition, up to a total of four points.²⁹³

Adjustments are also required if the accused committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. If the defendant was under such a sentence, two points are added to his criminal history category.²⁹⁴

A final adjustment is made if the instant offense was committed less than two years after the accused was released from a term of imprisonment of sixty days or more, or was in imprisonment or escape status on such a sentence. One or two points are added, depending on whether there were any adjustments for being under a criminal justice sentence.²⁹⁵

The number of criminal history points will determine the accused's "criminal history category." Category I contains offenders without any points, or with only one point. Category II contains those with two or three points. Category III consists of criminals with four, five or six points. Category IV offenders have seven to nine points. Category V consists of those with ten, eleven or twelve points. Category VI, the most sever, is made up of those offenders with thirteen or more criminal history points, as shown in Table 8.

²⁹³U.S.S.G. § 4A1.1(c).

²⁹⁴U.S.S.G. § 4A1.1(d).

²⁹⁵U.S.S.G. § 4A1.1(e).

TABLE 8

SENTENCING TABLE (Months)

Offense Level	Criminal History Category (Points)					
	I (0-1)	II (2-3)	III (4-6)	IV (7-9)	V (10-12)	VI (13+)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	1-7	2-8	4-10	8-14	12-18	15-21
8	2-8	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

Step 7: Step 7 of the sentencing process consists of comparing the Offense Level value, and the Criminal History Category value with the Sentencing Table,²⁹⁶ which is reproduced in Table 8.²⁹⁷ The comparison will yield a "sentencing range," denoted in months of imprisonment, for the individual defendant.

Most water polluters will have an offense level value of fourteen, for "generic" pollutants, and sixteen for "toxic" pollutants.²⁹⁸ If the accused has no prior involvement with the criminal justice system, he will be placed in Criminal History Category I.²⁹⁹ With this combination, the sentencing judge will be looking at a sentencing range of between fifteen and twenty-one months for a "generic" polluter, or between twenty-one and twenty-seven months for a "toxic" offender. Important to note is the fact that these terms of imprisonment apply to a first time offender.

Step 8: The eighth step in the process entails a determination of the sentencing requirements and options relating to probation, imprisonment, supervision conditions, fines and restitution.³⁰⁰

²⁹⁶U.S.S.G. § 1B1(g).

²⁹⁷U.S.S.G. § 5A.

²⁹⁸See supra text accompanying notes 232-243.

²⁹⁹See supra text accompanying notes 289-295.

³⁰⁰U.S.S.G. § 1B1(h).

Probation will rarely be authorized for environmental offenders. The option of absolute probation, without any additional conditions on the accused's liberty (other than the conditions on the probation itself³⁰¹), is available only if the minimum term of the "sentencing range" is zero.³⁰² For those offenders in Criminal History Category I, this would include only those with an Offense Level of six or less.

A form of probation short of imprisonment in a Federal penitentiary is available if the minimum term of imprisonment in the "sentencing range" is six months or less. Defendants falling into this category are eligible for this "partial probation," if the remainder of the sentence includes a condition or combination of conditions requiring intermittent confinement, community confinement or home detention.³⁰³ This "partial probation" is available to any first offender with an offense level of ten or less.

³⁰¹Any time probation is ordered, the term is limited to not more than five years in most cases. U.S.S.G. § 5B1.2(a)(1). Any probation will contain certain mandatory conditions such as a prohibition against creating any other offense, or possessing any illegal controlled substance. U.S.S.G. § 5B1.3(a). The court is also permitted to impose recommended "standard" conditions, such as a proscription against leaving the jurisdiction of the court without permission, and permitting a probation officer to visit the offender's home at any time. U.S.S.G. § 5B1.4(a). "Special conditions" are case specific, and may include provisions relating to restitution, community confinement, home detention and community service. U.S.S.G. § 5B1.4(b).

³⁰²U.S.S.G. § 5B1.1(a)(1).

³⁰³U.S.S.G. § 5B1.1(a)(2).

Since even a first time "generic" water polluter who has accepted responsibility for his actions³⁰⁴ will have an Offense Level of twelve, with a minimum term of imprisonment of ten months, absolute probation will generally not be available for a water polluter. Probation of any kind is absolutely denied to any subsequent offender under the "knowing endangerment" provisions.³⁰⁵

Imprisonment is the recommended form of punishment under the Guidelines. Any sentence to imprisonment which falls within the "sentencing range" is acceptable.³⁰⁶ However, in a few instances, the Guidelines permit certain "substitute punishments."

If the minimum term of imprisonment within the "sentencing range" is zero, then no imprisonment is necessary and probation may be ordered.³⁰⁷ Since this provision only applies to defendants in Criminal History Category I, with an Offense Level of six or less, then probation will seldom be appropriate for water polluters.

If the minimum term of imprisonment within the "sentencing range" is between one and six months, the

³⁰⁴See supra text accompanying notes 284-287.

³⁰⁵U.S.S.G. § 5B1.1(b)(1) (denying probation for a conviction of a Class A or B Felony). Probation is also not available to an accused who is sentenced to imprisonment at the same time for the same or a different offense. U.S.S.G. § 5B1.1(b)(3).

³⁰⁶U.S.S.G. § 5C1.1(a).

³⁰⁷U.S.S.G. §§ 5B1.1(a)(1); 5C1.1(b).

sentencing judge has several options. If only one-half of the sentence, with a minimum of one month, is to be served in actual incarceration, the remainder of the sentence may include supervised release with a period of community confinement or home detention. If the judge wishes, probation with intermittent confinement, community confinement or home detention may be substituted for incarceration altogether.³⁰⁸ Since this option is only available to those in Criminal History Category I, with an Offense Level of ten or less, then it too will seldom be available to water polluters.

If the minimum term of imprisonment within the "sentencing range" is between seven and ten months, the judge may sentence the criminal to a period of supervised release with community confinement or home detention, if at least one-half of the sentence is served in a jail cell.³⁰⁹ This provision will be available to Criminal History Category I offenders with an Offense Level of twelve or less. While most water polluters will still be excluded, first time polluters of "generic" pollutants, who have accepted responsibility for their actions, would be eligible. Even these offenders, however, would be looking at five months behind bars.

If the minimum term of imprisonment within the "sentencing range" is more than ten months, as most

³⁰⁸U.S.S.G. § 5C1.1(c).

³⁰⁹U.S.S.G. § 5C1.1(d).

environmental polluters will be, imprisonment for at least the minimum term is required.³¹⁰

The "substitute punishments" consist of intermittent confinement, community confinement, and home detention. Intermittent confinement allows the accused to maintain his employment, and serve his incarceration period during intermittent periods, such as weekends. Community confinement means residence in a community treatment center, halfway house, restitution center or other community facility; and participation in gainful employment, employment search efforts, community service, educational programs, or similar facility approved programs during non-residential hours.³¹¹ Home detention consists of a program of confinement and supervision that restricts the defendant to his place of residence continuously, except for authorized absences.³¹² If eligible, then one day of substitute punishment may be credited toward each day of imprisonment ordered.³¹³ The different options are listed in Table 9.

Whenever the court imposes a sentence to imprisonment of more than one year, the court is required to order a term of supervised release to follow the imprisonment.³¹⁴ Supervised

³¹⁰U.S.S.G. § 5C1.1(f).

³¹¹U.S.S.G. § 5F1.1, comment. (n.1).

³¹²U.S.S.G. § 5F1.2, comment. (n.1).

³¹³U.S.S.G. § 5C1.1(e).

³¹⁴U.S.S.G. § 5D1.1(a).

TABLE 9	
IMPRISONMENT OPTIONS	
Minimum Term of Imprisonment	Sentencing Options
(from applicable sentencing range)	
0	- Imprisonment. - Probation.
1 - 6	- Imprisonment. - Probation that includes intermittent confinement, community confinement, or home detention. - Imprisonment plus community confinement or home detention (at least one-half of the minimum term, but no less than one month, must be served by imprisonment).
7 - 10	- Imprisonment. - Imprisonment plus community confinement or home detention (at least one-half of the minimum term must be served by imprisonment).
11+	- Imprisonment.

release is optional in all other cases.³¹⁵ Whenever ordered, supervised release must contain as a condition that the accused will not commit any other federal, state or local crime, and that the defendant will not possess any illegal controlled substances.³¹⁶ Other conditions are permitted if they are reasonably related to the nature and circumstances of the offense, and the history and characteristics of the accused; as well as being reasonably related to the need for the sentence imposed to "afford adequate deterrence to criminal conduct, to protect the public from further crimes of

³¹⁵U.S.S.G. § 5D1.1(b).

³¹⁶U.S.S.G. § 5D1.3(a).

the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."³¹⁷

The terms of supervised release are dependant upon the Congressional classification of the crime.³¹⁸ The length of the required terms are listed in Table 10.³¹⁹

TABLE 10	
Term of Supervised Release	
Classification	Term (years)
- Class A or Class B Felony	3 - 5
- Class C or Class C Felony	2 - 3
- Class A Misdemeanor	1

A fine will be required of all defendants, unless that defendant can establish that he is unable to pay the fine, and is not likely to become able to pay the fine.³²⁰ In the case of environmental polluters, the fine provisions are substantial. The fine provisions for individual (as opposed to organizational) defendants are designed to provide a maximum fine that is twice the amount of loss resulting from the offense; ensure disgorgement of any gain from the offense,

³¹⁷U.S.S.G. § 5D1.3(b). In addition, any of the optional conditions relating to probation are permitted. See supra note 301; U.S.S.G. §§ 5B1.4; 5D1.3(c).

³¹⁸See supra notes 229-231 and accompanying text.

³¹⁹U.S.S.G. § 5D1.2.

³²⁰U.S.S.G. § 5E1.2(a).

such as gain from noncompliance with water pollution controls; and provide an adequate punitive fine.³²¹ If the amount of the fine from the Fine Table is inadequate to meet these objectives, then an upward departure is authorized.³²²

The amount of the fine will generally be based on the offense level and where it fits into the Fine Table.³²³ However, the Guidelines provide a number of factors for the sentencing judge to take into consideration. These factors include the need for the combined sentence to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment and to afford adequate deterrence; the evidence presented as to the accused's ability to pay the fine in light of his earning capacity and financial resources; the burden that the fine places on the criminal and his dependents relative to alternative punishments; any restitution or reparation that the accused has made or is obligated to make; any collateral consequences of conviction, including any civil obligations arising from the accused's criminal conduct; whether the accused has previously been fined for a similar offense; and "any other pertinent equitable considerations."³²⁴

³²¹U.S.S.G. § 5E1.2, comment. (n.4).

³²²Id.

³²³U.S.S.G. § 5E1.2(c).

³²⁴U.S.S.G. § 5E1.2(d).

TABLE 11

Fine Table

Offense Level	Minimum Amount	Maximum Amount
0-3	\$100	\$5,000
4-5	\$250	\$5,000
6-7	\$500	\$5,000
8-9	\$1,000	\$10,000
10-11	\$2,000	\$20,000
12-13	\$3,000	\$30,000
14-15	\$4,000	\$40,000
16-17	\$5,000	\$50,000
18-19	\$6,000	\$60,000
20-22	\$7,500	\$75,000
23-25	\$10,000	\$100,000
26-28	\$12,500	\$125,000
29-31	\$15,000	\$150,000
32-34	\$17,500	\$175,000
35-37	\$20,000	\$200,000
38+	\$25,000	\$250,000

Whenever a statute authorizes a fine in excess of \$250,000.00, or a fine "for each day of violation," such as in the case of the Clean Water Act, then the Fine Table is disregarded.³²⁵ The amount of any fine is to be considered "punitive."³²⁶ Thus, many environmental polluters will be liable for up to double the amount of damages for their pollution, without regard to any limits. For good measure, the Guidelines also require that the fine include, as an

³²⁵U.S.S.G. § 5E1.2(c)(4).

³²⁶U.S.S.G. § 5E1.2(e).

additional amount, the costs to the Government of any imprisonment, probation, or supervised release.³²⁷

In every case, the judge must order the offender to make restitution for his actions.³²⁸ If both a fine and restitution are ordered, as will usually be the case, any money paid by the accused will first be applied towards the restitution.³²⁹ These provisions implement the Congressional mandate that a sentencing court shall consider "the need to provide restitution to any victims of the offense."³³⁰

Step 9: The final step in the sentencing process consists of evaluating any "Specific Offender Characteristics" exhibited by the accused, and deciding whether any departures from the Guidelines are appropriate.³³¹

Most of the "Specific Offender Characteristics" which may be applicable to a given accused are specifically eliminated from consideration for departures. The accused's age;³³² any education and vocational skills;³³³ his employment record;³³⁴

³²⁷U.S.S.G. § 5E1.2(i).

³²⁸U.S.S.G. § 5E1.1(a).

³²⁹U.S.S.G. § 5E1.1(c).

³³⁰18 U.S.C. § 3553(a)(7) (1989).

³³¹U.S.S.G. § 1B1.1(i).

³³²U.S.S.G. § 5H1.1.

³³³U.S.S.G. § 5H1.2.

³³⁴U.S.S.G. § 5H1.5.

his family ties and responsibilities, as well as any community ties;³³⁵ and any military, civic, charitable or public service, employment-related contributions or record of prior good works³³⁶ are all specifically regarded as "not ordinarily relevant in determining whether a sentence should be outside the applicable Guideline range."

A downward departure may be appropriate if the accused provided substantial assistance to authorities;³³⁷ or if the criminal voluntarily disclosed his misconduct to authorities and accepted full responsibility for his actions before being discovered.³³⁸ On the other hand, an upward departure may be appropriate if death,³³⁹ or serious physical injury resulted from the commission of the offense.³⁴⁰

C. ORGANIZATIONAL DEFENDANTS.

Pursuant to statutory authority which allows the Commission to send proposed updates by May 1, after the beginning of any regular session of Congress,³⁴¹ the Commission has recently proposed amendments to the existing

³³⁵U.S.S.G. § 5H1.6.

³³⁶U.S.S.G. § 5H1.11.

³³⁷U.S.S.G. § 5K1.1.

³³⁸U.S.S.G. § 5K2.16.

³³⁹U.S.S.G. §§ 2Q1.1, comment. (n.1); 5K2.1.

³⁴⁰U.S.S.G. § 5K2.2.

³⁴¹28 U.S.C. § 994(p) (1989).

Guidelines.³⁴² These Guidelines included a new Chapter 8, dedicated wholly to organizational defendants.³⁴³ These new Guidelines will have a very real impact on environmental criminals.

When the Guidelines for organizational criminals were initially proposed,³⁴⁴ they were opposed by the Department of Justice. Richard Stewart, an assistant attorney general with the Department, argued before the Commission that to attempt to quantify the "social costs" of environmental offenses would be "time-consuming and burdensome for the court and the parties."³⁴⁵ At the time the Guidelines were finally sent to Congress, it appeared that Mr. Stewart and his "can't do" attitude had prevailed. It was reported that the Commission had decided to "exclude" organizations convicted of environmental crimes from the operation of the Guidelines. To the dismay of groups such as the Natural Resources Defense Counsel, the report claimed that the Commission had excluded environmental crimes on the grounds that "environmental

³⁴²Amendments to the Sentencing Guidelines for United States Courts, 56 Fed. Reg. 22,762 (1991).

³⁴³U.S.S.G. Ch.8. Unless Congress objects, the Guidelines will take effect on November 1, 1991. 28 U.S.C. § 994(p) (1989).

³⁴⁴Sentencing Guidelines for United States Courts, 56 Fed. Reg. 1,846 (1991).

³⁴⁵Justice Department Seeks Alternatives to Guidelines from Sentencing Commission, [Nov.-Apr.] 21 Env't Rep. (BNA) No. 34, at 1587 (Dec. 21, 1990).

offenses are different," and such offenses required further study.³⁴⁶

The Guidelines for organizational defendants do apply to environmental criminals however, at least in their current form. The initial Guideline in Chapter 8 states clearly, "This chapter applies to the sentencing of all organizations for Felony and Class A Misdemeanor offenses."³⁴⁷ Since all of the crimes involving water pollution are "Felony" or "Class A Misdemeanor offenses,"³⁴⁸ the new Guidelines apply. Some of the carefully crafted Guidelines applicable to fines will not apply to environmental crimes,³⁴⁹ but others will.

While a few of the original Guidelines will still apply to organizations, Chapter 8 preempts the operation of the majority of those original provisions. Examples of the original Guidelines that will not apply to organizational defendants include the Victim-Related Adjustments;³⁵⁰ the Role in the Offense Adjustments;³⁵¹ the Obstruction

³⁴⁶Commission Excludes Environmental Crimes from Sentencing Guidelines Sent to Congress, [May-Oct.] 22 Env't Rep. (BNA) No. 1, at 11 (May 3, 1991).

³⁴⁷U.S.S.G. § 8A1.1.

³⁴⁸See supra Table 4; 18 U.S.C. § 3559(a) (1989).

³⁴⁹The provisions of U.S.S.G. §§ 8C2.2-8C2.9 apply only to certain specified offenses, and the water pollution offenses are not listed. U.S.S.G. § 8C2.1; U.S.S.G. § 8A1.1, comment. (n.2).

³⁵⁰U.S.S.G. Ch.3, Pt.A.

³⁵¹U.S.S.G. Ch.3, Pt.B.

Adjustments;³⁵² the Acceptance of Responsibility Adjustments;³⁵³ and certain policy statements.³⁵⁴

The organizational Guidelines contain their own application procedures, and operate under a different set of stated principles. There are three primary principles applicable to organizations. First and foremost is the principle of restitution. A sentencing court, whenever practicable, must order the organization to remedy any harm caused by the offense. The restitution is not to be viewed as punishment, but as a means of making victims whole for the harm caused.³⁵⁵ In the case of an environmental criminal, one may assume that the restitution will extend to all natural resource damages.

The second principle behind the Guidelines for organizational defendants, is divestiture. "[I]f the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets."³⁵⁶ Divestiture promises to be a heavily litigated consequence for those organizations that make a living through the violation of environmental laws.

³⁵²U.S.S.G. Ch.3, Pt.C.

³⁵³U.S.S.G. Ch.3, Pt.E.

³⁵⁴U.S.S.G. § 8A1.2, comment. (n.2).

³⁵⁵U.S.S.G. Ch.8, intro. comment.

³⁵⁶Id. (emphasis added).

The third principle is proportionality. The basic premiss is that "the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization."³⁵⁷ The "seriousness of the offense" will generally be reflected in environmental crimes by the amount of pecuniary gain to the organization, or the amount of pecuniary loss to anyone else.³⁵⁸ "Culpability" will be determined based on the steps taken by the organization, prior to the offense, to prevent and detect criminal conduct, the level and extent of involvement in or tolerance of the offense by certain personnel, and the organization's actions after an offense has been committed.³⁵⁹

In order to implement these principles, the Guidelines for organizational defendants rely heavily on the probationary process. Probation will generally be a part of an appropriate punishment in either of two situations. First, probation is appropriate for an organizational defendant when needed to ensure that another sanction will be fully implemented. Second, probation is an appropriate punishment when necessary to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct.³⁶⁰

³⁵⁷Id.

³⁵⁸Id. See, e.g., infra note 385 and accompanying text.

³⁵⁹U.S.S.G. Ch.8, intro. comment.

³⁶⁰Id.

Step 1: The first step in implementing the Guidelines for organizational defendants, is to determine the requirements and options relating to restitution, remedial orders, and community service.³⁶¹

Restitution is required in all cases in which there is damage to property or which results in bodily injury.³⁶² Prior to the implementation of the Guidelines, restitution was optional, and only for violations of Title 18 of the United States Code.³⁶³ However, the Guidelines for organizational defendants mandates restitution for any offense in which the remedy is necessary to compensate the victim and otherwise remedy the harm caused or threatened by the offense.³⁶⁴ Restitution will not be ordered, however, if the organization has already made full restitution prior to the imposition of sentence. Nor will restitution be required if the court

³⁶¹U.S.S.G. § 8A1.2(a). The Guideline also requires compliance with provisions related to "notice to victims." Id. However, the specific Guidelines on "victim notification," U.S.S.G. §§ 5F1.4 and 8B1.4, apply only to offenses involving "fraud or other intentionally deceptive practices." 18 U.S.C. § 3555 (1989). While such cases may occur under environmental statutes, they are rare. If they do occur, the Guidelines merely require that victims be notified in a form acceptable to the parties and the court, and that the defendant pay for the notice. U.S.S.G. § 5F1.4. The notification is to "give reasonable notice and explanation of the conviction." 18 U.S.C. § 3555 (1989); U.S.S.G. § 5F4.1, comment. (backg'd.).

³⁶²See 18 U.S.C. §§ 3663(b)(1)-(2) (1989).

³⁶³18 U.S.C. § 3663(a).

³⁶⁴U.S.S.G. § 8B1.1(a)(2); U.S.S.G. Ch.8, Pt.B, intro. comment.

determines that the "complication and prolongation of the sentencing process" caused by the requirement, outweighs the benefits of a restitution order.³⁶⁵ The order for restitution may either be a part of the sentence itself, or made a condition of probation.³⁶⁶

Remedial orders may be imposed as a condition of probation. The purpose of the order may be to either remedy the harm caused by the illegal activity, in addition to an order of restitution, or to insure that no future harm will result from the offense.³⁶⁷ If the magnitude of future harm can reasonably be estimated, the court may require that a trust fund be established.³⁶⁸ Specifically contemplated by the Guidelines, is a situation in which a clean-up order is necessary to remedy an environmental violation. In such a case, since applicable statutes permit certain agencies, such as the EPA, inherent authority to issue remedial orders,³⁶⁹ the court should coordinate with the affected agency.³⁷⁰

³⁶⁵U.S.S.G. § 8B1.1(b).

³⁶⁶U.S.S.G. § 8B1.1(a)(2). See also supra notes 328-330 and accompanying text.

³⁶⁷U.S.S.G. § 8B1.2(a).

³⁶⁸U.S.S.G. § 8B1.2(b).

³⁶⁹See, e.g., 33 U.S.C. § 1319 (1989) (authorizing EPA to issue compliance orders for CWA violations).

³⁷⁰U.S.S.G. § 8B1.2, comment. (backg'd.).

Community service may be ordered, also as a condition of probation.³⁷¹ Since community service is, in reality, an indirect monetary sanction for an organization, it is a less desirable alternative to a direct fine. However, many organizations possess unique knowledge, skills or facilities that render those organizations as the most likely candidates to repair the damages. It is inappropriate to order an organization to perform community service that is unrelated to the sentencing goals, such as to contribute to a local charity.³⁷²

In completing Step 1, it should be remembered that the restitution requirement is mandatory in most cases. However, the provisions regarding remedial orders and community service are only "policy statements," which reflect the views of the Commission as to the appropriate steps to be taken in order to fully implement all of the goals of sentencing.³⁷³

Step 2: The second step in implementing the Guidelines for organizational defendants, is to determine the applicable fine.³⁷⁴

The first question to be resolved in order to determine the appropriate fine, is whether the organization operated

³⁷¹U.S.S.G. § 8B1.3.

³⁷²U.S.S.G. § 8B1.3, comment. (backg'd).

³⁷³See 28 U.S.C. § 994(a)(2) (1989).

³⁷⁴U.S.S.G. § 8A1.2(b).

primarily for a criminal purpose or primarily by criminal means:

If, upon consideration of the nature and circumstances of the offense and the history and characteristics of the organization, the court determines that the organization operated primarily for a criminal purpose or primarily by criminal means, the fine shall be set at an amount (subject to the statutory maximum) sufficient to divest the organization of all its net assets.³⁷⁵

An example of an organization which operated primarily for a "criminal purpose," would be an organization established for the purpose of distributing illegal narcotics. An example of an organization which operated "primarily by criminal means" would be a hazardous waste disposal business that had no legitimate means of disposing of hazardous waste.³⁷⁶ Organizations that may expect to be affected by this Guideline would include unpermitted dredge and fill operators and developers building on lands made "fast" without a permit from the Army Corps of Engineers.

If the organization is not operated primarily for a criminal purpose, or primarily by criminal means, then a fine is to be calculated based on certain enumerated factors.³⁷⁷

³⁷⁵U.S.S.G. § 8C1.1.

³⁷⁶U.S.S.G. § 8C1.1, comment. (backg'd.).

³⁷⁷The fines for most offenses are determined through the application of U.S.S.G. §§ 8C2.1-8C2.9. However, offenses covered by U.S.S.G. Ch.2, Pt.Q, Offenses Involving the Environment, are specifically excluded from the operation of §§ 8C2.1-8C2.9. U.S.S.G. § 8C2.1, comment. (backg'd.). Instead, environmental crimes are covered under U.S.S.G. § 8C2.10.

These factors include the nature and circumstances of the offense and the history and characteristics of the accused.³⁷⁸ The entire sentence, including the fine, should reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense.³⁷⁹ The sentence should also afford adequate deterrence to criminal conduct and protect the public from further crimes by the organization.³⁸⁰

The maximum amount of the fine will be the greater of the following:

- (1) The amount specified in the statute;
- (2) Twice the pecuniary gain from the offense to the defendant organization, or twice the pecuniary loss to any person other than that organization;
- (3) For any Felony, up to \$500,000.00;
- (4) For any Class A Misdemeanor resulting in death, up to \$500,000.00; or
- (5) For any Class A Misdemeanor not resulting in death, up to \$200,000.00.³⁸¹

³⁷⁸18 U.S.C. § 3553(a)(1) (1989).

³⁷⁹18 U.S.C. § 3553(2)(A) (1989).

³⁸⁰18 U.S.C. §§ 3553(a)(2)(B)-(C) (1989).

³⁸¹18 U.S.C. §§ 3571(c)-(d) (1989). Perhaps inadvertently, Congress dramatically increased the monetary consequences for environmental polluters in 1987 with the passage of the Criminal Fines Improvements Act of 1987, Pub. L. No. 100-185, 101 Stat. 1279 (to be codified in scattered sections of 18 and 28 U.S.C.). Under the Act, the rule set forth in the text above will determine the maximum amount of the fine unless the statute setting forth the offense both specifies a lower fine, and the statute, by specific (continued...)

Step 3: The third step in the Guidelines for organizational defendants, consists of implementing the fine.³⁸² This consists of aggregating the fine amount for each count of conviction, and determining how and when the defendant is to pay. If the organization operated primarily for a criminal purpose, or primarily by criminal means, payment is to be made immediately.³⁸³ In any other case, payment is to be immediate, unless otherwise dictated by the court.³⁸⁴

There are a few special provisions relating to some closely held organizations, in recognition of the fact that such organizations are generally the alter egos of their owners. If an owner of such an organization owns at least a five percent interest in the organization, and the owner has been fined in a Federal criminal proceeding for the same conduct that the organization is now being fined for, then the organizational fine may be offset. The offset may not exceed

³⁸¹(...continued)
reference, exempts its provisions from the operation of 18 U.S.C. § 3571 (1989). See 18 U.S.C. § 3571(e). See also H.R. Rep. No. 390, 100th Cong., 1st Sess. 6, reprinted in 1987 U.S. Code Cong. & Admin. News 2137, 2142 ("A statute that intends to establish a lower fine for an offense must on its face negate the effect of new Section 3571.") These provisions erase the relatively small monetary penalties permitted under the Rivers and Harbors Act of 1899. See supra note 35 and accompanying text.

³⁸²U.S.S.G. § 8A1.2(b)(3).

³⁸³U.S.S.G. § 8C3.2(a).

³⁸⁴U.S.S.G. § 8C3.2(b).

the total amount of the owner's fine, multiplied by his percentage of ownership in the organization.³⁸⁵ The offset is not available for an organization operated primarily for a criminal purpose or primarily by criminal means.³⁸⁶

Step 4: Once the amount of the fine has been determined, and the court has decided how the fine is to be collected, the court then turns to the issue of probation.³⁸⁷ There are eight situations in which a term of probation is mandatory.

Probation is required if necessary to secure payment of restitution, enforce a remedial order or ensure completion of community service.³⁸⁸ Probation is also required if the organization is sentenced to pay a monetary penalty, the penalty is not paid in full at the time of sentencing, and restrictions are necessary to safeguard the organization's ability to make payment.³⁸⁹ The third situation in which probation is required, is when the organization has fifty or more employees, and does not have an effective program to prevent and detect violations of the law.³⁹⁰

³⁸⁵U.S.S.G. § 8C3.4.

³⁸⁶U.S.S.G. § 8C1.1.

³⁸⁷U.S.S.G. § 8A1.2(c).

³⁸⁸U.S.S.G. § 8D1.1(a)(1).

³⁸⁹U.S.S.G. § 8D1.1(a)(2).

³⁹⁰U.S.S.G. § 8D1.1(a)(3).

The fourth and fifth requirements for probation involve recidivism. If the organization had "engaged" in similar misconduct within five years of the instant sentencing, and any of the conduct giving rise to the sentencing occurred after that time, the court must order probation.³⁹¹ Probation is also required if any high-level personnel within the organization, or within the affected unit of the organization, had similarly "engaged" in like misconduct within the preceding five years.³⁹²

Probation will be required if the court determines there must be changes within the organization to reduce the likelihood of future criminal misconduct, and probation is necessary to ensure that those changes are implemented.³⁹³ The seventh situation requiring probation, is a situation where no fine is imposed.³⁹⁴ Finally, probation is required in the event it is necessary to ensure that any of the sentencing factors to be considered are met.³⁹⁵

³⁹¹U.S.S.G. § 8D1.1(a)(4). Whether the organization so "engaged" must have been determined by a prior criminal adjudication.

³⁹² U.S.S.G. § 8D1.1(a)(5).

³⁹³U.S.S.G. § 8D1.1(a)(6).

³⁹⁴U.S.S.G. § 8D1.1(a)(7). Courts do have some authority to depart from the Guidelines in unusual cases. See U.S.S.G. §§ 8C4.1-8C4.11.

³⁹⁵U.S.S.G. § 8D1.1(a)(8). See supra note 360 and accompanying text.

The probationary period can last for up to five years.³⁹⁶ The sentence to probation must include a condition that the organization is not to commit another Federal, state or local crime during the term of probation,³⁹⁷ and may include such conditions as the court determines appropriate.³⁹⁸

Step 5: The final step in sentencing the organizational defendant, consists of determining the appropriate special assessments and costs.

A special assessment is required for any Class A Misdemeanor or Felony conviction.³⁹⁹ The amounts are trivial. A Class A Misdemeanor requires a special assessment of \$125.00, and a Felony conviction mandates a special assessment of \$200.00.⁴⁰⁰

Costs may be required by the court, and may include the costs of prosecution.⁴⁰¹

While the Guidelines applicable to organizational defendants are not as carefully controlled as the Guidelines applicable to individual defendants, and while the court

³⁹⁶U.S.S.G. § 8D1.2(a).

³⁹⁷U.S.S.G. § 8D1.3(a).

³⁹⁸U.S.S.G. § 8D1.4.

³⁹⁹U.S.S.G. § 8E1.1.

⁴⁰⁰18 U.S.C. 3013 (1989).

⁴⁰¹U.S.S.G. § 8E1.3.

retains more discretion with organizational defendants, it is clear that these Guidelines can and should frighten the organizations.

V. CONCLUSIONS

On July 2, 1890, Congress protected the Nation's business resources by making unreasonable restraints of trade a Federal criminal offense.⁴⁰² While the Rivers and Harbors Act, as it exists today, was passed nine years later, the purpose behind the Act's passage was to protect navigation, not the country's natural resources. It was not until 1972, eighty-two years after the first antitrust laws were passed, before America's natural resources were afforded protection on the same level as her business resources. While Federal criminal sanctions for water pollution offenses have been slow to materialize, they are now enforced with vigor.

Under the Rivers and Harbors Act of 1899, anyone placing any pollutant into any navigable water of the United States, or dredging such water, without a permit, is subject to incarceration for up to one year, and a fine equalling twice the amount of environmental damage wrought. Prosecution is simplified by the absence of having to prove scienter.

There are similar provisions under the Clean Water Act. For a mere negligent discharge into any water of the United

⁴⁰²Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1989)).

States, a polluter can be sentenced to up to one year in jail, and, again, ordered to pay a fine equalling twice the amount of damages.

Under the United States Sentencing Guidelines, prison is almost guaranteed. For a violation of the Rivers and Harbors Act of 1899, almost any "generic" discharge will result in a jail term of the twelve months authorized by the statute. The same holds true for any negligent discharge under the Clean Water Act. Jail is nearly a certainty.

There is no further need to worry about additional criminal penalties. If every corporate manager responsible for environmental compliance knows he will go to jail, for whatever period of time, upon the commission of every water pollution violation, then the violations will cease. With the white collar type of criminal involved in these operations, there will be no additional amount of deterrence gained by increasing the penalty for negligent discharges to five, or even fifty years. If these people know they will go to jail for twelve months, then the maximum amount of deterrence possible, from the maximum authorized penalty, will have been achieved. They will not accept jail for two weeks, let alone six months.

In order for these people to know they will go to jail, however, they must first be convinced that they will be caught. To whatever extent today's criminal sanctions deter, the degree of deterrence is directly related to the degree of

certainty that the offense will be detected. When a twenty year old student smokes a marijuana cigarette, he does not ask himself whether the looming experience is justified by the risk of imprisonment for six months, social isolation or being branded as a "drug user." He measures whether he will be caught and prosecuted for the offense. This same logic prevails to a larger degree for environmental offenders, since many of them are representing a corporate entity. If the president of Exxon knew that he would go to jail if his tankers did not have double liners, the chances of the Exxon Valdez sailing with a single liner would be minimal. What should be of concern is enforcement.

Enforcement may be assisted by an infusion of funds from the application of the Guidelines concerning fines. The mandatory fine for a water polluter should consist of twice the amount of damages (i.e., the cost to restore the water to the condition it would have been in but for the illegal pollution), plus the costs of the investigation, the prosecution and administrative costs of carrying out the sentence. The excess amount should then be returned to the enforcement agencies. Such a formula would have several benefits.

(a) The polluter would be encouraged to restore the polluted area on his own. The encouragement would come from the need to keep clean up costs to a minimum, in order to minimize those costs plus the total fine.

(b) Enforcement agencies would be encouraged to seek out additional polluters, in order to obtain additional funds.

(c) The entire water pollution control scheme would become self-financing.

Obviously a great deal of work needs to go into any new sentencing scheme. However, the Government is being dishonest with itself when one department claims that environmental "social costs" are not subject to quantification, while another department is under a Congressional mandate to quantify such costs.

Congress needs to turn away from the allure of simply authorizing more severe penalties, and turn to a more thoughtful use of the existing penalties. Once getting caught becomes as near a certainty as imprisonment, we may once again be able to expect every lake to become the landscape's most beautiful and expressive feature.