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In this article, Steven P. Solow provides an overview of recent developments in the criminal enforcement of environmental laws. He examines policy and legislative matters and summarizes 50 criminal cases, including some appellate decisions, from 2005. This article is based on Solow's presentation March 10 at the 35th annual conference on environmental law in Keystone, Colo., sponsored by the American Bar Association's Section of Environment, Energy, and Resources.

The State of Environmental Crime Enforcement: An Annual Survey

BY STEVEN P. SOLOW

In considering the issue of environmental crime enforcement, it was interesting to read the recently published book *Freakonomics* in which the authors explore what they term the ''friction between individual desire and societal norms.''[1] Exploration of that friction would seem particularly appropriate to the study of environmental crime.

Steven P. Solow, a partner in the Washington, D.C., office of Katten Muchin Rosenman LLP, was chief of the Environmental Crimes Section in the Department of Justice from 1997 to 2000. His practice focuses on business crimes, internal investigations, corporate compliance and security programs, and environmental civil and criminal litigation.

The opinions expressed here do not represent those of BNA, which welcomes other points of view.

The authors' fundamental ideas suggest at first that they are well suited to address the conundrum of regulatory compliance—that is, why do some companies comply and others do not, and what is the relative impact on the rate of compliance due to the various approaches to compliance taken by regulators and law enforcement? For example, they make the following observations about the difficulty in explaining the causes (or cures) for various kinds of behavior:

- Incentives are the cornerstone of modern life.
- The conventional wisdom is often wrong.

[1] Steven D. Levitt and Stephen J. Dubner, *Freakonomics*, HarperCollins (2005).

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- Dramatic effects often have distant, even subtle, causes.
- ''Experts'' use their informational advantage to serve their own agenda.

However, early in the book, they make the following observation:

> Despite all the attention paid to rogue companies like Enron, academics know very little about the practicalities of white-collar crime. The reason? There are no good data.[2]

The lack of data, however, is not the complete answer. Data by itself does not ''prove'' anything. Data can serve to support, or not, a particular theory. Thus, what any of us knows or does not know about white-collar (or the subset of environmental) crime is not simply a result of the lack of good data. It is because there has never been a sufficient effort to marry data gathering with a meaningful *theory* about the causes and cures of corporate crime. Without that effort, the mere aggregation of data does little. In the absence of data, many of the theories about corporate crime control are either based on adherence to one doctrinaire approach or another, or on the wide-spread process of reasoning by anecdote.

Corporate crime is a complex social phenomenon, with complex causes. For example, one could theorize that the level of education of corporate executives (which has gone up) has increased their willingness to engage in corporate crime. Would we be better off with less-educated executives, who may be less likely to develop sophisticated ways to game the system? One quickly sees that data (such as data about the level of education of corporate managers) are not an end, but only a useful means to test something, and that something is a theory.

What is the theoretical underpinning of the government's approach to environmental enforcement (including criminal enforcement)? Is it a theory that increased penalties and enforcement will deter environmental crime? Do we even know if environmental crime has fallen or risen in the past eight or ten years? Some criminologists have concluded that speed and certainty reduce street crime more than the severity of sentences. Their theory is that crime reduction in American cities is enhanced when law enforcement combines a higher certainty of crime detection coupled with swiftness of case resolution, and that this combination has a greater impact than fewer cases with more severe punishment. Would this work for environmental crime? Is anybody in a position to make policy even asking this question?

Following the Enron era frauds we have a slew of new law enforcement tools, and public expectations for ''tougher'' enforcement.'' The actions of publicly-traded companies are to be subject to greater scrutiny under the requirements of the Sarbanes-Oxley Act of 2002. But what is the government's theory of what caused the fraud at Enron? Does the government believe it was a weakness in the Sentencing Guidelines? Was it the use of the attorney-client privilege by the regulated community to investigate compliance problems? Was it a belief by highly educated high-level corporate executives that their clever schemes were immune from discovery because of lax SEC oversight? Don't look to the regulatory history of the Sarbanes-Oxley Act for an empirical approach to these questions, or a theoretical structure into which these incidents can be evaluated.

Instead, in the realm of environmental crime, we are provided with ''data'' such as the accompanying chart on EPA's criminal enforcement program.

What are we to make of such a chart?

Is it a measure of compliance efforts by companies? Is it a measure of work-effort by the government on enforcement? If we examined each of the investigations in 2005—the year of the smallest number of reported environmental crime investigations in the past eight years—what would we know then? Can we tell whether the investigations in 2005 involved more agent-hours and sophisticated investigative techniques? What has been the long-term impact of 9/11 on EPA's criminal investigation efforts? Do we know whether similar cases are being brought over and over again without recourse to a root-cause analysis as to why they recur? Do we know whether the defendants charged in 1998 caused more or less environmental harm than the defendants charged in 2005?

In the end, we need more. Not just more data. The environmental criminal enforcement program is ready for a theory of enforcement that is developed on the basis of an informed discussion that includes regulators, law enforcement, the regulated community and other stakeholders.

Counseling Clients

Absent a clearly constituted theory of enforcement, and without particularly meaningful data sets, how are we to appropriately and helpfully counsel our clients who seek to mitigate the very real and substantial risks that their environmental violations will be viewed as criminal behavior? Pick up almost any past set of materials from the American Bar Association, Section of Environment, Energy, and Resources 35th Annual Conference on Environmental Law (Keystone Conference) or from the ALI-ABA Course of Study on Environmental Crime, or Frank Friedman's 9th edition of his book on environmental management, and you will find abundant and sound advice on ways to best manage compliance, and ways to address and respond to the inevitable compliance issues that arise for most heavily regulated entities. This paper need not repeat these well-known approaches.

However, one approach that does not appear to get the attention it deserves is simply to be alert to what the government says it will do, and what it actually does. For example, it behooves the regulated community to engage in the key policy debates, such as the one referenced below regarding the appropriate circumstances under which the government should seek attorney-client privileged communications. The resolution of these issues will have very real consequences for the regulated community.

Another simple and generally reliable effort is to seek to predict the government's future enforcement efforts by observing and considering what has come before. With that in mind, this annual survey, as it has in the past, presents a review of recent cases. Past experience suggests that the government continues to bring the cases it has brought before, and when it develops new areas of enforcement (as it has in the area of worker health and safety protection tied to environmental criminal enforcement, or in continuing enforcement initiatives, such as the vessel pollution initiative) it is likely

[2] *Id*. at p. 46

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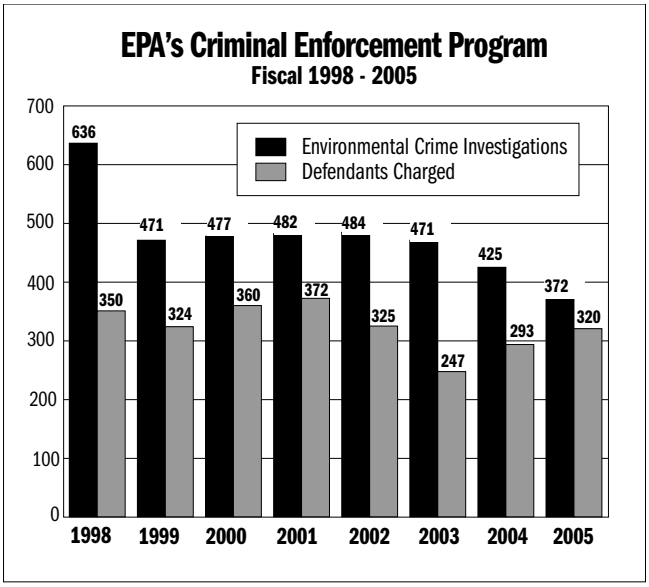

Source: EPA A BNA Graphic/dn033g01

to continue to do so in the future. With that in mind, the following is a summary of key policy developments, and some of the most recent environmental crime cases.

New Focus on Criminal Enforcement at EPA

Granta Nakayama was nominated by the president in June, 2005, and confirmed by the Senate in July as head of the EPA Office of Enforcement and Compliance Assurance (OECA). Nakayama immediately and publicly announced his intention to strengthen the environmental criminal program and to increase the level of communication and cooperation between the civil and criminal enforcement programs within EPA. Notably, Nakayama selected Catherine McCabe as his principal deputy. McCabe came from a position as a career attorney at the Environment Division of the Department of Justice, having served most recently as a Deputy Chief in the Environmental Enforcement Section.

Before Nakayama's arrival, Congress added $8 million to the enforcement budget, increasing the total for the criminal program to $39.4 million. In April 2005 EPA stated that the additional funds would be used to develop a strategy to identify and prosecute the most serious threats to public health, and would be invested in ''critical personnel, equipment and services, and infrastructure needs, focusing on areas that can most benefit from this one-time infusion of resources.'' In addition, EPA is moving to hire new criminal investigators. In 2003 the agency reported having 210 criminal investigators; by 2006, the number had fallen to 185.

In pursuit of a stronger criminal enforcement program, Nakayama wants to elevate the priority of the criminal enforcement office within EPA, and has suggested that he may co-locate the civil and criminal investigative offices around the country. This has raised concerns about the risk of misuse of the civil process to aid a criminal investigation (by using civil investigative techniques instead of obtaining a criminal search warrant, which requires a showing of probable cause) and risks to the secrecy of the grand jury process (it is a felony to reveal grand jury information to those outside of the criminal investigation absent a court order). Nakayama has also stated his intention to focus criminal prosecutions on the most egregious violations, even if a particular matter originates as a civil investigation.

Attorney-Client Privilege Waiver

In response to extensive public discussion and debate, the U.S. Sentencing Commission has identified, as a ''tentative priority,'' reconsideration of its 2004 position regarding waiver of the attorney-client privilege and work product protections. In its commentary to Chapter 8 of the Sentencing Guidelines, dealing with the sentencing of organizations, the Commission previously stated that waiver of the attorney-client privilege and work product protections by the subject of a government investigation could be an appropriate factor in determining whether a company can be considered to have ''cooperated'' with the government investigation and thus be subject to more lenient treatment. Because of the current language in the Guidelines, and the Department of Justice policy regarding the criminal investigation of corporations (the ''Thompson'' memo), many have expressed concern that the government will increasingly make the demand for a waiver a routine part of its investigations.

In a *Federal Register* notice published in June 2005, the Commission identified the waiver issue among its tentative priority issues for the 2005-06 amendment cycle, indicating its willingness to address the 2004 amendment, and is seeking public comment on the issue (70 Fed. Reg. 37,145).

The regulated community should consider the concerns summarized below and do so with the knowledge that the Sentencing Guidelines influence far more than sentencing. The guidelines play a crucial role in how cases are selected for investigation, what charges may be considered by the government, and under what terms a particular case may be resolved. These concerns include:

- The degree to which the regulated community relies upon the attorney-client privilege and the work-product doctrine to enhance their ability to conduct corporate self-investigations and maintain effective compliance programs, and the degree to which those investigations and programs would be hampered if communications with counsel were known to be subject to review by the government.
- Whether or to what degree invasion of the privilege will interfere with the routine use of lawyers to provide legal advice regarding a company's day-to-day business activities, legal advice that can be crucial in ensuring that a company's activities conform with the requirements of the law.

The Sentencing Commission has made clear that it wants those who share these concerns to make their views known to the commission, whether through testimony or written comments.

Cases of Note

Summaries of environmental crimes cases are detailed in the section below. Although the summaries in most cases are self-explanatory, there are a few highlights worthy of mention:

Worker Safety and Environmental Crimes: The Environmental Crimes Section has made public its intention to partner with the enforcement efforts of the Labor Department's Occupational Safety and Health Administra-

tion. Several of the prosecutions below (cases 1, 3, 7,18 and 41) are consistent with that approach.

Vessel Pollution—New Sanctions: Adding a new sanction to its vessel pollution cases, the government in the *Boyan* case (case 27) obtained an agreement from a twice-convicted defendant corporation that its next conviction will result in a five-year ban on its use of U.S. ports.

HazMat Prosecution: The Environmental Crimes Section successfully obtained an increase in the Sentencing Guidelines for HazMat violations, arguing to the U.S. Sentencing Commission that there were numerous such cases in the enforcement pipeline. The government also suggested that stiffer HazMat penalties were needed to combat potential acts of terrorism. Two HazMat cases appear below (cases 42 and 43). In both cases no prison sentences were imposed.

Appellate Courts Reversing Reversals of Conviction: Two district court judges found their dismissals of cases following conviction reversed by their appellate benches. In one (case 49) the Third Circuit reversed a district court that had thrown out the conviction of the former owner of a dry cleaning company, whose employees engaged in illegal disposal of hazardous waste. The court held that RCRA's punishment of those who ''cause'' unlawful disposal extends beyond those who carry out the activities to include the owner. The second (case 50) involved an operations manager who was convicted on Clean Water Act negligence counts, but whose conviction was first reversed by a district court that found the defendant was not aware that the material he flushed down a toilet would end up in the Colorado River. The Tenth Circuit reversed, holding that ''any act of ordinary negligence'' that leads to the discharge of a pollutant into the navigable waters of the United States can be punished as a crime. The court concluded that the jury could have found that the defendant did not exercise adequate care when he disposed of the wastewater in the toilet.

Clean Air Act

1. **United States v. McWane, Inc.** (D. Utah, No. 05-00811, *indictment filed* 11/3/05)—Two company officials of McWane, Inc., were charged with conspiring to increase production of cast iron pipe at a Utah facility by falsifying air pollution emission tests and reports. According to an indictment filed by the Justice Department, the company and its officers knowingly operated a furnace with an inadequate pollution control device, fixed air pollution tests, and intentionally misrepresented amounts of particulates. The indictment alleged that the company officials tested stacks when emissions would be less and when less polluting materials were being burned (36 ER 2289, 11/11/05).

2. **United States v. Motiva Enterprises** (D. Del., No. 05cr00021, 3/17/05)—Motiva Enterprises, an oil refining and retailing company that markets gasoline under the Shell and Texaco brands, pled guilty to Clean Air Act and Clean Water Act violations and agreed to pay a $10 million criminal fine. The charges stemmed from the explosion of a tank holding sulfuric acid, which killed one worker, injured eight others, and resulted in the release of sulfuric acid into the air and the Delaware River. The tank was designed to hold fresh sulfuric acid, but the company stored spent acid containing flammable hydrocarbons without conducting the proper review and engineering analysis. The plea agreement stated that workers repairing a catwalk adjacent to the tank were given permission to weld and grind there, and were not advised that spark containment was necessary. In 2003, Motiva paid $36.4 million to settle a wrongful death suit brought by the family of the worker who was killed (36 ER 577, 3/25/05).

3. **United States v. Tyler Pipe Co.** (E.D. Texas, No. 6:05-cr-00029, 3/22/05)—A Texas pipe manufacturer pled guilty to two felony violations of the Clean Air Act and agreed to pay a $4.5 million fine and invest in $12 million in state-of-the-art air emission control equipment. The Tyler Pipe Co., which is owned by McWane, Inc., razed a furnace and constructed a new one without applying for a permit which the government argued was required by the CAA's provisions on prevention of significant deterioration (PSD). The company agreed to a plea in which it accepted the statement that it illegally failed to utilize best available control technology when it replaced a furnace and connected the new furnace to its existing pollution control device, which was built in the 1960s. McWane also agreed to plead guilty to a charge that it had made a false statement when it claimed in its Title V permit that the furnace had not been ''modified'' since 1971, as that term is used in the CAA (36 ER 576, 3/25/05).

Asbestos

4. **United States v. Backus** (D. Colo., No. 01CR-103-EWN, *sentence entered* 5/12/05)—A Wyoming man pled guilty to falsely representing that he properly supervised an asbestos abatement project at a high school and was sentenced to 18 months in prison and ordered to pay restitution. David Backus's use of a high-pressure water sprayer to remove asbestos resulted in asbestos-laden water seeping into lockers and wall units. When the water dried, the asbestos became airborne, posing a health risk. The school was closed for a substantial period of time.

5. **United States v. Kay** (E.D. Pa., No. 05-CR-00231, *sentence entered* 9/7/05)—A real estate developer who pled guilty to directing illegal asbestos removal at a facility he owned was sentenced to 10 months in prison. During a renovation of a self-storage facility, asbestos-covered heating pipes were removed by untrained and uncertified workers who were not provided protective equipment. The developer, John Kay, allegedly knew the pipe insulation contained asbestos but did not inform the workers (36 ER 1902, 9/16/05).

6. **United States v. Springer** (D. Ariz., No. 05-63, 10/14/05)—The former owner of a commercial building faced imprisonment and fines after pleading guilty to exposing untrained workers to asbestos and illegally transporting the asbestos debris. Jeffrey L. Springer hired workers to demolish buildings at a Phoenix site, but failed to perform a required site survey prior to demolition, and failed to provide workers with protective gear. A subsequent assessment found that 2,550 square feet of asbestos existed at the site (36 ER 2166, 10/21/05).

7. **United States v. W.R. Grace** (D. Mont., No. CR 05-07, *indictment filed* 2/7/05)—A federal grand jury in Montana returned a 10-count indictment charging W.R. Grace and seven corporate officials with conspiracy, Clean Air Act violations, wire fraud, and obstruction of justice in connection with the company's vermiculite

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mine in Libby, Mont. According to the indictment, Grace mined, manufactured, and sold products from a vermiculite mine that it knew to be contaminated with asbestos, yet withheld that knowledge from the government, its employees, and the public. The indictment also alleged that the company misled and obstructed the government by failing to disclose the nature and extent of the asbestos contamination to a team conducting a CERCLA cleanup (36 ER 272, 2/11/05).

8. **United States v. Young** (D. Utah, No. 2:05-CR-00124, *indictment filed* 3/2/05)—A supervisor of a Utah road-building company was indicted by a federal grand jury for violating the Clean Air Act and concealing asbestos releases. The indictment alleged that Alan Young directed employees to excavate and crush water pipes containing asbestos without complying with practices designed to regulate asbestos disposal. The indictment also alleged that Young directed company employees to conceal the fact that the asbestos-containing materials were buried at the construction site and that Young himself, when questioned by investigators, denied that the material was buried.

Clean Water Act

9. **United States v. All State Environmental Dredging, Inc.** (E.D. Va., No. 2:04cr221, *plea entered*2/2/05)—The owner of a North Carolina dredging company pled guilty to violating the Clean Water Act by ''short pumping'' dredged sand into the Chesapeake Bay and lying to investigators to cover up the illegal activity. All State Environmental Dredging, Inc., entered into a contract with the Army Corps of Engineers to dredge a channel in the bay and to pump the dredged material through a pipeline to the shore for beach nourishment. Because of the long distance the sand needed to be pumped, the company encountered repeated problems with equipment clogging or breaking. Company owner Rudy J. Lanier instructed the dredge operator to uncouple the pipeline and leave the lower portion of the pipe in place so that, if it were discovered, he could claim that the illegal discharge was unintentional. A company employee tipped off investigators for the Corps (36 ER 332, 2/18/05).

10. **United States v. Artuner** (C.D. Calif., No. 05-cr-937, 9/28/05)—The owner of a fishing boat was indicted for violating the Clean Water Act by scuttling his boat and spilling a harmful quantity of oil, as well as trash and other debris. Beyond willfully causing the destruction of the squid-fishing vessel, Ahmet Artuner also allegedly made false statements to the Coast Guard and caused the Coast Guard to launch an unnecessary rescue mission (36 ER 2065, 10/7/05).

11. **United States v. Balch** (S.D. Fla., No. 04-CR-10013, *sentence entered* 1/10/05)—A Florida property owner who allowed a sewage contractor to dump excavated soil along his shoreline in violation of the Clean Water Act was sentenced to five months in prison. Jeffrey A. Balch used heavy equipment to push the fill dirt into the bay, affecting an area about a quarter acre in size. He pled guilty, paid restitution and fines, and agreed to remove the fill and restore the shoreline to its original condition (36 ER 129, 1/21/05).

12. **United States v. Ball** (E.D.N.C., No. 7:05-CR-104-1FL, 12/15/05)—A surveyor who falsified wetlands delineation maps in order to avoid the regulatory process and make the protected wetlands appear suitable for development pled guilty to violating the Clean Water Act and making false statements. In addition, Michael Todd Ball was charged with forging the signature of an Army Corps of Engineers official. According to the plea agreement, Ball agreed to pay fines and assessments of $93,000, and to make restitution, assist government investigators, and donate $20,000 to wetlands conservation efforts (36 ER 2353, 11/18/05).

13. **United States v. Cooper** (W.D. Va., No. 04-cr-00006, *sentence entered* 9/7/05)—The owner of a trailer park was sentenced to 27 months in prison for operating a sewage lagoon without a required Clean Water Act permit. Wastewater from the lagoon was discharged into a Virginia creek and eventually flowed into a river and a lake. The owner, D.J. Cooper, also was fined $270,000.

14. **United States v. Daisey** (D. Del., No. 09-CR-134, *sentence entered* 4/28/05)—A former operations chief of a Delaware Department of Natural Resources and Environmental Control facility was sentenced to six months in prison and two years probation for discharging contaminated wastewater into wetlands. William Daisey, who headed a facility used for docking and maintaining dredge boats, pled guilty to violating the Clean Water Act by regularly directing an employee to discharge wastewater contaminated with oil and antifreeze into wetlands that are connected through a series of mosquito ditches to the Broadkill River (36 ER 928, 5/6/05).

15. **United States v. Indika Farms, Inc.** (E.D. Va., No. 2:05CR73, 11/29/05)—Indika Farms of Windsor, Va., was ordered to pay $100,000 for violating the Clean Water Act by discharging more than 2,800 gallons of hog waste into public waters. On three occasions when heavy rains threatened to destroy a retention lagoon, the farm pumped hog waste into a swamp that empties into a Norfolk reservoir. The farm did not disclose the discharges to public authorities. Nor did the farm take measures to modify the lagoon to withstand severe weather (36 ER 2519, 12/9/05).

16. **United States v. Kellogg** (E.D. Pa., No. 03-CR-00321, *sentence entered* 3/15/05)—The head of an environmental testing lab was sentenced to 16 months in prison for falsifying the results of water quality tests. Edward V. Kellogg provided falsified environmental test results to nine customers of Johnson Laboratories in New Cumberland, Pa. The customers, in turn, submitted the falsified results to environmental agencies, as required under their discharge permits. Kellogg was also ordered to pay restitution and a special assessment, and required to perform community service (36 ER 547. 3/18/05).

17. **United States v. Lucas** (S.D. Miss., No. 1:04cr60GuRo, Feb. 25, 2005; *sentence entered* 12/5/05)—In what the government described as ''one of the most significant wetlands criminal enforcement prosecutions in U.S. history,'' three individuals and two corporations were sentenced to lengthy prison terms and fined more than $5 million. Over a nine-year period, Robert J. Lucas Jr. and his daughter Robbie Lucas Wrigley developed and sold lots in a 2,600-acre mobile home subdivision through two companies, Bill Hill Acres, Inc., and Consolidated Investments, Inc. Engineer M.E. Thompson designed septic tanks for the development. The mobile home park was constructed on federally protected wetlands without proper permits in violation of the Clean Water Act. The defendants were also convicted of mail fraud for misrepresenting the condition of the property, as the septic systems failed

and leaked sewage. Lucas was sentenced to nine years in prison, and Wrigley and Thompson were each sentenced to more than seven years. All were also given three years of supervised release and ordered to pay fines and assessments (36 ER 2515, 12/9/05).

18. **United States v. McWane, Inc.** (N.D. Ala., No. CR-04-PR-199-S, June 10, 2005; *sentence entered* 12/5/05)—A federal jury handed down guilty verdicts against the McWane Cast Iron Pipe Co. and three employees for conspiring to violate the Clean Water Act by discharging industrial wastewater through storm drains. In addition, company officials were convicted of making false statements to the EPA by misrepresenting facts related to the company's wastewater management program and inspections it claimed to have conducted. A federal judge later ordered the company to pay a $5 million fine and to build a storm water treatment facility and athletic fields, and fund long-term water quality research. Company officials were fined and ordered to serve probation (36 ER 2516, 12/9/05).

19. **United States v. Moore** (E.D.N.C., No. 2:05-CR-31-12/15/05)—A dredge and field maintenance superintendent for the North Carolina Department of Transportation pled guilty to a felony violation of federal environmental statutes after ordering crews to dredge an unauthorized channel in Currituck Sound. Billy R. Moore ordered the activity knowing that he lacked the necessary permit from the Army Corps of Engineers. Permits had previously been denied because of the adverse impact on fish and aquatic wildlife. Beyond the illegal dredging, Moore made false statements that the dredging was accidental. Moore pled to violations of the Clean Water Act and the Rivers and Harbors Act of 1899 (36 ER 2642, 12/23/05).

20. **United States v. Moses** (D. Idaho, No. CR-05-061, 9/15/05)—A developer who used heavy equipment to manipulate a stream bed was found guilty by a federal jury of three counts of violating the Clean Water Act. C. Lynn Moses, who was developing property in Idaho next to a creek, failed to submit an application for a dredge-and-fill permit as required by the CWA (36 ER 2065, 10/7/05).

21. **United States v. Roddy** (M.D. Tenn., No. 3:05-MJ-02036, *complaint filed* 6/20/05)—Two employees of a Tennessee municipal sewage treatment plant were charged with violating the Clean Water Act by submitting false reports to the government. According to federal prosecutors, reports filed by employees Marty Roddy and James Michael Holden falsely represented the levels of fecal coliform in the water discharged by the plant. Spot testing by Tennessee authorities found fecal coliform levels 20,000 times higher than the results on the reports (36 ER 1407, 7/8/05).

22. **United States v. Royal Canin USA, Inc.** (E.D. Mo., No. 04-CR-00652, 12/13/05)—Pet food manufacturer Royal Canin USA, Inc., pled guilty to violating the Clean Water Act after spilling over eight tons of liquid animal fat into ponds and a stream near its Rolla, Mo., processing plant. Although company officials discovered the spill, they did not investigate its extent or report it to authorities. A farmer with property nearby later noticed that the fat had migrated to ponds on his property. Royal Canin agreed to pay almost $200,000 in fines, damages, and restitution (36 ER 2643, 12/23/05).

23. **United States v. Seven-Up/RC Bottling Co. of Southern California** (C.D. Calif., No. CR-05-996, 11/10/05)—A California soft-drink bottler agreed to pay a $600,000 fine for 12 misdemeanor violations of the Clean Water Act. The Seven-Up/RC Bottling Co. of Southern California pled guilty to charges that untreated wastewater—including grease, petroleum byproducts, and rejected acid drink products—was discharged directly into the Los Angeles River. The investigation against the bottler was launched after regulators received an anonymous tip (36 ER 2351, 11/18/05).

24. **United States v. Still** (S.D. Ala., No. CR-04231, *sentence entered* 3/3/05)—The former director of a utilities board was placed on probation, fined $3,000, and required to surrender his license to operate a wastewater treatment plant after filing a false report on wastewater discharges with Alabama environmental authorities. Harry Still Jr. failed to report the discharge of untreated sewage into a creek adjacent to the Harry Still Sr. Wastewater Treatment Plant (which was named for the defendant's late father). Still reported that the concentration of nitrogen and ammonia effluent were within the levels specified in the utility's NPDES permit when, in fact, they were in violation (36 ER 491, 3/11/05).

25. **United States v. Yadav** (E.D. Mo., No. 4:04-CR-00618, *sentence entered* 1/27/05)— A cleaning products company and its owner were fined and sentenced to probation for illegally discharging contaminated wastewater into St. Louis sewers without a permit. Chemco Industries and its owner, Kamal P. Yadav, pled guilty to a felony violation of the Clean Water Act for discharging untreated wastewater that included trichloroethylene, tetrachloroethylene, benzene, toluene, and ethylbenzene. The company subsequently implemented a waste disposal and hazardous communication response policy (36 ER 226, 2/4/05).

Oil Spills/Ocean Dumping Act/ Act to Prevent Pollution from Ships

26. **United States v. A. P. Moller-Maersk A/S** (N.D. Calif, No. 05-CR-606, 9/26/05)—A Danish shipping company pled guilty to falsifying waste oil discharge records and was fined $500,000, the maximum fine for the violation. The violation was discovered after the Coast Guard found waste oil in the overboard piping of the M/V Jane Maersk, and subsequently uncovered evidence of alleged false entries made in the ship's oil record book. In a related proceeding, the ship's second engineer pled guilty to destroying records in anticipation of the pending Coast Guard investigation and was sentenced to four months community confinement.

27. **United States v. Boyang (Busan) Ltd.** (D. Alaska, No. A-05-035-CR, 4/26/05)—The operator of a fleet of cargo ships pled guilty and agreed to pay a $1 million fine for illegally dumping oily sludge and bilge water off the coast of Alaska. The company was still on probation for the same offense in 2002. As part of the settlement agreement, the company agreed to be banned from entering U.S. ports for five years if it commits further offenses. In this case, the company admitted that the chief engineer and first engineer of the M/V Baron rigged a bypass hose to an oil-water separator allowing oily waste to be discharged directly into the ocean, and falsified the ship's oil record book. Both men were separately convicted of pollution charges. In addition, the company agreed to pay $100,000 into an escrow account to pay for an updated environmental management system (36 ER 924. 5/6/05).

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28. **United States v. Evergreen International S.A.** (C.D. Calif., No. CR-05-238, 4/4/05)—A Taiwanese shipping company agreed to pay $25 million to resolve charges that crews on its ships engaged in a ''pattern of unlawful'' behavior by routinely discharging waste oil. In 2001, Coast Guard authorities traced a spill of 500 gallons of oil in the Columbia River to a vessel managed by Evergreen Marine. This led to the boarding of other Evergreen ships that revealed equipment that would allow the crew to bypass pollution control equipment and discharge oily waste and sludge directly into the ocean. In the plea, it was stated that some crew members had concealed illegal discharges through false entries in oil record books. The company was charged with 24 felony counts and one misdemeanor. It agreed to adhere to a comprehensive environmental compliance plan to prevent future violations, and was given three years of probation (36 ER 704, 4/8/05).

29. **United States v. Fujitrans Corp.** (D. Ore., Nos. CR 04-469, CR 04-531, 2/3/05)—A Japanese shipping company pled guilty to discharging waste oil and bilge water directly into the ocean and agreed to pay nearly $2 million in fines and fees. Fujitrans Corp. operated the M/V Cygnus, a car-carrier that transported automobiles between Japan and the United States. According to the plea, crew aboard the ship used a hose to bypass pollution control equipment and discharge the waste, and falsified oil record books. A former crew member tipped off Coast Guard investigators, who found fresh paint on the ship's overboard valve that was alleged to be part of the plan to conceal the fact that the bypass hose had been disconnected before the ship arrived in port. Two crew members separately pled guilty and were sentenced to jail time and probation (36 ER 289, 2/11/05).

30. **United States v. Karlog Shipping Co., Ltd.** (E.D.N.Y., No. 1:05-cr-00750, *plea entered* 11/15/05)—After pleading guilty to illegally dumping waste oil from a vessel, a cargo shipping firm agreed to pay a $1 million fine and to institute a fleetwide environmental plan. Karlog Shipping Co. admitted to routine discharges of oily bilge water through a hidden bypass pipe on the M/V Friendship, and to having concealed the discharges by maintaining a false oil record book that made it appear the ship was properly utilizing pollution-prevention equipment. The environmental management plan requires the company to appoint a senior official as compliance manager and to hire an independent environmental consultant to develop an action plan for improving compliance procedures and equipment. In related actions, the ship's chief engineer and fitter were sentenced to 30 days in prison and three years probation for ordering crew members to make false statements to the Coast Guard (36 ER 2407, 11/25/05).

31. **United States v. MSC Ship Management, Ltd.** (D. Mass., No. 05 CR 10351, *criminal information filed* 12/19/05)—MSC Ship Management Ltd., a Hong Kong-based container shipping firm, agreed to pay $10.5 million — what the government described as ''the largest-ever fine involving deliberate pollution from a single ship'' — for violating the federal Act to Prevent Pollution from Ships (APPS). The MSC Elena illegally discharged more than 40 tons of oil sludge and oil-contaminated waste into the ocean through a pipe that bypassed required pollution-prevention equipment. The company pled guilty to making false statements to the Coast Guard denying the existence and use of the bypass; obstructing justice by directing subordinates to lie to the Coast Guard; concealing evidence; and falsifying discharge records. In related actions, the ship's chief engineer and second engineer agreed to plead guilty to charges of conspiracy, obstruction, destruction of evidence, false statements, and violation of the APPS.

32. **United States v. Stickle** (S.D. Fla., No. 04-CR-20072, *sentence entered* 4/1/05)—A shore side executive of an Iowa-based shipping company was sentenced to 33 months in prison for dumping 443 metric tons of oil-contaminated wheat into the South China Sea. Rick Dean Stickle, owner of Sabine Transportation Co., was convicted of conspiracy in connection with giving the order to dump the grain from the U.S. flagged ship, the S.S. Juneau. In a related action, the company agreed to pay a $2 million fine and to serve three years probation in connection with eight counts of illegal dumping (36 ER 707, 4/8/05).

Rivers and Harbors Act

33. **United States v. Empire Transit Mix, Inc.** (E.D.N.Y., No. 05-310, *plea entered* 5/12, 05)—A concrete company that discharged concrete slurry into a creek through an illegal pipe pled guilty to violations of the federal Rivers and Harbors Act, which prohibits the deposit of refuse into navigable waters. Empire Transit Mix, Inc., made highly caustic discharges into Newtown Creek, a waterway that runs between the boroughs of Brooklyn and Queens in New York. The creek feeds into the East River. Under a bounty provision in the law, the Hudson Riverkeeper will receive half of the $300,000 the company agreed to pay. The organization assisted the EPA in its investigation and brought the illegal pipe to the attention of the agency's criminal investigators (36 ER 1042, 5/20/05).

Hazardous Waste

34. **United States v. George** (E.D. Mich., No. 03-90025, 3/16/05)—Two employees of a waste treatment company were given jail terms and fines for taking in more waste than the facility could handle and illegally disposing of it. Gazi George, a chemist in charge of the City Environmental Inc. facility and Donald Roeser, his second in command, admitted that they instructed employees to discharge liquid waste from trucks directly into the Detroit sewer and to falsify samples and treatment logs. Employees were also told to install a pipe that allowed the waste to bypass the treatment system. Similarly, the company accepted solid hazardous waste and delivered it to nonhazardous waste landfills with improper or no treatment. In addition, the two men were charged with witness tampering, after telling employees to stay away from auditors or to lie about the facility's waste treatment practices (36 ER 598, 3/25/05).

35. **United States v. J&N International Coatings, Inc**. (W.D. Okla., No. CR-04-00115, *sentence entered* 10/6/05)—The president of a painting company was sentenced to 16 months in prison for bribing a state inspector to permit the disposal of blasting waste at a site not authorized to accept hazardous materials. Drossos J. Tiliakos paid the inspector, Michael Zacker, two bribes of $3,000 to falsify documents allowing for the disposal of lead paint blasted from two bridges. The company saved a substantial amount of money by avoiding proper disposal of the blasting waste. The inspector was separately sentenced to 12 months in prison, and the

company's treasurer was ordered to pay a fine and placed on probation (36 ER 2106, 10/14/05).

36. **United States v. Klusaritz** (E.D. Pa., No. 2:05-cr-00148, 3/16/05 —An employee of a Pennsylvania underground storage tank maintenance and removal company was convicted of falsifying reports and sentenced to 21 months in prison. Michael L. Klusaritz, formerly with Boyko Petroleum Services Inc., charged customers $110,000 for false closure reports showing that there were no leaks or environmental damage from the tanks. The reports, required under the Resource Conservation and Recovery Act, must be obtained before the owner can close a tank and have it removed from the site. Klusaritz was also required to make restitution (36 ER 589, 3/25/05).

37. **United States v. North American Waste Assistance** (W.D. Texas, No. 3:05-CR-02498, 11/17/05)—A waste-hauling company and its president were indicted by a federal grand jury with criminally violating the Resource Conservation and Recovery Act by transporting hazardous waste to an unpermitted site and disposing of hazardous waste without a permit. Dennis Rodriguez's company, North American Waste Assistance, picked up 84 drums of a petroleum-based concrete curing compound, which is an ignitable hazardous waste. On uniform hazardous waste manifests, the company stated that the drums contained ''non-RCRA, nonregulated'' waste. The drums were then transported for disposal in landfills that were not permitted under RCRA to accept hazardous waste. If convicted, Rodriguez faces a maximum sentence of two years for making false statements, 10 years for unlawful transportation, and 10 years for unpermitted disposal, along with fines of $50,000 per violation (36 ER 2461, 12/2/05).

38. **United States v. Roof Depot, Inc.** (D. Minn., No. 04-377, *sentence entered* 2/16/05)—A company that disposed of containers of roofing supplies by burying them near its warehouse was fined $75,000, ordered to pay restitution of $86,000, sentenced to probation, and directed to donate $190,000 in construction supplies to Habitat for Humanity. Roof Depot sells roofing and construction supplies, including a number of hazardous materials such as roofing cement, strippers, and solvents. An operations manager at the company's warehouse facility directed employees to bury several pallets of damaged containers near the warehouse. The company had no permit to store or dispose of hazardous waste at the facility (36 ER 482, 3/11/05).

39. **United States v. Solomon** (E.D. Mich., No. 05-80041, *plea entered* Feb. 25, 2005—The president of a Michigan paint manufacturer faces up to 11 months in prison and $1 million in restitution after pleading guilty to knowingly storing hazardous waste without a permit. Norman Solomon, president of Michigan Industrial Finishes Corp., admitted to storing 3,300 drums of solvents—including xylene, toluene, and methyl ethyl ketone—at a site that has now been designated for a $4 million superfund cleanup (36 ER 429, 3/4/05).

40. **United States v. Udell** (E.D. Pa., No. 2:05-CR-00402, *indictment unsealed* 8/25/05)—The owner and operator of a Pennsylvania chemical storage facility was charged with 15 felony counts of violating the Resource Conservation and Recovery Act by using illegal strategies to remove hazardous substances. Joel D. Udell owned a warehouse that qualified as a Superfund site and was ordered to clean it up. Instead, his companies shipped some of the chemicals to the Netherlands without a buyer and without the consent of the country. Other chemicals were shipped in deteriorated drums without identification of their contents to U.S. facilities that did not have hazardous waste permits. Udell faces up to 48 years in prison and multimillion-dollar fines.

41. **United States v. Union Foundry Co.** (N.D. Ala., No. 2:05-cr-00299, *plea entered* 9/6/05)—Union Foundry, a division of McWane, Inc., will pay a criminal fine of $3.5 million and perform a $750,000 community service project for violating the Resource Conservation and Recovery Act by allowing workers to illegally treat hazardous waste without a permit. The investigation was spurred by an accident at the plant, where an employee was killed while working on a conveyor belt that did not have a safety guard mandated by Occupational Safety and Health Administration regulations. The company also admitted to a willful violation of the OSHA regulation (36 ER 1910, 9/16/05).

Hazardous Materials Transportation Act

42. **United States v. Beattie** (D. Conn., No. 3:05 cr 00205, 12/5/05)—The owner of a company that tested and requalified compressed gas cylinders was sentenced to six months of probation and ordered to pay a $1,000 fine for violating the federal Hazardous Materials Transportation Act. Kirk Beattie, owner of New England Ski and Scuba, LLC, pled guilty to knowingly and willfully violating the law by failing to perform required hydrostatic testing before requalifying the cylinders.

43. **United States v. Seaboard Marine Ltd., Inc.** (S.D. Fla., No 04-20455-CR, 5/5/05)—A shipping company was fined $304,000, given three years probation, and ordered to implement a hazardous materials compliance program for violating hazardous materials transportation regulations. The contents of a Florida warehouse, including a variety of hazardous chemicals, were sold to a detergent company in Antigua. Seaboard Marine was hired to transport the chemicals in a shipping container, which began leaking en route. The company had not identified the hazardous materials cargo on required transport forms. The leaking container was turned away, and was later found abandoned at the Florida warehouse.

Safe Drinking Water Act

44. **United States v. Cervi** (D. Colo., No. 05-CR-169, *plea entered* 5/27/05)—The former owner of an injection well pled guilty to criminal violations of the Safe Drinking Water Act. Michael Eugene Cervi owned and operated Envirocycle, a company that injected wastewater from oil drilling operations, which contained a number of toxic compounds, into an underground aquifer. After fluids contaminated with petroleum were found in the well's leak-detection system, Cervi and two employees sealed off the leak-detection system and placed clean water into the sampling tube provided to county authorities. A subsequent owner of the facility discovered the contamination. Cervi has already paid the new owner for the cost of cleanup and monitoring (26 ER 1135, 6/3/05).

45. **United States v. Greenfeld** (S.D.N.Y., No. 05-561, 8/4/04, *sentence entered* 11/15/05)—An employee of the New York City Department of Environmental Protection pled guilty to a felony violation of the Safe Drinking Water Act for making false entries in a log book used for monitoring turbidity in the city's drinking wa-

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ter supply. The entries falsely reflected that Dieter Greenfeld had calibrated monitoring equipment and taken samples of water flowing through the facility when he had not. Greenfeld was later sentenced to two years of probation including six months of home confinement (36 ER 2351, 11/18/05).

Wildlife

46. **United States v. Kahn Cattle Co. LLC** (N.D. Ga., No. 4:05-CR-006, 3/24/05) —A cattle company owner and farm manager were sentenced to home confinement and community service for poisoning several thousand birds of a variety of species. The two men, who operated the Kahn Cattle Co., mixed a restricted use pesticide with large amounts of shelled corn and spread it near a pond to kill nuisance birds. Federal and state agents ultimately collected more than 3,000 dead migratory birds over more than 1,000 acres. The company was ordered to pay $95,664 in restitution and $170,000 in fines for violating the Resource Conservation and Recovery Act. In addition, the two men were given the maximum $15,000 fine for violating the Migratory Bird Treaty Act, ordered to serve 60 days home confinement and perform 160 hours of community service, and required to place advertisements warning others not to employ illegal means for resolving nuisance animal problems (36 ER 638, 4/1/05).

47. **United States v. Rhee** (C.D. Calif., No. 04-1086, *sentence entered* 1/24/05)—The owner of a Los Angeles-area Korean market was fined $200,000 and placed on probation for three years after pleading guilty to smuggling northern snakehead fish into the country. The fish, which are native to Asia, are illegal in the United States. Sung Chul Rhee was also ordered to purchase advertisements in two Korean-language newspapers warning the community about the dangers the fish pose. His company, Assi Super Inc., also entered a guilty plea and was placed on probation (36 ER 226, 2/4/05).

CFC Smuggling and Handling Violations

48. **United States v. Shellef** (E.D.N.Y., No. 03cr00723, 7/28/05)—Two individuals were found guilty of conspiring to evade excise taxes due on the sale of trichlorotrifluoroethane (CFC). Importation and production of CFC was banned in 1996 by the Clean Air Act. Domestic sale of the chemical is subject to a significant excise tax in order to discourage its use. Dov Shellef and William Rubenstein purchased large quantities of CFC, asserting to the manufacturers that they planned to export the product. Accordingly, the manufacturers did not collect or pay the required excise taxes. The two men then diverted the product illegally to a number of domestic customers, using false shipping documents (36 ER 1661, 8/12/05).

Key Appellate Cases

49. **United States v. Wasserson** (418 F. 3d 225, 60 ERC 2092 (3d Cir. 2005))—The owner of a dry cleaning supply company was properly found guilty of disposing of hazardous waste without a permit, despite the fact that he did not actually carry out the disposal himself, the Third Circuit ruled, reversing the district court below. When Garry Wasserson closed down his business, he instructed an employee to hire someone to get rid of a warehouse full of leftover supplies, including hundreds of containers of hazardous dry cleaning chemicals. The employee contacted a salvage company who hauled the contents of the warehouse to a local landfill. After the hazardous waste was discovered, federal prosecutors charged Wasserson with violating RCRA by, among other things, causing, aiding, and abetting the disposal of hazardous waste without a permit. A jury found him guilty but the district court threw out the conviction, finding that a party who generates, but does not carry out the disposal of hazardous waste cannot be convicted of disposing of waste without a permit. The Third Circuit disagreed. The RCRA provision at issue, the court noted, does not expressly state that those who ''cause'' the unlawful disposal are liable. Accordingly, Wasserson could be found vicariously liable (36 ER 1671, 8/12/05).

50. **United States v. Ortiz** (427 F. 3d 1278, 61 ERC 1521 (10th Cir. 2005))—The operations manager of a propylene glycol distillation facility, who flushed industrial wastewater down a toilet, was properly convicted of violating the Clean Water Act by negligently discharging a pollutant into navigable waters, the Tenth Circuit held, reversing the district court below. After a jury convicted David Ortiz on a CWA negligence count, the district court reversed. According to the lower court, there was no evidence that Ortiz was aware that the toilet was not connected to a sanitary sewer line, or that flushing the wastewater down the toilet would result in a discharge into the Colorado River. In reinstating the jury's conviction, the appeals court pointed out that the Clean Water Act does not require a defendant to know that a discharge will enter waters of the United States. The district court's conclusion, it said, ''is at odds with the plain language of the Clean Water Act, which criminalizes any act of ordinary negligence that leads to the discharge of a pollutant into the navigable waters of the United States.'' A reasonable jury, the court concluded, could have found that Ortiz did not exercise adequate care when he disposed of the wastewater in the toilet (36 ER 2352, 11/18/05).

51. **United States v. Kraft** (8th Cir., No. 05-2581, 1/9/06)—A woman who falsely stated on wildlife transportation forms that illegal interstate sales of wildlife were lawful ''donations'' was properly convicted of submitting false records under the Lacey Act. Nancy Lee Kraft and her husband dealt in wildlife and exotic animals. After a jury found her guilty of submitting false records and conspiring with her husband and buyers to do so, she was sentenced to 15 months in prison. On appeal, she argued that government form 7020, which covers the interstate transportation of protected wildlife, is not a ''record'' under the Act. One provision of the Act makes it unlawful to submit a false record for any wildlife that is transferred in interstate commerce. The Eighth Circuit affirmed, finding that the form is a record within the term's common definition. The court added, ''Although the specific information about the nature of the transaction is not required to be provided on form 7020, the Krafts chose to complete that part of the form, and did so to hide their illegal conduct.''