ENVIRONMENTAL CRIMES MONTHLY BULLETIN

May 2006

A FEW WORDS FROM ECS CHIEF DAVID UHLMANN:

On April 26, 2006, after the longest federal environmental crimes trial in the United States, a jury in Trenton, New Jersey, returned guilty verdicts against Atlantic States Cast Iron Pipe Company and four managers at the Atlantic States facility for their roles in a wide-ranging conspiracy to violate environmental protection and worker safety laws. The jury convicted Atlantic States on 32 felony counts, including substantive Clean Water Act and Clean Air Act violations, obstruction of justice, and false statements. Each of the four managers also was convicted on multiple felony charges.

The nearly eight-month trial of Atlantic States culminates a more than three-year multi-district prosecution effort of McWane, Inc., which began when McWane was profiled in a series of front-page New York Times' articles and a Frontline expose revealing years of environmental and worker safety violations at McWane facilities nationwide. McWane was indicted for the crimes at the Atlantic States facility in December 2003 and for egregious violations at its flagship McWane Cast Iron Pipe facility in Birmingham, Alabama, in May 2004. The Alabama case went to trial first, in May 2005, resulting in guilty verdicts against McWane and three of its corporate officials in June 2005. In addition, McWane entered guilty pleas during 2005 and 2006 in Texas, Alabama, and Utah for Clean Air Act, RCRA, and worker safety violations at its Tyler Pipe, Union Foundry, and Pacific States facilities.

To date, McWane has paid nearly $20 million in criminal fines, and the national prosecution effort against McWane has been a centerpiece of the Justice Department's worker endangerment initiative. The investigations of McWane have included EPA, the FBI, and a host of state and local law enforcement and regulatory officials, and involved significant assistance from OSHA officials. Each of the cases has been a joint prosecution by the Environmental Crimes Section and the United States Attorney's Offices involved (New Jersey, Alabama, Eastern Texas, and Utah).

Congratulations to the Atlantic States prosecution team led by ECS Assistant Chief Andrew Goldsmith, Senior Trial Attorney Deborah Harris, First Assistant United States Attorney Ralph Marra, and Assistant United States Attorney Norv McAndrew -- and to everyone involved in the McWane prosecutions nationwide!

AT A GLANCE

SIGNIFICANT OPINIONS

♦ [redacted]

♦ **Baccarat Fremont Developers v. U.S. Army Corps of Engineers, 425 F.3d 1150 (9th Cir. 2005): Clean Water Act, "Waters of the United States" defined.**

♦ **Fairhurst v. Hagener, 422 F.3d 1146 (9th Cir. 2005) (per curiam): Clean Water Act, Discharge of a Pollutant.**

♦ **United States v. Shaw, 150 Fed. Appx. 863 (10th Cir. Oct. 13, 2005) (unpublished table decision), petition for cert. filed, 74 U.S.L.W. 3545 (U.S. Mar. 21, 2006) (No. 05-1220): Clean Air Act, Asbestos.**

♦ **United States v. Ortiz, 427 F.3d 1278 (10th Cir. 2005): Mental State, Negligence.**

♦ **United States v. W. R. Grace, 401 F. Supp. 2d 1065 (D. Mont. 2005): Rules of Ethics, Communications with Represented Parties.**

♦ **United States v. Hajduk, 396 F. Supp. 2d 1216 (D. Colo. 2005): Search and Seizure, Warrantless Inspections, Pervasively/Closely Regulated Businesses.**

Districts	Active Cases	*Case Type* / Statutes
C.D. Calif.	**US v. Bao Huynh** **US v. Rodolfo Esplana Rey**	***Tropical Fish Smuggling*/ ESA** ***Vessel*/ False Statement, APPS**
M.D. Fla.	**US v. James Messina**	***Nest Destroyed*/ Bald and Golden Eagle Protection Act**
N.D. Fla.	**US v. Christopher Weaver**	***Dolphin Harassment*/ Marine Mammal Protection Act**
S.D. Fla.	**US v. Parkland Town Center, LLC.** **US v. Kevin McMaster**	***Hotel Renovation*/ CAA NESHAP** ***Endangered Species Skins*/ Lacey Act, ESA**
D. Idaho	**US v. Tim Brown**	***Bear Killing*/ Malicious Destruction of Public Property, ESA**
E. D. La.	**US v. Chalmette Refining, LLC.**	***Negligent Benzene Discharge*/ CWA**
D. Mass.	**US v. Jose Silva** **US v. Mani Singh**	***Lobster Fishing*/ Lacey Act, Conspiracy, False Statement** ***Vessel*/ APPS, Conspiracy, Obstruction, False Statement**
D.N.J.	**US v. Atlantic States Cast Iron Pipe Co.** **US v. MK Shipmanagement**	***Pipe Manufacturer*/ CWA, CAA, OSHA, CERCLA, Conspiracy, False Statement, Obstruction** ***Vessel*/ APPS**
E.D. Pa.	**US v. Steven McClain**	***Wastewater Treatment*/ CWA**

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9th Circuit

Baccarat Fremont Developers v. U.S. Army Corps of Engineers, 425 F.3d 1150 (9th Cir. 2005).

Plaintiff was the developer of a site containing almost eight acres of seasonal wetlands. Man-made berms located on adjacent property owned by the county flood control district separated the wetlands from a flood control channel operated by the district. Plaintiff sought a permit from the U.S.

Army Corps of Engineers to discharge fill material in 2.36 acres of the wetlands as part of plans to construct commercial buildings on the site. As part of the issuance of the permit, the Corps imposed certain conditions, including that the plaintiff create on-site at least 2.36 acres of seasonal freshwater wetlands and enhance existing brackish wetlands on the site

Plaintiff brought an action (removed from state to federal court) seeking declaratory judgment and injunctive relief against the Corps and its District Engineer contesting the Corps assertion of jurisdiction and seeking to enjoin enforcement of the mitigation conditions. The district court granted the defendants' motion for summary judgment, holding that the Corps had jurisdiction over the wetlands.

Held: The Ninth Circuit affirmed the judgment of the district court. It held that the Corps' had jurisdiction under the adjacency clause of 33 C.F.R. § 328.3(a)(7), rejecting the plaintiff's argument under SWANCC that there must be a significant hydrological or ecological connection to waters of the United States. SWANCC had invalidated only the Migratory Bird Rule and had not addressed the Corps' adjacency jurisdiction. In Riverside Bayview Homes, the Supreme Court rejected the argument that a significant hydrological or ecological connection was required. The court reviewed in detail the relevant caselaw, finding that the Headwaters decision regarding tributaries is not to the contrary and found strong support in Carabell. In any event, the Corps here had found more than adequate evidence of a significant nexus between the wetlands in question and the flood control channels located in the adjacent property that clearly were waters of the United States.

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Fairhurst v. Hagener, 422 F3d 1146 (9th Cir. 2005) (per curiam).

Defendant Hagener, Director of the Montana Department of Fish, Wildlife and Parks, initiated a program in which the Department sought to re-introduce the Westslope cutthroat trout, a threatened fish species. His program included a plan to eliminate competition with other non-native trout species by removing those non-native species. The Department would apply the pesticide Antimycin into the water for short periods of time over several years before reintroducing the threatened species.

After the Department had performed at least one application of Antimycin to Cherry Creek (which constituted navigable waters), the plaintiff sued Hagener under the citizen suit provision of the Clean Water Act, claiming that, in order to legally disperse pesticide into waters of the United States, Hagener first was required to obtain an NPDES permit, which he had not done. Plaintiff also sought an injunction against all future unpermitted application of the Antimycin. The district court granted Hagener's motion for summary judgment.

Held: On appeal, the Ninth Circuit affirmed the judgment of the district court. The parties had agreed that the Department had applied the Antimycin in accordance with the requirements of its label approved by USEPA pursuant to FIFRA and that the program had gone "according to the plan which included application of Antimycin directly" to waters of the United States, resulting in the intended killing of non-native species of fish. They also did not dispute that the discharge of Antimycin had been an "addition" from a "point source"

The court found that, unlike the situation in Headwaters, where a herbicide was applied to irrigation canals for the beneficial purpose of clearing weeds, but had left chemical residue in the water, the pesticide here (again applied intentionally directly into water in accordance with all applicable requirements of FIFRA) left no residual chemical in the water, since the Antimycin dissipated rapidly after it had performed its intended purpose. Because the pesticide functioned as intended, it was not "damaged' or "defective' nor did it consist of "superfluous material" or "refuse or

excess material." Therefore, under the definition contained in the CWA, no "chemical waste," thereby constituting a "pollutant," had been added to the creek. Further, USEPA guidance provided that "pesticides applied consistently with FIFRA do not fall within the CWA definition of 'chemical wastes.'" The court did note, however, that as explicitly held in Headwaters, this analysis applies and an NPDES permit is not required when a pesticide is intentionally applied in accordance with a FIFRA label, and it leaves no residue or unintended effects.

[NOTE: The court did not consider the decision in No Spray Coalition, Inc. v. City of New York, ___ F. Supp. 2d ___, 2005 WL 1354041 (S.D.N.Y. June 8, 2005).]

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10th Circuit

United States v. Shaw, 150 Fed. Appx. 863 (10th Cir. Oct. 13, 2005) (unpublished table decision), petition for cert. filed, 74 U.S.L.W. 3545 (U.S. Mar. 21, 2006) (No. 05-1220).

Defendant professional engineer owned and operated ESCM & Associates, Inc. ("ECSM"), an engineering and environmental consulting firm. One of ECSM's clients' contacted the defendant seeking his assistance in demolishing an abandoned oil refinery located in Kansas. After an inspection of demolition work at the refinery by a representative of the state Department of Health and Environment, followed by an investigation by a criminal investigator from USEPA, the defendant was charged in a superseding indictment on four counts for violating the NESHAP for asbestos promulgated under the Clean Air Act; engaging in a scheme to falsify, conceal or cover up the presence of asbestos in violation of 18 U.S.C. § 1001(a)(1); making a false statement in violation in violation of 18 U.S.C. § 1001(a)(2); and illegally disposing of asbestos in violation of CERCLA. The principals of a small wrecking company performing work at the site were charged in the same indictment with removing asbestos without accreditation in violation of TSCA. In exchange for their cooperation in the prosecution of the defendant, they subsequently were allowed to plead guilty to a misdemeanor charge of failing to notify USEPA regarding the storage and disposal of asbestos at the site.

Defendant was convicted by a jury on one Clean Air Act violation for engaging in a scheme to falsify, conceal or cover up the presence of asbestos. He appealed both his conviction and his sentence.

Held: On appeal, the Tenth Circuit affirmed defendant's conviction, but remanded to the district court with instructions to re-sentence him in accordance with this opinion and with Booker. The court rejected the defendant's contention that the district had lacked subject matter jurisdiction over his prosecution under 18 U.S.C. § 1001 because the false statement provision of the Clean Air Act (42 U.S.C. § 7413(c)(2)(A)) was the sole and exclusive means for prosecuting the making of a false statement to USEPA in violation of the Act. When an action violates more than one criminal statute, absent statutory language or legislative history to the contrary, the government generally may prosecute under either, even when one of the statutes provides a harsher penalty. The court also rejected the defendant's argument that his prosecution under section 1001 was time-barred by the statute of limitations because the false statements in question had been made more than five years before the filing of the original indictment. In this case, the superseding indictment charged the defendant with a *scheme* to conceal the presence of asbestos, and the statute of limitations did not

begin to run until that scheme had been completed (which occurred within the five-years prior to the filing of the original indictment).

Finally, the court rejected the defendant's argument that only an "owner or operator" had a duty under the Act to disclose the presence of asbestos to USEPA by filing a Notification of Demolition and Renovation, and that, as a consultant, he did not fit that definition. Defendant in fact was convicted of violating subparagraph (a)(1) of 18 U.S.C. § 1001 (concealment of a material fact), not subparagraph (a)(2) (making of a false statement). Conviction under the former provision requires proof that a defendant had a legal duty to disclose the fact concealed, while under the latter provision it does not. But in any event, the court found that the government had met that burden. Whether or not defendant had been a person required to file a Notification of Demolition and Renovation, he had in fact done so. That form itself contained disclosure requirements regarding asbestos at the site, thereby imposing upon the person submitting that form a legal duty to disclose the presence of asbestos and, if present, the method of abatement. An agent clearly may complete and submit a notification form on behalf of a principal.

At sentencing, the district court calculated the defendant's base offense level at six (under Section 2F1.1, the applicable guideline for a violation of 18 U.S.C. § 1001(a)(1)). Based upon USEPA's estimate that it would cost almost $250,000 to clean up the asbestos improperly buried at the refinery, it enhanced the base level by five, finding that the cost of remediation "clearly" would exceed the "$40,000 loss" threshold for application of section 2F1.1(b)(1)(F). It denied a two-level enhancement based upon the offense having been committed by someone with special skill, and also denied a motion for downward departure based upon aberrant behavior.

At the initial sentencing hearing, the district court had imposed an additional two-level enhancement under section 2F1.1(b)(2), based upon "more than minimal planning," noting defendant's numerous significant contacts over several years with state officials and with the other persons involved in the violations. At the final sentencing hearing, however, the court reconsidered and denied that enhancement.

On appeal, the Tenth Circuit reviewed in detail defendant's dissembling and fraudulent acts over a considerable period of time, demonstrating a "greater amount of planning than [was] required to engage in a scheme to conceal the presence of asbestos from the EPA in its simple form." The court therefore, held that the district court clearly had erred in reversing its initial determination and denying the enhancement for more than minimal planning. Since the case was being remanded for re-sentencing on other grounds, the court concluded that it need not address the imposition of the enhancement based upon the cleanup cost. However, it noted that the re-sentencing would have to be conducted "in light of Booker."

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United States v. Ortiz, 427 F.3d 1278 (10th Cir. 2005).

Chemical Specialties, Inc., was the operator of a propylene glycol distillation facility for the production of airplane de-icing fluid in Grand Junction, Colorado, where the defendant was the operations manager and sole employee. The distillation process produced significant amounts of wastewater, which Chemical Specialties declined to discharge to a municipal waste treatment plant under permit, representing to City officials that it instead would ship all such wastewater to a nearby business.

The City operated a bifurcated sewage system that consisted of a wastewater treatment system fed by numerous sanitary sewer lines, plus a separate stormwater drainage system that collected rain

water that it discharged to the Colorado River. When these previously combined systems had been segregated in the early 1990s, the city had overlooked sewer line connections in the area near the Chemical Specialties facility, with the result that all sanitary discharges from Chemical Specialties and other businesses in the area flowed into a storm drain that discharged into the river.

In response to an odor complaint in 2002, the city found a pungent black substance pouring from a storm drain and seeping into the river. Samples indicated the presence of propylene glycol. Representatives of the City and the state Department of Public Health and Environment met with the defendant, who insisted that he sent all of the company's wastewater to a nearby business. Six days later, after additional discharges were discovered downstream (but none upstream) of the Chemical Specialties facility, government officials informed the defendant that the material appeared to be originating from Chemical Specialties, and again he denied discharging any wastewater. Upon receiving consent to inspect the facility, the officials detected the odor characteristic of the discovered discharges and observed a large bag of a granular black substance.

During a follow-up investigation, a City employee collected samples from the storm drain downstream from Chemical Specialties, which revealed the presence of propylene glycol. Earlier investigations had ruled out surrounding businesses as a likely source of the discharges, and a subsequent test by the City conclusively demonstrated a connection between the toilet in Chemical Specialties and the storm sewer. The City shut off the water in the bathroom and instructed the defendant not to discharge anything down the toilet or sink and arranged for portable toilet and hand washing units at the facility.

A couple of weeks later, USEPA criminal investigators discovered a tanker truck at the facilitiy spewing a liquid with the same characteristic odor onto the ground and observed the same type of substance pouring nearby from a storm drain outfall into the river. The same odor was detected downstream, but not upstream, from Chemical Specialties. Defendant told the investigators that the leaking tanker truck contained propylene glycol that he intended to process, but refused to state whether he ever had discharged pollutants through the toilet. City investigators noted water and a hose on the bathroom floor, and the toilet had been turned back on.

Defendant was charged with two violations of the Clean Water Act, for negligently discharging chemical pollutants without a permit on one occasion and for knowingly discharging chemical pollutants without a permit on a second occasion. After defendant was convicted by a jury on both counts, he filed a motion for judgment of acquittal. The district court denied the motion as to the second count but granted it as to the first, finding that the government had not proved that defendant had been aware that the toilet had not been connected to a sanitary sewer and that as a matter of law he could not be found guilty of the negligent discharge "in the absence of his knowledge that using the toilet would result in the discharge [to the river]." The court also at sentencing declined to apply an enhancement for an "ongoing, continuous or repetitive discharge" or for a "discharge without a permit." The government appealed both the judgment of acquittal and the denial of the sentencing enhancements.

Held: The Tenth Circuit reversed the district court's judgment of acquittal and reinstated the jury's verdict convicting defendant on count one. It remanded the matter to the district court with instructions also to vacate defendant's sentence and to re-sentence him in accordance with its opinion. The court first determined, citing Hanousek, that the standard for conviction under the negligent conduct provisions of the Act is ordinary, rather than heightened, negligence. A defendant violates those provisions "by failing to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstances, and, in so doing, discharges any pollutant into United States waters without a NPDES permit." The evidence here amply supported the jury's verdict.

The court also found that the district court erred in declining to apply the two sentencing enhancements. The jury had found specifically that the defendant had discharged a pollutant, and the district court's conclusion that the "discharge without a permit" enhancement could be applied only where a permit was available for the activity in question was erroneous. The factual impossibility of obtaining a permit is not a defense to that enhancement, since a permit, with a few non-relevant exceptions, is always required before discharging a pollutant into navigable waters. As for the enhancement for repetitive discharges, since the court had reversed the judgment of acquittal on the first of the two counts of which the jury had convicted the defendant, he now stood convicted of two counts that suffice for application of that enhancement. The court rejected the defendant's argument that the enhancement applies only to convictions for repetitive knowing charges.

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District Courts

United States v. W. R. Grace, 401 F. Supp. 2d 1065 (D. Mont. 2005).

Defendant corporation and certain current and former employees were charged with conspiracy to violate the Clean Air Act and to defraud the United States, violation of the Clean Air Act, wire fraud, and obstruction of justice. Government investigators in the case contacted a current corporate employee, apparently in the mistaken belief that he no longer worked for the company. After unsuccessful negotiations with defendants, the government moved for an order authorizing it to initiate *ex parte* communications with all of the corporation's former employees.

Held: The court granted the government's motion, holding that, under an explicit provision of the local rules of the district that incorporated Rule 4.2 of the Rules of Professional Conduct (and of the Montana Rules of Professional Conduct), the government was not required to obtain the consent of the corporation's attorney before contacting former employees (whether or not they had held managerial positions).

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United States v. Hajduk, 396 F. Supp. 2d 1216 (D. Colo. 2005).

Defendant Hajduk was operations manager for defendant Luxury Wheels O.E. Plating ("LW"), a privately-owned chrome plating business that discharged chemicals through its wastewater that were regulated under city, state and federal law.

The Persigo POTW ("Persigo") was owned and operated by the City of Grand Junction ("The City"). It regulated water discharges from industrial facilities into its facilities in order to ensure that its own subsequent discharges complied with state and federal law. Persigo operated under a NPDES permit and was charged under federal, state and municipal law with regulating industrial dischargers to its facility to ensure compliance with these laws. Persigo developed a regulatory program prescribing limits for entering effluent and for individual industrial users. It also established a permit system, including a monitoring system, that allowed users to self-monitor and gave Persigo the ability to inspect and sample. The City additionally required a permit under its City Code and set requirements

for industrial users discharging into Persigo, including a requirement that such users install a sewer with a manhole to allow sampling of wastes.

LW discharged its wastewater into the Persigo system through its own sewer line, carrying both process and domestic waste, that ran from its facility (under property that it owned, but which ran outside its fence line adjacent to the street) to the public sewer line. A manhole owned by the City, provided access for City inspectors at a point 45 feet from the LW property line and two feet from where LW's line connected to the City's main sewer line, where LW's effluent intermingled with other wastewater, in an unfenced and unused area of LW's property adjacent to a public street. Once the wastewater had reached the manhole (which was not a sampling point for LW compliance), LW no longer had any means to prevent it from reaching the main sewer line, which was not accessible to the public. A special tool was required to enter the line by opening the manhole.

LW's City permit stated that LW had to allow Persigo staff, upon presentation of credentials, to "enter the premises," have access to records required under the permit, inspect facilities, equipment and operations, sample or monitor for compliance purposes, and inspect any area where pollutants could originate.

Samples from the wastewater tank inside the LW plant could be obtained by means of a sampling box located on an outer wall of the building. The box could be accessed without entering into that building, which did not have any gates or other security barriers, but which required crossing LW property. The padlocked box could be opened only by Persigo officials. The external sampling box had been installed at Persigo's instigation in order to allow the drawing of samples (even covertly) without notice to LW, but the City permit had not been amended to reflect that the sampling box had been moved from its former location inside the building. When making unannounced sampling visits, Persigo officials used a clearly marked City vehicle and carried credentials which they would show if asked.

In October 2001, Persigo staff entered LW premises without a warrant and drew a sample from a sampling box on the property. The Persigo sample indicated a violation of the terms of LW's City permit and subsequently formed the basis for the defendants to be charged with one negligent Clean Water Act violation.

In January 2002, USEPA, using the results of the Persigo sample, obtained and executed a search warrant authorizing the agency to cut an opening into the LW service line and to conduct surreptitious sampling at the manhole. In February 2002, Persigo also took samples at the manhole, at the same location where USEPA cut into the line. Results from those samples indicated permit violations that formed the basis for defendants to be charged with three additional Clean Water Act violations.

A few days later, USEPA obtained another search warrant authorizing the agency to search the LW facilities for samples, technical data, diagrams, photographs and records, and to conduct interviews with employees.

Finally, after a Persigo official suffered a debilitating exposure to allegedly toxic gas while obtaining a sample in a shed assembled by LW, the Grand Junction Fire Department and Persigo staff in September 2003 conducted another search at the manhole during which they installed a sampler in the sewer line. They returned to retrieve their samples and to collect a grab sample of water in the sewer. These samples revealed an additional permit violation that formed the basis for another count of negligent violation of the Act.

Defendants moved to suppress evidence from the various searches, arguing that the searches had not been justified under LW's permits or federal law, that the exception to the warrant requirement for searches of "closely regulated industries" did not apply, that defendants had not consented to the searches, that the City easement for access to the manhole had not justified the searches, that a theory

of abandonment of the wastewater was inapplicable, and that the City's search of its sewer line constituted an invalid use of City administrative procedures to implement federal prosecution. Defendants further argued that the USEPA search warrants had been tainted by reliance upon the results and information derived from the allegedly unlawful initial sampling by Persigo. The government rebutted those arguments, and further argued the searches of the sampling box and the manhole were justified under the "open fields" doctrine.

Held: The court denied the defendants' motions to suppress and their motions for a Franks hearing. Relying upon Riverdale Mills, it found that defendants had no reasonable expectation of privacy in their wastewater, which flowed irrevocably into the City's public sewer line. The analogy to trash left on sidewalks as in Greenwood was persuasive, and the Persigo search was conducted at a sampling location specified in its own regulations as necessary for monitoring effluent discharges. However, the court found that defendants retained an expectation of privacy in the water still in the wastewater treatment tank located within the building on defendants' facility and, therefore, the sampling of that water constituted a search under the Fourth Amendment. Nevertheless, defendants, although required to submit to independent sampling, had consented to the installation of a sampling box outside of the confines of their facility. Furthermore, the terms of LW's permits and the provisions of the City code incorporated into those permits provided Persigo the authority to require and to conduct the type of independent sampling employed. Those terms were an agreed-to condition in exchange for the privilege of discharging into the City system. There had been implied consent to the sampling despite the lack of an opportunity or need for display of credentials and the lack of a limit upon the "reasonableness" of the time of day, or night, for such sampling. The City's easement for "maintenance" of its sewer line, supported by provisions of the City code, provided further support for its entry into the manhole for sampling purposes. Those activities fell within the purpose of the easement in that enforcing discharge limits helped maintain the system and helped protect maintenance workers, while not interfering with LW's use of its land.

The court, after reviewing Burger and the related caselaw, nevertheless concluded that LW was not a "closely regulated industry" justifying application of that exception to the warrant requirement. The statute here was a "general purpose environmental law" applied to industrial companies generally, rather than to a specific industry, and a particular activity (e.g. wastewater disposal) was being broadly regulated among all business operating in interstate commerce. The court rejected the government's argument that because LW, as an electroplater/metal finisher, was a "Significant Industrial User" subject to a more severe regulatory regime of specific "categorical limits" due to the hazardous chemicals and heavy metals it discharged, it was a closely regulated industry.

The court also found that defendants had not had a diminished expectation of privacy in the manhole and the sampling box because those devices had been located in "open fields" within LW's industrial facility. That doctrine might have justified mere visual inspection within LW's fence line, but here the searches went beyond such observations to physical contact with and removal of objects not immediately visible (samples of wastewater).

The court additionally rejected the defendants' claim that the City's administrative procedures had been used unlawfully as an agent and surrogate for USEPA's investigation, since the City used the same access point to the manhole as EPA, borrowed EPA's equipment, and passed its data on for EPA's use in its criminal investigation. While "an administrative inspection may not be used as a pretext solely to gather evidence of criminal activity," "the discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal." Here, Persigo had a long-standing regulatory relationship with LW, and Persigo and USEPA had overlapping regulatory responsibility regarding LW's effluents.

Finally, the court declined to conclude that defendant Hajduk lacked standing to challenge the searches in question and further found that the defendants had failed to make the required showing of intentional or reckless false statements or material omissions in supporting affidavits to justify a Franks hearing.

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Trials

United States v. Atlantic States Cast Iron Pipe Company et al., No. 3:03-CR-00852 (D. N. J.), ECS Assistant Chief Andrew Goldsmith [redacted], ECS Senior Trial Attorney Deborah Harris [redacted], First AUSA Ralph Marra [redacted] and AUSA Norv McAndrew [redacted]

On April 26, 2006, after six days of deliberation, the jury returned guilty verdicts against Atlantic States and four of the five individual defendants on multiple felony counts in this nearly seven-month long trial.

Iron foundry Atlantic States Cast Iron Pipe Company ("Atlantic States") and current and former managers John Prisque, Scott Faubert, Craig Davidson, and Jeffrey Maury were found guilty of conspiracy to violate the CWA and CAA; to make false statements and to obstruct EPA and OSHA; and to defeat the lawful purpose of OSHA and EPA. These five defendants also were variously found guilty of substantive CWA, CAA, CERCLA, false statement, and obstruction violations charged in a 34-count superseding indictment. Daniel Yadzinski was acquitted on the three counts for which he was charged.

Atlantic States, a division of McWane, Inc., manufactures iron pipes, which involves melting scrap metal in a cupola (a multi-story furnace), that reaches temperatures approaching 3,000 degrees Fahrenheit. Evidence at trial proved a corporate philosophy and management practice that led to an extraordinary history of environmental violations, workplace injuries and fatalities, and ultimately obstruction of justice. Evidence further showed that the defendants routinely violated the CWA permits by discharging petroleum-contaminated water and paint into storm drains that led to the Delaware River; repeatedly violated the CAA permits by, among other things, burning tires and excessive amounts of hazardous paint waste in the cupola; systematically altering accident scenes; and routinely lying to federal, state, and local officials who were investigating environmental and worker safety violations. This is the fifth successful prosecution brought against McWane-controlled entities.

This case was investigated by the United States Environmental Protection Agency Criminal Investigation Division, United States Department of Labor Occupational Safety and Health Administration; the New Jersey Department of Environmental Protection, the New Jersey Department of Law and Public Safety, Division of Criminal Justice, and the Phillipsburg Police Department.

Sentencing is scheduled for September 6, 2006.

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United States v. Parkland Town Center et al., No. 05-CR-80173 (S.D. Fla.), ECS Senior Trial Attorney Jennifer Whitfield [redacted] and AUSA Jose Bonau [redacted].

On the eve of trial, Parkland Town Center, LLC ("Parkland") pleaded guilty to one violation of the CAA for failure to file notice of a demolition or renovation. Neil Kozokoff pleaded guilty to being an accessory after the fact of a CAA violation for failure to file notice of demolition or renovation. Trial began on April 24, 2006, against co-defendant Terry Dykes.

Parkland,, a Palm Beach real estate development firm, Parkland owner and developer Kozokoff, and Dykes, a contractor, were charged in September 2005 with violating the CAA NESHAP requirements during the demolition/renovation of a West Palm Beach hotel between October 1999 and March 2000. Parkland and Kozokoff were the owner and operator, respectively, of the former Northwood Hotel Building. Dyke was the demolition and renovation subcontractor supervising the project. While installing a sprinkler system in the building, another contractor filed a complaint with the local building inspector after he discovered what he believed to be asbestos. Upon investigation, it was discovered that asbestos had been illegally removed from a large boiler and the attached pipes located on the third floor of the building.

This case was investigated by the United States Environmental Protection Agency Criminal Investigation Division with assistance from the Palm Beach County Sheriff's Department.

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Indictments

United States v. Rodolfo Esplana Rey, No. 06-CR-00315 (C.D. Calif.), AUSAs William Carter [redacted] Dorothy Kim [redacted] and RCEC Erica Martin [redacted]

On April 27, 2006, Rudolfo Esplana Rey, the Chief Engineer on the *M/T Cabo Hellas* was charged in a three count indictment with a false statement and an APPS violation for presenting a false oil record book to Coast Guard inspectors on March 24, 2006, at the Port of Los Angeles. He was further charged with obstruction of agency proceedings for instructing the crew to lie to officials about a valve that was used to discharge oily waste directly into the ocean.

The ship is a petroleum transport tanker registered in the Marshall Islands, and is operated by the Overseas Shipholding Group, Ltd.

This case was investigated by the United States Coast Guard and the United States Environmental Protection Agency Criminal Investigation Division.

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United States v. Christopher Weaver, No. 5:06-mj-00031 (N.D. Fla.), ECS Trial Attorney Mary Dee Carraway [redacted]

On April 7, 2006, an information was filed charging Christopher Weaver with a misdemeanor violation of the Marine Mammal Protection Act for knowingly and unlawfully taking a marine mammal, in this case a dolphin. The information states that on October 13, 2005, while captaining a chartered fishing vessel off the coast of Florida, Weaver fired several shots from a handgun at or near dolphins in an attempt to scare them away from his vessel.

This case was investigated by the National Oceanographic and Atmospheric Administration Office of Law Enforcement.

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United States v. Bao Huynh, No. 06-CR-00247 (C.D. Calif.), AUSA William Carter [redacted]

"Lucky Fish"

On March 29, 2006, Bao Huynh was charged with smuggling, false statement and ESA violations for attempting to smuggle Asian Arowana, which commonly are called "Lucky" fish, into the United States. Arowana are indigenous to Southeast Asia and can live for many years in an aquarium. The fish can grow to an adult length of two to three feet, and they sell for as much as $5,000 a piece in this country.

According to the indictment, Huynh attempted to bring a shipment of tropical fish into the United States from Vietnam in January of this year. During an inspection, five Arowanas were found hidden in unmarked bags among other tropical fish. The smuggled fish were not listed on the customs declaration or other attached invoices and shipping papers.

Huynh is scheduled for trial to begin on May 16, 2006.

This case was investigated by the United States Fish and Wildlife Service.

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Pleas / Sentencings

United States v. Steven McClain et al., No. 2:06-CR-00102 (E. D. Pa.), AUSA Seth Weber [redacted] and SAUSA Joseph Lisa [redacted]

On April 27, 2006, wastewater treatment plant superintendent Steven McClain, and operator Ronald Meinzer pleaded guilty to a two-count information filed last month charging them with felony CWA violations for dumping thousands of gallons of untreated sewage into the Delaware River.

McClain and Meinzer ordered workers, in August and September 2004, to wash thousands of gallons of raw sewage and sludge, which had spilled from a digester, into a storm water sewer that led to the Delaware River. Additionally, from approximately 1997 through June 2005, the defendants bleached samples prior to their being sent to an offsite lab for analysis in order to mask fecal coliform levels. The defendants also tampered with plant monitoring equipment by disconnecting devices including alarms on chlorine tanks and digesters at the Bristol Plant.

This case was investigated by the United States Environmental Protection Agency Criminal Investigation Division.

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United States v. Jose Silva, No. 1:05-CR-10011 (D. Mass.), AUSA Jonathan Mitchell [redacted]

On April 24, 2006, Jose Silva, a commercial fisherman, was sentenced to serve 18 months' incarceration followed by three years' supervised release. Silva pleaded guilty in December of 2005 to charges stemming from his illegally harvesting lobster over a four-year period. Silva pleaded guilty to conspiracy to violate the Atlantic Coastal Fisheries Cooperative Management Act ("ACFCMA") and the Lacey Act, two substantive Lacey Act violations and a false statement violation. The ACFCMA was promulgated to help sustain the lobster industry by protecting female lobsters and capping the number of lobsters that may be caught during a single fishing trip.

From February 2000 to March 2004, Silva and others illegally took lobsters, including female egg-bearing lobsters, "v-notched" female lobsters, and lobsters in excess of the 500-per-trip limit. Silva additionally removed, and directed others to remove, the eggs of caught female lobsters on board his fishing vessels. He also sold the lobsters to seafood brokers and wholesalers, and covered up his practices by hiding the lobsters from the Coast Guard in secret compartments on his fishing vessels and by instructing crew members to withhold information from law enforcement.

During a routine Coast Guard inspection, Silva presented documentation indicating significantly fewer lobster on board then he actually had. He verbally told inspectors that there were no lobster in the fish hold when he in fact knew there were hundreds. Silva further instructed the crew to tell investigators that they had removed eggs from female lobsters without his knowledge, when, in fact, Silva had instructed them to do so.

This case was investigated by the United States Coast Guard.

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United States. James Messina et al., No. 2:05-CR-00130 (M.D. Fla.), ECS Trial Attorney Lana Pettus [redacted] and AUSA Yolande Viacava [redacted]

On April 24, 2006, James Messina was sentenced to serve three years' probation and was ordered to pay a $5,000 fine. He pleaded guilty in January 2006 to destruction of a bald eagle nest in violation of the Bald and Golden Eagle Protection Act. Co-defendant Joseph Ulrich was acquitted by a jury of a similar charge in February of this year.

Ulrich was the on-site construction supervisor for Stock Development, LLC ("Stock Development). During the summer of 2003, a bald eagle's nest was discovered in a tree located within "an area designated for residential development by Stock Development. Acting on Ulrich's instructions, Messina cut down the tree with the nest, and the company proceeded with the construction of houses on the lot where the tree once stood. Earlier, the principal officer and manager for the company had discussed in Ulrich's presence the existence of the nest in the tree and the delay or cessation of construction that could result.

Stock Development pleaded guilty and was sentenced in September 2005 to serve a one-year term of probation and pay a $175,000 fine, plus an additional $181,000 in restitution to the following organizations: the Wildlife Foundation of Florida for "Bald Eagle Research"; the Peace River Wildlife Center of Punta Gorda, Florida, for "Wildlife Rehabilitation, Research, and Public Education"; the Audubon Center for Birds of Prey in Maitland, Florida, for the "Florida Bald Eagle Rehabilitation and Eagle Watch Program"; and the Florida Fish and Wildlife Conservation Commission Division of Law

Enforcement. This is the largest combination of a fine and restitution ever paid for the destruction of an eagle nest tree.

This case was investigated by the United States Fish and Wildlife Service and Florida Fish and Game.

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United States v. Kevin McMaster, No. 2:05-CR-14102 (S.D. Fla.), ECS Trial Attorney Georgiann Cerese [redacted] and AUSA Tom Watts-FitzGerald [redacted]

On April 20, 2006, Kevin McMaster was sentenced to serve 25 months' incarceration, to be followed by three years' supervised release. He pleaded guilty in January of this year to a four-count information charging him with two felony Lacey Act violations and two misdemeanor Endangered Species Act violations. Twelve months are to be served concurrently for the misdemeanor violations.

Beginning in November 2003, the Fish and Wildlife Service initiated a covert internet investigation after an undercover agent received an unsolicited email message from McMaster, sent to the agent's covert email address. In that email message, the defendant inquired as to whether the agent was interested in "cat skins." McMaster operated a website known as *deadzoo.com* and a business known as Exotic & Unique Gifts located in Port St. Lucie, Florida. Posing as a potential buyer, the agent communicated with McMaster over the course of the next year via email, phone and a visit to the defendant's business in his undercover capacity.

During the course of the investigation, McMaster sold the agent numerous endangered species' skins, including tiger, snow leopard and jaguar skins. Search warrants were executed at his home and business in December 2004. Based upon an examination of the items seized and a statement given by McMaster, numerous other offers to sell and sales of endangered species were identified, involving predominantly cat skins such as tigers, leopards, and jaguars as well as a gorilla skull and baby tiger mounts.

This case was investigated by the United States Fish and Wildlife Service.

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United States v. Chalmette Refining, LLC, No. 2:05-CR-00327 (E.D. La.), ECS Trial Attorney Mary Dee Carraway [redacted] and AUSA Dee Taylor [redacted]

On April 18, 2006, Chalmette Refining, LLC, was sentenced as a result of pleading guilty to a misdemeanor CWA violation that occurred in February 2000. The company pleaded guilty in January of this year to negligently discharging benzene into the Mississippi River. Chalmette paid the maximum fine of $200,000 and will also pay $50,000 to the Louisiana State police and $50,000 to the Southern Environmental Enforcement Network.

This case was investigated by the United States Environmental Protection Agency Criminal Investigation Division.

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United States v. MK Shipmanagement Company, Ltd., No. 2:06-CR-00307 (D. N. J.), ECS Trial Attorney Joe Poux [redacted] and AUSA Thomas Calcagni [redacted]

Illegal Oily Discharge

M/V Magellan Phoenix

On April 12, 2006, MK Shipmanagement Company, Ltd., operator of the *M/V Magellan Phoenix*, pleaded guilty to one count of violating APPS. Under the terms of the plea agreement, the company has agreed to pay a $350,000 fine, $150,000 of which will go to the National Fish and Wildlife Service to be applied toward the Delaware Estuary Foundation. The company also may be required to complete a term of probation and implement an environmental compliance program. Noel Abrogar, the ship's chief engineer, previously pleaded guilty to violating APPS and was sentenced in January of this year to serve a year and a day of incarceration. In March 2005, during a U.S. Coast Guard inspection in New Jersey, Abrogar presented inspectors with the oil record book containing false entries.

The company is scheduled to be sentenced on July 18, 2006.

This case was investigated by the United States Coast Guard and the United States Environmental Protection Agency Criminal Investigation Division.

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United States v. Tim Brown et al., No. 4:05-CR-00204 (D. Idaho), AUSA George Breitsameter [redacted]

On April 12, 2006, Tim Brown and Bard Hoopes were sentenced in connection with the killing of a grizzly bear cub and the destruction of the radio collar worn by the cub's mother. The sow was previously killed by a third man. Brown will serve three months' incarceration for killing the cub and pay a $1,000 fine plus $19,300 in restitution. Hoopes will serve two months' incarceration and pay a $500 fine and $500 in restitution for destroying the collar. Both men also lost their hunting privileges for two years. In sentencing the men, the judge found that the yearling grizzly was not shot in self-defense. In January of this year, Brown pleaded guilty to one Endangered Species Act violation and Hoopes pleaded guilty to a Malicious Destruction of Public Property violation.

The incident occurred in the Sawtelle Peak area in Idaho on September 23, 2002. Kentucky bow hunter Dan Walters pleaded guilty in January 2005 to killing the cub's mother. He was ordered to pay $15,000 in restitution and also lost his hunting privileges for two years. The seven-year-old sow shot by Walters was radio collared in the fall of 1999 and was known as bear F364. She gave birth to the female cub in the spring of 2001, her first successful attempt to raise offspring. The two bears routinely traveled between Yellowstone National Park and the Sawtelle Peak area. Neither had been involved in any human encounters.

The restitution will go to the Yellowstone Association, a private organization that collects and disburses funds to the Interagency Grizzly Bear Team. The team is made up of state and federal wildlife agencies in Idaho, Wyoming, and Montana.

This case was investigated by the United States Fish and Wildlife Service and the Idaho Department of Fish and Game, with assistance from the United States Forest Service.

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United States v. United States v. Mani Singh, MSC Ship Management (Hong Kong) Ltd. et al., and United States v. Aman Mahana, Nos. 1:05-CR-10269, 10274 and [redacted] (D. Mass.), ECS Senior Trial Attorney Richard Udell [redacted] ECS Trial Attorney Malinda Lawrence [redacted] ECS Paralegal Stephen Foster [redacted] AUSA Jon Mitchell [redacted] and SAUSA LCMDR Luke Reid [redacted].

On April 5, 2006, Mani Singh, was sentenced to serve two months' incarceration and ordered to pay a $3,000 fine. Singh, the chief engineer for the *M/V MSC Elena*, pleaded guilty in December 2005 to an indictment charging him with conspiracy, obstruction, destruction of evidence, false statements, and an APPS violation in connection with the use of the a secret pipe used to bypass pollution control equipment. In response to a Coast Guard inspection that uncovered the bypass equipment, Singh directed that a printout from the ship's computer and a rough log of actual tank volumes be concealed in an effort to cover up the falsification of ship records. Inspectors were presented with logs containing false entries claiming the use of the oil water separator and omitting any reference to dumping overboard using the bypass equipment. The crew took various measures to conceal the illegal conduct and avoid discovery, including discharging only at night, hiding the bypass equipment during port visits, and creating a false sounding log and oil record book.

On February 1, 2006, MSC Ship Management (Hong Kong) Ltd. ("MSC"), the management company for the *Elena*, entered its guilty plea and was sentenced to pay a $10 million fine. MSC will pay an additional $500,000 for a community service project administered by the National Fish and Wildlife Foundation, which will provide environmental education to mariners visiting to or sailing from Massachusetts' ports and inform them of how to report environmental crimes to the U.S. Coast Guard. Aman Mahana, the ship's second engineer, was sentenced in February of this year to serve a one-year term of probation in accordance with the government's recommendation for a reduced sentence, after pleading guilty in December 2005 to violating APPS for failing to maintain the oil record book.

The company also pleaded guilty to conspiracy, obstruction, destruction of evidence, false statements, and an APPS violation in connection with the use of the bypass to discharge sludge and oil-contaminated waste overboard. MSC discharged approximately 40 tons or approximately 10,640 gallons of sludge during a five-month period in 2004 through a three-piece bypass pipe manufactured on the ship. An even larger volume of oil-contaminated bilge waste also was discharged with a rubber hose and portable pump. The company also made false statements to the Coast Guard, denying knowledge about the existence and use of the bypass equipment; obstructed justice by directing subordinates to lie to inspectors; concealed evidence; and concealed oil pollution in a falsified oil record book.

This case was investigated by the United States Coast Guard.

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