# ENVIRONMENTALCRIMES SECTION

# MONTHLY BULLETIN

***August 2009***

***EDITOR'S NOTE:***

Please continue to submit information on relevant case developments in federal prosecutions for inclusion in the Bulletin.

If you have other significant updates and/or interesting photographs from a case, you may email these, along with your submission, to Elizabeth Janes: [redacted]. If you have information to submit on state-level cases, please send this to the Regional Environmental Enforcement Associations' website: http://www.regionalassociations.org.

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# *Significant Environmental Decisions*

## *Supreme Court*

**Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, 129 S. Ct. 2458 (2009).**

Coeur Alaska, Inc., planned to reopen the Kensington Gold Mine in Alaska using a technique known as "froth flotation", under which it would churn the mine's crushed rock in tanks of frothing water. Chemicals in the water would cause gold-bearing materials to float to the surface, where they would be skimmed off. Coeur Alaska would dispose of a slurry mixture of rock and water (30% crushed rock "tailings") left in the tanks. Rather than pumping the tailings into a pond for separation, Coeur Alaska proposed to pump 4.5 million tons of them over the life of the mine into a small 50-foot deep nearby lake (a navigable water), thereby raising the lake bed to the current surface level of the lake and almost tripling the area of the lake (which would be contained by construction of a large dam at the downstream shore). The lake water would be treated by reverse osmosis purification systems and would flow from the lake into a stream.

Coeur Alaska applied to the Army Corps of Engineers for a permit under Section 404 of the Clean Water Act. The Corps applied guidelines established by the U.S. EPA to evaluate the environmental consequences of the project and concluded that using the lake was the "least environmentally damaging" method of disposal of the tailings, and that the damage would be "temporary". The Corps issued the permit, under which Coeur Alaska would be required to treat water flowing from the lake to downstream waters by purification systems, and would then be required to help "reclaim" the lake after completion of mining operations by capping the tailings. The EPA had statutory authority to veto the Corps permit, but declined to do so. It did issue a second permit, under Section 402 of the CWA applying "new source performance standards" promulgated under Section 306(b) that strictly limit discharges from froth-floatation gold mines. Under that permit, Coeur Alaska was authorized to discharge treated water, subject to water-quality limits, downstream from the lake.

A group of environmental organizations (collectively known as "SEACC") filed suit challenging the Corps permit. SEACC claimed that, rather than obtaining a Section 404 permit from the Corps for the discharge of the slurry tailings into the lake, Coeur Alaska should have been required to obtain a Section 402 permit from EPA for those discharges, just as it had for the subsequent downstream discharges from the lake. It also contended that, whichever agency issued that permit, the

tailings discharges into the lake were unlawful because they violated the Section 306(b) new performance standards for froth-floatation gold mines.

Coeur Alaska and the State of Alaska intervened as defendants in the action. The district court granted summary judgment to the defendants, but the Ninth Circuit reversed and ordered the district court to vacate the Corps permit, finding that EPA's new source performance standards applied the discharges from the froth-floatation mill. The U.S. Supreme Court subsequently granted certiorari.

Held: The Supreme Court (in a 6-3 decision) reversed the judgment of the Ninth Circuit and remanded the matter for further proceedings. The Court held that under the CWA, the Corps, not the EPA, had permitting authority under Section 404 for discharges of "fill material." EPA is limited to promulgation of guidelines for the Corps to follow in exercising its permitting function and to the power to veto such permits. EPA's regulations confirm this division of responsibility. Here, the slurry meets the definition of "fill material", and the Court found that even material subject to EPA's new source performance standards was encompassed within this interpretation. Under EPA regulations and pursuant to an interpretive memorandum issued by an appropriate EPA official, discharges of dredged and fill material regulated under Section 404 do not require Section 402 permits, and thus EPA effluent limitations applicable to Section 402 permits (such as new source performance standards) do not apply. Furthermore, EPA has not attempted to apply performance standards to discharges of mining wastes that qualify as fill material. Thus, the Corps is not required to follow or take into account such limitations.

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## *Eleventh Circuit*

**Friends of the Everglades v. South Florida Water Management District, ___ F.3d ___, 2009 WL 1545551 (11th Cir. June 4, 2009).**

After failed attempts to control flooding during rainy seasons along the south shoreline of Lake Okeechobee, Congress authorized a project under which the Army Corps of Engineers expanded an existing dike and built pump stations, creating a complex system of gates, dikes, canals and pump stations to control water flow. South of the shoreline, the Corps dug canals to collect rainwater and runoff from sugar fields and surrounding industrial and residential areas. The canals connect to the lake, containing a "loathsome concoction" of chemical contaminants with a low oxygen content. Three pump stations operated by the defendants pump water from the canals up into the higher lake water; the pumps do not add anything to the water, simply move it through a piping system.

In 2002, two plaintiff environmental organizations brought a citizen suit under the Clean Water Act against the South Florida Water Management District and its executive director, seeking an injunction to force it to get an NPDES permit before pumping polluted canal water into the lake. The Miccosukee Tribe joined with the plaintiffs' side and the U.S. EPA, the Corps and U.S. Sugar Corp joined with the defendants. The district court granted summary judgment to the plaintiffs, and the Eleventh Circuit affirmed. However, the U.S. Supreme Court subsequently vacated the judgment of the Eleventh Circuit and remanded the matter for further proceedings. South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004), vacating and remanding 280 F.3d 1364 (11th Cir. 2002). The Court held nevertheless that the definition of the "discharge of a pollutant" contained in the CWA includes point sources that do not themselves generate pollutants. "[A] point source need not be the original source of the pollutant; it need only convey the pollutant to

'navigable waters' . . . ." The canal and pumping stations constituted a "discrete conveyance" that met the statutory definition of such a point source.

The Court, however, declined to rule upon an argument (raised in an *amicus* brief filed by the federal government) that an NPDES permit is not required when water from one navigable body is discharged, unaltered, into another navigable water body. While questioning this "unitary waters" approach, the Court nevertheless left that issue to be resolved upon remand. Similarly, the Court declined to rule upon the Water District's argument that the canal and a wetland impoundment area actually were not distinct water bodies but rather two hydrologically indistinguishable parts of a single water body.

In 2006, after a two-month bench trial, the district court held that operating the three pump stations without an NPDES permit violated the CWA, and itordered the executive director of the Water District to apply for a permit. See 559 F.3d 1191 (11th Cir. 2009).

Held: On further appeal, the Eleventh Circuit *inter alia* reversed the judgment of the district court that operation of the pumps without NPDES permits violated the Clean Water Act. The court found it "undisputed" that the agricultural and industrial runoff in the canals contained "pollutants", that the lake and the canals were "navigable waters", and that the pump stations were "point sources". The district court had found as a matter of fact, and the Eleventh Circuit agreed, that the canals and the lake were "meaningfully distinct" water bodies to which the NPDES requirement applied. The district court went on to hold that moving the pollutants from one navigable body of water to another (while adding nothing to the water) constituted an "addition" to navigable waters. However, USEPA subsequently had adopted a regulation that (contrary to the holdings in Catskill Mountains and Northern Plains Research Council) accepted the "unitary waters" theory that transferring pollutants between navigable waters did not constitute an "addition to navigable waters". 73 Fed. Reg. 33,697 (June 13, 2008).

After distinguishing decisions of other courts (including Catskill Mountains) and its own earlier decision in this case, the Eleventh Circuit found that the statutory language was ambiguous as to whether "navigable waters" referred to waters "in the individual sense" or "as one unitary whole", and that the context in which the language was used (either in isolation or in context with other provisions of the CWA or even within the broad context of the Act taken as a whole) was not helpful in resolving that ambiguity. The court concluded that the EPA regulation provided a reasonable interpretation of the ambiguous statute and a reasonable construction of one of two possible readings of the provision at issue.

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## *Eighth Circuit*

**United States v. Bailey, ___ F.3d ___, 2009 WL 1955608 (8th Cir. July 9, 2009)**.

The defendant owned a 13-acre parcel of land along the shore of a lake in Minnesota that contained approximately 12 acres of wetlands. He unsuccessfully attempted to develop the site by excavation of a harbor, abandoning the project after being advised by the Army Corps of Engineers that the site contained wetlands. He then decided to plat the site for residential development and later sale, and it hired a contractor to build a road through the site to provide access without seeking permits from the Corps. Upon instruction that he cease work on the road, defendant did so. He later, however, had the contractor complete the road. The Corps notified the defendant that the work had been done in violation of the Clean Water Act and denied his after-the fact permit application, and

subsequently ordered him to take specific actions to restore the property. The defendant refused and the government brought an enforcement action Finding that the road had been built on wetlands adjacent to the lake (a navigable-in-fact water), the district court granted summary judgment to the government and ordered defendant to submit a proposed restoration plan. After an unsuccessful appeal to the Eighth Circuit, the district court eventually ordered the defendant to restore the site at his own expense in accordance with the Corps' previous restoration order, and he again appealed.

Held: The Eighth Circuit affirmed the judgments of the district court. The gravel and fill placed on the site to build the road are pollutants discharged from a point source. After analyzing the fractured opinions in Rapanos and their application by various Courts of Appeal in subsequent cases, the court concluded that "the Corps has jurisdiction over wetlands that satisfy either the plurality or Justice Kennedy's test" in Rapanos. Examining in detail the methodology employed by the Corps in evaluating the defendant's site, it then found that the Corps had properly applied the criteria from its 1987 Wetlands Delineation Manual and its interpretive guidance in determining that portions of the site consisted of wetlands hydrology. Finally, the court found no abuse of discretion in the district court's order enjoining the defendant to comply with the restoration order, rejecting his argument that the order had been arbitrary and capricious.

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## *District Courts*

**United States v. Southern Union Company, No. 1:07-CR-000134 (D.R.I.).**

On July 23, 2009, the district court issued an order denying Southern Union Company's motions for judgment of acquittal and for new trial. The company was convicted by a jury on one RCRA storage violation for the illegal storage of waste mercury.

In its motion for judgment of acquittal, the defendant claimed the court erred by allowing the United States to enforce Rhode Island's regulation of small quantity generators of hazardous waste. While the federal hazardous waste regulatory scheme under RCRA conditionally exempts small quantity generators of hazardous waste from certain permit requirements, Rhode Island's authorized RCRA program did not provide for such an exemption. The corporate defendant was convicted for storing hazardous mercury waste without a permit. The defendant argued that because the state's program did not recognize the federal exemption for small quantity generators it brought many more hazardous waste generators within the regulatory scheme and was therefore broader in scope than the federal program. Accordingly, the defendant argued, the regulation could not be enforced in federal court.

The district court held that Rhode Island's decision not to conditionally exempt small quantity generators from permit requirements made the state's program more stringent than the federal program, not broader in scope. More stringent state regulations may be enforced federally. In reaching its conclusion, the court first noted that there was a question as to whether the court had jurisdiction to consider the argument. RCRA explicitly provides that challenges to state program authorizations must be brought in the Circuit Court of Appeals and that EPA's authorization decisions "shall not be subject to judicial review in civil or criminal proceedings for enforcement." However, the court then went on to address the defendant's claim on the merits, and it found that the EPA had expressly addressed this issue in its final rulemaking that authorized the portion of the state RCRA

program that dealt with small quantity generators. In its final rulemaking, EPA determined that Rhode Island's regulation was more stringent. Although the court noted some inconsistency in the way EPA treated other state programs with respect to the small quantity generator exemption, it concluded that such inconsistency did not rise to the level of arbitrariness on EPA's part so as to require invalidation of EPA's authorization of Rhode Island's regulatory scheme. The district court also was not persuaded by arguably inconsistent EPA informal guidance on the issue. Although the court criticized EPA for failing to formally retract such guidance documents and thus adding to the confusion, it concluded that EPA's final rulemaking in the Federal Register that explicitly determined Rhode Island's program was more stringent deserved more deference than EPA's informal guidance on the issue.

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# *Other Significant Decisions*

## *Supreme Court*

**Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009).**

Boston police officers conducted surveillance and detained a person who had exited a vehicle. Upon searching him, they found plastic bags containing a substance resembling cocaine. They then arrested the defendant and a third person in the car. The three then were driven in a police cruiser to a nearby police station. A subsequent search of the cruiser revealed additional plastic bags hidden between the front and back seats. All of the evidence was submitted to a state laboratory for analysis.

The defendant was charged in state court with distribution of cocaine and with trafficking in cocaine. At trial, the government placed in evidence the bags seized in the searches together with "certificates of analysis" showing results from forensic analyses, which stated that "[t]he substance was found to contain cocaine". The certificates were sworn to before a notary by analysts at the laboratory, as required under Massachusetts law. The defendant objected to the admission of the certificates, claiming that the Confrontation Clause of the U.S. Constitution required the analysts to testify in person. The trial court overruled that objection and the certificates were admitted (under state law) as "prima facie evidence of the composition, quality and the net weight of the narcotic . . . analyzed".

The defendant was convicted by a jury and an intermediate state appellate court, rejecting his Crawford claim under state law precedents, affirmed the conviction. The Massachusetts Supreme Judicial Court denied review and the U.S. Supreme Court subsequently granted certiorari.

Held: The Supreme Court (in a 5-4 decision) reversed the judgment of the state intermediate appellate court and remanded for further proceedings. Under Crawford, the Confrontation Clause of the Sixth Amendment guarantees a defendant's right to confront those who "bear testimony" against him. A witness's testimony against him (which includes affidavits) thus is inadmissible unless the witness either (1) appears at trial or (2) if the witness is unavailable, the defendant had a prior opportunity for cross-examination. The Court found that the certificates of analysis here were affidavits, which were functionally identical to live, in-court testimony. Furthermore, the analysts were "witnesses" under the Confrontation Clause.

The Court rejected the defendant's argument that the analysts were not "accusatory" witnesses in that they did not directly accuse him of wrongdoing. It found that the analysts provided testimony against the defendant (proving that the possessed substance was cocaine) and thus he had a right to confront them at trial. The Court also rejected the argument that the analysts were not "conventional" or "ordinary" witnesses within the historical context of the Confrontation Clause or because they had neither observed the crime or "any human action related to it". It also rejected the position that their statements had been "voluntary" because they had not been "provided in response to interrogation".

The Court further refused to distinguish the "testimony" here as the "result of neutral, scientific testing". Confrontation is the constitutionally prescribed means for assuring both the accuracy of forensic analysis and the proper training, methodology and judgment of the analyst, as much as for any other forms of testimony. The Court also rejected the defendant's argument that the affidavits were "traditional official or business records", since here the "regularly conducted business activity" was the production of evidence for use at trial. It distinguished "clerk's certificates" affixed to official records, since such certificates merely authenticated an otherwise admissible record rather than creating a record for the sole purpose of providing evidence against a defendant. The Court further noted that business or public records are generally admissible absent confrontation, not because of an exception to the hearsay rule but because they are not "testimonial", having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial. Finally, the Court observed that the defendant's power to subpoena the analysts was irrelevant, since the Confrontation Clause imposes the burden on the prosecution (not the defense) to present its witnesses.

NOTE: Justice Thomas filed a concurring opinion reiterating his position that he would apply the Confrontation Clause to extrajudicial statements contained only in "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions". The four dissenting Justices asserted that the majority had "swep[t] away an accepted rule governing the admission of scientific evidence", failing to recognize the difference between laboratory analysts who perform scientific tests and "other, more conventional witnesses". They set forth a litany of substantive and procedural difficulties and burdens that they anticipated would or might be created for the criminal justice system under the majority opinion, especially when a particular laboratory technician cannot or does not appear on a specified date at trial.

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# *Informations and Indictments*

**United States v. Mark Guinn, No. 09-CR-00414 (N.D. Calif.), AUSAs Stacey Geis [redacted] and Tina Hua ([redacted]**

On July 8, 2009, Mark Guinn, the general manager of the Northern California operations of Brusco Tug & Barge Incorporated ("Brusco"), was charged with four Clean Water Act violations.

The indictment alleges that, between 2003 and 2007, Guinn discharged and caused other Brusco employees to discharge dredged material without a permit from barges directly into waters surrounding Winter Island.

As part of its operations, Brusco towed and disposed of dredged material generated during various dredging projects. Many of the projects Guinn oversaw involved the transportation and disposal of dredged material by barge onto Winter Island where it was intended for use in levee rehabilitation and maintenance.

Winter Island, a privately owned 453-acre property located on the western edge of the Sacramento-San Joaquin River Delta in Contra Costa County, is managed as a freshwater wetland habitat and duck hunting club. The island is one of the few places in the Bay Area with an identified beneficial use for dredged material and it accepted certain limited types of material pursuant to a permit. The discharge of dredge materials to surface waters or drainage courses surrounding Winter Island is prohibited. At no time did Brusco or Guinn have a permit to discharge this material into these waters.

This case is being investigated by the United States Coast Guard Criminal Investigative Service and the United States Environmental Protection Agency Criminal Investigative Division.

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**United States v. J. Jeffrey Pruett et al., No. 09-CR-00112 (W.D. La.), AUSA Earl Campbell (**[redacted]

On June 4, 2009, a 17-count indictment was unsealed charging an executive and his public water and wastewater treatment businesses with CWA violations for improperly operating and maintaining the treatment facilities and for failing to submit discharge monitoring reports. J. Jeffrey Pruett and his companies, Louisiana Land & Water Co., ("LLWC") and LWC Management Co., allegedly failed to properly operate water and wastewater treatment facilities for seven residential subdivisions in Ouachita Parish from approximately 2004 through 2008.

Pruett is president of LLWC and chief executive of LWC Management Co. The businesses operate more than 30 water and wastewater treatment systems in northeastern Louisiana. The defendants allegedly allowed the wastewater treatment facilities to overflow in several residential subdivisions, discharging effluent on the ground without proper treatment; allowed suspended solids and fecal coliform to exceed effluent limitations in state discharge permits; and discharged raw sewage into several residential neighborhoods.

This case was investigated by the United States Environmental Protection Agency Criminal Investigation Division, the Louisiana Department of Environmental Quality and the Louisiana Department of Health and Hospitals.

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## *Pleas*

**United States v. Georgios Stamou, No. 2:09-CR-00186 (E.D. La.), ECS Trial Attorney Christopher Hale** [redacted] **and AUSA Dee Taylor** [redacted].

On July 30, 2009, Georgios Stamou, a Greek citizen and the chief engineer of the bulk cargo ship *M/V Theotokos,* pleaded guilty to an APPS violation and an 18 U.S.C. § 1001 false statement violation. The vessel is owned by Liberia-based Mirage Navigation Corporation and is managed by Polembros Shipping Limited. Stamou is the third crewmember from the ship to plead guilty to crimes related to the discharge of oily wastes while on the high seas. Captain Panagiotis Lekkas and the second ranking officer, Charles Posas, both pleaded guilty to multiple felony counts on July 15, 2009. *[See U.S. v. Lekkas below.]*

As chief engineer, Stamou was in charge of the engineering department and had been made aware that the oily water separator ("OWS") had stopped working. During a voyage from Korea to Panama, the defendant spoke with a company representative and notified him that there was a problem

with the OWS. He then directed crew members to discharge bilge wastes knowing that it would necessarily be discharged directly overboard through the bilge line or sewage discharge valve. None of these discharges were noted in the oil record book, which was presented to Coast Guard inspectors on October 1, 2008.

Stamou is scheduled to be sentenced on November 5, 2009. This case was investigated by the United States Coast Guard.

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**United States v. Qi Gui Nie, No. 1:09-CR-00218 (N.D. Ga.), AUSA Mary Roemer [redacted]**

On July 28, 2009, Qi Gui Nie pleaded guilty to a smuggling violation stemming from importing endangered and prohibited wildlife into the United States through the port of Atlanta.

In October 2008, Nie, doing business as Lucky Fin, Inc., a North Carolina-based wildlife importer, attempted to smuggle ten live endangered Asian Bonytongue fish into the United States from Vietnam. During an inspection of Nie's shipments, false bottoms were discovered hidden in boxes containing legally-imported fish and coral. The smuggled fish were found in the hidden compartments. The Asian Bonytongue fish, which is commonly referred to as the Asian Arowana fish, are highly sought after by the Asian community due to the belief that the fish will bring good fortune and protection to the owner. Asian Arowana fish are protected under the Endangered Species Act through CITES.

Sentencing is scheduled for October 7, 2009. This case was investigated by the United States Fish and Wildlife Service.

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**United States v. Joseph Peter Nelson Jr., et al., No.8:08-CR-00482 (D. Md.), ECS Senior Trial Attorney Wayne Hettenbach [redacted] ECS Trial Attorney Jeremy Peterson ([redacted] and AUSAs Stacy Belf [redacted] and Christen Sproule ([redacted].**

On July 27, 2009, a father and son pleaded guilty to illegally over-fishing striped bass, also known as rockfish, from 2003 through 2006. Joseph Peter Nelson, Jr., a commercial fisherman licensed in Maryland, pleaded guilty to four felony violations of the Lacey Act for participating in a scheme to illegally over harvest and under report the amount of rockfish he took from the Potomac River. His father, Joseph Peter Nelson, Sr., also pleaded guilty to one felony violation of the Lacey Act for assisting in transporting the illegally taken rockfish in interstate commerce.

From 2003 to 2006, Nelson Jr., with the assistance of his father and a Maryland designated check-in station named Golden Eye Seafood, operated by Robert Lumpkin, inflated the number of fish recorded and under reported the weight. By inflating the number of fish caught and under reporting the weight, the records made it appear that Nelson Jr. had not reached the poundage quota for the year. He then requested more tags from the state of Maryland in order to catch more fish above his quota which were never reported by Golden Eye Seafood and were then transported to other states for sale.

In addition, Nelson Jr. admitted to catching rockfish that were below the legal size limit in Maryland, and to using tags that falsely noted the method of catch. The tags indicated that he had caught the fish using a hook and line when in fact they were caught using a net. Nelson Jr. admitted that he used a knife to simulate hook marks on the fish in order to avoid detection. On eight different occasions Nelson Jr. with the assistance of his father sold more than 2,500 pounds of illegally harvested and tagged fish each time to an undercover agent posing as an out-of-state fish buyer. Nelson Jr. also admitted that he falsely and selectively tagged the rockfish in order to conceal where the fish had been caught in order to illegally maximize his catch.

The total amount of rockfish over harvested by Nelson Jr. was approximately 14,500 pounds, in addition to the rockfish that was falsely tagged. The total market value of both the Nelson's over-harvest of rockfish was in excess of $72,000.

Golden Eye Seafood and its owner, Robert Lumpkin, pleaded guilty last month to conspiracy to violate the Lacey Act and to substantive Lacey Act violations. A total of 14 individuals and two corporations have been convicted in Maryland, Virginia and Washington, D.C., as a result of this investigation.

Sentencing for both Nelsons is scheduled for October 22, 2009, and Lumpkin and Golden Eye are to be sentenced on September 22 and 23, 2009.

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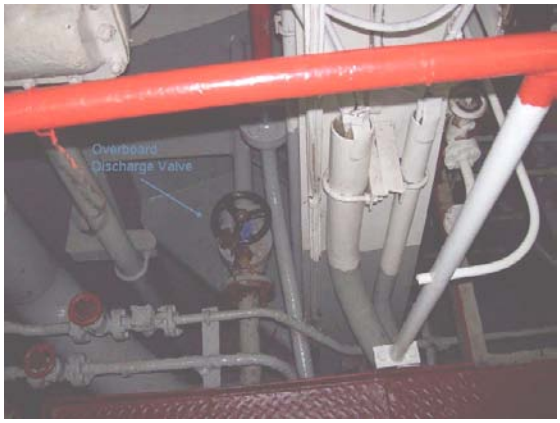
**United States v. Panagiotis Stamatakis et al., No. 2:09-CR-00130 (D.N.J.), ECS Trial Attorney Gary Donner [redacted] AUSA Kathleen O'Leary [redacted], and SAUSA Christopher Mooradian.**

On July 16, 2009, Greek citizens Panagiotis Stamatakis, the chief engineer for the *M/V Myron N*, an oceangoing bulk carrier vessel, and the ship's second engineer Dimitrios Papadakis pleaded guilty to using falsified records that concealed improper discharges of untreated bilge waste.




**Overboard discharge valve**

The government's investigation began in September 2008, when Coast Guard inspectors examined the ship following its arrival into New York and subsequently into the Port of Newark, New Jersey. The *Myron N* was operated and managed by Dalnave Navigation Inc., which is incorporated in the Republic of Liberia. The inspections uncovered evidence that crewmembers had improperly handled and disposed of the ship's oil-contaminated bilge waste and falsified entries in the ship's oil record book ("ORB").

Stamatakis served as the vessel's chief engineer between November 2007 and September 2008 and was responsible for all engine room operations. Papadakis served as a third engineer between November 2007 and August 2008 and as second engineer from August 2008 to September 2008. Between November 2007 and September 2008, under the supervision of Stamatakis, Papadakis ordered engine room crew members to discharge oil-contaminated bilge wastes from the ship's bilge holding tank directly into the ocean. When the ORB was presented to inspectors in Newark, both defendants had neglected to record these overboard discharges.

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

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**United States v. Panagiotis Lekkas et al., Nos. 2:09-CR-00182, 185 (E.D. La.), ECS Trial Attorney Christopher Hale [redacted] and AUSA Dee Taylor [redacted].**

On July 15, 2009, Panagiotis Lekkas, a Greek citizen and the captain of the bulk cargo ship *M/V Theotokos*, pleaded guilty to a four-count information charging one APPS violation, one count of obstruction of justice, and two counts of violating the Ports and Waterways Safety Act. In a related case, the ship's chief officer and Philippine citizen Charles Posas pleaded guilty to one false statement offense and one count of violating the Non-indigenous Aquatic Nuisance and Prevention Control Act, 16 U.S.C. § 4711, a law designed to mitigate the introduction of marine invasive species into waters of the United States. Posas is the first individual ever charged under the anti-invasive species law.

Investigation revealed problems with the operation and condition of the ship, specifically the discovery of a breach in the outer skin of the vessel located on the rudder stem and fuel oil leaks into the forepeak ballast tank. As captain and chief officer, the defendants monitored the ship's ballast water system and directed the crew to take soundings of the ballast tanks to determine the volume of liquid in particular tanks.

In the summer of 2008, during a passage from the Suez Canal to China, Lekkas and Posas suspected that the aftpeak ballast tank was leaking, but the crew was unable to confirm a leak during an inspection. While offloading cargo in China, the defendants observed an approximately 24-inch crack in the ship's rudder stem. It was evident that water had passed through the crack because water was streaming out from inside of the ship. Lekkas reported the crack to company personnel, but failed to write a written report. He also did not report it to the Coast Guard until confronted by inspectors in New Orleans, at which point they ordered that the crack be repaired.

After the defendants discovered that fuel oil had been leaking into the forepeak ballast tank in September 2008, Lekkas ordered the crew to clean out the ballast tank. They proceeded to pump the oily liquid directly overboard through the ballast pump. None of these discharges were recorded in the oil record book.

As the vessel approached New Orleans, it was clear that oil continued to leak into the forepeak tank. Lekkas ordered two fitters to construct and install an obstruction device onto the forepeak tank's sounding tube so that when inspectors boarded to take a sounding, the results would obscure the presence of any oil in the tank.

During the Coast Guard inspection in October 2008, inspectors were able to see that the forepeak tank contained approximately one meter of oil in the tank. During a delay in the inspection, Lekkas directed crew members to remove the obstruction device before inspectors had a chance to enter the tank and see it. Posas then provided inspectors with a false ballast log, which had omitted the presence of oil in the tank, as well as the effect the crack was having on the volume of liquid contained in the tank.

Maintenance of accurate ballast water records is required under Ballast Water Management for Control of Nonindigenous Species regulations promulgated under the Nonindigenous Aquatic Nuisance Prevention and Control Act. This case does not present an instance of an invasive species introduction; nevertheless, marine invasive species are a serious problem that can be transmitted in the ballast water of oceangoing vessels.

Lekkas and Posas are scheduled to be sentenced on October 14, 2009. The case was investigated by the United States Coast Guard Investigative Service.

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**United States v. Larkin Baggett, No. 4:09-CR-10016, 2:07-CR-00609 (S.D. Fla., D. Utah), AUSA Tom Watts-FitzGerald ([redacted], SAUSA Jody Mazer ([redacted] AUSA Jared Bennett [redacted] and SAUSA Alicia Hoegh [redacted]**


**Concealed weapon**

On July 6, 2009, Larkin Baggett pleaded guilty to assaulting law enforcement officers and to illegally possessing eight firearms while living as a fugitive in Florida from environmental charges lodged against him in Utah. Larkin further pleaded guilty to the pending CWA and RCRA violations in the District of Utah.

Baggett pleaded guilty to using a deadly weapon, including a semi-automatic assault rifle against three agents with the Environmental Protection Agency and a sergeant with the Monroe County Sheriff's Office. As the agents attempted to arrest the defendant on a fugitive warrant in Marathon, Florida, Baggett opened fire and was wounded as a result.

Baggett was the owner and operator of Chemical Consultants, which was in the business of mixing, selling, and distributing various chemicals used in the trucking, construction, and concrete industries in Utah. The chemicals were transported to customers in 55-gallon drums, which then were returned to the business to be cleaned and reused. A variety of techniques were used to illegally clean the drums. Employees would either dump the contents onto the floor or onto a paved alleyway behind the plant, leaving the chemicals there to evaporate. Baggett also instructed employees to wash out the drums directly into a sanitary sewer grate.

After the local sewer authority blocked the company's access to the POTW by plugging its sewer line, Baggett instructed employees to dump the residual and spilled chemicals and the process wastewater into this plugged sewer grate. After the sewer grate spilled over, Baggett and/or his employees would pump the contents of the sewer grate into uncovered 55 gallon drums to allow the dye to evaporate. Once the chemicals in the drum were colorless, they dumped them onto a gravel area outside. Baggett was charged in Utah in September 2007 and fled the state in April 2008, which was two months before his trial was scheduled to begin.

**Sewer grate**

This case was investigated by the United States Environmental Protection Agency Criminal Investigation Division; the Bureau of Alcohol, Tobacco, and Firearms; and the Monroe County Sheriff's Office.

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**United States v. Herbert Corn, No. 3:09-CR-00061 (N.D. Ind.), ECS Trial Attorney Gary Donner [redacted] AUSA Toi Houston [redacted] and SAUSA Dave Mucha [redacted]**

On June 30, 2009, Herbert Corn, the former Superintendent for the City of Rochester Wastewater Treatment Plant in Rochester, Indiana, pleaded guilty to an information charging five felony Clean Water Act violations. Corn admitted to making false statements in discharge monitoring reports submitted to the Indiana Department of Environmental Management ("IDEM"). From

approximately September 2004 and continuing through approximately May 2007, the defendant submitted at least five reports containing false data for treated water that is discharged from the Rochester Plant into Mill Creek, a tributary of the Tippecanoe River. These reports falsely indicated that the levels of e. coli, ammonia NH3-N, and CBOD-5 were all in compliance with the permit limits.

This case was investigated by the United States Environmental Protection Agency Criminal Investigation Division and the IDEM Office of Criminal Investigation, which are part of the Northern District of Indiana Environmental Crimes Task Force.

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## *Sentencings*

**United States v. Consultores De Navegacion et al., No. 1:08-CR-10274 (D. Mass.), ECS Trial Attorney Todd Mikolop [redacted], AUSA Linda Ricco [redacted] and SAUSA Christopher Jones.**

On July 22, 2009, Consultores De Navegacion ("Consultores") was sentenced to pay a $2.08 million fine, complete a three-year term of probation, and implement an environmental compliance plan. The company previously pleaded guilty to conspiracy, falsification of records, false statements, obstruction, and an APPS violation related to the overboard discharge of oil-contaminated bilge waste on the high seas.

Between 2007 and 2008, Consultores, a Spanish operator of the *M/T Nautilus*, an ocean-going chemical tanker ship, acting through employees, directed engine room crew members to use a metal pipe to bypass the ship's oil water separator and discharge oil-contaminated waste directly overboard. The charges stem from a Coast Guard inspection that began in the port of St. Croix and continued in the port of Boston. Inspection and subsequent investigation revealed that the oil record book ("ORB") failed to accurately reflect the overboard discharge of oily waste water.

Chief engineer Carmelo Oria, who pleaded guilty to an APPS ORB violation, previously was sentenced to serve one month of incarceration, followed by two years' supervised release, and paid a $3,000 fine. Another chief engineer Vadym Tumakov pleaded guilty to an APPS violation and was sentenced to serve one week of incarceration, followed by two years' supervised release, and paid a $2,000 fine.

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**United States v. David Dreifort et al., No. 4:08-CR-10079 (S.D. Fla.), AUSA Tom Watts-FitzGerald [redacted]**

On July 17, 2009, David Dreifort was sentenced to serve 30 months' incarceration followed by three years of supervised release. He is further prohibited from engaging in any fishing activities for a period of five years in the Southern District of Florida and in adjacent waters. His wife, Denise Dreifort, was sentenced to serve seven months' incarceration and seven months' home confinement followed by three years' supervised release. She also is prohibited from engaging in any fishing activities for a period of five years. The two previously pleaded guilty to conspiring to illegally harvest spiny lobsters from artificial habitat placed in the Florida Keys National Marine Sanctuary.

A total of six defendants were prosecuted for their involvement in the harvest of 922 whole lobster, as part of a conspiracy that illegally took 1,197 lobster on the opening day of Florida's

commercial lobster season in August 2008 and stockpiled approximately 1,700 pounds of wrung lobster tail (the edible part that is separated from the discarded body) harvested during the closed season, which was intended for sale after opening day.

Investigators became aware of a group constructing artificial lobster habitats in the lower Keys. Agents then tracked a boat owned by the Dreiforts as it traveled within the Sanctuary, harvesting out of season approximately 140 pounds of spiny lobster tails. The lobster tails were subsequently placed in a freezer at a lower Keys residence, which already held about 650 pounds of previously harvested and frozen tails. Officers returned to the sites within the Sanctuary and found artificial habitats plus freshly wrung spiny lobster heads.

Co-defendant Michael Delph was sentenced June 2, 2009, to serve ten months' imprisonment followed by two years' supervised release after being convicted by a jury of illegally conspiring to harvest spiny lobster. John Niles previously was sentenced to serve a one-year term of probation after providing substantial assistance in the investigation and after testifying during the trial. Sean Reyngoudt was sentenced on June 10th to serve four months' home confinement as a condition of four years' probation. He also will complete 300 hours of community service and is prohibited from any fishing activities for four years within the Southern District of Florida and adjacent waters. Robert Hammer was sentenced on June 11th to serve two months' incarceration followed by six months' home confinement. He is prohibited from any fishing activity during the two-year term of supervised release.

In addition to the other terms of their sentence, the Dreiforts were further ordered to forfeit three trucks, three vessels, and other pieces of equipment which were used in the scheme. They also forfeited $37,995 in profits from the sale of the lobster tail.

In a related matter, Hammer also was convicted and sentenced in connection with the sale of fish which had been illegally taken. Hammer formerly held a special use permit to operate a commercial enterprise at Dry Tortugas National Park. The permit authorized him to bring passengers to the Park and to engage in various activities, including recreational angling. He was not permitted, however, to engage in any commercial fishing or the sale of any fish harvested from Park waters.

As the result of a surveillance operation, investigators determined that Hammer was commercially selling fin fish to brokers and retail fish dealers in the Miami area. Between $10,000 and $30,000 in fair market value fish were taken from the federally protected areas and sold commercially. For his role in that case, Hammer was sentenced to serve a term of supervised release of six months to run concurrently with his other sentence. He also must pay $20,000 to the National Fish and Wildlife Foundation, to be used to acquire and distribute sonar and Global Positioning System Tracker equipment to assist in the location, identification, and abatement of resource violations within the National Sanctuaries, Refuges, and Parks of the Florida Keys and adjacent waters, and to assist in the identification and apprehension of violators of the marine resource and wildlife protection laws.

This case was investigated by National Oceanic and Atmospheric Administration Office for Enforcement, the United States Fish and Wildlife Service, the Florida Fish and Wildlife Conservation Commission, and the Damage Assessment and Resource Protection Office of the National Marine Sanctuary Program.

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**United States v. John Joseph Cota et al., No. 3:08-CR-00160 (N.D. Calif.), ECS Senior Trial Attorney Richard Udell [redacted] and AUSAs Stacey Geis [redacted] and Jonathan Schmidt [redacted].**

On July 17, 2009, John Joseph Cota was sentenced to serve 10 months' incarceration. Cota was the California ship pilot in command of the *M/V Cosco Busan* when it struck the San Francisco

Bay Bridge in November 2007. Cota previously pleaded guilty to negligently causing the discharge of approximately 50,000 gallons of heavy fuel oil into the Bay in violation of the Oil Pollution Act. He also pleaded guilty to a violation of the Migratory Bird Treaty Act for causing the death of approximately 2,000 protected migratory birds. As part of the plea agreement, the government dismissed additional charges of false statements made to the Coast Guard in 2006 and 2007 concerning Cota's medications and medical conditions.

Co-defendant Fleet Management Limited, a Hong Kong ship management company, remains scheduled for trial to begin on September 14, 2009, for acting negligently and being a proximate cause of the oil discharge from the *Cosco Busan* and for the killing of the migratory birds. Fleet further is charged with obstructing justice and with making false statements by falsifying ship records after the incident. A third superseding indictment alleges a loss amount of $20 million from the discharge of oil. Fleet had argued that fines were limited to $200,000 for the CWA offense unless a loss amount was alleged in the indictment.

This case was investigated by the United States Coast Guard Investigative Service, the United States Environmental Protection Agency Criminal Investigation Division, the Federal Bureau of Investigation, the United States Fish and Wildlife Service, and the California Department of Fish and Game, Office of Spill Prevention and Response.

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**United States v. Kenneth Nelson, No. 2:09-CR-0001 (E.D. Tenn.), AUSA Matthew Morris (**[redacted]

**Defendant with poison in white container**

On July 13, 2009, farmer Kenneth Nelson was sentenced to pay a $5,000 fine for improperly using restricted-use pesticide to kill birds in July 2008.

Nelson was charged with an MBTA violation and a FIFRA violation for mixing granular carbofuran, also known as Furadan, a restricted-use insecticide, with bird seed and placing it in meat used for bait. The misuse of the carbofuran resulted in an unlawful taking of a Song Sparrow, a migratory bird. The defendant pleaded guilty to the MBTA offense and, after a subsequent bench trial, was found guilty of violating FIFRA.

Furadan is widely misused in Tennessee and Kentucky to kill birds of prey and carnivores, such as coyotes. State and federal officers initiated the investigation after a neighbor reported that her pet dog had ingested some poison and became gravely ill. Investigators found several dead songbirds and a dead cat in proximity to Nelson's illegal bait stations.

Upon sentencing the magistrate judge remarked that a substantial penalty was warranted to deter others from misusing carbofuran, which is highly toxic and dangerous to wildlife. This case was investigated by the East Tennessee Environmental Crimes Task Force, which includes the United States Fish and Wildlife Service, the United States Environmental Protection Agency Criminal Investigation Division, the Tennessee Wildlife Resources Agency, and the Tennessee Department of Agriculture.

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**United States v. Durbin Hartel, No. 3:08-CR-00266 (D. Ore.), ECS Trial Attorney Ron Sutcliffe [redacted] and AUSA Dwight Holton [redacted].**

On July 13, 2008, Durbin Hartel, a former engineer with Spencer Environmental Inc. ("SEI"), pleaded guilty to a misdemeanor CWA violation for negligently discharging wastewater to the POTW with zinc levels that exceeded permit limitations. He was sentenced to pay a $1,250 fine and must complete a one-year term of probation.

SEI received a variety of waste streams for recycling, including used oil, which was the bulk of its business. It also received wastewater from a leaking underground gasoline storage tank remediation site, which was tested to be ignitable. The company discharged molybdenum, zinc, and grease to Portland's POTW in excess of its permit limitations.

The case arose from an investigation into a fire at SEI's former facility. Following the sale of the plant, a fire broke out when a welding spark touched off used oil residue in a pit and quickly spread to other oil-soaked parts of the building, largely destroying the plant and causing contamination of Johnson Creek, a tributary of the Willamette River, which is known to contain threatened salmonids.

Company president Donald Spencer and SEI previously pleaded guilty to RCRA violations with Spencer sentenced to serve six months' incarceration.

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

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**United States v. PacifiCorp, No. 1:09-CR-00174 (D. Wyo.), AUSA David Kubichek ([redacted]**

On July 10, 2009, PacifiCorp, doing business as Rocky Mountain Power, pleaded guilty to 34 Migratory Bird Treaty Act violations for the taking (or killing) of eagles and other large birds of prey.

Since 2007, approximately 232 golden eagles, 46 hawks and 59 owls, along with 193 other migratory birds, were electrocuted by electrical distribution and transmission facilities owned and operated by PacifiCorp. The company was sentenced to pay a $510,000 fine and will pay $900,000 in restitution to be used to support research and conservation of golden eagles and other birds of prey in Wyoming, Utah, Idaho and Montana. In addition, while completing a five-year term of probation, PacifiCorp will spend approximately $9.1 million to implement an avian protection plan to substantially reduce eagle electrocution deaths in Wyoming through the retro-fitting and modernizing of PacifiCorp's electrical distribution and transmission system.

**Electrocuted bird beneath pole**

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

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**United States. v. Kenneth Dent, 8:09-CR-00063 (D. Md.), ECS Senior Trial Attorney Wayne D. Hettenbach [redacted], ECS Trial Attorney Jeremy Peterson [redacted] and former Trial Attorney Madison Sewell.**

On July 2, 2009, Kenneth Dent was sentenced to pay a $1,000 fine, pay $2,905 in restitution, and complete a three-year term of probation. Dent previously pleaded guilty to a violation of the Lacey Act for trafficking in illegally taken striped bass.

On multiple occasions, Dent sold hundreds of pounds of rockfish that were illegally harvested or tagged to an undercover special agent with the Virginia Marine Police, who told Dent that the fish were being transported to Pennsylvania. On one occasion, Dent illegally harvested 400 pounds of fish from Virginia tributaries of the Potomac River and sold it to the undercover agent for $990. He knowingly tagged much of the fish with incorrect tags to exceed his limit of Virginia-caught fish. The majority of these fish also were not within the legal size limit. On a second occasion, Dent sold the undercover agent for $1,000 430 pounds of rockfish for that was larger than the legal size limit. During a third transaction, he sold the agent 480 pounds of fish for $1,375. All of these fish were more than the legal size limit, with the fair market retail value of the transactions in excess of $5,000. Dent also illegally sold the undercover agent 100 striped bass tags despite a prohibition against private sales.

This case was part of an investigation conducted by an interstate task force formed by the U.S. Fish and Wildlife Service, the Maryland Natural Resources Police, and the Virginia Marine Police Special Investigative Unit.

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**United States v. MagnaGro International, Inc., et al., No. 5:08-CR-40045 (D. Kan.), AUSA Christine Kenney [redacted] and SAUSA Ray Bosch [redacted].**

**End of sewer discharge hose**

On June 29, 2009, MagnaGro International, Inc., ("MagnaGro") and company owner Raymond Sawyer each were sentenced to pay jointly and severally a $240,000 fine. Sawyer also will complete a five-year term of probation. He previously pleaded guilty to a misdemeanor CWA violation for illegally discharging manufacturing waste into the city's sewer system. The company pleaded guilty to a CWA felony violation.

Sawyer and MagnaGro, a fertilizer manufacturer, admitted to discharging a large amount of industrial waste in March 2001 from its fertilizer production into the city's POTW. The Kansas Department of Health and Environment and the City of Lawrence ordered Sawyer and the company to stop the discharges at that time. Later, in September 2007, EPA agents found that the company was discharging waste into the POTW via a hose inserted into a toilet. Subsequent investigation determined that Sawyer and the company had been discharging waste through the hose for 10 years and that the hose was used to pump material into the toilet from a waste pit surrounding a mixing vat.

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

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**United States v. American Rivers Transportation Company, et al., No. 4:09-CR-00253 (E.D. Mo.), AUSA Michael Reap [redacted] and SAUSA Anne Rauch [redacted]**

On June 19, 2009, Justin Baker and Steve Keilwitz each were sentenced to serve a one-year term of probation and each will perform 25 hours of community service. Both were employees with the American River Transportation Company ("ARTCO"), the operator of a river terminal in the St. Louis area. The company recently pleaded guilty to discharging oil into the Mississippi River in violation of the Clean Water Act and was sentenced to pay a $3 million fine. Baker and Keilwitz pleaded guilty to a CWA felony false statement violation. Baker, who since has retired, was the terminal manager at the time of the violations and Keilwitz was the maintenance superintendent.

**Oil spill containment**

ARTCO owns and operates several terminals in the St. Louis area and also operates line boat vessels, hopper barges, harbor and fleeting services, and a fueling terminal. At one of its facilities, ARTCO cleans barges of residue, including grain, fertilizer, oil, and oil-based products.

In June 2007, a release of oil was discovered in the river near an ARTCO facility. Baker reported the oil to the National Response Center and to other emergency responders, but he and Keilwitz denied knowing the source of the oil. Baker and Keilwitz knew that the ARTCO facility was the source of the oil due in part to past events at the facility.

Between April 2004 and June 2007, ARTCO had discharged wastewater with oil and grease above permit limits into the St. Louis POTW and thereby into the Mississippi River. The company also directly discharged other pollutants into the Mississippi River during this period.

This case was investigated by the United States Environmental Protection Agency Emergency Response Division and the Missouri Department of Natural Resources.

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