



1998

United States v. Eidson: Navigating the Way toward Stiffer Penalties for Environmental Crimes

Kerri Ann Riley

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/elj>



Part of the [Criminal Law Commons](#), and the [Environmental Law Commons](#)

Recommended Citation

Kerri A. Riley, *United States v. Eidson: Navigating the Way toward Stiffer Penalties for Environmental Crimes*, 9 Vill. Envtl. L.J. 605 (1998).

Available at: <https://digitalcommons.law.villanova.edu/elj/vol9/iss2/7>

This Casenote is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Environmental Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

UNITED STATES v. EIDSON: "NAVIGATING" THE WAY
TOWARD STIFFER PENALTIES FOR
ENVIRONMENTAL CRIMES

I. INTRODUCTION

Throughout the 1970's, federal prosecutors handled only twenty-five cases involving environmental crimes.¹ During the same decade, however, environmental concerns gained increasing recognition in the political arena.² As a result, Congress amended the Clean Water Act (CWA) in 1972.³ These amendments led to a rise in the enforcement of pollution regulations and provided a wide array of possible penalties.⁴ Consequently, the number of federal environmental criminal indictments in 1992 reached 191.⁵ These prosecutions resulted in a total of thirty-four years of prison time and \$163 million in fines.⁶

In *United States v. Eidson*, the United States Court of Appeals for the Eleventh Circuit faced defendants convicted of violating the CWA after dumping hazardous wastes into a city's storm drainage system.⁷ In affirming the convictions under the CWA, the Eleventh

1. See Lindsay A. Larson III & Jean Paul Picou Overton, *Representing Corporate and Individual Clients in Criminal Prosecution for Environmental Pollution: A Primer*, 19 TUL. MAR. L.J. 113, 132 (1994) (citing Michael A. Verespej, *The Newest Environmental Risk: Jail*, INDUSTRY WK., Jan. 22, 1990, at 47, 48).

2. See S. REP. NO. 92-414, at 3-7 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3670-74. Congress was concerned specifically with the health of United States citizens and the safety of fish, shellfish and wildlife. See S. REP. NO. 92-414, at 7 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3674; see also Paul G. Nittoly, *Environmental Criminal Cases: The Dawn of a New Era*, 21 SETON HALL L. REV. 1125 (1991) (noting increasing publicity surrounding waste disposal crisis).

3. See Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1387 (1994)) [hereinafter CWA]. The CWA was originally enacted under the name Federal Water Pollution Act.

4. See *id.* For relevant provisions of the CWA, see *infra* notes 33-37 and accompanying text.

5. See Larson & Overton, *supra* note 1, at 132 (citing Rick Henderson, *Crimes Against Nature: The New Vice Crusaders Turning Justice Upside Down*, REASON, Dec. 1993, at 19).

6. See Larson & Overton, *supra* note 1, at 132.

7. 108 F.3d 1336 (11th Cir.), *cert. denied*, 118 S. Ct. 248 (1997). For a detailed discussion of the facts of *United States v. Eidson*, see *infra* notes 15-32 and accompanying text.

The United States' criminal justice system was not unfamiliar to Charles and Sandra Eidson. Charles Eidson was head of the controversial Church of the Avenger, a group known for promoting white-supremacist and anti-Semitic beliefs in the southern portion of the United States. See Bentley Orrick, *Digging up Dirt Smudges a Town's Life*, TAMPA TRIB., Dec. 10, 1995, available in 1995 WL 13839554.

Circuit held that the drainage ditch in question constituted "navigable waters" of the United States.⁸ By broadening the term "navigable waters," the Eleventh Circuit followed the current trend of strict

Charles Eidson has stated on several occasions that he has successful methods of fighting the government, and has been known to display a large swastika in the storefront window of the church. *See id.*

A few months after the Eidsons were evicted from the commercial property they had used for the Church of the Avenger, Eidson's Church was linked to Greater Ministries International, the subject of a significant investment scam investigation. *See* Doug Stanley, *Controversial Groups Linked by Court File*, TAMPA TRIB., Jan. 12, 1997, available in 1997 WL 7029317. Eidson denied any meaningful connection between the two groups. *See id.* Sources stated that he was attempting to keep a low profile after his eviction from the church's headquarters two years earlier. *See id.* During that eviction, witnesses observed members of the church leaving the property with portraits of Adolf Hitler, several weapons and signs reading "damnable Jews." *See id.*

Recently, Charles Eidson publicly renounced his anti-Semitic beliefs, stating that "[if] a wall-kissing Jew came in here today, I'd hug his neck." Michael Fechter, *State Foiled in Bid to Regulate Ministry Money*, TAMPA TRIB., Feb. 15, 1997, available in 1997 WL 7035216. He continued by announcing his recent efforts to "unite Christians of all faiths." *Id.* One commentator pointed out that while the Church of the Avenger seems inactive, it has been connected to several "right-wing militia movements." *Id.* The church's publications warn of "excessive government intrusion and the harassment of Christians." *Id.*

In April 1997, Eidson, with the leader of Greater Ministries, commenced suit against several newspapers. *See Suit Filed Against Tribune*, TAMPA TRIB., Apr. 29, 1997, available in 1997 WL 10784389. The complaint alleged that the newspapers were "leading a conspiracy against Christianity," and asked for \$10 billion and an injunction against "further campaigns of terror." *Id.* A federal judge dismissed the suit in October 1997. *See In Brief News of Tampa Bay*, TAMPA TRIB., Oct. 5, 1997, available in 1997 WL 13836146.

Eidson was also among seven individuals named as unindicted co-conspirators in a local militia movement. *See* Michael Fechter, *Charity Group Linked to Militia Organization*, TAMPA TRIB., May 7, 1997, available in 1997 WL 10785662. The movement acted under the "authority" of its own "Constitutional Common Law Court" when it declared war on the United States and threatened several judicial officials. *See id.*

Most recently, a Florida court enjoined Eidson from representing others in court and from filing any legal documents on their behalf. *See In Brief News of Tampa Bay*, TAMPA TRIB., Nov. 7, 1997, available in 1997 WL 13841468. The injunction came after Eidson attempted to represent a woman in court for traffic violations. *See id.* His representation resulted in suspension of the woman's license and points against her concerning her driving record. *See id.* The court subsequently ordered Eidson to pay \$2,406 in legal costs. *See id.*

Charles and Sandra's son, Keith Norland Eidson, has had legal problems of his own and was convicted of violating the CWA in 1994. *See* *United States v. Hartsell*, 127 F.3d 343, 347 (4th Cir. 1997). Keith Eidson operated a wastewater treatment and disposal business named Cherokee Resources, Inc. *See id.* at 346. Because the company accepted more waste than it could handle, Eidson frequently ordered illegal dumping. *See id.* at 347. Employees were instructed to dump wastewater into a toilet at the company's facility, and sometimes discharged pollutants directly into the sewer system. *See id.* Keith Eidson was sentenced to 51 months in prison for "conspiracy to knowingly violate the CWA, knowingly violating pretreatment standards, and tampering with a pollutant monitoring device." *Id.*

8. *See Eidson*, 108 F.3d at 1340 (holding that "drainage ditch connecting Ingraham and Commerce Streets is a 'navigable water' under the CWA").

enforcement of environmental law and left the door open for future courts to broaden the scope of the CWA even further.⁹

Part II of this Note provides a detailed examination of *Eidson*, discussing the case's factual background, as well as its procedural history.¹⁰ Part III considers the text of the CWA, relevant legislative history and judicial interpretations of the statute.¹¹ Part IV analyzes the Eleventh Circuit's reasoning in *Eidson*,¹² while Part V considers the Eleventh Circuit's reasoning as compared to prior case law and legislative intent.¹³ Finally, Part VI discusses the significance of the *Eidson* holding and its potential impact on the future of environmental criminal litigation.¹⁴

II. FACTS

Cherokee Trading Partners, Inc. (Cherokee) was a used oil recycling and wastewater disposal business.¹⁵ For little or no fee, Cherokee collected used oil from local businesses, transported the oil to Cherokee's facilities, reduced its water content, if necessary, and resold the product to other businesses.¹⁶ For a higher fee, Cherokee would also agree to properly dispose of industrial wastewater.¹⁷ Charles Eidson and his wife, Sandra, managed the corporation, which had its principle place of business in Tampa, Florida.¹⁸

9. For a discussion of the trend toward heightened enforcement of environmental laws, see *infra* notes 33-58, 65-87 and accompanying text. For an analysis of the implications of the *Eidson* holding, see *infra* notes 150-58 and accompanying text.

10. For a discussion of the facts and procedural history of *Eidson*, see *infra* notes 15-32 and accompanying text.

11. For a discussion of the text of the CWA, its legislative history and case law concerning the CWA, see *infra* notes 33-87 and accompanying text.

12. For a discussion of the Eleventh Circuit's reasoning in *Eidson*, see *infra* notes 88-109 and accompanying text.

13. For a comparison of the Eleventh Circuit's reasoning with the analyses of other courts and with the legislature's intent, see *infra* notes 110-49 and accompanying text.

14. For a discussion of the impact of the holding in *Eidson*, see *infra* notes 150-58 and accompanying text.

15. See *United States v. Eidson*, 108 F.3d 1336, 1340 (11th Cir.), *cert. denied*, 118 S. Ct. 248 (1997).

16. See *id.* The principle business of Cherokee Trading Partners, Inc. (Cherokee) was collecting used oil and selling it to companies in the fertilizer industry. See *id.*

17. See *id.*

18. See *id.* at 1339-40. Charles Eidson was the president of Cherokee, while Sandra acted as its secretary and registered agent. See *id.*

In April of 1990, a Tampa police officer noticed a Cherokee truck parked at an intersection close to the company's facility.¹⁹ The driver of the truck was pumping a "sludge substance" from the truck into a sewer that emptied into a storm drainage ditch.²⁰ The ditch led to a nearby drainage canal that eventually emptied into Tampa Bay.²¹ A light flow of water was running through the storm drainage ditch at the time of this occurrence.²²

As the officer observed the drainage, Sandra Eidson arrived to speak with him.²³ She informed the officer, and later an environmental official, that the substance had been used to rinse an underground fuel tank and that she had instructed the driver to dispose of it in the sewer.²⁴ Upon further investigation, authorities learned

19. *See id.* at 1340. Officer David Broce observed a white oil tanker on the corner of Ingraham and O'Brien Streets, about 100 yards from Cherokee's property. *See id.* The truck was empty, but had lines running into a nearby ditch. *See* Brief for Appellee, at 7, *United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997) (No. 94-2330); Brief for Appellant at 3, *United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997) (No. 94-2330).

20. *See Eidson*, 108 F.3d at 1340. Officer Broce testified that the operator of the tanker was pumping the substance into the underground ditch, which connected Ingraham and O'Brien Streets. *See id.* He approached the truck and asked the operator to stop the pumping process. *See* Appellee's Brief at 7, *Eidson* (No. 94-2330); Appellant's Brief at 3, *Eidson* (No. 94-2330). The operator agreed and Officer Broce contacted the local Environmental Protection Commission (Commission). *See* Appellee's Brief at 7, *Eidson* (No. 94-2330); Appellant's Brief at 3, *Eidson* (No. 94-2330). Gerald Tousley, a representative from the Commission, arrived soon after to assist Officer Broce. *See* Appellee's Brief at 7, *Eidson* (No. 94-2330); Appellant's Brief at 3, *Eidson* (No. 94-2330). He took samples of the substance being pumped from the tanker that later tested positive for compounds normally associated with petroleum, namely, benzene, toluene, ethyl benzene and xylene. *See* Appellee's Brief at 8-9, *Eidson* (No. 94-2330); Appellant's Brief at 3-5, *Eidson* (No. 94-2330).

21. *See Eidson*, 108 F.3d at 1340. At trial, testimony revealed that the drainage ditch under Ingraham Street led to a canal that flowed to Picnic Island Creek, a tributary of Tampa Bay. *See* Appellee's Brief at 9, *Eidson* (No. 94-2330); Appellant's Brief at 5, *Eidson* (No. 94-2330). The flow from this ditch varied with the tide and the weather. *See* Appellee's Brief at 9, *Eidson* (No. 94-2330); Appellant's Brief at 5, *Eidson* (No. 94-2330). At certain times of year, the ditch was completely dry; however, fish were observed swimming in the ditch at times when it did contain water. *See* Appellee's Brief at 9, *Eidson* (No. 94-2330); Appellant's Brief at 5, *Eidson* (No. 94-2330). Designers created the system to discharge storm water into Tampa Bay. *See* Appellee's Brief at 9, *Eidson* (No. 94-2330); Appellant's Brief at 6, *Eidson* (No. 94-2330).

22. *See Eidson*, 108 F.3d at 1340. The flow continued throughout the system until it reached Tampa Bay, where the drainage canal ended. *See id.*

23. *See id.*

24. *See id.* Sandra Eidson also informed the officer that she was the vice-president of Cherokee and that the company had permission to dispose of the liquid in the sewer. *See id.* At this point, Gerald Tousley went to the Cherokee offices, where he questioned Charles Eidson. *See* Appellee's Brief at 8, *Eidson* (No. 94-2330); Appellant's Brief at 3, *Eidson* (No. 94-2330). Charles Eidson stated that he had asked Sandra to instruct the employee to pump waste materials into the sewer.

that Charles and Sandra Eidson frequently instructed employees to conduct the unauthorized dumping of industrial wastewater.²⁵ Authorities also discovered that the company put significant effort into concealing this practice from government officials.²⁶ While Cherokee was disposing of wastewater in this manner, it continually as-

See Eidson, 108 F.3d at 1340. On behalf of the Commission, Tousley issued a warning notice to Cherokee as a result of the incident. *See Appellee's Brief at 3, Eidson* (No. 94-2330).

25. *See Eidson*, 108 F.3d at 1340. In August, 1990, the Commission conducted an announced inspection of Cherokee facilities. *See Appellee's Brief at 15, Eidson* (No. 94-2330); Appellant's Brief at 3-4, *Eidson* (No. 94-2330). Tousley gave a tour of the facilities, noting evidence of oily dirt on the property and in bags thrown in a dumpster. *See Appellee's Brief at 15, Eidson* (No. 94-2330); Appellant's Brief at 4, *Eidson* (No. 94-2330). He also discovered ponding oil inside a Cherokee containment facility. *See Appellee's Brief at 9, Eidson* (No. 94-2330); Appellant's Brief at 5, *Eidson* (No. 94-2330).

In November, 1990, Cherokee applied for a permit as a use-all collection facility. *See Appellee's Brief at 15, Eidson* (No. 94-2330); Appellant's Brief at 7, *Eidson* (No. 94-2330). As a result, an official from the Florida Department of Environmental Regulation took several samples from the site's well, its containment area, the area surrounding a tank, the adjacent property and a site near the company's trailer. *See Appellee's Brief at 15, Eidson* (No. 94-2330); Appellant's Brief at 7, *Eidson* (No. 94-2330). Except for the well-water, all of the samples tested positive for hydrocarbons. *See Appellee's Brief at 15-16, Eidson* (No. 94-2330); Appellant's Brief at 7-8, *Eidson* (No. 94-2330).

Employees regularly dumped wastewater into the ground on Cherokee's property, or into the woods of an adjacent lot. *See Eidson*, 108 F.3d at 1340. One Cherokee employee testified that Charles Eidson instructed co-workers to dump waste from the bottom of oil tanks onto the ground. *See Appellee's Brief at 9-10, Eidson* (No. 94-2330); Appellant's Brief at 6-7, *Eidson* (No. 94-2330). Another employee offered similar testimony. *See Appellee's Brief at 9-10, Eidson* (No. 94-2330); Appellant's Brief at 6-7, *Eidson* (No. 94-2330). This employee stated that both Charles and Sandra Eidson instructed him to drain "murky" water from oil tanks to adjacent property. *See Appellee's Brief at 9-10, Eidson* (No. 94-2330); Appellant's Brief at 6-7, *Eidson* (No. 94-2330). If the ground was too wet, he was instructed to leave the tank overnight and try to drain the water the next morning. *See Appellee's Brief at 9-10, Eidson* (No. 94-2330); Appellant's Brief at 6-7, *Eidson* (No. 94-2330). During the five months that he worked for Cherokee, this employee was never instructed to transport waste off site for treatment. *See Appellee's Brief at 9-10, Eidson* (No. 94-2330); Appellant's Brief at 6-7, *Eidson* (No. 94-2330).

26. *See Eidson*, 108 F.3d at 1340. Prior to an environmental inspection, Charles Eidson would instruct employees to spread truckloads of dirt over the property. *See Appellee's Brief at 15, Eidson* (No. 94-2330); Appellant's Brief at 6, *Eidson* (No. 94-2330). He also arranged for oil drums to be loaded onto a rental truck and driven off site until inspections were complete. *See Appellee's Brief at 15, Eidson* (No. 94-2330); Appellant's Brief at 6, *Eidson* (No. 94-2330). Cherokee's business records indicated that wastewater had been dumped into "Tank 8." *See Eidson*, 108 F.3d at 1340. At trial, three different employees testified that Tank 8 did not exist. *See Appellee's Brief at 14, Eidson* (No. 94-2330); Appellant's Brief at 6-7, *Eidson* (No. 94-2330). When Charles and Sandra Eidson directed employees to dump waste into Tank 8, this meant that the substance was to be disposed of on the ground. *See Appellee's Brief at 14, Eidson* (No. 94-2330); Appellant's Brief at 6-7, *Eidson* (No. 94-2330).

sured its customers that the company complied with all applicable laws, regulations and permits.²⁷

Both Charles and Sandra Eidson were indicted and charged with violating the CWA by knowingly discharging or causing the discharge of pollutants into navigable waters of the United States.²⁸ Additionally, these environmental infringements led to charges of mail fraud, since the Eidsons used false representations to solicit customers for their business.²⁹ In the United States District Court for the Middle District of Florida, a jury convicted the couple on all charges, and Charles and Sandra Eidson were sentenced to serve seventy and thirty-seven months imprisonment, respectively.³⁰

The Eidsons appealed, arguing that the storm drain did not constitute "navigable water" under the CWA.³¹ After reviewing the case, the Eleventh Circuit concluded that the drainage ditch was in

27. See *Eidson*, 108 F.3d at 1340. One customer testified that an individual at Cherokee indicated, over the phone, that the company had all necessary licenses to dispose of his business' wastewater. See Appellee's Brief at 13, *Eidson* (No. 94-2330); Appellant's Brief at 8, *Eidson* (No. 94-2330). Another received documents from the company which led him to believe that Cherokee had the essential permits for handling wastewater. See Appellee's Brief at 12-14, *Eidson* (No. 94-2330); Appellant's Brief at 8, *Eidson* (No. 94-2330). Similarly, an official from Mobil Oil Corporation contracted with Cherokee to remove wastewater from a service station. See Appellee's Brief at 13, *Eidson* (No. 94-2330); Appellant's Brief at 9, *Eidson* (No. 94-2330). The contract that the official from Mobil Oil Corporation signed contained provisions that the water would be disposed of in compliance with current laws, codes and regulations. See Appellee's Brief at 13, *Eidson* (No. 94-2330); Appellant's Brief at 9, *Eidson* (No. 94-2330). A customer who dealt directly with Charles and Sandra Eidson received a letter indicating that waste was disposed of properly. See Appellee's Brief at 14, *Eidson* (No. 94-2330); Appellant's Brief at 9, *Eidson* (No. 94-2330). In reality, Cherokee lacked the necessary permits for the handling and disposal of wastewater. See Appellee's Brief at 9, *Eidson* (No. 94-2330); Appellant's Brief at 10, *Eidson* (No. 94-2330).

28. See *Eidson*, 108 F.3d at 1340.

29. See *id.* On appeal, the defendants argued that there was insufficient evidence to uphold mail fraud convictions. See *id.* at 1343. Mail fraud occurs when one "intentionally participate[s] in a scheme to defraud or to obtain money by fraudulent pretenses and representations," and "use[s] the United States mails to further that scheme." *Id.* (citing *United States v. Wingate*, 997 F.2d 1429, 1433 (11th Cir. 1993)). In their contracts and advertisements, the defendants assured clients that they were handling wastewater "in accordance with all applicable laws, codes, and regulations." *Id.* Based upon these misrepresentations, the Eleventh Circuit upheld the defendants' convictions of mail fraud. See *id.* at 1343-44.

30. See *Eidson*, 108 F.3d at 1340.

31. See *id.* at 1341. The defendants also alleged that there was insufficient evidence to support their mail fraud convictions, and that certain upward sentencing adjustments made by the district court were unwarranted. See *id.* at 1344. In addition, they argued that the CWA was unconstitutionally vague in its definition of "pollutants." See *id.* at 1343. The defendants asked the Eleventh Circuit to reverse and remand with instructions to reverse the convictions on all counts in the indictments. See Appellant's Brief at 32, *Eidson* (No. 94-2330).

fact a “navigable water” under the CWA and affirmed the convictions.³²

III. BACKGROUND

A. The Clean Water Act

By enacting the CWA, Congress intended “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”³³ The CWA makes it a crime for “any person” to discharge “any pollutant” without a designated permit.³⁴ It also provides for

32. See *Eidson*, 108 F.3d at 1340. The Eleventh Circuit also upheld the mail fraud convictions and several of the upward sentencing adjustments. See *id.* It did rule, however, that two of the district court’s adjustments were not warranted. See *id.* at 1346-47. Therefore, the Eleventh Circuit vacated the sentences and remanded the case to the district court. See *id.* at 1347.

33. CWA § 101(a), 33 U.S.C. § 1251(a) (1994). In protecting the waters of the United States, Congress’s main concern was public health and safety. S. REP. NO. 92-414, at 3-4 (1972). The Senate’s Public Works Committee had become “increasingly concerned . . . with the effects of pollution upon public health” and it stated that “[t]he legislation reported by the Committee [was] the result of deep concern for protection of the health of the American people.” *Id.*; see also S. REP. NO. 99-50, at 29 (1985) (noting that environmental carelessness can lead to “serious environmental harm and millions of dollars of damage to . . . property,” as well as “the clear potential for loss of life and serious personal injury”); H.R. REP. NO. 99-189, 31 (1985) (stating that environmental violations can “result in significant harm to public health or the environment”).

The concern for the protection of health was also evident in a 1985 debate involving the CWA. See 131 CONG. REC. S7993 (daily ed. June 12, 1985) (statement of Sen. Chafee). During the debate, Senator Chafee noted that the CWA is of great importance to the United States. See *id.* Agreeing with Senator Chafee, Senator Moynahan discussed the public health issues related to the CWA. See *id.* In doing so, he stated:

[T]he discovery of waterborne disease and the transfer of disease-causing organisms from sewage systems to drinking water supplies [was a] great [event] . . . in public health in the 19th century. It was with [this advance] that cholera and such diseases and gastrointestinal diseases were first understood and began to be suppressed and the life of man changed. One only has to live in a society where water is not clean to understand the dimension of the issue involved. So it is altogether appropriate that one of the first major measures which the Congress enacted . . . was for clean water, both as a traditional measure of managing waste of various kinds, and, also, looking to the newer questions . . . as we discovered the consequences of runoffs of chemicals that come from agricultural . . . and industrial uses.

Id. at S7995 (statement of Sen. Moynahan).

34. CWA § 301(a), 33 U.S.C. § 1311(a). “Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.” *Id.* Permits are available only in limited circumstances and the Administrator of EPA has broad discretion over their issuance and revocation. See *id.* § 302(b)(2), 33 U.S.C. § 1312(b)(2). Specifically, section 302(b)(2) of the CWA provides:

The Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this section for pollutants other than toxic pollutants if the applicant demon-

the enforcement of its provisions through fines, imprisonment, or both.³⁵ Under section 309(c) of the CWA, a person may face a

strates at such hearing that (whether or not technology or other alternative sources are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this chapter) from achieving such limitation.

Id. Additionally, section 318 of the CWA provides:

(a) The Administrator is authorized, after public hearings, to permit the discharge of a specific pollutant or pollutants under controlled conditions associated with an approved aquaculture project under Federal or State supervision pursuant to section 1342 of this title.

(b) The Administrator shall by regulation establish any procedures and guidelines which the Administrator deems necessary to carry out this section. Such regulations shall require the application to such discharge of each criterion, factor, procedure, and requirement applicable to a permit issued under section 1342 of this title, as the Administrator determines necessary to carry out the objective of this chapter.

(c) Each State desiring to administer its own permit program within its jurisdiction for discharge of a specific pollutant or pollutants under controlled conditions associated with an approved aquaculture project may do so if upon submission of such program the Administrator determines such program is adequate to carry out the objective of this chapter.

Id. § 318, 33 U.S.C. § 1328; *see also* CWA § 402, 33 U.S.C. § 1342 (setting forth extensive and highly detailed procedures for issuance of permits to discharge certain pollutants).

35. *See* CWA § 309, 33 U.S.C. § 1319. The enforcement provision of the CWA states:

Any person who—

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than 3 years, or by both.

Id. § 309(c)(2), 33 U.S.C. § 1319(c)(2).

Section 309(c)(1) sets forth provisions for negligent violations of the CWA.

See id. § 309(c)(1), 33 U.S.C. § 1319(c)(1). It states:

Any person who—

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved

maximum \$50,000 fine, as well as three years imprisonment, by knowingly discharging or causing the discharge of pollutants into navigable waters of the United States.³⁶ Responsible corporate officers constitute “persons” for purposes of the CWA.³⁷

While Congress clearly intended to criminalize the discharge of pollutants into navigable waters of the United States, it failed to provide a clear definition of the term “navigable waters.”³⁸ The CWA merely states that “navigable waters” are “waters of the United States, including the territorial seas.”³⁹ The legislative history, how-

under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than 1 year, or by both.

Id. Similarly, a person who knowingly violates the CWA, “and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment of not more than 15 years, or both.” *Id.* § 309(c)(3)(A), 33 U.S.C. § 1319(c)(3)(A).

36. *See id.* § 309(c), 33 U.S.C. § 1319(c)(2). For the text of section 309(c)(2) of the CWA, see *supra* note 35 and accompanying text. If a person violates this provision a second time, the penalty potentially doubles. *See id.* (stating that “[i]f a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$100,000 per day of violation, or by imprisonment of not more than 6 years, or by both”). A decreased penalty exists for negligent violations of the CWA, while it increases for knowing endangerment to another person. *See id.* § 309(c)(1) & (3)(A), 33 U.S.C. § 1319(c)(1) & (3)(A).

37. *See id.* § 309(c)(6), 33 U.S.C. § 1319(c)(6) (stating that “[f]or the purpose of this subsection, the term ‘person’ means . . . any responsible corporate officer”). There has been much discussion concerning this aspect of the CWA. *See generally* Truxtun Hare, Comment, *Reluctant Soldiers: The Criminal Liability of Corporate Officers for Negligent Violations of the Clean Water Act*, 138 U. PA. L. REV. 935 (1990). One commentator noted that today’s environmental statutes subject “corporate officials to strict liability for actions or omissions in which they had a legally defined ‘responsible share’ yet no direct participation or knowledge.” *Id.* at 935. As such, these statutes hold corporate officers liable by reason of status and responsibility, regardless of their awareness or knowledge of the environmental violation. *See id.* at 936.

38. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132 (1985) (noting that CWA itself is ambiguous in its definition of “navigable waters”).

39. CWA § 502, 33 U.S.C. § 1362.

ever, provides evidence as to which waters Congress intended to protect with the CWA.⁴⁰

The CWA's legislative history demonstrates that Congress intended the definition of navigable waters to be broad.⁴¹ The legislative history indicates that Congress intended for the CWA to extend to "the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes."⁴² The legislative history reflects that Congress recognized that water moves in cycles, and therefore, believed that pollution must be controlled at its source, rather than after it has contaminated various bodies of water along its path.⁴³

The Environmental Protection Agency (EPA) has provided its own expansive interpretation of "waters of the United States."⁴⁴ According to EPA regulations, the term includes areas such as mudflats, swamps and small ponds.⁴⁵ Many federal courts have

40. See S. REP. NO. 92-414, at 77 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742-43; *see also* *United States v. Ashland Oil & Transp. Co., Inc.*, 504 F.2d 1317, 1325 (6th Cir. 1974) (examining Congress's expanded definition of "navigable waters" and considering intent behind definition). For a discussion of the CWA's legislative history, see *infra* notes 41-43, 113-21 and accompanying text.

41. See S. REP. NO. 92-414, at 77 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742-43. A Senate Report states that "[t]he control strategy of the Act extends to navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and Great Lakes. Through a narrow interpretation of the definition of interstate waters the implementation [of an earlier statute] was severely limited." *Id.* at 3742.

42. *Id.*

43. See *id.* at 3742-43. In the legislative history, Congress indicated that "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries." *Id.*

44. 40 C.F.R. § 230.3(s) (1997). For EPA's definition of "waters of the United States," see *infra* note 45 and accompanying text.

45. See *id.* In its entirety, EPA's definition of "waters of the United States" includes:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

adopted EPA's broad approach to defining "waters of the United States."⁴⁶

B. Judicial Definitions of "Navigable Waters"

In interpreting the scope of the CWA, courts have paid special attention to the legislative intent behind the statute.⁴⁷ This close examination of the legislative history has resulted in a broad definition of "navigable waters" for many jurisdictions.⁴⁸ The United States Supreme Court first addressed the issue in *United States v.*

(4) All impoundments of waters otherwise defined as waters of the United States under this definition.

(5) Tributaries of waters identified in paragraphs (1) through (4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA . . . are not waters of the United States. Waters of the United States do not include prior converted cropland.

Id.

46. For a discussion of the decisions in which courts have adopted EPA's definition of "waters of the United States," see *infra* notes 47-87 and accompanying text.

47. When the language of a statute is ambiguous, it is appropriate for courts to examine the legislative history in interpreting the law. See *New Jersey v. New York*, No. 120, 1997 WL 291594, at *24 (U.S. Mar. 31, 1997) (stating Supreme Court often looks to legislative history when considering statutes' meanings); *Board of Educ. v. Mergens*, 496 U.S. 226, 238 (1990) (holding courts must interpret unclear statutes in accord with policies and goals of Congress); *Coronado-Durazo v. INS*, 123 F.3d 1322, 1325 (9th Cir. 1997) (ruling that courts must first look to plain language of statutes, then to legislative history); *Kincade v. Sparkman*, 117 F.3d 949, 951 (6th Cir. 1997) (stating statutes must be construed in harmony with legislative intent).

The Supreme Court has relied on legislative history in deciding cases involving the CWA. See generally *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). In *Riverside*, the Court stated that it was appropriate to look to the legislative history and policies behind the CWA when considering its terms. *Id.* at 132. Similarly, the Tenth Circuit placed significant weight on the legislative intent behind the CWA. See generally *Quivira Mining Co. v. EPA*, 765 F.2d 126 (10th Cir. 1985). In upholding EPA regulations against a mining company dumping waste into a small creek, the Tenth Circuit relied on Congress's stated goal of protecting all waters from pollution. See *id.* at 129. In an earlier case, the Sixth Circuit based its interpretation of the CWA on the congressional intent that the statute "be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." *United States v. Ashland Oil & Transp. Co., Inc.*, 504 F.2d 1317, 1324 (6th Cir. 1974) (quoting 118 CONG. REC. 33,756-57 (1972)).

48. The Supreme Court relied heavily on legislative intent in *Riverside*. 474 U.S. at 121. The Court noted that Congress recognized that the problem of water pollution required broad federal authority. See *id.* at 132-33. Thus, the Court concluded that "Congress chose to define the waters covered by the Act broadly," and "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes" *Id.* at 133.

*Riverside Bayview Homes, Inc.*⁴⁹ In *Riverside*, the Court held that wetlands adjacent to, but not regularly flooded by rivers, streams and other areas traditionally identified as “waters” constituted “navigable waters” under the CWA.⁵⁰ In reaching this conclusion, the Court placed significant emphasis on both the intention of Congress and the scientific classifications of EPA.⁵¹

This view of the CWA’s legislative intent similarly was expressed by the court in *Georgia v. City of East Ridge* when it stated that “[a]lthough Congress included the term ‘navigable’ in the statute, Congress intended to broadly define the waters that would fall within the legislation’s protection.” 949 F. Supp. 1571, 1577 (N.D. Ga. 1996) (citing *Riverside*, 474 U.S. at 132-33). In *East Ridge*, citizens and the government of Georgia brought an action against a city in neighboring Tennessee. See *id.* at 1573. The claim alleged that city employees had violated the CWA by discharging raw sewage into a manhole that overflowed into a storm drain leading to an unnamed tributary. See *id.* at 1574. During heavy rains, residents observed “wastewater containing raw sewage, feces, toilet paper, tampons, and other materials” overflow from the manhole and into the storm drain. *Id.* The court relied on the legislative history of the CWA to construe the term “navigable waters” broadly and apply it to the unnamed tributary. See *id.* at 1577-88.

The United States District Court for the District of Arizona in *United States v. Phelps Dodge Corp.* followed the reasoning of *East Ridge*. 391 F. Supp. 1181, 1184-87 (D. Ariz. 1975). In its opinion, the court in *Phelps Dodge* engaged in a lengthy discussion of the CWA’s legislative intent. See *id.* As a result, the court held that even “normally dry arroyos, where any water which might flow therein could reasonably end up in any body of water” constituted navigable waters of the United States. *Id.* at 1187.

After careful consideration of the history behind environmental legislation, the United States District Court for the Middle District of Florida in *United States v. Holland* concluded that non-navigable man-made mosquito canals constituted “navigable waters.” 373 F. Supp. 665, 673 (M.D. Fla. 1974). In *Holland*, officials attempted to enjoin several individuals from filling man-made mosquito canals with sand, dirt, dredged soil and biological materials. See *id.* at 667. The court concluded that Congress intended “that the term ‘navigable waters’ be given the broadest possible constitutional interpretation” *Id.* at 672 (quoting S. REP. NO. 92-1236, at 144 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3822).

49. 474 U.S. 121 (1984).

50. See *id.* at 139. In *Riverside*, the Army Corps of Engineers sought to enjoin a local landowner from filling wetlands without a permit. See *id.* at 124. The property contained vegetation requiring saturated soil for survival. See *id.* at 130-31. It was adjacent to a navigable lake, but was not frequently flooded or permeated by the lake. See *id.* at 134.

51. See *id.* at 131-39. The Army Corps of Engineers developed its definition of navigable waters in accordance with that of EPA. See *id.* at 133. The Corps included adjacent wetlands in its definition, noting that wetlands affect the quality of adjacent waters even when not actually flooded by them. See *id.* at 134. For example, wetlands may drain into adjacent waters and also may serve as nesting and spawning sites for many biological species. See *id.* at 134-35. Thus, the Corps reasoned that even though adjacent waters may not be the source of a wetland’s moisture, the wetland is an integral part of the aquatic environment and must be protected. See *id.* at 135. The Court stated that EPA and the Army Corps of Engineers were reasonable in interpreting the CWA broadly, in light of “the evident breadth of congressional concern for protection of water quality and aquatic ecosystems” *Id.* at 133.

Following the Supreme Court's decision in *Riverside*, federal courts were not hesitant in expanding the term "navigable waters" beyond its literal meaning.⁵² Courts deemed wetlands adjacent to bodies of water and unnamed tributaries leading to interstate creeks "navigable waters" under the CWA.⁵³ In fact, one court, recognizing that many courts were reading the CWA broadly, commented that "courts applying the Act have effectively ignored the term 'navigable.'"⁵⁴

52. See, e.g., *United States v. Larkins*, 852 F.2d 189 (6th Cir. 1988). In *United States v. Larkins*, the Sixth Circuit examined alleged violations of the CWA by two brothers. See *id.* The defendants had acquired a large parcel of land in the flood plain of Obion Creek, a tributary of the Mississippi River. See *id.* at 190. When purchased, several acres of the land were knee-deep in water. See *id.* The defendants began digging ditches, cutting timber, blasting beaver dams and filling low spots. See *id.* A few years later, they began construction of dikes and levees on the property. See *id.* After an aerial inspection in 1982, officials notified the defendants that they had been discharging materials into portions of land classified as "wetlands." See *id.* Nevertheless, the brothers continued their work, completing the construction of dikes and levees. See *id.*

The government brought an action against the brothers, alleging that their construction efforts were in violation of the CWA. See *id.* The District Court for the Western District of Kentucky agreed, concluding that the land in dispute constituted wetlands and was covered by the CWA. See *id.* at 191. On appeal, the defendants argued that the property could not be defined as wetlands without officials first examining the frequency of the soil's saturation. See *id.* at 192. The Sixth Circuit disagreed, however, and stated that it was not necessary for land to be saturated frequently to constitute "wetlands." See *id.* Rather, the Sixth Circuit noted that "[t]he presence of vegetation that requires saturated soil conditions for growth and reproduction on land adjacent to a body of navigable water is sufficient to bring the land under the . . . definition of 'wetlands.'" *Id.* (citing *Riverside*, 474 U.S. at 130-31). The Sixth Circuit affirmed the district court's order that the defendants restore the wetlands they had polluted and fined them \$40,000. See *id.* at 190.

In *United States v. Schallom*, the Fourth Circuit upheld a conviction under the CWA where the defendant discharged "shotcrete," a mixture of sand, cement and water into a small creek. 998 F.2d 196, 198 (4th Cir. 1993) (per curiam). The defendant was site superintendent for a company hired to repair a bridge over the creek. See *id.* While performing these repairs, the defendant sprayed shotcrete onto the banks of the creek and dumped excess shotcrete trimmed from the bridge into the creek. See *id.* Evidence presented at trial revealed that "on at least one occasion [the defendant] sprayed tons of shotcrete into the creek while 'testing' a hose." *Id.* An underwater inspection of the small creek revealed significant amounts of shotcrete in the creek's bed. See *id.*

In *United States v. Vesicol Chemical Corp.*, the United States District Court for the Western District of Tennessee found a chemical corporation responsible for discharging pollutants into the Mississippi River and granted summary judgment in favor of the government. See generally 438 F. Supp. 945 (W.D. Tenn. 1976). In doing so, the court held that sewers leading to the river were "navigable waters" under the CWA. See *id.* at 950.

53. See generally *Larkins*, 852 F.2d 189; *East Ridge*, 949 F. Supp. 1571. For a discussion of the Sixth Circuit's decision in *Larkins*, see *supra* note 52. For a discussion of the court's holding in *East Ridge*, see *supra* note 48.

54. *East Ridge*, 949 F. Supp. at 1578. Earlier cases expressed this view as well. For example, in *Riverside*, the Supreme Court stated that the term navigable waters

Even before *Riverside*, federal courts applied a broad meaning to the term “navigable waters.”⁵⁵ The United States District Court

“is of limited import.” *Riverside*, 474 U.S. at 133. Similarly, the District Court for the District of Montana noted that courts have interpreted “navigable waters” as including “virtually any surface waters, navigable or not.” *Beartooth Alliance v. Crown Butte Mines*, 904 F. Supp. 1168, 1173 (D. Mont. 1995).

55. Prior to the Supreme Court’s decision in *Riverside*, the Tenth Circuit interpreted “navigable waters” broadly. See generally *Quivira Mining Co. v. EPA*, 765 F.2d 126 (10th Cir. 1985); *United States v. Texas Pipe Line Co.*, 611 F.2d 345 (10th Cir. 1979). In *Quivira*, the Tenth Circuit held that a small gully and creek, as well as an unnamed tributary, constituted “navigable waters.” 765 F.2d at 131. For a discussion of the Tenth Circuit’s holding in *Quivira*, see *supra* note 47 and accompanying text.

Texas Pipe Line Co. involved a government action under the Federal Water Pollution Control Act (FWPCA), the CWA’s predecessor, against a pipeline company for spilling oil into navigable waters of the United States. See 611 F.2d at 346. The pipeline ran under a large farm and was struck accidentally by a worker operating a bulldozer. See *id.* Close to 600 barrels of oil spilled into an unnamed tributary of a creek that eventually led to the Red River. See *id.* at 346-47. While the company reported the incident immediately and actually earned a commendation from the United States Coast Guard, it was still required to pay a \$2,500 civil fine. See *id.* at 347.

On appeal, the company argued that because the spill occurred in an unnamed tributary, the accident did not involve “navigable waters.” See *id.* In examining the legislative intent of the FWPCA, however, the Tenth Circuit found that the term “navigable waters” also included tributaries of navigable rivers. See *id.* The Tenth Circuit reasoned that because the Red River was protected by legislation, the unnamed tributaries that eventually would lead to it also received protection. See *id.*

Likewise, the Eleventh Circuit in *United States v. Lambert* ruled that marshes, swamps, bogs and like areas were protected as “navigable waters” under the CWA. See generally 695 F.2d 536 (11th Cir. 1983). In *Lambert*, the government sought a preliminary injunction against owners of a seafood company. *Id.* at 538. The defendants owned a large parcel of land next to the Banana River, where they routinely disposed of excess scallop shells. See *id.* Despite the imposition of a cease and desist order by the United States Army Corps of Engineers, the defendants continued to dump an average of four million pounds of shells on the land each week. See *id.* While the Eleventh Circuit affirmed the district court’s decision that injunction was not the proper remedy, it adopted the Corps’ extensive definition of wetlands, stating that “[w]etlands generally include swamps, marshes, bogs and similar areas’ Adjacent wetlands are those ‘bordering, contiguous, or neighboring’ navigable waters, including ‘[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like.’” *Id.* (quoting 33 C.F.R. § 323.2(c)-(d) (1981)).

Taking a similarly expansive view, the Fifth Circuit handed down two decisions in 1976 concerning “navigable waters.” See generally *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293 (5th Cir. 1976); *Weiszmann v. District Eng’r, United States Army Corps of Eng’r*, 526 F.2d 1302 (5th Cir. 1976). Both cases held that man-made canals that connected to navigable waters were subject to legislation; however, landlocked canals did not themselves constitute “navigable waters.” See *Sexton*, 526 F.2d at 1299-1300; *Weiszmann*, 526 F.2d at 1304-05.

Finally, several district courts produced decisions containing broad definitions of “navigable waters” as well. See *United States v. Holland*, 373 F. Supp. 665, 673-74 (M.D. Fla. 1974) (holding that non-navigable man-made mosquito canals and mangrove wetland areas were meant to be protected as “waters of the United States”); see also *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1187 (D. Ariz.

for the District of Arizona held that an area is protected under the CWA even if there is only a possibility that water could flow in and “end up in any body of water . . . in which there is some public interest.”⁵⁶ Similarly, the Tenth Circuit applied a broad definition to “navigable waters” in *Quivira Mining Co. v. EPA*.⁵⁷ Congressional intent played a significant role in the Tenth Circuit’s ruling that the CWA was “intended to regulate discharges made into every creek, stream, river or body of water that in any way may affect interstate commerce.”⁵⁸

Despite the trend to apply a broad meaning to the term “navigable waters,” not all courts have been willing to give broad meaning to similar language in other environmental statutes.⁵⁹ In *James River v. Richmond Metropolitan Authority*, the District Court for the Eastern District of Virginia held that a river and canal that had been drained and filled did not constitute “navigable waters” under the Rivers and Harbors Appropriation Act.⁶⁰ Similarly, the Eighth Circuit ruled that a “body of water must be navigable in fact . . . [and] it must itself, or together with other waters, form a highway over which commerce may be carried on with other states” in order

1975) (including both surface and underground water in definition of “navigable waters”). For further discussion of these cases, see *supra* note 48 and accompanying text.

56. *Phelps*, 391 F. Supp. at 1187. Furthermore, the court noted that “[f]or the purposes of [the Federal Water Pollution Control Act] to be effectively carried into realistic achievement, the scope of its control must extend to all pollutants which are discharged into *any waterway*, including normally dry arroyos . . .” *Id.* (emphasis added). See also *Leslie Salt Co. v. United States*, 896 F.2d 354, 358 (9th Cir. 1990) (stating that means by which area became “water of the United States” are irrelevant).

57. 765 F.2d at 126. The Tenth Circuit held that the CWA applied to the discharge of pollutants from uranium mining facilities into gullies and normally dry arroyos. See *id.*

58. *Quivira*, 765 F.2d at 129 (quoting *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979)). The Tenth Circuit concluded that “it was the clear intent of Congress to regulate waters of the United States to the fullest extent possible under the commerce clause.” *Quivira*, 765 F.2d at 130.

59. For a discussion of several decisions in which courts have interpreted the language of environmental statutes broadly, see *infra* notes 60-64 and accompanying text.

60. 359 F. Supp. 611 (E.D. Va. 1973). In *James River*, the plaintiffs, a nonprofit organization and its members, sought an injunction against state and federal defendants, opposing the construction of a limited access highway over a former waterway. See *id.* at 615. In denying the desired relief, the court reasoned that the canal had been filled and abandoned almost 100 years prior, and that it no longer flowed in a “natural state” that could become navigable if improved. See *id.* at 640. Additionally, the court indicated that the canal lacked water, the most important element of “navigable waters.” See *id.*

to constitute “navigable waters” under the Rivers and Harbors Appropriation Act.⁶¹

In a notable decision involving the interpretation of the CWA, the First Circuit concluded that ground waters were not “waters of the United States.”⁶² In arriving at this conclusion, the First Circuit looked to EPA’s definition of the term.⁶³ Because the determination of whether the term includes groundwaters involves a highly

61. *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 623 (8th Cir. 1979). In *Hoffman*, the Eighth Circuit examined the definition of navigable waters under the Rivers and Harbors Appropriation Act of 1899 (RHAA). *See id.* at 620. The RHAA states, in pertinent part:

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build . . . any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States . . . and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States

RHAA § 10, 33 U.S.C. § 403 (1994).

The district court granted a permanent injunction against the government defendant, preventing it from asserting jurisdiction over the construction of dams on Lake Minnetonka in Hennepin County, Minnesota. *See Hoffman*, 597 F.2d at 619. The Eighth Circuit agreed with the district court’s finding that “Lake Minnetonka is a natural [body of water and is] navigable in fact” *Id.* The Eighth Circuit noted, however, that the lake’s only outlet is Minnehaha Creek, whose flow is inadequate to allow any navigation of a private or commercial nature. *See id.* at 620. Therefore, the Eighth Circuit concluded that neither Lake Minnetonka nor Minnehaha Creek constitute “navigable waters,” because the waters are not “part of a navigable interstate waterway.” *Id.* at 623.

62. *Town of Norfolk v. United States Army Corps of Eng’rs*, 968 F.2d 1438, 1450-51 (1st Cir. 1992). In an effort to clean up Boston Harbor, the Corps issued a permit to create a landfill in the town of Walpole, a suburb of Boston. *See id.* at 1442. The proposed landfill was to function as a disposal site for wastes generated by water treatment facilities. *See id.* Citizens of Walpole and neighboring Norfolk opposed creation of the landfill because developers planned to build over former wetlands. *See id.* at 1443-44. The First Circuit rejected the citizens’ argument on appeal that groundwaters beneath the landfill were “waters of the United States.” *See id.* at 1450. In doing so, the First Circuit deferred to the determination of EPA and the Corps that the ecological relationship between groundwaters and surface waters was insufficient to make the former “waters of the United States.” *See id.* at 1451.

63. *See id.* at 1450. EPA’s definition of “waters of the United States” fails to mention groundwater. *See id.*; *see also* 40 C.F.R. § 230.3 (1997). As a result, the Army Corps of Engineers has interpreted the definition as excluding groundwater. *See Norfolk*, 968 F.2d at 1450. *But see* *Inland Steel Co. v. EPA*, 901 F.2d 1419, 1422 (7th Cir. 1990); *McClellan Ecological Seepage v. Weinberger*, 707 F. Supp. 1182, 1193-94 (E.D. Cal. 1988) (questioning whether term “waters of the United States” should include groundwaters connected to surface waters). For a discussion of EPA’s definition of “waters of the United States,” *see supra* note 45 and accompanying text.

ecological process, the First Circuit held that it should be left to the discretion of EPA and the Army Corps of Engineers.⁶⁴

C. Heightened Criminal Penalties for Environmental Offenses

The CWA has always authorized government officials to impose sanctions on individuals who violate its provisions.⁶⁵ In recent years, however, Congress has added amendments to the CWA, thus enhancing its criminal penalties.⁶⁶ Along with harsh criminal sanctions, violators are prohibited from receiving certain federal benefits and their names are published biannually in the Federal Register.⁶⁷ In an effort to successfully enforce these provisions, Congress expanded the resources of EPA, and the United States Department of Justice created a team to deal with environmental

64. See *Norfolk*, 968 F.2d at 1451.

65. See generally CWA §§ 101-607, 33 U.S.C. §§ 1251-1387 (1994) (providing broad authority to impose criminal sanctions). Specifically, section 102(a) of the CWA states that “[t]he Administrator [of EPA] is authorized to make joint investigations with any [federal or state] agencies of the condition of any waters in any State or States, and of the discharges of any sewage, industrial wastes, or substance which may adversely affect such waters.” CWA § 102(a), 33 U.S.C. § 1252(a). Furthermore, the CWA provides:

Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements [this Act] . . . he shall proceed under his authority . . . or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator’s notification the state has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation

CWA § 309(a)(1), 33 U.S.C. § 1319(a)(1).

Significantly, another section of the statute states that “[n]othing . . . shall be construed to limit the authority of the Administrator to take action pursuant to . . . this title.” CWA § 404(n), 33 U.S.C. § 1344(n). For the specific text of current criminal provisions of the CWA, see *supra* note 35 and accompanying text.

66. See Christine L. Wettach, *Mens Rea and the “Heightened Criminal Liability” Imposed on Violators of the Clean Water Act*, 15 STAN. ENVTL. L.J. 377, 381-82 (1996). In 1987, Congress increased the possible penalties for violations of the CWA and distinguished between negligent and intentional offenses. See *id.* at 382. Intentional violators can now face up to three years in prison, \$50,000 in fines per day of violation, or both. See CWA § 309(c)(2), 33 U.S.C. § 1319(c)(2). The amendments doubled penalties for a second offense, and provided up to \$250,000 in fines and 15 years in prison for violations that “place another person in imminent danger of death or serious bodily harm.” See CWA § 309(c)(2) & (c)(3)(A), 33 U.S.C. § 1319(c)(2) & (c)(3)(A).

67. See Wettach, *supra* note 66, at 382. Businesses and individuals who are convicted under the CWA are not entitled to receive federal contracts, funds or loans. See *id.* EPA also publishes a list of violators in the Federal Register. See *id.*

crimes.⁶⁸ As a result, prosecutions for environmental offenses have increased significantly.⁶⁹

The judiciary has followed the lead of the legislative and executive branches by becoming increasingly interested in enforcing environmental laws and regulations. In considering statutes that require a defendant to act "knowingly," a number of courts have held that an individual does not have to knowingly violate the statute; rather, the defendant must consciously perform the acts that constitute the violation.⁷⁰ In *United States v. Weitzenhoff*, the Ninth

68. See *id.* at 382-84. Congress passed the National Environmental Policy Act of 1969 (NEPA) to expand the resources of EPA. See NEPA § 2, 42 U.S.C. § 4321 (1994). Congress stated the original goals of NEPA as follows:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation

Id.

In 1990, Congress amended NEPA by passing the Pollution Prosecution Act of 1990. Pub. L. No. 101-593, 104 Stat. 2963 (codified as amended at 42 U.S.C. § 4321 (1994)). The new provisions authorized the Administrator of EPA to increase the number of criminal investigators from 72 to 200 by 1995. See Pollution Prosecution Act § 202(a), 33 U.S.C. § 4321. The Act also required the Administrator to increase the number of civil investigators by 50 in order to assist in enforcement. See *id.* § 203, 33 U.S.C. § 4321. Congress further stated that the Administrator would create an institute to train "Federal, State and local lawyers, inspectors, civil and criminal investigators, and technical experts in the enforcement of the Nation's environmental laws." *Id.* § 204, 33 U.S.C. § 4321. Congress appropriated \$110 million to EPA between 1991 and 1995 to carry out these goals. See *id.* § 205, 33 U.S.C. § 4321.

69. See Wettach, *supra* note 66, at 382-84. Convictions in this area increased 70% between 1989 and 1994, while fines increased 80% and jail time increased 35% during the same time period. See *id.* at 383.

70. See, e.g., *United States v. Hopkins*, 53 F.3d 533 (2d Cir. 1995); *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990); *United States v. Hayes Int'l Corp.*, 786 F.2d 1499 (11th Cir. 1986). In *United States v. Hopkins*, the defendant was the vice-president of Spirol International Corporation, which manufactured metal fasteners. 53 F.3d at 534. On several occasions, the company had been confronted by state environmental officials for discharging toxic wastewater into a nearby river. See *id.* As a result, Spirol was required to monitor its wastewater and submit reports to Connecticut's Department of Environmental Protection (DEP). See *id.* at 535. Hopkins was convicted of violating the CWA after tampering with the company's wastewater testing and falsifying reports to DEP. See *id.*

On appeal, Hopkins challenged his conviction because of the trial court's jury instructions, which he claimed were erroneous. See *id.* at 537. While instructing the jury on the knowledge element of the CWA, the trial judge stated that "the government need not prove that the defendant intended to violate the law or that the defendant had any specific knowledge of the specific requirements of the conditions and limitations of the permit." *Id.* at 536. The Second Circuit held that the district court's instructions were proper in light of the congressional intent behind the CWA. See *id.* at 540. The Second Circuit stated that "in construing knowledge elements that appear in . . . 'public welfare' statutes — i.e., statutes that regulate

Circuit upheld a felony conviction, reasoning that the polluter need not be aware of the CWA's provisions as long as the individual consciously took part in the action that caused the violation.⁷¹ The

the use of dangerous or injurious goods or materials — the Supreme Court has inferred that Congress did not intend to require proof that the defendant knew his actions were unlawful." *Id.* at 537 (citing *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971)).

The Fourth Circuit rendered a similar holding in *United States v. Dee*, when it affirmed a district court conviction of three defendants for knowingly violating the Resource Conservation and Recovery Act (RCRA). 912 F.2d 741 (4th Cir. 1990). The defendants in *Dee* were civilian engineers for the United States Army and were involved in the creation of chemical warfare systems. *See id.* at 743. One of the defendants, a chemical engineer, and his three superiors were convicted of violating RCRA after illegally storing, treating and disposing of hazardous wastes. *See id.* RCRA states that "[a]ny person who knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter without a RCRA permit shall, upon conviction, be subject to fine and/or imprisonment." RCRA § 3008, 42 U.S.C. § 6928(d)(2)(A) (1994). The defendants challenged their convictions, arguing that they did not "knowingly" commit the crimes at issue. *See Dee*, 912 F.2d at 745. Specifically, they alleged that they were unaware that violating RCRA was a crime or that the chemicals they handled were classified as hazardous wastes. *See id.*

The Fourth Circuit began its analysis by reasoning that "ignorance of the law is no defense." *Id.* (quoting *International Minerals*, 402 U.S. at 563). Accordingly, the Fourth Circuit determined that "the government did not need to prove defendants knew violation of RCRA was a crime, nor that regulations existed listing and identifying the chemical wastes as . . . hazardous wastes." *Id.* With respect to the hazardous nature of the chemicals, the Fourth Circuit held that it was enough for the government to show that the defendants knew the "general hazardous character of the wastes." *Id.*

Likewise, the Eleventh Circuit reversed a district court decision acquitting a defendant notwithstanding a jury verdict of guilty for illegal transportation of hazardous wastes. *See generally United States v. Hayes Int'l Corp.*, 786 F.2d 1499 (11th Cir. 1986). *Hayes* involved a corporation that operated an airplane refurbishing plant in Alabama that produced several hazardous wastes. *See id.* at 1500. Workers were required to drain fuel tanks in order to paint the planes and were required to clean their paint guns using solvents. *See id.* In 1982, environmental officials discovered illegally disposed of drums of waste from the Hayes plant. *See id.* at 1501. The government charged Hayes and several of its employees under RCRA, which requires a knowing violation of the statute. *See id.* Similar to *Dee*, the defendants argued on appeal that they were unaware that paint waste was hazardous under RCRA or that RCRA required permits for disposal of such waste. *See id.* at 1503. The Eleventh Circuit rejected this argument and stated that "it would be no defense to claim no knowledge that the paint waste was a hazardous waste within the meaning of the regulations; nor would it be a defense to argue ignorance of the permit requirement." *Id.* Thus, the Eleventh Circuit reversed the district court's judgment acquitting the defendants and remanded with instructions to reinstate the jury verdicts of guilty. *See id.* at 1507.

71. 35 F.3d 1275 (9th Cir. 1994). The defendants were the manager and assistant manager of a sewer treatment plant in East Honolulu, Hawaii. *See id.* at 1281. The plant was located near Sandy Beach, a popular area for swimming and surfing in Oahu. *See id.* The purpose of the plant was to treat four million gallons of human wastewater each day, removing pollutants and safely discharging remains into the ocean. *See id.* On forty different occasions, the defendants instructed employees to dump wastewater directly into the ocean before any treatments had taken place. *See id.* at 1282. As a result, employees dumped 436,000 pounds of

Ninth Circuit reached this conclusion after a detailed examination of the legislative history behind the statute.⁷²

Courts also have increased the use of imprisonment and community service rather than fines when sentencing environmental offenders.⁷³ In *United States v. Hopkins*, the Second Circuit affirmed a district court order sentencing a defendant to twenty-one months imprisonment after convicting him of violating permit restrictions, conspiring to commit violations and tampering with a monitoring device.⁷⁴ Similarly, defendants in *United States v. Dee* were each placed on three years of probation with a condition of 1,000 hours

pollutant solids into the ocean. *See id.* On appeal, the defendants claimed that they did not violate the CWA "knowingly," since they were unaware that their actions were illegal. *See id.* at 1283. The Ninth Circuit determined that authorizing the illegal dumping was enough to constitute a knowing violation of the CWA. *See id.* at 1284.

72. *See id.* at 1283-84. The Ninth Circuit considered the congressional intent behind the 1987 amendments that increased criminal sanctions for violations of the CWA. *See id.* The Ninth Circuit found that the legislative history suggests that Congress amended the CWA in hopes of deterring potential polluters. *See id.*; *see also* H.R. CONF. REP. NO. 99-1004, at 138 (1986); S. REP. NO. 99-50, at 29 (1985) (evidencing Congress's intentions of deterring future pollution).

73. *See, e.g.*, *United States v. Schallom*, 998 F.2d 196 (4th Cir. 1993) (*per curiam*); *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993). In *United States v. Schallom*, the Fourth Circuit affirmed the district court's significant sentence enhancements based solely on the lasting effects of the defendant's pollution. *See Schallom*, 998 F.2d at 201. Because the district court "found that a continuing discharge would result from [the defendant's actions]," it added six levels to the defendant's offense level at sentencing. *Id.* at 199. Similarly, the Ninth Circuit affirmed a district court order sentencing one defendant to 21 months and another to 33 months imprisonment after they discharged waste directly into ocean waters. *Weitzenhoff*, 35 F.3d at 1282-83; *see also* Nittoly, *supra* note 2, at 1140-42. Many courts have "gone further" than traditional fines and imprisonment when sentencing environmental offenders. *See* Nittoly, *supra* note 2, at 1140. For example, a Wisconsin court ordered a painting company to run announcements in local newspapers admitting to environmental crimes and encouraging adherence to government regulations. *See id.* at 1141 (citing *Wisconsin v. Doyle*, No. 86-CF-52 (Wisc. Cir. Ct., Juneau County, Sept. 3, 1987); *Wisconsin v. Doyle Handymark Corp.*, No. 86-CF-53 (Wisc. Cir. Ct., Juneau County, Sept. 3, 1987)). Similarly, a federal court in North Carolina ordered a defendant to place an ad in the newspaper, admitting to polluting the public sewer system. *See id.* at 1141 (citing *United States v. Central Transp., Inc.*, 4 *Toxics L. Rep.* (BNA) 1362 (Mar. 5, 1990)). In another decision, a Pennsylvania court forced a publishing corporation to pay for waste cleanup and industry education regarding environmental issues. *See* Nittoly, *supra* note 2, at 1141 (citing *Pennsylvania v. Suburban Publisher, Inc.*, No. 780-1987 (Luzerne County Ct., Pa., Apr. 9, 1987)). Finally, in 1988 a federal judge sentenced owners of a disposal company to community service after violating federal sanitation laws. *See id.* at 1141 (citing *STAR LEDGER*, Mar. 20, 1988, at 1). Specifically, the judge ordered the defendants to collect garbage once a week for five years. *See id.*

74. 53 F.3d at 534. The Second Circuit found that the defendant frequently falsified reports to environmental officials, ordered that unfavorable test results be discarded and mentioned to employees his intention to avoid environmental fines. *See id.* at 535.

of community service after being convicted of unlawful storage of hazardous materials.⁷⁵

With a trend toward harsher sentencing for environmental crimes, many white-collar offenders are facing imprisonment rather than traditional monetary penalties.⁷⁶ For example, in *Hopkins*, the Vice President of Manufacturing for an international corporation faced a lengthy prison term after continually violating environmental laws and paying several fines.⁷⁷ Similarly, the Fourth Circuit in *Dee* held that federal employees working at federal facilities are also subject to the criminal provisions of environmental statutes.⁷⁸

By prosecuting defendants under environmental laws and tangentially related non-environmental statutes, the federal government has been able to more aggressively punish environmental offenses.⁷⁹ For example, in charging violators with established envi-

75. For a discussion of the Fourth Circuit's decision in *Dee*, see *supra* note 70 and accompanying text.

76. See Nittoly, *supra* note 2, at 1125. Many businesses include potential environmental fines in their budgets. See *id.* These fines are often less expensive than the cost of proper waste disposal. See *id.* As a result of this practice, environmental officials have begun to seek larger fines from corporations that violate regulations, as well as criminal indictments against responsible corporate officers. See *id.*; see also *Hopkins*, 53 F.3d at 534 (corporation's vice president sentenced to 21 months in prison, two years of supervised release and \$7,500 in fines after supervising and instructing employees to perform illegal actions); *United States v. Speech*, 968 F.2d 795 (9th Cir. 1992) (president of waste treatment corporation charged with unlawful storage of hazardous waste when facility failed to obtain required storage permits); *United States v. Baytank (Houston), Inc.*, 934 F.2d 599 (5th Cir. 1991) (executive vice-president, safety and operations manager and technical manager of chemical storage facility charged with violations of Solid Waste Disposal Act after improperly storing hazardous wastes).

Corporate officers have even faced charges for the deaths or serious bodily injuries of employees after allowing environmental crimes. See Nittoly, *supra* note 2, at 1126-27; see also *People v. O'Neil*, 550 N.E.2d 1090 (Ill. App. Ct. 1990) (corporate officials charged with murder and corporation charged with involuntary manslaughter when employee died after exposure to cyanide); *People v. Pymm*, 563 N.E.2d 1 (N.Y. 1990) (affirming convictions of officers of thermometer manufacturing corporation prosecuted for first degree assault after employee suffered brain damage from mercury contamination).

77. See *Hopkins*, 53 F.3d at 535. An employee of the company testified that the defendant often expressed concern that the business would receive another fine. See *id.* Avoiding future fines was the defendant's justification for altering and falsifying test results. See *id.*

78. See *United States v. Dee*, 912 F.2d 741, 744 (4th Cir. 1990). The Fourth Circuit rejected the defendants' argument that because they were employed by the federal government, they were entitled to sovereign immunity. See *id.* The Fourth Circuit reasoned that the defendants "were indicted, tried, and convicted as individuals, not as agents of the government [S]overeign immunity does not attach to individual government employees so as to immunize them from prosecution for their criminal acts." *Id.* (citations omitted).

79. See Thomas M. Downs, *Recent Developments in Environmental Crime*, 17 Wm. & Mary J. Envtl. L. 1, 20 (1992). Criminal prosecutions for acts that affect the

ronmental offenses, the government has also prosecuted actions such as mail fraud, false statements and conspiracy in connection with the environment.⁸⁰ For example, in *United States v. Gold* the District Court for the Northern District of Illinois convicted the defendants of violating the Mail Fraud Act after they made false statements to EPA through the mail.⁸¹ Similarly, the Ninth Circuit upheld a conviction of aiding and abetting in relation to an environmental crime.⁸² Options such as these have allowed prosecutors to pursue environmental enforcement more aggressively.⁸³

environment fall into two categories. The first category consists of acts deemed punishable by Congress in environmental statutes and the second category consists of acts that are crimes under traditional criminal provisions. *See id.* at 1.

80. *See id.* at 20. Other offenses frequently charged in conjunction with environmental offenses include wire fraud, aiding and abetting, and obstruction of justice. *See id.* In 1990, EKOTEK, a waste disposal company, and its president were indicted for conspiracy to violate federal environmental laws, including the CWA. *See id.*; *see also First U.S. Felony Environmental Prosecution in Utah Announced Against Salt Lake City Firm*, 21 Env't Rep. (BNA) 423 (June 29, 1990). The company illegally burned and disposed of a number of hazardous materials, hiding its practice by falsifying corporate documents. *See id.* The government also charged EKOTEK with mail fraud, because it had used the mail to misrepresent to customers that the company had complied with all environmental laws. *See id.* Subject to the first federal environmental felony prosecution in Utah, EKOTEK faced \$24 million in fines, while its president faced up to 45 years in prison. *See id.*

81. 470 F. Supp. 1336 (N.D. Ill. 1979). In *Gold*, a chemical corporation was the sole manufacturer of certain pesticides in the United States. *Id.* at 1339. These chemicals were regulated by and registered with EPA. *See id.* Several corporate executives agreed to an extensive research project that investigated the possibility that several of the company's pesticides caused cancer in laboratory animals and humans. *See id.* at 1341. The company's researchers found substantial evidence indicating that the chemicals were causing liver cell carcinomas and tumors among laboratory mice. *See id.* The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) requires that all such findings be reported to EPA; however, when the company sent its reports to EPA, it significantly understated instances of cancer. *See id.* at 1339-41. The defendants were charged under the Mail Fraud Act with conspiracy to make and having made fraudulent statements and false representations to the government through the United States mail system. *See id.* at 1338.

82. *See generally United States v. Hoflin*, 880 F.2d 1033 (9th Cir. 1989). In *Hoflin*, the Director of the Public Works Department for Ocean Shores, Washington, frequently instructed employees to dispose of hazardous wastes illegally. *Id.* at 1035-36. In order to dispose of leftover road paint, the defendant instructed employees to bury drums of paint at a nearby sewage treatment plant. *See id.* at 1035. At the time, several drums were rusted and leaking, and employees crushed the drums when the hole they dug for burying them was not deep enough. *See id.* Additionally, the defendant ordered employees to bury kitchen sludge, rather than treat it properly. *See id.* at 1036. Both of these actions violated federal environmental permitting regulations. *See id.* A federal district court convicted the defendant for aiding and abetting the disposal of hazardous waste and burial of sludge, and the Ninth Circuit affirmed the judgment. *See id.* at 1040.

83. *See Downs*, *supra* note 79, at 20. Prosecutors have become more aggressive, and quite creative, in order to impose harsher penalties for environmental violations. *See id.* at 19-20. The government now prosecutes environmental offenders under general criminal provisions, such as mail fraud and conspiracy, and

As in all criminal cases, courts must also consider the rights of defendants charged with environmental violations.⁸⁴ For this reason, many courts have applied the rule of lenity, which requires courts to construe statutory ambiguity in favor of the defendant.⁸⁵ For example, the First Circuit recently applied the rule of lenity in deciding whether the CWA covered employers who knowingly subjected employees to hazardous substances.⁸⁶ Since the statute was unclear, the First Circuit held that the CWA's purpose was regula-

under "obscure," nontraditional statutes. *See id.* For example, federal prosecutors included charges under the Migratory Bird Treaty Act (MBTA) when they dealt with the Exxon Valdez spill. *See id.* at 19. The MBTA prohibits "the killing of migratory birds without required permits." *Id.* (citing MBTA § 6, 16 U.S.C. § 707(a) (1994)).

84. *See* Thomas E. Daniels, *Gideon's Hollow Promise—How Appointed Counsel Are Prevented from Fulfilling Their Role in the Criminal Justice System*, 71 MICH. BUS. L.J. 136, 140 (1992) (noting that courts have "responsibility for ensuring defendants' constitutional rights").

85. *See, e.g.,* Crandon v. United States, 494 U.S. 152 (1990); United States v. Plaza Health Lab., Inc., 3 F.3d 643 (2d Cir. 1993). Where a statute's language and legislative history are ambiguous, the Supreme Court has held that the rule of lenity must be applied by courts. *See Crandon*, 494 U.S. at 158 (holding that when governing standard is set forth in criminal statute, it is appropriate to apply rule of lenity in resolving any ambiguity in scope of statute's coverage). In *Plaza Health*, the defendant was co-owner and vice-president of a blood-testing laboratory. 3 F.3d at 643. On more than one occasion, the defendant transported numerous vials of blood to his residence, removed the vials from his car and placed them on the edge of the Hudson River during low tide. *See id.* at 644. A few months later, a class of eighth graders discovered the vials while on a field trip in Staten Island. *See id.* Some vials had washed up on shore, but several were floating in the water. *See id.* They all contained human blood and some were cracked. *See id.* City workers eventually recovered seventy vials of blood from the water. *See id.*

Shortly after this incident, a maintenance worker at the defendant's condominium complex found a plastic container holding blood vials on the condominium's grounds. *See id.* Authorities discovered a large number of vials later that day. *See id.* Testing revealed that the blood in ten of these vials was contaminated with the hepatitis-B virus. *See id.* Officials traced the vials to the defendant's laboratory and subsequently, the defendant was convicted of several violations of the CWA. *See id.*

On appeal, the defendant argued that the government failed to prove that the pollutants were discharged from a "point source." *See id.* His main contention was that the CWA's definition of "point source" did not include discharges from human beings. *See id.* The Second Circuit determined that the CWA and its legislative history were ambiguous as to whether human beings were considered "point sources." *See id.* at 647-49. Therefore, the Second Circuit decided that the rule of lenity required the issue to be resolved in the defendant's favor. *See id.* at 649.

86. *See generally* United States v. Borowski, 977 F.2d 27 (1st Cir. 1992). In *United States v. Borowski*, the defendant was the owner and president of a company that manufactured optical mirrors. *Id.* at 28. The company used several rinses, dips and baths to plate mirrors with nickel. *See id.* Employees frequently used nitric acid to strip nickel from mirrors that had been plated improperly. *See id.* When disposing of nickel and nitric acid baths after use, employees simply dumped the liquids into sinks. *See id.* As a result, the substances drained into underground pipes and eventually emptied into the city's sewer system, violating EPA regulations. *See id.*

tory in nature and did not prohibit employers from exposing employees to hazardous waste in the scope of their employment.⁸⁷

IV. NARRATIVE ANALYSIS

The question before the Eleventh Circuit in *United States v. Eidson* was “whether the drainage ditch into which [the defendants’] company discharged industrial wastewater was a ‘navigable water’ within the meaning of [the CWA].”⁸⁸ The Eleventh Circuit began its analysis by examining the defendants’ argument that the government failed to prove that the drainage ditch in question was a “navigable water” under the CWA.⁸⁹ In doing so, the Eleventh Circuit first turned to the plain language of the CWA.⁹⁰

The CWA merely defines navigable waters as “waters of the United States, including the territorial seas.”⁹¹ Due to this ambiguous language, the Eleventh Circuit turned to the CWA’s legislative history for guidance.⁹² After a careful examination of the history,

As a result of this practice, employees of the defendant were exposed to large quantities of hazardous chemicals and fumes. *See id.* Evidence at trial showed that safety gear proved insufficient and ventilation was poor. *See id.* Medical experts testified that enormous health concerns such as skin disorders, breathing problems and nasal bleeding could result from such exposure. *See id.* Moreover, both the corporation and its president knew the practices put employees at risk. *See id.* at 29.

The corporation and its owner were convicted under “knowing endangerment” provisions of the CWA. *See id.* at 29. On appeal, the First Circuit applied the rule of lenity and found that the statute was ambiguous as to whether employees were protected by the CWA. *See id.* at 31-32. The First Circuit also noted that “the fact that this case involve[d] pollution [did] not make the rule of lenity inapplicable.” *Id.* at 32 n.9.

87. *See id.* at 32. The First Circuit noted that the defendant’s conduct was “utterly reprehensible and may have violated any number of other criminal laws.” *Id.* The First Circuit held, however, that the CWA could not provide employees with a remedy because they were endangered in the course of their work, prior to any illegal discharge affecting public facilities. *See id.*

88. 108 F.3d 1336, 1339 (11th Cir.), *cert. denied*, 118 S. Ct. 248 (1997). The defendants also challenged their sentences and their mail fraud convictions, alleging that the convictions were not supported by evidence. *See id.* at 1343. The Eleventh Circuit rejected their claim regarding the mail fraud convictions, however, concluding that there was sufficient evidence to prove that the defendants had made false representations to customers through the United States Postal Service. *See id.* In dealing with the defendants’ challenges to the upward sentencing adjustments of the district court, the Eleventh Circuit vacated the sentences and remanded to the lower court for re-sentencing. *See id.*

89. *See id.* at 1340-43. The Eleventh Circuit considered the claim *de novo*, reviewing evidence in the light most favorable to the prosecution. *See id.* at 1341.

90. *See id.* For a discussion of the language and history of the CWA, see *supra* notes 33-37 and accompanying text.

91. CWA § 502, 33 U.S.C. § 1362(7) (1994).

92. *See Eidson*, 108 F.3d at 1341. For a discussion of the CWA’s legislative history, see *supra* notes 41-43 and accompanying text.

the Eleventh Circuit concluded that Congress intended the provisions of the CWA to have a broad scope.⁹³ Therefore, the Eleventh Circuit reasoned that Congress enacted the CWA to regulate contamination of all waters that could eventually reach waters affecting interstate commerce.⁹⁴ Not only did it consider congressional intent, but the Eleventh Circuit also examined EPA's definition of "waters of the United States."⁹⁵ The Eleventh Circuit noted that EPA's specific list of areas that constituted "waters of the United States" was in accordance with the legislative history and purpose of the CWA.⁹⁶

The Eleventh Circuit also examined other courts' interpretations of the term "navigable waters," under the CWA and several other environmental statutes.⁹⁷ The Eleventh Circuit pointed out that most courts favored a broad interpretation of the CWA.⁹⁸ It further noted that many courts recognized unnamed tributaries as "navigable waters" when the tributaries lead to bodies of water involved in interstate commerce.⁹⁹

93. *See id.* The Eleventh Circuit relied on prior interpretations of the congressional intent behind the statute. *See id.* (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985); *United States v. Lambert*, 695 F.2d 536, 538 (11th Cir. 1983)). The Eleventh Circuit concluded that the ambiguous definition of navigable waters "makes it clear that the term 'navigable' as used in the Act is of limited import' and that . . . Congress chose to regulate waters that would not be deemed navigable under the classical understanding of that term." *Id.* (quoting *Riverside*, 474 U.S. at 133).

94. *See Eidson*, 108 F.3d at 1341-42. In reaching this conclusion, the Eleventh Circuit considered Congress's statement that "water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." *Id.* at 1341 (quoting S. REP. NO. 92-414, at 77 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742-43). Thereafter, the Eleventh Circuit determined that Congress intended the CWA to protect "navigable waters, portions thereof, and their tributaries." *Id.*

95. *See Eidson*, 108 F.3d at 1341. For EPA's definition of "waters of the United States," see *supra* note 45 and accompanying text.

96. *See id.* For EPA's definition of "waters of the United States," see *supra* notes 44-46 and accompanying text.

97. *See Eidson*, 108 F.3d at 1341-42. For a discussion of interpretations of "navigable waters of the United States," see *supra* notes 47-64 and accompanying text.

98. *See id.* at 1341. The Eleventh Circuit quoted one of its past cases, stating that Congress intended the definition of navigable waters "'to reach to the full extent permissible under the Constitution.'" *Id.* (quoting *Lambert*, 695 F.2d at 538). The Eleventh Circuit also relied heavily on the United States Supreme Court's decision in *Riverside* when it agreed with the Court's reasoning that Congress intended the CWA to protect waters that were not "navigable" under the traditional definition of the word. *See id.* (citing *Riverside*, 474 U.S. at 133).

99. *See Eidson*, 108 F.3d at 1342. The Eleventh Circuit took notice of a number of cases involving tributaries. *See id.* Specifically, the Eleventh Circuit recognized that in *Texas Pipe Line*, the Tenth Circuit held that an unnamed tributary with a minimal flow was a "navigable water" for purposes of the CWA. *See id.* (citing *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979)). The Eleventh Circuit also referred to *Ashland Oil*, where the Sixth Circuit held that a

Next, the Eleventh Circuit considered cases involving man-made bodies of water.¹⁰⁰ These cases held that the term “navigable waters” was not limited to natural bodies of water.¹⁰¹ The Eleventh Circuit agreed with these courts, stating that “pollutants are equally harmful to this country’s water quality whether they travel along man-made or natural routes.”¹⁰²

The Eleventh Circuit also found support among cases involving tributaries with intermittent flows.¹⁰³ These decisions established that pollutants need not reach waters “immediately or continuously” to cause significant damage.¹⁰⁴ Thus, the Eleventh Circuit agreed that a tributary with little or no flow was a “navigable water,”

tributary flowing into a navigable river was “navigable water.” See *id.* (citing *United States v. Ashland Oil & Transp. Co., Inc.*, 504 F.2d 1317, 1324 (6th Cir. 1974)). Finally, the Eleventh Circuit relied on the court’s holding in *Georgia v. City of East Ridge*, in which the court extended this definition further by ruling that an unnamed tributary of an interstate creek constituted “navigable waters.” See *id.* (citing *Georgia v. City of East Ridge*, 949 F. Supp. 1571, 1578 (N.D. Ga. 1996)). For a further discussion of the Tenth Circuit’s holding in *Texas Pipe Line*, see *supra* note 55. For an analysis of the Sixth Circuit’s decision in *Ashland Oil*, see *supra* note 47. For a detailed discussion of the court’s holding in *East Ridge*, see *supra* note 48.

100. See *Eidson*, 108 F.3d at 1342 (citing *Leslie Salt Co. v. United States*, 896 F.2d 354, 358 (9th Cir. 1990); *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 947 (W.D. Tenn. 1976); *United States v. Holland*, 373 F. Supp. 665, 673 (M.D. Fla. 1974)).

101. See *Eidson*, 108 F.3d at 1342. The Eleventh Circuit relied on language from a federal district court in Florida, stating “the fact that bodies of water are ‘man-made makes no difference. . . . That the defendants used them to convey pollutants without a permit is the matter of importance.’” *Id.* (quoting *Holland*, 373 F. Supp. at 673). In *Holland*, the waters at issue were man-made mosquito canals that eventually emptied into Tampa Bay. See *Holland*, 373 F. Supp. at 673. For a further discussion of *Holland*, see *supra* note 48.

102. *Eidson*, 108 F.3d at 1342.

103. See *id.* (citing *Quivira Mining Co. v. EPA*, 765 F.2d 126, 130 (10th Cir. 1985); *Texas Pipe Line*, 611 F.2d at 130; *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1187 (D. Ariz. 1975)). The Eleventh Circuit determined that, although flow is only intermittent, pollution of such a body of water “is capable of spreading environmental damage and is thus a ‘water of the United States under the Act.’” *Id.* (citing *Texas Pipe Line*, 611 F.2d at 347).

104. See *Eidson*, 108 F.3d at 1342. Here, the Eleventh Circuit relied on the Tenth Circuit’s holding in *Texas Pipe Line Co.* that, for purposes of determining whether water is covered by the CWA, it is not important if a tributary was flowing into a navigable body of water at the time of the polluted discharge. *Id.* (quoting *Texas Pipe Line*, 611 F.2d at 347). The Eleventh Circuit also found support for its decision in *Quivira*, where the Tenth Circuit upheld the regulation of a tributary which occasionally connected to navigable streams during times of intense rainfall. See *id.* (citing *Quivira*, 765 F.2d at 130). Finally, the Eleventh Circuit agreed with a district court’s holding that normally dry arroyos, from which water may possibly flow to navigable waters, are covered under the CWA. See *id.* at 1342 (citing *Phelps Dodge*, 391 F. Supp. at 1187).

when the possibility existed that the tributary may discharge materials into a navigable body of water.¹⁰⁵

Having examined the legislative history of the CWA, EPA's regulations and the reasoning of other courts, the Eleventh Circuit then considered the facts in *Eidson*.¹⁰⁶ In *Eidson*, the storm sewer, drainage ditch and drainage canal "were all part of a . . . system that was designed to discharge storm water into Tampa Bay."¹⁰⁷ The Eleventh Circuit concluded that this was sufficient evidence to hold that the drainage ditch was a tributary of Tampa Bay and, therefore, a "navigable water" under the CWA.¹⁰⁸ The Eleventh Circuit reasoned that "[t]o hold otherwise and to allow polluters to contaminate this drainage system would defeat the intent of Congress and would jeopardize the health of our nation's waters."¹⁰⁹

V. CRITICAL ANALYSIS

The Eleventh Circuit's interpretation of the CWA was consistent with the statute's legislative intent, as well as prior case law.¹¹⁰ In giving a broad meaning to the term "navigable waters," the Eleventh Circuit followed the current trend toward strict enforcement of environmental laws through criminal penalties.¹¹¹ The holding of the Eleventh Circuit in *Eidson*, however, may seem inconsistent with several rules of statutory interpretation.¹¹²

A. The Legislative Intent and Purpose Behind the CWA

When Congress was considering passage of the CWA, environmental concerns were gaining recognition in the United States and

105. See *Eidson*, 108 F.3d at 1342.

106. See *id.* at 1342-43. For a discussion of the facts in *Eidson*, see *supra* notes 15-32 and accompanying text.

107. See *id.* at 1342. On the date in question, the storm sewer into which Cherokee employees were discharging waste was flowing lightly into an open drainage ditch connecting Ingraham and Commerce Streets in Tampa. See *id.* at 1342-43. The flow continued northward into an underground drainage canal that discharged into Tampa Bay. See *id.* This pattern was normal during times of significant rainfall and high tides. See *id.*

108. See *id.* at 1343.

109. *Id.*

110. For a discussion of the legislative intent of the CWA, see *supra* notes 33-43 and accompanying text. For an analysis of prior case law, see *supra* notes 47-64 and accompanying text.

111. For an examination of the trend toward strict enforcement of environmental laws, see *supra* notes 65-87 and accompanying text.

112. For a discussion of this inconsistency, see *infra* notes 129-149 and accompanying text.

the rest of the world.¹¹³ Legislators had become increasingly aware of the adverse effects of pollution on public health and were seeking to improve conditions through strict enforcement of environmental guidelines.¹¹⁴ In the text of the CWA, Congress stated that its goal was “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹¹⁵ The CWA, however, merely defines “navigable waters” as “waters of the United States, including the territorial seas.”¹¹⁶ Faced with this ambiguous language, the Eleventh Circuit correctly turned to the history behind the CWA.¹¹⁷

113. See S. REP. NO. 92-414, at 3-4 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3670-74. In its report, the Senate noted that members “became increasingly concerned during 1970 with the effects of pollution upon public health.” *Id.* It further stated that the problem of pollution was “more severe, more pervasive, and growing at a more rapid rate than was generally believed.” *Id.*

This concern continued even after Congress enacted the CWA, leading to its strict enforcement by officials. See Nittoly, *supra* note 2, at 1125. Publicity surrounding environmental issues increased during the 1980’s. See *id.* As a result, authorities began pursuing harsh criminal penalties for violations, including significant fines and prison sentences. See *id.* Officials believed this was the only way to deter dangerous disposal of pollutants. See *id.*

114. See S. REP. NO. 92-414, at 3-4 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3670-74. After a two-year study of water pollution in the United States, the Senate’s Public Works Committee found that efforts to protect the environment were proving inadequate. See *id.* The Committee’s findings revealed the following:

—Many of the Nation’s navigable waters [were] severely polluted, and major waterways near the industrial and urban areas [were] unfit for most purposes;

—Rivers [were] the primary sources of pollution of coastal waters and the oceans, and many lakes and confined waterways [were] aging rapidly under the impact of increased pollution;

—Rivers, lakes, and streams [were] being used to dispose of . . . wastes rather than to support . . . life and health; and

—The use of any river, lake, stream or ocean as a waste treatment system [was] unacceptable.

Id. Congress noted that the objective of the CWA could only be met through “vigorous and adequate pollution control programs.” *Id.* It criticized the “almost total lack of enforcement” of environmental guidelines prior to enactment of the CWA. *Id.*

Congress continued to advocate vigorous enforcement when it amended the CWA in 1985. See S. REP. NO. 99-50, at 29-30 (1985). In its report, the Senate stated that stronger criminal sanctions were necessary to deter unlawful conduct under the CWA. See *id.* at 29. Because of serious risks to public health and safety, Congress noted that violations of water-related pollution needed to be “discouraged as strongly as possible and should be subject[ed] to extraordinary sanctions when they occur[red].” *Id.* at 30. The Senate found strong public support for aggressive enforcement of environmental regulations and believed that imposing harsher criminal sanctions would reflect the public’s sentiments effectively. See *id.*

115. CWA § 101, 33 U.S.C. § 1251 (1994).

116. *Id.* § 502(7), 33 U.S.C. § 1362(7).

117. See *Eidson*, 108 F.3d at 1341-42.

The Eleventh Circuit reasoned that the CWA's broad definition of "navigable waters" was evidence that the term was "of limited import," and that Congress intended to regulate many types of "waters" and not only those that were "navigable" in the traditional sense of the term.¹¹⁸ In making its decision, the Eleventh Circuit reviewed a Senate Report, which provided that "reference to the control requirements [of the CWA] must be made to the navigable waters, portions thereof, and their tributaries."¹¹⁹ Based on this information from the legislative history, the Eleventh Circuit held that "Congress intended to regulate the discharge of pollutants into all waters that may eventually lead to waters affecting interstate commerce."¹²⁰ Because it extended the term "navigable waters" to the sewer system and drainage ditch at issue in *Eidson*, the Eleventh Circuit followed Congress's goal of deterring water pollution through strict enforcement and harsh criminal penalties.¹²¹

B. Judicial Consistency in Applying the CWA

The Eleventh Circuit's decision was consistent with precedent when it held that a storm sewer and drainage ditch were "waters of the United States," as used in the CWA. In *Eidson*, the Eleventh Circuit relied heavily on the decision of the Supreme Court in *Riverside*.¹²² In *Riverside*, the Court ruled that Congress intended the term "navigable" to be construed broadly, encompassing more than waters that merely were navigable in fact.¹²³

Similarly, prior case law confirms that "Congress intended the definition of navigable waters under the Act 'to reach to the full extent permissible under the Constitution.'¹²⁴ Thus, courts have held that tributaries to navigable bodies of water, whether natural or man-made, constitute "waters of the United States."¹²⁵ Addition-

118. *Id.* at 1341 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985)).

119. *Eidson*, 108 F.3d at 1341-42 (quoting S. REP. NO. 92-414, at 77 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3742-43).

120. *Eidson*, 108 F.3d at 1341.

121. For a discussion of Congress's goal of deterring water pollution, see *supra* notes 33-43 and accompanying text.

122. See *Eidson*, 108 F.3d at 1341-42 (citing *Riverside*, 474 U.S. 121). For a discussion of the facts in *Riverside*, see *supra* notes 48-51.

123. See *Eidson*, 108 F.3d at 1341-42 (citing *Riverside*, 474 U.S. at 133).

124. *Eidson*, 108 F.3d at 1341 (quoting *United States v. Lambert*, 695 F.2d 536, 538 (11th Cir. 1983)).

125. See, e.g., *Leslie Salt Co. v. United States*, 896 F.2d 354, 358 (9th Cir. 1990) (stating it is irrelevant how property in question became "water of the United States"); *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 947 (W.D. Tenn. 1976) (holding that sewers leading to Mississippi River were "navigable waters"); see

ally, courts have noted that “waters of the United States” can include tributaries that do not have a constant flow.¹²⁶

There is overwhelming agreement among courts that in order “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters . . . Congress chose to define the waters covered by the [CWA] broadly.”¹²⁷ If the Eleventh Circuit had held otherwise, it would have ignored precedent, allowing polluters to continue contamination, thereby “defeat[ing] the intent of Congress and . . . jeopardiz[ing] the health of our nation’s waters.”¹²⁸

C. Canons of Statutory Construction

Faced with an ambiguous statute, the Eleventh Circuit correctly looked to the CWA’s legislative history for guidance.¹²⁹ The debates and reports of Congress suggest that the legislature in-

also United States v. Sexton Cove Estates, Inc., 526 F.2d 1293 (5th Cir. 1976) (ruling that man-made canals connecting to navigable waters were protected under CWA); Weismann v. District Eng’r, U.S. Army Corps of Eng’r, 526 F.2d 1302 (5th Cir. 1976) (same).

The Eleventh Circuit in *Eidson* referred to a number of cases where courts held natural tributaries to be “navigable” under the CWA. *See id.* (citing United States v. Texas Pipe Line Co., 611 F.2d 345, 347 (10th Cir. 1979)) (holding that tributary of navigable river was protected by CWA); United States v. Ashland Oil & Transp. Co., Inc., 504 F.2d 1317, 1324 (6th Cir. 1974) (ruling that tributary was “navigable water”); Georgia v. City of East Ridge, 949 F. Supp. 1571, 1578 (N.D. Ga. 1996) (holding that unnamed tributary of interstate creek constituted “navigable water”). For a discussion of the facts of these cases, see *supra* notes 47-48 & 55.

In addition, courts have held that “[p]ollutants are equally harmful to this country’s water quality whether they travel along man-made or natural routes. The fact that bodies of water are ‘man-made’ makes no difference That the defendants used them to convey the pollutants without a permit is the matter of importance.” *Eidson*, 108 F.3d at 1342 (quoting United States v. Holland, 373 F. Supp. 665, 673 (M.D. Fla. 1974)). For a discussion of *Holland*, see *supra* note 48.

126. *See Texas Pipe Line*, 611 F.2d at 347 (holding it is irrelevant whether stream was discharging water into river at time of violation); *see also* Quivira Mining Co. v. EPA, 765 F.2d 126, 130 (10th Cir. 1985) (approving regulation where tributary connected to navigable stream only during times of intense rainfall); *Ashland Oil*, 504 F.2d at 1329 (holding prosecutors need not prove that pollutant actually reached navigable body of water).

127. *Eidson*, 108 F.3d at 1341 (quoting CWA § 101, 33 U.S.C. § 1251 (1994); *Riverside*, 474 U.S. at 131).

128. *Eidson*, 108 F.3d at 1343 (justifying holding that storm drainage system was “water of the United States” under CWA).

129. *See* New Jersey v. New York, No. 120, 1997 WL 291594, at *24 (U.S. Mar. 31, 1997) (stating that Court has “repeatedly looked to legislative history and other extrinsic material when required to interpret a statute which is ambiguous”); Board of Educ. v. Mergens, 496 U.S. 226, 271 (1990) (holding that ambiguous “statute must be interpreted by reference to its general purpose, as revealed by its overall structure and by the legislative history”); Coronado-Durazo v. INS, 123 F.3d 1322, 1325 (9th Cir. 1997) (stating that when plain language of statute is not clear, it is appropriate to rely on legislative history); Kincade v. Sparkman, 117 F.3d 949, 951 (6th Cir. 1997) (stating that “cardinal canon of statutory construction [is] that

tended the term “navigable waters” to encompass a wide variety of waterways.¹³⁰ It is not clear, however, that storm drainage systems were included in this definition.¹³¹

1. *The Rule of Lenity*

When determining the meaning of a criminal statute, the Supreme Court has held that courts must “apply the rule of lenity in resolving any ambiguity in the ambit of the statute’s coverage.”¹³² This standard guarantees fair warning of the consequences of criminal acts and guarantees that the legislature, rather than the judiciary, defines criminal conduct.¹³³ Therefore, when the policies and goals behind a statute are unclear and the legislative history is uncertain, courts are obligated to interpret ambiguous language in favor of the defendant.¹³⁴

There is no question that the language of the CWA is ambiguous in defining “navigable waters.”¹³⁵ Most courts, including the Eleventh Circuit, have turned to the legislative history of the CWA for guidance.¹³⁶ The legislative history has provided many courts with valuable information regarding the goals and concerns of Congress;¹³⁷ however, the Supreme Court has noted that neither the legislative history nor the underlying policies behind the CWA “pro-

statutes should be interpreted harmoniously with their dominant legislative history”) (quoting *United States v. Barry*, 888 F.2d 1092, 1096 (6th Cir. 1989)).

130. For a discussion of the legislative intent of the CWA, see *supra* notes 33-43 and accompanying text.

131. For an examination of the reasons that courts should not interpret the CWA such that it regulates drainage systems, see *infra* notes 132-49 and accompanying text.

132. *Crandon v. United States*, 494 U.S. 152, 158 (1990). For a discussion of cases applying the rule of lenity to environmental statutes, see *supra* notes 84-87 and accompanying text.

133. See *id.* (citing *Liparota v. United States*, 471 U.S. 419, 427 (1985); *United States v. Bass*, 404 U.S. 336, 347-48 (1971)).

134. See *Crandon*, 494 U.S. at 158 (citing *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)); see also *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)).

135. See, e.g., *Eidson*, 108 F.3d at 1341-42; see also *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-34 (1985) (noting that Congress’s broad definition of “navigable waters” is ambiguous and unclear).

136. See *Eidson*, 108 F.3d at 1341-42; see also *Riverside*, 474 U.S. at 132-34; *Georgia v. City of East Ridge*, 949 F. Supp. 1571, 1577 (N.D. Ga. 1996) (relying on legislative history in order to construe CWA broadly); *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1181 (D. Ariz. 1975) (holding that, based on legislative intent, dry arroyos that occasionally fill with water are “navigable waters”).

137. For a discussion of courts’ interpretations of the CWA, see *supra* notes 47-64 and accompanying text.

vides unambiguous guidance.”¹³⁸ As a result, several courts have applied the rule of lenity to the language of the CWA.¹³⁹

It remains uncertain why Congress has failed to clarify this issue with specific statutory language, or why it used the term “navigable waters” in the first place. Therefore, while the Eleventh Circuit took several adequate and well-settled steps in interpreting the CWA, there is a strong argument that it would be equitable for the courts to apply the rule of lenity in this case.

2. *Inclusio Unius*

It is well-established that Congress abandoned any requirement of navigability-in-fact when it defined navigable waters as “waters of the United States.”¹⁴⁰ Following this broad definition, EPA issued a federal regulation defining the scope of the term with more clarity than Congress.¹⁴¹ This regulation contains an extensive list of areas covered by the CWA, including “rivers, streams . . . mudflats . . . prairie potholes [and] . . . wet meadows.”¹⁴² Sewer and storm drainage systems, however, are noticeably absent from EPA’s definition of “waters of the United States.”¹⁴³ One commentator noted that the regulation fails to “indicate whether this list is

138. *Riverside*, 474 U.S. at 132.

139. See, e.g., *United States v. Plaza Health Lab., Inc.*, 3 F.3d 649 (2d Cir. 1993); *United States v. Borowski*, 977 F.2d 27 (1st Cir. 1992). In *Plaza Health*, the Second Circuit considered whether the term “point source” included human beings under the CWA. 3 F.3d at 649. Since the Second Circuit was unable to discern the “obvious intention of the legislature,” it stated that it must resolve the question in favor of the defendant. *Id.* The Second Circuit further stated that ambiguity must always be construed in favor of the defendants “unless and until Congress plainly states that [courts] have misconstrued its intent.” *Id.* (quoting *Crandon v. United States*, 494 U.S. 152, 168 (1990)).

Similarly, the First Circuit applied the rule of lenity in *United States v. Borowski*. 977 F.2d 27, 31-32 (1st Cir. 1992). There, the First Circuit used the rule of lenity to determine that the CWA did not afford protection to industrial employees who handled pollutants while at work. See *id.* The First Circuit also noted that the rule of lenity was applicable in cases involving pollution. See *id.* at n.9.

140. See generally Philip M. Quatrochi, Comment, *Groundwater Jurisdiction Under the Clean Water Act: The Tributary Groundwater Dilemma*, 23 B.C. ENVTL. AFF. L. REV. 603 (1996); see also *Riverside*, 474 U.S. at 132-33 (stating Congress intended to abolish limits on navigability set in earlier legislation); *United States v. Larkins*, 852 F.2d 189 (6th Cir. 1988) (holding wetlands constitute “navigable waters”); *East Ridge*, 949 F. Supp. 1571 (applying CWA to unnamed tributary).

141. For the language of EPA’s definition of “waters of the United States,” see *supra* note 45.

142. 40 C.F.R. § 230.3 (1997).

143. See *id.*

exclusive or, alternatively, whether this list cites only some types of waters that will be considered 'waters of the United States.'"¹⁴⁴

Inclusio unius is a well-known rule of statutory interpretation.¹⁴⁵ According to the rule, when the legislature includes a number of items in a statute's language, the exclusion of certain objects implies that the omission was intentional.¹⁴⁶ In this case, for example, EPA's failure to specify sewer and storm drainage systems in its definition of "waters of the United States" suggests that EPA intended to exclude sewer and storm drainage systems from the scope of the CWA. The purpose of the *inclusio unius* rule "is to emphasize that statutes should not be casually construed to mandate changes not specified by the language chosen."¹⁴⁷ The Eleventh Circuit and other courts, however, have failed to follow this rule in construing the CWA.

In failing to apply these important concepts of statutory construction, the Eleventh Circuit and many other courts have interpreted the CWA broadly.¹⁴⁸ At the same time, however, this seems to be the appropriate interpretation.¹⁴⁹ Had the Eleventh Circuit not found the storm drainage system in *Eidson* to be a "navigable water," the "chemical, physical, and biological integrity of the Nation's waters" would be in great danger.

VI. IMPACT

The Eleventh Circuit's decision in *United States v. Eidson* will have a potentially significant effect in the area of environmental crime. At a time when environmental issues are receiving increased

144. Quatrochi, *supra* note 140, at 615. In his Comment, Quatrochi examined the issue of whether groundwater is protected as a "water of the United States." See *id.* at 603. He noted that, while groundwater is essential to the water systems of this country, a majority of courts have been hesitant to include it in the CWA's definition of "navigable waters." See *id.* at 643.

145. See generally David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992). In its entirety, the rule is "*inclusio unius est exclusio alterius* (the inclusion of the one is the exclusion of another)" *Id.*

146. See *id.*

147. See *id.* Courts often do not mention *inclusio unius* because "it is so much a part of the interpretive process that . . . the correctness of the interpretation will not be questioned." *Id.* at 921.

148. See generally Robin L. Greenwald, *What's the "Point" of the Clean Water Act Following United States v. Plaza Health Laboratories, Inc.?: The Second Circuit Acts as a Legislator Rather Than as a Court*, 60 BROOK. L. REV. 689 (1994). At least one commentator has argued that the Second Circuit's decision in *Plaza Health* was not supported by the language of the CWA. See *id.* at 723-24. As a result, this critic asserted that the Second Circuit "essentially rew[ote] the Clean Water Act to limit its coverage to a very small subset of water pollution." *Id.*

149. See *id.* at 689 (criticizing courts' narrow interpretations of the CWA).

attention, federal and state prosecutors are aggressively pursuing environmental criminals.¹⁵⁰ By broadening the definition of “navigable waters,” the Eleventh Circuit has promoted the imposition of criminal penalties on even more environmental offenders.¹⁵¹

As a result of cases such as *Eidson*, corporate officers may begin taking environmental regulations more seriously.¹⁵² Offenders now face serious prison sentences, rather than mere monetary penalties, for instructing or allowing employees to violate environmental laws.¹⁵³ Another effect may be the end of the common practice of many businesses that anticipate environmental fines by including them in their budgets.¹⁵⁴

Potential defendants are not the only individuals who will be affected by this decision. Attorneys who have previously represented businesses and individuals in purely civil matters may be defending the same clients in future criminal cases.¹⁵⁵ Thus, lawyers with experience in civil law will have to become familiar with the criminal justice system.¹⁵⁶ Criminal defense attorneys also will need to become well-versed in environmental statutes and regulations.¹⁵⁷ Without this knowledge, attorneys and defendants will remain “weaponless in the government’s continuing fight against environmental pollution.”¹⁵⁸

In sum, the Eleventh Circuit’s holding in *Eidson* has affected at least three aspects of environmental law. First, prosecutors will enjoy more flexibility in enforcing environmental regulations. Second, corporate officers, as well as small business owners, may begin to comply more faithfully with environmental laws. Third, attorneys will be required to broaden their expertise.

Kerri Ann Riley

150. For a detailed description of the current trend toward strict environmental enforcement, see *supra* notes 65-87 and accompanying text.

151. See Wettach, *supra* note 66, at 382 (analyzing heightened criminal enforcement of environmental regulations); see also Larson & Overton, *supra* note 1, at 132 (discussing increase in environmental prosecutions due to broad readings of statutes and regulations).

152. For a discussion of the CWA’s effect on corporate officials, see *supra* notes 76-83 and accompanying text.

153. For the sentencing provisions of the CWA, see *supra* note 35 and accompanying text.

154. For a discussion of recent sentencing developments, see *supra* notes 73-83 and accompanying text.

155. See Larson & Overton, *supra* note 1, at 132.

156. See *id.*

157. See *id.*

158. See *id.*