



THE CLEAN WATER ACT: CRIMINAL EXPOSURE IN DEEPWATER

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On June 1, 2010, Attorney General Eric Holder spoke in New Orleans and confirmed that the Department of Justice was conducting a criminal investigation into the Deepwater Horizon sinking and the subsequent gulf oil spill.¹ He outlined a number of criminal theories, including possible violations of Clean Water Act (CWA).

The CWA criminalizes knowingly discharging pollutants from a point source into the navigable waters of the United States.² The Act authorizes a separate criminal penalty for each day that a violation continues. Without a permit to do so, the discharge of any pollutant by any person is unlawful.³ There is a general prohibition against discharging pollutants without a permit in order to force polluters with the stick of criminal liability to self report their activities by applying for a permit and allows the government to monitor and control pollution. The CWA is about the control and not the criminalization of pollution. With a permit, a discharge in violation of that permit is unlawful.⁴

The mental state of 'knowingly' requires the government to prove that the defendant's knowledge of all of the elements of a CWA violation.⁵ The defendant must know that he is discharging, know that what is being discharged is a pollutant, know that pollutant is being discharged from a point source, and know that the discharge is into the navigable waters of the United States.⁶ It has been argued that courts have read the mens rea out of CWA criminal violations by not requiring knowledge that the discharge is made without or in violation of permit.⁷ The courts only require knowledge of the underlying facts that give rise to the violation, not to that those acts are a violation of the law.⁸ The government does not need to prove that the person they are attempting to hold accountable knew of the permit and that they were violating it, nor whether they knew of the permit requirement and that they had not applied for one.⁹

Ignorance of the law CWA is not a defense to criminal liability. However, a mistake of fact defense is possible.¹⁰ For example, if the defendant acted under the mistaken belief that they were discharging water instead of oil, then the defendant could argue mistake of fact as a defense.¹¹ If the defendant had the mistaken belief that the discharge of oil did not require a permit or was within the permit limits, that would be a mistake of law and would not be a defense.¹²

A person under the CWA can mean an individual, corporation, other business entities, and even state and local government.¹³ The CWA contains a further person upon who liability may be placed and who did not actually perform the acts that gave rise to the violation: the responsible court officer.¹⁴ That person need not be a formally designated corporate officer.¹⁵

The granting of a title or the lack of one is irrelevant.¹⁶ A responsible corporate officer may have no formal association with the entity at all.¹⁷ A responsible corporate officer is a person, who through their substantial responsibility and control, bears such a relationship to the corporation that is appropriate to hold them criminally liable for failing to prevent a discharge in violation of the CWA.¹⁸ This definition exposes a broad swath of management to joint exposure to criminal liability.

A person may be liable under the misdemeanor criminal provisions of the CWA, which with multiple counts may allow for years of prison time, and only require that the defendant ‘negligently’ discharge a pollutant from a point source into navigable waters.¹⁹ The negligence required under the CWA has been found by courts to only require ordinary tort negligence, rather than a higher ‘gross’ negligence standard.²⁰

Under the CWA, oil is a pollutant and the ocean waters within the territorial limits of the United States are navigable waters.²¹ Under the Act, the pollutant must be discharged from a point source, a discrete and discernable conveyance.²² The CWA specifically includes a pipe in the definition of a point source.²³ It is likely that the Department of Justice in its investigation of the Deepwater Horizon sinking and the subsequent oil spill will review the facts to determine if they support a criminal prosecution under the CWA for either knowing or negligent discharges of oil into the Gulf of Mexico adjacent water ways.

¹Press Release, The U.S. Department of Justice, Attorney General Eric Holder on Gulf Oil Spill (Jun. 1, 2010), <http://www.justice.gov/ag/speeches/2010/ag-speech-100601.html>.

² 33 U.S.C. §1362; 33 U.S.C. §1311; 33 U.S.C. §1342; *See*, *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643 (2d Cir. 1993).

³ 33 U.S.C. §1311; 33 U.S.C. §1342.

⁴ *United States v. Frezzo Brothers, Inc.*, 602 F.2d 1123 (3d Cir. 1979).

⁵ *Id.*

⁶ *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ 33 U.S.C. § 1362(5); *See*, *United States v. Hong*, 242 F.3d 528 (4th Cir. 2001).

¹⁵ 33 U.S.C. § 1319(c)(6); *See*, *Hong*, 242 F.3d 528.

¹⁶ *Hong*, 242 F.3d 528.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 33 U.S.C. §1319(c)(1)(a); *See*, *Hong*, 242 F.3d 528.

²¹ *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999).

²² 33 U.S.C. §1362(6); *See*, *United States v. Riverside Bayview Homes, Inc.* 474 U.S. 121, 133 (1985); *But*, *Solid Waste Agency v. Army Corps of Engineers*, 531 U.S. 159 (2001).

²³ 33 U.S.C. §1362(14) (“The term ‘point source’ means any discernible, confined and discrete conveyance, including but not limited to any pipe...”).