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August 1, 2003

U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500
South Lobby
Washington, D.C. 20002-8002
Attn: Public Affairs-Priorities Comment

Re: Comment on Notice of Proposed Priorities

Dear Commissioners:

The Washington Legal Foundation (WLF) hereby submits these comments, with the attachments, to the U.S. Sentencing Commission in response to the Commission's solicitation of public comment on possible priority policy issues for the amendment cycle ending in May 2004 and possibly for the cycle ending in May 2005. The Commission is also soliciting suggestions from the public on "short- and long-term research issues."

While the Commission has listed 13 categories of issues that the Commission has identified as "tentative priorities," WLF requests for reasons discussed more fully below and in the attached documents that the Commission consider as one of its priorities amending Part Q- Offenses Involving the Environment, particularly §§2Q1.1, 2Q1.2, 2Q1.3 and 2Q2.1. At a minimum, the Commission should conduct a study of these guidelines (and application notes) to see how they have been implemented and/or appoint an advisory committee to conduct a study and make recommendations to the Commission.

Interests of WLF

WLF is a national non-profit public interest law and policy center organized under Section 501(c)(3) of the Internal Revenue Code. WLF is based in Washington, D.C., with supporters nationwide. WLF devotes substantial resources to litigating cases and filing *amicus curiae* briefs in the U.S. Supreme Court, this Court, and other federal courts promoting a limited and accountable government, and opposing overreaching by those administrative agencies and courts which act contrary to intent of Congress as reflected in the substantive statutes.

WLF has also served as counsel in environmental cases, including those involving criminal application of the Clean Water Act. See, e.g., *United States v. Pozsgai*, 897 F.2d 524 (3d Cir. 1990) (27-month prison sentence imposed on first offender for placing topsoil and clean non-hazardous fill on defendant's own property containing marginal wetlands zoned for industrial use). WLF has also appeared as *amicus curiae* in support of the defendants in

criminal prosecutions under the Clean Water Act arguing that the requisite intent or mens rea for imposing criminal liability was not sufficiently proven. See, e.g., *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994), cert. denied, 513 U.S. 1128 (1995); *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996); *United States v. Hansen*, 262 F.3d 1217 (11th Cir. 2001), cert. denied, 555 U.S. 1111 (2002).

In addition, WLF's Legal Studies Division has published numerous papers and monographs on these topics. See, e.g., Bartman & Gaynor, *Strict Intent Standard In Environmental Cases Protects Civil Liberties* (WLF Working Paper Series, June 1997); Ellsworth, *Scientific Evidence Under Daubert: Utilizing The New Standards At Trial* (WLF Contemporary Legal Note, No. 16, Sept. 1995); Onsdorff & Mesnard, *Criminalizing Environmental Law: Can America Afford Jailing Honest Businessmen?* (WLF Legal Backgrounder, July 10, 1992).

Comments

The application of the Commission's environmental guidelines over the last 16 years have produced what most observers would regard as unjust and excessive prison sentences, and thus, violative of the principles of punishment and the intent of Congress. The primary flaw with the guidelines is that they produce lengthy prison terms even when the environmental harm is minimal and/or the culpability of the defendant is low. Thus, the guidelines do not adequately reflect the actual level of harm to the environment from the offense.

For example, in *United States v. Mills*, 817 F. Supp. 1546 (N.D. Fla 1993), a father and son were each sentenced to 18 months in federal prison for placing some 15 piles of clean building sand on a quarter-acre lot of their own property in order to build a home. Their "crime" was that they did not obtain a permit from the Corps of Engineers due to the questionable finding that the lot contained wetlands. Of course, the presence of the sand was so harmful to the environment that the government was perfectly willing to allow the sand to remain there while the men serve their prison sentence. For first offenders, where the government has more than ample administrative and civil remedies available for this kind of regulatory offense,¹ an 18-month prison sentence meted out to first offenders for what would otherwise be an administrative or civil matter is clearly excessive. Yet, a strict application of the guidelines call for such a sentence. Under §2Q1.3, the base offense level is 6, but the specific offense for discharging a "pollutant" (clean sand) is 4; and if it is done without a permit, §2Q1.3(b)(4) requires another 4 levels, for a total of 14. But the "base offense" in the indictment was discharging sand without a permit, and yet elements of the basic charge were included or double-counted in the additional offense characteristics.

In yet another father and son case, *United States v. Hansen*, 262 F.3d 1217 (11th Cir. 2001), cert. denied, 555 U.S. 1111 (2002), the father was sentenced to 108 months in federal

¹ WLF submits that federal prosecutors are more apt to bring criminal charges for minor regulatory offenses that would otherwise have been handled administratively or civilly, precisely because they know that the Sentencing Commission's flawed guidelines will produce excessive sentences and also force defendants into making unjust plea bargains.

prison and his son 46 months for operating a chemical plant in the course of which a worker was exposed to a chemical that did not result in any injury to the worker. Yet, they were convicted of "knowing endangerment" under the Resource Conservation and Recovery Act (RCRA). Not only was their conviction questionable as a matter of law under the responsible corporate officer doctrine, but the sentence imposed on them and the plant manager was draconian. WLF's amicus brief in the Hansen case is attached hereto which discusses in greater detail the inherent and structural flaws of the environmental guidelines. In addition, a subsequently habeas corpus motion in the Hansen case which was recently filed is also submitted herewith to highlight how the "culpability" issue is not taken into account in these guidelines. Both of those documents are hereby incorporated by reference in these comments.

In a recent Lacey Act prosecution, three seafood importers were sentenced to 97 months in federal prison because approximately 6 percent of the lobster tail shipment from Honduras contained lobster tails that were less than 5.5 inches, which violated a Honduran regulation (not a U.S. law) which the Honduran courts have ruled to have been invalid. *United States v. McNab*, 2003 U.S. App. LEXIS 10708.

Why do these guidelines produce such truly bizarre sentences? As WLF explains more fully in its *Hansen* brief, the answer is that the Sentencing Commission simply did not do its homework before drafting the guidelines. The Commission ignored Congress' mandate that before the Commission was to set guidelines for any category of crime, it was to review past sentencing practices in order to determine "average sentences imposed in [each] category of cases" as the "starting point" before the Commissioners were allowed to exercise their independent (and informed) judgment as to whether or not it made any penological sense to depart from such past practice in devising the new guidelines for that category of crimes. 28 U.S.C. § 994(m) (emphasis added). The source material primarily used by the Commission in determining past sentencing practices was a 1,279 page report indexing and categorizing some 40,000 sentences imposed by federal courts from January 1, 1984 to February 28, 1985. Federal Judicial Center, Punishments Imposed on Federal Offenders (1986).

Conspicuously absent from this otherwise comprehensive study covering numerous categories of federal offenses is any data describing the sentences and fines imposed for violations of the Clean Water Act, the Clean Air Act, and the host of most other environmental laws on the books. Perhaps this was due to the paucity of such prosecutions, with administrative and civil remedies found to be more than adequate to punish, deter, and remedy the violations. After all, with respect to malum in se crimes like bank robbery, society cannot bring the robber before an administrative law judge to assess a fine, or file a civil suit for injunction and civil penalties. Criminal prosecution for such crimes is the only method that society has to deal with malum in se crimes. On the other hand, for malum prohibitum offenses, that is, conduct that is prohibited by statute or regulation, society has successfully used a number of remedies available to it short of criminal prosecution. Consequently, because almost any violation that is brought civilly could also be brought criminally, the more appropriate universe of determining what punishments society metes out for environmental offenses should take into account *all* the remedies used, i.e., administrative, civil, and criminal, to get an accurate picture of what the proper punishment should be.

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Conclusion

WLF submits that it is long overdue for the Commission to re-examine the environmental guidelines.² WLF would be more than willing to assist the Commission and its staff in this endeavor

Respectfully submitted,

Daniel J. Popeo
Chairman and General Counsel

Paul D. Kamenar
Senior Executive Counsel

² WLF notes that the Commission attempted to address some of the double-counting problem at a Commission meeting on April 14, 1992, agenda item #10, but the motion failed by a divided vote of 3-2.

No. 99-11638DD

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

UNITED STATES OF AMERICA,

Appellee,

v.

CHRISTIAN A. HANSEN, RANDALL W. HANSEN,
AND ALFRED R. TAYLOR,

Appellants.

On Appeal from the United States District Court
for the Southern District of Georgia
Brunswick Division

**BRIEF OF THE WASHINGTON LEGAL FOUNDATION
AS AMICUS CURIAE IN SUPPORT OF APPELLANTS
SEEKING REVERSAL**

INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C. The interests of WLF are more fully presented in the accompanying motion for leave to file

this brief.

STATEMENT OF THE ISSUES

Amicus hereby adopts by reference the Statement of the Issues as presented in the various briefs of the appellants. For purposes of this amicus brief, amicus will address the following issues:

1. Whether the District Court erred in denying the defendants' request for a *Daubert* hearing with respect to the government's expert witness, and whether it was error for the witness to testify about matters of law.

2. Whether the sentences must be vacated because they were imposed in violation of law inasmuch as the applicable guidelines were unlawfully promulgated and are otherwise arbitrary, capricious, and unreasonable.

STATEMENT OF THE CASE

In the interests of judicial economy, amicus hereby adopts the Statement of the Case as presented by the appellants in their respective briefs. In brief, the three defendants were convicted of several counts of violating the Clean Water Act (CWA) and the Resource Conservation and

Recovery Act (RCRA), including a "knowing endangerment" count under RCRA, due to exceedances of mercury discharges and related environmental matters occurring at the LCP chemical plant in Brunswick, Georgia. The regulatory offenses occurred at the time the company was in bankruptcy, and while the defendants were doing their best to operate the plant in a safe and environmentally sound manner under the circumstances.

Although no employee was harmed by these violations, and while the discharges of mercury were relatively minor, the trial court applied the Sentencing Guidelines and sentenced the defendants -- all first offenders and solid law-abiding citizens with families to support -- to draconian sentences ranging from four to nine years. Christian Hansen, the founder of the company, was sentenced to 108 months in prison; his son, Randall Hansen -- who dutifully helped his father by putting his own promising career on hold and served briefly as the acting CEO in 1993 after the company was in bankruptcy, and who lived in New Jersey for the most part during the relevant time period in question -- was sentenced to 46 months; and Alfred Taylor, a plant manager who assumed the duties for a limited period of time, was sentenced to 78 months.

SUMMARY OF ARGUMENT

The trial was riddled with reversible errors from beginning to end. While amicus supports all the arguments made by the parties, this brief argues that this Court should reverse the convictions and order a new trial because of the impermissible testimony of the government's so-called "expert," and because the jury instructions concerning mens rea and intent were fatally flawed. Finally, amicus submits that the draconian sentences imposed pursuant to the Sentencing Guidelines for environmental violations must be set aside because those particular guidelines were unlawfully promulgated, patently unreasonable, and fatally flawed.

ARGUMENT

I. IT WAS REVERSIBLE ERROR TO ALLOW THE GOVERNMENT'S "EXPERT" WITNESS TESTIFY AS TO MATTERS OF LAW AND TO PRESENT "JUNK SCIENCE" IN VIOLATION OF *DAUBERT*

WLF supports appellants' well-founded objections to the testimony of government witnesses as to their view of the law and technical matters that were not scientifically demonstrated. R. Hansen Br. at 42 (citing *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990); C. Hansen Br. at 15-22. The interpretation of a criminal statute is

strictly within the province of the court; the self-serving views of the law by the government or their so-called paid "experts" have no place in a criminal trial. As the Supreme Court made clear on this point:

The law in question, a criminal statute, is not administered by any agency, but by the courts. * * * The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute, but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference [under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984)].

Crandon v. United States, 494 U.S. 152, 177 (1990).

Expert witnesses are generally precluded from testifying at civil trials as to their views of what the law means. See *Reich v. Monfort, Inc.* 144 F.3d 1308, 1328 (10th Cir. 1998) ("Generally, an expert may not state his or her opinion as to legal standards nor may he or she state legal conclusions drawn by applying the law to the facts."). See also *Specht v. Jensen*, 853 F.2d 805, 807-08 (10th Cir. 1988) ("it is axiomatic that the judge is the sole arbiter of the law and its applicability"). Accordingly, it was clear and reversible error for the trial court to rule that the government witness in this case was free to testify about "his impression of what he feels like his view is with respect to this law." R21-8.

This error was particularly egregious and compounded where the government's chief expert witness, Daniel J. Teitelbaum, had been discredited by other courts in prior cases for providing similar "speculative" testimony without a proper scientific basis as required by *Daubert v. Merrell Dow Pharms., Inc.* 509 U.S. 579 (1993). The government's attempt to foist this "expert" upon the jury without apprising the trial court of the witness's credibility problems before other courts on similar scientific and worker safety issues constitutes reprehensible and unethical prosecutorial misconduct. The trial court's refusal to grant the defendant's pre-trial request to conduct a *Daubert* hearing was clear and reversible error. See C. Hansen Br. at 15-21.

It is bad enough when "junk science" finds its way into civil trials where a defendant's *property* interests are at stake; it is totally unacceptable and should not be tolerated in the least when it is used, as here, in a criminal case to deprive defendants of their *liberty* interests by incarcerating them for periods of four to nine years. Indeed, with respect to Mr. Christian Hansen, who is 73-years old and suffering from rheumatoid arthritis, more than his liberty interests are at stake: his nine-year sentence is effectively a death sentence. In short, the conviction of the defendants on the basis of

the testimony of the government's "expert" witnesses is a manifest injustice which this Court should not tolerate.

II. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO PROPERLY INSTRUCT THE JURY THAT THE PROSECUTION MUST PROVE THAT THE DEFENDANTS POSSESSED THE REQUISITE "KNOWING" MENS REA FOR ALL ELEMENTS OF THE OFFENSES CHARGED

A. The Prosecution Is Required to Prove Mens Rea for Each Element of the Offense

Amicus agrees with the appellants' argument that the trial court erred by not instructing the jury that it must find that the defendants acted knowingly with respect to all elements of the offense, including the existence of a permit. See R. Hansen Br. at 32-34 (citing *United States v. Hayes International Corp.*, 786 F.2d 1499 (11th Cir 1986); *U.S. v. BayTank, Inc.*, 934 F.2d 599 (5th Cir. 1991); *United States v. Johnson & Towers, Inc.* 741 F.2d 662, 669 (3d Cir. 1984). See also *United States v. Ellen*, 961 F.2d 462, 466-67 n.2 (4th Cir. 1992) (jury instruction stated that "actual knowledge" is required, not mere "ignorance," and that "the Government must prove that the defendant acted knowingly" as to "all four

elements of the offense," including knowledge of the "absence of a permit"); *United States v. Wilson*, 133 F.3d 251, 263-65 (4th Cir. 1997) (prosecution must prove mens rea as to "each essential element of the substantive offense").

Similarly, amicus agrees with appellants that the trial court's "responsible corporate officer" jury instruction compounded this error by impermissibly diluting or eliminating the mens rea or knowing requirement that Congress inserted in both the CWA and RCRA, and is contrary to the weight of judicial authority. R. Hansen Br. at 34-40, citing *United States v. McDonald & Watson Waste Oil Co.*, 933 F.2d 35, 51 (1st Cir. 1991); C. Hansen Br. at 28-36. See also *Vachon v. New Hampshire*, 414 U.S. 478 (1974) (the Court reversed the conviction of a shop owner who had been found guilty of contributing to the delinquency of a minor for selling her lewd merchandise since he did not personally sell the merchandise, although he controlled the store).

In addition to this compelling judicial authority, there are sound policy reasons why it is important that the prosecution must prove mens rea in this growing and complex field of environmental regulations.

B. The Dilution of the Standard of "Knowing" Violation

**Ignores the Complexity of the Law and Threatens
Prosecution of Innocent Conduct.**

**1. *Environmental Laws and Regulations Are Highly
Complex.***

The Supreme Court has stated that "[t]he proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws." *United States v. Cheek*, 498 U.S. 192, 199-200 (1991). Noting that Congress had set a higher intent standard for proof of violations of tax laws, the Court acknowledged that it as well had accorded "special treatment of criminal tax offenses . . . largely due to the complexity of the tax laws." *Id.* at 200.

Environmental regulations now rival the tax laws in their coverage of individuals and businesses. Regulations under the Clean Water Act, Clean Air Act, and RCRA alone number over 9,000 pages in the Code of Federal Regulations. See 40 C.F.R. parts 100-149, 400-503 (Clean Water Act); 40 C.F.R. parts 50-99 (Clean Air Act); 40 C.F.R. Parts 240-299(RCRA). At the same time, environmental laws and regulations are stringent and

complex. EPA Administrator Carol Browner has candidly admitted that the existing regulatory framework is "a complex and unwieldy system of laws and regulations and increasing conflict and gridlock." "New EPA 'Common Sense' Approach Cautiously Welcomed By Industries," *Air, Water Pollution Report* at 30 (July 25, 1994). Meanwhile, courts have variously noted a "regulatory hydra" and use of regulatory terms suggestive of "Alice In Wonderland," *United States v. Mills*, 817 F.Supp. 1546, 1548 (N.D. Fla. 1993), *aff'd* 904 F.2d 713 (11th Cir. 1994)¹

Even a former EPA Assistant Administrator acknowledged that RCRA is a "regulatory cuckooland of definition...[and] is very complex." *United States v. White*, 766 F. Supp. 873, 882 (E.D. Wash. 1991)(quoting comments of Don R. Clay).² See also *Inland Steel Co. v. EPA*, 901 F.2d

¹ The literary reference to *Alice in Wonderland* in *Mills* is particularly apt in this case: the government's "expert" witness, Mr. Tietlebaum, began testifying about the dangers of mercury with references to its role in the genesis of the term "Mad Hatter" in *Alice on Wonderland*. See C. Hansen Br. at 20-21.

² As a good example, EPA has given an interpretation regarding RCRA requirements in

1419, 1421 (7th Cir. 1990) (describing RCRA as a "statutory cloud cuckoo land"). At the same time, the Clean Water Act extends to many waste materials that are not actually hazardous or are even innocuous, such as clean sand.

2. Dilution of the Intent Standard Fosters Overcriminalization of Enforcement.

The dilution of the "knowing" standard of the kind evident in the present case undoubtedly affects environmental enforcement. Notably, EPA has tried for many years, sometimes together with the Department of Justice, to draw a clear distinction between cases that warrant criminal prosecution and cases that should be handled civilly under EPA's ample civil enforcement authorities. The Agency has been unable to set out a simple, bright-line rule. Instead, it has variously issued guidance to EPA regional offices for screening of cases to identify potential criminal cases, as well as guidance for special treatment of potential criminal cases that present issues of first

response to a regulated company's inquiry of whether rags contaminated with solvents used in cleanup work are hazardous waste after their use. EPA's answer was that if the solvents are poured onto the surface to be cleaned up, then the contaminated rags used in cleanup become hazardous waste. But if the solvent is first poured onto the rags to be used in cleanup, the rags do *not* become hazardous waste! See Letter dated May 20, 1987 from Jacqueline Sales, Chief, EPA Reg. Develop. Branch, to Frank Czigler of S&W Waste, Inc.

impression.³ EPA's difficulty in clearly and simply distinguishing criminal cases from civil ones has resulted in a lack of predictability about what conduct is criminal. Minor infractions could be, and have been, criminally prosecuted while major knowing violations may be, and have been, handled administratively before the agency, or in civil proceedings.⁴

Moreover, given the lack of a meaningful intent standard in environmental cases, the prosecutor has very substantial leverage to force unwarranted guilty pleas because of the likely imposition of substantial prison sentences under the Sentencing Guidelines for even minor offenses. The published opinions in environmental criminal cases do not reflect the many cases resolved by plea agreements that could have equally well

³ For examples of agency attempts to set standards for environmental criminal prosecutions, see D. Carr, ed., *Environmental Criminal Liability: Avoiding and Defending Enforcement Actions* 21-27 (Bureau of National Affairs, 1995).

⁴ As a byproduct of the overcriminalization in the environmental area and prosecutors' ready ability to force plea agreements, businesses are reluctant to engage in socially useful environmental audits and self-reporting, fearing arbitrary criminal prosecutions. See Keith A. Onsdorff and James M. Mesnard, *Criminalizing Environmental Law: Can America Afford Jailing Honest Businessmen?* (Washington Legal Foundation, Legal Backgrounder, July 10, 1992).

been pursued under civil and administrative enforcement authorities.

But whatever can be said as to the level of mens rea and intent necessary for proving the common or usual violations of CWA and RCRA, Congress made it unmistakably clear that with respect to "knowing endangerment" charges, carrying a maximum penalty of 15 years, the prosecutor must prove beyond a reasonable doubt the defendants' intent or mens rea as to each of the elements listed, particularly that each was aware that their conduct placed another person in imminent danger of death or serious bodily injury due to a RCRA violation, as opposed to some other workplace safety problem that is covered by OSHA regulations. R. Hansen Br. 17-23.

II. THE SENTENCE MUST BE VACATED BECAUSE THE ENVIRONMENTAL SENTENCING GUIDELINES WERE UNLAWFULLY PROMULGATED AND RESULT IN THE IMPOSITION OF PATENTLY UNREASONABLE SENTENCES

While this Court has more than enough reasons to remand this case for a new trial, amicus agrees with the defendants that the district court also erred by not departing downward by failing to find that this case was not a "heartland" violation, and by mistakenly believing that he did not have the discretion to do so. See R. Hansen Br. at 43-45; C. Hansen Br. at 38-41; Taylor Br. at 28-30. Amicus submits in the alternative that this Court can, and should, reverse the sentences imposed because, as will be demonstrated, the Environmental Sentencing Guidelines, U.S.S.G. §§ 2Q1.2 and 2Q1.3 were unlawfully promulgated and produce irrational sentences. This Court is mandated by 18 U.S.C. § 3742(f)(1) to set aside a sentence and remand the case for further sentencing proceedings if it "determines that the sentence * * * was imposed in

violation of law or imposed as a result of an incorrect application of the sentencing guidelines* * * ." The unlawful promulgation of the Environmental Guidelines produces sentences that are "imposed in violation of law." Accordingly, the district court should be free to re-sentence the defendants even if a new trial is not ordered by exercising its sentencing discretion as if the convictions were for pre-Guideline environmental offenses or for an offense for which the Commission has yet to promulgate a guideline. See R. Hansen Br. at 45, n.31.

As a preliminary matter, there can be no question that this Court has the jurisdiction to determine *de novo* whether a particular sentencing guideline is reasonable in the same way that courts routinely exercise their power to review the reasonableness of any other regulation promulgated by government agencies. In *United States v. Lee*, 887 F.2d 888 (8th Cir. 1989), for example, the court of appeals unanimously struck down the applicable guideline in that case, U.S.S.G. § 2J1.6, and remanded the case to the district court for resentencing because the guideline was "not sufficiently reasonable and violates the statutory mandate given to the Sentencing Commission" by producing unreasonably lengthy sentences. *Id.* at 892. Comparing the U.S. Sentencing Commission to any other regulatory agency, the standard of review of its regulations (guidelines) is whether they are "sufficiently reasonable" in light of the congressional directive given to the Sentencing Commission. *Id.* at 890, citing *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981).

To understand why the Environmental Sentencing Guidelines are patently

unreasonable and arbitrary, this Court need look no further than the sentences that were essentially mandated in this case for the defendants with respect to their convictions under the Clean Water Act. The Probation Office dutifully and mechanically calculated the offense levels as prescribed by U.S.S.G. §2Q1.3 and came up with a total adjusted offense level of 29. Because the defendants had no prior criminal history, the offender category was a level I. Cross-referencing these numbers to the grid on the Sentencing Commission's Sentencing Table yields a shockingly high 87-108 month sentence (approximately 7-9 years) for a first offender! Yet the maximum statutory sentence under the Clean Water Act for the worst water polluter with the worst criminal history not convicted of a "knowing endangerment" charge is only 36-months.⁵ How can the statutory maximum effectively constitute a mandatory minimum sentence? How can any rational guideline call for a sentence that is two to three *times* greater than the statutory maximum set by Congress? Even with the minor downward adjustments of 6 levels by the trial court, the resultant score of 23 still translates into a prison sentence of 46-57 months, which is still in excess of the statutory maximum of 36

⁵ The defendants were not charged with "knowing endangerment" under the Clean Water Act; rather, the charges in Counts 2-21 were for simple and relatively minor exceedances of the company's NPDES permit for mercury; such exceedances are not an uncommon occurrence in many companies which are not criminally prosecuted, let alone the officers of the company. Such regulatory violations are usually handled by administrative or civil proceedings.

months. The Court was left with no choice but to impose the statutory maximum of 36 months for each of the Clean Water Act counts. Surely, Congress did not intend that the maximum punishment be imposed in these kind of cases for these kind of first offenders.

These draconian sentences dictated by the guidelines are all the more unreasonable when one considers that it was only in 1987 that Congress reclassified the criminal penalty provisions for CWA violations from a Class A misdemeanor (up to one year imprisonment) to the current maximum term of three years, a Class E felony, the lowest classification for a felony. 18 U.S.C. § 3559. To be sure, the offense scores in this case were substantially raised by an additional 11 points for "substantial likelihood of death or serious bodily injury," but as noted, none of the defendants were charged with such "knowing endangerment" counts under the Clean Water Act, even though the Clean Water Act has an almost identical "knowing endangerment" provision to the RCRA provision. *Compare* 33 U.S.C. § 1319(c)(3) *with* 42 U.S.C. § 6928(e).⁶

⁶ Amicus submits that the addition of the 9 for "substantial likelihood of death or serious bodily injury" under § 2Q1.2(b)(2) (the guideline for hazardous pollutants) and 11 points under § 2Q1.3(b)(2) (the guideline for non-hazardous pollutants) for the Clean Water Act violations was in any event erroneous, since the Application Notes to both of those sections clearly indicate that the increase applies where the general "public health" is seriously endangered which was not demonstrated in this case. Rather, the prosecution focused only the alleged endangerment to the

Even subtracting all of the 11 points added under §2Q1.3(b)(2) for an offense that has a "substantial likelihood of death or serious injury," the normal offense score would be a level 18. This score translates into a sentence of 27-33 months for a first offender, a sentence that is unreasonably close to the statutory maximum for a first offender. While the RCRA violations were computed under U.S.S.G. § 2Q1.2 (the guideline for hazardous pollutants), the resulting offense score under that section was also 29, the identical score as that for the release of *non*hazardous pollutants under §2Q1.3. This equivalence in score for separate categories of pollutants simply does not make any sense.⁷

employees at the plant. If the government believes that the Clean Water Act seriously endangered the public health, why didn't the government charge the defendants with "knowing endangerment" under CWA? Amicus submits that there simply was no evidence to support such a charge.

⁷ The scores are the same for both categories of pollutants because the Commission arbitrarily provided for an increase of 11 levels for a non-hazardous pollutant where there is a "substantial likelihood of death or serious injury," whereas the Commission provided for an increase of only 9 levels for a hazardous pollutant under §2Q1.2(b)(2). The reason the numbers add up to the same total, whether the pollutant is hazardous or not is because the base offense level of the hazardous pollutant under §2Q1.2 is set at 8 which is two points higher than the base offense level for §2Q1.3 which is set at 6. This differential between the offense characteristics

To fully appreciate amicus' argument as to the unreasonableness of these guidelines, it is important to keep in mind the fact that prior to the promulgation of the Sentencing Guidelines in 1987, the normal practice was that those defendants sentenced to prison for more than one year were generally eligible for parole after serving only one-third of the sentence imposed. 18 U.S.C. § 4205(a). Thus, if a defendant were sentenced to prison for the statutory maximum of three years, that defendant would be eligible for parole after serving one year in prison. Likely candidates for parole included first-time offenders for regulatory offenses such as the defendants and offenses in this case.⁸ Therefore, the 46-month prison sentence imposed on Randall Hansen is comparable to a pre-guideline sentence of a staggering 132 months, or a 11-year sentence; the 78-month sentence for Mr. Taylor translates to mind-boggling 234-month sentence, or approximately 20 years; and the 108-month sentence imposed on 73-year old Christian Hansen translates into a truly draconian

for the two different kinds of discharges is backwards: one would think that hazardous pollutant offense levels would be greater than the non-hazardous pollutant, rather than the other way around as it is here. This is yet further evidence of the arbitrariness of the Environmental Guidelines.

⁸ Indeed, for those convicted of environmental violations and sentenced to prison, they were eligible for parole after serving 0 to 10 months. 28 C.F.R. Chapter Eleven, Subch. H; 28 C.F.R. § 2.20.

sentence of 324 months or 27 years! Even taking into account only the 36-month sentences imposed under the Clean Water Act for each defendant, that sentence still translates into a 9-year pre-guideline sentence.

All the defendants would have received drastically reduced sentences if instead of the committing these environmental regulatory offenses, they engaged in certain drug activity that Congress deemed deserving of *greater* punishment such as managing a crack house instead of a chemical plant that makes products that are socially useful in our society and improves our standard of living; or illegally using a registration number to manufacture or distribute controlled substances.⁹ Indeed, if the defendants had "wilfully" violated safety laws and regulations required under the Occupational Safety and Health Act (OSHA) -- the law which more properly governs the workplace

⁹ See U.S.S.G. § 2D1.8(a)(2) (managing or allowing use of premises for drug activity is **capped** by the Sentencing Commission at a level 16 (21-27 months) despite Congress providing in 21 U.S.C. § 857 for up to 20 years imprisonment, a statutory sentence almost seven *times* greater than the maximum three-year sentence provided under the Clean Water Act, and five years *more* than the 15-year sentence for knowing endangerment); *see also* U.S.S.G. § 2D3.1 (punishment for illegal use of registration number to distribute controlled substances is **capped** at a level 6, which allows for *probation*, despite the statutory maximum sentence of *four* years provided for in 21 U.S.C. § 843857(d), which is one-year greater than the maximum sentence under the Clean Water Act.

safety issue in this case -- and as a result, a worker was actually killed (and not merely threatened with serious injury as was alleged, but not proven, here), the statute, 29 U.S.C. § 666(e), provides a *maximum* of six-months in prison, a misdemeanor. And even when death results, courts have not always imposed prison terms. *See, e.g., United States v. Shear*, 962 F.2d 488 (5th Cir. 1992) (trial court sentenced a supervisor to three years probation, fine, and community service where employee killed in trench not properly shored up per OSHA regulations; conviction overturned because supervisor is not "employer" under the statute).

The arbitrariness of the Environmental Sentencing Guidelines is further evident from an examination of the various offense levels that can be, and often automatically are, added to the base level. The defendants were sentenced under U.S.S.G. § 2Q1.2, the guideline applicable for environmental offenses involving hazardous or toxic substances, as well as §2Q1.3 which is the guideline for non-hazardous substances. For illustration purposes, amicus will focus on § 2Q1.2, although the analysis is the same for §2Q1.3.

The base offense level under § 2Q1.2(a) is an 8. The base offense charged in this case is the discharge (or storing) of a hazardous pollutant without a permit or in violation of a permit. An additional 4 levels are added under § 2Q1.2(b)(1)(B) if the offense "involved a [single] discharge. . . of a hazardous . . . substance" regardless of the amount. If the discharge was continuous, perhaps over a period of a few days, an additional two points for a total of 6 are added to the base level of 8, thus bringing the

offense level to a 14. Yet that conduct -- discharging a pollutant -- was already accounted for in the base offense for which the defendants were charged and convicted. This double-counting would be comparable to a Sentencing Guideline providing for a certain base level for bank robbery, and then adding as an aggravating factor that the object of the robbery was a bank! In addition to the 14 points already accumulated, § 2Q1.2(b)(4) requires adding yet another four levels for not having a permit or discharging in violation of the permit. Again, this is double counting as aggravating conduct what should already be included in the base offense level since the base charge of almost any environmental violation is a discharge of some pollutant in violation of a permit or without a permit. Thus, the score has quickly escalated to a level 18 which translates into a sentence of 27-33 months for a first time offender for a garden variety permit exceedance.

Why do these guidelines produce such truly bizarre sentences? The answer is that the Sentencing Commission simply did not do its homework before drafting the guidelines. The Commission ignored Congress' mandate that before the Commission was to set guidelines for any category of crime, it was to review past sentencing practices in order to determine "*average sentences* imposed in [each] category of cases" as the "starting point" before the Commissioners were allowed to exercise their independent (and informed) judgment as to whether or not it made any penological sense to depart from such past practice in devising the new guidelines for that category of crimes. 28 U.S.C. § 994(m) (emphasis added). The source material primarily used

by the Commission in determining past sentencing practices was a 1,279 page report indexing and categorizing some 40,000 sentences imposed by federal courts from January 1, 1984 to February 28, 1985. Federal Judicial Center, Punishments Imposed on Federal Offenders (1986). Conspicuously absent from this otherwise comprehensive study covering numerous categories of federal offenses is any data describing the sentences and fines imposed for violations of the Clean Water Act, the Clean Air Act, and the host of most other environmental laws on the books. Perhaps this was due to the paucity of such prosecutions, with administrative and civil remedies found to be more than adequate to punish, deter, and remedy the violations. After all, with respect to malum in se crimes like bank robbery, society cannot bring the robber before an administrative law judge to assess a fine, or file a civil suit for injunction and civil penalties. Criminal prosecution for such crimes is the only method that society has to deal with malum in se crimes. On the other hand, for malum prohibitum offenses, that is, conduct that is prohibited by statute or regulation, society has successfully used a number of remedies available to it short of criminal prosecution. Consequently, because almost any violation that is brought civilly could also be brought criminally, the more appropriate universe of determining what punishments society metes out for environmental offenses should take into account *all* the remedies used, i.e., administrative, civil, and criminal, to get an accurate picture of what the proper punishment should be.

If the Commission had properly done its homework, and even if it simply limited

itself to looking at criminal prosecutions of environmental offenses, it would have quickly discovered that pre-guideline sentences for environmental offenses were fairly uniform (already one of the goals of the Sentencing Reform Act, i.e., the elimination of disparate sentences). The sentences meted out by federal judges using their sound discretion, and taking into account the goals of punishment to impose no more punishment than is necessary, rarely involved incarceration; rather, suspended sentences, probation, fines, community service, and restitution were the norm. Where incarceration was imposed, the length of the sentences were usually for several few weeks or months which more than adequately served the principles of punishment and deterrence. See generally U.S. EPA, Office of Enforcement, National Enforcement Investigations Center, Denver Summary of Criminal Prosecutions Resulting From Environmental Investigations (May 31, 1991) (summarizing the disposition of all environmental criminal cases from fiscal years 1983 to 1991) (hereinafter "Summary").¹⁰

¹⁰ A few representative cases makes this clear. For example, in *United States v. ABC Compounding Company, Inc.*, William S. Armistead and Vincent Armistead, No. 85-484 (N.D. Ga.), a company engaged in the business of mixing and selling chemicals was charged with RCRA conspiracy, disposal, and reporting violations. The company was fined \$40,000 and the father who was vice-president and part owner, and the son, who was plant supervisor, each received suspended term of imprisonment, placed on probation for one year, assessed a \$20,000 fine, and ordered to perform community service. Summary at 39. In *United States v. Richard*

Significantly, the Commission has never identified in any of its literature what other source documents and data it relied upon in developing the environmental guidelines, or more importantly, if it did use other information, whether it first determined the average pre-guideline sentence. The government no doubt will attempt

Brown, No. 86-005 (D. Col.), the defendant ordered five drums of toxic waste to be buried, and he was indicted for disposing of hazardous waste without a permit and for making a false statement to the EPA. The court fined the company \$3,500 and placed Mr. Brown in a pretrial diversion program. Summary at 38. In *United States v. Arthur J. Greer*, No. 85-00105 (M.D. Fla.), the proprietor and operator of four hazardous waste handling companies endangered the lives of employees by ordering them to test for the presence of chemicals such as cyanide, methyl ethyl ketone, xylene, and other chemicals by "sniffing samples or lighting them in soft drink cans, rather than by performing required chemical analysis." In addition, he dumped 1,000 gallons of waste and mislabeled the drums as harmless dirt. Greer was indicted on 33 counts, including six counts of "knowing endangerment" under RCRA. He was acquitted of the knowing endangerment counts, but sentenced for RCRA and CERCLA violations to one year and one month imprisonment (and eligible for parole after serving one-third of that time, or approximately four months). Summary at 35. In *United States v. Taylor Laboratories, Inc. and John H. Taylor, Jr.*, No. CR89-006-R (N.D. Ga.), the company and Mr. Taylor were charged with storing reagent chemicals in violation of RCRA, some of which were found near a lake. Mr. Taylor was sentenced to five years and five days imprisonment, all of which was suspended and placed on three-years probation. Summary at 84.

to counter amicus' arguments on this score by claiming that the Commission did have the authority to increase sentences from past practice if those sentences "d[id] not accurately reflect the seriousness of the offense." 28 U.S.C. § 994(m). But any such departures "will require that, as a starting point. . . the Commission ascertain the average sentences." Afterwards, departures upward may still be made, but only if the resulting sentencing range "is consistent with the purposes of sentencing" in 18 U.S.C. § 3553(a)(2). 28 U.S.C. § 994(m).¹¹ It is Commission Policy that "when departures [from past sentencing practice] are substantial, the reasons for departure will be specified." Paragraph 6, Principles Governing the Redrafting of the Preliminary Guidelines, adopted December 16, 1986, *reprinted in* Stephen Breyer (former member of the Sentencing Commission), The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 50 (1988); *see also id.* at 17 (Guidelines primarily to be based on "typical, or average, actual past practice").

Where are the Commission's reasons to justify the substantial upward departures from pre-guideline sentencing practices? There simply are none. The fact of the matter is that (a) the current sentences mandated for environmental offenses

¹¹ Congress also directed that the Commission "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 28 U.S.C. § 994(j).

clearly do not represent the "typical" or "average" pre-guideline sentence, and (b) the Commission has never provided any reasons for the sharp departure which would assist a reviewing court in determining whether those departures are "consistent with the purposes of sentencing" or whether they are, as *amicus* submit, arbitrary, unreasonable, and inconsistent with the sentencing factors mandated by Congress in 18 U.S.C. § 3553(a) (sentences shall be "sufficient, but not greater than necessary" to satisfy punishment, deterrence, avoid sentencing disparities, etc.). The Commissioners figuratively threw darts on the wall to come up with the offense levels for environmental guidelines. If the courts do not scrutinize the promulgation and reasonableness of the guidelines, they become, and have become, blank checks to be arbitrarily filled out or modified by the Commission.¹²

Because of these drafting flaws, it should come as no surprise that the environmental guidelines are inherently unreasonable and result in wildly disparate and excessive sentences in this and other environmental cases. For an excellent critique of the environmental sentencing guidelines and the Commission's misguided "one-size-fits-

¹² An agency's failure to follow Congressional directives for the promulgation of rules is itself sufficient grounds for invalidating a rule or guideline as a violation of law. *Environmental Defense Fund, Inc. v. EPA*, 898 F.2d 183, 189 (D.C. Cir. 1990) (court "cannot sustain [agency] action merely on the basis of interpretive theories that the agency might have adopted and findings that (perhaps) it might have made.") (emphasis added).

all" approach for applying the guidelines to different environmental statutes which provide for punishments ranging from 6 months to 15 years, see B. Sharp & L. Shen, The (Mis)Application of Sentencing Guidelines To Environmental Crimes, BNA Toxics L. Rpt'r 189 (July 11, 1990).

Not only do the flawed environmental guidelines produce sentences such as the instant one that are grossly disparate from pre-guideline cases, they also produce disparate post-guideline sentences, contrary to the purpose of the guidelines to reduce sentencing disparity. Consider, for example, *U.S. v. Wells Metal Finishing, Inc.*, 922 F.2d 54 (1st Cir. 1991) where the defendant was convicted after trial of 19 counts of "knowingly discharging excessive amounts of zinc and cyanide into the City of Lowell's sewer system" over a two-year period between February 1987 and 1989 resulting in the sewer system "containing levels of zinc and cyanide vastly in excess of federal pretreatment limits" and having costly impacts on the sewer system operation. The 15-month prison sentence imposed in *Wells Metal* for 19 counts of continuously discharging zinc and cyanide over two years stands in sharp contrast to the 46-108 month sentences imposed in this case. The 46-month sentence imposed on Randall Hansen in this case is a more than a 300 percent *longer* sentence than that imposed in *Wells Metal* for conduct that was less serious; Taylor's sentence of 78 months is over 500 percent greater than that in *Wells*; and Christian Hansen's sentence of 108 months is over 700 percent greater than in *Wells*. and certainly no worse than that in *Wells*.¹³

That is not to say that all sentences require mathematical exactitude; however,

sentencing disparities ranging from 300 to over 700 percent for roughly comparable acts for post-guideline offenses (and disparities easily over 1,000 percent between pre- and post-guideline sentences) is troubling to say the least, especially where the rationale for having the Guidelines in the first place was to *reduce* sentencing disparities, not to create them. Accordingly, this Court should seriously examine the fundamental flaws in the environmental guidelines and strike them down on their face or as applied in this case.

CONCLUSION

For all the foregoing reasons and those presented in the briefs of appellants, the judgment and convictions should be reversed. In the alternative, the sentences should be vacated, and the case remanded for re-sentencing.

Respectfully submitted,

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October 8, 1999

¹³ Cf. *United States v. Bogas*, 920 F.2d 363 (6th Cir. 1990) convicted for discharging hazardous and ignitable materials and lying about it to officials, was resentenced to a level 12 on remand, and received home detention. The defendants' sentences ranging from 46 to 108 months of hard prison time is infinitely greater than Mr. Bogas' home detention.

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
Brunswick Division**

UNITED STATES OF AMERICA,

Plaintiff,

v.

RANDALL W. HANSEN,

Defendant.

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Docket No. CR298-23
Argument Requested

**MEMORANDUM OF LAW IN SUPPORT OF MOTION OF
RANDALL W. HANSEN UNDER 28 U.S.C. § 2255 TO
VACATE, SET ASIDE, OR CORRECT HIS SENTENCE**

Defendant Randall W. Hansen, through his undersigned counsel, respectfully submits this memorandum of law in support of his motion, under 28 U.S.C. § 2255, to vacate, set aside, or correct his sentence. Mr. Hansen, the former Vice President and, after April 1993, acting Chief Executive Officer ("CEO") of LCP Chemicals ("LCP"), is currently serving out the 46-month sentence imposed by this Court following his conviction, on January 15, 1999, for conspiracy and violations of the Clean Water Act ("CWA") and Resource Conservation and Recovery Act ("RCRA"). The prosecution arose from LCP's operation, primarily in 1993 and early 1994, of a chlor-alkali plant in Brunswick, Georgia, although Randall Hansen at all relevant times resided and had his office in New Jersey. In the words of the Eleventh Circuit, Mr. Hansen's "primary focus was financial, and, with the support of the bankruptcy creditor's committee and court, he

sought to sell the company to a responsible party who could operate the business and have the financial resources to deal with the various environmental conditions.” *United States v. Hansen*, 262 F.3d 1217, 1229 (11th Cir. 2001), *cert. denied*, 535 U.S. 1111 (2002).

Given the absolute lack of any evidence whatsoever of Randall Hansen’s involvement in any actions that caused violations of the environmental laws, Mr. Hansen was prosecuted and convicted under a theory of vicarious “responsible corporate officer” (“RCO”) liability, as embodied in one of the Court’s jury instructions. Indeed, the Government’s theory to justify the conviction on appeal was that Mr. Hansen was responsible as acting CEO for failure to close the plant down when periodic violations of the environmental laws were inevitable. The RCO instruction permitted the jury to find Mr. Hansen guilty if (1) the CWA or RCRA violation “occurred under his area of authority and supervisory responsibility”; (2) he “had the power or capacity to prevent the violation”; and (3) he “acted knowingly in failing to prevent, detect or correct the violation.” *Id.* at 1252.

At trial, the Court overruled Mr. Hansen’s objection to this instruction, and the Eleventh Circuit affirmed the application of RCO liability. *Hansen*, 262 F.3d at 1235. Since that time, however, the Supreme Court has materially changed the law with respect to the imposition of vicarious liability on corporate officers such as that imposed on Randall Hansen. In *Meyer v. Holley*, 123 S. Ct. 824, (2003), the Supreme Court recently rejected the imposition of vicarious liability on corporate officers for an employee’s unlawful acts simply because they controlled, or had the right to control, the employee’s actions. As discussed below, Mr. Hansen’s conviction was clearly contrary to the principles set forth in *Meyer*. This change in law applies retroactively

to Mr. Hansen's sentence and requires that his sentence be vacated, set aside, or corrected under 28 U.S.C. § 2255.

BACKGROUND STATEMENT

The Court is familiar with this case from Mr. Hansen's trial and sentencing hearings, as well as the Eleventh Circuit's *per curiam* opinion. Our recitation of the background facts is abridged accordingly.

In 1998, a federal grand jury in the Southern District of Georgia, Brunswick Division, returned a 42-count indictment against Mr. Hansen and his codefendants. The indictment charged Mr. Hansen with violations of the federal conspiracy statute, 18 U.S.C. § 371 (count 1); the Clean Water Act, 33 U.S.C. § 1319(c)(2)(A) ("CWA") (counts 2-21); and RCRA, 42 U.S.C. §§ 6928(d)(2)(A) and (e) (counts 22-34). The last RCRA count (34) charged Mr. Hansen with knowing endangerment.

While the CWA has a provision allowing for RCO liability under the appropriate circumstances, *see* 33 U.S.C. § 1319(c)(6), RCRA does not. Moreover, the legislative history to RCRA's knowing endangerment provisions reflects the clear intention that corporate managers and officers *not* be subject to vicarious liability for the unlawful conduct of employees. *See* H.R. Conf. Rep. No. 96-1444, at 39-40 (1980), *reprinted in* 1980 U.S.C.C.A.N. at 5039 ("[R]esponsibility for the felony of criminal endangerment should properly be confined only to those persons who themselves have actual knowledge of the danger resulting from their conduct. A supervisor, for example, who personally lacks the necessary knowledge, should not be criminally prosecuted for knowledge that only his subordinates possessed.") By contrast, the

RCO instruction in this case permitted a conviction if Mr. Hansen "failed to detect" the unlawful actions. The "failure to detect" standard was well below the standard Congress expressly established, and undermined Congress's intent to reserve RCRA's knowing endangerment statute for "the occasional case where the defendant's knowing conduct shows that his respect for human life is utterly lacking and it is merely fortuitous that his conduct may not have caused a disaster." H.R. Conf. Rep. No. 96-1444, at 38 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5038.

As this Court concluded at Mr. Hansen's sentencing, the evidence established that Mr. Hansen "was never directly involved in the discharging or dumping of hazardous waste, nor did he order such conduct to take place," and, further, was not located in Georgia but New Jersey. The government argued that as CEO he should have allocated additional funds for repairs and maintenance at the Brunswick plant, but offered no proof that those funds existed. Indeed, in 1991, before Mr. Hansen joined LCP, Hanlin, the parent corporation, filed a voluntary bankruptcy petition, becoming a Chapter 11 debtor-in-possession, with pre-petition obligations exceeding \$100 million. *Hansen*, 262 F.3d at 1227. The company remained in bankruptcy throughout the relevant period, during which time the bankruptcy code severely restricted management's ability to allocate the bankruptcy estate's assets, or to assume new debts, for maintenance, repairs, and environmental compliance. *Id.*

Mr. Hansen nonetheless found additional funds for repairs. Maintenance spending increased under Mr. Hansen's management, contrary to the government's allegations. First, he "attempted to find additional funds by selling excess equipment and reducing the payroll but the

funds remained limited.” *Id.* Second, under an asset purchase agreement negotiated primarily by Mr. Hansen in the late summer of 1993, the plant’s former owner, Allied Signal, and another investor, Holtrachem, made a multimillion dollar advance against the purchase price for improvements primarily at the Brunswick plant. *Id.* 1230-31. Finally, contrary to the government’s argument that Mr. Hansen “denied” requests for funds to make repairs at the Brunswick plant, evidence introduced at the sentencing hearing showed that he directed that such requests be fulfilled. For example, in response to a memorandum received from Al Taylor regarding “small parts needed for cell repair,” Mr. Hansen instructed: “Mike, High priority to get funded. Help Al T[aylor] out as soon as practical. Thanks, R[andall].” (Document attached at Tab A(1).)

At trial and on appeal, the government argued that, because of the lack of funds available for repairs, Mr. Hansen should have caused LCP to cease operating the Brunswick plant before February 1994, when it was shut down. As acting CEO, however, Mr. Hansen did not have authority unilaterally to close the plant. The government’s own witnesses testified that only the Board of Directors could close the Brunswick plant, and even that was subject to the approval of the creditors’ committee and bankruptcy court. *Id.* at 1238. As the Eleventh Circuit stated, the “ultimate decision-making for all major projects, capital and extraordinary expenditures,” including whether to shut down or cease operations at any particular plant, “were subject to the approval of the Board and the bankruptcy creditor’s committee and court.” *Id.* at 1227-28. Furthermore, a government witness, Hugh Croom, testified that Mr. Hansen at least once sought to close the plant in 1993 but was denied authority to do so by the Board. R19-23.

Faced with the undisputed fact that Mr. Hansen could not have closed the plant by himself, the government has argued that he nonetheless caused the CWA and RCRA violations, or conspired to commit them, by concealing information from the Board about the number of excursions at the Brunswick plant, thereby duping the Board into continuing operations at Brunswick. The government's only evidence at trial to support this theory was the immunized testimony of James Mathis, who was a Board member, Chairman of LCP's Environmental Committee, and Chairman pro tem of the Board during most of 1993. Mr. Mathis testified that the information Mr. Hansen provided to the Board, "indicated that, really, compliance was not a problem" and that "there were really no excursions of any significance going on." *Id.* at 1238 & n.27. The Eleventh Circuit stated this "evidence indicates that [Mr. Hansen] apparently misled [the Board] into believing that environmental compliance was not a problem." *Id.* Indeed, this seemed to be essentially the closest the appellate court could come to identifying *anything* that in its view could have supported the notion that Randall Hansen was responsible for the environmental excursions in light of the uncontested evidence that closing the plant was a Board and Bankruptcy Court decision.

In fact, however, documents prove that the Board decided to continue operating the Brunswick plant *after* receiving information from *Mr. Mathis* about the number of excursions during the period January 1 to November 11, 1993. Specifically, on November 30, 1993, Mr. Mathis circulated a memorandum to the Board concerning the "Brunswick situation" in which he stated that the "thing that is causing much anguish by GAD-NR is the sporadically high rate of mercury releases since mid-August." (Document attached at Tab A(2).) Mr. Mathis appended a

chart to his memorandum "depicting the releases" from January 1 through November 11, 1993, which reflected a "dramatic worsening of results" beginning in mid-August. The November 30, 1993 memorandum from Mr. Mathis further advised his fellow members of the Board that "[f]ortunately the releases have been low the past several days."¹

After receiving Mr. Mathis's memorandum with data on the year to date mercury excursions at Brunswick, the next day, December 1, 1993, the Board convened during a conference call, and voted not to shut down the plant. In a memorandum to the files dated December 7, 1993 on the subject of the "December 1, 1993 Conference Call with RHansen, RHill, JMcKinney and Board of Directors," A. Patrick Nucciarone, Esq., wrote that, "*[a]fter expressing concern about past permit exceedences*, the Board concluded that it should not shut down the plant until further information developed because of the fact that a plant shut down may exacerbate other environmental problems and may prevent the acquisition by Allied and HoltraChem which are currently funding the plant upgrade and site remediation." (Document attached at Tab A(3).) These documents refute the argument – central to the government's case against Mr. Hansen and the Eleventh Circuit's affirmation– that he caused the violations at Brunswick by concealing information about compliance from the Board, which, in fact, voted to keep the plant operational after receiving such data from Mr. Mathis. Even Judge Amanda Williams visited the site in late 1993, at which time the Georgia DEP withdrew its motion to close the plant, commending LCP on its "extraordinary" efforts to improve compliance.

As the Court is aware from the many letters received prior to Mr. Hansen's sentencing

¹ Documents confirming these facts are attached at Tab A hereto.

hearing, one of Mr. Hansen's numerous character witnesses (who did not testify at trial as such but submitted letters on behalf of Mr. Hansen prior to his sentencing), was Hugh Croom. Mr. Croom, the former Brunswick manager, did testify at trial for the government, as its first witness, but later wrote to the Court asking for leniency for Mr. Hansen. At trial he also testified that Mr. Hansen was "just as concerned as we were about the problems" and "did the best he could to help us." R19-50. After making reductions to the offense levels but reluctantly denying Mr. Hansen's request for a downward departure ("if I knew of an appropriate way to really depart, I would do so."),² the court sentenced him to serve 46 months of incarceration and to pay a \$20,000 fine. Mr. Hansen has paid the fine and served almost a year of incarceration. His sentence was dramatically extended under the Guidelines by the knowing endangerment conviction, for which the evidence at trial was particularly weak, if not directly contradictory:

To minimize the workers' risk of skin irritations and burns, LCP held routine safety meetings, encouraged and received safety inspections, and provided the employees with training, protective equipment to preclude skin contact, and first aid stations and showers to relieve inadvertent contact. All employees, including those assigned to the cellrooms, were authorized to work elsewhere in the plant if they were concerned about their safety.

Hansen, 262 F.3d at 1227. The Eleventh Circuit upheld the conviction on the basis of water having accumulated on the cell room floors (while Mr. Hansen was in New Jersey), and the testimony of the government's expert that the caustic water on the floors could in theory have been fatal if one were to fall in and be unable to get out, and not be taken out by another person (which of course never happened). *Id.* at 1240. Indeed, the one person to testify that he did on

² June 2, 1999 Sentencing Tr. at 78 (excerpts attached as Tab B).

one occasion fall into the sump and come into contact with the caustic water admitted that he simply showered off and returned to work, never reported the incident to the plant nurse, and could not remember the decade in which the incident took place. *Id.* at 1227 n.6.

The judgment became final on June 3, 2002, when the Supreme Court denied Mr. Hansen's petition for a writ of certiorari.

ARGUMENT

I. the supreme court has changed the standard for vicarious corporate officer liability

When an intervening change in law is such that the defendant was punished "for an act that the law does not make criminal," the new rule is entitled to retroactive application. *Davis v. United States*, 417 U.S. 333, 346 (1974). Thus, a conviction that has become final may nonetheless be collaterally attacked on the basis of such a subsequent change in substantive law under 28 U.S.C. § 2255. *E.g.*, *United States v. McKie*, 73 F.3d 1149, 1152-53 (D.C. Cir. 1996).

In *Meyer*,³ the Supreme Court reversed a decision by the Ninth Circuit imposing vicarious liability on a corporate shareholder and officer for an employee's unlawful acts. 123 S. Ct. at 828. The case, which arose under the Fair Housing Act ("FHA"), involved claims against David Meyer, an officer and sole shareholder of Triad, Inc., a real estate corporation. *Id.* A Triad salesman, Grove Crank, was alleged to have prevented the Holleys from obtaining a house for discriminatory reasons. The Holleys sued Meyer, claiming that he was vicariously *civilly* liable for Crank's unlawful actions. The Ninth Circuit recognized that "under general principles of tort

³ The Supreme Court decided *Meyer* on January 22, 2003.

law corporate shareholders and officers usually are not held vicariously liable for an employee's action," but nonetheless interpreted the FHA to impose such liability. *Id.* The Ninth Circuit stated (in language similar to that used to affirm the RCO instruction in this case) that, in his capacity as Triad's sole shareholder and officer, Meyer had (1) "the authority to control the acts" of a Triad salesperson, and (2) "did direct or control, or had the right to direct or control, the conduct" of a Triad salesperson. *Id.* The Ninth Circuit further held that, even if Meyer neither participated in nor authorized the discrimination in question, "that control" or "authority to control" is "enough ... to hold Meyer personally liable." *Id.*⁴

The Supreme Court, in reversing the Ninth Circuit's decision, stated that "traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment." *Id.* at 829. Moreover, absent "special circumstances it is the corporation, not its owner or officer, who is the principal or employer, and thus subject to vicarious liability for torts committed by its employees or agents." *Id.* The Supreme Court further rejected the Ninth Circuit's extension of vicarious liability to corporate officers, stating that it "has applied unusually strict rules only where Congress has specified that such was its intent." *Id.* In the case of the FHA, "Congress said nothing in the statute or in the legislative history about extending vicarious liability" to corporate officers. "And Congress' silence, while permitting an inference that Congress intended to apply

⁴ Similarly, the RCO instruction in this case, directed the jury to find Randall Hansen guilty of knowing endangerment if (1) the violation "occurred under his area of authority and supervisory responsibility"; (2) he "had the power or capacity to prevent the violation"; and (3) he "acted knowingly in failing to prevent, detect or correct the violation." *Hansen*, 262 F.3d at 1252.

ordinary background tort principals, cannot show that it intended to apply an unusual modification of those rules." *Id.* (emphasis added).

The Supreme Court's decision in *Meyer* makes clear that an extension of vicarious liability can occur only where Congress "has specified that such was its intent." This case is even more clear than *Meyer*. Not only did Congress *not* express an intent to impose vicarious liability, it expressed its intent to the contrary. The legislative history for RCRA's knowing endangerment provisions made clear that Congress intended *not* to impose RCRA's strict felony sanctions vicariously and, indeed, that its intent was only to impose liability under the most egregious of circumstances.⁵ Congress expressly stated that it did *not* intend § 6928(e) (the RCRA knowing endangerment provision) to criminalize managerial negligence, that is, omissions based on knowledge that a defendant "should have had, could have had, or would have had under various circumstances." S. Rep. No. 96-172 at 39, *reprinted in* 1980 U.S.C.C.A.N. 5019, 5038. And Congress further stated that it *did not* intend the imposition of criminal liability under § 6928(e) to attach to corporate officers who were "making difficult business judgments" or "for errors in judgment made without the necessary scienter, however dire may be the danger in fact created." *Id.* at 37-39, *reprinted in* 1980 U.S.C.C.A.N. at 5036-5038. One is hard pressed

⁵ Congress understood the difference between permitting a responsible corporate officer to be held liable and how to express its desire that such be permitted. In the Clean Water Act, there are provisions that expressly permit "responsible corporate officers" to be convicted. *See, e.g.*, 33 U.S.C. § 1319(c)(6). By contrast, no RCRA provision contains such language, and, as discussed herein, the legislative history behind RCRA's knowing endangerment provisions demonstrate that it intended such vicarious liability not to attach. Although Mr. Hansen was convicted for Clean Water Act violations also, had he only been convicted on those counts, under the Sentencing Guidelines, he would no doubt have already served out his sentence as of the filing of this petition.

to describe Mr. Hansen's business quandary in 1993 otherwise; while the Board and Creditors decided to keep the plant open, he was hamstrung by bankruptcy proceedings in his ability to fund repairs. Instead, Congress intended the provision for "the occasional case where the defendant's knowing conduct shows that his respect for human life is utterly lacking and it is merely fortuitous that his conduct may not have caused a disaster." *Id.* at 40, *reprinted in* 1980 U.S.C.C.A.N. at 5037-5038. These standards are not only facially in contrast to the evidence at trial but certainly cannot form the basis for the Court to conclude, as it would have to under *Meyer v. Holley*, that Congress clearly expressed its intent that vicarious criminal liability be imposed under this statute on corporate officers rather than on the corporation itself.⁶

This Court itself at sentencing characterized the basis for Randall Hansen's conviction in terms describing negligence rather than the willful conduct that Congress explained was necessary to support a knowing endangerment conviction. For example, the Court stated that "The willful violation of the EPD permits were done without the prior consent or knowledge of [Randall Hansen]." It explained that Randall Hansen "failed to act in an appropriate and reasonable manner when various violations were reported to him... [but] he was notified of these violations after the fact. And his failure to act in a reasonable manner caused further harm to the environment." July 1, 1999 Sentencing Tr. at 6.

These circumstances could not be farther from those described by Congress in creating

⁶ The dearth of cases brought against individuals under this statute reflects the extreme nature of the conduct it was intended to punish. The government was never able to cite to a single case where an individual's conviction under § 6928(e) was upheld under even remotely analogous facts.

the statute under which Randall Hansen was convicted, as described above, and for which conviction he is serving out a lengthy sentence that is inconsistent with the Supreme Court's most recent pronouncement regarding vicarious corporate officer liability in *Meyer v. Holley*. The Court's reasoning in *Meyer* applies with even greater force in the criminal context than the civil context, where the repercussions of extending liability have infinitely greater implications on personal liberties.

**II. THE COURT DID HAVE THE DISCRETION TO GRANT A
DOWNWARD DEPARTURE BECAUSE THE CONDUCT AT ISSUE WAS
"ABERRANT BEHAVIOR"**

At the initial Sentencing Hearing in this matter, the Court indicated that it was particularly troubled by Randall Hansen's case. After hearing testimony regarding Mr. Hansen's exemplary character, family life and past conduct, the Court stated that the letters from friends and evidence before him "describe a life such as your wife did here, something that somehow is foreign to what finally happened here." The Court went on to add that, under those circumstances, "I do not mind saying, if I knew of an appropriate way to really depart, I would do so." June 2, 1999 Sentencing Tr. at 77-78. The Court's observations were, of course, correct. Randall Hansen had an impeccable record of achievement and community service, was a devoted family man with two young children in whose lives he remained intensely involved. Since his conviction, while his appeals were pending, Mr. Hansen devoted much of his time to helping his wife care for her ailing father (who has since passed away during Mr. Hansen's incarceration).

The Court apparently believed that it did not have the discretion to depart under the

Guidelines for conduct that was acknowledged to be "foreign" to Mr. Hansen's prior conduct and character. The Guidelines have since been revised to make clear that a departure based on "aberrant behavior" is appropriate. See Guideline §5K2.20, made effective November 1, 2000. This departure applies when "the defendant's criminal conduct constituted aberrant behavior." This provision applies unless the case involved: "serious bodily injury or death" (this case did not); discharge of a firearm or dangerous weapon by defendant (not applicable); serious drug or drug trafficking offense (not applicable); a defendant with more than one criminal history point (not applicable); or a defendant with a prior felony conviction (none here).

Application Note 2 for §5K2.20 states that "In determining whether the court should depart on the basis of aberrant behavior, the court may consider the defendant's (A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the offense. These factors warranted application of a downward departure in Randall Hansen's case. He had an exemplary record of employment and prior good works. Indeed, the record established that, with his M.B.A. from Harvard University, he had left a more lucrative career path at his father's urging to come to the assistance of LCP while it was in financial straits. Indeed, his cost-cutting actions included cutting his own salary to help raise money to improve plant conditions. It was clear that, as the evidence established at trial and the Court recognized (July 1, 1999 Sentencing Tr. at 5), his motivation was to find a buyer with the resources to handle the environmental and other problems plaguing the plant. Moreover, after the plant was closed, Randall sought funds from the Bankruptcy Court to remediate the conditions and effect a safe shutdown, but those funds

were denied. *Hansen*, 262 F.3d at 1231. He nevertheless was able to secure some funds from the prior owners to do everything possible to mitigate any harm from the plant's operation, though decisions as to expenditures for capital improvements were Board decisions that had to be approved by the Bankruptcy Court. *Id.* at 1227, 1231.

The Court was mistaken that it did not have the authority and discretion to depart from the guidelines. Randall Hansen should be resentenced accordingly.

III. conclusion

For the foregoing reasons,⁷ the Court should vacate the conviction of Randall Hansen under all counts alleging violations of RCRA. Alternatively, the Court should apply the Sentencing Guidelines to reduce his sentence because the conduct alleged was aberrant behavior.

Dated: June 2, 2003

Respectfully submitted,

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⁷ In addition to the argument contained in this Memorandum, Mr. Hansen adopts in support of his Motion, and incorporates by reference as if fully set forth herein, the arguments made in the "Memorandum of Law in Support of Motion Filed Pursuant to 28 U.S.C. § 2255" by Mr. Hansen's codefendant, Christian A. Hansen to the extent that they are applicable to him.

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