

## ***Clean Water Act Conviction Violates Double Jeopardy***

The United States District Court for the Eastern District of Michigan has vacated the conviction on one of four criminal counts brought against the former superintendent of a wastewater treatment plant because the conviction violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

Michael Kuhn is the former superintendent of the Bay City Wastewater Treatment Plant where he directed the clean-out of a large cement tank used in the wastewater treatment process. During Kuhn's criminal trial, the government presented evidence that Kuhn had ordered plant workers to discharge the sludge and debris generated by the clean-out directly to the Saginaw River. In addition, the government also presented evidence that, on another occasion, Kuhn instructed a laboratory technician at the plant to falsify certain information in a Discharge Monitoring Report for the plant, which Kuhn subsequently certified as true and submitted to the Michigan Department of Environmental Quality.

Kuhn was charged with, and convicted of, the following four criminal violations of the federal Clean Water Act ("CWA"): (1) knowingly causing the disposal of sewage sludge without a permit; (2) knowingly discharging a pollutant from a point source without a permit; (3) knowingly causing a false statement in a report required to be maintained under the CWA; and (4) knowingly certifying a false statement in report required to be submitted under the CWA. Following his trial, Kuhn argued that these convictions violated the Double Jeopardy Clause.

The Double Jeopardy Clause provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” This clause protects individuals from successive trials and from multiple punishments for the same offense. The Supreme Court has held that the test for determining whether double jeopardy prohibits multiple punishments “focuses on the statutory elements of the two crimes with which the defendant has been charged, not on the proof that is offered or relied upon to secure a conviction. . . . If each [offense] requires proof of a fact that the other does not, the [test] is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.”

Kuhn argued that double jeopardy prohibited separate punishments for Counts 1 and 2 because they arose out of the same conduct – pumping the sewage sludge into the Saginaw River. The court reviewed the underlying statutory language for each count and determined that they both required proof of six elements. The court summarized the six elements of Count 1 as “(a) knowingly, (b) disposing, (c) of sewage sludge, (d) from a treatment works, (e) which would result in a pollutant from sewage sludge entering navigable waters, (f) without, or in violation of, an NPDES permit.” The court summarized the six elements of Count 2 as “(1) knowingly, (2) discharge, (3) a pollutant, (4) from a point source, (5) into a navigable water of the United States, (6) without, or in violation of, an NPDES permit.” Because the first and last elements of each count were the same, the court compared the remaining four elements in order to determine whether each count requires proof of a fact that the other does not.

First, the court determined that the terms “discharge” and “disposal” were the same for purposes of double jeopardy. The court based this determination on the

definitions of those terms contained in the CWA and in other analogous federal environmental statutes. Second, the court determined that the terms “sewage sludge” and “pollutant” were synonymous because the CWA’s definition of “pollutant” expressly includes “sewage sludge.” Third, the court determined that a “treatment works” was the same as a “point source” because the definitions of both terms include pumps, such as the one used by Kuhn to discharge sludge from the tank. Fourth, the court determined that a discharge “into a navigable water of the United States” requires the same proof of facts as a disposal that “would result in any pollutant from sewage sludge entering navigable waters.” Thus, the court held that Counts 1 and 2 required the same proof of facts and, accordingly, a conviction under both counts violates the Double Jeopardy Clause.

Kuhn further argued that his convictions on Counts 3 and 4 also violated the Double Jeopardy Clause. The court, however, distinguished Counts 3 and 4, noting that Count 3 charged that Kuhn “caused” an employee to falsify a Discharge Monitoring Report, while Count 4 charged that Kuhn, himself, knowingly certified that report as true. The court held that procuring a false report, and later certifying that same report as true, constituted two separate, punishable criminal acts consistent with the Double Jeopardy Clause. Accordingly, the court upheld Kuhn’s convictions on Counts 3 and 4.

*United States v. Kuhn*, No. 99-20060-BC (E.D. Mich., Sept. 24, 2001)

Jeffrey L. Woolstrum