

## **Damning Discharge: Negligence can mean prison under the clean water act**

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The 9<sup>th</sup> U.S. Circuit Court of Appeals held last month that the ordinary negligence standard of “failure to use reasonable care” – instead of a criminal “gross negligence” standard – applies in Clean Water Act criminal cases, affirming the six-month prison sentence of Edward Hanousek. *United States v. Hanousek*, 99 Daily Journal D.A.R. 2590 (9<sup>th</sup> cir. March 19, 1999). It was a 2-1 decision, but the dissent was not published; a footnote stated that Judge Tom Stagg “intends to file a separate dissenting opinion.”

The decision is the latest chapter in a continuing 9<sup>th</sup> Circuit saga involving the interpretation of the criminal provisions of the Clean Water Act. Each chapter blurs any distinction between criminal and civil liability, and the ending for each chapter is never a surprise – prison sentences are affirmed.

For example, last December the 9<sup>th</sup> Circuit held that a corporate officer can be criminally convicted under the Clean Water Act if the officer has the *authority* to exercise control over the company activity causing the discharges, regardless of whether the officer in fact exercised such authority or whether the corporation expressly vested a duty in the officer to oversee the activity. *United States v. Iverson*, 162 F.3d 1015 (9<sup>th</sup> Cir. 1998). As a result of this interpretation, defendant Thomas Iverson remained in prison to serve his year-long term.

Several years earlier, the 9<sup>th</sup> Circuit held that to “knowingly violate” the Clean Water Act required only that the defendants were aware that they were discharging pollutants, not that they knew they were violating the terms of a statute or permit. *United States v. Weitzenhoff*, 35 F.3d 1275 (9<sup>th</sup> Cir. 1993). That decision affirmed prison sentences of 21 and 33 months for two sewage treatment plant operators.

The latest case focuses on Edward Hanousek, a “roadmaster” employed by the Pacific & Arctic Railway and Navigation Co. Under his employment contract, Hanousek was responsible “for every detail of the safe and efficient maintenance and construction of track, structures and marine facilities of the entire railroad...and [was to] assume similar duties with special projects.”

One of Hanousek’s special projects was an Alaskan rock-quarrying project on an embankment 200 feet above the Skagway River. The project involved blasting rock outcroppings alongside the railroad, working the fractured rock toward the railroad cars and loading the rock onto the cars with a backhoe. Pacific & Arctic hired Hunz & Hunz, a contracting company, to provide the equipment and labor for the project.

At the project site – known as “6-mile” – a high-pressure oil pipeline (owned by Pacific & Arctic’s sister company) runs parallel to the railroad at or above ground level within a

few feet of the track. On Oct. 1, 1994, Shane Thoe, a Hunz & Hunz backhoe operator, used the backhoe to load a train with rocks. After the train left, Thoe noticed that some fallen rocks had caught the plow of the train as it left and were deposited just off the tracks in the vicinity of the unprotected pipeline. Thoe moved the backhoe off the work platform and used the backhoe bucket to sweep the rocks from the tracks – and struck the pipeline. The pipeline ruptured, and an estimated 1,000 to 5,000 gallons of oil were discharged over the course of many days into the Skagway river.

Hanousek was charged with negligently discharging a harmful quantity of oil into a navigable water of the United States in violation of the Clean Water Act. 33 U.S.C. Sections 1319 (c)(1)(A) and 1321 (b)(3). He was also charged with conspiring to provide false information, in violation of 18 U.S.C. Sections 371 and 1001, to the Coast Guard officials who investigated the incident. M. Paul Taylor, an officer of Arctic & Pacific, was charged with the same crimes, as well as making false statements.

After a 20-day trial, the jury convicted Hanousek of discharging a harmful quantity of oil but acquitted him on the charge of conspiring to provide false information. The jury acquitted Taylor of all charges except two counts of making false statements in violation of 18 U.S.C. Section 1001.

On appeal, Hanousek's principal argument was that the district court erred by failing to instruct the jury that the government had to prove that Hanousek acted with criminal negligence, as opposed to ordinary negligence.

The Clean Water Act provides that any person who "negligently violates" Section 1321 (b) (3) shall be punished by fine, imprisonment or both, and that section proscribes the actual discharge of oil in harmful quantities into navigable waters of the United States. The term "negligently" is not defined in the Clean Water Act, so the 9<sup>th</sup> Circuit concluded that the ordinary meaning of the word should be used. Citing Black's Law Dictionary and the Random House College Dictionary, the court concluded that the ordinary meaning of "negligently" was a failure to use "such care as a reasonably prudent and careful person would use under similar circumstances."

The court found particularly significant the fact that the Clean Water Act contains a section that provides for increased civil penalties for violations resulting from "gross negligence or willful misconduct." 33 U.S.C. Section 1321(b)(7)(D). Hanousek argued that Congress could not have intended to distinguish "negligently" in 33 U.S.C. Section 1319(c)(1)(A) from "gross negligence" in 33 U.S.C. Section 1321(b)(7)(D) because the phrase "gross negligence" was added to the statute in 1990.

The court rejected that argument, noting that Congress is presumed to have known of the former legislation and to have passed new laws in light of the provisions of the legislation already enacted. Thus, the court concluded that Congress intended that a person who acts with ordinary negligence may be subject to criminal penalties.

Hanousek also argued that the Clean Water Act violated the due process clause of the Constitution by imposing an ordinary negligence standard for a criminal violation. But the majority rejected that argument as well, noting that the court had decided that the criminal provisions of the Clean Water Act constitute public-welfare legislation. See *Weitzenhoff*. And the court noted that it was well established that a public-welfare statute may subject a person to criminal liability for ordinary negligence without violating due process.

The court cited a number of cases dating back to 1922 in which the Supreme Court concluded that “where one deals with others and his mere negligence may be dangerous to them, as in selling diseased food or poison, the policy of the law may, in order to stimulate proper care, require the punishment of the negligent person though he be ignorant of the noxious character of what he sells.” *United States v. Balint*, 258 U.S. 250(1922).

Hanousek sought to distinguish *Weitzenhoff*, arguing that the defendants in that case were permittees under the Clean Water Act, whereas Hanousek was a roadmaster charged with overseeing a rock-quarrying project. He was not a Clean Water Act permittee, he argued, and thus not in a position to know what the law required under the Clean Water Act. But the court concluded it was a distinction without a difference. Although Hanousek was not a permittee, he was aware that a high-pressure pipeline ran close to the surface next to the railroad tracks at 6-mile, and should have been alerted to the probability of strict regulation.

Hanousek also argued that the district court erred by failing to instruct the jury that he could not be found vicariously liable for the negligence of Thoe, the backhoe operator. But the court concluded that the district court’s instructions adequately explained that Hanousek could be convicted only on the basis of his own negligent conduct and not on the basis of the negligence of others.

Hanousek also argued that the prosecutor invited the jury to convict on a theory of vicarious liability in closing argument when he stated that “when Shane Thoe hit that unprotected pipeline and that oil fired out of that pipeline, sprayed up into the air, and got into that Skagway River, these two defendants are guilty of negligent discharging [oil] into the Skagway River.” The prosecutor also said “the buck stops” with Hanousek and Taylor.

But the court concluded that when read in context, the prosecutor was appropriately arguing to the jury that Hanousek and Taylor failed to adequately protect the pipeline and that both should be held responsible for their negligent conduct. The court noted that when work initially began, Hunz & Hunz covered the pipeline with railroad ties, sand and ballast material to protect the pipeline, but, after Hanousek took over responsibility for the project a month later, no further sections of the pipeline along the work site were protected.

The *Hanousek* decision serves as a warning for supervisors and others working around water: Be careful, because ordinary negligence could mean prison.