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Criminal Enforcement of the Clean Water Act in the Coal Fields: United States v. Law and beyond

Phillip B. Scott
*Southern District of West Virginia*

S. Benjamin Bryant
*Southern District of West Virginia*

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CRIMINAL ENFORCEMENT OF THE CLEAN WATER ACT IN THE COAL FIELDS: UNITED STATES v. LAW AND BEYOND

PHILLIP B. SCOTT
S. BENJAMIN BRYANT*

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I. INTRODUCTION

Criminal prosecution has become an integral part of federal enforcement of this nation's environmental laws. In fiscal year 1991, the United States Environmental Protection Agency (EPA) reported record criminal fines.1 From 1987 to 1991, prison time and criminal fines

* Phillip B. Scott and S. Benjamin Bryant are Assistant United States Attorneys for the Southern District of West Virginia. The opinions expressed in this Article are those of the authors and not those of the United States Department of Justice. The authors would like to thank Pamela Hudson, Paralegal Specialist, and Syvonne Carlson, Secretary, for their work on this Article. The authors also acknowledge the many people who reviewed or otherwise helped in the Article's preparation.

1. Frank E. Allen, Few Big Firms Get Jail Time for Polluting, WALL ST. J., Dec. 9,
imposed in cases investigated by EPA more than quadrupled. Many commentators have noted, often with chagrin, the trend toward more frequent criminal prosecution.

The reasons for this upsurge are both straightforward and compelling. One is society’s recognition that those who illegally despoil our environment for financial gain must be severely punished. In a survey taken by the United States Department of Justice (DOJ) in 1984, the

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public ranked environmental crimes as more severe than both armed robbery and heroin smuggling. In the past decade, the major federal environmental statutes have been systematically amended to add stiffer criminal penalties. The citizenry has demanded action.

The second and more compelling reason for prosecution is the dramatic deterrent effect that these cases can have. While civil fines undoubtedly affect corporate behavior, too often they can be dismissed as just another cost of doing business. As former Attorney General Richard Thornburgh recognized, "We are finding that nothing so concentrates the mind of responsible management upon the environment as our putting their own pocketbooks and persons in jeopardy. Indeed, the sudden realization that culpable mismanagement might actually result in jail time concentrates such minds even more." In the more colorful words of one commentator, environmental prosecutions force corporate executives to face the "sorts of penalties that make pin-striped decision makers go pale." Moreover, these prosecutions can be controversial—focusing public attention on environmental issues in general and, more specifically, on the policy of actually jailing persons for environmental crimes.


8. Probably the most famous example of this phenomenon is United States v.
The recent case of United States v. Law\(^9\) is a prime example.\(^{10}\) Lewis R. Law, owner of Mine Management, Inc., was convicted for felony violations of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA).\(^{11}\) Law was sentenced to two years in prison, and he and his small company, which was also convicted, were assessed a total of $160,000 in fines.\(^{12}\) The case and the resultant strong penalties touched off a spirited public debate over the propriety, and, for that matter, the legality of the prosecution.\(^{13}\) The National Review, a noted conservative publication, charged that the theory of prosecution “appears to be a complete perversion of the principles of common law.”\(^{14}\) Ben Greene, President of the West Virginia Mining and Reclamation Association called the sentence “a travesty of justice .. . . the furthest extreme of anything in this whole broad category of environmental affairs.”\(^{15}\) How is that for spirited debate?

The Fourth Circuit’s affirmance of the convictions in Law should put the National Review and Mr. Greene at ease.\(^{16}\) Regardless, the

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Pozsgai, 897 F.2d 524 (3d Cir.), cert. denied, 498 U.S. 812 (1990). In Pozsgai, the defendant, after repeated warnings from environmental officials, placed clean fill material on five acres of his own property that were protected as wetlands under the Clean Water Act (CWA). The property had previously been used as a dump site. Pozsgai was convicted of felony violations of the CWA and sentenced to three years in jail and fined $202,000. Because of the defendant’s inability to pay, the fine was ultimately reduced to $5,000. 22 Envtl. L. Rep. (Envtl. L. Inst.) 20,772 (E.D. Pa. 1992). The public outcry both for and against the prosecution brought the issues of environmental prosecution and the federal government’s regulation of wetlands to the forefront of public discussion. See Adler & Lord, supra note 3, at 784-86; Marzulla & Kappel, supra note 3, at 215-16.


10. A word of caution: the authors represented the United States both at trial and on direct appeal in Law. This experience obviously informs and influences our evaluation of the case’s importance.


12. Law, 979 F.2d at 978.

13. See Paul Nyden, Judge to Spell Out Pollution Sentence: Defendant Says That He’s a Fall Guy, CHARLESTON GAZETTE, Jan. 16, 1992, at 1C; Paul Nyden, Engineer to Remain Free During Appeal of Felony Water Pollution, CHARLESTON GAZETTE, Apr. 2, 1992, at 10A.


15. Paul Nyden, Man to Begin Sentence for Polluting, CHARLESTON SUNDAY GAZETTE-MAIL, Dec. 6, 1992, at 12A.

16. Such is certainly not the case, however, at least insofar as the NATIONAL REVIEW
publicity surrounding the prosecution has focused the attention of the public, as well as that of legal commentators, on the importance of CWA compliance in the coal fields. Likewise, the devastating and, thus far, intractable problem of the acid mine drainage (AMD) attendant to coal mining is once again in the limelight. We believe the case signals the next step in CWA enforcement in the coal fields and should lead to better CWA compliance. Ideally, the result will be real progress in addressing the AMD problem.

This Article sets forth the bases for these beliefs. After a brief review of the AMD problem in Appalachia and the CWA in general, the Article will focus in some detail on the facts in Law. A complete understanding of those facts illuminates the court’s decision and will, we believe, dispel the seemingly uninformed criticism of the case. Next, Law’s import both for the CWA and for CWA enforcement are discussed. Finally, we will chart what we see as the future of the CWA in the coal fields.

II. AMD Problem

 Quite possibly the most adverse environmental consequence of bituminous coal mining is the generation of AMD. Appalachian is concerned. Upon hearing of the court’s decision, Peter Samuel expressed his view that Mr. Law was the victim of “unscrupulous prosecutors just out for scalps for display to appease environmental zealots.” Peter Samuel, Letters, Nat’l Rev., Feb. 1, 1993, at 4. The NATIONAL REVIEW then called for a presidential pardon of Law, maintaining that imprisonment of “so-called” ‘environmental criminals,’” such as Law, was an injustice rising to the level of “a serious human rights problem.” Public Enemies, Nat’l Rev., Feb. 1, 1993, at 16, 17.

17. See infra notes 22-41.
18. See infra notes 43-57.
20. See infra notes 92-121.
21. See infra notes 122-145.
coals and their related overburden frequently contain sulfur in the form of iron sulfide minerals. Once these strata are disturbed by mining, the sulfide minerals are exposed to oxygen and water and an acid-forming chemical reaction is triggered. The sulphur reacts with oxygen and water to form sulfuric acid. The resulting acidic solution generally lowers the pH of streams and raises the amount of ionized metals in solution. In particular, as a direct result of this reaction, large amounts of soluble iron are generated.

The effects of this bit of elementary chemistry have been widespread and devastating to the streams of the coal fields. A 1969 study determined that at least 10,000 miles of streams had been degraded by AMD. The increased acidity of Appalachian waters has increased water treatment costs, corroded bridge supports, locks, dams, and water treatment facilities, and proven deadly to aquatic life. The iron

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24. One method of determining the acidity of water is by measuring its hydrogen ion concentration, symbolized as "pH". Technically, "pH" is the negative logarithm of the effective hydrogen ion concentration in gram equivalents per liter. WEBSTER'S NINTH NEW COLLEGE DICTIONARY 880 (1988). A pH value of seven is neutral, with values of less than seven being exponentially more acidic and values of seven to fourteen being exponentially more basic. For example, an aqueous solution with a pH of four is ten times more acidic than a solution with a pH of five but only one-tenth as acidic as a solution with a pH of three. See generally WILLIAM L. MASTERTON ET AL., CHEMICAL PRINCIPLES 400-427 (5th ed. 1981).

28. McGinley & Sweet, supra note 22, at 69-70; Hill & Bates supra note 23, at 7-8;
eventually settles out of the streams as "yellow-boy," smothering streambeds and all that live there.\textsuperscript{29}

The cost of remedying the AMD problem has been estimated in the billions.\textsuperscript{30} The aesthetic loss is immeasurable. In the words of another, "[n]owhere is the human cost of water pollution more apparent than along the banks of the red, silt-choked streams of the Appalachian coal fields."\textsuperscript{31}

A unique aspect of AMD is that, unlike other industrial pollution sources, it continues long after operations have ceased.\textsuperscript{32} So long as the sulfide bearing strata remain exposed to oxygen and water, AMD will be generated; so long as this drainage reaches streams, AMD pollution will continue.\textsuperscript{33} The continuous nature of AMD is the root of Appalachia's stream quality problem. It has been estimated that as much as seventy-eight percent of AMD is caused by post-mining discharges.\textsuperscript{34}

This unique characteristic also explains why, thus far, the CWA and the federal Surface Mining Control and Reclamation Act of 1977 (SMCRA)\textsuperscript{35} have had only limited success in ameliorating the AMD problem. Both SMCRA and the CWA, as enforced, have required ongoing mining operations to treat AMD discharges.\textsuperscript{36} Moreover, to combat the perpetual nature of AMD, SMCRA requires reclamation of the surface effects of mining. Also, all surface mining operations are

\begin{tabular}{l}
Baker, \textit{supra} note 23, at 23 n.22. \\
29. Bryan, \textit{supra} note 22, at 194-95; McGinley \& Sweet, \textit{supra} note 22, at 69; Baker, \textit{supra} note 23, at 23. \\
32. Hill \& Bates, \textit{supra} note 23, at 6. \\
33. McGinley \& Sweet, \textit{supra} note 22, at 70. \\
36. The CWA regulates all discharges of pollutants from point sources into waters of the United States. \textit{See infra} notes 40-53. The SMCRA requires all surface discharges from mining operations to be treated per CWA standards. 30 C.F.R. § 816.42 (1992).
\end{tabular}
required to be designed to prevent continuous gravity-driven post-mining discharges of AMD.\textsuperscript{37} However, the problem of AMD from thousands of abandoned mine sites has been left largely unaddressed.

By its plain language, the CWA regulates discharges whether from active or abandoned mine sites; however, CWA compliance efforts have focused on active sites.\textsuperscript{38} SMCRA’s reclamation requirements apply only to mines active after August 3, 1977.\textsuperscript{39} SMCRA also established an Abandoned Mine Reclamation Fund to clean-up older abandoned mining sites.\textsuperscript{40} However, the fund does nothing to regulate AMD discharges prior to reclamation. Also, many abandoned sites do not qualify for the fund or have not yet been reclaimed.\textsuperscript{41}

This regulatory gap may now be closing. The Law prosecution and regulations promulgated pursuant to the most recent amendments to the CWA (which are discussed below)\textsuperscript{42} both deal with abandoned mine operations. Both also foretell increased AMD enforcement efforts.

\section*{III. THE CLEAN WATER ACT}

The CWA was extensively overhauled in 1972 to create the comprehensive water pollution control system in place today.\textsuperscript{43} Congress declared the statutory objective to be the restoration and maintenance of the “chemical, physical, and biological integrity of the Nation’s waters”\textsuperscript{44} and established as its lofty goal the complete elimination of discharges of pollutants into navigable waters.\textsuperscript{45}

\begin{thebibliography}{9}
\bibitem{42} See infra notes 122-42.
\end{thebibliography}
To this end, the CWA established a comprehensive program for regulating water pollution, the "cornerstone" of which is the National Pollutant Discharge Elimination System (NPDES) permit program.\(^\text{46}\) The program regulates all discharges of pollutants from "point sources,"\(^\text{47}\) establishing limits on the amount of pollutants that can be released from a point source.\(^\text{48}\) A "point source" is defined in the CWA as "any discernable, confined and discrete conveyance . . . [such as a pipe, ditch, or discrete fissure] from which pollutants are or may be discharged."\(^\text{49}\) Discharges not from point sources lie outside the NPDES permit program.\(^\text{50}\)

The CWA makes it illegal for any person\(^\text{51}\) to discharge\(^\text{52}\) a pollutant\(^\text{53}\) from a point source into a navigable water of the United States,\(^\text{54}\) unless that person has a NPDES permit and the discharge is


54. This means waters of the United States, 33 U.S.C. § 1362(7) (1988), and includes waters that do not meet the traditional tests of navigability. In fact, the CWA applies to all
in compliance with the permit. Both civil and criminal penalties are established for those persons who violate the strict prohibition against unpermitted discharges. In particular, the CWA was amended in 1987 to make it a felony for any person to:

1) knowingly
2) discharge
3) a pollutant
4) from a point source
5) into a navigable water of the United States
6) without a NPDES permit.

In Law, the defendants were convicted of sixteen violations of this prohibition. The discharges were AMD and came from water collection and treatment ponds associated with an abandoned coal operation. A detailed review of the specifics of the site will shed light on Law's applicability to the abandoned mine site AMD problem prevalent throughout the coal fields.


56. This is a general intent standard. The United States does not have to prove that a defendant had a specific intent to violate the CWA. It is sufficient to prove only that a defendant knew that he was discharging some noninnocuous effluent, regardless of whether or not that defendant was aware of the proscriptions of the CWA. See generally United States v. Dee, 912 F.2d 741, 745-46 (4th Cir. 1990), cert. denied, 111 S. Ct. 1307 (1991) (interpreting RCRA). Simply put, in the environmental arena, "ignorance of the law is no defense." Id. at 745 (citing United States v. International Minerals & Chem. Corp., 402 U.S. 558, 563 (1971)). The law has taken this seemingly unforgiving course because whenever "dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." International Minerals, 402 U.S. at 565.

IV. THE FACTS OF LAW

In 1977, Law, a real estate broker with a background in engineering, formed Mine Management, Inc. (MMI) to engage in various business activities related to the coal industry. Shortly thereafter, MMI leased the right to recover coal from slurry ponds and refuse piles on property owned by the New River Company located at Summerlee, Fayette County, West Virginia. In April 1980, MMI purchased 241 acres of the surface of this site from New River Company. The conveyance included an aged coal preparation plant, several buildings (including the old "company store"), various ponds, and coal refuse piles. In the deed to the property, MMI also assumed:

any and all liability, present and future, excluding any liability for any action or proceeding presently pending in any Court of record, Magistrate’s Court, or any administrative tribunal in this State, for all environmental and safety matters, including but not limited to, air pollution, water pollution... arising out of the ownership or use of the property conveyed, which includes all possible future claims that may be asserted by... [designated state and federal agencies].

For a number of years after the purchase, MMI leased the property to a series of companies for the purpose of engaging in coal related activities. At one point, one company subleased "the abandoned refuse pile" to "reprocess" coal from it. However, no coal was taken from the pile and no coal related activity had been conducted on the site for several years prior to the federal criminal trial.

59. J.A., supra note 58, at 497-501 (Certificate of Incorporation for Mine Management Inc.). Mr. Law was the only officer and sole shareholder of MMI since its inception. J.A., supra note 58, at 377. All acts of MMI in this matter were those of Law himself. Id. 378-79.
60. Id. at 69-71, 311-12, 502-09.
61. Id. at 510, 514-20.
62. Id. at 517.
63. Id. at 303, 525-27, 530.
64. Id. at 530.
The history of the Summerlee site is fairly typical of abandoned coal mining sites in West Virginia. The New River Company operated a deep mine, known as the Lochgelly mine, at the site for many decades. Coal mining activities of various types had been conducted, at different times, on property adjacent to the Summerlee site. For many years, New River Company also operated a coal preparation plant that was used to process coal from the Lochgelly mine, as well as coal transported to the site by rail and truck from other mines. Refuse from coal processing was dumped at the site, resulting in a refuse, or gob pile, covering approximately 100 acres of surface, averaging 100 feet in depth, and filling three valleys on the side of the mountain. Coal from numerous mining sites and seams were processed at the preparation plant; consequently, the refuse pile contained refuse and coal from varying seams processed by varying coal preparation technologies used over the decades. The headwaters of two creeks, Wolf and Arbuckle, are located near the foot of this large refuse pile. Each creek is a tributary of the New River.

AMD leached from the refuse pile and entered the headwaters of the creeks, primarily draining to Wolf Creek. In order to alleviate this problem, New River Company constructed a collection pond below the foot, or face, of the gob pile on the Wolf Creek side of the mountain. Originally, New River Company merely pumped the AMD collected in the Wolf Creek pond over the ridge and discharged the water, without treatment, into Arbuckle Creek. This was done because the water quality of Wolf Creek, the source for the Town of Fayetteville’s public water system, was of greater concern to authorities than the quality of Arbuckle Creek.

In 1979, in response to heightened enforcement efforts by state authorities, New River Company installed a series of ponds on the Arbuckle Creek side of the mountain to treat the AMD. AMD collected in the Wolf Creek pond was pumped to the Arbuckle ponds,
where it was channeled through a hopper filled with soda ash briquettes. The soda ash reduced the acidity of the water, which then flowed through settling ponds, where, with the pH raised, high concentrations of metals precipitated out of the water and settled in the ponds. From the last settling pond, the treated water was discharged into the headwaters of Arbuckle Creek. Without pumping, the collection pond on the Wolf Creek side would overflow, discharging AMD into Wolf Creek. Figure 1, shown at Appendix A, is a schematic of this treatment system.

Discharges from the system into Arbuckle Creek were authorized under a NPDES permit issued by EPA and a West Virginia Water Pollution Control Permit issued by the State to New River Company. The treatment system and permits were in place when MMI purchased the property in April 1980.

Evidence at trial was conflicting with respect to the ultimate source of the AMD entering the Wolf Creek collection pond. Prosecution experts testified that AMD leached from the face of the huge refuse pile, at least in part, as a result of rain falling on the pile’s largely unreclaimed surface, and the migration of water through the pile. Defense experts countered that the refuse pile did not generate any AMD; rather, the AMD collected in the Wolf Creek pond came from sub-surface springs contaminated as a result of mining activities on properties adjacent to MMI’s site. One engineering study used by the defense claimed the AMD resulted from up-mountain spring water that leached iron from the refuse as it migrated through the pile. Moreover, Law maintained that even if the gob pile produced AMD he had no responsibility to treat it because, as the owner of

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70. Id. at 89-90.
71. This figure is modeled after one found in a report prepared by John Michalovic, a chemist who testified at trial. See id. at 190-216.
72. Since 1982, the West Virginia Division of Environmental Protection (DEP) and its predecessor agencies have been delegated primary authority from EPA to administer the NPDES program. See 40 C.F.R. § 123.62 (1991).
74. Id. at 199-216.
75. Id. at 275-94.
76. Id. at 97-98, 532-34.
only the surface of the property, he had no duty to treat pollutants generated in the subsurface.\textsuperscript{77}

Regardless of the ultimate source of the AMD that found its way into the Wolf Creek collection pond, there was no dispute that MMI and Law failed to operate the treatment system during substantial periods of time from May 1980 through 1991, and consequently AMD entered both Wolf and Arbuckle Creeks.\textsuperscript{78} Likewise, there was no real dispute that the ponds were on the surface and that they constituted point sources under the CWA.\textsuperscript{79}

Beginning as early as late 1980, the West Virginia Department of Natural Resources\textsuperscript{80} repeatedly informed Law and MMI that a NPDES permit was required and any discharges had to be within permissible limits.\textsuperscript{81} State authorities filed civil enforcement actions against MMI in 1984, 1988, and 1991. In 1983, Law was prosecuted in the Magistrate Court of Fayette County, and charged with a misdemeanor violation of the state water pollution statute.\textsuperscript{82} Law was convicted in magistrate court, but, on his appeal to the Circuit Court of Fayette County, the matter was dropped by the prosecuting attorney's office. Despite these urgings by state authorities, neither Law nor MMI ever obtained a NPDES permit.\textsuperscript{83}

In the federal criminal trial, the primary defenses raised concerned the source of the AMD and the location of the collection ponds. Defendants argued that unless the United States could prove that the AMD in their ponds was generated by property under their control, they were not legally responsible to abate the discharges.\textsuperscript{84} They also contended that, prior to the creation of the gob pile, Arbuckle and

\textsuperscript{77} Id. at 444.
\textsuperscript{78} Id. at 135-64.
\textsuperscript{79} Id. at 444-46.
\textsuperscript{80} This agency is the predecessor of the DEP and oversaw the water quality program in West Virginia prior to the creation of DEP.
\textsuperscript{81} J.A., supra note 58, at 151-154, 175-79, 444-46.
\textsuperscript{82} Id. at 31-43, 175-79, 357-60.
\textsuperscript{83} Id. at 153.
Wolf Creeks extended through the area now under the pile.\textsuperscript{85} Consequently, they argued that the ponds were actually parts of the creeks, which creeks were contaminated by AMD from their very source. Thus, their argument concluded, the ponds added no pollutants to the creeks which were not already present, and, consequently, they had no duty to treat the AMD.\textsuperscript{86} As a corollary to these arguments, defendant Law maintained that he did not know of the pollution problem when he bought the property.\textsuperscript{87} On this point, three people testified to the contrary.\textsuperscript{88}

The district court rejected these defenses. Instead, the court instructed the jury that regardless of the original source of the AMD, as owners of the point sources, \textit{i.e.}, the ponds, defendants had a legal obligation not to discharge the pollutant without a NPDES permit.\textsuperscript{89} The court also told the jury that defendant Law’s knowledge of the discharges was what was crucial, not his knowledge of the pollution problem at the time he purchased the property.

So instructed, the jury convicted Law and MMI on sixteen counts.\textsuperscript{90} Subsequently, the Fourth Circuit affirmed.\textsuperscript{91} It is the authors’ belief that the impact of this decision will be felt in the coal fields, and beyond, for many years.

\section*{V. \textit{Law} and the CWA}

The \textit{Law} opinion, remarkable for its brevity, nonetheless makes one thing perfectly clear—the CWA means what it says, even when applied in the context of AMD generated by abandoned coal operations. This message is unmistakable in the Fourth Circuit’s rejection of defendants’ attempts to find defenses to the charges. The opinion’s central teaching—that the plain language of the CWA must be given

\begin{flushleft}
\textsuperscript{85} J.A., supra note 58, at 284-85, 294.  \\
\textsuperscript{86} Def. Br. 23-32.  \\
\textsuperscript{87} J.A., supra note 58, at 328-44, 405-10.  \\
\textsuperscript{88} Id. at 72-73, 114-18, 182-84.  \\
\textsuperscript{89} \textit{Law}, 979 F.2d at 977; J.A., supra note 58, at 489-90.  \\
\textsuperscript{90} J.A., supra note 58, at 20.  \\
\textsuperscript{91} \textit{Law}, 979 F.2d at 978.
\end{flushleft}
full force—will inform application of the statute well beyond the coal fields. This becomes apparent after analysis of the court’s refusal to recognize the proffered defenses.

A. No Requirement of Proof That a Defendant Created the Pollutants

Defendants steadfastly contended that they had no responsibility under the CWA to stop the discharge of pollutants from MMI’s ponds because the United States could not prove that they were the original creators, or generators, of the AMD.\(^9^2\) They based this contention on their evidence that the AMD was not generated on their property. Defendants argued that since they had not “caused” the AMD, they had no duty to stop its discharge.\(^9^3\) To this end, defendants offered jury instructions that would have required acquittals unless the United States proved that they “generated” the pollutants.\(^9^4\) They also requested instructions that, as surface owners, they “had no duty to treat waters contaminated by the property’s subsurface.”\(^9^5\)

The United States took the position that even assuming \textit{arguendo} that the pollutants did originate from property beyond defendants’ control, they were still forbidden to discharge those pollutants without a permit. The United States maintained that this was so because the CWA forbids unpermitted discharges from “point sources” and MMI unquestionably owned the point sources from which the AMD was discharged.\(^9^6\)

The trial court agreed, refusing to give defendants’ proffered instructions. Instead, the jury was told:

[I]t is not a defense to the charge that the water discharged from the point source came from some other place or places before its discharge from the point source. It is not a defense to this action that some, or all, of the pollutants discharged from a point source originated at places not on the

\(^9^2\) Def. Br. 24.

\(^9^3\) Def. Br. 24, 28-29.

\(^9^4\) \textit{Law,} 979 F.2d at 979 n*.

\(^9^5\) \textit{Id.}

In affirming the trial court’s decision, the Court of Appeals made the point as succinctly as possible: “The origin of the pollutants in the treatment and collection ponds is therefore irrelevant. The proper focus is upon the discharge from the ponds into Wolf and Arbuckle Creeks.” This holding is imminently sensible. In fact, to have held otherwise would have fatally undermined the statute.

The CWA does not regulate the generation of pollutants, but rather the addition of pollutants into this nation’s waters. To have adopted defendants’ position would have been to read into the term “discharge” a generation/creation aspect which would have hamstrung the CWA. Taken to its logical conclusion, defendants’ theory that causation (original generation of the pollutants) is inherent in discharge would completely eviscerate the CWA. For example, sewage treatment works, which by definition do not cause or generate the pollutants they discharge, plainly fall under the NPDES permit program. Under defendants’ proposed construction of the statute, such works would no longer be subject to CWA regulation, a result clearly contrary to Congressional intent. For that matter, under defendants’ theory, anyone could discharge pollutants with impunity, as long as those pollutants were generated by someone else. In the coal fields, the CWA could be defeated simply by severing the AMD producing estate, the subsurface, from the AMD discharging estate, the surface. Certainly,

97. Law, 979 F.2d at 979; J.A., supra note 58, at 489-90.
98. Law, 979 F.2d at 979.
100. This is obvious from the numerous provisions of the CWA devoted to such treatment works. E.g., 33 U.S.C. §§ 1281-99 (1988 & Supp. 1991); Shanty Town Assocs. Ltd. Partnership v. EPA, 843 F.2d 782, 785 (4th Cir. 1988).
101. As the district court stated in denying defendants’ motion for acquittal at the end of the United States’ case, “The surface that was purchased certainly includes the treatment facilities and that was, to some extent, operational. And to allow the continued discharge of these pollutants into the streams by saying, ‘Well, I didn’t buy that gob pile’ is just illogical to this Court.” J.A., supra note 58, at 242.
the CWA was not intended to produce results so contrary to its broad remedial purposes.  

To put it another way, the CWA does have a "causation" requirement. However, to "cause" the illegal act under the CWA one does not have to generate pollutants; one merely has to discharge pollutants. In the context of subsurface-generated AMD, this holding, of course, does not mean that a subsurface owner that does not own the surface cannot be prosecuted under the CWA. The federal aiding and abetting statute specifically allows the prosecution of individuals who knowingly "cause" others to violate the law. In the context of general criminal litigation, such prosecutions are common. There is no reason why they cannot be extended to this genre of CWA prosecution. In any event, the Law decision removes all doubt that one is liable for point source discharges—regardless of the original source of the pollutants discharged.

B. A Water Treatment System is a Point Source

The defendants also challenged their convictions on the ground that Wolf and Arbuckle Creeks originated, and were polluted, before entering their collection ponds and, thus, because the ponds added no additional pollutants to the waters, they were not regulated by the CWA. They based this contention on evidence that the original

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103. This is the aspect of the United States case that defendants (and the NATIONAL REVIEW) found so unprecedented in the common law. Precedent, however, is no more distant than the 1977 decision in Commonwealth v. Barnes & Tucker Co., 371 A.2d 461 (Pa. 1977). There, the Supreme Court of Pennsylvania, based in part on the common law theory of public nuisance, ordered a mine owner to abate AMD discharges even though fifty percent or more of the AMD came from other property. Id. at 465-67. In so holding, the court ruled that "[i]t is not the source of the polluted water, but the source of the discharge of the [AMD] into the waters of the Commonwealth with which we are presently concerned." Id. at 466. Similarly, the court rejected a claim of no duty to abate because the nuisance/discharges arose from past activities. Id. at 467.


105. Law, 979 F.2d at 978-79.
headwaters of the stream extended to the area now covered by the gob pile and that their ponds lay in the original streambeds.\(^\text{106}\)

The legal foundation of this argument rested entirely on defendants' analogy of their ponds to power plants and dams. A long line of cases has held that power plants and dams, which merely divert or accumulate waters of the United States, and then release those waters, do not require NPDES permits because they do not physically add pollutants from the outside world into those waters.\(^\text{107}\) This is so even though the operation of these facilities does affect the physical characteristics of the waters.\(^\text{108}\) Moreover, such facilities are not required to remove from the waters the pollutants already contained therein.\(^\text{109}\)

The Fourth Circuit found this analogy unpersuasive, with good reason. The court based its decision on two grounds. First, because the ponds were part of a water treatment system, the waters in them were, by regulation, not waters of the United States.\(^\text{110}\) Thus, by necessary implication, whether those waters originated from Wolf and Arbuckle Creeks was irrelevant because once they entered the treatment system, they ceased to be waters of the United States. Consequently, an unpermitted AMD discharge from either pond into either Wolf or Arbuckle Creeks is an addition of a pollutant into a water of the United States, prohibited by the CWA.\(^\text{111}\) Second, as parts of a water treatment sys-

\(^{106}\) Def. Br. 15, 17, 26-31.


\(^{108}\) See Consumers Power Co., 862 F.2d at 582 (additions of "entrained" fish and other aquatic life); Gorsuch, 693 F.2d at 174 n.57 (changes in dissolved oxygen and mineral content).

\(^{109}\) Appalachian Power Co., 545 F.2d at 1322 (because power plants add no pollutants to cooling water except heat, they cannot be required through a NPDES permit to remove other pollutants already present in the water).

\(^{110}\) Law, 979 F.2d at 979 (citing 40 C.F.R. 122.2(g) (1991)) ("Waste treatment systems, including treatment ponds and lagoons designed to meet requirements of the CWA . . . are not waters of the United States.").

\(^{111}\) See Rayle Coal Co. v. Chief, Division of Natural Resources, 401 S.E.2d 682 (W. Va. 1990). On facts remarkably similar to those in Law, in a case under the West Virginia...
tem, the ponds were, by statutory definition, point sources. Thus, the case was clearly removed from the more ambiguous situations posed by dams or power plants.

Although not relied upon by the court of appeals, the claim that the headwaters of Wolf and Arbuckle Creeks are under the gob pile was untenable for another reason. Any water under the gob pile, i.e., groundwater, would not meet the CWA's definition of a water of the United States, which applies only to surface waters. Consequently, for purposes of the CWA, the Wolf and Arbuckle creeks that defendants polluted no longer extended under the gob pile.

The conclusion that the waters in the ponds were not waters of the United States, although apparently based in part on somewhat technical statutory and regulatory definitions, is nonetheless grounded in good common sense. Discharges of effluent from systems designed to chemically treat pollutants are different in kind from releases of untreated water from a dam or power plant. Again, the implication of the court's holding is clear: if one owns a point source which is discharging pollutants into waters of the United States without a permit, that person is in violation of the CWA regardless of where those pollutants originated.

Water Control Act, W. VA. CODE § 20-5A-1 to -24 (1989 & Supp. 1992), the West Virginia Supreme Court of Appeals rejected the Consumers Power line of authority as "not pertinent because Rayle's ponds added pollutants to the small stream." Id. at 606.

112. Law, 979 F.2d at 979 (citing 40 C.F.R. 122.2 (1991)) ("a 'point source' is [among other things] . . . [a] landfill leachate collection system . . . from which pollutants are or may be discharged").

113. Law, 979 F.2d at 979-80.


115. This fundamental difference reveals one passage of dicta in the court of appeals' decision. In passing, the court noted that the district court's instruction—that it did not matter whether the original source of all the pollutants lied beyond defendant's control—was inaccurate in a stream diversion case. Law, 979 F.2d at 979. As the above discussion makes clear, this was not a stream diversion case. Thus, as given in this case, the lower court's instruction was correct in all respects.
C. Knowledge at Discharge

The Law opinion also sheds light on the knowledge element of criminal violations of the CWA. At trial, defendants intended to elicit certain testimony regarding an alleged policy of the property’s previous owner to conceal environmental problems from prospective purchasers. The thrust of this inquiry was to corroborate defendant Law’s contention that he was unaware of the AMD problem at the time defendant MMI acquired the site. The trial court excluded the evidence.

In affirming, the Fourth Circuit ruled that exclusion of the evidence was proper on relevance grounds. The relevant mens rea is knowledge at the time of discharge, not at the time of acquisition of the point source. Thus, the court made clear that a person’s lack of knowledge of a pollution problem at purchase in no way releases the owner of his duty to either abate discharges or obtain a NPDES permit.

D. Summary

Law stands for the proposition that a property owner’s responsibilities under the CWA are defined by the statute. There are no “inherent” preconditions to those responsibilities such as original production of the pollutants discharged or absolute knowledge of the discharge before purchase of the property. The import of Law for the CWA is that the statute’s terms will be given their full force—even in criminal prosecutions.

What does this mean for CWA enforcement in the coal fields? Regulators and prosecutors now have the answers to questions that have plagued them for years. First, it is now beyond dispute that surface land owners are liable under the CWA for AMD discharged from point sources on their property. This is so even if the AMD is gener-

116. Law, 979 F.2d at 980.
118. Law, 979 F.2d at 980.
ated from abandoned sites or from subsurface property or other surface property in which the landowners have no interest. Moreover, these persons are subject to regulation even though they may not have fully appreciated the pollution problem at the time they purchased the property. And, as Law makes clear, a knowing dereliction of these obligations can result in serious criminal penalties. Regulators now have the tools necessary to combat the AMD problem head on.

VI. THE FUTURE OF CRIMINAL ENFORCEMENT IN THE COAL FIELDS

Criminal prosecution sits atop a pyramid of enforcement mechanisms, all of which are geared to achieve one goal—full and voluntary compliance with the law. Thus, any discussion of criminal enforcement must necessarily encompass the noncriminal enforcement regime. In the wake of Law, regulatory and civil enforcement in the coal fields will undoubtedly increase.

It is evident that the West Virginia Division of Environmental Protection (DEP) views Law as precedent for increased enforcement of the CWA. Dr. Eli McCoy, Chief of the Water Resources Division of DEP has warned prospective property buyers that, "[i]f you buy a piece of property that has a source of pollutants on it, you have to take responsibility for that land." Relying upon Law, DEP Director David C. Callaghan has directed the issuance of orders requiring surface owners to treat AMD.


119. Law, 979 F.2d at 979-80.
120. Id. at 980.
121. Id. at 978.
122. Paul Nyden, Water Polluter's Precedent-Setting Jail Term to Begin, CHARLESTON SUNDAY GAZETTE-MAIL, Mar. 15, 1992, 10A.
123. Preston Mine Owners Fight State Order, CHARLESTON DAILY MAIL, Sept. 28, 1992, at 12A.
1990, EPA issued final NPDES Application Regulations for Storm Water Discharges. These regulations require, that point source discharges of storm water "associated with industrial activity" be permitted under the NPDES program. Such discharges include those from "areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water." Specifically, the NPDES permit requirement applies to "active or inactive mining operations" that discharge "storm water contaminated by the contact with or that has come into contact with, any overburden, raw material, intermediate products, finished products, byproducts, or waste products located on site of such operations." "Inactive mining operations" are defined as "mining sites that are not being actively mined, but which have an identifiable owner/operator." Such inactive operations do not include those mine sites satisfactorily reclaimed under SMCRA.

EPA intended these regulations to answer many of the questions that have plagued CWA enforcement to abandoned mine sites. The definition of point source is intended to be the "broadest possible . . . consistent with the legislative intent of the CWA and court interpretation to include any identifiable conveyance from which pollutants..."

127. "Storm water discharge associated with industrial activity" means the discharge from any conveyance which is used for collecting and conveying storm water and which is directly related to manufacturing, processing or raw materials storage areas, or an industrial plant." 40 C.F.R. § 122.26(b)(14) (1991).
130. "Overburden means any material of any nature, consolidated or unconsolidated, that overlies a mineral deposit, excluding tropical or similar naturally occurring surface material that are not distributed by mining operations." 40 C.F.R. § 122.26(b)(10) (1991).
131. 40 C.F.R. § 122.26(b)(14)(iii) (1991). This language comports with the mandate of 33 U.S.C. § 1341(e)(2) that a permit is not required for point source discharges of storm water that do not come into contact with overburden, raw materials, or waste products.
132. 40 C.F.R. § 122.26(b)(14)(iii) (1991). "Inactive mining sites" are not those being maintained prior to mineral extraction or where minimal activity is present only to maintain a mining claim. Id.
might enter the waters of the United States.” 134 This definition includes, among other things, naturally eroded gullies carrying surface water runoff from spoil piles associated with a coal mining operation. 135 Moreover, as the court did in Law, EPA has made it clear that, generally speaking, the duty to treat storm water discharges exists “regardless of the initial source of the discharges.” 136 Moreover, because of the serious pollution problem, EPA expressly rejected industry claims that regulation of storm water discharges from inactive sites posed an “unreasonable hardship.” 137 The necessary effect of these new regulations, like that of Law, is to begin to close the regulatory loophole through which AMD has discharged from an untold number of abandoned mine sites for years. Thus far, the regulations have survived industry challenge. 138

In West Virginia, Dr. McCoy has already publicly commented that these new regulations empower DEP to “require permits from owners of old gob piles and poorly reclaimed mines that are creating storm runoff pollution problems.” 139 In McCoy’s words, the regulations “could be the most significant development for the improvement of West Virginia streams in a long time.” 140

In an effort to implement the new regulations in West Virginia, DEP is considering the following guidelines for determining which owners of abandoned mine sites should apply for NPDES permits:

140. Id.
CATEGORY I
Permit Required if 1 is True and Either 2, 3 or 4 is Also True:

<table>
<thead>
<tr>
<th></th>
<th>Description</th>
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<tbody>
<tr>
<td>1</td>
<td>Site contributing pollutants during storm event</td>
</tr>
<tr>
<td>2</td>
<td>Current owner of site same entity that mined the site</td>
</tr>
<tr>
<td>3</td>
<td>Current owner was surface or mineral owner when property was mined</td>
</tr>
<tr>
<td>4</td>
<td>Current owner received financial benefits from the mining that caused the problem</td>
</tr>
</tbody>
</table>

CATEGORY II
May Be Required to Obtain Permit at Some Point if 1 is True and Either 2 or 3 is True:

<table>
<thead>
<tr>
<th></th>
<th>Description</th>
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</thead>
<tbody>
<tr>
<td>1</td>
<td>Site contributing pollutants during storm events</td>
</tr>
<tr>
<td>2</td>
<td>Current owner (land of surface) had no involvement in previous mining operation</td>
</tr>
<tr>
<td>3</td>
<td>Current owner was owner of surface or minerals when originally mined</td>
</tr>
</tbody>
</table>

CATEGORY III
No Need to Apply for Permit if 1 is True:

<table>
<thead>
<tr>
<th></th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>No contribution of pollutants during storm event</td>
</tr>
</tbody>
</table>

141. Letter from Dr. Laidley Eli McCoy, Chief of the Water Resources Division of DEP, to Phillip B. Scott, Assistant United States Attorney, Southern District of West Virginia (Nov. 18, 1992) (on file with author).
These guidelines make clear that enforcement of the storm water regulations will focus on those who created or benefitted from the mining activity that generated the pollutants.

Between the new storm water regulations, the proposed implementation guidelines, and the holding in Law, CWA enforcement in the coal fields may reach a new and unprecedented level. More property owners will be regulated than ever before. As many as 4,000 new sites may potentially require NPDES permits in West Virginia alone.\footnote{142. Id.} Undoubtedly, until the ramifications of these recent developments are fully appreciated, there will be uncertainty and confusion in the regulated community. Enforcement efforts must be geared to educating the public and initiating the permitting process for previously unpermitted sites. Property owners must be encouraged to cooperate in this effort and undertake full compliance with the CWA. Encouraging prompt compliance will be the most efficient way to make immediate and significant gains on the AMD problem.

In this context, criminal enforcement plays a crucial, albeit limited, role. Property owners who come forward, initiating the permitting process in an attempt to comply with the law, should reap the benefit of their good faith. To prosecute these individuals for past discharges would be counterproductive. Deterrence is, as one commentator has put it, the "overarching goal" of environmental prosecution.\footnote{143. Habicht, supra note 6, at 10,480.} To punish those who are making genuine efforts to conform their conduct with the law thus would defeat the very purpose of prosecution.

DEP takes the same view. The agency has devoted two full-time employees to assist businesses and other property owners in coming into compliance with the new storm water discharge regulations.\footnote{144. Susan Williams, Regulations Target Rainwater Runoff, CHARLESTON GAZETTE, Dec. 15, 1992, at 1D, 5D.} Recognizing that the new regulations encompass many who never have been exposed to the permitting process and who may previously have been in violation of the CWA, DEP has decided to encourage property owners to avail themselves of assistance by instructing the two em-

\footnote{142. Id.} \footnote{143. Habicht, supra note 6, at 10,480.} \footnote{144. Susan Williams, Regulations Target Rainwater Runoff, CHARLESTON GAZETTE, Dec. 15, 1992, at 1D, 5D.}
employees not to share information with the agency’s law enforcement personnel.\textsuperscript{145}

Prosecution of those who manifest contempt for regulation, however, must continue to be a top priority. The success of the CWA, like other environmental laws, rests in voluntary compliance by the regulated community. Those who seek to operate outside the system, thumbing their noses at regulatory efforts, must be brought to justice. To ignore such conduct would encourage noncompliance. At a time when the CWA is being extended into the coal fields as never before, the message must go out to the regulated community that intentional disregard of the CWA may have dire consequences. Consequently, in the upcoming years, criminal prosecution will continue to play a significant role in CWA enforcement.

\section*{VII. CONCLUSION}

For the first time, the CWA is now unquestionably poised to address the AMD problem in the coal fields. In Law, criminal enforcement played an important role in solidifying the legal bases for application of the CWA at abandoned mine sites. Recent storm water discharge regulations ensure that regulators will indeed begin to enforce the CWA at many of these locations. Criminal enforcement will most certainly again play an important role in that effort. The end result should be real progress in controlling AMD, one of Appalachia’s most devastating and intractable water pollutant problems.

\textsuperscript{145} Id.
APPENDIX A—SUMMERLEE SITE

Figure 1