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Medical Waste, a Loaded Gun on the Verge of Firing: United States v. Plaza Health Laboratories, Inc.

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NOTES AND COMMENTS

Medical Waste, A Loaded Gun on the Verge of Firing: *United States v. Plaza Health Laboratories, Inc.*[1]

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I. Introduction

"Infectious waste is essentially a loaded gun and should be legally recognized as such . . . . In New York, unlicensed possession of a loaded gun is a felony because it [is] ludicrous to have to follow criminals around until they shoot someone. The same logic certainly must apply to environmental crimes."[2]

The illegal disposal of infectious medical waste first intrigued Americans during the summer of 1987.[3] Throughout that summer, syringes, vials of blood, hypodermic needles, and other medical waste washed up along the shores of the

1. 3 F.3d 643 (2d Cir. 1993), *rev'g sub nom.* United States v. Villegas, 784 F. Supp. 6 (E.D.N.Y. 1991), *cert. denied*, __ U.S. __, 114 S. Ct. 2764 (1994).

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2. Michael Weisskopf, *Hodgepodge of State Laws, Lack of U.S. Statute Abet Medical Waste Problem*, THE WASHINGTON POST, Aug. 10, 1988, at A17 (quoting Brooklyn District Attorney Elizabeth Holtzman's statement to a House subcommittee).

3. *See Medical Waste, Raw Garbage Force N.J. Beaches to Close*, NEWSDAY, Aug. 15, 1987, at 3 (discussing how the beaches along the Atlantic Coast were closed as a result of the presence of a fifty mile long band of hospital waste and raw garbage); Sally Squires, *Local Hospitals Grapple With Waste Problem; Even a Definition of 'Infectious' Proves Elusive*, THE WASHINGTON POST, Aug. 30, 1988, at Z06.

Northeast seacoast.[4] These incidents not only closed many of the beautiful beaches along the coast but, more shockingly, instilled a great public fear of a new health hazard.[5] Geronimo Villegas, co-owner and vice president of Plaza Health Laboratories, Inc., was one of the culprits responsible for the illegal disposal of infectious medical waste into the Nation's waters.[6]

The discharge of a pollutant into the navigable waters of the United States is prohibited unless compliance is achieved under the provisions of the Clean Water Act (CWA).[7] One problematic area is whether pollution is discharged from a point source. In *United States v. Plaza Health Lab., Inc.*,[8] (*Plaza Health*), the United States Court of Appeals for the Second Circuit, in acquitting the defendant,[9] held that, in a criminal context, a person is not a point source under the CWA by virtue of the rule of lenity.[10] The problematic issue in *Plaza Health* was the court's reluctance to broaden the definition of the term "point source" in a criminal prosecution under the CWA. Although *Plaza Health* is well recognized for the Second Circuit's failure to make the logical leap of finding a person to be a point source under the CWA, it must also be noted that the court failed to recognize that the pollutants' discharge resulted from any one of a number of possible "point sources" defined in the CWA. The *Plaza Health* court failed to recognize either the container(s), the vials, the bulkhead, the car, or a human body to be a point source from which Villegas discharged pollutants. Furthermore, since the court should have found that the infected blood was dis-

4. Laura Carlan Battle, Note *Regulation of Medical Waste in the United States*, 11 PACE ENVTL. L. REV. 517, 543 (1994).

5. *See, e.g., supra* note 3.

6. *See* United States v. Villegas, 784 F. Supp. 6 (E.D.N.Y. 1991), *rev'd sub nom.* United States v. Plaza Health Lab., Inc., 3 F.3d 643 (2d Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 2764 (1994).

7. *See* Federal Water Pollution Control (Clean Water) Act (CWA) §§ 101-607, 33 U.S.C. §§ 1251-1387 (1988 & Supp. IV 1994).

8. 3 F.3d 643.

9. *Id.* at 649.

10. The rule of lenity provides that where language in a statute is ambiguous, the ambiguity should be resolved in defendant's favor. *See* discussion *infra* part II.C.4.A.

charged from a point source, it should also have elevated Villegas' punishment to a criminal violation under the CWA's knowing endangerment provision.[11]

The evidence, when viewed in totality, clearly points to one conclusion: Villegas was well aware that some of the blood he discharged into the Hudson River was infected with a deadly virus. The Second Circuit, along with other courts, must look to the general approach of the CWA as a whole, including its objectives, policy, and statutory language, to effectuate the goals of the statute.[12] If courts fail to apply such an approach, the ramifications could pose a serious threat to the safety of the Nation's waters.

This Case Note analyzes the *Plaza Health* decision by examining the relevant statutory provisions and case law, the court's methodology, the flaws of the decision, as well as its conceivable impact. Further, this Case Note proposes a different analysis as to how the *Plaza Health* court should have reached a more favorable decision in light of the goals of the CWA. Part I explores the legislative history and relevant provisions of the CWA, and the pertinent case law. Part II discusses the *Plaza Health* decision, focusing on both the district and circuit courts' decisions, and the convincing Second Circuit dissent. Part III analyzes the Second Circuit's flaws and suggests a basis to find Villegas liable under the CWA. Additionally, Part III proffers the idea that Villegas should have been held in violation of the knowing endangerment provision of the CWA which heightens punishment. Finally, this Case Note outlines other potential ramifications under the *Plaza Health* decision.

II. Background

Prior to the enactment of the Federal Water Pollution Control Act, water pollution control was led by the States while the role of Federal agencies was limited.[13] This ap-

11. *See* CWA § 309(c)(3), 33 U.S.C. § 1319(c)(3).

12. United States v. Gratz, No. 92-141, 1993 WL 19733, at *6-7 (E.D. Pa. Jan. 25, 1993).

13. FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972: GENERAL STATEMENT, S. REP. No. 414, 92d Cong., 1st Sess. 2 (1971), *reprinted in*

proach sought to "'protect the public health or welfare' and 'enhance the quality of water' through adoption and enforcement, primarily by the states, of 'water quality standards'."[14] However, this system proved to be inadequate, since it possessed a limited, unclear scope, suffered from administrative problems, and lacked a permitting process.[15]

Thereafter, it was determined that a nationwide approach, in conjunction with a permit program based on federal minimum effluent criteria enforceable directly against dischargers, would be more successful.[16] Although the proposed legislation initially failed to pass, Congress enacted the Refuse Act Permit Program in 1970 (Refuse Act).[17] This statute, originally designed to protect navigation, prohibited all discharges into navigable waters unless a permit was obtained, thereby requiring industrial dischargers to obtain permits or face the threat of prosecution.[18] Unfortunately, within two years of its enactment, it was clear that the Refuse Act "reached a point of stalemate."[19]

1972 U.S.C.C.A.N. 3668, 3669. Federal agencies were authorized to provide support for research, projects, and financial assistance. *Id.* This standard, derived from the Act of June 30, 1948, Pub. L. No. 80-845, ch. 750, 62 Stat. 1155, was "the first precursor to the present federal water pollution control statute, the Clean Water Act." Russell V. Randle & Suzanne R. Schaeffer, *Water Pollution*, *in* ENVIRONMENTAL LAW HANDBOOK 147 (Timothy A. Vanderver et al. eds., 1994).

14. J. Gordon Arbuckle & Timothy A. Vanderver, Jr., *Water Pollution Control*, *in* ENVIRONMENTAL LAW HANDBOOK 81 (J. Gordon Arbuckle et al. eds., 7th ed. 1983).

15. *Id.*

16. *Id.* at 82.

17. *Id. See* 33 U.S.C. § 407 (1988).

18. Arbuckle & Vanderver, *supra* note 14, at 82. The statute, originally entitled the Rivers and Harbors Act of 1899, is presently known as Protection of Navigable Waters and of Harbors and Rivers Improvements. 33 U.S.C. §§ 401-467 (1987) (originally enacted as Act of March 3, 1899, ch. 425, § 13, 30 Stat. 1151). This statute was designed to prohibit discharges from ship or shore installation(s) into the navigable waters of the United States. 33 U.S.C. § 407. Also, the Act prohibited discharges which had the potential to flow into navigable waters. 33 U.S.C. §§ 401-467.

19. Arbuckle & Vanderver, *supra* note 14, at 82. The permit program had many deficiencies: (1) no permit standards for the grant or denial thereof were promulgated; (2) the Act was inapplicable to the major pollution source: municipal sewers; (3) administration was ineffective; and, (4) the relationship between the Act and the modern environmental statutes was vague. *Id.* Ultimately,

In 1972, over President Nixon's veto, Congress promulgated the Federal Water Pollution Control Act,[20] more commonly known as the Clean Water Act (CWA), seeking to combine aspects of water quality standards and technology-based approaches.[21] The basis of pollution prevention and elimination is achieved by applying effluent limitations, where the program's effectiveness and performance is measured by water quality.[22] The CWA's objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"[23] through national goals and policies by focusing on industrial and municipal dischargers. With the passage of the CWA, Congress placed limits on what industries could discharge and, thus, for the first time, firms were required to use progressive control technology.[24]

To reach these goals and thereby limit discharges, Congress implemented the National Pollutant Discharge Elimination System (NPDES).[25] Under this system, a person must apply for and obtain a permit before discharging pollutants into navigable waters of the United States from any point

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these deficiencies proved to be fatal. *Id.* However, the Act's program is considered a major milestone regarding the regulation of industrial dischargers through the implementation of a permit program. *Id.*

20. CWA §§ 101-607, 33 U.S.C. §§ 1251-1387.

21. FEDERAL WATER POLLUTION CONTROL AMENDMENTS OF 1972: GENERAL STATEMENT, S. REP. No. 414, 92d Cong., 1st Sess. 2 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3675. The Environmental Protection Agency (EPA) set these standards, considering the "technological capability and [the] cost of pollution control technology." Randle & Schaeffer, *supra* note 13, at 148.

22. S. REP. No. 414, *supra* note 13, *reprinted in* 1972 U.S.C.C.A.N. at 3675. Water quality, as opposed to effluent limitations, is not a method of elimination and enforcement. *Id.* The term "effluent limitation" refers to a restriction established by a State or Administrator on quantitative amounts of pollutants which are discharged from point sources into navigable waters. CWA § 502(11), 33 U.S.C. § 1362(11).

23. CWA § 101(a), 33 U.S.C. § 1251(a). *See also* S. REP. No. 414, *supra* note 13, *reprinted in*, 1972 U.S.C.C.A.N. at 3674.

24. Natural Resources Defense Council v. EPA, 915 F.2d 1314, 1316 (9th Cir. 1990). The CWA established "technology-based" limitations; thus, the CWA mandated all sources to employ the "best practicable control technology currently available" to control pollution before permits are issued for any discharge. *See* CWA § 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A).

25. CWA § 402, 33 U.S.C. § 1342. *See also* 40 C.F.R. §§ 122.1, 122.2 (1981).

source.[26] NPDES permits are issued only for discharges of pollutants from point sources.[27] Thus, to establish a violation under the CWA, a plaintiff must show that a defendant: (1) discharged (2) a pollutant (3) into the navigable waters of the United States (4) from a point source (5) without a discharge permit.[28]

A. Terminology

"Pollutants" are biological materials (e.g. medical waste), solid waste, garbage, chemical waste, or industrial waste.[29] The illegal disposal of medical waste has sparked much controversy over the years due to its high-risk nature. Consequently, in 1988, Congress enacted the Medical Waste Tracking Act (MWTA).[30] The MWTA was prompted by the infamous medical waste wash-ups along the shores of the Northeast seacoast during the preceding summer which triggered public fears of a new health hazard.[31] Such wastes consisted of syringes, blood vials, rubber gloves, hypodermic needles, and blood bags.[32] Unfortunately, the MWTA and its implementations expired in June, 1991.[33] Today, the CWA is one of a few statutes governing the disposal of medical waste.[34]

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26. CWA § 301(a), 33 U.S.C. § 1311(a).

27. *Id.* §§ 402, 502(12), 33 U.S.C. §§ 1342, 1362(12).

28. *Id.* §§ 301(a), 502(12), 33 U.S.C. §§ 1311(a), 1362(12). "Navigable waters" refers to the waters of the United States, including the territorial seas. CWA § 502(7), 33 U.S.C. § 1362(7).

29. CWA § 502(6), 33 U.S.C. § 1362(6). Other types of pollutants enumerated in the CWA include equipment, rock, sand, sewage, and cellar dirt. *Id.* However, the term "pollutant" is not limited to what was enumerated in the text of the CWA.

30. Pub. L. No. 100-582, 102 Stat. 2950 (codified as amended in 42 U.S.C. §§ 6992-6992K). The four main features of the MWTA were (1) defining medical waste, (2) providing for a tracking system, (3) information gathering power and requirements, and (4) enforcement capabilities. *Id.*

31. *See supra* notes 3-4 and accompanying text.

32. Battle, *supra* note 4, at 543.

33. *Id.*

34. Other federal statutes governing the disposal of medical waste are the Resource Conservation and Recovery Act (RCRA) §§ 1002-11012, 42 U.S.C. §§ 6901-6922k (1988 & Supp. IV 1994), the Marine Protection Research and Sanctuaries Act (MPRSA) §§ 2-205, 33 U.S.C. §§ 1401-1445 (1988 & Supp. IV

Due to its stature, medical waste is classified as infectious medical waste and defined by the Environmental Protection Agency (EPA) as "pathogens with sufficient virulence and quantity so that exposure to the waste by a susceptible host could result in an infectious disease."[35] More simply, it is waste that is capable of producing infectious disease.[36] Human blood and blood products are included in the infectious waste category under EPA standards.[37] Interestingly, medical waste-related injuries are unlikely to occur when blood is infected with Hepatitis-B or the HIV virus. This is due to the fact that the virus must survive inside a living cell in order to multiply, and removal from that living cell results in the virus' numbers to either remain constant or decline.[38] Thus, viral numbers will never increase outside a living cell.

The CWA defines the "discharge of a pollutant" as "*any* addition of any pollutant to navigable waters from *any point source*."[39] A "point source" is "*any* discernible, confined and discrete conveyance, *including but not limited to* any pipe, ditch, channel, tunnel, conduit, well, discrete fissure,

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1994), and the Clean Air Act (CAA) §§ 101-617, 42 U.S.C. §§ 7401-7671q (1988 & Supp. IV 1994). Both, the CWA and the MPRSA not only protect the integrity of the water, but also prevent beach wash-ups of medical waste. *See* Battle, *supra* note 4, at 555. The CAA specifically addresses the incineration of medical waste. *See* Battle, *supra* note 4, at 559. *See also* CAA § 129(a)(1)(C), 42 U.S.C. § 7429(a)(1)(C). For a more comprehensive understanding of how the CAA regulates medical waste, see Battle, *supra* note 4, at 559.

35. Battle, *supra* note 4, at 524.

36. 40 C.F.R. § 259.10 (1994). *See also* Battle, *supra* note 4, at 524.

37. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GUIDE FOR INFECTIOUS WASTE MANAGEMENT 2-2 (1986).

38. William A. Rutala & David J. Weber, *Infectious Waste-Mismatch Between Science and Policy*, 325 NEW ENG. J. MED. 578 (Aug. 22, 1991).

> [F]or infection to happen a chain of events must occur: a person must come into contact with medical waste; an injury must follow, thereby creating a portal of entry (or a portal of entry must already exist); a sufficient number of viable infectious agents must enter a susceptible host via the portal; infection can then occur, but does not always result in disease . . . . '[A]n infectious organism's ability to survive outside a host varies widely and, consequently, its capability to transmit disease varies greatly, depending on its type and form and environmental factors such as temperature and moisture.'

Battle, *supra* note 4, at 533-34 (citations omitted).

39. CWA § 502(12), 33 U.S.C. § 1362(12) (emphasis added).

container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or *may be* discharged."[40] An addition can occur from or through a point source since EPA regulations define a "discharge of pollutants" to include surface run-off that is collected or channeled by man.[41] The term "point source" has historically caused substantial controversy in decision-making regarding the CWA. These controversies arise due to the lack of guidance from the legislative history and statutory definitions.[42]

The CWA primarily focuses on point source discharges since they are identifiable.[43] For ease of regulation, "point source" alone was included in the definition of "discharge of pollutant."[44] In contrast, "nonpoint source" pollution is not the result of a "discharge" or an "addition," but rather is the result of surface run-off.[45] "Nonpoint sources," although a major source of pollution, are multiple and unidentifiable sources and, thus, difficult to control.[46] "Point sources" are

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40. *Id.* § 502(14), 33 U.S.C. 1362(14) (emphasis added).

41. 40 C.F.R. § 122.2; *See* National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 174-75 (D.C. Cir. 1982) *rev'g* 530 F. Supp. 1291 (D.D.C. 1982).

42. Nowhere in the CWA's legislative history does Congress discuss what it envisioned as a point source. The fact that the statutory language is not precise, in conjunction with the lack of legislative history, gives rise to the present controversies surrounding the term "point source."

43. *Natural Resources Defense Council v. EPA*, 915 F.2d at 1316.

44. *See generally*, Oregon Natural Resources Council v. U.S. Forest Serv., 834 F.2d 842, 849 (9th Cir. 1987) *aff'g and rev'g in part* 659 F. Supp. 1441 (D. Or. 1987).

45. *Oregon Natural Resources Council*, 834 F.2d at 849 n.9. When read in totality, the CWA portrays more than Congress' intent to clean up polluted waters of the United States; it depicts the realization of "economic, technological, and political limits of total elimination of *all* pollution from *all* sources." *National Wildlife Fed'n*, 693 F.2d at 178 (emphasis added).

46. United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979). The *Earth Sciences* court held a discharge from a reserve pump in a gold extraction process was deemed a point source, regardless of whether the "source of the excess liquid [was either] rainfall or snow melt." *Id.* at 374. For a comprehensive analysis of non-point sources, see Daniel R. Mandelker, *Controlling Nonpoint Source Water Pollution, Can It Be Done?*, 65 CHI.-KENT L. REV. 479 (1989).

subject to federal regulation and enforcement under the CWA, while nonpoint sources are not.[47]

The CWA's definition of "discharge of pollutant" refers to "*any* addition of *any* pollutant to navigable waters from *any* point source,"[48] thereby indicating the Congressional intent to prohibit *all* violations, including minor ones. Furthermore, "point source" should not be separated from the phrase "addition of any pollutant."[49] Moreover, it should not be disconnected from the phrase "discharge of pollutant," since focusing solely on the term "point source" can lead to absurd results which fail to promote the purpose of the CWA.[50]

The point source is the object which introduces the pollutant into the water from the outside world.[51] In this respect, courts have interpreted the phrase "any point source" broadly, without limitation, mindful of Congressional intent.[52] Congress intended the definition of a "point source" to have broad meaning, "as it should be given its contemplated applicability to literally thousands of pollution sources. To cast such definitions in absolute, unequivocable terms would be unrealistic, if not altogether impossible."[53] The CWA permit program covers all point sources, not only those specifically identified in the CWA, but also "major sources, easily

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47. *Oregon Natural Resources Council*, 834 F.2d at 849; *see also National Wildlife Fed'n*, 693 F.2d 156.

48. CWA § 502(12), 33 U.S.C. § 1362(12) (emphasis added).

49. Friends of Sakonnet v. Dutra, 738 F. Supp. 623, 629 (D. R.I. 1990) (where homeowners brought a citizens suit against the owners of a septic system which polluted their homes and the Sakonet River, claiming such owners were the point source).

50. *Id.*

51. *National Wildlife Fed'n*, 693 F.2d at 175.

52. *See infra* notes 62-67, 71-74 and accompanying text.

53. Kennecott Copper Corp. v. EPA, 612 F.2d 1232, 1243 (10th Cir. 1979). In *Earth Sciences*, the court found

> [t]he concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States. It is clear from the legislative history Congress would have regulated so-called nonpoint sources if a workable method could have been derived; it instructed the EPA to study the problem and come up with a solution.

599 F.2d at 373.

controlled point sources, or point sources in the traditional sense."[54] If a pollutant is "conveyed or channelled," it is considered a point source discharge subject to the NPDES.[55] Moreover, the point source need not discharge a pollutant directly into navigable waters.[56] This is because there is no requirement for a point source to be directly adjacent to the water it pollutes.[57]

Any discernible,[58] confined[59] and discrete[60] conveyance,[61] is a point source under the CWA.[62] The "discrete conveyance" definition is so inclusive that it encompasses those discharges not explicitly enumerated in the CWA.[63] For example, various courts have held the following to be point sources: a railroad culvert,[64] a reserve pump,[65] a dam,[66] a leachate

54. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 4.4(a), 376 (1977). *See also* Natural Resources Defense Council, Inc. v. Train, 396 F. Supp. 1393 (D.D.C. 1975), *aff'd sub nom.*, Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369 (D.C. Cir. 1977).

55. *Gratz*, No. 92-141, 1993 WL 19733, at *7. *See generally*, O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642, 655 (E.D. Pa. 1981) (holding that discharges from overflowing ponds, collection-tank bypasses, gullies, trenches, ditches, broken dirt berms, and collection-tank cracks and defects all constituted point source discharges).

56. United States v. Velsicol Chem. Corp., 438 F. Supp. 945, 947 (W.D. Tenn. 1976). In *Velsicol Chem. Corp.*, the court found that discharges into a city sewer system, which emptied into the Mississippi River, were a violation of the CWA, since the defendants knew or should have known that the system led directly into the river. *Id.* Furthermore, the court determined this interpretation of the CWA was in line with Congress' intent to apply the CWA to its broadest limits. *Id.*

57. *O'Leary*, 523 F. Supp. at 655.

58. "Discernible" is something which is recognizable or identifiable. WEBSTER'S NEW COLLEGIATE DICTIONARY 322 (8th ed. 1979).

59. "Confined" refers to something which is restricted. *Id.* at 235.

60. "Discrete" means individually distinct. *Id.* at 323.

61. A "conveyance" refers to a means or way of conveying or transporting. *Id.* at 246.

62. CWA § 502(14), 33 U.S.C. § 1362(14) (emphasis added).

63. *Gratz*, No. 92-141, 1993 WL 19733, at *8.

64. Dague v. City of Burlington, 935 F.2d 1343, 1354 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 557 (1992).

65. *Earth Sciences*, 599 F.2d at 374.

66. Committee to Save Mokelumne River v. East Bay Mun. Util. Dist., 13 F.3d 305, 308-09 (9th Cir. 1993), *cert. denied*, __ U.S. __, 115 S. Ct. 198 (1994).

collection system,[67] a cattle feedlot,[68] and a break in a berm around a field.[69] Furthermore, a "point source" does not necessarily consist of physical and functional characteristics,[70] which are typically envisioned when one contemplates the type of point sources enumerated under the CWA, such as a pipe or a tunnel.[71] However, the CWA identifies floating craft and rolling stock as point sources, although they are mobile sources which fail to evoke the image of a permanent, functional structure.[72] In addition, courts have recognized a dump truck,[73] a bulldozer and a backhoe,[74] a liquid manure spreading vehicle,[75] an airplane and a ship[76] as point sources.

B. Liability

The term "point source" does not determine a source for liability purposes; rather, the liability rests on the person(s) in control of the addition of pollution into water.[77] To punish and deter violations, the CWA imposes civil and criminal pen-

67. Sierra Club v. Abston Constr. Co., Inc., 620 F.2d 41, 44-45 (5th Cir. 1980).

68. Carr v. Alta Verde Indus., Inc., 931 F.2d 1055 (5th Cir. 1991).

69. United States v. Oxford Royal Mushroom Prod. Inc., 487 F. Supp. 852, 854 (E.D. Pa. 1980).

70. *Dague*, 935 F.2d at 1354.

71. CWA § 502(14), 33 U.S.C. § 1362(14).

72. *Id.*

73. United States v. Tull, 615 F. Supp. 610, 622 (E.D. Va. 1983), *aff'd*, 769 F.2d 182 (4th Cir. 1985) *rev'd on other grounds*, 481 U.S. 412 (1987); United States v. Weisman, 489 F. Supp. 1331, 1337 (M.D. Fla. 1980).

74. Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 922 (5th Cir. 1983). A bulldozer was also held to be a point source in *Tull*, 615 F. Supp. at 622, and in *Weisman*, 489 F. Supp. at 1337.

75. Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114, 119 (2d Cir. 1994) *rev'g* 834 F. Supp. 1422 (W.D.N.Y. 1993), *cert. denied*, __ U.S. __, 115 S. Ct. 1793 (1995). The court also held that a liquid manure spreading operations area was a point source because a farm falls within the definition of a concentrated animal feeding operation, which is one of the sources enumerated under the CWA. *Id.* at 123. Here, the collection of liquid manure directly flowed into navigable waters. *Id. See supra* note 68 and accompanying text.

76. Weinberger v. Romero-Barcelo, 456 U.S. 305, 309 (1982).

77. *Abston Constr. Co., Inc.*, 620 F.2d at 45. In *Abston*, Defendants, who operated a strip mining plant, placed their excess in highly erodible piles that were carried away by rain water. *Id.* at 46-47. The court found that the CWA does not relieve the miners from liability if "they are reasonably likely to be the

alties against any person who violates its provisions.[78] In particular, criminal offenses are categorized as negligent violations, knowing violations, or knowing endangerment violations.[79] This categorization is significant because a defendant can be found liable without a showing of intent.[80]

The Water Quality Control Act (WQCA) of 1987, which revised the CWA in part, revised § 309(c), thereby increasing criminal penalties under the CWA.[81] However, under § 309(d), violators are subject to civil penalties no greater than $25,000 per day per violation.[82] This section was written without regard to a discharger's intent, thus making the discharger strictly liable for civil penalties. In contrast, a discharger's intent becomes relevant when an action is for criminal penalties.[83] Negligent and knowing violations may be punished separately or concurrently under the criminal provision.[84]

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means by which pollutants are ultimately disposed into a navigable body of water." *Id.* at 45.

78. CWA § 309(c)-(d), 33 U.S.C. § 1319(c)-(d). Violators penalized under the civil penalties provision, shall be subject to a fine, not exceeding more than $25,000 per day per violation. *Id.* § 309(d), 33 U.S.C. § 1319(d). In determining the penalty amount, the court shall consider: (1) the seriousness of the violation; (2) economic benefits which arise by virtue of the violation; (3) the violator's good-faith effort to comply with the CWA; (4) the penalty's economic impact on the violator; and (5) other matters justice so requires. *Id.*

79. CWA § 309(c)(1)-(3), 33 U.S.C. § 1319(c)(1)-(3).

80. *See, e.g.*, United States v. Baytank (Houston), Inc., 934 F.2d 599, 618 (5th Cir. 1991) (holding that a defendant's specific intent is not required to constitute a violation, since the CWA punishes both negligent and willful misconduct).

81. *See also* Shahrzad Heyat, et al., Note, *Environmental Crimes*, 31 AM. CRIM. L. REV. 475, 509 (1994).

82. CWA § 309(d), 33 U.S.C. § 1319(d).

83. *See* CWA § 309(c), 33 U.S.C. § 1319(c).

84. CWA § 309(c)(1)-(2), 33 U.S.C. § 1319(c)(1)-(2). Negligent violators shall be

> punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If the conviction is for a violation committed after a first conviction of such a person . . . punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

Id. § 309(c)(1), 33 U.S.C. § 1319(c)(1). In addition, if a person is convicted of a first offense for knowingly violating the CWA, that person is subject either to a

The knowing endangerment provision heightens the punishment of unlawful dischargers by allowing felony penalties to be imposed for life threatening conduct.[85] The provision requires not only that the discharger possess a knowing *mens rea*, but also requires that the discharger "know[ ] at that time he thereby places another person in imminent danger of death or serious bodily injury."[86] Additional provisions under the knowing endangerment section, such as affirmative defenses, are useful in determining whether an individual shall be subject to its penalties.[87]

In determining whether an individual defendant knew his conduct subjected another person to imminent danger, a person is held responsible for the actual awareness or actual belief he possessed.[88] Furthermore, the use of circumstantial evidence is permissible to establish the requisite *mens rea*.[89] The legislative history of the knowing endangerment provision indicates that Congress intended the "knowledge" element to be measured by prevailing case law standards.[90] Unfortunately, there is no guidance as to applying or ascertaining the knowing element of the provision.[91]

$50,000 per day of violation or up to three years imprisonment, or both. *Id.* § 309(c)(2), 33 U.S.C. § 1319(c)(2). The penalty for further violation of the knowing provision subjects a person to either a fine of up to $100,000 per day of violation or up to six years of imprisonment, or both. *Id.*

85. *See* CWA § 309(c)(3)(A), 33 U.S.C. § 1319(c)(3)(A).

86. *Id.* Serious bodily injury refers to bodily injury involving a substantial risk of death. *Id.* § 309(c)(3)(B)(iv), 33 U.S.C. § 1319(c)(3)(B)(iv).

87. *Id.* § 309(c)(3)(B), 33 U.S.C. § 309(c)(3)(B).

88. CWA § 309(c)(3)(B)(i)(I), 33 U.S.C. § 1319(c)(3)(B)(i)(I).

89. *Id.* § 309(c)(3)(B)(i), 33 U.S.C. § 1319(c)(3)(B)(i).

90. S. REP. No. 50, 99th Cong., 1st Sess. 30 (1985).

91. Besides *Villegas* and *Plaza Health*, only two cases mention the knowing endangerment provision. *See* United States v. Borowski, 977 F.2d 27 (1st Cir. 1992); United States v. Rutana, 932 F.2d 1155 (6th Cir. 1991), *cert. denied*, 502 U.S. 907 (1991). In *Borowski*, the First Circuit held that prosecution under the knowing endangerment provision cannot be based on the danger which ensues prior to the time the pollutant reaches a municipal waste water treatment facility. 977 F.2d at 32. Here, the employee, who handled pollutants on the premises from which the discharge originated was exposed, and the manufacturer of the optical mirrors, could not be prosecuted under the knowing endangerment provision of the CWA for the exposure. *Id.* In *Rutana*, the CEO and part owner of a metal finishing plant illegally discharged sulfuric and nitric acid into a city sewer line which, in turn, injured city employees. 932 F.2d at 1156-57. *Rutana*

A "person" under the criminal penalties section extends the definition set forth under the CWA, which includes "any responsible corporate officer."[92] Similarly, many courts have held the following corporate officers are responsible for CWA violations: the president and secretary of a company;[93] the manager of a manufacturing plant;[94] the foreman for a marina who discharged gasoline;[95] and the fuel director of a naval station.[96]

III. *United States v. Plaza Health Laboratories, Inc.*[97]

A. Facts

Geronimo Villegas was the co-owner and vice president of Plaza Health Laboratories, Inc., a facility in Brooklyn, New York, that tests blood for disease and other medical conditions.[98] On two occasions between April and September 1988, Villegas deposited numerous vials of blood, handled by his firm, in various containers.[99] Then Villegas, via his car, transferred these containers from his Brooklyn office to his residence at the Admirals Walk Condominium Complex in Edgewater, New Jersey.[100] On the first occasion, Villegas set the containers along the shoreline of the Hudson River.[101] On the second occasion, during low tide, Villegas placed two

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primarily dealt with the sentencing of a defendant and did not apply or further ascertain the *mens rea* element of the knowing endangerment provision. *Id.* at 1158. *See also infra* notes 136-147 and accompanying text.

92. CWA § 309(c)(6), 33 U.S.C. § 1319(c)(6). The CWA defines a person as "an individual, corporation, partnership, association, State . . . ." CWA § 502(5), 33 U.S.C. § 1362(5).

93. United States v. Frezzo Bros., Inc., 461 F. Supp. 266, 272-73 (E.D. Pa. 1978), *aff'd*, 602 F.2d 1123, *cert. denied*, 444 U.S. 1074 (1980).

94. United States v. Boldt, 929 F.2d 35, 39 (1st Cir. 1991).

95. United States v. Hamel, 551 F.2d 107, 108 (6th Cir. 1977).

96. United States v. Curtis, 988 F.2d 946, 948-49 (9th Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 177 (1993). Likewise, a president and general manager of a company were charged with violating the Federal Food, Drug, and Cosmetic Act. United States v. Dotterweich, 320 U.S. 277 (1943).

97. 3 F.3d 643 (2d Cir. 1993), *rev'g sub nom.* United States v. Villegas, 784 F. Supp. 6 (E.D.N.Y. 1991), *cert. denied*, __ U.S. __, 114 S. Ct. 2764 (1994).

98. *Villegas*, 784 F. Supp. at 7.

99. *Plaza Health*, 3 F.3d at 633-34.

100. *Id.* at 644.

101. *Id.*

containers within the crevice of a bulkhead below the high tide line.[102]

On May 26, 1988, a group of eighth graders attended a field trip at the Alice Austin House located in Staten Island, New York, adjacent to the Hudson River.[103] As the children played along the river's shore, they discovered numerous glass vials appearing to contain human blood.[104] The students not only found the vials washed up on the shore, but also vials lying in the water, cracked vials, and vials placed in ziplock bags.[105] Later that afternoon, a New York City sanitation worker collected approximately seventy more vials of blood that were scattered along the shoreline and bobbing in the water.[106] It was later determined that five of these vials contained blood infected with the Hepatitis-B virus.[107]

On September 25, 1988, an Admirals Walk maintenance worker discovered a plastic container consisting of vials of human blood, settled between the rocks of the bulkhead adjacent to Villegas' condominium complex.[108] The Edgewater Police Department collected approximately one hundred vials floating in the river or packed in plastic bags fixed in the bulkhead.[109] Fifty-five of those vials were tested for infectious disease; five vials were infected with the Hepatitis-B virus.[110]

Based on the information recorded on the vial labels, state investigators traced the vials of blood to Plaza Health Laboratories.[111] When Villegas was confronted by the investigators regarding their findings, he admitted to placing the

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102. *Id.*

103. *Plaza Health*, 3 F.3d at 644.

104. *Id.*

105. *Id.*

106. *Villegas*, 784 F. Supp. at 7.

107. *Id.* This virus causes inflammation of the liver and can induce chronic illness, such as cancer or, more seriously, can be fatal. *See supra* notes 35-37 and accompanying text.

108. *Plaza Health*, 3 F.3d at 644.

109. *Villegas*, 784 F. Supp. at 7.

110. *Id.*

111. *Id.*

containers in the bulkhead, blaming his actions on the lack of space in his laboratory for incoming blood samples.[112]

B. The District Court's Decision[113]

1. Point Source

In *United States v. Villegas* (*Villegas*), the District Court for the Eastern District of New York addressed whether Villegas could be found criminally liable under the CWA for his actions.[114] Under the CWA, it is an offense for "any 'person' to 'discharge' a 'pollutant' into 'navigable waters' from a 'point source.'"[115] Villegas argued that he could not be prosecuted under the CWA since a point source is a physical structure through which pollutants are discharged into water by an individual.[116] Therefore, since he placed the containers into the Hudson River without using a conveyance, as required under the CWA, Villegas claimed he could not be found liable under the CWA.[117]

The district court held "common sense, precedent and legislative history" all indicate that a person should be considered a point source under the CWA.[118] In supporting its proposition, the court analyzed 33 U.S.C. § 1362(14), which defines point sources as "any discernible, confined and discrete conveyance, including *but not limited to* any . . . discrete fissure, container . . . from which pollutants are or may be discharged."[119] The court reasoned that the general term "conveyance" clearly demonstrates Congress' desire to have this word interpreted broadly.[120] This concept is demonstrated by the definition of conveyance itself, as "a means or way of conveying," which is applicable to any conduit of waste.[121]

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112. *Id.*
113. *Villegas*, 784 F. Supp. 6.
114. *Id.* at 6.
115. CWA § 301(a), 33 U.S.C. § 1311(a).
116. *Villegas*, 784 F. Supp. at 8.
117. *Id.*
118. *Id.*
119. *Id.* (emphasis added).
120. *Villegas*, 784 F. Supp. at 8.
121. *Id.* at 8-9.

Furthermore, the court relied on Congress' intentional usage of the term "point source," as distinguished from a "nonpoint source," to demonstrate that point sources consist of deliberate discharges of pollutants and, therefore, must include discharges of pollutants by a person.[122] The term "point source" was created to distinguish between the deliberate discharge of pollutants and a mere ground erosion from pollution that has been collected or confined.[123] This distinction led the district court to conclude that the CWA, when read literally, includes discharges by individuals.[124] The court reasoned that although the phrase "any discernible, confined and discrete conveyance" does not evoke an image of a person, the phrase clearly does not bar one.[125]

Although the examples of point sources, highlighted in the definition, all represent physical structures, the court determined that such an implication is not dispositive.[126] In *Gooch v. United States*,[127] the United States Supreme Court held that the rule of *ejusdem generis* defeats the CWA's objectives of preventing unregulated pollution from navigable waters.[128] Moreover, the Tenth Circuit in *United States v. Earth Sciences*[129] (*Earth Sciences*), held that the "concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States."[130] Thus, the *Villegas* court concluded it would be preposterous not to find Villegas liable under the CWA

122. *Id.* at 9. A nonpoint source is a situation where naturally induced runoffs by rainfall cause pollutant discharges. *Id. citing Earth Sciences*, 599 F.2d at 373.

123. *Villegas*, 784 F. Supp. at 9.

124. *Id.*

125. *Id.*

126. *Id.*

127. 297 U.S. 124 (1936).

128. *Villegas*, 784 F. Supp. at 9. The rule of *ejusdem generis* is a canon of statutory construction. It applies when "general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated." BLACK'S LAW DICTIONARY 517 (6th ed. 1990).

129. 599 F.2d at 373.

130. *Villegas*, 784 F. Supp. at 9.

merely because he himself dumped the blood vials into the Hudson River instead of discharging the pollutants from a physical conveyance.[131]

In its analysis, the court recognized Congress' apprehension in finding everyday people that carelessly litter in navigable waters liable under the CWA.[132] In addressing this issue, the court looked to the CWA's main objective, which is to protect the Nation's waters from the ill effects of waste discharged by industrial polluters.[133] In consideration of this objective, the court focused upon the CWA's emphasis on the discharge of pollutants produced by waste-generating activities.[134] In turn, the court determined that this definition places the inquiry on whether Villegas "deliberately engaged in threatening the 'chemical, physical and biological integrity of the Nation's waters' . . . which is the object of the Clean Water Act, and not whether the conduit for such activity was a human being or an inanimate structure."[135]

Finally, the court held that regardless of whether Villegas constituted a point source, the rocks forming the bulkhead at his condominium were "discrete fissure[s]" which are enumerated in the CWA as a point source.[136] This was because the rocks constituted a natural structure which had the physical capacity to retain pollutants.[137] Even if the rocks forming the bulkhead did not constitute a point source, the court held that the containers holding the vials were point sources, since a container is clearly enumerated in the CWA's definition of a point source.[138]

2. Knowing Endangerment

The district court upheld Villegas' contention that even if he is guilty of discharging a pollutant from a point source, the

131. *Id.* at 10.
132. *Id.*
133. *Id.*
134. *Villegas*, 784 F. Supp. at 10.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Villegas*, 784 F. Supp. at 11.

evidence failed to establish that he violated the knowing endangerment provision of the CWA.[139] This provision places criminal liability on "[a]ny person who knowingly violates section 1311 . . . of this title . . . and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, ..."[140]

Under this section, a defendant must act with an "'actual awareness' or an 'actual belief' that he is placing another person in imminent danger."[141] This "actual awareness or belief" can be proven through circumstantial evidence.[142] Furthermore, the district court noted that the CWA's legislative history regarding this issue was drawn from the Resource Conservation and Recovery Act (RCRA).[143] Section 3008(f)(1)(c) of RCRA states "(1) A person's state of mind is knowing with respect to . . . (c) a result of his conduct, if he is aware or believes that his conduct is *substantially certain* to cause danger of death or serious bodily injury."[144]

The Senate Report on the CWA's knowing endangerment provision states that the above emphasized language was left out of the CWA because of the language's tendency to deter prosecutions.[145] By leaving the "substantially certain" language out of the CWA's knowing endangerment provision, the Senate Committee reasoned that the "knowledge" provision should be measured according to the prevailing case law.[146]

Since the district court deemed the prevailing case law unclear, it noted several interpretations of "substantial certainty."[147] The court analyzed the culpability standards of

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139. *Id.*

140. *Id.*, *quoting* CWA § 309(c)(3)(A), 33 U.S.C. § 1319(c)(3)(A).

141. *Id.*

142. CWA § 309 (c)(3)(B), 33 U.S.C. § 1319(c)(3)(B).

143. RCRA §§ 1002-11012, 42 U.S.C. §§ 6901-6922k (1988 & Supp. IV 1994).

144. *Id.* § 3008(f)(1)(c), 42 U.S.C. § 6928(f)(1)(C) (emphasis added).

145. *Villegas*, 784 F. Supp. at 11, *noting* S. REP. No. 50, *supra* note 90.

146. *Id.* At the time this case was decided at the district court level, only one case discussed the knowing endangerment provision, but it did not apply or further ascertain the *mens rea* element. *See* United States v. Rutana, 932 F.2d 1152 (6th Cir. 1991), *cert. denied*, 502 U.S. 907 (1991). *See supra* note 84 and accompanying text.

147. *Villegas*, 784 F. Supp. at 12.

knowing endangerment under the MWTA.[148] The district court looked to the Model Penal Code and the United States Sentencing Commission's approach to violations of the provision, and concluded that a "high probability" standard affords an appropriate alternative to the substantial certainty test rejected by Congress.[149] The "high probability" standard, although lower than RCRA's "substantial certainty" standard, corresponds with the purpose of the knowing endangerment provision.[150]

The language of § 309(c)(3)(A) implies that a person who discharges the pollutants "must actually place another person in imminent danger of death or serious bodily injury and not merely that such a result be a 'potential' consequence of the defendant's act."[151] The district court, by applying the aforementioned standard, concluded that "imminent danger" must mean danger resulting as a high probability of the consequential discharge.[152]

In support of finding that Villegas violated the knowing endangerment provision, the United States Attorney offered testimony from Plaza Health Laboratory employees regarding the caution with which blood was handled in the lab and precautions taken to protect employees from exposure. For example, prior to Villegas' promotion as co-owner and vice president, between thirty-five to fifty of the blood specimens brought into the laboratory were tested for Hepatitis-B in separate areas specifically designated for testing tainted blood. The laboratory often conducted a great deal of testing for diseases such as Hepatitis and Leukemia. In addition,

148. *Id.* The Medical Waste Tracking Act (MWTA) was enacted within one year of the Amendments to the CWA, which created the knowing endangerment provision. The MWTA contained its own knowing endangerment provision, and was used as a guide to determine the meaning of the CWA's knowing endangerment provision. However, the MWTA's knowing endangerment provision was a return to the "substantially certain" test espoused by RCRA, which was specifically rejected by Congress in its creating the knowing endangerment provision of the CWA. The MWTA expired as of June 1991. *See supra* notes 27-31 and accompanying text.

149. *Villegas*, 784 F. Supp. at 13.

150. *Id. See* CWA § 309(c)(3), 33 U.S.C. § 1319(c)(3).

151. *Villegas*, 784 F. Supp. at 13.

152. *Id.*

Villegas co-authored the laboratory's safety manual which outlined safety and health precautions to be followed by the laboratory employees.[153]

However, the district court determined that although the defendant's acts were irresponsible, the evidence presented failed to rise to the requisite level to prove that Villegas knew that there was a high probability of placing others in imminent danger of death or serious bodily harm when he placed the vials of blood into the Hudson River.[154] In doing so, the district court relied upon the expert testimony of Dr. Alfred Prince, a virologist, who testified that although there is a high risk of disease if a broken piece of vial were to penetrate a person's skin, the risk of that happening was very low.[155] Furthermore, the district court noted that there was no showing of Villegas' knowledge of tides and whether people walked on the rocks where the vials of blood were hidden.[156] Therefore, the district court found that although Villegas was a point source, the evidence was insufficient to support a conviction under the knowing endangerment provision of the CWA.[157]

C. United States Court of Appeals, Second Circuit Decision[158]

The question presented on appeal to the Second Circuit was whether Villegas knowingly discharged pollutants from a point source, or more succinctly stated: may a person be a point source under the CWA?[159] The defendant contended that the term "point source" fails to include discharges produced by the acts of people and, therefore, since the term is ambiguous, the rule of lenity must reverse his conviction.[160]

153. *Id.*
154. *Id.*
155. *Villegas*, 784 F. Supp. at 14.
156. *Id.*
157. *Id.*
158. *Plaza Health*, 3 F.3d 643.
159. *Id.* at 644.
160. *Id.*

The government cross-appealed the district court's post-verdict order acquitting Villegas of knowing endangerment.[161]

1. Language and Structure of the Act

The Second Circuit determined that since "a discharge from a point source" is fundamental for a knowing endangerment violation, it does not have to address the government's contentions regarding "imminent danger" until it is determined Villegas' discharges were from a point source.[162] After the court noted the definitions of the appropriate terms of the CWA, the court determined that, as applied to the case at bar, Villegas "'added' a 'pollutant' (human blood in glass vials) to 'navigable waters' (the Hudson River), and he did so without a permit."[163] Accordingly, the issue was whether Villegas' conduct comprised a discharge which, in turn, is contingent upon whether the addition of the vials into the Hudson River was "from any point source."[164] To determine the scope of the term "point source," the court declared it first must consider the language and the structure of the CWA.[165]

The Second Circuit began its analysis by declaring individuals are not among the specified list defining what a point source may be.[166] Whereas the enumerated terms in the definition of a point source are nonexclusive, the terms specified in the definition elicit images of physical structures.[167] Moreover, the court noted that if each and every discharge of a pollutant from a person were considered a discharge from a point source, the statutory definition of the term would have been needless.[168]

Furthermore, the court noted that if Congress desired to classify a person as a point source, it could have easily done so by enumerating the classification under the statute.[169]

161. *Id.*
162. *Plaza Health*, 3 F.3d at 644-45.
163. *Id.* at 645.
164. *Id.*
165. *Id.* at 646.
166. *Plaza Health*, 3 F.3d at 646.
167. *Id.*
168. *Id.*
169. *Id.*

The court opined that the CWA's referral to industrial and municipal dischargers is a reasonable emphasis, since industrial and municipal polluters are the most prominent and serious offenders of water quality.[170] The Second Circuit determined Congress did not intend to include people under the CWA.[171] To infer a person from the definition, the pertinent part of the statute would read as follows: "the addition of any pollutant to navigable waters *from any person by any person* shall be unlawful," and this statement obviously is inane.[172]

2. Legislative History

The Second Circuit next focused on the legislative history and the purposes of the CWA in "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters."[173] The court stated even if they were to accept the CWA's purpose on its face, that purpose is merely suggestive and, therefore, is not dispositive of the issue presented before this court.[174] Notwithstanding the fact that the legislative history affords little acumen into the definition of the term "point source," the history does focus on industrial polluters.[175] NPDES permits, required by Congress for those industrial polluters discharging from point sources, function as a system of identifying polluters.[176] Further, the definition of point source was included in the CWA to distinguish between the specified conveyances and run-offs, and to retreat from the more general approach taken by the Rivers and Harbors Act.[177] Thus, Congress' intent was not to in-

170. *Plaza Health*, 3 F.3d at 646.
171. *Id.*
172. *Id.* at 647 (emphasis added).
173. *Id.*
174. *Plaza Health*, 3 F.3d at 647.
175. *Id.*
176. *Id.*
177. *Id.* at 648. *See* 33 U.S.C. §§ 401-467. "It shall not be lawful to throw, discharge or deposit . . . any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States." 33 U.S.C. § 407. *See also* S. REP. No. 414, *supra* note 13.

clude random acts of people disposing of waste into navigable waters, such as throwing candy wrappers into the water.[178]

3. Case Law

The Second Circuit noted several cases where the point source element of the CWA was established.[179] These cases affirmed and, in some cases, broadened the types of point sources enumerated under the CWA.[180] However, the court refused to "further the leap of writing a human being into the statutory language."[181] The court specifically relied upon *Earth Sciences*, which held that the point source concept was intended to further the permit scheme under the CWA by embracing the extensive definition of a discernible conveyance from which pollutants enter the water.[182]

4. Regulatory Structure

Finally, the Second Circuit held that courts must give great deference to the EPA's construction of the term "point source" which includes discharging pollutants through pipes, sewers, and other conveyances, and not "indirect dischargers."[183] Furthermore, the court noted that the CWA's legislative history fails to shed light upon this issue and that civil cases, which broadly interpret the term, are not indicative of a broad interpretation of criminal cases where Congress imposed heavier sanctions.[184] To do so would read the point source element of the crime out of the statute.[185] Therefore, the court concluded the application of "point source" to a human being would be ambiguous.[186]

178. *Plaza Health*, 3 F.3d at 647.
179. *Id.* at 648.
180. *Id. See supra* notes 37-43, 45-46 and accompanying text.
181. *Plaza Health*, 3 F.3d at 648.
182. *Id.* at 648, *noting Earth Sciences*, 599 F.2d at 373.
183. *Id.* at 649.
184. *Id.*
185. *Plaza Health*, 3 F.3d at 649.
186. *Id.*

5. Rule of Lenity

The rule of lenity in criminal cases only arises when ambiguity is present.[187] It requires that ambiguity in a statute be resolved in the defendant's favor.[188] This proposition stands, due to the fact that courts are reluctant to punish an individual as a criminal under federal law unless he "plainly and unmistakenly" falls within the ambit of some provision of a statute.[189] "The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers."[190]

The court in *Plaza Health* reasoned that reading the statute to include a human being as a point source was not consistent with the legislative intent.[191] Since the CWA's criminal provisions did not clearly proscribe Villegas' conduct, the court held that the charges must be dismissed. This is because under the rule of lenity, Villegas' conduct did not fall within the ambit of the knowing endangerment provision, nor did Congress expressly proscribe such conduct.[192] Accordingly, the court could not impute to the statute that which Congress did not provide.[193]

6. Knowing Endangerment

The Second Circuit dismissed the knowing endangerment charge because it did not find that Villegas' discharges derived from a point source enumerated under the CWA.[194] The court concluded that although there was a heinous character to the crime and a desirability to punish such an act, the court must preserve the integrity of the CWA.[195]

187. United States v. Turkette, 452 U.S. 576, 580 n.10 (1981).
188. Crandon v. United States, 494 U.S. 152, 168 (1990).
189. United States v. Gradwell, 243 U.S. 476, 485 (1917).
190. *Turkette*, 452 U.S. at 588 n.10, *citing* Callanan v. United States, 364 U.S. 587, 590 (1961).
191. *Plaza Health*, 3 F.3d at 649.
192. *Id.*
193. *Id.*
194. *Id.* at 650.
195. *Plaza Health*, 3 F.3d at 650.

7. Second Circuit Dissent

In a convincing dissent, Justice Oakes stated that Villegas' actions, as found by the jury, fell within the ambit of the acts proscribed by the CWA.[196] Justice Oakes noted that the point source definition embraces a variety of means for discharging pollutants.[197] Although the dissent recognized the definition includes "classic" point sources such as pipes and conduits, the term has also been broadly construed by different courts, on numerous occasions, so long as the pollution reached navigable waters by human efforts or was collected by human efforts.[198]

Next the dissent distinguished a point source from a nonpoint source, noting the difference in modes of regulation.[199] Such a difference is attributed to the fact that a point source can be controlled at the source, cleaned up, and in some instances cleaned up by the responsible party.[200]

Therefore, the dissent first stated that although Villegas' acts were not a "classic" point source, his acts were more closely related to a point source rather than a nonpoint source discharge.[201] Further, the dissent noted the discharge was directly into the water by Villegas, an identifiable source. Thus, it was irrelevant to determine whether Villegas, the car, the vials, or the bulkhead was the point source because Villegas' acts functioned as a "discrete conveyance" or more simply, a point source.[202]

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196. *Id.* For a full analysis on the issues raised by the dissent, discussing why a human being can be considered a point source under the CWA, see Mark J. Dorval, Note, *Discharge of Pollutants into the Nation's Waters: What does the CWA Prohibit?—United States v. Plaza Health Laboratories, Inc., 3 F.3d 643 (2d Cir. 1993)*, 13 TEMP. ENVTL. L. & TECH. J. 121 (1994).

197. *Plaza Health*, 3 F.3d at 650-51.

198. *Id.* at 651. *See supra* notes 37-43, 45-46 and accompanying text.

199. *Plaza Health*, 3 F.3d at 652-53.

200. *Id.* at 653 (citations omitted).

201. *Id.* For a detailed discussion on nonpoint sources, see Daniel R. Mandelker, *Controlling Nonpoint Source Water Pollution: Can it be Done?*, 65 CHI.-KENT L. REV. 479 (1989).

202. *Plaza Health*, 3 F.3d at 653.

The dissent focused on the fact that the pollution's source was identifiable and could have been controlled.[203] The CWA's goal is the elimination of discharges, regardless of the method of waste disposal.[204] Justice Oakes remarked, "I doubt that Congress would have regarded an army of men and women throwing industrial waste from trucks into a stream as exempt from the statute."[205]

> [T]here are also dangers to paying too little attention to such broad stated goals. While the Clean Water Act may not always live up to its grand ambitions, in particular by setting definitional limits on what it covers (only pollution, only point sources), its ambitious goals are nonetheless useful interpretive guides: they indicate that, all other things being equal, a generous rather than a cramped interpretation of the statute is more likely to be what Congress intended.[206]

The dissent next focused its argument on the majority's suggestion that a person can never be a point source due to linguistic variables which would read in part, "any addition of any pollutant to navigable waters from a person by a per-

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203. *Id.* It is reasonable to assume that Villegas was aware that there were other methods available for controlling the discharge and that the blood was extremely dangerous for casual discharges, since his laboratory hired professional medical waste handlers. *Id.*

204. *Id.* at 653-54.

205. *Plaza Health*, 3 F.3d at 654.

> Since the Act contains no exemption for de minimis violations—since, indeed, many Clean Water Act prosecutions are for a series of small discharges, each of which is treated as a single violation—I cannot see that one man throwing one day's worth of medical waste into the ocean differs (and indeed, with this type of pollution, it might be that only a few days' violations could be proven even if the laboratory regularly relied on Villegas to dispose of its waste by throwing it into the ocean). A different reading would encourage corporations perfectly capable of abiding by the Clean Water Act's requirements to ask their employees to stand between the company trucks and the sea, thereby transforming point source pollution (dumping from trucks) into nonpoint source pollution (dumping by hand). Such a method is controllable, easily identifiable, and inexcusable.

Id. at 654.

206. *Id.* at 654 n.5.

son."[207] The oddness of this sentence disappears, however, because word placement of "any" preceding "person" and "point source" suggests broad constructions of the words.[208] "When a company chooses to use the [N]ation's waters as a dumpsite for waste it has created and gathered in a manageable place, it should ask for a permit or face prosecution."[209]

Under such a construction, a person may be subject to criminal penalties consisting of up to a $25,000 fine or three years in jail for intentionally throwing a candy wrapper into the ocean.[210] This analysis is contrary to congressional intent since the CWA focuses on dischargers of industrial and municipal waste, not individual litterers.[211] Furthermore, there were no factual disputes, and the jury found Villegas did not place the pollutants into the Hudson River.[212]

The dissent also refuted the majority's application of the rule of lenity to the present situation, doubting any ambiguity in the CWA with respect to an individual physically depositing medical waste into navigable water.[213] The dissent noted that only where a reasonable doubt exists in a statute's

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207. *Id.* at 654.

208. *Plaza Health*, 3 F.3d at 654. The dissent exemplifies how such a construction would read:

> . . . the addition of any pollutant to navigable waters by an employee's throwing them there (a person acting as a point source) at the instruction of his or her employer (a corporation, or person capable of being held responsible) . . . . More specifically, the sentence could refer to an individual hired to convey, by hand, all of a corporation's toxic wastes from the company's back door to the Mississippi River, three feet away (the point source), by that individual and by the corporation which authorized the disposal (the potential defendants).

Id.

209. *Id.* at 655. The dissent believed that a person can be a point source (when a person directly dumps waste into the water) or a nonpoint source (when a person spreads fertilizer on the ground so that it may be washed into nearby waters). *Plaza Health*, 3 F.3d at 654 n.6.

210. *Id.* at 655.

211. *Id.* The CWA does not apply not only to major dischargers of industrial and municipal waste as read by the statutory definition, which uses the word "any" prior to "addition," "point source," "pollutant," and "discharge," indicating congressional intent to bar all violations, including minor ones. *Id.* at 655 n.8.

212. *Id.* at 655.

213. *Plaza Health*, 3 F.3d at 655.

intent should a court utilize the rule of lenity: "I think it is plain enough that Congress intended the statute to bar corporate officers from disposing of corporate waste into navigable waters by hand as well as by pipe."[214] Finally, the dissent concurred with the majority with respect to the knowing endangerment counts, since the government experts agreed the risk that a person would be harmed by the Hepatitis-B infected blood was quite low.[215]

IV. Analysis

The *Plaza Health* court could have found at least five point sources which discharged the pollutants: (1) the container(s), (2) the vials, (3) the bulkhead, (4) the car, and (5) a human body. Since the legislative history and statutory provisions give little guidance to the point source interpretation, the Second Circuit, along with other courts, should look to the general approach of the CWA as a whole, including its objectives, policy, and statutory language, to effectuate the goals of the statute.

The district court and Judge Oakes' dissent from the Second Circuit correctly held Villegas criminally liable under the CWA. Nowhere in the transcript does it establish that Villegas applied for and obtained a permit. Furthermore, the government clearly established a violation of NPDES under the CWA because prosecutors established that Villegas (1) discharged (2) a pollutant (blood) (3) into navigable waters (Hudson River) (4) from a point source (5) without a discharge permit. Thus, the single questionable issue was whether the vials of blood were discharged by a point source.

A. Point Source

First, the containers in which Villegas placed the vials of blood are enumerated under the definition of point source in the CWA.[216] There is no requirement that a point source

214. *Id.* at 656.
215. *Id.*
216. *"[A]ny* discernible, confined and discrete conveyance, *including but not limited to* any pipe, ditch, channel, tunnel, conduit, well, discrete fissure,

need be directly adjacent to the water it pollutes.[217] Similarly, pollutants need not be discharged directly into navigable waters.[218]

A "point source" is "*any* discernable, confined and discrete conveyance."[219] The classic point source is usually envisioned as a pipe which is a permanent physical structure.[220] Although the CWA's definition of point source includes physical structures such as a pipe, the definition specifically states "*including, but not limited to.*"[221] Despite the fact that a container is not a permanent, physical structure placed in or near a body of water, Congress specifically enumerated it to be a point source.[222] Although no case law exists recognizing a container as a point source, Congress' intent is clear in this area. Therefore, the district court and the Second Circuit should have held that the containers were point sources.

Similarly, the vials which contained blood are point sources. A vial falls within the definition of a container. Some of the vials found along the shore by school children were cracked, indicating the likeliness that some of the blood escaped from these vials. In this situation, the vials, which were linked to Plaza Health Laboratories, were the objects which introduced or conveyed the human blood, some of which was infectious, into the Hudson River.

A vial is a small container, an object specifically listed in the point source definition. Furthermore, these vials were originally placed in containers, an object enumerated under the point source definition.[223] The vial/container holds and/or bounds within its limits a pollutant. Moreover, once the vial(s) break, it essentially becomes a point source from

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container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or *may be* discharged . . . ." CWA § 502(14), 33 U.S.C. § 1362(14) (emphasis added).

217. *See supra* note 52 and accompanying text.

218. *See supra* note 51 and accompanying text.

219. *See supra* notes 53-57 and accompanying text.

220. *Plaza Health*, 3 F.3d at 651. *See supra* notes 37-43, 45-46 and accompanying text.

221. CWA § 502(14), 33 U.S.C. § 1362(14) (emphasis added).

222. *Id.* § 502(14), 33 U.S.C. § 1362(14).

223. *Id.*

which the pollutant is introduced into the water. Thus, the vials were clearly point sources.

Third, the rocks forming the bulkhead where the containers were placed by Villegas are also a point source. As the district court noted, the rocks forming the bulkhead constitute a "discrete fissure(s)" enumerated under the CWA.[224] A fissure is a "narrow opening or crack . . . occurring from some breaking or parting."[225] Other physical structures, such as culverts[226] and ditches,[227] have also been found to be point sources. These structures are not functionally different than the bulkhead in the *Villegas* case. Therefore, the district court and Second Circuit should have held the bulkhead as a point source under a strict statutory construction of the CWA.

Villegas' car, which transported the pollutants, also could have been deemed a point source in *Plaza Health*. On numerous occasions, courts have held that airplanes, bulldozers, dump trucks, and ships are point sources.[228] Likewise, floating craft and rolling stock, both mobile objects, are listed under the point source definition.[229] Thus, it is logical to hold a car as a point source. Although airplanes, dump trucks, ships, etc., directly convey or channel the pollutants into navigable waters, unlike the car in this situation, pollutants do not have to be discharged *directly* into navigable waters.[230] Furthermore, the term "point source" has been interpreted broadly to apply to literally thousands of pollution sources.[231] Therefore, the car was clearly a point source.

Lastly, Villegas should have been deemed a point source. Although a person is not enumerated under the point source definition, the definition does not bar it. Contemplating

224. *Villegas*, 784 F. Supp. at 10.
225. WEBSTER'S NEW COLLEGIATE DICTIONARY 429 (8th ed. 1979).
226. *Dague*, 935 F.2d at 1355.
227. United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1401 (D. N.H. 1985).
228. *See supra* notes 68-71 and accompanying text.
229. CWA § 502(14), 33 U.S.C. § 1362(14). *See also supra* note 67 and accompanying text.
230. *See supra* note 51 and accompanying text.
231. *See supra* notes 48, 59-64, 68-71 and accompanying text.

thousands of pollution sources, Congress purposely phrased the term "point source" broadly. Congress did so by using the words "*including but not limited to*" in the CWA. Likewise, numerous cases have supported a broad interpretation of a "point source."[232] A restriction placed on the definition would be unrealistic, if not altogether impossible. Courts should look to the general approach of a statute as a whole, including its objectives, policy and statutory language. Upon doing so, it is clear that a human being can be considered a point source.

The Second Circuit's argument that a person cannot be properly read into the definition of "point source" is unwarranted. The court stated the statute would read, "the addition of any pollutant to navigable waters *from any point source by any person* shall be unlawful."[233] However, the term "any", before "person" and "point source", hints at a broad interpretation of the word.[234] The court noted the sentence could refer to a person hired to convey by hand pollutants into a navigable body of water which is a couple of feet away from the company.[235] Also, the person could refer to an employer or a corporation.[236] "The test should be whether the term fits the meaning and the purpose of the statute, not whether the term would fit the sentence."[237]

Congress sought to target industrial and municipal polluters to restore the bodily integrity of the Nation's waters by implementing the CWA.[238] Although Congress gave little insight into the term "point source," it is clear that Villegas' acts constituted the types of discharges which Congress sought to prevent. Furthermore, Congress purposely phrased "point source" broadly by including the words "*including but not limited to*," and numerous cases have supported a broad interpretation of "point source." Villegas was part of an in-

232. *Id.*
233. *Plaza Health*, 3 F.3d at 647.
234. *Id.* at 654.
235. *Id.*
236. *Id.*
237. Dorval, *supra* note 177, at 136.
238. *See supra* note 20 and accompanying text.

dustry as he and his company worked with infectious blood, which is considered a pollutant under the CWA.

Although Congress was concerned about finding people who merely throw a candy wrapper into the water criminally liable under the CWA, this situation will not happen if the courts recognize people as point sources. It is improbable that Congress sought to fine an individual who throws a candy wrapper into the water $25,000. On the other hand, it seems quite clear that Villegas' conduct was the type of action that Congress sought to prevent and/or punish: a representative of a corporation/industry. If all the requirements for a discharge of pollutants are met, the "person" should be subject to criminal liability. This should hold true regardless of whether it is an individual, corporation, or corporate officer, because each element has been satisfied.

A human body is not a permanent structure, in the sense that it is not fixed next to a body of water, which is typically envisioned under the CWA. However, neither are dump trucks, airplanes nor ships.[239] Thus, deeming a person a point source is a logical extension of the term.

Dump trucks, airplanes and ships are all transitory objects, as is a human being. Villegas was adjacent to the water when he "conveyed" the pollutants into the water. Furthermore, he is identifiable, he directly discharged the pollutants into the navigable waters, and he controlled the conveyance. Congress intended the statute to prohibit corporate officers from disposing pollutants by hand and by pipe. Thus, by following the circuits' trend in broadly construing a point source, it is logical to extend a point source to include a human being.

This trend is inevitable. Such an interpretation suggests the statute is not ambiguous and, therefore, the rule of lenity is not applicable to this case. The Second Circuit's refusal to treat a person as a point source, by virtue of the rule of lenity, is without merit.

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239. *See supra* notes 71, 74 and accompanying text.

B. Knowing Endangerment

The district court, in holding that a human body is a point source, also held that Villegas was not liable under the knowing endangerment provision of the CWA.[240] The evidence clearly established that Villegas was aware of the dangers and risks involved in disposing Hepatitis-B infected blood into the Hudson River and, therefore, the district court erred when it refused to find Villegas liable under the knowing endangerment provision.

The knowing endangerment provision provides that an individual is liable if he "knows at that time he thereby places another person in imminent danger of death or serious bodily injury."[241] This provision includes placing another in a substantial risk of death.[242] In such a situation, the person is held responsible for actual awareness or the actual belief that he possessed. Moreover, the use of circumstantial evidence is permissible to establish the requisite *mens rea*.[243]

Here, the vials of infected blood are medical waste which, under EPA standards, "contains pathogens with sufficient virulence and quantity so that exposure to the waste by a susceptible host could result in infectious disease" or "waste capable of producing infectious disease."[244] It has been argued that medical waste-related injuries are unlikely to be a concern when regarding Hepatitis-B infected blood due to the fact that the virus must live inside a living cell in order to multiply.[245] However, the removal from a living cell can cause viral numbers to remain constant or decline.[246] Thus, even though viral numbers will never increase outside a living cell, the virus will continue to survive. If the children who found the broken vials accidentally cut themselves with the glass, they could have been exposed to Hepatitis-B. This virus is known to cause inflammation of the liver and, ulti-

240. *Villegas*, 784 F. Supp. at 14.
241. CWA § 309(c)(3)(A), 33 U.S.C. § 1319(c)(3)(A).
242. *Id.*
243. *Id.* § 309(c)(3)(B)(i)(I), 33 U.S.C. § 1319(c)(3)(B)(i)(I).
244. Battle, *supra* note 4, at 524.
245. *Id.* at 534.
246. *Id.*

mately, death.[247] Such a risk, no matter how great or small, is unwarranted.

The facts elicited of *Plaza Health* establish that Villegas had the requisite intent to be convicted under the knowing endangerment provision. Testimony indicated Villegas worked in the laboratory handling the blood and took the requisite precautions to protect himself from exposure.[248] Between thirty-five and fifty of the blood specimens brought into the laboratory were tested for Hepatitis in specifically designated areas for testing tainted blood due to its inherent risks.[249] The laboratory continually conducted testing for diseases like Hepatitis and Leukemia.[250] Furthermore, Villegas co-authored the laboratory's safety manual followed by its employees, which included guidelines for handling the blood.[251] Finally, Villegas was aware that there were other methods available for controlling the discharge since his laboratory hired professional medical waste handlers.[252]

When viewed in totality, this evidence establishes Villegas knew or should have known he placed others in imminent danger of death or serious bodily injury. Although expert testimony revealed that the risk of disease from a broken piece of vial glass penetrating one's skin was low,[253] this testimony is irrelevant. What *is* relevant is Villegas' knowledge when he discharged the vials of infected blood in the water. Furthermore, the later determination that only five vials of blood found on each occasion were infected is also irrelevant. It does not matter how much of the blood was infected. What *does* matter is that *some* blood was infected. Nowhere in the case does it state that Villegas knew how much of the blood was infected. Villegas admitted to the illegal discharges, blaming lack of laboratory space for incoming samples as the reason for discharging the infectious medical waste.[254] Thus,

247. *See supra* note 100 and accompanying text.
248. *Villegas*, 784 F. Supp. at 13.
249. *Id.*
250. *Id.*
251. *Id.*
252. *Plaza Health*, 3 F.3d at 653.
253. *Villegas*, 784 F. Supp. at 14.
254. *Id.* at 7.

the district court incorrectly focused on the potential risk of contact with the infected blood and not Villegas' knowledge.

It is reasonable to assume that, as vice president and co-owner of Plaza Health Laboratories, Inc., Villegas was aware that Hepatitis-B infected blood passed through the laboratories. Further, it is reasonable to assume that due to the above mentioned facts, especially the fact that his laboratory hired professional medical waste handlers, Villegas knew or should have known that some of the blood was or could have been tainted. Thus, both the district court and the Second Circuit should have determined that Villegas was liable under the knowing endangerment provision.

The knowing endangerment provision provides that circumstantial evidence is permissible to prove a defendant's possession of actual knowledge; it can be used to establish actual awareness or belief.[255] Here, the amount of evidence is so overwhelming and points to one conclusion: Villegas knew that the blood was infected. In turn, this proves that Villegas knew he was placing others in imminent danger of death or serious bodily harm.

The legislative history states that the pertinent language was left out of the CWA because of the language's tendency to deter prosecutions and, therefore, the provision should be measured according to the prevailing case law.[256] Unfortunately, the prevailing case law is vague. Only two other cases, not including *Villegas* or *Plaza Health*, refer to this provision, both failing to apply or further define the provision.[257] Thus, since there is no set standard to use as a guideline under this provision, it cannot be established that a discharger violated the knowing endangerment provision without utilizing circumstantial evidence to establish such a violation.

The evidence in the *Plaza Health* case is overwhelmingly convincing. All of this evidence points to one conclusion: Villegas was well aware that some of the blood he dumped into

255. CWA § 309 (c)(3)(B)(i), 33 U.S.C. § 1319 (c)(3)(B)(i).

256. *See supra* note 83-84 and accompanying text.

257. *See supra* note 89 and accompanying text.

the Hudson River was infected with a deadly virus. Fortunately, none of the children who found the broken vials along the shore were injured. If there were reports of injury, the outcome of this case would most likely be different.

V. Conclusion

It is important to hold Villegas liable in order to effectuate the goals of the CWA. Even though he dumped infectious medical waste into the Hudson River on two noted occasions, it is unclear as to whether Villegas would have continued to dump the blood. Villegas stated that he dumped the blood in order to make room for the incoming blood.[258] Such disposal should not have occurred. Further, he was well aware of the risks involved in disposing the infected blood in the Hudson River.

The fact that the discharges were minor is irrelevant. Even minor discharges hinder the CWA's ability "to restore and maintain the chemical, physical, and bodily integrity of the Nation's waters."[259] The CWA's definition of "discharge of pollutants" refer to "*any* addition of *any* pollutant to navigable waters from *any* point source."[260] Thus it was clearly Congress' intent to punish *all* dischargers, regardless of quantity. To hold otherwise would be minimizing the goals behind the implementation of the CWA of restoring and maintaining the bodily integrity of the waters of the United States. Furthermore, the CWA clearly states that noncompliance with the Act's provisions subjects the violator to criminal or civil penalties.[261]

From a medical waste perspective, finding Villegas liable is also important since the CWA is one of a few federal statutes under which the illegal disposal of medical waste can be prosecuted.[262] The CWA not only protects the integrity of water, but also prevents beach wash-ups of medical waste since there is no federal law dealing primarily with the dispo-

258. *Villegas*, 784 F. Supp. at 7.
259. CWA § 101(a), 33 U.S.C. § 1251(a).
260. CWA § 502(12), 33 U.S.C. § 1362(12).
261. CWA § 301, 33 U.S.C. § 1311.
262. *See supra* note 31 and accompanying text.

sal of medical waste. The high-risk nature of infectious medical waste should make prosecution for noncompliance attractive.

Paying too little attention to the broad stated goals of the CWA, as exemplified by the Second Circuit, threatens our Nation's waters. Now, under such a reading, Mr. Peter Polluter, CEO of Nukem Nuclear Power Plant, can consolidate a small quantity of excess uranium 235 from his plant, place this excess in containers, drive off in his Mercedes to the base of the Tappan Zee Bridge and, by hand, throw some of the containers in the Hudson River and/or place some of the containers in a crevice along the shore, knowing that he will not be prosecuted under the CWA due to the *Plaza Health* decision. It is hard to decipher a difference between the above scenario and a scenario where, for example, a dump truck dumps toxic waste into the Hudson River or where a pipe, connected to a building, conveys toxic waste into the river. In all of the above scenarios, there is an illegal discharge of a pollutant from a point source into navigable waters of the United States, tampering with the bodily integrity of the Hudson River. The CWA was specifically implemented to prevent these types of occurrences: discharges from industrial and municipal origins. Although the above hypothetical sounds extreme, under *Plaza Health*, it is permissible. *Plaza Health* has drawn the magic line until the case is overruled.

The *Plaza Health* court failed to find that either the container(s), the vials, the bulkhead, the car, or a human body, was a point source that discharged pollutants. The Second Circuit neglected to follow its own precedent, and that of other circuits, by declining to extend the definition of a point source. Also, the Second Circuit failed to recognize the other sources in the case which were specifically enumerated under the CWA. Furthermore, the court should have held Villegas criminally liable under the knowing endangerment provision. Since the legislative history and statutory provision give little guidance to the point source interpretation, the Second Circuit, along with other courts, should look to the general approach of the CWA as a whole, including its objectives, pol-

icy and statutory language, to effectuate the goals of the statute.

If the point of the CWA is to deter and punish violators, it is ludicrous to wait around until someone comes in contact with infectious medical waste to convict an illegal discharger. Until *Plaza Health* is overruled, it will continue to be a loaded gun on the verge of firing.