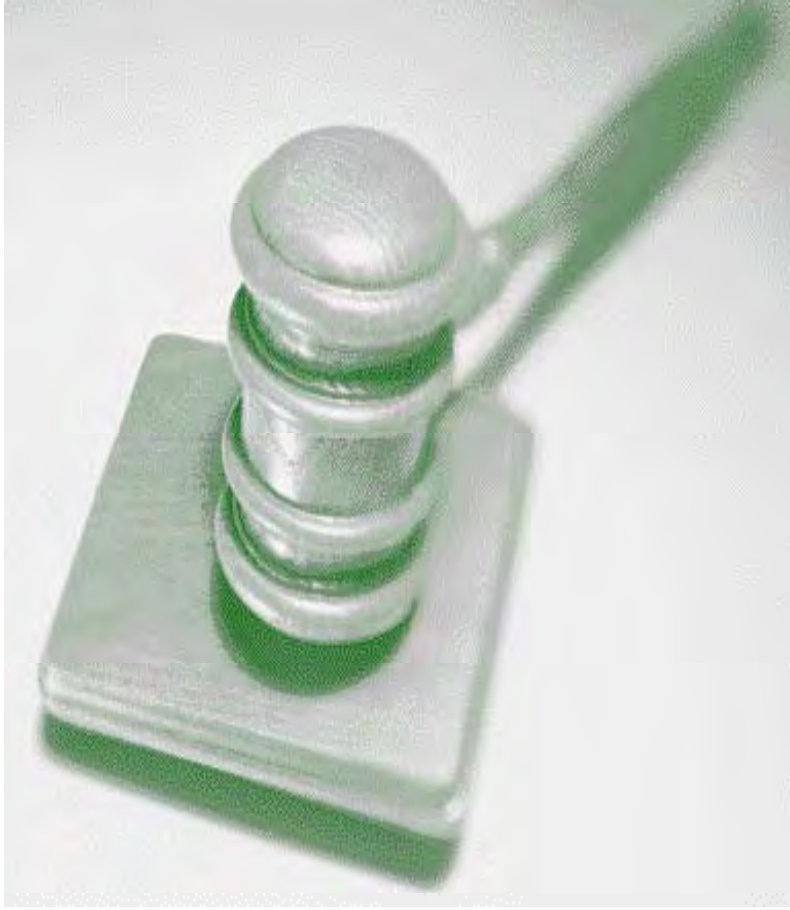
HONEST SERVICES FRAUD

THE FUTURE OF PROSECUTIONS FOR ENVIRONMENTAL CRIMES?

By Joseph J. Lisa



For more than 30 years, federal prosecutors have relied on a powerful, yet controversial, criminal charging provision to prosecute a number of high-profile government officials and private individuals. Former Illinois Governor Rod Blagojevich, lobbyist Jack Abramoff, former U.S. Congressman Randy "Duke" Cunningham, and former New Jersey State Senator Wayne Bryant, to name a few, have either been charged with or convicted of the crime of honest services fraud.[1]

The honest services fraud offense, 18 U.S.C. § 1346, is a type of federal mail or wire fraud in which a defendant is prosecuted for using the mail or wire services for the purpose of executing a scheme to defraud another of the "intangible right to honest services." Although the language of this statute is broad enough to encompass the private sector (that is, employees who defraud their employers), to date, the law has been used primarily to address fraud perpetrated by federal, state, and local government officials.[2] The provision is premised on the principle that public officials "inherently owe a fiduciary duty to the public to make government decisions in the public's best interest" and not their own.[3]

For a number of reasons, this fraud-based offense has become a favorite of prosecutors. (1) The government is able to prosecute corruption not only by federal government officials but also by state and local government officials. (2) The government does not need to prove that a fraud resulted in a loss to the public of money or tangible property.[4] (3) Honest services fraud is a felony that carries maximum criminal penalties of up to 20 years in prison and a criminal fine of up to $250,000 for individuals.[5] (4) The Federal Sentencing Guidelines generally provide for significantly higher calculations for sentencing those convicted of honest services fraud than for those convicted of traditional mail fraud.[6] (5) Each transaction involving mail or wire service in furtherance of the fraud constitutes a separate criminal offense.

Despite the fact that this statute has been used to address many different types of criminal cases, there has been a pronounced absence of honest services fraud prosecutions in connection with environmental crime, which is surprising in light of the fact that government officials are regularly charged as defendants in connection with such cases.[7] In addition, federal prosecutors frequently charge Title 18 offenses, including mail fraud, in these cases. However, this situation may be changing. As explained in this article, the honest services fraud statute is clearly applicable to a wide range of crimes related to environmental issues. Furthermore, charging this offense enables prosecutors to address both the environmental and public corruption aspects of such criminal conduct. As a result, the future use of this law in the environmental arena may be significant and should be of great interest to both prosecutors and members of the defense bar.

The purpose of this article is to discuss the honest services fraud offense in connection with the prosecution of public officials for environmental crimes. The first section provides a brief primer explaining the environmental crimes program run by the U.S. Environmental Protection Agency (EPA) and an overview of prosecutions for environmental crimes. The second part analyzes the history and basic elements of the honest services fraud offense, and the last part discusses how this offense can be used to prosecute public officials for environmental crimes and examines issues that might arise in connection with such prosecutions.

Primer on Federal Cases Involving Environmental Crimes

With close to 200 federal agents and more than 30 attorneys on its staff, EPA's environmental crimes program has generated a number of high-profile prosecutions and a

heightened level of awareness in the regulated community of the need to ensure compliance with federal environmental requirements.[8] Although there have been critics along the way, all indicators seem to suggest that prosecuting environmental crimes will continue to play an important role in EPA's future enforcement efforts.[9]

The federal government possesses a number of different legal authorities that can be used to address noncompliance with environmental regulations. These enforcement tools range from the issuance of Notices of Violation to the imposition of criminal penalties (criminal fines, terms of imprisonment, restitution, and community service). The majority of the environmental statutes that EPA administers contain criminal enforcement provisions.[10] Most of these statutory provisions contain a mens rea element and apply only to violations that are committed "knowingly." Although not defined in any federal statute, the "knowingly" standard has been interpreted by the federal courts as a general intent standard, requiring proof only that a violation resulted from intentional conduct and not because of ignorance, mistake, or an accident.[11] Proof of a defendant's knowledge of the federal environmental laws or a specific intent to violate these laws is not required to secure a conviction.

Generally, these criminal enforcement provisions provide for felony-level penalties of up to five years in prison. In certain instances, however, when a knowing violation also places another person in imminent danger of death or serious bodily injury (referred to as a "knowing endangerment" offense), enhanced penalties of up to 15 years in prison are available.[12] Two statutes, the Clean Water Act and the Clean Air Act, also make it a crime—a misdemeanor—to negligently violate certain environmental standards.[13]

Frequently, in environmental crime cases, federal prosecutors also charge defendants with more traditional criminal offenses, commonly referred to as Title 18 offenses because they are set forth in Title 18 of the U.S. Code.[14] Some of the more commonly charged Title 18 offenses include: false statements, 18 U.S.C. § 1001; obstruction of an agency proceeding, 18 U.S.C. § 1505; conspiracy, 18 U.S.C. § 371; wire fraud, 18 U.S.C. § 1343; and mail fraud, 18 U.S.C. § 1341.

Prosecutors charge Title 18 offenses in connection with environmental crime prosecutions for a number of reasons. Title 18 offenses tend to result in higher calculations under the now advisory Federal Sentencing Guidelines; therefore, there is a greater likelihood that a defendant will be sentenced to a period of incarceration, as opposed to a term of probation. If a defendant is convicted pursuant to a Title 18 offense rather than a federal environmental law, it is generally easier to secure an order of restitution for victims under the federal restitution statutes, 18 U.S.C. §§ 3663 and 3663A. In addition, Title 18 offenses, like conspiracy and mail fraud, enable prosecutors to reach beyond the normal five-year statute of limitations period that applies to the federal environmental statutes and address a broader range of criminal conduct. Prosecuting environmental crimes often involves complex scientific and technical issues that, in most instances, are not present in Title 18 prosecutions. Finally, many federal prosecutors tend to be more familiar with Title 18 offenses and, therefore, have a greater comfort level bringing such charges.

History and Overview of the Honest Services Fraud Offense

Any discussion of honest services fraud first requires a basic understanding of the federal mail and wire fraud statutes. Although the following section focuses on mail fraud, the analysis is almost virtually identical to the analysis applicable to wire fraud. 18 U.S.C. § 1343.

Mail Fraud

Enacted in 1872, the mail fraud statute, 18 U.S.C. § 1341, provides federal prosecutors with a potent tool with which to address instances in which either the U.S. mail or an interstate carrier is used to further a fraudulent scheme.[15] In trying to describe the importance that federal prosecutors place on this offense, a former assistant U.S. attorney described it as "our Stradivarius, our Colt .45, our Louisville Slugger, our Cuisinart—and our true love."[16]

Generally, in order to obtain a conviction for mail fraud, the government must prove beyond a reasonable doubt that,

1. a defendant devised a scheme or artifice to defraud or to obtain money or property by false and fraudulent pretenses, representations, or promises;
2. that the defendant acted with specific intent to defraud; and
3. that in execution or in furtherance of the scheme, the defendant used or caused a mailing to occur.

Although use of the mail need not be part of the underlying scheme, the government must still prove that a mailing occurred in furtherance of the fraudulent scheme. Ultimately, it is not necessary for the scheme to defraud to be successful in order for the government to secure a conviction.[17] Each and every mailing in furtherance of the scheme constitutes a separate offense. Mail fraud carries maximum criminal penalties of up to 20 years in prison and a criminal fine under 18 U.S.C. § 3571.

Honest Services Fraud

In the early 1970s, in the wake of the Watergate scandal, the U.S. Department of Justice made prosecution of public corruption a priority and used the federal mail and wire fraud statutes to address instances in which public officials had designed schemes to defraud the public of their intangible right to honest and good government.[18] The legal rationale was that public officials are fiduciaries and, therefore, owe the public a duty to provide honest, faithful, and disinterested services. According to this viewpoint, when government officials act to enrich themselves as a result of their positions, they have violated their duty and have defrauded the public.

Initially, prosecutors were very successful in convincing courts that these fraud-based laws were applicable to cases of public corruption.[19] However, a serious debate ensued as to whether the mail and wire fraud offenses were limited to cases in which a scheme to defraud resulted in a loss of money or property. This was a significant issue because, in many types of public corruption cases, even though public

officials profit through bribes or kickbacks, it is often difficult to prove that the government or the public has suffered a monetary or property loss.

Finally, in 1987, the U.S. Supreme Court resolved the debate in *McNally v. United States*, 483 U.S. 350 (1987), in which the Court held that the federal mail fraud statute is limited to the protection of tangible (monetary or property) rights and does not cover the intangible right of the citizenry to have public officials perform their duties honestly. The net effect of the decision was that prosecutions of cases involving honest services fraud came to a grinding halt.

In *McNally*, the governor of Kentucky had given the chairman of the state Democratic Party control over the selection of insurance agencies from which the state would purchase its policies. The chairman then demanded that, in order to obtain such contracts, these insurance agencies had to share part of their commissions with other agencies that were controlled by the chairman and another state official. The chairman was convicted under the mail fraud statute for defrauding the citizens and government of Kentucky of their right to honest services. The U.S. Court of Appeals for the Sixth Circuit affirmed the decision, holding that the chairman was a public fiduciary and had schemed to defraud the citizens of Kentucky.

In overturning the conviction, the Supreme Court noted that "the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property." *Id.* at 356. In the case before the Court, there was no evidence that the Commonwealth of Kentucky or its citizenry suffered a tangible loss because payments by Kentucky for insurance policies were required irrespective of the chairman's scheme to defraud. As a result, the Supreme Court refused to extend the scope of the mail fraud statute to public corruption cases that did not involve a fraud to obtain money or property. "Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in settling standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has." *Id.* at 360.

The *McNally* decision was a devastating blow to federal prosecutors and quickly drew the attention of Congress. In November 1998, Congress enacted 18 U.S.C. § 1346, which expanded the definition of "scheme to defraud" to include a scheme to "deprive another of the intangible right of honest services."[20]

Unfortunately, Congress' quick fix failed to address a number of issues. For example, the statute did not specifically define the type or nature of the duty that a public official needed to breach in order to be subject to prosecution.[21] The federal courts are divided as to whether such a duty must arise from a federal, state, or local law or whether violation of the mail and wire fraud statutes is sufficient.[22] In addition, Congress failed to define the scope of the law adequately. Critics have argued that the statute should not be used for private-sector matters and also that it is unduly vague, a violation of due process, and an invitation for prosecutorial abuse.[23] Nevertheless, prosecutors have pressed forward and successfully used § 1346 to secure convictions in a wide range of criminal cases involving individuals in both the public and the private sectors.

Application of Honest Services Fraud to a Case of Environmental Crime

Federal environmental laws specifically provide that federal, state, and local governmental entities are generally subject to environmental requirements to the same extent as any other member of the regulated community.[24] Furthermore, the federal courts have held that governmental officials are not immune from criminal prosecution for their failure either to comply or to ensure compliance with environmental laws and regulations.[25] As a result, it clearly can be argued that public officials possess both a legal and fiduciary duty to make certain that their facilities are operated in compliance with applicable environmental standards. Compliance ensures not only the protection of human health and the environment but also the proper expenditure of government funds. Failure to ensure such compliance constitutes a breach of a public official's duty and the potential basis for prosecution under § 1346.

A number of different types of situations may arise in which a public official knowingly creates a scheme to violate environmental laws and regulations and uses the mail or wire services to further and conceal such violations. Consider the following example: The licensed operator of a publicly owned treatment works discovers that the plant's treatment process is not working properly and that its effluent discharge exceeds the fecal coliform limit set by the facility's Clean Water Act permit. The township is suffering from financial problems and the operator does not want to ask for additional funds to repair the plant. He is concerned that he may lose his job for not controlling costs. However, the operator also knows that if he does not resolve the problem, the EPA and state environmental agency may discover the situation and fine the township for noncompliance with the permit. As a result, the operator devises a scheme whereby he orders his employees to add bleach to samples of the plant's effluent discharge prior to sending it to an outside laboratory for testing. The bleach is intended to kill the fecal coliform in the samples and thereby obtain false test results that conceal the problems of the publicly owned treatment works. The operator records these test results, which he knows are false, on the plant's Discharge Monitoring Reports, and, on a monthly basis, mails these materially false reports to the EPA and the state.[26]

The operator of the plant in this example could be indicted on a number of different criminal charges. One such charge that may not come immediately to mind, however, is honest services fraud. A prosecution for honest services fraud would be premised on the fact that plant operator is a public official as well as an environmental professional licensed by the state. Unarguably, he has a duty arising out of federal, state, and local law to ensure the plant's compliance with all applicable environmental requirements. In addition, the citizens of his township certainly expect the plant to comply with these laws, which are enacted in or-

der to provide for the protection of public health and the environment and to make certain that taxpayer money is used for legitimate matters. However, instead of fulfilling his duty, the operator devised an elaborate scheme with which to deceive the public and government regulators. The goal of the scheme was not to obtain money or property but, rather, to conceal the plant's noncompliance with the permit it was granted under the Clean Water Act. To further the scheme, the operator knowingly made materially false representations on the Discharge Monitoring Reports, which was evidence of a specific intent to defraud. Finally, he used the U.S. Postal Service to submit the false reports and to further his scheme.[27]

In this example, an issue clearly would exist as to whether the government could charge traditional mail fraud. No evidence exists that the public suffered a monetary or property loss as a result of the scheme to defraud. As in the *McNally* case, the township in this hypothetical case would have had to pay a superintendent to operate the plant and to provide a budget for the maintenance of the publicly owned treatment works, regardless of the fraud perpetrated by the operator. Furthermore, there was no evidence to indicate that the operator intended to profit—or actually profited—from his scheme to defraud. However, an honest services fraud charge would be appropriate in this case, because the operator deprived the public of its right to good government and proper operation of a public facility.

This is just one of many different types of environmental crime cases for which prosecuting an individual for honest services fraud might be appropriate. Other examples of such potential cases might include the following:

- The director of a municipal public works department orders employees to bury drums of hazardous waste on township property to avoid having to pay the cost of proper disposal and then attempts to cover up the illegal activity by creating false hazardous waste manifests and mailing them to the EPA in order to mislead the agency into believing that the wastes were properly disposed of at a permitted facility.
- The principal of an elementary school orders uncertified custodians to remove insulation that contains asbestos without following the Clean Air Act's work practice standards and then submits information to the EPA denying that the school ever contained asbestos.
- In a written response to the EPA's request for information, the managing director of a metropolitan area falsely denies that the city ever sent waste material to a landfill at which the EPA is conducting a Superfund cleanup in order to attempt to shield the city from having to pay for such cleanup.

In actuality, in any instance in which a member of the regulated community is required to submit data or make a written certification to government regulators concerning the compliance status of his or her facility, the basis for an honest services fraud case may exist. In light of the fact that numerous federal environmental laws, regulations, and permits contain reporting or certification obligations, the potential for the use of this offense in the environmental area is significant.

Conclusion

Ultimately, the goal of any criminal prosecution is to charge a defendant with the most appropriate criminal offense that adequately captures the nature of his or her conduct and that, upon conviction, provides for a fair, just, and reasonable punishment. For public officials involved in fraudulent schemes related to environmental matters, honest services fraud may provide just such an appropriate charge. **TFL**

Joseph J. Lisa is a regional criminal enforcement counsel for Region 3 of the U.S. Environmental Protection Agency and a special assistant U.S. attorney at the U.S. Attorney's Office for the Eastern District of Pennsylvania. The views expressed in this article are those of the author and do not necessarily reflect those of the EPA or the U.S. Department of Justice.

[1]*See From Coaches to Church Officials, An Honesty Law Gets a Workout*, WALL STREET JOURNAL (Feb. 5, 2009); *Fighting Corruption with the "Honest Services" Doctrine*, ST. PETERSBURG TIMES (Jan. 22, 2009); and U.S. Attorney's Office for District of New Jersey. Press Release. *Former N.J. State Senator Guilty* (Nov. 19, 2008).

[2]Daniel C. Cleveland, *Once Again, It Is Time to "Speak More Clearly" About § 1346 and the Intangible Rights of Honest Services Doctrine in Mail and Wire Fraud*, 34 N. KY. L. REV. 117 (2007).

[3]*United States v. DeVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999).

[4]*See United States v. Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996) ("[U]ndisclosed, biased decision-making for personal gain, whether or not tangible loss to the public has been shown, constitutes a deprivation of honest services.").

[5]18 U.S.C. §§ 1341 and 3571.

[6]*Compare* U.S.S.G. § 2B1.1 (applicable to general mail fraud cases), which provides for a base offense level 7, to U.S.S.G. § 2C1.1 (applicable to honest services fraud cases) with a base offense level of 14 for public officials.

[7]*See*, for example, *United States v. Daniel Carson* (08-CR-00099) (S.D. Ga.) (public works director of Harlem, Ga., charged with violating the Clean Water Act and making false statements); *United States v. Richard Sturgeon* (08-CR-04032) (W.D. Mo.) (former public works director of City of the Ozarks pled guilty to failing to report discharge of raw sewage into Lake of the Ozarks); *United States v. David Williams* (07-CR-00376) (chief warrant officer with U.S. Coast Guard sentenced for obstructing investigation of overboard discharges of bilge waste); *United States v. Nicholas Miritello* (07-CR-0063) (S.D.N.Y.) (employee of New York City Department of Environmental Protection sentenced for false statements about safe drinking water issues); and *United States v. Jerry Gaskill* (06-CR-00003) (E.D. N.C.) (director of North Carolina Department of Transportation charged with conspiracy to violate the Clean Water Act).

[8]*See*, for example, *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001), *cert. denied*, 537 U.S. 812 (2002); and

Joseph Hilldorfer, CYANIDE CANARY (Free Press, 2004). For an overview and history of the federal environmental crimes program, *see* Martin Harrell, Joseph Lisa, and Catherine Votaw, *Federal Environmental Crime: A Different Kind of "White Collar" Prosecution*, 23 NAT. RES. & ENVTL., no. 3 (Winter 2009); and John F. Cooney, *Criminal Enforcement of Environmental Laws: Part 1*, 25 ENVTL. L. REP. 10459 (1995).

[9]During fiscal year 2008, 176 defendants were charged in connection with environmental crimes and sentenced to 57 years of incarceration and ordered to pay a total of $63.5 million in criminal fines and restitution, Environmental Protection Agency, Office of Enforcement and Compliance Assurance, *Compliance and Enforcement Annual Results: FY 2008*. Under the federal budget proposed for fiscal year 2009, EPA's budget will increase by 34 percent, and its operating budget, which is used for matters like enforcement, will jump to $3.4 billion. *See also* Steven Solow, *The State of Environmental Crime Enforcement: A Survey of Developments in 2008*, BNA Daily Environment Report (Mar. 11, 2009).

[10]Clean Water Act (CWA), 33 U.S.C. § 1319(c); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6928(d)–(e); Clean Air Act (CAA), 42 U.S.C. § 7413(c); Comprehensive Environmental Response, Compensation, and Liability Act, 42, § 9603(b); Emergency Planning and Community Right-to-Know Act, 42 § 11045(b)(4); Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 1361(b); and Toxic Substances Control Act, 15 U.S.C. § 2615(b).

[11]Joseph E. Cole, *Environmental Criminal Liability: What Federal Officials Know (or Should Know) Can Hurt Them*, 54 A.F. L. REV. 1, 17 (2004). *See also United States v. Ho*, 311 F.3d 589, 605 n.17 (5th Cir. 2002); *United States v. Bryan*, 524 U.S. 184, 193 (1998); and *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 52 n.15 (1st Cir. 1991).

[12]RCRA § 3008(e), 42 U.S.C. § 6928(e); CAA Section 113(c)(5)(A), 42 U.S.C. § 7413(c)(5)(A); and CWA § 309(c)(3)(A); 33 U.S.C. § 1319(c)(3)(A).

[13]CWA § 309(c)(1)(A) and (B), 33 U.S.C. § 1319(c)(1)(A) and (B); and CAA § 113(c)(4), 42 U.S.C. § 7413(C)(4). *See also* Joseph J. Lisa, *Negligence-Based Environmental Crimes: Failing to Exercise Due Care Can Be Criminal* 18 VILL. ENVTL. L. J. 1 (2007).

[14]Attorney General John Ashcroft, *Memo Regarding Policy on Charging of Criminal Defendants* (U.S. Department of Justice, Sept. 22, 2003) (federal prosecutors are required in all federal cases to charge "the most serious, readily provable offense or offenses supported by the facts of a case").

[15]18 U.S.C. § 1341 provides in pertinent part, "[w]hoever, having devised or intending to devise a scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises ... for purposes of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by a private or commercial interstate carrier … shall be fined under this title and imprisoned for not more than 20 years or both."

[16]Jed S. Rakoff, *The Federal Mail Fraud Statute* (Part I), 18 DUQ. L. REV. 771 (1980).

[17]*United States v. Frey*, 42 F.3d 795, 800 (3d Cir. 1994).

[18]Mathew N. Brown, *Current Development 2007–2008: Prosecutorial Discretion and Federal Mail Fraud Prosecutions for Honest Services Fraud*, 21 GEO. J. LEGAL ETHICS 667, 670 (2008).

[19]Cleveland, *Once Again, It Is Time to "Speak More Clearly" About § 1346* at 117, 124 ("every Federal appellate court that had considered the scope of the mail and wire fraud provisions held that those provisions protected the right of the public to the honest services of public officials and others responsible for the conduct of public affairs ...").

[20]*United States v. Murphy*, 323 F.3d 102, 110–111 (3d Cir. 2003) (noting that Congress enacted § 1346 to restore the mail fraud jurisprudence to its "status pre-*McNally*").

[21]*United States v. Sawyer*, at 725.

[22]*Compare U.S. v. Brumley*, 116 F.3d 728 (5th Cir. 1997), with *U.S. v. Bissell*, 954 F. Supp. 841 (D.N.J. 1996), aff'd, 142 F.3d 439 (3d Cir. 1998).

[23]Gregory Williams, *Good Government by Prosecutorial Decrees: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137, 138 (1990); Brown, *Current Development 2007–2008*, at 668; and Paul M. Kessimian, *Business Fiduciary Relationships and Honest Services Fraud: A Defense of the Statute*, COLUM. BUS. L. REV. 197 (2004).

[24]*See*, for example, RCRA §§ 1004(15) and 6001, 42 U.S.C. §§ 6903(15) and 6961(a).

[25]*United States v. Dee*, 912 F.2d 741, 748–749 (4th Cir. 1990), *cert denied*, 499 U.S. 919 (1991) (federal employee subject to prosecution under RCRA); and *United States v. Curtis*, 988 F.2d 946, 949 (9th Cir. 1993), *cert. denied*, 510 U.S. 862 (1993) (Ninth Circuit found "clear and unambiguous" intent on part of Congress that federal employees' actions within the scope of their employment are subject to criminal prosecutions for violations of the CWA).

[26]This hypothetical case is based, in part, on an actual case concerning the, Pennsylvania Wastewater Treatment Plant in Bristol Township that was prosecuted in 2006 by Region III of the Environmental Protection Agency and the U.S. Attorney's Office for the Eastern District of Pennsylvania. *See United States v. Steve McClain* No. 06 CR 00102 (E.D. Pa.). The superintendent of the plant, Steve McClain, and his principal operator, Ronald Meinzer Jr., eventually pled guilty to felony violations of the Clean Water Act. McClain, the superintendent, was sentenced to one year and one day in prison, three months in a community detention center, three months under house arrest, and a $4,000 fine. Interestingly, the judge who sentenced McClain had just finished presiding over a public corruption case involving an official with the city of Philadelphia who was charged with, among other things, honest services fraud. *See United States v. Corey Kemp*, 04-CR-00370 (E.D. Pa.) (U.S. District Court Judge Michael M. Baylson presiding).

[27]*Compare* U.S.S.G. § 2C1.1 (applicable to general mail fraud cases), with U.S.S.G. § 2Q1.2 (applicable to environmental crime cases).