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Robin L. Greenwald

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WHAT'S THE "POINT" OF THE CLEAN
WATER ACT FOLLOWING *UNITED STATES v.*
*PLAZA HEALTH LABORATORIES, INC.?**
THE SECOND CIRCUIT ACTS AS A LEGISLATOR
RATHER THAN AS A COURT

*Robin L. Greenwald***

INTRODUCTION

During the summer of 1988, New York headlines chronicled the pollution, if not the destruction, of area beaches. One such article told of a day of beach closures from the devastating epidemic of medical waste wash-ups:

It began, unnoticed, on the crystalline morning of Sunday, July 3: Sometime around 10:30, the wind imperceptibly turned, blowing in from the southwest, targeting the beaches of Long Island.

Three days later, horrified noontime bathers along a six-mile swath of sandy shoreline from Point Lookout to Long Beach were wading through slicks of trash, including vials of encrusted blood and needle-tipped syringes. Amid the hysteria of the blood-borne AIDS epidemic, the finds set off a rush of closings of seafront parks along New York's vast underbelly and triggered one of the most sweeping environmental investigations ever in the region, involving Federal, state and local authorities.¹

The problem was not isolated to the New York metropolitan area, but affected states all along the eastern coastline.²

* 3 F.3d 643 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 2764 (1994).

** Assistant United States Attorney, Eastern District of New York. I was one of the attorneys who prosecuted *Plaza Health*. I also represented the government in the *Plaza Health* case on appeal. As a result of my close involvement in the case from the outset, the views I have expressed in this Article are as an advocate as much as an objective reviewer. Moreover, while the United States Department of Justice approved a petition to request the Second Circuit to rehear the appeal *in banc* after the Circuit's decision, and the Office of the Solicitor General filed a petition for a writ of certiorari in the United States Supreme Court, the positions set forth in this Article are mine and do not express the opinions of the United States Department of Justice.

¹ Ralph Blumenthal, *Mystery of Fouled Beaches: Clues, But No "Smoking Gun,"* N.Y. TIMES, July 25, 1988, at A1.

² One account read:

Government regulators were heard to say "I'd hate to be the individual we could catch."³ Chief state prosecutors also expressed outrage that more was not being done to apprehend and to prosecute those responsible for the wash-ups: "I am confident that each of you shares my outrage. . . . I'm not simply concerned with the presence of this waste along our coastline, but I am appalled that federal law enforcement resources have not been rallied earlier . . . to investigate, apprehend and prosecute the individuals or corporations responsible."⁴ Responding to the ever-growing fear that beachgoers would contract a deadly disease from medical waste peppering the beaches and that the economies of beach communities would be devastated by the medical waste wash-ups,⁵ George Bush, in his acceptance speech for the 1988 presidential nomination, called for the prosecution of those responsible for polluting the nation's waters with medical wastes: "I am going to have the FBI trace the medical wastes, and we're going to punish the people who dump those infected needles into our oceans, lakes and rivers."⁶

On June 3 four vials of blood washed up on Island State Park Beach in New Jersey. By July, more debris had turned up in Bayonne on Newark Bay. Over the rest of the summer, a wide array of catheters, colostomy bags, i.v. bottles, portions of respirators and other hospital equipment appeared along the coastline in New York, Massachusetts, Connecticut, Maryland, Rhode Island and Ohio.

Throughout the country, the sudden specter of medical wastes littering the landscape triggered public fears that a major new health hazard had slipped through the government controls—bringing with it a risk of infection from such diseases as hepatitis and AIDS.

. . . .

Few locations seem immune to the problem. From Cape Cod to North Carolina, from Long Island Sound to Baltimore Harbor, medical waste has generated headlines, driven away vacationers, closed public beaches, prompted hearings in Congress and elicited public outcries from politicians.

Sally Squires, *Needles on the Beach: The Growing Pains of Medical Waste*, WASH. POST, Aug. 23, 1988, at Z12.

³ Blumenthal, *supra* note 1, at A1 (quoting William J. Muszynski, deputy regional administrator of the federal Environmental Protection Agency).

⁴ Squires, *supra* note 2, at Z12 (quoting Rhode Island's then-Attorney General James E. O'Neil).

⁵ Direct economic costs to New York and New Jersey alone resulting from the medical waste wash-ups during the summer of 1988 were estimated at \$1 billion to \$5.4 billion. James W. Brown, *The Medical Waste Outcry: A Personal Update*, MED. LAB. OBSERVER, Apr. 1991, at 40.

⁶ Squires, *supra* note 2, at Z12.

Once the persons responsible for dumping medical wastes in the nation's waters were apprehended, everyone assumed that existing federal law included the enforcement mechanism necessary to punish such conduct.⁷ The Federal Water Pollution Control Act⁸ (commonly known as the "Clean Water Act") proclaims that the discharge of pollutants into navigable waters should cease by 1985.⁹ To accomplish this goal, Congress provided that, in the absence of a permit, the discharge into the water of any pollutant by any person is unlawful,¹⁰ and, if the unlawful discharge is made with the requisite *mens rea*, it is criminal.¹¹ In *United States v. Plaza Health Laboratories, Inc.*,¹² however, the Second Circuit defied existing wisdom and held that intentional dumping by an individual of medical waste into our nation's waters is not a crime.

This Article examines the Second Circuit's treatment, in *Plaza Health*, of a criminal prosecution and conviction of an individual under the Clean Water Act for dumping hundreds of blood vials into the Hudson River during the summer of 1988. The Article first sets forth the facts underlying the prosecution. Next, it reviews the provisions of the Clean Water Act relevant to the *Plaza Health* indictment, followed by a discussion of the proceedings before the district court. The Article then reviews the Second Circuit panel majority and dissenting opinions in *Plaza Health*, followed by an analysis of the majority's decision. Finally, the Article explores the many questions remaining about the viability of civil and criminal Clean Water Act enforcement following the Second Circuit's treatment of the law in *Plaza Health*.

⁷ As Richard B. Stewart, the then-Acting Attorney General for the Environment and Natural Resources Division of the Department of Justice, said when the jury returned a verdict of guilty in the *Plaza Health* trial: "This case is a sad reminder that even though criminal environmental prosecutions are on the rise, there are still individuals in this country who blatantly disregard the law—they must be punished." *New Jersey Lab Executive Guilty of Throwing Contaminated Blood Into New York Waterway*, U.S. NEWswire, Feb. 1, 1991.

⁸ 33 U.S.C. §§ 1251-1376 (1988 & Supp. V 1993).

⁹ *Id.* § 1251(a)(1) (Supp. V 1993).

¹⁰ *Id.* § 1311(a).

¹¹ *Id.* § 1319(c) (Supp. V 1993).

¹² 3 F.3d 643 (2d Cir. 1993), *cert. denied*, 114 S. Ct 2764 (1994).

I. THE PLAZA HEALTH PROSECUTION

A. *Facts*

The defendant, Geronimo Villegas, was the co-owner and vice president of Plaza Health Laboratories, Inc. ("Plaza Health"), a blood testing laboratory located in Brooklyn, New York.¹³ On at least two separate occasions, between April and September 1988, Villegas transported hundreds of blood vials generated at Plaza Health, some of which contained blood infected with the hepatitis-B virus, to his condominium complex in Edgewater, New Jersey.¹⁴ As the name suggests, Edgewater is located on the banks of the Hudson River. Once at his condominium complex, Villegas took the vials from the trunk of his car, walked them to the edge of the Hudson River and dumped them into the water.¹⁵

On May 26, 1988, a teacher at Saint John's Lutheran School took her eighth-grade class to the Alice Austin House in Staten Island, New York, for a field trip. During the field trip, a group of children took a walk along the beach. While on the beach, the children found blood vials scattered on the beach and saw other blood vials floating in the water.¹⁶ The children had the presence of mind to leave the vials where they had found them and to call to their teacher for help. Employees of the Alice Austin House reported the finding to the authorities.

Later that day, New York City Environmental Police Officers arrived at the scene and saw blood vials scattered on the beach and many more floating in shallow waters. Many of the vials in the water were breaking as they hit the rocks. The officers retrieved approximately 70 blood vials from the water.¹⁷

Nearly four months later, on September 25, 1988, a maintenance worker at the Admirals Walk Condominium Association, where Villegas lived, discovered a plastic container full of vials of blood wedged in the rocks forming the bulkhead be-

¹³ *Id.* at 643.

¹⁴ *Id.* at 643-44.

¹⁵ *Id.* at 644.

¹⁶ *Id.*

¹⁷ *Plaza Health*, 3 F.3d at 644.

tween the condominium complex and the Hudson River.¹⁸ He reported his finding to the New Jersey Police Department. Over the next two days, investigators found other plastic containers containing blood vials and hundreds of blood vials floating in the Hudson River alongside the condominium complex.

Many of the vials retrieved from the Alice Austin House beach and the area around the condominium locations had labels affixed to them which bore a numerical code and, in some instances, a patient's name. Investigators traced all of the vials to Plaza Health.¹⁹ As to the vials that had washed ashore in Staten Island, an oceanographer who testified as an expert witness for the government explained that materials dumped in the Hudson River at Edgewater, New Jersey, could readily be carried by the river's tides and currents to the beach in Staten Island.

Investigators learned that Villegas lived at the Admirals Walk Condominium at the time of the dumpings. When investigators questioned Villegas, he admitted to one incident of dumping vials in the bulkhead adjacent to his condominium in June 1988, as well as to dumping blood vials in a garbage can beside a tennis court in Edgewater.²⁰

B. Relevant Clean Water Act Provisions

Section 1311(a) of the Clean Water Act provides that, "[e]xcept as in compliance with this section and section[] . . . 1342 . . . of this title, the discharge of any pollutant by any person shall be unlawful."²¹ Section 1342 sets forth the requirements for obtaining permits for the discharge of pollutants.²² The criminal penalties provision of the Clean Water Act are contained in section 1319(c), which provides, in relevant part, that

Any person who —

(A) knowingly violates section 1311 . . . of this title,

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Joint Appendix [hereinafter "JA"] at 33. The Joint Appendix can be found in the Second Circuit Court of Appeals' file for the *Plaza Health* appeal.

²¹ 33 U.S.C. § 1311(a).

²² *Id.* § 1342 (Supp. V 1993).

shall be punished by a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than 3 years, or by both.²³

Thus, reading sections 1311, 1319(c) and 1342 together, the Clean Water Act makes it a crime for any person knowingly to discharge a pollutant into the waters of the United States unless the discharge is in accordance with a lawfully issued permit.

The term "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source."²⁴ Included in the term "pollutant" is "solid waste, . . . garbage, . . . biological materials . . . and industrial, municipal, and agricultural waste discharged into water."²⁵ Finally, the term "point source," the term that ultimately was at issue in *Plaza Health*, is defined as follows:

*any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.*²⁶

C. *The District Court Proceedings*

On May 16, 1989, a grand jury sitting in the Eastern District of New York indicted Plaza Health and Villegas on two counts of violating the Clean Water Act relating to the vials discovered on the Staten Island beach. In a superseding indictment, the grand jury charged Villegas and his company²⁷ with two additional counts relating to the vials found in Edgewater, New Jersey.²⁸ Each of the four counts of the indictment re-

²³ 33 U.S.C. § 1319(c)(2) (1988 & Supp. V 1993).

²⁴ *Id.* § 1362(12).

²⁵ *Id.* § 1362(6).

²⁶ *Id.* § 1362(14) (emphasis added).

²⁷ Following the indictment, but before the trial, Plaza Health filed for bankruptcy pursuant to Chapter 7 of the Bankruptcy Code. The trial, accordingly, proceeded against Villegas only. *Plaza Health*, 3 F.3d at 644.

²⁸ Each of the dumping incidents had one count for knowingly discharging pollutants into the water (the "knowing discharge" counts), 33 U.S.C. § 1319(c)(2), and a separate count for knowing endangerment under the Clean Water Act (the

quired the government to prove that the defendant discharged the pollutants from a "point source." In this case, Villegas threw the vials into the water with his hands; thus, the last "point" of contact with the pollutant before it entered the water was the defendant's hand.²⁹ The evidence introduced at trial relating to the means by which the vials entered the water was principally Villegas's own statement given to investigators in October 1988. In the statement, Villegas explained that he went to the bulkhead with the containers of blood vials and, at low tide, wedged the containers between rocks of the bulkhead.³⁰ That admission, coupled with identifying labels which

"knowing endangerment" counts). *Id.* § 1319(c)(3). Pursuant to the knowing endangerment provision, a person who knowingly dumps pollutants into the water without a permit, knowing at the time that such activity places another person in imminent danger of death or serious bodily injury, is subject to a term of imprisonment of 15 years and a fine of \$250,000. *Id.* Because some of the vials from both dumpings contained blood infected with hepatitis-B, a highly contagious and potentially deadly virus, Villegas was charged with knowing endangerment as well.

²⁹ It is this last link—the human touch—in the chain of events leading up to the vials washing ashore that led the Second Circuit to conclude that Villegas did not violate the Clean Water Act when he dumped vials from his blood testing laboratory into the Hudson River. *See infra* text accompanying notes 42-51.

³⁰ Villegas described his actions as follows:

Q: When was the next incident [following the June 1988 blood vial dumping in a garbage can at the Binghamton Racquet Club]?

A: Around the same time period. Probably the same day as the one at Binghamton. Around 9:30 to 10:00 o'clock at night.

Q: What did you do?

A: I put two containers filled with blood vials and maybe four or five small plastic bags next to a big hole next to a big rock with an opening in between.

Q: Did you throw any into the water?

A: No. When I put the stuff there it was low tide.

JA at 33-34. Villegas did not describe how he put the vials into the River on the other occasion charged in the indictment, but the evidence showed that he also discharged numerous blood vials into the Hudson River in Edgewater, New Jersey, on an earlier date.

Because Villegas, according to his confession, dumped the vials at low tide, and as such did not put them *directly* into water, does not mean that the vials were not discharged into navigable waters. The term "navigable waters" means "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The term navigable waters is further defined in the regulations as "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." 33 C.F.R. § 328.3(a)(1) (1993); 40 C.F.R. § 230.3(s)(1) (1993). Although Villegas said he dumped the vials in the rocks in an area that at the time was not covered with water, it was in an area that would be immersed in water at high tide. Thus, the dumping site satisfied the definition

remained on many of the vials recovered in Staten Island and at Edgewater, and which were traced to Plaza Health, and trial testimony of Plaza Health employees regarding Villegas's activities at the laboratory, proved that Villegas was responsible for the dumpings.

After the presentation of evidence, the district court instructed the jury that a number of elements were common to all four counts in the indictment. As to the point source element, the district court explained that Congress used the term "point source" in the Clean Water Act to distinguish between water pollution that is traceable to an identifiable source and pollution that comes from unidentifiable sources. The district court specifically instructed the jury on the meaning of point source as follows:

The statute also specifies that only discharges without a permit from so-called "point sources" are prohibited. Congress chose to distinguish between "point sources" and "non-point sources" with the specific purpose of excluding various kinds of pollution runoff, that is, runoff produced principally by rainfall that cannot be traced to one polluter. Congress did not intend to exempt from regulation any activity that emits pollution from an identifiable point. Congress did not intend by the term "point source" to distinguish between a person who drives a truck to the edge of the Hudson River and dumps blood vials, clearly a point source, and a person who gets out of the truck, takes the vials from the truck, walks to the river's edge and dumps them from his hand. Removing pollutants from a container, and a vehicle is a container, parked next to a navigable body of water and physically throwing the pollutant into the water constitutes a discharge from a point source.³¹

The jury convicted Villegas on all four counts in the indictment. Following trial, Villegas made a motion for a judgment of acquittal.³² With respect to the point source issue, Villegas argued that his conduct was not a point source discharge under the Clean Water Act, and, in any event, that the district court improperly instructed the jury on the meaning of point

of "navigable waters."

³¹ Trial Transcript at 469-70, *United States v. Villegas*, 784 F. Supp. 6 (E.D.N.Y. 1991) (No. CR-89-0338). Thus, the district court instructed the jury that the defendant's vehicle was the point source, and the fact that Villegas took the vials from the trunk of his car and dumped them in the River did not convert Villegas's actions into non-point source discharges.

³² Defendant made his motion pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

source. Therefore, the defendant argued, his conviction under the Clean Water Act should be reversed.³³

The district court denied the defendant's motion, finding that Villegas discharged pollutants from a point source.³⁴ Although the district court upheld the conviction, its decision denying the judgment of acquittal formed the basis for many of the misguided conclusions that the Second Circuit would reach later. As a preliminary matter, rather than upholding the conviction under the theory of point source it provided to the jury, the district court instead reformulated its analysis of the meaning of point source and held that a person can be a point source under the Clean Water Act.³⁵ It then restricted its holding, concluding that a person is not always as a matter of law a point source under the Act.³⁶

The district court first analyzed the words Congress used to define the term point source. Finding the statutory definition to be "emphatically inclusive, as reflected in the words 'any,' 'discernible' and 'not limited to,'" and further to include "such a highly general term as 'conveyance,'" the district court concluded that the term point source should be given a broad interpretation.³⁷ Villegas's conduct fell within the Clean Water Act's coverage, according to the district court, because he deliberately discharged pollutants into the water.³⁸ The district court, however, then restricted, without citation to statutory provisions or legislative history, the circumstances under which a person's deliberate act of dumping pollutants into the water could constitute a point source discharge to those instances in which a person discharges pollutants "produced in the course of a waste-generating activity."³⁹ Finding that

³³ Defendant also argued that, even if Villegas's dumping constituted a point source discharge, the conviction on the knowing endanger counts nevertheless should be reversed because the government failed to prove that Villegas knew that a person was likely to be hurt as a result of his actions.

³⁴ *United States v. Villegas*, 784 F. Supp. 6 (E.D.N.Y. 1991), *rev'd*, 3 F.3d 643 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 2764 (1994). The district court, however, granted the motion relating to the knowing endangerment counts, finding that there was insufficient evidence that Villegas's conduct created an imminent danger of hepatitis-B contagion. *Villegas*, 784 F. Supp. at 13-14.

³⁵ *Id.* at 8.

³⁶ *Id.* at 10.

³⁷ *Id.* at 8-10.

³⁸ *Id.* at 10.

³⁹ *Villegas*, 784 F.2d at 9.

Villegas's dumping was in furtherance of his company's waste-generating activity, the district court concluded that Villegas's conduct constituted a point source discharge. The court thus not only affirmed the conviction on a theory on which the jury was not instructed, but it also provided a unique interpretation of the Clean Water Act by holding that a person can be, but is not always, a point source. As a result, although it believed its ruling did not create arbitrary or irrational distinctions,⁴⁰ the district court in fact set the stage for the Second Circuit's finding that the Clean Water Act is ambiguous as it was applied to Villegas.

II. THE SECOND CIRCUIT DECISION

On appeal, a panel of the Second Circuit divided on the case, with Judges Pratt and Kearse voting to reverse the conviction and Judge Oakes voting to affirm the conviction on the knowing discharge counts. The majority continued where the district court had left off. It too analyzed the point source issue differently than the district court had when it instructed the jury and adopted the unsupported restrictions in the Clean Water Act's coverage that the district court created. But it then went further by creating its own additional insupportable restrictions to the Act's coverage.

The majority held that a person is not a point source for purposes of the criminal enforcement provisions of the Clean Water Act. It also held that the Clean Water Act's enforcement provisions apply only to industrial and municipal discharges. In reaching this extraordinary holding, the majority analyzed: (1) the language and structure of the Clean Water Act; (2) the legislative history and context of the Act; (3) case law interpreting the term "point source"; and (4) the regulatory structure of the Act. It then concluded that these sources mandated a finding that Villegas's conduct could not be punished as a violation under the Clean Water Act because "th[e] statute was never designed to address the random, individual polluter like Villegas."⁴¹

According to the majority, "[h]uman beings are not among

⁴⁰ *Id.* at 10.

⁴¹ *Plaza Health*, 3 F.3d 643, 646 (2d Cir. 1993).

the enumerated items that may be a 'point source,' because the images evoked in the statutory examples of point sources are those of physical structures, not people.⁴² Moreover, the majority believed that, if discharges from human beings could be point source discharges, it would have been unnecessary for Congress to include the term "point source" as an element of a Clean Water Act offense because everyone who polluted the water could be punished under the Act.⁴³ The court further explained that it "is evident from a perusal of its many sections" that the Clean Water Act "generally targets industrial and municipal sources of pollutants," since "the term 'point source' is used throughout the statute, but invariably in sentences referencing industrial or municipal discharges."⁴⁴

The panel majority similarly concluded that the legislative history adds no support to the proposition that a person can be a point source of pollution. While acknowledging that the purpose of the Clean Water Act is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters,"⁴⁵ the court simply dismissed the goal as "admirable" but not answered by the legislative history of the Act. Instead, the panel interpreted the legislative history as supporting its view that Congress adopted the "point source" concept simply "as a means of identifying industrial polluters."⁴⁶

Analyzing Clean Water Act case law next, the majority acknowledged that courts uniformly have given point source an expansive meaning.⁴⁷ But refusing to extend those holdings to the acts of Villegas, the majority reasoned that point source has been given a broad interpretation principally in civil penalty or licensing cases where, according to the court, "greater flexibility of interpretation to further remedial legislative purposes is permitted, and the rule of lenity does not protect a defendant against statutory ambiguities."⁴⁸ Considering the charges against Villegas, the court decided that "the term

⁴² *Id.* at 646.

⁴³ See *infra* text accompanying note 91.

⁴⁴ *Plaza Health*, 3 F.3d at 646.

⁴⁵ *Id.* at 647 (quoting 33 U.S.C. § 1251(a)).

⁴⁶ *Id.*

⁴⁷ *Id.* at 648.

⁴⁸ *Id.* at 648 (citing *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983)).

'point source' as applied to a human being is at best ambiguous,⁴⁹ and that the rule of lenity⁵⁰ should be applied to resolve the ambiguity in his favor. Finally, the majority found that the regulatory structure of the Act also offered no support for the proposition that a person can be a point source.⁵¹

Having analyzed the statute, its legislative history, regulatory structure and relevant case law, and finding no specific reference in any of these sources that a person is a point source, the panel majority applied the rule of lenity and found that "the [Clean Water Act] did not clearly proscribe Villegas's conduct and did not accord him fair warning of the sanctions the law placed on that conduct."⁵²

Judge Oakes dissented. He concluded that the Clean Water Act is not ambiguous "with respect to an individual physically disposing of medical wastes, in quantity, directly into navigable waters, by means of a controllable, discrete conveyance and course of action."⁵³ According to the dissent, "Congress intended the statute to bar corporate officers from disposing of corporate waste into navigable waters by hand as well as by pipe."⁵⁴ Indeed, the dissent found it incredible that Villegas honestly could have believed that his conduct did not violate the law.⁵⁵

Judge Oakes based his conclusion that a person could be a point source principally on the broad statutory definition of point source. He reasoned that "the term 'point source' has been broadly construed to apply to a wide range of polluting techniques, so long as the pollutants involved are not just

⁴⁹ *Plaza Health*, 3 F.3d at 649.

⁵⁰ The rule of lenity is a rule designed to resolve ambiguities in a criminal statute in favor of a defendant. *Crandon v. United States*, 494 U.S. 152, 168 (1990). The Supreme Court repeatedly has cautioned, however, that the rule should be applied only to cases involving a "grievous ambiguity or uncertainty in the language and structure of the Act" that cannot be resolved by recourse to all the normal aids to statutory construction. *Huddleston v. United States*, 415 U.S. 814, 831 (1974) (emphasis added); see also *Chapman v. United States*, 500 U.S. 453, 463 (1991); *Gozlon-Peretz v. United States*, 498 U.S. 395, 409-10 (1991). The Second Circuit misapplied the rule of lenity to the Clean Water Act's unambiguous statutory provisions. See *supra* text accompanying notes 123-31.

⁵¹ *Plaza Health*, 3 F.3d at 649.

⁵² *Id.*

⁵³ *Id.* at 655.

⁵⁴ *Id.* at 656.

⁵⁵ *Id.*

humanmade, but reach the navigable waters by human effort or by leaking from a clear point at which waste water was collected by human effort."⁵⁶ Concluding his analysis of the relevant statutory provisions, Judge Oakes explained the absurdity of the panel majority's holding:

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. Since the Act contains no exemption for de minimus [sic] 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. . . . 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. To call it nonpoint source pollution is to read a technical exception into a statute which attempts to define in broad terms an activity which may be conducted in many different ways.⁵⁷

Because "the discharge was directly into water, and came from an identifiable point,"⁵⁸ and Villegas had had fair warning that his actions were illegal,⁵⁹ the dissent concluded that Villegas's conduct was proscribed by the Clean Water Act.

III. THE FLAWS IN THE PANEL MAJORITY'S DECISION

A. A Fundamental Omission from the Second Circuit's Analysis

While the focus of this Article is on whether the panel majority erred in holding that a person can never be a point source, it is of interest, first, to mention a fundamental omission from the court's analysis. The Circuit refused to analyze the case according to the point source instruction on which the jury based its conviction of Villegas.⁶⁰ The jury was not in-

⁵⁶ *Plaza Health*, 3 F.3d at 651.

⁵⁷ *Id.* at 654.

⁵⁸ *Id.* at 653.

⁵⁹ *Id.* at 656.

⁶⁰ While the court correctly noted that the government urged in its appellate

structed that a person can be a point source. That issue would have been relevant to the validity of Villegas's conviction only if the Clean Water Act were read to require that the *last* link in the chain of conveyances that places pollutants in the water *itself* must be a point source. Instead, the jury was told that Villegas's vehicle, as opposed to Villegas himself, was the statutory conveyance.⁶¹

While the panel majority's entire analysis appears to be based on the very assumption that the Act requires the last link in the pollution process to be the point source, no provision in the Act requires it. The structure of the Clean Water Act and relevant case law leads to the conclusion that the relevant inquiry regarding the existence of a point source need *not* focus solely on the last step in the polluting process.⁶²

brief that a human being *can* be a point source, 3 F.3d at 645, the court ignored the government's first argument on appeal—that the jury was properly instructed on the meaning of “point source” and that the jury's conviction based on that instruction should stand. The court failed to acknowledge that the government addressed the issue of a person as a point source (in addition to the relevant issue of Villegas's car as the point source) in response to arguments made in defendant's appellate brief and the district court's decision. *See Villegas*, 784 F. Supp. at 10.

⁶¹ Had the court considered the instruction on which the jury convicted Villegas and determined that the Clean Water Act required the point source to be the very last link in the chain of events resulting in pollutants entering the water, a judgment of acquittal then would have been appropriate only if a person could never be a point source.

⁶² An analysis of whether the Act requires the last link in the chain of conveyances to be the statutory point source must begin with the meaning of the term “discharge of a pollutant,” which, as set forth *infra* at text accompanying notes 20-25, is defined as “any addition of any pollutant *from* any point source.” 33 U.S.C. § 1362(12). The issue is whether the word “from” in the definition requires that the discharge be *directly* from the point source. The Second Circuit answered that question in the negative in *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), *rev'd on other grounds*, 112 S. Ct. 2638 (1992). Relying upon *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945, 947 (W.D. Tenn. 1976), which “rejected the argument that the pollutants must be discharged directly into navigable waters” for the Clean Water Act to apply, the *Dague* court explained that discharges from the city's landfill, which first leached into a pond and then into a culvert and eventually emptied into a navigable water, was a point source discharge. *Dague*, 935 F.2d at 1355. Thus, the fact that the pollutants did not enter the navigable waters directly from the point source did not, in the view of the Second Circuit, remove the conduct from the Clean Water Act's enforcement provisions. Other courts similarly have held that the pollutant need not enter the navigable waters *directly* from the point source. *See, e.g.*, *Concerned Area Residents for the Env't v. Southview Farm*, No. 93-9229, 1994 WL 480646, at *12 (2d Cir. Sept. 2, 1994) (the activity of manure spreading vehicles (the point source) collecting liquid manure (the pollutant) for discharge onto fields, and the ultimate flow of

Had the Second Circuit considered and adopted the instruction given to the jury, it never would have reached the question of whether a person could be a point source under the Clean Water Act. There can be no doubt that a car is a point source under the Clean Water Act. A car is a conveyance, and a point source is defined as a "discernible confined and discrete conveyance."⁶³ Moreover, the statutory definition includes rolling stock, a type of moving vehicle.⁶⁴ Furthermore, a vehicle, in the Second Circuit's words, "evoke[s] images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waters."⁶⁵ Whether or not Villegas himself could have been considered a point source, the jury unquestionably found that he "added" a pollutant to the Hudson River "from" a "discernible, confined and discrete conveyance"—his car. This critical omission from the court's analysis resulted in the court instead addressing whether a person can be a point source and erroneously concluding that an individual cannot.

B. *The Panel Majority's Analytical Flaws*

The panel majority concluded, after analyzing the Clean Water Act's relevant statutory language, legislative history,

the manure into navigable waters, constitutes a point source discharge under the Clean Water Act); *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361 (D.N.H. 1985) (a point source discharge includes the collection of pollutants in a ditch, which then enter a brook and from the brook ultimately enter navigable waters).

⁶³ 33 U.S.C. § 1362(14) (emphasis added).

⁶⁴ "Rolling stock" is defined as "the wheeled vehicles owned and used by a railroad or motor carrier." WEBSTER'S NEW COLLEGIATE DICTIONARY 996 (3d ed. 1981). Case law similarly has referred to rolling stock as moving vehicles of a railroad. *See, e.g., San Francisco & S.J.V. Ry. Co. v. City of Stockton*, 84 P. 771, 774 (1906) ("[Railroad] property, included in the term 'rolling stock,' which is in one place today and in another tomorrow, being continually carried along the line of the road in the actual operation thereof, owing to its character and use, has no actual situs.").

⁶⁵ *Plaza Health*, 3 F.3d at 646. Indeed, numerous courts, including the Second Circuit, have held that dump trucks, backhoes and other types of vehicles are point sources under the Act. *See, e.g., Southview Farm*, No. 93-9229, 1994 WL 480646, at *12 (liquid manure spreading machines as point sources); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983) (bulldozers and backhoes as point sources); *United States v. Tull*, 615 F. Supp. 610, 622 (E.D. Va. 1983) (bulldozers and dump trucks as point sources), *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) (same).

case law and regulatory structure and after resorting to the rule of lenity, that a person can never be a point source under the Clean Water Act. A similar journey down this same analytic path demonstrates that the panel majority decided at the outset that the Clean Water Act "was never designed to address the random, individual polluter like Villegas," and, to justify that conclusion, employed an uncharted and insupportable analysis each step of the way.

1. The Language and Structure of the Clean Water Act

The plain language of the Act makes clear that a person is a point source. The operative word in the definition of "point source" is the word "conveyance."⁶⁶ Conveyance is defined as a "means or way of conveying."⁶⁷ The definition of "to convey" is "to cause to pass from one place or person to another."⁶⁸ The terms that modify the term "conveyance"—"discernible," "confined" and "discrete"—simply mean identifiable.⁶⁹ Moreover, the word "conveyance" is preceded by the word "any," an obviously inclusive term. Therefore, a point source is "any identifiable means or way of causing to pass from one place to another." Certainly the unambiguous meaning of these words leads to the conclusion that a person is a point source.⁷⁰ A person is a conveyance, being identifiable and capable of taking objects from one place to another. It follows, therefore, that a person who transmits pollutants from a vehicle to a navigable water-

⁶⁶ Indeed, point sources have been described generally as being any identifiable conveyance of pollutants. See 5 ROBERT E. BECK, *WATERS & WATER RIGHTS* § 53.01(b)(3), at 216-17 (1991).

⁶⁷ WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 287 (9th ed. 1988). When operative words of a statute are not defined therein, it is appropriate to resort to a dictionary for their meaning. *Harris v. Sullivan*, 968 F.2d 263, 265 (2d Cir. 1992).

⁶⁸ WEBSTER'S DICTIONARY, *supra* note 67, at 287.

⁶⁹ "To discern" is defined as "to recognize or identify as separate and distinct." WEBSTER'S DICTIONARY, *supra* note 67, at 360. "To confine" is defined as "to hold within a location." *Id.* at 275. "Discrete" is defined as "individually distinct." *Id.* at 362.

⁷⁰ A vehicle also is a point source because it, too, is capable of carrying objects from one place to another. However, because the Second Circuit's analysis focuses only upon the issue of whether a person is a point source, this section of the Article does not specifically discuss the ways in which a vehicle also squarely fits within the statutory definition of point source.

way falls squarely within the definition of a point source discharge.

Even if the plain meaning of the operative words used to define point source were somehow ambiguous either generally or as applied to Villegas's conduct specifically, application of general rules of statutory construction to the Act's language establishes that a person is a point source. Congress made clear the breadth of the Act's reach by including a wide-ranging, nonexclusive statutory list of examples of point sources and preceding those examples with the language "including but not limited to,"⁷¹ to cover the vast numbers and types of point sources.⁷² It is a general principle of statutory construction that when words of inclusion, such as "including but not limited to," are followed by examples of the term being defined, Congress intended the term to be interpreted expansively, not narrowly.⁷³

Since the Clean Water Act's promulgation, courts have interpreted the term "point source" broadly. In *National Wildlife Federation v. Gorsuch*,⁷⁴ the court applied the above-described principle of statutory construction, noting that the definition of "point source" is an example of a term in the Clean Water Act which is meant to be read expansively.⁷⁵ The court in *Kennecott Copper v. Environmental Protection Agency*⁷⁶ found that Congress defined the term point source broadly in contemplation of its application to countless pollution sources.⁷⁷ Similarly, in *United States v. Earth Sciences*,

⁷¹ 33 U.S.C. § 1362(14) (1988).

⁷² See *Federal Land Bank v. Bismark Lumber Co.*, 314 U.S. 95, 100 (1941) ("including is not one of all embracing definition, but simply connotes an illustrative application of general principle").

⁷³ One district court explained this principle of statutory construction as follows:

A term whose statutory definition declares what it "includes" is more susceptible to extension of meaning by construction than where the definition declared what a term "means." It has been said "the word includes is usually a term of enlargement, and not of limitation. . . . It, therefore, conveys the conclusion that there are other items includible, though not specifically enumerated. . . ."

City of New York v. Exxon Corp., 697 F. Supp. 677, 684 (S.D.N.Y. 1988) (quoting NORMAN J. SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION § 47.07 (4th ed. 1984)).

⁷⁴ 693 F.2d 156 (D.C. Cir. 1982).

⁷⁵ *Id.* at 172 n.49.

⁷⁶ 612 F.2d 1232 (10th Cir. 1979).

⁷⁷ In *Kennecott*, the court stated that the term "point source" should be defined

Inc.,⁷⁸ the court held that the term point source should be expansively defined:

Beginning with the Congressional intent to eliminate pollution from the nation's waters by 1985, the [Clean Water Act] was designed to regulate to the fullest extent possible those sources emitting pollution into rivers, streams and lakes. The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated. *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 the waters of the United States.*⁷⁹

Indeed, just two years before the *Plaza Health* decision, the Second Circuit in *Dague v. City of Burlington*,⁸⁰ applied the principle of statutory construction to conclude that the term point source should be broadly interpreted.⁸¹ In so holding, the *Dague* court noted that the definition of "discharge of pollutant" refers to a discharge from "any point source" without limitation.⁸² Moreover, in his dissenting opinion, Judge Oakes explained that "[a]s the linguistic hint 'any' before . . . 'point source' suggests, the term [is] to be construed broadly."⁸³ Finally, the district court recognized that the language Congress used in defining point source "is emphatically inclusive, as reflected in the words 'any,' 'discernible' and 'not limited to.'"⁸⁴

broadly "given its contemplated applicability to literally thousands of pollution sources." *Id.* at 1243. On appeal, Villegas contended that the use of the words "thousands" rather than "millions" in *Kennecott* suggests that human beings, and presumably vehicles, cannot be point sources because there are more than thousands of people. While it is unclear whether the Second Circuit considered this argument of defendant's in reaching its holding, it deserves mention that the reference to "thousands" in the *Kennecott* decision was to pollution sources, and not to the number of each source that exists in the universe. Indeed, like people, there are undoubtedly millions of pipes, containers and vessels; yet all of these conveyances are specifically enumerated point sources under the statute.

⁷⁸ 599 F.2d 368 (10th Cir. 1979).

⁷⁹ *Id.* at 373 (emphasis added).

⁸⁰ 935 F.2d 1343 (2d Cir. 1991), *rev'd on other grounds*, 112 S. Ct. 2638 (1992).

⁸¹ Ironically, the *Dague* decision was authored by Judge Pratt, the author of the panel majority in *Plaza Health*.

⁸² *Id.* at 1355 (emphasis added).

⁸³ *Plaza Health*, 3 F.3d at 654.

⁸⁴ *United States v. Villegas*, 784 F. Supp. 6, 8 (E.D.N.Y. 1991), *rev'd*, 3 F.3d 643 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 2764 (1994).

Congress further expressed its intention that the term "point source" be broadly interpreted by including specific, limited examples of what is *not* a point source. Congress provided two specific exclusions in the definition of point source—"agricultural stormwater discharges and return flows from irrigated agriculture."⁸⁵ Congress thus made it clear that the only source of pollution it meant to exempt from the Act's coverage is runoff pollution—pollution that is not traceable to a confined and discrete source.⁸⁶ It is another general rule of statutory construction that when Congress enumerates exceptions to a general prohibition, no other exceptions are to be applied.⁸⁷

The majority also ignored the fundamental purpose for including point source as an element of the offense. The definition of point source is included to distinguish between unpermitted point source discharges (which are federally enforceable under the Clean Water Act)⁸⁸ and non-point source pollution (which is subject only to state regulation under the Clean Water Act).⁸⁹ As the dissent understood: "The structure of the statute . . . indicates that the term 'point source' was included

⁸⁵ 33 U.S.C. § 1362(14).

⁸⁶ See OFFICE OF WATER REGULATIONS AND STANDARDS, ENVIRONMENTAL PROTECTION AGENCY, NON-POINT SOURCE GUIDANCE 3 (1987) ("In practical terms, non-point source pollution does not result from a discharge at a single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation."). Numerous courts have held that Congress included the term "point source" in the Clean Water Act to ensure that the Act regulated pollution emanating from an identifiable point, while leaving regulation of surface runoff pollution to the individual states. See, e.g., *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 44 (5th Cir. 1980) ("The focus of this Act is on the 'discernable, confined and discrete' conveyance of the pollutant, which would exclude natural rainfall drainage over a broad area.").

⁸⁷ See, e.g., *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1987) ("as a general rule of statutory construction, the expression of one exception indicates that no other exceptions apply"); *Israel-British Bank Ltd. v. Federal Deposit Ins. Corp.*, 536 F.2d 509, 513 (2d Cir.) ("the normal rule of construction is that where words of exception are used, they are to be strictly construed to limit the exception"), *cert. denied*, 429 U.S. 978 (1976); *Colorado Pub. Interest Res. Group, Inc. v. Train*, 507 F.2d 743, 747 (10th Cir.) ("Another cardinal rule of statutory construction is that where the legislature has acted to except certain categories from the operation of a particular law, it is to be presumed that the legislature in its exceptions intended to go only as far as it did, and that additional exceptions by implication are not favored."), *rev'd on other grounds*, 96 U.S. 1938 (1974).

⁸⁸ See 33 U.S.C. § 1342 (1988).

⁸⁹ See *id.* § 1288 (Supp. V 1993).

in the definition of discharge so as to ensure that nonpoint source pollution would *not* be covered."⁹⁰

Examining the above principles of statutory construction together, it is difficult to imagine a statutory definition more forcefully requiring a broad interpretation. Yet the majority simply ignored these established principles, and instead concluded that "if every discharge involving humans were to be considered a 'discharge from a point source', the statute's lengthy definition of 'point source' would have been unnecessary."⁹¹

The logic employed by the majority in fact supports the proposition that the Clean Water Act is intended to punish the conduct of individuals like Villegas. Unlike the *non-exclusive* examples of point sources, Congress used no such words of expansion to delineate what is not a point source. Presumably Congress decided not to include similar, expansive words, and did not include human beings among the specific exceptions to what can be a point source, because it did not intend to exempt from the Clean Water Act's enforcement provisions, including its criminal provisions, individuals who pollute the waters of the United States by wanton, deliberate acts. Rather, Congress included the term point source to make it clear that all pollution discharges but runoff pollution are covered under the statute.⁹² It is not within the court's powers to add an exception to a statute's coverage which Congress chose not to include.

The majority also erroneously concluded that if a human being were included in the definition of "point sources," the statute would not make linguistic sense. The majority reasoned that, because the term "point source" is defined as "'any addition of any pollutant to navigable waters from any point source,'" and because "§ 1311(a) reads in effect 'the addition of any pollutant to navigable waters *from any point source* by *any person* shall be unlawful,'" if a human being were included in the definition of point source "the prohibition would then read 'the addition of any pollutant to navigable waters *from any person* by *any person* shall be unlawful.'"⁹³

⁹⁰ *Plaza Health*, 3 F.3d at 653.

⁹¹ *Id.* at 646.

⁹² See *supra* note 62.

⁹³ *Plaza Health*, 3 F.3d at 647. As a preliminary matter, the majority's reason-

The majority's reasoning is nothing more than a linguistic game to create an ambiguity in an unambiguous statute. A fair reading of the prohibition of section 1311(a) is that "the addition of any pollutant to navigable waters from any identifiable, confined and discrete conveyance or point by any person shall be unlawful." The term "person" as used in section 1311 identifies the party or parties responsible for the conduct prohibited by the Act. The word "person" within the definition of point source, in contrast, refers to the means by which the pollutant enters the water—the discrete and confined point source of the pollution. Indeed, as should be evident, a person responsible under section 1311 may often be different from the person who actually introduces the pollutant into the water.

For example, a corporate officer could order a worker to dump toxic chemicals into the water and inform the employee that the company has a permit for such dumping. Based upon his belief that the discharge is permitted, the employee then would dump the chemicals into the water. The company officer (the "person" for purposes of section 1311(a)) is guilty of a Clean Water Act crime because he knowingly caused pollutants to be dumped into the water without a permit.⁹⁴ This is so even though the employee was the "person" who dumped (or conveyed) the pollutants into the water and was, therefore, the point source discharge. Thus, the responsible "person" for purposes of section 1311(a) criminal liability could be, and frequently is, different from the "person" who actually discharges the pollutant to the water.

The dissent recognized this structural aspect of the Act, criticizing the majority's stretch to find ambiguity in an unambiguous statute.⁹⁵ Flatly rejecting the majority's analysis of

ing again ignores that the jury was instructed that the conveyance was Villegas's car, not Villegas himself. Based on that instruction, the statute would "make linguistic sense" even under the majority's reasoning. See *supra* text accompanying notes 60-65.

⁹⁴ 33 U.S.C. §§ 1311(a), 1319(c) (1988 & Supp. V 1993).

⁹⁵ Judge Oakes explained the majority's misreading of the statute as follows: My colleagues suggest that a person can never be a point source, relying heavily on the supposed redundancy produced when the Act's language barring the "discharge of any pollutant by any person" is read with the definitional terms placed in terms of the linguistic variables, as follows: "any addition of any pollutant to navigable waters from a person by a person." Granted, this sounds odd. But I believe the oddity is an artifact

the supposed linguistic anomaly between sections 1311(a) and 1362(12) if a person were deemed a point source, Judge Oakes stated

I do not think technical arguments about whether the toxic substances were in discrete containers are fruitful when the activity is discrete, conveys pollutants, and is confined to a clear, traceable single source. When a company chooses to use the nation'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.⁹⁶

2. Legislative History

The majority next undertook a perusal of the legislative history of the Clean Water Act. Acknowledging that the legislative history does not elucidate the term "point source,"⁹⁷ the majority resorted to random excerpts from the 1972 Senate Report pertaining to the Clean Water Act,⁹⁸ suggesting that

of assuming that the term "person" means the same thing in both parts of the sentence, and that in both cases it means what it means in everyday language.

The apparent oddness disappears when one grasps that the first term "person" in the peculiar sentence means "a person acting as a point source" and that the second term "person" has been defined, typically for statutes imposing responsibility on a variety of parties, but not typically for ordinary speech, as a responsible party. . . . Thus, for example, one could fill in the linguistic variables as follows: the Act bars 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) and in particular of his or her supervisor (also a 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).

Plaza Health, 3 F.3d at 654 (Oakes, J., dissenting).

⁹⁶ *Id.* at 654-55.

⁹⁷ *Id.* at 647.

⁹⁸ The first excerpt merely explains that the Clean Water Act does *not* apply to and is not intended to provide an enforcement mechanism for non-point source pollution; that is, pollution resulting from runoff. *See Plaza Health*, 3 F.3d at 647. As the legislative history explains, control of pollutants from runoff rests with the states or other local agencies. Judge Oakes understood this distinction clearly. *See id.* at 653 (dissenting opinion). The second excerpt is a quote of Senator Robert Dole from the 1972 Senate Report on the Clean Water Act. That statement similarly states exactly what Congress provided in the definition of point source—that

these excerpts illustrate that Congress's focus when amending the Act was on industrial polluters only.⁹⁹ Based upon these excerpts, neither of which state or suggest that the Clean Water Act is intended to address industrial pollution exclusively, the majority concluded that the Act's enforcement provisions cover industrial and municipal polluters only. From this, the majority concluded, Villegas's activities were not punishable under the Clean Water Act because they were the act of an individual, not of an industrial or municipal polluter.¹⁰⁰

Preliminarily, it is difficult to make objective sense of the majority's conclusion that Villegas was not an industrial polluter. Villegas was convicted, after all, of polluting a major New York City waterway with medical waste that originated from the blood testing laboratory of which he was a fifty percent owner and vice-president. As Judge Oakes opined, "I think it 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."¹⁰¹

In any event, even if it could somehow be convincingly argued that Villegas's dumping was not industrial, the majority's reasoning nevertheless is insupportable. No provision of the Clean Water Act or its legislative history addresses the *type of polluter* that the Act is intended to target. To the contrary, the statute addresses the *types of pollutants* that cannot be discharged into United States waters without a permit. The Act clearly prohibits polluting the waters with all things that do not naturally occur in the waters, things that certainly can and are dumped both by the regulated community and by random, individual dumpers.¹⁰² There is no question that a person who dumps blood vials (or for that matter candy wrappers) into the water constitutes an identifiable

the term "point source" does not include non-point sources of pollution, such as agricultural runoff of pesticides and fertilizers into adjacent waters. *See id.* at 653.

⁹⁹ *See, e.g., Plaza Health*, 3 F.3d at 647.

¹⁰⁰ *Id.* at 646, 650. Presumably, even if a conveyance other than Villegas's hand had been the last link in the chain of events leading up to the vials' discharge into the water, the panel majority nonetheless would have found the Clean Water Act's criminal provision inapplicable to Villegas's conduct because, in its opinion neither Villegas nor his company "systematically" or regularly dumped used vials into the water. *See id.* at 646.

¹⁰¹ *Id.* at 656.

¹⁰² *See* 33 U.S.C. § 1362(6) (definition of pollutants).

pollution source and, therefore, does not fall within the limits of non-point source pollution.

Indeed, the majority's reasoning is conclusively refuted when one looks at the Act's definition of "pollutants." If Congress had intended the statute to proscribe discharges of industrial and municipal wastes only, it would not have included "industrial [and] municipal . . . waste"¹⁰³ as *types* of pollutants. Furthermore, it certainly would not have included "solid waste . . . and garbage"¹⁰⁴ as other types of pollutants since those wastes are generated by industries, municipalities *and* individuals alike. Moreover, even if the Act's emphasis were on curbing industrial and municipal pollution, that does not mean, absent a specific statement by Congress, that that is *all* the Clean Water Act is meant to cover. That the statutory language can be read to *include* certain evils does not mean that such language must be read to *exclude* other evils (such as dumping from a truck by hand), which also fall within the broad statutory terms chosen by Congress.¹⁰⁵ Indeed, as Judge Oakes explained, "the legislative history indicates that the Act was meant to control periodic, as well as continuous, discharges."¹⁰⁶ Reviewing the legislative history, Judge Oakes understood that by regulating point source pollution, Congress merely intended to exclude from the Act's coverage non-point sources of pollution. As he recognized, this exclusion of non-point source pollution was not insignificant: "Nonetheless, the term 'point source' sets significant definitional limits on the reach of the Clean Water Act. Fifty percent or more of all water pollution is thought to come from nonpoint sources."¹⁰⁷

¹⁰³ 33 U.S.C. § 1362(6).

¹⁰⁴ *Id.*

¹⁰⁵ See, e.g., *Smith v. United States*, 113 S. Ct. 2050, 2055 (1993); *Moskal v. United States*, 498 U.S. 103, 111 (1990); *Pittson Coal Group v. Sebben*, 488 U.S. 105, 115 (1988).

¹⁰⁶ *Plaza Health*, 3 F.3d at 651.

¹⁰⁷ *Id.* at 652; see also William Pedersen, Jr., *Turning the Tide on Water Quality*, 15 *ECOLOGICAL L.Q.* 69 n.10 (1988). Yet while Judge Oakes understood Congress's intention to distinguish between point and non-point source pollution, he curiously agreed with the majority that the statute is ambiguous as applied to individual litterers. *Plaza Health*, 3 F.3d at 655. In recognizing such a distinction, Judge Oakes seems to contradict his earlier statement that the statute does not contain an exception for de minimis violations. *Id.* at 654. Judge Oakes did not consider Villegas such a random litterer, however, because Villegas dumped waste generated by his company. *Id.*

The majority appears to have created the industrial and municipal discharge requirement for Clean Water Act enforcement to alleviate its stated concern that, if a person could be a point source, then a person could be prosecuted under the Clean Water Act for flinging a candy wrapper or for urinating into a navigable water.¹⁰⁸ This concern is unfounded. While such conduct might technically be punishable under the Clean Water Act's broadly drafted enforcement provisions, these types of negligible discharges are not the enforcement focus of the Act nor, based on a perusal of civil and criminal Clean Water Act enforcement actions, are they a focus of those who prosecute violations of the Act. Merely because one is able to conjure up a fact pattern that would involve an undoubtedly unreasonable prosecution—such as bringing a felony charge under the Clean Water Act against a person for throwing a candy wrapper into the Hudson River—an alarmist hypothetical is not sufficient reason to render an unambiguous statute ambiguous.¹⁰⁹

As the Second Circuit explained in *United States v. FMC Corp.*,¹¹⁰ in the context of construing the criminal provision of the Migratory Bird Treaty Act,¹¹¹ hypothetically abusive prosecutions not presented in the case itself, do not change a statute's viability or its application to the conduct of defendant:

Certainly construction that would bring every killing within the statute, such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings in to which birds fly, would offend reason and common sense. As stated in one of the early decisions under the Act, "[a]n innocent technical violation on the part of any defendant can be taken care of by the imposition of a small or nominal fine." Such situations properly can be left to the sound discretion of prosecutors and the courts.¹¹²

¹⁰⁸ *Plaza Health*, 3 F.3d at 647.

¹⁰⁹ In any case, the prosecution of Villegas was not such an unreasonable prosecution.

¹¹⁰ 572 F.2d 902 (2d Cir. 1978).

¹¹¹ 16 U.S.C. § 703 (1988). *FMC Corp.* set forth the pertinent provisions of the Migratory Bird Treaty Act as follows: "it shall be unlawful at any time, by any means or in any manner, to . . . kill . . . any migratory bird . . . included in the terms of the conventions between the United States and Great Britain . . . [Mexico] . . . [and Japan]." 16 U.S.C. § 703. *FMC Corp.*, 572 F.2d. at 903.

¹¹² *FMC Corp.*, 572 F.2d at 905 (citation omitted).

Imposing criminal liability on FMC did not dictate that some other party would face prosecution—which, moreover, was premised upon a strict liability theory—for the death of every bird. The court upheld prosecution of FMC.¹¹³

The majority searched the legislative history to find an ambiguity and, finding none, wrongfully rewrote the Act on its own initiative simply because it was possible to imagine a prosecution for conduct as innocuous as throwing a candy wrapper or urinating into the water. By rewriting the Clean Water Act to limit its scope to industrial and municipal discharges, the Second Circuit undermined the statutory goal of eliminating discharges of pollution into the nation's waters by 1985,¹¹⁴ and ensures that, at least in the Second Circuit, the government not only cannot prosecute an individual for dumping a candy wrapper into the water but it also cannot prosecute any human polluter for dumping blood vials, toxins or other harmful pollutants into our waters if the last contact with those pollutants before they enter the water is a human hand.

3. Case Law

The majority next discussed the case law that addressed the meaning of the term "point source," acknowledging that courts have interpreted the meaning of that term broadly, giving point source an expansive meaning.¹¹⁵ Without further

¹¹³ *Id.* at 908. *Cf.* *United States v. National Dairy Prods.*, 372 U.S. 29, 32-33 (1963) (the mens rea requirements for the Act should be interpreted in light of the conduct with which the defendant is charged, not in light of potentially marginal offenses that may fall within its statutory language). *See also* *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 503-04 (1982).

¹¹⁴ 33 U.S.C. § 1251(a)(1).

¹¹⁵ *Plaza Health*, 3 F.3d at 648. Indeed, the panel majority's decision conflicts with decisions from other courts that have found the plain language of the Clean Water Act to embrace a broad array of polluting conduct that is logically indistinguishable from Villegas's conduct. For example, in *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (1983), the court concluded that bulldozers and backhoes used to effect a discharge into navigable waters are statutory point sources. The fact that human intervention manifestly is necessary for a backhoe or a bulldozer to convey pollutants into water did not stop the Fifth Circuit from applying the Act as written. *See also* *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) (runoff collected by mining operation that escapes through a fissure in a berm or an overflow of a wall is a discharge from a point

explanation, however, the court simply disregarded these cases on the theory that the reported cases were mostly civil, and not criminal, cases. That distinction is legally unsound.

Congress gave the term "point source" only one meaning, and applied that definition for the Act's civil and criminal provisions alike. Under such circumstances, words have the same meaning whether they are being applied to a civil or criminal action. Indeed, the Supreme Court has repeatedly recognized that language that is capable of civil and criminal applications must receive the same construction in both contexts, and the rule of lenity does not change that principle of consistency.¹¹⁶ While the Second Circuit previously applied this same principle of consistency to other cases,¹¹⁷ it squarely violated the principle in *Plaza Health*.

Moreover, the court's eagerness in *Plaza Health* to construe the terms of the Clean Water Act narrowly because of the criminal context is, as evident from the cases cited below, contrary to statutory construction that is readily applied to environmental cases. Because environmental statutes are public welfare statutes, a reasonable person should know that his

source); *United States v. Tull*, 615 F. Supp. 610, 622 (E.D. Va. 1983) (discharges into water from bulldozers and dump trucks are point source discharges); *United States v. Weisman*, 489 F. Supp. 1331, 1337 (M.D. Fla. 1980) (same); *Barcelo v. Brown*, 478 F. Supp. 646, 664 (D.P.R. 1979) (release or firing of ordnance from aircraft is a discharge from a point source), *aff'd*, 643 F.2d 835, 861-62 (1st Cir. 1981), *rev'd on other grounds*, 456 U.S. 305 (1982).

Judge Oakes would have followed the analysis of the above cases. As he explained:

[C]ourts have deemed a broad range of means of depositing pollutants in the country's navigable waters to be point sources.

....

In short, the term "point source" has been broadly construed to apply to a wide range of polluting techniques, so long as the pollutants involved are not just humanmade, but reach the navigable waters by human effort or by leaking from a clear point at which waste water was collected by human effort. From these cases, the writers of one respected treatise have concluded that such a "man-induced gathering mechanism plainly is the essential characteristic of a point source" and that a point source, "[p]ut simply, . . . is an identifiable conveyance of pollutants."

3 F.3d at 651 (citations omitted).

¹¹⁶ See, e.g., *National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798, 806 (1994); *United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2110 n.10 (1992) (plurality opinion); see also *id.* at 2110 (Scalia, J., concurring).

¹¹⁷ *Beauford v. Helmsley*, 865 F.2d 1386, 1391 (2d Cir.) (in banc), *vacated*, 492 U.S. 914 (1989).

or her activity is subject to stringent public regulation, and thus courts generally apply a broad construction to such statutes' terms. Indeed, courts of appeals interpreting the criminal provisions of the Clean Water Act and other environmental statutes uniformly have held that their terms should be construed broadly.¹¹⁸

4. Regulatory Structure

The panel majority looked last to the regulatory structure of the Clean Water Act to determine whether the Environmental Protection Agency considers a human being to be a point source and concluded, again without authority, that it does not. In reaching this conclusion, the majority relied upon section 122.2 of Title 40 of the Code of Federal Regulations, which defines "discharge of a pollutant."¹¹⁹

Contrary to the majority's conclusion, the regulation is, in fact, consistent with the interpretation that a human being is a point source. The regulation, like the statute, provides examples of types of conduct constituting a discharge of a pollutant.¹²⁰ Included in that definition is the addition of pollutants into the water from "surface runoff which is collected or channelled by man" and "discharges through . . . conveyances."¹²¹ A human being unquestionably is contemplated as a type of point source under the regulations. As previously discussed, not only is a person a type of conveyance capable of discharging pollutants into navigable waters,¹²² but a person also is

¹¹⁸ See, e.g., *United States v. Dean*, 969 F.2d 187, 191 (6th Cir. 1992); *United States v. Baytank*, 934 F.2d 599, 613 (5th Cir. 1991); *United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991); *United States v. Carr*, 880 F.2d 1550, 1554 (2d Cir. 1989); *United States v. Hoflin*, 880 F.2d 1033, 1038 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990); *United States v. Hayes Int'l*, 786 F.2d 1499, 1503 (11th Cir. 1986); *United States v. Johnson & Towers*, 741 F.2d 662, 666 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985). *Contra United States v. Berowski*, 977 F.2d 27, 32 n.9 (1st Cir. 1992).

¹¹⁹ 40 C.F.R. § 122.2 (1993). The regulatory definition is virtually identical to the statutory definition of "discharge of a pollutant." See *supra* text accompanying note 24.

¹²⁰ Section 122.2 also includes a definition of "point source." 33 C.F.R. § 122.2. That definition is identical to the definition of that term in the Clean Water Act. See *supra* text accompanying note 26.

¹²¹ 33 C.F.R. § 122.2.

¹²² See *supra* text accompanying notes 66-96.

expressly contemplated as a link in the chain of events by which pollutants enter the water.

5. The Rule of Lenity

It is hard to imagine that when Villegas dumped hundreds of blood vials into the Hudson River, some of which he knew contained hepatitis-B infected blood, he thought his conduct was lawful. Yet that is the conclusion the majority reached when it applied the rule of lenity to overturn Villegas's conviction. To call the Clean Water Act ambiguous as applied to Villegas's conduct is to do an injustice to the plain language of the statute and its legislative goal.

As explained above, the rule of lenity is not applicable to statutory construction unless there is a "grievous ambiguity" in a statute¹²³ such that, even after a court has "'seize[d] every thing from which aid can be derived' it is still 'left with an ambiguous statute.'" ¹²⁴ The rule of lenity cannot be used to beget an ambiguity "merely because it [is] possible to articulate a construction more narrow than that urged by the Government."¹²⁵ Nor is a statute ambiguous for purposes of lenity because a particular application of clear statutory language was not contemplated by Congress; that a statute "has not been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."¹²⁶

The panel majority disregarded these principles, instead creating an ambiguity where none before had existed. As explained earlier,¹²⁷ the common definition of the words Congress used in the definition of "point source," such as "conveyance," affirmatively demonstrate that Congress meant human discharges such as Villegas's to be proscribed point source dis-

¹²³ *Huddleston v. United States*, 415 U.S. 814, 831 (1974); *see also supra* note 50.

¹²⁴ *Chapman v. United States*, 500 U.S. 453, 463 (quoting *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805))).

¹²⁵ *Moskal v. United States*, 498 U.S. 103, 108 (1990); *see also Smith v. United States*, 113 S. Ct. 2050, 2059 (1993).

¹²⁶ *National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798, 806 (1994) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)).

¹²⁷ *See supra* text accompanying notes 66-96.

charges.¹²⁸ Moreover, even if the statutory language were not evident on its face, general principles of statutory construction resolve the meaning of point source as that term is defined in the Act. Imposing the majority's restrictive reading of the term point source "does violence not only to the structure and language of the statute, but to its purpose as well."¹²⁹ The purpose of the Act, like its terms, is not ambiguous: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and to eliminate the discharge of pollutants into the nation's waters.¹³⁰

The majority's holding that the Act ceases to apply when a human being is placed between the water and the pollutant is not a viable interpretation of the statutory language. It is instead the court's speculation about the limits it believes Congress would have placed on the Clean Water Act had it thought about discharges like those of Villegas's. Such speculation, however, not only is unfounded in the statutory language and the Act's legislative history, but in fact conflicts with the broad, clear and unambiguous language Congress chose to use when defining the relevant statutory terms. As Judge Oakes aptly concluded,

I do not think the Clean Water Act is ambiguous with respect to an individual physically disposing of medical wastes, in quantity, directly into navigable waters, by means of a controllable, discrete conveyance and course of action.

....

Having resorted to the language and structure, legislative history and motivating policies of the Clean Water Act, I think it 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. Further, I note that this is not the sort of activity that Villegas could honestly have believed violated no statute, whether promulgated by federal, state, or local authorities. Thus, this is not a case in which the defendant had no fair warning that his actions were illegal. No compliance attorney here could have struggled with the difficulty of deciding whether this was activity for which a permit should be sought[;] rather, an attorney asked to advise Villegas whether his activity was permissible might say that there was as yet no case law indicating that such activity was point source pollution under the Clean Water Act, but that such a

¹²⁸ See *Smith*, 113 S. Ct. at 2060.

¹²⁹ *Id.*

¹³⁰ 33 U.S.C. § 1251.

view was certainly consistent with the Act and that the behavior would almost certainly be proscribed by that Act or some other.¹³¹

IV. TROUBLED WATERS AHEAD FOR CLEAN WATER ACT ENFORCEMENT IN THE SECOND CIRCUIT

The far-reaching implications of the majority decision cannot be underestimated. The Second Circuit left more questions unresolved than it answered, and created countless loopholes for clever—or lucky—polluters (like Villegas) that may serve to defeat the worthy goals of the statute.

By ruling that the Clean Water Act applies only to “industrial and municipal discharges,” and then compounding its unfortunate construction of the Act by ruling that Villegas’s dumpings from his blood testing laboratory were not industrial discharges, the panel majority in essence has given a green light to individuals to dump in the nation’s water at will, without penalty. The majority decision permits the dumping of any non-industrial and non-municipal waste into the water, regardless of the means by which the pollutants enter the water. Even if an enumerated point source, like a pipe, is the last link in the chain of events leading pollutants into the water, the panel majority’s decision would require law enforcement authorities to ignore such conduct unless the pollutants were *regularly* discharged into the water from an industrial facility or a municipality.

The court’s reasoning, however, is clearly suspect. If Congress intended this result, why would Congress have distinguished between point source and non-point source water pollution, rather than just industrial versus non-industrial pollution? Why would Congress have included pipes, for example, as a type of point source? Furthermore, if the Second Circuit’s analysis is correct, why did Congress fail to exclude *de minimis* discharges from the definitions of “discharge of pollutants,” “point source” and other statutory term?¹³²

The court’s ruling particularly eviscerates Clean Water Act wetlands enforcement¹³³ in the Second Circuit because viola-

¹³¹ *Plaza Health*, 3 F.3d at 656.

¹³² *See id.* at 654.

¹³³ Pursuant to § 1344 of the Clean Water Act, no fill material may be placed

tions of the wetlands regulations are most frequently found among individual, not commercial or industrial, actors.¹³⁴ A property owner now has a defense to a Clean Water Act prosecution for knowingly dumping large quantities of fill material into federally protected wetlands without a permit. Congress most likely would not have included the Clean Water Act's wetlands provisions if it intended to exempt from enforcement the principal violators.

Still other questions remain. As to doctors and medical laboratory executives, at least, the *Plaza Health* decision does not answer whether their dumpings can ever be point source discharges. Perhaps, under the majority's analysis, if a medical laboratory used the nation's waters as the dumpsite for its medical waste more regularly than Villegas did, and the dumpings were accomplished by means other than a human hand, the Second Circuit would consider such activity industrial discharges and hold, therefore, that the Clean Water Act renders such conduct punishable.¹³⁵ But if that were a proper interpretation of the Act, again, Congress would have exempted *de minimis* discharge from the Act's coverage.

The court's ruling limiting the Act's coverage to industrial and municipal discharges also seriously threatens the quality of the nation's waters themselves. The country's lakes, rivers and streams can be, and are being, polluted by a variety of sources. Indeed, any one discharge is unlikely alone to contaminate significantly a large body of water, yet the cumulative impact of numerous, smaller discharges can destroy ecosys-

in wetlands without a permit issued by the Army Corps of Engineers, the federal agency authorized to issue such permits. 33 U.S.C. § 1344. Violations of § 1344 are punishable both civilly and criminally.

¹³⁴ A typical wetlands enforcement action involves an individual property owner filling in a wetland to construct a home, driveway, dock or other structure without a permit. See, e.g., *United States v. Pozsgai*, 999 F.2d 719 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1052 (1994) (civil injunctive relief for wetlands filling by individual using bulldozer); *United States v. Pozsgai*, 897 F.2d 524 (3d Cir.), *cert. denied*, 498 U.S. 812 (1990) (upholding felony Clean Water Act penalties for illegal wetlands filling by individual using bulldozer).

¹³⁵ Moreover, the 1988 amendments to the Clean Water Act provide that for certain types of discharges, including discharges of "medical waste," the statute does not require that the discharge be from a point source for the Act's enforcement provisions to apply. 33 U.S.C. § 1311(f) (1988). That provision could not be used for the *Plaza Health* prosecution, however, because the dumpings pre-dated the amendment.

tems, render water unusable and jeopardize public health.¹³⁶ Thus, while the "classic" point source discharge might be an industrial discharge of untreated waste waters into a river or bay via a pipe, injury frequently results from other pollution sources, including random dumpers.

Besides the distinction between industrial and non-industrial waste, the other aspect of the Second Circuit's ruling—that a person can never be a point source—creates another gaping loophole for Clean Water Act enforcement. With this further limitation on the Act's scope, even industries and municipalities can avoid punishment under the Clean Water Act for polluting our nation's waterways. Under the panel majority's analysis, a company official wishing to save money on waste disposal, yet also desiring to stay out of jail (and, given the rule of lenity's equal application to civil enforcement, to avoid a substantial civil penalty¹³⁷), can now hire inexpensive labor to transport the company's waste (industrial pollution) to the water's edge and hoist it into the water with their hands without fear of prosecution under the Clean Water Act.¹³⁸

Under the majority's analysis, there are myriad acts that could cause substantial pollution of our waters but which the Second Circuit said the statute does not penalize—leaving individuals largely free to use the nation's waters as a waste receptacle. For example, homeowners can regularly dump their household trash, worn furniture or any other unwanted items in the Hudson River by any means without fear of federal liability. Car owners can dump old car batteries (or whole cars) in the river without concern. Business and industrial establishments need no longer expend money for a private carting service to collect their refuse because, if they so choose, they can take their garbage to the water's edge and heave it in by hand.¹³⁹

¹³⁶ See *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975) ("As was recognized by Congress . . . a good deal of our present air and water pollution has resulted from the accumulation of small amounts of pollutants added to the air and water by a great number of individual, unrelated sources.").

¹³⁷ See *supra* notes 116-17 and accompanying text.

¹³⁸ See *Plaza Health*, 3 F.3d at 654.

¹³⁹ For all examples of non-industrial dumpers, of course, it would not matter under the Second Circuit's analysis whether the dumpings were accomplished ulti-

But how far does this ruling extend? Would the court find a Clean Water Act violation if the employee of an industrial business first put the pollutants in a bucket (a container), walked to the river's edge and emptied the contents of the bucket into the water? If the employee used a shovel to transfer the pollutants to the water, would the Clean Water Act be violated? What if, instead of putting the company's waste vials in the trunk of a car and dumping it directly from the trunk into the water with the use of his hands, the employee instead put them in a dump truck, backed the truck to the river's edge and used his hand to press the lever to operate the dump truck so that its contents poured into the water?

We now know that, at least in the civil context, the Second Circuit considers "liquid-manure-spreading vehicles" to be point sources.¹⁴⁰ Assuming the panel majority had considered Villegas's dumping to be an industrial discharge, as the dissent did, would the majority then have distinguished Villegas's activities and found the Clean Water Act unambiguous as applied to his conduct had Villegas rented a dump truck to dump the vials instead of using his car?

The answers to these questions, especially for wetlands enforcement,¹⁴¹ are critical to understanding the extent to which polluters can avoid responsibility for polluting the nation's waterways. Indeed, as these few examples illustrate, the panel majority analysis leaves it unclear when, if ever, the intercession of a human hand in the dumping process will fail as a defense to charges under the Act.

Another critical question raised by the *Plaza Health* decision is how it will impact *civil* enforcement of the Clean Water Act. To what extent will the industrial/municipal requirement be applied to civil enforcement cases involving non-industrial or non-municipal pollution sources? Will the Second Circuit apply the rule of lenity to interpret the term "point source"

mately by the human hand or by a statutory-listed point source because the dumpings are non-industrial.

¹⁴⁰ See *Concerned Area Residents for the Env't v. Southview Farm*, No. 93-9229, 1994 WL 480646 (2d Cir. Sept. 2, 1994). Moreover, many courts have held that bulldozers, backhoes and dump trucks are point sources. See *supra* note 65.

¹⁴¹ As explained above, wetlands enforcement is typically against individuals, and the means by which individuals fill in wetlands are bulldozers, backhoes, dumptrucks and shovels.

narrowly in future civil Clean Water Act cases?¹⁴²

Certainly, a valid defense to a civil action brought against a non-industrial, non-municipal polluter, or to a civil action seeking to give an expansive meaning to the term "point source," would be that civil and criminal Clean Water Act enforcement cases must be treated alike since the same statutory terms apply to both types of cases. The rule established by the Supreme Court, and previously adopted in the Second Circuit, mandates that the statute be applied consistently in both civil and criminal enforcement contexts and that the term "point source" be construed the same regardless of the civil or criminal nature of the case.¹⁴³ Thus, because in *Plaza Health* the Second Circuit has limited the Clean Water Act to prosecutions for industrial and municipal pollution and has interpreted the meaning of the term "point source" narrowly, it unfortunately follows that these same principles must be applied to future Clean Water Act civil enforcement cases.

CONCLUSION

In sum, the Second Circuit has in effect granted a license to the "random" dumper who decides to use the nation's waters as a refuse receptacle for chemicals, toxins or simple household garbage, and to industrial and municipal dumpers as well if they avoid using pipes or other "typical" point source conveyances to dump their wastes into the water. There is, however, no legislative support for these "licenses" because there is no *de minimis* exception to the Clean Water Act's enforcement provision; nor is there any provision that permits deliberate dumping of pollutants into the water in circumstances when the human hand is ultimately responsible for the dumping. The majority's holding essentially rewrites the Clean Water Act to limit its coverage to a very small subset of water pollution. Unless and until the Second Circuit corrects the multiple errors in *Plaza Health*, the future of Clean Water Act en-

¹⁴² This question has been answered in part by a recent decision of the Second Circuit authored by Judge Oakes in which the court held that a vehicle is a point source under the Act. See *supra* note 62 and accompanying text. Moreover, just two years before *Plaza Health*, the court held that the term "point source" should be interpreted broadly. See *supra* notes 80-82 and accompanying text.

¹⁴³ See *supra* text accompanying notes 116-17.

forcement will remain as murky as our waters may become courtesy of that decision.