

Conviction for Violation of Clean Water Act Required Knowing Discharge "Into Water"



use the
water" to

In the

summer of 2014, Lucero executed a scheme under which he charged construction companies to dump dirt and debris on lands near the San Francisco Bay, including wetlands and a tributary subject to the Clean Water Act. Although Lucero admitted to "walking the land" where the dumping happened, the period when the dumping occurred was unusually dry due to drought. The trial court found Lucero guilty on two counts of discharges into wetlands and one count of discharge into a tributary. The Ninth Circuit overturned Lucero's conviction because the trial court had failed to instruct the jury that the defendant needed to knowingly discharge a pollutant in violation of the Clean Water Act. In order to determine the proper standard of proof, the court analyzed the language of section 1319(c) of the Clean Water Act, which makes it a felony to "knowingly violate[] section 1311" of the Act. The majority concluded that the statute requires the defendant to knowingly add a pollutant "into water" but does not require that the defendant must knowingly discharge pollutants into "waters of the United States." The majority reasoned that this was the proper reading based on the construction of the statute and Congress's broad concern for preventing water pollution. The court concluded that the failure to include instructions regarding the knowledge requirement was not harmless error and warranted a remand. The evidence that Lucero knew he was dumping into water was "underwhelming and contested" due to the drought conditions

at the time. The court rejected the defendant's argument that the definitions of "waters of the United States," "wetlands," and "tributaries" were unconstitutionally vague. The court held that the term "wetlands" was not vague, despite the Supreme Court's "significant nexus" interpretation, because it provided an "ascertainable standard" given the facts of the case. The term "tributary" was not vague because the court had long recognized a common understanding of the term. Lastly, the narrower 2020 "waters of the United States" definition did not apply to Lucero because the incident occurred in 2014 and the new statute did not apply retroactively.

Authors



[Kaela Shiigi](#)

Associate

KShiigi@perkinscoie.com [415.344.7064](tel:415.344.7064)

[Blog series](#)

California Land Use & Development Law Report

California Land Use & Development Law Report offers insights into legal issues relating to development and use of land and federal, state and local permitting and approval processes. [View posts by topic](#). [Subscribe ?](#)

[View the blog](#)