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## A Point Source of Pollution Under the Clean Water Act: A Human Being Should be Included

### I. Introduction

The Clean Water Act<sup>1</sup> provides that “the discharge of any pollutant by any person shall be unlawful.”<sup>2</sup> To be classified as discharge, the pollution must be “any addition of any pollutant to navigable waters from any point source.”<sup>3</sup> The Clean Water Act is not applicable to non-point sources.<sup>4</sup> Accordingly, there has been much litigation<sup>5</sup> over what constitutes a point source and courts in the past have held that the

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<sup>1</sup> Federal Water Pollution Act (Clean Water Act), enacted as Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 11555 (1948) (codified as amended at 33 U.S.C. §§ 1252a, 1253, 1254a, 1256-1267, 1281-87, 1289-1312, 1313a, 1316, 1323, 1326-28, 1341, 1343, 1345, 1361, 1363, 1366-73, 1375, 1377-83, 1385-87, & 1414a (1988); 1270 (Supp. 1992); 1251, 1254, 1268, 1313, 1315, 1317-21, 1324-1325, 1329-30, 1342, 1344, 1362, 1364-65, 1374, 1376, & 1384 (1988 & Supp. 1993); & 1252, 1255, 1269, 1271, 1288, 1314, & 1322 (Supp. 1993); and at 42 U.S.C. § 1962-20 note (1988)).

<sup>2</sup> § 1311(a) (1988).

<sup>3</sup> § 1362(12) (1988).

<sup>4</sup> See *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 117 (2d Cir. 1994). In this case, liquid manure, which had saturated some fields, was escaping from the property through a ditch and running into nearby streams. The defendants argued that the liquid manure spreading operations did not constitute a point source under the Clean Water Act. The defendants also claimed that its operations fell within the agricultural stormwater discharges exception. Although the District Court agreed with the defendants and granted them judgment as a matter of law on the Clean Water Act violations, the Second Circuit Court of Appeals disagreed. The court reasoned that the runoff was not caused merely by precipitation; it was caused by over-saturation of the fields. Because of this, the court found that the manure spreading operations did constitute a point source.

<sup>5</sup> See, e.g., *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983) (holding that backhoes and bulldozers used to gather fill and deposit it in wetlands are point sources); *Rybachek v. EPA*, 904 F.2d 1276, 1282-86 (9th Cir. 1990) (finding that a sluice box used in placer mining is a point source when it discharges water which is redeposited in a stream); *United States v. M.C.C. of Fla., Inc.*, 772 F.2d 1501, 1505-06 (11th Cir. 1985) (holding that tugs redepositing dirt from bottom of water body onto beds of water grass are point sources), *vacated on other grounds*, 481 U.S. 1034 (1987); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) (holding that escape of sodium cyanide hydroxide leachate solution constituted discharge of a pollutant from a point source); *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1374 (4th Cir. 1976) (holding that runoff from material storage sites is not a point source); *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642, 655 (E.D. Pa. 1981) (holding that escape of liquid from leachate collection system due to leakage or overflow is a discharge from a point source); and *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41 (5th Cir. 1980) (holding that spill or contaminated runoff from strip mine is a point source if it is collected or channeled by the operator).

definition of a point source may encompass many different types of sources.<sup>6</sup>

In contrast to past decisions, a Second Circuit Court has taken a narrow view of what can be classified as a point source. In *United States v. Plaza Health Laboratories, Inc.*,<sup>7</sup> the Second Circuit of the United States Court of Appeals recently held that the Clean Water Act's definition of a point source did not include a human being.<sup>8</sup> In this case, the defendant, Geronimo Villegas, the owner of Plaza Health Laboratories, consigned to the tides of the Hudson River containers of glass vials filled with human blood.<sup>9</sup> Villegas was charged with violating the Clean Water Act.<sup>10</sup> Although the District Court found Villegas to be a point source,<sup>11</sup> the Second Circuit Court of Appeals reversed.<sup>12</sup>

The *United States v. Plaza Health Laboratories, Inc.* decision has narrowed the definition of what constitutes a point source of pollution. This refined interpretation of a point source will have a significant negative impact on the enforcement of the Clean Water Act,<sup>13</sup> and could limit the fulfillment of the goals and policies behind the Clean Water Act.

This Comment examines whether a human being falls into the definition of a point source. Part II discusses the history of the Clean Water Act and the definition of a point source. Part III analyzes the reasoning for not recognizing a human being as a point source. Part IV analyzes the rationale for including a human being in the definition of a point source. Part V discusses the significance of the Second Circuit's holding in *United States v. Plaza Health Laboratories, Inc.* and the possible consequences the case could have on future enforcement of the Clean Water Act.

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<sup>6</sup> *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1243 (10th Cir. 1979) (finding that Congress defined "point source" broadly so that it would be applicable to thousands of contemplated point sources, not all of which could possibly be enumerated).

<sup>7</sup> 3 F.3d 643 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 2764 (1994).

<sup>8</sup> *Id.* at 649.

<sup>9</sup> *Id.* at 644.

<sup>10</sup> *Id.*

<sup>11</sup> *United States v. Villegas*, 784 F. Supp. 6, 7 (E.D.N.Y. 1991).

<sup>12</sup> *United States v. Plaza Health Lab., Inc.*, 3 F.3d at 650.

<sup>13</sup> Clean Water Act, *supra* note 1.

## II. History of the Definition of a Point Source

### A. *The Evolution of Water Pollution Legislation*

Prior to the 1970s, controlling water pollution was left primarily to the states. The federal government ordered the states to enact and enforce water quality standards that would help to “protect the public health or welfare” and “enhance the quality of water.”<sup>14</sup> State pollution laws were often ineffective<sup>15</sup> because many state laws favored industry over the environment and provided no penalties for violations.<sup>16</sup> Furthermore, at a time when industry in the United States was rapidly developing into a powerful economic, political, and social force,<sup>17</sup> even the courts often favored industry over the environment.<sup>18</sup> Although a few states were able to successfully meet the standards they set,<sup>19</sup> it became increasingly clear that more comprehensive federal legislation was needed to meet the growing environmental problems.<sup>20</sup>

Like state pollution laws, the early federal pollution laws, which were developed in the 1940s and 1950s, were also deferential to industries.<sup>21</sup> After much Congressional debate, the Federal Water Pollution Control Act was passed in 1948.<sup>22</sup> Although this Act was amended in the following years,<sup>23</sup> it was not until the Amendments of 1972<sup>24</sup> that Congress under-

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<sup>14</sup> J. GORDON ARBUCKLE ET AL., ENVIRONMENTAL LAW HANDBOOK 81 (7th ed. 1983).

<sup>15</sup> *Id.*

<sup>16</sup> PETER CLEARY YEAGER, THE LIMITS OF LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION 61 (1991).

<sup>17</sup> *Id.*

<sup>18</sup> R.R. PALMER & JOEL COLTON, A HISTORY OF THE MODERN WORLD SINCE 1815, at 594-95 (7th ed. 1990).

<sup>19</sup> YEAGER, *supra* note 16, at 61-62.

<sup>20</sup> ARBUCKLE, *supra* note 14, at 82.

<sup>21</sup> YEAGER, *supra* note 16, at 64. For example, Congressional deference, both to businesses and state governments, could be seen in the Federal Water Pollution Control Act of 1948. Although this Act provided for enforcement provisions, it was lenient towards businesses, including industries. If the federal government discovered that a company was polluting the waters, it first recommended reasonable and equitable abatement measures. *Id.* at 66. If the polluter didn't comply within a reasonable time, the federal government would then send out a second notification. If there still was no compliance, the federal government could hold a public hearing. Last, if the business still failed to take action, the federal government could request the U.S. Attorney General to file suit; filing suit was subject to the permission of the state in which the polluter was located. *Id.* at 66-67.

<sup>22</sup> Clean Water Act, *supra* note 1.

<sup>23</sup> Law of July 17, 1952, Pub. L. No. 82-579, 66 Stat. 755; Federal Water Pollution Control Act Amendments of 1956, Pub. L. No. 84-660, 70 Stat. 498 (1956); Law of June 25, 1959, Pub.

took a comprehensive revision.<sup>25</sup> The 1972 Federal Water Pollution Control Act Amendments were supplemented by the Clean Water Act of 1977.<sup>26</sup> The Clean Water Act was enacted due to increasing social concern and awareness of environmental problems.<sup>27</sup> These dynamic pieces of legislation are together referred to as the Clean Water Act.<sup>28</sup>

### B. *The Clean Water Act*

In adopting the Clean Water Act, Congress mounted a two-pronged assault on the problem of water pollution: 1) the statement of goals;<sup>29</sup> and 2) the regulatory mechanisms<sup>30</sup> enacted to accomplish those goals. The regulatory system established for meeting the Clean Water Act's goals prohibited the discharge of pollutants<sup>31</sup> and imposed effluent limitations.<sup>32</sup> Congress sought to establish an "effective federal-state regulatory framework preserving the best aspects of both the 'Water Quality Standards' and 'Effluent Limitations' regulatory approaches."<sup>33</sup> While the effluent standards assumed a dominant role, the water quality standards

L. 86-70, 73 Stat. 148 (1959); Law of July 12, 1960, Pub. L. 86-624, Law of July 1961, Pub. L. 87-88, 75 Stat. 204 (1961); Water Quality Act of 1965, Pub. L. 89-234, 79 Stat. 903 (1965); Clean Water Restoration Act of 1966, Pub. L. No. 89-754, 80 Stat. 1246 (1966); Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (1970-71); Law of Dec. 31, 1970, Pub. L. 91-611, 84 Stat. 1823 (1970-71); Law of July 9, 1971, Pub. L. 92-50, 85 Stat. 124 (1971); Law of Oct. 13, 1971, Pub. L. 92-137, 85 Stat. 379 (1971); Law of Mar. 1, 1972, Pub. L. 92-240, 86 Stat. 47 (1972).

<sup>24</sup> Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816 (1972), (codified as amended at 33 U.S.C. §§1252a, 1253, 1254a, 1256-65, 1281-1287, 1289-1292, 1311-1312, 1313a, 1316, 1323, 1326-28, 1341, 1343, 1345, 1361, 1363, 1366-73, 1375, & 1376 (1988); 1251, 1254, 1313, 1315, 1317-21, 1324-25, 1342, 1344, 1362, 1364-65, 1374, & 1376 (1988 & Supp. 1993); & 1252, 1255, 1288, 1314, & 1322 (Supp. 1993)).

<sup>25</sup> ARBUCKLE, *supra* note 14, at 82.

<sup>26</sup> Law of Dec. 27, 1977, Pub. L. 95-217, 91 Stat. 1566 (1977), (codified as amended at 33 U.S.C. §§ 1256, 1259, 1262-63, 1281-87, 1291-92, 1294-97, 1311, 1323, 1328, 1341, 1345, 1361, 1375, (1988); 1270 (Supp. 1992); 1251, 1254, 1315, 1317-19, 1321, 1324, 1342, 1344, 1364, & 1376 (1988 & Supp. 1993); & 1252, 1255, 1288, 1314, & 1322 (Supp. 1993) [hereinafter 1977 Amendments]).

<sup>27</sup> YEAGER, *supra* note 16, at 103-04.

<sup>28</sup> "This Act may be cited as the 'Federal Water Pollution Control Act' (commonly referred to as the Clean Water Act)." 1977 Amendments, *supra* note 26.

<sup>29</sup> § 1251(a). For a full discussion of the goals and policies of the Clean Water Act, see *infra* part IV.B.

<sup>30</sup> Sanctions for violations of the requirements of the Act are discussed *infra* note 48. Violations of the requirements of the Act are discussed *infra* note 48.

<sup>31</sup> § 1311(a) (1988). It states that "[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful."

<sup>32</sup> § 1311(b) (1988) (setting a detailed and lengthy timetable for achievement of objectives).

<sup>33</sup> ARBUCKLE, *supra* note 14, at 83.

still played an important role.<sup>34</sup> This compromise can be seen in Section 301(a) which declares any discharge of a pollutant by any person to be unlawful unless it is permitted under a provision of the Act that sets effluent limitations.<sup>35</sup>

The discharge of a pollutant is permitted under the Act when a person obtains a permit.<sup>36</sup> The nationwide permit program is the major device used to limit and control pollution discharges.<sup>37</sup> The discharge of a pollutant is permitted under the Act only if the person discharging the pollutant has obtained and complied with a permit.<sup>38</sup> For there to be a violation of the Clean Water Act, there must be a discharge<sup>39</sup> of a pollutant<sup>40</sup> into navigable water<sup>41</sup> from a point source<sup>42</sup> by a person.<sup>43</sup> A person, therefore, becomes a point source by placing a pollutant into navigable water. Only then may that person be potentially liable under the Clean Water Act.

### C. The Basic Concept of a Point Source

Section 1362(14) of the Clean Water Act defines a point source 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

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<sup>34</sup> WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER 14 (1986).

<sup>35</sup> § 1311(a).

<sup>36</sup> § 1342(a) (1988). After an opportunity for public hearing, the Administrator of the EPA may issue a permit for the discharge of a pollutant. *Id.* Additionally, a state may issue permits "for discharges into navigable waters within its jurisdiction" upon EPA approval of the state's program, § 1342(b) (1988); and the Secretary of the Army is authorized to grant permits for discharge of dredged or fill material, § 1344.

<sup>37</sup> *Id.* This Section establishes the CWA's "national pollutant discharge elimination system, or NPDES . . ." *United States v. Plaza Health Lab., Inc.*, 3 F.3d at 645.

<sup>38</sup> § 1342(a) (1988).

<sup>39</sup> The term "discharge" when used without qualification includes a discharge of a pollutant, and discharge of pollutants. § 1362(12) (1988).

<sup>40</sup> The definition of a pollutant, § 1362(6) (1988), lists certain materials and includes others. The list of materials included, such as solid waste, chemical waste, garbage, discarded equipment, and rock, are general and broad enough to encompass a wide variety of substances.

<sup>41</sup> "Navigable waters" means "waters of the United States, including the territorial seas." § 1362(7).

<sup>42</sup> § 1362(14) (1988). For a discussion of the definition of "point source," see *infra* part II.C.

<sup>43</sup> "The term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." § 1362(5) (1988).

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.<sup>44</sup>

Sources of water pollution range across a vast continuum, with point sources at one end, and nonpoint sources at the other end.<sup>45</sup> Whether a source of pollution falls under the regulations and penalties<sup>46</sup> of the Clean Water Act depends on what end of the continuum it is closer to. Sources like pipes and ditches are specifically included in the Clean Water Act's definition of a point source.<sup>47</sup> Courts also have found that vehicles, such as bulldozers involved in land clearing activities<sup>48</sup> or tugs<sup>49</sup> redepositing sediments, can also constitute point sources.

Sources such as pipes, bulldozers, and tugs, when used to discharge pollution, can easily be classified as point sources.<sup>50</sup> The courts, however, have not limited the definition of a point source to sources which are so easily recognizable as discrete conveyances. The definition of a point source has traditionally been broadly interpreted by the courts to achieve the goals of the Clean Water Act.<sup>51</sup> Sources such as abandoned mines,<sup>52</sup> spray irrigation systems,<sup>53</sup> stormwater runoff systems,<sup>54</sup> and sumps used

<sup>44</sup> § 1362(14) (1988).

<sup>45</sup> RODGERS, *supra* note 34, at 148.

<sup>46</sup> The Clean Water Act provides for many different types of penalties and enforcement mechanisms. The Administrator possesses the authority to seek temporary and permanent injunctive relief. § 1319(b) (1988). Criminal enforcement also is available. § 1319(c)(1) (1988).

<sup>47</sup> § 1362(14) (1988). For exact language, see *infra* text accompanying note 49.

<sup>48</sup> See *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d at 922-25.

<sup>49</sup> See *United States v. M.C.C. of Fla., Inc.*, 772 F.2d at 1506.

<sup>50</sup> *United States v. Plaza Health Lab., Inc.*, 3 F.3d at 651 (Oakes, J. dissenting).

<sup>51</sup> *Kennecott Copper Corp.*, 612 F.2d at 1243; *Earth Sciences, Inc.*, 599 F.2d at 373. Traditionally, the courts have found that they would be interfering with the intent of the act and its structure, if they did not include, within the definition of a point source, "any activity that emits pollution from an identifiable point." 599 F.2d at 373.

<sup>52</sup> *Pennsylvania Dep't of Env't'l Resources v. EPA*, 618 F.2d 991 (3d Cir. 1980). In this case, the Administrator, under the authority of Section 306, enacted a regulation which added coal mining as a new source category. *Id.* at 993. The court was not called upon to decide whether abandoned mines could be classified as point sources; instead, the issue was the timing and scope of the regulation. *Id.*

<sup>53</sup> *United States v. Oxford Royal Mushroom Products, Inc.*, 487 F. Supp. 852, 854 (E.D. Pa. 1980). In holding that a spray irrigation system that was designed to spray small amounts of water that would be quickly absorbed by fields might constitute a point source under the Clean Water Act, the court stated, "[t]he law is clear; uncollected surface runoff may, but does not necessarily, constitute discharge from a point source." *Id.* Since the discharge was caused from spraying an overabundance of water onto fields, the court could not conclude as a matter of law that the discharges were from a nonpoint source. *Id.* (citing *United States v. Earth Sciences*, 559

in gold leaching operations<sup>55</sup> have all been recognized by the courts as potential point sources.

In fact, the “discernible conveyance” language in the definition of a point source<sup>56</sup> has been found to be so comprehensive, that several types of discharges, which would ordinarily be included in the statute’s terms, have been exempted from permit requirements.<sup>57</sup> These exemptions cover discharges, such as “agricultural return flows”<sup>58</sup> and “stormwater runoff from oil, gas, and mining operations,”<sup>59</sup> which are not susceptible to efficient regulation.<sup>60</sup> It is important to note, however, that these exemptions have only been adopted for sources which cannot be regulated, but which may otherwise seem to fall under the Clean Water Act.<sup>61</sup>

### III. The Rationale for Not Recognizing a Human Being as a Point Source

#### A. Support in the Statutory Language

Primarily, the rules of statutory construction require that if a statute is unambiguous, it must be applied as written.<sup>62</sup> Unfortunately, the definition of a point source does not expressly include or exclude a human being as a point source.<sup>63</sup> The definition of a point source includes a list of specific sources, such as ditches and pipes, which fall within the definition of a point source.<sup>64</sup> The examples listed, however, are nonexclusive.<sup>65</sup>

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F.2d 368, 374 (10th Cir. 1979)).

<sup>54</sup> *United States v. Frezzo Brothers, Inc.*, 546 F. Supp. 713, 724 (E.D. Pa. 1982), *aff’d*, 703 F.2d 629 (3d Cir. 1983), *cert. denied*, 464 U.S. 829 (1983).

<sup>55</sup> *United States v. Earth Science, Inc.*, 599 F.2d at 374.

<sup>56</sup> § 1362(14). For exact language, see *supra* text accompanying note 44.

<sup>57</sup> § 1344(1) (1988).

<sup>58</sup> § 1342(1)(1) (1983).

<sup>59</sup> § 1342(1)(2) (1988).

<sup>60</sup> ARBUCKLE, *supra* note 14, at 85.

<sup>61</sup> *Id.*

<sup>62</sup> *Norfolk & Western Ry. Co. v. American Train Dispatchers Ass’n.*, 499 U.S. 117, 128 (1991).

<sup>63</sup> See § 1362(14) (1988).

<sup>64</sup> *Id.* For exact language, see *supra* text accompanying note 44.

<sup>65</sup> *United States v. Plaza Health Lab., Inc.*, 3 F.3d at 646. This proposition is supported by case law. See, e.g., *Hilton v. Bell Tel. Co.*, 936 F.2d 823, 828 (5th Cir. 1991) (holding that the use of the word “includes” just before a list of specific handicaps precludes the list from being interpreted as exclusive). Additionally, this proposition logically follows from the use of the phrase “included but not limited to” found in the definition of “point source.” It might be

The court in *United States v. Plaza Health Laboratories, Inc.* used three lines of reasoning in interpreting the language of the Clean Water Act as excluding human beings from constituting point sources.<sup>66</sup> First, the court concluded that the examples listed in the definition of a point source “evoke images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways.”<sup>67</sup> The court also applied the rule of statutory construction which commands that every statute must be construed in such a fashion that every word has some operative effect.<sup>68</sup> “[I]f 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.”<sup>69</sup> Congress could have simply stated, “any person who places pollutants in navigable water without a permit is guilty of a crime.”<sup>70</sup>

Second, the court pointed out that if a person were to be included in the definition of a point source, the structure of the definition and of the

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argued that the proposition is qualified by the principle of *ejusdem generis*. *Ejusdem generis* limits general terms illustrated by specific examples to the class of objects similar to those examples. See, e.g., *United States v. Powell*, 423 U.S. 87 (1975); *Hilton v. Southwestern Bell Tel. Co.*, 936 F.2d 823, 828 (5th Cir. 1991) (noting that specific handicaps listed, followed by general words “or any other health impairment that requires special ambulatory services” restrict the breadth of the general words to the class defined by the enumerated examples, a class identified by the common thread running through all examples); *Rainbow Navigation, Inc.*, 742 F. Supp. 171, 188 (D.N.J. 1990) (denying recovery by a carrier against the shipper under a more general contractual clause specifying “for any reason” where recovery was not permitted under a more specific clause specifying “strikes and work stoppages”); *Oglesby v. Coca-Cola Bottling Co. of Chicago/Wisconsin*, 620 F. Supp. 1336 (N.D. Ill. 1985) (holding that the general term “any claim related to employment” was restricted to the class identified by the examples “employee benefits, insurance, salary”). If *ejusdem generis* were applied to the definition of a point source, the general term, “any discernible, confined, and discrete conveyance . . . from which pollutants are or may be discharged,” which is illustrated by the specific examples, “pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft,” would be restricted to the class identified by those examples. However, the class delimited by the examples provided in § 1362 has been characterized as one of identifiable conveyances; see *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979); see also discussion, *infra* notes 113-16 and accompanying text. As such, the class is still broad enough to include a human being.

<sup>66</sup> *United States v. Plaza Health Lab., Inc.*, 3 F.3d at 646-49.

<sup>67</sup> *Id.* at 646.

<sup>68</sup> *Freytag v. Commissioner*, 501 U.S. 868 (1991) (“Our cases have consistently expressed a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.”) (citing *Pennsylvania Dep’t of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990)).

<sup>69</sup> *United States v. Plaza Health Lab., Inc.*, 3 F.3d at 646.

<sup>70</sup> *Id.*

Act's compliance provision, Section 1311(a), would be awkward.<sup>71</sup> Section 1311(a) declares that "the *discharge of any pollutant* by any person shall be unlawful" (emphasis added).<sup>72</sup> The definition of a "discharge of a pollutant" includes "any addition of any pollutant to navigable waters from any point source."<sup>73</sup> The court replaced "point source" with "person" in the definition of a "discharge of a pollutant."<sup>74</sup> The court then incorporated the definition of a "discharge of a pollutant" into Section 1311(a).<sup>75</sup> The compliance provisions of Section 1311(a) then read, "the addition of any pollutant to navigable waters from any person by any person shall be unlawful."<sup>76</sup> The court reasoned that because Congress could not have intended this awkward language and meaning, it did not intend to include a human being among possible point sources.<sup>77</sup>

Third, the court in *United States v. Plaza Health Laboratories, Inc.* decided whether a human being was a point source under the Clean Water Act by examining how the term "point source" was used throughout the Act. The court found that in other sections of the Act,<sup>78</sup> the term "point source" was consistently used in reference to industrial and municipal sources of pollutants.<sup>79</sup> Because the Clean Water Act is aimed primarily at regulating the discharge of pollutants from industries and municipalities,<sup>80</sup> the court reasoned that including a human being in the definition of a point source would exceed the scope of the Act.<sup>81</sup>

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<sup>71</sup> *Id.* at 647.

<sup>72</sup> § 1311(a) (1988).

<sup>73</sup> § 1362(12)(A) (1988).

<sup>74</sup> *United States v. Plaza Health Lab., Inc.*, 3 F.3d at 647.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 645 (citing 33 U.S.C. §§ 1311(e)(g)(2), 1314(b)(4)(B), 1316, 1318(a)(c) & 1342(f)).

<sup>79</sup> 3 F.3d at 646. (The court stated, "The words used to define the term and examples given . . . evoke images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways." *Id.* at 646. Later, the court found unpersuasive the argument advanced by the Tenth Circuit for a broad construction of "point source." *Id.* at 649 (citing *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979)). The court reasoned that, although the Tenth Circuit's holding that a ditch was a point source had required no great definitional leap, to write "human being" into the statute would do "violence to the language and structure of the CWA." *Id.*

<sup>80</sup> ENVIRONMENTAL LAW INSTITUTE, *FEDERAL ENVIRONMENTAL LAW 766* (Erica L. Dolgin et al., eds. 1974). This proposition is based on the premise that the definition of a point source is clear. Sources such as pipes or ditches are used to carry water from water-using industries and from municipal sewage treatment plants. Therefore, because these sources are specifically mentioned in the definition of a point source, the definition's primary thrust was at industries and municipalities. *Id.*

<sup>81</sup> *United States v. Plaza Health Lab., Inc.*, 3 F.3d at 647-48 (citing legislative history and context of the act.).

### B. Support in Case Law and Legislative History

Although the court in *United States v. Plaza Health Laboratories, Inc.* recognized that the Clean Water Act encompassed broad goals,<sup>82</sup> it did not recognize that it was necessary to include a human being in the definition of a point source to meet those goals.<sup>83</sup> First, the court noted that it agreed with the court in *National Wildlife Federation v. Gorsuch*<sup>84</sup> when it stated that “[c]aution is always advisable in relying on a general declaration of purpose to alter the apparent meaning of a specific provision.”<sup>85</sup> For these reasons, the court in *United States v. Plaza Health Laboratories, Inc.* was reluctant to rely heavily on the stated goals of the Clean Water Act.<sup>86</sup>

Starting with the above premise, the Second Circuit Court of Appeals went on to assert that the legislative history supported the proposition that a human being was not included as a point source<sup>87</sup> because the Clean Water Act focused on industrial and municipal polluters.<sup>88</sup> The court found that the definition of a point source was included in the Clean Water Act as “a means of identifying industrial polluters — generally a difficult task because pollutants quickly disperse throughout the subject water.”<sup>89</sup>

Next, the court responded to the government’s argument that the Clean Water Act should be interpreted broadly,<sup>90</sup> consonant with the broad interpretation courts have traditionally accorded the Rivers and Harbors Act of 1899.<sup>91</sup> The Rivers and Harbors Act provided that “[i]t shall not be lawful to throw, discharge, or deposit . . . any refuse matter of any kind or any description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States . . . .”<sup>92</sup>

Although the Rivers and Harbors Act was liberally construed by the courts, the Second Circuit Court of Appeals found that the Clean Water

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<sup>82</sup> *Id.* at 647 (“Discussions during the passage of the 1972 amendments indicate that congress had bigger Fish to Fry.”).

<sup>83</sup> *Id.*

<sup>84</sup> *National Wildlife Fed’n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982).

<sup>85</sup> *Id.* at 178.

<sup>86</sup> *United States v. Plaza Health Lab., Inc.*, 3 F.3d at 647.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 648.

<sup>91</sup> *United States v. Plaza Health Lab., Inc.*, 3 F.3d at 648.

<sup>92</sup> *Id.* at 648 (quoting 33 U.S.C. § 407).

Act could not be similarly interpreted.<sup>93</sup> In comparing the Rivers and Harbors Act to the Clean Water Act, the court determined that the Rivers and Harbors Act adopted a more general approach than the Clean Water Act in defining what was prohibited.<sup>94</sup> In addition, whereas the Rivers and Harbors Act provided for strict liability and misdemeanors as penalties, the Clean Water Act provides for broad penal provisions.<sup>95</sup> Because of these differences between the Clean Water Act and the Rivers and Harbors Act, the court declined to construe the Clean Water Act as liberally as the courts had construed the Rivers and Harbors Act.<sup>96</sup>

The Second Circuit Court of Appeals also pointed to case law which found that the Clean Water Act focused on industrial and municipal waste.<sup>97</sup> The court in *National Wildlife Federation v. Gorsuch* noted that Congress, while considering the Clean Water Act, focused on traditional industrial and municipal wastes.<sup>98</sup> The Second Circuit Court of Appeals relied on this in finding that Congress did not intend for the Clean Water Act to “impose criminal liability on an individual for . . . acts of human waste disposal . . . . Discussions during the passage of the 1972 amendments [to the Clean Water Act] indicate that congress [sic] had bigger fish to fry.”<sup>99</sup>

The court summed up its overview of the case law and legislative history on point sources by stating, “We find no suggestion . . . in the history of its passage that congress [sic] intended the CWA to impose criminal liability on an individual for the myriad random acts of human waste disposal . . . .”<sup>100</sup> The court concluded that it could not “add to the statute what congress [sic] did not provide.”<sup>101</sup> By finding that a human being could not constitute a point source, the court limited the term and truncated the statute’s reach. Because the Second Circuit Court of Appeals interpreted the Clean Water Act as limited to controlling municipal and industrial pollution, it will affect how law enforcement will

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<sup>93</sup> *United States v. Plaza Health Lab., Inc.*, 3 F.3d at 648.

<sup>94</sup> *Id.* at 647-84.

<sup>95</sup> *Id.* As noted *supra* note 46, the Clean Water Act provides for large fines and imprisonment as sanctions for noncompliance. Because the Rivers and Harbors Act provided, at most, misdemeanor penalties, the court refused to extend to the Clean Water Act the same liberal construction the courts had accorded the Rivers and Harbors Act. *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 647.

<sup>98</sup> *National Wildlife Fed’n v. Gorsuch*, 693 F.2d at 175.

<sup>99</sup> *United States v. Plaza Health Lab., Inc.*, 3 F.3d at 647.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 649.

handle individual polluters. Questions may arise as to how to punish employees of corporations when they individually discharge pollutants.<sup>102</sup>

#### IV. The Rationale for Recognizing a Human as a Point Source

##### A. Support of Statutory Language and Case Law

Although the Supreme Court has held that the legislative history should be consulted when interpreting the Clean Water Act,<sup>103</sup> a court in interpreting a statute still must begin with the language of the statute itself.<sup>104</sup> As previously stated in Section III of this Comment, the definition of a point source<sup>105</sup> includes a list of specific sources that fall within the scope of the definition. This list, however, is qualified by the phrase “not limited to” which directly precedes the list of specific sources.<sup>106</sup> Because every word in a statute has an operative effect,<sup>107</sup> the phrase “not limited to” indicates that there are other point sources which are not specifically listed that fall within the Clean Water Act.

Because of the expansive language of Section 1362(14), courts have found that many sources fall within the definition of a point source. For example, the court in *Sierra Club v. Abston Construction Co., Inc.*<sup>108</sup> found that coal miners’ strip mines could be a point source controlled by the Act.<sup>109</sup> Instead of focusing on the sources specifically included in the definition, the Fifth Circuit of the United States Court of Appeals focused on the “discernible, confined, and discrete conveyance” language of the

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<sup>102</sup> *Id.* at 654 (Oakes, J. dissenting). This question arises because, as the dissenting judge pointed out, “[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).” *Id.*

<sup>103</sup> *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 9-10 (1976) (“To the extent that the Court of Appeals excluded reference to the legislative history of the FWPCA in [discerning] its meaning, the court was in error. As we have noted before: ‘When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no ‘rule of law’ which forbids its use. However, clear words may appear on superficial examination.’”) (quoting *United States v. American Trucking Ass’ns*, 310 U.S. 534 (1940)).

<sup>104</sup> *Pennsylvania Dep’t of Public Welfare v. Davenport*, 495 U.S. 552, 557-58 (1990).

<sup>105</sup> § 1362(14) (1988). For exact language, see *supra* text accompanying note 44.

<sup>106</sup> *Id.*

<sup>107</sup> *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

<sup>108</sup> 620 F.2d 41 (5th Cir. 1980).

<sup>109</sup> *Id.* at 47.

Act.<sup>110</sup> The court agreed with the Government that collection or channeling of surface runoff could create a point source discharge. The court went further, however, by reasoning that even the design of spoil piles in a manner likely to permit erosion by surface runoff and discharge via existing “ditches, gullies, and similar conveyances” could constitute sufficient collection or channeling.<sup>111</sup> This court’s reading of the statutory language relied more on the meaning of the phrase “discernible, confined and discrete conveyance,” instead of on whether a strip mine was included in the list, or was similar in type to the sources on the list.

As the court in *Kennecott Copper Corp. v. EPA*<sup>112</sup> noted, Congress defined the term point source so broadly that thousands of point sources could fall within it. Furthermore, the concept of a point source was designed to advance the regulatory scheme of the Clean Water Act by “embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States.”<sup>113</sup> The Tenth Circuit Court of Appeals also has chosen to interpret the terminology of the Clean Water Act expansively to give full force to the goals and policies behind its enactment.<sup>114</sup> Instead of focusing on the small number of sources listed in the definition of a point source and whether other sources are physically similar to them,<sup>115</sup> it would be more helpful for courts to focus on whether a source is an “identifiable conveyance”<sup>116</sup> within the broad meaning of the definition of a point source.<sup>117</sup>

*B. The Goals and Policies of the Clean Water Act Support a Definition of a Human Being as a Point Source*

Although the remarks of a sponsor of a bill are not controlling in analyzing legislative intent,<sup>118</sup> they still deserve to be accorded substantial

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<sup>110</sup> *Id.* at 45.

<sup>111</sup> *Id.* at 44.

<sup>112</sup> 612 F.2d at 1243.

<sup>113</sup> *United States v. Earth Sciences, Inc.*, 599 F.2d at 373.

<sup>114</sup> *Sierra Club v. Colorado Refining Co.*, 838 F. Supp. 428, 434 (D. Colo. 1993). For example, in *Quivera Mining Co. v. EPA*, 765 F.2d 126 (10th Cir. 1985), the court, in holding that the EPA had the authority to issue permits regulating mining discharges, noted that, “it was the clear intent of Congress to regulate waters of the United States to the fullest extent possible . . .” *Id.* at 130, quoted in *Colorado Refining*, 838 F. Supp. at 1434.

<sup>115</sup> *United States v. Plaza Health Lab., Inc.*, 3 F.3d at 646, 649. See *supra* notes 78-81 and accompanying text.

<sup>116</sup> § 1362(14) (1988).

<sup>117</sup> *Id.* For exact language, see *supra* text accompanying note 44.

<sup>118</sup> *Consumer Product Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980).

weight in interpreting the statute.<sup>119</sup> As the late Senator Edmund Muskie, the sponsor and principal force behind the Clean Water Act, stated, "These [goals] are not merely the pious declarations that Congress so often makes in passing its laws; on the contrary, this is literally a life or death proposition for the nation."<sup>120</sup> Senator Muskie apparently realized that the reduction and eventual elimination of pollution were critical in acquiring a healthy environment. Despite the Senate's apparent recognition that achieving the proposed goals<sup>121</sup> and those eventually passed by both houses of Congress<sup>122</sup> would be difficult, any court interpreting the provisions of the Act should give these goals great weight.<sup>123</sup>

The Clean Water Act, including its far-reaching goals, was a dramatic response to the increasing pollution of the waters of the United States.<sup>124</sup> Although the Clean Water Act has many goals, those most prominently stated are the following:

- (a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective.

The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter-

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<sup>119</sup> *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

<sup>120</sup> *National Wildlife Fed'n v. Gorsuch*, 693 F.2d at 179 (quoting 188 CONG. REC. 33, 693 (1972), reprinted in 1 ENV'T'L POL'Y DIV. CONG. RES. SERV. LIBR. OF CONG., 93D CONG., 1ST SESS., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 164 (Comm. Print 1973) (statement of Sen. Muskie)).

<sup>121</sup> *Id.* ("There are no [cost] estimates . . . that, in my judgment, have any validity . . . [T]he 1985 target has not been related to costs. The bill does provide for the water quality inventories . . . designed to give us some hard estimates as to the cost of achieving no pollution discharge by 1985 . . . Then it would be for Congress to decide whether achieving no discharge by 1985 is within the ability of the American people to absorb the cost.")

<sup>122</sup> *Id.*

<sup>123</sup> *See, e.g., Earth Sciences*, 599 F.2d at 373. In holding that mining operations could involve point sources subject to regulation, the Tenth Circuit Court of Appeals noted that the "FWPCA was designed to regulate to the fullest extent possible those sources emitting pollution into rivers, streams and lakes." *Id.*

<sup>124</sup> *See Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1371 (D.C. Cir. 1977). In examining the reasoning and history behind the Clean Water Act, the court noted that the Act's passage was a "dramatic response to accelerating environmental degradation of rivers, lakes and streams in this country." *Id.* To respond to the environmental degradation, Congress intended to set up the enforcement of strict timetables and technology-based effluent limitations. *Id.*

- (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
- (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;
- (3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited[.]<sup>125</sup>

To fulfill the sweeping goals of the Clean Water Act, one must interpret the definition of a point source broadly. In explaining the intimate connection between the Clean Water Act's goals and the definition of a point source, the court in *Kennecott Copper Corp. v. EPA* noted that the statute sets the goal of eliminating the discharge of any pollutant. "[T]his objective could not be achieved if the term 'point source' were read narrowly."<sup>126</sup> Since the touchstone to regulating pollution under the Clean Water Act is its permit system, whether something is classified as a point source, and hence, subject to be regulated, is crucial.<sup>127</sup>

In *United States v. Plaza Health Laboratories, Inc.*,<sup>128</sup> therefore, the majority's exemption of a human being as a point source<sup>129</sup> will affect the enforcement mechanisms which were included in the Act to help reach its broad goals. As the dissent pointed out, there are dangers in paying too little attention to such broad goals since they are interpretive guides.<sup>130</sup>

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<sup>125</sup> § 1251 (1988 & Supp. 1993). Section 1251, which lists other goals, continues as follows:

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources for pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution. *Id.*

<sup>126</sup> *United States v. Plaza Health Lab., Inc.*, 3 F.3d at 652 (Oakes, J., dissenting) (citing *Kennecott Copper Corp. v. EPA*, 612 F.2d at 1243).

<sup>127</sup> *United States v. Plaza Health Lab., Inc.*, 3 F.3d at 652 (Oakes, J., dissenting).

<sup>128</sup> *Id.* at 649.

<sup>129</sup> *Id.* at 640.

<sup>130</sup> *Id.* at 654 n.5 (Oakes, J., dissenting). Corporations could escape liability for dumping waste by asking individual employees to dispose of the waste.

For example, following the reasoning of the majority, any individual member of a corporation could personally discharge pollutants into the water and be held not liable under the Clean Water Act.<sup>131</sup>

Instead, in determining the meaning of a statute, the courts should look not only to the particular statutory language, but to the design of the statute as a whole and to its objectives and policy.<sup>132</sup> A more consistent reading of the definition of point source would find that a person who dumps a truckload of manure into a storm sewer is a point source who has made a discharge because that person's actions can be controllable. In the above example, the person's actions not only fall under the definition of a point source, since he has collected and discharged the pollutant, but his actions also directly violate the goals of the Clean Water Act. Focusing on the broad statutory language and the objectives of the Clean Water Act would result in a more sensible interpretation of the Clean Water Act. A definition of a point source that includes a human being would be consistent with the Clean Water Act's goals and policies.

*C. The Controllability Theory: The Distinction Between a Nonpoint Source and a Point Source*

In 1987, Congress passed the Water Quality Act,<sup>133</sup> which declared a "national policy that programs for the control of nonpoint sources of pollution be developed and implemented . . . ."<sup>134</sup> However, nonpoint sources of pollution are not regulated in the Clean Water Act.<sup>135</sup> The definition of a point source effectively defines nonpoint sources by exclusion. A nonpoint source, therefore, is any source of water pollution

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<sup>131</sup> *Id.* at 654 (Oakes, J., dissenting).

<sup>132</sup> *Stafford v. Briggs*, 444 U.S. 527, 535 (1980). ("[I]t is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole . . . and the objects and policy of the law . . . .") *Id.* (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1856)).

<sup>133</sup> Water Quality Act of 1987, Pub. L. No. 100-4, 100 Stat. 7 (codified as amended at 33 U.S.C. §§ 1254a, 1256, 1262, 1281, 1281b, 1282-84, 1285, 1287, 1291, 1311-12, 1345, 1369, 1375, 1377, 1381-83, 1387, & 1414a (1988); 1251, 1254, 1268, 1313, 1317-19, 1321, 1324, 1329-30, 1342, 1344, 1362, 1365, 1376, & 12384 (1988 & Supp. 1993); & 1288, 1314, & 1322 (Supp. 1993); and 42 U.S.C. & 1962d-20 note (1988)).

<sup>134</sup> § 1251(a)(7) (1988). Furthermore, the programs were to be implemented in an "expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution." *Id.*

<sup>135</sup> *United States v. Earth Sciences, Inc.*, 599 F.2d at 371. ("Because nonpoint sources of pollution . . . are virtually impossible to isolate to one polluter, no permit or regulatory system was established as to them.")

not associated with a discrete conveyance.<sup>136</sup> Examples of nonpoint source pollution include “run-off [*sic*] from fields, forest lands, construction activity, and . . . salt water intrusion.”<sup>137</sup> Hence, whether a source is classified as a point source or nonpoint source is important because the Clean Water Act only applies to point sources.

One popular and reliable way to distinguish a nonpoint source from a point source is by applying the Controllability Theory.<sup>138</sup> The 1972 Amendments to the Clean Water Act concentrated on the identification and control of sources of pollution.<sup>139</sup> The legislative history of the 1972

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<sup>136</sup> See *National Wildlife Federation v. Gorsuch*, 693 F.2d at 166 & n.28.

<sup>137</sup> RODGERS, *supra* note 34, at 124. Professor Rodgers further defines nonpoint sources as producing a variety of pollutants, such as sediments, nutrients, minerals, pesticides, waste oils, organic wastes, and thermal pollution.

<sup>138</sup> RODGERS, *supra* note 34, at 150-52. There are several other popular theories besides the Controllability Theory that may help distinguish point sources from nonpoint sources.

The first is the Historical Theory, which looks to past industry practice to ascertain whether a pollutant is of the type commonly collected. *Id.* at 152. If industries have historically channeled or collected a pollutant, then channeling or collection constitutes a point source. See *Appalachian Power Co. v. Train*, 545 F.2d at 1351, 1372-74. However, the historical approach ignores the fact that past practice is not always right and that new, better ways of categorizing sources, such as the Controllability Theory, have been developed. RODGERS, *supra* note 34, at 152.

In addition to the historical approach, the Commons Theory is sometimes used to explain the differences between point sources and nonpoint sources. *Id.* This theory is based on the premise that nonpoint sources are the products of “incremental contributions, multiple actors, all doing their best while these separate bests assure the gradual decline of the resources.” *Id.* This theory neatly combines the opposite ideas that no one is responsible, and that everyone is responsible, for nonpoint source pollution. *Id.* This theory, though, conveys a sense of hopelessness at classifying, and hence, controlling sources of pollution. *Id.*

Last of all, the Culpability Theory asserts the proposition that point source pollution is that pollution which is done purposefully while nonpoint source pollution is accidental. RODGERS, *supra* note 34, at 155. This theory, however, has been rejected by most courts. See, e.g., *Sierra Club v. Abston Constr. Co.*, 620 F.2d at 44-45 (reasoning that a point source may be present where miners design spoil piles that are reasonably likely to erode as a result of precipitation and result in discharges via ditches, gullies or similar conveyances); *United States v. Earth Sciences, Inc.*, 599 F.2d at 374 (reasoning that “[t]he Act would be severely weakened if only intentional acts were proscribed”). The Culpability Theory poses several problems. It would often be difficult to tell the actor’s state of mind. RODGERS, *supra* note 34, at 155 (“It is improbable that the right answer to the question of whether a given discharge is suitable for control by permit can be found by probing the suspect’s state of mind.”)

Regulations and standards, as set by the Clean Water Act, encourage people to take care before the discharge of a pollutant happens, regardless of whether it was intentional or accidental. Of all the theories, the Controllability Theory best divides point sources from nonpoint sources because it eliminates much of the confusion in trying to classify sources since any source that could be controlled would be a point source.

<sup>139</sup> “The legislation recommended by the committee proposes a major change in the enforcement mechanisms of the federal water pollution control program from water quality standards to effluent limits.” S. REP. NO. 414, 92d CONG., 1ST SESS. 7 (1971), *reprinted in* 2 ENV’T POL’Y DIV., CONG. RES. SERV., LIBR. OF CONG., POLLUTION CONTROL ACT AMEND-

Amendments also confirms that the point source concept was meant to cover those sources which could be controlled.<sup>140</sup> The Senate believed nonpoint sources were uncontrollable.<sup>141</sup> When a “discernible, confined and discrete conveyance”<sup>142</sup> can be identified, then it can be controlled, primarily through the Clean Water Act’s permit program.<sup>143</sup>

Many courts also have applied the Controllability Theory when trying to decide whether a source was classified as a point source or a nonpoint source. In *United States v. Earth Sciences, Inc.*,<sup>144</sup> the United States Court of Appeals for the Tenth Circuit had to decide whether a reserve sump<sup>145</sup> could be considered a point source under the Clean Water Act.<sup>146</sup> During gold leaching operations, a toxic solution<sup>147</sup> was pumped into the sumps.<sup>148</sup> When it rained, the sumps would overflow and the toxic substance would discharge into the nearby rivers.<sup>149</sup> Although the defendant, Earth Sciences, argued that the overflow from a reserve sump did not constitute a discharge from a point source, the Tenth Circuit Court found to the contrary.<sup>150</sup>

In reaching this conclusion, the court examined the legislative history of the Clean Water Act.<sup>151</sup> The legislative history revealed to the court that nonpoint sources included sources like runoff caused primarily by

MENTS OF 1972, at 1425 (Comm. Print 1973), *quoted in* Michael R. Lozeau, *Preliminary Injunctions and the Federal Water Pollution Control Act: The Clean Water Permit Program as a Limitation on the Courts’ Equitable Discretion*, 42 RUTGERS L. REV. 701, 756 n. 237 (1990).

<sup>140</sup> “The Act relies on effluent limitations on individual point sources as the ‘basis of pollution prevention and limitation.’” *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d at 707 (quoting S. REP. NO. 414, 92d Cong., 1st Sess. A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1426 (Comm. Print 1973)).

<sup>141</sup> S. REP. NO. 414, 92d Cong., 1st Sess. [page number unavailable] (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3706 (discussing § 209 - Waste Treatment Management).

<sup>142</sup> § 1362(14) (1988).

<sup>143</sup> See *supra* note 36 and accompanying text.

<sup>144</sup> 599 F.2d at 368 (10th Cir. 1979).

<sup>145</sup> A “sump” is a pit, cistern, or cesspool used to drain, collect or store liquids. WEBSTER’S NEW WORLD DICTIONARY 591 (1990).

<sup>146</sup> *Earth Sciences*, 599 F.2d at 371.

<sup>147</sup> The Defendant, Earth Sciences, was using a toxic substance, sodium cyanide-sodium hydroxide water solution, to separate the gold from the ore in its gold leaching operation. *Id.* at 370.

<sup>148</sup> The sumps adequately stored the toxic substances until the warm April temperatures caused snow to melt, filling the sumps. *Id.* This, along with rainfall, caused the sumps to eventually overflow. *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 374.

<sup>151</sup> *Id.* at 372-73. The court examined the following legislative history: STAFF OF SENATE COMM. ON PUBLIC WORKS, 93d CONG., 1st Sess., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 530-235, 651-53 (Comm. Print 1973). *Id.* at 372.

rainfall.<sup>152</sup> The court also concluded from the legislative history that Congress would have regulated these types of nonpoint sources if it could have devised an effective method.<sup>153</sup> This view by the court is consistent with the Controllability Theory. If one can control a source of pollution — be it a sump, spoil pile, irrigation system, or abandoned mine — then it is a point source.

The Controllability Theory was also adopted by the Fifth Circuit Court of Appeals in *Sierra Club v. Abston Construction Co.*<sup>154</sup> In this case, the overburden<sup>155</sup> removed during strip mining accumulated into spoils piles<sup>156</sup> from which the rainwater caused runoff or draining from within the mined pit.<sup>157</sup> At a first glance, this type of activity may seem to be a nonpoint source since the pollution came from runoff.<sup>158</sup> The district court found that this pollution did not result from “any affirmative act of discharge by the defendants,” but instead was caused by natural forces, mainly erosion from rainfall.<sup>159</sup> The district court, therefore, concluded that the spoil piles did not fall under the definition of a point source.<sup>160</sup>

The Fifth Circuit Court of Appeals, though, reversed, finding that there were material facts as to whether a point source existed.<sup>161</sup> The court accepted the Government’s view that “surface runoff collected or channeled by the operator constitutes a point source discharge.”<sup>162</sup> Unlike the Government, however, the court reached this position by reasoning that, when an operator collects or channels water or other materials, or even designs spoil piles in a manner likely to permit surface runoff to erode the piles and cause discharges by means of existing

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<sup>152</sup> *Earth Sciences, Inc.*, 599 F.2d at 373. Runoff, caused primarily by rainfall, is the type of source which Congress would have regulated if it could have decided on a workable method. *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> 620 F.2d 41 (5th Cir. 1988).

<sup>155</sup> In strip mining, a technique is used which removes the rock material above the coal. *Id.* at 43. The rock material is referred to as overburden. *Id.* Removing the overburden exposes the coal that is close to the land surface. *Id.*

<sup>156</sup> The spoil piles, which are formed by the overburden, erode easily unless the overburden is put back into the land. *Id.*

<sup>157</sup> *Id.* at 43.

<sup>158</sup> “Runoff” is defined as “something that runs off, as rain that is not absorbed into the ground.” WEBSTER’S NEW WORLD DICTIONARY 516 (1990). This definition seems to exclude “runoff” from being a point source since it often would not be discernible or confined. § 1362(14) (1988). Also, runoff is not similar to the other types of sources, such as pipes, channels and tunnels, listed under the definition of a point source. *Id.*

<sup>159</sup> *Sierra Club v. Abston Constr. Co.*, 620 F.2d at 43.

<sup>160</sup> *Id.* at 44-45.

<sup>161</sup> *Id.* at 47.

<sup>162</sup> *Id.* at 44-45.

“ditches, gullies, and similar conveyances,” the human activity converts the runoff from an incident of erosion to a point source discharge.<sup>163</sup>

Other courts, while not expressly basing their findings on the Controllability Theory, imply in their opinions that control is one of the deciding factors as to whether something is a point source. In *United States v. Oxford Royal Mushroom Products, Inc.*, the court found a spray irrigation system to be a point source because it was putting out too much wastewater.<sup>164</sup> The excess wastewater was not absorbed by the fields, but flowed across the fields, through a break in the surrounding berm, and into the adjacent stream.<sup>165</sup> Abandoned mines also have been treated as point sources.<sup>166</sup> These were activities about which something could have been done.<sup>167</sup> Also, there was someone directly responsible for the discharge in each case.<sup>168</sup>

As the dissenting judge in *United States v. Plaza Health Laboratories, Inc.* pointed out, the rationale for regulating point sources and not nonpoint sources is that point sources can be controlled.<sup>169</sup> Furthermore, point sources, because they can be controlled, can also be cleaned up and the responsible parties identified.<sup>170</sup> The rationale of the Controllability Theory applies to the issue of whether a human being should be considered a point source.

By accepting a human being as a possible point source of pollution, a court would not be opening up Pandora's box. For example, a human being who spreads fertilizer on the ground or deposits oil in a driveway, which later washes into the water, would be considered a nonpoint source.<sup>171</sup> A human being could become a point source only by directly channeling pollution into the water. A human being, like the defendant Villegas in *United States v. Plaza Health Laboratories, Inc.*,<sup>172</sup> should be

<sup>163</sup> *Id.*

<sup>164</sup> 487 F. Supp. at 854.

<sup>165</sup> *Id.*

<sup>166</sup> See *American Mining Cong. v. EPA*, 965 F.2d 759, 765 (9th Cir. 1992) (implicitly recognizing that abandoned mines were point sources in holding that the EPA was authorized under CWA § 402(p)(2)(B), 33 U.S.C. § 1342(p)(2)(B) (1988), to require permits for the storm water discharges from abandoned mines).

<sup>167</sup> RODGERS, *supra* note 34, at 151. (“A large number of other types of activities adjudged to be ‘point sources’ of pollution strongly suggest empirical estimates that this was an activity or incident about which something could have been done and for which somebody is distinctly responsible . . . .”)

<sup>168</sup> *Id.*

<sup>169</sup> 3 F.3d at 653 (Oakes, J., dissenting).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 654 n.6 (Oakes, J., dissenting).

<sup>172</sup> *Id.* at 654 (Oakes, J., dissenting).

considered a point source because this form of a source can be controlled. A human being can be considered a “discrete conveyance”<sup>173</sup> because he or she is an identifiable source that channels pollution. As Judge Oakes stated, “the source [Villegas] of the pollution was clear, and would have been easy to control.”<sup>174</sup> Villegas, therefore, would be considered a point source.

## V. Conclusion

Whether a human being falls within the definition of a point source under the Clean Water Act is a crucial issue which the Second Circuit of the United States Court of Appeals recently addressed. Although the court found a human being not to be included as a point source,<sup>175</sup> the question is still open for other Circuits to decide.

By finding that a human being could be a point source if he or she channeled pollution into water, the courts would be furthering the broad goals and policies of the Clean Water Act. Courts also could adequately distinguish when a human being is a nonpoint source or a point source by using the rationale behind the Controllability Theory.

When a human being takes possession of over one hundred containers filled with vials of blood,<sup>176</sup> some infected by hepatitis-B, and knowingly conceals at least two of these containers in the crevice of a bulkhead below the high-water line, where the river would inevitably reach them,<sup>177</sup> the penalties of the Clean Water Act should apply. This type of pollution is not comparable to random individual pollution, like a person throwing a candy wrapper on the street. On the continuum of point sources and nonpoint sources, Villegas shared more characteristics with point sources. Villegas was an identifiable source, unlike sources such as unchanneled runoff caused by rainfall. The pollution discharged by Villegas is the type that comes from a controllable, identifiable source, and the source should be held responsible for clean-up costs and other penalties.

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<sup>173</sup> § 1362(14) (1988).

<sup>174</sup> *United States v. Plaza Health Lab., Inc.*, 3 F.3d at 653 (Oakes, J., dissenting). In fact, the dissent pointed out that Villegas was aware that the materials were dangerous and that there were methods of controlling and of properly disposing of them. *Id.* Although the laboratory had hired a medical waste handler before, Villegas chose not to employ a medical waste handler when he disposed of waste via the Hudson River. *Id.*

<sup>175</sup> *Id.* at 649; *see also* § 1362(14) (1988).

<sup>176</sup> *United States v. Villegas*, 784 F. Supp. at 7.

<sup>177</sup> *United States v. Plaza Health Lab., Inc.*, 3 F.3d at 644.

Unfortunately, by holding that a human being cannot be a point source of pollution, the court in *United States v. Plaza Health Laboratories, Inc.* has extended “an open invitation to circumvent the Clean Water Act.”<sup>178</sup> Villegas disposed of enough containers of blood to constitute a significant discharge. Also, Villegas, who was the co-owner of the Plaza Health Laboratories, admitted to placing vials into the bulkhead to make room in his laboratory for incoming blood samples.<sup>179</sup> He clearly was acting for his business.

The court’s decision in *United States v. Plaza Health Laboratories, Inc.* could provide industries with a means of escaping the reach of the Clean Water Act. An industry that does not want to take the proper steps or incur the costs of disposing of its waste may be tempted to dispose of waste through individuals. The Clean Water Act was enacted to regulate any pollution discharged from a point source. Unlike the Second Circuit Court of Appeals, other courts may further the purposes of the Clean Water Act by holding that in the right circumstances, a human being can be a point source.

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<sup>178</sup> Laurie Asseo, *Court Refuses to Reinstate Conviction for Dumping Blood into River*, The Associated Press, June 27, 1994, at 27.

<sup>179</sup> *United States v. Villegas*, 784 F. Supp. at 7.