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Obeying the Speed Limit: Framing the Appropriate Role of EPA Criminal Enforcement Actions against Clandestine Drug Laboratory Operators

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Comments

Obeying the "Speed" Limit: Framing the Appropriate Role of EPA Criminal Enforcement Actions against Clandestine Drug Laboratory Operators

> Making America's air cleaner, its water purer, and its land better protected . . . are clear and simple concepts that are rarely matched by clear and simple solutions. No one knows that better than environmental attorneys.[1]

I. Introduction

Methamphetamine is an extremely regulated, widely abused, and highly addictive stimulant.[2] The class of compounds known as

1. Statement of Robert Fabricant, Esq., Nominee to be General Counsel, Environmental Protection Agency, to the U.S. Senate Committee on Environment and Public Works, Washington, D.C., July 25, 2001.

2. RESEARCH REPORT SERIES—METHAMPHETAMINE ABUSE AND ADDICTION, NATIONAL INSTITUTE ON DRUG ABUSE, NATIONAL INSTITUTES OF HEALTH, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (Jan. 2002) *available at* http://www.nida.nih.gov/ResearchReports/methamph/methamph2.html (last visited Feb. 3, 2005) [hereinafter NATIONAL INSTITUTES OF HEALTH].

amphetamines was first discovered in 1887 in Germany,[3] and methamphetamine was synthesized in Japan in 1919.[4] Amphetamine became commercially available in the United States in the 1930's in a non-prescription nasal decongestant inhaler marketed as Benzedrine.[5] Methamphetamine was available in tabular form as Methedrine starting in the 1950's.[6] Amphetamines found use among some soldiers who occasionally relied on the drug to keep them awake during protracted times of battle in World War II and the Vietnam War.[7] Abuse of the drug by the American public increased through the middle of the 20th century, largely among truck drivers, motorcycle gangs, and college students.[8]

In 1970, Congress passed The Controlled Substances Act (*hereinafter* "CSA") of 1970[9] (Title II of The Comprehensive Drug Abuse Prevention and Control Act of 1970), limiting the commercial availability of methamphetamine. The CSA designates methamphetamine in its injectable liquid form as a Schedule II controlled substance and in all other consumable forms as a Schedule III controlled substance.[10] The Department of Justice, following a reclassification,[11] now recognizes all forms of methamphetamine as belonging to Schedule II.[12] As a Schedule II controlled substance, the manufacture,

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3. Edeleano, L.: Uber einige Derivate der Phenylmethacrylsaure und der Phenylisobuttersaure. Ber Deutsch Chem Ges, 20:616, 1887.

4. A. Ogata, *Constitution of ephedrine. Desoxyephedrine*. J. PHARM. SOC. JPN., 451 (1919) 751-764.

5. Narconon Arrowhead Website, *at* http://www.addiction2.com/meth_history.html (last visited Feb. 3, 2005) (providing a history of methamphetamines).

6. *Id.*

7. United States Army Presentation on Methamphetamines, *available at* http://acsap.army.mil/slides/Methamp.ppt#16 (last visited Feb. 3, 2005).

8. NARCONON ARROWHEAD, *supra* note 5. Some of the street names these groups have given to methamphetamine include speed, crystal meth, crank, ice, biker's coffee, and perhaps the most original of all, Methlie's Quick.

9. Controlled Substance Act of 1970, Pub. L. No. 91-513, 84 Stat. 1247 (codified as amended at 21 U.S.C. § 801 et seq. (2000)).

10. A Schedule II controlled substance is a drug or other substance that has a high potential for abuse, a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions, and abuse of which may lead to severe psychological or physical dependence. A Schedule III controlled substance, by comparison, has a lesser potential for abuse, a currently accepted medical use in the United States, and abuse of which may lead to moderate or low physical dependence or high psychological dependence. CSA, 21 U.S.C. § 812(b); 21 U.S.C. § 812(c), schedules II & III (2000).

11. The Attorney General has the authority to transfer a substance between schedules. CSA § 201(a), 21 U.S.C. § 811(a) (2000).

12. 21 C.F.R. § 1308.12(d)(2) (2002). *See also* United States v. Kendall, 887 F.2d 240, 241 (9th Cir. 1989) (explaining that the Department of Justice in 1971 delegated to the Bureau of Narcotics and Dangerous Drugs ("BNDD") all authority over the rescheduling of controlled substances; today, that authority rests with the DEA, but the

distribution, and dispensation of methamphetamine, or possession with intent to commit any such act, are prohibited[13] absent prior registration with the Drug Enforcement Administration.[14] Today, physicians may legally prescribe methamphetamine, though only under very limited circumstances.[15]

It was the grim recognition of methamphetamine's numerous harmful effects which led to the passage of the CSA.[16] Psychologically, symptoms of short-term use and withdrawal include anxiety, fatigue, paranoia, aggression, cravings for the drug, and depression.[17] Chronic abuse additionally can lead to violent behavior, confusion, and insomnia, and some addicts complain of auditory hallucinations ("the voices"), mood swings, and delusions or paranoia.[18] Physiologically, intake of methamphetamine causes a six to eight hour period of perceived bliss, accelerated physical activity ("the buzz"), and a decreased appetite.[19] Over time, an addict's skin becomes ulcerated and infected from poor

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BNDD's 1971 rescheduling of all forms of methamphetamine to Schedule II was a valid and binding determination for purposes of criminal sentencing).

13. A threshold amount of 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers, can lead to a term of imprisonment of ten or more years and/or a $4,000,000 fine. By comparison, 5 grams of a pure methamphetamine compound or 50 grams of a mixture or substance containing a detectable amount of methamphetamine trigger a potential sentence of 5 to 40 years imprisonment and/or a $2,000,000 fine. CSA, 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii), (b)(1)(B)(viii) (2000).

14. 21 C.F.R. § 1301.11(a) (2002).

15. Ovation Pharmaceuticals Inc. manufactures Desoxyn® CII (methamphetamine hydrochloride) tablets. The drug is used to treat attention deficit disorder with hyperactivity, as well as exogenous obesity in the short-term. *See* company website, *at* http://www.ovationpharma.com/products.html#2 (last visited Feb. 3, 2005).

16. H.R. Rep. No. 91-1444 (1970). The House Report accompanying the CSA stated some areas of concern with respect to stimulants such as methamphetamine:

> With regard to stimulant and depressant drugs . . . it should be noted that as estimated in a report by this committee in March of 1965 on the Drug Abuse Control Amendments of 1965, almost 50 percent of the 9 billion amphetamines and barbiturates produced legitimately in this country were diverted into illicit channels. As of late 1969, when that diversion figure was rechecked, it was still accurate. . . .
>
> Some use drugs to seek relief from the tedium of their jobs and their lives. . . . A larger number take to certain drugs to offset fatigue, and this group includes truck drivers, theatrical people, and even doctors and nurses facing the letdown that follows long hours of tension.

H.R. Rep. No. 91-1444 (1970), *reprinted in* 1970 U.S.S.C.A.N. 4566, 4572-3.

17. METHAMPHETAMINE DRUG FACTS, WHITE HOUSE OFFICE OF NATIONAL DRUG CONTROL POLICY, *available at* http://www.whitehousedrugpolicy.gov/drugfact/methamphetamine/ (last visited Feb. 3, 2003) [hereinafter WHITE HOUSE OFFICE OF NATIONAL DRUG CONTROL POLICY].

18. *Id.*

19. NATIONAL INSTITUTES OF HEALTH, *supra* note 2.

hygiene and lack of sustenance, and as body weight decreases, skin appears to hang off the person's bones.[20] Prolonged dosing on the drug can lead to stroke, epilepsy, and Alzheimer's disease.[21]

The socioeconomic effects of methamphetamine abuse, although secondary symptoms, can be shocking in particular instances and are appalling when considered in the aggregate. As methamphetamine laboratories move out of the archetypal abandoned warehouse setting and into private residences to avoid detection, children increasingly are exposed to hazardous chemicals which they might ingest or inhale.[22] Individuals sharing living quarters with a methamphetamine addict may accidentally be injected by stray needles (increasing their risk of infection from hepatitis, HIV, and other diseases).[23] Non-users may experience a correlated likelihood of suffering from malnutrition due to a caregiver's neglect[24] or from sexual or physical abuse by an addict.[25] An addict's insatiable habit can cause private citizens to become the victims of robbery, credit card fraud, or other identity theft.[26]

Despite the passage of the Controlled Substances Act in 1970, abuse of the drug continues.[27] However, the CSA's restrictions did change the methamphetamine industry in three fundamental respects. First, over the past five years the drug's illicit manufacture has become decentralized

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20. For a hauntingly stark pictorial documentation of one woman's ten year descent into methamphetamine addiction, visit the Drug Enforcement Agency website, *at* http://www.dea.gov/concern/methuse.jpg (last visited November 2, 2003).

21. WHITE HOUSE OFFICE OF NATIONAL DRUG CONTROL POLICY, *supra* note 17.

22. Press Release, White House Office of National Drug Control Policy, White House Office of National Drug Control Policy Official Testifies on Status of Methamphetamine Problem in U.S. (July 18, 2003), *available at* http://www.whitehousedrugpolicy.gov/news/press03/071803.html (last visited Feb. 3, 2005).

23. *Id.*

24. *Id.* For one account of the jeopardizing conditions found during a raid of one methamphetamine-producing residence in Pennsylvania, *see* Lisa Thompson & Gerry Weiss, *Home-Cooked Plague*, ERIE TIMES-NEWS, Apr. 27, 2003, at 1.

25. *See* Sentencing Guidelines for United States Courts, 68 Fed.Reg. 75340, 75366 (proposed Dec. 30, 2003) (to be codified at § 2D1.1 of the U.S. Sentencing Guidelines). The Commission requests comment regarding whether § 2D1.1 should be amended to better account for offenses that involve drug-facilitated sexual assault. *Id.*

26. *See supra* note 22; *see also* OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ANHYDROUS AMMONIA THEFT, EPA-F-00-005 (March 2000); Timothy Egan, *Meth Building Its Hell's Kitchen in Rural America*, N.Y. TIMES, Feb. 6, 2002, at A14 (discussing the effects of methamphetamine abuse on rural communities nationwide); Joey West, *More Meth-Related Charges In County*, THE CITIZEN (Auburn, N.Y.), Sept. 26, 2003 (reporting on the arrest of individuals for an attempted theft from a farm of an ingredient in the manufacture of methamphetamine).

27. *See supra* note 22. Approximately 9.6 million U.S. residents over the age of 12 in 2001 had used methamphetamine at least once in their lifetime, and use continues to rise across the country. *Id.*

from traditional production loci in the western United States, spreading across most of the country.[28] Second, numerous alternative synthetic routes have developed in response to governmental attempts to regulate methamphetamine precursor materials.[29] Third, due to the myriad recipes available in the public domain, small-volume, largely untrained producers are responsible for an increasing share of the underground supply of methamphetamine.[30] Lack of training also results in laboratory conditions that are dangerous to operators, the general public,[31] and as will be discussed in this comment, the natural environment.

Part II of this Comment discusses the relevant statutes and internal administrative guidelines which incorporate the Environment Protection Agency into the fight against clandestine methamphetamine laboratories. Part III details Congressional and executive responses to the methamphetamine epidemic. Part IV describes federal sentencing guidelines which can be used by the criminal justice system to punish offenders for environmental harms associated with the manufacture of the drug. In describing the Guidelines, the comment will address recent United States Supreme Court and circuit court rulings making these guidelines advisory rather than mandatory. Parts V and VI attempt to reconcile the many alternatives and demands facing the EPA and present suggestions which, if implemented, may define a more meaningful role for the EPA in the future.

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28. Guy Hargreaves, Clandestine Drug Labs, 69 FEDERAL BUREAU OF INVESTIGATION LAW ENFORCEMENT BULLETIN 1, 2 (Apr. 2000).

29. For a concise scholarly summary of popular synthetic routes to methamphetamine, *see* Andrew Allen & Thomas S. Cantrell, *Synthetic Reductions in Clandestine Amphetamine and Methamphetamine Laboratories: A Review*, 42 FORENSIC SCI. INT'L 183-99 (1989), *available at* http://www.rhodium.ws/chemistry/amphetamine.reduction.html (last visited Feb. 3, 2005). Some common reagents used in methamphetamine manufacture include pseudoephedrine (i.e., Sudafed®), anhydrous ammonia, and red phosphorus. *Id.*

30. BUREAU OF DRUG LAW ENFORCEMENT, PENNSYLVANIA STATE POLICE, METHAMPHETAMINE INTELLIGENCE BRIEF, Issue 2001-2 (June 5, 2001). From March to May 2001, the Pennsylvania State Police were involved in more clandestine laboratory seizures than in the prior three years. *Id.*

31. United States v. Dick, 173 F.Supp.2d 765 (E.D. Tenn. 2001). "Under normal circumstances, in which individuals in full control of their faculties conduct chemical reactions in residential areas, a serious risk of harm is present. . . . Cooking methamphetamine while under the influence of the methamphetamine obviously heightens the already serious risks inherent to methamphetamine manufacture. In addition to the danger of fire and explosion, the chemicals present . . . [pose] an inhalation risk." *Id.* at 771.

II. Enforcement of Methamphetamine-Related Activities by the Environmental Protection Agency

A. Seizing A Laboratory

Clandestine methamphetamine labs will prove to have profound environmental impacts in the United States in the years to come. A host of potential environmental crimes often greet local, state, and federal investigators conducting a search of these methamphetamine laboratories. When a methamphetamine "cook" completes a batch of the drug, he is not going to risk discovery of his illicit activities by calling a professional waste disposal service to remove the byproducts[32] of the production cycle.[33]

Often, methamphetamine producers dispose of this hazardous waste[34] in areas surrounding the production site. In West Virginia, EPA agents once discovered piles of hazardous waste on one producer's lawn.[35] At another site in the state, aqueous waste was found in a kitchen sink drain that led to a municipal sewer system.[36] Isolated streams in

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32. HARGREAVES, *supra* note 28. Typical waste compounds include petroleum ether, methanol, or acetone; muriatic, sulfuric, or hydroiodic acid; iodine; lye; lithium batteries, ammonia. *Id.*

33. Telephone Interview with Daniel Boehmcke, Esq., former Acting Assistant Regional Criminal Enforcement Counsel, EPA Region III (Nov. 12, 2003). "Methamphetamine producers are not likely to call Safety-Kleen." *Id.* Mr. Boehmcke and other EPA officials were interviewed for background information during the preparation of this comment. All statements made by these individuals represent their personal opinions and experiences, and should not be construed in any way to be the official policies or viewpoints of the EPA or any other entity of the United States government.

34. 40 C.F.R. § 261.11(a)(1) (2002). RCRA solid wastes (as defined at 40 C.F.R. § 261.2) may be considered RCRA hazardous wastes if they exhibit one or more of the following characteristics: ignitability (§ 261.21), corrosivity (§ 261.22), reactivity (§ 261.23), or toxicity (§ 261.24). *Id.*

35. Telephone Interview with Nick Gillispie, Criminal Investigation Division Special Agent, EPA Region III (Dec. 16, 2003). "On the lawn near one private residence were dozens of piles of sludge from someone using the anhydrous [ammonia] method of production. These piles had tested pH values of less than 1.0 [indicating extreme acidity and caustic properties]." *Id.*

36. *Id.* Gillispie recounted his discovery of waste materials in the sink of one residence:

> I was using my testing device, and it was indicating the presence of some methamphetamine residue on some glasswear near the sink. As I got closer to the sink, the device automatically pegged out and shut off, which is what the device does so as not to overload. Upon closer examination, I discovered about eight to ten ounces of solvent waste still in the drain. This solvent was highly flammable, with a flashpoint of 5° Celsius [meaning it could ignite at approximately 41° F].

Id.

rural areas have also been used as dump sites.[37] Hazardous methamphetamine waste may also be transferred to "temporary" storage units which remain on the premises indefinitely.[38]

After a seizure by law enforcement officials, the average lab costs $3,000 to remediate while larger production facilities can require expenditures of over $100,000.[39] Further complicating environmental clean-up efforts is the slowly increasing use of mobile laboratories.[40] As the House of Representatives stated in the year 2000, there is a "methamphetamine epidemic in America."[41]

Because of its jurisdiction over environmental crimes, the EPA has been asked to assist in the investigation and prosecution of methamphetamine lab operators. Within the past five years, the Drug Enforcement Agency and state and local police on numerous occasions have contacted the EPA after finding significant amounts of hazardous waste located at "busted" methamphetamine labs.[42] In such cases, EPA-CID will be contacted after the execution of a search warrant, and a

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37. Brian Bowling, *New Method Used to Take on Labs: Environmental Agencies Help Fight Methamphetamine*, CHARLESTON DAILY MAIL (WV), Mar. 27, 2003, at 2C.

38. *Id.* Chemicals used to make methamphetamines, as well as the resultant waste from its production, may be stored in makeshift containers, through which their caustic contents may eat, leak out to mix with other nearby compounds, and result in a chemical explosion or fire. *Id.*

39. HARGREAVES, *supra* note 28.

40. NATIONAL DRUG INTELLIGENCE CENTER, UNITED STATES DEPARTMENT OF JUSTICE, PENNSYLVANIA DRUG THREAT ASSESSMENT UPDATE: METHAMPHETAMINE (Oct. 2003). "Mobile methamphetamine laboratories . . . typically are set up in small trailers that are moved into wooded or secluded areas to run a production cycle, and then quickly moved to another location to run another production cycle." *Id.*

41. H.R. Rep. No. 106-878 (Sept. 21, 2000). The House of Representatives stated in this report:

> Methamphetamine can be made from readily available and legal chemicals and substances, and . . . it poses serious dangers to both human life and the environment. . . . Even small amounts of these chemicals, when mixed improperly, can cause explosions and fires. For every one pound of methamphetamine that is produced, approximately five pounds of toxic and often lethal waste products may be left behind at the laboratory site, or disposed of in rivers, kitchen sinks, or sewage systems in an effort to conceal evidence of illegal manufacturing.

Id. at *22-3.

42. GILLISPIE, *supra* note 35; BOEHMCKE, *supra* note 33. In EPA Region III (consisting of West Virginia, Virginia, Maryland, the District of Columbia, Delaware, and Pennsylvania), Gillispie and other members of EPA's Criminal Investigation Division (EPA-CID) are participants in various state and regional drug task forces, at which they have gained contact with members of the DEA and state police units. EPA-CID special agents have informed these authorities of what physical evidence may trigger charges against a meth lab operator for environmental crimes. Gillispie estimates that of the "meth labs that are busted every day" in West Virginia, for example, only about 1% require EPA-CID involvement.

special agent of the EPA-CID will obtain samples from the site.[43] If these samples test positive for hazardous waste the case may be examined further by the Office of the Regional Criminal Enforcement Counsel (RCEC).[44]

B. Putting Together A Case

It is the job of an RCEC to review the relevant criminal charges and supporting evidence and, where warranted, to refer the case to an Assistant United States Attorney (AUSA) at the Department of Justice for prosecution.[45] When the RCEC recommends criminal charges in methampthetamine-related cases to an AUSA after investigation by EPA-CID,[46] such charges almost exclusively fall under the regulatory provisions of two laws: the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act.[47] Beyond the substantive environmental charges, an RCEC must also consider the enforcement prerogatives developed by the EPA itself, prerogatives which of late have come under close scrutiny.

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43. GILLISPIE, *supra* note 35.

44. As stated on EPA's Criminal Enforcement website (EPA CE):

> The mission of the multi-media criminal enforcement program is to identify, apprehend, and assist prosecutors in successfully convicting those who are responsible for the most significant and egregious violations of environmental law that pose substantial risks to human health and the environment. EPA's criminal enforcement program was established in 1982. Recognizing the growing need to combat environmental crime, Congress granted EPA full law enforcement authority in 1988 and greatly expanded the program with the enactment of the 1990 Pollution Prosecution Act. . . .
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> The criminal enforcement program is made up of well-trained, fully designated federal law enforcement agents, environmental forensic scientists and engineers, attorneys and training specialists. With more than 40 Regional and area offices nationwide, and supported by its forensics laboratory in Denver, Colorado and its training facilities in Washington, D.C., Denver, Colorado and the Federal Law Enforcement Training Center in Glynco, Georgia, the program works closely with other federal, state, tribal and local law enforcement authorities, both to investigate and successfully prosecute criminal violations and to build the criminal enforcement capacity of other units of government.

EPA Criminal Enforcement website, *at* http://www.epa.gov/compliance/criminal/index.html (last visited Feb. 3, 2004) (hereinafter EPA CE).

45. *Id.*

46. Regional Criminal Enforcement Counsels are part of the Legal Counsel & Resource Management Division of the Office of Criminal Enforcement, Forensics and Training (OCEFT), of which the Criminal Investigation Division is also a part. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, REVIEW OF THE OFFICE OF CRIMINAL ENFORCEMENT, FORENSICS AND TRAINING 9 (NOV. 2003).

47. Because most reported cases in this area involve charges under RCRA, violations of the Clean Water Act will not be examined in detail in this comment.

1. Resource Conservation and Recovery Act

The provisions of the Resource Conservation and Recovery Act serve as valuable tools in the prosecution of methamphetamine laboratory owners and operators. Under RCRA, it is illegal to store or dispose of hazardous waste without a permit from the EPA,[48] and land disposal is severely restricted.[49] Failure to abide by these requirements can result in criminal convictions carrying prison terms of up to five years.[50] Clandestine methamphetamine laboratory operators, by virtue of their illicit activities, are easy targets for prosecutions under the RCRA provisions.

The general culpability requirements for RCRA charges favor the application of the law's criminal provisions wherever possible.[51] To successfully convict a defendant under RCRA, the federal government does not need to show that the defendant knew that any relevant materials were RCRA-defined hazardous wastes,[52] nor that the defendant knew the illegality of his actions.[53] All that must be established beyond a reasonable doubt is that the defendant knew that the material had the potential for causing harm to the environment or persons, and therefore was "hazardous" in the general sense of the word.[54] Such general knowledge may be established by circumstantial evidence.[55]

A recent federal appeals court decision illustrates the use of RCRA criminal charges in prosecutions aimed at stifling the methamphetamine

48. 42 U.S.C. §§ 6924, 6925; 40 C.F.R. Part 264 (2002).

49. 40 C.F.R. Part 268; 40 C.F.R. §257.3-3 (2003).

50. 42 U.S.C. § 6928(d)(2)(A) (2002).

> Any person who knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter without a permit under this subchapter . . . shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment . . . not to exceed five years, or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment.

Id.

51. Boehmcke, *supra* note 33. "These cases are fairly efficient to bring. The production [of methamphetamine] itself creates hazardous waste."

52. United States v. Self, 2 F.3d 1071, 1091 (10th Cir. 1993).

53. United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558 (1971). "[W]here . . . obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *Id.* at 565.

54. United States v. Goldsmith, 978 F.2d 643, 645 (11th Cir. 1992) (government only had to show that the defendant knew the general hazardous character of materials in question).

55. *Self*, 2 F.3d at 1087.

epidemic. In *United States v. Hines*,[56] the defendant appealed his district court convictions on drug and RCRA charges[57] on the grounds that the charges had been improperly joined[58] at trial, and that the district court had erred in not granting his motion for severance.[59] The Tenth Circuit Court of Appeals reasoned that the RCRA counts and the methamphetamine conspiracy counts were part of a common scheme[60] as

56. United States v. Hines, 210 F.3d 390, 2000 WL 350219 (10th Cir. 2000).

57. *Id.* at 1-2. Hines owned a business known as H & J Auto in Marshall County, Oklahoma. *Id.* An investigator from the Oklahoma Department of Environmental Quality (ODEQ) inspected the site in February 1997, and noticed about 34 fifty-five gallon barrels, many rusted, leaking, or bulging, some labeled "methylethyl ketone" (MEK, or in EPA parlance "methylethyl death" due to its extreme toxicity). *Id.* The investigator, after determining that Hines was responsible for the barrels, returned to test them but found the barrels had vanished. *Id.* Further investigation showed that Hines had conspired with others to have the barrels taken off-site with a company truck to codefendant Daniel Martin's garage, where they were stored and later disposed of in an adjacent lot. *Id.* During the course of investigating the RCRA charges, an illegal methamphetamine operation involving Hines, Martin, and others was discovered. *Id.*

Carl Hines was convicted, among other things, of illegally transporting hazardous waste to an unpermitted facility without a manifest, in violation of 42 U.S.C. §§ 6928(d)(1), 6928(d)(5) and 18 U.S.C. § 2, and conspiracy to manufacture and distribute methamphetamine, in violation of 21 U.S.C. § § 841(a)(1) and 846 and 18 U.S.C. § 2. *Id.* at 2. Under the enumerated RCRA provisions found in Title 42, hazardous waste, if transported, may only be destined for a permitted treatment, storage, or disposal (TSD) facility, and while in transit, it must be properly marked with a manifest. Illegal transportation charges under RCRA may operate solo or in concert with other RCRA charges for illegal storage or disposal. *See generally* 42 U.S.C. Chapter 82, Subchapter III (2000). Here, Hines was not convicted of illegal storage of waste, but Martin was. *Id.* at 2-3.

58. FED.R.CRIM.P. 8 (2005). This rule permits offenses to be joined that "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." *Id.* FED.R.CRIM.P. 14 permits severance to be granted at the discretion of the district court if the joinder of offenses will result in prejudice to the defendant.

59. *Hines*, 210 F.3d 390, at 5. "The alleged misjoinder of offenses under Rule 8 is a question of law subject to de novo review." *Id.* (citing United States v. Johnson, 130 F.3d 1420, 1427 (10th Cir. 1997)). "The decision whether to sever counts of an indictment for separate trial is a matter committed to the sound discretion of the trial court," and will not be reversed "absent a strong showing of prejudice." *Hines*, 210 F.3d 390, at 5 (citing United States v. Wiseman, 172 F.3d 1196, 1211 (10th Cir.), *cert. denied*, 120 S.Ct. 211 (1999)).

60. An example of a case that did not involve a common scheme involving methamphetamine and hazardous waste was *United States v. Derewal*, a case decided by jury on June 15, 1998 in the U.S. District Court for the Eastern District of Pennsylvania. *See* Press Release, EPA Region III Office of External Affairs, Federal Jury Convicts Former Businessman of Hazardous Waste and Drug Violations in Doylestown (June 17, 1998), *available at* http://www.epa.gov/region3/r3press/pr98-222.htm (last visited Feb. 3, 2003). The case was investigated by EPA-CID, the DEA, and the FBI. *Id.* The defendant, Manfred Derewal, Jr., had generated corrosive hazardous waste from 1982-1987 and stored it at a former metals processing facility he owned. *Id.* He was convicted on a count of RCRA-prohibited storage without a permit, and on an unrelated count of attempting to manufacture methamphetamine. *Id.* Perhaps surprisingly, the charges were

required by Rule 8 of the Federal Rules of Criminal Procedure. In *dicta*, the court outlined five factors it considered in arriving at this conclusion: (1) both the drug conspiracy and the waste removal conspiracy were led by the same individual; (2) both conspiracies involved the same participants; (3) investigation of RCRA violations led to the discovery of the drug conspiracy; (4) the storage of waste and "cooking" of methamphetamines both occurred at the same location, H & J Auto; and (5) witnesses at trial testified to events underlying both the RCRA and drug conspiracies.[61] The court held that based on the facts of the case, Hines had not been prejudiced, and the joinder of charges and subsequent denial of severance was not an abuse of discretion by the trial court.[62] Federal prosecutors in other jurisdictions also charge environmental crimes concurrently with methamphetamine-related crimes.[63]

2. EPA's Internal Charging Procedures

The EPA Office of Compliance, Enforcement, Forensics and Training (OCEFT) has not published a policy statement directly relating to prosecutions of methamphetamine lab operators.[64] In discussing enforcement actions with EPA officials,[65] many of them referred to a

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joined at trial. *Id.*

61. *Hines,* 210 F.3d 390, at 5.

62. *Id.* at 6. "The counts involved distinct facts and we find little risk that the jury confused or cumulated the evidence with respect to the separate counts." *Id.*

63. Two unreported cases are worth mentioning because they also involved RCRA charges brought concurrently with charges for methamphetamine-related crimes. On July 15, 1999, John Sams of Parkersburg, West Virginia, was sentenced in the U.S. District Court for the Southern District of West Virginia to imprisonment for 12 years and 7 months and 3 years of supervised release. *See* EPA Headquarters Press Release, West Virginia Man Sentenced For RCRA and Drug Charges (July 22, 1999), *available at* http://yosemite.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/a5731130d62a64bb852567b6005b60e1?OpenDocument (last visited Feb. 4, 2005). He had been convicted of illegal storage of RCRA hazardous waste and possession with intent to distribute methamphetamine. *Id.* The DEA and EPA-CID investigated the case. *Id.* On November 27, 2000, William W. Parsley pleaded guilty in the U.S. District Court for the Eastern District of Missouri to charges for conspiracy, disposal of ignitable RCRA hazardous waste without a permit, and disposal of corrosive RCRA hazardous waste without a permit. Press Release, EPA Headquarters, Three Plead Guilty in Missouri Illegal Drug Lab Case (Dec. 8, 2000)(on file with author). "This case involved an extensive investigation that uncovered and closed down numerous illegal clandestine methamphetamine laboratory sites throughout Jefferson County, Mo. The illegal disposal of drug laboratory chemicals presented a serious environmental threat and puts people at risk due to the explosive, flammable and inherently toxic nature of the chemicals used in the process." *Id.* The case was investigated by EPA-CID, the FBI, DEA, U.S. Immigration and Naturalization Service, and state and local authorities. *Id.*

64. OCEFT is the steering office for EPA-CID. *See* the OCEFT website, *at* http://www.epa.gov/compliance/about/offices/oceft.html (last visited January 24, 2004).

65. In addition to the interviews with Gillispie, *supra* note 35 and Boehmcke, *supra* note 33, other individuals at EPA consulted via telephone were Martin Harrell, Region III

general piece of agency guidance known simply as "the Devaney memo."[66] The memo recognizes EPA's limited criminal resources, and outlines specific factors to use in the identification of cases appropriate for criminal investigation;[67] in short, the EPA should only pursue "the most significant and egregious violators."[68]

a. The Devaney Memo's Enforcement Factors

According to the Devaney Memo, two factors should be considered during the criminal case selection process: the culpability of the conduct and the significance of the environmental harm.[69] When analyzing a targeted individual's culpable conduct, EPA officials should weigh the history of repeated violations; the deliberate misconduct resulting in violation; the concealment of misconduct or falsification of required records; any tampering with monitoring or control equipment; and the business operation of pollution-related activities without a permit, license, manifest or other required documentation.[70] The factors to be considered when adjudging significant environmental harm are: the degree of actual harm; the threat of significant harm to the environment or human health; failure to report an actual discharge or release within the context of the first two factors; and illegal conduct representing a trend or common attitude within the regulated community for which a significant deterrent effect from enforcement may exist.[71] Though ten years old, the Devaney memo in its original form remains the guide used in deciding which cases the EPA chooses for criminal enforcement.[72]

b. The 2003 Management Evaluation of OCEFT

In July 2003, J.P. Suarez, Assistant Administrator of the Office of Enforcement and Compliance Assurance (the office of which OCEFT is a part), requested a review of the current operations of OCEFT, posing among other queries the question: How well defined are OCEFT's links to the mission and organizations within EPA and relevant Federal, State

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Assistant Regional Criminal Enforcement Counsel (Dec. 31, 2003), and Mike Fisher, Acting Assistant Regional Criminal Enforcement Counsel (Dec. 15, 2003).

66. Memorandum from Earl E. Devaney, Director of the Office of Criminal Enforcement, to All EPA Employees Working in or in Support of the Criminal Enforcement Program 1 (Jan. 12, 1994) (on file with the author)(hereinafter DEVANEY).

67. *Id.* at 1.

68. *Id.* at 2.

69. DEVANEY, *supra* note 66, at 3.

70. *Id.* at 5.

71. *Id.* at 4.

72. *See* DEVANEY, *supra* note 66.

and local criminal justice organizations?[73] On November 25, 2003, the reviewing committee presented its findings to Suarez[74], and on December 15, 2003, Suarez relayed the report to all of OCEFT.[75]

The answer to the aforementioned question illustrates the void left on many enforcement fronts by the Devaney memo's ambiguities and the demands of a post-9/11 world. The Review of the OCEFT indicates that OCEFT should "actively develop, communicate and promote a strategic vision among Federal and State prosecutors as a way of making the most of scarce prosecutorial resources."[76] First, the OCEFT Report acknowledges that the Legal Counsel & Resource Management Division has a mission "defined largely by the legal and administrative demands of the Criminal Investigation Division,"[77] and that the LCRMD has a self-perceived responsibility to provide perspective on legal and regulatory policies affecting criminal enforcement endeavors.[78] Second, the Report notes that in the wake of September 11, 2001, with general law enforcement agencies busy ensuring homeland security, "it is increasingly the case that if OCEFT does not investigate environmental activity, no one else will."[79] Third, the Report states that OCEFT's participation in drug cases is valued by other Federal law enforcement agencies,[80] but that when the time for prosecution comes, EPA's enforcement in this and any other area could benefit from a better-defined "strategic vision" and more systematic screenings of cases.[81] Finally, the Report admits that the EPA's crediting of criminal sentences derived from "mixed cases" remains a topic of controversy (such as in methamphetamine laboratory busts, where environmental crimes may be charged along with other Title 18 or Title 21 crimes).[82] The outcome of

73. Memorandum from J.P. Suarez, Assistant Administrator, Office of Enforcement and Compliance Assurance, to All OCEFT Staff, Deputy Regional Administrators, Regional Counsel, and Enforcement Division Directors (July 10, 2003).

74. Memorandum from A. Stanley Meiburg, Deputy Regional Administrator, to J.P. Suarez, Assistant Administrator, Office of Enforcement and Compliance Assurance (Nov. 25, 2003).

75. Memorandum from J.P. Suarez, Assistant Administrator, Office of Enforcement and Compliance Assurance, to All OCEFT Staff (Dec. 15, 2003).

76. U.S. ENVIRONMENTAL PROTECTION AGENCY, REVIEW OF THE OFFICE OF CRIMINAL ENFORCEMENT, FORENSICS AND TRAINING (Nov. 2003) [hereinafter OCEFT REVIEW], EXECUTIVE SUMMARY v, *available at* http://www.epa.gov/oeca/resources/reports/review/oceft-managementreview.pdf (last visited Feb. 3, 2005).

77. OCEFT REVIEW, *supra* note 76, at 17.

78. *Id.*

79. *Id.* at 36.

80. *Id.* at 46.

81. *Id.* at 51.

82. *Id.* at 57. "Defendants in these cases may be indicted on violations of multiple criminal statutes, only some of which are strictly environmental violations. In some

these observations is simple: Although the investigation and prosecution of methamphetamine laboratories is important, there has been no affirmative representation that such cases are part of a comprehensive environmental enforcement plan, nor can such cases effectively be vetted and their results analyzed without greater precision and guidance from administrators within the EPA.

c. The 2003 Congressional Request on EPA Enforcement Resources and Accomplishments

On July 24, 2003, eight U.S. Senators and four Representatives asked the EPA Office of Inspector General (OIG) to provide assessments of five particular concerns: sufficiency of agents and available resources; EPA's homeland security duties; effective and efficient use of enforcement resources; the efficacy of the management structure and goals of the Office of Enforcement and Compliance Assurance (OECA); and EPA's descriptions of enforcement successes.[83] The resulting Special Report has myriad facts which are beyond the scope of this comment, but three points in particular are worth noting. First, during Fiscal Year 2002, PEA referred 250 cases to Federal (DOJ) and State prosecutors, but 91 of these cases (roughly 36.4%) ended after being declined by these prosecutors.[84] Second, after September 11, 2001, EPA-CID added two categories (security/protection detail for the EPA Administrator and counter-terrorism) to its case management tracking system, but *did not* add a category for drug cases (e.g. methamphetamine labs) involving environmental law violations.[85]

The third point contained in the Special Report relates to the controversial area of measuring enforcement results. In a "mixed case," OECA reports the total number of years arising from consecutive sentences and the greater jail time arising from concurrent sentences, whereas CID tallies all sentences, even if the underlying conviction is from a non-environmental statute.[86] CID justifies this liberal accomplishment quantification because (1) CID "opened the case based upon a potential violation of an environmental statute" and

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cases, environmental violations are the easily provable charge in a larger underlying pattern of criminal behavior. OCEFT has developed guidance on how to apportion sentences in such cases but the subject remains controversial." *Id.*

83. OFFICE OF THE INSPECTOR GENERAL, U.S. ENVIRONMENTAL PROTECTION AGENCY, SPECIAL REPORT: CONGRESSIONAL REQUEST ON EPA ENFORCEMENT RESOURCES AND ACCOMPLISHMENTS: REPORT 2004-S-00001 (Oct. 10, 2003) [hereinafter SPECIAL REPORT], Foreword.

84. SPECIAL REPORT, *supra* note 81, at 13.

85. *Id.* at 19.

86. *Id.* at 20-22.

(2) throughout the history of EPA criminal enforcement, such inclusion of "relevant 'non-environmental' sanctions has been standard procedure,"[87] despite the facts that the DEA is usually the lead enforcement agency in drug cases, sentences for environmental crimes are usually smaller, and environmental penalties often may be eliminated prior to trial during plea bargaining.[88] The result of this crediting scheme is that the CID tallied 1,934 months of incarceration and 300 months of probation from at least 10 drug-related cases closed between the year 2000 and late 2003.[89]

III. Recent Legislative and Regulatory Responses to the Methamphetamine Outbreak

A. Congressional Responses

Congress, which realized the metamorphosis of methamphetamine production from "super-labs" to clandestine operations, hastened passage of the Comprehensive Methamphetamine Control Act ("CMCA") of 1996,[90] and later the Methamphetamine Anti-Proliferation Act ("MAPA") of 2000.[91] The CMCA authorized the United States Sentencing Commission[92] to determine whether federal Sentencing Guidelines adequately punished the handling and disposal of controlled substances that could be introduced to the environment as hazardous wastes, and to promulgate harsher guidelines if they were found inadequate.[93] The result of this evaluation by the United States

87. *Id.* at 22.
88. *Id.*
89. *Id.*
90. Comprehensive Methamphetamine Control Act, Pub. L. No. 104-237, 110 Stat. 3099 (1996).
91. Methamphetamine Anti-Proliferation Act, Pub. L. No. 106-310, 114 Stat. 1101 (2000).
92. This authority is established under 28 U.S.C. § 994 (1994 and Supp. II 1996).
93. CMCA, § 303. This section reads:

> (a) IN GENERAL.—Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall determine whether the Sentencing Guidelines adequately punish the offenses described in subsection (b) and, if not, promulgate guidelines or amend existing guidelines to provide an appropriate enhancement of the punishment for a defendant convicted of such an offense.
>
> (b) OFFENSE.—The offense referred to in subsection (a) is a violation of section 401(d), 401(g)(1), 403(a)(6), or 403(a)(7) of the Controlled Substances Act (21 U.S.C. 841(d), 841(g)(1), 843(a)(6), and 843(a)(7)), in cases in which in the commission of the offense the defendant violated—
>
> (1) subsection (d) or (e) of section 3008 of the Solid Waste Disposal Act (relating to handling hazardous waste in a manner inconsistent with Federal or applicable State law); . . .

Sentencing Commission was the passage of an amendment to § 2D1.1(b)(5) of the U.S. Sentencing Guidelines.[94] Four years later, Congress took an even more proactive stand, specifically enumerating in the MAPA stricter sentencing guidelines for the punishment of environmental harms caused by methamphetamine laboratory operators.[95]

Today, many members of Congress continue to push for additional measures meant to curb the scourge of methamphetamine abuse as it threatens American citizens and their natural environment.[96] The Congressional Caucus to Fight and Control Methamphetamine seeks to

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(3) section 301(a), 307(d), 309(c)(2), 309(c)(3), 311(b)(3), or 311(b)(5) of the Federal Water Pollution Control Act (relating to the unlawful discharge of pollutants or hazardous substances, the operation of a source in violation of a pretreatment standard, and the failure to notify as to the release of a reportable quantity of a hazardous substance into the water).

94. U.S. Sentencing Guidelines, 1997 Amendments. The relevant amendment stated:

> Section 2D1.1(b) is amended by redesignating subdivision (4) as subdivision (6) and inserting after subdivision (3) the following additional subdivision[n]
> . . . (5) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance, or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels."
> . . . [I]n response to the directive in section 303 of the Act, this amendment provides an enhancement of two levels, with an invited upward departure in more extreme cases, for environmental violations occurring in association with an illicit manufacturing or other drug trafficking offense.

Id.

95. MAPA § 3612. This section provides in relevant part:

> (a) Federal Sentencing Guidelines. —
> (1) In General.—Pursuant to its authority under [28 U.S.C. § 994(p)], the United States Sentencing Commission shall amend the Federal sentencing guidelines in accordance with paragraph (2) with respect to any offense relating to the manufacture, attempt to manufacture, or conspiracy to manufacture amphetamine or methamphetamine in violation of—
> (A) the Controlled Substances Act (21 U.S.C. § 801 et. seq.) . . .
> (2) Requirements.—In carrying out this paragraph, the United States Sentencing Commission shall—
> (A) if the offense created a substantial risk of harm to human life (other than a life described in subparagraph (B)) or the environment, increase the base offense level for the offense—
> (i) by not less than 3 offense levels above the applicable level in effect on the date of the enactment of this Act; or
> (ii) if the resulting base offense level after an increase under clause (i) would be less than level 27, to not less than level 27.

Id. [Emphasis added.]

96. The Congressional Caucus to Fight and Control Methamphetamine, chaired by Reps. Brian Baird (D-WA), Ken Calvert (R-CA), Chris Cannon (R-UT), and Leonard Boswell (D-IA), serves as the guiding force in methamphetamine related legislation. *See* http://www.radanovich.house.gov/meth/ (last visited October 17, 2003) for more information about the Caucus.

open dialogue with foreign countries that may be sources of the drug's precursor chemicals, to increase funding for federal seizures of clandestine labs, and to facilitate the cleanup of environmental degradation from hazardous drug waste.[97] Meanwhile, the task of drafting meaningful legislation to assist in the criminal enforcement of methamphetamine production largely rests with the House of Representatives' Government Reform Committee's Subcommittee on Criminal Justice, Drug Policy and Human Resources.[98] This Subcommittee met on July 18, 2003,[99] October 10, 2003,[100] February 6, 2004,[101] April 20, 2004,[102] June 28, 2004,[103] August 2, 2004,[104] and

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97. *Id.*

98. *See* the Subcommittee website *at http://reform.house.gov/CJDPHR/* (last visited February 13, 2005). "The Subcommittee is responsible for authorizing legislation for the Office of National Drug Control Policy and its programs as well as general oversight for all U.S. government drug control efforts (including international and interdiction programs, law enforcement, and prevention and treatment initiatives)." *Id.*

99. *Facing the Methamphetamine Problem in America: Hearings before the Subcommittee on Criminal Justice, Drug Policy and Human Resources, of the House Committee on Government Reform*, 108th Cong., 1st Sess. (July 18, 2003). In his opening statement, Subcommittee Chairman Mark Souder noted:

> [A] major source of meth comes from small local labs unaffiliated with major trafficking organizations. These labs have proliferated across the country, especially in rural areas. DEA reports that over 7,700 of 8,000 clandestine labs seized in 2001 were these smaller labs. The total amount of meth actually supplied by these labs is relatively small. The environmental damage and health hazard they create, however, make them a serious problem for local communities.

Id. (opening statement of Chairman Mark Souder (R-IN)). To quantify the environmental harm done by clandestine labs, Rep. Elijah Cummings added:

> Many clandestine labs produce as little as ten pounds of meth a year, but their impact on the environment, and the cost of cleaning these sites, can be huge. Collectively, clandestine labs produce over 20 metric tons of toxic waste each year, and individual labs can cost from a few thousand to more than a hundred thousand dollars to clean-up, depending upon size.

Id. (opening statement of Rep. Elijah Cummings (D-MD)).

100. *The Impacts of Drug Production on Public Lands: Hearings before the Subcommittee on Criminal Justice, Drug Policy and Human Resources, of the House Committee on Government Reform*, 108th Cong., 1st Sess. (October 10, 2003). As one Drug Enforcement Administration official from San Francisco testified,

> Methamphetamine production has a profound environmental impact on the state of California. In the Northern and Central Valley areas, chemicals from large-scale laboratory dumpsites have killed livestock, contaminated streams, and destroyed large trees and vegetation. In 2001, the California Department of Toxic Substances Control conducted over 2,000 methamphetamine laboratory and dumpsite cleanups, costing California taxpayers nearly $5.5 million ($2,450 per laboratory on average).

Id. (opening testimony of Stephen C. Delgado, Special Agent in Charge, San Francisco Field Div., DEA).

101. *Fighting Methamphetamine in the Heartland: How Can the Federal Government Assist State and Local Efforts: Hearings before the Subcommittee on Criminal Justice, Drug Policy and Human Resources, of the House Committee on Government Reform*,

November 18, 2004[105] to discuss the ongoing problems associated with methamphetamine in this country. The most recent of these hearings, on November 18, 2004, focused on the role of law enforcement in investigating, arresting, and prosecuting methamphetamine lab operators.

108th Cong., 2d Sess. (Feb. 6, 2004). This hearing was held in Indiana, because as Chairman Souder pointed out,

> In Indiana alone, the State Police reported that 1,260 drug labs were raided in 2003, up 26% from the 998 seized in 2002—and most of these labs were meth labs. The problem is particularly severe in our rural areas, where meth cooks can steal precursor chemicals like anhydrous ammonia from local farmers, and then manufacture the drug in secrecy.

Id. (opening statement of Chairman Mark Souder (R-IN)).

102. *Methamphetamine Precursor Chemical Smuggling: Hearings before the Subcommittee on Criminal Justice, Drug Policy and Human Resources, of the House Committee on Government Reform*, 108th Cong., 2d Sess. (Apr. 20, 2004).

103. *Ice in the Ozarks: The Methamphetamine Epidemic in Arkansas: Hearings before the Subcommittee on Criminal Justice, Drug Policy and Human Resources, of the House Committee on Government Reform*, 108th Cong., 2d Sess. (Jun. 28, 2004). James MacDonald, an on-scene coordinator for EPA Region 7, testified to the environmental threats posed by methamphetamine production and EPA's response, including the Agency's criminal enforcement program:

> EPA participates nationwide in a multitude of environmental crime task forces. Our partners in these task forces consist of other federal law enforcement agencies, Offices of the U.S. Attorney, as well as state and local law enforcement and regulatory agencies. EPA works with many of these partners in their efforts to arrest and prosecute producers of methamphetamine who not only violate state and federal narcotics laws but also federal hazardous waste laws.... EPA will continue to help local, state and other federal agencies address the problems associated with methamphetamine production.

Id. (opening testimony of James MacDonald, EPA Region 7). However, another testifying witness cautioned that such alliances currently are insufficient. "Relying on existing personnel and resources from already overburdened law enforcement, environmental protection and public health infrastructures will not be enough to address the growing problems associated with cleanup of contamination from clandestine methamphetamine laboratories for the protection of the public and our environment." *Id.* (opening testimony of Shirley Louie, M.S., CIH, Chief Environmental Epidemiologist, Arkansas Dept. of Health).

104. *The Poisoning of Paradise: Crystal Methamphetamine in Hawai'i: Hearings before the Subcommittee on Criminal Justice, Drug Policy and Human Resources, of the House Committee on Government Reform*, 108th Cong., 2d Sess. (Aug. 2, 2004).

105. *Law Enforcement and the Fight Against Methamphetamine: Hearings before the Subcommittee on Criminal Justice, Drug Policy and Human Resources, of the House Committee on Government Reform*, 108th Cong., 2d Sess. (Nov. 18, 2004). In his opening remarks, Chairman Souder summarized the economic costs of arresting the spread of methamphetamine in this country when he stated, "Everywhere [subcommittee members] go,... we have heard about the high costs and long hours required by law enforcement agencies to hunt down, investigate, and clean up dangerous meth lab sites.... *This drug is probably the single biggest drain on law enforcement resources in the country.*" *Id.* (opening statement of Chairman Mark Souder (R-IN)) (emphasis added).

B. *Executive Responses*

In October 2004, one month prior, the Bush Administration issued its most comprehensive plan for curbing the methamphetamine epidemic, the National Synthetic Drugs Action Plan.[106] Among the recommendations made in the NSDA Plan is the directive to the DOJ and the DEA to make greater use of the environmental enhancement set forth in USSG § 2D1.1(b)(5);[107] curiously, the EPA's role in the pursuit of this enhancement is not discussed in the Plan.[108] We now turn our attention to the application of federal sentencing guidelines.

IV. The Intersection of Criminal Sentences for Drug and Environmental Offenses

Federal prosecutors of methamphetamine lab operators, in the wake of the MAPA's passage, have various avenues of punishment available to them at the sentencing phase of a trial.[109] Which type of punishment a court chooses depends upon the nature and severity of the underlying charges, pertinent offender characteristics, and the statutory purposes of sentencing.[110] As an introduction to the federal sentencing system as it pertains to methamphetamine-related environmental criminals, this section will focus upon incarceration as a means of penalizing offenders. Elucidation of the relevant sentencing guidelines will afford an answer to the question: Is the harshest punishment of methamphetamine laboratory operators available through substantive charges pursued by the EPA and the DOJ under RCRA, or through application of the sentencing

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106. OFFICE OF NATIONAL DRUG CONTROL POLICY, NATIONAL SYNTHETIC DRUGS ACTION PLAN (October 2004), *available at* http://www.whitehousedrugpolicy.gov/publications/national_synth_drugs/index.html (last visited Feb. 13, 2004) (hereinafter NSDA PLAN).

107. NSDA PLAN, at 45. "In 2000, only 31 federal methamphetamine defendants received this adjustment under Sentencing Guideline § 2D1.1(b)(5). While not all 3,358 methamphetamine offenders were prosecuted for offenses related to manufacturing—as opposed to importation or distribution—the number of labs seized indicates that many were charged with manufacturing methamphetamines." *Id.* at n. 81.

108. The NSDA Plan only mentions the Bush Administration's hope that the EPA will "review lab cleanup resources" and "apply updated clandestine lab cleanup guidelines." *Id.* at 45. Such an omission of EPA's criminal enforcement capabilities is shocking in light of language found in the introductory memo to the Plan, which states that "this Action Plan creates a high-level interagency working group to ensure that these recommendations are implemented as effectively and rapidly as possible."

109. The United States Sentencing Commission, in Chapter 5 of its Guidelines Manual (hereinafter USSG) of November 2004, outlines the following permissible sanctions: probation (Part B); imprisonment (Part C); supervised release (Part D); restitution, fines, assessments, and forfeitures (Part E); and conditions of probation and supervised release such as community service, community confinement, and home detention (Part F). USSG, Ch. 5.

110. USSG Ch. 5, Pt. A, intro., comment.

enhancement found in U.S.S.G. § 2D1.1(b)(5)?

A. Background

A court determines a prison sentence after analyzing two factors: offense behavior and offender characteristics.[111] The general analysis works in this way: Each count of a conviction carries with it a base offense level; a higher assigned number correlates to a more serious offense.[112] This base offense level increases upward or downward depending on specific offense characteristics[113] related to conduct or consequences associated with the base offense.[114] Each count of a conviction receives this treatment at which point a court groups all counts and adjusts them accordingly to arrive at a final number.[115] The court plots the offense level against the defendant's criminal history category[116] to determine a guideline range.[117] The prison sentence imposed within a guideline range is at the discretion of the court.[118]

Convictions on drug and environmental charges trigger different sentencing guidelines.[119] There are two possible scenarios at the time of sentencing a methamphetamine lab operator whose illicit activities resulted in environmental harm. The defendant may face a drug charge[120] *and* an environmental charge,[121] or the defendant may

111. USSG Ch. 1, Pt. A, intro. comment. "An offense behavior category might consist, for example, of 'bank robbery/committed with a gun/$2500 taken.' An offender characteristic category might be 'offender with one prior conviction not resulting in imprisonment.'" *Id.*

112. USSG Ch. 1, Pt. A, intro. comment.

113. USSG § 1B1.1(b).

114. After these determinations, the offense behavior category will lead to a number which may be adjusted "as appropriate related to victim, role, and obstruction of justice." USSG § 1B1.1(c). For the purposes of this comment, such adjustments will be disregarded.

115. The number, after final adjustment for the defendant's acceptance of responsibility pursuant to Ch. 3, Pt. E, will range from 1 to 43. *See* USSG § 1B1.1(d) and Ch. 1, Pt. A, intro. comment.

116. *See* USSG § 1B1.1(f) and Ch. 4, Pt. A.

117. USSG § 1B1.1(g). The guideline range for an offense level of 27 can vary from 70-87 months imprisonment for a defendant with a minor criminal history to 130-152 months for an egregious recidivist. *See* USSG Ch. 5, Pt. A for the sentencing table.

118. USSG § 1B1.4. "In determining the sentence to impose within a guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." *Id. See also* Ch. 5, Pt. A, intro. comment.; United States v. Massey, 79 Fed.Appx. 832, 835 (2003) ("A departure by its nature is a sentence that falls outside the sentencing range that is prescribed by the application of the Sentencing Guideline provisions.").

119. USSG Ch. 2. USSG Ch. 2, Pt. D deals with offenses involving drugs, whereas Ch. 2, Pt. Q covers offenses involving the environment.

120. The typical drug charges in methamphetamine cases fall into one or more of the

otherwise face only drug charges in which case the court may consider the environmental harm as a specific offense characteristic.[122]

B. *Applying The Sentencing Guidelines To Actual Criminal Convictions*

In the first scenario, the potential for conviction exists for both environmental crimes and illicit drug activity. The USSG contains two guidelines applicable to environmental convictions. The first addresses crimes involving mishandling of hazardous or toxic substances[123] designated as such by statute or regulation.[124] In general, the provision assumes knowing conduct.[125] It also assumes an environmental discharge that leads to actual environmental contamination.[126] At least

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following categories: unlawful manufacture of, or possession with intent to deliver, the controlled substance methamphetamine in violation of 21 U.S.C. § 841(a)(1); endangerment of human life while illegally manufacturing a controlled substance in violation of 21 U.S.C. § 858; unlawful distribution or possession of the listed chemicals ephedrine, pseudoephredrine, phenylpropanolamine, or red phosphorus in violation of 21 U.S.C. § 841(c); and unlawful possession of prohibited drug-related equipment, or stealing or transportation of anhydrous ammonia, in violation of 21 U.S.C. §§ 843(a)(6), (7), 864.

121. Environmental damages due to methamphetamines, as discussed earlier, may be violations of 33 U.S.C. §§ 1319(c)(1), (2) (involving unlawful discharge of pollutants under the CWA) and/or 42 U.S.C. § 6928(d) (dealing with unlawful storage or disposal of hazardous waste under RCRA).

122. *See* USSG §§ 2D1.1, 2D1.11, 2D1.12, all of which consider environmental harm a specific offense characteristic, that is, a fact of a particular case which may lead to an upward adjustment of the offense level.

123. USSG § 2Q1.2. Mishandling of Hazardous or Toxic Substances . . .

Base Offense Level: 8

Specific Offense Characteristics:

> (1)(A) If the offense resulted in an ongoing, continuous, or repetitive discharge [or] release of a hazardous or toxic substance . . . into the environment, increase by 6 levels; or (B) If the offense otherwise involved a discharge, release, or emission of a hazardous or toxic substance . . ., increase by 4 levels.
>
> (2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 9 levels.
>
> (3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.
>
> (4) If the offense involved transportation, treatment, storage, or disposal without a permit or in violation of a permit, increase by 4 levels.

124. USSG § 2Q1.2, comment, (n.3).

125. USSG § 2Q1.2, comment, (n.4). Negligent conduct may warrant a downward departure. *Id.*

126. USSG § 2Q1.1, comment, (n.5). This Application Note reads:

> Subsection (b)(1) assumes a discharge . . . into the environment resulting in actual environmental contamination. A wide range of conduct, involving the handling of different quantities of materials with widely differing propensities, potentially is covered. Depending upon the harm resulting from the . . . release

three federal circuit courts have considered the concept of "actual environmental contamination" and in all three situations the court defined the concept in terms of its plain language meaning.[127] The second sanction addresses similar conduct involving other environmental pollutants, that is, materials not designated as hazardous waste under RCRA but which are pollutants under the Clean Water Act.[128]

A federal prosecutor also will bring drug charges against methamphetamine lab operators, by themselves or in tandem with the aforementioned environmental charges. The applicable sentencing guidelines for three drug charges[129] (unlawful manufacture and

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> or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, a departure of up to two levels in either direction from the offense levels prescribed in these specific offense characteristics may be appropriate.

Id.

127. *See* United States v. Bogas, 920 F.2d 363 (6th Cir. 1991) (visual contamination of the soil and some probable water contamination from paint drums was sufficient evidence to establish actual environmental contamination); United States v. Sellers, 926 F.2d 410 (5th Cir. 1991) (one drum of methylethylketone, although leaking for only one day prior to discovery, was an actual environmental contamination); and United States v. Ferrin, 994 F.2d 658 (9th Cir. 1993).

In *Ferrin*, the Ninth Circuit Court of Appeals stated that an illegal discharge of industrial waste "necessarily embraces a contaminating environmental discharge," but other offenses such as the illegal hazardous waste disposal perpetrated by the defendant "may or may not result in de facto environmental contamination. . . . [The] enhancement under subsection (b)(1) requires a showing that some amount of hazardous substance in fact contaminated the environment." *Ferrin*, 994 F.2d at 663. The general rule enunciated by the court was that "a finding that the hazardous waste came into contact with land or water or was released into the air is the appropriate predicate for an enhancement under subsection (b)(1)." *Id.* at 664.

The *Ferrin* court also offered guidance in dicta regarding appropriate means of observing and evaluating such contamination:

> Proof of environmental contamination does not necessarily require a full-blown scientific study. We see no reason why in most cases reasonable inferences from available evidence concerning the offense at issue would not suffice to support a conclusion that the illegal acts resulted in contamination. "Contaminate" is not defined in [RCRA], but in common English it means "to soil, stain, or infect by contact or association" or "to make . . . impure by admixture." (Citing Webster's New Collegiate Dictionary 245 (1977)).

Id. at 664.

128. USSG § 2Q1.3 is almost identical to § 2Q1.2. "This section parallels § 2Q1.2 but applies to offenses involving substances which are not . . . designated as hazardous and toxic." USSG § 2Q1.2, comment. (backg'd). This distinction is supported by the fact that § 2Q1.3 does not list any sections of RCRA under its enabling statutory provisions, but does include 33 U.S.C. §§ 1319(c)(1), (2), the criminal provisions of the Clean Water Act. USSG § 2Q1.3.

129. For the purposes of this comment, we assume that no death or serious bodily injury to humans resulted from the use of the substance or the commission of the crime. The only specific offense characteristics explored in detail will deal with environmental harms.

possession with intent to deliver (PID),[130] unlawful distribution or possession of a listed chemical[131] and unlawful possession of drug-related equipment[132]) also carry specific offense characteristics for prohibited acts against the environment.[133] Under the unlawful

130. USSG § 2D1.1. This section, Unlawful Manufacturing, . . ., or Trafficking (Including Possession with Intent to Commit These Offenses), applies where:

> (a) Base Offense Level:
>
> . . .(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) . . .
>
> (b) Specific Offense Characteristics
>
> . . .(5)(B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to (I) human life other than a life described in subdivision (C) [minor or imcompetent]; or (II) the environment, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.
>
> (5)(C) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by 6 levels. If the resulting offense level is less than level 30, increase to level 30.

Id. This language flows directly from MAPA § 3612(b), *supra* note 105. USSG § 2D1.1(b)(5)(B) was formerly found at § 2D1.1(b)(6)(A). *See* USSG, supp. to app. C, amendment 620, at 198 (2001).

131. USSG § 2D1.11. This guideline, Unlawfully Distributing . . . or Possessing a Listed Chemical, reads:

> (a) Base Offense Level: The offense level from the Chemical Quantity Table set forth in subsection (d) or (e), as appropriate.
>
> (b) Specific Offense Characteristics
>
> . . (3) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.

Id.

132. USSG § 2D1.12. This guideline, Unlawful Possession [or] Distribution . . . of Prohibited Flask, Equipment, Chemical, Product, or Material, reads:

> (a) Base Offense Level (Apply the greater):
>
> (1) 12, if the defendant intended to manufacture a controlled substance or knew or believed the prohibited flask, equipment, chemical, product, or material was to be used to manufacture a controlled substance; or
>
> (2) 9, if the defendant had reasonable cause to believe the prohibited flask, equipment, chemical, product, or material was to be used to manufacture a controlled substance.
>
> (b) Specific Offense Characteristics
>
> . . . (2) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.

Id.

133. Interestingly, one statutory provision not listed as a source of authority for these enhancements (or any others under the USSG) is 21 U.S.C. § 841(b)(6):

> Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—
>
> (A) creates a serious hazard to humans, wildlife, or domestic animals, (B)

manufacture and PID sentencing guideline, there is commentary[134] explaining the environmental harm specific offense characteristic that provides guidance to courts in applying the sentence level increase. The other two drug-related guidelines offer commentaries, but they are less specific to methamphetamine.[135] The remainder of this section therefore will focus upon the application of the specific offense characteristic found in USSG § 2D1.1(b)5)(B), which specifically addresses environmental harm due to methamphetamine manufacturing.

Application of the § 2D1.1(b)(5)(B) enhancement has been upheld, even when the actual amount of hazardous waste disposed of is minimal or indeterminate. In *United States v. MacDonald*,[136] the defendant was charged with conspiracy to manufacture methamphetamine in violation of 21 U.S.C. § 846. MacDonald pled guilty and admitted to participating

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> degrades or harms the environment or natural resources, or (C) pollutes an aquifer, spring, stream, river, or body of water, shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

Id.

134. USSG § 2D1.1, comment. (n.20). This note, entitled, Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine, reads:

> (A) Factors to Consider.—In determining, for purposes of subsection (b)(5)(B) . . ., whether the offense created a substantial risk of harm to human life or the environment, the court shall include consideration of the following factors:
>
> (i) The quantity of any chemicals or hazardous or toxic substances found at the laboratory, and the manner in which the chemicals or substances were stored.
>
> (ii) The manner in which hazardous or toxic substances were disposed, and the likelihood of release into the environment of hazardous or toxic substances.
>
> (iii) The duration of the offense, and the extent of the manufacturing operation.
>
> (iv) The location of the laboratory (e.g., whether the laboratory is located in a residential neighborhood or a remote area), and the number of human lives placed at substantial risk of harm).

Id. Consideration of these factors became mandatory in 2001 with the passage of amendment 620. *See supra* note 109. However, a sentencing court need not "find each Factor satisfied in order to apply the Risk Enhancement." *See* United States v. Houchins, 364 F.3d 182, 188 n.9 (4th Cir. 2004).

135. USSG § 2D1.11, comment. (n.6) and § 2D1.12, comment. (n.3) virtually are identical, and state that their specific offense characteristics apply:

> if the conduct for which the defendant is accountable . . . involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d) [or] the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c). In some cases, the enhancement . . . may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted.

USSG §§ 2D1.11, .12.

136. United States v. MacDonald, 339 F.3d 1080 (9th Cir. 2003).

in a methamphetamine production conspiracy on Montana public lands.[137] MacDonald appealed his sentence of 24-30 months in prison because it included an enhancement for disposal of hazardous materials.[138] Contrary to what MacDonald asserted on appeal, the 9th Circuit Court of Appeals stated that there was "no threshold quantity of hazardous waste required by statute" to trigger the enhancement.[139] After looking at the facts of the case, and considering the government's argument regarding the sufficiency of these facts,[140] the court upheld the environmental harm enhancement of MacDonald's sentence.

Other interpretations by federal appeals courts of the § 2D1.1(b)(5)(B) enhancement make this specific offense characteristic particularly attractive to federal prosecutors. Prosecutors may pursue the enhancement to a drug conviction even in the absence of a conviction under an environmental statute.[141] The enhancement applies not only to the creation of waste, but also to storage, release, and disposal activities,[142] and the defendant need not be personally responsible for the actual release of the waste.[143]

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137. *Id.* at 1081.

138. *Id.* at 1081. Although not charged for a substantive RCRA violation, evidence presented at trial showed, to the satisfaction of the U.S. District Court for the District of Montana, that there had been an unlawful discharge of a RCRA hazardous waste at Telegraph Creek and Jackson Creek, two sites involved in the drug conspiracy. *Id.* Trace amounts of xylenes, naphtha, or acetone were found at one or both sites. *Id.*

139. *Id.* at 1082. The trial court, operating under the USSG prior to the MAPA-sanctioned amendments, applied § 2D1.1(b)(5), the predecessor to § 2D1.1(b)(5)(B). *Id.*

140. *Id.* at 1083. The Government believed the district court was correct in its findings of fact regarding the suitability of the enhancement for environmental harm. *Id.* The Government used the following syllogism: (1) Methamphetamine ingredients were found at production sites; (2) these ingredients were RCRA hazardous materials; (3) MacDonald conspired to dispose of these substances. Therefore, MacDonald conspired to dispose of RCRA hazardous materials. *Id.* The Court agreed with the Government that the enhancement was suitable, but did not view the evidence to be as "syllogistically self-evident as the Government makes it out to be." *Id.*

141. United States v. Robison, 19 Fed.Appx. 490, 497, 2001 WL 804142 (9th Cir. 2001). Although a prosecutor is free to pursue the enhancement, he must be careful not to prejudice a defendant by including in the indictment an allegation as to the environmental harm (in the absence of an environmental charge). *See* United States v. Mutchler, 333 F.Supp.2d 828, 833-34 (S.D. Iowa 2004) ("[T]he factors in the indictment should only be included if they are actual crimes as defined by Congress. . . . The Court finds each of the aggravating factors [including an allegation as to substantial risk to the environment] in the Superseding Indictment to be prejudicial surplusage.").

142. "Although [co-defendant] Johnston did not set the fire that attracted attention to the hazardous waste on the site, he was doubtless aware of its existence. . . . The enhancement punishes activity such as storage, release, and disposal, not just creation, of waste. As a member of the conspiracy, he was properly held liable for its conduct, including the storage of waste involved in the production of methamphetamine." *Robison*, 19 Fed. Appx. at 497.

143. At least one court has suggested that the defendant need not be responsible personally for any actual discharge or release of chemical; the mere creation of

1. The Effect of Conviction for a Drug Charge but not an Environmental Charge

A hypothetical application of the guidelines discussed above is in order at this point. Let us assume that a defendant has been convicted under 21 U.S.C. § 841(a)(1) for the manufacture of a substance containing 5.0 g of actual methamphetamine.[144] Let us also assume that there have been no environmental convictions for which sentencing under USSG § 2Q1 would apply, although the prosecutor filed criminal charges under RCRA.[145] A sentencing court would rate the defendant's drug offense at Level 26.[146] The prosecutor may seek an offense level increase for creation of a substantial risk of harm to the environment caused by the manufacturing operation.[147] This risk of harm to the environment resulted from the defendant's disposal, without a RCRA-authorized permit, of hazardous waste containing toluene, sulfuric acid, and red phosphorus from his clandestine lab. Suppose also that disposal activities occurred over fifteen times. However, for some reason, the court did not convict the defendant for violations of RCRA.[148]

The court then must weigh the factors outlined in application note

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circumstances that may lead to the substantial risk of environmental harm is sufficient to trigger the enhancement. In United States v. Beckstead, 61 Fed.Appx. 633 (10th Cir. 2003), the discharge of hazardous phosphine gas was caused by law enforcement officials as they dismantled the lab in the defendant's absence. *Id.* at 636. The 10th Circuit Court of Appeals held that, "because there is no well-settled law establishing that the defendant must release the hazardous substance in order for § 2D1.1(b)(5) to apply, the district court [D. Utah] did not plainly err in applying the enhancement to Beckstead's offense level." *Id.* at 637. The circuit court interpreted § 2D1.1(b)(5) (2000), which was a precursor to § 2D1.1(b)(5)(B) (2002), because that was the provision applied by the district court. *Id.* at 637.

144. *See* USSG § 2D1.1(c), fn. (A). This measurement may be for any salts, isomers, or salts of isomers of methamphetamine. USSG § 2D1.1, comment. (n. 5).

145. Note that the effect of a non-conviction for an environmental charge, at the time of sentencing, is the same as would be the case had the environmental charge not been brought in the first place.

146. USSG §§ 2D1.1(a)(3), (c)(7).

147. *See supra* notes 109, 113. One of the advantages of an enhancement was that, prior to Jan. 12, 2005 (when the Supreme Court decided *United States v. Booker*, 125 S.Ct. 738 (2005)) unlike a substantive charge, it need not be established by facts proven beyond a reasonable doubt. "Generally, due process requires that courts find the presence of a sentencing factor by a preponderance of the evidence." United States v. Layne, 324 F.3d 464, 472 (6th Cir. 2003) (citing McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986)). Otherwise, due process mandates that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490, 494 n.19 (2000). The statutory maximum prison sentence for the manufacture of 5g of methamphetamine is 40 years (480 months). *See supra* note 12.

148. Whether or not the defendant was charged under RCRA is not important for this scenario.

20 to § 2D1.1.[149] If the specific offense characteristic applies, then the offense level will be raised from 26 to 29.[150] The prison sentence for the defendant's drug charge conviction with the enhancement for the substantial risk of environmental harm may range from 87-108 months to 151-188 months.[151]

2. The Effect of Convictions on Both Drug and Environmental Charges

A second hypothetical sentencing situation involves not only a drug charge conviction such as that described in the first scenario, but also a conviction for a violation of RCRA (42 U.S.C 6928(d)). In such a case, USSG § 2Q1.2 applies and the base offense level for the environmental charge is 8.[152] Because the offense resulted in an ongoing, continuous, or repetitive discharge of hazardous substances into the environment without a disposal permit, the specific offense characteristics of §§ 2Q1.2(b)(1)(A) & (4) apply to increase the base offense by ten levels to level 18.[153] Depending upon the criminal history of the defendant, the sentence for the RCRA count without the drug charge under the federal sentencing guidelines would range from 27-33 months to 57-71 months.[154]

When a defendant faces multiple counts, USSG Ch. 3, Pt. D guides computation of a total sentence. The general strategy involves an initial

149. *See supra* note 134. An example of a court's application of these factors (as pertinent to the former § 2D1.1(b)(6)(B)) is found in United States v. Massey, 79 Fed.Appx. 832 (6th Cir. 2003):

> Addressing the first factor, the district court found that there were substantial amounts of hazardous or toxic substances stored in the shed, attached to a residence that was used as a daycare center. Next, the court found that, although there was no evidence as to how some of the chemicals were disposed of because the officers entered the house shortly after a 'cook,' a gas generator was in the yard blowing gas when the officers arrived. Under the third factor, the court concluded that the operation was ongoing, based on strong evidence that there was more than one cook. Finally, on the fourth factor, the court found that there was no worse place for a methamphetamine lab than in a daycare center . . . [s]o the location of this laboratory particularly creates a substantial risk of harm. . . . We find that the district court properly applied USSG § 2D1.1(b)(6)(B) to enhance Massey's offense level.

Id. at 836. *See generally* United States v. Houchins, 364 F.3d 182 (4th Cir. 2004), for another example of a court's analysis under Application Note 20.

150. It is worth noting that, had the total amount of the base offense level and the specific offense characteristic increase been less than level 27, it would have been increased to level 27. USSG § 2D1.1(b)(5)(B).

151. This determination must be made by examination of the sentencing table found at USSG Ch. 5, Pt. A.

152. *See supra* note 123.

153. *Id.*

154. USSG Ch. 5, Pt. A.

collection of Groups of Closely Related Counts ("Groups").[155] The offense level applicable to each Group is determined,[156] and the combined offense level for all Groups as a whole is calculated.[157] Under these rules, sentencing courts exclude from grouping those counts for which a term of imprisonment is specified or a term of incarceration is to run consecutively to other counts.[158]

We first examine the effect of grouping the two counts. Courts aggregate into a single Group all counts involving substantially the same harm.[159] The environmental crime referred to as "a substantial risk of harm to the environment" in the specific offense characteristic of § 2D1.1(b)(5)(B) relates substantially to the mishandling of hazardous substances punished under § 2Q1.2.[160] The two counts (one arising under the Controlled Substances Act and the other under RCRA) should constitute one Group, and the Group's offense level would be that of the count with the highest offense level.[161] Here, that level (from the drug

155. USSG § 3D1.1(a)(1).

156. USSG § 3D1.1(a)(2).

157. USSG § 3D1.1(a)(3).

158. USSG § 3D1.1(b). This guideline does not apply in this case because neither the drug charge nor the RCRA charge has a mandatory term of imprisonment or a directive to run consecutive to other counts.

159. *See* USSG § 3D1.2(c). "Counts involve substantially the same harm within the meaning of this rule: . . . (c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts." *Id.*; *see also* § 3D1.1, comment. (backg'd). "Counts involving different victims (or societal harms in the case of 'victimless' crimes) are grouped together only as provided in subsection (c) or (d)." *Id.* Subsection (d) enumerates certain counts which must be grouped, but does not state that §§ 2D1.1 and 2Q1.2 must be grouped. Therefore, subsection (c) would seem to apply.

160. It is the mishandling of hazardous substances that resulted in a repetitive discharge of the waste. Establishment of the RCRA count in almost every case implicates a substantial risk of harm to the environment. This observation is supported by the fact that the specific offense characteristic of the drug charge involves a factor related to "the manner in which hazardous or toxic substances were disposed, and the likelihood of release into the environment of hazardous or toxic substances" and another factor related to "the duration of the offense, and the extent of the manufacturing operation." § 2D1.1, comment (n. 20(A)(ii)). A RCRA conviction, therefore, almost automatically triggers the specific offense characteristic under § 2D1.1(b)(5)(B), and it is not impermissible "double-counting" when the facts underlying an enhancement also serve as the basis for a separate conviction. *See generally* United States v. Pierce, 388 F.3d 1136, 1139 (8th Cir. 2004).

161. USSG § 3D1.3(a). It is also important that a court apply the § 2D1.1(b)(5)(B) enhancement to the *manufacturing* conviction, not to any other conviction. In United States v. Kroeger, 229 F.3d 700 (8th Cir. 2000), the court reversed the district court's sentence of the defendant because the district court erroneously applied the environmental harm enhancement found in § 2D1.1(b)(5) to an underlying conviction for endangering human life, rather than to a contemporaneous conviction for manufacturing methamphetamine, resulting in a sentence which exceeded the rightful Guidelines Sentence by 30 months. *Id.* at 702.

charge discussed in subsection (i)) is 29, and the court bases the appropriate sentence upon this combined offense level.[162]

Oddly enough, even if the court does not group the two charges, the resulting sentence is the same. Each count is its own Group, and the court computes a combined offense level by determining how many Units these two Groups constitute.[163] The highest offense level (29) belongs to the substantive drug count. The Court disregards the RCRA count of level 18 because it is 11 levels less than the drug count,[164] and the combined offense level is 29, the same result as when the two counts were grouped.

V. The Dilemma of Sentencing Guidelines

A. Sentencing Guidelines Prior to January 12, 2005

Given the identical outcomes from the two different applications of the sentencing guidelines, one may question whether the pursuit of a RCRA charge is worthwhile under any circumstances. Therein lays an arguably unforeseen no-win situation for the EPA reminiscent of Joseph Heller.[165] Any analysis of this problem must begin with the assumption that the environmental harm caused by a methamphetamine lab is of a kind worthy of enforcement by the EPA, given the Agency's limited criminal enforcement resources. If so, the EPA would assist the DEA and DOJ in the prosecution of a methamphetamine lab operator. As demonstrated in the scenarios above, if both the drug and environmental counts result in convictions, the substantive drug charge effectively swallows the EPA's contribution to the ultimate sentence. Alternatively, no environmental count could be brought against the defendant, with the

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162. USSG §§ 3D1.4, 3D1.5.

163. USSG § 3D1.4. This guideline reads in part:

> In determining the number of Units for purposes of this section:
>
> (a) Count as one Unit the Group with the highest offense level. Count one additional Unit for each Group that is equally serious or from 1 to 4 levels less serious.
>
> (b) Count as one half Unit any Group that is 5 to 8 levels less serious than the Group with the highest offense level.
>
> (c) Disregard any Group that is 9 or more levels less serious than the Group with the highest offense level. Such Groups will not increase the applicable offense level but may provide a reason for sentencing at the higher end of the sentencing range for the applicable offense level.

Id.

164. USSG 3D1.4(c).

165. In his 1961 novel CATCH-22, Heller outlined the concept of "a trap created by mutually frustrating regulations," as described by one commentator. *See* http://alt-usage-english.org/excerpts/fxcatch2.html (last visited Feb. 24, 2005) (describing the underlying themes of Catch-22 and providing an excellent excerpt from the book).

EPA placing its reliance at sentencing for the drug charge upon the specific offense characteristic of § 2D1.1(b)(5)(B). This follows from the Agency's hamstrung role as a referring body devoid of inherent prosecutorial powers. The Agency then either: (a) runs the risk of never benefiting from the enhancement if the overriding drug count does not result in a conviction, or (b) finds itself essentially in the same position it would have been if the environmental charge had issued, given the triggering of the § 2D1.1(b)(5)(B) enhancement.

It is difficult to visualize a scenario in which the pursuit of a substantive RCRA charge in addition to a charge under the Controlled Substances Act would have any meaningful independent effect. Again, it is useful to outline some basic premises:

> 1. If the EPA and DOJ bring a RCRA charge against a clandestine lab operator sentenced under § 2Q1.2, then DEA and DOJ also will bring a substantive drug charge for methamphetamine manufacture or possession with intent to deliver sentenced under § 2D1.1.
>
> 2. The elements of a RCRA charge, when proven beyond a reasonable doubt, in most but not all cases establish the operative facts of the § 2D1.1(b)(5)(B) enhancement by a preponderance of the evidence.[166]
>
> 3. When the § 2D1.1(b)(5)(B) enhancement applies, the substantive drug charge will be rated at level 27 or higher.
>
> 4. Pursuant to § 3D1.4(c), whenever an environmental count (group) is 9 or more levels less than a higher-rated drug count (group), the environmental count will be disregarded for sentencing purposes.

Proceeding to the heart of the problem, we first imagine a RCRA count and a drug count, both of which result in convictions. Applying §§ 2Q1.2(a),(b)(1)(A), & (b)(4), the offense level from the RCRA charge would be 18. Under all circumstances in which the § 2D1.1(b)(5)(B) enhancement applies to the drug charge, RCRA charges will not result in any enhancement of the final offense level. This conclusion proceeds directly from premises 3 and 4.

For RCRA charges to have a meaningful effect upon sentencing in this scenario, the § 2D1.1(b)(5)(B) enhancement should not apply. In the absence of that enhancement, and assuming no other enhancements under § 2D1.1, our fourth premise gains added significance. The only

166. The immediate discussion is based upon federal sentencing guidelines as they were in effect prior to Jan. 12, 2005, the date on which the United States Supreme Court decided United States v. Booker, 125 S.Ct. 738 (2005).

situation that warrants a RCRA charge arises where the base offense level of the drug charge is within 9 levels of the RCRA charge.[167] Upon examination of §§ 2D1.1(a)(3) & (c)(7),[168] it becomes clear that only where less than 200 g of methamphetamine or less than 20 g of methamphetamine (actual) exist would the RCRA charge, as described, have independent value. Furthermore, that independent value would be quantitatively negligible by reference to the number of months of incarceration attributable to the RCRA charge. Even in the limiting case where the drug count is level 22[169] and the RCRA is level 18, the overall increase is by only two levels because the separate counts constitute two units under § 3D1.4(c).[170] The overall increase from level 18 to level 22 can augment the term of imprisonment by up to 14 months.[171] In the extreme case of a defendant with the worst possible criminal history, a court increases the level 18 term of 57-71 months by up to 34 months to a level 22 term of 84-105 months. In summary, the "best-case" scenario for an EPA success (an additional 34 months of imprisonment) in this scenario would require the following alignment of unique circumstances:

1. The RCRA and drug counts must not be grouped at sentencing.

2. The "substantial risk of environmental harm" enhancement cannot be proven by a preponderance of the evidence at sentencing, yet a RCRA charge must be proven beyond a reasonable doubt at trial.

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167. Imagine a situation in which the RCRA charge has an offense level of 14. To avoid the negating effect of § 3D1.4(c) as stated in our fourth premise, the drug conviction must carry a level of less than 23.

168. USSG § 2D1.1(c) is the Drug Quantity Table.

169. Incidentally, Level 22 applies to circumstances where at least 30 g but less than 40 g of methamphetamine or at least 3 g but less than 4 g of methamphetamine (actual) are present. USSG § 2D1.1(c)(9). A level 18 drug quantity would be at least 10 g but less than 20 g of methamphetamine, or at least 1 g but less than 2 g of methamphetamine (actual). USSG § 2D1.1(c)(11). A level 14 drug quantity would be at least 2.5 g but less than 5 g of methamphetamine or at least 250 mg but less than 500 mg of methamphetamine (actual). USSG § 2D1.1(13).

170. USSG § 3D1.4. It reads:

> The combined offense level is determined by taking the offense level applicable to the Group with the highest offense level and increasing that offense level by the amount indicated in the following table:
>
> | Number of Units | Increase in Offense Level |
> |---|---|
> | 1 | none |
> | 1 ½ | add 1 level |
> | 2 | add 2 levels |
> | 2 ½-3 | add 3 levels |
> | 3 ½-5 | add 4 levels |
> | More than 5 | add 5 levels. |

Id.

171. USSG Ch. 5, Pt. A.

> 3. The defendant must have possessed at least 2.5 g but less than 40 g of methamphetamine, or at least 250 mg but less than 4 g of methamphetamine (actual).[172]
>
> 4. The defendant must fall within the highest criminal history category.

Should any of these circumstances not be met, less than 34 months of additional imprisonment would be directly attributable to the EPA under these conservative estimates.

It is now time to test these conclusions by adopting a more liberal approach. As discussed earlier, a prerequisite circumstance for the effective sentencing of any count under § 2Q1.2 is that it not be grouped with drug counts brought against the same defendant. We assume application of the maximum number of enhancements, resulting in a § 2Q1.2 offense level of 31.[173] We next examine the substantive drug charge. In the case of domestic clandestine methamphetamine laboratories, the applicable enhancements are found at §§ 2D1.1(b)(1)[174], (5)(B), & (5)(C). If all of these specific offense characteristics apply, then the resultant offense level will be 35 or greater.[175] A combination of these drug and environmental charges represents the highest possible increase in sentence,[176] and would result in a final offense level of 37.[177]

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172. The typical weight of methamphetamine per unit (dose, pill, or capsule) is 5 mg. USSG § 2D1.1, comment. (n. 11). The situation described, therefore, would involve a defendant caught manufacturing (or possessing with intent to distribute) 50-800 units. When actual "street" units of methamphetamine are not found,

> courts may properly estimate drug quantity based on available precursors when other necessary ingredients are absent. United States v. Hyde, 977 F.2d 1436, 1440 (11th Cir.1992) (calculating methamphetamine based on precursor that defendant possessed when other precursors were missing). Likewise, the sentencing court may also estimate drug quantity based on the most abundant chemical even if lesser abundant precursors are also present.

United States v. Smith, 240 F.3d 927, 931 (11th Cir. 2001).

173. *See supra* note 123. The sum of the base offense and the enhancements found at subsections (b)(1)(A), (2-4) amounts to an offense level of 31.

174. USSG § 2D1.1(b)(1). It states that "if a dangerous weapon (including a firearm) was possessed, increase by 2 levels." *Id.* It would not seem odd for methamphetamine "cooks" and other abusers of the drug to be armed, given their illicit activities and drug-induced paranoia.

175. To arrive at this number, imagine a base offense level (related to the amount of drugs manufactured or possessed) of 18. Whether or not § 2D1.1(b)(5)(B) or § 2D1.1(b)(5)(B) is applied first, we see that the base offense level after both are applied is increased to 33. Application of § 2D1.1(b)(1) results in an offense level of 35.

176. *See* USSG 3D1.4(c).

177. Under the rules set forth in this example, the § 2D1.1 drug count guideline has three available specific offense characteristics. By itself and with these enhancements, § 2D1.1 has eight possible combinations, ranging in value from level 12 to level 43. The environmental count guideline, § 2Q1.2, on the other hand, has four available specific offense characteristics. Therefore, it has sixteen possible combinations. If the drug and

For the offender with the least extensive criminal history, this increase may mean a difference of 42-52 months imprisonment. For the criminal with the most history, it can mean the difference between 292-365 months and 360 months to life imprisonment. It is in at least this extreme case that the pursuit of a substantive RCRA charge finds redemption.[178]

Alternatively, one might imagine a RCRA charge being brought as a "safety valve" for a prosecutor. If a substantive drug charge did not result in a conviction, a sentence for a conviction for environmental charges brought contemporaneous to the drug charge would result in at least some imprisonment of a defendant, i.e., some punishment of the offender.

B. Sentencing Guidelines after January 12, 2005

The Supreme Court of the United States potentially threw into upheaval two decades of federal sentencing guidelines axioms when on January 12, 2005 it decided the case of *United States v. Booker*.[179] *Booker* stands for the proposition that "a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt"[180] to satisfy the requirements of the Sixth Amendment of the U.S. Constitution that convictions can only arise from proof beyond a reasonable doubt of all facts necessary to the charged crime[181] and that a criminal defendant has the fundamental right to a jury's determination of guilt as to all relevant elements of the charged crime.[182] To the extent that federal sentencing guidelines as written were binding on judges, having the force and effect of laws,[183] and because under these guidelines a judge could impose a sentence based on facts outside the scope of those found beyond a reasonable doubt by a jury or admitted by

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environmental counts are not grouped, there are an available 128 combinations of possible sentences. In the interest of space, only the limiting case is examined.

178. In this model, success is measured by comparing the increase in a term of imprisonment attributable to a substantive RCRA charge to the statutory maximum for such a charge. A criminal violation of RCRA carries a maximum sentence of five years imprisonment. Therefore, a sentence increase of 42-52 months (3.5-4.3 years) is a relative success because the increase in sentence approaches the statutory maximum term of incarceration.

179. United States v. Booker, 125 S.Ct. 738 (2005).

180. *Id.* at 756. However, "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." *Id.* at 750.

181. *See* In re Winship, 397 U.S. 358, 364 (1970).

182. *See* United States v. Gaudin, 515 U.S. 506, 511 (1995).

183. *Booker*, 125 S.Ct. at 750 (citing from Mistretta v. United States, 488 U.S. 361, 391 (1989)).

the defendant[184] through the use of sentencing enhancements,[185] such guidelines ran afoul of the Sixth Amendment,[186] and the Court deemed an appropriate remedy necessary.

The Court concluded that this remedy consisted of two parts, both procedural in nature. First, the Court "severed and excised" from the federal sentencing statute the portion making the federal sentencing guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp. 2004).[187] Second, the Court held that the appropriate standard of review on appeal of sentencing enhancements under the Guidelines would no longer be that set forth in 18 U.S.C. § 3742(e) (which the Court stated must be excised), but rather a standard of review for "unreasonableness."[188]

The fallout from *Booker* continues to pile up as federal courts of appeal and district courts wrestle with the extent of the decision's holdings and the questions left unanswered. Courts to this point consider: what type of weight the Guidelines should be given when fashioning a sentence;[189] the appropriate procedures for future sentencing;[190] whether *Booker*'s holdings are retroactively applicable;[191]

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184. *Booker*, 125 S.Ct. at 749.

185. *Id.* at 751. "The effect of the increasing emphasis on facts that enhance sentencing ranges, however, was to increase the judge's power and diminish that of the jury. It became the judge, not the jury, that determined the upper limits of sentencing, and the facts determined were not required to be raised before trial or proved by more than a preponderance." *Id.*

186. *Id.* at 753. "Regardless of whether the legal basis of the accusation is in a statute or in guidelines promulgated by an independent commission, the principles behind the jury trial right are equally applicable." *Id.*

187. *Id.* at 756. The practical effect of this action is to render the Guidelines "advisory" in nature. *Id.* That is, a district court, "while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." *Id.* at 767.

188. *Id.* at 765. As the Court noted, the ultimate goal to be preserved notwithstanding the case it was addressing was "to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Id.* at 767. Both the Sixth Amendment holding and the Court's "remedial interpretation of the Sentencing Act" apply to all cases on direct review. *Id.* at 769.

189. Judge Cassell of the U.S. District Court for the District of Utah described the appropriate weight as "heavy" or "considerable." *See* United States v. Wilson, 2005 WL 78552, ___ F.Supp.2d ___ (D.Utah 2005). Contrariwise, other courts describe the appropriate weight as non-presumptive and advisory, the Guidelines being but one of many factors for a sentencing court to consider. *See*, e.g., United States v. Myers, 2005 WL 165314 (S.D. Iowa 2005) ("This Court will endeavor, then, to square the real conduct presented by the evidence presented concerning a particular defendant, with the public interests expressed through the sentencing statute, in order to deliver a judgment in a manner as even-handed and reasonable as humanly possible."); *see also* United States v. West, 2005 WL 180930 (S.D.N.Y. 2005).

190. *See id.* The recommended procedure found in *Wilson* is: following conviction, the probation office files a pre-sentence report containing Guideline calculations, to which both sides may object; after resolving all disputes regarding the proper application of the Guidelines, the judge at the sentencing hearing determines what the Guidelines

how and when facts relevant to sentencing should be submitted to the jury;[192] what is meant in *Booker* by a "statutory maximum";[193] and whether *Booker* rights of appeal may be waived in a plea agreement.[194]

Although it is too early to tell, the ultimate effect of *Booker* on federal sentencing protocols may not be as drastic as might be believed by other commentators.[195] The Second Circuit Court of Appeals went so far as to state:

> Although the court in the Substantive Opinion [of *Booker*] prohibits a sentencing judge from finding any fact that enhanced a Guidelines sentence above the range that is based solely on facts found by the jury in its verdict or admitted by the defendant, the Court in its Remedy Opinion contemplates that, with the mandatory use of the Guidelines excised, the traditional authority of a sentencing judge to find all facts relevant to sentencing will encounter no Sixth

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sentencing range is; the judge must then exercise his discretion while also giving considerable weight to the Guidelines sentence in determining the ultimate sentence. Any deviation in the sentence from that dictated by the Guidelines must be explain "with specificity in writing" with supporting reasons. "The preferable course today is to faithfully implement the congressional purposes underlying the Sentencing Reform Act by following the Guidelines in all but unusual cases." *Id.*

191. Some courts find that *Booker* is not applicable to case that are final on direct review, *see* Quirion v. United States, 2005 WL 83832 (D.Me. 2005) and In re Anderson, 2005 WL 123923 (11th Cir. 2005), nor to cases on collateral review, *see* Tuttamore v. United States, 2005 WL 234368 (N.D.Ohio 2005) and United States v. Williams, 2005 WL 240939 (E.D.Pa. 2005), nor to cases not on direct appeal when they were decided, Gerrish v. United States, 2005 WL 159642 (D.Me. 2005).

Nevertheless, some courts, in light of *Booker*, take the opportunity to exercise discretion in vacating and remanding cases suffering from plain error at sentencing. *See* United States v. Hughes, 2005 WL 147059 (4th Cir. 2005) and United States v. Oliver (6th Cir. 2005) ("We read the Supreme Court's decision in *Booker* as encouraging us to review cases like Oliver's which are currently pending on direct appeal for "plain error" where the Sixth Amendment issue was not raised before the district court."); *but see* United States v. Rodriguez, 2005 WL 272952 (11th Cir. 2005). Other courts do not foreclose the possibility of a retroactive application of *Booker*, but carefully limit the scenarios in which relief would be appropriate. *See* United States v. Seigelbaum, 2005 WL 196526 (D.Or. 2005) (relief limited to "persons presently serving a sentence that was enhanced on the basis of *contested facts* that were not found to be true, beyond a reasonable doubt, nor admitted by the defendant").

192. "Sentencing allegations, which do not allege elements of the charged offenses and are matters only for determination at sentencing under the advisory Sentencing Guidelines, have no place within the charging document against the defendant." United States v. Cormier, 2005 WL 213513 (D.Me. 2005).

193. "'Statutory maximum' and 'the maximum permitted by statute' refer to the longest sentence that the statute which punishes a crime permits a court to impose, regardless of whether the actual sentence must be shortened in a particular case because of the principles involved in [*Booker*]." United States v. Rubbo, 2005 WL 120507 (11th Cir. 2005).

194. Such a right of appeal of one's sentence can be waived. *See* United States v. Rubbo, 2005 WL 120507 (11th Cir. 2005).

195. *See* United States v. Crosby, 2005 WL 240916 (2nd Cir. 2005).

> Amendment objection. Thus the sentencing judge will be entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence.[196]

Nor, for that matter, will *Booker* likely have an effect on the Department of Justice's reliance on the guidelines at sentencing.[197]

Since *Booker,* only one court addressed a sentencing enhancement under USSG § 2D1.1(b)(5)(B).[198] In *Frye*, the Eleventh Circuit Court of Appeals held that this enhancement was appropriate where the defendant admitted in the factual resume that was part of his guilty plea that he manufactured three to four ounces of methamphetamine per week and had to use protective gear while doing so at various residential locations.[199]

In light of the reasoning set forth in *Frye*, mere proof of methamphetamine manufacturing coupled with a showing of the laboratory operator's production of the drug at a private residence and the operator's use of protective gear[200] would seem to be sufficient to establish the predicate facts for a sentencing enhancement under USSG § 2D1.1(b)(5)(B). Because these facts do not necessarily implicate the scientific expertise and specialized training which differentiates an EPA criminal investigator from his or her DEA counterpart, the question becomes: Has *Booker* and its progeny effectively diluted the Guidelines to a point which renders EPA-CID involvement in methamphetamine laboratory investigations redundant? We turn to that question in the next section.

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196. *Id.*

197. "We must do our part to ensure that the Guidelines continue to set the standard for federal sentencing. . . . Federal prosecutors must actively seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases." Memorandum from James B. Comey, Deputy Attorney General, to All Federal Prosecutors (January 28, 2005)(on file with author). Furthermore, the DOJ is implementing a system for federal prosecutors to report instances where judges either fail to calculate a Guideline range before imposing an unreasonable sentence or sentence defendants outside the appropriate Sentencing Guidelines range. *Id.* The effect of this policy may be to strike fear into the hearts of judges who may have the "temerity" to exercise discretion beyond that found in the Guidelines, which brings into question just how "advisory" the Guidelines will be in the future.

198. *See* Unites States v. Frye, 2005 WL 315563 (11th Cir. 2005).

199. "These admissions are sufficient to support the finding by the district court that the offense involved a substantial risk to human life or the environment. The sentence, therefore, did not violate the Sixth Amendment as explicated in *Booker*, and the district court did not err." *Id.*

200. In essence, these pieces of evidence constitute the typical elements of a methamphetamine laboratory which are readily apparent to investigators upon executing a search warrant.

VI. Reconciling The Devaney Memo's Themes with Post-MAPA, Post-9/11, and Post-*Booker* Realities

A. Assessing the Devaney Memo in the Methamphetamine Context

The EPA's challenge at this time should be the development of additional guidance to facilitate meaningful agency assistance on prosecutions of clandestine methamphetamine laboratory operators. The Devaney memo is the status quo for EPA criminal enforcement and offers a starting point towards the creation of new strategies. Devaney's central theme[201] ((a) culpable conduct that (b) leads to significant environmental harm worthy of enforcement actions) should remain undisturbed. Room for clarification exists in the measurement of activities along these two axes. Looking at the factors related to culpable conduct, it is clear that three of the five factors ("concealment of misconduct or falsification of required records," "tampering with monitoring or control equipment," and "business operation of pollution-related activities without . . . required documentation") realistically apply to the commission of environmental crimes by businesses or individuals in regulated communities.[202]

The other two factors, history of repeated violations and deliberate misconduct resulting in violation, may only have limited applicability in the context of clandestine methamphetamine laboratories. For the first factor to apply there must be a history of repeated violations *of environmental laws*. "Clearly, a history of repeated violations will enhance the government's capacity to prove that a violator was aware of environmental regulatory requirements, had actual notice of violations and then acted in deliberate disregard of those requirements."[203] A

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201. *See supra* note 66.

202. *Id.* Factors 3-5 under Section IV(B) of the memo refer to "concealment of misconduct or falsification of required records," "tampering with monitoring or control equipment," and "business operation of pollution-related activities without a permit, license, manifest or other required documentation." Devaney, *supra* note 46, at 5. A methamphetamine lab is not a registered business. There are no traditional records to be kept, let alone be falsified. There are no pieces of control or monitoring equipment required by a clandestine lab. The very furtiveness of clandestine labs operates to remove them in a wholesale fashion from these factors.

203. DEVANEY, *supra* note 66, at 5. A voluminous criminal history unrelated to environmental violations does not fit under the rubric of this first factor.

The second factor covers deliberate misconduct resulting in violation. "Although the environmental statutes do not require proof of specific intent, evidence, either direct or circumstantial, that a violation was deliberate will be a major factor indicating that criminal investigation is warranted." DEVANEY, *supra* note 66, at 5. This statement should be viewed in light of another memo excerpt: "The case selection process is designed to identify misconduct worthy of criminal investigation. The case selection process is not an effort to establish legal sufficiency for prosecution." DEVANEY, *supra*

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This second factor seems to instruct against, rather than promote, the investigation and prosecution of methamphetamine-related environmental harms. As a whole, these two culpable conduct factors appear better suited for regulation of business entities and their employees rather than individual violators on the fringes of regulated society such as clandestine lab operators.

Conversely, Devaney's factors regarding significant environmental harm pass muster with ease. By addressing actual harm or the threat of significant harm to the environment, these factors go to the heart of violations covered under the RCRA.[206] The factor regarding failure to report an actual discharge accounts for additional harms from the release of pollutants over a prolonged period; that is, as methamphetamine producers deposited waste materials on the ground, their failure to report the discharge allowed hazardous chemicals to seep into the environment over time.[207] The fourth factor is perhaps the most applicable to methamphetamine cases. It concerns illegal conduct appearing to represent a trend or common attitude within the regulated community.

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204. DEVANEY, *supra* note 66, at 5.

205. DEVANEY, *supra* note 66, at 3.

206. DEVANEY, *supra* note 66, at 4.

207. "Our investigative resources should generally be targeted toward those cases in which the failure to report is coupled with actual or threatened environmental harms." DEVANEY, *supra* note 66, at 5.

"While the single violation being considered may have a relatively insignificant impact on human health or the environment, such violations, if multiplied by the numbers in a cross-section of the regulated community, would result in significant environmental harm."[208] By prosecuting a methamphetamine lab operator for environmental harms he caused, EPA and DOJ constructively can put on notice other members of the clandestine lab community *that they are regulated.* Each new prosecution in a different area of the country may help to put more potential violators on notice that regulations apply to them and that violations carry federal criminal penalties.

B. Proposed Additions to the Devaney Memo's Principles in the Methamphetamine Context

The culpable conduct factors of the Devaney memo, if amended to account for methamphetamine-related cases, would provide effective guidance to EPA Criminal Enforcement officials. Some possible factors worth consideration would be: whether the discharge occurred in the furtherance of another crime (this factor is automatically triggered in methamphetamine cases, but is worth noting nonetheless); the regularity or frequency of such discharges; the disregard for the environment or humans, *if any*, whom resided in or used the disposal area; and the role of the defendant in supervising or directing the illegal disposal practices. These amended factors would give EPA officials some guidance more applicable to methamphetamine cases than the current standards.

Whatever the form of this guidance, the EPA must juxtapose the implications of the Devaney memo against the MAPA-authorized sentencing enhancement for substantial risk for environmental harm found in USSG § 2D1.1(b)(5)(B), and the now-advisory nature of that Guidelines enhancement following *Booker.* This assessment would allow the EPA to better understand prosecutorial imperatives outside its control. Application Note 20 to USSG § 2D1.1(b)(5)(B) provides four criteria that a court must examine before applying the specific offense criterion to the underlying drug count.[209] However, these criteria are not exclusive to determinations under subsection (b)(5)(B)(ii)(II) (substantial risk of environmental harm). They also apply to determinations pursuant to subsection (b)(5)(B)(ii)(I) (substantial risk of harm to human life).[210] Another portion of the USSG, § 2D1.10, contains identical criteria relevant to determining "a substantial risk of harm to the life of a minor

208. DEVANEY, *supra* note 66, at 4.
209. *See supra* note 134.
210. USSG § 2D1.1, comment. (n. 20).

or an incompetent."[211]

A separate Application Note for the environmental harm specific offense characteristic to § 2D1.1 is in order. There is no need to change the first three criteria in Application Note 20. Appropriately, they deal with the amount of chemicals or hazardous waste stored at a methamphetamine lab and how offenders stored such waste, the manner in which offenders disposed of the waste, the likelihood of release to the environment, and the duration of the offense and the extent of the manufacturing process.[212]

However, the fourth current factor is inapplicable to an evaluation of environmental harm or threat of harm. This factor involves consideration of the laboratory's location and the number of human lives placed in harm's way.[213] If applied as read, this factor would serve to discriminate against the very areas in which methamphetamine outbreaks are occurring across EPA Region III (e.g. West Virginia, northern and western Pennsylvania) and other rural parts of the country susceptible to the spread of methamphetamine. Such locales have low population densities as compared to regions around Philadelphia and Pittsburgh. Methamphetamine producers most often conduct their activities in remote areas to avoid detection. Under the current fourth factor, the more remote the area, the more removed from humanity the methamphetamine production occurs, the *lesser* the reason for the specific offense characteristic to apply. But that result is not supportable. Whether methamphetamine waste dumping occurs in Love Park in Philadelphia or in Elk County, Pennsylvania, the substantial risk of harm to the environment is the same; the environment in either location will suffer. What exacerbates this disconnection of logic is the fact that federal courts *must* consider all four factors at sentencing.[214]

Factor four should be kept as it pertains to the substantial risk of harm to human life, but it should be eliminated from considerations of environmental harm.The environmental harm enhancement of § 2D1.1(b)(5)(B)(ii)(II), to be found applicable, should involve a direction to courts to consider the first three factors of the current enhancement and another new factor. This new factor would account for

211. USSG § 2D1.10 concerns endangering human life while illegally manufacturing a controlled substance. Application Note 1 to this guideline is the same as Application Note 20 to § 2D1.1, save for its applicability to a determination of a substantial risk of harm to the life of a minor or an incompetent.

212. USSG § 2D1.1, comment. (n. 20).

213. *Id.*

214. "The court shall include consideration of the following factors." USSG § 2D1.1, comment. (n. 20). A Latin proverb instructs that "the best law leaves the least discretion to the judge." In the context of methamphetamine cases, such a mandate requires judges to suspend *all* logic and discretion, not just their own, in applying the guideline.

the degree of destruction of wilderness areas, waters of the United States, or in the case of areas traditionally populated or frequented by humans, the degree to which the illegal disposal activities accelerated the damage to the environment. As a whole, the amended four factors would assist courts in applying the enhancement in a meaningful manner sensitive to environmental harm divorced from the harm risked to humans. Such a change to the Guidelines could come either from Congress or the Sentencing Commission, but whatever the source, it would involve the EPA in a more meaningful way by infusing the factors found in Application Note 20 with a required assessment of the harm to the environment which only the EPA investigators and other staff at the Agency could provide.

C. Potential Congressional Responses Implicating the EPA

As discussed earlier, a significant obstacle facing the EPA in its worthwhile pursuit of methamphetamine investigations and prosecutions with the help of DOJ is the effect of USSG § 3D1.2(c). At sentencing, this guideline operates in most cases to affect the absorption[215] of a CWA or RCRA count into the substantive drug count. Nevertheless, the role of the EPA criminal enforcement is to prosecute "the most significant and egregious violators."[216] Despite the effects at sentencing, the EPA seems obliged to carry out the directives of the Devaney memo and statutory edicts whenever such a violator presents himself. Congress could amend RCRA and the CWA to require mandatory terms of imprisonment, or to mandate that such terms run consecutive to other sentences.[217] Until such a change occurs, the joinder of environmental and drug charges at trial, and the grouping of subsequent convictions at sentencing, will continue.

The first step for the EPA to take is to determine, based upon the Devaney memo and this comment's suggested amendments to it, whether or not the pursuit of methamphetamine laboratory operators fits into the EPA's criminal enforcement mission. If the EPA, the current administration and Congress believe the EPA is an appropriate partner in the fight against clandestine laboratories, then the appropriate next steps

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215. But is this so wrong? In United States v. Hines, 210 F.3d 390, 2000 WL 350219 (10th Cir. 2000), *supra* note 56, the court outlined factors it considered sufficient to join environmental and drug charges at trial. These same factors should be applied routinely to determine whether a drug count and environmental count should be merged at sentencing into the same group.

216. DEVANEY, *supra* note 66, at 2.

217. *See* USSG § 3D1.1(b). The likelihood of this wholesale amendment of criminal provisions in environmental laws is unlikely at this time, but if and when Congress revisits these statutes, one or both of these changes may be warranted.

can include one or more of the following options: amending the Application Note to USSG § 2D1.1(b)(5)(B) as suggested in this comment; making sentences for RCRA convictions subject to mandatory terms of imprisonment; or making these RCRA-based sentences run consecutive to other sentences for drug activity. These steps would have the effect of giving new life to the EPA criminal enforcement effort against methamphetamine, moralizing relevant staff in the Agency and giving greater consistency to the overall tasks of the LCRMD and CID. The proposed initiatives require foresight, funding,[218] and fundamental changes in the current enforcement scheme, but they are by no means impossible, and the benefits that would accrue from them would be well worth the cost.

VII. Conclusion

Methamphetamine manufacture at clandestine laboratories will continue to grow as more individuals feel "the need for speed." Since 1970, Congress has attempted to keep pace with the changing times, enacting the Controlled Substances Act, the Comprehensive Methamphetamine Control Act, and most recently, the Methamphetamine Anti-Proliferation Act. Addicts responded to these laws by decentralizing their production processes, and as a result, releasing hazardous waste and other pollutants into the environment regularly, and dangerously.

In recent years, the DOJ has asked the EPA to assist in the prosecution of methamphetamine cases. Yet, at the same time, the agency must fulfill its core criminal enforcement mission of prosecuting only the most egregious and significant violators. Whether clandestine methamphetamine manufacturers are significant violators is a question the EPA must answer on a case-by-case basis, keeping in mind its limited resources and the effect of other non-EPA charges on the overall sentencing of a defendant.

It is the hope of the author that this comment has elucidated relevant points of legal tension and offered viable strategies for a cohesive enforcement approach by regulators, investigators, and attorneys at the EPA. The EPA may need to reexamine its case selection methods, scrutinize its reporting practices for "successful" cases, or both. A reexamination of enforcement practices in the field of methamphetamine-related crimes may allow for a better relation of these non-traditional cases to EPA's core mission of only prosecuting the most

218. It is worth noting that the Bush Administration proposed $7.6 billion for the EPA in fiscal year 2006, a 5.6 percent decrease. *See* http://www.cnn.com/2005/ALLPOLITICS/03/04/bush.epa.ap/index.html (last visited Mar. 5, 2005).

egregious and significant environmental crimes.

It cannot be questioned that the context of drug activities lends gravity and immediacy to any enforcement actions by EPA, but caution is in order. The punishment of methamphetamine addicts and laboratory operators with environmental charges or related sentencing enhancements should be thought of as additional weapons in a federal prosecutor's arsenal. As one EPA official commented, "Methamphetamine manufacturers are bad people already. There is virtually no societal barrier to putting someone in jail for an environmental crime, when that crime is as visible as a pile of hazardous waste on a lawn where children play."[219] Nevertheless, in pursuing and punishing those who abuse "speed" and pollute the environment because these cases look and feel worthwhile, the EPA must ensure that the agency does not become a victim itself by diverting its attention too much from the established path of criminal enforcement it took the latter part of the 20th century to blaze.

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219. Telephone Interview with Daniel Boehmcke, former Acting Assistant Regional Criminal Enforcement Counsel, EPA Region III (Nov. 12, 2003).

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