

## Publications

### **Client Alert: USEPA Can Seek Restitution for CERCLA Clean-Up Based on EPA Accounting Table and EPA Employee Testimony Without Further Evidence**

#### **Related Attorneys**

Mark A. Norman

David M. Edelstein

Kristin L. Watt

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The United States Court of Appeals for the Sixth Circuit recently affirmed the guilty plea of Mark Sawyer for conspiring to violate the Clean Air Act (CAA), 18 U.S.C. 371. *United States v. Sawyer*, No. 15-5181 (6<sup>th</sup> Cir. 2016). The Court affirmed both Sawyer's 60-month prison sentence and \$10,388,576.71 restitution order. Whether Sawyer's maximum-guideline sentence is unreasonably high for an individual with no criminal history who pleaded guilty is a matter of debate for another forum. However, components of the restitution analysis are relevant to anyone owning or operating, or working at a U.S. Environmental Protection Agency (EPA) regulated entity.

The case found that Sawyer conspired with four other owners of his company, A&E Salvage, to knowingly violate the CAA by demolishing buildings containing friable asbestos without following the CAA's standards. His illegal demolition practices resulted in 300 acres of commercial property contaminated with asbestos. The EPA exercised its power under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) which included over \$10 Million in direct costs for the clean-up of contamination related to asbestos at the site.

Under the Mandatory Victim's Restitution Act, 18 U.S.C. § 3663(A), the Court required Sawyer to pay restitution to identifiable victims. The U.S. District Court for the Eastern District of Tennessee determined that Sawyer's conviction for conspiracy to violate the CAA was a "crime against property." In a matter of first impression before the Sixth Circuit, the Court upheld that EPA can be a victim of a crime against property, even when it has no possessory interest in the land. This affirmation opened the door to EPA's recovery of restitution in the subject case.

In determining the amount of restitution, the District Court relied on a SCORPIOS report from EPA and the testimony of EPA's on-site supervisor. A SCORPIOS report is ostensibly a table of accounting for costs incurred and lacks specific detail. EPA's on-site supervisor

testified extensively about the simple SCORPIOS report and the District Court found her testimony substantiated the report.

Sawyer argued before the Sixth Circuit that the SCORPIOS report was insufficient to establish the government's losses. Sawyer supported his argument with case law from three different Circuits establishing that summary accounting tables are insufficient to support a restitution award. The Sixth Circuit found that the SCORPIOS report, combined with the testimony from the EPA on-site supervisor, was sufficient to substantiate the \$10 Million order of restitution.

The Sixth Circuit showed great deference to the EPA. EPA, in seeking restitution, can establish "victim standing" in crimes against property and then seek restitution through a table of accounting substantiated by testimony from its own personnel.

If you have questions regarding this case, please contact David Edelstein ([dmedelstein@vorys.com](mailto:dmedelstein@vorys.com) or at 513.723.4007) or your Vorys attorney.