

**Preparing to Successfully Challenge
Expert Testimony
in an Environmental Criminal Case
Under the Clean Air Act
(Knowing Endangerment, 42 USC § 7413 (c)(5)(A))**

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This paper provides excerpts from a criminal Clean Air Act¹ case involving a successful *Daubert* challenge in a criminal case involving the provision of the Clean Air Act proscribing “knowing endangerment” by the release of hazardous air pollutants.² In pre-trial proceedings, we convinced the judge to exclude the proffered testimony by the government’s designated expert witness, a board certified physician, on relevancy grounds.³ As a result of this pretrial challenge, even before the trial began, the government was forced to dismiss the most dangerous charge in the indictment, one that authorizes a maximum punishment of 15 years imprisonment,⁴ and had to substantially refocus its case theory.

¹ See 42 U.S.C. § 7413(c)(5)(A).

² *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993).

³ The district court (Werlein, J.) orally granted Ho’s motion, ruling, *inter alia*, that the opinion was legally irrelevant since it wasn’t based on evidence probative to the statutory issue:

[B]ecause Dr. Kalnas’ report . . . addresses the effects of asbestos which affected workers only inside the . . . abandoned hospital building . . . it does not . . . address any imminent danger of death or serious bodily injury caused as a result of the defendant’s release of asbestos into the ambient air. [B]ecause . . . his testimony would not be relevant to the crime charged in . . . Count 5 of the . . . superseding indictment, therefore, it should be excluded.

⁴ We calculated that under the Sentencing Guidelines, had our client been convicted of the crime of Knowing Endangerment, he would have had to serve a minimum of 12.5 years imprisonment, even though he lacked any criminal record.

This information illustrates the importance of carefully researching the statutory language, legislative history, any administrative record, and pertinent scholarly materials to determine if a successful challenge can be lodged against a government's expert witness in a criminal environmental case. If successful, a *Daubert* challenge will not only help to limit the "taint" from having to defend against a serious criminal charge, but it will also be crucial at the time of sentencing (assuming the client is convicted of violating less serious environmental crimes), since most environmental offenses carrying significant upward adjustments under the Sentencing Guidelines.⁵

If the government does not charge environmental harm to individuals, but saves that argument for sentencing to obtain an upward adjustment, several issues are raised: 1) is a *Daubert* challenge at that stage permitted; and 2) if so, are the strict evidentiary standards about the admissibility of scientific evidence applied, or are the more relaxed standards of evidence at sentencing hearings to be applied?⁶

For one lawyer's excellent briefing on these issues, refer to the "Memorandum in Support of Defendants' Joint Motion for (1) Leave to Present Documentary and Testimonial evidence at sentencing Hearing and (2) Discovery and Disclosure in Advance of Sentencing Hearing," in *U.S. v. Peters, et al.*⁷

⁵ See, e.g., U.S.S.G. § 2Q1.2(b)(2), which provides for a nine level increase if the offense resulted in a substantial likelihood of death or serious bodily injury.

⁶ See 18 U.S.C. §3661 and §6A1.3, United States Sentencing Guidelines, Commentary: "In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial."

⁷ Pacer: *U.S. v. Peters, et al.*; Cr. No. 1:98CR129; In the United States District Court, Eastern District of Texas, Beaumont Division; Docket No. 199 dated October 5, 2000.

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APPENDIX

U.S. v. Eric Kung-Shou Ho, et al.
No. CR-H-00-183
United States District Court
Southern District of Texas, Houston Division

1. Indictment Excerpts

Count One

· Conspiracy [18 USC § 371]

Count Seven:

· Knowing Endangerment [42 USC § 7413 (c)(5)(A)]

2. Memorandum of Law Regarding Scientific Evidence and the Standard to Prove Imminent Risk of Death or Serious Bodily Injury

3. Excerpts: Court's Ruling on *Daubert* Issues⁷