**United States Department of Justice**

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*Southern District of West Virginia*

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August 19, 2014

Thomas G. Dyer, Esquire
P.O. Box 1332
Clarksburg, WV 26302

5:14-00189

Re: United States v. John W. Shelton

Dear Mr. Dyer:

This will confirm our conversations with regard to your client, John W. Shelton (hereinafter "Mr. Shelton"). As a result of these conversations, it is agreed by and between the United States and Mr. Shelton as follows:

1. **CHARGING AGREEMENT.** Mr. Shelton agrees to waive his right pursuant to Rule 7 of the Federal Rules of Criminal Procedure to be charged by indictment and will consent to the filing of a one-count information to be filed in the United States District Court for the Southern District of West Virginia, a copy of which is attached hereto as "Plea Agreement Exhibit A."

2. **RESOLUTION OF CHARGES.** Mr. Shelton will plead guilty to a violation of 18 U.S.C. § 371 (conspiracy to violate clean water act) as charged in said information.

3. **MAXIMUM POTENTIAL PENALTY.** The maximum penalty to which Mr. Shelton will be exposed by virtue of this guilty plea is as follows:

(a) Imprisonment for a period of five years;

(b) A fine of $250,000, or twice the gross pecuniary gain or twice the gross pecuniary loss resulting from defendant's conduct, whichever is greater;

(c) A term of supervised release of three years;

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(d) A mandatory special assessment of $100.00 pursuant to 18 U.S.C. § 3013; and

(e) An order of restitution pursuant to Section 5E1.1 of the United States Sentencing Guidelines.

4. **SPECIAL ASSESSMENT.** Prior to the entry of a plea pursuant to this plea agreement, Mr. Shelton will tender a check or money order to the Clerk of the United States District Court for $100, which check or money order shall indicate on its face the name of defendant and the case number. The sum received by the Clerk will be applied toward the special assessment imposed by the Court at sentencing. Mr. Shelton will obtain a receipt of payment from the Clerk and will tender a copy of such receipt to the United States, to be filed with the Court as an attachment to this plea agreement. If Mr. Shelton fails to provide proof of payment of the special assessment prior to or at the plea proceeding, the United States will have the right to void this plea agreement. In the event this plea agreement becomes void after payment of the special assessment, such sum shall be promptly returned to Mr. Shelton.

5. **PAYMENT OF MONETARY PENALTIES.** Mr. Shelton agrees not to object to the District Court ordering all monetary penalties (including the special assessment, fine, court costs, and any restitution that does not exceed the amount set forth in this plea agreement) to be due and payable in full immediately and subject to immediate enforcement by the United States. So long as the monetary penalties are ordered to be due and payable in full immediately, Mr. Shelton further agrees not to object to the District Court imposing any schedule of payments as merely a minimum schedule of payments and not the only method, nor a limitation on the methods, available to the United States to enforce the judgment.

6. **COOPERATION.** Mr. Shelton will be forthright and truthful with this office and other law enforcement agencies with regard to all inquiries made pursuant to this agreement, and will give signed, sworn statements and grand jury and trial testimony upon request of the United States. In complying with this provision, Mr. Shelton may have counsel present except when appearing before a grand jury. Further, Mr. Shelton agrees to be named as an unindicted co-conspirator and unindicted aider and abettor, as appropriate, in

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subsequent indictments or informations.

7. **USE IMMUNITY.** Unless this agreement becomes void due to a violation of any of its terms by Mr. Shelton, and except as expressly provided for in paragraph nine below, nothing contained in any statement or testimony provided by Mr. Shelton pursuant to this agreement, or any evidence developed therefrom, will be used against Mr. Shelton, directly or indirectly, in any further criminal prosecutions or in determining the applicable guideline range under the Federal Sentencing Guidelines.

8. **LIMITATIONS ON IMMUNITY.** Nothing contained in this agreement restricts the use of information obtained by the United States from an independent, legitimate source, separate and apart from any information and testimony provided pursuant to this agreement, in determining the applicable guideline range or in prosecuting Mr. Shelton for any violations of federal or state laws. The United States reserves the right to prosecute Mr. Shelton for perjury or false statement if such a situation should occur pursuant to this agreement.

9. **STIPULATION OF FACTS AND WAIVER OF FED. R. EVID. 410.** The United States and Mr. Shelton stipulate and agree that the facts comprising the offense of conviction and relevant conduct include the facts outlined in the "Stipulation of Facts," a copy of which is attached hereto as "Plea Agreement Exhibit B."

Mr. Shelton agrees that if he withdraws from this agreement, or this agreement is voided as a result of a breach of its terms by Mr. Shelton, and Mr. Shelton is subsequently tried on any of the charges in the information, the United States may use and introduce the Stipulation of Facts in the United States case-in-chief, in cross-examination of Mr. Shelton or of any of his witnesses, or in rebuttal of any testimony introduced by Mr. Shelton or on his behalf. Mr. Shelton knowingly and voluntarily waives, see United States v. Mezzanatto, 513 U.S. 196 (1995), any right he has pursuant to Fed. R. Evid. 410 that would prohibit such use of the Stipulation of Facts. If the Court does not accept the plea agreement through no fault of the defendant, or the Court declares the agreement void due to a breach of its terms by the United States, the Stipulation of Facts cannot be used by the United States.

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The United States and Mr. Shelton understand and acknowledge that the Court is not bound by the Stipulation of Facts and that if some or all of the Stipulation of Facts is not accepted by the Court, the parties will not have the right to withdraw from the plea agreement.

10. **AGREEMENT ON SENTENCING GUIDELINES.** Based on the foregoing Stipulation of Facts, the United States and Mr. Shelton agree that the following provisions of the United States Sentencing Guidelines apply to this case.

The United States and Mr. Shelton agree that the following guidelines apply:

| | | |
|---|---|---|
| Base offense level | | 6 |
| Ongoing, continuous or repetitive Discharge | + | 6 |
| Discharge in violation of a permit | + | 4 |

The United States and Mr. Shelton disagree on whether an adjustment under U.S.S.G. §3B1.1 for an aggravating role is applicable.

The United States and Mr. Shelton acknowledge and understand that the Court and the Probation Office are not bound by the parties' calculation of the United States Sentencing Guidelines set forth above and that the parties shall not have the right to withdraw from the plea agreement due to a disagreement with the Court's calculation of the appropriate guideline range.

11. **WAIVER OF APPEAL AND COLLATERAL ATTACK.** Mr. Shelton knowingly and voluntarily waives his right to seek appellate review of his conviction and of any sentence of imprisonment, fine, or term of supervised release imposed by the District Court, or the manner in which the sentence was determined, on any ground whatsoever including any ground set forth in 18 U.S.C. § 3742(a), except that the defendant may appeal any sentence that exceeds the maximum penalty prescribed by statute. The United States also agrees to waive its right to appeal any sentence of imprisonment, fine, or term of supervised release imposed by the District Court, or the manner

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in which the sentence was determined, on any ground whatsoever, including any ground set forth in 18 U.S.C. § 3742(b), except that the United States may appeal any sentence that is below the minimum penalty, if any, prescribed by statute.

Mr. Shelton also knowingly and voluntarily waives the right to challenge his guilty plea and conviction resulting from this plea agreement, and any sentence imposed for the conviction, in any collateral attack, including but not limited to a motion brought under 28 U.S.C. § 2255.

The waivers noted above shall not apply to a post-conviction collateral attack or direct appeal based on a claim of ineffective assistance of counsel.

12. **WAIVER OF FOIA AND PRIVACY RIGHT.** Mr. Shelton knowingly and voluntarily waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including without any limitation any records that may be sought under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, or the Privacy Act of 1974, 5 U.S.C. § 552a, following final disposition.

13. **FINAL DISPOSITION.** The matter of sentencing is within the sole discretion of the Court. The United States has made no representations or promises as to a specific sentence. The United States reserves the right to:

(a) Inform the Probation Office and the Court of all relevant facts and conduct;

(b) Present evidence and argument relevant to the factors enumerated in 18 U.S.C. § 3553(a);

(c) Respond to questions raised by the Court;

(d) Correct inaccuracies or inadequacies in the presentence report;

(e) Respond to statements made to the Court by or on behalf of Mr. Shelton;

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(f) Advise the Court concerning the nature and extent of Mr. Shelton's cooperation; and

(g) Address the Court regarding the issue of Mr. Shelton's acceptance of responsibility.

14. **VOIDING OF AGREEMENT.** If either the United States or Mr. Shelton violates the terms of this agreement, the other party will have the right to void this agreement. If the Court refuses to accept this agreement, it shall be void.

15. **ENTIRETY OF AGREEMENT.** This written agreement constitutes the entire agreement between the United States and Mr. Shelton in this matter. There are no agreements, understandings or recommendations as to any other pending or future charges against Mr. Shelton in any Court other than the United States District Court for the Southern District of West Virginia.

Acknowledged and agreed to on behalf of the United States:

R. BOOTH GOODWIN II
United States Attorney

By: Blaire L. Malkin

BLAIRE L. MALKIN
Assistant United States Attorney

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I hereby acknowledge by my initials at the bottom of each of the foregoing pages and by my signature on the last page of this seven-page agreement that I have read and carefully discussed every part of it with my attorney, that I understand the terms of this agreement, and that I voluntarily agree to those terms and conditions set forth in the agreement. I further acknowledge that my attorney has advised me of my rights, possible defenses, the Sentencing Guideline provisions, and the consequences of entering into this agreement, that no promises or inducements have been made to me other than those in this agreement, and that no one has threatened me or forced me in any way to enter into this agreement. Finally, I am satisfied with the representation of my attorney in this matter.

John W. Shelton
Defendant

8-22-14
Date Signed

Thomas G. Dyer, Esquire
Counsel for Defendant

8/22/14
Date Signed

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
BECKLEY

UNITED STATES OF AMERICA

v. CRIMINAL NO. _____
18 U.S.C. § 371

JOHN W. SHELTON

# I N F O R M A T I O N

**(Conspiracy to Violate the Clean Water Act)**

The United States Attorney Charges:

At all relevant times:

Regulatory Introduction

1. The Federal Water Pollution Control Act of 1972, commonly known as the Clean Water Act ("CWA"), codified at Title 33, United States Code, Sections 1251-1387, was enacted by Congress to restore and maintain the chemical, physical, and biological integrity of the United States waters.

2. The CWA prohibited the discharge of any pollutant into waters of the United States by any person, except in compliance with a permit issued under the National Pollution Discharge Elimination System ("NPDES") by the United States Environmental Protection Agency ("EPA") or by an authorized state.

3. The CWA defined a "person" as an individual or corporation, among others things, 33 U.S.C. § 1362(5); the "discharge of a pollutant" as any addition of any pollutant to navigable waters from any point source, 33 U.S.C. § 1362(12); a "point source" as any discernible, confined, and discrete conveyance from which pollutants are discharged, for example a pipe, ditch, channel, conduit, or discrete fissure, 33 U.S.C. § 1362(14); and a "pollutant" as, among other things, solid waste, sewage, chemical wastes, munitions, and industrial waste discharged into water.

4. The EPA delegated the NPDES program to the State of West Virginia in May 1982, see 47 Fed. Reg. 22, 363 (May 24, 1982). Thereafter, the NPDES program in West Virginia was administered by the West Virginia Department of Environmental Protection ("DEP").

5. The NPDES program required that all active and inactive coal mining operations that discharged pollutants into the waters of the United States obtain an NPDES permit for those discharges. These permits required the companies to have the water they discharged sampled, tested, and analyzed for pollutants specified in their NPDES permits at least twice a month, and the results of such analyses submitted to the DEP. The sampling, testing, and analysis had to be completed in

accordance with CWA methods and regulations. The DEP required that this testing and analysis be conducted by a DEP-certified laboratory.

6. In order to qualify as a DEP-certified laboratory, among other requirements, a laboratory had to fill out an application listing which EPA approved methods it was using to perform its testing and analyses. DEP also conducted an annual audit to ensure these procedures were being followed.

7. CWA regulations required that water samples (that were to be analyzed for particular pollutants) be preserved at or below six degrees Celsius, with the exception of those samples analyzed within 15 minutes of being pulled.

8. CWA regulations further required that all samples taken be representative of the monitored activity.

Factual Introduction

9. Appalachian Laboratories, Inc. (Appalachian), was a corporation organized and existing under the laws of the State of West Virginia, formed for the purposes, among others, of establishing and maintaining chemical laboratories and collecting and analyzing water samples from industrial sites to detect and measure the concentrations of certain pollutants in those samples and to report the results of such analyses to customers and to regulatory agencies.

10. Appalachian sought, obtained, and maintained certification from the DEP that permitted and authorized Appalachian to gather, test, and analyze water samples under and according to the standards and methods established by the EPA and enforced by the DEP for such collection, testing and analysis and to report the results of such testing and analysis to the DEP.

11. Under that DEP certification, Appalachian gathered and analyzed samples of water entering the waters of the United States from sources on or near coal mining operations in Southern West Virginia and reported the results of that analysis to its customers and to the DEP.

12. Defendant JOHN W. SHELTON was an agent and employee of Appalachian, that is a field technician and field manager, and, in such capacity gathered, transported, and stored water samples from the mine sites of Appalachian's customers in southern West Virginia and further supervised and directed the gathering, transportation, and storage of such water samples carried out by other employees of Appalachian.

The Conspiracy to Violate the Clean Water Act

13. From 2008 until approximately July 2013, defendant JOHN W. SHELTON knowingly conspired with a person known to the United States Attorney (the First Known Person) and other

individuals, both known and unknown to the United States, to commit offenses against the United States, that is: to knowingly tamper with, cause to be tampered with, falsify and render inaccurate monitoring methods required to be maintained under the Clean Water Act, namely that samples and measurements taken shall be representative of the monitored activity (40 CFR 122.4(j)(1)), and that samples (to be analyzed for certain pollutants) must be preserved at or below six degrees Celsius (40 CFR 136.3 Table II), in violation of 33 U.S.C. § 1319(c)(4).

*Objects of the Conspiracy*

14. The objects of the conspiracy were to increase the profitability of Appalachian by avoiding certain costs associated with full compliance with the Clean Water Act and to maintain and increase its revenue by providing its customers and the agencies regulating those customers with reports purporting to show that those customers were operating their sites in compliance with the CWA and thereby allow those customers to avoid fines and other costs associated with bringing their operations into compliance with the CWA and to thus encourage and maintain for Appalachian the patronage of those customers.

*Manner and Means of the Conspiracy*

15. The manner and means by which defendant JOHN W. SHELTON and his co-conspirators carried out and attempted to carry out the conspiracy included:

(a) knowingly diluting water samples, which the conspirators believed were not in compliance with CWA standards and the requirements of the NPDES permits under which the mine operated, to bring them within permit limits;

(b) knowingly substituting water that would test within permit limits in place of samples that had actually been gathered from mine sites in southern West Virginia, and which the conspirators believed would not be in compliance with CWA standards and the requirements of the NPDES permits under which the mine operated;

(c) knowingly failing to transport, store, and preserve water samples at the temperature required by the applicable regulations.

*Overt Acts*

16. In furtherance of the conspiracy and to further the conspiracy's objects, defendant JOHN W. SHELTON, the First Known Person, and others known and unknown to the United States, knowingly committed and caused to be committed, numerous overt acts, including the following:

(a) On or about March 1, 2012, at or near Beckley, West Virginia, defendant JOHN W. SHELTON added distilled water to a water sample pulled from a mine site in Nicholas County, West Virginia to ensure that the analysis of that water sample would result in measurements that would be in compliance with permit limits.

(b) On or about May 1, 2012 at or near Beckley, West Virginia, the First Known Person instructed the defendant JOHN W. SHELTON and other persons known and unknown to the United States to place ice in their coolers that they kept in their trucks in preparation for the DEP inspection, to conceal from the inspector that on a daily basis Appalachian did not properly preserve its samples.

All in violation of Title 18, United States Code, Section 371.

UNITED STATES OF AMERICA

R. BOOTH GOODWIN II
United States Attorney

By: _____
BLAIRE L. MALKIN
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
BECKLEY

UNITED STATES OF AMERICA

v. CRIMINAL NO._____

JOHN W. SHELTON

## STIPULATION OF FACTS

The United States and John W. Shelton stipulate and agree that the facts comprising the offense of conviction (One Count Information in the Southern District of West Virginia, Criminal No._____) and some of the relevant conduct for that offense, include the following:

### Appalachian Laboratories

Appalachian Laboratories, Inc., (Appalachian), was an environmental analysis company, located in Beckley, West Virginia. Appalachian was certified by the DEP to conduct analyses of water samples for companies that discharged water into the waters of the United States. These companies had to comply with CWA regulations regarding these discharges. Appalachian collected the water samples from the companies' discharge points and then analyzed the samples.

Appalachian's customers were primarily coal mining operations. Appalachian entered into contracts with these customers to collect water samples from the mine sites and to conduct the required analyses. Appalachian reported the results of its analyses to the companies for their use in reporting the pollutant levels in their discharges to the DEP to maintain compliance with their NPDES permits.

The Clean Water Act required that the water be collected, preserved, and analyzed in accordance with particular methods outlined in the regulations. To obtain and maintain its certification by DEP, Appalachian filled out an annual application. In that application and in an annual audit, Appalachian represented to the DEP that it gathered, stored, preserved, prepared, and tested all water samples in accordance

with the standards and methods required by the Clean Water Act and applicable regulations.

To carry out the water sampling and analysis, Appalachian had employees working in the field and in the lab. The employees who worked in the field were known as field technicians or field samplers. The field technicians went out to the water outlets on the various mine sites and collected the water samples that were needed for testing. The employees who worked in the lab consisted of those who prepared the samples for analysis and those who conducted the analyses.

John Shelton was a field technician and also a field supervisor at Appalachian. John Shelton was hired as a field technician in 2008. Around 2012 the First Known Person gave him additional responsibility as a field supervisor allowing him to supervise the work of the field technicians. John Shelton's duties consisted primarily of pulling water samples from mine sites and conducting the field tests on those samples. Throughout his time at Appalachian, the First Known Person stressed to him the importance of pulling "good samples." John Shelton and other employees understood that the terminology "good samples" meant samples that would test within NPDES permit limits - not samples that had been pulled properly.

## Offense and Relevant Conduct Related to the Conspiracy to Falsify, Tamper With, or Render Inaccurate a Monitoring Method Under the CWA

### *Refrigeration and Preservation*

The CWA required water samples that are to be tested for certain parameters be preserved at or below six degrees Celsius. This preservation temperature applied unless the sample is analyzed within fifteen minutes after it is pulled. This requirement preserves sample integrity.

From the time John Shelton was hired in 2008 until the summer of 2013, employees and agents of Appalachian including John Shelton and the First Known Person did not preserve water samples at the required temperature. John Shelton, the First Known Person, and other agents and employees of Appalachian collected water samples and put them into coolers that contained neither ice packs nor ice and kept the samples in their trucks all day until they returned to the lab. When they arrived at the lab, the samples were placed on counters or in boxes and not refrigerated.

When it came time for the annual DEP inspection, the First Known Person instructed John Shelton and other field technicians to make sure there was ice in their coolers. The annual inspections were the only time ice was put in the coolers to make it appear as if Appalachian regularly cooled its samples to the required temperature. Each time John Shelton, the First Known Person, and other employees at Appalachian failed to preserve the water samples at the required temperature they tampered with a method required to be followed by the CWA.

*Dilution and Substitution*

John Shelton, the First Known Person, and other employees and agents of Appalachian tampered with, falsified and rendered inaccurate monitoring methods required by the CWA by diluting water samples and substituting water samples from other sites. The practices of dilution and substitution of water samples resulted in the analysis of samples by Appalachian that were not representative of the monitored activity as required by the Clean Water Act. These samples did not represent the water that was actually flowing from the discharge ponds where John Shelton and other employees diluted the water samples or substituted water samples from other sites.

John Shelton was responsible for conducting the sampling and field testing at multiple mine sites. Several of these mine sites had outlets with discharges that would often or always test above permit limits. John Shelton could often tell by looking at the water whether it would likely test within permit limits for certain pollutants. At times when he knew the water would likely not be within permit limits, Shelton would dilute the water by adding some distilled water to the sample.

Appalachian employees used the term "honeyhole" to refer to water from certain sites that would always test within permit limits and could be used in place of or to dilute bad water. John Shelton used a particular "honeyhole" at an inactive mine site that the First Known Person had shown to him. The First Known Person had explained to Shelton that this water was always within permit limits. On at least one occasion, the First Known Person specifically directed John Shelton to use water from the inactive mine site in place of a sample from another site.

On several occasions, field technicians would call Shelton or bring a water sample to his house when they believed it would not pass. John Shelton would sometimes tell the sampler he

would take care of it and then replace the sample that the sampler believed would test outside permit limits with a sample from the "honeyhole." On at least one occasion in March 2012, John Shelton added distilled water to a sample so that the field technician could turn in a sample that was within permit limits. At other times, John Shelton instructed the sampler to throw out the sample and pull another one later.

*Impact of the Conspiracy to Violate the CWA*

Each time that Shelton and others at Appalachian diluted the sample water or replaced the sample water with water that would pass they allowed water that they believed exceeded permit limits to discharge into the waters of the United States. This occurred on an ongoing basis. These discharges violated the levels in the NPDES permits.

Appalachian was located in Beckley, Raleigh County, West Virginia. Appalachian's customers' sites were located throughout the Southern District of West Virginia.

This Stipulation of Facts does not contain each and every fact known to John Shelton and to the United States concerning his involvement and the involvement of others in the charges set forth in the Indictment, and is set forth for the limited purpose of establishing a factual basis for the defendant's guilty plea.

Stipulated and agreed to:

John Shelton
Defendant

8-22-14
Date

Thomas G. Dyer, Esquire
Counsel for Defendant

8/22/14
Date

Blaire L. Malkin
Assistant United States Attorney

9/10/14
Date