Statutory Interpretation of Clean Water Act Section 1319(C)(2)(A)'s Knowledge Requirement: Reconciling the Needs of Environmental and Criminal Law

*Katherine H. Setness**

CONTENTS

* Associate, Hartmann & Setness, Stockton, California. J.D. 1995, Boalt Hall School of Law, University of California at Berkeley; recipient of the Boalt Hall Environmental Law Certificate; B.S., 1982, California Polytechnic State University, San Luis Obispo. The author is grateful to Professor John P. Dwyer for guidance and the many hours spent exploring the normative issues raised in this paper, and to Jeffrey B. Setness, criminal defense counsel and former Assistant U.S. Attorney, for insight into the practical realities of criminal prosecution.

INTRODUCTION

The two basic goals of environmental law are to reduce the human health risks resulting from pollution and to preserve biodiversity.[1] In pursuit of these goals, environmental law has often had a wrenching effect on the traditional principles of many other legal areas, causing major shifts in the evolution of precedent, policy rationales, and societal goals embodied in the competing law. Prime examples of this phenomenon include the impact environmental law

1. Donald T. Hornstein, *Lessons from Federal Pesticide Regulation on the Paradigms and Politics of Environmental Law Reform*, 10 YALE J. ON REG. 369, 380-83 (1993).

has had on conventional doctrine in the areas of standing,[2] lender liability,[3] bankruptcy,[4] and corporate dissolution law.[5]

Many courts and commentators express fear that this phenomenon is also taking place as environmental law confronts the traditional goals of criminal law.[6] In particular, they worry that the pursuit of environmental goals threatens to override the criminal law's traditional requirement that criminal punishment be predicated on a showing of *mens rea*.[7]

Recently, commentators have argued that it is time to reconcile the competing goals of environmental and criminal law, rather than letting one subsume the other.[8] The ideal solution would be a thorough Congressional re-examination of the criminal provisions of major environmental statutes. This seems unlikely in the near future, however.[9] An interim solution is to foster a judicial interpretation of the *mens rea* element of "knowledge" in the criminal provisions of existing environmental laws that aims to assimilate the competing goals of environmental and criminal law. This would occur by reconciling the need for the law to give fair warning of actions constituting criminal conduct with the need to disallow ignorance of the law as a defense.[10]

This comment seeks to reconcile these competing goals with regard to statutory interpretation of a provision of the Clean Water Act.[11] Section 1319(c)(2)(A) of the Clean Water Act provides that people who "knowingly" violate the Act are guilty of a felony.[12] Two recent U.S. Court of Appeals decisions, *United States v. Weitzenhoff*[13]

2. *See, e.g.,* Sierra Club v. Morton, 405 U.S. 727 (1972) (allowing destruction of scenery, natural and historic objects, and wildlife as a sufficient injury in fact to form a basis for standing under the Administrative Procedure Act).

3. *See, e.g.,* United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990) (broadly interpreting CERCLA liability which attaches through "participation in the management" to include the "capacity to influence" the treatment of hazardous waste).

4. *See, e.g., In re* Chateaugay Corp., 944 F.2d 997 (2d Cir. 1991) (holding that an injunctive remedy is not a dischargeable claim in bankruptcy).

5. *See, e.g.,* United States v. Sharon Steel Corp., 681 F.Supp. 1492, 1496 (D. Utah 1987) (stating that CERCLA preempts state laws which have the effect of limiting the liability of those whom Congress intended to be responsible for cleanup costs).

6. *See generally,* Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime,* 27 LOY. L.A. L. REV. 867, 887-89 (1994) (exploring the difficulty of assimilating environmental protection values into the rules of criminal law).

7. *See infra* part V.

8. *See* Lazarus, *supra* note 6, at 887-90.

9. *See id.*

10. *Id.*

11. 33 U.S.C. §§ 1251-1387 (1994).

12. 33 U.S.C. § 1319(c)(2)(A) (1988).

13. United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1993).

and *United States v. Hopkins*[14], interpret section 1319(c)(2)(A). Unfortunately, these decisions fail to engage in the careful analysis that this important issue requires. Both properly hold that knowledge of the law is not an element of a section 1319(c)(2)(A) violation.[15] However, neither decision specifically delineates the prima facie case that must be established to prove guilt under this section, and therefore they fail to identify what "knowledge" is sufficiently blameworthy to justify a conviction under section 1319(c)(2)(A). This failure is particularly troublesome in the context of the Clean Water Act, a statute with "tremendous sweep,"[16] which regulates a wide variety of activities, ranging from the disposal of highly toxic materials to "much more ordinary, innocent, productive activity . . . than people not versed in environmental law might imagine."[17]

The purpose of this comment is to build on the *Weitzenhoff* and *Hopkins* decisions by identifying which facts the defendant must have "known" in order to commit a section 1319(c)((2)(A) violation. Part I outlines the structure of the Clean Water Act and introduces its provisions on criminal penalties.

Part II explores the rules of statutory interpretation, including the role of the public welfare offense doctrine. While these rules are often contradictory and unclear, a basic understanding of the process of statutory interpretation is necessary to understand the arguments surrounding section 1319(c)(2)(A).[18]

Part III analyzes two strands of relevant precedent. First, it discusses the heated judicial debate regarding application of the public welfare offense doctrine to "knowing" violations of the Resource Conservation and Recovery Act (RCRA),[19] a debate whose outcome has sometimes resulted in a reduced *mens rea* requirement for "knowing" violations of that statute. Second, it discusses four 1994 Supreme Court cases interpreting the scienter requirements of four non-environmental statutory crimes. These cases may be read to restrict use of the public welfare offense doctrine and reduce judicial leeway to adopt a lower standard for a statute's "knowledge" requirement.

14. United States v. Hopkins, 53 F.3d 533 (2d Cir. 1995).

15. United States v. Weitzenhoff, 35 F.3d at 1283; United States v. Hopkins, 53 F.3d at 541.

16. United States v. Weitzenhoff, 35 F.3d at 1293.

17. *Id.*

18. "[L]egislatures and not courts should define criminal activity." United States v. Bass, 404 U.S. 336, 348 (1971). Unfortunately, the level of *mens rea* set by Congress is often ambiguous, and this permits the courts great leeway in their interpretation of congressional intent. *See* Kevin A. Gaynor et al., *Environmental Criminal Prosecutions: Simple Fixes for a Flawed System*, 3 VILL. ENVTL. L.J. 1, 5-10 (1992).

19. 42 U.S.C. §§ 6901-6986 (1988).

These strands of precedent delineate the competing policy issues informing the interpretation of section 1319(c)(2)(A).

Part IV examines *United States v. Weitzenhoff*[20] and *United States v. Hopkins*,[21] two recent U.S. Court of Appeals decisions interpreting the "knowingly violates" language of section 1319(c)(2)(A). This comment argues that these cases properly held that the government need not prove the defendant had knowledge of the law to sustain a conviction under 1319(c)(2)(a). However, the two opinions stopped short of a complete *mens rea* analysis in that they did not clearly establish what facts a defendant must "know" in order to be guilty.

Part V interprets section 1319(c)(2)(A) in a way that remains loyal to the rules of statutory interpretation while reconciling the competing needs of environmental and criminal law. It begins with a general discussion of these competing needs. It then argues that the competing needs of these two areas of law can best be met by requiring the government to prove that the justifications of the public welfare offense doctrine apply to the facts of the particular case, through proof that the defendant: (1) knew that his or her conduct was subject to strict regulation; or (2) knew that his or her conduct had the potential to cause significant harm to human health or the environment, while allowing the defendant the opportunity to establish an affirmative mistake-of-fact defense. This comment concludes with model jury instructions on this issue.

I
STRUCTURE OF THE CLEAN WATER ACT

A. Overview

The Clean Water Act (CWA), officially known as the Federal Water Pollution Control Act, was enacted in 1972, and amended in 1977 and 1987.[22] It covers a broad range of conduct. While most statutes permit anything except what is prohibited, the Clean Water Act prohibits all regulated conduct involving waters and wetlands except what is permitted.[23] Defining the boundaries of the CWA's jurisdiction is made difficult by its multiple terms of art, some of which retain little of their plain language meaning. The CWA prohibits the dis-

20. United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1993).

21. United States v. Hopkins, 53 F.3d 533 (2nd Cir. 1995).

22. JOHN P. DWYER & MARIKA F. BERGSUND, FEDERAL ENVIRONMENTAL LAWS ANNOTATED 717 (1994-95).

23. 33 U.S.C. § 1311(a) (1983). "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." *Id.* "Much more ordinary, innocent, productive activity is regulated by this law than people not versed in environmental law might imagine." United States v. Weitzenhoff, 35 F.3d at 1293.

charge[24] of any pollutant[25] by any person[26] into the navigable waters of the United States[27] through point sources[28] not in compliance with the standards of Title III of the CWA or the permit requirements of the National Pollutant Discharge Elimination System (NPDES).[29] Thus, the Clean Water Act, taken to its logical extreme, is violated by a father (person) taking rocks (pollutant) from a container (point source) in order to teach his son to skip (discharge) rocks in a stream (navigable water of the United States) without a permit (not in compliance with the permit requirements). Of course, the Clean Water Act is also violated by the improper discharge of "toxic pollutants,"[30] "oil and hazardous substances,"[31] and "sewage sludge,"[32] and the regulation of these types of discharge is the primary focus of the Act.[33]

24. "Discharge" is defined as "any addition of any pollutant to navigable waters." 33 U.S.C. § 1362(12) (1988).

25. "Pollution" is defined as "the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water." 33 U.S.C. § 1362(19) (1988).

26. "Person" is defined as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5) (1988).

27. "Navigable waters" are defined as the "waters of the United States." 33 U.S.C. § 1362(7) (1988). The Environmental Protection Agency and the Army Corps of Engineers have construed "waters of the United States" to include "wetlands." 33 C.F.R. § 328.3(b) (1993) (Army Corps' definition); 40 C.F.R. § 230.3 (t)(1993) (EPA definition). "Wetlands" are defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(a) (1993) (Army Corps' definition); 40 C.F.R. § 230.3(s) (1993) (EPA definition). Wetlands generally include swamps, marshes, bogs, and similar areas. Thus, the Army Corps of Engineers' definition of "wetlands" encompasses "land that is not 'wet' in the ordinary sense of the word." United States v. Mills, 817 F. Supp. 1546, 1553 (N.D. Fla. 1993). The federal courts have applied the Clean Water Act to waters with only a slight connection to navigable waters. *See, e.g.*, West Virginia Coal Ass'n v. Reilly, 728 F. Supp. 1276, 1291 (S.D. W. Va. 1989), *aff'd*, 932 F.2d 964 (4th Cir. 1991) (CWA applied to instream fills and treatment ponds); United States v. Larkins, 657 F. Supp. 76, 79 (W.D. Ky. 1987), *aff'd*, 852 F.2d 189 (6th Cir. 1988), *cert. denied*, 489 U.S. 1016 (1989) (CWA applied to wetlands adjacent to rivulets); Leslie Salt Co. v. Froehlke, 578 F.2d 742, 756 (9th Cir. 1978) (CWA applied to water trapped behind company's dikes even though no longer subject to tidal fluctuations).

28. "Point source" is defined as "any discernible, confined and discrete conveyance . . . ." 33 U.S.C. § 1362(14) (1988).

29. 33 U.S.C. § 1311(a) (1988).

30. *See* 33 U.S.C. § 1317(a) (1988).

31. *See* 33 U.S.C. § 1319(c)(7) (1988).

32. *See* 42 U.S.C. § 6901 (1988).

33. *See* United States v. Weitzenhoff, 35 F.3d 1275, 1284-85 (9th Cir. 1993).

B. Enforcement

The Clean Water Act contains an "elaborate hierarchy of enforcement provisions."[34] No showing of intent is required for issuing compliance orders[35] or assessing either of two classes of administrative penalties.[36] The court is directed to consider compliance efforts by the violator when imposing civil penalties.[37]

The Clean Water Act's enforcement provisions culminate in criminal penalties. Section 1319(c) establishes three levels of criminal penalties. The government must prove negligence to impose misdemeanor penalties under section 1319(c)(1).[38] In order to impose felony penalties under section 1319(c)(2), the government must prove "knowing" behavior.[39] Finally, a "knowing endangerment" conviction under section 1319(c)(3) requires an even greater showing of mental culpability, the "knowing[ ] violat[ion]" of a permit condition with contemporaneous knowledge that the violation "place[s] another person in imminent danger of death or serious bodily injury."[40]

In this "carefully calibrated enforcement scheme,"[41] each criminal provision requires, in identical language, that the accused have violated "any permit condition or limitation."[42] Thus, only the mental

34. Brief of National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Appellants' Petition for Rehearing at 3, United States v. Weitzenhoff, 35 F.3d 1275 (Nos. 92-10105 and 92-10108).

35. Section 1319(a) authorizes the EPA to issue compliance orders to any person in violation of EPA implementing rules or in violation of any condition or limitation of a permit. 33 U.S.C. § 1319(a) (1988).

36. Section 1319(g) provides that any person who has violated any permit condition or limitation is subject to two classes of administrative penalties. 33 U.S.C. § 1319(g) (1988).

37. Section 1319(d) provides that any person who violates any permit condition or limitation is subject to civil penalties of up to $25,000 per day through a civil action in federal district court. In determining the amount of the penalty, the court is directed to consider any good faith efforts by the violator to comply with the applicable requirements. 33 U.S.C. § 1319(d) (1988).

38. Section 1319(c)(1) provides that any person who "negligently violates . . . any permit condition or limitation . . . in a permit . . . shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both . . . ." 33 U.S.C. § 1319(c)(1) (1988).

39. Section 1319(c)(2) provides that any person who "knowingly violates . . . any permit condition or limitation . . . shall be punished by a fine of not less that $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both . . . ." 33 U.S.C. § 1319(c)(2) (1988).

40. Section 1319(c)(3) allows a fine of not more than $250,000 or imprisonment for not more than 15 years, or both. 33 U.S.C. § 1319(c)(3) (1988).

41. Brief of National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Appellants' Petition for Rehearing at 5, United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1993) (Nos. 92-10105 and 92-10108).

42. *Id.*

element changes from misdemeanor to felony violations, escalating with the gravity of the penalty that may be imposed.[43]

This comment focuses on section 1319(c)(2), which prohibits a knowing violation of the Act.[44] It provides, in pertinent part, that:

> Any person who—(A) *knowingly violates* [an effluent limitation, reporting or record requirement, pretreatment standard], or any permit condition or limitation . . . shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation or by imprisonment for not more than 3 years, or by both.[45]

This is a broad provision encompassing virtually all of the statutes and incorporated regulations which can give rise to criminal violations under the Clean Water Act.[46]

The language of this provision lends itself to two basic interpretations. First, it can be interpreted to require that an individual "knows" she is violating the Clean Water Act when she commits the violation in order to be found guilty under this provision. This interpretation leads to the conclusion that Congress intended to override the traditional maxim that "ignorance of the law is no defense."[47] On the other hand, section 1319(c)(2)(A) can be interpreted to require that an individual "knows" certain facts involving her conduct, but not that she "knows" she is violating the Clean Water Act. This interpretation raises a question: what facts must the individual "know"?

C. *An Illustrative Hypothetical*

The following hypothetical illustrates the difficulties in determining when an individual has "knowingly" violated the Clean Water Act.[48] Assume that a jelly bean factory produces a certain variety of "sugar water" (water with a pH level of less than 5) as a by-product of

---

43. *Id.*

44. 33 U.S.C. § 1319(c)(2)(A) (1988). Subsection (B)—a completely new provision added in 1987 to close a regulatory loophole—has substantially different terms than the traditional definition found in all other enforcement provisions both prior to and after the 1987 Amendments. *See* 33 U.S.C. § 1319(c)(2)(B) (1988). This subsection prohibits:

> "knowingly introduc[ing] [pollutants or hazardous substances] into a sewer system or into a publicly owned treatment works ("POTW") any pollutant or hazardous substance which [is known] or reasonably should have [been] known could cause personal injury or property damage or . . . which causes [the POTW] to violate [its own permit]."

Id. What distinguishes subsection (B) is that it is limited to violations which the actor knows, or reasonably should know, could cause either personal injury, property damage, or a violation of effluent limitations by a POTW.

45. 33 U.S.C. § 1319(c)(2) (1988) (emphasis added).

46. *See id.*

47. United States v. Johnson & Towers, Inc., 741 F.2d 662, 669 (3d Cir. 1984).

48. The following hypothetical may sound as farfetched and absurd as a fact pattern on a law school exam. It is, however, loosely based on the facts of an actual Clean Water Act case: United States v. Liquid Sugars, Inc., 158 F.R.D. 466 (E.D. Cal. 1994). For a discussion of *Liquid Sugars*, see *infra* part IV.B.1.

its manufacturing process. This sugar water, because of its low pH, is considered a pollutant under the Clean Water Act.[49] The factory holds a NPDES[50] permit to discharge 500 gallons of sugar water into the city storm sewer each day. Under normal operating conditions, the factory discharges 495 gallons of sugar water per day.

In celebration of its recent expansion, the factory holds a public open house where it serves fruit punch and its new line of gourmet jelly beans. During the open house, several people each pour ten gallons of sugar water down the drain under the circumstances described below. Each of these people cause a violation of the Clean Water Act, because their individual ten gallon discharges, in combination with the plant's normal 495 gallon discharge earlier in the day, causes the plant to exceed the 500 gallon discharge limit established by its NPDES permit. The relevant inquiry then becomes: which of the following people "knowingly" violated the Clean Water Act?

(1) A secretary leaving for the day accidently trips over a ten-gallon container of punch left on the floor, causing the punch to spill down a nearby drain.

(2) A janitor in the kitchen dumps what he thinks is a pot of water down the drain. The pot actually contains ten gallons of sugar water meant for the punch.

(3) The helpful plant manager carries the leftover punch back into the kitchen, pouring ten gallons of this sugar water down the drain. The manager knows she is pouring out punch, but does not realize that the punch contains sugar.

(4) The cook pours ten gallons of excess punch left in the kitchen down the drain. He knows the punch is made of sugar, but has no idea that it might be harmful or illegal to dump sugar water down the drain.

(5) The public relations officer prepares a display of how the jelly beans are made. After the open house, she takes down the display, and pours the ten gallons of sugar water used in the display down the drain. The officer knows the substance is sugar water and knows the Clean Water Act prohibits the disposal of some "pollutants" down the drain, but has no idea that sugar water is a "pollutant."

(6) The assistant to the public relations officer pours another ten gallons of left-over sugar water down the drain. He recognizes that, because of its pH level, sugar water is a "pollutant." He also knows that the factory has a permit to discharge sugar water, but does not

49. "Sugar water" is not always the harmless substance it may seem. For example, the disposal of large amounts of "sugar water" by Hawaiian sugar mills has caused serious damage to local coral reefs. DAILY ENV'T NEWS, Feb. 25, 1994, at 26.

50. *See* 33 U.S.C. §§ 1251(a), 1311(b)(1)(c) (1988).

realize that the addition of ten gallons causes the factory to exceed its daily limit.

(7) The plant engineer holds a manufacturing demonstration and pours ten gallons of sugar water down the drain as part of the demonstration. He knows that he is working with sugar water, that sugar water meets the Act's definition of "pollutant," and that this disposal will cause the factory to exceed its daily NPDES permit limit.

Which of these people "knowingly" violated the Clean Water Act? Only two answers are clear. The secretary in example (1) did not "knowingly" violate the Act, as her discharge was entirely accidental. The plant engineer in example (7) did "knowingly" violate the Act, as he knew that his act would cause the plant to exceed its permit. All of the other individuals, however, "knew" certain things about their discharge, but did not "know" certain other things. The focus of this comment is to determine which, if any, of these people could be convicted under section 1319(c)(2)(A) consistently with the goals of environmental law and criminal law. Because this comment concludes that the answer may depend on the nature of the "pollutant" being "discharged," it may be helpful to imagine a similar hypothetical, but one that involves the discharge of highly toxic paint thinner, rather than sugar water.

II
RULES OF STATUTORY INTERPRETATION

This part provides the background necessary to understand fully the debate surrounding interpretation of section 1319(c)(2)(A), and other environmental statutes criminalizing "knowing" behavior, by providing a brief overview of some important rules of statutory construction. It pays special attention to the public welfare offense doctrine, because this doctrine has played an important role in the interpretation of the criminal provisions of environmental statutes.[51]

How should a court proceed when litigants disagree about the proper interpretation of a statute? Both commentators and the courts are engaged in a lively debate on this question.[52] The methodological arguments center on the order in which the different rules are utilized and the rigidity of their application, as the framework of analysis frequently determines the outcome.

---

51. *See infra* part II.D.

52. For a general overview of the complexities of statutory interpretation, see William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992).

Skeptics argue that the canons of statutory interpretation are merely judicial inventions "designed to serve the self-interest of their inventors."[53] Nonetheless, lower courts remain obligated to attempt to make sense of contradictory and confusing precedent on this issue when faced with a question of statutory interpretation.

A. Statutory Language and the Plain Meaning Rule

Examination of the statutory language itself is the first step in statutory interpretation. The "plain meaning rule" provides that if the meaning of a statute is unambiguous, the court should adopt this meaning, regardless of legislative history or policy considerations.[54] Proponents of the plain meaning rule argue that it advances several policies regarding the proper role of a court. First, the ordinary meaning of the text is a more reliable guide than legislative history to the intent of all the actors in the federal legislative process.[55] Second, the ordinary meaning of a phrase makes statutory language more accessible and comprehensible to officials enforcing and citizens affected by the legislation.[56] Third, ordinary meaning can constrain judicial discretion more effectively than recourse to legislative history.[57]

The plain meaning rule's major weakness is that judges are often unable to agree on a given statute's plain meaning.[58] This problem is prominently displayed in *United States v. Yermian*,[59] a Supreme Court case in which all justices agreed that the statutory meaning was unambiguous and therefore plain, but split five to four over what that meaning was.[60] Furthermore, neither the majority nor the dissent adopted the lower court's "plain meaning" interpretation.[61] Thus, the plain meaning rule often provides little help to courts attempting to interpret a statute.

---

53. Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 649 (1992).

54. Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992) ("In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.").

55. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990).

56. *Id.*

57. *Id.*

58. *See id.*

59. United States v. Yermian, 468 U.S. 63 (1984).

60. *Id.* at 77.

61. Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561, 1571 (1994) (book review).

B. The Rule of Lenity

The "rule of lenity" commands the court to give an ambiguous criminal statute a narrow interpretation.[62] This rule of construction rests on the principle that courts should not extend the reach of a criminal statute beyond what the legislature clearly enacted. Courts and commentators disagree, however, about the timing of the rule's application. If the rule of lenity is applied only if reference to legislative history and other extra-textual materials are inconclusive, it has virtually no role to play.[63] In contrast, if the rule is employed before examining legislative history, it sharply curtails inquiry into legislative intent.

Like the plain meaning rule, the rule of lenity is a principle of judicial restraint, meant to restrict the leeway of judicial interpretation. "The rule . . . is founded on the tenderness of the law for the rights of individuals; and on the plain principle, that the power to punish is vested in the legislature, not in the judicial department."[64] Traditionally, the rule has operated as a background principle, which, when balanced with other tools of statutory interpretation, is meant to assure that the statutory words are given "fair meaning in accord with the manifest intent of the lawmakers."[65] As one commentator notes, "[t]he rule of lenity's 'slant' is to maintain the balance between the courts and the legislature and to help avoid constitutional difficulties by obviating inquiry into underlying due process concerns."[66]

C. Legislative Intent

1. Legislative History

If a statute's meaning is not "plain," then a court will denominate the statute as "ambiguous." At this point, the court will look to indications of legislative intent to assist it with its interpretation, unless it decides that the rule of lenity prohibits such action. In recent decades, legislative history has been an important tool for courts seeking to ascertain the congressional intent behind ambiguous statutory provisions. The legislative history typically encompasses the evolution of the statute from early legislative proposals to enactment. The court considers this evolution to "recreate the general assumptions, goals, and limitations of the enacting Congress," thereby reaching the inter-

62. *See* Sarah Newland, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197, 198 (1994).

63. *See id.*

64. United States v. Witlberger, 18 U.S. (5 Wheat.) 76, 95 (Marshall, Circuit Justice 1820).

65. United States v. Brown, 333 U.S. 18, 25 (1948) (stating that the rule "is not an inexorable command to override common sense and evident statutory purpose.").

66. Newland, *supra* note 62, at 204.

pretation that Congress presumably would have given had the issue been posed directly at the time.[67]

2. *Constitutional Considerations*

In addition to legislative history, a court can consider an important background assumption about congressional intent to help it interpret a statute: a court should assume that Congress intended to enact a constitutional statute. Thus, if a statute is ambiguous, and one possible interpretation leads to an unconstitutional result but another interpretation does not, the court should adopt the constitutional interpretation.[68] The exact dimensions of what type of conduct can be criminalized consistent with the Constitution have not been precisely drawn, but some limits clearly exist.[69] An important constitutional issue, for the purposes of this comment, is the due process concern raised by criminalizing unintentional behavior through strict liability.

D. The Public Welfare Offense Doctrine

The public welfare offense doctrine is a tool of statutory interpretation that generally applies only in highly regulated areas of the law. By imposing a threat of criminal penalties, rather than merely economic civil sanctions, the doctrine's policy goal is to force corporate officers to internalize the risks of business.[70] The scope and application of the doctrine has varied over the years, originating in strict liability misdemeanor statutes imposing small monetary penalties and expanding to felonies with an explicit "knowledge" requirement.

Courts employ the doctrine to reduce or eliminate the criminal law's general requirement of *mens rea*[71] on the rationale that where "dangerous or deleterious devices or products or 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."[72]

---

67. Eskridge, *supra* note 55, at 630.

68. United States v. X-Citement Video, Inc., 115 S. Ct. 464, 467-70 (1994) ("We do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution as construed by this Court."); Yates v. United States, 354 U.S. 319, 324 (1957) ("in [construing the statute] we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked.").

69. *See* United States v. Cordoba-Hincapie, 825 F. Supp. 485, 515 (E.D.N.Y. 1993).

70. *See* Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law,* 83 GEO. L.J. 2407, 2412-13 (1995); John F. Cooney, *Defenses to the Second Generation of Environmental Crimes,* C964 ALI-ABA 39, 42 (Oct. 20, 1994).

71. *See infra* part III.A.

72. United States v. International Minerals & Chem. Corp., 402 U.S. 558, 565 (1971).

1. Historical Origin

The public welfare offense doctrine originated as a method of statutory interpretation, through which courts declined to read a *mens rea* element into misdemeanor violations of regulations that are silent as to scienter.[73] The early strict liability misdemeanors were designed to protect public health and safety[74] by "heighten[ing] the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare."[75] These new "public welfare" crimes denoted a shift from punishing moral wrongdoing to protecting social and public interests. As the purpose of the criminal statute shifted, so did the requisite *mens rea*; instead of a mind bent on evil-doing, the regulations required an intent to do that which unduly endangers social or public interests.[76]

In an early application of the public welfare offense doctrine, the Supreme Court held that the 1914 Anti-Narcotic Act's[77] "manifest purpose [was] to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute," and therefore refused to import a common law *mens rea* requirement into the strict liability statute.[78]

Application of the doctrine was refined in *United States v. Dotterweich*,[79] which held that strict liability was appropriate where Congress had sought to make the misdemeanor regulation more effective by dispensing with any intent element.[80] The interest of protecting the public allowed Congress to override the traditional requirement of an evil intent and place the risk of criminal conviction for an *actus reus* on a person otherwise innocent but standing "in responsible relation to a public danger."[81] *Dotterweich* upheld the strict liability conviction of a corporate officer for shipping adulterated drugs.[82] In so doing, the Court reasoned that: "[T]he purposes of this legislation touch phases of the lives and health of people which, in the circumstances of

73. *See* United States v. Balint, 258 U.S. 250, 255 (1922).
74. *See* United States v. Dotterweich, 320 U.S. 277, 280-81 (1943).
75. Morissette v. United States, 342 U.S. 246, 254 (1952).
76. United States v. Cordoba-Hincapie, 825 F. Supp. 485, 503 (E.D.N.Y. 1993).
77. Former Harrison Anti-Narcotics Act of December 17, 1914, 38 Stat. 785, Ch. 1 § 9 (1914).
78. United States v. Balint, 258 U.S. 250, 254 (1922).
79. United States v. Dotterweich, 320 U.S. 277 (1943).
80. *Id.* at 280.
81. *Id.* at 281. Although the *Dotterweich* Court did not define such a "responsible relationship," dicta from a later Supreme Court opinion stated that engaging in commercial activity which introduced items with the potential to cause harm into the stream of commerce would constitute such a responsible relationship. United States v. Park, 421 U.S. 658, 672 (1975).
82. United States v. Dotterweich, 320 U.S. at 280.

modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation . . . ."[83]

2. *Modern Approaches*

Over time, the Supreme Court expanded the application of the public welfare offense doctrine in two important ways. First, it used the doctrine to interpret statutes imposing felony, rather than misdemeanor, penalties. Second, it used the doctrine to interpret statutes criminalizing "knowing" conduct rather than confining the doctrine to strict liability crimes. By focusing on the dangerous character of the offense, the modern approach has expanded the doctrine's range while narrowing its scope.

In 1971, the public welfare offense doctrine's range was expanded to cover statutes establishing felony penalties in *United States v. Freed*.[84] Here, the Court construed the registration provision of the National Firearms Act, which made it unlawful for any person "to receive or possess a firearm which is not registered to him . . . ."[85] Classifying the offense as a "regulatory measure in the interest of public safety,"[86] the Court held that the government must prove the defendant knew that the instruments possessed were hand grenades, but not that he knew that the hand grenades were unregistered.[87]

The Court was not concerned that such a ruling might impinge on the constitutional due process right of fair notice,[88] as "one would hardly be surprised to learn that possession of hand grenades is not an innocent act."[89] Thus, the Court distinguished the act of possessing grenades, which by their nature alert their possessor to the potential danger, from circumstances where a reasonable person would have no reason to think there might be a duty to inquire about applicable regulations.[90]

---

83. *Id.*

84. United States v. Freed, 401 U.S. 601 (1971).

85. 26 U.S.C. § 5861(d) (1964 ed., Supp. V).

86. United States v. Freed, 401 U.S. at 609. The Court contrasted the registration of hand grenades with the statute struck down in Lambert v. California, 355 U.S. 225 (1957), which made it a crime for convicted felons to remain in Los Angeles for more than five days without registering. United States v. Freed, 401 U.S. at 609. "Being in Los Angeles is not per se blameworthy," and does not "alert the doer to the consequences of his deed." Lambert v. California, 355 U.S. at 228.

87. United States v. Freed, 401 U.S. at 608.

88. *Id.* Where there is no notice, and therefore no duty to inquire, an unknowing defendant may not be convicted consistently with due process. "Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community." *Id.*

89. *Id.* at 609. The *Freed* opinion expands the application of the public welfare offense doctrine from statutes regulating those engaged in commerce to statutes regulating private individuals handling inherently dangerous items. *See id.*

90. *Id.*

The public welfare offense doctrine was used to interpret a statute criminalizing "knowing" conduct in *United States v. International Minerals & Chemical Corp.*[91] In *International Minerals*, the Supreme Court interpreted a provision of the Federal Explosives Act,[92] which imposed misdemeanor penalties on any individual who "knowingly violates any . . . regulation" promulgated by the Interstate Commerce Commission for the safe transportation of corrosive liquids.[93] The defendants in *International Minerals* were charged with "knowingly" failing to show on shipping papers the required classification of corrosive liquids being transported across state lines.[94]

The Court found that the term "knowingly" referred only to the acts made criminal, not to knowledge of the regulations, and that the term "regulations" was simply a shorthand designation for the specific acts which violated the statute.[95] Following *United States v. Freed*, the Court indicated that where "dangerous or deleterious devices or products or 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."[96]

International Minerals establishes a presumption of knowledge, but that presumption is rebuttable. The Court sought to protect the unwary by fashioning a good faith defense for those unaware that they were dealing with hazardous substances.[97]

3. *Limitations of the Public Welfare Offense Doctrine*

The Supreme Court has always acknowledged that the public welfare offense doctrine is a departure from the principles of construction generally applicable to statutory *mens rea* requirements.[98] In 1952, in *Morissette v. United States*,[99] the Supreme Court first began to define the boundaries within which the public welfare offense doctrine should function. In overturning a Sixth Circuit decision based on the public welfare offense doctrine, the Supreme Court held that, as ap-

91. United States v. International Minerals & Chem. Corp., 402 U.S. 558 (1971).

92. 50 U.S.C. §§ 121-44 (1970).

93. United States v. International Minerals, 402 U.S. at 559. The "knowingly violates" requirement of the statute at issue in *International Minerals* closely parallels the language of the "knowingly violates" requirement of section 1319(c)(2)(A) of the Clean Water Act. *Compare* former 18 U.S.C. § 834(f) (1979) *with* 33 U.S.C. § 1319(c)(2)(A) (1988).

94. United States v. International Minerals & Chem. Corp., 402 U.S. at 559.

95. *Id.* at 562-64.

96. United States v. International Minerals & Chemical Corp., 402 U.S. at 564.

97. *Id.* at 563-64 ("A person thinking in good faith that he was shipping distilled water when in fact he was shipping some dangerous acid would not be covered [by the statute].").

98. Morissette v. United States, 342 U.S. 246, 250 (1952).

99. *Id.*

plied to a "knowing conversion of government property," proof of "knowing conversion" requires more than proof that the defendant knew he was taking the property into his possession.[100] "He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion."[101] This required the government to prove that the defendant knew he was taking government property, and that by so taking the property, he was converting it to his own use.[102]

The Court distinguished the statute in *Morissette*, governing conduct that poses no direct threat to human health or safety, from true public welfare offenses. The Court described such statutes as imposing a duty of care, the violation of which pose a probability of danger to people or property, and which generally carry small misdemeanor penalties.[103] The Court supported this argument by noting that the defendant was not engaged in highly regulated commerce, and therefore likely to be knowledgeable of the regulations affecting his trade, but was a part-time scrap metal collector.[104]

The nature of the public welfare offense doctrine was further refined and limited in *Liparota v. United States*.[105] In *Liparota*, the Court interpreted a statutory provision criminalizing the "knowing" misuse of food stamps.[106] The Court looked at the character of the offense and asked two questions. First, was the sale of food stamps the "type of conduct that a reasonable person should know is subject to stringent" public regulation?[107] Second, could the conduct "seriously threaten the community's health" or safety?[108]

The Court distinguished the fraudulent use of food stamps from the violations in *Freed* and other public welfare offense cases by answering just these questions. It stated that "[t]he distinctions between these cases and the instant case are clear. A food stamp can hardly be compared to a hand grenade . . . nor can the unauthorized acquisition or possession of food stamps be compared to the selling of adulterated

100. *Id.* at 270-71.

101. *Id.* at 271.

102. *Id.* It is not apparent how the defendant could have knowingly or intentionally converted property that he did not know could be converted. If someone does not know certain property belongs to the government, that person cannot know the property is being "converted": someone cannot "knowingly convert" property he believes to be abandoned.

103. *Id.* at 256.

104. *Id.*

105. Liparota v. United States, 471 U.S. 419 (1985).

106. Section 2024(b)(1) of the Food Stamp Act provides that "whoever knowingly uses, transfers, acquires, alters, or possesses coupons . . . in any manner contrary to [the statute]" shall be guilty of a criminal offense. 7 U.S.C. § 2024(b)(1) (1977).

107. Liparota v. United States, 471 U.S. at 433.

108. *Id.*

drugs."[109] Reluctant to criminalize a broad range of apparently innocent conduct without a clear message from Congress, the Court held that the culpability requirement should be read to modify all elements of the offense.[110]

Thus, the boundaries of the modern public welfare offense doctrine have now expanded to include felonies as well as statutes requiring that a defendant act with "knowledge." In *Liparota*, the Supreme Court established a two-part test for determining whether the doctrine should act to support an interpretation requiring a lower level of *mens rea*.[111] First, would reasonable people know that their underlying conduct, in connection with an inherently dangerous regulated item, is subject to regulation?[112] Second, would misuse of the regulated item seriously endanger public health or safety?[113]

If the doctrine applies, the rationale of *Freed* controls, and, so long as the defendant is not mistaken as to the identity of the regulated item, the government may impose sanctions where the defendant's conduct results in a legal violation, regardless of whether he or she was cognizant of the existence of the regulation.[114] Alternatively, if the doctrine does not apply, the rationale of *Liparota* controls, and the government must prove the defendant was aware that he or she acted in a manner unauthorized by statute or regulations.[115]

III
RELEVANT PRECEDENT

This part discusses two very different lines of precedent regarding the rules of statutory interpretation and criminal "knowledge" requirements. The first line is a series of federal courts of appeals cases interpreting "knowing" violations of the Resource Conservation and Recovery Act (RCRA).[116] While these cases have not been entirely consistent, they nevertheless form a strong line of precedent supporting a minimal requirement for proof of a "knowing" violation of an environmental statute, such as the Clean Water Act.

The second line of precedent is four 1994 Supreme Court decisions that involved the interpretation of four different criminal stat-

109. *Id.*
110. *Id.* at 426.
111. *Id.* at 425-27.
112. *Id.*
113. *Id.* Many commentators have been critical of this test. *See* Cooney, *supra* note 70, at 49.
114. *See* United States v. Freed, 401 U.S. 601, 604 (1971); Morissette v. United States, 342 U.S. 246, 250 (1952).
115. Liparota v. United States, 471 U.S. 419, 425 (1985).
116. 42 U.S.C. §§ 6901-6986 (1988).

utes.[117] In each case the Court expressed concern with a lower *mens rea* requirement under the facts, and imposed a heavier burden of proof than the government believed appropriate. These cases provide important analogies and policy considerations for anyone seeking to interpret section 1319(c)(2)(A) of the CWA.

A. RCRA Section 6928(d)

RCRA section 6928(d) has two subsections, one prohibiting the "knowing" transport of regulated hazardous waste to a non-permitted facility and one prohibiting the "knowing" treatment, storage, or disposal of regulated hazardous waste.[118] The subsection governing "treatment, storage or disposal" is further divided into actions without a permit and actions in knowing violation of a permit.[119]

Although a variety of environmental statutes criminalize "knowing" violations, RCRA cases have thus far provided the most influential interpretations of such a provision. The federal courts have struggled to construe section 6928(d)'s mental culpability requirements, a job made difficult by congressional drafting that renders the knowledge requirement so ambiguous that "courts cannot clearly determine the legislature's intended construction."[120] Left with little legislative guidance,[121] the circuit courts have adapted the public welfare offense doctrine as an aid in construing section 6928(d)'s mental culpability requirements. While courts interpreting section 6928(d) have utilized the doctrine, they have split over its proper application, particularly regarding whether notice of the likelihood of regulation is provided by the defendant's knowledge of the hazardous nature of the regulated substance, or merely by the fact that the regulated substance is hazardous in nature.

In *United States v. Johnson & Towers, Inc.*,[122] the Third Circuit concluded that the term "knowingly" extends to each element of the offense, including knowledge that the company was required to have a permit and did not have one.[123] This approach implicitly considers the

117. *See* Posters 'N' Things, Ltd. v. United States, 114 S. Ct. 1747 (1994); Ratzlaf v. United States, 114 S. Ct. 655 (1994); Staples v. United States, 114 S. Ct. 1793 (1994); United States v. X-Citement Video, Inc., 115 S. Ct. 464 (1994).

118. 42 U.S.C. § 6928(d) (1988).

119. *Id.*

120. United States v. Bailey, 444 U.S. 394 (1980). "[I]t is clear that legislative drafters do not always operate with a high degree of linguistic precision." United States v. Laughlin, 768 F. Supp. 957, 960 (N.D.N.Y. 1991).

121. Congress itself declared that it has "not sought to define 'knowing' for offenses under subsection (d) [of the Resource Conservation and Recovery Act]; that process has been left to the courts under general principles." S. REP. No. 172, 96th Cong., 2d Sess. 39 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5038.

122. United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984).

123. *Id.* at 669.

character of the offense by holding individuals accountable for their behavior based on the nature of their professional duties. Low-level employees would not be harmed by ignorance that their employer lacked a permit, for example, because this fact is beyond their knowledge and control. Any advantage this holding appears to give to corporate officers is largely illusory, however, as a jury "would have no difficulty in inferring knowledge on the part of those whose business it is to know, despite their protestations to the contrary."[124]

The majority of courts interpreting section 6928(d) have held that the "knowledge" element does not extend to knowledge of the permit. In *United States v. Hoflin,*[125] the Ninth Circuit explicitly rejected the *Johnson & Towers*[126] analysis. Instead, it articulated what has become the majority position on this issue, an interpretation which has strikingly lowered the level of knowledge required to sustain a "knowing" violation of RCRA.[127] The court held that the "knowingly" language of section 6928(d) refers only to the action of disposal and the hazardous nature of the waste.[128] *Hoflin* provided that the government must prove only that the defendant "knew that the chemical waste had the potential to be harmful to others or to the environment," not that the defendant knew disposal of the waste was illegal.[129]

United States v. Sellers[130] may be the RCRA case that adopts the lowest knowledge standard. In this case, the Fifth Circuit interpreted section 6928(d) to require only proof that the "[d]efendant knew what the wastes were" (paint and paint solvent waste in this case).[131] Such a standard substantially alters the public welfare offense inquiry by dispensing with one of its two elements: *Sellers* requires no nexus between the imposition of liability and a determination that the defendant was engaging in conduct that a reasonable person would know was subject to stringent public regulation.[132] Nor does it require that the defendant "knew the chemical waste had the potential to be harmful to others or to the environment."[133]

Recently, the courts have crafted rulings which differentiate among types of defendants. In *United States v. Speach,*[134] the Ninth Circuit held that unlike the conviction of an individual for disposing of

124. *Id.*
125. United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 493 U.S. 1038 (1990).
126. United States v. Johnson & Towers, Inc., 741 F.2d at 664.
127. United States v. Hoflin, 880 F.2d at 1038-40.
128. *Id.*
129. *Id.* at 1039.
130. United States v. Sellers, 926 F.2d 410 (5th Cir. 1991).
131. *Id.* at 416-17.
132. *Id.*
133. *Id.*; *see also* United States v. Hoflin, 880 F.2d at 1039.
134. United States v. Speach, 968 F.2d 795 (9th Cir. 1992).

RCRA waste without a permit, the conviction of an individual for *transporting* RCRA waste without a permit "requires proof that the defendant knew the facility lacked a permit."[135] While based on the statutory language, the conclusion was bolstered with the equitable argument that, unlike those involved in disposal, transporters are not in the best position to know that a facility lacks a permit.[136] Moreover, the court reasoned that "[r]emoving the knowledge requirement would criminalize innocent conduct, such as that of a transporter who relied in good faith upon a recipient's fraudulent certificate."[137]

Facing an ambiguously drafted statute, the circuit courts have turned to the public policy considerations of the public welfare offense doctrine as an aid to interpreting RCRA.[138] In so doing, they have generally adopted a definition of knowledge that is much lower than that generally found outside environmental law. Courts interpreting the Clean Water Act's knowledge requirement are likely to turn to the precedent developed under RCRA. In so doing, the courts should bear in mind the substantial differences between the two statutes. RCRA is a relatively narrow statute, primarily meant to regulate industrial activity as it relates to specific hazardous wastes.[139] The Clean Water Act controls a much broader range of activity, and covers much wider range of substances.[140]

B. 1994 Supreme Court Precedent

This part discusses four 1994 Supreme Court decisions that interpret the *mens rea* elements of four different statutory crimes. Unlike the RCRA cases discussed above, this line of precedent increases the *mens rea* required to sustain conviction under each statute.[141] These decisions illustrate the Court's recent approaches to statutory interpretation, and indicate the Court's policy concern that in certain circumstances, a lowered *mens rea* standard "may criminalize a broad range of morally innocent conduct."[142]

---

135. *Id.* at 796.
136. *Id.* at 797.
137. *Id.* at 796.
138. *See* United States v. Hoflin, 880 F.2d 1033, 1038-40 (9th Cir. 1989), *cert. denied*, 493 U.S. 1038 (1990); United States v. Johnson & Towers, Inc., 741 F.2d 662, 669 (3rd Cir. 1984); Unites States v. Speach, 968 F.2d 795, 796 (9th Cir. 1992).
139. *See* 42 U.S.C. §§ 6901-86 (1988).
140. *See* 33 U.S.C. §§ 1251-1376 (1988).
141. Cooney, *supra* note 70, at 49.
142. United States v. X-Citement Video, Inc., 115 S. Ct. 464, 468 (1994).

1. Ratzlaf v. United States

Ratzlaf v. United States[143] was the first 1994 Supreme Court case to interpret the intent requirement of a federal criminal statute. The majority opinion, authored by Justice Ginsburg, prescribed a strict methodology for construction of a *mens rea* element. First, a statutory term should not be treated as surplusage, particularly when the term describes a level of intent constituting an element of a criminal offense.[144] Second, if the level of intent is ambiguous, all doubts are to be resolved in favor of the defendant.[145]

The case involved an alleged "willful violation" of section 5324 of the Money Laundering Control Act of 1986,[146] which prohibits the structuring of cash transactions for the purpose of evading governmental reporting requirements. The Supreme Court held that Congress intended a "willful" violation to require proof that the defendant acted with knowledge that his actions were unlawful.[147] In essence, the Court held that while the structuring of cash transactions to avoid governmental requirements is illegal, it is not a crime unless the structurer is aware of its illegality.[148] The policy underlying the Court's opinion was imported from criminal tax precedent, where, given the complexity of tax law, it is seen as unfair to imprison citizens who inadvertently violate the extensive duties and obligations imposed by statute and regulations.[149]

The *Ratzlaf* opinion was based on a grammatical analysis of the statute, but went on to prescribe a methodology for interpretation of criminal statutes. In dicta, the opinion declared the interpretive superiority of the rule of lenity to legislative history. Where a statute is ambiguous, the Court stated that it would "resolve any doubt in favor of the defendant,[150] despite the presence of "contrary indications" for such a reading in the statute's legislative history.[151]

The government argued that because "structuring" was not an innocent activity, proof that the defendant acted with the purpose to avoid the reporting requirement was sufficient to satisfy the "willful-

143. Ratzlaf v. United States, 114 S. Ct. 655 (1994).

144. *Id.* at 659.

145. *Id.* at 663.

146. Money Laundering Control Act, Pub. L. No. 99-570, Tit. I, Subtit. H, § 1354(a), 100 Stat. 3207-22 (1986).

147. Ratzlaf v. United States, 114 S. Ct. 655, 657 (1994).

148. *See id.*

149. *See* Cheek v. United States, 498 U.S. 192, 199-200 (1991) (subjectively honest, yet unreasonable belief that pilot's pay was not included in definition of income for federal tax purposes failed to meet intent requirement for criminal tax evasion).

150. Ratzlaf v. United States, 114 S. Ct. at 663.

151. *Id.* The statute was enacted to deter circumvention of reporting requirements designed to prevent banks from acting as financial intermediaries for those involved in criminal activity. *Id.* at 658.

ness" requirement.[152] The Court did not accept this argument, however, holding that "currency structuring is not inevitably nefarious," and noting that people might deliberately structure cash transactions out of fear that cash transaction reports would increase the risk of an IRS audit, or to keep a former spouse unaware of their wealth.[153]

The dissenting opinion, authored by Justice Blackmun, argued that the majority interpretation was not supported by the text of the statute, conflicted with basic principles governing the interpretation of criminal statutes, and was undermined by evidence of congressional intent.[154] It maintained that splitting up transactions involving tens of thousands of dollars in cash for the specific purpose of circumventing a bank's reporting duty is hardly "innocuous activity," and therefore a "knowledge of illegality" interpretation was not required to ensure that the defendant acted with a wrongful purpose.[155]

2. Posters 'N' Things, Ltd. v. United States

In *Posters 'N' Things, Ltd. v. United States*,[156] the Supreme Court interpreted section 857(a) of the Mail Order Drug Paraphernalia Control Act,[157] which provided that it was illegal "to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia . . . ."[158] The majority opinion, authored by Justice Blackmun, held that this section was "properly construed as containing a scienter requirement,"[159] and that the government was required to prove that "the defendant knowingly made use of an interstate conveyance as part of a scheme to sell items that he knew were likely to be used with illegal drugs" to sustain a conviction.[160]

The Court refused to dispense with a scienter requirement simply because the statute did not contain the word "knowingly," noting that even public welfare offense statutes generally require proof that the defendant knew facts sufficient to alert him to the probability of regulation.[161]

---

152. *Id.* at 660-61.

153. *Id.* Such evasive goals hardly seem benign when one considers that the purpose of an IRS audit is to prevent tax fraud, and that the enforcement of an order for child support might constitute a legitimate reason for learning of a former spouse's wealth.

154. *Id.* at 664 (Blackmun, J., dissenting).

155. *Id.* at 666 (Blackmun, J., Dissenting).

156. Posters 'N' Things, Ltd. v. United States, 114 S. Ct. 1747 (1994).

157. Mail Order Drug Paraphernalia Control Act, Pub. L. No. 99-570, Tit. I, § 1822, 100 Stat. 3207-51 (1986) (formerly codified, as amended, at 21 U.S.C. § 857) (repealed 1990).

158. *Id.*

159. Posters 'N' Things, Ltd. v. United States, 114 S. Ct. at 1753.

160. *Id.*

161. *Id.*

3. Staples v. United States

In *Staples v. United States*,[162] the Supreme Court interpreted section 5861(d) of the National Firearms Act, which prohibits possession of unregistered "firearms," including "machine guns."[163] The Court held that conviction under this section requires the government to prove that the defendant knew of the features of his assault rifle that brought it within the statutory definition of "machine gun" for purposes of the Act.[164]

The majority opinion, authored by Justice Thomas, began by stating the background assumption that a statute should generally be construed to require *mens rea*.[165] It noted that the Court had declined to apply this assumption in the past when it was construing a public welfare offense statute. However, the Court rejected several rationales for characterizing the National Firearms Act as a public welfare offense.[166] These rejected rationales are nearly identical to those used by the lower courts to justify dispensing with proof of knowledge of illegal action in environmental cases.[167]

The majority opinion contained an extended discussion distinguishing the firearm registration requirement from what the Court considered true public welfare offenses. This discussion was largely an answer to Justice Stevens' dissenting opinion,[168] which argued that the possession of an unregistered machine gun is a public welfare crime.[169] In response to Stevens' dissent, the majority explicitly attacked the broad application of the public welfare offense doctrine.

The first basis put forth by the *Staples* majority for differentiating the Act from a statute to which the public welfare offense doctrine applies was that "[g]uns in general are not 'deleterious devices or

162. Staples v. United States, 114 S. Ct. 1793 (1994).

163. The National Firearms Act imposes strict registration requirements on statutorily defined "firearms," such as the fully automatic AR-15 assault rifle owned by Mr. Staples. *See* 26 U.S.C. § 5861(d) (1968). While semi-automatic weapons are not included within the statutory definition of "firearms," the rifle owned by Mr. Staples had been modified by the substitution of M-16 selective fire components and the filing away of its metal receiver stop. Staples v. United States, 114 S. Ct. at 1796.

164. Staples v. United States, 114 S. Ct. at 1796-97.

165. *Id.* at 1794.

166. "[T]he court found that the mere dangerousness of an automatic rifle . . . did not justify changing the default setting for the mental element, in view of the commonplace nature of innocent gun ownership . . . . [T]he fact that gun ownership is highly regulated does not in itself justify dispensing with proof of actual knowledge . . . . [P]rior decisions showed a strong reluctance to read a *mens rea* requirement out of felony provisions, absent explicit Congressional directions." Cooney, *supra* note 70, at 50.

167. *See* United States v. Hopkins, 53 F.3d 533, 538-40 (2d Cir. 1995); United States v. Johnson & Towers, Inc., 741 F.2d 662, 669 (3d Cir. 1984).

168. Justice Blackmun joined Justice Stevens' dissenting opinion. Staples v. United States, 114 S. Ct. 1793, 1806 (1994) (Stevens, J., dissenting).

169. *Id.* at 1809 (Stevens, J., dissenting).

products or obnoxious waste materials.' "[170] This reasoning was utilized to distinguish the Court's previous holding in *United States v. Freed*,[171] which required proof that the defendant knew he possessed a hand grenade, but not that the hand grenade was a "firearm" within the meaning of the statute.[172]

Rejecting the proposition that the *Freed* logic applied to the *Staples* case, Justice Thomas stated that such an argument "gloss[es] over the distinction between grenades and guns," and to do so would "criminalize a broad range of apparently innocent conduct."[173] Under this view, simply because an item is "dangerous" does not necessarily suggest that it cannot also be entirely "innocent."[174] The majority opinion concluded that "[i]t is unthinkable to us that Congress intended to subject such law-abiding, well-intentioned citizens to a possible ten-year term of imprisonment" if what they genuinely and reasonably believed was a conventional semi-automatic weapon turns out to have worn down into, or been secretly modified to be, a fully automatic weapon.[175]

The "commonplace and generally available" nature of guns formed the majority's second basis for distinguishing the registration requirement from a public welfare offense.[176] "[D]espite the overlay of legal restrictions on gun ownership, we question whether regulations on guns are sufficiently intrusive that they impinge upon the common experience that owning a gun is usually licit and blameless conduct."[177]

The final basis upon which the *Staples* majority distinguished the registration provision from a public welfare offense was the seriousness of the penalty imposed.[178] "[A] severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement."[179] In the course of articulating this last point, the majority questioned the propriety of applying the public welfare offense doctrine to felony statutes at all.[180] It backed away, however,

170. *Id.* at 1800 (quoting United States v. International Minerals & Chem. Corp., 402 U.S. 558, 565 (1971)); *see also* United States v. Dotterweich, 320 U.S. 277, 281 (1943).

171. United States v. Freed, 401 U.S. 601 (1971).

172. *Id.* at 606.

173. United States v. Staples, 114 S. Ct. 1793, 1799 (1994) (citing Liparota v. United States, 471 U.S. 419, 426 (1985)).

174. *Id.* at 1800.

175. *Id.* at 1802 (citing with approval United States v. Anderson, 885 F.2d 1248, 1254 (5th Cir. 1989)).

176. *Id.*

177. *Id.* at 1801.

178. *Id.* at 1803.

179. *Id.* at 1804.

180. *Id.* *See* ROLLIN M. PERKINS, CRIMINAL LAW 793-98 (2d ed. 1969) (suggesting that the penalty should be the starting point in determining whether a statute describes a public

from promoting such an assertion as a definitive rule of construction, however.

The concern over criminalizing a broad range of apparently innocent conduct was in the forefront of the concurring opinion to *Staples*, authored by Justice Ginsburg. Reiterating policy concerns similar to those of her *Ratzlaf* opinion, Justice Ginsburg stated that since only a "very limited class" of "especially dangerous" firearms requires registration, the "generally 'dangerous' " character of all guns does not suffice to give individuals in the defendant's situation cause to inquire about the need for registration.[181]

Justice Stevens' dissent grounded its conclusion in classic public welfare reasoning: the "serious threat to health and safety" posed by ownership of semi-automatic weapons, which are readily convertible into machine guns, warrants "the imposition of a duty on the owners of dangerous weapons to determine whether their possession is lawful."[182] The dissent conceded that "the enforcement of public welfare offenses always entails some possibility of injustice," but nevertheless concluded that Congress had decided that the overriding public interest in health and safety outweighed the risk of injustice to the individual.[183]

The structure and language of Justice Stevens' dissent are analogous to interpretations of the public welfare offense doctrine as applied in some of the RCRA cases.[184] First, semi-automatic weapons that are readily convertible into machine guns are highly dangerous devices.[185] Second, anyone in possession of such a weapon is "standing in responsible relation to a public danger."[186] Third, Congress has determined that the serious threat to health and safety posed by the private ownership of such firearms warrants the imposition of a duty on the owners of dangerous weapons to determine whether their possession is lawful.[187] Fourth, semi-automatic weapons that are readily convertible into machine guns are sufficiently dangerous to alert persons who knowingly possess them to the probability of a stringent public regulation.[188] Therefore, "the jury's finding that petitioner

welfare offense); *but see, e.g.*, State v. Lindberg, 215 P. 41 (1923) (applying the public welfare offense rationale to a felony).

181. United States v. Staples, 114 S. Ct. 1793, 1805 (1994) (Ginsburg, J., concurring).

182. *Id.* at 1815 (Stevens, J., dissenting).

183. *Id.* at 1812 (Stevens, J., dissenting).

184. *See, e.g.*, United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 493 U.S. 1038 (1990); United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984).

185. Staples v. United States, 114 S. Ct. 1793, 1806-07 (1994) (Stevens, J., dissenting).

186. *Id.* at 1814 (Stevens, J., dissenting).

187. *Id.*

188. *Id.*

knowingly possessed a dangerous device of a type as would alert one to the likelihood of regulation adequately supports the conviction."[189]

4. United States v. X-Citement Video, Inc.

In *United States v. X-Citement Video, Inc.*,[190] the Supreme Court interpreted a provision of the Protection of Children Against Sexual Exploitation Act of 1977.[191] The provision in question penalizes:

(a) Any person who—
(1) knowingly transports or ships . . . any visual depiction, if—
(A) such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
(B) such visual depiction is of such conduct;
(2) knowingly receives or distributes, any visual depiction . . . if—
(A) such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
(B) such visual depiction is of such conduct.[192]

The Court rejected the most "natural grammatical reading" of the statute,[193] which would construe the term "knowingly" as modifying only the surrounding verbs of "transports, ships, receives, distributes, or reproduces."[194] Instead, Justice Rehnquist, writing for the majority, held that "knowingly" extends not only to the verbs surrounding it, but to elements in entirely separate clauses clarifying the type of visual depictions which are prohibited, namely, the sexually explicit nature of the material and the age of the performers.[195]

The majority opinion began by restating the general rule that a statute should be interpreted to require *mens rea*.[196] In this case, the Court looked to precedent stating that the "presumption in favor of a scienter requirement should apply to each of the statutory elements which criminalize otherwise innocent conduct."[197] The Court held that shipping sexually explicit material, without more, is "otherwise innocent conduct," and therefore, the scienter presumption led to the requirement that a violation of the statute requires proof that the defendant knew the performers were underage.[198] The opinion bolstered this interpretation with the rule that a statute should be

189. *Id.*
190. United States v. X-Citement Video, Inc., 115 S. Ct. 464 (1994) (reinstating the conviction of a Los Angeles retailer who sold sexually explicit videotapes of the then-underage porn queen, Traci Lords).
191. 18 U.S.C. § 2252 (Supp. V 1988).
192. 18 U.S.C. § 2252(a) (Supp. V 1988).
193. United States v. X-Citement Video, Inc., 115 S. Ct. at 467.
194. *See id.*
195. *Id.* at 472.
196. *Id.* at 469.
197. *Id.*
198. *Id.*

interpreted, if possible, to avoid an unconstitutional result, stating that a statute that did not contain a scienter requirement as to the age of the performers would raise "serious constitutional doubts."[199]

The Court also held that section 2252 of the Act is not a public welfare offense.[200] The opinion advanced two arguments to support this conclusion. First, people "do not harbor settled expectations that the contents of magazines and film are generally subject to stringent public regulation."[201] Therefore, where "one would reasonably expect to be free from regulation," the scienter requirement must extend to all elements, thereby reducing the opportunity for reasonable mistake and "separating legal innocence from wrongful conduct."[202] Second, the Court cited the Act's harsh penalties as a basis for distinguishing it from public welfare offenses.[203]

Justice Stevens reached a similar conclusion by a different route, stating, in his concurring opinion, that "the normal, commonsense reading of a subsection of a criminal statute introduced by the word 'knowingly' is to treat that adverb as modifying each of the elements of the offense identified in the remainder of the subsection."[204]

The dissenting opinion, authored by Justice Scalia, argued that the plain meaning of section 2252 did not require the defendant's knowledge as to the age of the performers.[205] Justice Scalia believed that his interpretation rendered the statute unconstitutional, but did not believe that the rule favoring a constitutional statutory interpretation mandated a contrary result, because the majority's interpretation was unreasonable.[206]

---

199. *Id.* at 472.

200. *Id.*

201. *Id.* at 468-69. Justice Scalia points out in dissent that the pictures in question were not run-of-the-mill photographs, but depicted "sexually explicit conduct," defined as "sexual intercourse . . . between persons of the same or opposite sex, bestiality, masturbation, sadistic or masochistic abuse and lascivious exhibition of the genitals or pubic area." *Id.* at 475 (Scalia, J., dissenting).

202. *Id.* at 469.

203. *Id.* Violations of the Act are punishable by up to 10 years in prison as well as substantial fines. 18 U.S.C. §§ 2252(b), 2253, 2254 (1984).

204. United States v. X-Citement Video, Inc., 115 S. Ct. at 472 (Stevens, J. concurring). Justice Stevens supported this point by comparing the statute at issue in *X-Citement*, which requires "knowing" action, with the statute at issue in United States v. Staples, 114 S. Ct. 1793 (1994), which contained no express knowledge requirement. "Surely reading [the] provision to require proof of scienter for each fact that must be proved is far more reasonable than adding such a requirement to a statutory offense that contains no scienter requirement whatsoever." United States v. X-Citement Video, Inc., 115 S. Ct. at 474.

205. *Id.* at 475 (Scalia, J., dissenting).

206. Justice Scalia did not agree with the majority's constitutionality analysis. Rather, he believed that the statute was unconstitutional because it established a severe deterrent to fully-protected First Amendment activities and was not narrowly tailored to its purposes. *Id.*

5. Lessons from the 1994 Cases

Ratzlaf,[207] *Posters*,[208] *Staples*,[209] and *X-Citement*[210] should influence statutory interpretation of section 1319(c)(2)(A) of the Clean Water Act. Although these cases are hardly consistent, they have two important common themes that provide strong persuasive authority for a lower court.

The first common theme of these four cases is that the current Supreme Court is very reluctant to interpret a criminal statute in a way that would allow the incarceration of individuals who did not have fair notice that their behavior was criminal. The cases strongly imply that individuals who engage in "morally innocent" behavior, where there are no "harbored expectations" that such behavior is regulated, must receive such "fair notice."[211]

Each of the cases demonstrates this proposition. In *Ratzlaf*, the Court was unwilling to adopt an interpretation of the Money Laundering Act that would have allowed conviction without the defendant's knowledge that his actions were unlawful, because people might structure cash transactions for innocent reasons.[212] In *Posters*, the Court refused to adopt an interpretation of the Mail Order Drug Paraphernalia Act that would have allowed conviction without the defendant's knowledge that the items sold were likely to be used with illegal drugs, apparently because this interpretation might allow the conviction of "innocent" people.[213] In *Staples*, the Court refused to allow a conviction under the National Firearms Act without proof that the defendant knew the illegal characteristics of his weapon, because gun ownership alone is "usually licit and blameless conduct."[214] Finally, in *X-Citement Video*, the Court went so far as to refuse to adopt the "most grammatical reading" of the statute, because this would have allowed conviction merely upon proof that the defendant "knowingly transported or shipped sexually explicit material"—conduct that is "otherwise innocent."[215]

In each of these cases, the government argued that the statute's underlying goals justified an interpretation with a minimal "knowledge" requirement, but the Court consistently failed to accept this ar-

207. Ratzlaf v. United States, 114 S. Ct. 655 (1994).
208. Posters 'N' Things, Ltd. v. United States, 114 S. Ct. 1747 (1994).
209. Staples v. United States, 114 S. Ct. 1793 (1994).
210. United States v. X-Citement Video, Inc., 115 S. Ct. 464 (1994).
211. *See* Posters 'N' Things, Ltd. v. United States, 114 S. Ct. at 1754; Ratzlaf v. United States, 114 S. Ct. at 663; Staples v. United States, 114 S. Ct. at 1801; United States v. X-Citement Video, Inc., 115 S. Ct. at 470.
212. Ratzlaf v. United States, 114 S. Ct. at 660-61.
213. Posters 'N' Things, Ltd. v. United States, 114 S. Ct. at 1754.
214. Staples v. United States, 114 S. Ct. at 1801.
215. United States v. X-Citement Video, Inc., 115 S. Ct. at 470.

gument. In particular, the Court refused to adapt the public welfare offense doctrine to reach such a result. Although the 1994 Supreme Court cases do not explicitly reject the public welfare offense doctrine, they suggest that the modern Court views the doctrine as an additional way to determine whether a certain statutory interpretation meets the criminal law's "fair notice" requirement, rather than as a way of dispensing with fairness concerns in the name of public policy.

The second common theme of the 1994 Supreme Court cases is that the Court continues to lack a consistent and coherent approach to statutory interpretation. This proposition is supported by examining the disparate views the cases take towards the use of legislative history and the rule of lenity. *Ratzlaf* takes the most extreme position. It essentially eliminates legislative history as a tool of statutory interpretation for statutory crimes by commanding that if a provision is ambiguous, a court should turn to the rule of lenity without considering legislative history.[216] *Staples* takes an intermediate approach. It reserves the rule of lenity for cases in which legislative history does not clarify congressional intent.[217] Finally, *X-Citement Video* utilizes legislative history not only to increase statutory *mens rea* but to justify its departure from the natural reading of the statute.[218] These three different approaches provide an uncertain road map for a lower court. The result is that a lower court can continue to justify almost any statutory interpretation by picking and choosing authority from the supply of inconsistent Supreme Court precedent.

IV

CURRENT JUDICIAL INTERPRETATION OF "KNOWINGLY VIOLATES" UNDER SECTION 1319(c)(2)(A) OF THE CLEAN WATER ACT—*UNITED STATES V. WEITZENHOFF* AND *UNITED STATES V. HOPKINS*

Two recent federal courts of appeals decisions, *United States v. Weitzenhoff*[219] and *United States v. Hopkins*,[220] address the "knowingly violates" language of the Clean Water Act's section 1319(c)(2)(A). These cases contain some cogent analysis and provide a valuable starting point for interpretation of section 1319(c)(2)(A). However, they simply do not go far enough. Because they are so concerned with the question of whether the prosecution must prove that the defendant had knowledge of the law, both cases fail to define

216. *See* Ratzlaf v. United States, 114 S. Ct. at 662-63.
217. Staples v. United States, 114 S. Ct. at 1804 n.17.
218. United States v. X-Citement Video, Inc., 115 S. Ct. at 471.
219. United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1993).
220. United States v. Hopkins, 53 F.3d 533 (2d Cir. 1995).

clearly the prima facie case the government is required to present in order to establish a knowing violation.

A. United States v. Weitzenhoff

1. *Facts*

The defendants in *Weitzenhoff* were the manager and assistant manager of the East Honolulu Community Services Sewage Treatment Plant.[221] At trial, the government presented evidence that the defendants had violated the plant's NPDES permit to discharge treated sewage into the ocean by improperly disposing of waste-activated sludge ("WAS"), a component of sewage that is hundreds of times more concentrated than normal effluent.[222] Rather than fully treating the WAS, the defendants "chose a more convenient method of handling the excess,"[223] directing plant workers to rig a make-shift system of hoses and pumps circumventing the plant's effluent sampler and discharging the WAS directly into the ocean.[224] Two plant workers would return to the plant after dark to hook up the hoses and turn on the pumps used for the discharges.[225] The same workers arrived early the next morning to unhook the hoses and hide the evidence of the discharges.[226]

2. *Holding*

Weitzenhoff held, *inter alia*, that "criminal sanctions are to be imposed on an individual who knowingly engages in conduct that results in a permit violation, regardless of whether the polluter is cognizant of the requirements or even the existence of the permit."[227] In so holding, the court upheld the trial court's jury instructions, which disallowed a defendant's mistaken belief that the discharge was authorized by the permit to serve as a defense.[228]

In arriving at this conclusion, the court first considered the statutory language, stating that "[a]s with certain other criminal statutes that employ the term 'knowingly,' it is not apparent from the face of the statute whether 'knowingly' means a knowing violation of the law or simply knowing conduct that is violative of the law."[229] Faced with

221. United States v. Weitzenhoff, 35 F.3d at 1281.
222. *Id.* at 1282.
223. Brief for the United States at 7, United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1993).
224. 3 Trial Transcript at 23-41, United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1993).
225. 2 *id.* at 55-56.
226. 2 *id.* at 55-57; 3 *id.* at 29.
227. United States v. Weitzenhoff, 35 F.3d at 1284.
228. *Id.* at 1294 (Kleinfeld, J., dissenting).
229. *Id.* at 1283.

ambiguous statutory language, the court next considered legislative history.[230] Unfortunately, however, the *Weitzenhoff* court relied on the legislative history cited in appellee United States' brief that applied to section 1319(c)(2)(B), rather than to section 1319(c)(2)(A).[231]

The court fortified its conclusion through use of the public welfare offense doctrine as applied to what the court saw as "analogous public welfare statutes" such as Interstate Commerce Commission regulations and the Resource Conservation and Recovery Act.[232] It reasoned that Mr. Weitzenhoff, as the manager of a sewage treatment plant, was employed in a closely regulated industry that is engaged in "discharging waste materials that affect public health."[233] The court concluded that:

> Like other public welfare offenses that regulate the discharge of pollutants into the air, the disposal of hazardous wastes, the undocumented shipping of acids, and the use of pesticides on our food, the improper and excessive discharge of sewage causes cholera, hepatitis, and other serious illnesses, and can have serious repercussions for public health and welfare . . . . [T]he dumping of sewage and other pollutants into our nation's waters is precisely the type of activity that puts the discharger on notice that his acts may pose a public danger.[234]

The opinion acknowledged the recent Supreme Court cases of *Ratzlaf*[235] and *Staples*,[236] but stated that these opinions were consistent with its holding.[237]

3. *Dissent*

The *Weitzenhoff* defendants petitioned for rehearing, and rehearing en banc, by the Ninth Circuit.[238] Their petition was denied.[239]

---

230. Authority for this methodology was taken from Central Mont. Elec. Power Coop., Inc. v. Administrator of Bonneville Power Admin., 80 F.2d 1472 (9th Cir. 1988) (stating that "[i]n construing statutes in a case of first impression, we first look to the language of the controlling statutes, and second to legislative history."). United States v. Weitzenhoff, 35 F.3d at 1283.

231. Brief for the United States at 21 n.28, United States v. Weitzenhoff, 35 F.3d 1275 (1993) (conceding that the portion of legislative history quoted in the brief refers to language in subsection (B)). Section 1319(c)(2) is split into two subsections, with subsection (A) prohibiting "knowingly" violating any permit condition or limitation. 33 U.S.C. § 1319(c)(2)(A) (1988). Subsection (B), a completely new provision added in 1987, prohibits "knowingly" introducing pollutants or hazardous substances into sewer systems or Publicly Owned Treatment Works ("POTW") when the actor knew or should have known that personal injury or property damage would result, or when the discharge would cause the POTW to violate its own permit. *Id.* at § 1319(c)(2)(B).

232. United States v. Weitzenhoff, 35 F.3d at 1284.

233. *Id.* at 1285.

234. *Id.* at 1286.

235. Ratzlaf v. United States, 114 S. Ct. 655 (1994).

236. Staples v. United States, 114 S. Ct. 1793 (1994).

237. United States v. Weitzenhoff, 35 F.3d at 1285-87.

238. *Id.* at 1275.

Five judges dissented from the decision to reject rehearing en banc.[240] The dissenting opinion, authored by Judge Kleinfeld and joined by four other judges, argued that "[o]rdinary English grammar, common sense, and precedent" all compelled a result contrary to that yielded at trial.[241]

The dissent urged a different methodology for interpreting the statute. First, it applied the plain meaning rule and found that the statutory language was not ambiguous. "If we read the statute on the assumption that Congress used the English language in an ordinary way, the state of mind required is knowledge that one is violating a permit condition."[242] Next, the dissent stated that if the provision were ambiguous, then "the rule of lenity requires that the construction allowing the defendant more liberty rather than less be applied by the courts."[243] Additionally, the dissent criticized the *Weitzenhoff* opinion's use of legislative history, stating that this was "not an appropriate way to resolve an ambiguity in a criminal law,"[244] and arguing that "[w]e cannot fairly put sewer plant workers in peril of prison if they do not read House and Senate committee reports."[245]

The dissent argued that *Weitzenhoff* is "a case of exceptional importance" for two reasons. First, "it impairs a fundamental purpose of criminal justice, sorting out the innocent from the guilty before imposing punishment."[246] Second, it does so in the context of the Clean Water Act, a statute with "tremendous sweep,"[247] which regulates "[m]uch more ordinary, innocent, productive activity . . . than people not versed in environmental law might imagine."[248]

Judge Kleinfeld's dissent warned that the *Weitzenhoff* interpretation of section 1319(c)(2)(A) might make felons of a large number of innocent people doing socially valuable work.[249] First, the dissent pointed out that the wrongful conduct could not be discharging waste into the ocean, as the sewage plant held a federal permit to do just that.[250] In fact, society *wanted* the defendants to discharge treated

239. *Id.*
240. *Id.* at 1294.
241. *Id.*
242. *Id.*
243. *Id.* at 1295.
244. "Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Id.* (citing Crandon v. United States, 494 U.S. 152, 160 (1990)).
245. United States v. Weitzenhoff, 35 F.3d at 1295.
246. *Id.* at 1293.
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.* at 1294.

sewage, as "that was socially desirable conduct by which the defendants protected the people of their city from sewage-borne disease and earned their pay."[251] As defined by the dissent, the wrongful conduct was in violating the permit by discharging 26,000 more pounds of waste than authorized over a fourteen-month period.[252] The dissent believed that the danger of the *Weitzenhoff* holding was that the only thing the defendants would have to "know" to be guilty of violating section 1319(c)(2)(A) was that they were dumping sewage into the ocean, even though that was a lawful activity expressly authorized by their federal permit.[253]

B. United States v. Hopkins

1. Facts

The defendant in *United States v. Hopkins*[254] was the Vice President of Manufacturing for Spirol International Corporation, responsible for overseeing the treatment of Spirol's wastewater that was generated in the company's zinc-based plating process in Connecticut.[255] Mr. Hopkins had experienced zinc-related wastewater trouble in the past; in 1987 he had signed a consent order on behalf of Spirol (then operating under the name "CEM Co.") requiring the company to pay a $30,000 fine and to comply in the future with discharge limitations specified in the order.[256]

Spirol's wastewater system was never consistently effective in removing zinc from the discharge to the Five Mile River.[257] Nevertheless, all of the defendant's samples tested by an independent lab during the period relevant to the conviction were within the permit limitations for zinc.[258] Evidence introduced at trial revealed that Mr. Hopkins accomplished this result by directing his employees to utilize improper sampling methods such as discarding non-compliant discharge samples, diluting samples with tap water, and passing samples through a coffee filter.[259]

---

251. *Id.*
252. *Id.* The sewage plant was licensed by the EPA to discharge 976 pounds of waste per day, or about 409,920 pounds over the fourteen months covered in the indictment. The overage was about six percent. *Id.*
253. *Id.*
254. United States v. Hopkins, 53 F.3d 533 (2d Cir. 1995).
255. *Id.* at 534-35.
256. *Id.* at 535.
257. Appellee's Brief at 3, United States v. Hopkins, 53 F.3d 533 (2d Cir. 1995).
258. *Id.* at 5.
259. *Id.* at 2.

2. *Holding*

The Second Circuit held, *inter alia*, that in order to establish a violation of section 1319(c)(2)(A), "the government was required to prove that Hopkins knew the nature of his acts and performed them intentionally, but was not required to prove that he knew that those acts violated the CWA, or any particular provisions of that law, or the regulatory permit issued to Spirol."[260]

In arriving at this conclusion, the court took a slightly different path than had the Ninth Circuit in *Weitzenhoff*.[261] Declaring that section 1319(c)(2)(A) itself does not expressly state what type of actual knowledge the adverb "knowingly" requires, the court turned directly to the public welfare offense doctrine.[262] Instead of looking for Congressional intent in legislative history, the *Hopkins* court looked to a "presumption of awareness of regulation" it found in judicial interpretations of "public welfare" statutes, where "the Supreme Court has inferred that Congress did not intend to require proof that the defendant knew his actions were unlawful."[263] The *Hopkins* court bolstered this reasoning by stating that "[t]he vast majority of the substances [regulated by the Clean Water Act] are of the type that would alert any ordinary user to the likelihood of stringent regulation."[264]

The *Hopkins* court then turned to legislative history. It cited the separation of intentional and negligent violations and the substitution of "knowingly" for "willfully" in the 1987 amendments to the Clean Water Act as further evidence that the government need not prove that the defendant knew his conduct was in violation of the Clean Water Act.[265]

C. *Analysis of* Weitzenhoff *and* Hopkins

The *Weitzenhoff* and *Hopkins* decisions are the only two circuit court opinions interpreting section 1319(c)(2)(A) of the Clean Water Act. These cases of first impression presented an opportunity to assimilate elements of the methodology and public policy concerns from the RCRA and 1994 Supreme Court precedents and apply them to the Clean Water Act. Unfortunately, the decisions largely sidestepped that challenge. Instead they relied heavily on the RCRA precedent without full consideration of how that precedent should be tempered by the differences between RCRA and the Clean Water Act.

260. United States v. Hopkins, 53 F.3d 533, 541 (2d. Cir. 1995).
261. *See* United States v. Weitzenhoff, 35 F.3d 1275, 1283-86 (9th Cir. 1993).
262. United States v. Hopkins, 53 F.3d at 537.
263. *Id.* at 537-38.
264. *Id.* at 539.
265. *Id.*

The *Weitzenhoff* and *Hopkins* decisions concurred that knowledge of the law is not an element of a section 1319(c)(2)(A) violation.[266] However, they failed to clarify the prima facie elements of a violation—the facts the defendant must have known in order to establish a criminal violation.

Moreover, the cases failed to address the effect the 1994 Supreme Court cases might arguably have on the methodology for interpreting the Clean Water Act, specifically the role of the rule of lenity and its use in relationship to legislative history. The cases varied in their use of legislative history. The *Weitzenhoff* opinion's use of legislative history was unpersuasive. First, it cited the legislative history of another subsection of the Clean Water Act,[267] which therefore had little bearing on the subsection at issue. Second, although it discussed the 1987 language change, it did not engage in any analysis on this point. The *Hopkins* court's analysis was better. It discussed the language change in depth, and properly recognized that the Congressional decision to change the modifying adverb from "willfully" to "knowingly" in 1987 should be given weight.[268] The opinion seemed to recite legislative history in a conclusory manner to justify its position, however, never explaining how "giving weight" to a consideration should translate into the specific facts to be proven.[269]

Both cases also used the public welfare offense doctrine to justify their holdings, borrowing heavily from the RCRA precedent.[270] While both *Weitzenhoff* and *Hopkins* acknowledged the 1994 Supreme Court precedent, they distinguished or minimized its importance. Rather than engaging in a rigorous evaluation of the public welfare offense doctrine, the decisions tended towards resorting to the justification of consequentialist arguments instead carefully discussing how the doctrine may have been narrowed by the 1994 Supreme Court cases. These cases did not apply the Supreme Court's two-part test from *Liparota* to determine whether the doctrine should be employed. Neither do they explicitly allow for the mistake-of-fact defense articulated in the Supreme Court's *International Minerals*[271] decision.

Most important, both cases failed to consider whether some Clean Water Act violations might fall outside the scope of the public welfare offense doctrine. For example, the *Hopkins* court stated that "[t]he vast majority of [the substances regulated by the Clean Water

266. United States v. Hopkins, 53 F.3d at 536; United States v. Weitzenhoff, 35 F.3d 1275, 1284 (9th Cir. 1993).

267. United States v. Weitzenhoff, 35 F.3d at 1283.

268. U.S. v. Hopkins, 53 F.3d at 539-40.

269. *Id.*

270. *See* United States v. Weitzenhoff, 35 F.3d at 1279; United States v. Hopkins, 53 F.3d at 540.

271. United States v. International Minerals & Chem. Corp., 402 U.S. 558 (1971).

Act] are of the type that would alert any ordinary user to the likelihood of stringent regulation."[272] This statement implies that some substances regulated by the Clean Water Act would not alert the user about stringent regulation, but the *Hopkins* court failed to address this situation. Was the court prepared to use a different test for those minority of substances that do not alert any ordinary user to the likelihood of stringent regulation? Alternatively, was the court prepared to overlook concerns about fairness in this case for the greater good?

These questions were not answered in either case, because both cases were impermissibly vague about the prima facie case that the government must prove to sustain a conviction under section 1319(c)(2)(a). For example, the *Hopkins* court cited a hodgepodge of opinions with differing definitions of knowledge in support of its holding. Rather than distinguishing between these definitions of knowledge, the court apparently concluded that there is no conflict between the prima facie case requiring proof that the defendant had "knowledge of the facts that make the defendant's conduct illegal"[273] and prima facie cases requiring proof that the defendant "knew the nature of his acts,"[274] "knew that he was discharging the pollutants in question,"[275] or that was "aware of his acts."[276] Actually, however, these different descriptions of knowledge could significantly alter the burdens of production and proof in a given case.[277]

---

272. U.S. v. Hopkins, 53 F.3d at 539.

273. Staples v. United States, 114 S. Ct. 1793, 1805-06 n.3 (1994) (Ginsburg, J., concurring).

274. United States v. International Minerals & Chem. Corp., 402 U.S. at 561.

275. United States v. Hopkins, 53 F.3d at 540.

276. United States v. Laughlin, 10 F.3d 961, 967 (2d Cir. 1993).

277. To illustrate how differing definitions of knowledge can alter a prima facie case, consider what an assistant U.S. attorney prosecuting a worker at a plant that had discharged a quantity of effluent which exceeded its permit would have to prove under the following definitions:

1. "Knowledge of the Facts That Make Defendant's Conduct Illegal"
   a. Defendant knew he was engaging in some physical action;
   b. defendant knew the physical action resulted in the release of a substance;
   c. defendant knew the identity of the discharged substance; and
   d. defendant knew the quantity of the effluent released.
2. "Knowledge of the Nature of His Acts"
   a. defendant knew he was engaging in some physical action;
   b. defendant knew the physical action resulted in the release of a substance; and
   c. defendant knew the identity of the discharged substance.
3. "Knowledge That He Was Discharging Pollutants in Question"
   a. Defendant knew he was engaging in some physical action; and
   b. defendant knew the physical action resulted in the release of a substance.
4. "Aware of His Acts"
   a. Defendant knew he was engaging in some physical action.

V
RECONCILING THE COMPETING VALUES OF ENVIRONMENTAL LAW AND CRIMINAL LAW THROUGH INTERPRETATION OF SECTION 1319(c)(2)(A)

This part attempts to interpret section 1319(c)(2)(A) in a manner that considers and promotes both the goals of environmental law and the goals of criminal law. It begins by considering the relevant goals of criminal law and environmental law and the potential problems with very low or very high knowledge requirements in the context of the Clean Water Act. It then proposes model jury instructions to give when the government seeks to prove that an individual has violated section 1319(c)(2)(A). These instructions reconcile the competing needs of criminal law and environmental law by requiring the government to prove a prima facie case that avoids felonizing inculpable behavior. They do not require proof of a defendant's knowledge of the law, but do require the prosecution to prove that the public welfare offense doctrine justifications apply to the facts of the particular case, by proving that the defendant knew his conduct was subject to strict regulation or had the potential to cause substantial harm to human health or the environment. Furthermore, they allow the defendant to offer a "mistake-of-fact" defense. If the defendant can establish that he believed in good faith that the pollutant discharge was authorized by his NPDES permit, or that he was not required to obtain a NPDES permit, then the defendant should escape conviction for a "knowing" violation.

A. The Needs of Environmental Law and the Danger of a Very High Standard of Knowledge

Environmental law endeavors to reduce the human health risks resulting from pollution and to preserve biodiversity.[278] The Clean Water Act seeks to further both of these goals,[279] and relies on criminal penalties to do so. Interpreting section 1319(c)(2)(A) to require proof of "awareness of illegality" before conviction would seriously undermine the goals of the Clean Water Act. Requiring the government to prove an individual's or corporation's subjective knowledge of the Clean Water Act or individual permit requirements would make obtaining a conviction under section 1319(c)(2)(A) much more difficult, and would substantially weaken the deterrent effect of crimi-

278. Hornstein, *supra* note 1, at 380-83 (stating that environmental law may be subdivided into the two broad fields of pollution risk remediation and biodiversity protection).

279. The Clean Water Act is predominantly a pollution risk remediation statute, but through section 404 and regulations defining wetlands, it aims to protect biodiversity as well. *See* 33 U.S.C. §§ 1251-1376 (1988).

nal sanctions under the Clean Water Act. The jury would need to find an increased number of facts, and "unless prosecutors have substantial evidence on every element of an offense, they will not seek an indictment on that charge."[280]

Such a deterrent effect is necessary to environmental law. Because the cost of compliance with environmental regulation is often quite high, the threat of criminal penalties serves as a more effective deterrent than civil fines, which may be seen by the regulated community as an incidental cost of doing business that may be passed on to a firm's customers.[281]

Laws are more than the reflection of established cultural norms; they also shape and mold social values and ideals.[282] Criminal law has an expressive capacity and unique ability to give force and symbolic representation to moral values by conveying condemnation and disgrace.[283]

This capacity has been particularly appealing in the enforcement of environmental laws against corporations and their individual corporate officers. Civil penalties often provide insufficient deterrent incentives for companies, which may view monetary sanctions for violating environmental laws as a mere cost of doing business, perhaps even a lower cost than full environmental compliance.[284] Civil fines are often ineffective at changing the behavior of corporate officers, who are insulated through layers of corporate hierarchy from direct personal accountability for the ecological ramifications of their decisions.[285]

By contrast, "[j]ail terms have a self-evident deterrent impact upon corporate officials, who belong to a social group that is exquisitely sensitive to status deprivation and censure."[286] "The moral

280. Interview with Jeffrey B. Setness, former Assistant U.S. Attorney, in Stockton, California (Nov. 22, 1994).

281. *See* Susan Hedman, *Expressive Functions of Criminal Sanctions in Environmental Law*, 59 GEO. WASH. L. REV. 889, 894 (1991) (describing the unique capacity of criminal law to condemn and to shame those who violate environmental laws).

282. *See id.* at 891.

283. *Id.* at 896.

284. *But see* STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 127 (1988) (arguing that criminal sanctions should depend not on a moral judgment about the gravity of harm or the culpability of the offender, but on a strategic judgment about the amount of pain necessary to deter the criminal from seeking the profits of the crime).

285. Although it is often relatively easy to assign knowledge and blame to the low-level employee who dumped or buried hazardous waste, or to prove that a shift foreman or plant manager personally directed the employee's actions, it is much more difficult to climb up the corporate ladder and prove that a corporate executive had knowledge of an environmental violation. Jane F. Barrett & Veronica M. Clarke, *Perspectives on the Knowledge Requirement of Section 6928(d) of RCRA after United States v. Dee*, 59 GEO. WASH. L. REV. 862, 883 (1991).

286. GILBERT GEIS, ON WHITE-COLLAR CRIME 53 (1982).

stigma associated with a criminal conviction can irreparably destroy not only existing and future economic relations, but social and familial relations as well. The economic effect of criminal sanctions imposed on a corporate entity rather than on an individual can likewise be more devastating than civil penalties."[287] This capacity to shame parties into compliance has not been lost on federal enforcers, as evidenced by statements of U.S. Attorney Albert Dabrowski:

> Corporations that fail to pay careful attention to federal environmental law should know that we will aggressively pursue them. The time is long past when companies can say they didn't know any better. Our air, our land, and our water are too limited and too precious to tolerate its [sic] slow destruction. This District has gained a national reputation due to its aggressive pursuit of environmental criminals. That is a reputation I am proud of.[288]

The advantage of criminal enforcement is in its capacity to convey a message of moral outrage while imposing a punishment that cannot be economically measured or passed on.[289] Strong criminal enforcement is of vital importance to environmental law in general, and the Clean Water Act in particular.[290] If section 1319(c)(2)(A) is interpreted to contain a knowledge of the law element, it would protect more than the morally-innocent violators of such concern to the *Weitzenhoff* dissenters. It would also protect midnight dumpers and sophisticated violators of the Act by presenting prosecutors with an unduly high burden of proof.

B. The Needs of Criminal Law and the Danger of a Very Low Knowledge Requirement

Criminal law seeks to promote justice and ensure that only the guilty are punished.[291] Traditionally, our substantive criminal law is based upon a theory of punishing the vicious will, commonly referred to as *mens rea*.[292] A definition of crime requiring an "evil meaning mind" and "evil doing hand" took "deep and early root in American soil."[293] Blackstone stated that "an unwarrantable act without a vi-

287. Lazarus, *supra* note 6, at 880.

288. EPA Note to Correspondents, 1992 WL 245,701 (Sept. 3, 1992) (quoting U.S. Attorney Albert Dabrowski).

289. *See* Lazarus, *supra* note 70, at 2496.

290. *See* Daniel Riesel, *Criminal Enforcement and the Regulation of the Environment*, C855 ALI-ABA 869, 875 (1993).

291. *See* Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107, 172 (1995-96); WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.5 (1995).

292. *See generally*, SANFORD H. KADISH, BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW (1987).

293. Morissette v. United States, 342 U.S. 246, 252 n.9 (1952).

cious will is no crime at all."[294] Oliver Wendell Holmes illustrated this principle by saying that "even a dog distinguishes between being stumbled over and being kicked."[295] The traditional canons of criminal law hold that once the element of blameworthiness is identified, a defendant's behavior becomes criminal if he or she violated that element with the requisite level of intent—"knowingly violated" in the context of CWA section 1319(c)(2)(A).[296]

Because the Clean Water Act is such a broad statute, it could foreseeably prohibit a great deal of ordinary conduct, such a skipping rocks and pouring coffee down the drain.[297] The danger of a low standard of knowledge in this context is that an individual might know exactly what she was doing, yet have no reason to know that his or her conduct was subject to strict regulation, or threatened substantial harm to human health or the environment. Subjecting individuals to felony penalties for conduct they have no reason to suspect is regulated or may be dangerous would tread on individuals' Constitutional right to due process.[298]

1. Prosecutorial Discretion Is Not the Answer

One possible response to this problem is the notion of prosecutorial discretion. However, this response is insufficient. The tacit understanding behind broad prosecutorial discretion is that we can blindly trust prosecutors not to charge essentially blameless offenders. Unfortunately, however, recent public opinion demanding protection for the environment has resulted in a prosecutorial climate so highly charged that "it has become impossible for prosecutors to decline cases."[299] In such an environment there is a temptation to make close prosecutorial decisions based on the ease of the target, particularly given the public pressure to prosecute environmental crimes.[300]

Two recent Clean Water Act indictments demonstrate that prosecutors are pursuing violations of the Act that do not necessarily in-

294. KADISH, *supra* note 292, at 65.

295. OLIVER WENDELL HOLMES, THE COMMON LAW 3 (1881).

296. *See id.*

297. United States v. Weitzenhoff, 35 F.3d 1275, 1298 (9th Cir. 1993).

298. *See* United States v. Freed, 401 U.S. 601, 608 (1971) ("where there is no notice, an unknowing defendant may not be convicted consistently with due process.").

299. Jonathan Weber, *Corporate Crime of the 90s: Prosecutors Are Aiming for the Boardroom in a Growing Push Against Polluters*, L.A. TIMES, Nov. 25, 1989, at 1; *see also* Hedman, *supra* note 281, at 889 ("Over seventy percent of the American public favors the use of jail terms when companies are found guilty of deliberately violating pollution laws.").

300. *See* Lazarus, *supra* note 6, at 878.

volve sophisticated actors or pollutants that threaten substantial environmental damage or harm to human health.[301]

The first indictment, in *United States v. Alegre*,[302] involves a farmer in the San Joaquin delta who used concrete roofing tile to level a depression and reinforce the levee in a corner of his property, which is bordered by the San Joaquin River.[303] The farmer, Mr. Frank Alegre, owns a trucking company which hauls a variety of cargo, including locally-manufactured concrete roofing tiles. From time to time during manufacture, transport, and installation, these tiles are broken. Instead of burying these broken tiles in a landfill, Mr. Alegre hauled them to his property, filling in an area of his field that had been washed out when flood waters breached the levee surrounding his property in 1986.[304]

Federal prosecutors charged that Mr. Alegre violated section 1319(c)(2)(A) of the Clean Water Act because he "knowingly discharge[d] . . . various pollutants, that is, truck loads of garbage, diesel contaminated dirt, sand, broken tile, concrete, and other industrial wastes"[305] onto his property, which is adjacent to the San Joaquin River.[306]

The second indictment, in *United States v. Liquid Sugars, Inc.*,[307] involves a California corporation that manufactured and marketed raw food products and liquid sweeteners, and regularly disposed of sugar wastewater for its customers. Federal prosecutors have now charged that the corporation, Liquid Sugars, Inc., and its vice-president and general manager, Warren D. Mooney, conspired to violate, *inter alia*, section 1319(c)(2)(A) of the Clean Water Act, because they knowingly discharged wastewater with a pH lower than 5.0 into a city's sanitary sewer system.[308]

Privately, prosecutors concede that this violation did not cause direct environmental harm, and the indictment does not even describe any threatened injury to the environment.[309] Instead, a press release issued by the Justice Department states that the motivation behind

301. *See* Indictment in the Matter of United States v. Alegre (E.D. Cal. 1994); United States v. Liquid Sugars, Inc., 158 F.R.D. 466 (E.D. Cal. 1994).
302. Indictment in the Matter of United States v. Alegre (E.D. Cal. 1994).
303. *Id.* at 2.
304. *Id.*
305. *Id.* at 3.
306. *Id.* at 2.
307. United States v. Liquid Sugars, Inc., 158 F.R.D. 466 (E.D. Cal. 1994).
308. *Id.* at 468.
309. Indictment in the Matter of United States v. Liquid Sugars, Inc., No. CR-S-93-302 DFL (E.D. Cal. 1993).

this indictment was to curtail the competitive advantage Liquid Sugars enjoyed by virtue of avoiding waste pretreatment costs.[310]

These indictments illustrate potential problems with the *Weitzenhoff*[311] and *Hopkins*[312] holdings. These cases might be interpreted to require proof only that the defendants "knew" what they were disposing. For example, they might predicate a finding of a section 1319(c)(2)(A) violation merely upon proof that Mr. Alegre knew he was dumping concrete tile onto the levee bordering his field and that the defendants in *Liquid Sugars* knew they were pouring sugar water down the drain.

Sustaining a section 1319(c)(2)(A) action on these facts would skate dangerously close to disregarding the 1994 Supreme Court precedent discussed above. Applying this new line of precedent to the allegations in *Liquid Sugars*, a court might find that the disposal of sugar water is "not inevitably nefarious," and is even "morally innocent conduct."[313] Similarly, unless the defendant in *Alegre* should have been aware that cement tile might be considered a "pollutant," it would have been impossible for him to act "with knowledge that the proscribed effect" of filling a wetland "would most likely follow" from his actions.[314]

People generally "do not harbor settled expectations" that sugar water or cement tile are "generally subject to stringent public regulation."[315] They are quite "commonplace and generally available," and neither is clearly a "deleterious device or obnoxious waste material."[316] The public welfare offense doctrine probably does not justify a section 1319(c)(2)(A) conviction in *Liquid Sugars* or *Alegre* simply based on the nature of the substances being disposed, and such a conviction would seem to criminalize innocent behavior, in contravention of recent commands of the Supreme Court.

---

310. U.S. Department of Justice Press Release at 2, July 9, 1993. Liquid Sugars was able to sell its sweeteners to food processors by offering to accept wastewater that could not be legally discharged without treatment. The fact that Liquid Sugars' customers were unwilling to flush the wastewater down their own sanitation sewer systems suggests that Liquid Sugars should have known that disposal of the wastewater raised environmental issues, though the indictment appears carefully worded so as not to assert that connection. Indictment in the Matter of United States v. Liquid Sugars, Inc., No. CR-S-93-302 DFL (E.D. Cal. 1993).

311. United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1993).

312. United States v. Hopkins, 53 F.3d 533 (2d Cir. 1995).

313. *See* discussion *supra* part III.B.3.

314. *See* discussion *supra* part III.B.4.

315. *See* discussion *supra* part III.B.5.

316. Staples v. U.S., 114 S. Ct. at 1800 (quoting U.S. v. International Minerals & Chemicals Corp., 402 U.S. 558, 565 (1971)).

C. *Reconciling the Values of Environmental and Criminal Law: Proposed Jury Instruction Regarding the "Knowledge" Element of Section 1319(c)(2)(A)*

1. *Facts the Government Must Prove*

A defendant must be aware of the facts making his conduct criminal to "knowingly violate" the Clean Water Act. These essential facts are elements of the crime which the prosecution must establish as part of the prima facie case. As a case comes to trial, both the prosecution and defense will submit suggested jury instructions to the judge.[317] Prosecutors and defense counsel must translate conceptual grappling with the concept of *mens rea* and the definition of "knowledge" into practical decisions regarding the facts that must be proven, the evidence available to prove those facts, and evidence that can be used to raise an inference of reasonable doubt.

Section 1319(c)(2)(A) provides felony penalties for persons who "knowingly" violate provisions of the Clean Water Act. These diverse provisions include, among other things, effluent limitations, reporting and record requirements, pretreatment standards, and permit conditions and limitations. Rather than formulating jury instructions for each type of section 1319(c)(2)(A) violation, this comment advocates more general instructions that may be adapted to any factual circumstance.[318] Specifically, these instructions seek to acknowledge the need to give fair warning of actions constituting criminal conduct while disallowing ignorance of the law as a defense.[319]

Adopting a "knowledge of illegality" standard would allow ignorance of the law to protect even sophisticated operators whose job description includes responsibility for compliance with environmental laws. However, presuming that all defendants are aware of the broad scope of Clean Water Act regulations would occasionally fail to give fair warning of actions constituting criminal conduct. While the vast majority of criminal charges under the Clean Water Act have involved highly toxic substances, some of the indictments have involved substances that are generally thought to be nonharmful.[320]

To ensure that the law gives fair warning, the government should be required to prove that the defendant, in his position, would have been aware that discharge of the "pollutant" was subject to strict regulation or had the potential to be harmful to others or to the environment. Proving that a defendant knew his conduct was subject to

317. Interview with Jeffrey B. Setness, former Assistant U.S. Attorney, in Stockton, California (Jan. 3, 1996).

318. *See infra* Appendix A.

319. *Id.*

320. *See* United States v. Liquid Sugars, Inc., 158 F.R.D. 466, 469 (E.D. Cal. 1994).

regulation or would cause harm is much easier than proving the defendant knew his conduct was illegal. For instance, under such a standard, the prosecutors in *Hopkins* and *Weitzenhoff* could have satisfied this requirement by showing that the defendants were corporate officers dealing with the disposal of waste and that their facility held a NPDES permit. This would allow the jury to make the inference that the defendants were aware that their facilities held a NPDES permit, and therefore knew their conduct was subject to strict regulation.

2. *Mistake-of-Fact Defense*

The above standard does not go far enough to protect innocent violators, because it would still allow the conviction of defendants who held a NPDES permit and honestly thought that their discharge complied with the permit terms. Convicting these individuals of a "knowing" violation of the Clean Water Act would also seem to contravene the commands of the Supreme Court, particularly the mistake-of-fact defense articulated by the *International Minerals*[321] decision.

Therefore, in order to protect permit holders who have a good faith belief that their discharge is in compliance with the law, the defendant should be allowed to proffer a mistake-of-fact defense. After the government has made a showing on each element in the prima facie case, the defense should be permitted to put on evidence that the defendant had a good faith belief that the quantity or substance discharged was in compliance with the permit limitation. The defense would bear the burden of proof on this issue, thereby reducing the potential for abuse of this defense by unworthy defendants.

3. *Method of Proving Facts About "Knowledge"*

A conscious-avoidance instruction is another way to promote a fair result in a section 1319(c)(2)(A) prosecution. This instruction allows the jury to find that a defendant had the required knowledge when the evidence would permit a rational juror to conclude beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.[322] *United States v. Littlefield*[323] provides a succinct definition of those cases in which a deliberate ignorance instruction is proper:

> [A] willful blindness instruction is proper if a defendant claims a lack of knowledge, the facts suggest a conscious course of deliberate igno-

321. United States v. International Minerals & Chem. Corp., 402 U.S. 558 (1971).

322. *See* United States v. Hopkins, 53 F.3d at 541-42.

323. United States v. Littlefield, 840 F.2d 143, 147 (1st Cir.), *cert. denied*, 488 U.S. 860 (1988).

> rance, and the instruction, taken as a whole, cannot be misunderstood as mandating an inference of knowledge.[324]

Conscious-avoidance instructions (also known as deliberate ignorance, willful blindness, or "ostrich" instructions)[325] are an effective tool to separate honestly-mistaken violators, such as those in the sugar water hypothetical discussed above,[326] from corporate managers, such as the *Weitzenhoff* and *Hopkins* defendants, who direct their subordinates to commit an offense while protesting ignorance. Even further, "the willful blindness theory imposes criminal liability on people who, recognizing the likelihood of wrongdoing, nonetheless consciously refuse to take basic investigatory steps."[327]

CONCLUSION

Section 1319(c)(2)(A) criminalizes a "knowing" violation of the Clean Water Act, but does not clearly establish what a defendant must "know." In the name of deterrence, proponents of strong environmental protection might argue that to be guilty under this section, the defendant needs only to have "known" that he was discharging a substance. This could allow the conviction of individuals who had no reason to suspect that their discharge was illegal or improper, violating criminal law's traditional requirement that criminal penalties be predicated on proof of culpable behavior.

On the other hand, in the name of the protection of innocent violators, some might argue that the defendant needs to have "known" that his discharge was illegal to be guilty under section 1319(c)(2)(A). Requiring the government to prove that the defendant "knew" his discharge violated the Clean Water Act would satisfy criminal law's *mens rea* concern, but only at the expense of environmental law's need for the deterrent effect of strong criminal penalties.

Is it possible to interpret section 1319(c)(2)(A) in a way that considers the needs of environmental and criminal law, and strikes a balance between them? This comment argues that the answer is yes, and proposes model jury instructions to accomplish this task in Appendix A. These instructions do not require the government to prove that the defendant was aware that his acts violated the Clean Water Act, and therefore do not vitiate the deterrent effect of strong criminal penalties under the Act by presenting prosecutors with an unduly high burden of proof. However, by requiring proof that the defendant was aware that his conduct was regulated or had the potential to cause

---

324. *Id.*

325. EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 17.09 (1992).

326. *See* United States v. Liquid Sugars, Inc., 158 F.R.D. 466 (E.D. Cal. 1994).

327. United States v. Rothrock, 806 F.2d 318, 323 (1st Cir. 1986).

harm to human health or the environment, and by allowing a mistake-of-fact defense, these instructions are sensitive to the needs of criminal law, and will not allow the conviction of individuals who lacked fair notice that their conduct was wrong.

APPENDIX A
PROPOSED JURY INSTRUCTIONS PERTAINING TO THE ELEMENT OF KNOWLEDGE

A. The knowledge that a person possesses at any given time may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining the issue of what a person knew at a particular time, you may consider any statements made or acts done or omitted by that person and all other facts and circumstances received in evidence which may aid in your determination of that person's knowledge or intent.[328] The government must prove, beyond a reasonable doubt, that the defendant intentionally discharged (substance) and that a reasonable person in defendant's position would have been aware that the discharge of (substance) was subject to strict regulation or had the potential to be harmful to human health or safety or to the environment.

B. You may find that the defendant acted knowingly if you find beyond reasonable doubt that the defendant was aware of a high probability that (facts constituting act) and that the defendant deliberately avoided learning the truth. This element of knowledge is satisfied if the defendant deliberately closed his eyes to what would otherwise have been obvious to him.[329]

C. You may not find that the defendant acted knowingly, however, if you find that the defendant actually believed that (mistake-of-fact defense). A showing of negligence, mistake, or carelessness is not sufficient to support a finding of knowledge.[330]

328. *See, e.g.*, DEVITT ET AL., *supra* note 325, at § 17.07 (proof of knowledge or intent).
329. *See id.* at § 17.09.
330. *Id.*