



Volume 10 | Issue 1

Article 1


1999

Questions of Intent: Environmental Crimes and Public Welfare Offenses

Lawrence Friedman

H. Hamilton Hackney

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/elj>

 Part of the [Criminal Law Commons](#), and the [Environmental Law Commons](#)

Recommended Citation

Lawrence Friedman & H. H. Hackney, *Questions of Intent: Environmental Crimes and Public Welfare Offenses*, 10 Vill. Envtl. L.J. 1 (1999).

Available at: <https://digitalcommons.law.villanova.edu/elj/vol10/iss1/1>

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Environmental Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

VILLANOVA ENVIRONMENTAL LAW JOURNAL

VOLUME X

1999

NUMBER I

QUESTIONS OF INTENT: ENVIRONMENTAL CRIMES AND “PUBLIC WELFARE” OFFENSES

LAWRENCE FRIEDMAN†
H. HAMILTON HACKNEY III††

I. INTRODUCTION

FEW corporate managers faced with the task of ensuring compliance with environmental regulations would argue that full compliance with the broad array of requirements is truly feasible.¹ Yet few members of the public likely would disagree that legislators intended environmental protection laws, such as the Clean Water Act

† B.A. 1989, Connecticut College; J.D. *cum laude* 1993, Boston College Law School. Associate, Choate, Hall & Stewart, Boston, Massachusetts; Adjunct Professor of Law, Massachusetts School of Law.

†† B.A. *cum laude* 1984, Middlebury College; J.D. 1990, University of Utah. Attorney, Choate, Hall & Stewart, Boston, Massachusetts.

1. See Kepten D. Carmichael, Note, *Strict Criminal Liability for Environmental Violations: A Need for Judicial Restraint*, 71 IND. L.J. 729, 748 (1996) (noting that “[r]egulations under the Clean Water Act, Clean Air Act, and RCRA number over [sic] 9000 pages in the Code of Federal Regulations” and claiming that “[t]he EPA has even acknowledged that one hundred percent compliance with certain CWA requirements is not feasible”); PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* 32 (1994) (discussing how full compliance with administrative regulations may well be impossible). Consider *United States v. White*, 766 F. Supp. 873 (E.D. Wash. 1991), in which the government charged the defendants with unlawful disposal and storage of hazardous waste under the Resource Conservation and Recovery Act (RCRA). See *White*, 766 F. Supp. at 877. The defendants moved to dismiss the charges on the grounds that the regulations allegedly violated were “impermissibly vague.” See *id.* at 878. The district court cited the testimony of an EPA Assistant Administrator for the EPA Office of Solid Waste and Emergency Response, stating that “RCRA is a regulatory cuckoo land of definition . . . I believe we have five people in the agency who understand what ‘hazardous waste’ is. What’s hazardous one year isn’t — wasn’t hazardous yesterday, is hazardous tomorrow, because we’ve changed the rules.” *Id.* at 882. Despite the court’s recognition that the regulations were often confusing, the court declined to find such regulations unconstitutional for vagueness. See *id.* at 882-83.

(CWA),² to play an essential role in ensuring the well-being of the nation's citizenry. In other words, they would agree that the protection of "the chemical, physical, and biological integrity of the Nation's waters"³ is, in itself, a project worthy of the close scrutiny of government regulators and enforcement agents.⁴ The tension created by the intersection of these forces — regulatory complexity resulting from command-and-control administrative agencies versus a strong public expectation of regulatory enforcement — increases when authorities rely upon criminal sanctions to punish noncompliance. An unsurprising result has been frequent appeals from convictions for environmental crimes.⁵

In light of the complexity of environmental statutes like the CWA, and the consequences of violating these laws, environmental criminal defense lawyers have argued that, to obtain a conviction, the government should be required to prove a defendant knew the illegality of his conduct.⁶ Courts have correctly rejected this argu-

2. Federal Water Pollution Control Act of 1972, §§ 101-607, 33 U.S.C. §§ 1251-1387 (1994) (commonly referred to as Clean Water Act [hereinafter CWA]).

3. CWA § 101(a), 33 U.S.C. § 1251(a).

4. See Patrick W. Ward, Comment, *The Criminal Provisions of the Clean Water Act as Interpreted by the Judiciary and the Resulting Response From the Legislature*, 5 DICK. J. ENVTL. L. & POL'Y 399, 401 (1996) (stating that "[w]ithin [CWA's] regulations are provisions for enforcement, which over the past three decades have become more severe to coincide with popular culture's concern with our deteriorating environment"). Cf. Philip M. Quatrochi, Note, *Groundwater Jurisdiction Under the Clean Water Act: The Tributary Groundwater Dilemma*, B.C. ENVTL. AFF. L. REV. 603, 603 (1996) (noting that "ninety percent of the United States's fresh water is groundwater" and criticizing that "no federal statute comprehensively addresses the prevention of groundwater pollution").

5. See, e.g., *United States v. Kelley Technical Coatings, Inc.*, 157 F.3d 432 (6th Cir. 1998) (appealing conviction under RCRA); *United States v. Wilson*, 133 F.3d 251, 253 (4th Cir. 1997) (discussing challenge to district court's interpretation of *mens rea* for felony convictions under CWA); *United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 248 (1997) (appealing conviction for CWA violations); *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996) (appealing conviction for CWA violations); *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994) (appealing conviction for CWA violations).

6. See David S. Krakoff, *Establish Environmental Defenses Early*, PRAC. REAL EST. LAW., Jan. 1998, at 9. Krakoff argues that the rule of *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558 (1971), that knowledge of illegality is not required to prove a knowing violation of the law, is not practical in the area of environmental regulation. See *id.* at 22. Noting the "complex network of permits, inspections, and self-reporting" required by environmental statutes, Krakoff concludes that "*International Minerals* did not contemplate such a regulatory regime." *Id.*

See also Jane F. Barrett, "Green Collar" Criminals: Why Should They Receive Special Treatment?, 8 MD. J. CONTEMP. LEGAL ISSUES 107, 107 (1996-97) (noting that "[a]ccording to th[e] defense view, [among] the major problems with environmental crimes are . . . minimal or no *mens rea* requirements for these crimes. . . ."); cf. Carmichael, *supra* note 1, at 752 (concluding that courts should require govern-

ment that the CWA's "knowledge" requirement means the government must prove the defendant knew that his actions were prohibited by law.⁷ The common law has long rejected ignorance of the law as a defense to its violation.⁸ The legislative history of the CWA, moreover, strongly suggests that Congress did not intend knowledge of illegality to be a requirement for conviction.⁹

Prosecutors claim that the criminal defense bar has simply urged the creation of a new category of federal criminal defendant, the so-called "green collar" criminal, entitled to special treatment denied persons accused of non-regulatory crimes.¹⁰ Nonetheless, prosecutors too, have also sought to segregate environmental criminal defendants from other criminal defendants. The government has contended that criminal violations of the CWA and other envi-

ment to prove high standard of *mens rea* under CWA in respect to legality of conduct; otherwise, such statutes will "make felons of a large number of innocent people doing socially valuable work"); Michael Vitiello, *Does Culpability Matter?: Statutory Construction Under 42 U.S.C. § 6978*, 6 TUL. ENVTL. L.J. 187, 191-92 (1993) (observing that "[f]ailing to allow a defendant to negate knowledge of a permit requirement may impose liability on a defendant lacking a culpable state of mind").

7. See, e.g., *United States v. Sinskey*, 119 F.3d 712, 716 (8th Cir. 1997) (concluding that legislative history of CWA supported holding that knowledge of illegality was not required); *United States v. Hopkins*, 53 F.3d 533, 537-38 (2d Cir. 1995) (inferring from public welfare statutes and precedent that Congress never intended that defendants must know actions were unlawful); *Weitzenhoff*, 35 F.3d at 1283-86 (holding that in public welfare cases, government need not prove that defendants knew their acts violated CWA).

8. See *Cheek v. United States*, 498 U.S. 192, 199 (1991) ("The general rule that ignorance of the law . . . is no defense to criminal prosecution is deeply rooted in the American legal system."); see also OLIVER W. HOLMES, JR., *THE COMMON LAW* 47-48 (1881). Holmes explained the rationale for the rule as follows:

Ignorance of the law is no excuse for breaking it The true explanation of the rule is the same as that which accounts for the law's indifference to a man's particular temperament, faculties, and so forth. Public policy sacrifices the individual to the general good It is no doubt that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse would be to encourage ignorance

Id. at 48.

9. See *Wilson*, 133 F.3d at 262 (discussing design of Congress in light of 1987 amendments to CWA which "intended to facilitate enforcement of the Clean Water Act"); but see Carmichael, *supra* note 1, at 734-35 (arguing that Congress intended only to punish individuals who knew illegality of their actions).

10. See Barrett, *supra* note 6, at 107-13. Barrett, an Assistant United States Attorney, accuses defense lawyers of trying to create the "green collar" crime category so that violators of environmental law will be treated more favorably than other criminal defendants. See *id.* at 107. The differences between environmental law prosecutions and other criminal prosecutions cited by such defense attorneys as justification for the "green collar" category are: (1) *mens rea* requirement for environmental crimes is minimal and (2) federal prosecutors are overzealous in this area. See *id.*

ronmental statutes fall within the category of crimes known as “public welfare” offenses.¹¹ Under the public welfare doctrine, courts have held that certain regulatory crimes require no showing of traditional *mens rea* as a predicate to criminal liability.¹² The government has accordingly argued that, notwithstanding the statutory “knowledge” requirement in alleging criminal violations of the CWA, a conviction does not require proof that the defendant acted with the requisite intent in respect to each of the elements of the underlying statutory offense.¹³

Such a position misconstrues the nature of the public welfare doctrine; to accept this argument, the courts would indeed create a special category of “green collar” criminals, transforming environmental statutes like the CWA into a virtual strict liability scheme. Under such a scheme the government would, in essence, have to make only the most minimal showing with respect to intent.¹⁴ In evaluating the prosecutors’ argument, this Article turns first to the public welfare doctrine, briefly canvassing its creation and evolution. Next, the Article considers two recent cases in which courts have attempted to limit the boundaries of the public welfare doctrine in the context of alleged violations of the CWA. Finally, the Article concludes that courts should reject the argument that the CWA requires only the most minimal showing of intent to sustain a conviction.

11. See *United States v. Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996) (citing *Staples v. United States*, 511 U.S. 600, 618 (1994)). The Fifth Circuit rejected the government’s assertion that CWA violations are “public welfare offenses,” exempt from any *mens rea* requirement. See *id.* The court’s reasoning was supported by the statute’s prohibition of acts which a reasonable person might believe to be legal and thus not prohibited, as well as the statute’s harsh penalties. See *id.* For a more complete discussion of *Ahmad*, see *infra* notes 46-76 and accompanying text. See also *Wilson*, 133 F.3d at 263-64 (concluding that government need only prove that defendant knew of facts to meet each essential element of substantive offense, not that defendant knew he was violating law).

12. See *Morrisette v. United States*, 342 U.S. 246, 258-59 (1952). The *Morrisette* Court justified the existence of such regulatory crimes as an exception to the general rule that criminal prosecutions require a showing of “guilty mind” because “[t]he accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities.” *Id.* For a more complete discussion of *Morrisette*, see *infra* notes 18-21 and accompanying text. See also Note, *Mens Rea in Federal Criminal Law*, 111 HARV. L. REV. 2402, 2403 (1998) [hereinafter *Mens Rea*] (discussing evolution of public welfare doctrine).

13. See *Ahmad*, 101 F.3d at 391 (holding that two of charged offenses were not public welfare offenses and usual presumption of *mens rea* applied).

14. See, e.g., *United States v. Dotterweich*, 320 U.S. 277 (1943) (providing for strict liability under Federal Food, Drug, and Cosmetic Act).

II. CRIMINAL INTENT AND PUBLIC WELFARE OFFENSES

Under Anglo-American jurisprudence, criminal liability flows from an intentional act.¹⁵ The mental state necessary for criminal liability, or *mens rea*, may be viewed in varying degrees depending upon the likelihood of intervention by chance.¹⁶ As the term is used in American jurisprudence, *mens rea* is understood as “the requirement of a ‘guilty mind’ with respect to an element of a crime.”¹⁷

The significance of the criminal intent requirement cannot be underestimated. As the Supreme Court opined in *Morissette v. United States*,¹⁸: “[t]he contention that an injury can amount to a crime only when inflicted by intention is . . . as universal and persistent in mature systems of law as belief in freedom of the human will

15. See HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 83-88 (1979) (concluding that act, although it poses significant threat of harm, “must be done intentionally if it is to be judged a culpable act”); see also HOLMES, *supra* note 8, at 67-68 (arguing that intent plays central role in establishing criminal liability because it serves as indicator of what types of circumstances may follow particular act). The risk of social harm is greater when one “intends” a harmful result and, therefore, the intentional actor is treated more harshly. See *id.* Holmes notes that “[t]he importance of the intent is not to show that the act was wicked, but to show that it was likely to be followed by hurtful consequences.” *Id.* at 68. The likelihood of death is greater if an actor “intends” it to be the natural consequence of his act. See *id.* Conversely, the likelihood of a death is not so great if the actor merely drops a loaded gun and death is the unfortunate result. See *id.*

16. See Gross, *supra* note 15, at 87 (describing four measures of criminal culpability recognized by Model Penal Code: purposely, knowingly, recklessly, and negligently). Gross asserts, much like Holmes, that the difference among these degrees of culpability is “that as the scale is ascended, conduct of each degree leaves succeeding less room for chance to determine the occurrence of harm.” *Id.* at 88.

17. *Staples v. United States*, 511 U.S. 600, 607 n.3 (1994). In *Staples*, the Court held that the government should have been required to prove that the defendant, convicted of possession of an unregistered machine gun, knew that his weapon was a machine gun regulated by law. See *id.* at 619. The Court rejected the government’s contention that this violation constituted a “public welfare offense” which did not require the defendant to know the underlying facts that made his conduct illegal. See *id.* at 606-18. In reaching this conclusion, the Court relied upon the common law rule that *mens rea* must be proven for every element of the offense charged and that the silence of Congress does not dispense with this requirement. See *id.* at 619.

18. 342 U.S. 246 (1952). *Morissette* was convicted of “knowingly” converting for his own use property of the United States after he collected and sold apparently abandoned shell casings left on an Air Force bombing range. See *id.* at 247. *Morissette* appealed his conviction on the ground that since he thought the casings were abandoned, he did not possess the requisite *mens rea*. See *id.* at 249. The Supreme Court agreed and held that “knowing conversion requires more than knowledge that a defendant was taking the property into his possession.” *Id.* at 270-71. Rather, the Court required him to have “knowledge of the facts, though not necessarily the law, that made the taking a conversion.” *Id.* at 271. To convict, therefore, the government needed to prove that *Morissette* knew the bomb casings were the property of the United States. See *id.*

and a consequent ability and duty of the normal individual to choose between good and evil.”¹⁹ Thus, courts traditionally have understood the codification of criminal laws to contain some intent requirement, even if the requirement is not explicitly stated.²⁰

With the development of the regulatory state, the Supreme Court recognized that Congress had the authority to create public welfare offenses, or “regulatory offenses,” which require a reduced level of criminal intent as a predicate to their violation.²¹ As the Court recognized in *United States v. Dotterweich*,²² the Congress during the New Deal era extended the reach of the Commerce Clause to protect “the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection.”²³ The Court continued, “[s]uch legislation dispenses with the conventional requirements for criminal conduct — awareness of some wrongdoing. In the interest of the larger good it puts the

19. *Id.* at 250 (footnote omitted). See also *Staples*, 511 U.S. at 605 (stating “[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence”) (quoting *United States v. Gypsum Co.*, 438 U.S. 422, 436 (1978)).

20. See *Morrisette*, 342 U.S. at 252 (explaining that as legislatures “codified the common law of crimes, even if their enactments were silent on the subject [of intent], their courts assumed the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation”). See also *Staples*, 511 U.S. at 605-06 (noting that “offenses that require no *mens rea* generally are disfavored” and that “some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime”); *Mens Rea*, *supra* note 12, at 2409 (discussing common law presumption in favor of intent requirement).

21. See *Morrisette*, 342 U.S. at 258-59 (noting that Court first recognized such offenses in *United States v. Balint*, 258 U.S. 251, 252 (1922)). See also LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 286-90 (1993) (discussing history and development of regulatory crimes); Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56 (1933) (coining term “public welfare offenses”).

22. 320 U.S. 277 (1943). The government brought charges against a pharmaceutical corporation and Dotterweich, its president and general manager, for the shipment of misbranded drugs and an adulterated drug in interstate commerce. See *id.* at 278. The jury cleared the corporation of culpability, but found Dotterweich guilty on all counts. See *id.* The court of appeals, however, overturned the conviction because the only “person” subject to prosecution under the relevant act was the corporation. See *id.* at 279. In reversing the appellate court and reinstating the conviction, the Supreme Court held Dotterweich criminally liable for the acts of the corporation, as a corporation can only act through its agents, even though there was no showing that Dotterweich knew of the criminality of the corporation’s conduct. See *id.* at 284-85.

23. *Id.* at 280. See also Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2529 n.167 (1995) (stating that “[b]y the 1930’s, however, Congress began to exercise its Commerce Clause authority far more expansively . . . with a series of crimes distinguished by the intensity of public concern rather than a uniquely federal interest”).

burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.”²⁴

Having sanctioned the creation of reduced-intent crimes under the rubric of public welfare offenses, the Court has looked to principles of statutory construction to ascertain whether Congress intended the creation of such crimes.²⁵ In *United States v. International Minerals & Chemical Corp.*,²⁶ for example, the Court considered whether Congress, in requiring that an individual must “knowingly violate” a regulation to be convicted, intended to impose criminal liability only when a defendant had knowledge of the illegality of his conduct.²⁷ The defendant faced charges of shipping sulfuric acid and hydrosulfuric acid in interstate commerce and “knowingly fail[ing] to show on the shipping papers the required classification of said property, to wit, Corrosive Liquid, in violation of 49 C.F.R. 173.427.”²⁸ The enabling statute provided that “whoever knowingly violates” regulations regarding the safe transportation of corrosive liquids “shall be fined or imprisoned.”²⁹ The district court dismissed the charge, reasoning that the government

24. *Dotterweich*, 320 U.S. at 281. See also *Morrisette*, 342 U.S. at 258-59 (observing that regulatory offenses are adjunct to “regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment”); Andrew J. Turner, *Mens Rea in Environmental Crime Prosecutions: Ignorantia Juris and the White Collar Criminal*, 23 COLUM. J. ENVTL. L. 217, 220 (1998) (discussing public welfare offenses as “a category of crimes that threaten injury to individuals or property for which intent is not a necessary element of the violations”).

25. See *Morrisette*, 342 U.S. at 258-59; see also *Liparota v. United States*, 471 U.S. 419, 424 (1985) (stating that legislature must define elements of criminal offense); *United States v. Balint*, 258 U.S. 250, 253 (1922) (determining mental state required for commission of crime requires “construction of the statute and . . . inference of the intent of Congress”). As one commentator has observed, though the high court generally takes a textualist approach to intent requirements, that approach is frequently inconsistent. See *Mens Rea*, *supra* note 12, at 2414.

26. 402 U.S. 558 (1971).

27. See *id.* at 562-63.

28. *Id.* at 559.

29. *Id.* (quoting 18 U.S.C. § 834(f)). This section of the United States Code grants the Interstate Commerce Commission “power to ‘formulate regulations for the safe transportation’ of corrosive liquids.” *Id.* Furthermore, the regulation provided:

[e]ach shipper offering for transportation any hazardous material subject to the regulations in this chapter, shall describe that article on the shipping paper by the shipping name prescribed in § 172.5 of this chapter and by the classification prescribed in § 172.5 of this chapter, and may add a further description not inconsistent therewith. Abbreviations must not be used.

49 C.F.R. § 173.427.

failed to claim a “knowing violation” in the information; the government then appealed.³⁰

The defendant argued before the Supreme Court that the government had to prove the defendant had “knowledge” of the regulation at issue.³¹ The Court noted that Congress had rejected strict liability in regard to the transportation of corrosive substances and concluded that the use of the word “knowingly” in the statute indicated the existence of a *mens rea* requirement.³² Still, it did not follow that Congress had created an exception “to the rule that ignorance of the law is no excuse.”³³ The Court concluded that, when “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.”³⁴ In short, the Court reasoned that in the public welfare context, the term “knowingly” applies to factual knowledge, “such as knowledge that corrosive liquids are possessed, rather than knowledge of the regulations that govern possession of the materials.”³⁵

And so two principles have emerged from the Court’s public welfare offense jurisprudence. The first principle, as articulated in cases like *Dotterweich* and *Morissette*, is that Congress may create reduced-intent crimes within the realm of regulatory offenses.³⁶ The

30. See *International Minerals*, 402 U.S. at 559.

31. See *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 560 (1971). Relying on its ruling in *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952), the Court noted that “[t]he statute punishes only those who knowingly violate the Regulation. This requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the Regulation would be so unfair that it must be held invalid.” *International Minerals*, 402 U.S. at 560 (quoting *Boyce*, 342 U.S. at 342-43).

32. See *id.* at 561.

33. *Id.* The Court explained:

The principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation. In the context of these proposed 1960 amendments [18 U.S.C. § 834(f)] we decline to attribute to Congress the inaccurate view that that Act requires proof of knowledge of the law, as well as the facts, and that it intended to endorse that interpretation by retaining the word “knowingly.” We conclude that the meager legislative history of the 1960 amendments makes unwarranted the conclusion that Congress abandoned the general rule and required knowledge of both the facts and the pertinent law before a criminal conviction could be sustained under this Act.

Id. at 563.

34. *Id.* at 565.

35. Turner, *supra* note 24, at 224.

36. See *Morissette v. United States*, 342 U.S. 246, 258-59 (1952) (examining nature and quality of offense in determining *mens rea* requirement); *United States v. Dotterweich*, 320 U.S. 277, 280-81 (1943) (citing *United States v. Balint*, 258 U.S.

second principle is that the public welfare nature of these offenses justifies a rule that reduced intent does not require knowledge of an act's illegality.³⁷ In reviewing the public welfare cases, the Court, in *Staples v. United States*,³⁸ noted that it will recognize such offenses only in "limited circumstances":

Typically, our cases recognizing such offenses involve statutes that regulate potentially harmful or injurious items. In such situations, we have reasoned that as long as a defendant knows that he is dealing with a dangerous device of a character that places him in responsible relation to a public danger, he should be alerted to the probability of strict regulation, and we have assumed in such cases Congress intended to place the burden on the defendant to ascertain at his peril whether his conduct comes within the inhibition of the statute.³⁹

In sum, when conduct involves certain particularly dangerous activities or materials, a defendant will be presumed to be aware that the conduct is regulated; the public welfare doctrine obviates the government's burden of proving that the defendant knew his conduct was illegal. Two recent cases before federal appellate courts illustrate the application of these principles against the background of a complex regulatory statute, the CWA.

III. THE LIMITS OF KNOWLEDGE

In 1972, Congress enacted the Federal Water Pollution Control Act Amendments, commonly known as the Clean Water Act (CWA).⁴⁰ As amended, the CWA provides that "any one who know-

250 (1922) and stating "[i]n the interest of the larger good [regulatory legislation] puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger". For a discussion of *Morissette*, see *supra* notes 18-21 and accompanying text; for a discussion of *Dotterweich*, see *supra* notes 22-24 and accompanying text.

37. See *Turner*, *supra* note 24, at 220 (noting that intent is not necessary because public welfare offenses threaten injury to individuals and property and that threat can be mitigated by exercising reasonable care).

38. 511 U.S. 600 (1994).

39. *Id.* at 607 (quotations, citations and ellipses omitted). One commentator has suggested that the *Staples* decision indicates a retreat from the continued recognition of public welfare offenses. See *Mens Rea*, *supra* note 12, at 2403 (explaining explicit refusal by Supreme Court to extend public welfare exception).

40. See Victor B. Flatt, *A Dirty River Runs Through It (The Failure of Enforcement in the Clean Water Act)*, 25 B.C. ENVTL. AFF. L. REV. 1, 7 (1997) (citing S. REP. NO. 92-144 (1972) and noting that "the ever-mounting pollution resulting from the industrial revolution and the increasing urban population largely had gone unchecked, despite repeated efforts to address the problem"). The earlier efforts were aimed

ingly violates” any of a number of the Act’s provisions commits a felony.⁴¹ In *United States v. Ahmad*⁴² and *United States v. Wilson*,⁴³ the federal courts considered whether “knowingly” refers to knowledge of the underlying conduct constituting each element of the offense, to knowledge of the illegality of the conduct, or to both kinds of knowledge.⁴⁴

A. *United States v. Ahmad*

In 1992, Attique Ahmad (Ahmad) purchased a combination convenience store/gas station with two gasoline pumps, each fed by an 8,000-gallon underground tank.⁴⁵ Ahmad discovered that one of the tanks, which held high-octane gasoline, had developed a leak.⁴⁶ In October 1993, Ahmad hired a tank testing company to examine the tank, the results of which indicated that the tank contained approximately 800 gallons of water and that the rest was

at pollution control, but still gave deference to local authority. *See id.* The 1972 Amendments, however, federalized pollution control and clean-up, departing significantly from the previous approach. *See id.* *See also* Barrett, *supra* note 6, at 108-09 (explaining how CWA violations started as misdemeanors and then violation provisions were amended to include both misdemeanor and felony offenses).

41. 33 U.S.C. § 1319(c)(2)(A). The statute provides:

(2) Knowing violations

Any person who —

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; 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 both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

Id. § 309(c)(2)(A), 33 U.S.C. § 1319(c)(2)(A). *See* Sean J. Bellew & Daniel T. Surtz, Note, *Criminal Enforcement of Environmental Laws: A Corporate Guide to Avoiding Liability*, 8 VILL. ENV'T. L.J. 205, 214-16 (1997) (discussing criminal sanctions under CWA).

42. 101 F.3d 386 (5th Cir. 1996).

43. 133 F.3d 251 (4th Cir. 1997).

44. *See Wilson*, 133 F.3d at 260-65; *Ahmad*, 101 F.3d at 389-91. Congress amended the CWA in 1987 “to increase penalties for violations of the Act. Congress substituted the term ‘knowingly’ for the earlier intent requirement of ‘willfully.’ The stated purpose was to deter would-be polluters.” Turner, *supra* note 24, at 222 (footnotes omitted). *See also* S. REP. NO. 99-50, at 29 (1985) (discussing reasons to amend CWA).

45. *See Ahmad*, 101 F.3d at 387.

46. *See id.*

mostly gasoline.⁴⁷ When Ahmad inquired about emptying the tank himself, the company informed him that it would be dangerous and illegal to do so.⁴⁸

On January 25, 1994, Ahmad rented a hand-held pump and pumped 5,220 gallons from the leaky tank, of which approximately 4,690 gallons were gasoline.⁴⁹ Some of the waste liquid from the tank ran down the street and some drained into a manhole cover in front of the store.⁵⁰ Via these two routes, the gasoline entered a nearby creek and the sanitary sewer system.⁵¹ Within a day, investigators had traced the gasoline back to Ahmad's store.⁵²

Ahmad was indicted for three violations of the CWA: (1) "knowingly discharging a pollutant from a point source into a navigable water of the United States without a permit . . . (count one);"⁵³ (2) "knowingly operating a source in violation of a pre-

47. *See id.*

48. *See id.* Ahmad inquired about the cost to have the testing company empty the tank. *See id.* The company estimated 65 cents per gallon and \$65 per hour of labor. *See id.* After hearing this estimate, Ahmad inquired about emptying the tank himself and the company's employee told him it would be dangerous and illegal. *See id.* This employee testified that Ahmad then stated, "Well, if I don't get caught, what then?" *Id.*

49. *See id.*

50. *See* United States v. Ahmad, 101 F.3d 386, 387 (5th Cir. 1996).

51. *See id.* The gasoline discharged into the street entered a storm drain, continued through the sewer system, and emptied into a nearby creek — which ultimately flowed into Lake Houston. *See id.* Several trucks were required to decontaminate the creek. *See id.* The gasoline discharged into the manhole flowed through the sanitary system and eventually landed in the city sewage treatment plant. *See id.* To handle the 1,000 gallon pool of gasoline thus created, the plant supervisor ordered a partial evacuation of the plant. *See id.* The fire department also ordered the evacuation of two nearby schools. *See id.*

52. *See id.* By 9:00 a.m. on January 26, 1994, investigators traced the source of the contamination back to the manhole in front of Ahmad's store. *See id.* When questioned by investigators, Ahmad first denied operating a pump the night before. *See id.* He then admitted to having used the pump, but claimed that he did not pump anything from the tanks. *See id.*

53. *Id.* The relevant provisions are:

§ 1311 Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant shall be unlawful.

§ 1319 Enforcement

(c) Criminal Penalties

(2) Knowing violations

Any person who —

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition . . . , or any requirement imposed in a retreatment program, . . . shall be punished by a fine of not less than \$5,000 per day of violation, or by imprisonment for not more than 3 years, or by both

treatment standard . . . (count two);”⁵⁴ and (3) “knowingly placing another person in imminent danger of death or serious bodily injury by discharging a pollutant . . . (count three).”⁵⁵ At trial, Ahmad argued that the discharge of gasoline was not “knowing” because he believed he was discharging water.⁵⁶

On appeal, Ahmad asserted that the district court improperly instructed the jury on the *mens rea* required for counts one and two,

CWA § 301(a), 33 U.S.C. §§ 1311(a), CWA § 309(c)(2)(A), 1319(c)(2)(A) (1994). The navigable United States water requirement was met as the gasoline discharged by Ahmad “entered a storm drain and the storm sewer system and flowed through a pipe that eventually empties into Possum Creek . . . Possum Creek feeds into San Jacinto River, which eventually flows into Lake Houston.” *Ahmad*, 101 F.3d at 388.

54. *Id.* Section 1317(d) reads:

§ 1317 Toxic and Pretreatment effluent standards

(d) Operation in violation of standards unlawful

After the effective date of any effluent standard or prohibition or pretreatment standard promulgated under this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

CWA § 307(d), 33 U.S.C. § 1317(d) (1994). A “source” is defined as “any building, structure, facility, or installation from which there is or may be the discharge of pollutants.” *Id.* § 306(a), 33 U.S.C. § 1316(a). “Pretreatment standards” involve “standard[s] of performance,” “a standard for the control of the discharge of pollutants” *Id.* Pretreatment standards are more stringent than ordinary standards of performance, and are developed in regulations “for introduction of pollutants into treatment works which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works.” *Id.* § 307(b)(1), 33 U.S.C. § 1317(b)(1).

55. *Ahmad*, 101 F.3d at 388 (citing 33 U.S.C. § 1319(c)(3)). The statute’s relevant provisions are:

§ 1319 Enforcement

(c) Criminal Penalties

(3) Knowing Endangerment

(A) Any person who knowingly violates [provisions previously stated in § 1319 (c)(2)(A)], and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment of not more than 15 years, or both

CWA § 309(c)(3), 33 U.S.C. § 1319(c)(3) (1994).

56. *See Ahmad*, 101 F.3d at 388-89. At trial, Ahmad did not dispute that he had discharged gasoline from the tank or that the gasoline landed in Possum Creek and the storage treatment plant. *See id.* Rather, he argued that his discharge of gasoline was not “knowing” because he thought he was only discharging water. *See id.* at 389.

One key piece of evidence Ahmad sought to introduce in district court to support the theory that he did not act “knowingly” was the testimony of two witnesses who would have told the jury that he was at the store only until 7:30 or 8:00 p.m. on the night in question. *See id.* The purpose of the testimony would be to show that Ahmad did not “knowingly” discharge gasoline himself, but negligently left his employees in charge of handling the pump. *See id.* The district court found this testimony irrelevant and excluded it. *See id.* The jury found Ahmad guilty on counts one and two, but deadlocked on the third count. *See id.*

and erred in finding irrelevant the testimony that Ahmad sought to introduce to show that he did not act knowingly, but acted negligently by leaving control of the pump to his employees.⁵⁷ Ahmad argued that the district court should have instructed the jury that the statutory *mens rea* requirement applied to each element of each offense, not just to the discharge or operation of a source.⁵⁸ In contrast, the government maintained that the words “knowingly violates” require it to prove only the defendant’s knowledge of the nature of the acts and that the defendant performed those acts intentionally.⁵⁹ Specifically, the Fifth Circuit faced the question whether “knowingly” applied to the element that the discharge involved a pollutant, “for Ahmad’s main theory at trial was that he thought he was discharging water, not gasoline.”⁶⁰

The court reviewed precedent on the issue and noted “the long-held view that the presumption in favor of a scienter require-

57. *See id.* The district court instructed the jury that to find Ahmad guilty, the government merely had to prove beyond a reasonable doubt that he “knowingly discharged” a pollutant. *See id.* With respect to count two, the court’s instructions held the burden on the prosecution was to prove beyond a reasonable doubt that the defendant “was the owner or operator of a source [and] knowingly operated that source by discharging into a public sewer system [a pollutant].” *Id.* For a listing of the instructions and the elements according to the lower court, see *infra* notes 58-59 and accompanying text.

58. *See id.* at 389. The jury instructions for the first count stated that the government must prove beyond a reasonable doubt:

- (1) That on or about the date set forth in the indictment,
- (2) the defendant knowingly discharged
- (3) a pollutant
- (4) from a point source
- (5) into the navigable waters of the United States
- (6) without a permit to do so.

Id.

59. *See id.* The jury instructions for the second count stated that the government must prove beyond a reasonable doubt each of the following elements:

- (1) That on or about the date set forth in the indictment,
- (2) the defendant,
- (3) who was the owner or operator of a source,
- (4) knowingly operated that source by discharging into a public sewer system or publicly owned treatment works
- (5) a pollutant that created a fire or explosion hazard in that public sewer system or publicly owned treatment works.

Id.

60. *Id.* at 389. Because Ahmad had requested different instructions in the lower court, the Fifth Circuit reviewed the lower court’s refusal under the abuse of discretion standard. *See id.* Under this standard, the Fifth Circuit would affirm “if the charge, viewed in its entirety, is a correct statement of the law that plainly instructs jurors on the relevant principles of law . . . [and] reverse . . . if the instructions do not correctly state the law.” *Id.* (citations omitted). *See generally*, United States v. Gray, 96 F.3d 769, 775 (5th Cir. 1996); United States v. Townsend, 31 F.3d 262, 270 (5th Cir. 1994); United States v. Allibhai, 939 F.2d 244, 251 (5th Cir. 1991) (explaining, in all three cases, correct standard of review).

ment should apply to each of the statutory elements which criminalize otherwise innocent conduct.”⁶¹ After a brief review of Fifth Circuit cases, the court concluded that it was “eminently sensible” that the phrase “knowingly violates” uniformly applies to each element that defines CWA offenses, rather than applying only to select elements of these offenses.⁶²

The Fifth Circuit distinguished those cases concerning a mistake-of-law defense, and explained that CWA violations do not fall within the judicially-created exception for public welfare offenses.⁶³ The court also rejected the government’s argument that the instructions, considered as a whole, indicated to the jury that Ahmad should be found guilty only if he knew he was discharging gasoline.⁶⁴ The court considered it likely that the jury understood the instructions to require a finding of knowledge only in respect to acts constituting a discharge.⁶⁵ Because there was at least a reason-

61. *Ahmad*, 101 F.3d at 389-90. The main issue was “whether ‘knowingly’ applies to the element of the discharges being a pollutant.” *Id.* at 390. This issue is especially difficult to resolve because *mens rea* is not listed in the section of the statute defining the elements of the offense. *See id.*

62. *Id.* Interestingly, the “knowingly violates” language appears elsewhere in the language of the CWA, but does not appear in the section defining the elements of a violation. *See id.* The Fifth Circuit stated that to reach a contrary holding “would require an explanation as to why some elements should be treated differently from others, which neither the parties nor the caselaw seems able to provide.” *Id.* The court supported its conclusion both with prior decisions of the Fifth Circuit and the Supreme Court. *See id.* The court began with the presumption which supports the idea that a scienter element is required for each element of the offense where, as here, the statute criminalizes typically innocent conduct. *See id.* (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)). The court then determined its holding in *Ahmad* was consistent with precedent:

The Supreme Court has spoken to this issue in broad terms. In *United States v. X-Citement Video, Inc.*, . . . the Court read “knowingly” to apply to each element of a child pornography offense, notwithstanding its conclusion that under the “most natural grammatical reading” of the statute it should apply only to the element of having transported, shipped, received, distributed or reproduced the material at issue.

Id. (citing *X-Citement Video, Inc.*, 513 U.S. at 68-69). *See Staples v. United States*, 511 U.S. 600, 619-20 (1994) (holding statutes criminalizing knowing possession of machine gun require defendants not only to know that they possess firearms, but that those firearms are machine guns).

63. *See Ahmad*, 101 F.3d at 390 (quoting *X-Citement Video, Inc.*, 513 U.S. at 64, in which Supreme Court read “knowingly” to apply to each element of child pornography offense).

64. *See id.*

65. *See id.* As support for this conclusion, the court pointed to its own decision in *United States v. Baytank (Houston), Inc.*, in which it concluded that a conviction for “knowing and improper storage of hazardous wastes” requires that the defendant know “factually” what it is doing — storing, what is being stored, and that what is stored has the potential for harm to others or the environment, and that it has no permit. *See id.* at 390 (citing *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 613 (5th Cir. 1991)). The court added that “[t]o hold other-

able likelihood that the jury applied the instructions in this way, the Fifth Circuit reversed, concluding that the instructions misled the jury as to the elements of the offense.⁶⁶

In rejecting the government's argument that violations of the CWA are public welfare offenses, the Fifth Circuit labored to explain that the public welfare exception is narrow, and that violations of the CWA simply did not fall within its ambit.⁶⁷ The court noted, for example, that CWA violations are felony offenses punishable by significant terms in federal prison.⁶⁸ This reasoning, however, is inconsistent with prior caselaw. As discussed above, the Supreme Court has determined that the applicability of the public welfare doctrine depends to a certain extent upon an inquiry into whether a statute concerns the regulation of dangerous activities or materials that could affect public health and safety — an inquiry the *Ahmad* court declined to undertake in any detail.⁶⁹

wise would require an explanation as to why some elements would be treated differently from others, which neither the parties nor the caselaw seems to be able to support." *Id.*

66. *See id.* at 390-91. The court rejected the government's reliance on *United States v. Hopkins*, 53 F.3d 533, 537-41 (2d Cir. 1995), and *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994), for the proposition that the government need not demonstrate that the defendant knew his acts were illegal. *See Ahmad*, 101 F.3d at 390-91. The court distinguished these cases based on the fact that neither directly addressed the mistake of fact or statutory construction issues raised by *Ahmad*. *See id.*

67. *See id.* at 391. To avoid bringing *Ahmad* within the narrow public welfare exception, the Fifth Circuit compared the danger to that in *Staples*. *See id.* Because the Supreme Court rejected the public welfare doctrine in respect to a statute involving machine guns, and because gasoline could not be considered as dangerous, the exception could not apply. *See id.* "Though gasoline is a 'potentially harmful or injurious item,' it is certainly no more so than machine guns [T]he key to the public welfare offense analysis is whether 'dispensing with mens rea would require the defendant to have knowledge only of traditionally lawful conduct.'" *Id.* (quoting *Staples v. United States*, 511 U.S. 600, 618 (1994)).

68. *See United States v. Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996). The Fifth Circuit concluded that this strict punishment militated against finding the public welfare exception applicable because "public welfare offenses have virtually always been crimes punishable by relatively light penalties such as fines or short jail sentences, rather than substantial terms of imprisonment." *Id.* (citing *Staples*, 511 U.S. at 618). The rationale for this is that "[i]n a system that generally requires a 'vicious will' to establish a crime, . . . imposing severe punishments for offenses that require no mens rea would seem incongruous." *Staples*, 511 U.S. at 617 (citations omitted) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *21 (1765-69)).

See also Morissette v. United States, 342 U.S. 246, 256 (1952) (holding public welfare offense exception generally applies when punishment is light and there is little harm to the offender's reputation); *Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960) (finding that public welfare exception commonly applies where associated penalty is relatively slight).

69. *See Ahmad*, 101 F.3d at 389-91.

On its face, the CWA certainly appears to concern public welfare offenses. Such crimes are those not simply involving dangerous devices and activities, but those that could adversely affect public health and safety across broad populations.⁷⁰ By these standards, violations of environmental statutes like the CWA are arguably public welfare offenses.⁷¹ Given the legislative determination that the integrity of the nation's ecosystems and waterways is of paramount concern, and the commonsense realization that, for example, discharging pollutants into surface waters will be adverse to human health and to the environment, an individual can reasonably be expected to know that the government regulates such activities.⁷²

To be sure, the *Ahmad* court correctly rejected the government's argument that prosecutors do not have to show that the defendant had knowledge of the facts underlying each element of the offense in proving violations of the CWA.⁷³ The better explanation for rejecting this argument, however, lies in a fuller understanding of the public welfare doctrine.⁷⁴ That explanation was articulated

70. See generally, Barrett, *supra* note 6, at 117-18 (discussing reasons for declaring CWA public welfare statute). For a discussion of the dangers necessary to constitute a public welfare offense, see *supra* notes 11-15. For the text of the applicable sections of the CWA, see *supra* notes 53-55 and accompanying text.

71. See *id.* at 117-18 (arguing that CWA is public welfare statute). Citing CWA's express purpose of "restor[ing] the chemical, physical and biological integrity of the nation's waters," the author points to *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994) and *United States v. Ellen*, 961 F.2d 462 (4th Cir. 1992), as support for the proposition that Congress designed CWA to prevent serious threats to public health, welfare and safety. See *id.* The author further explains that a material need not be deemed hazardous or toxic by statute in order to be dangerous enough to qualify a statute as one of public welfare. See *id.* What is "dangerous" varies depending upon the circumstances, location, and nature of the activity. See *id.* Accordingly, what might be dangerous in one circumstance may not be in another: "[t]hrough [CWA] and other environmental laws, Congress has determined that harm to the environment — even absent imminent threats to public health, welfare, or safety is a public policy concern of the greatest magnitude." *Id.* at 118.

72. See *Ahmad*, 101 F.3d at 388 (pointing out that defendant had been informed of danger and illegality of dispersing contents of tanks).

73. See *id.* at 391.

74. See, e.g., Turner, *supra* note 24, at 228 (explaining that commentators have criticized *Ahmad* court for holding that *mens rea* of knowledge applies to each element of offense, with exception of purely jurisdictional elements). These commentators argue that the *Ahmad* opinion sends "mixed signals." See *id.* The case has been interpreted to require the government to prove that the defendant had knowledge of the law. See *id.* In addition, some commentators view the opinion as a departure from precedent in environmental prosecutions because of its holding that the charged offenses were not "public welfare" offenses. See *id.* at 229. The court did not directly declare, however, that knowledge of the law must be proved; nor did it require the government to show knowledge that the gas was a "pollutant." See *id.* Rather, the court's specific ground for reversal was its "concern that

by the Fourth Circuit in *United States v. Wilson*,⁷⁵ to which we next turn.

B. *United States v. Wilson*

United States v. Wilson involved alleged CWA violations concerning the unpermitted excavation and filling of wetlands on four parcels adjacent to property being developed by the defendants.⁷⁶ From 1988 through 1993, without seeking permits or approvals from the Army Corps of Engineers, the defendants attempted to drain at least three of the four parcels by digging ditches and depositing the excavated dirt next to the ditches, a process known as "sidecasting."⁷⁷ The defendants also transported fill dirt and gravel to three of the parcels.⁷⁸ Portions of each parcel contained wetlands.⁷⁹

At trial, the government presented extensive evidence about the physical presence and characteristics of the wetlands.⁸⁰ The government also produced evidence that the defendants were

the jury may have believed that Ahmad only needed to be aware that he was discharging 'something' in order to be convicted." *Id.* Thus, the Fifth Circuit reversed because it believed the lower court had denied Ahmad a mistake-of-fact defense, not a mistake-of-law defense. *See id.*

75. 133 F.3d 251 (4th Cir. 1997).

76. *See id.* at 254. The defendants were James J. Wilson, chief executive and chair of the board of directors of co-defendant Interstate General Company, and St. Charles Associates, L.P. *See id.* Wilson was personally responsible for decisions relevant to alleged CWA violations. *See id.* Interstate General was a publicly traded land development company worth more than \$100 million, and the general partner of St. Charles Associates, which owned land being developed within the planned community of St. Charles in Charles County, Maryland. *See id.*

77. *See id.*

78. *See id.* The government provided evidence that the defendants transported a "substantial amount" of fill dirt and gravel, and deposited it on three of the four parcels. *See id.* Only the fourth parcel involved sidecasting without the addition of fill. *See id.*

79. *See id.* Importantly, the government demonstrated that all four parcels contained wetlands and that the defendants did not obtain permits from the Army Corps of Engineers (Corps) to drain and fill the parcels. *See id.* The Corps is charged with issuing permits for such activity under section 1344 of the CWA. *See id.*

80. *See United States v. Wilson*, 133 F.3d 251, 254 (4th Cir. 1997). The evidence included:

testimonial and photographic evidence of significant sanding water, reports of vegetation typical to hydrologic soils, and infrared aerial photographs showing a pattern of stream courses visible under the vegetation. . . . [P]roperties were identified as containing wetlands on public documents. . . . [W]ater from these lands flowed in a drainage pattern through ditches, intermittent streams, and creeks, ultimately joining the Potomac River, a tributary of the Chesapeake Bay.

Id. at 255.

aware of the land's physical conditions.⁸¹ This evidence included: the defendants' efforts to improve drainage on the land; their addition of substantial amounts of fill to raise the ground level; repeated reshoring efforts due to "wetness-induced" ground shifting and collapse; differential price quotations on bids for work depending upon the level of moisture on the property; and testimony that, notwithstanding the efforts at filling the land, "wetland-loving plants continued to sprout through the fill."⁸²

The defendants produced evidence challenging the government's argument that the parcels were wetlands subject to regulation under the CWA.⁸³ They sought to show that the Army Corps of Engineers was inconsistent in asserting jurisdiction over the parcels and had suggested in an internal memorandum that it was "not clear . . . that these areas can be interpreted as 'waters of the United States' within the meaning or purview of [the CWA]."⁸⁴ In addition, the defendants introduced evidence reflecting their beliefs that draining the three parcels before filling them was entirely legal and that no fill went into the fourth parcel, where ditches were being used to drain the area.⁸⁵

The jury convicted the defendants on four felony counts of "knowingly discharging fill material and excavated dirt into wetlands on four separate parcels without a permit, in violation of the CWA, 33 U.S.C. §§ 1319(c)(2)(A) & 1311(a)."⁸⁶ The district court

81. *See id.*

82. *Id.* The government also produced evidence at trial that the defendants retained a private consulting firm which informed them that it believed, based upon its observations, that the parcels contained wetlands. *See id.* According to the evidence introduced by the government, this private consulting firm recommended that the defendants seek permits from the U.S. Army Corps of Engineers prior to beginning development of the land. *See id.* Further evidence introduced by the government at trial showed that the defendants were contacted by zoning authorities from Charles County, who were concerned with the possibility that the construction projects were located in an area containing wetlands. *See id.* Finally, the government produced evidence showing that the defendants continued to develop other parcels of land without notifying the Corps while, at the same time, they were complying with an order from the Corps to cease construction on another parcel. *See id.*

83. *See id.*

84. *Id.* The defendants argued that the Corps was inconsistent in dealing with the four parcels of land at issue in the case because they had asserted jurisdiction over only one of the parcels, while they were aware of the development of all four parcels. *See id.* The defendants also argued that the Corps itself was uncertain whether the areas in question could rightfully be considered "waters of the United States." *See id.* The internal memorandum of the Corps, which the defendants introduced at trial, suggested that they obtain guidance from higher officials within the Corps as to what would constitute "waters of the United States." *See id.*

85. *See United States v. Wilson*, 133 F.3d 251, 255 (4th Cir. 1997).

86. *Id.* at 254. Section 1319(c)(2) of the Act provides:

sentenced Wilson to twenty-one months in prison, one year supervised release, and a fine of \$1 million, and fined the other two defendants \$3 million, placing each on five years probation.⁸⁷ Finally, the court ordered the defendants to implement a government-proposed wetlands restoration and mitigation plan.⁸⁸

On appeal, the defendants argued, among other things, that the district court improperly instructed the jury regarding the *mens rea* necessary to prove a felony violation of the CWA.⁸⁹ The defendants insisted that the trial court should have instructed the jury that the government had to prove that the defendants knew their conduct was illegal.⁹⁰ The Fourth Circuit rejected this argument, concluding that criminal intent in this context did not require knowledge of the illegality of one's conduct, but only that the de-

Any person who—

(A) Knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) . . . 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.

CWA § 309(c)(2), 33 U.S.C. § 1319(c)(2). Section 1311(a) of the Act provides:

(a) Illegality of pollutant discharges except in compliance with law:

Except as in compliance with this section and section 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

Id. § 301(a), 33 U.S.C. § 1311(a).

87. *See Wilson*, 133 F.3d at 254.

88. *See id.*

89. *See id.* at 260.

90. *See id.* The trial court instructed the jury that the government must prove the four elements of the offense beyond a reasonable doubt. *See id.* One of the elements required the government to show that the defendants knowingly discharged a pollutant. *See id.* *See also* 33 U.S.C. § 1311(a) (explaining illegality of discharging pollutants). The trial court then defined an act as knowingly "if it is done voluntarily and intentionally and not because of ignorance, mistake, accident or other innocent reason." *Wilson*, 133 F.3d at 260. For each count, the trial court stated:

the government must prove that the defendants knew, one, that these areas which are the subject of these discharges had the general characteristics of a wetland; and, two, the general nature of their acts. The government does not have to prove that the defendants knew the actual legal status of wetlands or the actual legal status of the materials discharged into the wetlands. *The government does not have to prove that the defendants knew that they were violating the law when they committed their acts.*

Id. (emphasis added).

defendant have knowledge of the facts that make his conduct illegal.⁹¹ In the court's view, Congress intended "that the defendant have knowledge of each of the elements constituting the proscribed conduct even if he were unaware of their legal significance."⁹²

Importantly, the Fourth Circuit, in supporting its conclusion, satisfactorily reconciled the intent requirement with the dictates of the public welfare doctrine.⁹³ Unlike the *Ahmad* court, the Fourth Circuit acknowledged that CWA violations implicate the "public welfare" doctrine:

Even though the materials involved in this case, fill and native soil from a wetland, may not be inherently deleterious, the Clean Water Act is, as a general matter, largely

91. *See id.* at 262. The court arrived at this conclusion by recognizing two general common law principles of criminal intent. *See id.* at 261. The first principle was that "in Anglo-American jurisprudence, criminal offenses are ordinarily required to have a mens rea." *Id.* (citing *Staples*, 511 U.S. at 605). The second principle that the court relied on was that "ignorance of the law provides no defense to its violation." *Id.* (citing *Cheek v. United States*, 498 U.S. 192, 199 (1991) and *Barlow v. United States*, 32 U.S. 404, 411 (1833)). As a corollary to the second principle, the court stated, "while some level of deliberateness is usually required to impose criminal punishment, it is also usually true that the defendant need not appreciate the illegality of his conduct." *Id.*

92. *Id.* at 262. The court looked to the legislative history of the Act as support for its conclusion that Congress intended that criminal defendants under the CWA only have knowledge of their conduct and not the legal significance of their actions. *See id.* The court found that the 1987 amendments to the CWA demonstrated that Congress "intended to facilitate enforcement of the Clean Water Act and increase the impact of sanctions by creating a separate felony provision for deliberate, as distinct from negligent, activity." *Id.* Comparing the Act as amended to the original Act, the court noted that the pre-amendment CWA did not distinguish between criminal penalties for willful and negligent violations. *See id.* (citing 33 U.S.C. § 1319(d)(1) (1986)). After the 1987 amendments, however, the CWA "segregated the penalties for negligent violations, making them misdemeanors, and added felony provisions for knowing violations." *Id.* (citing 33 U.S.C. §§ 1319(c)(1)(A) and (c)(2)(A)). In so doing, Congress changed "willful" to "knowing," causing the court to assume that by changing words, Congress also intended to change meaning. *See id.* (citing *United States v. Hopkins*, 53 F.3d 533 (2d Cir. 1995) and *United States v. Sinskey*, 119 F.3d 712 (8th Cir. 1997)). The court concluded:

[b]ecause "willful" generally connotes a conscious performance of bad acts *with an appreciation of their illegality*, . . . , we can conclude that Congress intended to provide a different and lesser standard when it used the word "knowingly." If we construe the word "knowingly" as requiring the defendant must appreciate the illegality of his acts, we obliterate the distinction from the willfulness.

Id. (citation omitted).

93. *See Fourth Circuit Says 'Knowingly Violates' Means What It Says: Another Boost For Intent Standard For Crimes Under Clean Water Act*, 28 ENV'T. REP. (BNA) 1736, 1739 (Jan. 9, 1998) [hereinafter *Fourth Circuit - BNA*] (noting that *Wilson* reflects "a proper reading of *International Minerals*"). For a discussion of the public welfare doctrine, see *supra* notes 11-15 and accompanying text.

concerned with pollutants that are inherently deleterious. The legislative history of the Act records Congress' explicit concern with public health. And the Act specifically authorized research to determine the harmful effects of pollutants on the health and welfare of persons.⁹⁴

The court thus joined three other federal circuit courts in recognizing that alleged violations of the CWA are public welfare offenses by virtue of the statute's regulation of inherently deleterious pollutants.⁹⁵

Having determined that CWA violations do fall within the ambit of public welfare offenses, the *Wilson* court acknowledged the limits of the doctrine's reach — that is, that the public welfare doctrine, when properly applied, justifies exempting the government only from proving that the defendant knew the illegality of his actions.⁹⁶ Because the CWA concerns public health and safety, the statutory requirement that violations be “knowing” means alleged

94. *Wilson*, 133 F.3d at 263-64 (citations omitted). In *Wilson*, the defendants argued that the precedent provided by *International Minerals* did not apply because the crimes they were accused of were not public welfare offenses. *See id.* The defendants instead contended that the proper precedent to be applied in this case was *Liperota v. United States*, 471 U.S. 419 (1985), in which the Supreme Court held that when prosecuting a person for violation of a food stamp statute, the government has to prove that the defendant knew his acts were illegal. *See id.* (citing *Liperota*, 471 U.S. at 433). Discussing the holding of *Liperota*, the *Wilson* court reasoned that had the Supreme Court held otherwise, the result would have been “to outlaw a number of acts which a reasonable person would very likely believe were entirely unregulated, including actions that were wholly accidental.” *Id.* at 263. The Court's holding in *Liperota* was also based on the conclusion that Congress could not have intended such a harsh result. *See id.* In rejecting the defendant's argument that *Liperota* applied to the instant situation under the CWA, the Fourth Circuit reiterated its conclusion that Congress did not intend to create a requirement that a defendant charged with a crime under the Act be aware of the illegality of his behavior. *See id.* (stating “we believe the several factors we have already discussed indicate a different congressional intent than that found by the Court in *Liperota*, as we too resist the temptation to create a mistake-of-law defense”).

95. *See id.* at 263-64 (citing *United States v. Sinskey*, 119 F.3d 712, 716 (8th Cir. 1997); *United States v. Hopkins*, 53 F.3d 533, 534 (2d Cir. 1995); and *United States v. Weitzenhoff*, 35 F.3d 1275, 1284 (9th Cir. 1994)). The court applied the public welfare doctrine even though it concluded that the pollutant at issue (native soil) was not deleterious, because it reasoned that the CWA's general purpose concerned regulation of deleterious pollutants. *See id.* Therefore, the precedent of *International Minerals* did apply even though that case involved the regulation of specifically dangerous materials. *See id.* at 263. It is ironic that the Fourth Circuit was willing to apply the public welfare doctrine to a case involving the discharge of native soils, while the Fifth Circuit in *Ahmad* was unwilling to reach the same conclusion when the pollutant was gasoline and the discharge resulted in a significant emergency response and evacuation effort.

96. *See id.* at 264.

violators can be presumed to know that the government regulates the nation's waterways.⁹⁷

At the same time, the court implicitly recognized that the public welfare doctrine does *not* justify reducing the government's burden concerning intent under the CWA to prove, for example, that a defendant simply discharged a substance into a waterway. Rather, the opinion reflects an understanding that traditional common law principles governing criminal intent should not be abandoned because an act may be deemed a public welfare offense. The Fourth Circuit thus countered the government's contention advanced in *Ahmad*, that the public welfare nature of CWA offenses warrants eliminating the requirement that the government must prove the defendant "knew the operative facts which ma[d]e [the defendant's] action illegal."⁹⁸ As *Wilson* makes clear, the government's litigation position in *Ahmad* reflected a misunderstanding of the Court's public welfare jurisprudence from *Dotterweich* through *Staples*.⁹⁹

Under the CWA, the government must prove not just that the defendant discharged a substance into waters of the United States, but that he did so knowing the substance was a pollutant. This construction of the statute allows defendants to mount credible mistake-of-fact defenses: "if a defendant thought he was discharging water when he was in fact discharging gasoline, he would not be guilty of knowingly violating the act which prohibits the discharge

97. See *id.* The court listed the elements that the government must prove in order to establish a felony violation under CWA as:

(1) that the defendant knew that he was discharging a substance, eliminating a prosecution for accidental discharges; (2) that the defendant correctly identified the substance he was discharging, not mistaking it for a different, unprohibited substance; (3) that the defendant knew the method or instrumentality used to discharge the pollutants; (4) that the defendant knew the physical characteristics of the property into which the pollutant was discharged that identify it as a wetland, such as the presence of water and water-loving vegetation; (5) that the defendant was aware of the facts establishing the required link between the wetland and the waters of the United States; and (6) that the defendant knew he did not have a permit.

Id. Sensing the possibility that the last of these elements may be read as creating a mistake-of-law defense, the court further explained that requiring the government to prove the defendant knew he did not have a permit "does not require the government to show that the defendant knew that permits were available or required." *Id.* Instead, this element "preserves the availability of mistake of fact defense if the defendant has something he mistakenly believed to be a permit to make the discharges for which he is being prosecuted." *Id.*

98. *Id.* at 264.

99. For a discussion of the Supreme Court's public welfare jurisprudence, see *supra* notes 15-39 and accompanying text.

of pollutants.”¹⁰⁰ In other words, while the government must demonstrate that the defendant knew he was discharging gasoline, it need not prove he knew gasoline was a pollutant regulated under CWA — this is the import of the public welfare doctrine in the CWA context, as explained by the *Wilson* court.¹⁰¹

IV. CONCLUSION

Striking the balance between competing desires for comprehensive regulatory protection and fair regulatory enforcement is no small task. While “[p]rofit, the common denominator in environmental crimes, will continue to be a seductive motive to the white collar criminal,”¹⁰² protecting human health and the environment is not sufficient justification for “compromising the intent standard that is fully accorded to defendants, including drug dealers, under other statutes.”¹⁰³ Notwithstanding the salutary purpose of environmental laws, courts must respect well-developed common law principles such as the requirement that the government, in order to secure a conviction, prove that the defendant acted with some intent. Fundamental fairness demands no less.

With the *Wilson* decision, the Fourth Circuit has provided guidance to courts negotiating the intersection where regulatory complexity and government enforcement concerns collide. While some commentators praise *Wilson* for its rejection of the defense argument that the government must prove the defendant knew his actions were illegal,¹⁰⁴ it should also be recognized for its reconciliation of the CWA, the public welfare doctrine, and the common law’s concern “that an injury can amount to a crime only

100. *Id.* at 262.

101. The *Wilson* court’s conclusions in regard to CWA are in accord, moreover, with the construction of “knowingly” under the Resource Conservation and Recovery Act (RCRA). See *United States v. Kelley Technical Coatings, Inc.*, 157 F.3d 432 (6th Cir. 1998) (concluding that under RCRA, government must prove defendant had “knowledge of the facts that made the conduct a crime”). The decision in *Wilson* also had a dramatic effect on another regulatory issue, overturning the Army Corps of Engineer’s longstanding practice of regulating discharges from sidecasting. See *Wilson*, 133 F.3d at 258-59 (“In instructing the jury that sidecasting was prohibited by the Clean Water Act, we believe that the district court included conduct not prohibited by the Act, and the regulations promulgated under it.”).

102. Turner, *supra* note 24, at 235.

103. *Fourth Circuit - BNA*, *supra* note 93, at 1739.

104. See Turner, *supra* note 24, at 235-36 (commenting that debate regarding *mens rea* will continue and that environmental laws “must ensure concern and diligence on the part of those in a position to do the most harm since they, frequently, are also the ones in the best position to know and conform to the law”).

when inflicted by intention.”¹⁰⁵ Given the similarity of the CWA to many state and federal environmental statutes, other courts may rely upon *Wilson* in future environmental criminal prosecutions for its sound rejection of the prosecutor’s argument that intent has virtually no role to play in bringing alleged “green collar” criminals to justice.

105. *Wilson*, 133 F.3d at 261 (quoting *Staples v. United States*, 511 U.S. 600, 605 (1994)).