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Kepten D. Carmichael
Indiana University School of Law

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KEPTEN D. CARMICHAEL*

INTRODUCTION

Michael Weitzenhoff and Thomas Mariani spent over twenty months in a federal penitentiary as the result of the unprecedented merger of two independent judicial trends by the Ninth Circuit Court of Appeals.[1] The first trend is a growing number of criminal prosecutions for violations of environmental laws and permits.[2] The second is the use of the "public welfare offense" doctrine, which creates an exception to the firmly established criminal law requirement of a requisite mental state in enforcing regulatory offenses. The result of this merger is judicially created strict liability for environmental regulatory violations. This strict criminal liability has extremely dangerous implications for environmental managers, corporate executives, and most importantly, the environment itself.

In *United States v. Weitzenhoff*,[3] the court affirmed the felony convictions of Weitzenhoff and Mariani for violations of the Clean Water Act ("CWA"),[4] which provides that anyone who "knowingly violates" certain sections of the CWA "or any

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* J.D. Candidate, 1996, Indiana University School of Law-Bloomington; B.A., 1993, DePauw University. Special thanks to Joan M. Heinz for her original suggestion of this topic and to John M. Kyle III for his comments on an earlier draft of this Note. Sincere thanks to my parents Dan and Judy Carmichael for their constant support, love, and encouragement.

1. United States v. Weitzenhoff, 1 F.3d 1523 (9th Cir. 1993), *amended on denial of reh'g and reh'g en banc*, 35 F.3d 1275 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 939 (1995). Similarly, Robert Hopkins is currently spending 21 months of his life in a federal penitentiary following the Second Circuit Court of Appeals' recognition of this judicially created merger. United States v. Hopkins, 53 F.3d 533 (2d Cir. 1995).

2. Over the past 15 years, the Department of Justice ("DOJ") and the Environmental Protection Agency ("EPA") have increased their efforts in criminal prosecutions for violations of environmental statutes. In November, 1982, the DOJ had only three lawyers who concentrated exclusively on environmental crime cases. John F. Cooney et al., *Criminal Enforcement of Environmental Laws: Part I*, 25 Envtl. L. Rep. (Envtl. L. Inst.) 10,459, 10,462 (Sept. 1995). In May, 1987, the Department created an independent Environmental Crimes Section ("ECS") to prosecute environmental crimes. *Id.* By 1992, this section had grown to 28 attorneys. The Federal Bureau of Investigation ("FBI") assigned 100 agents to assist the ECS in its investigation of environmental crimes. *Id.* The EPA's criminal investigation staff also grew dramatically between 1982 and 1992 from six to 62 criminal investigators. *Id.* As of the summer of 1995, the EPA had more than 160 criminal investigators in 32 field offices throughout the country. *Criminal Enforcement of Environmental Laws*, ALI-ABA COURSE OF STUDY FOR THE GOVERNMENT AND DEFENSE BARS (advertising circular for conference held November 2-3, 1995 in Washington, D.C.) [hereinafter ALI-ABA]. The Pollution Prevention Act of 1990, Pub. L. No. 101-593, §202, 104 Stat. 2962 (1990), established a goal that by October, 1995 the EPA would have 200 criminal investigators. Cooney, *supra*, at 10,462.

With the increased number of investigators and prosecutors in the EPA, FBI, and DOJ came an increase in the number of indictments, pleas, and convictions. Between October, 1982, and April, 1995, the DOJ obtained indictments against 443 corporations and 1068 individuals. Three hundred thirty-four of those corporations and 740 of those individuals were convicted by plea or verdict. *Id.* In 1994 alone, the DOJ obtained 178 environmental crime indictments with 124 pleas and convictions. ALI-ABA, *supra*. These numbers represented a 40% increase over the number of environmental criminal charges brought in 1993. Thomas R. Bartman, *High Criminal Intent Standard Needed for Complex Environmental Laws*, LEGAL BACKGROUNDER, Sept. 15, 1995, at 4. The record high of 1994 is expected to have been surpassed in 1995. ALI-ABA, *supra*. Between 1982 and 1995, individuals convicted of environmental crimes have served a total of over 560 years in prison. Cooney, *supra*, at 10,462.

3. 1 F.3d 1523.

4. 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993).

permit condition or limitation implementing any such sections" is guilty of a felony.[5] Weitzenhoff was sentenced to twenty-one months and Mariani to thirty-three months imprisonment.[6]

Weitzenhoff was the manager and Mariani was the assistant manager of the East Honolulu Community Services Sewage Treatment Plant on the Hawaiian island of Oahu.[7] The plant operates under a National Pollution Discharge Elimination System ("NPDES") permit which establishes limitations for effluent discharges in the ocean. During fourteen months in 1988 and 1989, the plant exceeded its NPDES permit effluent limitations by six percent.[8] Weitzenhoff and Mariani defended their failure to maintain levels within permit limitations by asserting that, according to their interpretation of the NPDES permit, the discharges were permissible.[9] The district court, however, made their assertion irrelevant by refusing to provide the jury with the mens rea instruction sought by the defendants. Instead, the district court construed "knowingly" in § 1319(c)(2)(A) of the CWA as merely requiring that Weitzenhoff and Mariani knew they were discharging pollutants into the ocean and not that they knew the discharges violated the NPDES permit. Accordingly, the court refused to instruct the jury on the defendants' proposed affirmative defense that they did not know their actions violated the NPDES permit.[10]

In affirming the convictions, the Ninth Circuit based its holding on the statutory language of the CWA, the legislative history of the 1987 amendments to the CWA, and an analysis of decisions interpreting public welfare offenses.[11] In a six-to-five decision, the Ninth Circuit denied a petition for rehearing en banc. While acknowledging that "[e]n banc review is extraordinary, and is generally reserved for . . . egregious errors in important cases," the dissenting judges asserted that a rehearing en banc was necessary because this was "a case of exceptional importance."[12] The dissent's sharp criticism highlighted many of the opinion's erroneous conclusions and presented many of the dangerous implications of this mistaken decision.[13]

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5. *Id.* § 1319(c)(2)(A). Specifically, the section states:

> Any person who . . . knowingly violates [various sections of the Clean Water Act] or any permit condition . . . [commits a felony and] 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.

Id.

6. *Weitzenhoff*, 35 F.3d at 1282.

7. *Id.* at 1281.

8. *Id.* at 1296 (Kleinfeld, J., dissenting). The purpose of this Note is neither to defend nor condone the actions of the two defendants. Rather, this Note is critical of the precedent established by the Ninth Circuit's opinion, which unjustifiably removes any mens rea requirement from the elements of the offense, making it easier for the prosecution to obtain a conviction. It is possible that the defendants' action or character so frustrated the district and appellate courts that removing the mens rea requirement was justified to ensure that these defendants were punished. There is no indication in the record, however, that these violations were systemic or that any other particularly egregious factors led to the courts' frustration. The courts neither highlighted nor presented any such factors as justification for their holdings. In easing the prosecution's burden in this case by permitting a conviction with no proof of the requisite mens rea, *Weitzenhoff* has established dangerous precedent. The desire to punish two individuals is no justification for subjecting multitudes of future defendants to criminal sanctions without any proof of the requisite criminal intent.

9. *Id.* at 1287 (opinion of the court). In addition to establishing effluent discharge limitations, the NPDES permit at issue also regulated "bypass." Bypass is the intentional diversion of waste streams from any portion of the treatment facility. The permit generally prohibited bypass except to "prevent loss of life, personal injury, or severe property damage." *Id.* Weitzenhoff and Mariani asserted that the discharges were permissible bypasses essential for the maintenance of the plant. *Id.*

10. *Id.* at 1283.

11. *Id.* at 1283-86.

12. *Id.* at 1293 (Kleinfeld, J., dissenting).

13. *Id.*

Unfortunately, *Weitzenhoff* has not been dismissed by other courts as a rogue opinion to which they refused to adhere. In *United States v. Hopkins*,[14] the Second Circuit specifically followed the Ninth Circuit and affirmed the twenty-one-month sentence of Robert Hopkins, former vice president of manufacturing for Spirol International Corporation. As in *Weitzenhoff*, the prosecution was not required to prove the defendant knew his actions violated the NPDES permit of the manufacturing facility.[15] Unlike the courts in *Weitzenhoff* and *Hopkins*, other courts must refrain from creating strict criminal liability in the context of the CWA and other similar environmental statutes. The statutory language and available precedent do not justify the radical judicial action taken by the Ninth and Second Circuits, especially in light of the alarming ramifications that could result from nonlegislated, strict criminal liability for environmental regulatory violations.

Part I of this Note examines both the language and the legislative history of the CWA to determine Congress' actual intent regarding the function of its enforcement provisions. Part II challenges the Ninth and Second Circuits' reliance on the public welfare doctrine to skew an unambiguous text. It examines the development of the public welfare offense from the late 19th century to its present form and notes its inapplicability in the context of the CWA. Part III analyzes similar case law that enforces "knowing" offenses and identifies the Ninth Circuit's, and subsequently the Second Circuit's, sharp break from applicable precedent. Finally, Part IV presents several of the intolerable implications of strict liability for environmental regulatory violations.

I. THE STATUTORY LANGUAGE OF THE CLEAN WATER ACT AND LEGISLATIVE INTENT

Weitzenhoff and Mariani were charged and convicted under § 1319(c)(2)(A) of the CWA. The most appropriate place to uncover the intended function of this provision is the plain language of the statute itself, and, if necessary, its legislative history. It is a "familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."[16] The Ninth Circuit itself has acknowledged the importance of statutory language. In a previous opinion interpreting a similar provision of the CWA, the court stated: "[T]he statute itself is the best source for determining the elements of this offense due to the paucity of case law analyzing it."[17]

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14. 53 F.3d 533 (2d Cir. 1995).

15. The facts in *Hopkins* do not portray the defendant as a model environmental manager. The particular NPDES permit required Spirol International Corporation to take weekly samples of the manufacturing facility's wastewater and deliver the samples to an independent laboratory each Friday for testing. The defendant directed his employees to take samples early in the week and test them. If the tests showed that the wastewater exceeded the NPDES permit limits, the defendant directed the employees to retest the wastewater the next day. If the samples continued to exceed the NPDES permit limitations, the defendant ordered the employees to dilute the samples before sending them to the independent laboratory. *Id.* at 535-36. As mentioned previously, this Note neither condones nor defends the actions of Robert Hopkins or the *Weitzenhoff* defendants. It does, however, criticize the opinion for adopting an interpretation which unnecessarily eased the prosecution's path to conviction. In an effort to catch a small fish, the court, following the example set by the Ninth Circuit, has cast an overly broad net and set a precedent that will inevitably entangle a large number of morally innocent people.

16. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

17. United States v. Hoflin, 880 F.2d 1033, 1040 (9th Cir. 1989) (interpreting § 1319(c)(1) of the CWA, relating to misdemeanor violations), *cert. denied*, 493 U.S. 1083 (1990).

The *Weitzenhoff* court did begin its analysis with the actual language of the statute. After analyzing the text, however, the court concluded that § 1319(c)(2)(A) was ambiguous. The court then turned to the legislative history concerning the 1987 amendments to the CWA, and held the section does not require that defendants know their conduct violates the NPDES permit. The court held 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."[18] A careful and logical reading of the plain language of the statute severely calls into question the Ninth Circuit's conclusion. While superfluous in light of the clear statutory language, a thorough review of the legislative history of the 1987 amendments to the CWA also clearly indicates that the *Weitzenhoff* interpretation is erroneous.

A. The Plain Meaning

Section 1319(c) of the CWA provides penalties for dischargers or individuals who violate certain requirements of the CWA. A United States district court convicted Weitzenhoff and Mariani of violating § 1319(c)(2)(A). The penalty scheme of § 1319(c) is as follows, with the portion under which Weitzenhoff and Mariani were charged emphasized:

> (1) Any person who . . .
> (A) negligently violates [various sections of the CWA] . . . or any permit condition or limitation . . . ;[19] or
> (B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or . . . which causes such treatment works to violate any effluent limitation or condition in any permit . . . [commits a misdemeanor].[20]
> *(2) Any person who . . .*
> *(A) knowingly violates [various sections of the CWA] . . . or any permit condition or limitation . . . ;*[21] or
> (B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or . . . which causes such treatment works to violate any effluent limitation or condition in a permit . . . [commits a felony].[22]
> . . . .
> (3)(A) Any person who knowingly violates [various sections of the CWA] . . . or any permit condition or limitation . . . and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury . . . [commits a felony punishable by up to 15 years imprisonment].[23]

18. *Weitzenhoff*, 35 F.3d at 1284.
19. 33 U.S.C. § 1319(c)(1)(A).
20. *Id.* § 1319(c)(1)(B).
21. *Id.* § 1319(c)(2)(A) (emphasis added).
22. *Id.* § 1319(c)(2)(B).
23. *Id.* § 1319(c)(3)(A).

After reviewing the statute, the *Weitzenhoff* panel was still uncertain as to the requisite mental state under § 1319(c)(2)(A).[24] After applying proper grammatical analysis, however, the meaning of "knowingly violate[s] . . . any permit limitation or condition" becomes clear. "'Knowingly' is an adverb. It modifies the verb 'violates.' The object of the verb is 'any permit condition or limitation.' The word 'knowingly' is placed before 'violates' to 'explain its meaning in the case at hand more clearly.'"[25] The word "knowingly" is clearly intended to modify the word "violate." A meaning of the word "violate" is "to disregard."[26] As an illustration, one dictionary offers the phrase "to disregard the law."[27] With the adverb "knowingly" placed before "violates," "knowingly violates" means to knowingly disregard the law, not, as *Weitzenhoff* suggests, to knowingly discharge pollutants that cause a NPDES permit violation. Had Congress intended to punish persons who knowingly discharged pollutants which resulted in a NPDES permit violation, it could have easily provided that "any person who knowingly causes a discharge of pollutants which results in a NPDES permit violation commits a felony."[28] It clearly did not. Congress explicitly "distinguished those who knowingly violate permit conditions, and are thereby felons, from those who unknowingly [(*i.e.*, negligently)] violate permit conditions, so are not."[29]

While ultimately following the Ninth Circuit's holding in *Weitzenhoff*, the Second Circuit Court of Appeals acknowledged in *Hopkins* that a grammatical and logical reading of § 1319(c)(2)(A) suggested that the above analysis is correct. The court first asserted that the section itself did not expressly state whether Congress intended "knowingly" to require proof that the defendant had knowledge that his actions violated the NPDES permit. However, the court conceded that "[a]s a matter of abstract logic, it would seem that a statute making it unlawful to 'knowingly violate[]'a given statutory or permit provision would require proof that the defendant both violated and knew that he violated that provision."[30] Unfortunately, the court refused to accept this logical conclusion. Instead, it relied on the public welfare offense doctrine[31] to conclude that the statute did not require proof that the defendant both violated and knew that he violated the permit. Mere proof that he knew of the nature of his actions which caused the permit violation was sufficient to obtain a conviction under § 1319(c)(2)(A).[32]

In addition to ignoring the specific language of the statute, the *Weitzenhoff* interpretation significantly alters the function of a carefully engineered statutory scheme. Congress structured the enforcement section of the CWA with a multitier penalty scheme. Section 1319(c) contains subsections (1), (2), and (3). Subsection (1) addresses negligent violations. The subsection defines the degree of culpability (negligence), the prohibited conduct, and appropriate penalty (misdemeanor charge). Subsection (2) increases the degree of culpability and requisite mental state to knowledge and increases the penalties

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24. *Weitzenhoff*, 35 F.3d at 1283 ("[I]t 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.").

25. *Id.* at 1294 (Kleinfeld, J., dissenting) (quoting 1 GEORGE O. CURME, A GRAMMAR OF THE ENGLISH LANGUAGE 72 (1935)).

26. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2554 (3d ed. 1981).

27. *Id.*

28. In this hypothetical provision, the adverb "knowingly" is placed before "discharges" to explain its meaning more clearly, indicating that the defendant only needs to have knowledge of the discharge (not the violation) to be convicted.

29. *Weitzenhoff*, 35 F.3d at 1294 (Kleinfeld, J., dissenting).

30. United States v. Hopkins, 53 F.3d 533, 537 (2d Cir. 1995).

31. *Id.* at 537-38. For a detailed discussion on the development and characteristics of a public welfare offense, see *infra* part II.

32. *Hopkins*, 53 F.3d at 541.

accordingly (felony charge). Finally, subsection (3) defines the worst violation. It prohibits "knowing endangerment" and increases the penalty substantially.[33]

The *Weitzenhoff* holding has substantially unraveled the effect of the multitier scheme engineered by Congress. Congress has explicitly stated that a negligent violation is a misdemeanor. However, the *Weitzenhoff* court held that one may be convicted of a felony under § 1319(c)(2)(A) if one is aware that he is discharging pollutants even if he does not know that his actions violated the permit. Therefore, under the *Weitzenhoff* interpretation, the government must prove *negligence* to convict a person of a misdemeanor, but merely *action* to convict a person of a felony.[34] In effect, the burden on the prosecution to obtain a misdemeanor conviction is greater than the burden to obtain a felony conviction. This illogical interpretation destroys the function of the multitier penalty scheme.

B. The Legislative History

While the statutory language is clear, the legislative history of the CWA and its amendments shed even more light on Congress' intentions concerning the enforcement provisions.[35] In 1987, Congress amended the CWA.[36] The amendments substantially increased the penalties for environmental violations. Congress believed that the elevated penalties were required to deter potential polluters and further the goals of the CWA.[37] The resulting legislation greatly increased the force of the legislation and substantially increased the authority of the administrative agencies responsible for its enforcement.

The *Weitzenhoff* court used some of the language from the legislative history to support its holding that a court could convict a person of a felony without any knowledge of a permit violation. The decision cited a Senate report accompanying the legislation which stated that "'criminal liability shall . . . attach to any person who is not in compliance with all applicable Federal, State and local requirements and permits and causes a POTW [publicly owned treatment works] to violate any effluent limitation or condition in any permit issued to the treatment works.'"[38] Because Congress used such language as "causing" a violation, the *Weitzenhoff* court concluded that Congress intended that an individual merely have knowledge of an action which "causes" a permit

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33. The CWA provides that those convicted of "knowing endangerment" are subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. 33 U.S.C. § 1319(c)(3)(A).

34. It is interesting to note that the action the prosecution must prove to obtain a felony conviction is the same action that entitles the EPA to commence a civil action under 33 U.S.C. § 1319(b). This section authorizes the EPA "to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation [of the CWA.]" *Id.* Obviously, the civil penalties permitted under § 1319(b) are substantially less than the penalties which attach to felony convictions. *See id.* The *Weitzenhoff* court's interpretation, however, enables the prosecution to obtain felony convictions (and the accompanying penalties) for CWA violations by proving no more than the same action which would result in mere civil penalties.

35. It is important to note that because the statutory language of the enforcement provisions in the CWA is clear and unambiguous, it is unnecessary and ill advised to probe into the legislative history in an effort to uncover the "true" intent of Congress. The Supreme Court has stated: "[W]e do not resort to legislative history to cloud a statutory text that is clear." Ratzlaf v. United States, 114 S. Ct. 655, 662 (1994). However, even if an examination of the legislative history is appropriate, the following discussion shows that such an examination would not support the conclusion reached in *Weitzenhoff*.

36. Pub. L. No. 100-4, §§ 312, 313(a)(1), 313(c), 314(a), 101 Stat. 42, 45, 46 (1987) (codified at 33 U.S.C. §§ 1319, 1319(c)(1)(A), 1319(d), 1319(g) (1988)). The amendments created the multitier penalty scheme. The new legislation contained penalties for negligent violations, replaced "willfully" with "knowingly," and created a penalty for "knowing endangerment."

37. *See* H.R. CONF. REP. NO. 1004, 99th Cong., 2d Sess. 138 (1986); S. REP. NO. 50, 99th Cong., 1st Sess. 29 (1985).

38. *Weitzenhoff*, 35 F.3d at 1284 (quoting S. REP. NO. 50, *supra* note 37, at 29).

violation in order to be subject to criminal sanctions.[39] This conclusion, however, is clearly erroneous. The legislative history cited in *Weitzenhoff* did not refer to the enforcement section at issue. The legislative history explicitly referred to § 1319(c)(2)(B), which does not contain any "knowingly violates" language. Instead, the section speaks of "knowing[] introduc[tions] . . . which cause . . . violat[ions.]"[40] The defendants in *Weitzenhoff* were not charged with or convicted of violating § 1319(c)(2)(B). They were convicted of violating § 1319(c)(2)(A), which contains significantly different language.[41] The *Weitzenhoff* court's reliance on language from the legislative history which related to provisions under which the defendants were not charged and which were not at issue in the case was clearly erroneous. It appears as if the court in *Hopkins* acknowledged that the legislative history used in *Weitzenhoff* was not relevant to the CWA section at issue. While the Second Circuit did follow the holding in *Weitzenhoff*, it did not cite the legislative history upon which *Weitzenhoff* based its holding.[42]

While the legislative history that *Weitzenhoff* cites is of little value for the section at issue, another piece of legislative history provides much more guidance in determining Congress' intent concerning "knowing violations." In a House report, Congress clearly stated the purpose and function of the elevated criminal penalties in the new legislation:

> Presently the [CWA] has no provision that deals with knowing violations of major statutory or regulatory requirements. [The enforcement section] is intended to be used primarily to address intentional violations of the [CWA] occurring on a regular basis over an extended period of time that result in significant harm to public health or the environment. The section is intended to provide for imposition of severe penalties for such actions.[43]

From the language of this legislative history, Congress' intent regarding "knowing violations" is indisputable. Congress intended to punish individuals who "intentional[ly] violat[e]" the provisions of the CWA. Clearly, the result in *Weitzenhoff* is contrary to this objective.

II. PUBLIC WELFARE OFFENSES

In addition to its questionable reading of the statutory text and legislative history, the *Weitzenhoff* court relied on case law which construed the requirements of so-called "public welfare" statutes to bolster its conclusion that § 1319(c)(2)(A) did not require the government to prove the defendant knew his actions violated a NPDES permit. This Part examines the development of public welfare statutes in the United States, analyzes the reasoning courts used when interpreting such statutes, and explains why this reasoning is inapplicable in the context of the CWA.

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39. *Id.*

40. 33 U.S.C. § 1319(c)(2)(B). The section states:

> Any person who . . . knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could *cause* personal injury or property damage or . . . which *causes* such treatment works to violate any effluent limitation or condition in a permit . . . [commits a felony.]

Id. (emphases added).

41. *See supra* text accompanying note 21.

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

43. H.R. REP. NO. 189, 99th Cong., 1st Sess. 31 (1985).

At the core of our criminal justice system is the notion that "an injury can amount to a crime only when inflicted by intention."[44] The idea that a crime required the concurrence of an evil-meaning mind with an evil-doing hand was firmly established in English common law. William Blackstone stated: "To constitute a crime against human laws, there must be first a vicious will, and secondly an unlawful act consequent upon such vicious will."[45] The concept was so well entrenched in the common law of this country that if legislatures did not mention an intent requirement in the codification of a common law crime, the courts would read an intent requirement into the statute. The courts acknowledged that "intent was so inherent in the idea of the offense that it required no statutory affirmation."[46] This mens rea requirement evolved from the original objective of criminal law: to keep the peace and to punish the morally delinquent.[47]

The increasingly complex demands of a growing and industrialized society in the late 19th and early 20th centuries, however, led to an increase in social regulation. Society shifted its focus from protecting individual rights to protecting public and social interests. From this movement emerged new regulatory measures that involved no moral delinquencies.[48] The legislatures and the courts turned to criminal law to enforce these new offenses that were punishable without any regard to intent. The new offenses were termed "public welfare offenses."[49] Public welfare offenses created an exception to the rule that to constitute a crime, an action had to be accompanied by a vicious will.

A. Historical Origins in the United States

The Massachusetts Supreme Court first introduced the public welfare offense doctrine to the United States in *Commonwealth v. Boyton*.[50] In *Boyton*, a court convicted the defendant of selling intoxicating liquor. Ignoring the traditional mens rea requirement, the court affirmed the conviction despite the fact that the defendant was unaware that the beverage was intoxicating. The court declared that "if the defendant purposely sold the liquor, which was in fact intoxicating, he was bound at his peril to ascertain the nature of the article."[51] Following *Boyton*, several states began adopting, and courts began enforcing, similar statutes that punished defendants regardless of whether they possessed any criminal intent.[52] Legislatures primarily designed these first public welfare statutes to regulate sales of intoxicating liquors, distribution of adulterated foods and drugs, and other activities which jeopardized the health and safety of the public.[53]

The function and enforcement of the public welfare offense gained greater acceptance in American courts throughout the 20th century. Legal scholars, however, cautioned that this "group of offenses punishable without proof of any criminal intent must be sharply

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

45. 4 WILLIAM BLACKSTONE, COMMENTARIES *21.

46. *Morissette*, 342 U.S. at 252.

47. Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 68 (1933).

48. One can see a parallel trend in civil common law developing during the same period. In the late 19th and early 20th centuries, the law witnessed the emergence of strict liability for certain abnormally dangerous activities. *See, e.g.*, Enos Coal Mining Co. v. Schuchart, 188 N.E.2d 406 (Ind. 1963); Healey v. Citizens' Gas & Elec. Co., 201 N.W. 118 (Iowa 1924); Ball v. Nye, 99 Mass. 582 (1868); Cahill v. Eastman, 18 Minn. 324 (1872); Berg v. Reaction Motors Div., Thiokol Chem. Corp., 181 A.2d 487 (N.J. 1962); *see also* Rylands v. Fletcher, 3 L.R.-E. & I. App. 330 (1868).

49. Sayre, *supra* note 47, at 56.

50. 84 Mass. (2 Allen) 160 (1861).

51. *Id.* at 160.

52. Sayre, *supra* note 47, at 64-66.

53. *Id.* at 73.

limited."[54] The Supreme Court also stated that these offenses should be recognized only in "limited circumstances."[55] The Supreme Court noted that limiting public welfare offenses is crucial when "[t]he purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries."[56] The case law recognizing public welfare offenses has established some parameters to help define these limited circumstances. A public welfare statute has four basic characteristics: (1) the statute is designed to protect the public health and safety; (2) the regulated activity is of such a nature that a reasonable person should know that it is subject to stringent public regulation; (3) the statute does not explicitly include a mens rea requirement; and (4) the punishment for a violation involves a light fine or penalty.

B. The Public Health and Safety

As the term suggests, one of the key elements of a public welfare offense is that its fundamental purpose is to protect the public health and safety. The presence of this element in the Federal Food, Drug, and Cosmetic Act ("the 1938 Act") helped persuade the Supreme Court to uphold the conviction of a pharmaceutical company president for shipping mislabeled drugs in violation of the 1938 Act without any proof of mens rea.[57] In *United States v. Dotterweich*, the Court considered Congress' purpose and intent behind the creation of the 1938 Act, and in the interest of the "larger good," subjected the defendant to criminal misdemeanor penalties despite his lack of awareness of any wrongdoing.[58] In *United States v. Park*, the Court reaffirmed "that knowledge or intent were not required to be proved in prosecutions under [the 1938 Act's] criminal provisions."[59]

Because the Federal Food, Drug, and Cosmetic Act was America's first example of expansive federal regulation in which the courts recognized the need to enforce criminal sanctions without any proof of intent or knowledge on the part of the accused, it is important to understand Congress' motivations in creating the legislation. In 1906, the Federal Food and Drug Act ("the 1906 Act") was enacted amidst a growing concern over the quality and safety of America's foodstuffs. The need to protect human lives and the health of consumers drove Congress to enact the legislation. The 1906 Act "was an exertion by Congress of its power to keep impure and adulterated food . . . out of the channels of commerce."[60] At the time of its enactment, the 1906 Act was a significant accomplishment in the movement to protect consumer welfare and was praised as a social

54. *Id.* at 70.
55. United States v. United States Gypsum Co., 438 U.S. 422, 437 (1978).
56. Morissette v. United States, 342 U.S. 246, 263 (1952).
57. United States v. Dotterweich, 320 U.S. 277 (1943).
58. *Id.* at 281.
59. United States v. Park, 421 U.S. 658, 670 (1975).
60. *Dotterweich*, 320 U.S. at 280.

landmark.[61] In 1938, Congress amended the 1906 Act.[62] One of the primary purposes for the amendments was to "strengthen and extend that law's protection of the consumer."[63] A tragic incident involving an antibiotic drug in which more than seventy-three persons died also sparked the movement to amend the 1906 Act.[64] The incident horrifically illustrated the dangers that improperly tested drugs posed to the public's health and safety. The tragedy also displayed the ineffectiveness of the 1906 Act. In response to public sentiment and genuine concern for safety, the Federal Food, Drug, and Cosmetic Act of 1938 encompassed a broader range of products and provided a more effective enforcement mechanism.[65]

Unlike the motivations behind the Federal Food, Drug, and Cosmetic Act, the driving force behind the enactment of the CWA was not the preservation of human life. While protecting individuals from the harmful effects of pollution may have been a consideration of the drafters, it was not the principal goal of the CWA. The primary objective is clearly stated in the first section of the CWA:

> The objective of [the CWA] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that . . . it is the national goal that whenever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved . . . .[66]

Arguably, a statute which contemplates the integrity of the nation's waters and the interests of fish and other wildlife before addressing the issues of human health and safety does not fit within the traditional category of statutes (like the Food, Drug, and

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61. JAMES T. O'REILLY, FOOD AND DRUG ADMINISTRATION § 3.02, at 3-6 (2d ed. 1993). The propaganda of the day deserves much of the credit for the creation of the legislation. Propaganda helped the general public become more aware of the unsanitary conditions of the slaughterhouses and food warehouses. Literature such as Upton Sinclair's 1905 novel *The Jungle* presented information to the public regarding the appalling practices of the meat-packing industry. Heightened public awareness of conditions through publications such as Sinclair's novel helped produce a public mandate for federal regulation in this and similar industries to protect the public's welfare. *Id.* at 3-5.

62. Federal Food, Drug, and Cosmetic Act, ch. 675, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301-95 (1994)). The amendments changed the 1906 Act in several ways:

> First, the enforcement remedy of injunction was added to the existing seizure and criminal authorities. Second, standards of identity for all but a few foods were authorized in an expansion of the 1930 canned-food standardization statute. Third, nonstandardized foods with two or more ingredients were required to list all ingredients. Fourth, drugs were required to undergo prior screening by the [Food and Drug Administration ("FDA")]—a form of negative option power to reject proffered applications. Fifth, cosmetics and devices came under regulation for the first time. Finally, the FDA's enforcement power was generally enlarged as the number and type of offenses increased.

O'REILLY, *supra* note 61, § 3.04, at 3-11.

63. S. REP. NO. 152, 75th Cong., 1st Sess., pt. 1, at 1 (1937). A House Committee expressed the same sentiment when it declared that the amendments "seek[] to set up effective provisions against abuses of consumer welfare growing out of inadequacies in the Food and Drugs Act of June 30, 1906." H. REP. NO. 2139, 75th Cong., 3d Sess., pt. 1, at 1 (1938).

64. David F. Cavers, *The Food, Drug, and Cosmetic Act of 1938: Its Legislative History and Its Substantive Provisions*, 6 LAW & CONTEMP. PROBS. 2, 20 (1939). The deaths occurred as a result of a fatal error by a developmental chemist for the Massengill Company. A new solvent for a drug had been tested for qualities such as flavor and fragrance but never for safety. The chemists never even performed tests on animals before Massengill marketed the drug for public consumption. More than 73—perhaps over 90—persons died after ingesting the new drug solvent. *Id.*

65. *See supra* note 62.

66. 33 U.S.C. § 1251(a) (1988).

Cosmetic Act) which were designed primarily, if not exclusively, to protect the public from dangerous and potentially fatal products.[67]

Compliance with the CWA does benefit the public at large: it preserves the aesthetic beauty of our nation's waters, provides an hospitable environment in which aquatic life may flourish (which in turn provides food and recreation for the public), and supplies a source of recreation for millions of people each year. The motivations behind the creation of the CWA, however, were not like those behind the Federal Food, Drug, and Cosmetic Act and other similar acts. Unlike traditional public welfare statutes, the CWA was not designed primarily to prevent the loss of human life. Because the CWA's general purpose does benefit the public, the statute probably possesses the first characteristic of a public welfare statute. However, the argument for attributing public benefit to the CWA is not nearly as compelling as the argument for attributing it to the Federal Food, Drug, and Cosmetic Act and other similar legislation.[68]

C. Nature of the Action

The second notable characteristic of most public welfare statutes is the nature of the action which the law regulates. In *Liparota v. United States*, the Supreme Court stated that it recognized those public welfare offenses in which "Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health and safety."[69] The Supreme Court defined the type of conduct regulated by public welfare statutes in *United States v. International Minerals & Chemical Corp.*[70] The Court held 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."[71] The Court, however, also explicitly stated that the public welfare doctrine should not be applied to *all* regulated activity. "Pencils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions if Congress did not require . . . 'mens rea' as to each ingredient of the offense."[72]

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67. This distinction, of course, does not diminish the importance of the CWA. The CWA is an extremely important tool which can help society preserve the earth's fragile environment for future generations. The distinction, however, leads one to question whether it is appropriate to include the CWA in a class of statutes primarily designed to prevent loss of human life and to increase public safety.

68. Because the argument in the context of the CWA is less compelling, one should refrain from applying the public welfare offense rationale to it without critically analyzing the other three characteristics.

69. 471 U.S. 419, 433 (1985).

70. 402 U.S. 558 (1971).

71. *Id.* at 565. The Supreme Court has not fully embraced the idea that all "dangerous" and "regulated" activity should be governed by the public welfare doctrine. The Court has been especially reluctant to apply the doctrine in situations where a violation could result in a prison term, as in *Weitzenhoff*. In Staples v. United States, 114 S. Ct. 1793 (1994), the Court deemed the following hypothetical unacceptable:

> Automobiles, for example, might also be termed "dangerous" devices and are highly regulated at both the state and federal levels. Congress might see fit to criminalize the violation of certain regulations concerning automobiles, and thus might make it a crime to operate a vehicle without a properly functioning emission control system. But we probably would hesitate to conclude on the basis of silence that Congress intended a prison term to apply to a car owner whose vehicle's emissions levels, wholly unbeknownst to him, began to exceed legal limits between regular inspection dates.

Id. at 1801-02.

72. *International Minerals*, 402 U.S. at 564-65.

The CWA's definition of "pollutant" includes such items as chemical wastes, biological materials, and radioactive materials.[73] These are probably the types of materials to which the Supreme Court was referring when it discussed "dangerous and deleterious" materials. Therefore, the CWA arguably possesses the second characteristic of the traditional public welfare statute. The CWA's definition of pollutant, however, also includes such items as rock, sand, dirt, and hot water.[74] Clearly, these types of materials are not the type the Supreme Court would include in a category of "dangerous and deleterious" products; in fact, they may fall within the "pencils, dental floss, paper clips" category of materials. While the CWA probably does possess the second characteristic of traditional public welfare statutes, the fact that it also regulates such nondangerous and nondeleterious items such as rock and sand should cause one to pause before applying a broad doctrine, such as the public welfare doctrine, without first ensuring that the other characteristics are also present. A failure to do so could result in erroneously subjecting numerous persons who handle materials that pose no danger to public health to strict criminal liability as a result of a doctrine designed primarily to protect the public against dangerous materials.

D. Lack of a Mens Rea Requirement

The third significant characteristic of traditional public welfare statutes is the lack of any mention of the requisite mens rea in the language of the statute. In Professor Sayre's article in which he coined the term "public welfare offense," the only offenses that Sayre considered were those "where the statute creating the offense [wa]s entirely silent as to requisite knowledge."[75] Not surprisingly, the cases that have established the public welfare offense in American law have dealt primarily with those statutes which did not require any mens rea—in effect, creating a form of strict criminal liability.[76] The Supreme Court has recognized Congress' ability to exclude explicitly any mention of the requisite mens rea in a statute: "The power of the legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned."[77]

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73. 33 U.S.C. § 1362(6) (1988).

74. *Id.*

75. Sayre, *supra* note 47, at 72.

76. *See, e.g.*, United States v. Park, 421 U.S. 658, 671 (1975) (holding that when the statute under which defendants were prosecuted dispensed with "consciousness of wrongdoing," an omission or failure to act was deemed a sufficient basis for liability); United States v. Freed, 401 U.S. 601, 607 (1971) (holding that no element of scienter was necessary for conviction under a statute which made it unlawful "to receive or possess a firearm which is not registered"); United States v. Dotterweich, 320 U.S. 277, 281 (1943) (stating that the Federal Food, Drug, and Cosmetic Act did not require knowledge that the items were misbranded or adulterated); United States v. Balint, 258 U.S. 250 (1922) (holding that in order for the government to prove the defendant violated the Narcotic Act of 1914, which did not contain a mens rea requirement, it need only prove that the defendant knew that he was selling drugs, not that he knew the specific items he had sold were "narcotics"); People v. Sheffield Farms-Slawson-Decker Co., 225 N.Y. 25 (1918) (stating that convictions under the child labor laws could be obtained without proof that the defendant knew the children were under age because the statute did not require knowledge on the part of the defendant). *But cf. International Minerals*, 402 U.S. at 559 (holding that knowledge of the regulation is not required for conviction under a statute which states that whoever "knowingly violates any such regulation" shall be fined).

77. Chicago, B. & Q. Ry. v. United States, 220 U.S. 559, 578 (1910). Recently, in Staples v. United States, 114 S. Ct. 1793 (1994), the Court, in reaffirming its recognition of public welfare offenses, has

> understood Congress to impose a form of strict criminal liability through statutes that do not require the defendant to know the facts that make his conduct illegal. In construing such statutes, we have inferred from silence that Congress did not intend to require proof of *mens rea* to establish an offense.

Id. at 1797.

In *United States v. Balint*,[78] a court convicted the defendant of violating the Narcotic Act. The section under which the defendant was charged had no mens rea requirement.[79] The Supreme Court held that the government did not have to prove the defendant knew he was selling narcotics. The Court reasoned that "Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided."[80]

At the same time courts gave effect to a legislature's omission of a requisite mental state, they also noted the significance of a legislature explicitly including mens rea as a required element. In *United States v. MacDonald & Watson Waste Oil Co.*,[81] the government charged the president of a waste disposal company with violating certain provisions of the Resource Conservation and Recovery Act ("RCRA").[82] The section under which the defendant was charged specifically included a knowledge requirement.[83] In reversing the defendant's conviction, the court stated, "[W]e know of no precedent for failing to give effect to a knowledge requirement that Congress has expressly included in a criminal statute."[84] The Supreme Court has also consistently recognized the importance of an explicit mens rea requirement. In *Ratzlaf v. United States*,[85] the Court reversed the conviction of a defendant charged with violating the anti-structuring law. The defendant had broken up cash deposits into amounts less than $10,000 to avoid bank reporting requirements. The Court held that to establish that the defendant "willfully violat[ed]" the anti-structuring law, the government must prove that the defendant knew that his conduct was unlawful.[86] In its opinion, the Court stated: "We do not dishonor the venerable principle that ignorance of the law generally is no defense to a criminal charge. In particular contexts, however, Congress may decree otherwise."[87]

Like the statutes at issue in *MacDonald & Watson Waste Oil* and *Ratzlaf*, the section of the CWA which *Weitzenhoff* addressed clearly indicates the requisite mens rea. Section 1319(c)(2)(A) states that anyone who "*knowingly* violates . . . any permit condition or limitation" commits a felony.[88] This is precisely the type of statute which courts should not interpret as a traditional public welfare statute. The courts should apply the language of the statute, as Congress intended, to the facts of each case. It is one thing for a court to refrain from reading a knowledge requirement *into* a statute which does not contain

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78. 258 U.S. 250.

79. *Id.* at 253-54. The Narcotic Act provided, in part:

> That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue.

Id. at 254 n.1.

80. *Id.* at 254.

81. 933 F.2d 35 (1st Cir. 1991).

82. 42 U.S.C. § 6928(d)(1) (1988 & Supp. V 1993).

83. Section 6928(d)(1) penalizes "[a]ny person who . . . knowingly transports or causes to be transported any hazardous waste identified or listed under the subchapter to a facility which does not have a permit."

84. *MacDonald*, 933 F.2d at 52. In reaching its holding, the court also noted that this "crime is a felony carrying possible imprisonment of five years and, for a second offense, ten." *Id.* For a more detailed comparison between the potential penalties under the traditional public welfare offenses and those requiring proof of the defendant's knowledge, see *infra* part II.E.

85. 114 S. Ct. 655 (1994).

86. *Id.* at 657. In the opinion, the Court criticized the Ninth Circuit for "treat[ing] . . . [the] 'willfulness' requirement essentially as surplusage—as words of no consequence." *Id.* at 659.

87. *Id.* at 663 (citations omitted).

88. 33 U.S.C. § 1319(c)(2)(A) (emphasis added). For a thorough discussion of the enforcement section of the CWA, see *supra* notes 19-29 and accompanying text.

one;[89] it is quite another to read an explicit knowledge requirement *out of* a criminal statute.[90] The CWA differs from traditional public welfare statutes in that the enforcement provisions of the CWA do contain specific mens rea requirements.

E. Light Fines and Penalties

The final characteristic of the public welfare offense involves the penalties which the statutes impose. This characteristic is of vital importance. The penalty a given statute imposes is often the starting point from which to determine if the statute is a traditional public welfare statute.[91] The cases which first defined the public welfare offense involved primarily statutes which imposed light fines for violations, not prison terms.[92] The Supreme Court noted that under public welfare statutes "penalties . . . are relatively small, and conviction does no grave damage to an offender's reputation."[93] Legal scholars have agreed, reasoning that "[t]he sense of justice of the community will not tolerate the infliction of punishment which is substantial upon those innocent of intentional . . . wrongdoing."[94]

Accordingly, courts have been extremely hesitant to convict defendants without proof of mens rea when the penalties involved substantial imprisonment. In limiting the scope of his decision affirming the assessment of a fine without a showing of mens rea, Justice Cardozo (while serving as a judge on the New York Court of Appeals) stated: "[I]n sustaining the power to fine we are not to be understood as sustaining to a like length the power to imprison."[95] Legal scholars have also asserted that courts should not consider crimes punishable with prison sentences to be public welfare offenses, and must require proof of mens rea to sustain a conviction.[96]

In *Weitzenhoff*, the district court convicted the two defendants of felonies and sentenced Weitzenhoff and Mariani to twenty-one months and thirty-three months imprisonment, respectively. In affirming the conviction without proof of mens rea, the Ninth Circuit attempted to justify its holding partly on the assertion that the defendants violated a public welfare statute.[97] However, as the discussion above indicates, the penalties imposed under the CWA are incompatible with such a holding. Unlike the defendants convicted of traditional public welfare offenses, Weitzenhoff and Mariani

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89. *See supra* notes 75-80 and accompanying text.

90. This is exactly the course the Ninth Circuit took in *Weitzenhoff*. The court only required the government to prove that the defendants were aware of the behavior that caused the violation. The court did not require proof that the defendants knew their actions violated the permit. *Weitzenhoff*, 35 F.3d at 1284. The court's holding merely required the defendants to know that they were discharging pollutants into the ocean. As managers of a waste treatment plant, the two defendants knew the plant was discharging waste into the ocean daily. Therefore, each day the defendants came to work, this knowledge subjected them to the possibility of criminal liability. Eliminating the need for prosecutors to prove the defendants knew that the discharges violated the waste treatment plant's NPDES permit, in effect, subjects the defendants to strict liability for any permit violation at the plant.

91. *See* ROLLIN M. PERKINS, CRIMINAL LAW 793-98 (2d ed. 1969).

92. *See, e.g.*, Commonwealth v. Raymond, 97 Mass. 567 (1867) (fine up to $200 or six months in jail, or both); Commonwealth v. Farren, 91 Mass. (9 Allen) 489 (1864) (small fine); People v. Snowburger, 71 N.W. 497 (Mich. 1897) (fine up to $500 or incarceration in county jail). *But see, e.g.*, State v. Lindberg, 215 P. 41 (Wash. 1923) (applying the public welfare statute offense rationale to a felony).

93. Morissette v. United States, 342 U.S. 246, 256 (1952).

94. Sayre, *supra* note 47, at 70.

95. People v. Sheffield Farms-Slawson-Decker Co., 121 N.E. 474, 477 (N.Y. 1918).

96. *See* PERKINS, *supra* note 91, at 793-98 (suggesting that the penalty should be the starting point in determining whether a statute describes a public welfare offense); Sayre, *supra* note 47, at 72 ("Crimes punishable by prison sentences, therefore, ordinarily require proof of a guilty intent.").

97. *Weitzenhoff*, 35 F.3d at 1285-86.

were not convicted of misdemeanors; they were convicted of felonies and subjected to substantial penalties.[98] As the Supreme Court has stated,

> Close adherence to the early cases . . . might suggest that punishing a violation as a felony is simply incompatible with the theory of the public welfare offense. . . . After all, "felony" is, as we noted in distinguishing certain common law crimes from public welfare offenses, "'as bad a word as you can give to man or thing.'"[99]

Because of the substantial penalties attached to the section under which Weitzenhoff and Mariani were convicted, the final characteristic of traditional public welfare statutes is absent.

F. Inapplicability in the Context of the Clean Water Act

The public welfare offense is a unique legal mechanism created in concert by the legislatures and the courts. Because it dispenses with the traditional requirement of mens rea, the courts have limited its application. The public welfare offense rationale has been limited to those statutes that (1) are designed to protect the public's health and safety, (2) regulate activities which involve "dangerous and deleterious" materials, (3) do not explicitly require mens rea, and (4) impose light penalties for violations. While not every statute which courts have labeled a "public welfare" statute has displayed all of these characteristics, most reflect a majority of these features. However, the CWA possesses, at best, only two of these characteristics. Compliance with the CWA does benefit the public's health and safety[100] and it does regulate activities which involve some noxious waste materials.[101] However, the CWA's similarities to the traditional public welfare statutes end there. Unlike the traditional public welfare statutes, the CWA contains explicit language regarding the requisite mens rea[102] and those who violate its provisions are guilty of a felony and subject to substantial prison terms.[103] Because of these considerations, the Ninth Circuit cannot sensibly justify its removal of the mens rea requirement in *Weitzenhoff* by asserting that the defendants were convicted of a public welfare offense. The CWA is not a traditional public welfare statute as the term has come to be known. Accordingly, courts cannot apply the public welfare offense rationale to it.

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98. Section 1319(c)(2) provides that violators of this section

> 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. If the conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be a fine of not more than $100,000 per day of the violation, or by imprisonment of not more than 6 years, or by both.

33 U.S.C. § 1319(c)(2).

99. Staples v. United States, 114 S. Ct. 1793, 1803-04 (1994) (quoting Morissette v. United States, 342 U.S. 246, 260 (1952) (quoting 2 SIR FREDERIC POLLOCK & FREDERIC W. MAITLAND, HISTORY OF ENGLISH LAW 465 (2d ed.) (London, Cambridge Univ. 1898))).

100. *See supra* notes 66-68 and accompanying text. Unlike other traditional public welfare statutes, however, the CWA's primary objective is not to protect the public's health and safety. Arguably, almost all statutes that regulate individuals' actions seem to protect health and safety, although they may have another, primary purpose. Courts should not interpret all statutes as public welfare statutes, however, merely because they have this collateral purpose.

101. *See supra* notes 73-74 and accompanying text. The reader should also remember, however, that the CWA also regulates materials relatively harmless to humans such as rock, sand, and dirt. *See supra* note 74 and accompanying text.

102. *See supra* notes 88-90 and accompanying text.

103. *See supra* notes 97-99 and accompanying text.

III. "KNOWING" VIOLATIONS

In addition to the statutory language, legislative history, and the inapplicability of the public welfare doctrine, available precedent also contradicts the Ninth Circuit's interpretation of the CWA. *Weitzenhoff* is not the first decision in which litigants have asked the court to determine exactly what action the legislature intended to punish when it included the term "knowingly" in the language of a criminal statute. Numerous courts have addressed whether the legislature intended to require that the defendant have knowledge that his acts are unlawful at the time of his action or merely that he have knowledge that he was engaging in activity which, unbeknownst to him, resulted in a violation subject to criminal sanctions. Many courts have settled this issue in the context of criminal enforcement provisions of other environmental statutes. In determining the legislature's intent in using the term "knowingly," these courts have considered, among other factors, the explicit language of the statute and common sense. While there has been some confusion among the circuits, and while various courts have resolved this issue differently, precedent weighs in favor of requiring the prosecution to prove that the defendant had knowledge of the *unlawfulness* of the activity, not merely knowledge of the activity itself.

A. Knowledge of the Violation

Several courts have required knowledge of the activity's unlawfulness as an element of the offense.[104] In *United States v. Johnson & Towers, Inc.*,[105] the Third Circuit Court of Appeals construed the enforcement provision of RCRA.[106] Specifically, the court needed to determine exactly what the prosecution had to prove the defendants knew in order to convict them under RCRA's criminal provision. Section 6928(d)(2)(A) states that a person is guilty of a felony if he or she "knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter . . . without [having obtained] a permit under [42 U.S.C. § 6925]."[107]

In construing this section, the court concluded that "knowingly" in subsection (2) should be read throughout the entire section.[108] *Johnson & Towers* held that individuals had to have more than mere knowledge of their activity to be guilty of a felony. The court stated that one can "be subject to criminal prosecution [under subsection (2)(A)] only if they knew or should have known that there had been no compliance with the permit requirement . . . ."[109]

In reaching its conclusion, the court first acknowledged that RCRA was in a class of regulatory statutes, like the Federal Food, Drug, and Cosmetic Act, which can be

104. *See, e.g.*, Ratzlaf v. United States, 114 S. Ct. 655 (1994); United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35 (1st Cir. 1991); United States v. Hayes Int'l Corp., 786 F.2d 1499 (11th Cir. 1986); United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984).

105. 741 F.2d 662.

106. 42 U.S.C. §§ 6901-6989 (1988 & Supp. V 1993).

107. *Id.* § 6928(d)(2)(A).

108. *Johnson & Towers*, 741 F.2d at 668.

109. *Id.* at 665.

classified as a public welfare statute.[110] Therefore, the court recognized that it had a sound basis for interpreting the statute without any mens rea requirement. The court reasoned, however, that "such a reading would be arbitrary and nonsensical when applied to this statute."[111] The court used common sense to conclude that "[i]f the word 'knowingly' in section 6928(d)(2) referred exclusively to the acts of treating, storing or disposing, . . . [the word knowledge] would be an almost meaningless addition since it is not likely that one would treat, store or dispose of waste without knowledge of that action."[112] Similarly, it is highly unlikely that the two *Weitzenhoff* defendants, as managers of a waste treatment plant, would discharge pollutants into the ocean without knowledge of that action—their job required them to manage the pollutant discharge.[113]

Three years later, however, the Ninth Circuit Court of Appeals refused to follow the Third Circuit's interpretation in *Johnson & Towers*. In *United States v. Hoflin*,[114] the court refused to read "knowingly" into § 6928(d)(2)(A) of RCRA. The court held that the prosecution only needed to show that the defendant had knowledge of his activity. "Had Congress intended knowledge of the lack of a permit to be an element under subsection (A) it easily could have said so."[115] In addition, however, the court proceeded to interpret Congress' intent under § 6928(d)(2)(B) of RCRA's enforcement provision. Interestingly, this interpretation is contrary to its interpretation in *Weitzenhoff*. This section states: "(d) [a]ny person who . . . (2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter . . . (B) in *knowing violation* of any material condition or requirement of such permit [commits a felony]."[116]

Like in the CWA criminal provision,[117] Congress used the phrase "knowing violation" in this section of RCRA's criminal provision. In *Hoflin*, the Ninth Circuit held that "[t]he statute requires knowledge of violation of the terms of a permit under subsection (B) . . . ."[118] In *Weitzenhoff*, the same circuit refused to conclude that the remarkably similar language of the CWA required proof of a defendant's knowledge of a permit violation. The court in *Weitzenhoff* made no attempt to reconcile these two diametrically opposed interpretations.

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110. *Id.* at 667. The court determined that "no less than in the Food and Drugs Act, Congress endeavored to control hazards that, 'in the circumstances of modern industrialism, are largely beyond self-protection.'" *Id.* (quoting United States v. Dotterweich, 320 U.S. 277, 280 (1943)). The court also recognized that "it is well established that criminal penalties attached to regulatory statutes intended to protect public health, in contrast to statutes based on common law crimes, are to be construed to effectuate the regulatory purpose." *Id.* at 666 (citing United States v. Park, 421 U.S. 658, 672-73 (1975); Smith v. California, 361 U.S. 147, 152 (1959); *Dotterweich*, 320 U.S. at 280-81, 284-85; United States v. Balint, 258 U.S. 250, 251-52 (1922)).

111. *Johnson & Towers*, 741 F.2d at 668. It is interesting to note that although the court in *Johnson & Towers* concluded that RCRA was a public welfare statute, it still required proof that the defendant knew there had been no compliance with the permit requirement. Arguably, the CWA should not be classified as a public welfare statute. *See supra* part II.F. Unlike RCRA, which is a "cradle-to-grave" regulatory scheme for toxic materials, hazardous waste, and other noxious articles, the CWA regulates discharges of some harmless materials such as rock, sand, dirt, and hot water, and was not designed primarily to protect public health and safety. If the *Johnson & Towers* court considered RCRA to be a public welfare statute and still required proof of mens rea for a conviction, it would seem incongruous to remove the mens rea requirement from a statute which arguably is not a public welfare statute.

112. *Johnson & Towers*, F.2d at 668.

113. The *Weitzenhoff* court required the prosecution to prove only that the defendants were knowingly discharging pollutants, not that they also knew the discharges violated the permit. *Weitzenhoff*, 35 F.3d at 1283.

114. 880 F.2d 1033 (9th Cir. 1989).

115. *Id.* at 1038.

116. 42 U.S.C. § 6928(d)(2)(B) (emphasis added).

117. *See supra* note 21 and accompanying text.

118. *Hoflin*, 880 F.2d at 1038.

In *United States v. Hayes International Corp.*,[119] the Eleventh Circuit interpreted a different "knowing" violation of RCRA's criminal provision. Section 6928(d)(1) provides criminal sanctions for any person who "knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter . . . ."[120] The court had little difficulty in determining that the section required individuals to know that their actions violated the statute in order to be convicted of a felony. The Eleventh Circuit reached this conclusion after considering the intentions of Congress and the unfavorable possibility of punishing innocent individuals. "The precise wrong Congress intended to combat through section 6928(d) was transportation to an unlicensed facility. Removing the knowing requirement from this element would criminalize innocent conduct . . . ."[121]

Like the RCRA section interpreted in *Hayes International*, the wrong which Congress intended to deter through § 1319(c)(2)(A) of the CWA was the discharge of pollutants *in violation of NPDES permits*, not the mere discharge of pollutants. Discharging pollutants into the ocean is "socially desirable conduct by which [waste treatment plants] protect[] the people . . . from sewage-borne disease . . . ."[122] Removing the knowing requirement from the CWA's enforcement provision will likely subject numerous innocent persons, who knowingly discharge pollutants everyday, to criminal sanctions. Courts should reserve these sanctions for only those individuals who discharge pollutants with the knowledge that they are violating the applicable NPDES permit.

B. Knowledge of the Activity

While some courts have required knowledge of a violation, others have interpreted "knowing violations" as merely requiring that the defendant have knowledge of the activity.[123] These holdings have relied on *United States v. International Minerals & Chemical Corp.*[124] as the touchstone environmental case in this area. In *International Minerals*, the Supreme Court construed a statute which gave the Interstate Commerce Commission power to "formulate regulations for the safe transportation" of "corrosive liquids" and to punish any person who "knowingly violates any such regulation."[125] The defendant in *International Minerals* was shipping sulfuric and hydrofluosilicic acids in interstate commerce and was charged with "knowingly fail[ing]" to show the required cargo classification on their shipping papers.[126] The Court addressed only the question as to whether "knowledge" of the regulation was required under the statute. The Court held that the term "knowingly" referred to the acts rather than the violation of the regulation.[127] In affirming the misdemeanor conviction, the Court expressly limited its

119. 786 F.2d 1499 (11th Cir. 1986).

120. 42 U.S.C. § 6928(d)(1).

121. *Hayes Int'l Corp.*, 786 F.2d at 1504.

122. United States v. Weitzenhoff, 35 F.3d 1275, 1294 (9th Cir. 1994) (Kleinfeld, J., dissenting), *cert. denied*, 115 S. Ct. 939 (1995).

123. *See, e.g.*, United States v. Laughlin, 10 F.3d 961, 965-66 (2d Cir. 1993) (construing § 6928(d)(2)(A) of RCRA), *cert. denied*, 114 S. Ct. 1649 (1994); United States v. Buckley, 934 F.2d 84, 88 (6th Cir. 1991) (interpreting the pre-1990 version of § 7413(c)(1)(C) of the Clean Air Act); United States v. Dee, 912 F.2d 741, 745 (4th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991); United States v. Corbin Farm Serv., 444 F. Supp. 510, 519-20 (E.D. Cal.), *aff'd*, 578 F.2d 259 (9th Cir. 1978) (construing the Federal Insecticide, Fungicide and Rodenticide Act).

124. 402 U.S. 558 (1971).

125. *Id.* at 559 (construing 18 U.S.C. § 834(f) (1976), *repealed by* Pub. L. No. 96-129, § 216(b), 93 Stat. 1015 (1979)).

126. *International Minerals*, 402 U.S. at 559.

127. *Id.* at 565.

holding to situations in which "dangerous or deleterious devices or products or obnoxious waste materials are involved."[128]

While the statute at issue in *International Minerals* is syntactically similar to the CWA, the Court's holding does not apply to the CWA because of two distinguishing characteristics. First, the defendant in *International Minerals* was convicted of a misdemeanor, as opposed to the felony imposed under § 1319(2)(A) of the CWA. Second, the CWA does not limit the pollutants it regulates to "dangerous and deleterious" materials. On the contrary, the CWA regulates pollutants such as rock, sand, heat, and dirt. Because of these pronounced distinctions, courts should refrain from applying *International Minerals* in the context of the CWA.

C. The Government Can Prove Knowledge

Requiring the prosecution to prove that a defendant had knowledge of a violation in order to convict him under the CWA will not result in multitudes of criminals freely polluting the environment with little chance of prosecution. The government can prove that the defendant acted with knowledge of the permit violation without encountering an insurmountable burden of proof. "Knowledge does not require certainty."[129] The government can successfully prove that the defendant acted in knowing violation if it can show the defendant was aware "'that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.'"[130] The jurors may draw inferences from circumstantial evidence to conclude that the defendant knew he was violating the permit.

Aside from presenting evidence which would allow a jury to infer that the defendant had knowledge of the violation, the prosecution could also seek a "conscious-avoidance" instruction for the jury. A conscious-avoidance instruction allows the jury to find that the defendant had the equivalent of knowledge if it finds that the defendant consciously avoided confirming that a permit violation was occurring so that he could deny knowledge of the violation if subsequently apprehended.[131] A court may charge a jury with a conscious-avoidance instruction if: (a) the defendant's knowledge is in dispute, and (b) "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.'"[132]

Because juries may infer knowledge and judges may charge juries with the conscious-avoidance instruction, it is unnecessary to remove the mens rea requirement to ensure that

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128. *Id.*

129. United States v. Hayes Int'l Corp., 786 F.2d 1499, 1504 (11th Cir. 1986).

130. United States v. United States Gypsum Co., 438 U.S. 422, 445 (1978) (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 196 (1972)); *see also* United States v. Bailey, 444 U.S. 394, 404 (1980).

131. United States v. Hopkins, 53 F.3d 533, 542 (2d Cir. 1995).

132. *Id.* (quoting United States v. Rodriguez, 983 F.2d 455, 458 (2d Cir. 1993)); *see also* United States v. Civelli, 883 F.2d 191, 194-95 (2d Cir.), *cert. denied*, 493 U.S. 966 (1989). In *Hopkins*, the court acknowledged that a conscious-avoidance instruction was applicable to its facts because both prerequisites for the instruction were present. Despite the appropriateness of this conclusion, however, it is inconsistent with its other conclusion regarding the knowledge requirement in the statute. With respect to mens rea, the court held that the prosecution need merely prove that the defendant had knowledge of his activity, not the violation. However, the court also acknowledged that the conscious-avoidance instruction would allow the jury to find that the defendant had the equivalent of knowledge of the violation. A more consistent approach would be for the court to both require the prosecution to prove the defendant had knowledge of the violation, and to instruct the jury that it may convict the defendant if it finds the defendant had the equivalent of this knowledge due to the defendant's conscious avoidance.

the unscrupulous environmental managers do not escape prosecution. Armed with the ability to infer knowledge and the conscious-avoidance instruction, juries will be competent to convict those individuals Congress sought to punish for their knowing violations of the CWA. The courts must allow the jurors to perform their function in the courtroom. They must refrain from easing the prosecution's path to conviction by relieving the jury from its responsibility of applying the facts of the case to the statutory law.

IV. DANGEROUS IMPLICATIONS

The holding in *Weitzenhoff* promises a negative impact on many more individuals than merely Michael Weitzenhoff and Thomas Mariani. The precedent established in *Weitzenhoff* has the potential to create extremely dangerous and costly results in a wide range of areas. First, due to the enormous complexity of the current environmental regulatory structure, there is great potential that a large number of morally innocent and decent people will be subject to criminal sanctions, including felony charges and possible prison terms. Second, *Weitzenhoff* is not necessarily limited to supervisors and managers who directly operate and oversee the discharge and monitoring of pollutants. Application of the responsible corporate officer doctrine could subject countless corporate executives to criminal prosecution should a plant operated by their company at any time violate an NPDES permit. Finally, and most importantly, the disincentives to manage created by *Weitzenhoff* may adversely affect the quality of environmental management across the country.

A. Complexity of the Current Environmental Regulatory Structure

The courts have recognized the complexity of the environmental laws and regulations of this country.[133] Even the EPA has recognized that the current regulatory structure has become remarkably complex. The current EPA administrator, Carol Browner, has noted that the current scheme is "a complex and unwieldy system of laws and regulations and increasing conflict and gridlock."[134] Currently, environmental compliance requirements may exceed those under the Internal Revenue Code.[135] Regulations under the Clean Water Act, Clean Air Act, and RCRA number over 9000 pages in the Code of Federal Regulations.[136] The CWA requirements affect the day-to-day operations of nearly every industrial, commercial, and municipal operation in this country.[137] These laws and

133. *See, e.g.*, Chemical Mfrs. Ass'n v. Natural Resources Defense Council, 470 U.S. 116, 125 (1985) (granting "considerable deference" to the EPA in construing the Clean Water Act); Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 848 (1984) (noting complexity and detail of Clean Air Act amendments).

134. Bartman, *supra* note 2, at 3 (quoting *New EPA "Common Sense" Approach Cautiously Welcomed by Industry*, AIR WATER POLLUTION REP., July 25, 1994, at 30); *accord* Inland Steel Co. v. Environmental Protection Agency, 901 F.2d 1419, 1421 (7th Cir. 1990) (stating that RCRA is a "Statutory Cloud Cuckoo Land"); United States v. White, 766 F. Supp. 873, 882 (E.D. Wash. 1991) (stating that "RCRA is a regulatory cuckoo land of definition" and quoting Don R. Clay, former assistant administrator for the EPA Office of Solid Waste and Emergency Response).

135. Bartman, *supra* note 2, at 3.

136. Brief of Air Transport Association of America et al. as Amici Curiae in Support of Petitioners at 15, Mariani v. United States, 115 S. Ct. 939 (1995) (No. 94-6683); *see* 40 C.F.R. §§ 100-149, 400-503 (regulations implementing the CWA); *id.* §§ 50-99 (regulations implementing the Clean Air Act); *id.* §§ 240-299 (regulations implementing the RCRA).

137. Bartman, *supra* note 2, at 3.

regulations require companies to devote an enormous amount of time to environmental testing, recordkeeping, and reporting.[138]

At the core of the regulatory scheme of the CWA are the NPDES permits, which can be more complex than the laws themselves. The permits include complex specifications for discharges of "industrial wastewaters, storm water, and domestic sewage into practically any river or stream."[139] The permits may prescribe effluent discharge limitations of particular pollutants in terms of mass, concentration, or toxicity. Compliance with these permits may be determined on a daily, weekly, monthly, or even continuous basis.[140] Obviously, the complex, detailed, and scientific nature of these permits and regulations can make interpretation and complete understanding extremely difficult. As a result, full compliance with the permits and regulations can be very elusive. The EPA has even acknowledged that one hundred percent compliance with certain CWA requirements is not feasible.[141]

Because of the complexity of the regulatory scheme and the strict liability standard pronounced by *Weitzenhoff*, it is highly probable that employees involved in day-to-day environmental management, in both the public and private sector, will be subject to felony charges due to inadvertent, unintentional, and unknown technical permit violations. It does not seem appropriate to subject individuals who are working diligently to protect the environment and comply with all permit requirements to criminal liability in the event of any inadvertent, technical violation. This is especially so when a conviction carries with it the potential of a three-year prison sentence.

B. Responsible Corporate Officer Doctrine

While the possibility of punishing environmental managers for inadvertent permit violations with three-year prison terms is frightening, the application of the responsible corporate officer doctrine may subject even more morally innocent and productive individuals to criminal liability. In *United States v. Dotterweich*, the Supreme Court upheld the conviction of a company president for the shipment of misbranded drugs under the Federal Food, Drug, and Cosmetic Act.[142] While the president employed numerous workers to carry out the day-to-day operations of the company, the Court held that the offense was committed by "all who do have such a responsible share in the furtherance of the transaction which the statute outlaws."[143] The holding placed a burden on all those "standing in responsible relation to a public danger" to ascertain all the facts relating to the regulated activity.[144] The Court did not attempt to define this "class of employees" which stands in responsible relation to the public;[145] however, it apparently included corporate executives and employees who were responsible for the operation of

138. For example, at a medium-size chemical processing plant in northern Indiana, 5400 worker hours are devoted to the testing and reporting requirements each year. Linda Lipp, *Environmental Rules Keep Firms Busy: Staying Legal Means Work*, FORT WAYNE J. & COURIER, Aug. 13, 1995, at E12.

139. Bartman, *supra* note 2, at 3; *see also* 40 C.F.R. §§ 401-424 (1995).

140. Brief of Air Transport Association of America et al. at 14, *Mariani* (No. 94-6683).

141. Bartman, *supra* note 2, at 3 (citing 47 Fed. Reg. 24,535 (1982)).

142. 320 U.S. 277, 278 (1943); *see supra* notes 57-58 and accompanying text.

143. *Id.* at 284.

144. *Dotterweich*, 320 U.S. at 281.

145. *Id.* at 285.

activities which were regulated by public welfare statutes.[146] This holding established the responsible corporate officer doctrine.

In *United States v. Park*,[147] the Supreme Court applied the responsible corporate officer doctrine to uphold the criminal conviction of a president of a nationwide food chain for failure to maintain a sanitary food warehouse under the Federal Food, Drug, and Cosmetic Act. Applying the doctrine established in *Dotterweich*, the Court concluded that the jury need not find that the president engaged in any wrongful action. Instead, the Court found that, as president, the defendant had a responsible relation to the situation and the authority to effect change and therefore could be held liable. The conviction was based solely on his constructive knowledge of the unsanitary conditions of the warehouse.[148] Scholars have noted that what is troublesome about *Park* is not the application of the *Dotterweich* holding, but rather language in the opinion which suggests another positive duty.[149]

The opinion declared that corporate executives who engage in regulated activity must take affirmative steps to prevent any violations:

> [T]he Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur. The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.[150]

The application of the responsible corporate officer doctrine, as extended by *Park*, in conjunction with *Weitzenhoff* has alarming implications. *Weitzenhoff* provides that one may be convicted of a felony under § 1319(c)(2)(A) of the CWA even if he acted without any knowledge as to a permit violation. *Dotterweich*, as applied by *Park*, states that criminal liability may extend to all those who are in responsible relation to the regulated activity. Therefore, it is conceivable that a corporate executive who oversees the overall plant operations of a company could be held criminally liable for a NPDES permit violation at a distant plant without any showing that he had any knowledge that pollutant discharges had exceeded permit limitations.[151] *Park* holds that because a person has authority over the regulated activities, he has an affirmative duty to ensure that the operations are in compliance with the permit limitations. By adding the holding in *Weitzenhoff* to the responsible corporate officer doctrine in *Park*, if the executive merely knows that the plant is discharging pollutants, he may be subject to criminal liability if these discharges happen to violate a NPDES permit.

Reasonableness plays no part in the *Weitzenhoff* interpretation of § 1319(c)(2)(A) of the CWA. An individual could be convicted of a felony despite the fact that he or she believed the operations were in total compliance with all applicable regulations and

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146. M. Diane Barber, *Fair Warning: The Deterioration of Scienter Under Environmental Criminal Statutes*, 26 LOY. L.A. L. REV. 105, 115 (1992).

147. 421 U.S. 658 (1975).

148. *Id.* at 673-76.

149. Barber, *supra* note 146, at 127.

150. *Park*, 421 U.S. at 672.

151. *Weitzenhoff* holds that no one has to have knowledge of a permit violation in order for criminal sanctions to apply. Under *Weitzenhoff*, it is possible that a corporate executive could be convicted of a felony and sentenced to three years in prison despite the fact that even the employee directly monitoring the discharges did not know the discharges were in violation of the NPDES permit. The violations could result from, among other things, mechanical failure or human error.

limitations and had taken reasonable steps to ensure that they were in compliance. In his dissent in *Park*, Justice Stewart envisioned this dangerous application of the responsible corporate officer doctrine when he feared that the "standardless conviction approved today can serve in another case tomorrow to support a felony conviction and a substantial prison sentence."[152] The foreshadowed "tomorrow" of Stewart's dissent may be close at hand.[153]

C. Impacts Contrary to the Goal of Environmental Management

The ultimate goal of environmental management is to reduce the level of pollution in the environment. This consideration was probably utmost in the minds of the drafters of the *Weitzenhoff* opinion and presumably influenced their decision greatly. However, the precedent established by *Weitzenhoff* will not achieve this goal and may in fact do more harm to the environment than good.

A key factor in the quality of environmental management is the quality of the people in control of its management. It is in the best interest of the environment and society to have the most capable people overseeing environmental management operations. The possibility of criminal sanctions for permit violations, without any proof that the defendant knew of the violation, deter the most capable people from assuming these extremely important positions. One of the justifications for criminal punishment is deterrence. Society punishes that activity which it wishes to deter. The activity that *Weitzenhoff* deters is the discharge of pollutants that happens to violate an NPDES permit, not the knowing violation of the permit. As a result, highly capable individuals will be deterred from engaging in the activity—supervising and directing the discharge of pollutants—which the *Weitzenhoff* holding punishes.[154] These individuals will seek comparable employment elsewhere that does not pose the threat of felony convictions and prison sentences in the event of inadvertent and unknown violations of the applicable permits. But someone will have to fill these vacated environmental management positions. Unfortunately, because of the decrease in the number of highly capable and qualified individuals willing to accept the significant and unpredictable liability that accompanies these jobs, companies will be forced to fill the vacancies with less qualified

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152. *Park*, 421 U.S. at 683 (Stewart, J., dissenting).

153. The convergence of the responsible corporate officer doctrine and prosecutions of "knowing violations" under the CWA has already begun to appear in the language of some court opinions. In United States v. Hopkins, 53 F.3d 533, 541 (2d Cir. 1995), the court noted that the defendant "had sole corporate responsibility for supervising the [corporation's] wastewater testing program throughout the relevant period." While the court did not rely on Hopkins' corporate position as the only reason for upholding his conviction, it did use that fact as evidence that Hopkins was aware of the permit requirements and of the corporation's environmental practices. *Id.*

154. One may argue that *Weitzenhoff* is not deterring activity, but rather encouraging a socially desirable behavior: 100% compliance with environmental regulations and permits. However, as indicated above, 100% compliance at all times is virtually impossible. *See supra* note 141 and accompanying text. It is unlikely that very many persons will be willing to subject themselves to strict criminal liability knowing that, despite an individual's best efforts, 100% compliance is not a possibility.

A more appropriate way to encourage regulatory compliance without deterring qualified personnel from directing environmental management programs may be to apply a negligence standard. Under this standard, individuals could be prosecuted for permit violations if their diligence became deficient. However, they would not be subject to felony convictions or prison sentences should they inadvertently violate a permit. Fortunately, this alternative is already available to courts and prosecutors, since Congress included this enforcement scheme under § 1319(c)(1) of the CWA. Courts should apply this negligence standard and refrain from unjustifiably subjecting environmental managers to strict liability.

individuals. These less qualified individuals' lack of skill and knowledge will ultimately have an adverse effect on the environment.[155]

Our environment demands the most qualified and dedicated individuals to protect its integrity. While obviously motivated by a desire to protect the environment, the *Weitzenhoff* interpretation actually undermines this crucial need of our environment by deterring the most qualified and capable people from working to preserve it.

CONCLUSION

The protection of this nation's and the world's environment is of vital importance to society. Recognizing this interest, Congress has passed a wealth of legislation aimed at safeguarding the environment against further deterioration. To ensure compliance with its legislation and accompanying regulations, Congress provides criminal sanctions should an individual knowingly violate any of the numerous provisions or permits. Presumably motivated by an interest in preserving the environment, the Ninth Circuit has ignored the plain meaning of the statutory language, unjustifiably applied the public welfare offense doctrine, and removed the explicit mens rea requirement from the criminal provisions of the CWA. This action created extraordinarily dangerous precedent. Not only will this ruling subject a multitude of morally innocent persons to strict criminal liability, it may have damaging effects on our environment.

Courts must use restraint in enforcing the criminal provisions of the environmental statutes which Congress has legislated. They must refrain from easing the burden on the prosecution by removing the mens rea element from the criminal statute and requiring the prosecution to prove each and every element the statute requires. Congress has written the law; the courts must apply it. The courts require the prosecution to meet its burden of proof in every other criminal case, and they should not excuse the prosecution from doing the same in the context of an environmental statute simply by relying on an inapplicable doctrine. To do so in the context of the Clean Water Act and other similar environmental statutes would make "felons of a large number of innocent people doing socially valuable work."[156]

155. For example, these less qualified managers may be unable to accurately calculate the complicated permit requirements and limitations and may thus cause additional pollution to be released into the environment. The fact that they are later convicted of violating the permit and sentenced to years in prison does not remedy the harm to the environment—a harm that could have been avoided had more qualified individuals managed the corporation's environmental affairs.

156. United States v. Weitzenhoff, 35 F.3d 1275, 1293 (9th Cir. 1994) (Kleinfeld, J., dissenting), *cert. denied*, 115 S. Ct. 939 (1995).