Pace Environmental Law Review

Volume 20
Issue 2 *Spring 2003*

Article 4

April 2003

Section 309(c) of the Clean Water Act: Using the Model Penal Code to Clarify Mental State in Water Pollution Crimes

Andrew C. Hanson

Section 309(c) of the Clean Water Act: Using the Model Penal Code to Clarify Mental State in Water Pollution Crimes

ANDREW C. HANSON*

I. Introduction

Courts and commentators have struggled with interpreting the mental state requirement in modern regulatory criminal statutes, and the public welfare offense doctrine has been the focus of that confusion.[1] Although the doctrine was first recognized by Professor Francis Sayre in 1933 as a growing trend in courts to dispense with mental state in so-called "petty offenses,"[2] the Supreme Court has defined public welfare offenses as those which a reasonable person would know are subject to strict public regulation and could threaten public health and safety.[3] Further, the Supreme Court recently clarified that public welfare offense statutes regulate activities that are both "dangerous" and "uncommon."[4] No longer limited to "petty offenses," it has been a tortuous journey for the public welfare offense doctrine since the days of Professor Sayre.[5]

Most commentary on federal environmental crimes attempts to address the normative inquiry of whether an activity should or should not fall analytically within the ambit of the public welfare

* Equal Justice Works Fellow, Midwest Environmental Advocates, Inc.; J.D., Northwestern School of Law of Lewis and Clark College, 2001. The author wishes to thank Professor Susan Mandiberg of the Northwestern School of Law for her open door, helpful guidance and thoughtful criticism in completing this article.

1. *See, e.g.*, John Shepard Wiley, Jr., *Not Guilty By Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999) (arguing in general that the Court should not apply the public welfare offense doctrine to federal regulatory crimes); Stuart P. Green, *Why It's A Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997) (arguing that intentional disobedience of government authority is morally wrongful and justifies application of the public welfare offense doctrine).

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

3. Liparota v. United States, 471 U.S. 419, 432-33 (1985); *see also* discussion *infra* Section III.B.2).

4. Staples v. United States, 511 U.S. 600, 611-12 (1994).

5. *See infra* Section III.B.3.

offense doctrine.[6] Despite the struggle with answering that question, few commentators have suggested abandoning the public welfare offense doctrine altogether as an interpretative tool and replacing it with a more structured scheme.[7] Such a scheme would not necessarily answer the normative question of whether certain acts should or should not be made criminal. That question is for Congress to answer. Instead, a more structured approach would address at least one source of the controversy: whether a mental state requirement applies at all, and if so, to which acts and attendant circumstances declared in the statute. Enter the Model Penal Code (MPC).

---

6. *See, e.g.*, M. Diane Barber, *Fair Warning: The Deterioration of Scienter Under Environmental Criminal Statutes*, 26 LOY. L.A. L. REV. 105, 143-48 (1992) (arguing that the public welfare offense doctrine should not apply environmental crimes such as those enumerated in the Resource Conservation and Recovery Act, Migratory Bird Treaty Act, Clean Air Act, and Endangered Species Act because, unlike traditional public welfare offenses, they carry heavy penalties); David Gerger, *Environmental Crime*, CHAMPION, Oct. 2000, at 34 (arguing the complexity of environmental laws mitigates against application of the public welfare offense doctrine); Robert A. Milne, Comment, *The Mens Rea Requirements of the Federal Environmental Statutes: Strict Criminal Liability In Substance But Not Form*, 37 BUFF. L. REV. 307, 330-32 (1989) (arguing that application of the public offense doctrine to environmental statutes means they are treated as strict liability statutes); Michael Vitiello, *Does Culpability Matter?: Statutory Construction Under 42 U.S.C. § 6928*, 6 TUL. ENVTL. L.J. 187, 222 (1993); Stanley A Twardy, Jr. & Michael G. Considine, *What Must One "Know" To Be Convicted Under the Environmental Laws?*, NAT. RESOURCES & ENV'T, Spring 1997, at 48; Dennis Jenkins, Comment, *Criminal Prosecution and the Migratory Bird Treaty Act: An Analysis of the Constitution and Criminal Intent in an Environmental Context*, 24 B.C. ENVTL. AFF. L. REV. 595 (1997); Richard J. Lazarus, *Mens Rea in Environmental Criminal Law: Reading Supreme Court Tea Leaves*, 7 FORDHAM ENVTL. L.J. 861 (1996); John D. Copeland, *The Criminalization of Environmental Law: Implications for Agriculture*, 48 OKLA. L. REV. 237 (1995); Andrew J. Turner, *Mens Rea in Environmental Crime Prosecutions: Ignorantia Juris and the White Collar Criminal*, 23 COLUM. J. ENVTL. L. 217 (1998).

7. At least one author has suggested that Congress should adopt a uniform culpability provision that would apply to all federal crimes. *See* Vitiello *supra* note 6, at 247-51. Another author has suggested a clearer scheme for interpreting mental state in federal environmental crimes. *See* Rebecca S. Weber, Comment, *Element Analysis Applied to Environmental Crimes: What Did They Know, and When Did They Know It?*, 16 B.C. ENVTL. AFF. L. REV. 53 (1988). Although both authors suggest that the Model Penal Code interpretative protocols would be helpful to clarifying mental state in federal regulatory crimes, neither recognizes that Congress has drafted federal criminal statutes using common law techniques. As a result, to make the MPC's definitions and interpretative protocols workable, Congress would have to redraft the statute according to those definitions and protocols. *See* Susan F. Mandiberg, *The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example*, 25 ENVTL. L. 1165, 1236-37 (1995).

The Clean Water Act's criminal statute, section 309(c),[8] provides a suitable vehicle for exploring what effect the MPC's definitions and interpretative protocols might have on mental state in water pollution crimes. Section 309(c)(2) prohibits "knowing" violations of various sections of the Act, most notably the requirement to comply with conditions in a pollutant discharge permit.[9] Controversy surrounds whether section 309(c) should be considered a public welfare offense statute. Early courts interpreting section 309(c)'s predecessor in section 407 of the Refuse Act of 1899[10] held that water pollution crimes are public welfare offenses,[11] arguably applying Professor Sayre's concept of the term.[12] Courts and commentators interpreting section 309(c)(2) of the Clean Water Act today, however, have struggled with the Supreme Court's modern formulation of the public welfare offense doctrine. Some argue that water pollution is not a public welfare offense and therefore that "knowing" relates to defendant's awareness of the law that he has just broken.[13] Others argue that the public welfare offense doctrine does apply, and "knowing" means a knowing act that results in a violation of the law.[14] As drafted, the statute is arguably ambiguous.[15] Given the controversy, there

8. Clean Water Act, 33 U.S.C. § 1319(c) (2000). Specifically, section 309(c)(2)(A) provides:

> (2) Knowing violations. Any person who—
> knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title [sections 311, 312, 316, 318, 311(b)(3), 318, or 405], or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 [402] of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) [section 402(a)(3) or 402(b)(8)] of this title or in a permit issued under section 1344 [404] of this title by the Secretary of the Army or by a State; . . .
> 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 a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

Id.

9. *See* 33 U.S.C. §§ 1319(c)(2)(A), 1311, 1342.
10. The Refuse Act of 1899, 33 U.S.C. § 407 (2000).
11. *See* discussion *infra* Section IV.A.
12. *See generally* Sayre, *supra* note 2, at 70-73.
13. *See* discussion *infra* Section IV.B.
14. *See* discussion *infra* Section IV.B.
15. United States v. Weitzenhoff, 1 F.2d 1523 (9th Cir. 1993), *amended by* 35 F.3d 1275, 1295 (1994) (Kleinfeld, J. *dissenting*). The dissent from denial of review *en banc* argued that section 309(c)(2) was ambiguous as to whether "knowingly" in the statute meant knowledge of the permit violation, or knowledge of the act that amounted to

can be no better reason for Congress to restructure section 309(c)(2) to clarify just what a defendant has to know to be convicted of a water pollution crime under that section.

The current controversy over interpreting culpability requirements in federal environmental crimes requires Congress to more clearly define mental state requirements in those statutes. One way to provide that clarity is for Congress to begin selectively redrafting environmental criminal statutes using Model Penal Code definitions and interpretative protocols. This paper uses section 309(c)(2) of the Clean Water Act and the controversy surrounding the interpretation of its mental state requirement as an illustration of one such statute that would benefit from a Model Penal Code approach. Part II of this paper offers some basic background in criminal law mental state concepts for those who have an interest in environmental crimes, but lack a familiarity with criminal law. Part III describes the public welfare offense doctrine as a common law concept, its history, and its modern synthesis in the Supreme Court today. Part IV explores the public welfare offense doctrine in the context of water pollution crimes, beginning with early water pollution crimes and ending with more recent case law under the Clean Water Act. Finally, Part V explores what section 309(c)(2) would look like in a federal Model Penal Code world, and concludes that redrafting of section 309(c)(2) under that scheme would add clarity and certainty to its interpretation in the courts. In using MPC protocols and definitions to amend the language of section 309(c), this section concludes that Congress should require the government to prove some awareness of the law under that provision. Moreover, Congress should require the government to prove recklessness, as defined under the MPC, with respect to that awareness.

II. What Does "Culpability" Mean in Criminal Law?

A. What Does "Culpability" Mean in Common Law?

The "culpability" concept is deeply rooted in Anglo-American law.[16] "Culpability" takes many different forms, and its difficulty to define has been a thorn in the sides of both courts and commen-

---

the permit violation, and that the rule of lenity should apply in favor of the defendants in that case. For a discussion of this case and the dissent, see *infra* Section IV.B.

16. *See* United States v. Morissette, 342 U.S. 246, 251 (1952).

tators for the past 1,000 years.[17] The Supreme Court in *United States v. Morissette* in 1952, for example, noted the various definitions of culpability that have evolved over the centuries, and indicated that the government is required to prove at least some degree of mental state.[18] Regardless of the confusion surrounding degrees of culpability, the common law applies a "normative" approach to culpability, looking at the actor's moral blameworthi-

---

17. *See* RICHARD G. SINGER & MARTIN R. GARDENER, CRIMES AND PUNISHMENT: CASES, MATERIALS, AND READINGS IN CRIMINAL LAW 224-25 (1996); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 396 (1978); Wiley, *supra* note 1, at 1025-29; *see generally* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1947). One commentator has distilled the history of mental state in the criminal law into five general phases, beginning with the earliest period in which mental state was not required at all for the "government" to obtain a conviction: 1) liability without regard for culpable state of mind; 2) willful v. accidental; 3) willful v. careless v. faultless; 4) intentional v. reckless v. negligent v. faultless; and 5) purposeful v. knowing v. reckless v. negligent v. faultless. Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 825 (1980). At first, whether the act made criminal was committed intentionally was irrelevant to establishing liability, but may have been relevant to determining the degree of punishment. *Id.* ("Harms caused faultlessly may have been punished (strict liability), yet punished less severely than willful harms."). As time wore on and the culpability concept continued to evolve, courts began to recognize the distinction between mere accidents and willful conduct, between one actor's recklessness and another's negligence, and most recently, between purposeful and knowing conduct. *Id.*

18. *See Morissette*, 342 U.S. at 251-52. Specifically, the Court stated:

> The unanimity with which [courts] have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity, and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as "felonious intent," "criminal intent," "malice aforethought," "guilty knowledge," "fraudulent intent," "willfulness," "scienter," to denote guilty knowledge, or "mens rea," to signify an evil purpose or mental culpability.

Id. at 252; *see also* Robinson, *supra* note 17, at 815. Robinson states the Court in *Morissette* "complained" of the confusion surrounding the definition of culpability, but it seems more likely that the Court used the "variety" and "disparity" of definitions to argue that *some* evidence of culpability has long been required in common law. *Morissette*, 342 U.S. at 251-52.

> The unanimity with which [courts] have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity, and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as "felonious intent," "criminal intent," "malice aforethought," "guilty knowledge," "fraudulent intent," "willfulness," "scienter," to denote guilty knowledge, or "mens rea," to signify an evil purpose or mental culpability.

Id.

ness rather than merely whether the defendant was aware of what he was doing.[19]

Courts have created the concepts of general and specific intent crimes to delineate the applicable culpability requirements in common law statutes. A general intent crime is one in which the mental state word in the definition of the crime relates only to the conduct and result that comprise the offense.[20] At common law, general intent can be inferred from the commission of the act because, generally speaking, one intends the probable consequences of one's acts.[21] On the other hand, a specific intent crime is one that requires some special mental element beyond the mental state required solely for the act element.[22] For example, "assault *with the intent to rape*" would be a specific intent crime because it requires proof of intent to commit an act beyond committing an assault.[23]

A mistake of fact is a defense to a crime if it negates the mental element of that crime. This makes the distinction between general and specific intent crimes a critical one. General intent crimes allow a mistake of fact defense if the mistake that the defendant made was objectively reasonable and subjectively honest.[24] However, if the mistake goes to specific intent, then the mistake need only be subjectively honest if the mistake is logically relevant to the specific intent.[25] This means that the mistake is permitted as a defense no matter how unreasonable the defen-

19. *See* GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 81-83 (1998); JOSHUA W. DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 132 (2d. ed. 1999) ("Broadly speaking, 'mens rea' means 'guilty mind,' 'vicious will,' 'immorality of motive,' or, simply, 'morally culpable state of mind.'"); David L. Bazelon, *The Morality of Criminal Law*, 49 S. CAL. L. REV. 385, 387-88, *reprinted in* THE INTERNATIONAL LIBRARY ON LAW AND LEGAL THEORY AREAS 16 (Thomas Morawetz, ed., 1991); Susan F. Mandiberg, *The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example*, 25 ENVTL. L. 1165, 1204-09 (1995).

20. *See* DRESSLER, *supra* note 19, at 140 (1999); *see also* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 3.5 (1986).

21. *See* LAFAVE & SCOTT, *supra* note 20, § 3.5; *see also* People v. Conley, 543 N.E.2d 138 (Ill. App. Ct. 1989), *cited in* DRESSLER, *supra* note 19, at 135. This statement should be qualified in the context of attendant circumstances. For example, arson is considered to be a general intent crime, and is defined as generally as "the malicious burning of the dwelling of another." ROLLIN M. PERKINS, CRIMINAL LAW 216 (2d ed. 1969). "Dwelling of another" is an attendant circumstance. A defendant does not commit arson if she burns her own dwelling. Therefore, we cannot infer intent regarding ownership from the mere conduct of burning the building. *See id.*

22. *See* DRESSLER, *supra* note 19, at 140-41.

23. *Id.* at 141 (emphasis in original).

24. *See id.* at 172-74.

25. *Id.*

dant's belief concerning the relevant facts. As a result, the government's only hope of obtaining a conviction at that point is to prove the defendant was lying about his mistake.

In addition to general intent and specific intent crimes, the common law recognizes strict liability crimes. Strict liability crimes consist of those offenses that require no mental state with respect to one or more act elements.[26] This category of crimes was created to help the prosecution prove mental state where doing so would make it unduly burdensome to obtain a conviction for some who had clearly committed the criminal act.[27] Also, these crimes have historically consisted of misdemeanors and carried relatively light penalties.[28] Some crimes have been labeled "true strict liability," in which the crime contains no mental state with respect to *any* act element, while other strict liability crimes may apply a mental state to some, but not other, act elements.[29] Regardless, the utilitarian value of strict liability crimes lies in their deterrence of socially undesirable conduct and arguably justifies their continued existence.[30]

B. What Does "Culpability" Mean under the Model Penal Code?

In contrast to the common law, the Model Penal Code applies a descriptive approach to defining culpability.[31] The MPC, rather than focusing on "vicious will" or an "evil mind," focuses instead on what facts and circumstances are known to the defendant at the time the crime was committed, regardless of whether the defendant was aware of doing anything morally wrong. To carry out the MPC descriptive approach and to clarify the confusion surrounding mental state in the common law,[32] the drafters created

---

26. *See* LAFAVE & SCOTT, *supra* note 20, § 3.8.

27. *Id.*

28. *Id.*; *see also Morissette*, 342 U.S. at 257-58 (1955).

29. *Staples*, 511 U.S. at 607 n.4; *see also* LAFAVE & SCOTT, *supra* note 20, § 3.8.

30. Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 738 (1960) (arguing that strict liability offenses deter socially undesirable conduct, and that there is little evidence that strict liability offenses deter socially desirable conduct).

31. *See* FLETCHER, *supra* note 17; *see also* MODEL PENAL CODE AND COMMENTARIES § 2.02 cmt. 2 (Official Draft & Revised Comments, 1985) [hereinafter MODEL PENAL CODE] ("In the Code's formulation, both 'purposely' and 'knowingly,' as well as 'recklessly,' are meant to ask what, in fact, the defendant's mental attitude was.").

32. MODEL PENAL CODE § 2.02 cmt. 1. Specifically, the Drafters state:

> The purpose of articulating these distinctions is to advance the clarity of draftsmanship in the delineation of the definitions of specific crimes, to

four mental state words graded in order of degrees of culpability: purposely, knowingly, recklessly, and negligently.[33] One commentator referred to the beneficial aspects of the MPC's culpability definitions as a significant improvement over the past intellectual chaos that has surrounded common law culpability.[34] As a matter of perspective, however, the benefits may be somewhat offset by the subtle distinctions drawn between purpose versus knowledge, knowledge versus recklessness, and recklessness versus negligence.[35] The drafters of the MPC recognized that these distinctions were narrow and in some cases, inconsequential for purposes of determining liability.[36] However, the drafters also stated that the distinctions are essential where the common law draws the distinction between purpose and knowledge, as with some specific intent crimes like attempt and conspiracy, and therefore are necessary under a MPC regime.[37]

> provide a distinct framework against which those definitions may be tested, and to dispel the obscurity with which the culpability requirement is often treated when such concepts as "general criminal intent," "mens rea," "presumed intent," "malice," "wilfulness," "scienter" and the like have been employed.

Id.

33. *Id.* § 2.02(2). A person acts "purposely" with respect to a material element of the offense when it is his "conscious object" to engage in the prohibited conduct or produce a certain prohibited result, or is aware of attendant circumstances or hopes they exist. *Id.* § 2.02(2)(a). A person acts "knowingly" when he is aware his conduct or that certain circumstances exist, and is aware that "it is practically certain that his conduct" will cause a prohibited result. *Id.* § 2.02(2)(b). A person acts "recklessly" when he disregards a substantial and unjustifiable risk that a material element of the offense exists or will result from his action, and disregard of that risk involves a gross deviation from the standard of conduct of a law-abiding person. *Id.* § 2.02(2)(c). Finally, "negligently" refers to a person who failed to perceive a "substantial and unjustifiable risk" and that failure involved a gross deviation from the standard of care of a reasonable person in the actor's situation. MODEL PENAL CODE §2.02(2)(d) (Official Draft & Revised Comments, 1985).

34. *See* Robinson, *supra* note 17, at 816.

35. MODEL PENAL CODE § 2.02 cmts. 2, 3, 4.

36. *Id.*

37. *Id.; see also* United States v. United States Gypsum Co., 438 U.S. 422, 444 (holding that government's proof of knowledge, as that term is used in the MPC, is sufficient to obtain a conviction for violation of federal anti-trust laws). Specifically, the Supreme Court in *United States Gypsum* stated:

> In dealing with the kinds of decisions upon which the antitrust laws focus, the concepts of recklessness and negligence have no place. Our question instead is whether a criminal violation of the antitrust laws requires, in addition to proof of anticompetitive effects, a demonstration that the disputed conduct was undertaken with the "conscious object" of producing such effects, or whether it is sufficient that the conduct is shown to have been undertaken with knowledge that the prescribed effects would most likely follow. While the difference between the formulations is a narrow

At least one of the above levels of culpability must apply to each "material element" of the crime.[38] The MPC distinguishes between "elements of an offense" and "material elements of an offense."[39] An element of the offense means conduct, an attendant circumstance, and a result of conduct that is included in the description of the forbidden act. It also establishes the degree of culpability required, negatives an excuse or justification or statute of limitations defense, or establishes jurisdiction or venue.[40] A "material element," on the other hand, is much narrower. An element is material when it relates solely to the harm sought to be prevented by the law or the existence of a justification or excuse for such conduct.[41] Facts that relate to jurisdiction, venue, or statutes of limitations are not material elements.[42]

The MPC applies two important interpretative protocols determining which mental state applies to a material element of a crime.[43] First, the MPC establishes "recklessness" as the default mental state in a statute where no mental state is provided.[44] Second, when the statute does include a mental state word, that word is presumed to apply to all material elements of the offense unless the statute displays contrary purpose.[45] If such a contrary purpose appears, then the default mental state of recklessness would apply.[46] This latter protocol is perhaps the more significant of the two because it provides courts with guidance in interpreting ambiguities in the mental state requirement depending on the grammar and the syntax of the statute.

> one, [citations omitted], we conclude that action undertaken with knowledge of its probably consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws.

Id.

38. MODEL PENAL CODE §2.02 Explanatory Note (Official Draft & Revised Comments, 1985).

39. *Id.* § 1.13.

40. *Id.* § 1.13(9).

41. *Id.* § 1.13(10).

42. *Id.* § 2.02.

43. *Id.* § 2.02(3), (4); *see generally* Paul H. Robinson & Jane A. Grall, *Element Analysis In Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983).

44. MODEL PENAL CODE § 2.02(3) (Official Draft & Revised Comments, 1985).

45. *Id.* § 2.02(4).

46. *See id.* § 2.02 cmt. 6.

III. Culpability: Public Welfare Offenses and Innocent Activities

A. The Rise of the Public Welfare Offense Doctrine

Public welfare offenses have historically been defined as a "distinct group of offenses punishable without regard to any mental element,"[47] and have their origins in strict liability criminal statutes.[48] These statutes arose around the late nineteenth and mid-twentieth centuries, and have been explained by the changing social conditions under which the doctrine developed.[49] Cities became more crowded as urban economies soared.[50] More products were put on the shelf for personal consumption, and were more widely distributed.[51] This new development, in turn, created new risks to public health and welfare.[52] Despite the fact that most of those responsible presumably lacked the intent to cause harm, local, state and federal authorities responded by criminalizing activities that had before then gone unrestrained.[53] By eliminating mental state from the elements of the crime, the object of the public welfare offense statute was to deter risk-taking and promote social betterment, rather than punish moral wrong-

47. *See* Sayre, *supra* note 2, at 67.

48. *See, e.g.,* Felton v. United States, 96 U.S. 699 (1877); United States v. Balint, 258 U.S. 250 (1922); United States v. Behrman, 258 U.S. 280 (1922). See Mandiberg, *supra* note 19, at 1181-88, for a thoughtful analysis of *Felton* and *Balint*, and Barber, *supra* note 6, at 113, for a discussion of *Behrman*.

49. *See* Sayre, *supra* note 2, at 56.

50. Morrisette v. United States, 342 U.S. 246, 253-54. There, the Court described in some detail the circumstances under which the public welfare offense doctrine arose:

> The industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms, driven by freshly discovered sources of energy, requiring higher precautions by employers. Traffic of velocities, volumes and varieties unheard of came to subject the wayfarer to intolerable casualty risks if owners and drivers were not to observe new cares and uniformities of conduct. Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety, or welfare.

Id.

51. *Id.*

52. *Id.*

53. *Id.*

doing in the traditional sense, as associated with thefts and violent crimes.[54]

Early in its evolution, the public welfare offense doctrine was interpreted to carry forth strict liability principles. Two frequently cited examples of a public welfare offense statute imposing strict liability are those at issue in *United States v. Balint*[55] and *United States v. Behrman*.[56] In *Balint*, the defendants had been convicted of violating a statute that prohibited the sale ofselling narcotics without a permit from the Commissioner of Internal Revenue. The primary purpose of the statute was to ensure that these sales transactions were properly taxed, while the secondary purpose was to control the spread of drug addiction.[57] Observing the absence of any culpability requirement in the statute, the Supreme Court rejected the argument that the government must prove that the defendants knew the substances they were selling were narcotics.[58] Instead, the person dealing with the substance must "ascertain at his peril"[59] whether the substance falls within the purview of the statute.[60] This was seen by the Court as a mat-

54. *See, e.g.,* United States v. Balint, 258 U.S. 250, 252 (1922); *see also* Mandiberg, *supra* note 19, at 1184 (suggesting that this approach to *mens rea* represented a utilitarian philosphy concerned with seeking solutions to the "overwhelming social problems" of the period); Barber, *supra* note 6, at 113 (noting that the notion of public welfare statutes as regulatory in nature designed to promote social betterment was consistent with early English cases recognizing that the purpose of such statutes was protection of the public rather than punishment of the individual).

55. *Balint,* 258 U.S. at 250; *see also* Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 69-70 (1910). Preceding *Balint* by twelve years, that case held that a statute that made logging on state land without a permit punishable as a felony was, even without a mental state requirement, a valid exercise of the police power. *Id.* Further, the Court held that, "public policy may require that in the prohibition or punishment of particular acts it may be provided that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance." *Id.* at 70.

56. 258 U.S. 280 (1922).

57. *Balint*, 258 U.S. at 253.

58. *Id.* at 253-54.

59. *Id.* at 254. At least one other author has referred to this as the "at-peril doctrine." *See e.g.,* Barber, *supra* note 6, at 113-14.

60. *Balint*, 258 U.S. at 254. At least one commentator has recognized that this language in *Balint* could have dual meaning, with serious implications for the defendant. Mandiberg, *supra* note 19, at 1242 n.102. For example, a defendant might argue that he did not know the item was a drug, but instead thought it was sugar or some other lawful substance. *Id.* According to Professor Mandiberg, *Balint* does not appear to preclude this type of mistake of fact defense, though some commentators have thought otherwise. *Id.* However, *Balint* would preclude the defendant from arguing that he knew the substance was a drug, but did not know this particular drug fell within the jurisdiction of the statute, or knew it was a drug, did not know *which* drug. *Id.* The former would be a mistake of law while the latter would be a mistake of fact. *Id.*

ter of legislative choice to put the value and necessity of collecting taxes, and preventing drug addiction, above the need to protect defendants who have not committed any moral wrong in the traditional sense.[61] Similarly, a few weeks later in *Behrman*, the Court sustained an indictment that alleged that a physician had prescribed large doses of cocaine, heroin, and morphine to an addict without a permit in violation of the Narcotics Act.[62] In so holding, the Court reasoned that if the statute did not contain a mental state requirement, then the indictment did not have to allege mental state provided the indictment was clear enough to charge a statutory violation.[63]

In 1952, the Supreme Court took the opportunity to further refine the rising concept of the public welfare offense in two cases decided within a few weeks of one another. In *Morissette v. United States*, the Court overturned the conviction of a man who had taken spent bomb casings from a U.S. Air Force bombing range in violation of a federal statute making it a crime to steal, embezzle or knowingly convert government property.[64] At his trial, Morissette testified that he believed the spent bomb casings were abandoned, and therefore he did not intend to steal them. As a result, he argued, he could have no wrongful intent. The trial court was unconvinced and refused to allow Morissette argue to the jury that he acted innocently. The Court of Appeals affirmed the conviction, concluding that the statute did not expressly require mental state as to the offense of "stealing," basing its holding in part on *United States v. Balint* and *United States. v. Behrman*.[65]

The Supreme Court reversed, ultimately holding that Congress' omission of mental state from the federal larceny statute would not prevent it from imposing a mental state requirement in the statute.[66] Before coming to that holding, however, the Court went to great lengths to crystallize the evolving public welfare offense jurisprudence and contrast it with the traditional requirement that the government prove mental state in every crime.[67] The Court noted that two categories of criminal offenses had developed: those steeped in the common law, and public welfare offenses that were created to seek some social betterment and

61. *Balint*, 258 U.S. at 254.
62. United States v. Berhman, 258 U.S. 280, 286.
63. *Id.* at 288.
64. *Morissette*, 342 U.S. 246.
65. *Id.* at 249-50.
66. *Id.* at 262.
67. *Id.* at 250-62.

prevent risk.[68] The Court characterized the federal larceny statute at issue as falling into the former category, recognizing that states were charged with the primary role of formulating common law crimes, and none had dispensed with mental state in larceny.[69] Moreoever, common law had historically required the prosecution to prove mental state for larceny.[70] Thus, the Court announced an early departure from the evolution of the public welfare offense doctrine, holding that where Congress had taken a crime from common law and failed to impose a mental state requirement, the Court will presume that Congress intended to adopt the common law mental state.[71]

Although *Boyce Motor Lines, Inc. v. United States* does not specifically address the public welfare offense doctrine, the Court appeared to treat the statute in that case as a public welfare offense statute. The Court upheld the conviction of a hazardous materials transport company for knowingly transporting flammable liquids in a traffic-congested tunnel in New York City in violation of a federal statute.[72] The statute in that case prohibited a

68. *Id.* at 262. The Court, however, was cautious not to establish a bright line rule for distinguishing between "crimes that require a mental element and crimes that do not." *Id.* at 260. It further stated, "we attempt no closed definition, for the law on the subject is neither settled nor static. The conclusion reached in the *Balint* and *Behrman* cases has our approval and adherence for the circumstances to which it was there applied." *Morissette*, 342 U.S. 246. at 260.

69. *Id.* at 263.

70. *Id.*

71. *Id.* Specifically, the Court stated,

> [w]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Id. In addition, the Court later noted that, "it is significant that we have not found, nor has our attention been directed to, any instance in which Congress has expressly eliminated the mental element from a crime taken over from the common law." *Id.* at 265.

72. Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952). The Court rejected a due process challenge that the federal statute failed to provide adequate notice. *Id.* at 342. The Court acknowledged that a statute must be sufficiently definite to give notice of the required conduct, but that the ICC's regulations provided that degree of definiteness. *Id.* at 340. This was in part based on the long history of the regulation of flammable materials transport, and the trucking industry's participation in the development of those regulations. Therefore, knowledge of the regulations would be presumed and the due process notice requirement satisfied. *Id.* at 341-42. Finally, the Court noted that the statute contains a mental state requirement, eliminating any due process concerns. *Id.* at 342.

"knowing" violation of Interstate Commerce Commission regulations governing transport of hazardous materials,[73] but the Court did not require awareness of what the regulations demanded.[74] Instead, the Court reasoned that knowledge would be presumed given the long history of regulation of hazardous waste transportation.[75] The disregard of that presumed knowledge and the consequent harm that resulted from committing the act constituted the punishable wrong.[76] As in *Balint* and *Behrman,* the Court merely required awareness of engaging in conduct that made the act unlawful.[77]

Therefore, it appears that the Court in regulatory offenses like those in *Balint*, *Behrman*, and *Boyce*, will not require knowledge of the law to satisfy the mental state requirement in the statute. However, *Morissette* makes clear that where the federal regulatory crime is taken from the common law, some mental state is required absent congressional intent to dispense with it. The cases that followed have produced what has been termed an interpretative protocol for classifying federal statutes as crimes taken from the common law, public welfare offenses or innocent activity offenses.[78]

B. A New Interpretative Paradigm

1. The Modern Public Welfare Offense

As noted above, public welfare offenses were originally regarded as "light police offenses" which imposed relatively lenient

73. The statute delegated rulemaking authority to the Interstate Commerce Commission for the purpose of promulgating regulations for the safe transportation of explosives. *Id.* at 339 n.1. The federal statute further required that a knowing violation of those regulations carried a maximum $10,000 fine and up to ten years imprisonment if death or bodily injury resulted from the regulation's violation. *Boyce*, 342 U.S. at 339 n.3.

74. *Id.* at 342.

75. *Id.* at 341.

76. *See* Mandiberg, *supra* note 19, at 1192. Professor Mandiberg attempts to synthesize *Morissette*, *Boyce*, and *Lambert v. United States,* 355 U.S. 225 (1957), and questions why some regulatory crimes seem to require mental state while others do not. Professor Mandiberg suggests that one possible reason is that regulatory crimes have a normative component, where the Court is willing to dispense with mental state where the defendant should have known that the activity was regulated. Mandiberg, *supra* note 19, at 1192.

77. *Boyce*, 342 U.S. at 341.

78. *See* Mandiberg, *supra* note 19, at 1213. At least one other author has referred to this development as the "rule of mandatory culpability." Wiley, *supra* note 1, at 1022.

criminal penalties.[79] Much has changed since then. Now, the public welfare offense label has been applied primarily to statutes prohibiting "inherently dangerous" or "uncommon" activities[80] and can carry heavy fines and prison sentences.[81] For example, almost twenty years after the *Boyce* and *Morissette* decisions, lines started to become clearer as to what those activities might be. The Supreme Court issued two very similar opinions that indicated that the public welfare offense doctrine would be reserved for what the Court held were "dangerous" activities.

In *United States v. Freed*, the Court held that the government did not have to prove that the defendant knew that his hand grenades had not been registered under the National Firearms Act.[82] The National Firearms Act made it unlawful for any person "to receive or possess a firearm which is not registered to him."[83] At the time the statute was enacted, lower courts had only imposed a knowledge requirement with respect to whether the weapon was a "firearm" within the meaning of the Act. In holding that knowledge was not required as to the "registration" element, the Court relied heavily on the public welfare offense doctrine. Specifically, the Court justified dispensing with the knowledge of the registration element by noting that the National Firearms Act was a "regulatory measure in the interest of public safety" and that hand grenades were comparable in dangerousness to the narcotics in *Balint*.[84]

Later, in *United States v. International Minerals Chemical Corp.*, the Supreme Court held that the "knowing" requirement in a statute prohibiting the transportation of hazardous substances did not require knowledge of the law, but only knowledge that the

79. *See* Sayre, *supra* note 2, at 67.

80. *Staples*, 511 U.S. at 606 (citing United States v. International Minerals & Chemical Corp, 402 U.S. 558 (1971)) ("Typically, our cases recognizing such offenses involve statutes that regulate potentially harmful or injurious items.").

81. For example, section 309(c) of the Clean Water Act, which has been labeled a public welfare offense statute in some circuits, imposes criminal fines of up to $50,000 per day and imprisonment for up to three years. For second convictions, fines can reach up to $100,000 per day and six years imprisonment. 33 U.S.C. § 1319(c)(2). *See also Weitzenhoff*, 1 F.2d 1523. The Ninth Circuit noted, "while the *Staples* opinion expresses concern with this evolution of enhanced punishments for public welfare offenses, it refrains from holding that public welfare offenses may not be punished as felonies." *Id.* (citing *Staples*, 511 U.S. at 618). A discussion of the Ninth Circuit's decision in *Weitzenhoff* and the dissent from denial of review *en banc* follows, *infra*.

82. United States v. Freed, 401 U.S. 601, 609 (1971).

83. *Id.* at 607 (citing 26 U.S.C. § 5861(d) (1964 ed., Supp. V)).

84. *Freed*, 401 U.S. at 607.

substances were hazardous.[85] In so holding, the Court relied on *Boyce* for the proposition that the dangerousness of the activity of transporting such liquids put the defendant on notice that the activity was regulated.[86] The word "knowingly" in the statute pertained to knowledge of facts making the conduct illegal,[87] and not to knowledge of the regulation. Significantly, the Court emphasized that if the defendant lacked knowledge that it was shipping dangerous acids but instead in "good faith" thought he was shipping "distilled water," the person would not be covered under the Act.[88] Therefore, although knowledge of the regulation was not required, a mistake of fact defense as to underlying conduct was still available to the defendant. Significantly, the Court's use of "good faith" implies that an honest rather than a reasonable mistake as to the nature of the substance was sufficient to absolve the defendant of liability.[89]

More than twenty years after *Freed* and *International Minerals*, the Court in *Staples v. United States*[90] added another layer to the public welfare offense analysis. Not only must the activity be "dangerous," it also must be "uncommon."[91] In *Staples*, the defendant was convicted under the National Firearms Act[92] of possessing an unregistered firearm. "Firearm" under the Act includes machine guns, defined as "any weapon which shoots, . . . or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger."[93] The defendant possessed an AR-15 rifle, which is manufactured as a

85. *International Minerals*, 402 U.S. at 558. In this case, the defendant was charged in an indictment for shipping sulfuric acid and hydrosulfuric acid in interstate commerce and with knowingly failing to show on the shipping papers the classification of the shipment as corrosive liquid. *Id.*

86. *Id.* at 565. The Court stated that, "where, as here, . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability or 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." *Id.*

87. *See* Mandiberg, *supra* note 19, at 1210 (suggesting that public welfare offenses are "at least superficially similar" to common law general intent crimes in regard to the mental state requirement).

88. *International Minerals*, 402 U.S. at 563-64.

89. *Id.* at 563-64. The Court stated, "a person thinking in good faith that he was shipping distilled water when in fact he was shipping some dangerous acid would not be covered [under the Act]." *Id.*

90. *Staples*, 511 U.S. at 600.

91. *Id.* at 611; *see also* Mandiberg, *supra* note 19, at 1213 (analyzing *Staples'* impact on the construction mental state requirements in modern environmental statutes such as the Clean Water Act and Resource Conservation and Recovery Act).

92. 26 U.S.C. §§ 5801-5872 (2000).

93. *Staples*, 511 U.S. at 602 (citing 26 U.S.C. § 5845(b)).

semi-automatic weapon but can be altered by its owner to fire fully automatically.[94] Defendant's weapon had been altered in this way. However, the defendant claimed that he did not know that the weapon could fire automatically, and that the weapon had never fired automatically while in his possession.[95] Therefore, Staples claimed he should be absolved of criminal liability.[96] The government argued that it did not need to prove mental state with regard to "firearm" because the National Firearms Act is a public welfare offense statute.[97]

The Supreme Court agreed with Staples that the government had to prove that he knew the facts making the gun a "firearm," and thus rejected the government's public welfare offense theory.[98] The Court stated that it has historically looked to the "nature of the statute and the particular character of the items regulated" to determine whether Congress' omission of a mental state word means that the statute should be regarded as dispensing with the conventional mental state requirements.[99] The Court rejected the government's argument that all guns, not just machine guns, are dangerous and put the owner on notice that they are subject to strict regulation.[100] The Court recognized a long tradition of gun ownership that simply did not apply to the hand grenades in *Freed*. Gun ownership is so common in the United States, according to the Court, that to consider all guns "dangerous and deleterious devices"[101] and dispense with conventional mental state would be to criminalize a broad range of innocent conduct.[102] Therefore, it seems clear that the National Firearms Act is a public welfare statute only to the extent that it regulates the "uncommon" type of gun ownership involving machine guns and other weapons defined under the Act. The dangerousness of the activity is no longer enough after *Staples*.

---

94. *Id.*

95. *Id.* at 603.

96. *Id.* at 603-04. The District Court rejected the defendant's requested jury instruction to that effect, and the Court of Appeals affirmed, reasoning that the government did not have to prove the defendant's knowledge as to the guns physical characteristics to obtain a conviction. *Id.* at 604.

97. *Id.* at 606.

98. *Staples*, 511 U.S. at 608-16.

99. *Id.* at 607.

100. *Id.* at 610.

101. *Id.* (citing *International Minerals*, 401 U.S. at 565; *Chemical Corp.*, 402 U.S. at 565).

102. *Id.* (citing Liparota v. United States, 471 U.S. 419, 426 (1985)).

2. Otherwise Innocent Activities

Otherwise innocent activities, or innocent activity offenses, can be classified as all other regulatory offenses in which the defendant is not handling what the court deems to be dangerous or uncommon devices, or engaged in dangerous or uncommon activities.[103] Whereas culpability in public welfare offense statutes merely requires that the defendant have knowledge of engaging in an uncommon or dangerous activity, innocent activity offenses require that the defendant be aware of engaging in certain acts and know that such acts violate a statute or regulation.[104] The only question then becomes whether a statute regulates what would be considered an otherwise innocent activity.

The genesis of the concept of the innocent activity offense can be found in *United States v. Liparota*,[105] where the Supreme Court held that the government must prove that the defendant knew that his conduct violated a statute criminalizing the unauthorized sale of food stamps.[106] In that case, *Liparota* was a sandwich shop owner in Chicago, Illinois, who had been indicted for "knowingly" acquiring and possessing food stamps in violation of 7 U.S.C. § 2024(b)(1).[107] The Supreme Court held that § 2024(b)(1) required a showing that Liparota knew his conduct to be unauthorized by statute or regulation. The Court in part relied on the fact that criminal offenses lacking mental state are disfavored. Moreover, the Court relied on *Morissette* for the proposition that simply

103. *See* Mandiberg, *supra* note 19, at 1199.

104. *Liparota*, 471 U.S. at 432-33.

105. 471 U.S. 419 (1985).

106. *Id.* at 403; *see also* United States v. U.S. Gypsum Co., 438 U.S. 422, 440 (1978), where the Court held that the antitrust laws regulated innocent conduct and therefore required a showing of intent to create anti-competitive effects and thus violate the statute. *Id.* at 441. Specifically, the Court stated:

> The imposition of criminal liability on a corporate official, or for that matter on a corporation directly, for engaging in such conduct which only after the fact is determined to violate the statute because of anticompetitive effects, without inquiring into the intent with which it was undertaken, holds out the distinct possibility of overdeterrence.

Id. at 441.

107. The government authorizes restaurants to receive food stamps as payment for food only in limited circumstances. *See Liparota,* 471 U.S. at 422 n.2. Liparota's arrest resulted from something of a sting operation. *Id.* at 421. Liparota bought food stamps at a substantially lower price than face value from an undercover Department of Agriculture agent. *Id.* The District Court instructed the jury that the government must prove that Liparota knowingly acquired and the possessed the food stamps, and the jury returned a verdict of guilty. *Id.* at 422-23. The Court of Appeals affirmed, rejecting Liparota's argument that the District Court erred in failing to give a specific intent instruction. *Id.* at 423.

because Congress has not explicitly inserted a mental state word does not mean that the Court is precluded from applying background assumptions from criminal law requiring mental state.[108] The Court stated that this protocol is particularly appropriate where eliminating mental state would "criminalize a broad range of apparently innocent conduct."[109] As an example, the Court stated that a food stamp recipient would be rendered a criminal if she used her food stamps at a store that, unknown to her, charged higher than normal prices to food stamp program recipients.[110] The Court refused to assume that Congress would have made that conduct illegal without some showing of mental state.[111]

The Court also rejected the government's argument that unlawfully "transferring" food stamps was a public welfare offense.[112] For perhaps the first time, the Court articulated a modern definition of that term. The Court stated that it applied the public welfare offense doctrine only where Congress had criminalized conduct that "a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety."[113] Assuming the converse to be true, any offense that a reasonable person would not know is subject to stringent regulation and threaten public health is not a public welfare offense. The narcotics in *Balint*, the misbranded drugs in *Dotterweich*, the dangerous chemicals in *International Minerals*, and the hand grenades in *Freed* all fell within that category, according to the Court, but not the food stamps in *Liparota*.[114]

What about the machine guns in *Staples*? In that case, the Court seemed to imply that a gun control statute that regulated "common" guns would be considered an innocent activity offense statute. This is, according to the Court, owing to the common-ness of gun ownership in the United States.[115] Although the government had strenuously argued that all guns are dangerous, and that this should therefore alert the owner to stringent regulation,

108. *Id.* at 426.

109. *Liparota*, 471 U.S. at 426

110. *Id.*

111. *Id.* at 427. Moreover, the Court observed that, to the extent that Congress was unclear on this point, the rule of lenity should apply and require the government to prove illegality. *Id.*

112. *Id.* at 432-33.

113. *Id.* at 433.

114. *Liparota*, 471 U.S. at 433.

115. *Staples*, 511 U.S. at 610-11 (1994).

the Court appeared to suggest that the common-ness of the item lessens the significance of its dangerousness.[116] This result would be different, however, if the statute regulated "uncommon" guns, like the hand grenades in *Freed*. In such a case, it is fairly safe to assume that the statute would be a public welfare offense, and the act of ownership would suffice to prove mental state. Thus, the reasoning in both *Liparota* and *Staples* shows the primary feature of an innocent activity as being so common and posing so small a threat to public safety that the regulated person or entity would not normally expect the item or activity to be subject to stringent regulation.[117]

IV. Application of the Public Welfare Offense Doctrine To Federal Environmental Crimes: CWA Section 309(c) as an Illustration

Applying the public welfare offense doctrine to federal environmental crimes has produced considerable controversy in an already complex area of the law. This section first traces prosecutions of water pollution crimes from their genesis in the early water pollution control statutes to show that those were considered *mala prohibita*, meaning that the government did not have to prove mental state with respect to causing the pollution because no mental state word was required in the statute. Second, this section notes that the Clean Water Act today is different in that it does contain a mental state requirement. Yet, in spite of that requirement, courts construing section 309(c)(2)(A) have relieved the government from having to prove awareness of the law, relying in part on the public welfare offense doctrine.

A. The Rise of the CWA as a Public Welfare Offense Statute: Mental State in Early Water Pollution Crimes

Water pollution has been made criminal in the United States at least since the Rivers and Harbors Act of 1899,[118] also known

116. *Id.* at 613.

117. This new dichotomy between the modern public welfare offense and what at least one commentator has dubbed "innocent activity offenses" displays the highly normative nature of the Supreme Court's culpability inquiry in federal regulatory crimes. *See* Mandiberg, *supra* note 19, at 1199, 1211 (suggesting that the distinction between the regulatory public welfare offense and innocent activities indicates that the court is faced with the same normative questions in distinguishing general and specific intent crimes).

118. Rivers and Harbors (Refuse) Act, 33 U.S.C. § 407 (2000).

as the Refuse Act of 1899.[119] Significantly, no mental state had ever been required in the water pollution crimes[120] until Congress enacted the Federal Water Pollution Control Amendments of 1972.[121] Courts construing the Rivers and Harbors Act and the Refuse Act readily concluded that they prohibited conduct that was *malum prohibitum*, and therefore did not require proof of mental state.[122] For example, in *United States v. Interlake Steel Corporation*,[123] the defendants challenged the sufficiency of an indictment charging a violation of section 13 of the Rivers and Harbors Act for failure to allege mental state.[124] Defendants had been charged with discharging iron particles and oily substances into the Little Calumet River. In challenging the indictment, the defendants argued that the government was required to prove that the defendants acted "willfully, intentionally, knowingly, or negligently."[125] The court rejected the argument, noting that "[d]epositing refuse in navigable waters is *malum prohibitum* constituting a violation of Section 13."[126] The court concluded that in the absence of any statutory or precedential guidance, it would not read a mental state requirement into section 13.[127] Thus, *Interlake Steel* appeared to look closely at the type of act prohibited in determining whether proof of mental state was required.

---

119. 33 U.S.C. § 407. See Milne, *supra* note 6, at 310, for a brief overview of the history of criminal enforcement in water pollution control statutes and Barber, *supra* note 6, at 131, for an analysis of criminal sanctions under early environmental statutes.

120. United States v. White Fuel, 498 F.2d 619, 622 (1st Cir. 1974) (citing Scow No. 36, 144 F. 932, 933 (1st Cir. 1906)); United States v. U.S. Steel Corp., 328 F. Supp. 354, 356 (N.D. Ind. 1970), *aff'd* 482 F.2d 439 (7th Cir.), *cert. denied*, 414 U.S. 909 (1973); *see also* United States v. Ashland Oil Co., 705 F. Supp. 270, 275 (W.D. Pa. 1989); United States v. American Cyanamid Co., 354 F. Supp. 1202, 1204 (S.D.N.Y. 1973); Dollar S.S. Co. v. United States, 101 F.2d 638 (9th Cir. 1939).

121. 33 U.S.C. §§ 1251-1387 (2000).

122. *American Cyanamid*, 354 F. Supp. at 1204 (citing United States v. Ballard Oil Co. of Hartford, 195 F.2d 369 (2d Cir. 1952)). Despite the fact that the discharges were accidental in *American Cyanamid*, the Court held "[s]cienter is not required. The offense charged is *malum prohibitum*." *Id.*; *see also* Barber, *supra* note 6, at 130. (contending that the Refuse Act does not require mental state for corporate defendants, but does for corporate officers. Unfortunately, Barber offers no support for this contention).

123. 297 F. Supp. 912 (N.D. Ill. 1969).

124. *Interlake Steel*, 297 F. Supp. at 914-15. Defendants had been charged with discharging iron particles and oily substances into the Little Calumet River. *Id.* at 913.

125. *Id.* at 914-15.

126. *Id.* at 915 (footnote omitted).

127. *Id.*

Two courts early in the history of modern water pollution control regulation have treated the Refuse Act and Rivers and Harbors Act as public welfare offense statutes.[128] In *United States v. United States Steel Corporation,*[129] the defendants challenged the sufficiency of an indictment charging a violation of section 13 of the Rivers and Harbors Act for failure to allege mental state.[130] The defendant steel corporation had been charged with discharging "a quantity of a red-brown particulate sediment from a drain pipe" into the Grand Calumet River. The defendant argued that the government should have to prove that it acted "willfully and knowingly." The District Court rejected the argument, noting first that the statute does not require any mental state.[131] Further, as was the case in *Interlake Steel*, the court rejected the argument. Depositing waste in navigable waters was *malum prohibitum* rather than *malum in se*, and therefore could be categorized as a public welfare offense, like those referred to in *Morissette*.[132]

In the second case, *United States v. White Fuel*,[133] the defendant was convicted of violating the Refuse Act by inadvertently allowing oil stored beneath its property to seep into Boston Harbor. On appeal, White Fuel contended that the government was required to prove mental state with respect to the oil discharges. The First Circuit rejected that argument, relying on the Supreme Court's discussion of the public welfare offense doctrine in *Morissette* for the proposition that water pollution crimes fell within that category.[134] The court also stressed that proof of mental state had never been required in any case since the Refuse Act's

128. *See, e.g.*, United States v. U.S. Steel Corp., 328 F. Supp. 354 (N.D. Ind. 1970); United States v. White Fuel, 498 F.2d 619, 622 (1st Cir. 1974); *accord* United States v. Standard Oil Co., 384 U.S. 224, 229 (1966) (Harlan, J. dissenting). In *Standard Oil*, the Supreme Court reversed the conviction of a corporate defendant who had spilled gasoline into the St. John's River, because a narrow reading of the section 13 required that "useful" gasoline not be considered "refuse" under that provision. *Standard Oil*, 384 U.S. at 229. As a result, the Court elected not to address the scienter requirement under section 13. *Id.* In dissent, Justice Harlan argued that section 13 need not be strictly construed because "[t]he spilling of oil of any type into rivers is not something one would be likely to do whether or not it is legally proscribed by a federal statute." *Id.* at 233.

129. 328 F. Supp. 354 (N.D. Ind. 1970).

130. *Id.* at 356.

131. *Id.*

132. *Id.* (citing Morissette v. United States, 342 U.S. 246, 254 (1952)).

133. 498 F.2d 619 (1st Cir. 1974).

134. United States v. White Fuel, 498 F.2d 619, 622 (1st Cir. 1974) (quoting *Morissette*, 342 U.S. at 255-56).

existence.[135] The court speculated that this was so because the purpose of the Refuse Act was to require people to exercise care in not discharging refuse into waterways.[136] As a result, the court refused to create any defense other than what was necessary to ensure due process.[137]

Significantly, it appears that the courts in *United States Steel* and *White Fuel* were both using the term "public welfare offense" the way Professor Sayre used it,[138] rather than the Supreme Court's recent formulation in *Staples*.[139] Both courts made no reference to the dangerousness or the uncommon-ness of water pollution. Instead, both courts focused on whether the Refuse Act contained a mental state requirement, as the Court had done with the Narcotics Act in *Balint* and *Behrman*.[140] Since the Act did not

135. *Id.* In addition, White Fuel argued that the government should at least have to prove negligence, apparently hoping to assert due care as a defense. *Id.* at 621. The court rejected that argument, comparing the statute to the recently enacted Federal Water Pollution Control Amendments of 1972 and noted that unlike that statute, the Refuse Act does not draw any distinction between civil and criminal violations. *Id.* at 623.

136. *Id.* at 623.

137. *Id.*

138. The court in *United States Steel* referred to the offense of water pollution as *malum prohibitum* and therefore would fall within the category of "public welfare offenses" that the Supreme Court described in *Morrisette*. United States v. U.S. Steel Corp., 328 F. Supp. 354, 356 (N.D. Ind. 1970). The First Circuit in *White Fuel* also quoted the Supreme Court's decision in *Morissette* and further noted that in the seventy-five years of the Refuse Act's existence, there has never been a mental state requirement in the statute. *White Fuel,* 498 F.2d at 621. The Court in *Morissette* in turn refers to Sayre's article, *supra* note 2. *Morissette*, 342 U.S. at 251 n.7. Therefore, it seems clear that the court in *United States Steel* was referring to Sayre's definition of the term public welfare offense, rather than the Supreme Court's "dangerous" and "uncommon" formulation.

139. *Staples*, 511 U.S. at 610-11.

140. A decision previous to *Interlake Steel Corp.* and *U. S. Steel*, however, muddies the analysis somewhat by its focus on a statutory analysis of the Rivers and Harbors Act, 33 U.S.C. §§ 410-426 (2000), to determine the mental state requirement, rather than just looking for the mental state word in the statutory language. The court in *United States v. M.H. Bigan,* 170 F. Supp. 219, 224 (W.D. Pa. 1959), appeared to rely heavily on a statutory analysis of section 13 of the Rivers and Harbors Act, 33 U.S.C. § 403, in holding that proof of mental state was not required. In that case, Bigan had been charged with violating the Refuse Act by inadvertently depositing mining overburden into and along side of the Allegheny River. *Bigan,* 170 F. Supp. at 221. After Bigan had been informed by the Army Engineers that he was in violation of the Rivers and Harbors Act, he ceased operation. *Id.* at 222. A violent rain shower then caused much of the overburden in the form of a landslide to run-off into the river. *Id.* The court construed section 10 of the Rivers and Harbors Act as requiring some degree of mental state in order for the government to obtain a conviction, *id.*, despite the fact that section 10 contains no mental state word, *see* 33 U.S.C. § 403. *Bigan* then held that the same conduct violated Section 13, *Bigan*, 170 F. Supp. at 223, despite that Section 13 similarly contains no mental state word, 33 U.S.C. §407. That provi-

contain a mental state requirement, none would be imposed. At the same time, however, the offenses at issue were misdemeanors rather than felonies.[141] This would perhaps explain those two courts' willingness to apply the public welfare offense doctrine. Professor Sayre referred to public welfare offense as carrying relatively light penalties,[142] and this presumably would have included misdemeanors. One can speculate whether these courts would have applied the public welfare offense doctrine had the offenses had been felonies under the Refuse Act.

B. Section 309(c) of the CWA as a Public Welfare Offense Statute

In 1972, Congress passed the Federal Water Pollution Control Amendments, or the Clean Water Act.[143] Among other groundbreaking provisions, the Clean Water Act (CWA) established a new framework for criminally prosecuting a person who either discharges without a permit or discharges in violation of her permit.[144] Unlike the Refuse Act or Rivers and Harbors Act, as enacted in 1972, the Clean Water Act contained a mental state requirement. Section 309(c)(1) provided that any person who "willfully or negligently" violated the Act would be subject to criminal sanctions.[145] In 1987, section 309(c) was substantially amended to provide different penalties for "knowing" and "negligent" violations of the Act. As its language now reads, section 309(c)(2)(A) provides up to a $50,000 fine and 3 years imprisonment, or both, for "knowing" violations of the Act.[146] Central to the debate surrounding section 309(c)(2)(A)'s status as a public welfare offense is whether a "knowing" violation of the Act re-

---

sion makes it illegal to "throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited . . . refuse matter of any kind or description whatever. . . ." *Bigan*, 170 F. Supp. at 223. While section 13 uses more passive verbs like "suffer" and "cause" in prohibiting depositions of refuse, 33 U.S.C. § 407, section 10 uses more active phrases like "build," "excavate," and "fill" in prohibiting the obstruction of waterways, *id.* § 403. Thus, section 13 does not appear to require any "knowing" act on the part of the defendant, while section 10's use of active verbs indicating intent does appear to require the government prove mental state.

141. 33 U.S.C. § 411 (2000); *see also* United States v. White Fuel, 498 F.2d 619, 621 n.3 (1st Cir. 1974).

142. *See* Sayre, *supra* note 2, at 73.

143. 33 U.S.C. §§ 1251-1387.

144. 33 U.S.C. § 1319(c) (1972), *amended by* 33 U.S.C. § 1319(c) (2000).

145. 33. U.S.C. § 1319(c)(1).

146. *Id.* § 1319(c)(2)(A).

quires merely awareness of facts making the discharge illegal, or also awareness that the discharge was a violation of the law.

Perhaps one of the most notable cases holding that the CWA is a public welfare offense statute is the Ninth Circuit's decision in *United States v. Weitzenhoff*.[147] In that case, Weitzenhoff and Mariani were managers at a sewage treatment plant that discharged treated sewage into the Pacific Ocean near a popular swimming area. From March 1988, the plant was facing an accumulation of waste-activated sludge, and Weitzenhoff and Mariani ordered two employees to discharge the untreated sludge into the ocean, bypassing the treatment storage tanks. As a result, the sludge bypassed the sampling devices so that samples taken from the treated sewage did not reflect the discharge.[148] These discharges apparently took place 40 times between April 1988 and June 1989. Perhaps not coincidentally, most of the discharges occurred at night and none were reported to EPA or the Hawaii Department of Health.[149] Both Weitzenhoff and Mariani were convicted under §309(c)(2) and (c)(4) for knowingly discharging untreated sewage in violation of the plant's permit and knowingly falsifying monitoring reports.

On appeal, the defendants argued that the government had to prove that Weitzenhoff and Mariani knew, in addition to facts making the discharge illegal, also that the defendants knew that the discharge was a violation of their permit. The Ninth Circuit upheld the convictions on the ground that the CWA was a public welfare offense statute, which merely required knowledge of the facts that made the discharge a violation of the CWA, rather than knowledge that the law prohibited the discharge.[150] In so holding, the court analogized the sewage discharges to the hazardous materials in *International Minerals*[151] and noted that anyone who knows she is dealing with such materials should be presumed to be aware of their regulation.[152] The court rejected the defendants'

147. *Weitzenhoff*, 35 F.3d 1275; *see also* United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000).

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

149. *Id.* The Ninth Circuit noted later, in holding that the CWA was not unconstitutionally vague, that Weitzenhoff and Mariani had apparently made considerable efforts at hiding the discharges from EPA. *Id.* at 1289. The discharges occurred at night, plant employees were not allowed to discuss them, and both Weitzenhoff and Mariani lied to health officials when asked about the discharges. *Id.*

150. *Id.* at 1284.

151. 402 U.S. at 565.

152. *Weitzenhoff*, 35 F.3d at 1284.

reliance on *Liparota*, reasoning simply that the food stamps in *Liparota* were factually dissimilar from the sewage in *Weitzenhoff*.[153] Moreover, the court rejected the defendants' reliance on *Staples*[154] and another recently decided case, *Ratzlaf v. United States*,[155] distinguishing each of them in turn.

As for *Ratzlaf*, the court noted that that case involved a banking regulation statute that restricted a defendant from structuring financial transactions to avoid financial reporting requirements. The court stated that, unlike Weitzenhoff and Mariani's case, the banking regulation statute proscribed conduct that most people would be unaware was subject to regulation.[156] As for *Staples*, the court stated that the Supreme Court had reaffirmed the vitality of the public welfare offense doctrine.[157] The court reasoned that the CWA fell within this category of statutes because "the dumping of sewage and other pollutants into our nation's waters is precisely the type of activity that puts the discharger on notice that his acts may pose a public danger."[158] As a result, the government did not have to prove that Weitzenhoff and Mariani knew their discharges were in violation of the plant's CWA permit or the CWA itself.[159]

The denial of the defendants' request for a rehearing *en banc* in *Weitzenhoff* produced a vigorous and lengthy dissent by several Circuit Judges arguing that the government should have to prove that Weitzenhoff and Mariani knew the discharges were illegal.[160] Arguing that the CWA did not qualify as a public welfare offense,

153. *Id.* at 1284-85.
154. 511 U.S. 600 (1991).
155. 510 U.S. 135.
156. *Weitzenhoff*, 35 F.3d at 1285.
157. *Id.*
158. *Id.* at 1286. The court compared sewage dumping to several other activities which it deemed to be dangerous:

> Like other public welfare offenses that regulate the discharge of pollutants into the air, the disposal of hazardous wastes, the undocumented shipping of acids, and the use of pesticides on our food, the improper and excessive discharge of sewage causes cholera, hepatitis, and other serious illnesses, and can have serious repercussions for public health and welfare.

Id.
159. *Id.*
160. *Id.* at 1292. Generally, the dissent was concerned that the public welfare offense doctrine was leading to the dilution of the traditional requirement of mental state in all crimes. *Weitzenhoff*, 35 F.3d at 1292. According to the dissent, eliminating the mental state requirement in turn leads to an evisceration of the moral authority of criminal law because morally "innocent" people are put in jail with violent criminals. *Id.* The dissent attacked the majority's reliance on the public welfare of-

the dissent first pointed out that elimination of the traditional mental state requirement is generally disfavored where penalties are excessive.[161] The dissent relied on *Staples* for the proposition that where a felony is involved, it is presumed that the government must prove that the defendant knew facts making his conduct illegal.[162] The key dispute between the majority and the dissent appears to arise as to what those facts are. While the majority in *Weitzenhoff* believed the facts making the conduct illegal were limited to the discharges, the dissent believed the government should also have to prove that the defendants knew that those discharges were permit violations.[163] Therefore, if Weitzenhoff and Mariani did not know they were violating their permit, then they did not know facts making the conduct illegal and thus could not be convicted.[164] Moreover, the CWA criminalizes discharges of substances that are neither dangerous nor deleterious,[165] such as hot water, rocks, and sand, because those substances are characterized as pollutants,[166] the discharge of which requires a permit under the CWA.[167] As a result, the CWA should not be deemed a public welfare offense statute and should require proof that the defendants knew the discharge violated the permit.

The dissent's reasoning in *Weitzenhoff* appears not to have taken off in other circuits. Subsequent to *Weitzenhoff*, the Second Circuit decided *United States v. Hopkins*[168] and arrived at a similar result. In that case, Hopkins, manufacturing vice president at Spirol International Corporation, was convicted of one count of falsifying and tampering with a monitoring device in violation of sec-

---

fense doctrine as the source of the dilution of the mental state requirement in federal crimes. *Id.* at 1296.

161. *Id.* at 1296.

162. *Id.* at 1297 (quoting *Staples*, 511 U.S. at 618).

163. *Id.*

164. *Weitzenhoff*, 35 F.3d at 1297. The dissent also addressed the panel's reliance on *International Minerals* simply by noting that the crime in *International Minerals* was a misdemeanor, not a felony, therefore justifying application of the public welfare offense doctrine. *Id.* at 1298.

165. *Id.* The dissent referred to these substances as falling into the "pencils, dental floss, and paper clips" category that the Court in *International Minerals* stated would not justify elimination of a mental state requirement because they are not "dangerous" or "deleterious." *Id.; see also International Minerals*, 402 U.S. at 564-65.

166. *See* 33 U.S.C. § 1362(6) (2000).

167. *See id.* §§ 1311, 1342.

168. United States v. Hopkins, 53 F.3d 539 (2d Cir. 1995).

tion 309(c)(4),[169] one count of violating Spirol's permit in violation of section 309(c)(2)(A), and one count of conspiracy to violate section 309(c)(2)(A) and (c)(4) in violation of 18 U.S.C. § 371.[170] Hopkins appealed the trial court's jury instructions that section 309(c)(2)(A) did not require the government to prove that he had knowledge that he was violating permit conditions or the CWA.[171] The court rejected that argument, holding that section 309(c)(2)(A) did not require the government to prove knowledge of permit conditions or the CWA to obtain a conviction.[172] Instead, awareness of regulation is presumed. Like the Ninth Circuit in *Weitzenhoff*, the Second Circuit in *Hopkins* based its holding on the public welfare offense doctrine as articulated in *International Minerals*.[173] The court reasoned that section 309(c)(2)(A) refers to several types of pollutants,[174] such as water quality related effluent limits,[175] toxic pollutants listed under section 307,[176] oil and hazardous substances,[177] and sewage sludge.[178] According to the Second Circuit, the vast majority of these substances would alert a person to the possibility of strict regulation.[179] Therefore, the court held that section 309(c)(2)(A) is a public welfare offense statute, and the government need only prove Hopkins knew of his acts in authorizing the discharges and committed those acts intentionally.[180]

---

169. 33 U.S.C. § 1319(c)(4). That provision relates to criminal sanctions for violating monitoring and reporting requirements. *Id.* Arguably, offenses under section 309(c)(4) do not implicate the "public welfare offense v. innocent activity" debate because those offenses involve lying, which is most likely considered *mala in se* when done knowingly.

170. Spirol had just signed a consent order with the Connecticut Department of Environmental Protection (DEP) and paid a $30,000 fine for violating the zinc limits in its CWA permit. *Hopkins,* 53 F.3d at 534. To avoid the possibility of future fines, Hopkins ordered his staff to either discard samples that did not meet the zinc limits or dilute those samples with tap water until the limits had been met. *Id.* at 535. This allowed Hopkins to file monthly discharge monitoring reports with the DEP that showed no violations of the zinc limit, signing the same under penalty of perjury. *Id.* Hopkins was convicted under sections 309(c)(2) and (4). *Id.* at 540-41.

171. *Id.* at 537.

172. *Id.* at 538.

173. *International Minerals,* 402 U.S. at 558.

174. *Hopkins,* 53 F.3d at 538.

175. 33 U.S.C. § 1312 (2000).

176. *Id.* § 1317.

177. *Id.* § 1321.

178. *Id.* § 1345.

179. *Hopkins*, 53 F.3d at 538.

180. *Id.* at 541. Moving on to the knowledge requirement in section 309(c)(4), *Hopkins* reached the same conclusion as in (c)(2)(A), holding the government did not have to prove that he knew the CWA required accurate and truthful monitoring reports.

Finally, in *United States v. Sinskey*,[181] the Eighth Circuit held that the government did not have to prove that Sinskey, a wastewater treatment plant manager, knew he was violating his meatpacking company's permit when he allowed the discharge of high levels of nitrates into a stream.[182] In so holding, the court reasoned that "knowingly" applies to the underlying conduct proscribed in the statute[183] and rejected the defendant's argument that section 309(c)(2)(A) meant that the conduct prohibited in section 309(c)(2)(A) is the violation of the permit limitation.[184] Instead, the permit limitation was "another layer in the nature of a law" that applied only to the defendant's company.[185] To violate the permit limitation, the permittee must be engaged in conduct proscribed by the permit.[186] Therefore, the government only had to prove that the defendant knew he had discharged a pollutant, but not that the defendant knew the permit proscribed the discharge.[187]

In addition to the Second, Eighth, and Ninth Circuits, the Fourth Circuit in *United States v. Wilson*[188] also addressed the public welfare offense doctrine. In upholding the conviction of a land developer, Wilson,[189] who filled an area of wetlands without a permit in violation of section 404 of the CWA, the Fourth Circuit held that the government had to prove that Wilson knew the area

---

Id. Although not specifically stated in the opinion, it is appropriate to infer that the government must prove that the defendant knew he was tampering with and falsifying reports. *Id.*

181. United States v. Sinskey, 119 F.3d 712 (8th Cir. 1997).

182. *Id.* at 715-16.

183. *Id.* at 715.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Sinskey*, 119 F.3d at 715-16.

188. United States v. Wilson, 133 F.3d 251 (4th Cir. 1998).

189. Wilson was a land developer who was chief executive officer of his land development company, Interstate General Co. *Id.* at 254. That Company was engaged in a development plan of 9,100 acres in St. Charles County, Maryland, some of which the U.S. government asserted were wetlands and therefore within the definition of "navigable waters," under the CWA. *Id.*; *see also* 33 U.S.C. § 1362(7) (2000); 33 C.F.R. § 328.3(a)(3) (2000). The government presented evidence that Wilson was informed by its consulting firm that the Army Corps of Engineers may require a permit to fill wetlands on the relevant parcels. *Wilson*, 133 F.3d at 255. The government also presented evidence that Interstate General continued to develop other parcels without notifying the Army Corps of Engineers or making an effort to determine whether a permit was necessary. *Id.* Defendants Wilson and Interstate General were charged with and convicted on four felony counts under CWA § 309(c)(2)(A) for knowingly discharging pollutants into a navigable water without a permit. *Id.*

was a wetland.[190] However, the government did not have to prove that he knew a permit was required to fill the wetland. As one of the grounds for its holding, the Fourth Circuit pointed to the legislative history behind section 309.[191] Congress amended the criminal provisions of the CWA in 1987, which at the time contained penalties for "willful or negligent" violations.[192] Congress deleted the word "willful" and created separate penalties for negligent violations and knowing violations.[193] Because "willful" connotes an appreciation of illegality, Congress' choice of the term "knowingly" indicates a Congressional intent to impose a lesser standard of guilt.[194] Requiring awareness of illegality, according to the Court, would destroy the distinction that Congress apparently attempted to draw in deleting "willful" and inserting "knowingly."[195]

Although the law up to this point has appeared uniform, two subsequent developments have recently departed from the Second, Eighth, and Ninth Circuits. The Fifth Circuit in dictum stated that the CWA is *not* a public welfare offense statute and therefore the government must prove that the defendant was aware that his actions violated the CWA.[196] In *United States v. Ahmad*,[197] the defendant was convicted of knowingly discharging gasoline into a city sewer system in violation of section 309(c) of the CWA. Ahmad owned and operated a gas station in Conroe, Texas, and had discovered a leak in one of the underground tanks. The leak was on the top of the tank and allowed water to contaminate the gasoline. The water sank to the bottom of the tank, and because the gas was pumped from the bottom, Ahmad was unable to sell gas from it. He decided to pump the contents of the tank, some of which flowed into a manhole and ultimately to the city sewage treatment plant. As a result, the treatment plant and two

190. *Id.*; *see also* 33 C.F.R. § 328.3(a)(3).

191. The court cited two additional grounds as well. First, the court relied on *International Minerals*, reasoning that the phrase "knowingly violates [several provisions of the Act]" is merely "a shorthand designation for specific acts or omissions which violate the act." *Wilson*, 133 F.3d at 261 (quoting *International Minerals*, 402 U.S. at 562). Second, the Court recognized the time honored common law maxim that "ignorance of the law provides no defense to its violation." *Id.* (quoting Cheek v. United States, 498 U.S. 192, 199 (1991)). As a result, although the defendant must be aware of his conduct, he need not be aware that his conduct is illegal in order for the government to obtain a conviction. *Id.* at 262.

192. *Id.*

193. 33 U.S.C. § 1319(c) (2000).

194. *Wilson*, 133 F.3d at 262.

195. *Id.* (citations omitted).

196. United States v. Ahmad, 101 F.3d 386 (5th Cir. 1996).

197. 101 F.3d 386.

nearby schools had to be evacuated.[198] The trial court convicted Ahmad of knowingly discharging a pollutant into a navigable water of the United States.[199] Ahmad claimed that he thought he was discharging water, not gasoline, and therefore was not aware that he was discharging a pollutant.[200]

In reversing the conviction and holding that "knowingly" in section 309(c)(2)(A) applies to each element of the offense, the Fifth Circuit rejected the government's argument that the CWA is a public welfare offense requiring only awareness of facts making the conduct illegal.[201] In so holding, the court reasoned that although gasoline is a potentially harmful or injurious item typically regulated by public welfare offense statutes, it was no more harmful than the machine gun in *Staples*.[202] The court cited *Staples* for the proposition that the key to the public welfare offense is "whether 'dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct.'"[203] The court asserted that such was the case with the CWA, because if knowledge is required as to whether a "pollutant" has been discharged, then a person who honestly and reasonably believes that she has discharged water should not be convicted of discharging gasoline.[204]

Ahmad's discussion of the public welfare offense doctrine should be considered *dicta*. The facts did not raise a substantive issue relating the public welfare doctrine or section 309(c)(2)(A)'s knowledge requirement other than whether Ahmad knew he was discharging gasoline and not water.[205] Thus, the decision should have focused on whether Ahmad could assert a mistake of fact defense, and whether that mistake must only be honest, as with specific intent crimes, or also be reasonable, as with general intent crimes. If a jury could find that it was reasonable for Ahmad to believe that he was discharging water, then he would not be con-

198. *Id.* at 388.
199. *Id.* at 389.
200. *Id.* at 388-89.
201. *Id.* at 391.
202. *Id.*
203. *Ahmad*, 101 F.3d at 391 (citing *Staples*, 511 U.S. at 618).
204. *Id.*
205. The Fifth Circuit in *Ahmad* acknowledged the only issue it faced was whether Ahmad knew he was discharging gasoline or water, and distinguished *Weitzenhoff* and *Hopkins* on the grounds that those cases dealt with whether section 309(c)(2)(A) creates a mistake of law defense to what a CWA discharge permit means. *Id.* at 390-91.

victed.[206] The court simply did not decide whether the government must also prove that Ahmad knew that the discharge of gasoline violated the CWA. As one commentator has pointed out, the Fifth Circuit's muddled discussion of the public welfare doctrine and its assertion that the CWA did not fall within that category was pointless.[207]

The second development came more recently when two members of the Supreme Court dissented from a denial of certiorari in a Clean Water Act "public welfare offense" case. The two members of the Court, Justices Thomas and O'Connor, declared that the CWA is not a public welfare offense statute.[208] In *Hanousek v. United States*,[209] defendant Hanousek, a roadmaster of the White Pass & Yukon Railroad, was convicted under section 309(c)(1) of negligently discharging oil into Alaska's Skagway River when a subcontractor inadvertently ruptured a high pressure oil pipeline near the river.[210] The Ninth Circuit affirmed the conviction, following *Weitzenhoff* and holding that the CWA is a public welfare statute.[211] As a result, the court reasoned that Hanousek could be convicted, without violating due process, for acting with ordinary negligence.[212]

In their dissent from denial of certiorari, Justices Thomas and O'Connor argued that the CWA is not a public welfare offense statute for two primary reasons. First, the CWA regulates "a broad range of ordinary and industrial commercial activities."[213] Even to the extent that the backhoe could be considered dangerous, Justice Thomas pointed to the Court's holding in *Staples* that some dangerous activities are so commonplace as to fall outside the am-

206. *Id.* As a result, the government was required to prove that Ahmad knew he was discharging gasoline, not solely that Ahmad knew he was discharging something. *Id.*

207. *See* Turner, *supra* note 6, at 230 (noting that Ahmad could have been decided solely on the basis of the permissibility of Ahmad's mistake-of-fact defense, and that the Fifth's Circuit's discussion of the public welfare offense doctrine had only "clouded an already murky area of the law.").

208. Hanousek v. United States, 528 U.S. 1102 (2000) (Thomas J. and O'Connor J., dissenting from a denial of certiorari).

209. United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000).

210. *Id.* at 1119. Hanousek was sentenced to six months imprisonment, six months in a halfway house, six months of supervised release, and a fine of $5,000. *Id.* at 1120.

211. *Id.* at 1121.

212. *Id.*

213. *Id.*

bit of the public welfare offense doctrine.[214] Second, Justice Thomas examined the penalty imposed for negligent violations in the CWA, and noted that statutes which impose harsh penalties generally have not been considered public welfare statutes.[215] Justice Thomas concluded that courts of appeals have employed the public welfare doctrine too readily, reasoning that simply because a statute regulates conduct known to be subject to extensive regulation, that should not make the statute a public welfare offense.[216]

This signal from the Supreme Court is significant if for no other reason than it may cast the reasoning of decisions such as *Wilson*, *Weitzenhoff*, *Hopkins,* and *Sinskey* into doubt. Dangerousness aside, it is fairly common for municipal sewage treatment plants, like the one in *Weitzenhoff*,[217] and manufacturers, like Spirol in *Hopkins*[218] and the meat packing plant in *Sinskey*[219] to discharge pollutants into navigable waters. However, it is not clear whether the Court would consider those activities sufficiently common to disregard application of the public welfare offense doctrine. The relative certainty that decisions like *Weitzenhoff*, *Hopkins*, *Wilson* and *Sinskey* have appeared to produce can be considered somewhat less reliable than previously thought.

V. An Opportunity for Clarity: The Model Penal Code's Definitions and Interpretative Protocols as Applied to Section 309(c)

Until now, this note has discussed the debate surrounding the content of "knowingly" in section 309(c)(2)(A).[220] Congress has an

214. *Hanousek*, 528 U.S. at 1103 (citing *Staples*, 511 U.S. at 611).

215. *Id.* at 1104. Interestingly, Justices Thomas and O'Connor also examined the penalties for "knowing" violations for which Hanousek was not convicted, and concluded that the seriousness of the penalties suggested that the CWA could not be considered a public welfare offense. *Id.*

216. *Id.* at 1104-05.

217. 35 F.3d 1275 (9th Cir. 1994).

218. 53 F.3d 533 (2d Cir. 1995).

219. 119 F.3d 712 (8th Cir. 1997).

220. Not only is the public welfare offense doctrine to blame but one commentator has noted that the Court has sometimes used MPC meanings, *United States Gypsum*, 438 U.S. at 444 (applying the MPC definition of "knowledge" to a statute containing no mental state word), and sometimes common law meanings. See, for example, *Staples*, 511 U.S. at 604-05 (construing statute according to background principles of common law), for mental state words, and sometimes used MPC interpretative protocols, and sometimes not. *See* Mandiberg, *supra* note 19, at 1236.

opportunity to wipe the slate clean and eliminate the public welfare offense doctrine in federal environmental crimes by adopting MPC definitions and interpretative protocols. These definitions and interpretative protocols carry the promise of clarity and precision in analyzing the content of the "knowledge" requirement and its context within the criminal provision as a whole.[221] This section argues that Congress should redraft section 309(c)(2)(A) using MPC definitions and interpretative protocols and analyzes how section 309(c)(2)(A) would look using that approach. This section also offers a version of section 309(c)(2)(A) redrafted according to MPC definitions and interpretative protocols.

Before discussing the benefits of a MPC approach, however, three questions have to be answered: 1) Should awareness of the law be deemed a material element of the offense? 2) How can MPC protocols be used to clarify section 309(c)? and 3) If section 309(c) is redrafted using MPC protocols such that knowingly would not apply to awareness of the law, what mental state would apply?

A. Should Awareness of the Law be Considered a Material Element of the Offense under Section 309(c)(2)(A)?

Courts that have addressed the issue of mental state with respect to awareness of the law under section 309(c) have held that the government does not have to prove awareness of the permit violation in order to obtain a conviction under section 309(c)(2)(A).[222] However, an analysis of the reasoning of those courts shows that Congress should overrule them in amending section 309(c)(2)(A). For four key reasons, some mental state should be required with respect to awareness of the permit violation.

First, the plain language of section 309(c)(2)(A) indicates that knowingly refers to a violation of the law. That is, the word "knowingly" refers to "violating sections [301 and others]."[223] Although all the courts that have heard the argument have rejected

221. *See* Mandiberg, *supra* note 19, at 1235 (discussing the merits of the MPC's approach to analyzing mental state, but also recognizing its descriptive nature and consequent departure from the normative nature of common law *mens rea*); *see also* Robinson & Grall, *supra* note 43, at 757 ("This modern 'element analysis' approach provides, for the first time, a statement of the minimum requirements for liability that is sufficiently clear and precise to satisfy the demands of the legality principle.").

222. *See supra* Section III.B.

223. 33 U.S.C. § 1319(c)(2)(A) (2000).

it, it nonetheless carries some force.[224] As Judge Kleinfeld pointed out in his dissent from the Ninth Circuit's denial of review *en banc*, section 309(c)(2)(A) does not say "knowingly discharge pollutants."[225] Instead, it says "knowingly violates," and according to the Judge Kleinfeld, the required state of mind should be that of one who knows he is violating his permit.[226]

Second, the several courts' use of legislative history for holding that proof of knowledge of illegality is not required is not persuasive.[227] For instance, the Fourth Circuit in *Wilson* stated that Congress' decision to amend section 309(c)(2)(A)'s language from "willfully" to "knowingly" indicated a Congressional intent to lessen the standard of *mens rea* under that provision.[228] This was because "willful" had been interpreted by the Supreme Court in *United States v. Ratzlaf*[229] to mean "a conscious performance of bad acts with an appreciation of their illegality."[230] The inference that the Fourth Circuit draws from this is that "knowingly" must involve some lesser standard of guilt.[231] However, the Court in *Ratzlaf* also recognized that "willful" can have several meanings, depending on the context in which the term is used.[232] Congress's use of the term in the context of a money restructuring statute, as in *Ratzlaf*, may carry the same or a different meaning in the context of a water pollution control statute. Moreover, the MPC uses "knowledge" and "willfulness" synonymously by allowing that one who has acted willfully has also acted knowingly, unless the stat-

224. *Weitzenhoff*, 35 F.3d at 1293 (Kleinfeld, J. dissenting). The dissent argued vigorously that a plain reading of the grammar of section 309(c) indicates that some knowledge was required to be proved with regard to the permit violation. *Id.*

225. *Id.* at 1294.

226. *Id.*

227. *See, e.g., Wilson*, 133 F.3d at 262 (noting that Congress' choice of "knowingly" over "willfully" in the 1987 Amendments to section 309 connotes a lesser standard of guilt); *Hopkins*, 53 F.3d at 539 (noting the same); *Sinksey*, 199 F.3d at 716 (noting the same). The panel in *Weitzenhoff* used different legislative history. There, the court noted that the history of the 1987 amendment to section 309 used the terms "causing a violation." *Weitzenhoff*, 35 F.3d at 1284. This, according to the panel, was evidence that Congress intended to dispense with knowledge of illegality. *Id.* The dissent, on the other hand, argued that the panel should not construe a statute that was not enacted. *Id.* at 1296 ("Careful grammatical analysis might better be applied to the law which Congress passed and the President signed.").

228. *Wilson,* 133 F.3d at 262.

229. 510 U.S. 135, 141 (1994).

230. *Wilson,* 133 F.3d at 262 (citing *Ratzlaf*, 510 U.S. at 141).

231. 133 F.3d at 262.

232. *Ratzlaf*, 510 U.S. at 141; *see also* Wiley, *supra* note 1, at 1120 (quoting *Ratzlaf*, 510 U.S. at 141 (noting that *Ratzlaf* was limited in scope because there the Court recognized that "willful" was a "word of many meanings.")).

ute appears to impose further requirements.[233] The drafters of the MPC believed that this was the prevailing judicial and legislative position in a number of states.[234] Therefore, Congress's amendments in section 309(c)(2)(A) may have been more structural than substantive,[235] and its use of "knowingly" over "willfully" is anything but conclusive of an intent to disregard knowledge of illegality.[236]

Third, and more importantly, it has long been held that society reserves the criminal justice system for those who are morally culpable.[237] One commentator has argued that a defendant cannot be aware of any moral wrong-doing if he reasonably but mistakenly believes that his permit authorizes him to discharge a

---

233. MODEL PENAL CODE § 2.02(8) (Official Draft & Revised Comments, 1985). That provision provides:

> (8) Requirement of Willfulness Satisfied by Acting Knowingly. A requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears.

Id.; *see also* Wiley, *supra* note 1, at 1120-21 (noting that willfulness and knowledge are treated as the same under the MPC).

234. MODEL PENAL CODE § 2.02 cmt. 9.

235. Granted, it is helpful to compare the current section 309(c) with the pre-1987 section 309(c). Before 1987, Congress housed the criminal penalty provisions in the same provision, which created sanctions for both "willful" and "negligent" violations. *See Wilson,* 133 F.3d at 262; *Hopkins*, 53 F.3d at 539; *Sinskey*, 199 F.3d at 716. In 1987, Congress amended the statute to create separate provisions for "knowing" and "negligent" violations. 33 U.S.C. § 1319(c)(2) (2000). The question is whether a court can assume, as does the Fourth Circuit in *Wilson*, Congress intended something different when it used the word "knowing" over "willful." *See Wilson,* 133 F.3d at 262 ("In changing from 'willful' to 'knowing,' we should assume that Congress intended to effect a change in meaning.").

236. Incidentally, the Ninth Circuit in *Weitzenhoff* relied on different legislative history as the Fourth Circuit had used in *Wilson*. 35 F.3d at 1284. The Ninth Circuit reasoned that the legislative history's use of the words "knowingly . . . cause a violation" indicated that Congress intended criminal sanctions for a person who knowingly engages in conduct which results in a permit violation. *Id.* This is true "regardless of whether the polluter is cognizant of the requirements or even the existence of the permit." *Id.* As a result, according to the panel, the government did not have to prove awareness of permit violation as an element of the offense. *Id.* However, as noted by the dissent, this is not the language that Congress ultimately used in drafting the current section 309(c)(2), and therefore does not deserve the Ninth Circuit's attention. *Id.* at 1296.

237. *See* Wiley, *supra* note 1, at 1022; *Morissette*, 342 U.S. at 250. The frequently quoted passage from *Morissette* follows:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Morissette, 342 U.S. at 250.

certain amount of effluent.[238] Assuming that regulatory crimes have a retributive component,[239] it makes little sense to punish those who have no awareness they are or even may be doing anything wrong.

B. How would MPC Protocols Clarify Section 309(c)?

Assuming that awareness of the law is a material element under section 309(c), and that the government must therefore prove some mental state with respect to it, the next question becomes how the MPC protocols can help clarify the mental state requirement in the statute. There are two ways in which the MPC has the potential to add clarity to the interpretation of section 309(c)(2)(A). First, section 2.02(4) dictates whether knowingly applies to all or only some elements of the statute.[240] Section 2.02(4) states that when a mental state word is provided in the statute, that word will apply to all elements of the offense unless a contrary purpose plainly appears.[241] As a result, the word "knowingly" in section 309(c)(2)(A) would apply to all material elements of the offense unless the provision were redrafted in a way that displays some contrary purpose through sentence structure, syntax, or grammar. Second, where the syntax and grammar of the provision do indicate a contrary purpose and no other mental state word is provided, section 2.02(3) provides that the default mental state is recklessness.[242]

As section 309(c)(2)(A) now reads, the government must prove that the defendant "knowingly" violated various sections of the Act or any permit condition.[243] Although other lower courts have held that this means that the defendant must only engage in conduct and know the facts that amount to the violation,[244] MPC section 2.02(4) may produce a different reading depending on which

238. *See* Mandiberg, *supra* note 19, at 1227. Specifically, Professor Mandiberg contends that "[i]f regulatory crimes have a normative basis, it is difficult to justify the rejection of the 'permit status' defenses in cases such as *Weitzenhoff*, *Freed*, and the hypothetical. This is so because a defendant who reasonably believes the activity is permitted is not aware of wrongdoing." *Id.*

239. *See id.*

240. MODEL PENAL CODE § 2.02(4) (Official Draft and Revised Comments, 1985).

241. *Id.*

242. *Id.* § 2.02(3).

243. 33 U.S.C. § 1319(c)(2)(A) (2000).

244. *See Weitzenhoff*, 35 F.3d at 1284; *Wilson*, 133 F.3d at 264; *Sinskey*, 119 F.3d at 715 ("To violate a permit limitation. . .one must engage in the conduct prohibited by that limitation. The permit is in essence another layer of regulation in the nature of law, in this case, a law that applies only to [the defendant]."); *Hopkins*, 53 F.3d at 537.

elements of the offense are deemed "material" under MPC section 1.13. For example, assuming awareness of the permit violation is material, "knowingly" in section 309(c)(2)(A) would apply to the defendant's awareness of the permit violation. This, combined with the mental state word's grammatical proximity to "violate section 1311"[245] would indicate that the government must prove some awareness of law as part of the offense.

Applying MPC 2.02(4) to different grammatical versions of section 309(c)(2)(A), however, "knowingly" can be placed strategically in section 309(c) to avoid applying that mental state to the awareness of the law element. For example, section 309(c)(2)(A) refers to a knowing violation of section 301. Section 301, in turn, declares that "[e]xcept in compliance with [section 301,[246]section 402,[247] and other sections[248]] of this title, the discharge of any pollutant by any person" is unlawful.[249] The knowledge requirement could appear at the beginning of the sentence, as follows:

> A person shall not *knowingly, except in compliance with [section 301 and other sections]*, discharge any pollutant into navigable waters.[250]

Assuming that "compliance with [section 301 and other sections]"[251] is a material element of the offense, its placement immediately after "knowingly" could mean that the government must prove that the defendant was aware of the illegality of the discharge.[252] On the other hand, "knowingly" could be placed after "[e]xcept in compliance," as follows:

---

245. *See* MODEL PENAL CODE § 2.02(4). Proximity of the mental state word to a material element tends to negate any argument that Congress intended a contrary purpose. *See also Weitzenhoff*, 35 F.3d at 1295 (Kleinfeld, J., dissenting) ("That is what the statute says, 'knowingly violates,' not 'knowingly discharges.'").

246. 33 U.S.C. § 1311(a).

247. *Id.* § 1342.

248. *Id.* §§ 1312, 1316, 1317, 1328, & 1344.

249. 33 U.S.C. § 1311(a) (2000). "Discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). The terms "navigable waters," "point source," and "pollutant" all have their own definitions as well. *Id.* §§ 1362(7), (14), & (6), respectively.

250. MODEL PENAL CODE § 2.02(4) (Official Draft and Revised Comments, 1985) (emphasis added).

251. This phrase and "awareness of permit status or violation" will be used interchangeably to denote general awareness of illegality.

252. An even better case could be made if the commas were removed altogether.

> A person shall not, *except in compliance with [section 301 and other sections], knowingly* discharge any pollutant into navigable waters.

The syntax of this sentence could show a "contrary purpose" by the legislature to relieve the government of its burden of proving knowledge as to noncompliance.[253] This is because the "compliance" element is separated from the "discharge" element by a comma, and therefore knowingly would not apply.[254]

C. If "Knowingly" Does Not Apply to "Compliance," then what Mental State Does Apply?

Assuming that Congress would draft section 309(c) in a way that "knowingly" does not apply to "compliance," the question becomes what mental state does apply. As noted above, section 2.02(3) of the MPC dictates that where no mental state is specified in the statute, the default mental state is recklessness.[255] Therefore, the government would have to prove that the defendant was subjectively aware of a substantial and unjustifiable risk of violating his permit and that his disregard of that risk was a gross deviation from the standard of conduct of a law-abiding citizen.[256]

The drafters of the MPC offer little guidance as to what would constitute a substantial and unjustifiable risk,[257] but it seems

---

253. MODEL PENAL CODE § 2.02(4).

254. *See* MODEL PENAL CODE § 2.02 cmt. 6. The drafters of the MPC provide an example where section 2.02(3) falls short of solving all ambiguity problems. For example, the offense of burglary includes "one who enters a building . . . with the purpose to commit a crime therein. . . ." *Id.* § 2.02(3). One commits burglary in the second degree if she commits the offense "in the dwelling of another at night." *Id.* The drafters state that it is not clear whether purposely, which clearly applies to "commit a crime therein," also applies to "dwelling" and "night." At the very least, according to the drafters, "recklessness" would be the appropriate mental state. *Id.* § 2.02 cmt. 6.

255. *Id.* § 2.02(3). Recklessness is in turn defined as awareness of a substantial and unjustifiable risk, the disregard of which constitutes a gross deviation from the standard of conduct of a law-abiding citizen. *Id.* § 2.02(2)(c).

256. MODEL PENAL CODE § 2.02(2)(c) (Official Draft and Revised Comments, 1985).

257. *Id.* § 2.02 cmt. 3. The drafters articulated the difficulty in defining substantial and unjustifiable risk as follows:

> Describing the risk as "substantial" and "unjustifiable" is not sufficient, for these are terms of degree, and the acceptability of the risk in a given case depends on a great many variables. Some standard is needed for determining *how* substantial and *how* unjustifiable the risk must be in order to warrant a finding of culpability. There is no way to state this value judgment that does not beg the question in the last analysis; the point is that the jury must evaluate the actor's conduct and determine whether it should be condemned. The Code proposes, therefore, that this

clear that this is what the Second,[258] Fourth,[259] Eighth,[260] and Ninth[261] Circuits could have had in mind. For example, even if Weitzenhoff and Mariani did not know that they were violating their permits in *Weitzenhoff*, it was certainly possible that they were aware of the substantial and unjustifiable risk that their actions would result in a permit violation, and that the defendants disregarded that risk.[262] The court observed that the discharges occurred at night, that plant employees were told not to discuss the discharges, and that Weitzenhoff and Mariani had repeatedly denied that the discharges occurred when asked.[263] It seems clear, therefore, that even if Weitzenhoff and Mariani did not "know" that they were violating the City of Honolulu's discharge permit, they were certainly aware of the risk of doing so. In the context of the MPC, one could argue that even if the two sewage plant workers were aware of the risk of violating the permit, taking that risk was justifiable.[264] Weitzenhoff and Mariani had engaged in socially desirable conduct designed to prevent a worse environmental problem: sewage flooding into the basements of residents' homes.[265] As another example, the Second Circuit might have applied a similar analysis where it observed that an employee of the metal manufacturing plant testified that Hopkins, the President of the Company, said "I know nothing, I see nothing" when responding to his staff's efforts to adjust the plant's ef-

---

> difficulty be accepted frankly, and that the jury be asked to measure the substantiality and unjustifiability of the risk by asking whether its disregard, given the actor's perceptions, involved a gross deviation from the standard of conduct that a law-abiding person in the actor's situation would observe.

Id. (emphasis in original).

258. *Hopkins*, 53 F.3d at 533.

259. *Wilson*, 133 F.3d at 251.

260. *Sinskey*, 119 F.3d at 712.

261. *Weitzenhoff*, 35 F.3d at 1275.

262. *Id.* The drafters of the Model Penal Code suggest that the jury take on two inquiries. MODEL PENAL CODE § 2.02 cmt. 3 (Official Draft and Revised Comments, 1985). The first is to look at the risk and the factors that would define its substantiality, and whether, given those factors, taking the risk was justifiable. *Id.* The drafters make clear that the focus of this inquiry is on the defendant's perceptions of the substantiality and justifiability of the risk. *Id.* Second, the jury is asked whether, "[c]onsidering the nature and purpose of his conduct and the circumstances known to him," the disregard of that risk was a "gross deviation from the standards of conduct that a law-abiding person would have observed in the actor's situation." *Id.*

263. *Weitzenhoff*, 35 F.3d at 1289.

264. *Id.* at 1299.

265. *Id.*

fluent sampling results.[266] Rather than reject the defendant's attempt to create a mistake of law defense,[267] under a MPC regime the court could have observed that Hopkins was at least aware of a substantial and unjustifiable risk that his actions in instructing his staff to discharge levels beyond the permit limits would violate the permit.

A final example can be found in the Fourth Circuit's decision in *United States v. Wilson.*[268] In that case, the government presented evidence that Wilson was informed, by his consulting firm, that the Army Corps of Engineers may require a permit to fill wetlands on the relevant parcels.[269] The government also presented evidence that Interstate General continued to develop other parcels without notifying the Army Corps of Engineers or making an effort to determine whether a permit was necessary.[270] In light of these facts, it seems clear that Wilson was at least aware of the risk that the law required him to obtain a permit, even if he subjectively did not know with confidence that he was required to do so. Moreover, a trier of fact could find that his failure to inquire as to whether a permit was required in light of his consultant's advice makes the risk substantial and unjustifiable.

D. A Proposed Amendment to Section 309(c)(2)

Based on the principles discussed above, below is a proposed amendment to section 309(c)(2) that may provide clarity and consistency to the confusing decisions surrounding the section. The statute establishes as material elements "discharge," "pollutant," and "navigable waters," and "permit violation." Moreover, discharge is considered a "conduct" element, while "pollutant," "navigable waters," and "permit status or violation" are considered attendant circumstances. Thus, the government is required to prove some degree of awareness by the defendant for each of those circumstances.

For "discharge," "pollutant," and "navigable waters," the amended statute retains the requirement that the government prove the defendant's knowledge of the facts making the discharge illegal. With regard to knowledge of permit violation, the statute attempts to strike a balance between the time-honored maxims

266. *Hopkins*, 53 F.3d at 536.
267. *Id.* at 541.
268. 133 F.3d 251 (4th Cir. 1997).
269. *Wilson*, 133 F.3d at 255.
270. *Id.*

that ignorance of the law is no excuse[271] and that we only convict the morally culpable.[272] In so doing, the statute establishes "recklessness" as the default mental state for knowledge of permit violation by using grammar and syntax to separate that element from the word "knowingly." This approach may both satisfy overcriminalization critics concerned with convicting defendants without proof of a guilty mind and environmentalists who seek to ensure that the government has the necessary tools to convict the most careless and egregious violators of section 309(c).

In addition to amending the mental state requirements and establishing material elements, each of the cross references in section 309(c)(2) has been placed in a separate subparagraph to clarify exactly which mental state is required with respect to each element.

Proposed amended section 309(c)(2) reads as follows:

> (2) A person shall not,
>
> (A) except in compliance with section 1311, or 1345, or permits issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, *knowingly discharge any pollutant into navigable waters;*
>
> (B) subject to exceptions found in section 1321(b)(3), *knowingly discharge oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or* (ii) in connection with the Outer Continental Shelf Lands Act [43 U.S.C.A. §1331 et seq.] or the Deepwater Port Act of 1974 [33 U.S.C.A. §1501 et seq.], or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C.A. §1801 et seq.]) *in such quantities as may be harmful* as determined by the President under paragraph (4) of section 1321(b).

271. *See* Turner, *supra* note 6, at 217 (quoting Barlow v. United States, 32 U.S. 404, 411 (1833)).

272. *Morissette*, 342 U.S. at 250.

(C) *for effluent limits promulgated under section 1312, knowingly exceed those effluent limits;*

(D) *for national standards of performance promulgated under section 1316, and where the* person qualifies as a the "owner or operator" of a "new source" as those terms are defined under section 1316, *knowingly violate national standards of performance promulgated under section 1316;*

(E) *for toxic pollutants promulgated under section 1317, knowingly exceed those effluent limits;*

(F) except in compliance with a permit issued under section 1342, *knowingly discharge pollutants from an aquaculture project into navigable waters;*

(G) except in compliance with a permit issued under section 1342, *knowingly discharge sewage sludge resulting from a treatment works which the person knows to be a treatment works as defined in section 1292, into navigable waters;*

(3) A person shall not

(A) *knowingly introduce into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knows or is practically certain could cause personal injury or property damage or,*

(B) except in compliance with all applicable Federal, State, or local requirements or permits, *knowingly cause such treatment works to violate any effluent limitation or condition of a permit which the person knows or is practically certain to be an effluent limitation or condition of the permit issued to the treatment works under section 1342 of this title by the Administrator or a State*;

Upon conviction of violations of either paragraphs (2) or (3), the person shall be punished by 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 a conviction of a person is for a violation committed after a first violation of such person under this subparagraph, punishment shall be by fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(4) Knowing Endangerment.

(A) General rule

Any person who violates subparagraphs (2) and (3), and knows at that time that he thereby places another person in imminent danger of death or serious bodily

injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

(B) Additional provisions (*no change*).

(5) A person who, in violation of section 1318, *knowingly fails to*

(A) maintain records

(B) make reports

(C) install, use, and maintain monitoring equipment or methods

(D) sample effluents

(E) *and provide other information*

is subject to the same penalties as those provided in subparagraphs (2) and (3).

VI. Conclusion

The public welfare offense doctrine has endured a long journey, from a relatively obscure trend in the courts to a recognized and frequently applied doctrine in federal courts today. Public welfare offenses began as strict liability crimes in the early 20th century and were limited primarily to petty offenses, such as liquor and drug sales. It was not formally defined by the Court until 1985 in the *Liparota* decision, where the Court declared that public welfare offenses were those which one should reasonably expect to be subject to strict regulation and could threaten public health and safety.[273] Along the way, the public welfare offense doctrine was applied to several criminal provisions, some with mental state requirements and some without, as in *Boyce* and *Morissette*, respectively.[274] Then the Court issued *International Minerals* and *Freed*, holding that the public welfare offense doctrine was limited to dangerous activities. The Court in *Staples* added another requirement: the activity must also be "uncommon"

273. *Liparota*, 471 U.S. at 432-33.

274. *See supra* Section III.A.

to justify application of the public welfare offense doctrine.[275] How the Court moved from "petty offenses" to "dangerous" and "uncommon" activities begs explanation beyond the scope of this comment.

The public welfare offense doctrine has produced some controversy in the context of section 309(c) of the CWA. Early on, courts declared water pollution crimes *mala prohibita*, requiring no mental state where the statute contained none.[276] Somewhat ironically, when section 309(c) of Clean Water Act was enacted in 1972 and subsequently amended in 1987, courts continued to treat water pollution crimes as *mala prohibita* in spite of clear mental state requirements in the statute. Those courts have required only knowledge of the acts committed, and not knowledge of the legal significance of those acts.[277]

Section 309(c)(2) could benefit greatly from a revision according to MPC definitions and interpretative protocols.[278] Those definitions and protocols have the potential to help answer whether and what mental state applies to the awareness of the law element in section 309(c).[279] In amending the language of section 309(c), Congress should require the government to prove some awareness of the law. Moreover, Congress should require the government to prove recklessness, as defined under the MPC, with respect to that awareness. It is hoped that this comment and proposed amendment to section 309(c) have provided some beginning analysis for determining how MPC definitions and protocols would apply to that statute. By clearly labeling each material element in section 309(c), and precisely defining what mental state requirements apply to each element, Congress will provide the clarity and precision needed to effectively implement section 309(c) of the Clean Water Act.

275. *See supra* Section III.B.
276. *See supra* Section IV.
277. *See supra* Section IV.B.
278. *See supra* Section V.
279. *See supra* Section V.