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A Little Knowledge Can Be a Dangerous Thing - State of New Jersey v. Robertson & Mens Rea in the Freshwater Wetlands Protection Act of 1987

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NOTES AND COMMENTS

A Little Knowledge Can Be a Dangerous Thing— *State of New Jersey v. Robertson*[1] & Mens Rea in the Freshwater Wetlands Protection Act of 1987

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1. 670 A.2d 1096 (N.J. Super. Ct. App. Div. 1996).

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I. Introduction

In a case of first impression, the Superior Court of New Jersey, Appellate Division, offered an original interpretation of the requisite mens rea to convict under criminal provisions of the Freshwater Wetlands Protection Act of 1987 (FWPA)[2] in *State v. Robertson*.[3] In reversing the defendant's conviction, the *Robertson* court held that it was essential for the State to prove that "the defendant knew or should have known that he was filling wetlands subject to the Act."[4] Consequently, the court imposed a heavy burden on the prosecution to convict the defendant who was allegedly in violation of the criminal provisions of the FWPA. *Robertson* adds to the list of cases that have attempted to establish some measure to distinguish between those elements of environmental crimes that prescribe culpability and those that do not. Much like those decisions that came before it, *Robertson* "left for another day the establishment of criteria" that would allow this distinction.[5] The decision in *Robertson*, which required that a violator of the FWPA have knowledge of the illegality of his or her acts, appeared to run contrary to a majority of cases that have interpreted the mens rea requirement in

2. N.J. STAT. ANN. §§ 13:9B-9a, 17a, 21f (West 1994).
3. 3670 A.2d 1096 (N.J. Super. Ct. App. Div. 1996).
4. *Id.* at 1099.
5. Mary S. Henifin, *State Must Prove Intent in Wetlands Crimes*, 144 N.J.L.J. 1016, 1017 (1996).

criminal provisions of environmental statutes. This Case Note will explain how *Robertson* was improperly decided. The jury should have been instructed that in order to obtain a criminal conviction under the FWPA, the State need only prove that the defendant knew factually what he was doing, rather than that what he was doing was prohibited by a statute.

Part II of this Case Note examines the culpability requirements of particular federal criminal and environmental statutes, and *State v. Sewell*,[6] a Supreme Court of New Jersey case relied on by the *Robertson* court. It also discusses the imposition of the public welfare doctrine on criminal provisions of the FWPA as a device to regulate certain types of dangerous and harmful activities and considers the justifications for imposing strict liability for violations of certain criminal statutes. Moreover, Part II outlines freshwater wetlands protection in New Jersey prior to the FWPA, the purposes for enacting the FWPA, and the specific criminal provisions of the FWPA that were interpreted in *Robertson*. Part III examines the facts, holding, and reasoning of the *Robertson* decision, including the arguments raised by both parties. Part IV analyzes the court's decision in *Robertson* by examining the express words of the FWPA's criminal provisions and its legislative history. Part IV also looks at the decisions of other courts that have interpreted the mens rea requirements of criminal statutes and determines whether the decision in *Robertson* is consistent with them. Furthermore, Part IV considers whether a violation of the criminal provisions of the FWPA could have appropriately been considered a public welfare offense. Lastly, Part IV discusses whether the decision in *Robertson* follows the current trend of assigning culpability requirements to criminal environmental statutes, and whether, when considered with other decisions, helps to establish a concrete test for determining when to apply culpability to elements of environmental crimes. Finally, Part V concludes that analyzing the criminal provisions of the FWPA as a public welfare statute would have been proper,

6. 603 A.2d 21 (N.J. 1992).

and that knowledge of the existence of wetlands and the statutes that regulate them was inappropriately deemed a necessary element in a FWPA criminal prosecution.

II. Background

A. Origins of Mens Rea

1. Common Law Origins

It has long been recognized that acts punishable as crimes require proof of mens rea.[7] In fact, this concept is so deeply rooted in Anglo-American jurisprudence that courts have found mens rea to apply even in instances where Congress has not explicitly written it into the criminal statute.[8] As the states codified the common law of crimes, courts recognized that since intent was so inherent in the idea of the offense, an omission did not signify its disapproval.[9] In an often cited passage in *Morissette v. United States*,[10] the Court observed that "[u]nqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.'"[11] However, an exception to this principle developed in England and the United States for "public welfare offenses," characterized as "offenses punishable without regard to any mental element."[12] In a prosecution for selling intoxicating liquor, the Massachusetts Supreme Court, in *Commonwealth v. Boynton*,[13] held that "if the defendant purposely sold the liquor,

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7. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2147, 2176 (William C. Jones ed. 1976).

8. *See* Morissette v. United States, 342 U.S. 246 (1952) (stating that the omission of any intent from the statute will not be interpreted as eliminating that element).

9. *See id.*

10. 342 U.S. 246 (1952).

11. *Id.* at 251.

12. Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56 (1933). Professor Sayre was the originator of the phrase "public welfare offenses."

13. 84 Mass. 160 (2 Allen 1861) (referring to Commonwealth v. Goodman, 97 Mass. 117 (1867)).

which was in fact intoxicating, he was bound at his peril to ascertain the nature of the article which he sold."[14]

2. "At Peril" Doctrine

At the turn of the century, courts began to recognize the "at peril" doctrine as applying to particular acts regulated by statute for the welfare of the public.[15] As a result, courts imposed an affirmative duty on the part of the actor to learn the facts, as "every man is presumed to know the law."[16] The Supreme Court in *Shevlin-Carpenter Co. v. Minnesota*[17] recognized the "at peril" doctrine as a legitimate extension of the police power, noting that "the legislation was in effect an exercise of the police power . . . . 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."[18] Consequently, an actor would be "at peril" with no possibility of pleading good faith or ignorance.

In *United States v. Balint*,[19] the Court determined that common law scienter[20] need not be read into an indictment under the Narcotic Act of 1914.[21] The Court in *Balint* was concerned with avoiding interference with Congress' purpose in a public welfare statute by requiring proof of knowledge.[22] Chief Justice Taft, realizing the inherent problems of proving scienter for such a public welfare regulation and the possibility of penalizing innocent conduct, subsequently substituted

14. *Id.* at 160.

15. *See* M. Diane Barber, *Fair Warning: The Deterioration of Scienter Under Environmental Criminal Statutes*, 26 LOY. L.A. L. REV. 105, 111 (1992).

16. *Id.*

17. 218 U.S. 57 (1910).

18. *Id.* at 70.

19. 258 U.S. 250 (1922).

20. "Scienter" can be defined as "[k]nowingly" and describes "the defendant's . . . previous knowledge of a state of facts which it was his duty to guard against, and his omission to do which has led to the injury complained of." BLACK'S LAW DICTIONARY 1345 (6th ed. 1990). "Scienter" has also been defined as "knowing or intentional misconduct." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976).

21. *See Balint* 258 U.S. at 251-52.

22. *See id.* at 252.

the traditional intent requirement with the "at peril" doctrine, thus forcing the actor "to find out the facts"[23] or be penalized.[24] This approach was consistent with the widely accepted principle that the primary role of statutes is to protect the public, not to punish the individual.[25]

On the same day that it decided *Balint*, the Supreme Court decided *United States v. Behrman*.[26] In *Behrman*, the Court held that an indictment under a drug law does not have to charge intent or knowledge if the statute does not contain an intent or knowledge requirement.[27] The Court reaffirmed its desire to place the interests of the innocent public over those of an ignorant actor.[28]

3. Public Welfare Doctrine

a. Strict Liability Generally

For years, strict liability has been incorporated into environmental statutes and other criminal statutes for numerous reasons. "The premise of strict liability is that the defendant is held guilty no matter how careful and morally innocent he or she . . . has been."[29] The implementation of strict liability has been justified for certain "morality crimes" and offenses involving "transgressions of society's sexual and social norms."[30] One justification for imposing strict liability for these types of offenses is society's discomfort with particular kinds of behavior.[31] As a result, the legislature is more likely to turn to strict liability to shift the risk of potential physical

23. *Id.* at 254.
24. *See id.*
25. *See id.*
26. 258 U.S. 280 (1922).
27. *See id.* at 288.
28. *See id.*
29. Richard G. Singer, *The Resurgence of Mens Rea: III-The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 356 (1989).
30. Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 422-23 (1993). Strict liability is justified under the theory that "the need to prevent certain kinds of occurrences is sufficiently great as to override the undesirable effect of punishing those who might in some either sense be 'innocent.'" Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 739 (1960).
31. *See* Levenson, *supra* note 30, at 424.

or moral harm to the defendant.[32] Furthermore, the imposition of strict liability is likely to increase the probability that a culpable defendant will avoid punishment by claiming ignorance or mistake.[33] Another theory supporting the imposition of strict liability for morality offenses is that the defendant is engaged in high-risk activity, and therefore is deserving of punishment, whether or not he intended the result.[34]

There is also opposition to the doctrine of strict liability. Some critics suggest that strict liability is inconsistent with the utilitarian and retributivist theories of punishment.[35] According to the utilitarian theory, punishment is justified if it deters unlawful conduct.[36] Under certain circumstances, individuals may abstain from engaging in constitutionally protected activities because of their fear of being punished for doing so.[37] Moreover, an individual who has no reason to believe that he is engaging in unlawful behavior will not be deterred, since if he is unaware that he is doing anything illegal, he will be unable to change his conduct until after the act has been completed.[38]

According to the retributivist approach, a person should be punished for choosing to break the law.[39] Retributionists suggest that the law should hold individuals responsible only

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32. *See id.* at 423-24.

33. "Any increase in the number of conditions required to establish criminal liability increases the opportunity for deceiving the courts or juries by the pretence that some condition is not satisfied." Steven S. Nemerson, Note, *Criminal Liability Without Fault: A Philosophical Perspective*, 75 COLUM. L. REV. 1517 (1975) (quoting H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 77 (1968)).

34. *See* Levenson, *supra* note 30, at 420-22. This is a significant theory supporting the imposition of strict liability for "public welfare offenses."

35. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 247-48 (1986).

36. *See generally* Louis M. Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L. J. 315 (1984).

37. *See* Phillip E. Johnson, *Strict Liability: The Prevalent View*, *in* 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1512, 1520-21 (1983).

38. *See* Levenson, *supra* note 30, at 427 (citing Reynolds v. G.H. Austin & Sons Ltd., 2 K.B. 135, 150 (Eng. 1951) (concluding that it is senseless to impose a penalty on an individual who could not have reasonably been aware of the relevant circumstances surrounding his actions)).

39. *See* Nemerson, *supra* note 33, at 1560-65.

for those acts for which they are blameworthy because of a knowing and conscious breach of the law, not because of accidental conduct.[40] "At a minimum, the defendant must have acted below the standard of care that a reasonable person would have exercised under the same conditions."[41]

b. Strict Liability for Public Welfare Offenses

Courts have consistently applied strict liability to public welfare offenses—those for which the defendant's knowledge is presumed because of the danger of the activity involved.[42] The public welfare doctrine establishes an exception to the rule that to constitute a crime, a vicious mind must accompany the action.[43] "These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals."[44] Traditional examples include the violation of motor vehicle laws, the illegal sale of intoxicating liquor, the improper handling of dangerous chemicals or nuclear waste, the sale of impure or adulterated foods or drugs, criminal nuisances, violations of anti-narcotic acts, and violations of various Workmen's Compensation Act provisions.[45]

There are several reasons why the strict liability doctrine is used to correct public welfare invasions. First, the doctrine shifts the risk of the dangerous activity to those who are most able to prevent misfortune.[46] Second, the doctrine makes certain that juries will consider similar cases that involve the public welfare alike.[47] In other words, it ensures "uniform

40. *See* BLACKSTONE, *supra* note 7, at 2189-93.

41. Levenson, *supra* note 30, at 426.

42. *See* Sayre, *supra* note 12, at 68. Courts acknowledged that "intent was so inherent in the idea of the offense that it required no statutory affirmation." *Morrisette*, 342 U.S. 246, 252 (1952).

43. *See generally Morissette*, 342 U.S. 246.

44. *Id.* at 255.

45. *See* United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984) (dumping of hazardous wastes); United States v. International Minerals & Chem. Corp., 402 U.S. 558 (1971) (transporting of dangerous liquids or products); United States v. Y. Hata & Co., 535 F.2d 508 (9th Cir. 1976) (prosecuting under the Food, Drug and Cosmetic Act).

46. *See* Levenson, *supra* note 30, at 419.

47. *See id.* at 421.

treatment of particular high risk conduct."[48] Third, strict liability is often imposed because it can relieve the burden on the prosecutor to prove intent in complex cases.[49] Fourth, legislatures have determined that the risk of an incorrect presumption "is outweighed by the need for additional protection of society and expeditious prosecution of certain cases."[50] Lastly, the implementation of strict liability is a strong public statement that the legislature will not tolerate certain conduct, regardless of the actor's intent.[51]

c. Characteristics of Public Welfare Offenses

(i). Protection of Public Health and Safety

One element of a public welfare statute is the protection of the public's well being. In *United States v. Dotterweich*,[52] the Supreme Court affirmed the defendant's conviction under the Federal Food, Drug, and Cosmetic Act of 1938, which subjected the defendant to criminal penalties even though he was not aware that he was committing any wrongdoing.[53] More recently, in *United States v. Park*,[54] the Supreme Court reaffirmed its decision in *Dotterweich* by holding that it was not necessary to prove knowledge or intent in a prosecution under this statute.[55]

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48. *Id.* at 421 (citing Mark Kelman, *Strict Liability: An Unorthodox View in* 4 ENCYCLOPEDIA OF CRIME & JUST. 1517 (1983)).

49. *See* State v. Weisberg, 55 N.E.2d 870, 872 (Ohio Ct. App. 1943).

> There are many acts that are so destructive of the social order, or where the ability of the state to establish the element of criminal intent would be so extremely difficult if not impossible of proof, that in the interest of justice the legislature had provided that the doing of the act constitutes a crime, regardless of knowledge or criminal intent on the part of the defendant. In these cases it is the duty of the defendant to know what the facts are that are involved or result from his acts or conduct.

Id.

50. People v. Travers, 124 Cal. Rptr. 728, 730 (1975) (citing People v. Stuart, 302 P.2d 5, 8-9 (1956)).

51. Levenson, *supra* note 30, at 422.

52. 320 U.S. 277 (1943).

53. *See id.*

54. 421 U.S. 658 (1975).

55. *See id.* at 670. In *Park*, the Court concluded that Congress' intent was "to require every person dealing in drugs to ascertain at his peril whether that

In *Morissette*,[56] another case involving the public welfare, the Supreme Court held that the absence of any mention of intent in the statute at issue would not be construed as eliminating this element from the crime.[57] The Court concluded that a showing of criminal intent was necessary to prove the "knowing" element in a federal statute that prohibited embezzlement, theft, or conversion of government property.[58] After reviewing the background of the "public welfare doctrine," the Court refused "to expand the doctrine of crimes without intent to include those charged here."[59] In reaching its decision, the majority distinguished *Morissette* from two earlier cases, *Balint*[60] and *Behrman*.[61] The Court in *Morissette* reasoned that because the statutes involved in *Balint* and *Behrman* did not contain any requirement of criminal intent, it could not accept these cases as authority for eliminating intent from offenses incorporated from the common law.[62] The offenses before the Court in those cases were of such a type that the Court had no guidance other than the act itself. In contrast to those offenses in which Congress is silent as to the mental elements of the statute, this federal statute involved "a concept of crime already so well defined in common law and statutory interpretation by the states."[63]

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which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him." *Balint*, 258 U.S. 250, 254 (1992).

56. 342 U.S. 246 (1952).

57. *See id.* at 263.

58. *See id.* at 270-71.

59. *Id.* at 260.

60. 258 U.S. 250 (1922).

61. 258 U.S. 280 (1922).

62. *See Morissette,* 342 U.S. at 250.

63. *Id.* at 262. Traditional public welfare offenses basically fall into the following subdivisions: (1) illegal sales of intoxicating liquor; (2) sales of impure or adulterated food or drugs; (3) sales of misbranded articles, (4) violations of antinarcotic laws; (5) criminal nuisances; (6) violations of traffic regulations; (7) violations of motor-vehicle laws; and (8) violations of general police regulations which are passed for the safety, health or well-being of the community. *See* Sayre *supra* note 12, at 55, 73, 84.

(ii). Nature of the Action

Another element of public welfare offenses is the nature of the action being regulated by the statute. In *United States v. Freed*,[64] a case that dealt with mens rea in the National Firearms Act,[65] the Court unanimously upheld the statute based upon the nature of the act—the possession of hand grenades.[66] The Court noted that this case did not fall into the same category of cases as *Morissette*, but was closer to *Dotterweich*.[67] *Freed* involved a provision of the National Firearms Act that required "no specific intent or knowledge that the hand grenades were unregistered . . . [t]he only knowledge required to be proven was knowledge that the instrument possessed was a firearm."[68]

(iii). Absence of a Mens Rea Requirement

Another common, although not entirely conclusive characteristic of public welfare statutes, is the absence of any mens rea requirement. The cases that have been characterized as involving public welfare offenses have dealt primarily with statutes containing no culpability requirement, establishing, in effect, a type of strict criminal liability.[69] *Balint* involved a provision of the Narcotic Act of 1914 that did not

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64. 401 U.S. 601 (1971).

65. 26 U.S.C. § 5861(d) (1994). The National Firearms Act makes it unlawful for any person "to receive or possess a firearm which is not registered to him." *Id.*

66. *See Freed*, 401 U.S. at 601.

67. *See id.* at 609.

68. *Id.* at 607. According to the Supreme Court in *Morissette*,

> 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 afterthought,' 'guilty knowledge,' 'fraudulent intent,' 'willfulness,' 'scienter,' to denote guilty knowledge, or 'mens rea,' to signify an evil purpose or mental culpability.

Morissette, 342 U.S. at 252.

69. *See* United States v. Park, 421 U.S. 658, 671 (1975) (holding that when the statute under which defendants were prosecuted eliminated "consciousness of wrongdoing," a failure to act was considered a sufficient basis for liability); *see also Freed*, 401 U.S. at 607 (1992) (deciding that no element of mens rea was necessary to convict under a statute prohibiting the receipt or possession of an unregistered firearm); *Dotterweich*, 320 U.S. 277, 281 (1945) (concluding that

contain a mens rea requirement.[70] The Court held that in order to prosecute under this Act, the government must establish that the defendant knew he was selling drugs—it was not necessary to prove that the defendant knew that the items he sold were "narcotics," as defined under the act.[71]

Similarly, in *Freed*,[72] a case involving a provision of the National Firearms Act, there was no mens rea requirement specified in the statute.[73] Consequently, the Court held that since this act required no intent or knowledge by the defendants that the hand grenades were unregistered, the dismissal of an indictment charging them with possessing and conspiring to possess unregistered hand grenades was in error.[74] According to other decisions that were decided before this requirement was written into the statute, the only knowledge required was the defendant's knowledge that the device possessed was a firearm.[75]

(iv). Light Fines and Penalties

The imposition of minor fines and penalties, not prison terms, for offenses in which the "conviction does no grave damage to an offender's reputation," is characteristic of most traditional public welfare offenses.[76] The penalty that a particular statute or regulation imposes is often a starting point for determining if a statute is a traditional public welfare statute.[77] Courts have been hesitant to convict defendants without proof of mens rea when the penalties are extreme,

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the Federal Food, Drug, and Cosmetic Act did not require knowledge that the items at issue were misbranded or adulterated).

70. *See Balint*, 258 U.S. at 251. The section of the act involved provided in part: "it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs . . . ." *Id.*

71. *See id.* at 253.

72. 401 U.S. 601 (1971).

73. *See id.* at 607.

74. *See id.*

75. *See id.*

76. Kepten D. Carmichael, *Strict Criminal Liability for Environmental Violations: A Need for Judicial Restraint*, 71 IND. L. REV. 740 (1996) (quoting *Morissette*, 342 U.S. at 256).

77. *See id.* at 742. *See also* ROLLIN M. PERKINS, CRIMINAL LAW 793-98 (2d ed. 1969).

because, as some legal scholars have concluded, "[t]he sense of justice of the community will not tolerate the infliction of punishment which is substantial upon those innocent of intentional . . . wrongdoing."[78] Typical public welfare offenses that impose minor fines or penalties include many traffic regulations and motor vehicle violations, and generally, any offense that does not involve a term for years in prison.[79]

B. Background Principles of Mens Rea

1. General Intent Versus Specific Intent

Mens rea is incorporated into the criminal provisions of most federal environmental statutes by the term "knowing."[80] In determining the meaning of "knowing," courts have typically imposed a general intent requirement, unless specified to the contrary by the words of the statute. Under this requirement, the government must prove that the defendant generally knew what he had done, rather than that his act or omission violated the law.[81] Thus, the defendant would be unable to defend on the ground that he was unaware he was doing something illegal.[82] For example, the government is neither required to prove that the defendant was aware of the identity of a particular substance he was disposing of, nor that the defendant knew of the existence of any statutory, regulatory or permit prohibition which made disposal of the substance illegal.[83] It need only prove that the defendant was disposing of a material that he knew generally to be harmful.[84]

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78. Sayre, *supra* note 12, at 55.

79. *See* Alan Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Due Process*, 24 WAYNE L. REV. 1571, 1573 (1978).

80. *See, e.g.*, RCRA § 3008(d), 42 U.S.C. § 6928(d); Clean Water Act § 309(c)(2), 33 U.S.C. § 1319(c)(2); CERCLA § 103(b), 42 U.S.C. § 9603(b).

81. *See* United States v. Weitzenhoff, 35 F.3d 1279 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 939 (1995).

82. *See* DANIEL RIESEL, ENVIRONMENTAL ENFORCEMENT CIVIL AND CRIMINAL 6-43 (1997).

83. *See id.*

84. *See id.*

At times, Congress has strayed from this general intent requirement, moving in either of two directions—toward a standard of no intent, thereby imposing strict criminal liability, or toward a standard of specific intent, thereby requiring proof that the violator had some specific statutory or regulatory knowledge that went beyond the factual knowledge of what he was doing.[85] *Liparota v. United States*[86] supports the principle that where only proof of general intent is required, the government need only prove that the defendant knew or was conscious of his actions, and where only proof of specific intent is required, the government must prove that the defendant not only intended his acts but was aware that the consequences of his acts would be illegal.[87] In *Liparota*, the defendant was convicted under a statute that imposed criminal penalties for "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations."[88] The jury was given a general intent instruction—that the government need only prove that the defendant acquired and possessed the food stamps in a manner not authorized by law, rather than one which required proof that the defendant knew his acts were illegal.[89] The Supreme Court reversed the defendant's conviction, holding that a specific intent instruction should have been given; the government was required to prove that the defendant knew what the law was and had an intent to violate it.[90] Thus, the Court determined that the government must show that the defendant knew his use of the food stamps was in a manner unauthorized by the statute.[91] The Court distinguished the type of offenses involved in *Liparota* and *Morissette* from public welfare offenses involving conduct of such a potentially danger-

85. *See id.*
86. 471 U.S. 419 (1985).
87. *See id.* at 425.
88. *Id.* at 433.
89. *See id.*
90. *See id.*
91. *See id.*

ous nature that the actor is presumed to have knowledge of any applicable regulations.[92]

2. Knowledge of the Law and Knowledge of the Facts

"The distinction between knowledge of law and knowledge of fact is simultaneously obvious and subtle."[93] "Knowledge of facts refers to the facts that make the defendant's conduct unlawful," facts which can include "the conduct itself, or any external circumstances, or consequences of the conduct"—neither knowledge of the legal consequences of the defendant's acts nor its legal relevance is considered as such.[94]

Knowledge of the law means that the defendant must know that the criminal prohibition exists and that he is in violation of it, or

> it may mean only that when . . . a criminal provision incorporates by reference a standard of conduct from another source of law (either a different statutory provision or implementing regulations), the defendant must know that there is a standard of conduct and that she is violating it. Under this second, broader meaning, the defendant need not know that such a violation is subject to criminal sanction.[95]

The issue of the defendant's knowledge of the law in environmental criminal law focuses solely on this second meaning.[96] There is no criminal penalty provision that requires the government to prove the defendant's knowledge of the criminal status of his conduct.[97] "There is, however, textual support for the view that the defendant must possess some knowledge of the environmental standards external to the criminal penalty provision that serve as the basis for prosecution."[98]

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92. *See id.* at 432-33.

93. Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2471 (1995).

94. *Id.*

95. *Id.*

96. *See id.* at 2468.

97. *See id.*

98. *Id.*

In the area of criminal law, federal courts have generally adopted the principle that "ignorance of the law is no excuse."[99] Consistent with this principle, in *United States v. Weitzenhoff*,[100] the Ninth Circuit upheld the convictions of two sewage treatment plant managers, holding that "congressional explanations of the new penalty provisions strongly suggest that criminal sanctions are to be imposed on an individual who knowingly engages in conduct that results in a permit violation, regardless of whether the polluter is cognizant of the requirements or even the existence of the permit."[101]

3. Rule of Lenity

The rule of lenity is a substantive canon of statutory interpretation that requires the court to resolve statutory and regulatory ambiguities in favor of a criminal defendant.[102] Under this theory, if a criminal statute or regulation does not clearly prohibit specific conduct, the defendant cannot be penalized.[103] The rule of lenity also safeguards the procedural due process right to adequate notice of the type of conduct that can potentially give rise to criminal punishment.[104]

Upon examination of the express words and legislative history of a statute, and analysis of background assumptions

99. *See generally* United States v. International Minerals, 402 U.S. 558 (1971).

100. 35 F.3d 1275 (9th Cir. 1994).

101. *Id.* at 1284.

102. *See* Liparota v. United States, 471 U.S. 419, 427 (1985) (stating that ambiguities concerning the words of a criminal statute are to be resolved in favor of lenity).

103. *See* Lisa K. Sachs, *Strict Construction of the Rule of Lenity in the Interpretation of Environmental Crimes,* 5 N.Y.U. ENVTL. L.J. 600 (1996).

104. *See* Dunn v. United States, 442 U.S. 100, 112 (1979) (observing that the "long established practice of resolving questions concerning the ambit of a criminal statute in favor of lenity . . . is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited."); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) (noting that crimes must be clearly defined so individuals have adequate notice that their conduct may be prohibited. The rationale for this principle of adequate notice was derived from the notion that a legislature cannot penalize an individual who is unaware of his wrongdoing as a result of a vague statutory provision).

of criminal law, if the meaning of the statute cannot be determined, the rule of lenity provides the court with a public policy rationale to prefer the interpretation most favorable to the defendant—the need to ensure that the defendant has been given fair warning that his conduct has been deemed criminal.[105] Proponents of the rule of lenity find merit in the rule as being supportive of constitutional principles. However, critics argue that the rule "is merely an interpretive shortcut to result-oriented jurisprudence."[106] Courts have consistently emphasized the need for fair warning, regardless of whether the offense charged is mala prohibitum (where the conduct involved is more morally ambiguous and where notice becomes more significant) or mala in se (an act which is in and of itself wrong, such as the crime of homicide).[107]

In *United States v. International Minerals & Chemical Corp.*,[108] the Court did not state that the rule of lenity was completely unavailable as a defense in regulatory contexts involving "dangerous or deleterious devices or products or obnoxious waste materials."[109] However, its willingness to "presume regulatory awareness and forego traditional mens rea protections for such activities suggested that the Court would be leery of reliance on the rule of lenity to resolve ambiguity in statutes intended to protect human health and the environment."[110]

In *Liparota*, the Court reaffirmed the pro-regulatory position that it took in *International Minerals*.[111] The *Liparota* Court applied the rule of lenity to the statute at issue and refused to dispense with the mens rea requirement.[112] The

105. *See Liparota*, 471 U.S. at 427.

106. Sachs, *supra* note 103, at 605.

107. *See* Crandon v. United States, 494 U.S. 152, 158 (1990) (stating that the rule of lenity "serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability").

108. 402 U.S. 558 (1971).

109. *Id.* at 565.

110. David E. Filippi, *Unleashing the Rule of Lenity: Environmental Enforcers Beware!*, 26 ENVTL. L. 923, 936 (1996) (citing *International Minerals*, 402 U.S. at 564-65).

111. *See Liparota*, 471 U.S. 419, 419 (1985).

112. *See id.* at 427.

government unsuccessfully argued that the defendant's violation under the Food Stamp Act constituted a "public welfare" offense, an argument, which if successful, would have permitted the Court to forego a mens rea requirement.[113] However, the Court established a test for determining whether an offense fits the "public welfare" category; the crime must be of "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety."[114] By establishing a test for identifying "public welfare" offenses, the Court also appeared to be setting forth an exception to the traditional application of the rule of lenity:[115]

> If an act falls within the 'public welfare' category of offenses, then a 'reasonable person should know' that his conduct is regulated. It follows that if a defendant is presumed to know that his conduct is regulated, the rule of lenity is no longer necessary to ensure that the defendant has received fair warning that his conduct is in fact regulated. Instead, the existence of 'stringent public regulation' and the serious threat to 'the community's health and safety' removes the basis for the rule of lenity's pro-defendant presumption.[116]

In *Staples v. United States*,[117] another case brought under the National Firearms Act, the Court affirmed its holding in *International Minerals* by observing that those who possess or deal with "deleterious devices or products or obnoxious waste material" should be "on notice that they stand 'in responsible relation to a public danger.'"[118] The government argued that "dangerousness alone should alert an individual to probable regulation and justify treating a statute that regulates the dangerous device as dispensing with mens

113. *See id.* at 432 (quoting *Morissette*, 342 U.S. 246, 252-53 (1952)). A public welfare crime "depend[s] on no mental element but consist[s] only of forbidden acts or omissions." *Liparota*, 471 U.S. at 432.
114. *Id.* at 433.
115. *See* Filippi, *supra* note 110, at 938.
116. *Id.* (citing *Liparota*, 471 U.S. at 432).
117. 511 U.S. 600 (1994).
118. *Id.* at 611.

rea."[119] However, the Court responded that the mere "dangerousness" of an item "does not necessarily suggest . . . that it is not also entirely innocent. Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation . . . ."[120] Thus, the Court in *Staples* believed that the "commonality and general availability" of firearm ownership prevented interpretation of the statute as creating a public welfare offense which might otherwise have dispensed with mens rea.[121] The Court in *Staples* did not use the rule of lenity to reach its conclusion because it did not find ambiguity in the statute.[122] However, its finding that the dangerousness of a regulated activity or device would not necessarily "alert individuals to the likelihood of strict regulation," enables other courts confronted with ambiguous criminal statutes alleging to regulate these dangerous activities or devices, to utilize the rule of lenity.[123] Had the Court determined that dangerousness was sufficient to categorize an offense as a public welfare offense, the rule of lenity would not have been available.[124]

C. Mens Rea in Federal Water Pollution Control Statutes

1. Clean Water Act[125]

a. Knowledge of the Statute Not an Element of the Offense

In most instances, criminal liability has been imposed under the Clean Water Act (CWA) without proof that the defendant had knowledge of the applicable laws or regulations. In *United States v. Weitzenhoff*,[126] the defendant was convicted under section 301(a) of the CWA for discharging sew-

119. *Id.*
120. *Id.*
121. *Filippi*, *supra* note 110, at 942 (quoting *Staples*, 511 U.S. at 614).
122. *See Staples*, 511 U.S. at 619 n.17.
123. *See id.*
124. *See id.* at 619.
125. Federal Water Pollution Control Act of 1972 §§ 101-607, 33 U.S.C. §§ 1251-1387 (1994) (commonly referred to as the Clean Water Act (CWA)).
126. 35 F.3d 1275 (9th Cir. 1993).

age into navigable waters without a NPDES permit, and section 309(c)(2) which makes it a felony to "knowingly violate" this permit requirement.[127] As in any case of first impression, the Ninth Circuit was required to "first look to the language of the controlling statutes, and second to legislative history."[128] Moreover, "as with other criminal statutes that employ the term 'knowingly,' it is not apparent from the face of the statute whether 'knowingly' means a knowing violation of the law or simply knowing conduct that is violative of the law."[129] Thus, the court was forced to turn to the legislative history of the provision in question in order to determine the requisite intent.[130]

The court determined that "knowingly" did not refer to knowledge of the violation.[131] It held that because the criminal provisions of the CWA were designed to protect public health and welfare by improving the quality of water, they fell under the category of public welfare legislation.[132] As a result, the court in *Weitzenhoff* relied on judicial interpretations of comparable public welfare statutes.[133] One such case was *International Minerals*,[134] in which the Supreme Court characterized the type of conduct that is regulated by public welfare statutes.[135] In *International Minerals*, the Court

127. *Id.* at 1282-83. Prior to trial, the district court interpreted "knowingly" in section 309(c)(2) of the CWA as only requiring that the defendants were aware that they were discharging the pollutants in question, and not that they were aware of violating the terms of the statute. *See id.* at 1283. The appellants argued that the district court improperly interpreted the CWA by instructing the jury that "the government is not required to prove that the defendant knew that his act or omissions were unlawful." *Id.* (citing 14 Transcript of Trial at 117). They further proposed that the jury should have been given their proposed instruction based on the defense that they mistakenly believed that their acts were allowed by the permit. *See id.*

128. *Id.* (citing Central Montana Elec. Power Corp., Inc. v. Administrator of Bonneville Power Admin., 840 F.2d 1472, 1477 (9th Cir. 1988)).

129. *Weitzenhoff*, 35 F.3d at 1283.

130. *See id.* at 1284.

131. *See id.* at 1286.

132. *See id.*

133. *See id.* at 1284-86.

134. 402 U.S. 558 (1971).

135. *See generally id.* In *International Minerals*, the appellee was charged with unlawfully transporting obnoxious wastes under 18 U.S.C. § 834(a), which makes it a crime to "knowingly violate [ ] any . . . regulation" authorized by the

held that where "dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation."[136] The Court concluded that knowledge of the regulation was not required for conviction under a statute stating that anyone who knowingly violated such a regulation is subject to penalty.[137] In other words, the defendant's knowledge of the shipment of the dangerous materials was necessary to convict.

The appellants in *International Minerals* sought to rely on the decision in *Liparota*.[138] There, the Supreme Court held that in order to prosecute under the Food Stamp Act of 1964,[139] the "Government must prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations . . . the Government may prove by reference to facts and circumstances surrounding the case that petitioner knew that his conduct was unauthorized or illegal."[140] The Court concluded that the issue in *Liparota* differed substantially from those "public welfare offenses" that have been recognized in the past.[141] In a majority of these offenses, "Congress has rendered criminal a type of conduct that a reasonable person should know is

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Interstate Commerce Commission pursuant to this section of the Code. *Id.* The appellee shipped sulfuric and hydrofluosilicic acids in interstate commerce and "did knowingly fail to show on the shipping papers the required classification of said property, to wit, Corrosive Liquid, in violation of 49 CFR § 173.437 issued pursuant to 18 U.S.C. § 834(a)." *Id.* at 558.

136. *Id.* at 565. The Supreme Court noted that the public welfare doctrine should not be applied to all regulated activities. "Pencils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions if Congress did not require . . . 'mens rea' as to each ingredient of the offense." *Id.* at 564-565.

137. *See id.* at 565.

138. 471 U.S. 419 (1985).

139. 78 Stat. 708, *as amended in* 7 U.S.C. § 2024(b)(1) (1994). The Act provides that anyone who "knowingly uses, transfers, acquires, alters, or possesses [food stamp] coupons or authorization cards in any manner not authorized by [the statute] or regulations" is subject to a penalty. 7 U.S.C. § 2024(b)(1) (1994).

140. *Liparota*, 471 U.S. at 433-34.

141. *See id.* at 433.

subject to stringent public regulation and may seriously threaten the community's health or safety."[142]

Mens rea in criminal provisions of the Clean Water Act was further examined in *United States v. Hopkins*.[143] *Hopkins* dealt with the identical provisions of the CWA interpreted in *Weitzenhoff*. The Second Circuit held that the government was required to prove the defendant knew the nature of his acts and performed them intentionally.[144] It need not prove that he knew those acts violated the CWA or any particular provision of that law or of a regulatory permit.[145] As explained by the court in *Hopkins*:

> In defining the mental state required for conviction under a given statute . . . the courts must seek the proper 'inference of the intent of Congress,' and in construing knowledge elements that appear in so-called 'public welfare' statutes—i.e., statutes that regulate the use of dangerous or injurious goods or materials—the Supreme Court has inferred that Congress did not intend to require proof that the defendant knew his actions were unlawful.[146]

The court further stated that the defendant's reliance on *Staples* was misplaced.[147] The court of appeals in *Staples* affirmed the defendant's conviction on the ground that it was not necessary for the government to prove the defendant's knowledge of the weapon's physical characteristics.[148] But the Supreme Court reversed, holding that the defendant could not be convicted unless the government proved that he was aware of the nature of his acts.[149] The Court did not suggest that the government had the burden of proving that the defendant knew his acts violated the statute at issue.[150] The Court in *Staples* reiterated the point that it had made in *Mor-*

142. *Id.* at 432-33.
143. 53 F.3d 533 (2d Cir. 1995).
144. *See id.* at 541.
145. *See id.*
146. *Id.* (citations omitted).
147. *See Hopkins*, 53 F.3d at 540.
148. *See Staples*, 511 U.S. at 604.
149. *See id.*
150. *See id.*

issette, that "[n]either this Court, nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not."[151]

Additionally, in *United States v. Frezzo Bros.*,[152] the Third Circuit held that the defendants could not avoid liability for willfully or negligently discharging pollutants into navigable waters without a permit, in violation of the CWA.[153] Referring to the Supreme Court's decision in *Chicago, Burlington, & Quincy R. Co. v. United States*,[154] the court in *Frezzo Bros.* noted in its opinion that "[t]he power of the legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned."[155] The court concluded that all of the evidence revealed that the defendants "knew or should have known" that their compost-producing activities were not exempted from federal anti-pollution laws.[156] The court added that the statute under which the defendants were convicted did not require the government to prove that the defendants intended to violate the law.[157] Rather, it was only necessary that the government

151. *Id.* at 619-20 (citing *Morissette*, 342 U.S. 246, 260 (1952)). The Supreme Court's most recent pronouncement on the issue in *Staples* was in *United States v. X-Citement Video, Inc.* 513 U.S. 64 (1994). In *X-Citement Video, Inc.*, the Court held that "knowingly" applied to each element of a child pornography offense, although it concluded that according to the most grammatical reading of the statute, it should only apply to the element of having transported, shipped, received, distributed, or reproduced the material in question. *See id.* at 68-69. The Court reaffirmed the long-standing view that "the presumption in favor of a scienter requirement should apply to each of the statutory elements which criminalize otherwise innocent conduct." *Id.* at 64.

152. 546 F. Supp. 713 (E.D. Pa. 1982), *aff'd* 703 F.2d 62 (3d Cir. 1983).

153. *See id.* at 720.

154. 220 U.S. 559 (1910).

155. *Frezzo Bros.*, 546 F. Supp. at 720.

156. *Id.* The court did not accept the defendants' argument that the pollution resulting from their agricultural activities was exempted from the CWA, because they could not prove that they were aware of this exemption and never claimed they relied on the regulation when they decided to pollute the water. *See id.*

157. *See id.*

prove that the defendants intended to perform the acts for which they were convicted.[158]

Recently, in *United States v. Wilson*,[159] the Fourth Circuit held that in a prosecution under section 309(c)(1)(A) of the CWA, the government must prove the defendant's "knowledge of the facts meeting each essential element of the substantive offense and not the fact that defendant knew his conduct to be illegal."[160] The defendants were convicted of felony violations under the CWA for knowingly discharging fill and excavated material into United States' wetlands without a permit.[161] The court first examined the express words of the statute and determined that the order of the words "knowingly violates" suggested that this clause only required punishment when a person violates the statute with knowledge that his conduct was illegal.[162] Looking at the structure of the CWA, the court noted that the conduct made criminal with the language of "knowingly violates" incorporates numerous elements from other statutory sections, each of which may be enforced with other civil and criminal penalties if the acts prohibited are performed with different scienter.[163] The court stated:

> If Congress intended that the 'knowing' mens rea accompany each element of the offense, as we have previously assumed is the case, the task of inserting the alternative mens rea requirements for the multiple civil and criminal enforcement provisions within each substantive prohibition would require confusingly repetitious drafting. A shorthand method of accomplishing the same purpose thus would be to insert 'knowingly' in a single place where the conduct is made criminal, in this case, § 1319(c)(2)(A).[164]

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158. *See id.*

159. 1997 WL 785530 (4th Cir. 1997).

160. *Id.* at *14.

161. *See id.* 33 U.S.C. § 1319(c)(2)(A) (1994) imposes criminal penalties on "[a]ny person who knowingly violates section 1311 . . . of this title" and 33 U.S.C. §§ 1311(a), 1362(12)(A) (1994) prohibit the discharge of pollutants into navigable waters without a permit. *Id.*

162. *See Wilson*, 1997 WL 785530 at *10.

163. *See id. See generally* 33 U.S.C. § 1319 (1994).

164. *See Wilson*, 1997 WL 785530 at *10 (citation omitted).

The court then turned to two background rules of common law concerning mens rea. First, a criminal offense is typically required to have mens rea, and second, ignorance of the law is no defense to its violation.[165] The court concluded that mens rea does not require that a defendant have awareness of the illegality of his conduct, but that he "know the facts that make his conduct illegal,"[166] unless Congress specifies otherwise.[167] Turning to legislative history, the court observed that Congress, by its 1987 amendment to the statute, intended to increase the impact of CWA penalties by creating separate criminal provisions for "deliberate" and "negligent" conduct.[168] It noted that it would be reasonable to assume that a change from "willful" to "knowing" evidenced Congress' intent to "effect a change in meaning."[169] The court then concluded that Congress intended that the defendant have knowledge of each of the elements of the prohibited conduct even if he knew of their legal significance.[170] "This interpretation would not carry with it the corollary that the defendant's ignorance of his conduct's illegality provides him a defense, but would afford a defense for a mistake of fact."[171] As a result, the court held that the government must prove the defendant's "knowledge of facts meeting each essential el-

165. *See id.*

166. *Staples*, 511 U.S. 600, 605 (1994). This knowledge generally must be proven with respect to each of the elements of the offense. *See, e.g.*, United States v. X-citement Video, Inc., 513 U.S. 64, 78 (1994).

167. *See Wilson*, 1997 WL 785530 at *10.

168. *See id.* at *11. Prior to its 1987 amendment, the Clean Water Act imposed one set of criminal penalties for "willful or negligent" violations. *See* 33 U.S.C. § 1319(d)(1) (1986). Under the 1987 amendments, negligent violations were designated as misdemeanors and knowing violations felonies. *See* 33 U.S.C. § 1319(c)(1)(A), (2)(A) (1994) (the respective "negligent" violation and "knowing" violation provisions).

169. *Wilson*, 1997 WL 785530 at *11 (citing *Hopkins*, 53 F.3d 533, 539 (2d Cir. 1995). "Because 'willful' generally connotes a conscious performance of bad acts with an appreciation of their illegality, we can conclude that Congress intended to provide a different and lesser standard when it used the word 'knowingly.'" *Id.* (citing Ratzlaf v. United States, 510 U.S. 135, 141 (1994)).

170. *See id.*

171. *Id.*

ement of the substantive offense, but need not prove that the defendant knew his conduct to be illegal."[172]

The court then addressed the defendant's contention that a public welfare designation, like in *International Minerals* and cases in three other circuits[173] that have determined that the CWA concerns public welfare offenses, was inappropriate in the case at hand.[174] It stated:

> [t]he fact that International Minerals involved regulations of an inherently deleterious substance of a type not involved in the present prosecution does not undercut our belief that Congress did not here intend to create a mistake-of-law defense. Even though the materials involved in this case, fill and native soil from a wetland, may not be inherently deleterious, the Clean Water Act is, as a general matter, largely concerned with pollutants that are inherently deleterious.[175]

b. Knowledge of the Statute as an Element of the Offense

In *United States v. Ahmad*,[176] the Fifth Circuit held that knowledge, which was an element of criminal provisions of

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172. *Id.* at *11 n.4 (citations omitted). Specifically, the court held that the government must prove the following:

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

Id. at *14.

173. The courts in each of these cases noted that the pollutants involved were inherently dangerous. *See Hopkins*, 53 F.3d 533, 534; United States v. Sinskey, 119 F.3d 712, 716 (8th Cir. 1997); *Weitzenhoff*, 35 F.3d at 1284.

174. *See Wilson*, 1997 WL 785530 at *13.

175. *Id.*

176. 101 F.3d 386 (5th Cir. 1996).

the CWA under which the defendant was convicted, applied to each element of the offenses.[177] Thus, the government was required to prove that the defendant not only knew of the nature of his acts, but knew that what he was discharging was a pollutant.[178] The court in *Ahmad* concluded that CWA violations do not appear to implicate the public welfare doctrine.[179] It explained: "[a]s recent cases have emphasized . . . the public welfare offense exception is narrow . . . . *Staples* held, the key to the public welfare offense analysis is whether 'dispensing with mens rea would require the defendant to have knowledge only of traditional lawful conduct.'"[180] The court further noted that the CWA offenses for which the defendant was convicted possess this characteristic, "for if knowledge is not required as to the nature of the substance discharged, one who honestly and reasonably believes he is discharging water may find himself guilty of a felony if the substance turns out to be something else."[181] Moreover, the fact that violations of section 309(c)(2)(A) of the CWA are felonies punishable by imprisonment, supports the court's view that they do not fall under the public welfare doctrine.[182] As stated by the court in *Ahmad*, "public welfare offenses have virtually always been crimes punishable by relatively light penalties such as fines or short jail sentences, rather than substantial terms of imprisonment."[183] Thus, serious felonies should not be included under the public welfare doctrine, "[a]bsent a clear statement from Congress that mens rea is not required."[184]

177. *See id.* at 390. The defendant was indicted for three violations of the CWA: (1) knowingly discharging a pollutant from a point source into navigable water, in violation of 33 U.S.C. §§ 1311(a) and 1319(c)(2)(A); (2) knowingly operating a source in violation of a pretreatment standard, in violation of 33 U.S.C. §§ 1317(d) and 1319(c)(2)(A); and (3) knowingly placing another person in imminent danger of death or serious bodily injury by discharging a pollutant, in violation of 33 U.S.C. § 1319(c)(3). *Id.* at 388.

178. *See id.* at 390.

179. *See id.* at 391.

180. *Id.* (citations omitted).

181. *Id.*

182. *See id.*

183. *Id.* (citing *Staples*, 511 U.S. 600, 616 (1994)).

184. *Ahmad*, 101 F.3d at 391 (citing *Staples*, 511 U.S. at 618).

2. Marine Protection, Research and Sanctuaries Act[185]

The Marine Protection, Research and Sanctuaries Act (Ocean Dumping Act) imposes criminal liability for the dumping of obnoxious waste materials into the ocean if the defendant "knowingly violate[d]" the act.[186] In *United States v. Reilly*,[187] the United States District Court for the District of Delaware held that it is only necessary that "the offense be done consciously; it is not necessary to demonstrate that the defendant had knowledge of relevant provisions of the Act."[188] Upon examining the mens rea element in the context of the statute and after reviewing the legislative history of the Act, the court concluded that this interpretation was consistent with the construction of other public welfare environmental statutes.[189]

D. The Freshwater Wetlands Protection Act of 1987 (FWPA): A Historical Perspective and Statutory Analysis

1. New Jersey's Definition and Characterization of Wetlands

According to title 7, section 7A-1.4 of the New Jersey Administrative Code, a "freshwater wetland" is

> an area that is inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions . . . provided, however, that the Department, in designating a wetland, shall use the three-parameter approach.[190]

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185. 33 U.S.C. §§ 1401 to -1445 (1994).
186. *Id.* § 1415(b).
187. 827 F. Supp. 1076 (D. Del. 1993).
188. *Id.* at 1078.
189. *See id.*
190. N.J. ADMIN. CODE tit. 7, § 7A-1.4 (1996). *See* N.J. STAT. ANN. § 13:9B-3 (West 1991). The three-parameter approach is described in tit. 7, § 7A-2.4(a), (b) of the New Jersey Administrative Code. It reads:

> (a) The designation of freshwater wetlands shall be based upon the three-parameter approach (that is hydrology, soils and vegeta-

Section 13:9B-3 of the FWPA defines a "transition area" as "an area on land adjacent to a freshwater wetland which minimizes adverse impacts on the wetland or serves as an integral component of the wetlands ecosystem."[191]

The FWPA requires that the Department of Environmental Protection (DEP)[192] develop up-to-date wetlands inventory maps to be distributed to the county clerks (or registrar of deeds and mortgages) and to each municipal clerk.[193] Additionally, the FWPA requires that the DEP provide copies of the National Wetlands Inventory maps prepared by the United States Fish and Wildlife Service.[194] Because of the relatively large scale used to prepare the inventory maps, neither set is conclusive for determining the presence or absence of wetlands.[195]

Wetlands are considered to have exceptional natural resource value.[196] They are areas of tremendous natural productivity, environmental diversity, and they serve as habitats

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tion) enumerated in the "Federal Manual for Identifying and Delineating Jurisdictional Wetlands," and any subsequent amendments thereto.

(b) The three-parameter approach is a methodology for determining, in a consistent and repeatable manner, the presence of wetlands and the boundaries of wetlands. It requires careful consideration of such factors as vegetative species composition, saturated soil conditions, depth to seasonal high water table and the presence or absence of hydrologic indicators.

N.J. ADMIN. CODE tit. 7, § 7A-2.4(a), (b). Moreover, New Jersey classifies wetlands into (1) "exceptional resource value," (2) "ordinary value," and (3) "intermediate resource value" (leftovers), based upon the character and the nature of the freshwater wetland. N.J. STAT. ANN. § 13:9B-7(a)-(c).

191. N.J. STAT. ANN. § 13:9B-3.

192. The FWPA actually designates its authority to the former Department of Environmental Protection and Energy. *See generally* N.J. STAT. ANN. §§ 13.9B-9a, 17a, 21f (West 1994).

193. *See id.* § 13:9B-25(c).

194. *See id.* § 13-9B-26.

195. The FWPA requires that the DEP inform the clerk of each municipality that the maps are not entirely conclusive for purposes of locating the actual boundary of wetlands. *See id.*

196. *See* John Fitzgerald English & John J. Sarno, *The Freshwater Wetlands Protection Act: Give and "Take" in New Jersey*, 12 SETON HALL LEGIS. J. 249, 254 (1989) (citing W. NIERING, WETLANDS, (1985) (Audobon Society Nature Guide)).

for fish and wildlife resources.[197] Thus, the enactment of the FWPA reveals an unclouded intention on the part of the legislature to preserve the integrity and purity of freshwater wetlands from "unnecessary or undesirable alteration or disturbance."[198]

2. A Statutory History of Wetlands Regulation in New Jersey

Prior to the passage of the FWPA in 1987, the authority to regulate the preservation of freshwater wetlands, with the exception of the Meadowlands and Pinelands,[199] was vested in local authorities pursuant to the Municipal Land Use Law (MLUL).[200] Under the MLUL, each municipality was permitted to adopt a master plan.[201] Each plan was based upon several elements, including housing, utility service, transportation, recreation, economic impact, recycling, his-

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197. *See id.* (citing Exec. Order No. 11,990 (May 24, 1977) and accompanying statement).

198. N.J. STAT. ANN. § 13:9B-2.

199. The legislators of the Act wanted to avoid "duplicative procedures with respect to freshwater wetlands already regulated." *Senate Energy and Environment Committee Statement to Senate Committee Substitute for Assembly Committee Substitute for Assembly Nos.* 2342 and 2499, 2d Legis. Sess. 16 (N.J. 1996). The Act:

> exempts lands located in the pinelands areas as defined in section 10 of the 'Pinelands Protection Act,'; P. L. 1979, c. 111 (C. 13:18A-11), those lands under the jurisdiction of the Hackensack Meadowlands Development Commission pursuant to P. L. 1968, c. 404 (C. 13:17-1 et seq.), . . . and coastal wetlands regulated pursuant to 'The Wetlands Act of 1970,' P. L. 1970, c. 272 (C. 13:9A-1 et seq.). This exemption is not absolute, however, because development activities in these areas would be required to meet the criteria of the federal wetlands program as implemented by either the U.S. Army Corps of Engineers or the [D]epartment [of Environmental Protection] (after assumption of the federal program).

Id. at 14, 16.

200. *See* N.J. STAT. ANN. §§ 40:55D-1 to -112 (West 1991).

201. According to section 40:55D-28(a) of the New Jersey Code, "[t]he planning board may prepare and, after public hearing, adopt or amend a master plan or component parts thereof, to guide the use of lands within the municipality in a manner which protects public health and safety and promotes general welfare." *Id.* § 40:55D-28(a).

toric preservation, and conservation.[202] The plan was to include

> a conservation plan element providing for the preservation, conservation, and utilization of natural resources, including, to the extent appropriate, energy, open space, water supply, forests, soil, marshes, wetlands, harbors, rivers and other waters, fisheries, endangered or threatened species wildlife and other resources, and which systematically analyzes the impact of each other component and element of the master plan on the present and future preservation, conservation and utilization of those resources.[203]

3. Legislative History of the FWPA

In the years preceding the enactment of the FWPA, both legislators and environmentalists recognized a need for uniform state freshwater wetlands protection regulation in New Jersey that was more stringent and encompassing than the federal program under the CWA section 404.[204] With increasing efforts to maintain clean waters, protect against flooding, and preserve the habitat for endangered species, legislators drafted the FWPA in an attempt to protect the environment from various types of intrusions.[205] The FWPA regulates more development than is regulated by the federal program, and unlike the federal program, it regulates development in transition areas adjacent to freshwater wetlands.[206]

Prior to the enactment of the FWPA, the undertaking of regulated activities in freshwater wetlands was a substantial obstacle to wetlands preservation and protection. Consequently, when the legislators drafted the FWPA, they mandated that permits be issued before regulated activities could

202. *See id.* § 40:55D-28(b).
203. *Id.* § 40:55D-28(b)(8).
204. *Senate Energy and Environment Committee Statement to Senate Committee Substitute for Assembly Committee Substitute for Assembly Nos. 2342 and 2499,* 1st Legis. Sess. 1 (N.J. 1987).
205. *See id.*
206. *See id.*

be lawfully conducted, but only in circumstances where the applicant could "demonstrate a compelling public need for the project," and where the proposed project "would be in the public interest, would result in minimal alteration of the aquatic ecosystem, and would not jeopardize any threatened or endangered species, cause a violation of a water quality or discharge standard, or degrade surface or ground water."[207]

4. The FWPA Generally

In Summer 1987, new wetlands legislation was enacted in New Jersey.[208] The FWPA was passed in response to an Executive Order by then Governor Thomas Kean, and declared an immediate delay on state processing of permits authorizing development in freshwater wetlands.[209] The FWPA became effective on July 1, 1988,[210] and the "transition area" provision became effective one year later.[211] The FWPA was modeled after a wetlands preservation law in Michigan that was in effect at the time of enactment of the FWPA.[212] At that time, Michigan was one of the only states allowed by the federal government to regulate wetlands under the CWA.[213]

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207. *Id.* at 2.

208. *See id.* §§ 13:9B-1 to -30. *See also* N.J. ADMIN. CODE tit. 7, §§ 7A-6 to -7 (1996).

209. *See* N.J. ADMIN. CODE tit 7, §§ 7A-6 to –7 (citing Exec. Order No. 175 (June 8, 1987)).

210. *See* Wolf & Goldshore, *Navigation Through the Wetlands Act*, 120 N.J.L.J. 645 (1987).

211. *See* N.J. STAT. ANN. § 13:9B-1. According to title 7, section 7A-6.1 of the New Jersey Administrative Code, a transition area serves the following roles:

> (1) An ecological transition zone from uplands to freshwater wetlands which is an integral portion of the freshwater wetlands ecosystem, providing temporary refuge for freshwater wetlands fauna during high water episodes, critical habitat for animals dependent upon but not resident in freshwater wetlands, and slight variations of freshwater wetland boundaries over time due to hydrologic or climatologic effects; and
>
> (2) A sediment and storm water control zone to reduce the impacts of development upon freshwater wetlands and freshwater wetlands species.

N.J. ADMIN. CODE tit. 7, § 7A-6.1.

212. *See* MICH. COMP. LAWS §§ 281.700 to -722 (repealed 1994).

213. *See Public Bill Signing: Wetlands Bill Signing, Sponsor Statement, Assembly Bills 2342, 2499, State of New Jersey* (July 1, 1987).

The FWPA mandates strict regulation of activities in freshwater wetlands and establishes complex requirements for obtaining permits to develop in and around wetlands.[214] The FWPA's drafters provided for the state takeover of the Federal 404 program[215] within one year of the FWPA's enactment.[216] Moreover, a large number of activities that are considered destructive of wetlands are regulated pursuant to the Act's permit program.[217] As of 1987, the year that the FWPA

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214. *See* N.J. STAT. ANN. §§ 13:9B-1 to -30.

215. *See* 33 U.S.C. § 1344 (1994). New Jersey and Michigan are the only states to have been delegated Clean Water Act Section 404 permitting authority. New Jersey's 404 Program assumption took effect on March 2, 1994. *See* 59 Fed. Reg. 9933 (1994). Michigan's 404 Program assumption took effect on October 16, 1984. *See* Fed. Reg. 38,947 (1984).

216. *See* N.J. STAT. ANN. § 13:9B-27 (West 1994). According to the provisions of the Act, New Jersey assumes wetlands permit jurisdiction, which was previously exercised by the United States Army Corps of Engineers and the EPA, under the 404 program (section 404 of the Clean Water Act). *See id.* § 13:9B-2. Under the current federal 404 program, the Army Corps of Engineers regulates only the filling in of freshwater wetlands. The state program administered by the state DEP "will cover every activity in the wetlands, from moving sand to dredging soil. *Public Bill Signing: Wetlands Bill Signing, Sponsor Statement, Assembly Bills 2342, 2499, State of New Jersey* (July 1, 1987). *See* 33 U.S.C. § 1344. *See also* N.J. STAT. ANN. § 13:9B-17a which states:

> The following activities, except for normal property maintenance or minor and temporary disturbances of the transition area resulting from, and necessary for, normal construction activities on land adjacent to the transition area, are prohibited in the transition area, except in accordance with a transition waiver approved by the department pursuant to section 18 of this act:
>
> (1) Removal, excavation, or disturbance of the soil;
>
> (2) Dumping or filling with any materials;
>
> (3) Erection of any structures, except for temporary structures of 150 square feet or less;
>
> (4) Placement of pavements;
>
> (5) Destruction of plant life which would alter the existing pattern of vegetation.

Id.

217. Title 7, section 7A-2.3, of the New Jersey Administrative Code lists those activities that are regulated under the Act. These activities include:

> (1) The removal, excavation, disturbance or dredging of soil, sand, gravel, or aggregate material of any kind;
>
> (2) The drainage or disturbance of the water level or water table;
>
> (3) The dumping, discharging or filling with any materials;

became effective, the wetlands rules affected approximately 300,000 acres of freshwater wetlands in New Jersey, constituting about six percent of the state's land mass.[218]

Despite the existence of the MLUL, the FWPA contains a preemption clause stating that "no municipality, county, or political subdivision thereof, shall enact, subsequent to [July 1, 1988], any law, ordinance, or rules or regulations regulating freshwater wetlands, and further, this act shall supersede any law or ordinance regulating freshwater wetlands enacted prior to [July 1, 1988]."[219] Thus, the FWPA supersedes all local laws passed pursuant to the Municipal Land Use Law that regulate the use of freshwater wetlands in any way.[220] However, the regulations "shall not preempt pre-existing State regulatory programs which affect regulated activities in freshwater wetlands."[221] The legislature, in adopting the FWPA, balanced its interests in protecting wetlands with the rights of a real property owner affected by the new program.[222]

Robertson dealt with three provisions of the FWPA. First, section 9a requires that "[a] person proposing to engage in a regulated activity shall apply to the department for a freshwater wetlands permit."[223] Second, section 17a lists the activities that are prohibited in transition areas.[224] Third, section 21f describes the culpability requirements of violations of the FWPA and the penalties that can be imposed. It states that "[a] person who willfully or negligently violates

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(4) The driving of pilings;

(5) The placing of obstructions; or

(6) The destruction of plant life which would alter the character of a freshwater wetland, including the cutting of trees except the approved harvesting of forest products pursuant to N.J.A.C. 7:7A-2.7(b).

N.J. ADMIN. CODE tit. 7, § 7A-2.3 (1996).

218. *See Public Bill Signing: Wetlands Bill Signing, Sponsor Statement, Assembly Bills* 2342, 2499, 1st Legis. Sess. 1 (July 1, 1987).

219. N.J. STAT. ANN. § 13:9B-30 (West 1991).

220. *See* N.J. ADMIN. CODE tit. 7, § 7A-1.6(b) (1996).

221. *Id.* § 7A-1.6(d).

222. *See* N.J. STAT. ANN. § 13:9B-30.

223. *Id.* § 13:9B-9a.

224. *See id.* § 13:9B-17a (West 1994). *See supra* note 201.

this act shall be guilty, upon conviction, of a crime of the fourth degree and shall be subject to a fine of not less than $2,500.00 nor more than $25,000.00 per day of violation."[225] It is unclear how the phrase "willfully or negligently" should be defined, and to which elements it should extend.

E. Application of New Jersey's Gap Filler Provision—*State v. Sewell*[226]

The court in *Robertson* did not consider whether the criminal provisions of the FWPA could be adequately deemed a public welfare offense, but instead, relied on the New Jersey Supreme Court's holding in *Sewell* to interpret the mens rea requirements in the criminal provisions of the FWPA. In *Sewell*, the defendants were charged with the robbery of a woman at an Atlantic City casino.[227] The issue in *Sewell* was the degree of culpability that a defendant must possess when he "inflicts injury or uses force against another in the course of a theft in order to escalate theft into robbery."[228] The statute did not indicate the mental state that must be shown with respect to the injury/force element of robbery.[229] The court determined that the legislature did not in-

225. *Id.* § 13:9B-21f.

226. 603 A.2d 21 (N.J. 1992).

227. *See id.*

228. *Id.* at 23.

229. *See id.* Section 2C:15-1a of the New Jersey Code, the robbery provision, states that "[a] person is guilty of robbery if, in the course of committing a theft, he: (1) [i]nflicts bodily injury or uses force upon another . . . ." N.J. STAT. ANN. § 2C:15-1a (West 1991). When a statute does not specify the culpability standard the New Jersey Code provides a method for determining the relevant mental state. "[T]he absence of any express culpability requirement [in a criminal statute] brings into play the gap filler provision of N.J.S.A. 2C:2-2c(3)." *See* State v. Demarest, 599 A.2d 937 (N.J. Super App. Div. 1992) (endangering the welfare of a child); State v. Brown, 571 A.2d 1367 (N.J. Super Ct. App. Div. 1990) (escape); State v. A.J. Emers, Inc., 532 A.2d 1124 (N.J. Super. Ct. App. Div. 1987) (failure to remit unemployment insurance contributions to evade tax payments); State v. Merlino, 505 A.2d 157 (N.J. Super. App. Div. 1985) (bribery); State In Interest of C.P. & R.D. 341 A.2d 850 (N.J. Ch. 1986) (aggravated sexual assault). Section 2C:2-2c(3) of the New Jersey Code, the gap filler provision provides:

> Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of such offense, or with respect to

dicate an intent to impose strict liability to the injury/force element of robbery,[230] but rather, the defendant must have "knowingly" inflicted injury or used force against another while committing a theft in order for it to qualify as a robbery.[231]

III. *State of New Jersey v. Robertson*

A. Facts

The defendant, David Robertson, was a farmer who raised chickens and livestock.[232] In order to level his land to make it suitable for grazing, the defendant arranged to have more than one hundred tons of wood chips delivered to his property, in an area that was slightly more than one acre of his property.[233] After local authorities complained about the amount of wood chips being dumped on the defendant's property, a detective from the prosecutor's office, along with the municipal zoning officer, representatives from the Depart-

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> some or all of the material elements thereof, if the proscribed conduct necessarily involves such culpable mental state. A statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime with the culpability defined in paragraph b.(2) of this section.

N.J. STAT. ANN. § 2C:2-2c(3) (West 1991). This gap filler provision specifically directs that unless there is a specific intention on the part of the legislature to apply strict criminal liability to the commission of a crime, it should not be done. *See id.*

230. *See Sewell*, 603 A.2d at 24.

231. *See id.* "Where the intent to impose strict liability is not clearly indicated, a specific culpable mental state must be ascribed to the crime or its material elements 'if no culpable mental state is expressly designated in [the] statute defining [the] offense.'" *Id.* at 23. *See also* State v. Michalek, 504 A.2d 155 (N.J. Sup. Ct. Law Div. 1985). That mental state is "knowingly." *See* State v. Rovito, 494 A.2d 309 (1985). *See id.* at 23-24. "Where the intent to impose strict liability is not clearly indicated, a specific culpable mental state must be ascribed to the crime or its material elements 'if no culpable mental state is expressly designated in [the] statute defining [the] offense.'" N.J. STAT. ANN. § 2C:2-2c(3) (West 1991). That mental state is "knowingly." *See* N.J. STAT. ANN. § 2c:2-2b(2) (West 1991). *See Rovito*, 494 A.2d 309 (1985) (requiring that when an offense has no "specified requirement of culpability," "knowingly" is the standard of culpability that is applied according to the gap-filler provision of the New Jersey Code).

232. *See Robertson*, 670 A.2d at 1097.

233. *See id.*

ment of Environmental Protection (DEP), and the county health inspector inspected the site with the defendant.[234] The defendant, in a discussion with the detective, revealed little knowledge of freshwater wetlands, and admitted that he was never given permission to fill the property in question.[235] One of the DEP investigators inspected the site four times and performed a number of tests.[236] Of the tests that were performed, the "three-parameter approach"[237] revealed characteristic vegetation and soil types indicative of wetlands.[238] As a result of his observations and experiences with freshwater wetlands, the investigator deduced that the area was a wetland, and that "placing wood chips [on this property] constituted a regulated activity requiring a permit from the DEP."[239]

The defendant offered a soil survey map that he had received some years before he began to introduce the wood chips onto his property.[240] The map indicated some soil types indicative of a wetland, and the defendant subsequently identified his property on the map.[241] He acknowledged that he had neither a freshwater wetlands permit nor a transition area waiver from the DEP.[242] Robertson sought to challenge the testing methods and to assert that he was exempt from regulation because he was engaged in an exempted farming activity—the use of wood chips to create pasture.[243]

B. Jury Instructions

At trial, the judge was uncertain how to define "willfully or negligently," the mens rea requirement in the statute.[244] As a result, he decided not to instruct the jury on negligent

234. *See id.*
235. *See id.*
236. *See id.*
237. *See supra* note 190 and accompanying text.
238. *See Robertson*, 670 A.2d at 1097-98.
239. *Id.* at 1098.
240. *See id.*
241. *See id.*
242. *See id.*
243. *See id.*
244. *See id.*

conduct, but rather determined that he would hold the State to a higher burden of proof.[245] Accordingly, the judge defined "willfully" as "purposely."[246] The judge subsequently explained to the jury that it had to decide whether the State proved that the area at issue was, in fact, a freshwater wetlands or transition area, and if so, whether the defendant engaged in a regulated activity "with a purposeful state of mind."[247] Lastly, the jury had to decide whether the defendant's conduct was exempt from requiring a permit as normal farming.[248] The judge instructed the jury that the State did not have the burden of proving the defendant had knowledge that the property in question was wetlands.[249] The jury asked the judge to explain his response and the "judge restated the elements of the crime and emphasized that the elements did not include a requirement that the State was required to prove defendant knew the area [was a wetland]."[250] The defense objected to this instruction on the ground that these responses effectively directed a guilty verdict against the defendant.[251]

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245. *See id.*

246. *Id.* The judge instructed the jury that

> a person acts purposely with respect to the nature of his conduct or the result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to the attendant circumstances if he is aware of the existence of those circumstances or believes or hopes that they exist. The phrases with purpose, design or with design or the equivalent terms have all the same meaning.

Id. at 1098.

247. *Id.*

248. *See id.* According to N.J. STAT. ANN. 13:9B-4, normal farming "[is] exempt from the requirement of a freshwater wetlands permit and transition area requirements unless the United States Environmental Protection Agency's regulations providing for the delegation to the state of the federal wetlands program conducted pursuant to the federal Act require a permit . . . ." N.J. STAT. ANN. § 13:9B-4 (West 1991).

249. *See Robertson,* 670 A.2d at 1099.

250. *Id.*

251. *See Id.*

C. Holding of the Superior Court

In the Superior Court of New Jersey, Law Division, Monmouth County, Robertson was found guilty of performing an

> unlawful regulated activity in a freshwater wetlands or transition area by willfully or negligently engaging in a regulated activity within a freshwater wetlands or transition area without a freshwater wetlands permit or a transition area permit issued by the Department of Environmental Protection, contrary to the provisions of N.J.S.A. 13:9B-9a, N.J.S.A. 13:9B-17a and N.J.S.A. 13:9B-21f.[252]

He was convicted and sentenced to two years of probation and fined $5,000.[253] The defendant appealed to the Superior Court of New Jersey, Appellate Division.[254] The Appellate Division held that all of the defendant's arguments were without merit, with the exception of the defendant's challenge to the jury charge.[255]

D. Defendant's Arguments

During the course of the proceedings, the defendant made a number of arguments. The trial court realized that

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252. *Id.* at 1097.

253. *See Id.*

254. *See id.* at 1098. The following issues were raised on appeal:

(1) The Grand Jury was not properly instructed as to the law before handing up the indictment.

(2) The most important element of proof necessary for conviction was not presented to the Grand Jury or at trial.

(3) The statute is unconstitutional with respect to criminal convictions.

(4) The County Prosecutor lacked the authority to indict or prosecute.

(5) The indictment is defective.

(6) The defendant was denied effective assistance of counsel.

(7) The jury charge was erroneous.

(8) The State misled the juries.

Id.

255. *See id.*

there would be problems with incorporating the word "negligently" as was stated in the statute, so the court omitted the term when it read its indictment to the jury.[256] The defendant argued that the court should have either left the word in and allowed the jury to decide its meaning, or attempted to explain its meaning in a criminal context.[257] The defendant also claimed that the court incorrectly stated the law by making no mention of any possible exemptions, such as the Nationwide Permit[258] or the Right to Farm Act.[259] Defendant asserted that this resulted in great confusion during jury deliberations.[260] Further, the defendant suggested that the investigator from the DEP had to have been aware of these exemptions and he must have told the prosecutor.[261] Thus, there was no legitimate reason for the court not to have been informed of these exemptions.[262] The defense counsel was concerned that the judge's charge to the jury would have the effect of directing a verdict against the defendant.[263] Moreover, the jury equated freshwater wetlands permit requirements with building permit requirements, which appellant claimed was incorrect.[264] In effect, the judge conferred to the jury the idea that it did not matter whether the defendant knew whether the lands were wetlands or not.[265]

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256. *See* Brief of Appellee at 13, *State of New Jersey v. Robertson*, 670 A.2d 1096 (N.J. Super. Ct. App. Div. 1996) (No. 91-09-1397).

257. *See id.* at 13-14.

258. *See id.* at 14. The Nationwide Permit exemption is set forth in tit. 7, § 7A-2.9(B)(6)(1), and issued pursuant to § 7A-2.7(f) of the New Jersey Administrative Code. *See* N.J. ADMIN. CODE tit. 7, §§ 7A-2.9(b)(6)(1), 7A-2.7(f) (1996).

259. *See* Brief of Appellee at 13-14, *Robertson* (No. 91-09-1397). The Right to Farm Act is found at section 4:1C-1 to 55 of the New Jersey Code and section 13:9B-4 of the New Jersey Code exempts various activities from the permit requirements of the Act. *See* N.J. STAT. ANN. §§ 4:1C-1 to -55 (West 1991).

260. *See id.*

261. *See* Brief of Appellee at 14, *Robertson* (No. 91-09-1397).

262. *See id.* at 14.

263. *See id.* at 16.

264. *See id.*

265. *See id.* at 17.

E. State's Arguments

In response to the arguments raised by the defendant, the State defended the holding of the trial court. The State conceded that the trial court erred in its instructions to the jury, but that the error worked to the advantage of the defendant, as it had the effect of heightening the State's burden beyond the requirements of the law.[266] The State also claimed that since the defendant did not initially challenge the jury charges on the grounds complained of, the challenges were waived.[267] Additionally, the State asserted that should the court reach the merits of the defendant's claim, the defendant would have to prove that the alleged error led the jury to reach a verdict that it otherwise would not have reached in order to get a reversal on this ground.[268]

In response to the defendant's claim of exemption based on the Nationwide Permit and Right to Farm Act, the State contended that these claims had already been addressed and there was no reason to revisit their merits.[269]

Moreover, the State asserted that it was the defendant's responsibility to determine whether the area in question constituted a freshwater wetlands or transition area before engaging in regulated activity.[270] The State added that the FWPA actually provided a device in order to make such a determination.[271]

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266. *See Brief of Appellant* at 38, *State of New Jersey v. Robertson*, 670 A.2d 1096 (N.J. Super. Ct. App. Div. 1996) (No. 91-09-1397).

267. *See id.* (citing N.J. CT. R. 1:7-2 (West 1992)).

268. *See id.* (citing N.J. CT. R. 2:10-2).

269. *See id.*

270. *See id.*

271. *See id.* at 39 (N.J. STAT. ANN. §§ 13:9B-8a, 8i (West 1991)). Section 13:9B-8a of the Act provides:

> A person proposing to engage in a regulated activity in a freshwater wetland or in an activity which requires a transition area waiver may, prior to applying for a freshwater wetlands permit or transition area waiver, request from the department a letter of interpretation to establish that the site of the proposed activity is located in a freshwater wetland or transition area.

N.J. STAT. ANN. § 13:9B-8a. Section 13:9B-8i of the Act provides:

> Any person who requests a letter of interpretation pursuant to the provisions of this act and does not receive a response from the de-

The State added that "only instructional error occurred when the court eliminated that portion of N.J.S.A. 13:9B-21(f), which provides for criminal liability under the Wetlands Act, even if a person 'negligently' violates its mandate."[272] The FWPA contains the culpability requirement of "willfully" which is not among the options in N.J.S.A. 2C:2-2.[273] Thus, the court construed "willfully" to be synonymous with "purposely" as provided by N.J.S.A. 2C:2-2(b)(1).[274] The State opposed the court's assertion that the FWPA's similar treatment of violations that are willful and negligent "doesn't make any sense."[275] The court consequently explained that it was not going to instruct the jury of its responsibility to find the defendant guilty even if it determined that he acted negligently.[276] The State admitted that the court's attempt to "judicially reconstruct" the FWPA in this way was "badly misguided," as it is the job of the legislature to define crimes in an appropriate manner, subject only to constitutional limitations.[277]

The State contended that the legislative history of the FWPA confirmed the legislature's intention to treat willful and negligent violators of the FWPA similarly, by exposing them to less severe punishment.[278] The Senate Committee Statement attached to the Senate Committee Substitute dated June 25, 1987, eventually signed into law as public law 1977, chapter 74,[279] stated that "[t]his bill also provides pen-

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> partment within the deadlines imposed in this section shall not be entitled to assume that the site of the proposed activity which was the subject of the request for a letter of interpretation is not in a freshwater wetland. A person who receives a letter of interpretation pursuant to this section shall be entitled to rely on the determination of the department . . . .

Id. § 13:9B-8i (West 1996).

272. Brief of Appellant at 41-42, *Robertson* (No. 91-09-1397).

273. *Id.* at 42.

274. *Id.*

275. *Id.*

276. *See id.* at 42 (citing Record at 3/8, 10-4 to -10).

277. *Id.*

278. *See id.* at 43.

279. *Senate Committee Substitute for Assembly Committee Substitute for Assembly Nos. 2342 and 2499,* 1st Legis. Sess. 6 (N.J. 1987) (citing Pub. L. No. 1977, ch. 74 (June 25, 1987)).

alties for violations of the 'Water Pollution Control Act.'"[280] The significance of this is that the criminal provisions of the Water Pollution Control Act do not treat similarly those who violate its provisions willfully and those who violate its provisions negligently.[281] "Instead, it provides more stringent penalties for purposeful, knowing or reckless violations, N.J.S.A. 58:10A-10(f)(1)(a) and 58:10A-10(f)(2) (designated as second or third degree crimes) than it does for negligent violations, N.J.S.A. 58:10A-10(f)(3) (a fourth degree crime)."[282] The State alleged that what this effectively demonstrated is that the legislators of the FWPA purposely grouped the same classes of offenders it had seen proper to treat differently in

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280. *Id.*

281. *See* Brief of Appellant at 43, *Robertson* (No. 91-09-1397).

282. *Id.* Section 58:10A-10(f)(1)(a) of the New Jersey Code provides:

> [A]ny person who purposely, knowingly or recklessly violates this act, and the violation causes a significant adverse environmental effect, shall, upon conviction, be guilty of a crime of the second degree, and shall . . . be subject to a fine of not less than $25,000 nor more than $250,000 per day of violation, or by imprisonment or by both.

N.J. STAT. ANN. § 58:10A-10(f)(1)(a) (West 1991). Section 58:10A-10(f)(1)(b) of the New Jersey Code provides:

> [A]ny person who purposely, knowingly or recklessly violates this act, including making a false statement, representation, or certification in any application, record, or other document filed or required to be maintained under this act, or by falsifying, tampering with, or rendering inaccurate any monitoring device or method required to be maintained pursuant to this act, or by failing to submit a monitoring report, or any portion thereof, required pursuant to this act, shall, upon conviction, be guilty of a crime of the third degree, and shall . . . be subject to a fine of not less than $5,000 nor more than $75,000 per day of violation, or by imprisonment, or by both.

Id. § 58:10A-10(f)(2). Section 58:10A-10(f)(3) provides:

> Any person who negligently violates this act, including making a false statement, representation, or certification in any application, record, or other document filed or required to be maintained under this act, or by falsifying, tampering with, or rendering inaccurate any monitoring device or method required to be maintained pursuant to this act, shall, upon conviction, be guilty of a crime of the fourth degree, and shall . . . be subject to a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment, or by both.

Id. § 58:10A-10(f)(3).

the source statute, subjecting all to the more lenient punishment for a fourth degree offense.[283]

F. Appellate Division's Opinion

1. Holding

On appeal, the Superior Court, Appellate Division, taking into account the decision of the Supreme Court of New Jersey in *Sewell,* held that the State could not rest on strict liability.[284] In a criminal prosecution brought under N.J.S.A. 13:9B-21(f),[285] the State must prove that the defendant had knowledge or should have had knowledge that the area in question was subject to the FWPA, and the jury should have been instructed to decide whether the State proved that the defendant was culpable in neglecting to determine whether a permit or waiver was required.[286]

2. Reasoning

The evidence revealed that the defendant, by examining the soil logs on the local maps, did inquire into the status of the property as freshwater wetlands.[287] The jury should have been informed that it was required to decide whether the State proved that the defendant was culpable in failing to determine whether he needed a permit or waiver.[288] Instead, the judge took this issue from the jury by explaining that the State was not required to prove that the defendant knew that the area was a wetlands or a transition area.[289] As a result, the defendant was held strictly liable, which effectively directed the verdict against the defendant.[290] Subsequently, the Appellate Division reversed and remanded the case for a

283. *See* Brief of Appellant at 43.
284. *See Robertson*, 670 A.2d 1096, 1099 (N.J. Super. Ct. App. 1996).
285. *See supra* note 225 and accompanying text.
286. *See Robertson*, 670 A.2d at 1099.
287. *See id.*
288. *See id.*
289. *See id.*
290. *See id.*

new trial or for other action that the prosecutor or commissioner deemed necessary.[291]

IV. Analysis

A. Criminal Provisions of the FWPA as a Public Welfare Offense

In arriving at its decision, the *Robertson* court did not consider whether the criminal provisions of the FWPA could appropriately have been considered a public welfare offense. Instead, the court relied on the decision in *Sewell*, which held that the knowledge of the defendant applied to each of the elements of a robbery statute which was void of any mental state element, because "[c]ourts have generally ascribed the culpable mental state of 'knowingly' with respect to crimes that do not otherwise designate a culpable mental state."[292]

If *Robertson* had incorporated a public welfare doctrine analysis, like the four of the five circuits that have interpreted the criminal provisions of the CWA, the State would not have been required to prove the defendant's knowledge of the relevant provisions of the FWPA. Yet, because public welfare offenses do not fit into any neat categories, the elements of public welfare offenses must be examined in order to determine if criminal provisions of the FWPA could be appropriately deemed public welfare offenses.

First, one of the most common elements of a public welfare offense is the protection of the public health and safety. Some of the goals of the FWPA are to maintain clean waters, protect against flooding, and preserve the habitat for plants and animals. These objectives certainly affect the public's well being in its entirety and the classification of the criminal provisions of the FWPA as a public welfare offense would aid in furthering these objectives.

Second, the nature of the action is often considered an aspect of a public welfare offense, as certain acts are so dangerous or risky that the actor should be held responsible re-

291. *See id.*
292. *Sewell*, 603 A.2d at 25.

gardless of his or her mental state. By considering activities that have been placed into this category, such as the possession of hand grenades in *Freed*, unregistered machine guns in *Staples*, and possession and shipping of obnoxious waste materials in *International Minerals*, provisions of the FWPA do not appear to be of a similar nature. The "nature" of the provisions of the FWPA themselves probably do not justify the implementation of the public welfare doctrine, as they would not place a reasonable person on notice of the substantial regulation of freshwater wetlands.

Third, many, though not all, statutes that have been considered in light of the public welfare doctrine lack a mens rea requirement. The criminal provisions of the FWPA at issue in *Robertson* did contain a mens rea requirement, but it was unclear to which elements of the statute it applied. In *Ratzlaf,* like in *Robertson*, the court held that in order to prove that the defendant had "willfully" violated the applicable statute, the government must prove that the defendant possessed knowledge of the illegality of his or her conduct.

Finally, a common element of public welfare offenses is the imposition of light fines and penalties in which the defendant suffers little harm to his or her reputation. It is unclear whether criminal provisions of the FWPA, violations of which are fourth degree crimes, would fit into this category.[293] However, because penalties for FWPA violations do not possess the same seriousness as many felonies that are considered public welfare offenses, they may be considered "light." As noted by the Supreme Court in *Staples*, courts are not very quick to classify statutes that impose substantial penalties as public welfare offenses.

The Fourth Circuit's decision in *Wilson*, a case brought under criminal provisions of the CWA and involving the filling of freshwater wetlands, is probably the most compelling authority for deeming criminal provisions of the FWPA public welfare offenses. *Wilson* represents the first time that a circuit court of appeals applied the public welfare doctrine to the

293. *See supra* note 225 and accompanying text for the penalties that are imposed under the criminal provisions of the FWPA.

filling of freshwater wetlands. This court indicated that although the illegal filling of wetlands may not be as deleterious or destructive as other statutes that have been identified as public welfare offenses, its effects stand in the way of Congress' objective to protect the public health.

B. Express Words and Legislative History of the FWPA, General Principles of Mens Rea, and Relevant Decisions

1. Express Words of the FWPA's Criminal Provisions and Legislative History

As an analysis of the express words of the FWPA proves unhelpful in determining the requisite mens rea and how it should be applied, it is necessary to turn to legislative history. According to the legislative history of the FWPA, the legislators intended for the FWPA to be liberally construed, and noted that "[t]he object, design, and purpose of this act [is] the protection of the freshwater wetlands resources of the State."[294] Thus, although "knowledge" is not explicitly mentioned in section 21f of the FWPA, the *Robertson* court broadly interpreted the phrase "willfully or negligently" to require that the defendant have knowledge of all of the elements of the statute, to ensure proper maintenance and continued preservation of the state's freshwater wetlands and encourage economic growth.

Moreover, by providing penalties for violations of criminal provisions of the FWPA comparable to the penalties for violations of the Federal Water Pollution Control Act, the FWPA's legislators intended to assign harsher penalties to those who knowingly violated the statute. This is demonstrated by the separate grouping of different classes of offenders. But the grouping of both willful and negligent offenders into one class in the provisions of the FWPA indicated that the legislators intended to punish all willful and negligent violations as fourth degree crimes.

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294. *Senate Energy and Environment Committee Statement to Senate Committee Substitute for Assembly Committee Substitute for Assembly Nos.* 2342 and 2499, 1st Legis. Sess. 16 (N.J. 1987).

2. General Principles of Mens Rea

a. General Intent Versus Specific Intent

Interestingly, the court in *Robertson* strayed from the typical general intent imposition by requiring that the defendant possess knowledge that he was performing acts strictly prohibited by the FWPA. However, it is not completely uncommon to have a specific intent requirement for the type of statute that was involved in *Liparota* and *Morissette* for example, and generally for those statutes that would not fall under the ambit of the public welfare doctrine. This specific intent designation is also consistent with the general principle that actors are presumed to be aware of statutes that regulate dangerous conduct or deleterious devices. This could be indicative of the *Robertson* court's unwillingness to designate the FWPA as a public welfare statute. However, the defendant's acts in *Robertson* would not be considered of the type that a reasonable person should know are strictly regulated. The *Wilson* court, in interpreting provisions of the CWA, noted that the filling of freshwater wetlands could trigger the public welfare doctrine. In the interests of fairness, it would be improper to subject the defendant to stringent penalties for performing acts, unaware of their regulation and potential consequences.

b. Mistake of Law and Mistake of Fact

By examining general principles of mens rea and criminal law, commentators, and even some courts, have recognized that the argument that ignorance of the law is no defense has been overstated.[295] This argument, however, does continue to hold true in two areas of cases—those in which a defendant contends that he was ignorant of the law with which he has been charged,[296] and those in which the

295. *See, e.g.*, Model Penal Code § 2.04 commentary at 274-275 (1985); Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 Wm. & Mary L. Rev. 1269, 1295-1299 (1974); *Liparota*, 471 U.S. 419, 420 (1985); Lambert v. California, 355 U.S. 225, 225 (1957); United States v. Simpson, 561 F.2d 53, 61-62 (7th Cir. 1977).

296. *See, e.g.*, Morgan v. District of Columbia, 476 A.2d 1128, 1133 (D.C. App. 1984); United States v. Currier, 621 F.2d 7, 9-10 (1st Cir. 1980).

defendant knows the law exists and concludes reasonably and in good faith that it does not apply to him, but is incorrect in his assumption.[297]

The defendant in *Robertson* alleged ignorance of the existence of the pertinent provisions of the FWPA. However, evidence showed that either he was aware that his acts were regulated or he should have known. By holding that proof of the defendant's knowledge of the statute was a prerequisite to conviction, the court's decision in *Robertson* runs counter to the widely, although not completely, accepted principle that ignorance of the law is not a defense to its violation.[298]

c. Rule of Lenity

Another principle of criminal law, the rule of lenity, has been offered as an exception to the traditional application of mens rea in certain contexts. However, the Supreme Court, in cases such as *Liparota*, *International Minerals*, and *Staples*, has hinted that in the area of public welfare offenses, the rule of lenity may not be entirely appropriate. The holding in *Robertson* is generally consistent with these fundamental principles. By applying the requisite mens rea to each element of the statute, consistent with the principle set forth in *Sewell*, the *Robertson* court ensured that the defendant, in light of the confusion surrounding the mens rea requirement of the FWPA, would be treated in a most favorable manner.

V. Conclusion

The court in *Robertson*, held that the State must prove the defendant was aware of the illegality of his conduct and that the area in question was freshwater wetlands, in order for him to be found guilty of violating the FWPA. The decision in *Robertson*, although consistent with the general principle that a mens rea term is to be applied to each element of the offense, was inconsistent with a majority of the decisions

297. *See* GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 101, at 288-289 (2d ed. 1961).

298. *See* Cheek v. United States, 498 U.S. 192, 199 (1991); Barlow v. United States, 32 U.S. 404, 411 (7 Pet. 1833).

that applied the public welfare doctrine to criminal provisions in various environmental statutes.

Although not considered by the *Robertson* court, the imposition of the public welfare doctrine would have been an effective way to accomplish the legislators' goal of protecting and preserving New Jersey's freshwater wetlands. The fact that *Robertson* could have been examined under the public welfare doctrine, and because courts have been considering environmental statutes in this regard, New Jersey courts may decide to move in the direction of applying this doctrine to the criminal provisions of the FWPA. By applying the public welfare doctrine to the FWPA and other environmental statutes, persons who fill freshwater wetlands, transport or store hazardous chemicals, or emit pollutants into the water or the air, would be penalized for failing to follow the proper legal procedures, procedures which they know or should know exist. These individuals would be unable to escape liability by simply claiming that they were not aware of the illegality of what they were doing, either because they failed to find out about or ignored the industry regulations, or because they did not go through the proper channels to conduct their activity legally.

Cases such as *Weitzenhoff*, *Hopkins*, *Frezzo Bros.*, and *Wilson* illustrate that courts are willing to examine federal water pollution control regulations in light of the public welfare doctrine. Yet, critics of applying the public welfare doctrine to federal water pollution control regulations and similar environmental statutes note that such application could make "felons of a large number of innocent people doing socially valuable work."[299]

Courts will likely continue to recognize the public welfare doctrine in environmental statutes, but this still remains to be seen. The direction in which courts ultimately decide to move will likely represent a compromise between the government's responsibility to preserve the environment and to en-

299. *Weitzenhoff*, 35 F.3d 1275, 1293 (9th Cir. 1994) (Klienfeld, J., dissenting).

courage economic growth, and an individual's desire to live in and contribute to a safe and productive environment.

The Supreme Court in *Morissette* noted that "[n]either this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not . . . [as it exists at this time] the law on the subject is neither settled nor static."[300] The law remains unsettled today, and *Robertson*, although it does not delineate any standards to determine when to apply a mens rea requirement to criminal provisions of environmental statutes, it does help to clarify how courts may prosecute under the FWPA in years to come.

300. *Morissette*, 342 U.S. 246, 260 (1952).