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It's All About What You Know: The Specific Intent Standard Should Govern "Knowing" Violations of the Clean Water Act

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INTRODUCTION

Criminal convictions for violations of federal environmental statutes have increased dramatically in the past decade. During fiscal years 1997 and 1998, the United States Environmental Protection Agency (EPA) levied $169.3 million and $92.8 million, respectively, in criminal fines.[1] These figures marked the highest and second-highest annual totals of criminal fines in EPA history.[2] Essentially, this trend is positive and promotes the aggressive criminal enforcement agenda Congress intended under the federal environmental statutes. However, it is coextensive with at least one troubling distortion of congressional intent: application of the general intent, rather than specific intent, standard to the prosecution of "knowing" violations of the Clean Water Act (CWA).[3]

Two types of knowledge, or "scienter," requirements are used in criminal statutes: 1) general intent; and 2) specific intent.[4] To secure a conviction under a general intent statute, the prosecution only needs to show that the defendant intended his actions.[5] Under the general intent standard, whether the defendant

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1 *Fiscal 1998 Action Led to $184 Million in Criminal, Civil, Administrative Penalties*, 29 Env't Rep. (BNA) No. 47, at 2375 (Apr. 2, 1999).

2 *Id.* A single case involving a seventy-five million dollar fine in 1997 accounts for the significant disparity between the figures for 1997 and 1998. *Id.*

3 33 U.S.C. §§ 1251-1387 (1994 & Supp. III 1997).

4 Liparota v. United States, 471 U.S. 419, 422-24 (1985).

5 *Id.* at 425.

intended the criminal consequences of his actions is of no import.[6] If specific intent is required, however, the prosecution must show that the defendant intended the illegal consequences of his actions. To be culpable, the defendant must have been aware that his behavior constituted a crime.[7]

Section 309(c)(2)(A) of the CWA provides that an individual commits a felony when he "knowingly violates" various sections of the Act, "or any permit condition or limitation."[8] A plain language reading of this text suggests that the defendant must know his actions are illegal. The adverb "knowingly" modifies the verb "violates." Thus, the defendant must "know" he is "violating" the Act to "knowingly violate" it.[9]

Despite inclusion of this "knowing" violation language, several courts have interpreted the text to require only a general intent, rather than specific intent, standard for knowing violation prosecutions under the Clean Water Act.[10] Applying the general intent standard to alleged violations of section 309(c)(2)(A) undermines congressional intent and risks the overcriminalization of negligent or reckless behavior at the higher level of "knowing" criminal conduct.

Part I of this Article examines the historical and conceptual foundations of the specific intent standard both outside and within the environmental law context. Part II addresses the historical and conceptual foundations of the general intent standard, also outside and within the environmental law context. Part III reviews the history of the conflict between application of the specific intent and general intent standards in prosecutions for knowing violations of the Clean Water Act. Part IV presents

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[6] *See* Morissette v. United States, 342 U.S. 246, 251-60 (1952).

[7] *See, e.g.*, Staples v. United States, 511 U.S. 600, 618-19 (1994) (holding that the government must prove defendant knew of features of a machine gun that brought it within the scope of the National Firearms Act).

[8] Section 309(c)(2)(A) of the Clean Water Act provides, in pertinent part:

> Any person who . . . knowingly violates section 1311, 1312, 1316, 1318, 1321(b)(3), 1328, or 1345 . . . or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 . . . shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both.

33 U.S.C. § 1319(c)(2)(A) (1994).

[9] United States v. Wilson, 133 F.3d 251, 261 (4th Cir. 1997).

[10] *See, e.g.*, *Wilson*, 133 F.3d 251; United States v. Sinskey, 119 F.3d 251 (8th Cir. 1997); United States v. Hopkins, 53 F.3d 533 (2d Cir. 1995); United States v. Weitzenhoff, 1 F.3d 1523 (9th Cir. 1993).

arguments that support application of the specific intent standard to knowing violation cases under section 309(c)(2)(A) of the CWA. Part V analyzes the Ninth Circuit's decision and the United States Supreme Court's denial of certiorari in *United States v. Hanousek*.[11] The Article concludes that the Supreme Court should grant certiorari to address knowing violations of the Clean Water Act and decide that such violations are subject to a specific intent analysis.

I
HISTORICAL AND CONCEPTUAL FOUNDATIONS OF THE SPECIFIC INTENT STANDARD

A. *Background: The Specific Intent Standard in Non-Environmental Contexts*

The conflict between application of the specific and general intent standards traces its origins to a series of Supreme Court cases outside the environmental law context. In 1952, the Supreme Court in *Morissette v. United States*[12] addressed knowing violations as applied to the elements of the federal embezzlement statute. The provision states: "[w]hoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States . . . [s]hall be fined."[13] Lack of knowledge that what one is doing constitutes a "conversion," the Court held, is a defense to a charge of "knowingly converting" federal property.[14] The Court required that the defendant have knowledge of the facts that made the taking a conversion—that is, that the property belonged to the United States.[15]

Subsequent Supreme Court decisions addressing specific intent issues relied on the analysis contained in the seminal decision in *Morissette*. In a 1985 case, *Liparota v. United States*,[16] the Supreme Court addressed a violation of the federal statute governing food stamp fraud.[17] The applicable provision states:

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[11] 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000).
[12] 342 U.S. 246 (1952).
[13] *Id.* at 248 n.2 (citing 18 U.S.C. § 641).
[14] *Morissette*, 342 U.S. at 271.
[15] *Id.*
[16] 471 U.S. 419, 420 (1985).
[17] *Id.* (citing 7 U.S.C. § 2024(b)(1)).

"whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations" is subject to a fine and imprisonment.[18] The Court held that this provision requires a showing that the defendant knew his conduct to be unauthorized by the statute or regulations.[19] The Court reasoned that "to interpret the statute [to dispense with mens rea] would be to criminalize a broad range of apparently innocent conduct."[20]

The Supreme Court decided a trio of cases in 1994 that confirmed the specific intent rationale developed in *Morissette* and *Liparota.* In *Ratzlaf v. United States*,[21] the defendant was convicted of structuring financial transactions to avoid currency reporting requirements. The statute provides that any person "willfully violating" this anti-structuring provision is subject to criminal penalties.[22] The Court held the government must prove that the defendant acted with knowledge that the restructuring he undertook was unlawful.[23]

The other two cases in the trio reinforce this interpretation. In *Staples v. United States*,[24] the Court addressed a conviction under the National Firearms Act (NFA),[25] which imposes strict registration requirements on statutorily defined firearms. The NFA makes it unlawful for any person to possess a machine gun that is not properly registered with the federal government.[26] The Court held the government was required to prove that the defendant knew of the features of his gun that made it a "firearm" under the NFA.[27] The Court reasoned that the potentially harsh penalty attached to a violation of the provision at issue—imprisonment for up to ten years—confirmed that Congress did not intend to dispense with the mens rea requirement.[28]

Like *Staples*, the Supreme Court in *United States v. X-Citement Video, Inc.*[29] also addressed the issue of criminalizing other-

18 *Liparota*, 471 U.S. at 420.
19 *Id.* at 425.
20 *Id.* at 426.
21 510 U.S. 135, 137 (1994).
22 *Id.* at 136.
23 *Id.* at 138.
24 511 U.S. 600, 602 (1994).
25 26 U.S.C. §§ 5801-5872 (1994).
26 *Staples*, 511 U.S. at 603.
27 *Id.* at 619.
28 *Id.* at 616.
29 513 U.S. 64 (1994).

wise lawful conduct. The case involved a conviction under The Protection of Children Against Sexual Exploitation Act,[30] which concerns the trafficking of pornography depicting minors. In reversing the conviction, the Court stated that it was improper to impose a relaxed mens rea requirement because the trafficking of pornography alone was not unlawful. What rendered the conduct illicit was the age of the participants. Therefore, the Court held that "knowingly" applied to each of the statutory elements of the offense.[31] The Court reasoned that a relaxed mens rea standard to exclude knowledge of the age of the participants would criminalize otherwise innocent conduct.[32]

This line of Supreme Court cases interpreting the nature and scope of the specific intent standard underscores two analytical starting points for this Article. First, the Court has consistently refused to eliminate the "guilty mind" requirement in the absence of congressional intent to the contrary. Second, a "knowing" violation requires knowledge of the applicable law regulating the defendant's conduct. This interpretation does not undermine the principle that "ignorance of the law is no excuse."[33] Ignorance of the law cannot exonerate criminal defendants from all forms of culpability. However, it can, and should, allow a defendant to avoid conviction for a "knowing" violation of the law.

B. *The Specific Intent Standard as Applied to Federal Environmental Statutes*

1. *General Environmental Cases*

Evolving from its origins in non-environmental contexts, the specific intent standard was subsequently applied to federal environmental statutes such as the Clean Water Act,[34] the Resource Conservation and Recovery Act (RCRA),[35] and the Toxic Substances Control Act (TSCA).[36] Apart from the Clean Water Act

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30 18 U.S.C. §§ 2252(a)(1), (2) (1994).

31 *X-Citement Video*, 513 U.S. at 72.

32 *Id.* at 73.

33 *See* United States v. Wilson, 133 F.3d 251, 261 (4th Cir. 1997) (citing Cheek v. United States, 498 U.S. 192, 199 (1991)).

34 *See infra* Part III.

35 42 U.S.C. §§ 6901-6992k (1994 & Supp. IV 1998). The knowing violation provisions of RCRA are extensive and appear in section 3008(d). § 6928(d).

36 15 U.S.C. §§ 2601-2692 (1994). TSCA regulates chemical substances and mixtures that present an unreasonable risk of injury to health or the environ-

cases, RCRA cases effectively illustrate the underlying rationale for applying the specific intent standard to knowing violations of federal environmental laws.

Several RCRA cases have addressed alleged knowing violations of permit requirements. In *United States v. Johnson & Towers, Inc.*, the Third Circuit held that the "knowing requirement applied to each element of the offense."[37] The defendants were indicted for knowingly disposing of hazardous waste without a permit under section 3008(d)(2)(A) of RCRA. The indictment alleged the defendants knew that: (1) they were disposing of materials; (2) which were hazardous wastes; (3) at a facility for which there was no RCRA permit; and (4) that a permit requirement existed under the statute and regulations.[38] Although the court indicated that the provision at issue was part of a public welfare statute, the court required a specific intent standard.[39] Its reasons for applying the specific intent standard included promoting statutory consistency,[40] the fact that the defendants were merely employees rather than owners or operators of a facility,[41] public policy concerns regarding hazardous wastes,[42] and the government's high burden of proof.[43]

In applying the specific intent standard to knowing violations of permit requirements or permit status under RCRA, some courts have addressed the need to avoid criminalizing innocent conduct. In *United States v. Speach*, the defendant was convicted of knowingly transporting hazardous waste to a facility that lacked a permit.[44] The court reversed the conviction, holding that the defendant had to have actual knowledge that the facility lacked a RCRA storage permit.[45] The court reasoned that

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ment. Section 16(b) renders it unlawful to knowingly or willfully violate any provision of section 15, the "prohibited acts" section of the statute. § 2614. *See* United States v. Catucci, 55 F.3d 15, 18 (1st Cir. 1995) (affirming conviction under section 16(b) of defendant who knew that removers of PCB-laden transformers located at his facility would dump the PCBs in violation of TSCA).

37 741 F.2d 662, 669 (3d Cir. 1984).

38 *Id.* at 668-69.

39 *Id.* at 666.

40 *Id.* at 668-69.

41 *Id.* at 664-67.

42 *Id.* at 666-67.

43 *Id.* at 669. *See* Karen M. Hansen, *"Knowing" Environmental Crimes*, 16 WM. MITCHELL L. REV. 987, 1005-06 (1990).

44 968 F.2d 795, 796 (9th Cir. 1992).

45 *Id.* at 797. *See also* United States v. Hill, 1998 U.S. App. Lexis 5478, *2 (9th Cir. Mar. 18, 1998) (relying on *Speach* and affirming defendant's conviction

"[r]emoving the knowledge requirement would criminalize innocent conduct, such as that of a transporter who relied in good faith upon a recipient's fraudulent certificate."[46]

Similarly, the Eleventh Circuit addressed the issue of criminalizing otherwise lawful conduct in *United States v. Hayes International Corp.*, a case that dealt with unlawful transportation of hazardous waste under RCRA.[47] The statute prohibits anyone from "knowingly transport[ing] . . . any hazardous waste identified or listed [in that chapter] to a facility which does not have a permit."[48] The court held that knowledge of the permit status was required because the "precise wrong Congress intended to combat . . . was transportation to an unlicensed facility."[49] The court noted that removal of the knowing requirement would criminalize innocent behavior; for example, when a defendant reasonably believes that a facility had a permit, "but in fact had been misled by people at the site."[50]

Underscoring the significance of knowledge of the applicable law in securing knowing violation convictions, the Tenth Circuit addressed the "good faith defense" in *United States v. Self*.[51] In *Self*, the court affirmed a conviction under section 3008(d)(2)(B) of RCRA for knowingly storing hazardous waste. The court stated that "a good faith belief that a permit allows a particular manner of treatment, storage or disposal of hazardous waste, when in fact it does not, is a defense to a criminal charge."[52] The court, however, did not accept the defendant's reliance on the good faith defense because the defendant knew he was in violation of the RCRA permit.[53] Significantly, the court made an important clarification concerning what a defendant needs to know to be convicted: "[w]hile the government was

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for a knowing violation of RCRA when he knew his driver transported hazardous waste to, and stored the waste at, a facility that lacked the necessary RCRA permit).

[46] *Speach*, 968 F.2d at 796 (quoting United States v. Hayes Int'l Corp., 786 F.2d 1499, 1504 (11th Cir. 1986)).

[47] 786 F.2d at 1501.

[48] 42 U.S.C. § 6928(d)(1) (1994).

[49] *Hayes Int'l*, 786 F.2d at 1504.

[50] *Id.* *See also* United States v. Heuer, 4 F.3d 723, 731 (9th Cir. 1993) (holding that in the absence of specific guidance from RCRA's legislative history, the knowledge requirement extends to each element of the offense in a conviction for the illegal disposal of hazardous waste).

[51] 2 F.3d 1071, 1088 (10th Cir. 1993).

[52] *Id.* at 1091.

[53] *Id.*

not required to prove that Defendant knew that the material was identified or listed as hazardous waste under RCRA regulations, the government was required to prove that Defendant knew the material was hazardous in that it held the potential to be harmful to persons or the environment."[54]

2. *Environmental Cases Involving Corporate Officers*

Like their subordinates, corporate officers also risk being snared in a large net for "knowing" violations of federal environmental statutes. The responsible corporate officer doctrine, which pre-dates the enactment of federal environmental statutes, is the source of this potential danger. The mens rea standard for knowing violations in the context of corporate officers has been relaxed to allow two alternate sources of knowledge: 1) imputed knowledge; and 2) deliberate avoidance (or willful blindness). These two forms of knowledge eliminate the need for actual knowledge to secure convictions of corporate officers for "knowing" violations.

In 1985, the Ninth Circuit addressed the deliberate avoidance doctrine in the context of violations of TSCA in *United States v. Pacific Hide & Fur Depot, Inc.*[55] The court reversed the defendants' convictions because of improper jury instructions on the deliberate avoidance doctrine.[56] The trial court had instructed that a conviction would be appropriate if "the defendant was aware of a high probability" that TSCA was being violated "and deliberately avoided learning the truth."[57] The Ninth Circuit concluded that the evidence the government had presented did not warrant use of the instruction. There was no showing that the defendants "avoided learning the true nature of the fluid inside the capacitors so as to build a defense in the event of arrest."[58] In addition, no evidence indicated that corporate headquarters had informed the defendants that the capacitors might contain PCBs.[59] Finally, there was no evidence that defendants "knew what capacitors were or what they contained."[60] The defendants were not liable under the deliberate avoidance doctrine

54 *Id.*
55 768 F.2d 1096 (9th Cir. 1985).
56 *Id.* at 1098-99.
57 *Id.* at 1098.
58 *Id.* at 1099.
59 *Id.*
60 *Id.*

because an awareness of a high probability of the need to investigate did not exist.

In *United States v. MacDonald & Watson Waste Oil Co.*,[61] the First Circuit vacated a conviction under RCRA of the owner and president of a waste oil company.[62] It held that the jury instructions erroneously permitted a finding of guilt in the absence of any proof that the president had actual knowledge of the violations.[63] The court distinguished *United States v. Dotterweich*[64] and *United States v. Park*,[65] both of which were based on a strict liability misdemeanor statute, noting that it knew of "no precedent for failing to give effect to a knowledge requirement that Congress has expressly included in a criminal statute."[66]

Like *MacDonald & Watson Waste Oil*, the court in *United States v. White* held that a corporate officer could not be held criminally liable under RCRA absent actual knowledge.[67] In *White*, a company and several employees were charged with unlawful storage and disposal of hazardous waste in violation of RCRA. Section 3008(d)(2)(A) of RCRA, which contains the element of a knowing violation, was at issue. The court concluded that "the government must prove not only knowing treatment, storage or disposal of hazardous waste but also that the defendant knew the waste was hazardous."[68] Therefore, the corporate officer could not be convicted of the offense solely on the basis of his position.

This line of cases, maintaining a high burden on the government in cases of knowing violations of both corporate officers and lower-level employees, is positive and should continue. Unfortunately, as discussed in Part II of this Article, several courts have misapplied the public welfare offense doctrine[69] and con-

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61 933 F.2d 35 (1st Cir. 1991).

62 *Id.* at 61.

63 *Id.* at 51.

64 320 U.S. 277, 284 (1943) (affirming conviction of corporation president under Food, Drug and Cosmetic Act for shipping adulterated and mislabeled drugs, even though evidence of "consciousness of wrongdoing [was] totally wanting").

65 421 U.S. 658, 670, 675 (1975) (upholding conviction of corporation president under Food, Drug and Cosmetic Act without proof of either his knowledge or intent with respect to violations of the Act at a rodent-infested warehouse).

66 *MacDonald & Watson Waste Oil*, 933 F.2d at 52.

67 766 F. Supp. 873, 895 (E.D. Wash. 1991).

68 *Id.* (citing United States v. Hoflin, 880 F.2d 1033, 1039 (9th Cir. 1989)).

69 The Supreme Court in *Morissette* described public welfare offenses as those that threaten injury to individuals or property for which intent is not a

cluded that a general intent standard should govern knowing violations under RCRA regardless of whether such violations are committed by lower-level employees or corporate officers.

II

HISTORICAL AND CONCEPTUAL FOUNDATIONS OF THE GENERAL INTENT STANDARD AND THE PUBLIC WELFARE OFFENSE DOCTRINE

A. *Background: The General Intent Standard and the Public Welfare Offense Doctrine*

The common law rules governing criminal prosecutions historically required proof of the defendant's guilty mind, or mens rea.[70] Exceptions to this requirement eventually were recognized for crimes such as statutory rape.[71] The mens rea component similarly was eliminated from crimes that threatened public health, safety and welfare.[72]

These exceptions created a variety of strict liability crimes, known as "public welfare offenses."[73] Public welfare offenses are "virtually always . . . crimes punishable by relatively light penalties such as fines or short jail sentences, rather than substantial terms of imprisonment."[74] The first public welfare offenses included sale of liquor to a habitual drunkard[75] and distribution of adulterated milk.[76] Ultimately, public welfare offenses were classified to include sale of adulterated food, drugs and misbranded articles, narcotics violations, traffic violations, criminal nuisances, illegal distribution of liquor, and violations of public safety and health regulations.[77]

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necessary element of the offense. United States v. Morissette, 342 U.S. 246, 252-54 (1952).

70 *Id.* at 250.

71 *Id.* at 251.

72 *See generally* United States v. Freed, 401 U.S. 601 (1971) (National Firearms Act); United States v. Balint, 258 U.S. 250 (1922) (Anti-Narcotic Act); United States v. Brown, 578 F.2d 1280 (9th Cir. 1978) (securities regulations); United States v. Gris, 247 F.2d 860 (2d Cir. 1957) (Federal Communications Act).

73 *Morissette*, 342 U.S. at 255.

74 United States v. Ahmad, 101 F.3d 386, 391 (5th Cir. 1996).

75 *Morissette*, 342 U.S. at 256 (citing Barnes v. State, 19 Conn. 398 (Conn. 1849)).

76 *Morissette*, 342 U.S. at 256 (citations omitted).

77 Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 73, 84 (1933). *Contra* Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 524 (1994) (holding that government is required to prove defendant knowingly

The public welfare offense doctrine is narrow and ultimately turns on whether diminishing the scienter requirement would criminalize otherwise lawful conduct.[78] In applying the public welfare offense doctrine, courts sought to foster "a degree of diligence for the protection of the public"[79] from individuals and corporations whose conduct could adversely affect the innocent.

In an apparent departure from its 1994 trio of specific intent opinions, the Supreme Court embraced this general intent rationale in *Bryan v. United States*,[80] a 1998 case involving a conviction under the willfulness provision of the Firearms Owners' Protection Act.[81] In *Bryan*, the Court affirmed the defendant's conviction for conspiring to engage in the sale of firearms without a federal license and engaging in the sale of firearms without a license.[82] The applicable statutory language provides, "whoever . . . willfully violates any other provision of this chapter . . . shall be fined under this title, imprisoned not more than five years, or both."[83] The Court held that only knowledge of the unlawful conduct, not of the federal licensing requirement, was necessary under the statute.[84] It stated that the "willfulness requirement of section 924(a)(1)(D) does not carve out an exception to the traditional rule that ignorance of the law is no excuse."[85]

Public welfare offenses in the environmental law context originated under the Refuse Act of 1899.[86] Environmental violations under the Act were treated as public welfare offenses, and the Act authorized the prosecution of individuals who had no

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made use of interstate conveyance as part of a scheme to sell items that he knew were likely to be used with illegal drugs to sustain conviction under the Mail Order Drug Paraphernalia Control Act).

78 *Ahmad*, 101 F.3d at 391 (citing Staples v. United States, 511 U.S. 600, 618 (1994)).

79 *Morissette*, 342 U.S. at 257.

80 524 U.S. 184 (1998).

81 Pub. L. No. 99-308, 100 Stat. 449 (1986) (codified at scattered sections of 18 U.S.C. (1994)).

82 *Bryan*, 524 U.S. at 200.

83 18 U.S.C. § 924(a)(1) (1994 & Supp. III 1997).

84 *Bryan*, 524 U.S. at 196, 198-99.

85 *Id.* at 196.

86 Rivers and Harbors Appropriation Act, 33 U.S.C. §§ 401-467n (1994 & Supp. IV 1998); Daniel Riesel, *Criminal Enforcement and the Regulation of the Environment*, *in* ENVIRONMENTAL ENFORCEMENT 1993 228 (PLI Litig. & Admin. Practice Course, Handbook Series No. H-457, 1993) [hereinafter Riesel].

specific knowledge of the allegedly criminal act.[87] Significantly, such convictions were based on the strict liability language of the statute. The seminal public welfare offense doctrine case in the environmental law context is the Supreme Court's decision in *United States v. International Minerals & Chemical Corp.*[88] In that case, the defendant was charged with knowingly violating a statute that required disclosure of hazardous chemicals on shipping manifests.[89] The Supreme Court invoked the public welfare offense doctrine, stating that when "dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them . . . must be presumed to be aware of the regulation."[90] Therefore, the government was not required to prove the defendant intended the illegal consequences of his actions.

B. *Square Peg in a Round Hole: Misapplication of the General Intent Standard to Knowing Violations of RCRA*

The public welfare offense doctrine originated in non-environmental contexts and, for that reason, should not be transplanted as a paradigm standard in analyzing knowing violations under federal environmental statutes. Several courts have misapplied the public welfare offense doctrine and general intent standard to govern knowing violations under RCRA.[91] The general intent standard has also been applied to the knowing violation provision of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).[92] FIFRA regulates the registration, transportation, sale and use of pesticides. Section 14(b) establishes misde-

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87 Riesel, *supra* note 86, at 228.

88 402 U.S. 558 (1971).

89 *Id.* at 565.

90 *Id.*

91 Also note that criminal enforcement provisions for knowing violations of the Clean Air Act (CAA) appear in section 113(c). 42 U.S.C. § 7413(c) (1994). At least one court has interpreted the knowing violation provision of the CAA to require only a general intent standard. *See* United States v. Buckley, 934 F.2d 84, 86 (6th Cir. 1991) (holding knowledge only of asbestos emissions themselves, not of the statute or of the hazards such emissions pose, satisfied the CAA's knowledge requirement). *See also* United States v. Fern, 155 F.3d 1318 (11th Cir. 1998) (refusing to read "willfulness" into the "knowing" language of section 113(c)(2) in affirming a conviction for knowingly making false statements concerning asbestos emissions).

92 7 U.S.C. §§ 136-136y (1994 & Supp. IV 1998).

meanor penalties for knowing violations of any provision of the Act.[93]

The Fourth Circuit in *United States v. Dee* affirmed the defendants' convictions for multiple violations of the criminal provisions of RCRA.[94] The defendants were civilian employees of the United States Army involved in the development of chemical warfare systems. The facility at which the defendants worked had a RCRA permit for management of hazardous waste. However, the permit did not authorize storage, treatment or disposal of such waste.[95] On appeal, the defendants contended that they did not "knowingly" violate RCRA because there was insufficient evidence to prove that they knew a violation of the statute was a crime.[96] Also, they were not aware that the chemical wastes they managed were categorized as hazardous wastes.[97] The court agreed with the Eleventh Circuit that the "ignorance of the law is no excuse" principle applies to prosecutions under RCRA.[98] The court concluded that the knowledge element extends only to "knowledge of the general hazardous character of the wastes."[99]

In *United States v. Hoflin*, the Ninth Circuit affirmed the defendant's conviction under RCRA for aiding and abetting disposal of hazardous waste without a permit.[100] While serving as city director of public works, the defendant directed employees to dispose of drums containing old traffic paint by burying them at the city's sewage treatment plant.[101] The defendant was charged and found guilty of "knowingly" disposing of a hazardous waste at an unpermitted facility in violation of section 3008(d)(2)(A).[102] On appeal, defendant contended that knowledge that a permit was lacking is an element of the RCRA viola-

93 § 136*l*(b). *See* United States v. Corbin Farm Serv., 444 F. Supp. 510, 519-20 (E.D. Cal. 1978) (holding that "knowingly" in section 136*l* required proof that defendants, whose spraying activities caused the death of protected waterfowl, knew they were dealing with a pesticide when they sprayed the field or caused it to be sprayed).

94 912 F.2d 741, 745-46 (4th Cir. 1990).

95 *Id.* at 743.

96 *Id.* at 745.

97 *Id.*

98 *Id.*

99 *Id.*

100 880 F.2d 1033, 1038-40 (9th Cir. 1989).

101 *Id.* at 1035.

102 *Id.* at 1036.

tion.[103] The court declined to follow the Third Circuit's analysis in *Johnson & Towers* and held that knowledge of the absence of a permit is not a necessary element for conviction under section 3008(d)(2)(A).[104]

Similarly, the Sixth Circuit in *United States v. Dean* upheld a knowing violation conviction under section 3008(d)(2)(A) of RCRA.[105] As facility production manager, the defendant oversaw the facility's employees and the day-to-day facets of its production process.[106] His duties included handling and disposing of hazardous wastes.[107] He instructed employees to dispose of the hazardous wastes by placing them into drums and burying them in a pit behind the facility.[108] The defendant asserted on appeal that knowledge of a RCRA permit requirement is an element of the offense.[109] Like the *Hoflin* court, the *Dean* court rejected the analysis in *Johnson & Towers* and held that knowledge of a permit requirement is not an element of the crime.[110]

In *United States v. Wagner*, the defendants were convicted of unlawfully storing and disposing of hazardous waste in violation of RCRA.[111] The Seventh Circuit also held that "knowledge of RCRA's permit requirement is not an element of a violation."[112] Drawing on principles of statutory interpretation, the court stated, "[t]o read 'knowingly' as used in subsection (2) to apply to subsidiary subsections (A), (B), and (C) would render its use in (B) and (C) mere surplusage."[113] The court also analogized *International Minerals* to *Wagner*, noting that in *International Minerals* knowledge of an Interstate Commerce Commission regulation was not required.[114]

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103 *Id.*

104 *Id.* at 1038-39.

105 969 F.2d 187, 190 (6th Cir. 1992).

106 *Id.* at 189.

107 *Id.*

108 *Id.*

109 *Id.* at 190.

110 *Id.* at 190-92.

111 29 F.3d 264, 265 (7th Cir. 1994).

112 *Id.* at 266. *See also* United States v. Laughlin, 10 F.3d 961, 965-67 (2d Cir. 1993) (affirming conviction of owner of railroad tie-treating business for knowingly disposing of hazardous waste without a permit in violation of RCRA).

113 *Wagner*, 29 F.3d at 266.

114 *Id. See also* United States v. Sellers, 926 F.2d 410, 415-17 (5th Cir. 1991) (relying on *Int'l Minerals* and holding defendant knew or reasonably should have known that material he was disposing was extremely dangerous paint sol-

Employing a quintessential general intent rationale, the Fifth Circuit upheld a conviction under section 3008(d)(2)(A) of RCRA for illegal storage of hazardous waste in *United States v. Baytank (Houston), Inc.*[115] The court held that the knowledge requirement meant "no more than that the defendant knows factually what he is doing . . . and it is not required that he know that there is a regulation which says what he is storing is hazardous under the RCRA."[116]

In the most recent knowing violation case under RCRA, the Sixth Circuit in *United States v. Kelley Technical Coatings, Inc.*[117] affirmed the defendant's conviction for knowingly storing and disposing hazardous waste without a permit in violation of RCRA.[118] The case involved the vice president in charge of the manufacturing process at an industrial paint manufacturing company.[119] The company's manufacturing process included the storage and disposal of hazardous waste. Drums containing hazardous wastes, some of which were leaking,[120] were stored at the company's premises without a RCRA storage permit. Although the defendant had a hazardous waste disposal company dispose of some of the drums, he had a company drain the liquids on site. Rainwater that had collected in the drums was dumped onto the ground and the remaining residue was collected into one drum. The court noted that the Sixth Circuit has rejected the "knowledge of illegality" principle.[121] *United States v. Dean* was controlling in the present case because the court held that section 3008(d)(2)(A) of RCRA "does not require that the person charged have known that a permit was required."[122]

The *Dean* court had classified a violation of RCRA as a public welfare offense.[123] The defendant in *Kelley Technical* contended that *Dean* is no longer applicable because, after *Staples*, the public welfare offense doctrine cannot be applied to statutes

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vent, the improper disposal of which was potentially dangerous to humans and the environment).

115 934 F.2d 599, 613 (5th Cir. 1991).

116 *Id.* at 613.

117 157 F.3d 432 (6th Cir. 1998).

118 *Id.* at 438.

119 *Id.* at 435.

120 *Id.*

121 *Id.* at 436.

122 *Id.* at 437 (citing United States v. Dean, 969 F.2d 187, 191(6th Cir. 1992)).

123 *See Dean*, 969 F.2d at 191.

that have felony provisions.[124] The *Kelley Technical* court disagreed for two reasons. First, the holding in *Dean* was premised on the plain language of the RCRA statute, not the public welfare offense doctrine.[125] Second, even to the extent that *Dean* was premised on the public welfare offense doctrine, "neither *Staples* nor *X-Citement Video* undermined the application of the public welfare offense doctrine to felony prosecutions under RCRA."[126]

As evidenced by this line of cases, courts have failed to recognize that the public welfare offense doctrine and general intent standard are inappropriate in the context of knowing violations of permit requirements or permit status under RCRA. As with RCRA, such knowledge of the law also is easy to ascertain under the Clean Water Act (CWA) because the governing law often takes the form of a permit[127] for which a company must apply to be regulated under the CWA's provisions. Knowing violations of permit requirements under these statutes require application of the specific intent standard. To knowingly violate a permit, an alleged violator must be aware of the existence of such a permit governing the activities in question. It is unfair and illogical to convict a defendant of "knowingly" violating a permit of which the defendant was unaware.

Part III of this Article illustrates the ramifications of the federal courts' flawed approach in applying the general intent standard to knowing violations of RCRA. This misapplication of the general intent standard fueled, at least in part, a concomitant failure by the federal courts to apply the specific, rather than general, intent standard to knowing violations of the CWA.

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124 *Kelly Technical*, 157 F.3d at 438

125 *Id.* at 438-39.

126 *Id.* at 439.

127 For example, National Pollutant Discharge Elimination System (NPDES) permits under section 402 and dredge and fill permits under section 404 are available under the Act. 33 U.S.C. §§ 1342, 1344 (1994 & Supp. V 2000).

III

HISTORY OF THE CONFLICT BETWEEN APPLICATION OF THE SPECIFIC AND GENERAL INTENT STANDARDS FOR KNOWING VIOLATIONS OF THE CLEAN WATER ACT

A. *Cases Applying the Pre-1987 Amendment Language*

Early convictions under the Clean Water Act were secured pursuant to section 309(c)(1),[128] the willful or negligent provision of the Act. This provision was revised with the 1987 Amendments to the Act.[129] Only a few cases tested the scope of this pre-1987 Amendment language. In 1979, the Third Circuit in *United States v. Frezzo Brothers, Inc.* affirmed the defendants' convictions for willfully or negligently discharging pollutants into navigable waters of the United States without a permit.[130] Frezzo Brothers, Inc., a mushroom farming business, and the individual defendants "had willfully discharged manure into the storm water run-off system that flowed into the channel box and into the stream."[131] Counts One through Four of the indictment alleged that the defendants willfully discharged pollutants without a permit, while Counts Five and Six alleged a negligent discharge.[132] With respect to the willful violations discharges, the evidence included samples of wastewater collected at the Frezzo farm that revealed concentrations of pollutants,[133] meteorological evidence that no rain had fallen on the dates of the discharges[134] and the elimination of other possible causes of pollution in the water.[135] The court stated that "evidence of someone turning on a valve or diverting wastes" was not neces-

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[128] 33 U.S.C. § 1319(c)(1) (1994). This section provided, in pertinent part, that "[a]ny person who willfully or negligently violates [various sections] of this title . . . shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both." § 1319(c)(1).

[129] The Second Circuit in *United States v. Hopkins* summarized the changes implemented under the 1987 Amendments as follows: "In 1987, Congress amended § 1319(c)(1), placing the prohibitions against intentional and negligent violations in separate sections, addressing negligent violations in § 1319(c)(1)(A) and intentional violations in § 1319(c)(2)(A); and in § 1319(c)(2)(A) changed the term 'willfully' to 'knowingly.'" 53 F.3d 533, 539 (2d Cir. 1995).

[130] 602 F.2d 1123, 1129 (3d Cir. 1979).

[131] *Id.* at 1125.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.* at 1129.

sary to prove the willful discharge.[136] The court concluded that the jury could rely on the totality of the circumstances[137] and held there was substantial evidence on the record to support each count.[138]

In *United States v. Oxford Royal Mushroom Products, Inc.*, the defendants were charged with willfully and negligently discharging pollutants in violation of the CWA.[139] The defendants filed a motion to dismiss for duplicity,[140] contending that because different mens rea standards were applied to negligence and willfulness, "they are really separate offenses."[141] The court noted that the "mens rea required for negligent conduct and that required for willful conduct cannot be viewed as entirely distinct."[142] The court relied on the fact that section 309(c) of the Act identifies a single penalty for negligent and willful discharges.[143] The court stated that "[t]he addition of the words 'negligently' or 'willfully' merely specifies the mode or method by which this proscribed conduct was accomplished."[144] Consequently, the court denied defendants' motion to dismiss the indictment.

The most recent application of the pre-1987 Amendment language occurred in 1991. In *United States v. Brittain*, the defendant was convicted for falsely reporting material facts to a government agency pursuant to 18 U.S.C. § 1001 and for discharging pollutants into waters of the United States pursuant to sections 301(a) and 309(c)(1) of the CWA.[145] As public utilities director for the City of Enid, Oklahoma, the defendant oversaw operations of the wastewater treatment plant and filing of discharge monitoring reports.[146] The plant supervisor informed the defendant that raw sewage was being discharged in violation of the

136 *Id.*
137 *Id.*
138 *Id.* Counts Five and Six were supported by the following evidence: eyewitness testimony, samples collected at the farm, evidence of rainfall, and expert hydrological testimony. *Id.* at 1125, 1129. *See also* United States v. Hamel, 551 F.2d 107, 108, 110 (6th Cir. 1977) (affirming a conviction under section 309(c)(1) for willfully discharging gasoline into a lake).
139 487 F. Supp. 852, 857 (E.D. Pa. 1980).
140 *Id.* at 856.
141 *Id.* at 857.
142 *Id.*
143 *Id.*
144 *Id.*
145 931 F.2d 1413, 1414 (10th Cir. 1991).
146 *Id.* at 1415.

NPDES permit. The defendant had personally observed the discharge of the sewage twice.[147] The defendant instructed the plant supervisor not to report the discharges.[148] The court upheld his conviction pursuant to section 309(c)(1), which authorized "criminal sanctions for 'any person' who 'willfully or negligently' violated § 1311(a) or any NPDES permit."[149] Although the 1987 Amendments modified willful conduct to "knowing" conduct, the old statute applied because the defendant's conduct occurred prior to 1987.[150] The defendant had a duty to report the discharges according to the NPDES permit and "he willfully allowed the discharges to continue unabated and unreported."[151]

B. *Muddying the Waters of Knowing Violation Convictions Under the Clean Water Act: The* Weitzenhoff *Decision*

Following the 1987 Amendments, the first significant case to address the mens rea requirement for knowing violations of the CWA was the controversial decision in *United States v. Weitzenhoff*.[152] The Ninth Circuit in *Weitzenhoff* applied the general intent standard to knowing violations. The defendants were convicted of violating the Clean Water Act for discharging waste activated sludge directly into the Pacific Ocean in violation of their NPDES permit. Classifying the CWA violation as a public welfare offense, the court construed the language "knowingly violated" to mean "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."[153]

Concluding that the language of section 309(c)(2) was ambiguous, the court reviewed the applicable legislative history. The court noted that the House Report reflected an intent to impose "penalties for dischargers or individuals who knowingly or negligently violate or cause the violation of certain of the Act's

147 *Id.* at 1418.
148 *Id.*
149 *Id.*
150 *Id.* at 1418 n.3.
151 *Id.* at 1420.
152 35 F.3d 1275 (9th Cir. 1993).
153 *Id.* at 1284.

requirements."[154] The court held that "[b]ecause they speak in terms of 'causing' a violation, the 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 a permit."[155] Therefore, the court concluded that the government did not need to show that defendants knew the discharge violated the plant's permit. Instead, the prosecution could secure the convictions merely by showing that the defendants acted intentionally or knowingly.[156]

The *Weitzenhoff* dissent stated that "[o]rdinary English grammar, common sense, and precedent" warranted a specific intent standard.[157] The defendants had to know they were discharging sewage and violating the permit. The dissenting opinion addressed several reasons as to why the majority opinion was flawed. First, it addressed the parallel negligence provision, which makes it a misdemeanor to violate a permit condition or limitation. It reasoned that, "[i]f negligent violation is a misdemeanor, why would Congress want to make it a felony to violate the permit without negligence and without even knowing that the discharge exceeded the permit limit?"[158] Second, the dissent stated that the CWA was not ambiguous and that the majority's reliance on legislative history to determine the intent of Congress was "not an appropriate way to resolve an ambiguity in a criminal law."[159]

The dissent next addressed the issue of public welfare offenses. Historically, the penalty imposed under a statute determined the mens rea requirement.[160] Public welfare offenses involve light penalties and no mens rea requirement.[161] However, "[i]f Congress makes a crime a felony, the felony categorization alone is a 'factor tending to suggest that Congress did not intend to eliminate a mens rea requirement.'"[162]

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154 *Id.* at 1283-84.
155 *Id.* at 1283.
156 *See id.* at 1284.
157 *Id.* at 1294 (Kleinfeld, J., dissenting).
158 *Id.* at 1295.
159 *Id.*
160 *Id.* at 1296.
161 *Id.*
162 *Id.* at 1297 (quoting Staples v. United States, 511 U.S. 600, 619 (1994)).

The dissent also addressed public policy concerns under the Clean Water Act. While the statute is "clearly designed to protect the public at large from the dire consequences of water pollution,"[163] the majority "does not explain how the public is to be protected by making felons of sewer workers who unknowingly violate their plants' permits."[164] The dissent reasoned that under such circumstances people would be unwilling to work in sewage treatment plants, thereby depriving the public of sewage disposal services.[165]

C. *The Post-*Weitzenhoff *Era*

The *Weitzenhoff* decision left widespread confusion in its wake. The Second Circuit was the first court to apply *Weitzenhoff* to knowing violations of the Clean Water Act in *United States v. Hopkins*.[166] In *Hopkins*, the defendant, who was vice president for manufacturing and responsible for ensuring his company's compliance with the wastewater discharge permit, was convicted of violating sections 309(c)(2)(A) and 309(c)(4) of the Clean Water Act. He ordered the tampering of wastewater samples and falsified reports to the Department of Environmental Protection. On several occasions, an employee told Hopkins that an unsatisfactory sample had been collected, to which he responded, "I know nothing, I hear nothing."[167] The court relied on *Weitzenhoff* and other public welfare offense doctrine cases, such as *International Minerals*, to support its conclusion that the statutory provisions of the CWA strive "to protect the public at large from the potentially dire consequences of water pollution."[168] The court held that "the government was required to prove that [the defendant] knew the nature of his acts and performed them intentionally, but was not required to prove that he knew that those acts violated the CWA, or any particular provision of the law, or the regulatory permit issued to [his company]."[169]

Conversely, the Fifth Circuit applied the specific intent standard to a knowing violation conviction under the CWA in *United*

163 *Weitzenhoff*, 35 F.3d at 1299.
164 *Id.*
165 *Id.*
166 53 F.3d 533 (2d Cir. 1995).
167 *Id.* at 536.
168 *Id.* at 540 (quoting *Weitzenhoff*, 35 F.3d at 1286).
169 *Hopkins*, 53 F.3d at 541.

States v. Ahmad.[170] In *Ahmad*, the defendant owned a combination convenience store and gas station. He discovered that one of the gasoline tanks had a leak that allowed water to enter the tank and contaminate the gas. The defendant discharged the gas-water mixture in front of the store. Some of this mixture ran down the street and into a creek. Other portions flowed into a manhole and ended up in the city's sewage treatment plant.[171] The court held that the government had to prove knowledge as to each element of the offense, "[w]ith the exception of purely jurisdictional elements."[172] The court reasoned that to do away with the knowledge requirement would mean "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."[173] Since Ahmad believed water, not gasoline, was being discharged from the tank, he did not "knowingly violate" each element of the offense.[174] Citing *Staples*, the court also held that the public welfare offense doctrine did not apply because gasoline did not pose a threat to the public's health or safety.[175]

Following the Fifth Circuit's decision, the United States filed a rehearing brief contending that *Ahmad* was directly at odds with *Weitzenhoff* and *Hopkins* because it was the "first departure from a long line of cases . . . uniformly holding that Congress intended the major pollution control statutes to be construed under the public welfare offense doctrine."[176] The court responded to these arguments by stating: 1) "knowingly violates" applies to five possible elements;[177] 2) since "knowing" violations are felonies subject to harsh penalties and years in federal prison, a lessened mens rea requirement was unwarranted; and 3) the government incorrectly relied upon *International Minerals* because the issue in that case was whether the government had to prove defendant's knowledge of the regulation and also that hydrochloric acid was a highly regulated substance, whereas gas

170 101 F.3d 386 (5th Cir. 1996).
171 *Id.* at 387-88.
172 *Id.*
173 *Id.* at 391.
174 *Id.* at 390.
175 *Id.* at 391.
176 Kevin A. Gaynor & Thomas R. Bartman, *Was United States v. Ahmad Wrongly Decided?*, 28 Env't Rep. (BNA) No. 6, at 290, 291 (June 6, 1997).
177 These five elements are: 1) the discharge, 2) of a pollutant, 3) from a point source, 4) into navigable waters of the United States, 5) without a permit to do so. *Id.*

was subject to a low level of regulation.[178] The government did not appeal *Ahmad* to the United States Supreme Court because the high court might have affirmed it, making it binding on all states rather than those only within the Fifth Circuit. It may also have been awaiting the outcome of two then-pending cases:[179] *United States v. Sinskey*[180] and *United States v. Wilson*.[181]

In *Sinskey*, the defendants were the plant manager and plant engineer of a large meat-packing plant. Although the plant had a CWA permit for discharge of wastewater, the level of ammonia nitrate in the discharged water was above the permissible level. The defendants were convicted of "knowingly rendering inaccurate a monitoring method required to be maintained under the CWA."[182] Defendant Sinskey was also convicted of "knowingly discharging a pollutant into waters of the United States in amounts exceeding CWA permit limitations."[183] The Eighth Circuit relied on *Weitzenhoff* and *Hopkins,* rather than *Ahmad,* for its holding: The government had to prove only that the defendant was aware of his violative conduct, not that he knew he was in violation of the CWA or the NPDES permit.[184] The court also distinguished the mistake-of-law defense in *Sinskey* from the mistake-of-fact defense in *Ahmad*.[185] Unlike *Weitzenhoff* and *Hopkins*, the *Sinskey* court had not relied on the public welfare offense doctrine. The *Sinskey* decision set forth a narrow interpretation of *Ahmad*.[186]

The Fourth Circuit's holding in *Wilson* reinforced the split in authority concerning the intent necessary for "knowing" violations. In *Wilson*, the defendants were convicted under the CWA's knowing provisions for placing fill material and dirt into wetlands without a permit.[187] As in *Ahmad*, the *Wilson* court

178 *Id.* at 290-91.

179 *Id.* at 293.

180 119 F.3d 712 (8th Cir. 1997).

181 133 F.2d 251 (4th Cir. 1997).

182 *Sinskey*, 119 F.3d at 714.

183 *Id.*

184 *Id.* at 715.

185 *Id.* at 716-17.

186 Andrew J. Turner, *Mens Rea in Environmental Crime Prosecutions: Ignorantia Juris and the White Collar Criminal*, 23 COLUM. J. ENVTL. L. 217, 232 (1998).

187 United States v. Wilson, 133 F.3d 251, 254 (4th Cir. 1997).

applied the term "knowingly" to each element of the offense.[188] On the other hand, it did not promote a narrow application of the public welfare offense doctrine. The court held that the CWA "requires the government to prove the defendant's knowledge of facts meeting each essential element of the substantive offense . . . but need not prove that the defendant knew his conduct to be illegal."[189]

In 1998, the Ninth Circuit produced the most recent and most sensible analysis of knowing violations under the Clean Water Act. The defendant in *United States v. Iverson*[190] was the founder, president and chairman of the board of CH20, Inc. Its drum-cleaning operation produced wastewater.[191] Since the company did not have sewer access, the defendant took matters into his own hands by personally dumping the wastewater and ordering employees to dump it in three areas: the plant's property, the sewer drain of an apartment complex that the defendant owned, and a sewer drain at his home.[192] After purchasing a warehouse with sewer access, the defendant restarted the drum-cleaning operation, dumping the wastewater into the sewer. The defendant occasionally was present during the cleaning process at the warehouse.

The court acknowledged that the CWA has a scienter requirement, specifically stating that Iverson "must know that the substance was a pollutant (*i.e.*, industrial waste)."[193] He was found liable as a responsible corporate officer under the Clean Water Act because he had knowledge that his employees were discharging pollutants into the sewer.[194] Not only did he instruct them to carry out these actions, he also directly took part in the disposal. The defendant also "had the authority and capacity to prevent the discharge of pollutants to the sewer system," but failed to do so.[195]

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188 *Id.* at 265. *See also* United States v. Ellen, 961 F.2d 462, 466 n.2 (4th Cir. 1991) (applying specific intent standard to conviction for knowingly discharging pollutants into wetlands and determining that "knowingly" applies to each element of the offense).

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

190 162 F.3d 1015 (9th Cir. 1998).

191 *Id.* at 1018.

192 *Id.*

193 *Id.* at 1027.

194 *Id.* at 1018-19.

195 *Id.* at 1022.

Therefore, *Iverson* was properly decided because the defendant is the type of individual whom the knowing violation provision was designed to convict. His activities were conducted in knowing disregard of the governing law under the CWA. Application of the specific intent standard would convict similarly egregious violators of the CWA, such as the "midnight dumpers" in *Weitzenhoff*, without compromising the aggressive criminal enforcement agenda that Congress envisioned under section 309.

IV

APPLICATION OF THE SPECIFIC INTENT STANDARD TO KNOWING VIOLATIONS OF THE CLEAN WATER ACT

One commentator has noted, "[t]he most hotly debated question in the environmental crimes area is whether the diminished knowledge requirement under the public welfare offense doctrine may be applied to charges of violating a discharge permit."[196] This Article establishes a framework in which misapplication of the general intent standard and public welfare offense doctrine to knowing violations of permit-based limitations of the Clean Water Act may be analyzed. An individual discharging a regulated substance for which a permit has been obtained could innocently exceed the limitations imposed by the permit if she had no knowledge of such limitations. Since the discharge of pollutants would be lawful in light of the plant's possession of a permit, what renders the act illegal is the discharge outside the parameters of the permit. The elimination of a mens rea requirement for that latter aspect of the crime (relating to permit limitations) would criminalize otherwise lawful conduct.[197] Therefore, Clean Water Act permit violations should not be treated as public welfare offenses.

The specific intent standard should govern prosecution of knowing violations of CWA permit limitations. Arguments supporting application of a specific intent standard for such violations can be divided into five categories: 1) the negligence provision; 2) the knowing endangerment provision; 3) the CWA's

196 John F. Cooney, et al., *Criminal Enforcement of Environmental Laws*, *in* ENVIRONMENTAL CRIMES DESKBOOK 26 (1996).

197 United States v. Weitzenhoff, 35 F.3d 1275, 1298 (9th Cir. 1993) (Kleinfeld, J., dissenting).

enactment history; 4) the rule of lenity;[198] and 5) the penalty structure. Congress' inclusion of the negligence and knowing endangerment provisions in section 309, coupled with the 1987 Amendments to section 309(c)(2)(A), indicate that "knowing" violations of the Act at least require knowledge of the existence of the permit, if not the conditions contained in the permit. The rule of lenity and the penalty structure of section 309 further confirm the conclusion that the specific intent standard should govern interpretation of knowing violations of the Clean Water Act.

A. *The Negligence Provision: Section 309(c)(1)*

In the Clean Water Act, Congress specifically provided for those instances when defendants who act with a reduced level of criminal intent may be subject to criminal sanctions. Under section 309(c)(1), defendants may be prosecuted for negligent violations of the Act.[199] Congress classified such violations as misdemeanors.[200] The absence of a heightened mens rea standard under section 309(c)(2)(A) would create the absurd result of making negligent conduct punishable as a misdemeanor, while those defendants who engage in innocent conduct could face felony convictions, harsh penalties and imprisonment.[201] To interpret the felony provisions of the CWA as not requiring proof of a guilty intent would render duplicative the negligence provision. The Supreme Court is "hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law."[202]

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198 The rule of lenity requires that ambiguities in criminal statutes be resolved in favor of the defendant. *See* United States v. Borowski, 977 F.2d 27, 31-32 (1st Cir. 1992).

199 The negligence provision states, in pertinent part:

> Any person who . . . negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 . . . or any permit condition or limitation implementing any of such sections in a permit . . . shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment of not more than 1 year, or by both.

33 U.S.C. § 1319(c)(1)(A) (1994).

200 § 1319(c)(1).

201 *Weitzenhoff*, 35 F.3d at 1295 (Kleinfeld, J., dissenting).

202 Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 837 (1988).

B. *The Knowing Endangerment Provision: Section 309(c)(3)*

Like other environmental statutes such as RCRA[203] and the Clean Air Act,[204] the CWA has a "knowing endangerment" provision.[205] Section 309(c)(3)(A) of the CWA states that "[a]ny person who knowingly violates [various sections of the Act] . . . and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury . . ." is subject to criminal sanctions.[206] Since Congress included this provision in the statute—which addresses a heightened and more serious type of "knowing" violation—the courts should not read a general intent standard into "knowing" violations.

Inclusion of the knowing endangerment requirement reinforces the "stratification"[207] of the levels of criminal awareness that Congress intended in section 309. The language and interpretation of section 309(c)(3) establish a "somewhat substantial

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[203] 42 U.S.C. § 6928(e) (1994). The knowing endangerment provision of RCRA provides in pertinent part:

> Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subtitle . . . who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment for not more than fifteen years, or both.

§ 6298(e)

[204] 42 U.S.C. § 7413(c)(5)(A) (1994). The knowing endangerment provision of the CAA provides in pertinent part:

> Any person who knowingly releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section 7412 of this title, and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment of not more than 15 years, or both.

§ 7413(c)(5)(A)

[205] 33 U.S.C. § 1319(c)(3)(A) (1994). The CWA's knowing endangerment provision provides in pertinent part:

> Any person who knowingly violates [various sections] of this title, or any permit condition or limitation implementing any of such conditions in a permit . . . and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both.

§ 1319(c)(3)(A)

[206] § 1319(c)(3)(A)

[207] The term "stratification" refers to Congress' deliberate delineation among the degrees of awareness required and the extent of criminal sanctions imposed for knowing endangerment, knowing, and negligent violations under section 309.

threshold for the prosecution to prevail on endangerment charges."[208] Given the severe penalties at stake under this provision, the government "must show both a violation and that the defendant knew that by the violation he endangered a person."[209] Knowingly endangering others is analogous to knowingly violating a permit condition; both involve deliberate conduct and awareness that one's conduct violates the law. Therefore, because case law supports a specific intent standard for knowing endangerment violations and because knowing violations are more analogous to knowing endangerment violations than to strict liability or negligence offenses, the specific intent, rather than general intent, standard should also be applied to knowing violations under the CWA.

Interpreting the Clean Water Act's knowing endangerment provision, the First Circuit in *United States v. Borowski* vacated the convictions of a company and its owner for knowingly violating pretreatment standards for industrial waste discharges.[210] The defendant was the owner of a manufacturing facility that produced optical mirrors for use in aerospace guidance and sighting systems.[211] The defendant participated in the disposal of spent nickel and nitric acid plating baths into sinks leading to a sewer and also ordered employees to do the same.[212] This conduct resulted in non-compliance with EPA pretreatment regulations.[213] Disposal of such chemicals exposed employees to serious health problems such as allergic reactions, chemical burns, skin disorders and respiratory problems.[214] For purposes of appeal, the court assumed the defendants knowingly violated the CWA and knew they had placed their employees in danger.[215] The issue presented was whether the defendants knew they had placed the employees in imminent danger.[216]

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208 Kevin A. Gaynor & Thomas R. Bartman, *Criminal Enforcement of Environmental Laws*, 10 COLO. J. INT'L ENVTL. L. & POL'Y 39, 73 (1999).

209 *Id.*

210 977 F.2d 27, 32 (1st Cir. 1992).

211 *Id.* at 28.

212 *Id.* at 28-29.

213 *Id.* at 28.

214 *Id.*

215 *Id.* at 29.

216 *Id.*

The court relied on three factors in determining the defendants lacked this knowledge.[217] First, it recognized that the CWA "is not a statute designed to provide protection to industrial employees who work with hazardous substances."[218] Second, it determined that RCRA, not the CWA, is a more appropriate statute for the "general handling, treatment and storage of hazardous substances."[219] Lastly, due to the ambiguity of the statute, the court applied the rule of lenity. This rule requires that ambiguities in criminal statutes be resolved in favor of the defendant.[220] Based on these three factors, the court held that a "knowing endangerment prosecution cannot be premised upon danger that occurs before the pollutant reaches a publicly-owned sewer or treatment works."[221]

The *Borowski* case illustrates the high threshold the government must meet to secure a knowing endangerment conviction. The defendants' conduct in *Borowski* did not rise to the level of knowing endangerment; however, their conduct satisfied the requirement for a knowing violation. The court's reliance on the rule of lenity reinforces the need to make the punishment fit the crime—the harshest sanctions should be imposed against only the most egregious violators. This theme also applies to the need for a specific intent standard for knowing violations. The lesser offenses available under 1) the negligence provision in section 309(c)(1) or 2) the civil penalties provision in section 309(d) for violations of various sections of the Act without regard to mens rea are available and more appropriate for defendants who did not knowingly violate a permit condition or limitation under the CWA.

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217 *Id. See also* United States v. Villegas, 784 F. Supp. 6, 13-14 (E.D.N.Y. 1991), *rev'd sub nom.*, United States v. Plaza Health Labs., Inc., 3 F.3d 643 (2d Cir. 1993) (holding that knowing endangerment means more than the mere possibility or risk that death or serious bodily injury is a foreseeable consequence of a discharge; defendant must know there is a high probability that the discharge places another person in imminent danger).

218 *Borowski*, 977 F.2d at 29.

219 *Id.* at 31.

220 *Id.* at 32. *See also* Ratzlaf v. United States, 510 U.S. 135, 148 (1994) (quoting Hughey v. United States, 495 U.S. 411, 422 (1990)); Liparota v. United States, 471 U.S. 419, 427 (1985).

221 *Borowski*, 977 F.2d at 32.

C. *Enactment of the Knowing Violation Provision*

The enactment history of the Clean Water Act's knowing violation provision supports a specific intent interpretation. When Congress drafted section 309 of the CWA, despite its authority to do so, it "did not adopt the strict criminal liability of earlier public welfare statutes . . . . Instead it required proof of a mens rea or scienter."[222] Even when Congress amended the CWA in 1987, the scienter requirement was not deleted. Instead, it was modified to acknowledge two levels of intent: "negligent" violations and "knowing" violations.[223] Similarly, Congress changed the term "willfully" to "knowingly." This adjustment suggests Congress' intention to retain a heightened mens rea standard without requiring that the defendant deliberately violate the Act. The change from willfully to knowingly does not, as the *Hopkins* court determined,[224] reflect Congress' intention to create a general intent standard for knowing violations of the Act.[225]

Moreover, EPA's exercise of investigative discretion is governed by the level of the actor's culpability. The EPA instructs its employees that evidence of a deliberate violation "will be a major factor indicating that criminal investigation is warranted."[226] It is well established that an agency's interpretation of its own statutes and regulations must be afforded great defer-

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[222] *See* Riesel, *supra* note 86, at 227-28

[223] *See supra* note 129 and accompanying text.

[224] United States v. Hopkins, 53 F.3d 533, 540 (2d Cir.1995) (concluding that the change from "willfully" to "knowingly" permits the inference that "Congress intended not to require proof that the defendant knew his conduct violated the law or a regulatory permit").

[225] The EPA has reinforced the relevance of the heightened level of knowledge that a criminal sanction entails under the Act. For example, Robert M. Perry, then-EPA Associate Administrator, made the following remarks in a 1982 guidance memorandum to EPA Regional Counsels:

> An individual who engages in conduct prohibited by statute or regulation can be prosecuted civilly or administratively without regard to the mental state that accompanied the conduct. Criminal sanctions, on the other hand, will ordinarily be limited to cases in which the prohibited conduct is accompanied by evidence of "guilty knowledge" or intent on the part of the prospective defendant(s).

Memorandum from Robert M. Perry, Associate Administrator, to Regional Counsels, Regions I-X, *Criminal Enforcement Priorities for the Environmental Protection Agency* 1 (Oct. 12, 1982) (on file with author).

[226] Memorandum from Earl E. Devaney, Director, Office of Criminal Enforcement, to All EPA Employees Working in or in Support of the Criminal Enforcement Program, *The Exercise of Investigative Discretion* 5 (Jan. 12, 1994) (on file with author).

ence.[227] Therefore, because EPA advises its employees to seek evidence of heightened mens rea, courts should require similar proof.

Prior to the 1987 Amendments, criminal conduct was prosecuted under the "willful" provision.[228] In 1987, this provision was amended to a "knowing" provision.[229] This change increased the government's success in prosecuting violations because a lessened showing of knowledge was required—defendants only had to have an awareness of their violative conduct. Now, with the "knowing" provision, there is a split in authority as to the intent necessary for conviction.[230] This split in authority is evidence that the provision is ambiguous in that it admits of two conflicting interpretations. To the extent a criminal provision of a statute is ambiguous, the rule of lenity should apply, as discussed in the next section of this Article. The rule requires application of the specific intent standard for violations of section 309 (c)(2)(A).

D. *The Rule of Lenity*

Courts construe penal statutes narrowly to safeguard the rights of criminal defendants. Consistent with this approach, courts apply a canon of statutory construction known as the "rule of lenity" when interpreting criminal provisions of statutes.[231] If a court determines that penal statutory language is ambiguous, it must apply the rule of lenity.[232] To ensure defendants have "fair warning" of what actions constitute crimes, "lenity principles 'demand resolution of ambiguities in criminal statutes in favor of the defendant.'"[233] Therefore, in the face of ambiguous language in a criminal statute, the courts must adopt a less severe interpreta-

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227 *See* Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), *reh'g denied*, 468 U.S. 1227 (1984).

228 *See supra* note 128 and accompanying text.

229 *See supra* note 129 and accompanying text.

230 *Compare* United States v. Weitzenhoff, 35 F.3d 1275, 1284 (9th Cir. 1993) (applying a general intent standard for knowing violations), *with* United States v. Ahmad, 101 F.3d 386, 390-91 (5th Cir. 1996) (applying a specific intent standard for knowing violations).

231 United States v. Iverson, 162 F.3d 1015, 1025 (9th Cir. 1998).

232 *Weitzenhoff*, 35 F.3d at 1295 (Kleinfeld, J., dissenting).

233 Ratzlaf v. United States, 510 U.S. 135, 148 (1994) (quoting Hughey v. United States, 495 U.S. 411, 422 (1990)); Liparota v. United States, 471 U.S. 419, 427 (1985).

tion.[234] Courts require a high threshold to trigger application of the rule of lenity. The statutory language must contain a "grievous ambiguity or uncertainty."[235] In evaluating the gravity of an alleged ambiguity in statutory language, congressional intent underlying the language is addressed.[236]

In the context of section 309(c)(2)(A) of the CWA, interpretation of the term "knowingly violates" has created a conflict between application of the specific and general intent standards. Since the two standards are competing and there are irreconcilable interpretations of the knowing violation language, a grievous ambiguity exists. Therefore, the rule of lenity must be applied[237] and the "less severe interpretation" would prevail; specifically, that interpretation which endorses the specific intent standard for knowing violation cases.

Application of the rule of lenity to require the specific intent standard for knowing violations promotes fairness in two respects. First, it promotes an equitable reading of the statute to protect the rights of the accused. Courts must refrain from interpreting penal statutes in a manner that extends the range of possible culpability or increases the degree of possible criminal sanctions beyond the legislature's intent in enacting the statute. Potential defendants are entitled to notice and due process with respect to potential criminal violations. Second, the rule of lenity promotes fairness in that it helps avoid overcriminalizing allegedly criminal conduct by precluding application of the general intent standard—only defendants who knowingly disregard a permit condition or standard under the CWA, as opposed to those who are merely aware of their acts, should be subject to the harsh sanctions under section 309(c)(2)(A).

E. *Penalty Structure*

Public welfare offenses are "virtually always . . . crimes punishable by relatively light penalties such as fines or short jail sentences, rather than substantial terms of imprisonment."[238] On

234 *Ratzlaf*, 510 U.S. at 148; *Weitzenhoff*, 35 F.3d at 1295.

235 Staples v. United States, 511 U.S. 600, 619 n.17 (1994) (quoting Chapman v. United States, 500 U.S. 453, 463 (1991)).

236 United States v. Wells, 519 U.S. 482, 499 (1997) (citations omitted) ("The rule of lenity applies only if 'after seizing everything from which aid can be derived,' we can make 'no more than a guess as to what Congress intended.'").

237 United States v. Speach, 968 F.2d 795, 796 (9th Cir. 1992).

238 United States v. Ahmad, 101 F.3d 386, 391 (5th Cir. 1996).

the other hand, "knowing" violations are serious felonies. Relying on *Staples*, the Fifth Circuit in *Ahmad* held that "[s]erious felonies . . . should not fall within the [public welfare] exception 'absent a clear statement from Congress that mens rea is not required.'"[239] Therefore, because violations of section 309(c)(2)(A) are punishable by fines of up to $50,000 per day, imprisonment of up to three years, or both, it is inappropriate to apply the general intent standard to such violations.

The penalty structure reflects Congress' deliberate stratification of culpability in section 309. The more a potential defendant is aware of her violative conduct and the law that makes it a crime, the more severe the potential criminal sanctions. Congress would not have enacted this graduated scale of sanctions from civil penalties to criminal fines and imprisonment if it had intended the general intent standard to apply to knowing violations under section 309(c)(2)(A). The general intent standard, particularly in the context of the public welfare offense doctrine, operates much like a strict liability standard. Congress, however, indicated its understanding that criminal sanctions require a culpable mental state—section 309(c) lists "negligent," "knowing" and "knowing endangerment" versions of this mens rea—and its understanding that conduct that lacks these levels of awareness can be addressed on a strict liability basis through civil penalties assessed under section 309(d).

V
THE *HANOUSEK* CASE AND THE NEED FOR A SPECIFIC INTENT STANDARD

The adverse effects of the *Weitzenhoff* decision and misapplication of the public welfare offense doctrine are more evident in cases under the Clean Water Act than in cases under other federal environmental statutes. The most recent and potentially most disturbing misapplication of the general intent standard occurred in the Ninth Circuit's decision in *United States v. Hanousek*,[240] which addressed a violation of section 309(c)(1), the negligence provision. The *Hanousek* case is the latest in a line of cases that have imposed criminal liability on individuals who violate public welfare statutes regardless of whether such individuals

[239] *Id.* (quoting *Staples*, 511 U.S. at 618).
[240] 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000).

possess the requisite level of mental culpability. More troubling still, the Supreme Court denied certiorari in the case and in so doing bypassed an ideal opportunity to resolve definitively the standard to apply for criminal violations of the CWA.

In *Hanousek*, the Ninth Circuit upheld the conviction of a defendant for negligently discharging a harmful quantity of oil into navigable waters of the United States in violation of sections 309(c)(2)(A) and 311(b)(3) of the Clean Water Act.[241] As roadmaster of the White Pass & Yukon Railroad, the defendant was responsible "'for every detail of the safe and efficient maintenance and construction of track, structures and marine facilities of the entire railroad . . . and [was to] assume similar duties with special projects.'"[242] One such project involved rock-quarrying near the Skagway River, a navigable waterway of the United States.[243] A high-pressure petroleum pipeline ran parallel to the railroad. A work platform of sand and gravel was constructed to protect the pipeline. On the evening of October 1, 1994, while clearing fallen rocks in the vicinity of the unprotected pipeline, a backhoe operator struck the pipeline, causing a rupture.[244] The defendant was charged following an investigation.

On appeal, the defendant contended that the government had to prove he acted with criminal negligence rather than ordinary negligence.[245] The court disagreed, concluding that "Congress intended that a person who acts with ordinary negligence . . . may be subject to criminal penalties."[246] The court classified the violation of section 309(c)(1)(A) as a public welfare offense,[247] holding that the doctrine also supported assessment of criminal penalties against the defendant for ordinary negligence.[248]

On January 10, 2000, the Supreme Court denied a petition for writ of certiorari for the Ninth Circuit's decision in *United States v. Hanousek*.[249] Justice Thomas, joined by Justice O'Connor, dissented in the denial.[250] The dissenting opinion

241 *Hanousek*, 176 F.3d at 1118.
242 *Id.* at 1119.
243 *Id.*
244 *Id.*
245 *Id.* at 1120.
246 *Id.* at 1121.
247 *Id.*
248 *Id.*
249 528 U.S. 1102 (2000).
250 *Id.* (Thomas, J., dissenting).

stated that it was incorrect to interpret a violation of the CWA as a public welfare offense.[251] The dissent maintained that the Ninth Circuit's narrow interpretation of the public welfare offense doctrine "imposes criminal liability for persons using standard equipment to engage in a broad range of ordinary industrial and commercial activities."[252] The dissent also argued that harsh penalties are associated with the negligent and knowing provisions.[253] Therefore, through misapplication of the public welfare offense doctrine, individuals engaged in ordinary negligence under section 309(c)(1)(A) could be subject to criminal sanctions that are grossly disproportionate to the severity of the offense.

Justice Thomas concluded his dissenting opinion with a well-reasoned plea for review of the scope and applicability of the public welfare offense doctrine:

> [W]e have never held that any statute can be described as creating a public welfare offense so long as the statute regulates conduct that is known to be subject to extensive regulation and that may involve a risk to the community. Indeed, such a suggestion would extend this narrow doctrine to virtually any criminal statute applicable to industrial activities . . . . To the extent that any of our prior opinions have contributed to the Court of Appeals' overly broad interpretation of this doctrine, I would reconsider those cases. Because I believe the Courts of Appeals invoke this doctrine too readily, I would grant certiorari to further delineate its limits.[254]

Therefore, though the case involved a violation of section 309(c)(1), its ramifications affect future interpretations of section 309(c)(2)(A). The analytical thread common to both contexts—the public welfare offense doctrine—has been misapplied and threatens to overcriminalize conduct that is prosecuted under either the negligence or knowing violation provisions.

CONCLUSION

The specific intent standard should govern knowing violations under section 309(c)(2)(A) of the Clean Water Act. Congress has spoken directly to the need for "knowledge" of wrongdoing in the language of this provision and has distin-

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251 *Id.* at 1103.
252 *Id.*
253 *Id* at 1104.
254 *Id.* at 1105.

guished such knowledge from the level of awareness required for violations of the knowing endangerment and negligence provisions. Applying a general intent standard to violations of section 309(c)(2)(A) would undermine congressional intent by rendering meaningless the purpose and effect of the stratification of levels of awareness that Congress intended in enacting these provisions. In addition, use of the general intent standard risks criminalizing otherwise innocent behavior and excessively criminalizing conduct that should be governed by lesser criminal charges.

The public welfare offense doctrine originated in non-environmental contexts and, for that reason, should not be transplanted as a paradigm standard in analyzing knowing violations of permit-based limitations under the CWA. The cases discussed in this Article that applied the public welfare offense doctrine in contexts outside the federal environmental statutory framework are correctly decided because such cases arose under a non-statutory scheme that did not include knowing violation provisions. In *International Minerals*, for example, the Court invoked the public welfare offense doctrine to allow knowledge of a regulation to be imputed due to the threat to the public's health and safety.[255] Such knowledge, however, should not be imputed for knowing violations of the Clean Water Act, because Congress expressly included mens rea provisions in section 309 of the Act.

In denying certiorari in the *Hanousek* case, the Supreme Court bypassed an important opportunity to resolve the confusion that has plagued the federal courts since *Weitzenhoff*. In refusing to address misapplication of the public welfare offense doctrine to criminal prosecutions under the CWA, the Supreme Court has perpetuated piecemeal and contradictory jurisprudence concerning whether the specific intent or general intent standard should govern knowing violations under the Clean Water Act.

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[255] United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 565 (1971).