

## COMMENTS

# Water Criminals: Misusing Mens Rea and Public Welfare Offense Analysis in Prosecuting Clean Water Act Violations

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### I. INTRODUCTION

The Clean Water Act (CWA) criminalizes both “negligent” conduct and two degrees of “knowing” conduct.<sup>1</sup> When the United States charges a defendant with a “knowing” violation of the CWA, two interrelated doctrines guide courts in their interpretation of the mens rea requirement: public welfare offense analysis, and “knowing” mens rea analysis.<sup>2</sup> When a court finds that a statute defines a public welfare offense, it interprets the statute as dispensing with the usual presumption that the government must prove a mens rea.<sup>3</sup> The United States Supreme Court

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1. 33 U.S.C. § 1319(c) (2006).

2. See, e.g., *Staples v. United States*, 511 U.S. 600, 606-07 (1994); see also *Morissette v. United States*, 342 U.S. 246, 271 (1952).

3. *Staples*, 511 U.S. at 607 n.3.

has held that public welfare offenses are limited in number, usually impose small fines or short jail sentences as opposed to long-term imprisonment, and govern the use of dangerous or offensive products, though this last factor is not dispositive.<sup>4</sup>

The Supreme Court has also held that where a statute contains a “knowing” mens rea requirement, this requirement applies to each element of the offense, and if the statute is silent, then there is a presumption that this same holding applies.<sup>5</sup> The Supreme Court has yet to hear a CWA criminal appeal from a defendant challenging how a United States Court of Appeals applied these two doctrines in his particular case. In that appellate vacuum, a majority of courts of appeals have held that the CWA establishes public welfare offenses, and have used those holdings to further conclude that the United States does not have to prove knowledge of every element of the offense in a prosecution for a “knowing” violation of the CWA.<sup>6</sup> Only the United States Court of Appeals for the Fifth Circuit has held both that the CWA does not establish public welfare offenses, and that the United States must prove knowledge of every element of the offense in a prosecution for a “knowing” violation of the CWA.<sup>7</sup> The Fifth Circuit has the better approach because it is more in line with Supreme Court precedent, and it better protects defendants from being held criminally liable for what otherwise might be completely innocent conduct. The majority of courts of appeals are most likely motivated by a desire to hold water criminals strictly liable, which might be contravened if the government had to prove, for example, that defendants knew their conduct violated a permit condition, even though the United States could prove they knew all other elements of the actus reus. While this outcome might seem beneficial as a significant deterrent to water polluters, courts of appeals’ means of reaching that outcome goes too far because it strays from Supreme Court precedent, it illogically applies public welfare offense analysis to the “knowing” mens rea requirement analysis, and it raises due process concerns. Also, those courts’ approach is unnecessary to reaching the goal of holding water polluters accountable because even if the United States had to prove knowledge of every element of the offense, the individuals most likely to face CWA prosecutions are those in the

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4. *Id.* at 606-07, 616-18.

5. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994); *see also Morissette*, 342 U.S. at 271.

6. *See, e.g., United States v. Sinskey*, 119 F.3d 712 (8th Cir. 1997); *see also United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994).

7. *United States v. Ahmad*, 101 F.3d 386, 391 (5th Cir. 1997).

industry with the most knowledge of the CWA permitting scheme, which the government could demonstrate at trial.

Part II of this Comment discusses the background of the CWA and its criminal provisions. Part III examines the Supreme Court cases that the courts of appeals most often cite when deciding whether the CWA establishes public welfare offenses. Part IV examines the Supreme Court cases that the courts of appeals most often cite when deciding how to apply the “knowing” mens rea requirement to the elements of a crime under the CWA. Part V discusses the split among the courts of appeals concerning whether the CWA establishes public welfare offenses, and how the “knowing” mens rea requirement should be applied to the elements of a crime under the CWA. Part VI analyzes how the courts of appeals’ holdings line up with Supreme Court precedent. Part VII summarizes the legal analysis of this Comment and its recommendations.

## II. BACKGROUND OF THE CWA AND ITS CRIMINAL PROVISIONS

Congress’s stated intent in passing the Clean Water Act (CWA) was to reduce pollution into the nation’s waterways, and to restore their natural water quality.<sup>8</sup> Congress implemented federal standards under the CWA that required states to reduce pollution into national waters below a certain level, and required polluters to obtain federal and/or state permits to discharge regulated pollutants into national waters.<sup>9</sup> The CWA vests in the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers principal regulatory authority to enforce its provisions.<sup>10</sup>

The CWA establishes several mechanisms for enforcement of its provisions and permits issued under its authority.<sup>11</sup> When the Administrator of the EPA discovers that a person is violating a condition or limitation in his permit, the Administrator must (1) issue a compliance order or bring a civil action, or (2) notify both the violator and the state of the violation.<sup>12</sup> If the Administrator chooses this second option and the state does not commence an enforcement action within thirty days of the notification, then the Administrator must issue a compliance order or

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8. ROBIN KUNDIS CRAIG, THE CLEAN WATER ACT AND THE CONSTITUTION: LEGAL STRUCTURE AND THE PUBLIC’S RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT 9 (3d ed. 2004) (citing 33 U.S.C. § 1251(a) (2006)).

9. *Id.* at 22.

10. *Id.*; ELLEN S. PODGOR & JEROLD H. ISRAEL, WHITE COLLAR CRIME IN A NUTSHELL 210 (2004).

11. 33 U.S.C. § 1319 (2006).

12. *Id.* § 1319(a)(1)(3).

bring a civil action.<sup>13</sup> The Administrator may bring a civil action for any violation for which the Administrator may otherwise issue a compliance order.<sup>14</sup> Finally, the United States may bring a criminal action against the violator.<sup>15</sup> Section 1311(a) of the CWA establishes that “the discharge of any pollutant by any person shall be unlawful.”<sup>16</sup> Section 1311 then lists exceptions to this general and complete prohibition on discharging pollutants, such as the discharge of pollutants in compliance with a permit issued under section 1311 or one of several other listed sections.<sup>17</sup>

The CWA establishes criminal penalties for negligent, knowing, and knowing endangerment violations of its provisions or permits issued under its authority.<sup>18</sup> Thus, the CWA contains three different mens rea requirements for criminal violations.<sup>19</sup> Each mens rea requirement is followed by a list of enforcement sections to which that particular mens rea requirement applies. For example, section 1319(c)(2)(A) states:

Any person who—*knowingly* violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 . . . 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.<sup>20</sup>

Section 1311, the first enforcement section listed in criminal provision section 1319(c)(2)(A), to which the mens rea “knowingly” applies, prohibits “discharging a pollutant from a point source into a navigable water of the United States without a permit . . .”<sup>21</sup> The format is similar for both negligent and knowing endangerment violations: The mens rea requirement is followed by a list of enforcement sections to which it applies.<sup>22</sup> Knowing violations lead to harsher penalties than negligent violations.<sup>23</sup> When a person knowingly violates certain sections of the

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13. *Id.* § 1319(a)(1).

14. *Id.* § 1319(b).

15. *Id.* § 1319(c).

16. *Id.* § 1311.

17. *Id.*

18. *Id.* § 1319(c).

19. *Id.*

20. *Id.* § 1319(c)(2)(A) (emphasis added).

21. United States v. Ahmad, 101 F.3d 386, 388 (5th Cir. 1997); 33 U.S.C. §§ 1311(a), 1319(c)(2)(a).

22. 33 U.S.C. §§ 1319(c)(1), (3).

23. see PODGOR & ISRAEL, *supra* note 10, at 210; Compare *id.* § 1319(c)(1) (imposing maximum fine of \$25,000 per day and/or imprisonment up to one year for negligent violation), with *id.* § 1319(c)(2) (imposing maximum fine of \$50,000 per day and/or imprisonment up to three years for knowing violation).

CWA and additionally knows that his actions put someone else “in imminent danger of death or serious bodily injury,” the maximum prison term increases to fifteen years; the maximum fine increases to \$250,000; and if the person is an organization, the maximum criminal fine is \$1,000,000.<sup>24</sup>

A potential ambiguity emerges regarding how to apply the mens rea requirements to the enforcement sections because the enforcement sections, like section 1311, contain multiple elements and are incorporated by reference into the section 1319(c) criminal violations that establish the mens rea requirements.<sup>25</sup> For example, section 1311 prohibits “discharging a pollutant from a point source into a navigable water of the United States without a permit.”<sup>26</sup> If the United States charges a defendant with “knowingly” violating section 1311, it is unclear whether the United States must prove only that the defendant knew he was discharging something; or whether the United States must prove that the defendant knew that he was discharging a pollutant, knew he was discharging from a point source, knew the pollutant was going into a navigable water of the United States, and knew that he did not have a permit to do so.<sup>27</sup> If the former is true, then the United States need only show that the defendant knew of the discharge in order to secure a conviction. If the latter is true, then the United States must provide more evidence at trial because it must show that the defendant had knowledge of each element of the crime.

As Parts III and IV of this Comment show, the Supreme Court has spoken directly to both public welfare offense analysis and “knowing” mens rea requirement analysis in statutes other than the CWA. As Part V shows, and as is argued in this Comment, the majority of the courts of appeals have not followed Supreme Court precedent when applying either analysis to CWA criminal cases.

### III. U.S. SUPREME COURT JURISPRUDENCE ON PUBLIC WELFARE OFFENSE ANALYSIS

Statutes that establish public welfare offenses impose strict liability, and therefore do not require the government to show that the defendant knew “the facts that [made] his conduct illegal” to secure a conviction.<sup>28</sup>

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24. 33 U.S.C. § 1319(c)(3); *see* PODGOR & ISRAEL, *supra* note 10, at 210.

25. 33 U.S.C. §§ 1311, 1319(c).

26. *Ahmad*, 101 F.3d at 388; 33 U.S.C. § 1311.

27. 33 U.S.C. § 1311; *see also id.* § 1319(c)(2)(A).

28. *Staples v. United States*, 511 U.S. 600, 606 (1994); *see also id.* at 607 n.3 (“[W]e have interpreted statutes defining public welfare offenses to eliminate the requirement of *mens rea*.”).

When a statute is silent as to a mens rea requirement and a court finds that the statute establishes a public welfare offense, then the court will infer that Congress intended not to require a mens rea.<sup>29</sup> This category of statutes is an exception to the common law rule that all crimes require some form of mens rea.<sup>30</sup> Indeed, if the statute is silent as to a mens rea requirement, and a court finds that it does not establish a public welfare offense, then the court reads in “the usual presumption” that the government must prove the defendant knew the facts that made his conduct illegal.<sup>31</sup>

The Supreme Court has interpreted that congressional silence as to a mens rea requirement is an indication of Congress’s intent to create public welfare offenses only in “limited circumstances.”<sup>32</sup> Dispensing with the mens rea requirement is “generally . . . disfavored,” and courts look for evidence that Congress intended not to require a mens rea.<sup>33</sup> Generally, imposing a harsh penalty such as a felony penalty, or one that imposes more than “fines or short jail sentences,” is a strong indication that Congress intended for a mens rea requirement to apply.<sup>34</sup> Statutes that correctly fall in this category usually regulate “potentially harmful or injurious items.”<sup>35</sup> It is the harmful and injurious nature of the items that justifies dispensing with the mens rea requirement because it is assumed that the defendant is on notice that he is engaging in dangerous activity that is likely subject to regulation.<sup>36</sup>

Although statutes that establish public welfare offenses typically regulate potentially harmful or injurious items, this factor is not dispositive.<sup>37</sup> In *Staples*, agents of the Bureau of Alcohol, Tobacco, and Firearms executed a search warrant at the defendant’s home and seized a

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29. *Id.* at 606.

30. *Id.* at 605 (citing *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978)).

31. *Id.* at 619.

32. *Id.* at 607 (quoting *Gypsum*, 438 U.S. at 437) (internal citations omitted).

33. *Id.* at 606.

34. *Id.* at 616, 618; *see also id.* at 618 n.16 (“Title 18 U.S.C. § 3559 makes any crime punishable by more than one year in prison a felony.”); *Morissette v. United States*, 342 U.S. 246, 256 (1952) (“[P]enalties commonly are relatively small, and conviction does no grave damage to an offender’s reputation.”).

35. *Staples*, 511 U.S. at 607; *see also United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971) (“[W]here . . . 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.”).

36. *Staples*, 511 U.S. at 607 (citing *United States v. Dotterweich*, 320 U.S. at 277, 281 (1943)); *see also Liparota v. United States*, 471 U.S. 419, 433 (1985) (stating that public welfare offenses govern “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”).

37. *Staples*, 511 U.S. at 611, 619-20.

rifle that had to be reconfigured to be fully automatic.<sup>38</sup> The National Firearms Act (NFA) makes it illegal to possess an unregistered “firearm,” which includes a weapon that shoots automatically.<sup>39</sup> Sections 5861(d) and 5871 of the NFA “make[] it a crime, punishable by up to 10 years in prison . . . for any person to possess a firearm that is not properly registered.”<sup>40</sup> The NFA is silent on a mens rea requirement.<sup>41</sup> The defendant’s fully automatic rifle was not registered, so he was charged with violating section 5861(d) of the NFA.<sup>42</sup> The district court judge instructed the jury as follows:

The government need not prove the defendant knows he’s dealing with a weapon possessing every last characteristic [which subjects it] to the regulation. It would be enough to prove he knows that he is dealing with a dangerous device of a type as would alert one to the likelihood of regulation.<sup>43</sup>

The defendant was found guilty, and received a sentence of “five years’ probation and a \$5,000 fine.”<sup>44</sup>

The Supreme Court overturned the defendant’s conviction, holding that even though the NFA was silent as to a mens rea requirement and regulated seemingly harmful or injurious items, the NFA did not establish a public welfare offense, and therefore the United States did have to prove the defendant knew his rifle was fully automatic to secure a conviction.<sup>45</sup> First, the Court found that the NFA did not “put gun owners sufficiently on notice of the likelihood of regulation to justify interpreting § 5861(d) as not requiring proof of knowledge of a weapon’s characteristics.”<sup>46</sup> The Court reasoned that despite the potentially harmful and injurious nature of guns, and the pervasive regulation of gun ownership, gun owners can use them innocently, and buying a gun does not alert someone to regulation of the product any more than buying a car does.<sup>47</sup> Second, the Court found that the felony penalty associated with the charged crime (a maximum of ten years in prison), excluded the offense from the public welfare offense category.<sup>48</sup> The Court

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38. *Id.* at 603.

39. *Id.* at 602; *see* 26 U.S.C. §§ 5801–5872 (2006).

40. *Staples*, 511 U.S. at 602–03; 26 U.S.C. §§ 5861(d), 5871.

41. *Staples*, 511 U.S. at 605.

42. *Id.* at 603.

43. *Staples*, 511 U.S. at 604.

44. *Id.*

45. *Id.* at 615–16, 620.

46. *Id.* at 612.

47. *Id.* at 610–13.

48. *Id.* at 616–19.

reasoned that where a crime has a harsh penalty, and “dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct,” Congress likely intended a mens rea requirement even if it did not include it expressly.<sup>49</sup>

Assuming either that a statute has an explicit mens rea requirement, or that a court decides to apply a mens rea requirement of “knowing” to an otherwise silent but nonpublic welfare offense statute, an ambiguity in how to apply “knowing” to the elements of the crime emerges, as discussed earlier. Part IV examines how the Supreme Court has addressed this issue.

#### IV. U.S. SUPREME COURT JURISPRUDENCE ON “KNOWING” MENS REA ANALYSIS

The Supreme Court has held that the “knowing” mens rea requirement applies to each and every element of the offense, even if it only explicitly modifies certain elements of the offense in the statute.<sup>50</sup> Where “knowing” only modifies certain elements of the offense, and that reading of the statute is the “most natural grammatical reading,” it is still not necessarily the correct one.<sup>51</sup> A court should consider absurd applications that may result from the most natural grammatical reading; should invoke the presumption that a mens rea applies to a criminal statute, even if the statute is silent; and it should construe a statute in a constitutional way where there is a choice between alternate constructions.<sup>52</sup>

*Morissette v. United States* is the Supreme Court’s “landmark opinion” applying mens rea to the elements of a federal crime.<sup>53</sup> In *Morissette*, the Court applied the principle of “evil intent” to a statute where the word “knowingly” only modified one element of the crime in the statute, and the Court held that “knowingly” should be read to apply to all of the elements of the crime.<sup>54</sup> However, the mens rea requirement typically does not extend to a purely jurisdictional element of a statute.<sup>55</sup>

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49. *Id.* at 618.

50. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994).

51. *Id.* at 70.

52. *Id.* at 68-69.

53. *Id.* at 70 (citing 342 U.S. 246, 271 (1952)).

54. *Id.* (citing 342 U.S. at 271).

55. *United States v. Feola*, 420 U.S. 671, 677 n.9 (1975); *see also id.* at 672-73, 676-77 (stating that the “federal officer” element of a statute criminalizing assault on a federal officer is merely jurisdictional and does not require a defendant to have known he was assaulting a federal officer); *United States v. Cooper*, 482 F.3d 658, 664-68 (4th Cir. 2007) (holding that when “waters of the United States” is an element of the crime under the CWA, the mens rea requirement does not apply to that element because it merely establishes federal jurisdiction).

In *United States v. X-Citement Video, Inc.*, undercover police purchased from X-Citement Video, Inc. pornographic films depicting pornographic film star Traci Lords before her 18th birthday.<sup>56</sup> The Protection of Children Against Sexual Exploitation Act of 1977 prohibits “the interstate transportation, shipping, receipt, distribution, or reproduction of visual depictions of minors engaged in sexually explicit conduct.”<sup>57</sup> Specifically, section 2252 states:

- (a) Any person who—
  - (1) *knowingly transports* or *ships* in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—
    - (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
    - (B) such visual depiction is of such conduct;
  - (2) *knowingly receives*, or *distributes*, any visual depiction that has been mailed . . . or *knowingly reproduces* any visual depiction for distribution in interstate or foreign commerce or through mails, if—
    - (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
    - (B) such visual depiction is of such conduct . . . shall be punished as provided in subsection (b) of this section.<sup>58</sup>

The United States charged defendants with violating sections 2252(a)(1) and (a)(2), for which they were convicted.<sup>59</sup> The United States Court of Appeals for the Ninth Circuit reversed, holding that the statute was unconstitutional.<sup>60</sup> The Ninth Circuit reasoned that because “knowingly” only modifies the verbs “transports,” “ships,” “receives,” “distributes,” and “reproduces,” the statute does not require knowledge that one of the performers is underage (an element of the crimes contained in the two (A) subsections), which violates the First Amendment.<sup>61</sup>

The Supreme Court reversed the Ninth Circuit’s decision, holding that the statute was constitutional.<sup>62</sup> First, the Court found that although the Ninth Circuit’s reading of the statute was “the most natural grammatical reading,” it would lead to absurd applications.<sup>63</sup> The Court

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56. 513 U.S. 64, 66 (1994).

57. *Id.* at 65-66; *see* 18 U.S.C. § 2252 (2006).

58. 18 U.S.C. § 2252 (emphasis added).

59. *X-Citement Video*, 513 U.S. at 66; *see* 18 U.S.C. § 2252(a)(1)-(a)(2).

60. 513 U.S. at 67.

61. *Id.* at 68.

62. *Id.* at 67.

63. *Id.* at 68-69.

reasoned that if “knowingly” only applied to the five relevant verbs, innocent actors would be guilty of the conduct section 2252 prohibits: (1) a retail film developer who returns unexamined pictures to a customer that depict underage pornography, (2) a new tenant who receives and retains unopened mail of the former tenant that depicts underage pornography, and (3) a mail courier who delivers a package marked “film” that contains underage pornography.<sup>64</sup> These three otherwise-innocent activities would be illegal under the Ninth Circuit’s reading of the statute because the film developer, the new tenant, and the courier would not be required to “know” that the contents of their packages contain underage pornography. Second, the Court found that it had applied the mens rea requirement to each element of a crime in several prior cases, even where the statute was silent.<sup>65</sup> Third, the Court found that section 2252 did not constitute a public welfare offense, which is “traditionally excepted from the background principle favoring scienter [intent requirement].”<sup>66</sup> The Court reasoned that media such as film and magazines are not subject to a comprehensive regulatory scheme that would otherwise put the general public on notice that their use of those media might violate some statute.<sup>67</sup> The Court also reasoned that because violations of section 2252 can result in maximum sentences of ten years in prison and fines, there was a strong presumption that section 2252 did not constitute a public welfare offense.<sup>68</sup> Thus, the Court concluded that “knowingly” applied to each element of the offense, including knowledge that the visual depiction was that of a minor.<sup>69</sup>

So far, this Comment has examined how the Supreme Court has addressed public welfare offense analysis and “knowing” mens rea requirement analysis. The Supreme Court has yet to grant a writ of certiorari to address how these two issues apply to crimes under the Clean Water Act. Thus, the courts of appeals have developed their own answers to how these two doctrines apply to the CWA. Part V examines the varying approaches the courts of appeals have taken. Part VI

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64. *Id.* at 69.

65. *Id.* at 70-71; *see also* *Morissette v. United States*, 342 U.S. 246, 271 (1952) (discussing common law history of mens rea applied to a federal statute); *Liparota v. United States*, 471 U.S. 419, 426 (1985) (holding scienter requirement applied to two separate elements following “knowing”); *Staples v. United States*, 511 U.S. 600, 619 (1994) (concluding defendant must know he is in possession of an illegally modified firearm even though it is normally legal to possess an unmodified firearm).

66. *X-Citement Video*, 513 U.S. at 71-72 (citing *Morissette*, 342 U.S. at 55); *see* 18 U.S.C. § 2252 (2006).

67. 513 U.S. at 71-72.

68. *Id.* at 72 (citing *Staples*, 511 U.S. 600); *see* 18 U.S.C. §§ 2252(b), 2253-54.

69. 513 U.S. at 72-73.

analyzes their consistency with Supreme Court precedent outlined in Parts III and IV.

#### V. THE U.S. COURTS OF APPEALS SPLIT

U.S. courts of appeals that hold that the “knowing” mens rea requirement applies only to some elements of the offense under the CWA arrive at that conclusion in large part because they conclude that the CWA establishes public welfare offenses.<sup>70</sup> In finding that the CWA establishes public welfare offenses, these courts focus on the dangerous nature of the CWA’s regulated activities, the pervasive government regulation of pollutant discharges into water, and statutory changes to the criminal provisions of the CWA that purportedly reduced the required mens rea.<sup>71</sup> The only court of appeals to hold differently on both points focuses on the harsh penalties that the CWA imposes for criminal violations to find that it does not establish public welfare offenses, and analogizes the CWA provisions to those of other statutes where the Court has held that “knowing” applies to each and every element of the offense.<sup>72</sup>

The United States Court of Appeals for the Second Circuit has held that section 1319(c)(2)(A) of the CWA only requires the United States to prove that a defendant had knowledge of his actions and “performed them intentionally,” not that he knew his actions were illegal or that they violated a permit.<sup>73</sup> In *Hopkins*, the United States charged the defendant with, among other things, “knowingly violat[ing] the conditions of the DEP permit, in violation of 33 U.S.C. § [] 1319(c)(2)(A).”<sup>74</sup> The district court judge instructed the jury that “[i]t is not necessary for the government to prove that the defendant intended to violate the law or that the defendant had any specific knowledge of the particular statutory, regulatory or permit requirements imposed under the Clean Water Act.”<sup>75</sup> The Second Circuit upheld the instruction.<sup>76</sup> First, it found that because the CWA describes public welfare offenses, “Congress did not intend to require proof that the defendant knew his actions were unlawful.”<sup>77</sup> The court based its public welfare offense conclusion partly on the hazardous

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70. See, e.g., United States v. Hopkins, 53 F.3d 533, 537-38 (2d Cir. 1995).

71. See, e.g., *id.* at 537-41.

72. See United States v. Ahmad, 101 F.3d 386 (5th Cir. 1997); see also United States v. X-Citement Video, Inc., 513 U.S. 64 (1994).

73. *Hopkins*, 53 F.3d at 541; see 33 U.S.C. § 1319(c)(2)(A) (2006).

74. 53 F.3d at 536; 33 U.S.C. § 1319(c)(2)(A).

75. 53 F.3d at 536.

76. *Id.* at 537.

77. *Id.*

nature of the substances the CWA regulates: toxic pollutants, sewage sludge, oil, and hazardous substances.<sup>78</sup> The court cited language from *United States v. International Minerals & Chemical Corp.*: “[T]he vast majority of these substances are of the type that would alert any ordinary user to the likelihood of stringent regulation.”<sup>79</sup> Second, the court found that because Congress changed the mens rea requirement from “willfully” to “knowingly” in 1987, Congress did not intend to require the United States to prove a defendant knew his conduct was illegal or violated a permit condition.<sup>80</sup>

The United States Court of Appeals for the Sixth Circuit has held that the CWA “fit[s] squarely within the public welfare offense doctrine.”<sup>81</sup> While *United States v. Kelley Technical Coatings, Inc.*, dealt with a challenge to a criminal conviction under the Resource Conservation and Recovery Act (RCRA), in holding that RCRA establishes public welfare offenses, the court also held that the CWA similarly belonged in this category.<sup>82</sup> The court reasoned that even though the Supreme Court found in *Staples v. United States* that early cases recognizing public welfare offenses “involved statutes that provided for only light penalties such as fines or short jail sentences rather than imprisonment,” and that statutes imposing felony convictions were “incompatible” with public welfare offense doctrine, those observations by the Court essentially constituted dicta and did not prevent a lower court from finding that a statute imposing felony penalties could establish public welfare offenses.<sup>83</sup>

The United States Court of Appeals for the Eighth Circuit has held that “knowingly” under the CWA applies only to “acts constituting the underlying conduct.”<sup>84</sup> In *United States v. Sinskey*, the defendant was charged with, and found guilty of, “knowingly rendering inaccurate a monitoring method required to be maintained under the CWA in violation of 33 U.S.C. § 1319(c)(4), and . . . of knowingly discharging a pollutant into waters of the United States in amounts exceeding CWA permit limitations, in violation of 33 U.S.C. § 1319(c)(2)(A).”<sup>85</sup> The district court judge instructed the jury that “the government was not

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78. *Id.* at 539.

79. *Id.* (citing 402 U.S. 558 (1971)).

80. *Id.* at 540.

81. *United States v. Kelley Technical Coatings, Inc.*, 157 F.3d 432, 439 n.4 (6th Cir. 1998).

82. *Id.* at 439.

83. *Id.* (citing *Staples v. United States*, 511 U.S. 600, 616 (1994)).

84. *United States v. Sinskey*, 119 F.3d 712, 715 (8th Cir. 1997).

85. *Id.* at 714; see 33 U.S.C. §§ 1319(c)(2)(A), (c)(4) (2006).

required to prove that Sinskey knew that his acts violated the CWA or permits issued under that act.”<sup>86</sup> The Eighth Circuit upheld the instructions as a valid statement of the law because of the “commonly accepted construction” of applying the mens rea only to the underlying offense rather than to all the elements of the crime.<sup>87</sup> The court reasoned that because the CWA regulates “obnoxious waste materials” like those referenced in *International Minerals*, and because Congress reduced the mens rea requirement from “willfully” to “knowingly” in 1987, the government need only prove that the defendant knew what he was doing, rather than that the defendant knew that what he was doing was illegal.<sup>88</sup>

The Ninth Circuit has held that “knowingly” under the CWA applies only to the acts “that result[] in a permit violation, regardless of whether the polluter is cognizant of the requirements or even the existence of the permit,” and that the CWA establishes public welfare offenses.<sup>89</sup> In *United States v. Weitzenhoff*, the defendant was charged with, and found guilty of, a number of CWA violations.<sup>90</sup> The district court judge instructed the jury that “the government is not required to prove that the defendant knew that his act or omissions were unlawful.”<sup>91</sup> The Ninth Circuit upheld the jury instructions because of Congress’s 1987 changes to the mens rea requirement from “willfully” to “knowingly,” which indicated Congressional intent to penalize strictly individuals whose conduct “result[ed] in a permit violation.”<sup>92</sup> The court reasoned that its determination that the CWA established public welfare offenses—based on its regulation of “obnoxious waste materials”—bolstered its decision that “‘knowingly’ does not refer to the legal violation.”<sup>93</sup>

Similarly, in *United States v. Hanousek*, the Ninth Circuit held that because the CWA establishes public welfare offenses, it permits “criminal penalties for ordinary negligent conduct,” which the Due Process Clause of the U.S. Constitution would otherwise prohibit.<sup>94</sup> In *Hanousek*, the defendant was responsible for a special project called “6-mile,” where a high pressure, aboveground oil pipeline ran parallel and

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86. 119 F.3d at 715.

87. *Id.*

88. *Id.* at 716.

89. *United States v. Weitzenhoff*, 35 F.3d 1275, 1280, 1284 (9th Cir. 1994).

90. *Id.* at 1282 n.1.

91. *Id.* at 1283.

92. *Id.* at 1283-84.

93. *Id.* at 1284 (quoting *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971)).

94. *United States v. Hanousek*, 176 F.3d 1116, 1120-22 (9th Cir. 1999).

adjacent to the tracks that his company was realigning.<sup>95</sup> One of his contractors was blasting rock in the same area and loading it onto rail cars for transport.<sup>96</sup> On the night of October 1, 1994, while at home after his day at work, an employee of Hanousek's rock-blasting contractor noticed that some rocks had fallen off a transport train and onto the tracks as it left.<sup>97</sup> He moved the backhoe, a machine used to lift and move rocks, off its work platform, and drove it to where the rocks were located, approximately fifty to one hundred yards away.<sup>98</sup> The high pressure, aboveground oil pipeline was covered only by a thin layer of soil where the fallen rocks were located, whereas at the work platform where the backhoe had been located, the pipeline was protected with "railroad ties, sand, and ballast material."<sup>99</sup> While using the backhoe to push the rocks off the track, the employee punctured the pipeline.<sup>100</sup> Over a matter of days, up to 5000 gallons of oil from the ruptured pipeline entered the nearby Skagway River.<sup>101</sup> The United States charged Hanousek with "negligently discharging a harmful quantity of oil into a navigable water of the United States, in violation of the Clean Water Act."<sup>102</sup> After a short trial and a jury conviction, the district court judge sentenced Mr. Hanousek to "six months of imprisonment, six months in a halfway house and six months of supervised release, as well as a fine of \$5,000."<sup>103</sup>

Mr. Hanousek appealed his conviction to the Ninth Circuit, which held that his conviction should stand because the CWA permits "criminal penalties for ordinary negligent conduct."<sup>104</sup> He also appealed to the Supreme Court, which denied his petition for writ of certiorari over the dissent of Justice Thomas, joined by Justice O'Connor.<sup>105</sup> Justices Thomas and O'Connor believed that the courts of appeals invoked public welfare legislation doctrine too often to dispense with the presumption of a mens rea requirement, that the Clean Water Act did not establish public welfare offenses, and that the Ninth Circuit erred by factoring its

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95. *Id.* at 1119.

96. *Id.*

97. *Id.*; see also *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000) (Thomas, J., dissenting).

98. 176 F.3d at 1119.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 1120.

104. *Id.* at 1120, 1122.

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

contrary conclusion into its analysis of whether imposing criminal liability for ordinary negligent conduct violates constitutional due process.<sup>106</sup>

The sandy Fifth Circuit, on the other hand, has held both that the CWA does not establish public welfare offenses, and that the “knowingly” mens rea requirement applies to each and every element of a CWA crime.<sup>107</sup> In *United States v. Ahmad*, a convenience store/gas station owner was charged with, and convicted of, “knowingly discharging a pollutant from a point source into a navigable water of the United States without a permit, in violation of 33 U.S.C. §§ 1311(a) and 1319(c)(2)(A) [and] knowingly operating a source in violation of a pretreatment standard, in violation of 33 U.S.C. §§ 1317(d) and 1319(c)(2)(A).”<sup>108</sup> The charges arose because the defendant pumped gasoline out of a leaking underground storage tank and into the street, and claimed he thought he was merely discharging the water that had seeped into the tank.<sup>109</sup> The defendant unsuccessfully sought to introduce evidence demonstrating that he “only negligently left the pump in the hands of his employees.”<sup>110</sup> On count one, for example, the district court judge instructed the jury as follows:

For you to find Mr. Ahmad guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

- (1) That on or about the date set forth in the indictment,
- (2) the defendant *knowingly* discharged
- (3) a pollutant
- (4) from a point source
- (5) into the navigable waters of the United States
- (6) without a permit to do so.<sup>111</sup>

The Fifth Circuit held that the jury instruction was flawed because the United States was required to show that Ahmad had knowledge as to each and every element, including knowing that he did not have a permit.<sup>112</sup> The court reasoned that both *Staples* and *X-Citement Video* stood for the proposition that the government must prove the required mens rea for every element of the crime, and that “[t]o hold otherwise would require an explanation as to why some elements should be treated

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106. *Id.*

107. *United States v. Ahmad*, 101 F.3d 386, 391 (5th Cir. 1997).

108. *Id.* at 388; *see* 33 U.S.C. §§ 1311, 1317(d), 1319(c)(2)(A) (2006).

109. 101 F.3d at 388-89.

110. *Id.* at 389.

111. *Id.* (emphasis added).

112. *Id.* at 390.

differently from others.”<sup>113</sup> The court also held that the CWA does not establish public welfare offenses.<sup>114</sup> While acknowledging that the CWA does seek to protect public welfare by restricting the discharge of pollutants into national waters, the Fifth Circuit examined Supreme Court precedent and concluded that the exception is narrow, that the harsh penalties, including felonies, imposed by the CWA criminal provisions “should not fall within the exception ‘absent a clear statement from Congress that *mens rea* is not required,’” and that “‘dispensing with mens rea would require the defendant to have knowledge only of traditionally lawful conduct,’” such as discharging into the street what one believes to be water.<sup>115</sup>

## VI. ANALYSIS OF U.S. COURTS OF APPEALS’ CONSISTENCY WITH U.S. SUPREME COURT JURISPRUDENCE

The majority of the courts of appeals cite Supreme Court precedent in their determinations that the CWA establishes public welfare offenses. But they focus heavily on the fact that the CWA regulates harmful or injurious products. The Supreme Court has held that this is not a dispositive factor, thereby ignoring other factors.<sup>116</sup> For example, in *Weitzenhoff*, the Ninth Circuit held that the CWA establishes public welfare offenses primarily because it regulates “obnoxious waste materials.”<sup>117</sup> In *Staples*, however, the Supreme Court held that some dangerous materials, like guns, are so common and available that it cannot be said that mere possession “alert[s] individuals to the likelihood of strict regulation.”<sup>118</sup> The Ninth Circuit also failed to take into consideration in *Weitzenhoff* the many limitations that the Supreme Court has placed on public welfare offenses: they apply when a statute is silent as to a mens rea requirement, they apply in “limited circumstances,” and the imposition of harsh penalties counsels against finding that a statute establishes public welfare offenses.<sup>119</sup> While the CWA certainly regulates harmful and injurious materials, it also includes

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113. *Id.*

114. *Id.* at 391.

115. *Id.* (quoting *Staples v. United States*, 511 U.S. 600, 618 (1994)).

116. 511 U.S. at 611; *see, e.g.*, *United States v. Weitzenhoff*, 35 F.3d 1275, 1284 (9th Cir. 1994); *see also United States v. Sinskey*, 119 F.3d 712 (8th Cir. 1997).

117. 35 F.3d at 1284 (quoting *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971) (internal citations omitted)).

118. *Staples v. United States*, 511 U.S. 600, 611, 619-20 (1994).

119. *See id.* at 606, 616, 618; *see also United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978).

three express mens rea requirements.<sup>120</sup> Also, the CWA imposes harsh penalties, including felonies.<sup>121</sup> If someone is found guilty of knowing endangerment under the CWA, the maximum prison term is fifteen years, and the maximum fine is \$250,000.<sup>122</sup> If The Protection of Children Against Sexual Exploitation Act of 1977's imposition of ten-year prison terms is too harsh to fit in the category of statutes describing public welfare offenses, then the CWA's imposition of fifteen-year prison terms is certainly too harsh to fit in that category.<sup>123</sup>

The majority of courts of appeals also illogically applies their public welfare offense finding to their "knowing" mens rea analyses.<sup>124</sup> For example, in *Sinskey*, the Eighth Circuit held that the "knowing" mens rea requirement applied only to the conduct underlying the offense, rather than to every element of the offense, in part because the CWA was the type of statute that regulated "obnoxious waste materials."<sup>125</sup> However, the Supreme Court has held that when it determines a statute establishes public welfare offenses, it then dispenses with the mens rea requirement entirely; it does not then apply the mens rea only to certain elements of the offense.<sup>126</sup> The courts of appeals are muddling their faulty public welfare offense analyses with their "knowing" mens rea requirement analyses.

The majority of courts of appeals also seem to ignore entirely Supreme Court precedent holding that the "knowing" mens rea requirement applies to each and every element of the offense, even if it only explicitly modifies certain elements of the offense in the statute.<sup>127</sup> For example, in *Hopkins*, the Second Circuit upheld a jury instruction that it need not find that the defendant knew that his conduct violated a CWA permit condition to find him guilty, even though violating a permit condition was one of the elements of the offense.<sup>128</sup> These CWA criminal provisions are directly analogous to the criminal provision in *X-Citement*

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120. 33 U.S.C. § 1319(c) (2006).

121. *See id.*

122. *See id.* § 1319(c)(3)(A).

123. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72-73 (1994) (citing *Staples*, 511 U.S. at 600); 18 U.S.C. §§ 2252(b), 2253, 2254 (2006).

124. *See, e.g.*, *United States v. Sinskey*, 119 F.3d 712 (8th Cir. 1997).

125. *Id.* at 716 (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 564-65 (1971)).

126. *Staples*, 511 U.S. at 607 n.3 ("[W]e have interpreted statutes defining public welfare offenses to eliminate the requirement of *mens rea*.").

127. *X-Citement Video*, 513 U.S. at 72; *see, e.g.*, *United States v. Hopkins*, 53 F.3d 533, 541 (2d Cir. 1995) (holding that the government was not required to prove Hopkins had knowledge of his act's illegality under the CWA).

128. 53 F.3d at 535-36, 540.

*Video.*<sup>129</sup> Like the criminal provision in *X-Citement Video*, which included a “knowing” mens rea requirement that only modified certain elements of the crime when read naturally, the insertion of the enforcement provisions<sup>130</sup> into the CWA criminal provisions<sup>131</sup> would most naturally be read to apply the mens rea requirement only to the underlying offense, such as “knowingly discharged.”<sup>132</sup> *X-Citement Video*, however, stands for the proposition that the “most natural grammatical reading” is not necessarily the correct one, and that “knowing” should apply to each and every element of the offense.<sup>133</sup> Thus, when the enforcement provisions of the CWA are read into the criminal provisions of the CWA that reference them, the criminal provisions’ mens rea requirements should apply to each and every element of the enforcement provisions, including, for example, knowledge of violating a permit condition.<sup>134</sup>

The courts of appeals most likely have misapplied Supreme Court precedent concerning public welfare offense analysis and “knowing” mens rea requirement analysis because they do not want water polluters to go free simply because the United States cannot prove, for example, that polluters knew they were violating a CWA permit condition. However, were the jury instruction in *Hopkins* to comply with Supreme Court precedent, it would not create an undue burden on the United States to prove that Hopkins “knowingly” violated a permit condition.<sup>135</sup> He had direct corporate responsibility for complying with the permit that he was convicted of knowingly violating.<sup>136</sup> The United States could have been required to prove that Hopkins knew he was violating a CWA permit condition without its case being significantly impaired.<sup>137</sup>

## VII. CONCLUSION

Courts employ both public welfare offense analysis and “knowing” mens rea analysis when interpreting a criminal statute.<sup>138</sup> When courts find that a statute establishes public welfare offenses, they interpret the

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129. See *X-Citement Video*, 513 U.S. at 72; 33 U.S.C. § 1319(c) (2006).

130. See, e.g., 33 U.S.C. § 1311.

131. See, e.g., *id.* § 1319(c)(2).

132. 513 U.S. at 68; see 33 U.S.C. §§ 1311, 1319(c)(2)(A).

133. See 513 U.S. at 64, 70, 72.

134. But see *United States v. Hopkins*, 53 F.3d 533, 541 (2d Cir. 1995).

135. Cf. *id.* at 536; *X-Citement Video*, 513 U.S. at 72.

136. 53 F.3d at 535.

137. See *id.*

138. See, e.g., *Staples v. United States*, 511 U.S. 600, 606-07 (1994); see also *Morissette v. United States*, 342 U.S. 246, 270-71 (1952).

statute as dispensing with a mens rea.<sup>139</sup> This category of offenses is limited in number, usually imposes small fines or short jail sentences, and governs the use of dangerous or offensive products, though this latter factor is not definitive.<sup>140</sup> Where a statute contains a “knowing” mens rea requirement, it applies to each element of the offense.<sup>141</sup> The Supreme Court has yet to hear a CWA criminal appeal from a defendant challenging how a court of appeals applied these two doctrines in his particular case. A majority of courts of appeals have held that the CWA does establish public welfare offenses, and that the “knowing” mens rea requirement does not apply to each and every element of a CWA offense.<sup>142</sup> Only the Fifth Circuit has held both that the CWA does not establish public welfare offenses, and that the “knowing” mens rea requirement applies to each and every element of a CWA offense.<sup>143</sup> The Fifth Circuit has the better approach because it is more in line with Supreme Court jurisprudence, and it better protects defendants from being held criminally liable for what otherwise might be completely innocent conduct.

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139. 511 U.S. at 607 n.3.

140. *Id.* at 606-07, 616, 618.

141. X-Citement Video, 513 U.S. at 72; *see also Morissette*, 342 U.S. at 271.

142. *See, e.g.*, United States v. Sinskey, 119 F.3d 712 (8th Cir. 1997); *see also* United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1994).

143. United States v. Ahmad, 101 F.3d 386, 391 (5th Cir. 1997).