APPLICATION OF THE RULE OF LENITY: THE SPECTER OF THE MIDNIGHT DUMPER RETURNS

I. INTRODUCTION

Criminal enforcement under the Clean Water Act[1] has exploded in the past decade.[2] Courts are meting out tougher fines and longer prison sentences to water polluters.[3]

---

1. The Clean Water Act appears at 33 U.S.C. § 1251-1387 (1988). The criminal enforcement provision appears at § 1319.

2. Susan A. Bernstein, Note, *Environmental Criminal Law: The Use of Confinement for Criminal Violators of the Federal Clean Water Act*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 107 (1991). In fact, 569 corporations and individuals have been indicted and 432 pleas and convictions have been recorded between the years 1983 and 1990. *Id*. at 107-08 n.6.

3. Thomas J. Kelly and Nancy A. Voisin, *Criminal Enforcement of Environmental Laws: Enforcement Trends*, C776 ALI-ABA 21, 27-28 (1992). "The size of fines for environmental

Several justifications exist for the stepped-up criminal prosecution under the Clean Water Act. First, the general public has become increasingly aware of the dangers associated with pollution.[4] In fact, a Harris Poll taken in 1984 revealed that environmental crimes ranked seventh "on the list of severity, ahead of such crimes as armed robbery and bribing public officials."[5] Secondly, environmental agencies have realized that most water polluters have "increasingly accept[ed civil fines and monetary penalties] as part of their operating budgets."[6] An Ohio assistant attorney general noted, "'We have had people in corporations charged with an environmental crime who say that they would pay almost any civil penalty if we dropped the criminal case.'"[7] Another reason for increased criminal enforcement is that "lenient [civil] sanctions encourage [the] perception that environmental transgressions are not considered serious by either society or the criminal justice system."[8]

---

criminal violations has risen steadily . . . ." *Id.* For instance, "Exxon agreed to pay a record-breaking $25 million criminal fine for a misdemeanor under the Clean Water Act." *Id.* (citing United States v. Exxon Corp. and Shipping Co., A90-015 CR (December 19, 1990)). "Ashland Oil was fined over $2 million for a negligent discharge of oil in violation of the Clean Water Act." *Id.* (citing United States v. Ashland Oil Co., 705 F. Supp. 270 (W.D. Pa. 1988)).

In addition, the Federal Sentencing Guidelines of 1987 encouraged courts to issue longer sentences. *Id.* Defendants are also more likely to serve their entire sentence. *Id.* "In 1983, individuals convicted of environmental crimes were sentenced to a total of 11 years in prison, but actually served only five years of confinement. In 1991, such violators were sentenced to a total of approximately 25 years in prison, nearly 23 years of which will actually be served." *Id.* (citing Memorandum from Peggy Hutchins to Neil Cartusciello, Chief, Environmental Crimes Section, Statistics FY 83 Through FY 91 (October 10, 1991)). Specifically, under the Clean Water Act, the longest sentence that had been meted out for a wetlands violation prior to 1987 was seven days. *Id.* Subsequent to the Federal Sentencing Guidelines, a defendant charged with wetlands violation received a 27 month incarceration sentence. *Id.* (citing United States v. John Pozsquai, 897 F.2d 524 (3d Cir. 1990)).

4. Robert A. Milne, Comment, *The Mens Rea Requirements of the Federal Environmental Statutes: Strict Criminal Liability in Substance But Not Form*, 37 BUFF. L. REV. 307, 308 (1988-89). The media is bombarding the public with stories of acid rain, depletion of the ozone layer, and the disasters linked with the landfill disposal of hazardous wastes (i.e., the "Love Canal" incident). *Id*. at 307.

5. *Id*. at 308 (footnote omitted).

6. Paul G. Nittoly, *Environmental Criminal Cases: The Dawn of a New Era*, 21 SETON HALL L. REV. 1125 (1991).

7. Bernstein, *supra* note 2, at 120 (citing *Criminal Enforcement of Environmental Laws Seeks Deterrence Amid Need for Increased Coordination, Training, Public Awareness*, 17 [Current Developments] Env't. Rep. (BNA) 800, 802 (Sept. 26, 1986) (quoting E. Dennis Muchnicki).

8. Brian E. Concannon, Jr., Comment, *Criminal Sanctions for Environmental Crimes and the Knowledge Requirement:* United States v. Hayes International, 786 F.2d 1499 (11th Cir. 1986), 25 AM. CRIM. L. REV. 535, 538 (1988) (footnote omitted).

Perhaps the most persuasive justification for stepped-up criminal enforcement is that such sanctions provide a more powerful deterrent than civil penalties.[9] The social stigma associated with a criminal indictment and the adverse publicity is "as devastating as an actual conviction."[10] Since corporations fear the prospect of a public relations nightmare so much, the Los Angeles city attorney's office has forced convicted companies to advertise their environmental crimes and sentences in newspapers.[11] Moreover, criminal sanctions deter more effectively because an individual executive's knowledge "that he would be personally subject to criminal prosecution" may persuade him to comply with the Clean Water Act.[12] Finally, the Clean Water Act contains listing provisions[13] which automatically ban convicted defendants from contracting with the government until conditions of noncompliance have been rectified.[14] The loss of the government as a potential client is a strong incentive for companies not to transgress criminal environmental laws.

Because of the greater deterrent capability of criminal sanctions, environmental agencies expect to expand their criminal enforcement efforts. Recent expansions include the addition of an Environmental

---

9. Robert A. Milne provides an excellent discussion of the deterrence rationale:

> Deterrence is the fundamental justification for the use of criminal sanctions against corporate officers for environmental violations .... [M]anagers would be highly motivated to seek out and remedy potential transgressions if they knew that there existed a substantial possibility of personal incarceration if their corporation violated an environmental statute.
>
> An oft-voiced objection to this rationale is that studies have been unable to establish a clear link between certainty of criminal conviction and deterrence. Many of these studies were weighted heavily with crimes and criminals less likely to be affected by the threat of incarceration .... An upper-middle class corporate officer would probably be stigmatized to a greater degree by his peers upon a criminal conviction than would a member of a lower socioeconomic class.

Milne, *supra* note 4, at 318-19 (footnotes omitted).

Although the majority view finds criminal sanctions more capable of deterring potential violators, a few believe that civil penalties can be as effective as criminal sanctions if the fines are large enough to be truly burdensome to the company. Bernstein, *supra* note 2, at 120-21.

10. Daniel Riesel, *The Impact of Environmental Criminal Prosecution Upon Civil Litigation*, C427 ALI-ABA 877, 905 (1989).

11. Bernstein, *supra* note 2, at 122-23 n.152.

12. Concannon, *supra* note 8, at 538.

13. *See* 33 U.S.C. § 1368.

14. Kelly & Voisin, *supra* note 3, at 34-35.

Crimes Section in the Justice Department in 1987,[15] and the personnel increase in the EPA's criminal enforcement division from fifty to sixty-five in 1991.[16] The EPA will eventually augment the number of criminal investigators to two hundred.[17]

This comment focuses on recent judicial interpretations of the Clean Water Act which threaten the momentum of criminal enforcement. Certain courts have invoked the rule of lenity to narrowly construe the provisions of the Clean Water Act, thus permitting defendants to escape from its regulatory scope.[18] Part II of this comment examines the role of the rule of lenity in statutory interpretation. Part III reveals the inappropriateness of strictly interpreting environmental statutes such as the Clean Water Act. Part IV describes the recent trend in applying the rule of lenity to Clean Water Act provisions despite past precedents. Part V discusses the impact the rule of lenity has on criminal prosecution of water polluters. In particular, this comment scrutinizes the Second Circuit's application of the rule of lenity in *United States v. Plaza Health Laboratories Inc*.[19] which upset the regulatory distinction between point and non point sources in the Clean Water Act. The Second Circuit essentially ignored jurisprudence on statutory construction in order to arrive at its decision.

II. THE JURISPRUDENCE OF STATUTORY CONSTRUCTION

In the interpretation of statutes, a desirable outcome may be obtained "by a liberal construction of some statutes and a strict construction of others."[20] For instance, courts generally apply a liberal construction to public welfare statutes.[21] These statutes advance and

---

15. R. Christopher Locke, *Environmental Crimes: The Absence of "Intent" and The Complexities of Compliance*, 16 COLUM. J. ENVTL. L. 311 (1991).

16. Kelly & Voisin, *supra* note 3, at 24.

17. *Id*. at 25.

18. *See* Peter D. Isakioff, *First Circuit Limits the Application of the Clean Water Act*, 6 No. 12 Inside Litig. 8 (December 1992) (discussing the First Circuit's application of the rule of lenity in United States v. Borowski in order to reverse convictions under the Clean Water Act); United States v. Plaza Health Laboratories, Inc., 3 F.3d 643 (2d Cir. 1993), *cert. denied*, United States v. Villegas, ___ U.S. ___, 114 S. Ct. 2764 (1994) (reversing convictions based on violations of the Clean Water Act by invoking the rule of lenity).

19. 3 F.3d 643 (2d Cir. 1993), *cert. denied sub nom.* United States v. Villegas, ___ U.S. ___, 114 S. Ct. 2764 (1994).

20. 73 AM. JUR. 2D, *Statutes* § 271 (1974).

21. *See id*. § 281. Public welfare statutes exhibit three primary characteristics. First, they "regulate[] activities that pose serious dangers to public health and safety." Concannon, *supra* note

protect the health, morals, and safety of society. Thus, courts broadly construe them in order to accomplish their objectives.

On the other hand, penal statutes are subject to strict construction.[22] "If the [penal] statute contains a patent ambiguity and admits of two reasonable and contradictory constructions, that which operates in favor of a party accused under its provisions is to be preferred."[23] Recognized as the rule of lenity, this principle of statutory construction compels any ambiguity in the provisions of a statute to be resolved in the favor of the criminal defendant. The judiciary simply may not extend the scope of a penal statute to persons, things, or conduct in the face of an ambiguity.

The rule of lenity safeguards the due process rights of criminal defendants.[24] Due process mandates fair notice to those subject to criminal laws. Thus, the rule of lenity forces courts to dismiss cases against defendants for actions that are not clearly proscribed by a criminal statute. No individual should have to guess whether his behavior is prohibited. The doctrine also encourages legislatures to speak with "special clarity when marking the boundaries of criminal conduct."[25] Furthermore, the rule of lenity minimizes the risk of selective and arbitrary enforcement and maintains the proper balance among Congress, prosecutors, and courts.[26]

Despite the lofty objectives accomplished by strict construction, the rule of lenity does not automatically apply in every criminal case. In order to invoke the rule, a genuine ambiguity must exist.[27] Statutory

---

8, at 542. Secondly, the injury from these activities occurs regardless of the violator's intent (deliberate or accidental). *Id.* Finally, even if the violator did not intend to do the harmful act, he "is at least in a position to prevent its occurrence." *Id.*

22. *See generally* Callanan v. United States, 364 U.S. 587 (1961); Huddleston v. United States, 415 U.S. 814 (1974); Barrett v. United States, 423 U.S. 212 (1976); Lewis v. United States, 445 U.S. 55 (1980); and Bifulco v. United States, 447 U.S. 381 (1980). A typical penal statute is the Violent Crime Control and Law Enforcement Act of 1994. 108 Stat. 1796, Pub. L. No. 103-322. Like most penal statutes, the Act seeks to prevent crime by deterring individuals.

23. 73 AM. JUR. 2D, *Statutes* § 295 (citing United States v. Enmons, 410 U.S. 396 (1973); People v. Stuart, 302 P.2d 5 (1956)). *See also* Staples v. United States, ___ U.S. ___, 114 S. Ct. 1793, 1804 (1994).

24. *See* 73 AM. JUR. 2D, *Statutes* § 295.

25. 62 L.Ed. 2d 827, 828 (1979).

26. *See* United States v. Kozminski, 487 U.S. 931 (1988).

27. *See generally* Perrin v. United States, 444 U.S. 37 (1979), *cert. denied sub nom.* LaFont v. United States, 444 U.S. 990 (1979), *cert. denied sub nom.* Levy v. United States, 444 U.S. 990 (1979); Lewis v. United States, 445 v. U.S. 55 (1980); Bifulco v. United States, 447 U.S. 381 (1980); and Beecham v. United States, ___ U.S. ___, 114 S. Ct. 1669 (1994).

ambiguity arises in situations in which a reasonable doubt persists about the statute's intended scope even after resorting to the statute's language, structure, legislative history, and motivating policies.[28] Therefore, the rule of lenity comes into play "at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers."[29]

III. THE RULE OF LENITY AND THE CLEAN WATER ACT

According to legislative history, statutory language, and relevant case law, the Clean Water Act is a public welfare statute. Therefore, liberal construction of the Act is warranted even though it contains criminal provisions.[30]

A. Legislative History

The legislative history behind the Clean Water Act demonstrates that Congress was not drafting a penal statute. Congress was primarily concerned with preventing the deterioration of the nation's waters so as not to jeopardize public health, wildlife, and the environment.[31] Punishing polluters is only a means to achieve that end.

Prior to the 1972 Amendments, the Subcommittee on Air and Water Pollution made the following findings: ". . . many of the nation's navigable waters are severely polluted . . . [to the extent that they] are unfit for most purposes . . . [Furthermore,] [r]ivers, lakes, and streams are being used to dispose of man's wastes rather than to support man's life and health."[32] As a consequence of these discoveries, the Subcommittee became "increasingly concerned with pollution's effects on public health."[33] Thus, Congress characterized the main objective of the 1972 Amendments to the Clean Water Act as "[s]triving towards and maintaining a pristine state [of water so that it] minimizes [the] burden to

---

28. *See generally* Moskal v. United States, 498 U.S. 103 (1990); and United States v. Granderson, ___ U.S. ___, 114 S. Ct. 1259 (1994).

29. Gozlon-Peretz v. United States, 498 U.S. 395, 410 (1991) (quoting Callanan v. United States, 364 U.S. 587, 596 (1961)).

30. Many public welfare statutes contain criminal provisions. Nevertheless, courts have continued to broadly construe such penal provisions to achieve the overall purposes of the statute. *See infra* Part III.C.

31. 1972 U.S.C.C.A.N. 3668.

32. *Id*. at 3674.

33. *Id*. at 3672.

man in maintaining a healthy environment and which will provide for a stable biosphere that is essential to the well-being of human society."[34]

Congress urged that the "overall thrust and objectives of the program should not be abandoned" during the making of the 1977 Amendments to the Clean Water Act.[35] The national policy continued to be that

> the discharge of waste directly into the nation's waters and oceans is permitted only where they will not interfere with the attainment or maintenance of that water quality which assures the protection of public water supplies and the protection and propagation of a balanced, indigenous population of fish, shellfish, and wildlife, and allows recreational activities, in and on water.[36]

Moreover, the legislative history shows that the means of achieving this paramount goal can be flexible at times. In particular, Congress amended section 1311 of the Act so that dischargers of conventional pollutants could substitute their BAT (best available technology) performance standards with BPT (best practicable technology). This option was conditioned on a demonstration of no interference with the attainment and maintenance of the water quality standards necessary to protect humans and the environment.[37] Publicly owned treatment works could also modify their requirements if they made a similar showing.[38] These modifications reveal that Congress intended to permit flexibility in the means of achieving what it considers to be of utmost importance: maintaining and attaining water quality standards that assure the protection of public health and the environment. It is doubtful that such flexibility would have been available if Congress had intended to draft the Clean Water Act as a penal statute.

B. Statutory Language of the Clean Water Act

The statutory language of the Clean Water Act reflects legislative goals of protecting public health and the environment by preventing water degradation. Section 1251(a) provides that "[t]he objective of this

---

34. *Id.* at 3742.
35. 1977 U.S.C.C.A.N. 4327, 4328.
36. *Id.* at 4330.
37. *Id.* at 4365-66.
38. *Id.* at 4370.

chapter is to restore and maintain the chemical, physical, and biological integrity of the [n]ation's waters."[39] Moreover, the national goal was to eliminate discharge of pollutants into navigable waters by 1985.[40] Congress also enacted an interim goal of water quality that protected the propagation of "fish, shellfish, and wildlife and provides for recreation in and on the water . . . by . . . 1983."[41] In addition, Congress requires the Administrator of the EPA to develop comprehensive programs for water pollution control in which "due regard shall be given to the improvements which are necessary to conserve such waters for the protection and propagation of fish and aquatic life and wildlife, recreational purposes . . . ."[42] When establishing such national programs, the EPA must investigate "the harmful effects on the health and welfare of persons caused by pollutants."[43]

Furthermore, the EPA bears the burden of developing criteria used by states to formulate water quality standards.[44] When generating these criteria for water quality standards, the EPA must depend on "the latest scientific knowledge (A) on the kind and extent of all identifiable effects on health and welfare including, but not limited to, plankton, fish, shellfish, wildlife, plant life, shorelines, beaches, esthetics, and recreation which may be expected from the presence of pollutants in . . . water . . . and (C) on the effects of pollutants on biological community diversity, productivity, and stability . . . ."[45] Congress's concern for protecting the public from water pollution is particularly obvious in section 1321. It authorizes the President to take action when he determines that "there is an imminent and substantial threat to the public health or welfare of the United States . . . because of an actual or threatened discharge of oil or a hazardous substance from a facility[] . . . ."[46]

---

39. 33 U.S.C. § 1251(a).
40. *Id.* § 1251(a)(1).
41. *Id.* § 1251(a)(2).
42. *Id.* § 1252(a).
43. *Id.* § 1254(c).
44. The 1965 Amendments of the Clean Water Act required states to adopt water quality standards designed to protect public health and welfare and enhance the quality of water. William L. Andreen, *Beyond Words of Exhortation: The Congressional Prescription for Vigorous Federal Enforcement of the Clean Water Act*, 55 GEORGE WASH. L. REV. 202, 213 n.69 (1987).
45. 33 U.S.C. § 1314(a)(1).
46. *Id.* § 1321(e).

C. *The Recognition of the Clean Water Act as a Public Welfare Statute by the Courts*

Both legislative history and statutory language demonstrate that Congress drafted the Clean Water Act as a public welfare statute and not a penal statute.[47] Courts have followed this intent by broadly interpreting ambiguous criminal provisions in environmental statutes such as the Clean Water Act.[48]

Rather than incorporating the strict liability standards of earlier public welfare statutes,[49] Congress adopted scienter for the major federal environmental statutes. "Scienter for the purpose of the environmental statutes is the requirement of a 'knowing' violation."[50] Unfortunately, Congress provided no explicit guidelines as to what is a knowing violation. Yet, courts have consistently interpreted these ambiguous culpability requirements broadly to achieve the regulatory purpose of the environmental statutes.[51] Hence, the judiciary views environmental statutes as public welfare statutes.

1. Loosened Culpability Requirements

One of the ways courts have broadly construed scienter requirements is by applying the *Dotterweich* rationale to environmental statutes.[52] When a person is subject to criminal prosecution under a public welfare statute, the government's burden of proof with respect to

---

47. 1972 U.S.C.C.A.N. 3668.

48. *See, e.g.*, Southern Dredging Co. v. United States, 1994 U.S. App. LEXIS 25004 (4th Cir., Sept. 13, 1994); Allsteel, Inc. v. United States EPA, 25 F.3d 312 (6th Cir. 1994); United States v. Sharapan, 13 F.3d 781 (3d Cir. 1994); United States v. Weitzenhoff, 1 F.3d 1523 (9th Cir. 1994).

49. *See* The Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 401 *et seq*. This Act prohibited the discharge of refuse into navigable waters. Riesel *supra* note 10, at 883. "[I]ndividuals could be convicted without specific knowledge of the alleged criminal act." *Id*.

50. *Id*. at 884 (footnote omitted).

51. *See, e.g.*, Southern Dredging Co. v. United States, 1994 U.S. App. LEXIS 25004 (4th Cir., Sept. 13, 1994); Allsteel, Inc. v. United States EPA, 25 F.3d 312 (6th Cir. 1994); United States v. Sharapan, 13 F.3d 781 (3d Cir. 1994); United States v. Weitzenhoff, 1 F.3d 1523 (9th Cir. 1994).

52. United States v. Dotterweich, 320 U.S. 277 (1943). For use the *Dotterweich* rationale by the different circuits, see, e.g., United States v. Burke, 888 F.2d 862, 867 (D.C. Cir. 1989); United States v. Aversa, 984 F.2d 493, 496 (1st Cir. 1993); United States v. Acosta, 17 F.3d 538, 545 (2d Cir. 1994); United States v. Mishra, 979 F.2d 301, 306 (3d Cir. 1992); United States v. Dee, 912 F.2d 741, 745 (4th Cir. 1990); United States v. Straach, 987 F.2d 232, 241 (5th Cir. 1993); United States v. Dean, 969 F.2d 187, 193 (6th Cir. 1992); United States v. Schnell, 982 F.2d 216, 220 (7th Cir. 1992); Cortis v. Kenney, 995 F.2d 838, 840 (8th Cir. 1993); United States v. Weitzenhoff, 1 F.3d 1523, 1530 (9th Cir. 1993); United States v. Hill, 971 F.2d 1461, 1468 (10th Cir. 1992); Kent v. Benson, 945 F.2d 372, 374 (11th Cir. 1991).

the defendant's culpability "is more easily satisfied than it is with traditional crimes."[53] This reduced burden of proof originated in the seminal case of *United States v. Dotterweich*[54] In that case, the United States Supreme Court announced,

> [t]he prosecution to which Dotterweich was subjected is based on a [public welfare statute] whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.[55]

Although *Dotterweich* involved a non environmental statute based on strict liability, its rationale has been extended to criminal provisions of environmental statutes which are also designed to protect public health and welfare.[56] Therefore, the government may satisfy the burden of proof by merely demonstrating the defendant's "intent to commit the act charged, as opposed to his specific intent to violate the law."[57] This can be accomplished by simply "showing that [defendant's] conduct was not done by accident or mistake."[58]

The loosened culpability requirements are clearly visible in cases construing criminal provisions of the Resource Conservation and Recovery Act (RCRA).[59] For example, in *United States v. Hayes Int'l Corp*.,[60] the Eleventh Circuit grappled with the issue of whether "knowingly" applies to the defendant's awareness of the relevant regulations. Hayes International Corp. employed L.H. Beasley at its airplane refurbishing plant.[61] Beasley supervised the disposal of

---

53. Kelly & Voisin, *supra* note 3, at 29.

54. 320 U.S. 277 (1943). The facts of *Dotterweich* involved a prosecution of the defendant and the Buffalo Pharmacal Company for violating the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 333. Specifically, the federal government charged Dotterweich with the "'introduction or delivery for introduction into interstate commerce of any . . . drug . . . that is adulterated or misbranded.'" *Id.* at 278. A person who violates this portion of the Act is guilty of a misdemeanor. *Id.* (citing Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 333 (1938)).

55. *Id.* at 280-81 (citation omitted).

56. Kelly & Voisin, *supra* note 3, at 29.

57. *Id*.

58. *Id*.

59. The Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq*. (1988).

60. 786 F.2d 1499 (11th Cir. 1986).

61. *Id*. at 1500.

hazardous wastes.[62] In 1981, Performance Advantage Inc., a fuel recycler, agreed with Beasley to buy the jet fuel that Hayes drained from planes and to accept other wastes at no charge, including a mixture of paints and solvents.[63] Upon discovery of six hundred illegally disposed drums of paint and solvent mixture, the government instituted a criminal prosecution based on RCRA.[64] The jury convicted both Hayes International and Beasley of violating section 6928(d)(1) of RCRA which prohibits anyone from knowingly transporting any hazardous waste to a facility which does not have the appropriate permits.[65] The district court granted judgments of acquittal notwithstanding the verdict because the government had presented insufficient proof of knowledge to support the conviction.[66]

On appeal, the Eleventh Circuit found sufficient evidence of culpability to reinstate the convictions.[67] In addressing the issue of whether awareness of the relevant regulations is a necessary element of a "knowing violation," the court noted that RCRA is a public welfare statute.[68] The *Hayes* Court then relied on a prior Supreme Court decision[69] and declared that a violator of a public welfare statute such as RCRA is presumed to know all the relevant regulatory provisions.[70] The court found a duty on the part of one operating in this dangerous, heavily

62. *Id*.
63. *Id.*
64. *Id*. at 1501.
65. *Id.* (citing 42 U.S.C. § 6928(d)(1) (1988)).
66. *Id*. at 1499.
67. *Id.* at 1500.
68. *Id.* at 1503.
69. *See* United States v. International Minerals & Chem. Corp., 402 U.S. 558 (1971).
70. United States v. Hayes Int'l Corp. 786 F.2d 1499, 1503 (11th Cir. 1986). Other circuit courts of appeal have also loosened culpability pursuant to *Hayes*. *See* United States v. Dee, 912 F.2d 741, 744-45 (4th Cir. 1990), *cert. denied*, 499 U.S. 919, 111 S. Ct. 1307 (1991) (holding that defendants "knowingly" violated criminal provisions of RCRA even though they did not know that a violation of RCRA was a crime, nor that regulations existed which identified chemicals as hazardous); and United States v. Baytank, Inc., 934 F.2d 599, 613 (5th Cir. 1991) ("'knowingly' means no more than that the defendant knows factually what he is doing . . . it is not required that he know that there is a regulation which says what he is storing is hazardous under the RCRA."). The Eleventh Circuit recently revisited *Hayes*. *See* United States v. Goldsmith, 978 F.2d 643 (11th Cir. 1992). The *Hayes* Court stated in dictum that "to convict under 6928(d)(1), the jurors must find that the defendant knew what the waste was . . . ." 786 F.2d at 1505. In *Goldsmith*, the defendant relied on this dicta to argue that a knowing violation required specific knowledge of the identity of the chemicals being handled. The Eleventh Circuit decided, however, that "a defendant need not know the exact identity of the chemicals disposed of, but only that the chemicals have 'the potential to be harmful to others or to the environment.'" 978 F.2d at 646 (citing United States v. Dee, 912 F.2d at 745).

regulated area to acquaint himself with the applicable regulations.[71] Thus, violators of public welfare statutes cannot plead ignorance of the law because courts presume that they have specific intent to violate the relevant law.

In *United States v. Johnson & Towers Inc.*[72] the Third Circuit merely paid lip service to the scienter requirements of RCRA. The defendants allegedly drained methylene chloride and trichlorethylene from vehicle cleaning operations at the Johnson & Towers plant into a trench which flowed directly into the Delaware River.[73] Apparently, the EPA had never issued a permit nor received an application for one from Johnson & Towers.[74] The defendants were later charged with "knowing" violations of RCRA permitting requirements.[75] The district court held that the government did not have to prove that individual defendants knew they were acting in violation of RCRA.[76] The Third Circuit disagreed. Because of the explicit knowledge requirement in RCRA, the government prosecutors had to demonstrate that the defendants had known that they needed a permit and operated without one.[77]

At this point, it appeared that the Third Circuit returned to the stringent mens rea requirements of traditional penal statutes. The court recalled that public welfare statutes such as RCRA "only [demand] knowledge of the actions taken and not of the statute forbidding them."[78] Therefore, the Third Circuit concluded that "knowledge, including that of the permit requirement, may be inferred by the jury."[79] One commentator remarked that "[b]y allowing juries to infer knowledge . . . the defendant's actual knowledge becomes irrelevant."[80]

---

71. *Hayes*, 786 F.2d at 1502; *See also* Concannon, *supra* note 8, at 542.

72. 741 F.2d 662 (3d Cir. 1984), *cert. denied sub nom.* Angel v. United States, 469 U.S. 1208 (1985).

73. *Id.* at 664.

74. *Id*.

75. *Id.* at 668 (citing 42 U.S.C. § 6928(d)).

76. *Id.*

77. *Johnson and Towers, Inc.*, 741 F.2d at 668-70.

78. *Id.* at 669 (citing United States v. International Minerals & Chem. Corp., 402 U.S. at 563).

79. *Id.* at 670.

80. Milne, *supra* note 4, at 331 (footnote omitted). *See also* United States v. Self, 2 F.3d 1071, 1088 (10th Cir. 1993) ("[W]hile knowledge of prior illegal activity is not conclusive as to whether a defendant possessed the requisite knowledge of later illegal activity, it most certainly provides circumstantial evidence of the defendant's later knowledge from which the jury may draw the necessary inferences . . . .").

Along with RCRA, courts have also recognized the Clean Water Act as a public welfare statute and have loosened culpability requirements accordingly. For instance, in *United States v. Weitzenhoff*,[81] the defendants managed the East Honolulu Community Service Sewage Treatment Plant. They ordered two employees to dispose the excess waste activated sludge generated by the plant "by pumping it from the storage tanks directly into the outfall, that is, directly into the ocean."[82] Consequently, the defendants were indicted for numerous "knowing" violations of the Clean Water Act.[83] The trial court defined "knowingly" in section 1319(c)(2) as only requiring the government to prove that defendants knew they were discharging the pollutants.[84] The government did not have to show that defendants knew they were violating the Clean Water Act.[85]

The Ninth Circuit affirmed the lower court's ruling. Relying on cases interpreting public welfare statutes, the court held that

> [t]he criminal provisions of the [Clean Water Act] are clearly designed to protect the public at large from the potentially dire consequences of water pollution . . . and as such fall within the category of public welfare legislation . . . . [Therefore,] [t]he government did not need to prove that [the defendants] knew that their acts violated the permit or the [Clean Water Act].[86]

---

81. 1 F.3d 1523 (9th Cir. 1993).

82. *Id.* at 1528.

83. *Id.* R. Christopher Locke summarizes the scienter requirements and penalties of the Clean Water Act:

> The Clean Water Act makes it a crime to knowingly or negligently introduce a pollutant into navigable water without a permit, or in violation of any effluent limitation, pretreatment standard, or permit condition. Misdemeanor penalties apply to "negligent" violations, while "knowing" violations carry felony penalties of up to three years' imprisonment and a $50,000 fine per day of violation. A third level of culpability, "knowing endangerment," carries the most severe penalties, providing for up to fifteen years' imprisonment, and fines of up to $250,000 for individuals and $1 million for corporations, where the violation would place another person in imminent danger of death or serious bodily injury.

Locke, *supra* note 15, at 315-16 (footnotes omitted).

84. *Id*. at 1529.

85. *Weitzenhoff*, 1 F.3d at 1530.

86. *Id*.

2. Responsible Corporate Officer Doctrine

On top of lowering the threshold of proof necessary to establish culpability, courts have broadly interpreted scienter requirements in order to impose liability on corporate officials. For example, the responsible corporate officer doctrine contains several components: "a corporate officer who is directly responsible in the corporate management scheme for the conduct in question, and knew that the improper activity in question was occurring, may be held criminally liable . . . ."[87] The Justice Department adopted this doctrine and has made it a policy "to conduct environmental criminal investigation with an eye toward identifying, prosecuting, and convicting the highest ranking truly responsible corporate officials."[88] Courts overwhelmingly endorsed the policy to hold corporate officers criminally liable for their own deeds and for those of their employees.[89] Courts have approved of corporate liability because "the need to protect the public welfare is paramount and that corporate officers must be motivated to seek out and prevent harm to the public."[90]

The judiciary has not hesitated to convict corporate officers under the Clean Water Act. For instance, in *United States v. Distler*,[91] the Sixth Circuit affirmed the conviction against the president of a waste disposal company. The company discharged toxic chemicals into the Louisville sewage system in willful violation of permit and effluent requirements of the Clean Water Act.[92]

In *United States v. Frezzo Bros. Inc.*,[93] mushroom farmers were convicted in their capacity as corporate officers for willfully allowing toxic horse manure to overflow into a local creek.[94] On six occasions runoff from a mushroom compost pile invaded the separate storm water

87. Kelly & Voisin, *supra* note 3, at 29.

88. Riesel, *supra* note 10, at 896 (footnote omitted).

89. *See, e.g.*, Stephens v. Commissioner, 905 F.2d 667 (2d Cir. 1990); United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983); United States v. Ward, 618 F. Supp. 884 (E.D.N.C. 1985); United States v. Conservation Chem. Co., 619 F. Supp. 162 (W.D. Mo. 1985).

90. Bernstein, *supra* note 2, at 124.

91. 671 F.2d 954 (6th Cir. 1981), *cert. denied*, 454 U.S. 827 (1981).

92. *Id*. at 955.

93. 461 F. Supp. 266 (E.D. Pa. 1978), *aff'd*, 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

94. *Id.* at 269.

runoff system and entered White Clay Creek.[95] Examining the legislative history of the Clean Water Act, the district court declared that without a permit it is unlawful for any person to discharge a pollutant.[96] "Because the defendants admit that they never obtained or applied for a permit, any discharge of pollutants by them would be unlawful . . . even though no effluent standards are applicable to them."[97]

Similarly, the Fourth Circuit Court of Appeals upheld the jury's conviction of Law, the sole officer and stockholder of Mine Management, Inc.[98] Law and his company knowingly discharged pollutants into navigable waters without a permit.[99] The Fourth Circuit affirmed his prison sentence of two years and a fine of $80,000.[100]

In general, the scienter requirements have been loosened and expanded to include corporate officials because the courts view environmental statutes as public welfare legislation. The criminal provisions are broadly interpreted to accomplish the objectives of various environmental laws. One commentator explains the rationale behind the relaxed scienter requirements particularly well:

> If ever there existed a situation which mandated the compromise of defendants' individual rights to achieve a greater good, this is it . . . . [T]he personal rights at stake here are not overwhelmingly compelling. The maximum sentences . . . are . . . rarely, if ever . . . assessed. Balanced against this are the continued viability of the earth's ecosystems and the health and well-being of its inhabitants.[101]

IV. A NEW TREND

The legislative history and statutory language of the Clean Water Act clearly reveal Congress' intent to characterize this particular environmental statute as a public welfare statute.[102] Several circuit

---

95. *Id.*
96. *Id.*
97. *Id.*
98. United States v. Law, 979 F.2d 977, 978 (4th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct 1844 (1993).
99. *Id.*
100. *Id.*
101. Milne, *supra* note 4, 333 (footnotes omitted).
102. 1972 U.S.C.C.A.N. 3668.

courts of appeal have complied with Congress' intent and have broadly construed ambiguous provisions of the Clean Water Act in order to further its objectives.[103] Recently, however, two circuits departed from the traditional manner of broadly interpreting Clean Water Act provisions and chose to apply the rule of lenity instead.

A. United States v. Borowski

In *United States v. Borowski*,[104] the First Circuit applied the rule of lenity to the criminal provisions of the Clean Water Act even though it acknowledged that it is a public welfare statute.[105] The defendant instructed his employees to dump spent nickel plating baths and nitric acid directly into the sinks. These wastes eventually wound up in a municipal sewage treatment plant.[106] The company provided no safety equipment to its workers despite the health risks posed by handling of nickel and nitric acid. Employees complained that they had suffered nose bleeds, headaches, chest pains, breathing difficulties, dizziness, rashes, and blisters due to their exposure to those chemicals.[107] The government charged the defendant with knowingly endangering his employees in violation of the Clean Water Act's pre-treatment standard.[108] The defendant appealed his conviction.[109] He argued that the Clean Water Act's knowing endangerment provisions when linked with pre-treatment violations only applied when the danger was to persons downstream in the municipal sewage treatment plant.[110]

The First Circuit ruled for the defendant. The court found the statutory language ambiguous and therefore invoked the rule of lenity.[111] The *Borowski* Court admitted that the rule of lenity did not apply to public welfare statutes.[112] Although the purpose of the litigation was to improve working conditions at the plant, this did not serve the primary

---

103. *See, e.g.*, United States v. Plaza Health Lab., Inc., 3 F.3d 643 (2d Cir. 1993); Passaic Valley Sewerage Commissioners v. Reich, 992 F.2d 474 (3d Cir. 1993); United States v. Cumberland Farms of Connecticut, Inc. 826 F.2d 1151 (1st Cir. 1987).

104. 977 F.2d 27 (1st Cir. 1992).

105. *Id.* at 30.

106. *Id.* at 28.

107. *Id.*

108. *Id.* at 29.

109. *Id.*

110. *Id.* at 28.

111. *Id.* at 31-32.

112. *Id.*

goal of the Clean Water Act. The court found that the primary goal of the Clean Water Act was to restore water quality,[113] and concluded that the rule of lenity did apply when the purpose of the conviction was not the same as the purpose of the public welfare statute.[114]

B. United States v. Plaza Health Laboratories, Inc.

Due to the rule of lenity in statutory construction, the Second Circuit decided that a broad definition of point sources was impermissible in the criminal enforcement of the Clean Water Act.[115] Villegas was the co-owner and vice president of Plaza Health Laboratories, Inc.[116] On at least two occasions, he loaded containers of human blood vials generated at his blood-testing laboratory into his car and headed toward his condominium in Edgewater, New Jersey.[117] Upon arrival, he removed the containers from his car and placed them at the edge of the Hudson River. On another occasion, he put two containers of vials below the water line in a crevice within a bulkhead which divided his residence from the water. On May 26, 1988, a group of school children on a field trip in Staten Island, New York, found a number of vials containing blood washed up on the shore.[118] Although most of the vials had remained in tact, some of them had cracked. Later on that afternoon, New York City workers retrieved seventy vials from the shore.[119] On September 25, 1988, a janitor at Villegas's residence saw a container of blood vials in between the rocks forming the bulkhead. Ten of the recovered vials contained blood tainted with the hepatitis-B virus.[120]

Based on the discovery of the vials, Villegas faced four counts of violating the Clean Water Act in his indictment.[121] Counts II and IV accused "Villegas with knowingly discharging pollutants from a 'point

113. *Id.* at 32.
114. *Id.* at 30-32.
115. United States v. Plaza Health Lab., Inc., 3 F.3d 643, 648-50 (2d Cir. 1993), *cert. denied sub nom.* United States v. Villegas, ___ U.S. ___, 114 S. Ct. 2764 (1994).
116. *Id.* at 643.
117. *Id.* at 644.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*

source' without a permit."[122] The jury rendered a guilty verdict on January 31, 1991.[123]

Subsequently, Villegas motioned for acquittal. The "district judge denied the motion on counts II and IV, rejecting arguments that the [Clean Water] [A]ct did not envision a human being as a 'point source.'"[124] The trial judge sentenced Villegas to two concurrent terms of twelve months imprisonment, one year of supervised release, and a one hundred dollar special assessment.[125]

On appeal, defendant Villegas argued that one element of the crime of knowingly discharging pollutants from a point source had not been proven. He contended that point sources did not extend to human beings.[126] Villegas claimed that "the term 'point source' is ambiguous as applied to him, and that the rule of lenity should result in reversal of his convictions."[127] The Second Circuit responded that the rule of lenity may apply if the statute remained ambiguous as applied to Villegas even after examining the language and structure the Clean Water Act, the legislative history, and judicial interpretations of the term "point source."[128]

The *Plaza Health* Court first examined the language of the Clean Water Act in its determination of the scope of the term "point source." The court noticed that human beings are not among the items listed under the definition of point source.[129] The Second Circuit recognized that the list was not exhaustive. Nevertheless, "the examples given ('pipe, ditch, channel, tunnel, conduit, well, discrete fissure', etc.) evoke images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways."[130] While acknowledging section 1311(a) of the Clean

122. *Id*. (citation omitted).
123. *Id.*
124. *Id.* (citation omitted).
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 646.
129. *Id.* "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).
130. *Plaza Health,* 3 F.3d at 646.

Water Act,[131] the court declared that "[h]ad [C]ongress intended to punish any human being who polluted navigational waters, it could readily have said: 'any person who places pollutants in navigable waters without a permit is guilty of a crime.'"[132] In its continued search for the regulatory scope of the term "point source," the Second Circuit promptly engaged in a cursory review of the legislative history of the Clean Water Act. The Second Circuit observed that the "broad remedial purpose of the [Clean Water Act] is to 'restore and maintain the chemical, physical, and biological integrity of the [n]ation's waters,'"[133] but summarily dismissed it as "only suggestive, not dispositive of [the issue before us]."[134] Focusing solely on the legislative history surrounding the 1972 Amendments to the Clean Water Act, the court discerned that the term "point source" was "intended to function as a means of identifying industrial polluters."[135] Accordingly, the *Plaza Health* Court announced that Congress did not wish to "impose criminal liability on an individual for the myriad, random acts of human waste disposal . . . ."[136]

Since the statute did not expressly include human beings as a type of point source and legislative history did not shed much light on the issue, an ambiguity existed in the eyes of the Second Circuit. Thus, it turned to judicial construction of the term "point source" for guidance. It noticed that liberal interpretation of the term "point source" coincided with civil cases which permit "greater flexibility of [statutory] interpretation to further remedial legislative purposes . . . ."[137] In criminal prosecutions, however, the rule of lenity requires that any ambiguity in the statute be resolved in the defendant's favor.[138] Since the rule of lenity forbids the broad interpretation of ambiguous statutes in the criminal context, the Second Circuit refused to incorporate human beings into the statutory definition of point source.[139] Consequently, a dismissal

---

131. Section 1311(a) states "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).

132. *Plaza Health,* 3 F.3d at 646.

133. *Id.* at 647 (citing 33 U.S.C. § 1251 (a)).

134. *Id.*

135. *Id.* at 648 (citing 1972 U.S.C.C.A.N. 3668, 3744).

136. *Id.*

137. *Id.* (citing Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 922 (5th Cir. 1983)).

138. *Id.* at 649 (citing Crandon v. United States, 494 U.S. 152, 168 (1990); Bifulco v. United States, 447 U.S. 381, 387 (1980); and Huddleston v. United States, 415 U.S. 814, 830-31 (1974)).

139. *Id.*

of the charges against Villegas ensued because the provisions of the Clean Water Act "did not clearly proscribe [his] conduct."[140]

V. IMPACT OF APPLYING THE RULE OF LENITY

Applying the rule of lenity permits water polluters to escape the regulatory scope of the Clean Water Act. *Plaza Health* created a particularly large escape hatch. The impact of *Borowski* is more circumscribed because the case involved very narrow factual circumstances.

A. Mitigating the Impact of Borowski

In *Borowski*, the First Circuit applied the rule of lenity because the purpose of the conviction was not the same as the purpose of the Clean Water Act.[141] Environmental prosecutors could avoid another *Borowski* type ruling by emphasizing in their complaint that defendant's activities degraded the nation's waters and threatened the community's drinking water supply. More importantly, Borowski did not exactly escape all liabilities. He was still held accountable for the working conditions he provided his employees under OSHA regulations.[142]

B. The Ramifications of Plaza Health

The narrow reading of point sources in *Plaza Health* poses a major threat to federal enforcement of the Clean Water Act. In order to understand the pervasive impact of this case, the role of point sources must be examined. "The Clean Water Act divides pollution into two fundamental categories: pollution emanating from point and non-point sources."[143] This distinction creates important regulatory ramifications.

---

140. *Id.*

141. *See supra* notes 111-114 and accompanying text.

142. United States v. Borowski, 977 F.2d 27, 32 (1st Cir. 1992).

143. ANDERSON, MANDELKAR, AND TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 356 (1990). Although a fundamental regulatory distinction, differentiating point from nonpoint sources has always been a complicated matter. The Clean Water Act defines point source as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel . . . ." 33 U.S.C. § 1362(14). From this working definition, it would be simple to infer that nonpoint sources are not discrete, confined conveyances. But the line between point and nonpoint sources is not so clear. If the only distinction between point and nonpoint is the existence of a discrete conveyance, then William Rodgers warns that many nonpoint sources will be incidentally included as a point source. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER 4.9 at 126 (1986). To mention a few examples, runoff from an industrial site may be concentrated in a

Section 301 of the Clean Water Act prohibits the discharge of any pollutant by any person.[144] The statute defines discharge as "any addition of any pollutant to navigable waters from any point source."[145] Thus, the prohibition contained in section 301 applies only to point sources. In order to be exempted from this prohibition, point sources must comply with the stringent permitting provisions of the National Pollutant Discharge Elimination System (NPDES).[146] In addition to the

---

drain prior to discharge; sedimentation, pesticide residues and other pollutants from a farm may be collected in a ditch connected to a waterway; debris from a timber cutting operation may be gathered in a truck before being dumped into a stream. *Id.* Most courts have relied on the "controllability theory" to help them distinguish point sources from nonpoint sources. *Id.* at 151 (citing United States v. Frezzo Bros., Inc., 546 F. Supp. 713 (E.D. Pa. 1982), *aff'd*, 703 F.2d 62 (3d Cir. 1983), *cert. denied*, 464 U.S. 829 (1983); United States v. Oxford Royal Mushroom Products, Inc., 487 F. Supp. 852, 854 (E.D. Pa. 1980); O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642 (E.D. Pa. 1981); Commonwealth of Pennsylvania v. EPA, 618 F.2d 991 (3d Cir. 1980); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 922-25 (5th Cir. 1983); United States v. Homestake Mining Co., 595 F.2d 421 (8th Cir. 1979); and United States v. M.C.C. of Florida, Inc., 772 F.2d 1501, 1506 (11th Cir. 1985)). The controllability theory defines point sources as those activities or incidents "about which something could have been done and for which somebody is distinctly responsible." *Id.* at 151. Thus, the general tendency is to characterize a point source as "any activity that emits pollution from an identifiable point." United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979).

By personally placing containers of contaminated blood vials next to the water, Villegas's conduct became an activity "that emits pollution from an identifiable point." He was distinctly responsible for the illegal discharge because he was the vice-president of the laboratory and he handled the discharging himself. More importantly, Villegas was in the position to prevent the discharge of contaminated blood into the water. He deliberately placed the containers near the water. Under these facts, the Second Circuit should have applied the responsible corporate officer doctrine to affirm Villegas's conviction. *See supra* notes 87-101 and accompanying text.

144. 33 U.S.C. § 1311(a) (1988).

145. *Id.* § 1362(12). The term "pollutant" is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *Id.* § 1362(6).

146. *Id.* § 1342. The NPDES permits establish the effluent limits and compliance deadlines for each discharger. Anderson *et al, supra* note 143, at 357. Anderson, explains the nature of the effluent limits and deadlines:

> The most important effluent limitations are the two-step technology-forcing standards imposed on sewage treatment plants and industrial sources. Originally, sewage treatment plants had to provide secondary treatment by 1977 and had to use the best practicable level of technology over the life of the works by July 1, 1983 . . . but this deadline was repealed in 1981. Likewise, all existing industrial dischargers had to use the best practicable control technology currently available (BPT) by 1977 and the higher best available technology economically achievable (BAT) by 1983 .... [t]he 1977 amendments extended the deadline for BAT to July 1, 1984, and . . . divided pollutants into three classes: conventional, nonconventional, and toxic. BAT is still required for nonconventional and toxic pollutants, but conventional

technology—forcing effluent limits contained in the permits, point sources must also attain water quality standards. In contrast, non point sources are subject to much less grueling standards.[147] They are mainly controlled by the states through section 208 planning processes and land use laws.[148] Thus, the regulatory linchpin of the Clean Water Act is the point source. Unless a source of pollution is characterized as such, it will not have to comply with demanding regulatory provisions of the Clean Water Act.

By limiting the range of point sources in a criminal prosecution to those enumerated in the statute, the Second Circuit is risking the return of the "midnight-dumpers." Since a human being is not within the Second Circuit's definition of a point source, water polluters in that jurisdiction can continue their dumping activities without any major interference from the Clean Water Act by simply sending a person to place wastes at the edge of the water. Although a broader range of point sources are recognized by the Second Circuit in civil suits such penalties will not curb the tide of midnight-dumpers. Water polluters will simply absorb the civil penalties as part of their operating costs and pass them on to their consumers. The legislative history and statutory language of the Clean Water Act strongly suggests that Congress did not intend for such a narrow interpretation of the term "point source."

1. The Legislative History of Point Sources

The legislative history of the Clean Water Act Amendments strongly suggest that Congress did not intend to rigidly interpret the term "point source." From 1948 through 1987, Congress repeatedly strengthened the enforcement provisions of the Clean Water Act and attempted to close loopholes used by polluters to escape regulation.[149]

> pollutants are subject to a less rigorous standard [known as BCT] . . . . In 1987, Congress extended the deadline for compliance to March 31, 1989.

Id. at 357-58.

147. Nonpoint sources are subject to fewer regulations because it is difficult to find someone responsible for such a source. Nevertheless, it is important to discover ways to control these sources because they are "primarily responsible for the wholesale violation of water quality standards found in virtually all states . . . . [I]t is 'ranked first in 26 states and second in 13 others. Forty states reported that nonpoint sources need to be controlled if water quality is to continue to improve.'" Rodgers, *supra* note 143, at 125 (quoting Mid-Decade assessment at 123 (footnote omitted)).

148. 33 U.S.C. § 1288. *See* Anderson et al., *supra* note 143, at 359.

149. *See infra* notes 155-169 and accompanying text.

Thus, in order to assist Congress in its efforts to capture and punish more polluters, courts should use this history to justify a broad reading of the term "point source."

Prior to the 1972 Amendments, federal efforts to compel compliance with the Clean Water Act were almost nonexistent. "In fact, in over twenty years of the program's existence, only one case against a polluter had been prosecuted in federal court."[150] The lack of federal enforcement was due to limited federal authority and time-consuming procedures. For instance, the first comprehensive effort to control pollution was the 1948 Water Pollution Control Act.[151] This act restricted federal enforcement to those situations in which the "'pollution of interstate waters' actually endangered the 'health or welfare' of persons in a state other than the state where the pollution was discharged."[152] Therefore, polluters could avoid federal regulations if they jeopardized the health or welfare of only local residents.[153]

In addition to the restricted scope of federal authority, the enforcement procedures of the 1948 Act were too cumbersome.[154] The federal government had to issue two notices to the discharger to reduce the pollution and hold a public hearing before a suit could be brought.[155] Furthermore, "[s]uch a suit . . . could proceed only with the consent of the state where the pollution originated."[156] If the federal government surpassed these obstacles, "it still faced two hurdles before obtaining judicial relief."[157] First, the government had to show that the public health or welfare had been endangered by a specific polluter.[158] Secondly, the court could have considered the physical and economic feasibility of abating such pollution when issuing its judgment.[159]

Since 1956, Congress has amended the Act several times to strengthen its enforcement provisions and to close any loopholes. After 1956, the federal government no longer had to procure the consent of the

---

150. Andreen, *supra* note 44, at 203 (footnote omitted).

151. Pub. L. No. 80-845 (1948) (superseded 1972).

152. Andreen, *supra* note 44, at 211 (citing Water Pollution Control Act § 2(d) (footnote omitted)).

153. *Id*. (footnote omitted).

154. *Id*.

155. *Id.*

156. *Id.* (footnote omitted).

157. *Id.*

158. *Id.* at 211.

159. *Id*. at 212.

state from which pollution originated in order to commence a federal action.[160] The 1961 Amendments enlarged the federal enforcement scope to include those instances in which interstate pollution endangered the health or welfare of inhabitants of the state in which the discharge occurred.[161]

The Water Quality Act of 1965 continued to augment federal enforcement powers. It required states to adopt health-based water quality standards. It also authorized the Secretary of Health, Education, and Welfare to recommend to the Attorney General that a suit be filed to stop water quality violations.[162]

Congress developed a completely new approach to water pollution control with the 1972 Amendments. The new amendments prohibited the discharge of any pollutant without a permit or in violation of such a permit. Therefore, "[e]nforcement . . . is no longer limited to instances where public health is endangered or where the government can show that a particular source of pollution is responsible for violation of a water quality standard."[163] Moreover, the 1972 Act removed the procedural obstacles of previous legislation and established a variety of civil and criminal sanctions for illegal dischargers.[164]

With each subsequent amendment, Congress intended to capture more polluters within the regulatory scope of the Clean Water Act. Before passing the 1977 Amendments, the Senate declared that "[t]here is no defense for the practice of dumping all of the wastes that this country generates into its rivers, lakes and streams."[165] Then, Congress specified several gaps that it intended to close with the 1977 Amendments. First,

---

160. *Id.* However, these amendments also implemented the conference procedure which caused much delay.

161. *Id.* However, "the federal government could convene an enforcement conference only at the request of the state's governor." *Id.* at 213 (footnote omitted).

162. *Id.* The act had its share of flaws. The procedure did not extend to intrastate water polluters. Moreover, the federal government had to prove which specific polluter violated the water quality standards. *Id.* at 214.

163. *Id.* at 217.

164. The EPA has a variety of enforcement tools available. When a discharge has violated the Clean Water Act, § 1319(a)(1) compels EPA to take action in one of two ways. First, the EPA can notify the discharger and state government of the violation. If the state does not react within thirty days, the EPA can either issue an administrative order exacting compliance from the discharger or bring a civil suit. The second option is described in § 1319(a)(3): EPA can issue a compliance order or institute a civil action without giving notice or awaiting state enforcement. The Clean Water Act also authorizes criminal prosecutions for knowing or negligent violations. *See* 33 U.S.C. § 1319.

165. 1977 U.S.C.C.A.N. 4327, 4330.

Congress declared that "the limited waiver for thermal effluent limitations was not intended to be a major loophole .... [y]et ... administrative interpretation has caused a virtual elimination of control requirements applicable to powerplant[s] and major industr[ial] thermal discharge[rs] .... This is an unacceptable result ...."[166] Thus, Congress wanted to clarify in the 1977 Act that the limited waiver for thermal effluent limits would be granted only when the source could "establish beyond any question the lack of relationship between federally established effluent limitations and ... water quality ...."[167]

Ancillary industrial activities are those that add toxic pollutants into navigable waters. By adding a provision in section 1314 which authorized the EPA to publish regulations for ancillary industrial activities of point sources, Congress again demonstrated its intent to increase federal authority over water polluters.[168] Congress provided direct authority to promulgate regulations which specify treatment requirements, operating procedures, and management practices with respect to these ancillary activities so that it would control "the total toxic pollutant picture."[169]

In 1977, Congress also amended section 1342 of the Clean Water Act to eliminate pollution havens created by less stringent state-issued NPDES permits. The amended provision allows the EPA to issue its own NPDES permit when the state permit conflicts with the objectives of the Clean Water Act. Congress delineated two reasons for changing section 1342. First, it wanted to "avoid the impasse which may now result [under the 1972 Act] when [EPA] objects to the issuance of a permit ... and the [s]tate is unwilling to issue a permit to the point source ... consistent with the ... Act."[170] Secondly, Congress noted that the "EPA has been much too hesitant to take any action[] where [s]tates have approved permit programs" that are inconsistent with the Act.[171]

Congress passed the 1987 Amendments to the Clean Water Act with an eye once again towards catching more sources of pollution and more polluters.[172] In particular, it added section 1329 to impose more

166. *Id.* at 4368.
167. *Id.* at 4334.
168. *Id.*
169. *Id.* at 4377.
170. *Id.* at 4327, 4398.
171. *Id.*
172. 1987 U.S.C.C.A.N. 5.

requirements on non point sources "so as to enable the goals of this [a]ct to be met."[173] Section 1319 expanded to include two new crimes after being amended. Section 1319(c)(1) now subjects those who negligently violate the Clean Water Act to criminal penalties.[174] Furthermore, any person who violates the Clean Water Act knowing that he places another person in imminent danger of death or serious bodily injury is also eligible for fines and imprisonment.[175]

The 1987 Amendments also illustrate Congress's intention to mete out tougher penalties. Civil penalties increased from $10,000 to $25,000 per day of noncompliance.[176] Plus, the Amendments allowed EPA to impose fines for administrative penalties.[177]

The legislative history does not offer much guidance on the distinction between point and non point sources. Congress consistently revised the Clean Water Act to capture more polluters within its regulatory scheme. Yet, the Second Circuit defeated this intent by interpreting the term "point source" narrowly and letting more water polluters escape federal enforcement.[178]

2. The Statutory Language of Point Sources

Congress explicitly indicated in the statutory definition of point source that it is not to be construed narrowly. Section 1362(14) defines point source as "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel . . . ."[179] Congress did not attach to this definition of point source any clause which compels courts to narrowly construe the term in a criminal context. The Second Circuit responded to this argument by stating that "had Congress intended to punish any human beings who polluted navigational waters, it could readily have said: 'any person who places pollutants in navigable waters without a permit is guilty of a crime.'"[180] But that is exactly what Congress did say in section 1311(a). It specifically declares that "the

173. *Id*. at 30.
174. *Id.* at 28.
175. *Id*.
176. *Id*.
177. 1987 U.S.C.C.A.N. at 28.
178. United States v. Plaza Health Lab., Inc., 3 F.3d 643, 646 (2d Cir. 1993), *cert. denied sub nom.* United States v. Billegas, ___ U.S. ___, 114 S. Ct. 2764 (1994).
179. 33 U.S.C. § 1362(14).
180. *Plaza Health*, 3 F.3d at 646 (2d Cir. 1993).

discharge of any pollutant by any person shall be unlawful"[181] except in compliance with permitting provisions. Such unambiguous language renders the Second Circuit guilty of manufacturing an ambiguity in order to invoke the rule of lenity.

VI. CONCLUSION

Application of the rule of lenity to the Clean Water Act is a disturbing new trend with potentially disastrous consequences for the environment. One such consequence is the narrow interpretation of the term "point source" which essentially permits human beings to place pollutants next to water without fear of criminal sanctions. It is difficult to predict how much more the courts will restrict the scope of point sources in future criminal prosecutions. For that matter, it is difficult to predict what other terms in the Clean Water Act might suddenly become ambiguous in the eyes of a court with power to apply the rule of lenity in a criminal case. Moreover, application of the rule of lenity to the Clean Water Act opens up the door for application to other environmental statutes. Criminal defendants may be able to escape the regulatory scope of RCRA, CERCLA, and the myriad of other environmental statutes through the rule of lenity. This may simply be a parade of imagined horribles, but the continued viability of the Earth and the well-being of its inhabitants forces a critical look at the impact of the rule of lenity on environmental statutes. What is certain is that the rule of lenity endangers the successful criminal prosecution of water polluters. Therefore, courts should not apply this rule to the Clean Water Act.

KASTURI BAGCHI

181. 33 U.S.C. § 1311(a).