

**MURKY WATER: THE CLEAN WATER ACT CRIMINAL  
PROVISIONS**  
Camrie Ventry\*

I. Background.....	77
II. Criminal Provisions .....	78
A. Public Welfare Offenses.....	80
B. Technological Changes .....	82
C. Elements of the Clean Water Act.....	84
D. Courts’ Interpretation of the Provisions .....	85
III. Commenter’s Definition.....	90
IV. Corporate Liability.....	93
V. Conclusion.....	100

I. Background

The Federal Water Pollution Control Act was created in 1948 for the purpose of maintaining the chemical, physical, and biological integrity of surface waters.<sup>1</sup> The Act also established, through regulatory authorities, recommendations and standards for wastewater industries with additional regulations that protected fish and helped in controlling toxins.<sup>2</sup> The Federal Water Pollution Control became known as the Clean Water Act (“CWA”) in 1972 after revising and expanding its original purpose.<sup>3</sup> The CWA gave the Environmental Protection Agency (“EPA”) the ability to set wastewater standards and “develop national water quality criteria recommendations for pollutants in surface waters.”<sup>4</sup>

In 1987, Congress realized that the CWA had deficiencies in regulating toxic pollutants and discharges. This led Congress to pass the Water Quality Act of 1987.<sup>5</sup> In passing the Water Quality Act, Congress

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\* Juris Doctor, Loyola University New Orleans College of Law, 2021; B.A., Benedictine College, 2018. I am appreciative of the support from my classmates and professors. I would like to thank my family and friends who have been with me throughout my law school career. I would also like to thank God, because without Him, nothing is possible.

<sup>1</sup> Clean Water Act § 304, 33 U.S.C. § 1314 (2000); 33 U.S.C. §1251 et seq. (1972).

<sup>2</sup> 33 U.S.C. §1251.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Bobby Yu, *Criminal Ambiguity: Redefining the Clean Water Act's Mens Rea Requirements*, 11 Seton Hall Cir. Rev. 327, 336 (2014).

changed the *mens rea* requirement written in the CWA criminal provisions.<sup>6</sup> Legislative history suggests that when changing "willfully" to "knowingly," Congress made clear that one of these linguistic revision goals was to strengthen criminal sanctions.<sup>7</sup> Initially, to be charged with a crime, the criminal provisions stated that an individual must have "willfully or negligently" violated one of the criminal provisions.<sup>8</sup> During the CWA amendment process, the addition of the term "knowingly" replaced the original "willful" standard of intent.<sup>9</sup> Additionally, "knowingly" and "negligently" were separated into two different and distinct sections of the Act.<sup>10</sup> Congress classified the negligent provisions as a misdemeanor, and the knowledge provisions were classified as a felony.<sup>11</sup> This came just after Congress had, for the first time, authorized a felony conviction for violation of an environmental statute.<sup>12</sup>

## II. Criminal Provisions

Both the "knowingly" and "negligently" intent requirements are broad standards.<sup>13</sup> Congress never explained what standard of negligence the revised provisions would require, whether it should be ordinary or gross negligence, or another standard meant explicitly for the CWA. Just as the CWA's negligent provisions leave a substantial amount up to the court's discretion, Congress did not explain how to read the "knowingly" provisions. It also seems that Congress wanted states

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<sup>6</sup> J.T. Morgan, *The Mythical Erosion of Mens Rea*, 23 NAT. RES. & ENV'T 29, 29 (2009).

<sup>7</sup> *United States v. Hopkins*, 53 F.3d 533, 539 (2d. Cir. 1995) (quoting S.Rep. No. 50, 99<sup>th</sup> Cong., 1<sup>st</sup> Sess. 30 (1985)).

<sup>8</sup> *Hopkins*, 53 F.3d 533 at 539.

<sup>9</sup> Morgan, *supra* note 6.

<sup>10</sup> *Hopkins*, 53 F.3d 533 at 539.

<sup>11</sup> *Id.* at 541.

<sup>12</sup> Sidney M. Wolf, *Finding an Environmental Felon under the Corporate Veil: The Responsible Corporate Officer Doctrine and RCRA*, 9 J. LAND USE & ENVT'L. L. 1, 3 (1993); Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, § 13, 94 Stat. 2334 (codified as amended at 42 U.S.C. § 6928 (1988) (The Resource Conservation and Recovery Act (RCRA) was reauthorized in 1980 to make it a felony for any person knowingly treating, storing, or disposing of hazardous waste without a permit.).

<sup>13</sup> Yu, *supra* note 5, at 337.

to have a more significant role in enforcing and defining CWA provisions.<sup>14</sup>

There are three separate sections within the CWA for criminal provisions of knowledgeability: 33 U.S.C. § 1319 (c)(2)(A), 33 U.S.C. § 1319 (c)(2)(B), and 33 U.S.C. § 1319 (c)(3)(A).<sup>15</sup> U.S.C. § 1319 (c)(2)(A) discusses knowingly violating a series of previous provisions, while § 1319 (c)(2)(B) is a criminal provision that is violated when someone introduces a pollutant or hazardous substance when “such a person knew or reasonably should have known could cause personal injury or property damage.”<sup>16</sup> Another violation would be the unlawful discharge of any pollutant from a point source into navigable waters unless the polluter in question obtained the appropriate permit.<sup>17</sup> For example, individual homes do not need a permit when connected to a municipal system or septic system; however, other facilities, such as industrial and municipal plants, need to obtain a license if the discharge will flow directly to surface waters.<sup>18</sup> The criminal provisions in the CWA, when violated, are punishable by a fine or imprisonment, dependent on the offense.<sup>19</sup> For example, suppose an individual violates a provision by knowingly introducing a dangerous substance into a sewer system. In that case, there is a fine “of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment not more than 3 years, or by both.”<sup>20</sup>

Under the CWA, there are a low number of prosecuted cases because of the uncertain meaning of the “knowingly” requirement in the criminal provisions. Under the traditional *mens rea* standard, there are both general and specific intent categories.<sup>21</sup> If the accused is aware of his or her actions but not of the consequences, this is enough to prove general intent.<sup>22</sup> The specific intent standard requires that the accused be aware

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<sup>14</sup> Clean Water Restoration Act, S. Rep. No. 685, 111<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 111-361 (2010).

<sup>15</sup> § 1251; *see* 33 U.S.C. § 1319 (c)(2)(A); 33 U.S.C. § 1319 (c)(2)(B); 33 U.S.C. § 1319 (c)(3)(A).

<sup>16</sup> § 1319 (c)(2)(A); § 1319 (c)(2)(B).

<sup>17</sup> § 1251.

<sup>18</sup> *Id.*

<sup>19</sup> U.S.C. § 1319 (c)(2)(B).

<sup>20</sup> *Id.*

<sup>21</sup> Patrick W. Ward, *The Criminal Provisions of the Clean Water Act as Interpreted by the Judiciary and the Resulting Response from the Legislature*, 5 DICK. J. ENVTL. L. & POL'Y 399, 402 (1996).

<sup>22</sup> *Id.* at 402-03.

that his or her actions were unlawful.<sup>23</sup> Under traditional *mens rea*, the prosecution must prove that the accused had the specific intent to violate the law.<sup>24</sup> However, for public health and safety statutes, such as the CWA, that have a *mens rea* that involves “knowing,” this requirement leaves the prosecution to prove only that the person did not engage in the conduct by accident or mistake.<sup>25</sup>

There must be two elements present to convict someone of a crime: the guilty act and the guilty mind. In the eighteenth century, Blackstone proclaimed that if there is to be a crime, there must first be a “vicious will.”<sup>26</sup> However, because of the lack of clarity surrounding the Clean Water Act’s criminal provisions, there has been confusion and inconsistencies in interpreting the *mens rea* requirement. The Supreme Court in *United States v. Bailey*, a case which involved the escape of several prisoners from confinement, stated that “[f]ew areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime.”<sup>27</sup>

#### A. Public Welfare Offenses

The primary difference between the traditional *mens rea* requirement and the CWA is that most courts view the CWA criminal provisions as public welfare offenses.<sup>28</sup> A public welfare offense is one that has a direct threat to human health or safety.<sup>29</sup> Through defining a statute or provision as a public welfare offense, a person is convicted on a strict liability standard because of the harm to the public at large.<sup>30</sup> A charge of a public welfare offense gives the court a special standard. There is no longer a need for traditional *mens rea* requirements, as the activity itself makes the individual guilty.<sup>31</sup> Multiple courts have found

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<sup>23</sup> *Id.* at 403.

<sup>24</sup> Joseph G. Block & Nancy A. Voisin, *The Responsible Corporate Officer Doctrine- Can You Go to Jail for What You Don't Know*, 22 ENVTL. L. 1347, 1357 (1992).

<sup>25</sup> *See id.* at 1357-58.

<sup>26</sup> *Morissette v. United States*, 342 U.S. 246, 251 (1952) (quoting 4 Bl. Comm. 21).

<sup>27</sup> *United States v. Bailey*, 444 U.S. 394, 403 (1980), *see also* Ward, *supra* note 21 at 403.

<sup>28</sup> Yu, *supra* note 5, at 338.

<sup>29</sup> Morgan, *supra* note 6, at 31.

<sup>30</sup> Yu, *supra* note 5, at 328.

<sup>31</sup> *Staples v. United States*, 511 U.S. 600, 606 (1994).

that public welfare statutes uphold due process because the defendant should have had awareness that there would be strict regulations when handling a dangerous or hazardous substance.<sup>32</sup>

In *United States v. Weizenhoff*, the defendants, the treatment plant managers, were charged with a CWA violation because they instructed employees to dump waste-activated sludge directly into the ocean.<sup>33</sup> Specifically, in finding the defendants guilty, the court ruled 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.”<sup>34</sup> The court’s statement in *Weizenhoff* puts the defense attorneys’ backs against the wall.

Most environmental doctrines are seen as public welfare statutes.<sup>35</sup> For example, the Resource Conservation and Recovery Act (“RCRA”) has a long history, which demonstrates that its purpose is to protect the public’s safety and welfare.<sup>36</sup> Since the nineteenth century, public welfare offenses have evolved, and this evolution is attributed to the steady increase in technology and industrial advancements.<sup>37</sup> Public welfare offenses pose “no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize.”<sup>38</sup> However, with this standard, the Supreme Court in *Morissette v. United States* stated that the penalties for violating a

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<sup>32</sup> See *United States v. Balint*, 258 U.S. 250, 252-53 (1922); *Morissette v. United States*, 342 U.S. 246 (1952); *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558, 564-65 (1971); see also *United States v. Dotterweich*, 320 U.S. 277, 281 (1943) (“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.”).

<sup>33</sup> *United States v. Weizenhoff*, 35 F.3d 1275, 1281-82 (9th Cir. 1993).

<sup>34</sup> *Id.* at 1286; *Ward*, *supra* note 21, at 400.

<sup>35</sup> *Block & Voisin*, *supra* note 24, at 1350; See Clean Water Act (CWA), 33 U.S.C. § 1251(a) (1988); Clean Air Act (CAA), 42 U.S.C.A. § 7401(a)(2), (b)(1) (West Supp. 1991); RCRA, 42 U.S.C. §§ 6901(a)(3), (b), 6902(a), (b) (1988); Toxic Substances Control Act, 15 U.S.C. § 2601(a)(2), (b)(2) 1988).

<sup>36</sup> *Block & Voisin*, *supra* note 24, at 1350; 42 U.S.C. §§ 6901-87 (1988).

<sup>37</sup> *Iowa City v. Nolan*, 239 N.W.2d 102, 104 (Iowa 1976) (stating “These are public regulations that arose in the post-industrial revolution era to cope with the complexities of the then-emerging industrialized world”).

<sup>38</sup> *Id.* (quoting *Morissette v. United States*, 342 U.S. 246, 255-56 (1952)).

public welfare statute are "relatively small, and conviction does no grave damage to an offender's reputation."<sup>39</sup>

### B. Technological Changes

Rapid changes in technology and agriculture have created additional frustrations for those who already find the provisions vague and uninterpretable.<sup>40</sup> As modern-day technology swiftly advances, there are increased difficulties in defining public welfare offenses.<sup>41</sup> The phenomena of "emerging contaminants" are examples of how new technology changes are creating unforeseen debates.<sup>42</sup> These contaminants are called "emerging" because "new analytical technologies and methods are now making trace amounts detectable."<sup>43</sup> The contaminants are defined as "potentially toxic substances whose effects or presence is poorly known..."<sup>44</sup> The potential harm from these newly found contaminants is still unknown, which causes more debate as to whether the misuse of the new contaminants constitutes an environmental offense.<sup>45</sup>

On the other hand, technology has made it easier to advance the protection and preservation of the country's social and economic status, which leads to a growing question as to what now constitutes a direct, widespread impact. Currently, in society, pollution is permitted to a certain extent. However, this does not mean that pollution itself is good for the environment.<sup>46</sup> Unfortunately, for society to continue to function properly, pollution is a necessary component.<sup>47</sup> Pollution control will have to continue to keep progressing towards a better and more advanced way of living. This is one example of the frustration that comes with balancing technological changes with environmental concerns.

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<sup>39</sup> *Morissette*, 342 U.S. at 256.

<sup>40</sup> See Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 66-69 (1933).

<sup>41</sup> *Id.* at 69.

<sup>42</sup> Keith A. Johnston & Kristine Sendek-Smith, *Muddy Waters: Recent Developments under the Clean Water Act*, 24 NAT. RESOURCES & ENV'T 31, 37 (2010).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* (quoting Anders Hove, *Emerging Contaminants: The New Front on the Fight for Clean Water* (RAND, unknown date)).

<sup>45</sup> *Id.*

<sup>46</sup> See Morgan, *supra* note 6, at 30.

<sup>47</sup> *Id.*

Some believe the modern-day definition of a public welfare offense should require some type of mental culpability.<sup>48</sup> With its new and complex machinery, the Industrial Revolution increased the number of workers subjected to injury and harm.<sup>49</sup> The simpler times before the congestion of people, traffic, and pollution within city limits have passed.<sup>50</sup> The court in *Morissette* made itself very clear when it held that “[s]uch dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries...that affect public health, safety or welfare.”<sup>51</sup>

From 1987 onward, there have been no amendments to the CWA, and since that time many of the advancements made could alter the reading of the criminal provisions. New agricultural practices created increase difficulties in regulation practices for the run-off of chemicals to surface waters.<sup>52</sup> According to Bill Holman, director of state policy at Duke University’s Nicolas Institute for Environmental Policy Solutions, the CWA is “one of the most successful environmental laws ever created.”<sup>53</sup> However, Ken Greenberg, chief of the EPA CWA compliance office for Region 9, and Holman, while applauding the enacted legislation, agree that the Act still needs vast improvement.<sup>54</sup> As of 2012, thirty-five percent of American waters are still unfit for fishing or swimming, and the CWA does not provide for the legal regulation of non-point sources, such as run-off from urban stormwater or farms.<sup>55</sup>

There is one path to define what should constitute a direct threat to the public’s health and safety. It is a two-part test that first examines the violated statute.<sup>56</sup> Suppose the statute is purely regulatory, and the injury is widespread and public. In that case, it should be deemed a public welfare offense if proof of guilt would be hard to find to prevent further violations.<sup>57</sup> The growing complex social order creates a

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<sup>48</sup> See Sayre, *supra* note 40, at 68-70.

<sup>49</sup> See *Morissette*, 342 U.S. 246 at 253-54.

<sup>50</sup> *Id.* at 254.

<sup>51</sup> *Id.*

<sup>52</sup> Russell McLendon, *Clean Water Act Is 40 Years Old: Landmark Water Law Hits A Milestone During Critical Time*, Huffington Post, (Sept. 11, 2012), [http://www.huffingtonpost.com/2012/09/11/clean-water-act-2012\\_n\\_1874980.html](http://www.huffingtonpost.com/2012/09/11/clean-water-act-2012_n_1874980.html).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Sayre, *supra* note 40, at 62.

<sup>57</sup> *Id.*

necessity for public welfare offenses.<sup>58</sup> However, individual interest needs to be weighed against public concern. The weight between these two concerns shifts back and forth like a pendulum, which leaves a healthy balance challenging to find.<sup>59</sup>

### C. Elements of the Clean Water Act

One huge problem in discussing the knowledge requirement for felony convictions under the CWA is if *mens rea* applies to all elements or only some aspects of the criminal provisions.<sup>60</sup> For example, 33 U.S.C. § 1319 (c)(2)(A)-(B) provides that any person who “knowingly violates [section number]...shall be punished by a fine...or by imprisonment.”<sup>61</sup> One of the sections listed in section 1321(b)(3).<sup>62</sup> This provision has multiple components; the first element refers to the discharge of hazardous substances, while the second element is indicative of the discharge being “into or upon navigable waters of the United States.”<sup>63</sup> This leaves a question mark as to whether an offender must know that he or she is discharging a hazardous substance, only discharging a substance into navigable waters, or knowledge of both elements.

The Supreme Court, in *Liparota v. United States*, addressed this issue.<sup>64</sup> The court had to look at the word “knowingly” in regards to a food stamp violation and see if it applied to the words immediately following it, which were “uses, transfers, acquires, alters, or possess,” or if “knowingly” also modified the phrase “in any manner not authorized.”<sup>65</sup> The distinction determined if the defendant had to know that the statute did not authorize his actions.<sup>66</sup> The defendant was the co-owner of a restaurant who could not accept food stamps under the Department of Agriculture’s regulations.<sup>67</sup> At trial, the government proved that the defendant accepted food stamps from an undercover agent for “substantially less” than the food stamps were worth.<sup>68</sup> The

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<sup>58</sup> *Id.* at 67.

<sup>59</sup> *Id.* at 68.

<sup>60</sup> Yu, *supra* note 5, at 346-37.

<sup>61</sup> 33 U.S.C. § 1319(c)(2)(A)-(B).

<sup>62</sup> § 1319(c)(2)(A).

<sup>63</sup> § 1321(b)(1).

<sup>64</sup> *Liparota v. United States*, 471 U.S. 419, 424 (1985).

<sup>65</sup> *Id.*; *see also* Ward, *supra* note 21, at 403.

<sup>66</sup> *Liparota*, 471 U.S. at 421; *see also* Ward, *supra* note 21, at 404.

<sup>67</sup> *Liparota*, 471 U.S. 419 at 421.

<sup>68</sup> *Id.*

court ultimately held that the defendant had to know that his actions violated the regulation.<sup>69</sup> Congress has stated that it would be explicitly stated in the criminal provisions if it meant to encompass stricter standards.<sup>70</sup> However, critics are quick to respond to that ultimatum. When the intent standards changed, Congress could not have foreseen the societal changes that occurred over recent decades.<sup>71</sup>

#### D. Courts' Interpretation of the Provisions

The question now turns to the courts. How do courts define the “knowingly” intent in the CWA? At present, there is a division among the courts on how to define “knowledge.” Most courts look to Congress’s intent, which leaves room for interpretation because Congress never gave an in-depth definition of what was meant by the *mens rea* for the criminal provisions. In its evaluation, a court must seek the proper “inference of the intent of Congress.”<sup>72</sup>

A point of contention within the courts is deciding whether there needs to be knowledge of the regulation. This requires the courts to decide what type of material or activity in and of itself is dangerous enough for there to be no requirement to know of the law or regulation. Current jurisprudence suggests that the focus is on how much damage the material or activity causes to the public. If there is a dangerous substance involved, most courts believe that it is enough to convict.<sup>73</sup>

*Morissette v. United States* is one of the first cases to determine what regulations require knowledge of the regulation itself. In this case, the defendant took three tons of used bomb casings from a government bombing range. Subsequently, pursuant to 18 U.S.C. § 641, the defendant was charged with embezzling, stealing, purloining, or knowingly converting government property.<sup>74</sup> The defendant argued that the spent bomb casings were not stored in an orderly fashion;

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<sup>69</sup> *Id.* at 433.

<sup>70</sup> Kirk F. Marty, *Criminal Prosecution of Responsible Corporate Officers and Negligent Conduct under Environmental Law*, 23 NAT. RESOURCES & ENV'T 33, 36 (2009) (quoting *United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999)).

<sup>71</sup> Yu, *supra* note 5, at 328.

<sup>72</sup> *Staples*, 511 U.S. at 605 (quoting *Balint*, 258 U.S. at 253).

<sup>73</sup> *Int'l Minerals & Chem. Corp.*, 402 U.S. at 564-65; *Liparota*, 471 U.S. at 433-34; *United States v. Kelley Technical Coatings, Inc.*, 157 F.3d 432, 444 (6th Cir. 1998).

<sup>74</sup> *Morissette*, 342 U.S. at 247-48.

instead, the casings were thrown into piles that had been accumulating for over four years and exposed to harsh weather conditions, which caused them to rust.<sup>75</sup> The defendant maintained that even though he was aware the casings were government property, he believed they were abandoned; thus, he did not have the requisite intent to be charged with the knowing conversion of Government property.<sup>76</sup> Ultimately, the Court reversed the Sixth Circuit decision and found that the defendant did not have the criminal intent required; therefore, he could not be guilty solely because he completed the act of taking the casings.<sup>77</sup>

In the case of *United States v. Kelley Technical Coatings, Inc.*, the defendant, an industrial paint manufacturing company, was convicted of “knowingly storing and disposing of hazardous waste without a permit,” which violated RCRA.<sup>78</sup> The jury did not need to find that the defendants knew of the regulation, only that they knowingly treated, stored, or disposed of any hazardous waste.<sup>79</sup> The company regularly handled materials including toluene, ethylbenzene, lead, nickel, and a variety of other paint components.<sup>80</sup> However, the company had never applied for a permit to store the waste on-site.<sup>81</sup> Between 1986 and 1989, the company arranged for a licensed hazardous waste disposal company to remove some of the drums that contained hazardous waste.<sup>82</sup> However, to save money, the defendants had the waste disposal company come on-site and drain the drums’ hazardous waste.<sup>83</sup> After the drums were drained, the employees were told to consolidate whatever waste remained into one drum.<sup>84</sup> In the process of putting the remaining residue into one drum, the hazardous waste spilled, which, in part, led to a RCRA violation.<sup>85</sup> The court noted that it and every other court of appeals rejected the argument of “knowledge of illegality.”<sup>86</sup> Undoubtedly, it maintained its stance and held that if the

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<sup>75</sup> *Id.* at 247.

<sup>76</sup> *Id.* at 248-49.

<sup>77</sup> *Id.* at 275-76.

<sup>78</sup> *Kelley Technical Coatings, Inc.*, 157 F.3d at 435.

<sup>79</sup> *Id.* at 437-439.

<sup>80</sup> *Id.* at 435.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 435-36.

<sup>83</sup> *Kelley Technical Coatings, Inc.*, 157 F.3d at 436.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

material is hazardous or dangerous, there should be the knowledge that it is regulated.<sup>87</sup>

In *Liparota v. United States*, the defendant was found not guilty because food stamps in and of themselves are not inherently dangerous.<sup>88</sup> The defendants in *Kelley Technical Coatings* presented this case as the foundation of their argument.<sup>89</sup> The court in *Kelley* distinguished itself from *Liparota* by voicing that food stamps are not a dangerous threat to the public; therefore, there is no reason to subject someone to stringent regulations by requiring a person to know that food stamps are regulated.<sup>90</sup> This holding is consistent with most federal cases that have ruled that if the substance is not inherently dangerous, there must be knowledge of the regulation because the material is not in and of itself inherently dangerous.<sup>91</sup>

One year before the CWA passage, the court in *United States v. International Minerals & Chemical Corp.*, tackled the *mens rea* requirement for criminal punishment.<sup>92</sup> The defendant violated 49 C.F.R. 173.427 by shipping sulfuric and hydrofluosilicic acid in interstate commerce and failing to show the required shipping papers.<sup>93</sup> The purpose of the regulation to require a shipping paper with a description of the shipment contents was to promote safe transportation of “corrosive liquids.”<sup>94</sup> Before the court, the question was if the defendant had to have knowledge of the specific regulation to be found guilty.<sup>95</sup> It held that the defendant only needed to know that he was transporting sulfuric and hydrofluosilicic acid to violate the regulation.<sup>96</sup>

The Court, in its holding, stated where “dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that is in possession of them or dealing with them must be presumed to be aware of the regulation.”<sup>97</sup> In its opinion, the Court stated that ignorance is not

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<sup>87</sup> *Id.* at 439.

<sup>88</sup> *Liparota*, 471 U.S. at 432-33.

<sup>89</sup> *Kelley Technical Coatings, Inc.*, 157 F.3d at 437.

<sup>90</sup> *Id.*

<sup>91</sup> *Liparota*, 471 U.S. at 432-33.

<sup>92</sup> *International Minerals & Chem. Corp.*, 402 U.S. 558, 559 (1971).

<sup>93</sup> *Id.* at 559.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 560.

<sup>96</sup> *Id.* at 565.

<sup>97</sup> *Int'l Minerals & Chem. Corp.*, 402 U.S. at 565.

a defense; therefore, ignorance of the regulation will not hold up in court.<sup>98</sup> Adding to its opinion, the Court stated, “the fact that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion.”<sup>99</sup> However, the dissent maintained that in reading the statute, the plain language stated that an offense occurs when someone “knowingly violates any such regulation.”<sup>100</sup> Therefore, according to the dissent, there must be knowledge of the specific regulation.<sup>101</sup>

There are many variables for courts to consider when deciphering the “knowingly” criminal provisions. One key point on which some cases do turn is the severity of the imposed penalty. In *Staples v. United States*, the defendant unlawfully possessed an unregistered machine gun, which violated the National Firearms Act.<sup>102</sup> The judges had to determine if the defendant needed to know his weapon’s characteristics that made it a “firearm” under the Act for him to be convicted.<sup>103</sup> After much deliberation, the court held that the Government is required to prove that the defendant knew the features of his weapon that made it a “firearm” under the Act.<sup>104</sup>

The court’s reasoning was, in part, based on the severity of the defendant’s punishment if convicted.<sup>105</sup> The holding made it clear that if a felony offense was involved, there should be great caution in defining the crime as a public welfare offense.<sup>106</sup> It noted that penalties need to be taken into consideration, especially when the penalties are more severe.<sup>107</sup> This reasoning came after the determination that for the imposition of a severe penalty, it is unlikely that Congress intended to eliminate the traditional *mens rea* standard.<sup>108</sup> Under the CWA, a violation of a criminal provision with “knowingly” as the *mens rea* is a felony.<sup>109</sup>

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<sup>98</sup> *Id.* at 563.

<sup>99</sup> *Id.* at 564 (quoting *Morissette*, 342 U.S. at 250).

<sup>100</sup> *Id.* at 556.

<sup>101</sup> *Id.*

<sup>102</sup> *Staples*, 511 U.S. at 602.

<sup>103</sup> *Id.* at 604.

<sup>104</sup> *Id.* at 619.

<sup>105</sup> *Id.* at 616.

<sup>106</sup> *Id.* at 618.

<sup>107</sup> *Staples*, 511 U.S. at 618.

<sup>108</sup> *Id.*

<sup>109</sup> *See* U.S.C. § 1319 (c)(2)(B).

Furthermore, in cases specifically dealing with the CWA, courts have held that there is no requirement to know that specific actions violated the Act, but only that the defendants were aware of the nature of their actions and performed them intentionally.<sup>110</sup> In *United States v. Hopkins*, the defendant was charged with one count of knowingly falsifying and tampering with his company's discharge sampling methods.<sup>111</sup> This charge violated CWS requirements.<sup>112</sup> The State of Connecticut's Department of Environmental Protection ("DEP"), which administered the CWA provisions, required the defendant, the vice president for a company that manufactured metal shims, to limit the quantity of zinc and other substances that the company put into the river.<sup>113</sup>

The defendant had to ensure that the weekly testing of zinc concentrates did not exceed 2.0 milligrams per liter.<sup>114</sup> However, some samples exceeded that limit, and to avoid fines, the defendant instructed employees to either discard the samples or dilute them.<sup>115</sup> This way, the zinc would be within the proper statutory concentration limits.<sup>116</sup> The court held that the prosecution only needed to prove that the defendant knew the nature of his acts and performed them intentionally; they were not required to prove that he knew those acts violated the CWA or any particular provisions of that law.<sup>117</sup> In concluding, the court looked at the legislative history and held that Congress meant for this specific section of the CWA to be violated "if the defendant's act were proscribed, even if the defendant was not aware of the proscription."<sup>118</sup>

More judicial opinions dealt with the same violations under the Transportation and Explosives Act. In 1960, those decisions were brought before Congress by the Interstate Commerce Commission, which sought to have Congress strike out the word "knowingly" or to substitute the words "being aware that the Interstate Commerce Commission has formulated regulations for the safe transportation of

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<sup>110</sup> *Hopkins*, 53 F.3d at 541.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 534-35.

<sup>114</sup> *Id.* at 535.

<sup>115</sup> *Hopkins*, 53 F.3d at 541.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 534.

<sup>118</sup> *Id.* at 540.

explosives and other dangerous articles.”<sup>119</sup> The Senate voted to adopt the second option because deleting “knowingly” from the Act would create absolute liability, which the Senate was not ready to adopt, calling it “too stringent.”<sup>120</sup> The House refused to accept a change in the language with a note that because the penalties were substantial, the word “knowingly” needed to be kept for purposes of a higher *mens rea*.<sup>121</sup> The modern-day Supreme Court, as stated in *International Minerals*, has effectively taken the word “knowingly” out of the Act, something that the Legislative branch in 1960 was unwilling to do.<sup>122</sup> Suppose Congress made this decision regarding the Transportation and Explosives Act. In that case, this may provide Congress with the framework of interpreting the CWA’s knowing criminal violations in a lenient manner.

However, knowledgeable offenses also depend on the issuance of a permit, in which case, there is a heightened awareness of the existence of regulation.<sup>123</sup> In *United States v. Hopkins*, the defendant intentionally tampered with wastewater testing and falsified reports to Connecticut’s DEP.<sup>124</sup> The Second Circuit held, for one of the contentions, that the defendant did not have to know his actions violated a specific provision or permit, only that the defendant knew the nature of his conduct and acted intentionally.<sup>125</sup> The panel also doubted that Congress would encourage both knowledge of the law and the facts.<sup>126</sup> A pertinent fact that led to this decision was the issuance of a governmental permit,<sup>127</sup> which raised awareness of an existing regulation.<sup>128</sup>

### III. Commenter’s Definition

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<sup>119</sup> *Int’l Minerals & Chem. Corp.*, 402 U.S. 558 at 567; See H. R. Rep. No. 1975, 86th Cong., 2d Sess., 10-11.

<sup>120</sup> *Int’l Minerals & Chem. Corp.*, 402 U.S. 558 at 567; S. Rep. No. 901, 86th Cong., 1st Sess., 2-3.

<sup>121</sup> *Int’l Minerals & Chem. Corp.*, 402 U.S. 558 at 567-68; H. R. Rep. No. 1975, 86th Cong., 2d Sess., 2.

<sup>122</sup> *Int’l Minerals & Chem. Corp.*, 402 U.S. at 567-68.

<sup>123</sup> *Hopkins*, 53 F.3d at 539.

<sup>124</sup> *Id.* at 534-35.

<sup>125</sup> *Id.* at 541.

<sup>126</sup> *Id.* at 538.

<sup>127</sup> *Id.* at 541.

<sup>128</sup> *Id.* at 539.

Based on Congress's intent at the time of the revision, coupled with court rulings over the years, this comment proposes a fair method of assessing “knowingly” in the CWA’s criminal provisions. First, most federal courts use the same methodology when it comes to deciphering the meaning of “knowingly,” even if they arrive at different conclusions.<sup>129</sup> Thus, the most prudent route is to base the definition of “knowingly” on the federal courts’ standards.<sup>130</sup> The federal courts’ decisions set the interpretation standard for “knowingly” criminal provisions and provided a uniform structure for state courts to implement consistently. Regarding state courts, some states, such as Florida and California, would be more apt to bring charges against individuals who violate the CWA. In contrast, more conservative states, like Texas, may not have as many cases brought before the court involving the CWA’s criminal provisions. Furthermore, some states have larger bodies of water, which raises the possible prosecution rate for environmental violations. Deference to the federal courts would substantially decrease the amount of bias and prejudice possible, and the standard will avoid prejudicing or giving an advantage to any one state. Above all, the state courts should be consistent with the federal level’s standard not to have a huge differential between the outcome at the state level versus the federal level.

Conviction of a CWA criminal provision violation should be made on a case-by-case basis, with several factors considered. The first factor is the severity of the penalty. If the court finds that the imposed penalty for the violation is of great magnitude, it should lean toward requiring the prosecution to prove that, to be found guilty, the accused knew the regulation. If the punishment is small, such as a misdemeanor carrying a fine or less than a year of jail time, the court would be wise to find that the accused only knew that the act itself was wrong. The reasoning for this decision is that when comparing a small fine to the environmental impact of the defendant’s actions, it is likely that the public impact will outweigh the severity of the penalty.

The second factor a court should consider is whether the material involved is inherently dangerous. As seen in *Liporata*, when the material is not inherently hazardous or dangerous, there is no

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<sup>129</sup> See generally *Int’l Minerals & Chem. Corp.*, 402 U.S. at 569; *Liparota v. United States*, 471 U.S. 419 (1985); *United States v. Kelley Tech. Coatings*, 157 F.3d 432 (6th Cir. 1998); *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993).

<sup>130</sup> See Colburn T. Cherney & Karen M. Wardzinski, *State and Federal Roles under the Clean Water Act*, 1 NAT. RESOURCES & ENV’T. 19 (1986).

requirement to know the regulation.<sup>131</sup> Most courts already assess if the material was toxic and dangerous, and this analysis should be required of courts in the future. If the material is dangerous, the court should be more apt to hold that there is no need for knowledge of the regulation; the very fact that an individual is handling hazardous material should put that person on notice that there are regulations in place. Circumstantial evidence in these cases will be crucial to determine if the accused knew the substance or material and of the violated regulation. Furthermore, the individual should also be aware that a heightened level of responsibility is present when in charge of inherently toxic and dangerous substances; therefore, a charge can be brought against that person for any violation that occurs, regardless of knowledge level.

Public welfare offenses, as previously stated, carry a standard of strict scrutiny. When applying strict scrutiny, there is no need for the prosecution to prove knowledge of the hazardous substance, regulation, or permit. The act itself is enough to find someone guilty of the crime. This comment is not in favor of readily classifying the CWA's criminal provisions as public welfare offenses. The criminal provisions center around protecting the environment with the possibility of a direct and widespread impact effect when there is the occurrence of a violation.

However, this comment finds that there are too many variables that surround each individual case to make a blanket classification of the entire section of criminal provisions. Classification of the criminal provisions as public welfare offenses takes away the courts' ability to look at circumstantial evidence, the severity of the crime, and the potential imposed penalty. A fine line exists between the need to weigh the costs of subjecting someone to a penalty and the evil of exposing innocent people to the harm caused by the person's actions.<sup>132</sup> Moreover, stripping an individual's ability to defend against high penalties when the need for deterrence is minute and when the facts of the case show little widespread impact would impede that person's constitutional rights and most likely cause more disagreements. Additionally, one must consider public policy concerns when forming a definition.

If the court finds that knowledge of the regulation is a requirement to ensure a conviction, knowledge of each element will determine if the accused will be found guilty. As previously stated, there are multiple elements to specific provisions that could potentially alter a court's holding based on if "knowingly" applies to all or only some of the elements to the criminal provisions. To determine what elements of a

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<sup>131</sup> *Liparota*, 471 U.S. at 432-33.

<sup>132</sup> *Balint*, 258 U.S. at 254.

provision should be held to the *mens rea* requirement, Congress must contemplate a wide variety of factors to determine the outcome. With evolving technological and environmental changes occurring rapidly, the need to consider multiple policy concerns is pertinent in creating a uniform standard of which elements in the CWA's criminal provisions will be held to the "knowledge" standard.

When discussing the definition of "knowingly," the terms *malum in se* and *malum prohibitum* are vital to the analysis. *Malum in se* is a term that refers to conduct that is wrong, independent of regulations.<sup>133</sup> *Malum prohibitum* makes a particular type of conduct wrong only because it is prohibited by law.<sup>134</sup> Crimes that are defined as *malum in se* are easier to convict under the "knowingly" standards because the acts themselves are inherently wrong.<sup>135</sup> On the other hand, *malum prohibitum* is a necessary type of standard because unless certain acts are prohibited by law, certain crimes can be written off by the defendant's lack of knowledge.<sup>136</sup>

#### IV. Corporate Liability

The next questions regard corporations: who can be charged for CWA violations? Can the court charge a CEO with "knowingly" violating a criminal provision in the CWA? The answers to these questions are key in providing the necessary management tools to force corporate officials to "redirect company policies and resources toward sounder environmental management practices by their company."<sup>137</sup> The simple answer is only those who supervise the activity can easily be held responsible for the actions of employees.<sup>138</sup> The CWA and Clean Air Act ("CAA") have defined a "person" who can be culpable to the criminal provision in the Acts.<sup>139</sup> Both Acts describe a "person" in its criminal

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<sup>133</sup> Morgan, *supra* note 6, at 29.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 32.

<sup>136</sup> *See Id.*

<sup>137</sup> Wolf, *supra* note 12, at 2.

<sup>138</sup> Summary of Criminal Prosecutions, United States Environmental Protection Agency,

[https://cfpub.epa.gov/compliance/criminal\\_prosecution/index.cfm?action=3&prosecution\\_summary\\_id=2868](https://cfpub.epa.gov/compliance/criminal_prosecution/index.cfm?action=3&prosecution_summary_id=2868) (Last visited Nov. 26, 2020).

<sup>139</sup> Marty, *supra* note 70, at 33.

provisions as “any responsible corporate officer.”<sup>140</sup> Of course, this is once again, a broad definition with numerous interpretations.

One route to holding corporations liable is through the Corporate Collective Knowledge Doctrine.<sup>141</sup> This doctrine was established with the intent of prosecuting corporations as a whole.<sup>142</sup> The doctrine accomplishes this task by taking knowledge from different people in different departments in the corporation, and in turn, gathering enough information so that there is the possibility of prosecuting the entire corporation based on the theory that the corporation “knew” of the violation.<sup>143</sup> Under this doctrine, the whole corporation could be found guilty, but no single individual would be charged with a crime.<sup>144</sup> Of course, this strategy does take away individual intent, which contradicts the notion of traditional corporate criminal liability. Another problem with this doctrine is that it contradicts traditional corporate criminal liability — it takes employee criminal intent and binds it to the whole corporation.<sup>145</sup> The *actus reus* and *mens rea* are not captured in one individual.<sup>146</sup> The corporation as a juridical person is fined and held responsible.

There is another doctrine used to prosecute those working within corporations. This is the Responsible Corporate Officer Doctrine.<sup>147</sup> It is actually included in the CWA, but once again, Congress did not define in the Act what a “responsible corporate officer” is, nor does legislative history provide any clarity.<sup>148</sup> The doctrine started out as the narrow exception to the common rule that “an individual should not be subjected to criminal liability without evidence of a blameworthy *mens rea*.”<sup>149</sup> The doctrine, in its broadest application, allows an individual executive to be charged with a crime on the basis that they “knew or should have known

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<sup>140</sup> *Id.*; 33 U.S.C. § 1319(c)(6) (2019); 42 U.S.C. § 7413(c)(6) (1990).

<sup>141</sup> Steve Solow, *What Does a Corporation Have to “Know” To Be Criminally Prosecuted?*, 32 Nat’l Inst. on White Collar Crime (2018).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Solow, *supra* note 141.

<sup>147</sup> Marty, *supra* note 70, at 33.

<sup>148</sup> 33 U.S.C. § 1319(c)(6).

<sup>149</sup> Robert T. Rhoad & Brian M. Castro, *Healthcare Executives in the Cross Hairs: navigating the Emerging Threat of Prosecution and Exclusion under the Responsible Corporate Officer Doctrine*, 24 HEALTH LAW 1, 3 (2012).

of the violative conduct.”<sup>150</sup> This doctrine became prominent from two Supreme Court Cases: *United States v. Dotterweich* and *United States v. Park*.<sup>151</sup> Both of these cases deal with food and drug violations as this statute’s original purpose was for that narrow set of offenses.<sup>152</sup>

The court in *Dotterweich* weighed in on the doctrine’s use saying, “[t]hose that have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce...should be penalized.”<sup>153</sup> Dotterweich, the president and general manager of Buffalo Pharmaceutical Company Inc, was convicted of violating a provision of the Food and Drug Act.<sup>154</sup> The company was shipping adulterated drugs, which was in violation of the Federal Food, Drug, and Cosmetic Act (“FDCA”).<sup>155</sup> The Court, in assessing his liability, had to address his *mens rea* in depth, since the provision that Dotterweich violated was silent to the “guilty mind” requirement.<sup>156</sup> Moreover, the president maintained that because the corporation was found not guilty, he was not guilty.<sup>157</sup> The Supreme Court held that employees whose mental state could be imposed on Dotterweich were all trying to “further the transaction which the statute outlaws.”<sup>158</sup> The guilt of the unlawful conduct was imputed to the president “solely on the basis of his authority and responsibility as president and general manager of the corporation.”<sup>159</sup>

The dissent, in opposition to the conviction, stated that “in clear absence of clear statutory authorization, it is inconsistent with established canons of criminal law to rest liability on an act in which the accused did not participate and of which he had no personal knowledge.”<sup>160</sup> The dissent maintained that every person, regardless of social or economic status, should not be subject to vicarious liability if

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<sup>150</sup> *Id.*

<sup>151</sup> Block & Voisin, *supra* note 24, at 1351.

<sup>152</sup> *Id.* at 81350-518.

<sup>153</sup> *Dotterweich*, 320 U.S. at 285.

<sup>154</sup> *Id.* at 278.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 280 (This doctrine has also been used in cases where there is a *mens rea* standard in the Act. See *United States v. Freed*, 401 U.S. 601 (1971)).

<sup>157</sup> *Dotterweich*, 320 U.S. at 279.

<sup>158</sup> *Id.* at 284.

<sup>159</sup> *Id.* at 286.

<sup>160</sup> *Id.*

the statute does not explicitly state it.<sup>161</sup> Justice Murphy opined that no corporate officer should be held liable for public health and welfare crimes when Congress has not mentioned such liability the statute. This is because Congress “alone has the power to define a crime and to specify offenders.”<sup>162</sup>

In *Park*, Acme Markets, Inc. and its president were charged with violating the FDCA.<sup>163</sup> Acme left food that was held before shipment, in one of its facilities that was accessible to rodents, which caused an adulteration in the food.<sup>164</sup> Acme plead guilty, but the president maintained his innocence with a statement that although the employees that were responsible for the contamination were under his watch, the company had an “organizational structure for responsibilities for certain functions,” and he did not know about the infestation.<sup>165</sup> The Supreme Court held the president liable for the collective actions of his employees.<sup>166</sup> In its ruling, the Court stated that the president “could not rely on his system of delegation to subordinates to prevent or correct insanitary conditions,” and the president conceded that the “sanitary conditions of food offered for sale” was something he was “responsible for in the entire operation of the company.”<sup>167</sup> Additionally, it held that the FDCA did not require a showing of “consciousness of wrongdoing;” therefore, those who committed the act as well as those in in managerial position would be held liable.<sup>168</sup>

The dissent in *Park* questioned the jury instructions, stating that the jury was left to decide both the facts and law of the case.<sup>169</sup> The vagueness of the meaning behind being in “responsible relation” to a certain crime left the jury wide discretion in the eyes of the dissent.<sup>170</sup> Because the jury instructions stated that they must find the president guilty if he is in a position of “responsibility,” the word “had whatever meaning the jury in its unguided discretion chose to give it.”<sup>171</sup>

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<sup>161</sup> *Id.*

<sup>162</sup> *Dotterweich*, 320 U.S at 287; see *United States v. Wiltberger*, 18 U.S. 76, 95 (1820).

<sup>163</sup> *United States v. Park*, 421 U.S. 658, 660 (1975).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 660-63.

<sup>166</sup> *Id.* at 673.

<sup>167</sup> *Id.* at 664, 667-68.

<sup>168</sup> *Park*, 421 U.S. 670.

<sup>169</sup> *Id.* at 680.

<sup>170</sup> *Id.* at 679.

<sup>171</sup> *Id.*

Therefore, the vagueness of the criminal statutes lead to the dissent's inability to agree with the majority in this case.

These two cases are examples of how to implement the Responsible Corporate Officer Doctrine in health and safety cases. However, even though the Food and Drug Act, which originally used this doctrine, and the CWA are meant to protect the health and safety of the public, they require different standards of intent.<sup>172</sup> Defense attorneys argue that the doctrine should apply only if the statute requires strict liability, such as the Food and Drug Act.<sup>173</sup> Prosecutors have read the two cases, *Dotterweich* and *Park*, to mean that the Responsible Corporate Officer Doctrine can apply to any environmental offenses because, like the Food and Drug Act, most environmental statutes are for the health and safety of the public.<sup>174</sup>

To help solve the debate between prosecutors and defense attorneys, circumstantial evidence provides an additional piece of the puzzle to help prosecute corporate officers.<sup>175</sup> Someone can infer knowledge from circumstantial evidence, but evidence cannot replace explicit knowledge.<sup>176</sup> One of the CWA's provisions explicitly states this perspective,<sup>177</sup> as noted in *United States v. Hayes Int'l Corp.*<sup>178</sup> This case is centered upon the degree of knowledge needed for a conviction for the unlawful transportation of hazardous waste.<sup>179</sup> Drums of hazardous waste (paint and solvent) were improperly disposed by being dumped in yards and buried.<sup>180</sup>

The Eleventh Circuit used circumstantial evidence in its decision.<sup>181</sup> Finding the defendant guilty of the violation, the Court of Appeals pointed out that the defendant knew that the paint was not recycled, had no resale value, and based on conversations between the defendant

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<sup>172</sup> Block & Voisin, *supra* note 24, at 1355.

<sup>173</sup> *Id.* at 1356.

<sup>174</sup> *Id.*

<sup>175</sup> *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991); *see Marty, supra* note 70, at 4; *see also* Block & Voisin, *supra* note 24, at 1359-60.

<sup>176</sup> *Marty, supra* note 70, at 34.

<sup>177</sup> 33 U.S.C.S. § 1319 (3)(B)(i)(II).

<sup>178</sup> *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1504 (11th Cir. 1986).

<sup>179</sup> *Id.* at 1500.

<sup>180</sup> *Id.* at 1501.

<sup>181</sup> *Id.* at 1505.

and a contact company, had knowledge of the cost of proper disposal.<sup>182</sup> The court used these circumstances to infer that the defendant knew that he was in violation the provision and at the end, took away his defense of a good faith mistake.<sup>183</sup> In *Hayes*, the court acknowledged that “knowledge does not require certainty,” and the government can convict if it proves the defendant was aware “that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.”<sup>184</sup> There are other cases that describe implementation of this doctrine and its use to prosecute more corporate executives for the actions of their employees.<sup>185</sup> From the cases, the easiest way to hold an officer liable is by establishing that the officer directed the employee(s) to commit the act in question.<sup>186</sup>

There are also several cases that discuss willful blindness and how one may use that claim to prosecute entire corporations for CWA violations.<sup>187</sup> The willful blindness standard does not require as heavy a burden of proof for prosecutors as for the Corporate Collective Knowledge Doctrine.<sup>188</sup> To show that there was willful blindness on the part of any employee, there has to be evidence that the employee deliberately characterized information in such a way that the corporation would be willfully blind to the truth.<sup>189</sup> Through the employee’s actions, the entire corporation is liable for allowing the employee to format the information in a way that avoids detection.<sup>190</sup> The court in *Hayes* mentioned that a defendant can act knowingly if “he willfully fails to determine the permit status of the facility.”<sup>191</sup> This approach parallels traditional criminal intent more than the Corporate Collective Knowledge Doctrine.<sup>192</sup> Willful blindness includes an element

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<sup>182</sup> *Id.* at 1506-07.

<sup>183</sup> *Hayes Int’l Corp.*, 786 F.2d at 1505-07.

<sup>184</sup> *Id.* at 1504 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 445 (1978) (quoting *W. LaFave & A. Scott*, *CRIMINAL LAW* 96 (1972)).

<sup>185</sup> *United States v. Hoflin*, 880 F.2d 1033, 1035-37 (9th Cir. 1989).

<sup>186</sup> *Id.*

<sup>187</sup> *See e.g.* *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976); *Hayes Int’l Corp.*, 786 F.2d 1499, 1502-04 (11th Cir. 1986); *United States v. Hanlon*, 548 F.2d 1096 (2d Cir. 1977).

<sup>188</sup> Solow, *supra* note 141, at 2 (2018).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Hayes Int’l Corp.*, 786 F.2d at 1504.

<sup>192</sup> *See* Solow, *supra* note 141, at 2.

of criminal intent – the employee’s deliberate attempt to hide information – that the other approaches lack.<sup>193</sup>

There are two ways to infer if an “individual” is also a “corporate officer.” The first is by actual knowledge.<sup>194</sup> The second consists of three facts: (1) the individual is an officer of the corporation, (2) the officer had direct responsibility for the activities that are alleged to be illegal,<sup>195</sup> and (3) the officer must have knowledge or belief of the occurrence of the alleged illegal activity.<sup>196</sup> Corporate officers are liable by virtue of the position of responsibility, as well.<sup>197</sup> The *Park* case discusses an officer as a “responsible relation” to the crime, but the term “responsible relation” is too broad to convict a corporate officer of a crime.<sup>198</sup> One important consideration is if the officer had the authority to correct or prevent the violation. It is possible to use consideration if the officer knew or should have known about the offense. An additional consideration is that corporate officers may have different motives behind their actions. The officer could be worried about losing his job and having to provide for his family. With the existence of clear-cut rules, motive cannot be considered.

There is a list of factors used in the FDA Regulatory Procedures Manual that can give some guidance as to how to prosecute corporate officers. The FDA added these factors in hopes of securing a more solid prosecution method after the ruling in *Park*.<sup>199</sup> The non-exhaustive list includes the following: (1) whether the violation involve actual or potential harm to the public; (2) whether the violation is obvious; (3) whether the violation reflects a pattern of illegal behavior and/or failure to heed prior warnings; (4) whether the violation is widespread; (5) whether the violation is serious; (6) the quality of the legal and factual support for the proposed prosecution; and (7) whether the proposed prosecution if a prudent use of agency resources.<sup>200</sup>

The agency added these factors to the FDA regulatory manual as it diligently works to update and expand the criteria for prosecutions for

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<sup>193</sup> *Id.*; Marty, *supra* note 70, at 34; Block & Voisin, *supra* note 24, at 1362.

<sup>194</sup> *MacDonald & Watson Waste Oil Co.*, 933 F.2d at 50.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Park*, 421 U.S. at 673-74.

<sup>198</sup> *Id.* at 668-69.

<sup>199</sup> Rhoad & Castro, *supra* note 149, at 4.

<sup>200</sup> *Id.*

environmental and health offenses.<sup>201</sup> Some of the factors have been discussed in federal courts, such as the potential harm to the public and if the violation is widespread.<sup>202</sup> However, the other factors mentioned in the manual can give prosecutors more guidance on the best way to reinforce their arguments to produce a more well-rounded and solid case against those that violate environmental statutes.

The final option utilized in discussion of who is prosecuted for CWA violations is the Inferential Doctrine. This doctrine states that knowledge can be inferred from known internal corporate policies.<sup>203</sup> The doctrine also sets the standard of what the defendant should have known through the exercise of reasonable diligence.<sup>204</sup> Although the Inferential Doctrine is not as widely regarded as the Responsible Corporate Officer Doctrine, it may provide more opportunities for prosecutors to capitalize on environmental corporate misdeeds.

## V. Conclusion

There must be more clarity to effectively interpret the meaning behind the “knowingly” criminal provisions in the CWA. When revising this Act in 1987, Congress gave no clear indication, besides wanting to strengthen criminal sanctions, as to its intent behind changing “willfully and negligently” into two separate sections of “knowingly” and “negligently.”<sup>205</sup> Nevertheless, if the criminal provisions are going to become as effective and efficient as they are meant to be, there needs to be uniformity in interpretation of the *mens rea* for these provisions.

Looking at the methods federal courts used to interpret “knowingly” violations gives a better picture of how to expound upon the “knowingly” violations. By considering the penalty to be imposed, the severity of the crime, and the direct and widespread impact of the individual’s actions, therein exists the ability to implement a consistent analysis of CWA violations. Based on these factors, federal and state courts could look at an offense on a case-by-case basis without the pressure to enforce a specific judgment. To build the foundation for the effective prosecution of the criminal provisions under the CWA, courts

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<sup>201</sup> *Id.*

<sup>202</sup> *See Int’l Minerals & Chem. Corp.*, 402 U.S. 558 (1971); *See also Liparota*, 471 U.S. 419 (1985).

<sup>203</sup> *United States v. Greer*, 850 F.2d 1447 (11<sup>th</sup> Cir. 1988).

<sup>204</sup> *United States v. Dee*, 912 F.2d 741 (4<sup>th</sup> Cir. 1990).

<sup>205</sup> *Hopkins*, 53 F.3d 533 at 539.

should look to how the federal courts interpreted these factors over the years.

The doctrines laid out in this comment can guide prosecutors as to the best method for prosecuting corporate officers and corporations as a whole. The threat of prosecution for criminal violations is needed to make corporate officials have more interest and concern for themselves than for the corporation.<sup>206</sup> Former Attorney General, Richard Thornburgh, summed up the goal of these doctrines when he said, “nothing so concentrates the mind of responsible management upon the environment as our putting their own pocketbooks and persons in jeopardy. Indeed, the sudden realization that culpable mismanagement might actually result in jail time concentrates minds even more.”<sup>207</sup>

The CWA’s criminal provisions are vague and leave open much room for interpretation. Congress’s fatal flaw in the revision was not defining what “knowingly” would entail. However, courts relied upon several factors over the years when presented with criminal violations involving “knowingly” offenses. There is a long road ahead to deciphering what the knowledge requirement means, but when looking to the factors and corporate doctrines, both individuals and corporations can be held liable for environmental violations fairly and honestly.

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<sup>206</sup> Wolf, *supra* note 12, at 2.

<sup>207</sup> *Id.* (quoting Roger J. Marzulla & Bret G. Kappel, *Nowhere to Run, Nowhere to Hide: Criminal Liability for Violations of Environmental Statutes in the 1990s*, 16 COLUM. J. ENVTL. L. 201, 201-02 (1991) (quoting Address by Attorney General Richard Thornburgh, 1991 Environmental Law Enforcement Conference, in New Orleans, LA (Jan. 8, 1991)).