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INTERPRETING “KNOWINGLY” TO ESTABLISH CRIMINAL LIABILITY IN ENVIRONMENTAL LAW: A MODIFIED PUBLIC WELFARE APPROACH

*Jesse Harte Edelman**

Now, more than ever, environmental disasters occur on an unprecedented scale. The main objective of environmental law is to protect the environment and human health from harm. In recognition of the role that businesses and corporations play in causing such harm, many environmental laws have been amended to criminalize their harmful conduct.

*Focusing on the criminal provisions in the Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act that target offenders who engage in conduct “knowingly,” this Note addresses the split regarding the intent required for a criminal conviction, and the resultant weight accorded these statutes. Courts should interpret “knowingly” to require proof that a defendant only had a general awareness of the harmful conduct—rather than knowledge of the law or additional facts—by adopting a modified public welfare approach. This approach is proper, as it is derived from the Supreme Court case *United States v. International Minerals*, and necessary, considering the plain meaning of the statutory text, statutory purpose, legislative history, and general principals of criminal law.*

This Note contends that the modified public welfare approach is correct because it classifies the above statutes as dealing with public welfare offenses, which in turn permits application of the Responsible Corporate Officer Doctrine to hold corporate officers responsible and deter future violations. It also provides safeguards to ensure that the “knowingly” standard of intent is accorded proper weight. Since statutes are not interpreted in a vacuum, this Note holistically evaluates the propriety of the approach based on the ordinary meaning of the statutes’ text, which ultimately advances congressional intent.

* J.D. Candidate, 2023, LMU Loyola Law School, Los Angeles; B.A., 2018, U.C. San Diego. Thank you to the folks at the *Loyola of Los Angeles Law Review* for all of your hard work in getting my Note published, and to Professor Adam Zimmerman for your continuous guidance and support. Special thanks to my family, friends, and classmates, who have graciously supported me throughout the writing process and beyond. Lastly, thank you Mikey for listening to me talk about this Note for hours on end.

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INTRODUCTION

Environmental protection laws make the most egregious forms of pollution subject to criminal liability.¹ Under a range of federal environmental protection laws—the Clean Air Act (CAA), the Clean Water Act (CWA), and the Resource Conservation and Recovery Act (RCRA)—criminal liability is triggered by “knowingly” violating the law.² However, courts disagree about what “knowingly” means, with some requiring a defendant to have knowledge of the facts meeting each essential element of the offense, or, in addition, requiring knowledge of the law.³ Others treat these statutes as public welfare statutes, like those that criminalize the sale of adulterated food, illegal drugs, and sex trafficking, by reducing what must be proved to establish that a defendant acted “knowingly.”⁴ In those cases, the government can prove the defendant acted “knowingly” by showing either a general knowledge of the conduct giving rise to such action, or that the substances were hazardous.⁵ In these instances, the defendants are presumed to be on notice of the law based upon the harmful nature of the regulated substances.⁶

This presumption of notice was established by the U.S. Supreme Court in *United States v. International Minerals*,⁷ which was the first

1. “Where such harmful actions are at issue, criminal prosecution is an appropriate response to the most egregious and harmful conduct.” Todd Kim, Assistant Att’y Gen., Env’t and Nat. Res. Div., U.S. Just. Dep’t, Keynote Address at INTERPOL’s 25th Annual Pollution Crime Working Group Meeting (Apr. 20, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-todd-kim-justice-department-s-environment-and-natural-resources> [<https://perma.cc/47A5-ZDXS>].

2. See generally 42 U.S.C. § 7413; 33 U.S.C. § 1319; 33 U.S.C. § 1321; 42 U.S.C. § 6928.

3. See *United States v. Wilson*, 133 F.3d 251, 262 (4th Cir. 1997) (holding that the government must prove that the defendant had knowledge of each element of the law); *United States v. Ahmad*, 101 F.3d 386, 390 (5th Cir. 1996) (holding that the defendant must have had knowledge of all the elements that made his conduct illegal). But see *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 47 (1st Cir. 1991) (holding that the defendant must know that a permit was required by law).

4. Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 419 (1993); Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 62 (1933); see, e.g., *United States v. Catlett*, 747 F.2d 1102, 1104 (6th Cir. 1984) (killing of protected animals under Migratory Bird Treaty Act); *United States v. Y. Hata & Co.*, 535 F.2d 508 (9th Cir. 1976) (prosecution under Food, Drug and Cosmetic Act); *People v. Dillard*, 201 Cal. Rptr. 136, 138 (Ct. App. 1984) (carrying loaded firearm); *Morissette v. United States*, 342 U.S. 246, 251 n.8 (1952) (discussing sex offenses, such as statutory rape, where the defendant could be convicted despite a reasonable belief of age and consent).

5. See *United States v. Buckley*, 934 F.2d 84, 88 (6th Cir. 1991); *United States v. Hopkins*, 53 F.3d 533, 541 (2d Cir. 1995); *United States v. Weitzenhoff*, 35 F.3d 1275, 1286 (9th Cir. 1993).

6. *Buckley*, 934 F.2d at 88; *Hopkins*, 53 F.3d at 539; *Weitzenhoff*, 35 F.3d at 1286.

7. 402 U.S. 558 (1971).

case to discuss what level of intent the government must prove in order to impose criminal sanctions for violations of environmental regulations.⁸ In doing so, this case developed a framework for considering environmental law in the public welfare context, such that when the subject matter being regulated is a dangerous or deleterious device or obnoxious waste material, a high probability of regulation exists and is sufficient to establish that the defendant was on notice of the law.⁹ Where a court finds an environmental statute within the public welfare exception, then the defendant need not know that his actions were unlawful to be liable.¹⁰

However, *International Minerals* was decided in 1971, when the Court interpreted the language “knowingly” in a regulation governing the transportation of corrosive liquids under 18 U.S.C. § 834(f) (since repealed).¹¹ Moreover, since the Supreme Court’s “textualist turn” in the 1980s and its now heavy reliance on statutory text, dictionary definitions, and canons of statutory interpretation,¹² it is unclear how much weight courts will continue to give to cases like *International Minerals*—which explicitly relied on the broad remedial purposes of environmental laws to punish wrongdoers who violate them. For example, in June, 2022, the Supreme Court in *Ruan v. United States*¹³ rejected the government’s aim to make it easier to convict physicians—who it alleged acted more like drug dealers in prescribing pain killers—under the Controlled Substances Act by requiring a mental state of a hypothetical “reasonable” doctor’s understanding.¹⁴ The Court held the government must prove beyond a reasonable doubt that the defendant subjectively “knew” that he or she was acting “in an unauthorized manner” to be subject to criminal penalties under the CSA.¹⁵

8. *United States v. Tomlinson*, 1999 U.S. App. LEXIS 16758, at *8 (9th Cir. July 16, 1999).

9. *Int’l Mins. & Chem. Corp.*, 402 U.S. at 565.

10. *Id.*

11. *Id.* at 560.

12. Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 66 (2018) (describing the modern Supreme Court’s “textualist turn” that started in the mid-1980s as “one of the most significant changes in the Supreme Court’s interpretive practices”).

13. 142 S. Ct. 2370 (2022).

14. *Id.* at 2381.

15. *Id.* (rejecting government’s argument that knowledge would be satisfied if the defendant failed to make an “objectively reasonable good-faith effort” to comply with the law).

The confusion over what kind of mens rea applies in criminal environmental regulation has inhibited the accessibility of criminal recourse for some of the nation's most significant environmental disasters.¹⁶ Take the Exxon Valdez spill, one of the largest manmade disasters in human history. In March, 1989, an oil spill in Alaska shocked the world when oil tanker Exxon Valdez was run aground on Bligh Reef in Prince William Sound, spilling an estimated eleven million gallons of crude oil.¹⁷ Consequently, the spill in Prudhoe Bay Oil Field has affected over 1,300 miles of coastline.¹⁸ Wildlife ranging from seabirds to killer whales has yet to recover from the disaster, and the once lucrative industries of salmon and herring fisheries in Alaska have collapsed.¹⁹ As a result, the total economic loss has been estimated to be about \$2.8 billion, and oil contamination still remains in more than half of the beach sites located in Prince William Sound as late as 2001.²⁰ Ultimately, a jury ordered Exxon to pay \$5.1 billion in damages, which was substantially reduced as a result of Exxon agreeing to settle all claims for an estimated \$1.25 billion.²¹ While this case

16. Charles J. Babbitt et al., *Discretion and the Criminalization of Environmental Law*, 15 DUKE ENV'T L. & POL'Y F. 1, 3 (2004).

17. U.S. v. Exxon Corp. et al. (D. Alaska), U.S. DEP'T OF JUST. (May 14, 2015), <https://www.justice.gov/enrd/us-v-exxon-corporation-et-al-dalaska> [https://perma.cc/29Q2-DZZ7]; Exxon Valdez, DAMAGE ASSESSMENT, REMEDIATION, & RESTORATION PROGRAM (Aug. 17, 2020), <https://darrp.noaa.gov/oil-spills/exxon-valdez> [https://perma.cc/9GW3-99QD].

18. *Damage Assessment, Remediation, and Restoration Program*, supra note 17.

19. *Id.*; Melanie Dorsett, *Exxon Valdez Oil Spill Continued Effects on the Alaskan Economy*, COLONIAL ACAD. ALL. UNDERGRADUATE RSCH. J., 2010, at 1, 9–10, <https://scholarworks.wm.edu/cgi/viewcontent.cgi?article=1020&context=caaurj> [https://perma.cc/L3TU-CJKK]; Debbie Elliott & Marisa Penaloza, *Exxon Valdez Oil Spill Brings 'Bad Juju' and Pain 25 Years Later*, NPR (Mar. 26, 2014, 5:31 PM), <https://www.npr.org/2014/03/26/294709397/exxon-valdez-oil-spill-brings-bad-juju-and-pain-25-years-later> [https://perma.cc/Z7QD-KPZJ].

20. *Damage Assessment, Remediation, and Restoration Program*, supra note 17; *Economic Impacts of the Spill*, EXXON VALDEZ OIL SPILL TR. COUNCIL, <https://evostc.state.ak.us/oil-spill-facts/economic-impacts/> [https://perma.cc/52GD-V8LB]; Doug Struck, *Twenty Years Later, Impacts of the Exxon Valdez Linger*, YALE ENV'T 360 (Mar. 24, 2009), https://e360.yale.edu/features/twenty_years_later_impacts_of_the_exxon_valdez_linger [https://perma.cc/JHR8-YMR9].

21. Yereth Rosen, *Exxon Valdez Oil Spill Saga Reaches Anticlimactic End in Federal Court*, ANCHORAGE DAILY NEWS (Sept. 28, 2016), <https://www.adn.com/environment/article/exxon-valdez-saga-reaches-anticlimactic-end-federal-court/2015/10/16/> [https://perma.cc/CNC9-4J9L]; see Press Release, U.S. Env't Prot. Agency, Exxon to Pay Record One Billion Dollars in Criminal Fines and Civil Damages in Connection with Alaskan Oil Spill (Mar. 13, 1991), <https://www.epa.gov/archive/epa/aboutepa/exxon-pay-record-one-billion-dollars-criminal-fines-and-civil-damages-connection-alaskan.html> [https://perma.cc/K4YL-XZBH]; James Vicini, *Exxon Valdez \$2.5 Billion Oil Spill Ruling Overturned*, REUTERS (June 25, 2008), <https://www.reuters.com/article/us-exxon-valdez-court/exxon-valdez-2-5-billion-oil-spill-ruling-overturned-idUSWB00926720080625> [https://perma.cc/QU7P-L8HG].

was primarily the result of human error, it raised serious questions regarding corporate America being held criminally accountable for environmental misconduct,²² the adequacy of existing federal environmental statutes at the time,²³ and the sufficiency of sanctions in modifying conduct.²⁴

This Note argues that the proper solution is to adopt a similar framework to *International Minerals* but with a slight twist based on the plain language of the statutes. Absent an express provision that says otherwise, courts should assume that when a criminal environmental law uses the word “knowingly” it applies generally to the actor’s knowledge of the conduct that results in a violation and not to knowledge of the law or additional elements of the crime. While public welfare statutes, like environmental criminal statutes, are intended to prevent harms caused by dangerous or deleterious devices or materials, they traditionally do not expressly include elements of intent. These environmental crimes, however, do include such provisions. This Note argues that the proper approach to such laws is a modified public welfare approach. Given the potential for catastrophic environmental harm and the lack of stricter punishment to serve as deterrence, this standard is necessary because large corporations may not take precautionary measures to comply with environmental laws.²⁵ This is

22. See Nina Totenberg, *Exxon Makes Case on Valdez for High Court*, NPR (Feb. 27, 2008, 4:00 PM), <https://www.npr.org/2008/02/27/75029288/exxon-makes-case-on-valdez-for-high-court> [<https://perma.cc/Q3JG-3J7R>].

23. SAMUEL K. SKINNER & WILLIAM K. REILLY, THE NAT’L RESPONSE TEAM, THE EXXON OIL SPILL: A REPORT TO THE PRESIDENT 35 (1989), <https://nrt.org/sites/2/files/Valdez%20spill%20RTP.pdf> [<https://perma.cc/JZB7-5YJU>].

24. See John Holusha, *Chairman Defends Exxon’s Effort to Clean Up Oil*, N.Y. TIMES (Apr. 19, 1989), <https://www.nytimes.com/1989/04/19/us/chairman-defends-exxon-s-effort-to-clean-up-oil.html> [<https://perma.cc/AEW8-32U2>] (discussing Exxon Chairman Rawl’s apathetic response catalyzing serious debate as to whether monetary sanctions go far enough).

25. See, e.g., *Court Orders \$507.5 Million Damages in Exxon Valdez Spill*, REUTERS (June 15, 2009, 11:42 AM), <https://www.reuters.com/article/us-exxon-award/court-orders-507-5-million-damages-in-exxon-valdez-spill-idINTRE55E6DU20090615> [<https://perma.cc/TH35-D7FY>] (“The oil spill from the Exxon Valdez supertanker in 1989 was the worst in the nation’s history, blackening more than 1,200 miles of Alaska’s coastline.”). In a study to provide researchers and policy-makers with systematic information about company non-compliance and whether specific regulatory interventions and informal crime-prevention strategies affect the behavior of managerial decision-makers and, in the aggregate, the firms in which they operate, inspectors interviewed said that the threat of detection was more effective when it was clear that enforcement actions were available to penalize persistent or acute noncompliance in procedures, reporting practices, or violations of discharge limits. SALLY S. SIMPSON ET AL., WHY DO CORPORATIONS OBEY ENVIRONMENTAL LAW? ASSESSING PUNITIVE AND COOPERATIVE STRATEGIES OF CORPORATE CRIME CONTROL 18 (2007), <https://www.ojp.gov/pdffiles1/nij/grants/220693.pdf> [<https://perma.cc/3Y7Q-89F2>].

consistent with the Supreme Court's modern textualist approach to criminal law statutes, as it is consistent with the statutory language, dictionary definitions, and the canons of statutory interpretation, especially when considered collectively.

To situate this issue, this Note will first discuss the basic principles of criminal law. Next, this Note will give background context to the development of environmental criminal law, the Public Welfare Doctrine, and the Responsible Corporate Officer Doctrine. From there, the arguments and justifications for and against classifying these statutes as public welfare statutes will be analyzed. Finally, this Note will posit that the proper solution for the current split is to adopt a modified public welfare approach.

I. CRIMINAL LAW PRINCIPALS

Distinct characteristics of criminal law are vital to understanding the varying statutory interpretations of the criminal provisions in the CAA, CWA, and RCRA. At the heart of criminal law, *mens rea*, or the mental state of a person's intention to commit a crime, is typically required to show culpability.²⁶ Generally, criminal law seeks to punish the "vicious will."²⁷ To that end, the Supreme Court has said that consciousness of wrongdoing is a principle "as universal and persistent in mature systems of [criminal] law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."²⁸

The law generally distinguishes "intent" based on either "specific intent," "general intent," or "strict liability."²⁹ "Specific intent" requires that the defendant intentionally commit an act and intend to cause a particular result by committing said act, which necessitates proving that the defendant acted with purpose.³⁰ On the other hand, "general intent" crimes require the prosecution to prove only that the

26. *The Mental State Requirement in Criminal Cases*, JUSTIA (Oct. 2022), <https://www.justia.com/criminal/mental-state-requirement/> [<https://perma.cc/HT2H-FXS6>].

27. *Ruan v. United States*, 142 S. Ct. 2370, 2376 (2022); *Morissette v. United States*, 342 U.S. 246, 251 (quoting Roscoe Pound, *Introduction to FRANCIS SAYRE, A SELECTION OF CASES ON CRIMINAL LAW*, at xxxvi–xxxvii (1927)).

28. *Morissette*, 342 U.S. at 250.

29. *Id.*; Mary Hofmann, *Criminal Liability in Environmental Statutes: A Comparative Analysis of the Interpretations of "Knowingly" in the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act*, 52 U. TOL. L. REV. 467, 468–69 (2021).

30. *Morissette*, 342 U.S. at 250; Hofmann, *supra* note 29, at 468–69.

accused knowingly meant to do an act prohibited by law, whether or not the defendant intended the act’s result.³¹ In contrast, “strict liability” offenses are those that require no showing of any culpability or mens rea,³² and criminal penalties can be imposed regardless of the intent of the actor.³³ Thus, for a strict liability crime, the burden of proof is lower, as it must only be proven that the defendant performed the wrongful act, irrespective of whether he or she intended to perform it or for the results to occur.³⁴

The Model Penal Code further categorizes mens rea into categories of “purposely,” “knowingly,” “recklessly,” and “negligently.”³⁵ With the highest level of intent required, a defendant who acts “purposely” intentionally engages in conduct and intends to cause a certain result.³⁶ “Purposeful criminal intent resembles specific intent to cause harm.”³⁷ Next, “knowingly” is to act with knowledge or awareness of the conduct or situation, and not because of mistake, accident or some other innocent reason.³⁸ In the environmental context, there is a dispute as to whether a “knowing” violation of a statute requires knowledge of the action, or knowledge of the action and its illegality.³⁹ A person acts “recklessly” when they knew or should have acknowledged that their conduct would likely cause harm.⁴⁰ Requiring the least intent, a defendant acts “negligently” when they fail to exercise reasonable care, resulting in the injury of another person.⁴¹ In considering these principals, Part II will discuss how environmental law has

31. *Morrisette*, 342 U.S. at 250; Hofmann, *supra* note 29, at 468–69.

32. Hofmann, *supra* note 29, at 487.

33. MICHAEL J. REITZ, MACKINAC CTR. FOR PUB. POL’Y, POLICY BRIEF: CRIMINAL MINDS: DEFINING CULPABILITY IN MICHIGAN CRIMINAL LAW 4–5 (2013), <https://www.mackinac.org/archives/2013/s2013-10.pdf> [<https://perma.cc/CGL9-2HVB>]; *People v. Lardie*, 551 N.W.2d 656, 660–61 (Mich. 1996).

34. *Lardie*, 551 N.W.2d at 660–61.

35. MODEL PENAL CODE § 2.02 (1962).

36. *Id.* § 2.02(2)(a).

37. *Criminal Law: 4.2 Crim. Intent*, UNIV. OF MINN. (Dec. 17, 2015), <https://open.lib.umn.edu/criminallaw/chapter/4-2-criminal-intent/> [<https://perma.cc/EJ7E-BVPG>].

38. *Criminal Resource Manual: 910. Knowingly and Willfully*, U.S. DEP’T OF JUST., <https://www.justice.gov/archives/jm/criminal-resource-manual-910-knowingly-and-willfully> [<https://perma.cc/5WET-NKL9>].

39. *United States v. Int’l Mins. & Chem. Corp.*, 402 U.S. 558, 562 (1971); David A. Gordon, *Protecting Public Welfare: Mens Rea Under Section 308(d)(2)(A) of the Solid Waste Disposal Act*, 1997 U. CHI. LEGAL F. 439, 443.

40. Travis Peeler, *What Is Recklessness?*, LEGALMATCH (Mar. 25, 2022), <https://www.legalmatch.com/law-library/article/what-is-recklessness.html> [<https://perma.cc/8PXA-R3Q6>].

41. *Id.*

developed, the reasons that criminal law has become embedded in environmental law, and how the Public Welfare Doctrine and Responsible Corporate Officer Doctrine have come to apply.

II. BACKGROUND: ENVIRONMENTAL LAW

“It would be difficult to contest the status of pollution as a public health problem.”⁴² Public and private environmental harm is a leading cause of both global warming and extreme weather according to Gallup’s latest annual environmental poll and in 2021, nearly one in three Americans live in a county hit by a weather disaster.⁴³ This harm also causes financial burdens.⁴⁴ In 2021 and 2022 alone, wildfires in California, severe ice storms in Texas, and numerous hurricanes across the country have averaged over \$1 billion in damages.⁴⁵ Almost half of Americans drink tainted water regularly.⁴⁶ In the United States alone, approximately 53,000 people die prematurely each year from lung ailments caused by air pollution.⁴⁷ Improper hazardous waste disposal

42. Robin Kundis Craig, *Valuing the Public Health Aspects of Environmental Enforcement: Qualitative Versus Quantitative Evaluations of Enforcement Effort*, 33 S. ILL. U. L.J. 403, 403 (2009). See generally Wendy Wagner & Lynn Blais, *Children’s Health and Environmental Exposure Risks: Information Gaps, Scientific Uncertainty, and Regulatory Reform*, 17 DUKE ENV’T L. & POL’Y F. 249, 258 (2007) (discussing how regulatory mechanisms for air toxins fail to prevent the significant risks to public health); Jessica E. Yates, *Pollution and Health Care Costs: States Can and Should Seek Medicaid Reimbursement from Big Polluters*, 24 VA. ENV’T L.J. 423, 423 (2006) (“States routinely pay for medical expenses related to health problems sustained from pollution, but thus far have failed to pursue reimbursement from those responsible.”); Todd Stedeford et al., *Environmental Quality and Health: Got Merc? Regulating, Mitigating, and Litigating Mercury Levels for the Fish We Eat*, 20 J. LAND USE & ENV’T L. 503, 505 (2005) (discussing the deleterious effects of methylmercury on the central nervous system in relation to mass poisonings that occurred in Japan and Iraq).

43. Lydia Saad, *A Seven-Year Stretch of Elevated Environmental Concern*, GALLUP (Apr. 5, 2022), <https://news.gallup.com/poll/391547/seven-year-stretch-elevated-environmental-concern.aspx> [https://perma.cc/WHV7-PB9A]; Sarah Kaplan & Andrew Ba Tran, *Nearly 1 in 3 Americans Experienced a Weather Disaster This Summer*, WASH. POST (Sept. 4, 2021, 1:35 PM), <https://www.washingtonpost.com/climate-environment/2021/09/04/climate-disaster-hurricane-ida/> [https://perma.cc/RQF8-MBEN].

44. *Deloitte Report: Inaction on Climate Change Could Cost the US Economy \$14.5 Trillion by 2070*, DELOITTE (Jan. 25, 2022), <https://www2.deloitte.com/us/en/pages/about-deloitte/articles/press-releases/deloitte-report-inaction-on-climate-change-could-cost-the-us-economy-trillions-by-2070.html> [https://perma.cc/PLX4-WNEW].

45. *Billion-Dollar Weather and Climate Disasters*, NAT’L CTRS. FOR ENV’T INFO. (2021–2022), [https://www.ncei.noaa.gov/access/billions/events/US/2021-2022?disasters\[\]=all-disasters](https://www.ncei.noaa.gov/access/billions/events/US/2021-2022?disasters[]=all-disasters) [https://perma.cc/U3GP-HNWA].

46. YINGYI SITU & DAVID EMMONS, ENVIRONMENTAL CRIME: THE CRIMINAL JUSTICE SYSTEM’S ROLE IN PROTECTING THE ENVIRONMENT 7 (2000).

47. *Id.*

poses serious threats of miscarriage, cancer, birth defects, and other ailments to residents living in the vicinity.⁴⁸

Whether caused by large corporations or smaller companies, businesses in the United States generate hundreds of millions of metric tons of hazardous waste, emit potentially lethal levels of contaminants into surface waters, and release hazardous toxic chemicals into the air every year.⁴⁹ In 2015, environmental offenses made up nearly a third of the most common federal offenses by organizations, with 70 percent being water-related, 16.7 percent affecting wildlife, 8.3 percent involving hazardous materials, and 5 percent being air-related.⁵⁰ In fact, serious noncompliance with environmental laws is common across all industry types and “occur[s] at 25% or more of facilities in nearly all programs for which there is compliance data.”⁵¹

Even though slow and often invisible degradation of the environment, by nature, makes the resulting harm harder to assess,⁵² environmental violations can undoubtedly cause catastrophic results to human health.⁵³ While the number of environmental protection laws have substantially increased over the past twenty years, there remains a significant deficiency in corporate and individual compliance with environmental laws and regulations.⁵⁴ In fact, this dilemma was sadly reinforced on February 3, 2023, by the devastating environmental disaster caused by the Norfolk Southern Railroad train derailment in East Palestine Ohio.⁵⁵ As Pennsylvania Governor Josh Shapiro made

48. *Id.* at 8.

49. See generally Navarro Ferronato & Vincenzo Torretta, *Waste Mismanagement in Developing Countries: A Review of Global Issues*, 16 INT’L J. ENV’T RSCH. & PUB. HEALTH, no. 6, at 1; SITU & EMMONS, *supra* note 46, at 50.

50. Drew Broach, *What’s the Most Common Corporate Crime in Federal Court? You Might Be Surprised*, TIMES-PICAYUNE (July 7, 2021, 11:51 AM), https://www.nola.com/news/crime_police/article_1f36dd4a-e7e4-548e-aff3-ef2297873a7d.html [<https://perma.cc/845G-8WCV>].

51. CYNTHIA GILES, HARV. L., ENVIRONMENTAL REGULATION FOR THE MODERN ERA PART 2: NONCOMPLIANCE WITH ENVIRONMENTAL RULES IS WORSE THAN YOU THINK 3 (2000), <http://eelp.law.harvard.edu/wp-content/uploads/Cynthia-Giles-Part-2-FINAL.pdf> [<https://perma.cc/3Y9N-9E3UR>].

52. Richard J. Lazarus, *Mens Rea in Environmental Criminal Law: Reading Supreme Court Tea Leaves*, 7 FORDHAM ENV’T L. REV. 861, 865 (2011).

53. *Id.*; see Robert I. McMurry & Stephen D. Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 LOY. L.A. L. REV. 1133, 1162–63 (1986).

54. See GILES, *supra* note 51 (discussing the significance of corporate environmental non-compliance and violations).

55. *Timeline: The Toxic Chemical Train Derailment in Ohio*, CBS NEWS (Mar. 14, 2023, 5:09 PM), <https://www.cbsnews.com/news/timeline-east-palestine-ohio-train-derailment-chemicals-evacuations/> [<https://perma.cc/B9QH-R63W>].

a criminal referral to the state's attorney general to investigate whether criminal charges are warranted, he stated: "What I know is that Norfolk Southern is governed every day, not by caring about the communities that they send their trains through, but by corporate greed."⁵⁶ Further, Shapiro emphasized his disbelief in Norfolk Southern's genuine care for the damage caused by the train derailment, as evidenced by its failure "to show up at community meetings, by really insulting the community with a lackluster investment in their recovery," and the fact that Norfolk Southern has successfully spent multiple years lobbying Congress to do away with safety measures.⁵⁷

With this in mind, Part II will discuss the development of criminal environmental law in response to heightened public concern. Subsequently, it will discuss how the Public Welfare Doctrine has developed and been applied in the environmental law context. Finally, it will conclude with the development of the Responsible Corporate Officer Doctrine as an effective tool in holding corporations liable for their employees' crimes under the Public Welfare Doctrine.

A. *Development of Criminal Environmental Punishment*

Prior to the 1980s, civil sanctions were the essential enforcement tool for environmental law.⁵⁸ However, civil sanctions for violations of environmental laws were seen as a slap on the wrist for larger corporations.⁵⁹ Given the significant overhead that environmental regulation compliance costs businesses, many have attempted to avoid these additional costs.⁶⁰ Methods have included openly refusing to comply with regulations, hiding noncompliance (such as by disposing hazardous waste in secluded areas), or opting to pay governmental fines rather than compliance costs.⁶¹ For large corporations, being ordered to write a check has done little to deter them from engaging in similar

56. John Helton, *Governor's Office in Pennsylvania Makes a Criminal Referral in Ohio Train Derailment*, NPR (Feb. 22, 2023, 5:08 PM), <https://www.npr.org/2023/02/22/1158686284/governors-office-in-pennsylvania-makes-a-criminal-referral-in-ohio-train-derailment> [<https://perma.cc/YE29-AXFM>].

57. *Id.*

58. McMurry & Ramsey, *supra* note 53, at 1134.

59. Babbitt et al., *supra* note 16, at 3.

60. *Environmental Law Violations*, CORNELL L. SCH. (Nov. 2022), https://www.law.cornell.edu/wex/environmental_law_violations [<https://perma.cc/J2V6-DMS8>].

61. *Id.*

behavior in the future.⁶² Furthermore, while civil remedies are the regulatory actions depended on, it is more likely that large corporations with deep pockets will recidivate.⁶³ It follows that “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages,”⁶⁴ and while laws and regulations are a fine start, what matters is whether they will ultimately produce real world action.

Alternatively, the threat of incarceration and negative publicity from criminal prosecution undoubtedly haunts corporate executives and businesses more than civil sanctions and lawsuits.⁶⁵ As congressional leaders noticed that civil penalties did little to stem the harmful environmental behaviors of corporate polluters,⁶⁶ Congress began amending federal environmental statutes to enact stricter criminal penalty provisions for many of the most prominent federal environmental statutes.⁶⁷ In order to enforce such environmental criminal laws, the Environmental Protection Agency (EPA) works in conjunction with the Department of Justice (DOJ).⁶⁸ Ultimately, criminal sanctions are regarded as a proper avenue for offsetting corporations’ economic benefits of noncompliance “because, in the words of EPA’s Deputy Assistant Administrator for Criminal Enforcement, ‘[j]ail time is one cost of doing business that cannot be passed along to the consumer.’”⁶⁹

Criminal enforcement is considered “an essential strategy for stemming environmental wrongdoing that cannot be duplicated or replaced by the broad-based system of regulatory activity or the more

62. See JOEL EPSTEIN ET AL., U.S. DEP’T OF JUST., LAW ENFORCEMENT RESPONSE TO ENVIRONMENTAL CRIME 20 (1995), <https://www.ojp.gov/pdffiles1/Digitization/151399NCJRS.pdf> [<https://perma.cc/3BMT-FEM6>]; GILES, *supra* note 51.

63. Jonathan D. Brightbill & Jennifer Roualet, *DOJ Leaders Will Stress Criminal Environmental Enforcement*, WINSTON & STRAWN LLP (Dec. 22, 2021), <https://www.winston.com/en/winston-and-the-legal-environment/doj-leaders-will-stress-criminal-environmental-enforcement.html>.

64. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 54 (2008) (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987)).

65. DEP’T OF ENV’T QUALITY, GENERAL DETERRENCE OF ENVIRONMENTAL VIOLATION: A PEEK INTO THE MIND OF THE REGULATED PUBLIC, <https://www.oregon.gov/deq/FilterDocs/DeterrenceReport.pdf> [<https://perma.cc/9DE9-J4GU>].

66. McMurry & Ramsey, *supra* note 53, at 1138.

67. See *id.* at 1138–39.

68. OFF. OF CRIM. ENF’T FORENSICS & TRAINING, U.S. ENV’T PROT. AGENCY, AMERICA’S ENVIRONMENTAL CRIME FIGHTERS 6, https://www.epa.gov/sites/default/files/documents/oceft_brochure.pdf [<https://perma.cc/CP36-MFUS>].

69. Michael S. Elder, *The Criminal Provisions of the Clean Air Act Amendments of 1990: A Continuation of the Trend Toward Criminalization of Environmental Violations*, 3 FORDHAM ENV’T L. REP. 141, 142–43 (1992).

individualized use of civil penalties, damages, or injunctions.”⁷⁰ As such, it may be the best enforcement tool to satisfy the purposes of retribution and deterrence through fear of prison sentences and the stigma associated with criminal records.⁷¹ But with constant and pervasive violations still occurring today,⁷² there is a dire need for consistency in environmental criminal prosecution; criminal prosecution should not remain an underutilized tool in environmental enforcement.⁷³ The question of what constitutes acting “knowingly” is crucial to ensuring meaningful criminal enforcement of environmental laws and is central to the extension of the Public Welfare Doctrine.⁷⁴

B. Development of the Public Welfare Doctrine

Criminal environmental laws passed in the 1970s and 1980s represent a natural extension of public welfare statutes, which emerged in the late nineteenth century as growing industrialization and urbanization generated new potential public dangers to human health, wild life, and the environment.⁷⁵ In response to this industrial growth, a new form of regulatory crimes, commonly known as “public welfare” offenses, were formulated to address these dangers.⁷⁶ Public welfare offenses are intended to “heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.”⁷⁷ To achieve this purpose, the Public Welfare Doctrine imposes a form of strict liability on to these offenses, which “requires the government to prove only that defendants were generally aware of what they were doing.”⁷⁸ Such offenses have included driving faster than the speed limit, the sale of impure or adulterated foods or drugs, the sale of alcohol to minors, and sex with

70. EPSTEIN ET AL., *supra* note 62, at 1.

71. *Id.*

72. GILES, *supra* note 51, at 3.

73. See Antony Millner & Helene Ollivier, *Beliefs, Politics, and Environmental Policy*, 10 REV. ENV'T ECON. & POL'Y 226, 226–27 (2016).

74. See generally Stephen B. Chapman, Comment, *Are Obnoxious Wastes More Like Machineguns or Hand Grenades?: Mens Rea Under the Resource Conservation and Recovery Act After Staples v. United States*, 43 U. KAN. L. REV. 1117 (1995).

75. *Historical Development of Environmental Criminal Law*, U.S. DEP'T OF JUST. (May 13, 2015) <https://www.justice.gov/enrd/about-division/historical-development-environmental-criminal-law> [<https://perma.cc/H7AZ-YMTE>].

76. Levenson, *supra* note 4, at 419.

77. *Morrisette v. United States*, 342 U.S. 246, 254 (1952).

78. Chapman, *supra* note 74, at 1121.

minors.⁷⁹ Furthermore, the Doctrine does not require the government to prove that the defendants know specific facts that make their acts or omissions illegal.⁸⁰ Rather, it relaxes the mens rea required.⁸¹ By doing so, this shifts the risks of dangerous activities to those best able to control them and assures that juries “will treat like cases alike” despite the difficulty of deciding what is reasonable in “complex high risk activities.”⁸² This eases the prosecution’s burden of proving intent in difficult cases, addresses situations where public safety concerns outweigh possible injustices, and sends a “powerful public statement of legislative intolerance for certain behavior.”⁸³

The original case that applied the Public Welfare Doctrine to an environmental statute was *United States v. International Minerals & Chemical Corp.*, which predated the advent of most modern environmental criminal statutes.⁸⁴ In this early Supreme Court case, the Court created a framework to evaluate violations in environmental law made “knowingly”⁸⁵ and developed a model for regulating environmental crimes as public welfare offenses with a more generalized mens rea standard.⁸⁶

In 1971, International Minerals & Chemical Corp. (IMC) was charged for shipping sulfuric acid and hydrofluosilicic acid across state lines and knowingly failing to show the required classification of said acid on the shipping papers.⁸⁷ This failure was in violation of a regulation requiring that the classification of certain hazardous materials appear on the shipping papers.⁸⁸ The regulation imposes a

79. Levenson, *supra* note 4, at 419; Sayre, *supra* note 4, at 55; *see, e.g.*, *United States v. Catlett*, 747 F.2d 1102 (6th Cir. 1984) (killing of protected animals under Migratory Bird Treaty Act); *United States v. Y. Hata & Co.*, 535 F.2d 508 (9th Cir. 1976) (prosecution under Food, Drug and Cosmetic Act); *People v. Dillard*, 201 Cal. Rptr. 136 (Ct. App. 1984) (carrying loaded firearm); *Morissette*, 342 U.S. at 251 n.8 (discussing sex offenses such as statutory rape where the defendant could be convicted despite a reasonable belief of age and consent).

80. Chapman, *supra* note 74, at 1121.

81. Levenson, *supra* note 4, at 419–22.

82. *Id.* at 421; Chapman, *supra* note 74, at 1119 n.22.

83. Levenson, *supra* note 4, at 419, 422; Chapman, *supra* note 74, at 1119 n.22.

84. Stefan A. Noe, Comment, “Willful Blindness”: A Better Doctrine for Holding Corporate Officers Criminally Responsible for RCRA Violations, 42 DEPAUL L. REV. 1461, 1478 (1993); Chapman, *supra* note 74, at 1126.

85. Gordon, *supra* note 39, at 443; *see generally* *United States v. Int’l Mins. & Chem. Corp.*, 402 U.S. 558 (1971).

86. *Id.*

87. *Int’l Mins.*, 402 U.S. at 559; 49 CFR § 173.427.

88. 49 CFR § 173.427.

criminal penalty on anyone who “knowingly violates” it,⁸⁹ under which the Supreme Court considered whether the phrase “knowingly violates” required knowledge of just the action or, additionally, knowledge of the specific regulation that was being violated.⁹⁰ The Court held that the government was not required to prove that IMC knew of the regulation prohibiting the shipment of corrosive liquids.⁹¹ Instead, only knowledge of general facts—in this case, knowledge of the safer routes and those that were less safe under the regulation—was required.⁹² The Court explained that it refused to apply the heightened knowledge requirement to the regulation because of the general principle that ignorance of the law is no defense.⁹³ Although the statute in this case has since been amended, the framework the Court established was that, where “dangerous or deleterious devices or products or obnoxious waste materials are involved,” no knowledge of the statute’s existence is required because “the probability of regulation is so great that anyone who is aware that he is in possession of [corrosive liquids] or dealing with them must be presumed to be aware of the regulation.”⁹⁴ Most significantly, the Court implied that environmental hazards, like dangerous narcotics and hand grenades, can involve the public welfare,⁹⁵ lending support to later courts’ application of the Public Welfare Doctrine.⁹⁶

After *International Minerals*, some courts considering the CAA, CWA, and RCRA have adopted, as a per se rule, that one who knowingly possesses “dangerous or deleterious . . . or obnoxious waste materials” may be subject to criminal liability under the public welfare offense doctrine because such a person is presumed to be on notice of the law, since “the probability of regulation is . . . great.”⁹⁷ Essentially, violating safety laws, such as these statutes, that are meant to protect

89. 18 U.S.C. § 834(a) (giving the Interstate Commerce Commission (ICC) power to “formulate regulations for the safe transportation” of “corrosive liquids”); *id.* § 834(f) (stating that whoever “knowingly violates any such regulation” shall be fined or imprisoned; pursuant to this power, the ICC promulgated a regulation requiring that the shippers show on the shipping papers the classification of the property).

90. *Int’l Mins.*, 402 U.S. at 560.

91. *Id.* at 563.

92. *Id.* at 560–62.

93. *Id.* at 563.

94. *Id.* at 565; Gordon, *supra* note 39, at 443.

95. *Int’l Mins.*, 402 U.S. at 560.

96. Gordon, *supra* note 39, at 444.

97. Chapman, *supra* note 74, at 1126 (quoting *Int’l Minerals*, 402 U.S. at 565); *see, e.g.*, *United States v. Laughlin*, 10 F.3d 961, 965 (2d Cir. 1993).

the public is considered to warrant extension of the Public Welfare Doctrine.⁹⁸ Courts have recognized that public welfare statutes are vital to prevent injury to people and property, not to punish.⁹⁹ Under this Doctrine, it is knowledge of the conduct that provides sufficient moral culpability for an environmental conviction.¹⁰⁰ This extension has ultimately provided the landscape for the Responsible Corporate Officer Doctrine to develop in environmental law.¹⁰¹

C. Extending the Responsible Corporate Officer Doctrine in Environmental Law

The Responsible Corporate Officer Doctrine (“RCO doctrine”) has become an important extension of the court’s public welfare framework for environmental crimes as a way of achieving corporate compliance and protecting the public from potentially serious dangers.¹⁰² Criminal actions have historically been difficult to bring against corporations because determining individual responsibility for decisions within the corporate entity can be difficult.¹⁰³ In response to this problem, the RCO doctrine imposes liability on those with the responsibility or authority to prevent or correct the violation.¹⁰⁴ The rationale for this is that the risk of injury to the public has superior importance and is unrelated to the violator’s intent.¹⁰⁵ Culpability can arise in public welfare statutes which impose either strict criminal liability or where some form of guilty knowledge is required.¹⁰⁶

98. See WASH. LEGAL FOUND., *FEDERAL EROSION OF BUSINESS CIVIL LIBERTIES* 7 (2008).

99. See *United States v. Weitzenhoff*, 35 F.3d 1275, 1284 (9th Cir. 1993); *United States v. Hoflin*, 880 F.2d 1033, 1037 (9th Cir. 1989); *United States v. Hopkins*, 53 F.3d 533, 536 (2d Cir. 1995); *United States v. Weintraub*, 273 F.3d 139, 146 (2d Cir. 2001); *United States v. Tomlinson*, 1999 U.S. App. LEXIS 16758, at *10 (9th Cir. July 16, 1999).

100. 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. ENV’T L. & POL’Y 399, 407 (1996).

101. Noe, *supra* note 84, at 1462; *United States v. Sinskey*, 119 F.3d 712, 719 (8th Cir. 1997) (discussing how the supervisor was sufficiently liable based on his active encouragement and affirmative participation in the misleading monitoring scheme).

102. See Steven Zipperman, Comment, *The Park Doctrine—Application of Strict Criminal Liability to Corporate Individuals for Violation of Environmental Crimes*, 10 UCLA J. ENV’T L. & POL’Y 123, 150 (1991).

103. *Id.* at 126; David J. Reilly, Comment, *Murder, Inc.: The Criminal Liability of Corporations for Homicide*, 18 SETON HALL L. REV. 378, 403–04 (1988).

104. Zipperman, *supra* note 102, at 126.

105. *Id.* at 123; Kathleen F. Brickey, *Criminal Liability of Corporate Officers for Strict Liability Offenses – Another View*, 35 VAND. L. REV. 1337, 1342–43 (1982).

106. Zipperman, *supra* note 102, at 129–35.

The RCO doctrine developed from two seminal Supreme Court cases.¹⁰⁷ First, in the 1943 case *United States v. Dotterweich*,¹⁰⁸ the Supreme Court considered the conviction of the president and general manager of a shipping corporation for shipping misbranded drugs in interstate commerce under the Food, Drug, and Cosmetic Act.¹⁰⁹ The court found that the overall purpose of the Act touches “phases of the lives of the people which, in the circumstances of modern industrialism, are largely beyond self-protection.”¹¹⁰ Accordingly, the Court dispensed with conventional requirements for mens rea criminal conduct in the interest of the larger good where a person is otherwise innocent but for his standing in responsible relation to a public danger.¹¹¹ Thus, while the defendant was not the person directly involved, his authority and responsibility as president and general manager of the corporation warranted the Court in sustaining the district court’s conviction and extending the RCO doctrine.¹¹²

Later, in the 1975 case *United States v. Park*,¹¹³ the Supreme Court considered whether to extend the RCO doctrine in a case concerning rodent contamination.¹¹⁴ In *Park*, John R. Park, the president of a national food store chain, was convicted of a Federal Food, Drug, and Cosmetic Act violation brought about by rodent contamination in the company’s warehouses.¹¹⁵ The Court found that a corporate officer may be found liable when the officer is found to be in an authoritative position with respect to the conditions that formed the basis of the alleged violations, shares responsibility in furthering the transaction that the statute outlaws, and fails to prevent or correct it.¹¹⁶

Ultimately, the “*Park* decision increased the responsibility of corporate officers even further than had *Dotterweich*.”¹¹⁷ Contrary to the

107. See generally *United States v. Dotterweich*, 320 U.S. 277 (1943); *United States v. Park*, 421 U.S. 658 (1975).

108. 320 U.S. 277 (1943).

109. *Id.* at 277.

110. Zipperman, *supra* note 102, at 127 (quoting *Dotterweich*, 320 U.S. at 280).

111. *Dotterweich*, 320 U.S. at 281.

112. *Id.* at 286.

113. 421 U.S. 658 (1975).

114. *Id.* at 660.

115. *Id.*

116. *Id.* at 670; Michael W. Peregrine, *The “Responsible Corporate Officer Doctrine” Survives to Perplex Corporate Boards*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 5, 2017), <https://corp.gov.law.harvard.edu/2017/07/05/the-responsible-corporate-officer-doctrine-survives-to-perplex-corporate-boards/> [https://perma.cc/2F99-95NR].

117. Zipperman, *supra* note 102, at 129–30.

small company in *Dotterweich*, the company in *Park* was a national corporation engaged in the storage, transportation, and sale of food, comprised of “36,000 employees, 874 retail outlets and sixteen warehouses.”¹¹⁸ Consequently, “the corporate officer in *Park* had far less daily supervisory control over the company as a whole than did the corporate officer in *Dotterweich*.”¹¹⁹ Since the charges in these cases under the Federal Food, Drug, and Cosmetic Act lacked express knowledge elements, the government was able to establish liability only by showing that “the officer had ‘authority with respect to the conditions that formed the basis of the alleged violations.’”¹²⁰

Following *Dotterweich* and *Park*, the RCO doctrine has been extended to environmental crimes.¹²¹ However, unlike *Park* and *Dotterweich*, environmental crimes require some form of a guilty mind.¹²² Thus, where courts classify environmental laws as public welfare statutes and apply general requirements for “knowing violations,” corporate officers can be found criminally liable where there is proof that the officers knew of the violation. Such proof can be inferred from circumstantial evidence, such as the defendant’s conduct or proof of willful blindness, and the failure of the officer to prevent or correct said violations.¹²³ While the Supreme Court has yet to consider extending the RCO doctrine in the environmental context, corporate officers must be held accountable as environmental criminal statutes seek to hold liable those in positions of protecting people, like the general public, who are wholly helpless of protecting themselves.¹²⁴

Even with this in mind, many large corporations are still being regarded as “too big to jail,” a term initially used in reference to the government’s “failure to prosecute Wall Street banks,”¹²⁵ but is

118. *Id.* at 130.

119. *Id.*

120. *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 51 (1st Cir. 1991) (quoting *Park*, 421 U.S. at 674).

121. *See United States v. Hodges X-Ray, Inc.*, 759 F.2d 557, 561 (6th Cir. 1985); *United States v. Osborne*, No. 1:11-CV-1029, 2012 U.S. Dist. LEXIS 44742, at *11 (N.D. Ohio, Mar. 30, 2012).

122. *MacDonald & Watson Waste Oil Co.*, 933 F.2d at 51.

123. Lisa Ann Harig, *Ignorance Is Not Bliss: Responsible Corporate Officers Convicted of Environmental Crimes and the Federal Sentencing Guidelines*, 42 DUKE L.J. 145, 150 (1992); *see United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 664–65 (3d Cir. 1984); *People v. Martin*, 211 Cal. App. 3d 699, 712 (1989).

124. Brickey, *supra* note 105, at 1347.

125. BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 2 (2016).

applicable in a range of settings today.¹²⁶ Over the past decade, greater public interest in accountability and deterrence to prevent future crime has shown the imperative need for such action.¹²⁷ While this has exhibited the heightened importance of federal prosecutions of corporations, there remains a prodigious amount of corporate misconduct left untouched.¹²⁸ This lack of federal corporate prosecution highlights the importance of categorizing these crimes as public welfare offenses to best hold accountable corporations responsible for the most egregious forms of environmental misconduct.¹²⁹ That being so, Part III will discuss the various criminal interpretations of environmental statutes and the reasons for and against prosecuting such crimes as public welfare offenses.

III. CRIMINAL INTERPRETATIONS OF ENVIRONMENTAL STATUTES

When determining the requisite level of mens rea required under the criminal provisions in the CAA, CWA, and RCRA, courts must decide, as a threshold matter, whether to interpret a criminal provision as a public welfare statute.¹³⁰ Reasonable courts have come to different conclusions,¹³¹ with the Second Circuit, Sixth Circuit, Eighth Circuit, Ninth Circuit (in most of its decisions), and Eleventh Circuit holding that they are public welfare statutes¹³² and the First Circuit, Third Circuit, and Fifth Circuit holding that they are not.¹³³ Part III will first consider arguments in favor of the public welfare designation and their supporting reasoning. Then, it will consider arguments against the public welfare designation.

126. Danielle Kurtzleben, *Too Big to Jail: Why the Government Is Quick to Fine but Slow to Prosecute Big Corporations*, VOX (July 13, 2015, 10:52 AM), <https://www.vox.com/2014/11/16/7223367/corporate-prosecution-wall-street> [<https://perma.cc/2A8X-UKEK>].

127. GARRETT, *supra* note 125, at 2.

128. Kurtzleben, *supra* note 126.

129. See EPSTEIN ET AL., *supra* note 62, at 20.

130. See, e.g., Hofmann, *supra* note 29, at 485.

131. See, e.g., *id.*

132. See *United States v. Laughlin*, 10 F.3d 961, 966–67 (2d Cir. 1993); *United States v. Hopkins*, 53 F.3d 533, 540 (2d Cir. 1995); *United States v. Buckley*, 934 F.2d 84, 88–89 (6th Cir. 1991); *United States v. Dean*, 969 F.2d 187, 191–92 (6th Cir. 1992); *United States v. Sinskey*, 119 F.3d 712, 715–6 (8th Cir. 1997); *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1503 (11th Cir. 1986); *United States v. Tomlinson*, 1999 U.S. App. LEXIS 16758, at *10 (9th Cir. July 16, 1999); *United States v. Weitzenhoff*, 35 F.3d 1275, 1296 (9th Cir. 1993).

133. *United States v. Speech*, 968 F.2d 795, 797 (9th Cir. 1992); *United States v. Borowski*, 977 F.2d 27, 32 n.9 (1st Cir. 1992); *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 668 (3d Cir. 1984); *United States v. Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996).

A. Arguments Supporting the Public Welfare Doctrine Application

A slight majority of courts have interpreted criminal provisions in the CAA, CWA, and RCRA as within the realm of the Public Welfare Doctrine.¹³⁴ In doing so, courts have held that a criminal defendant can possess sufficient “knowledge” to violate these statutes in one of two ways.¹³⁵ First, a defendant can violate public welfare laws by merely being aware of the conduct.¹³⁶ For example, a conviction under the CAA for a violation of asbestos work-practice standards was upheld by applying the Public Welfare Doctrine, regardless of whether the defendant knew that his conduct involved the kind and quantity of asbestos sufficient to trigger a violation.¹³⁷ In these circumstances, some courts have held that knowledge of the harmful nature of the conduct is presumed because of the inherently dangerous activity involved.¹³⁸ Second, criminal defendants can be required to have knowledge of the harmful conduct and of the harmful nature of their conduct, but need not be aware of the unlawful nature of their actions.¹³⁹ In these cases, courts have reasoned that knowledge of the dangerous activity is sufficient to put a defendant on notice of a regulation,¹⁴⁰ and ignorance of the law is no excuse.¹⁴¹

Courts have distinguished between the knowledge of the conduct and knowledge of its illegality.¹⁴² Unlike knowledge of illegality (i.e. knowledge of the law), knowledge of the conduct which happens to be in violation of the law requires only knowledge of facts that would create, in a reasonable person’s understanding, an expectation that his conduct was likely subject to strict regulation.¹⁴³ For example, in applying this distinction, all three circuit courts to rule on the

134. See, e.g., *United States v. Kelley Tech. Coatings, Inc.*, 157 F.3d 432, 438–39 (6th Cir. 1998) (analyzing the doctrine’s origins and status among the circuits). *But see Hanousek v. United States*, 528 U.S. 1102, 1103 (2000) (holding the broad range of liability counsels against applying the public welfare doctrine); Caroline Williamson et al., *Environmental Crimes*, 56 AM. CRIM. L. REV. 807, 861 n.459 (2019).

135. Glen V. Borre, *Public Welfare Offenses: A New Approach*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 418 (1961); *United States v. Weintraub*, 273 F.3d 139, 146 (2d Cir. 2001); Hofmann, *supra* note 29, at 488.

136. *Id.*

137. *Weintraub*, 273 F.3d at 146–51.

138. Borre, *supra* note 135, at 418.

139. *Id.* at 420; *Weintraub*, 273 F.3d at 147–48.

140. See *Weintraub*, 273 F.3d at 147, 149.

141. Hofmann, *supra* note 29, at 488.

142. *Weintraub*, 273 F.3d at 147.

143. *Id.* at 147–48; see Borre, *supra* note 135, at 418.

interpretation of “knowingly” in the CAA have held that provisions of the Act are public welfare statutes in cases involving asbestos and therefore only required the defendants to have knowledge of the asbestos disposal, not knowledge of the legal status of the materials or the violation.¹⁴⁴ Limiting the requisite level of mens rea to establish liability¹⁴⁵ has also further allowed for the application of the RCO doctrine by lowering the government’s burden of proof for showing “knowledge.”¹⁴⁶

In considering the reasons used to extend the public welfare application, the next section will first analyze the broad principle that the dangerous attributes of the substances being regulated implicate the public welfare. The following section will consider canons of statutory interpretation that courts have used to support this finding.

1. Dangerous Nature of Criminally Regulated Materials

Courts finding that these laws are public welfare statutes have reasoned that the public welfare nature of the offenses justifies not requiring knowledge of the law and further warrants limiting the application of “knowingly.”¹⁴⁷ In holding that no knowledge of the law is necessary, courts have extended the *International Minerals* framework to find that those dealing with such dangerous and deleterious substances ought to be presumed to be on notice of the regulations.¹⁴⁸ For example, environmental crimes have been found to be dealing with highly dangerous materials where they regulate activities that can cause serious illnesses, such as “the discharge of pollutants into the air, the disposal of hazardous wastes, the undocumented shipping of acids, . . . the use of pesticides on our food, [and] the improper and excessive discharge of sewage,” because of the potential for serious

144. Hofmann, *supra* note 29, at 476; *United States v. Buckley*, 934 F.2d 84, 87 (6th Cir. 1991); *United States v. Tomlinson*, 1999 U.S. App. LEXIS 16758, *6, *12–13 (9th Cir. July 16, 1999); *Weintraub*, 273 F.3d. at 146–47.

145. Hofmann, *supra* note 29, at 488.

146. *See* Brickey, *supra* note 105, at 1366.

147. Lawrence Friedman & H. Hamilton Hackney, *Questions of Intent: Environmental Crimes and “Public Welfare” Offenses*, 10 VILL. ENV’T L.J. 1, 9 (1999); Andrew J. Turner, *Mens Rea in Environmental Crime Prosecutions: Ignorantia Juris and the White Collar Criminal*, 23 COLUM. J. ENV’T L. 217, 220 (1998) (stating that intent is not necessary because public welfare offenses threaten injury to individuals and property, and that threat can be mitigated by exercising reasonable care).

148. *United States v. Int’l Mins. & Chem. Corp.*, 402 U.S. 558, 565 (1971).

repercussions to public health and welfare.¹⁴⁹ Additionally, the mere fact that permits are required for an activity has been found to be a sufficient warning to the defendant of the possibility of regulation.¹⁵⁰

Under the CAA, one example where felony liability can arise is in the rare instance where Hazardous Air Pollutants (HAP) listed in section 112 of the Act¹⁵¹ are being knowingly released.¹⁵² Under section 112, 188 hazardous air pollutants are listed¹⁵³ as being substances known or suspected to cause cancer and other serious non-cancer health effects.¹⁵⁴ Moreover, a significant number of cases involving CAA violations have involved asbestos.¹⁵⁵ For example, the Second Circuit considered such a violation in *United States v. Weintraub*,¹⁵⁶ when the defendant was charged under the CAA for procuring falsified documents showing that asbestos abatement at a construction site had been completed.¹⁵⁷ Interpreting the phrase “knowingly” in the statute, the court relied on the dangerous nature of the substance and the expectations that individuals have when dealing with asbestos.¹⁵⁸ Due to the grave public health implications associated with asbestos exposure, the court concluded that “a reasonable person could not hold ‘settled expectations’ that his handling of asbestos is innocent, substantially unregulated conduct.”¹⁵⁹

Under the CWA, felony liability can arise, for example, where a person knowingly discharges a hazardous pollutant without a permit or in violation of a permit¹⁶⁰ from a point source (any discernible,

149. *United States v. Weitzenhoff*, 35 F.3d 1275, 1286 (9th Cir. 1993).

150. *United States v. Hopkins*, 53 F.3d 533, 539 (2d Cir. 1995).

151. 42 U.S.C. § 7412(b)(1).

152. E. Donald Elliott et al., *The Clean Air Act: New Enforcement and Liability Provisions*, 42 AIR & WASTE MGMT. ASS’N 1414, 1415 (1992).

153. *Initial List of Hazardous Air Pollutants with Modifications*, U.S. ENV’T PROT. AGENCY (Dec. 19, 2022), <https://www.epa.gov/haps/initial-list-hazardous-air-pollutants-modifications> [<https://perma.cc/U7FX-XLZL>].

154. *Hazardous Air Pollutant Permitting*, IND. DEP’T OF ENV’T MGMT., <https://www.in.gov/idem/toxic/hazardous-air-pollutant-permitting/> [<https://perma.cc/5PNX-GMZ7>].

155. *United States v. Weintraub*, 273 F.3d 139, 150 (2d Cir. 2001).

156. 273 F.3d 139 (2d Cir. 2001).

157. *Id.* at 142.

158. *See id.* at 148.

159. *Id.* at 151.

160. *Criminal Provisions of Water Pollution*, U.S. ENV’T PROT. AGENCY (Nov. 10, 2022), <https://www.epa.gov/enforcement/criminal-provisions-water-pollution> [<https://perma.cc/QNY5-64NR>].

confined, and discrete conveyance)¹⁶¹ into a water of the United States.¹⁶² The EPA defines the term hazardous material as “any item or chemical which can cause harm to people, plants, or animals when released by spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment.”¹⁶³ For example, the Ninth Circuit has interpreted criminal provisions under the CWA as public welfare statutes because dumping sewage and other pollutants into our nation’s waters causes cholera, hepatitis, and other illnesses and can have serious repercussions for public health and welfare.¹⁶⁴

The RCRA is a public law that creates the framework for our national system of solid waste control and imposes criminal regulations for hazardous waste.¹⁶⁵ Under the RCRA, a “hazardous waste” is any solid waste which may pose a substantial present or potential hazard to human health or the environment when improperly disposed.¹⁶⁶ In *United States v. Laughlin*,¹⁶⁷ the Second Circuit considered whether the defendant was required to have knowledge that creosote sludge was “identified or listed” under the RCRA or only that the defendant had a general knowledge that he was performing acts proscribed by the statute.¹⁶⁸ The Court ultimately applied the *International Minerals* framework and ruled against the defendant, holding that creosote sludge is a dangerous waste material with a high enough probability of regulation to warrant presuming an awareness of regulation.¹⁶⁹

Where courts have inferred such notice based on the hazardous nature of the substances being regulated and extended the RCO doctrine,¹⁷⁰ the government is not required to prove wrongful intent and

161. *Clean Water Act Section 502: General Definitions*, U.S. ENV’T PROT. AGENCY (Apr. 20, 2022), <https://www.epa.gov/cwa-404/clean-water-act-section-502-general-definitions> [https://perma.cc/W8FP-73EY].

162. *Criminal Provisions of Water Pollution*, *supra* note 160.

163. *HazMat Definitions by OSHA, EPA, and DOT*, HAZWOPER TRAINING, <http://hazwoperhazmattraining.com/blog/hazwoper-training/definition-of-hazardous-material-hazmat-by-osh-and-epa-dot-and-nrc/> [https://perma.cc/2J4R-AZ8Q].

164. *United States v. Weitzenhoff*, 35 F.3d 1275, 1280–81 (9th Cir. 1993).

165. *Resource Conservation and Recovery Act (RCRA) Overview*, U.S. ENV’T PROT. AGENCY (June 29, 2022), <https://www.epa.gov/rcra/resource-conservation-and-recovery-act-rcra-overview> [https://perma.cc/HKG8-CXNG].

166. 42 U.S.C. § 6903(5)(B).

167. 10 F.3d 961 (2d Cir. 1993).

168. *Id.* at 965.

169. *Id.*

170. *United States v. Int’l Mins. & Chem. Corp.*, 402 U.S. 558, 565 (1971).

good faith is immaterial.¹⁷¹ It is the responsibility of persons who voluntarily associate themselves with hazardous materials as supervisors or persons in charge to comply with the law.¹⁷² In justifying such reasoning, courts have looked to the statutory language and legislative history to infer congressional intent.

2. Canons of Statutory Interpretation Illustrating Congressional Intent

While examining the nature of the substances being regulated provides grounds for holding these crimes as public welfare statutes, statutory interpretation is still necessary to resolve uncertainty as to the requisite standard of mens rea. “In construing statutes in a case of first impression, [courts must first] look to the language of the controlling statutes,” and second, when the language is ambiguous, to the legislative history.¹⁷³ When the language is ambiguous as to the standard of mens rea, a court’s primary goal is to determine congressional intent.¹⁷⁴ Accordingly, the following sections will discuss how courts have found environmental laws to be public welfare statutes by first examining the statutory language and then the legislative history.

a. Statutory Language

Statutory interpretation begins with examining the language of the statute itself.¹⁷⁵ Where courts consider the language of the statute and find that the language is clear and plain, courts will cease with their statutory construction analysis.¹⁷⁶ Take, for example, section 6928(d) of the RCRA. It reads:

(d) Criminal penalties

Any person who— . . .

(2) *knowingly* treats, stores or disposes of any hazardous waste identified or listed under this subchapter—

171. *United States v. Buckley*, 934 F.2d 84, 89 (6th Cir. 1991).

172. *Id.*

173. *Cent. Mont. Elec. Power Coop., Inc. v. Bonneville Power Admin.*, 840 F.2d 1472, 1477 (9th Cir. 1988).

174. *See United States v. Weintraub*, 273 F.3d 139, 147 (2d Cir. 2001).

175. *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

176. *United States v. Hofflin*, 880 F.2d 1033, 1037 (9th Cir. 1989).

- (A) without a permit under this subchapter . . .
 ; or
 (B) in *knowing* violation of any material condition or requirement of such permit; or
 (C) in *knowing* violation of any material condition or requirement of any applicable interim status regulations or standards; . . .

shall, upon conviction, be subject to [fines, imprisonment, or both].¹⁷⁷

Some courts that have considered this statute have found that, under subsection (A), knowledge that a permit is lacking is not an element of the offense because the word “knowing” is included in paragraphs (B) and (C) but notably omitted from (A).¹⁷⁸ Courts have also reasoned that extending the “knowingly” requirement from section 6928(d)(2) to subsection (A) would render the addition of “knowing” in subsections (B) and (C) unnecessary.¹⁷⁹ Courts have concluded that, had Congress intended knowledge of the lack of a permit to be an element under subsection (A), it easily could have said so, given that it did under both subsections (B) and (C).¹⁸⁰

Another way that statutory language has been read is where one provision punishes the “knowing violation” of a separate provision, the later provision defines the illegal conduct.¹⁸¹ In considering this language and structure, it has been found that the word “knowingly” is modifying the acts that constitute the underlying conduct.¹⁸² Knowledge is therefore considered to be read as an element of the act that has been criminalized.¹⁸³ As such, “knowingly” has been taken to be a shorthand expression for knowingly doing specific acts, rather than knowledge of the law or knowledge of the hazards that such acts cause.¹⁸⁴ Accordingly, “[w]here a statute does not specify a heightened

177. 42 U.S.C. § 6928(d)(2) (emphasis added).

178. *United States v. Laughlin*, 10 F.3d 961, 966 (2d Cir. 1993); *Hoflin*, 880 F.2d at 1038.

179. *United States v. Dean*, 969 F.2d 187, 190 (6th Cir. 1992).

180. *Hoflin*, 880 F.2d at 1038.

181. *United States v. Sinskey*, 119 F.3d 712, 715 (8th Cir. 1997); *see, e.g.*, 33 U.S.C. § 1319(c).

182. *Sinskey*, 119 F.3d at 715; *United States v. Farrell*, 69 F.3d 891, 893 (8th Cir. 1995); *see United States v. Hern*, 926 F.2d 764, 766–68 (8th Cir. 1991).

183. *United States v. Buckley*, 934 F.2d 84, 89 (6th Cir. 1991).

184. *United States v. Int’l Mins. & Chem. Corp.*, 402 U.S. 558, 562–63 (1971); *United States v. Weitzenhoff*, 35 F.3d 1275, 1283–84 (9th Cir. 1993); *United States v. Rubenstein*, 403 F.3d 93, 97–98 (2d Cir. 2005); *United States v. Weintraub*, 273 F.3d 139, 147 (2d Cir. 2001); *Buckley*, 934

mental element . . . general intent is presumed to be the required element.”¹⁸⁵ For example, in the section of the CWA that prohibits “knowing violations” of “any permit condition,”¹⁸⁶ the Ninth Circuit found this language to be a shorthand designation for the specific act, which, in turn, is in violation of the CWA.¹⁸⁷ The Court found that the drafting of the statutory language was done in a general fashion in order to encompass a wide variety of possible violations.¹⁸⁸ Thus, “knowingly” is used generally to reflect a knowledge of one’s actions and the government must only prove general intent in order to establish a violation.¹⁸⁹

However, where courts have considered the language of the statute and found that the language is not so clear or plain, courts then have continued with a statutory analysis by assessing the legislative history.¹⁹⁰

b. Legislative History

When courts have found statutory language in environmental laws to be ambiguous in defining the mental state required for conviction but have still held these statutes to be public welfare statutes, courts have looked to legislative history to infer congressional intent.¹⁹¹

This analysis has been consistently used regarding the CWA to ascertain what Congress intended.¹⁹² Specifically, in the CWA’s 1987

F.2d at 88 (finding that “knowingly violate[s]” does not require knowledge of the illegality of one’s conduct in asbestos work-practice standards).

185. *Buckley*, 934 F.2d at 88 (quoting *United States v. Brown*, 915 F.2d 219, 225 (6th Cir. 1990)).

186. 33 U.S.C. § 1319(c)(2)(A).

187. *Weitzenhoff*, 35 F.3d at 1286.

188. *Id.* at 1285 n.6.

189. *Id.*; *Int’l Mins.*, 402 U.S. at 563; see *Buckley*, 934 F.2d at 88 (“The statutory language [“knowingly violates”] makes knowledge an element of the crime of violating emission standards; however, the statute requires knowledge only of the emissions themselves, not knowledge of the statute or of the hazards that emissions pose.”); *United States v. Sherbondy*, 865 F.2d 996, 1002 (9th Cir. 1988) (“In construing criminal statutes . . . we have often held that ‘knowingly’ does not include knowledge of the law.”); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 519 (E.D. Cal. 1978).

190. *Cent. Mont. Elec. Power Coop., Inc. v. Bonneville Power Admin.*, 840 F.2d 1472, 1477 (9th Cir. 1988); *Weitzenhoff*, 35 F.3d at 1283.

191. *United States v. Hopkins*, 53 F.3d 533, 537 (2d Cir. 1995); *Staples v. United States*, 511 U.S. 600, 627 (1994); see *Weitzenhoff*, 35 F.3d at 1283; *United States v. Sinskey*, 119 F.3d 712, 716 (8th Cir. 1997).

192. *Hopkins*, 53 F.3d at 537; *Weitzenhoff*, 35 F.3d at 1283.

Amendments, Congress replaced “willfully” with “knowingly,” which is currently the mens rea in place today.¹⁹³ This substantially amended the prior standard and elevated the penalties for violations of the Act¹⁹⁴ because “[i]ncreased penalties were considered necessary to deter would-be polluters.”¹⁹⁵ Where amendments include changes in the language, it is presumed that there was an intended change in meaning.¹⁹⁶ The Ninth Circuit in *United States v. Weitzenhoff* considered these amendments and the accompanying Senate and House reports to the legislation.¹⁹⁷ By comparing the two reports, the Court found that “the congressional explanations of the new penalty provisions strongly suggest that criminal sanctions are to be imposed on an individual who knowingly engages in conduct that results in a permit violation, regardless of whether the polluter is cognizant of the requirements or even the existence of the permit.”¹⁹⁸ The Court further reasoned that criminal liability in the act was intentionally left broad to best prevent violations.¹⁹⁹

Other courts to consider these Amendments to the CWA have similarly found that this change is sufficient grounds to deduce that Congress was intending to permit the application of the Public Welfare Doctrine to the prohibited acts based on the term’s textual meaning.²⁰⁰ In doing so, it has been noted that the term “willfulness” has generally been interpreted to refer to knowledge of the unlawful or wrongful nature of one’s conduct, and “knowingly” normally means acting with an awareness of one’s actions.²⁰¹ Accordingly, if Congress had intended to require proof that the defendant knew his acts were unlawful,

193. *Hopkins*, 53 F.3d at 540; *Weitzenhoff*, 35 F.3d at 1283; see H.R. REP. NO. 1004, at 137 (1986) (Conf. Rep.).

194. *Weitzenhoff*, 35 F.3d at 1283–84.

195. S. REP. NO. 50, at 29 (1985); *Weitzenhoff*, 35 F.3d at 1283.

196. *Stone v. Immigr. & Naturalization Serv.*, 514 U.S. 386, 397 (1995); see *United States v. Wilson*, 503 U.S. 329, 336 (1992).

197. *Weitzenhoff*, 35 F.3d at 1284.

198. Compare S. REP. NO. 50, at 29 (1985) (“Criminal liability shall . . . attach to any person who is not in compliance with all applicable Federal, State and local requirements and permits and causes a POTW [publicly owned treatment works] to violate any effluent limitation or condition in any permit issued to the treatment works . . .” (emphasis added)), with H.R. REP. NO. 99-189, at 29–30 (1985) (stating the proposed amendments were to “provide penalties for dischargers or individuals who knowingly or negligently violate or cause the violation of certain of the Act’s requirements” (emphasis added)); *Weitzenhoff*, 35 F.3d at 1283–84.

199. *Weitzenhoff*, 35 F.3d at 1286.

200. *Id.* at 1283–84; see *United States v. Hopkins*, 53 F.3d 533, 539–40 (2d Cir. 1995); *United States v. Sinskey*, 119 F.3d 712, 716 (8th Cir. 1997).

201. *Sinskey*, 119 F.3d at 716.

then it wouldn't have made this change.²⁰² This approach to analyzing the legislative history has also been applied to the RCRA.²⁰³ Here, the initial enactment was in 1976, designed as a regulatory scheme for toxic materials to provide “nationwide protection against the dangers of improper hazardous waste disposal.”²⁰⁴ Amendments in 1978 and 1980 expanded the criminal provisions in the RCRA, adding provisions for the treatment and storage of waste, and made violations of hazardous waste treatment a felony.²⁰⁵ Congress twice amending the statute to broaden its scope and enhance penalties has been seen as a strong indication of increasing concern about the seriousness of the prohibited conduct at issue.²⁰⁶ Since the RCRA plays “an essential role in ensuring the well-being of the nation's citizenry,”²⁰⁷ Congress considered discharges of hazardous waste onto the ground, which are regulated under the RCRA, as no less serious than such discharges into water.²⁰⁸

In reaching conclusions that the CAA, CWA, and RCRA are public welfare statutes, courts have also argued that if Congress intended for knowledge of the law to be required, it would have said so.²⁰⁹ Therefore, Congress has stated that liability flows from knowledge of actions—such as knowingly engaging in the prohibited conduct—alone.²¹⁰ In contrast, the next section will discuss the reasonings and justifications used to find that these statutes are not within the public welfare exception.

202. *Hopkins*, 53 F.3d at 540.

203. *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 666 (3d Cir. 1984).

204. *Id.*; H.R. REP. NO. 94-1491, at 3 (1976) (Conf. Rep.), as reprinted in 1976 U.S.C.C.A.N. 6238, 6249.

205. *Johnson & Towers, Inc.*, 741 F.2d at 667.

206. *Id.*

207. *Friedman & Hackney*, *supra* note 147, at 2.

208. *United States v. Hopkins*, 53 F.3d 533, 537 (2d Cir. 1995) (showing that Congress discussed the “increase in criminal penalties proposed by 1987 amendments to CWA to parallel existing penalties under RCRA [as reflecting] the commensurately serious nature of the violations to be criminally prosecuted under the [CWA]”); S. REP. NO. 50, at 3 (1985).

209. *See Hopkins*, 53 F.3d 533 at 537; *United States v. Weitzenhoff*, 35 F.3d 1275, 1283 (9th Cir. 1993); *United States v. Tomlinson*, 1999 U.S. App. LEXIS 16758, at *10 (9th Cir. July 16, 1999); *United States v. Hoflin*, 880 F.2d 1033, 1037–38 (9th Cir. 1989); *United States v. Laughlin*, 10 F.3d 961, 966–67 (2d Cir. 1993).

210. Cases cited *supra* note 209.

B. Arguments Against Applying the Public Welfare Doctrine

Unlike courts that have held that the criminal provisions of the CAA, CWA, and RCRA are public welfare statutes, there remains a number of circuit courts that have required these statutes to have a higher level of mens rea to establish liability.²¹¹ Courts that have concluded this can be categorized into two categories. In one category, courts have applied the knowledge requirement to additional facts that make the action illegal.²¹² In the other, courts have, beyond applying the knowledge requirement to additional facts, required knowledge of the laws.²¹³ First, this section will discuss arguments that the public welfare designation is inappropriate in the environmental law context. Second, this section will discuss the various canons of statutory interpretation that have been used to support this position.

1. Fears of Applying the Public Welfare Doctrine

Critics have raised various arguments that the Public Welfare Doctrine application is inappropriate in the environmental context. In considering some of the most common reasons, this section will first discuss the argument that the Doctrine is inappropriate because it is limited to criminal statutes with minimal punishments, and environmental crimes are not so limited. Then, this section will discuss fears that the application may punish innocent offenders, and lastly, that such application is inconsistent under mens rea principles.

a. Minimal Punishment Limitations

One critique of the Public Welfare Doctrine is that it is limited to crimes that have minimal punishment, but criminal punishment for environmental statutes is not so minimal.²¹⁴ Environmental statutes have

211. See *United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990); *United States v. Speech*, 968 F.2d 795, 796 (9th Cir. 1992); *United States v. Ahmad*, 101 F.3d 386, 390 (5th Cir. 1996); *United States v. Borowski*, 977 F.2d 27, 30 (1st Cir. 1992).

212. Hofmann, *supra* note 29, at 489; see *Ahmad*, 101 F.3d at 390 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 130 (1994)); *Staples v. United States*, 511 U.S. 600, 600 (1994) (holding a statute criminalizing knowing possession of a machine gun required the defendants to know, not only that they possessed a firearm, but that it was actually a machine gun).

213. *Ahmad*, 101 F.3d at 390 (quoting *X-Citement Video, Inc.*, 513 U.S. at 130); see *Staples*, 511 U.S. at 600.

214. Aaron F. Kass, *Mindless Guilt: Negative Aspects of State Environmental Prosecutions Using the Public Welfare Exception*, 29 WM. & MARY ENV'T L. & POL'Y REV. 517, 518 (2005); see generally Margaret Shaw, *Criminal Enforcement of Environmental Laws: Relevancy of the*

increased criminal penalties since 1980 due to growing concerns of improper disposal and treatment of hazardous waste²¹⁵ and the passage of the Superfund law,²¹⁶ which is a program designed to investigate and clean sites contaminated with hazardous substances.²¹⁷ On average, first-time environmental violators serve sentences of twelve to sixteen months in jail,²¹⁸ and can incur criminal fines starting at \$2,500 and up to \$50,000 a day for continued violations.²¹⁹ However, violations of knowing endangerment can be as harsh as up to fifteen years for a violation.²²⁰

Crimes that are categorized as public welfare statutes have initially involved statutes providing for only light penalties, such as short jail sentences, but not imprisonment in the state penitentiary.²²¹ Critics argue this makes environmental criminal law outside the bounds of public welfare statutes.²²² And they highlight that the community’s sense of justice cannot tolerate the substantial infliction of punishment upon those who are potentially innocent of intentional wrongdoing.²²³

b. Risks of Punishing the Innocent

Critics fear that applying the Public Welfare Doctrine will potentially result in morally innocent people being subject to felony charges.²²⁴ They have argued that this is because the conduct being criminalized is typically innocent behavior that is not immoral.²²⁵

Public Welfare Doctrine in Determining Culpability, 27 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 337, 344 (2001).

215. Shaw, *supra* note 214, at 339–40.

216. See *Summary of the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)*, U.S. ENV’T PROT. AGENCY (Sept. 12, 2022) [hereinafter *Superfund*], <https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act> [https://perma.cc/H69T-3WSX].

217. *Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/comprehensive_environmental_response_compensation_and_liability_act_cercla.

218. See *Enforcement Annual Results Fiscal Year 2021*, U.S. ENV’T PROT. AGENCY (Sept. 29, 2022), <https://www.epa.gov/enforcement/enforcement-annual-results-fiscal-year-2021> [https://perma.cc/FD5C-KV6X].

219. See 33 U.S.C. § 1319.

220. Clean Air Act § 113(c), 42 U.S.C. § 7413(c); *id.* § 6928.

221. See WASH. LEGAL FOUND.: EROSION OF BUS. CIV. LIBERTIES, *supra* note 98, at 1–7; *Weitzenhoff*, 35 F.3d at 1296.

222. Sayre, *supra* note 4, at 70.

223. *Id.*

224. Kepten D. Carmichael, *Strict Criminal Liability for Environmental Violations: A Need for Judicial Restraint*, 71 IND. L.J. 729, 748 (1996).

225. See Kass, *supra* note 214, at 525.

Where courts have extended the knowledge requirement to additional elements of the statute, it's been reasoned that this allows for enhanced protection because environmental statutes criminalize typically innocent conduct.²²⁶

Courts and critics have also argued that holding these crimes as public welfare statutes may punish innocent conduct based on the nature of the substance involved not being so harmful.²²⁷ Where this has been asserted, a comparison of machine guns to gasoline has been used, based on the Supreme Court's holding in *Staples v. United States*.²²⁸ In *Staples*, the Supreme Court held that a statute criminalizing the knowing possession of a machine gun was outside of the public welfare exception because guns have traditionally been widely accepted as lawful possessions and public welfare statutes are appropriate to protect wholly innocent people from widespread harm.²²⁹ In applying this reasoning under the CWA, the Fifth Circuit in *United States v. Ahmad*²³⁰ found that the discharge of gasoline, although "potentially harmful or injurious," was "certainly no more so than are machineguns" and therefore not within the exception.²³¹ Accordingly, the conviction of a gas station operator that had pumped out 5,220 gallons of fluid, with approximately 4,690 gallons of it being gasoline, which contaminated a creek and a sewer system, caused an explosion hazard, and forced schools and business to shut down, was reversed because he claimed that he thought it was water rather than gasoline.²³² Despite evidence that he was warned by a tank-testing company about emptying the tank himself and what could result if he did, the defendant's claim of mistake of fact was preserved by the court.²³³

c. Criminal Law Principles

Additionally, courts are hesitant to stray from dispensing with the mens rea all together, which is what the traditional application of the Public Welfare Doctrine initially does by applying strict liability,

226. *United States v. Ahmad*, 101 F.3d 386, 390 (5th Cir. 1996); Hofmann, *supra* note 29, at 489.

227. *See Ahmad*, 101 F.3d at 391.

228. *Id.*; *Staples v. United States*, 511 U.S. 600, 612 (1994).

229. *Staples*, 511 U.S. at 612.

230. 101 F.3d 386.

231. *Id.* at 391.

232. *Id.* at 393.

233. *Id.* at 388.

because statutes requiring no mens rea are generally disfavored.²³⁴ “Under Anglo-American jurisprudence, criminal liability flows from an intentional act.”²³⁵ Thus offenses are ordinarily required to have a mens rea.²³⁶ This supposition is based on “the contention that an injury can amount to a crime only when inflicted by intention.”²³⁷ Additionally, since “knowledge” is written into these statutes, critics have asserted that they should not be read as strict liability because the government is being required to prove a mental element.²³⁸

2. Canons of Statutory Interpretation

Courts have typically rooted their justifications for holding that environmental statutes are not public welfare statutes in the above-raised concerns.²³⁹ Consequently, this next section will discuss the various approaches to statutory interpretation taken by courts that have found that these statutes require additional forms of mens rea.

a. Statutory Language

First, a couple of courts have looked to the statutory language to determine that Congress did not intend for the public welfare exception to apply.²⁴⁰ Courts that have taken this approach have applied the “knowingly” element to either knowledge of additional facts²⁴¹ or knowledge of the law.²⁴²

For example, knowledge of the law has been required under RCRA section 6928(d)(2) discussed above,²⁴³ which criminalizes any person who knowingly treats, stores, or disposes of any hazardous

234. See *Staples*, 511 U.S. at 606; *United States v. Wilson*, 133 F.3d 251, 261 (4th Cir. 1997).

235. Friedman & Hackney, *supra* note 147, at 5.

236. *Staples*, 511 U.S. at 605; *Wilson*, 133 F.3d at 261.

237. *Staples*, 511 U.S. at 605 (quoting *Morissette*, 342 U.S. at 250).

238. Shaw, *supra* note 214, at 344; see, e.g., 33 U.S.C. §§ 1319(c)(1)–(2).

239. See *United States v. Ahmad*, 101 F.3d 386, 390 (5th Cir. 1996) (discussing fears of punishing innocent offenders); *Wilson*, 133 F.3d at 261 (discussing how statutes requiring no mens rea are generally disfavored); *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 51 (1st Cir. 1991) (discussing how applying the responsible corporate officer doctrine to the felony environmental crime was unprecedented); see also *supra* Section III.B.1.a, b, & c.

240. *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 665 (3d Cir. 1984); *United States v. Hayes Int’l Corp.*, 786 F.2d 1499, 1503–04 (11th Cir. 1986).

241. See *United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990); *United States v. Speech*, 968 F.2d 795, 796 (9th Cir. 1992); *Ahmad*, 101 F.3d at 391; *United States v. Borowski*, 977 F.2d 27, 29 (1st Cir. 1992).

242. See *Johnson & Towers*, 741 F.2d at 669; *Hayes Int’l Corp.*, 786 F.2d at 1504.

243. See *supra* Section III.A.2.a.

waste listed by the statute.²⁴⁴ In this contrary reading, the Third Circuit held that the “knowingly” requirement referred to in section 6928(d)(2) was either inadvertently omitted from the permit requirement in subsection (A), or that “knowingly,” which introduces subsection (2), applies to subsection (A).²⁴⁵ In arriving at this reading, the Court reasoned that, if “knowingly” modified only the actions, it would be an almost meaningless addition to the statute, as it is unlikely a person could be treating, storing, or disposing of a substance without knowing that they were doing so.²⁴⁶ Additionally, courts have stated that this requirement does not create a heavy burden, as “[k]nowledge does not require certainty.”²⁴⁷

b. Grammatical Interpretation

A grammatical reading has been another approach used to interpret the mens rea in environmental statutes where courts have not applied the public welfare exception.²⁴⁸ This approach has been taken where courts have found that “knowingly” applies to additional elements of the statute.²⁴⁹ For example, section 1319(c)(2)(A) of the CWA makes an illegal discharge of a pollutant a felony, proving that any person who “(A) *knowingly violates* section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1322(p), 1328, or 1345 of this title . . . shall be punished.”²⁵⁰ In turn, section 1311 makes unlawful “the discharge of any pollutant” without a permit.²⁵¹ In considering this structure, the Fourth Circuit “concluded “that ‘knowingly violates’ could perhaps be a ‘shorthand method’ of requiring the mens rea to accompany each element of the other statutory sections” numerically referred to in section 1319(c)(2), “rather than inserting the same mens rea requirement repeatedly for each element.”²⁵² When discussing the issue of to which elements of the offense the modifier “knowingly” should be applied,

244. 42 U.S.C. § 6928(d)(2).

245. *Johnson & Towers*, 741 F.2d at 668 (holding that the offense required knowledge of the action, the waste’s hazardous character, and the status of the permit).

246. *Id.*

247. *Hayes Int’l Corp.*, 786 F.2d at 1504.

248. *See United States v. Wilson*, 133 F.3d 251, 261 (4th Cir. 1997).

249. *Id.*

250. 33 U.S.C. § 1319(c)(2)(A) (emphasis added).

251. *Id.* § 1311(a).

252. Hofmann, *supra* note 29, at 480; *Wilson*, 133 F.3d at 261.

courts have also given significant consideration to the inconsistency it would create to not apply it to each element.²⁵³

Additionally, in finding that this same provision of the CWA requires knowledge of each element in the provision, it has been suggested that the order of the words was designed in order for “knowingly” to modify “violates” so that the clause imposes punishment only when one has knowledge of each statutory element or the law.²⁵⁴ The reasoning behind taking this approach has been both to address the fear of criminalizing innocent conduct and adhere to the general rule of not reading out the mens rea requirement.²⁵⁵

As a result of these contrasting reasonings, courts remain split over how to interpret “knowingly” in environmental criminal statutes.²⁵⁶ In resolving this conflict, Part IV will argue that courts should adopt a modified public welfare approach, which is proper under the plain language of the statutes and derived from *International Minerals* but provides safeguards to ensure the fears discussed above will be mitigated.

IV. SOLUTION: ADOPTING A MODIFIED PUBLIC WELFARE APPROACH

Uncertainty in environmental criminal statutes provides inadequate guidance for prosecutors and judges, resulting in inconsistent interpretation by the courts.²⁵⁷ Moreover, the Supreme Court has declined to take on the issue.²⁵⁸ However, without a real threat of

253. *United States v. Ahmad*, 101 F.3d 386, 390 (5th Cir. 1996).

254. *Id.* at 390.

255. *Id.*; Hofmann, *supra* note 29, at 489; *see Staples v. United States*, 511 U.S. 600, 606 (1994); *Wilson*, 133 F.3d at 261.

256. *See United States v. Laughlin*, 10 F.3d 961, 961; *United States v. Hopkins*, 53 F.3d 533, 533 (2d Cir. 1995); *United States v. Weintraub*, 273 F.3d 139, 140 (2d Cir. 2001); *United States v. Buckley*, 934 F.2d 84, 87 (6th Cir. 1991); *United States v. Dean*, 969 F.2d 187, 187 (6th Cir. 1992); *United States v. Sinskey*, 119 F.3d 712, 712 (8th Cir. 1997); *United States v. Hayes Int’l Corp.*, 786 F.2d 1499, 1500 (11th Cir. 1986); *United States v. Tomlinson*, 1999 U.S. App. LEXIS 16758, at *9–10 (9th Cir. July 16, 1999); *United States v. Weitzenhoff*, 35 F.3d 1275, 1281 (9th Cir. 1993). *But see United States v. Speach*, 968 F.2d 795, 797 (9th Cir. 1992); *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 36 (1st Cir. 1991); *United States v. Borowski*, 977 F.2d 27, 27 (1st Cir. 1992); *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 663 (3d Cir. 1984); *Ahmad*, 101 F.3d at 386; Albert C. Lin, *The Unifying Role of Harm in Environmental Law*, 2006 WIS. L. REV. 897, 902 (discussing the contrasting ways in which harm is being interpreted).

257. REITZ, *supra* note 33, at 8 (“The lack of a clear *mens rea* provision in criminal statutes provides inadequate guidance to prosecutors and judges and can result in inconsistent interpretation by the courts.”).

258. Gordon, *supra* note 39, at 440; *see, e.g., Weitzenhoff*, 35 F.3d 1275, *cert. denied*, 115 S. Ct. 939; *United States v. Hoflin*, 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1143 (1990); *Johnson & Towers, Inc.*, 741 F.2d 662, *cert. denied*, 469 U.S. 1208 (1985); *United States v. Dee*,

criminal prosecution there remains a high likelihood for severe harm, both to the environment and human health, given the continued lack of corporate compliance.²⁵⁹

Public welfare statutes outside of the environmental realm apply a traditional strict liability approach—such as in cases dealing with statutory rape,²⁶⁰ distribution of adulterated drugs, and sales of narcotics²⁶¹—and require only proof that the act was performed regardless of what the actor knew or did not know.²⁶² In the environmental context however, a new modified form of the Public Welfare Doctrine should be adopted to properly classify the requisite environmental criminal intent.²⁶³ In this modified public welfare scheme, strict liability should be applied in a limited fashion, such that the defendant need not have knowledge of the law or permit requirements so long as he has a general “knowledge” of the conduct, reducing the level of mens rea to a more general form of intent. This approach should be adopted because it protects individual rights by demanding a general awareness of the conduct, while holding corporate officers and entities responsible for criminal violations when circumstances permit. While this designation has not been explicitly used, the approach is derived from the Supreme Court’s holding in *International Minerals*, and adopting a default modified public welfare approach to mens rea will best comport with the statutes’ remedial purpose, plain statutory text, and legislative history.²⁶⁴

912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991); *Laughlin*, 10 F.3d 961, *cert. denied*, 114 S. Ct. 1649 (1994).

259. See EPSTEIN ET AL., *supra* note 62, at 20; Rena I. Steinzor, *How Criminal Law Can Help Save the Environment*, 46 ENV’T L. 209, 220 (2016) (discussing how criminal law is a crucial enforcement tool to achieve deterrence of conduct and prevention of harm).

260. Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 324 (2003); *Morissette v. United States*, 342 U.S. 246, 251 (1952).

261. *United States v. Dotterweich*, 320 U.S. 277, 278 (considering strict liability under Title 21 U.S.C. § 331 for distribution of adulterated drugs); *United States v. Balint*, 258 U.S. 252–53 (1922) (considering strict liability for the sale of narcotics under the Narcotic Act of December 17, 1914).

262. *Dotterweich*, 320 U.S. at 286; *Balint*, 258 U.S. at 253.

263. “The regulatory response to growth of industrialization and urbanization in the late 19th century introduced a new form of strict-liability crimes, commonly known as ‘public welfare’ offenses, which legislatures began enacting under their police power to promote social order.” REITZ, *supra* note 33, at 5; Richard G. Singer, *The Resurgence of Mens Rea: III — The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 408 (1989).

264. *United States v. Int’l Mins. & Chem. Corp.*, 402 U.S. 558, 565 (1971); REITZ, *supra* note 33, at 8 (“If a statute is silent on the requisite state of mind to establish a crime, the default mens rea provision would be incorporated. The Legislature would be free to adopt new public welfare offenses but would need to explicitly state its intent to do so.”).

Accordingly, Part IV will explain why courts should adopt a modified public welfare approach in order to best deter future violations and hold corporate officers responsible. First, it will explain how this approach is necessitated by the fact that these statutes undeniably fit within the overall purpose of the public welfare exception. Then, it will resolve the concerns raised by critics against applying the public welfare designation in this context. Finally, it will argue that this approach is consistent with the statutory language, legislative history, and unambiguous text.

A. Approach is Consistent with the Overall Purpose of Public Welfare Statutes

In asserting that these statutes fit within the public welfare category, a “commonsense evaluation of the nature of the particular devices or substances Congress has subjected to regulation and the expectations that individuals may legitimately have in dealing with these regulated items” further highlights the appropriateness of this approach.²⁶⁵ “The touchstone is the defendant’s ‘settled expectations’ about the regulated conduct.”²⁶⁶

Public welfare offenses regulate activities and materials that “create an unacceptably high probability of injury,”²⁶⁷ and “conduct that a reasonable person should know is subject to stringent public regulation [given that such conduct] may seriously threaten the community’s health and safety.”²⁶⁸ Public welfare offenses developed as a class of offenses that create an unacceptably high probability of injury,²⁶⁹ and can have serious repercussions for public health and welfare.²⁷⁰ In accordance, environmental crime is at least as serious as any other crime affecting society today and, although perceived as “victimless,”²⁷¹ has determinative consequences for all of society, impacting public health,

265. *United States v. Weintraub*, 273 F.3d 139, 148 (2d Cir. 2001) (quoting *Staples v. United States*, 511 U.S. 600, 619 (1994)).

266. *Id.*; *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 71 (1994).

267. Gordon, *supra* note 39, at 442 (quoting *Morissette v. United States*, 342 U.S. 246, 255–56 (1952)).

268. 5 GREGORY A. BIBLER, *LAW OF HAZARDOUS WASTE* § 17A.02, LexisNexis (database updated Nov. 2012) (quoting *Liparota v. United States*, 471 U.S. 419, 433 (1985)).

269. Gordon, *supra* note 39, at 442; *Morissette*, 342 U.S. at 255–56.

270. *United States v. Weitzenhoff*, 35 F.3d 1275, 1286 (9th Cir. 1993).

271. DEBBIE BANKS ET AL., *ENV’T INVESTIGATION AGENCY, ENVIRONMENTAL CRIME: A THREAT TO OUR FUTURE* 1–2 (2008), <https://globalinitiative.net/wp-content/uploads/2017/12/EIA-Environmental-Crime-A-Threat-to-Our-Future.pdf> [<https://perma.cc/43D6-UDXT>].

economies, non-human species, and nature itself, in the present as well as for future generations.²⁷²

Where a gas station owner is faced with a contaminated tank, would it be unreasonable to expect that, given his position, he would properly heed the advice of a certified tank-testing company and refrain from illegally and dangerously discharging 4,690 gallons of gasoline down the side of the road or into a manhole?²⁷³ Would it be fair to require him to have acted with knowledge that this would cause a major risk of explosion, cause two nearby schools and an entire treatment plant to evacuate, and contaminate a lake to prove liability? Or is such knowledge of the potential harms an exceptionally high burden to require, since knowledge of such consequences likely requires expertise? To prevent such harm from occurring again, the knowledge standard must be limited to knowledge of the basic facts, regardless of knowledge of the potential health hazards that could result, because such knowledge creates a heavy burden that would require defendants to have knowledge far beyond what is reasonable.²⁷⁴ It is the very hazardous nature and quantity of the substances that environmental statutes regulate which puts individuals controlling those substances on notice that “criminal statutes probably regulate the handling and release of the substances.”²⁷⁵

Adopting a modified public welfare approach is also supported by the overall purpose of the CAA, CWA, and RCRA. First, the criminal provisions of the CAA, including the amendments in 1990, were designed to address the persistent and visible problems resulting from polluted air.²⁷⁶ Prior to the 1990 Amendments, the CAA provided misdemeanor penalties for a limited range of violations.²⁷⁷ However, the

272. EILEEN SKINNIDER, INT’L CTR. FOR CRIM. L. REFORM AND CRIM. JUST. POL’Y, EFFECT, ISSUES AND CHALLENGES FOR VICTIMS OF CRIMES THAT HAVE A SIGNIFICANT IMPACT ON THE ENVIRONMENT 1 (2013), https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_22/PNI_Workshop/Paper_ICCLR_CJP_PNI-Workshop.pdf [<https://perma.cc/QX9L-2KB6>]; Steinzor, *supra* note 259, at 220 (discussing how criminal law is a crucial enforcement tool to achieve deterrence of conduct and prevention of harm).

273. *See generally* United States v. Ahmad, 101 F.3d 386, 387–88 (5th Cir. 1996).

274. United States v. Buckley, 934 F.2d 84, 88–89 (6th Cir. 1991) (explaining how the presence of asbestos alone is sufficient to show notice).

275. *See id.*

276. Elder, *supra* note 69, at 141; Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399-71 (current version at 42 U.S.C. §§ 7403–7671).

277. Elder, *supra* note 69, at 141; *see* Clean Air Act § 113(c); 42 U.S.C. § 7413(c).

public’s heightened awareness of the dangers of polluted air led to substantially increased criminal penalties.²⁷⁸

Second, the criminal provisions of the CWA are clearly designed to protect the public at large from the “potentially dire consequences of water pollution,” and therefore fall within the category of public welfare legislation.²⁷⁹ The CWA was developed by Congress in recognition of the severe impact of the nation’s increasing water pollution on public health as well as on industries including fishing, agriculture, and outdoor recreation.²⁸⁰ It was crafted as a complex and comprehensive statute to preserve and restore “the chemical, physical, and biological integrity of the Nation’s waters.”²⁸¹

Third, the RCRA’s purpose, like the Food and Drug Act, is to protect the lives and health of people in areas in which circumstances of modern industrialism are largely beyond self-protection.²⁸² Further, “hazardous waste laws constitute a public welfare statute because they pervasively affect activities which threaten human health and safety as well as the environment.”²⁸³

This modified approach is further applicable because it permits holding corporate officers responsible, which is necessary due to significant data highlighting how informal sanctions do little to deter corporate recidivism.²⁸⁴ An officer may be liable under the RCO doctrine

278. Elder, *supra* note 69, at 141.

279. United States v. Weitzenhoff, 35 F.3d 1275, 1286 (9th Cir. 1993); United States v. Kelley Tech. Coatings, Inc., 157 F.3d 432, 436, 439 (6th Cir. 1998) (discussing how the CWA is a public welfare statute and denying the defendant’s argument that knowledge of the illegality was required).

280. 33 U.S.C. § 1251(a); United States v. Wilson, 133 F.3d 251, 259 (4th Cir. 1997).

281. 33 U.S.C. § 1251(a); *Wilson*, 133 F.3d at 259.

282. United States v. Hoflin, 880 F.2d 1033, 1038 (9th Cir. 1989) (quoting United States v. Dotterweich, 320 U.S. 277, 280 (1943)); see United States v. Sherbondy, 865 F.2d 996, 1001–02 (9th Cir. 1988) (explaining that the word “knowingly” in 18 U.S.C. §§ 922(g) & 924(a)(1)(B), part of the Firearms Owners’ Protection Act, does not require proof that defendant knew he was violating law).

283. *In re Dougherty*, 482 N.W.2d 485, 489 (Minn. Ct. App. 1992); United States v. Hayes Int’l Corp., 786 F.2d 1499, 1503 (11th Cir. 1986) (characterizing the RCRA as a public welfare statute); United States v. Johnson & Towers, Inc., 741 F.2d 662, 666 (3d Cir. 1984) (same); Matthews v. Eichorn Motors, Inc., 800 N.W.2d 823, 832 (Minn. Ct. App. 2011).

284. Zipperman, *supra* note 102, at 123; SIMPSON ET AL., *supra* note 25. On December 14, 2021, the DOJ’s Assistant Attorney General for the Environment and Natural Resources Division (ENRD) Todd Kim spoke at the American Bar Association’s National Environmental Enforcement Conference’s Section on Environmental, Energy, and Resources and “stress[ed] that the enforcement of the criminal provisions of the environmental laws is a priority.” He further said that “[v]igorous criminal enforcement is critical to the proper functioning of the overall enforcement scheme under the environmental statutes. It also expresses our values as a society and is an appropriate response to the most egregious and harmful conduct. Criminal prosecutions ‘are an indispensable

when the public welfare rationale is extended because the potential violator, by adhering to the law, could have prevented the harm caused by such offenses “with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities.”²⁸⁵ Thus, this “heighten[s] the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare” and addresses the dangerous potential for the powerful executive with vast control over corporate operations to easily create the impression that he did not know the details of illegal activity.²⁸⁶ Similarly, when corporate defendants work with environmentally dangerous substances, it is reasonable to assume they are on notice that they are dealing with substances that place them in “responsible relation to a public danger,” such as from dumping sewage into national waters.²⁸⁷

Traditionally, “public welfare offenses do not require a mental state or wrongful intent on the part of the defendant.”²⁸⁸ However, this has shifted in the environmental context with a split on whether to apply the RCO doctrine “in cases involving public welfare statutes containing a scienter requirement.”²⁸⁹

and powerful deterrent’ and a genuine threat of criminal prosecution can and will change the conduct of individuals and corporations who would not be deterred by the threat of civil enforcement alone.” Brightbill & Roualet, *supra* note 63.

285. Gordon, *supra* note 39, at 442 (quoting *Morissette v. United States*, 342 U.S. 246, 255–56 (1952)).

286. REITZ, *supra* note 33, at 5 (quoting *Morissette*, 342 U.S. at 254); Amiad Kushner, *Applying the Responsible Corporate Officer Doctrine Outside the Public Welfare Context*, 93 J. CRIM. L. & CRIMINOLOGY 681, 686 (2003); see, e.g., *United States v. TIC Inv. Corp.*, 68 F.3d 1082, 1089 (8th Cir. 1995) (noting that an officer who exercises complete control over corporate operations may avoid confronting the details of illegal toxic waste disposal, making it difficult to impose liability); Jane F. Barrett & Veronica M. Clarke, *Perspectives on the Knowledge Requirement of Section 6928(d) of RCRA after United States v. Dee*, 59 GEO. WASH. L. REV. 862, 883 (1991) (noting that in environmental prosecutions knowledge is easier to assign to a lower level employee who handles hazardous waste than to a senior executive).

287. *United States v. Weitzenhoff*, 35 F.3d 1275, 1280, 1286 (9th Cir. 1993) (quoting *Staples v. United States*, 511 U.S. 600, 610 (1994)); see SIMPSON ET AL., *supra* note 25 (in a study assessing the correlation between corporate characteristics and environmental violations, regardless of the specific pollutant examined, it was found that financial performance, profitability, return on assets, sales and liquidity, and numbers of facilities owned all showed strong correlation with companies that have higher violation rates); Joseph G. Block & Nancy A. Voisin, *The Responsible Corporate Officer Doctrine-Can You Go to Jail for What You Don’t Know?*, 22 ENV’T L. 1347, 1349–50 (1992) (“It is now well established that environmental laws fall within the realm of health and welfare statutes, whose purpose is to protect the general public.”).

288. Sayre, *supra* note 4, at 55; Levenson, *supra* note 4, at 419.

289. Harig, *supra* note 123, at 147.

Thus, the modified public welfare approach is well suited to resolve this split and ensure that these statutes are being categorized properly as public welfare statutes, and it permits the application of the RCO doctrine to best prevent recidivism. This will further permit liability to be properly distributed amongst corporate officers given the modern complexities within large corporations in which multiple managers may be connected to the illegal activity.²⁹⁰ Modifying the traditional public welfare approach to strict liability in the environmental context will also best align with the statutory language and legislative history and mitigate the concerns raised by critics discussed above.

B. Modified Approach is Equipped to Address Fears of Applying the Public Welfare Doctrine

This modified approach is equipped to combat concerns with categorizing environmental statutes as public welfare statutes. First, this section will discuss how environmental statutes don't impose more severe penalties than other public welfare statutes. Second, it will discuss how the approach protects against punishing innocent conduct, and finally, how this reading is consistent with basic principles of criminal law.

1. Environmental Crimes Are Consistent with Minimal Punishment Limitations

First, critics have argued that environmental crimes should not be treated like other public welfare crimes because the public welfare doctrine is designed for violations that carry small penalties.²⁹¹ However, this argument fails to consider the numerous limitations these statutes have in place.²⁹² Environmental criminal statutes, like public welfare statutes, are applied in limited situations, such as when asbestos or creosote sludge exposure is involved, and environmental crimes have comparably limited penalties to other public welfare offenses to safely protect the interests of innocent individual defendants.²⁹³

290. Kushner, *supra* note 286, at 703 (arguing that the traditional public welfare approach must be modified in order to suit modern conditions within corporate structures to best distribute liability).

291. Shaw, *supra* note 214, at 344.

292. *Id.*

293. *Id.*; Kirk Ross, *Creosote Plant Now Superfund Site*, COASTAL REV. (Sept. 12, 2012), <https://coastalreview.org/2012/09/creosote-plant-now-superfund-site/> [https://perma.cc/HW39

Additionally, “[a]lthough a modest penalty may indicate that a crime is a public welfare offense, such a penalty is not a requisite characteristic of public welfare offenses.”²⁹⁴

Along the lines of traditional public welfare crimes, such as possession of hand grenades under the National Firearms Act which has a punishment for a violation of imprisonment for not more than ten years,²⁹⁵ or the crime of selling dangerous drugs with punishment of up to five years’ imprisonment,²⁹⁶ the typical sentencing for a first time environmental offender is no more than five years, with a limited exception for knowing endangerment crimes.²⁹⁷ Thus, environmental statutes are well within the minimal punishment bounds. In contrast, knowing endangerment crimes under the CWA, CAA, and RCRA have maximum penalties of up to fifteen years, which warrants an exception to applying the modified approach.²⁹⁸ These provisions warrant exceptions because, in addition to having maximum penalties beyond what has been held as reasonable under traditional public welfare crimes, these provisions encompass expanded knowledge elements in their text such that, in addition to requiring knowingly acting, defendants must possess knowledge at the time of commission that they are placing another in imminent danger.²⁹⁹ Given that interpreting statutory text demands reading the language as a whole, the fact that Congress drafted knowing endangerment crimes by including additional elements of “knowing” further illustrates how the other criminal provisions must require only a general knowledge to warrant liability. Accordingly, only where environmental crimes have additional elements of mens rea written into their texts will it be appropriate to find that the modified public welfare approach may not be applied.

-SBGN] (discussing the increased risk in cancer and respiratory problems from creosote sludge exposure).

294. See *United States v. Dotterweich*, 320 U.S. 277, 285 (1943); *Staples v. United States*, 511 U.S. 600, 635 n.20 (1994).

295. *United States v. Freed*, 401 U.S. 601, 612 (1971); 26 U.S.C. § 5871.

296. *United States v. Balint*, 258 U.S. 250, 253–54 (1922); *United States v. Freed*, 401 U.S. 601, 609–10 (1971); CAL. HEALTH & SAFETY CODE § 11352 (a).

297. 33 U.S.C. § 1319(c)(3); 18 U.S.C. § 3571; 42 U.S.C. § 7412(c)(5); 42 U.S.C. § 6928(e); see *Criminal Provisions of the Resource Conservation and Recovery Act (RCRA)*, *supra* note 165; *Criminal Provisions of the Clean Air Act*, U.S. ENV’T PROT. AGENCY (Mar. 30, 2022), <https://www.epa.gov/enforcement/criminal-provisions-clean-air-act> [<https://perma.cc/6BTL-AJXS>]; *Criminal Provisions of Water Pollution*, *supra* note 160.

298. 33 U.S.C. § 1319(c)(3); 18 U.S.C. § 3571; 42 U.S.C. § 7412(c)(5); 42 U.S.C. § 6928(e).

299. 33 U.S.C. § 1319(c)(3); 18 U.S.C. § 3571; 42 U.S.C. § 7412(c)(5); 42 U.S.C. § 6928(e).

2. Limited Scope of Environmental Crime Offsets Risks of Punishing Innocent Offenders

On the surface, fears of punishing innocent offenders may appear valid. But this is offset both by the limited scope of the substances regulated, the limited instances in which criminal suits are brought, and their harmful nature. First, the substances environmental crimes regulate are not so commonplace that a layperson might find himself faced with criminal charges.³⁰⁰ While “many pollutants subject to environmental laws . . . include benign substances such as sand, dirt, and other substances which, at low levels, pose no immediate or irreparable harm, or threat to health or the environment,”³⁰¹ the pollutants regulated by criminal provisions are limited to those which pose widespread risks that affect all of society.³⁰² On one hand, the CWA does make it criminal to knowingly discharge pollutants to navigable waters, including pollutants that are more commonplace such as fill material, cellar dirt, sand, and rock.³⁰³ However, criminal charges are typically only brought in limited situations where either substantial amounts of toxic materials are being displaced or the most frequent offenders are being targeted.³⁰⁴ For example, in order for criminal regulations concerning asbestos to apply under the CAA, a minimum threshold amount of regulated asbestos-containing material must first be met.³⁰⁵ Additionally, the lack of investigative resources available

300. *United States v. Weintraub*, 273 F.3d 139, 149–50 (2d Cir. 2001) (examining the reasonably settled expectations people have when dealing with asbestos). *See generally Overview of the Asbestos National Emission Standards for Hazardous Air Pollutants (NESHAP)*, U.S. ENV’T PROT. AGENCY (Feb. 9, 2022), <https://www.epa.gov/asbestos/overview-asbestos-national-emission-standards-hazardous-air-pollutants-neshap> [<https://perma.cc/X86L-RZFE>] (explaining the standard for asbestos national emissions for hazardous air pollutants).

301. WASH. LEGAL FOUND., *supra* note 98, at 1–7.

302. *United States v. Buckley*, 934 F.2d 84, 88 (6th Cir. 1991); *United States v. Tomlinson*, 1999 U.S. App. LEXIS 16758, at *5–6 (9th Cir. July 16, 1999); *Weintraub*, 273 F.3d at 149–50; *Wien v. State*, 882 A.2d 183, 186–87 (Del. 2005) (holding that a state statute governing wetlands was not overbroad as to pose a constitutional violation); *SKINNIDER*, *supra* note 272, at 2 (discussing the detrimental and widespread harmful effects that criminal law targets).

303. 33 U.S.C. §§ 1311(a), 1362(12)(A), 1362(6); *Weintraub*, 273 F.3d at 145 (detailing the threshold amount of asbestos that need be present to trigger criminal regulation).

304. *See United States v. Wilson*, 133 F.3d 251, 254 (4th Cir. 1997) (improperly discharging fill material and excavated dirt into wetlands on four separate parcels without a permit); *United States v. Righter*, No. 1:08-CV-0670, 2010 U.S. Dist. LEXIS 127721, at *7 (M.D. Pa., Dec. 2, 2010) (improperly disposing twenty-five dump truck loads of pollutants into the wetland area); *SIMPSON ET AL.*, *supra* note 25, at 83.

305. 40 C.F.R. § 61.145(a)(4)(i)-(ii) (specifying the threshold quantities of regulated asbestos-containing material (RACM) needed to trigger the asbestos work-practice standard); 42 U.S.C.

to the EPA and limited prosecutorial staff of the DOJ restricts the EPA to focus only on the most serious forms of environmental misconduct.³⁰⁶ Thus, prosecutors rarely consider criminal charges against violations not rising to levels posing significant harm; the overzealous prosecution that critics fear is highly unlikely.

Next, the harmful nature of the chemicals that these statutes aim to protect against are such that a reasonable person would expect regulation to exist, thus preventing innocent violations and due process problems.³⁰⁷ “A defendant is deemed to have fair notice of an offense if a reasonable person of ordinary intelligence would understand that his or her conduct is prohibited by the law in question.”³⁰⁸ Courts have “distinguished materials not obviously subject to regulations such as pencils, dental floss, and paper clips.”³⁰⁹ These may be the type of products which might raise substantial due process questions if Congress did not require mens rea as to each element of the offense.³¹⁰ For example, in *United States v. X-Citement Video, Inc.*,³¹¹ the Supreme Court interpreted “knowingly” in the Protection of Children Against Sexual Exploitation Act, not as a public welfare statute, but as to apply knowledge to each element of the crime because the public does not have a general expectation that adult magazines and films are to be the subject of stringent regulation.³¹² Unlike this lesser expectation, the probability of regulations for those handling hazardous or toxic materials is so great that anyone in the business of using them can safely be presumed to be aware of such regulations.³¹³

Finally, the small risk that innocent wrongdoers might be punished is outweighed by the public interest in ensuring faithful

§ 7412 & § 7413(b)(2) (CAA provisions creating strict liability for violations of the asbestos work-practice standard); *Weintraub*, 273 F.3d at 145.

306. *Criminal Investigations: Understanding Criminal Investigations*, U.S. ENV'T PROT. AGENCY (Apr. 18, 2022), <https://www.epa.gov/enforcement/criminal-investigations> [<https://perma.cc/9UT9-HCFM>] (discussing the EPA's low budget to prosecute environmental crimes compared to policymaking); see Justin A. Savage, *Where Are Resources to Enforce Law?*, 39 ENV'T L. INST., May-June 2022.

307. See, e.g., *United States v. Weitzenhoff*, 35 F.3d 1275, 1298 (9th Cir. 1993); *United States v. Park*, 421 U.S. 658, 672–73 (1975).

308. *Weitzenhoff*, 35 F.3d at 1289 (quoting *United States v. Fitzgerald*, 882 F.2d 397, 398 (9th Cir. 1989)).

309. *Id.* at 1298.

310. *Id.*

311. 513 U.S. 64 (1994).

312. *Id.* at 71.

313. *Weitzenhoff*, 35 F.3d at 1298.

compliance with environmental law.³¹⁴ The rationale behind applying a stricter form of liability is that, although criminal sanctions are being relied upon, the primary purpose of public welfare statutes is to regulate behavior rather than punish or remedy it.³¹⁵ In conforming to this rationale, environmental statutes are inherently regulatory, as they criminalize conduct that is inconsistent with the best interests of society. Thus, in line with traditional public welfare statutes, it is in the interest of public health and safety that the risk of an occasional innocent offender being punished be permissible in order to prevent the escape of a greater number of culpable offenders.³¹⁶ Our environmental regulatory system must accept some risk that a defendant charged with a stricter liability crime acted innocently in order to operate efficiently and effectively.³¹⁷ However, by requiring knowledge of one’s conduct, the modified approach will ultimately act as safeguard to minimize this possibility.³¹⁸

3. Modified Approach is Consistent with Criminal Law Principals

The modified approach minimizes the application of strict liability in order to comport with basic principles of law by properly controlling the mens rea application. The presumption that criminal offenses are ordinarily required to have mens rea is based on the contention that an injury can amount to a crime only when it is inflicted with intention.³¹⁹ A strong justification for requiring knowledge of the crime exists when “criminal sanctions are imposed for regulatory violations absent consciousness of wrongdoing, [where] the criminal law risks overdetering innocent, *socially beneficial*

314. See Levenson, *supra* note 4, at 424–25 (applying the strict liability doctrine to morality offenses).

315. Levenson, *supra* note 4, at 422; *People v. Travers*, 124 Cal. Rptr. 728, 730 (Ct. App. 1975) (citing *People v. Stuart*, 302 P.2d 5, 8–9 (Cal. 1956)).

316. *People v. Travers*, 124 Cal. Rptr. 728, 730 (Ct. App. 1975); see Steinzor, *supra* note 259, at 218 (examining how the RCO doctrine is properly fitted within the environmental criminal context).

317. Levenson, *supra* note 4, at 422.

318. See *United States v. Weintraub*, 273 F.3d 139, 147 (2d Cir. 2001) (holding that the scienter requirement should be presumed to require no more knowledge than necessary to put a defendant on notice that he is committing a non-innocent act) (citing *United States v. Figueroa*, 165 F.3d 111, 118 (2d Cir. 1998) (requiring “sufficient knowledge to recognize that they have done something culpable”)).

319. See *id.* at 147–148.

conduct.”³²⁰ However, where conduct is considered so dangerous and harmful to society, such risk of over-detering beneficial conduct cannot justifiably be imported into the meaning of a statute’s design.³²¹ Where an offense is deemed criminal based on the need to regulate harmful effects of behavior rather than to punish, as in environmental law, the concern regarding intention is necessarily lessened.³²²

This reading of the CAA, CWA, and RCRA is proper based on the inherent differences in the harms that traditional criminal law and environmental criminal law seek to deter.³²³ Central to traditional criminal law is the maxim “[t]here can be no crime large or small, without an evil mind.”³²⁴ Thus, mens rea plays a distinct role in separating the intentional actors from the unintentional.³²⁵ Making this distinction is necessary to address the greater risk of social harm that arises when one “intends” a harmful result, warranting harsher punishment.³²⁶ Further, traditional criminal law typically involves direct harm, with an ascertainable victim and offender.³²⁷ On the contrary, environmental crime is typically multidimensional and complex, resulting in indirect harms involving numerous victims, and is usually committed by multiple individuals or corporations outside the public view.³²⁸ Intent to commit an evil act in the environmental context may be hard to prove where corporate objectives and financial gain are the driving forces behind committing these crimes and the harms are invisible.³²⁹ Given these complexities, the risk of social harm that comes

320. Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Neither Party at 4, *Ruan v. United States*, 142 S. Ct. 2370 (Nos. 20-1410, 21-5261) (Dec. 21, 2021) (emphasis added); see also *Liparota v. United States*, 471 U.S. 419, 426 (1985) (considering a statute proscribing knowing possession or use of food stamps “in any manner not authorized by statute or regulations” (quoting 7 U.S.C. § 2024(b)(1))).

321. See generally Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Neither Party at 3–4, *Ruan*, 142 S. Ct. 2370 (Nos. 20-1410, 21-5261).

322. See Levenson, *supra* note 4, at 422; *People v. Travers*, 124 Cal. Rptr. 728, 730 (Ct. App. 1975) (citing *People v. Stuart*, 302 P.2d 5, 8–9 (Cal. 1956)).

323. See Friedman & Hackney, *supra* note 147, at 1–2.

324. Eugene J. Chesney, *The Concept of Mens Rea in the Criminal Law*, 29 J. AM. INST. CRIM. L. & CRIMINOLOGY 627, 627 (1939).

325. See MICHAEL A. FOSTER, CONG. RSCH. SERV., R46836, MENS REA: AN OVERVIEW OF STATE-OF-MIND REQUIREMENTS FOR FEDERAL CRIMINAL OFFENSES 4–5 (2021), <https://crsreports.congress.gov/product/pdf/R/R46836> [<https://perma.cc/UJZ5-JLBM>].

326. See OLIVER W. HOLMES JR., *THE COMMON LAW* 47–48, 67–69 (1881).

327. *Environmental Crime: II. What Is Environmental Crime?*, CRIM. JUST., <https://criminal-justice.iresearchnet.com/crime/environmental-crime/2/> [<https://perma.cc/869T-7WZS>].

328. *Id.*

329. See *id.*

with convicting unintentional environmental offenders should not be said to necessitate the same distinction between intentional and unintentional offenders where the harm is indirect, difficult to define, and its effects may occur over long periods of time.

Further, it is a deeply rooted common law principle that ignorance of the law provides no defense to a violation.³³⁰ While some have tried to say that the face of these statutes might suggest that the government must prove that the defendant knew that he was violating the law,³³¹ this reading will hinder the ability to prosecute given the complexity of environmental law. This reading is further precluded by the Supreme Court’s decision in *International Minerals*.³³² Consequently, while a general level of deliberateness is required to impose criminal punishment under this modified approach, it also follows that the defendant need not appreciate the illegality of his conduct.³³³

When environmental statutes are viewed as modified public welfare laws, a court can more easily interpret the mens rea term in the statute as requiring a general knowledge of only the activity.³³⁴ This application is further proper under the general rule that scienter requirements should be presumed to require no more knowledge than necessary to put a defendant on notice that he is committing a non-innocent act.³³⁵

C. *Canons of Statutory Interpretation Support this Solution*

Treating environmental statutes as modified public welfare statutes is consistent with both their statutory language and legislative history. Further, these statutes are not so ambiguous as to warrant application of the rule of lenity and applying the modified approach will further promote congressional intent.

1. Statutory Language Shows That a General Application is Proper

Without guidance on how to interpret “knowingly,” a comparison of the language of “knowing crimes” provides insight into proper

330. *United States v. Int’l Mins. & Chem. Corp.*, 402 U.S. 558, 563 (1971).

331. *United States v. Weintraub*, 273 F.3d 139, 146 (2d Cir. 2001).

332. *Int’l Mins.*, 402 U.S. at 565 (finding no evidence of congressional intent to abrogate the bedrock common law principle that ignorance of the law is not a defense).

333. *United States v. Wilson*, 503 U.S. 329, 261 (1992).

334. Gordon, *supra* note 39, at 443; *Int’l Mins.*, 402 U.S. at 560, 565.

335. *Weintraub*, 273 F.3d at 147 (quoting *United States v. Figueroa*, 165 F.3d 111, 117 (2d Cir. 1998)).

interpretation.³³⁶ For example, the CWA includes various statutes, most of which state that a person must “knowingly” commit a violation to be criminally convicted.³³⁷ However, two alternate provisions lend support to show that, had Congress intended to extend the mens rea requirement to additional elements of the crime or require knowledge of the law, it would have.

First, the provision relating to “Discharge to a Publicly Owned Treatment Works Causing the Plant to Violate its Own Permit/Limitation” reads: “Any person who . . . knowingly introduces into a sewer system or [POTW] any pollutant or hazardous substance which such person *knew or reasonably should have known could cause* personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits,” causes the POTW to violate its permit.³³⁸ Second, the “CWA Knowing Endangerment” provision reads: “Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3), 1322(p), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit[s] issued under section 1342 [or] section 1344 of this title . . . , and who *knows at that time* that he thereby places another person in imminent danger of death or serious bodily injury,” shall be convicted.³³⁹ The additional elements of mens rea in these two crimes distinguish them from the other crimes by expressly requiring knowledge of additional elements. Thus, where Congress intends to require additional knowledge requirements, it has expressly done so.³⁴⁰

Critics have also raised concerns that applying the Public Welfare Doctrine will essentially be reading out the “knowingly” language found in the statutes.³⁴¹ However, the modified approach resolves this because the government must still show that the defendant had knowledge of the conduct that gave rise to the crime.³⁴²

336. See *Criminal Provisions of Water Pollution*, *supra* note 160.

337. *Id.*

338. *Id.*; 33 U.S.C. § 1319(c)(2)(B) (emphasis added).

339. *Criminal Provisions of Water Pollution*, *supra* note 160; 33 U.S.C. § 1319(c)(3)(A) (emphasis added).

340. *Criminal Provisions of Water Pollution*, *supra* note 160 (“[k]nowing violation of the MARPOL Protocol, the Act, or regulations” relating to wastes from ships, including garbage, oil, and hazardous substances); see 33 U.S.C. § 1319(c)(3).

341. Shaw, *supra* note 214, at 346; see, e.g., 33 U.S.C. § 1319(c)(1)–(2).

342. Harig, *supra* note 123, at 147 (discussing the application of the RCO doctrine to cases involving public welfare statutes that contain a scienter requirement); see Shaw, *supra* note 214, at

2. Legislative History Proves That Congress Intends for the Modified Approach

Congress has expressly recognized the profound impact of man’s activity on the interrelations of all components of the natural environment, particularly its profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances.³⁴³ Congress further recognized the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man.³⁴⁴ It has declared that it is the Federal Government’s policy, with cooperation from State and local governments and other concerned public and private organizations, to use all practicable means and measures in a deliberate manner to promote the general welfare, to create and maintain conditions under which man and nature can live in productive harmony, and achieve social, economic, and prosperous requirements for present and future generations.³⁴⁵ Consistent with such sentiment, the legislative history of the CAA, CWA, and RCRA further illustrate that Congress intended these statutes to be implemented using a modified public welfare approach.

First, in 1976, Congress enacted the RCRA as “a multifaceted approach toward solving the problems associated with the 3–4 billion tons of discarded materials generated each year, and the problems resulting from the anticipated 8% annual increase in the volume of such waste.”³⁴⁶ In 1984, the RCRA was amended to impose criminal penalties for knowing violations.³⁴⁷

Next, in 1987, Congress amended the CWA by increasing penalties, which was “necessary to deter would-be polluters.”³⁴⁸ In doing so, Congress modified the mens rea from “willfully” to

346 (“[E]nvironmental statutes contain culpability standards—strict liability is not actually being imposed.”); *see, e.g.*, 33 U.S.C. § 1319(c)(1)–(2).

343. 42 U.S.C. § 4331.

344. *Id.*

345. *Id.*

346. H.R. REP. NO. 94-1491, at 6238 (1976) (Conf. Rep.), *as reprinted in* 1976 U.S.C.C.A.N. 6238, 6249.

347. H.R. 3994, 96th Cong. (1980) (enacted); Joshua Ozymy & Melissa L. Jarrell, *Southern Harm: Analyzing the Criminal Enforcement of Environmental Law in the Southern United States, 1938-2019*, 46 WM. & MARY ENV’T L. & POL’Y REV. 115, 118 (2021) (discussing the addition of criminal felony violations in the 1984 Hazardous and Solid Waste Amendments to the RCRA).

348. *United States v. Weitzenhoff*, 35 F.3d 1275, 1283 (9th Cir. 1993); S. REP. NO. 50, at 29 (1985).

“knowingly.”³⁴⁹ As a way to strengthen criminal sanctions, the reduction further validates the finding that this approach is proper; it relaxed the “willfulness” requirement, which is generally viewed as knowledge that the conduct in question was wrongful, to that of “knowingly,” a mere awareness of one’s actions.³⁵⁰ By making these changes and then by constructing later statutes as merely requiring “knowingly,” Congress impliedly recognized judicial interpretations and acknowledged the need to continue enhancing these regulations to promote feasible prosecution.³⁵¹

Finally, the 1990 Amendments to the CAA added criminal provisions for “knowing” violations.³⁵² The Amendments also specifically target “senior management officials and provide a defense for lower-level employees.”³⁵³ They imposed accountability upon those in the best position to ensure that environmental requirements and safe practices are observed.³⁵⁴ Congressional intent can also be inferred from the accompanying Congressional Record that contains a Conference Committee report discussing the CAA.³⁵⁵ In it, Senators Chafee and Baucus state that the “criminal provisions that are introduced in [the CAA were] largely modeled upon those contained in the CWA and [the] RCRA, and [they] expect them to operate in the same fashion as those have operated.”³⁵⁶ In particular, they stated that it was their “intention that—with the exception only of the crimes of knowing and negligent endangerment—crimes under these new criminal provisions are crimes of *general intent*, rather than crimes of specific intent.”³⁵⁷

Since *International Minerals* was decided in 1971, years prior to the amendments to the CAA, CWA, and RCRA,³⁵⁸ it is presumed that

349. See 33 U.S.C. §§ 1319 (c)(1)(A) (“negligent” violation and “knowing” violation).

350. S. REP. NO. 50, at 29 (1985); *United States v. Hopkins*, 53 F.3d 533, 539 (2d Cir. 1995) (discussing how Congress considered “discharges of hazardous waste onto the ground, which are regulated in [the] RCRA, as no less serious than such discharges into water,” which is regulated in the CWA).

351. H.R. 3994, 96th Cong. (1980) (enacted).

352. Elder, *supra* note 69, at 141.

353. *Id.*

354. *Id.* at 142 (“The former Assistant Attorney General in charge of the Environment and Natural Resources Division of the United States Department of Justice has made the government’s objectives abundantly clear by warning corporate executives: ‘violate the environmental laws and you may save your company some money in the short run, but you personally may go to jail.’”).

355. *United States v. Alghazouli*, 517 F.3d 1179, 1194 (9th Cir. 2008); 136 CONG. REC. 36084 (1990).

356. 136 CONG. REC. 36084 (1990).

357. *Id.*

358. See, e.g., 42 U.S.C. § 7413(c)(1).

Congress was aware of this judicial interpretation when it drafted these new regulations by using the same language.³⁵⁹ This shows that Congress intends for these statutes to be interpreted according to the framework established in *International Minerals*.³⁶⁰ Accordingly, general intent to establish that the violator is aware of the proscribed acts is the proper level of mens rea to apply and is consistent with the modified public welfare approach.³⁶¹ This application also permits a finding of guilt of corporate officers based on showing that such defendants knew or should have known of the protected activity but failed to investigate, or by showing that they closed their eyes to obvious facts.³⁶²

3. Unambiguous Statutory Text

These statutes are not so ambiguous as to warrant the rule of lenity. It is true that when courts are left with the ultimate impression that a criminal statute is grievously ambiguous, the rule of lenity requires the statute to be construed in favor of the defendant.³⁶³ However, this “maxim of construction is reserved for cases where, after seizing *everything* from which aid can be derived, the [c]ourt is left with an ambiguous statute.”³⁶⁴ Environmental criminal laws are not ambiguous, especially when taken as a whole and considering their statutory language and legislative history. In only a handful of provisions, Congress has explicitly required the government to prove additional knowledge elements where it has added “knowingly” in multiple subsections of a provision.³⁶⁵ Where “knowingly” has not been added to additional elements, sufficient knowledge to establish general intent is

359. Hofmann, *supra* note 29, at 476.

360. *Id.*

361. *United States v. Buckley*, 934 F.2d 84, 87 (6th Cir. 1991) (holding that “where a statute does not specify a heightened mental element, general intent is presumed to be the required element” and accordingly, all the government had to prove was that “the defendant knew the general nature of the asbestos material on pipes or other facility components being demolished”); *United States v. Laughlin*, 10 F.3d 961, 965 (2d Cir. 1993).

362. *Buckley*, 934 F.2d at 88 (“[U]nder the law, the government could establish the officer’s knowledge by showing that the officer closed his eyes to obvious facts or failed to investigate when aware of facts which demanded investigation.”).

363. *Chapman v. United States*, 500 U.S. 453, 463 (1991); *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994); *Hughey v. United States*, 495 U.S. 411, 422 (1990); *Ratzlaf v. United States*, 510 U.S. 135, 148 (1994).

364. *Staples*, 511 U.S. 600 n.17 (quoting *Smith v. United States*, 508 U.S. 223, 239 (1993)) (emphasis added) (internal quotation marks omitted).

365. *See, e.g.*, 33 U.S.C. § 1319 (c)(2)(B), (3); 42 U.S.C. § 6928(e).

the proper standard.³⁶⁶ This further protects against defendants abusing the ignorance of the law defense. If ignorance were to be accepted as an excuse, the defendant charged is left to claim ignorance as a complete defense to avoid consequences.³⁶⁷

CONCLUSION

Central to criminal punishment is the familiar concept that defendants ought to be imprisoned for illegal conduct deemed unacceptable by society.³⁶⁸ Vigorous criminal enforcement is critical to the proper functioning of the overall enforcement scheme, since it “expresses our values as a society and is an appropriate response to the most egregious and harmful conduct.”³⁶⁹ Criminal prosecution is an indispensable and powerful deterrent to crime.³⁷⁰ A genuine threat of criminal prosecution has a high chance of changing the conduct of individuals and corporations who are not so deterred by the threat of financial penalties.³⁷¹ To punish reprehensible conduct and deter future environmental violations, prosecutors must be provided avenues by which they can best achieve this goal.³⁷² This is what applying the modified public welfare approach achieves.

The modified public welfare approach is proper based on a commonsense evaluation of the nature of the substances regulated, the expectations that individuals have in dealing with such substances, a textualist evaluation, and the canons of statutory interpretation.³⁷³ Safeguards that are currently in place ensure that environmental crimes are limited to only the most egregious forms of environmental

366. *United States v. Weintraub*, 273 F.3d 139, 147 (2d Cir. 2001).

367. *Ignorance of the Law – Is It a Defense?*, WERKSMAN JACKSON & QUINN LLP (Mar. 16, 2022), <https://werksmanjackson.com/blog/ignorance-of-the-law-is-it-a-defense/> [https://perma.cc/7CYK-29QY].

368. TRACY THOMAS ET AL., *REMEDIES: PUBLIC AND PRIVATE* 463 (6th ed. 2016).

369. Kim, Keynote Address, *supra* note 1.

370. *Id.*

371. *Id.*

372. Elder, *supra* note 69, at 141–42 (“By specifically targeting senior management officials and providing a defense for lower-level employees, the Amendments impose strict accountability upon those in the best position to ensure that environmental requirements and safe practices are observed.”).

373. *United States v. Weintraub*, 273 F.3d 139, 148 (2d Cir. 2001) (“Determining the extent of the mens rea required by a statute thus involves a ‘commonsense evaluation of the nature of the particular device or substance Congress has subjected to regulation and the expectations that individuals may legitimately have in dealing with the regulated items.’” (quoting *Staples v. United States*, 511 U.S. 600, 619 (1994))).

pollution, which permits expectations of regulation to be reasonably inferred.³⁷⁴ The CAA, CWA, and RCRA fit within the overall purpose of the Public Welfare Doctrine because public welfare offenses focus “more upon the injurious conduct of the defendant than upon the problem of [his] individual guilt,”³⁷⁵ and unlike traditional crimes that focus on the defendant’s morally culpable mental state,³⁷⁶ environmental criminal law focuses on the impacts of the harmful conduct on society.³⁷⁷ This approach is consistent with the principle that public welfare statutes are not to be interpreted narrowly but rather should be interpreted to accomplish their regulatory purpose.³⁷⁸

374. *United States v. Kelley Tech. Coatings, Inc.*, 157 F.3d 432, 439 (6th Cir. 1998); *United States v. Weitzenhoff*, 35 F.3d 1275, 1280 (9th Cir. 1993) (quoting *Staples*, 511 U.S. at 611); *see United States v. Hopkins*, 53 F.3d 533, 538–39 (2d Cir. 1995) (recognizing that the “presumption of awareness of regulation” doctrine applies to the CWA and the RCRA).

375. *Shaw*, *supra* note 214, at 343–44.

376. *Id.* at 341.

377. *See id.* at 344.

378. *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 666 (3d Cir. 1984); *see also United States v. Laughlin*, 10 F.3d 961, 965 (2d Cir. 1993).

