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

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INTRODUCTION

Tonawanda Coke, a coke-manufacturing facility in Buffalo, New York, was officially shut down in October 2018.[1] Still remaining at the site are "leaking tanks," "moats containing chemicals," "contaminated equipment," "toxic dust," and underground tunnels with the possibility of runoff spilling into the Niagara River.[2] After a number of community members were diagnosed with various forms of cancer, the New York State Department of Environmental Conservation conducted a study and found an increased concentration of benzene in the area.[3] As a consequence, Tonawanda Coke's executive, Mark Kamholz, was convicted of three counts for knowingly violating the Clean Air Act and the Resource Conservation and Recovery Act.[4] Kamholz was ultimately sentenced to twelve months in prison and a $20,000 fine.[5]

Like the Clean Air Act and the Resource Conservation and Recovery Act, many other environmental statutes provide a pathway to criminal liability for individuals who knowingly violate the law. "Knowingly" in the context of environmental statutes has yet to be interpreted by the Supreme Court, and lower courts have disagreed on what elements of an offense an individual must know to

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1. T.J. Pignataro, *Experts Paint Bleak Picture of What Tonawanda Coke Left Behind*, THE BUFFALO NEWS (Nov. 14, 2018), https://buffalonews.com/2018/11/14/five-environmental-threats-at-tonawanda-coke/.

2. *Id.*

3. United States v. Tonawanda Coke Corp., 5 F. Supp. 3d 343, 347 (W.D.N.Y. 2014); *See also Tonawanda Community Air Quality Study*, DEP'T OF ENVTL. CONSERVATION, https://www.dec.ny.gov/chemical/59464.html (last visited Oct. 1, 2019).

4. *See generally Tonawanda Coke Corp.*, 5 F. Supp. 3d.

5. *DEC Issues Notice of Violation at Tonawanda Coke*, NIAGARA GAZETTE (Jul. 20, 2018), https://www.niagara-gazette.com/news/local_news/dec-issues-notice-of-violation-at-tonawanda-coke/article_538d03c0-0a71-51d0-9d50-dccb43effe83.html.

be held criminally liable.[6] Whether the language "knowingly violates" requires a defendant to have knowledge of the statute or the illegality of the act differs by jurisdiction.

This note will discuss the circuit split regarding the interpretation of "knowingly" in three different environmental statutes. A general understanding of criminal liability and the common-law surrounding it is required to fully understand these criminal provisions and will be discussed in Section I. The Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act will then be compared in Section II by looking at their legislative intent, the language of the statutes, and how they have been interpreted by the courts. Only after the criminal law principles, the statutes, and the courts' precedents are understood can one begin to comprehend where the current state of the law is and where it may be going. Section III's analysis of the knowledge mental requirement in environmental statutes will show that the circuit courts' current interpretations can be separated into three categories: those requiring only knowledge of the act, those requiring knowledge of the facts that make the act illegal, and those requiring knowledge of the facts and the statute that make the act illegal.

I. AN OVERVIEW OF CRIMINAL LIABILITY

Because criminal law is inherently different than many other fields of law, a general understanding of common criminal law principles is required to best appreciate its implication on environmental statutes.

A. Mens Rea

One distinctive characteristic of criminal law is that some degree of *mens rea*, or culpability, is required to complete an offense.[7] In modern criminal law, common *mens rea* categories include negligence, recklessness, knowledge, and purpose.[8] Alternatively, strict liability offenses are those that require no showing of any culpability.[9] Courts have, as a principle, generally been hesitant to read in strict liability when a statute does not explicitly mention a level of required *mens rea*.[10]

Beyond the four *mens rea* categories mentioned, "intent" is also often used in common law. While intent is not defined in the Model Penal Code,[11] it has become colloquially similar to some form of knowledge or purpose.[12] Within intent, the law sometimes distinguishes between "general intent" and "specific

6. *See generally* United States v. Buckley, 934 F.2d 84 (6th Cir. 1991); United States v. Tomlinson, 189 F.3d 476 (9th Cir. 1999); United States v. Sinskey, 119 F.3d 712 (8th Cir. 1997).

7. PAUL H. ROBINSON, SHIMA BARADARAN BAUGHMAN & MICHAEL T. CAHILL, CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES 127 (4th ed. 2017).

8. *Id.*

9. *Id.*

10. *See* United States v. U.S. Gypsum Co., 438 U.S. 422, 436 (1978).

11. *See* MODEL PENAL CODE § 2.02 (2020).

12. BLACK'S LAW DICTIONARY 964 (11th ed. 2019) ("Occasionally it is found in the sense of an intent to violate the law, - implying a knowledge of the law violated.").

intent" requirements. General intent is the overall intention to commit some act, as opposed to an intent to bring about the consequences of the act.[13] Conversely, specific intent requires the defendant have both the intent to commit the act and an intent to cause the wrongful result.[14]

B. Canons of Statutory Interpretation

When interpreting ambiguous terms, the courts repeatedly consider many of the same factors. Courts must balance these rules of interpretation and consequently weigh each one differently on a case-by-case basis. The primary goal is to determine the Congressional intent of the statute, often looking to evidence such as legislative history to do so.[15] For example, if a statute's amendments include changes in the language, it is presumed that there was an intended change in meaning.[16] Where the intent is still not clear, courts will also look to factors such as the plain language, grammar, syntax, and punctuation.[17]

Additionally, there are deference issues such as the rule of lenity, which provides that when there is ambiguity in a criminal statute the interpretation should be read in favor of the defendant.[18] The Supreme Court has repeatedly reaffirmed that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."[19] While not always a deciding factor, many of the courts discussed later (and many more not discussed) have at least acknowledged the rule of lenity in their analyses when interpreting "knowing" in environmental statutes.

C. Interpreting Knowledge in the Supreme Court

The Supreme Court has been asked to interpret what "knowing" means in a variety of statutes. In many of these cases, the Supreme Court has applied "knowing" to all elements in a statute, thereby required that the defendant know of the additional facts or circumstances that make his or her conduct illegal.[20] However, the Court has carved out an exception to the *mens rea* requirement when dealing with public welfare statutes.

1. Public Welfare Statutes

Public welfare statutes are statutes that are intended to protect public health, safety, or welfare and are therefore considered by courts to not require any *mens*

13. *Id.* at 965.
14. *Id.*.
15. Christina Gomez, *Canons of Statutory Construction*, COLO. LAW. 23 (2017).
16. *Id.* at 24.
17. *Id.* at 23.
18. *Id.*
19. Rewis v. United States, 401 U.S. 808 (1971).
20. *See, e.g.*, Flores-Figueroa v. United States, 556 U.S. 646, 650-51 (2009).

rea.[21] The Supreme Court has inferred that for public welfare statutes, Congress did not intend to require additional proof that the defendant knew his actions were unlawful.[22] When interpreting "knowing" in environmental statutes, lower courts will frequently cite to the Supreme Court cases discussed below to determine if a statute is a public welfare statute and what the resulting *mens rea* should be.[23] If a lower court holds that the statute is a public welfare statute, "knowingly" is interpreted more strictly; the defendant need only know that he is committing the act. If the court holds that the statute is not a public welfare statute, the court must then use other rules of interpretation to decide if "knowingly" requires only knowledge of the act, knowledge of the unlawfulness of the act, or something in between.

2. International Minerals

An early case on the topic and arguably the most well-known is *United States v. International Minerals & Chemical Corp.* In 1971 (five years before the Resource Conservation and Recovery Act's enactment) the Supreme Court held that statutes dealing with "dangerous or deleterious devices…or obnoxious waste materials" have such a high probability of regulation "that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation."[24]

The Court was interpreting "knowingly" in 18 U.S.C. § 834(f) (since repealed), which gave the Interstate Commerce Commission the authority to regulate transportation of corrosive liquids. The statute section provided for imprisonment and fines for anyone who "knowingly violates any such regulation."[25] The interpretation at issue was whether the phrase "knowingly violates" required knowledge of just the action or knowledge of the specific regulation that was violated. Keeping in mind the general criminal law policy that ignorance of the law is no excuse, the Court looked to the legislative history of Title 18.[26] Despite finding that Congress did not intend for a strict liability reading, the majority did not believe that Congress was intending to abandon the general policy mentioned.[27] Ultimately, the majority held that the government was not required to prove that the defendant knew of the regulation prohibiting shipment of corrosive liquids.[28] Because Title 18's subject matter was an obnoxious waste material with a high probability of regulation, the defendant was presumed to have

21. Michael J. Reitz, *Strict Liability and Public Welfare Offenses*, MACKINAC CENTER FOR PUBLIC POLICY (Dec. 10, 2013), https://www.mackinac.org/19579; *see also* Alex Arensberg, *Are Migratory Birds Extending Environmental Criminal Liability?*, 38 ECOLOGY L. QUARETERLY. 428 (2011).

22. Bobby Yu, *Criminal Ambiguity: Redefining the Clean Water Act's Mens Rea Requirements*, 11 SETON HALL CIR. REV. 327, 337 (2015).

23. United States v. Currier, 621 F.2d 7, 10 (1st Cir. 1980).

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

25. 18 U.S.C. § 834(f) (repealed 1979).

26. Int'l Minerals & Chem. Corp., 402 U.S. at 562.

27. *Id.* at 563.

28. *Id.* at 565.

knowledge of the regulation.[29] The majority still preserved a mistake-of-fact defense if the defendant believed in good faith that the material was harmless.[30]

Three justices dissented to *International Minerals*. The dissenting justices looked first at the statutory language itself, arguing that a defendant could not "knowingly violate" a regulation unless he knew of the regulation.[31] The dissenters also argued that the majority effectively created a strict liability statute, even though all justices agreed that was not the intent of Congress.[32] As a final point, the dissenters considered policy. Realistically, it would not be difficult to find that those at whom Title 18 was directed knew or should have known that there was a regulation they were violating.[33] Rather, the dissenters believed that the majority's decision was over-inclusive and would harm the innocent "casual shipper, who might be any man, woman, or child in the Nation."[34]

The most important takeaway of *International Minerals* is the Court's definition of public welfare statutes.[35] When finding that an environmental statute is a public welfare statute, the lower courts below will follow the *International Minerals* Court's test of whether the subject matter being regulated is a dangerous or deleterious device with a high probability of regulation.[36]

3. Notable Supreme Court Cases Following International Minerals

In 1985, the Supreme Court again interpreted "knowingly" in the *mens rea* of a statute, this time in 7 U.S.C. § 2024(b)(1), which makes it criminal to knowingly utilize food stamps in an unlawful manner.[37] In *Liparota v. United States*, the Court ultimately held for a more specific intent approach than in *International Minerals*, stating that the defendant must know that the manner in which he acquired or possessed food stamps was prohibited by statute or regulation.[38] The Court found that neither the language of the statute nor the legislative history was definitive in determining Congress's intent, turning instead to policy considerations.[39] Reading out the knowledge requirement and creating a strict-liability statute would render behavior that was typically innocent, purchasing and using food stamps, now criminal.[40] The Court also looked to the common-law rule of lenity, stating that the interpretation should favor the

29. *Id.*

30. *Id.* at 563-64 ("A person thinking in good faith that he was shipping distilled water when in fact he was shipping some dangerous acid would not be covered.").

31. *Id.* at 567.

32. *Id.* at 568.

33. *Id.* at 569.

34. *Id.*

35. *Id.* at 565 ("But where…dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.").

36. Int'l Minerals & Chem. Corp., 402 U.S. 558, 565 (1971).

37. 7 U.S.C. § 2024(b)(1) (2018).

38. Liparota v. U.S., 471 U.S. 419, 425 (1985).

39. *Id.*

40. *Id.* at 426.

defendant because the Congressional intent was unclear.[41] Two justices dissented in *Liparota*, arguing primarily that the majority's reading of the statute incorrectly created an ignorance of the law defense and a mistake-of-fact defense.[42]

In 1994, the Supreme Court expanded on what it meant to be a public welfare statute when it was asked to determine the *mens rea* in the National Firearms Act (which did not explicitly state any *mens rea* requirement). In *Staples v. United States*, the Court ultimately found that the National Firearms Act (NFA) was not a public welfare statute like that in *International Minerals* and therefore the defendant had to know that his weapon was statutorily defined as a machine gun.[43] According to the Court, Congress would not have intended to ignore the strong presumption that some level of *mens rea* is generally required.[44] In determining that the NFA was not a public welfare statute, the *Staples* Court offered a set of factors: the nature of the statute, the character of the items regulated, and the possible penalties of violating the statute.[45] According to the majority, guns, which have been widely and legally owned in America's history, were not the "deleterious devices" intended by *International Minerals*.[46] Additionally, the NFA had potentially harsh penalties, which supported a requiring of *mens rea*.[47] The Court stated that public welfare statutes traditionally "provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary."[48] Ultimately, the Court held that public welfare offenses were a very limited category.[49] Despite these factors, many lower courts defer to only the definition provided in *International Minerals* rather than using the *Staples* analysis.[50]

In the same year as *Staples*, the Supreme Court also decided *United States v. X-Citement Video, Inc.*, interpreting "knowingly" in 18 U.S.C. § 2252 (the Protection of Children Against Sexual Exploitation Act).[51] Similarly to *Staples*, the Court held that "knowingly" applied to all elements of the crime.[52] This holding came despite recognition of the more grammatical reading that "knowingly," an adverb, only modifies verbs.[53] The Court first reiterated that criminal statutes are

41. *Id.* at 427; *see, e.g.*, Rewis v. United States, 401 U.S. 808, 812 (1971).

42. *Liparota*, 471 U.S. at 436 (White, J., dissenting) ("Knowingly to do something that is unauthorized by law is not the same as doing something knowing that it is unauthorized by law.").

43. Staples v. U.S., 511 U.S. 600, 619 (1994).

44. *Id.* at 615-616.

45. *Id.* at 607, 616.

46. *Id.* at 609-10. *But see* United States v. Freed, 401 U.S. 601 (1971) (holding that a statute regulating unregistered hand grenades was a public welfare statute).

47. *Staples*, 511 U.S. at 616.

48. *Id.*

49. *Id.* at 607 (citing United States v. Gypsum Co., 438 U.S. 422, 437 (1978)).

50. United States v. Atl. States Cast Iron Pipe Co., 2007 U.S. Dist. LEXIS 56562, *71-72 (D. N.J. filed Aug. 2, 2007).

51. *See generally* United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994).

52. *Id.* (rev'g United States v. X-Citement Video, Inc., 982 F.2d 1285 (9th Cir. 1992)).

53. *Id.* at 69-7070 (Justice Stevens, in his concurrence, notes that "the normal, commonsense reading of a subsection of a criminal statute introduced by the word 'knowingly' is to treat that adverb as modifying each of the elements of the offense identified in the remainder of the subsection").

generally read to have broad *mens rea* requirements.[54] The Act, which protects minors against child pornography, was furthermore not a public welfare statute because the public does not generally expect magazines and films to be subject to stringent regulation.[55] Rather, the Act was more in line with that of *Liparota* because it concerned apparently innocent conduct.[56] The decision in *X-Citement* has been interpreted by some commentators as requiring only knowledge of enough of the elements of the crime as to be able to distinguish innocent from wrongful behavior.[57]

More recently, in 2009, the Supreme Court decided *Flores-Figueroa v. United States*. The statute in question, 18 U.S.C. § 1028A(a)(1), allowed for criminal prosecution of one who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person."[58] The Court held that the government must prove the defendant knew that he was unlawfully transferring a means of identification that belonged to another person.[59] This was in accordance with the normal, grammatical reading of the statute: "knowingly" should apply to all the elements listed, including that the means of identification belonged to another person.[60] The Court's decision relied heavily on this ordinary, grammatical reading of the statute and where "knowing" was placed.[61] Justice Alito, in his concurring opinion, expressed concern that this decision would become an inflexible rule requiring a statute's *mens rea* to always apply to every element, insinuating that he did not believe this should not be the case.[62] The Court also found this reading consistent with other Supreme Court decisions, such as *X-Citement Video* and *Liparota*, but did not distinguish *International Minerals*.[63]

As shown, the Supreme Court has consistently held for a more specific-intent approach to "knowingly" following *International Minerals*. While each decision highlighted slightly different reasoning (such as typically innocent behavior, low regulation of the subject matter, and a grammatical reading of the text), the Court has repeatedly found statutes and topics to be less than the *International Minerals* standard and therefore not public welfare statutes. The primary question for many lower courts interpreting *mens rea* in environmental statutes is therefore where environmental issues and environmental statutes fall on this spectrum.

D. Caveat: Criminal versus Environmental Law

Although the preceding Supreme Court cases are frequently cited to and used to guide lower courts' analyses and interpretations of "knowing" in environmental

54. *Id.* at 70.
55. *Id.* at 71.
56. *Id.*
57. Linda S. Kato & Patricia W. Davies, *Post Flores-Figueroa: The Impact on the Knowing Mental State in Environmental Prosecutions*, 59 ENVTL. CRIMES 4, 18 (July 2011).
58. Flores-Figueroa v. United States, 556 U.S. 646, 648 (2009).
59. *Id.* at 657.
60. *Id.* at 650-51.
61. *See generally Flores-Figueroa*, 556 U.S. 646.
62. Kato & Davies, *supra* note 57 at 22.
63. Flores-Figueroa v. United States, 556 U.S. 646, 652-53 (2009).

statutes, it is important to keep in mind that they are not directly correlative. As some of the following decisions will exemplify, environmental law is in some respects fundamentally different than criminal law. Most importantly, environmental law is more precautionary than criminal law. Environmental law is built upon the precautionary principle, which suggests that a lack of scientific certainty should not be a barrier to enforcement of environmental regulations.[64] Similarly, environmental law deals with reducing risks of harm, while criminal laws are concerned with actual harm.[65]

II. A COMPARISON OF THREE PROMINENT ENVIRONMENTAL STATUTES

Three of the most prominent and well-known environmental statutes contain provisions allowing for criminal liability for "knowingly" violating the statute: the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act. The Environmental Protection Agency (EPA), which administrates most environmental statutes, has not released any guidance documents to help interpret "knowingly" in the statutes. However, it references "knowing" crimes in a few of its webpages, giving some insight into its interpretation. On EPA's Basic Information Enforcement webpage, EPA states that criminal actions are allowed for violations that are "knowingly committed," which differs from the typical statute language of "knowingly violate."[66] On its Criminal Investigations webpage, EPA further attempts to define knowing violations as "those that are deliberate and not the product of an accident or mistake."[67]

These three acts and their criminal provisions, including their legislative intent and history, language, and judicial interpretations, will be compared. In doing so, it will become clear that the conflicting legal and policy arguments from both sides have ultimately led to inconsistent interpretations of "knowing" between both the courts and the statutes.

A. Clean Air Act

The Clean Air Act (CAA) was passed in 1963 in order to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare."[68] The CAA's criminal provisions are all contained within section 113.[69] Most relevant to this discussion is section 113(c)(1), which states:

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64. JOCELYN STACEY, PREVENTIVE JUSTICE, THE PRECAUTIONARY PRINCIPLE AND THE RULE OF LAW (2016).

65. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY, 1123 (Rachel E. Barkow et al. eds., 8th ed. 2018).

66. *Basic Information on Enforcement*, US EPA, https://www.epa.gov/enforcement/basic-information-enforcement (last visited Oct. 1, 2019).

67. *Criminal Investigations*, US EPA, https://www.epa.gov/enforcement/criminal-investigations (last visited Oct. 1, 2019) (insinuating that EPA intends for a mistake-of-fact defense to apply).

68. 42 U.S.C. § 7401(b)(1) (2018).

69. To see each specific provision, *see Criminal Provisions of the Clean Air Act*, US EPA, https://www.epa.gov/enforcement/criminal-provisions-clean-air-act (last visited Oct. 1, 2019).

> (1) Any person who *knowingly violates* any requirement or prohibition of an applicable implementation plan…shall, upon conviction, be punished by a fine pursuant to title 18 or by imprisonment for not to exceed 5 years, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.[70]

The CAA includes other provisions within section 113(c) which provide for criminal liability for knowingly making false statements or representations, knowingly failing to notify or report, knowingly falsifying data, knowingly failing to pay fees, or knowingly releasing hazardous air pollutants.[71] Additionally, the CAA contains one criminal provision for *negligently* releasing hazardous air pollutants.[72]

1. The Sixth Circuit

The Sixth Circuit was the first circuit court to rule on the interpretation of "knowingly" in the CAA. In *United States v. Buckley*, the Sixth Circuit was asked to interpret section 113(c)(1).[73] The defendant in *Buckley* argued that the jury instructions violated due process by ignoring the *mens rea* required by the statute.[74] The jury instructions stated that the government must only prove that the defendant knew the general nature of the material, not that the defendant knew the legal status or that he was in violation.[75] The Sixth Circuit held that section 113(c)(1) required only knowledge of the emissions rather than the statute or the health hazards of the emissions.[76] Citing *International Minerals*, the court considered this section of the CAA a public welfare statute "[b]ecause of the very nature of asbestos and other hazardous substances," for which "individuals dealing with them have constitutionally adequate notice that they may incur criminal liability for emissions-related actions."[77]

2. The Ninth Circuit

The next time "knowingly" was challenged in the circuit courts for purposes of the CAA was in 1999. In *United States v. Tomlinson*, the Ninth Circuit also interpreted section 113(c)(1) of the CAA.[78] The Ninth Circuit agreed with the previous interpretation of the *Buckley* Court, holding that this was a public welfare

70. 42 U.S.C. § 7413(c)(1) (2018) (emphasis added).
71. *Id.* § 7413(c)(2)-(3), (4).
72. *Id.* § 7413(c)(4).
73. United States v. Buckley, 934 F.2d 84, 86 (6th Cir. 1991).
74. *Id.*
75. *Id.*
76. *Id.* at 88.
77. *Id.*
78. United States v. Tomlinson, No. 99-30020, 189 F.3d 476 (Table), 1999 WL 511496, at *2 (9th Cir. 1999).

statute requiring only knowledge of the emissions themselves, not the statute.[79] The Ninth Circuit reached its decision by looking at *International Minerals*, its previous interpretation of "knowingly" in the Clean Water Act (to be discussed in the Clean Water Act section), and the act's legislative history.[80] *International Minerals* was decided in 1971, while section 113(c)(1) was not enacted until the Clean Air Act's 1990 amendments.[81] The Ninth Circuit therefore "presume[d] that Congress was aware of prior judicial interpretations when it drafted this section of the CAA using the same language,"[82] leading the court to believe Congress had intended the same interpretation of the CAA's language.[83]

3. Second Circuit

The Second Circuit ruled on the interpretation of "knowingly" in section 113(c)(1) in *United States v. Weintraub*. Although the Second Circuit admitted that the text alone suggested that the defendant was required to know he was violating the law, it ultimately held that that reading was precluded by *International Minerals*.[84] It further noted that this interpretation was consistent with two previous Second Circuit cases ruling on the issue in the Clean Water Act and the Resource Conservation and Recovery Act.[85]

4. Clean Air Act: Summary

All three circuit courts to rule on the interpretation of "knowingly" in the Clean Air Act held that the Act is a public welfare statute and therefore only requires the defendant have knowledge of his actions. This was the Sixth Circuit's first interpretation of "knowingly" in an environmental statute, whereas the other two circuits had previously interpreted "knowingly" in either the Clean Water Act or the Resource Conservation and Recovery Act.

B. Clean Water Act

The Clean Water Act (CWA) was passed in 1972 in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[86]

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79. *Id.* at *3.

80. *Id.*

81. *Id.*

82. *Id.*

83. Almost ten years later, the Ninth Circuit reaffirmed this interpretation in *United States v. Alghazouli*. Interestingly, the Ninth Circuit mentions that this interpretation is consistent with its decision in *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Circ. 1993) (the Clean Water Act case) but does not mention the *Tomlinson* decision. *See* United States v. Alghazouli, 517 F.3d 1193 (9th Cir. 2008).

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

85. *Id.*; *See also* United States v. Rubenstein, 403 F.3d 93 (2d Cir. 2005) (reaffirming the interpretation).

86. 33 U.S.C. § 1251(a) (1972).

The CWA's criminal provisions are all contained within sections 309 and 311.[87] Most relevant to this discussion is section 309(c)(2), which states:

> (2) KNOWING VIOLATIONS Any person who—
>
> (A) *knowingly violates* section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1322(p), 1328, or 1345 of this title…or
>
> (B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage…
>
> shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both.[88]

The CWA also includes criminal provisions for knowing endangerment, knowingly making false statements, and *negligently* violating the Act.[89]

1. Ninth Circuit

The Ninth Circuit was the first to provide its interpretation of "knowingly" in section 309(c)(2) of the CWA. Its decision became arguably the most controversial decision regarding the interpretation of "knowingly" for purposes of criminal liability in environmental statutes. In *United States v. Weitzenhoff*, the Ninth Circuit held that the CWA was a public welfare statute because it was "clearly designed to protect the public at large from the potentially dire consequences of water pollution."[90] To reach this decision, the court looked at the language of the statute and its legislative history.[91] In the CWA's 1987 amendments, Congress replaced "willfully" with the "knowingly" *mens rea* currently in place today.[92] The Senate and House reports, according to the Ninth Circuit, support the opinion that criminal liability was intentionally left broad to prevent knowingly committing an act that violates a permit, even if the polluter is not knowledgeable of the requirement for or lack of a permit.[93] The court also cited to other circuit courts' findings that environmental statutes were public welfare statutes.[94]

The *Weitzenhoff* decision came three years after the Ninth Circuit's decision in *United States v. Speach*, a Resource Conservation and Recovery Act case discussed in the next section, in which the court held for a more specific-intent

87. To see each provision, *See Criminal Provisions of the Clean Water Act*, U.S. EPA, https://www.epa.gov/enforcement/criminal-provisions-clean-water-act (last visited Oct. 1, 2019).

88. 33 U.S.C. § 1319(c)(2) (2018) (emphasis added).

89. *Id.* § 1319(c)(1), (3)-(4).

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

91. *Id.* at 1283 (finding that the language of the statute was not definitive and looking to the legislative history).

92. *Id.*

93. *Id.* at 1284.

94. *Id.* at 1279 (citing cases such as *Buckley*, United States v. Laughlin, 10 F.3d 961 (2d Cir. 1993) (a Resource Conservation and Recovery Act case, discussed later), and United States v. Dee, 912 F.2d 741 (4th Cir. 1990) (a Resource Conservation and Recovery Act case, discussed later)).

approach.[95] The *Weitzenhoff* majority distinguished *Speach* because the defendant in *Speach* had not been "the person in the best position to know the facility's permit status," while the defendant in *Weitzenhoff* was.[96] The majority also distinguished the Supreme Court's decision in *Staples*, stating that machine-guns were not the "dangerous or deleterious devices" intended by *International Minerals* as the subject of public welfare statutes because they were not historically regulated enough as to put the owner on notice that regulations exist.[97]

Notably, *Weitzenhoff* was denied a rehearing *en banc*. This denial prompted a dissent from four circuit judges, who disagreed with the denied rehearing and with the panel's decision in *Weitzenhoff*.[98] *Weitzenhoff* was also denied *certiorari* by the Supreme Court.

2. Second Circuit

Two years after the Ninth Circuit decided *Weitzenhoff*, the Second Circuit gave its interpretation in *United States v. Hopkins*. In determining whether section 309(c)(2) required knowledge that the defendants were acting in violation of their CWA permit, the Second Circuit looked to Congress's intent and the legislative history of the CWA.[99] The Second Circuit determined that the CWA was a public welfare statute because the majority of substances covered by the Act are "of the type that would alert any ordinary user to the likelihood of stringent regulation," and the mere fact that permits are required warns the defendant of the possibility of regulation.[100] Because it determined the CWA was a public welfare statute, the defendant did not need to know that his actions were unlawful.[101] The legislative history supported this interpretation. According to the Second Circuit, the 1987 amendments clearly had the goal of strengthening criminal sanctions, and one way of doing so is to lessen the *mens rea* requirement.[102] In its conclusion, the court mentioned that its decision was in accordance with the only other circuit court to have ruled on the interpretation of "knowingly" in the CWA – the Ninth Circuit in *Weitzenhoff*.[103]

Hopkins was appealed to the Supreme Court but was denied *certiorari*.

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95. *See generally* United States v. Speach, 968 F.2d 795 (9th Cir. 1992).

96. *Weitzenhoff*, 35 F.3d at 1284 n.5.

97. *Id.* at 1297 (the court also stated that the third factor of *Staples*, the severity of the penalty, was no longer applicable because modern statutes had longer imprisonment sentences).

98. *Id.* at 1293 (the dissenting justices argued for a more specific interpretation because of the text itself and the innocent conduct it regulates).

99. United States v. Hopkins, 53 F.3d 533, 537-38 (2d Cir. 1995).

100. *Id.* at 539.

101. *Id.* at 537 ("[I]n construing knowledge elements that appear in so-called 'public welfare statutes'… the Supreme Court has inferred that Congress did not intend to require proof that the defendant knew his actions were unlawful.").

102. *Id.* at 539.

103. *Id.* at 540.

3. Eighth Circuit

Similarly, the Eighth Circuit found in *United States v. Sinskey* that the CWA is a public welfare statute.[104] The Eighth Circuit considered many of the same factors other courts had in interpreting "knowingly" in section 309(c)(2), such as statutory construction, legislative history, and other circuit courts' precedents.[105] The court ultimately held that "knowingly" only applies to the conduct prohibited by the statute and permit, not the statute or permit themselves.[106]

4. Fifth Circuit

The Fifth Circuit was the first circuit court to interpret that defendant's knowledge under the Clean Water Act must equate to more than just his actions. However, the facts of *United States v. Ahmad* were slightly different than the cases previously mentioned.[107] The defendant, Ahmad, alleged a mistake-of-fact defense to section 302(c)(2), stating that he believed he was discharging water rather than gasoline.[108] Contrary to the other circuit courts, the Fifth Circuit held that the CWA was not a public welfare statute[109] because public welfare statutes are a narrow exception to the general rule requiring *mens rea.* Therefore, the Fifth Circuit held in *Ahmad* that gasoline, like the machine-guns in *Staples*, should not fall within the public welfare rule.[110] Because the statute was not a public welfare statute, the Fifth Circuit concluded that "knowingly" applied to each of the elements of the offenses violated in section 309(c)(2).[111]

The *Ahmad* court distinguished *Weitzenhoff* and *Hopkins* because neither case "directly addresses mistake of fact or the statutory construction issues raised by Ahmad."[112] Despite this, the *Ahmad* Court still differed in its determination that the CWA was not a public welfare statute and therefore requires *mens rea* for all elements.[113]

5. Fourth Circuit

The Fourth Circuit provided a similar interpretation of "knowingly" in *United States v. Wilson*. To interpret the *mens rea* of section 309(c)(2), the Fourth Circuit looked at a grammatical reading, the legislative history, and the Supreme Court's

104. United States v. Sinskey, 119 F.3d 712, 716 (8th Cir. 1997) (citing *International Minerals*).

105. *Id.* (the court considered other circuit courts' opinions such as the Second Circuit in *Hopkins* and the Ninth Circuit in *Weitzenhoff*).

106. *Id.* at 715.

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

108. *Id.* at 389.

109. *Id.* at 391.

110. *Id.* (discussing the third factor of Staples v. United States, 511 U.S. 600 (1994), reiterating that public welfare offenses are indicated by light penalties).

111. *Id.*

112. *Id.* at 390-91.

113. *Id.* at 391.

rulings on *mens rea* in other federal criminal law statutes.[114] The Fourth Circuit first concluded that "knowingly violates" could perhaps be a "shorthand method" of requiring the *mens rea* to accompany each element of the other statutory sections encompassed in the section, rather than inserting the same *mens rea* requirement repeatedly for each element.[115] The court then considered common law principles of criminal *mens rea*: that criminal offenses generally require a *mens rea* and ignorance of the law is no defense.[116] Because application of these principles give contradictory results, the court looked to precedential Supreme Court cases interpreting *mens rea* requirements in other criminal provisions.[117] The court ultimately held that "knowingly" in section 309(c)(2) "requires the government to prove the defendant's knowledge of *facts* meeting each essential element of the substantive offense…but need not prove that the defendant knew his conduct to be illegal."[118]

6. First Circuit

Unlike the other circuit courts, the First Circuit's interpretation of "knowingly" in the CWA was in section 309(c)(3)(A): knowing endangerment. While its analysis is not completely compatible with those of the other circuit courts, the First Circuit's reasoning is interesting to note for the broader discussion of "knowingly" interpretations. In *United States v. Borowski*, the court focused on two important criminal law principles. First, it held that the rule of lenity required it to construe the ambiguity in favor of the defendant.[119] Second, it interpreted the statute to give effect to all terms.[120] Ultimately, the court held that "knowingly violates," for purposes of the CWA's knowing endangerment provision, meant that the defendants must know they were placing their employees in imminent danger.[121]

7. Clean Water Act: Summary

Three circuit courts (the Second Circuit, the Eighth Circuit, and the Ninth Circuit) held that the Clean Water Act was a public welfare statute, meaning Congress did not intend to require the defendant to know that his conduct was illegal. The Fourth Circuit did not discuss whether the CWA was a public welfare statute, but ultimately required the government to prove that the defendant had knowledge of all the elements that made his conduct illegal. The Fifth Circuit

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

115. *Id.* at 261.

116. *Id.*

117. *Id.* at 262. *See generally* United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558 (1971); United States v. X-Citement Video, Inc., 513 U.S. 64 (1994); Staples v. United States, 511 U.S. 600 (1994).

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

119. United States v. Borowski, 977 F.2d 27, 31-32 (1st Cir. 1992). *See, e.g.*, Hughey v. United States, 495 U.S. 411, 422 (1990).

120. *Borowski*, 977 F.2d at 32. *See, e.g.*, Wadsworth v. Whaland, 562 F.2d 70, 78 (1st Cir. 1977).

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

required the same proof of knowledge as the Fourth Circuit while explicitly holding that the CWA was not a public welfare statute. Despite interpreting a different section of the CWA, the First Circuit also required knowledge of additional facts that made the conduct illegal.

C. Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act (RCRA) was passed in 1976 in order to "promote the protection of health and the environment and to conserve valuable material and energy resources."[122] RCRA's criminal provisions are all contained within section 3008.[123] Most relevant to this discussion are subsections 3008(d)(1) and 3008(d)(2), which have been interpreted differently within the circuit courts:

(d) CRIMINAL PENALTIES Any person who —

(1) *knowingly transports* or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit…[or]

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

(A) without a permit…

(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 a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both.[124]

The Resource Conservation and Recovery Act also contains criminal provisions for knowingly omitting material information, knowingly making false statements, knowingly generating, storing, or treating hazardous wastes, knowingly transporting without a manifest, and knowingly exporting hazardous waste.[125] Like the Clean Air Act and the Clean Water Act, RCRA also contains a criminal provision for knowing endangerment, but RCRA does not include any provisions for negligent actions.[126]

Although the Resource Conservation and Recovery Act came after the Clean Air Act and the Clean Water Act, it was the first of the three to be interpreted by the appellate courts.

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122. 42 U.S.C. § 6902(a) (2018).

123. *See Criminal Provisions of the Resource Conservation and Recovery Act (RCRA)*, U.S. EPA, https://www.epa.gov/enforcement/criminal-provisions-resource-conservation-and-recovery-act-rcra (last visited Oct. 1, 2019) (providing general descriptions of the criminal provisions).

124. § 6928(d) (emphasis added).

125. *Id.* § 6928(d)(3)-(7).

126. *Id.* § 6928(e).

1. Third Circuit

In 1984, the Third Circuit held in *United States v. Johnson & Towers, Inc.* that criminal prosecution requires that the defendant "knew or should have known that there had been no compliance with the permit requirement of section 3005."[127] Because this was the first time any court of appeals issued its interpretation of "knowingly" in an environmental statute, the Third Circuit's reasoning will be discussed at more length.

Focusing first on the statutory language of section 3008(d)(2), the Third Circuit reasoned that if "knowingly" modified only the actions, "it would be an almost meaningless addition," as it is unlikely a person could be treating, storing, or disposing of a substance without knowing that they were doing so.[128] The court then considered whether RCRA was a public welfare statute according to *International Minerals* and therefore whether a higher *mens rea* threshold would be appropriate.[129] While the Third Circuit acknowledged that RCRA can be classified as a public welfare statute, the court stated that "whatever policy justification might warrant applying such a construction as a matter of general principle, such a reading would be arbitrary and nonsensical when applied to this statute."[130] As Congress specifically reiterated "knowing violation" in subsection (B), the court held that Congress would have included it in subsection (A) if it had intended it to be read the same.[131] The defendant was therefore required to know that he was not in compliance with RCRA's permit requirement.

In its decision, the Third Circuit reiterated that a good faith mistake-of-fact would still be a defense.[132] Additionally, the Third Circuit made clear that the requirement of proof that the defendant did not know he had a permit would not be a large burden for the government.[133] A defendant facing criminal prosecution for environmental crimes could easily be inferred to have knowledge of their business, which would include their environmental permits.[134]

Johnson & Towers, Inc. was appealed to the Supreme Court but was denied *certiorari*.

2. Eleventh Circuit

The Eleventh Circuit in *United States v. Hayes International Corp*. reached a similar interpretation for section 3008(d)(1). The Eleventh Circuit first held that section 3008(d)(1) was "undeniably a public welfare statute."[135] The court did not find this to mean that no knowledge was required however, only that to do so would

127. United States v. Johnson & Towers, Inc., 741 F.2d 662, 665 (3d Cir. 1984).
128. *Id.* at 668.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* (citing United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 563-64 (1971)).
133. *Id.* at 669.
134. *See id.*
135. United States v. Hayes Int'l Corp., 786 F.2d 1499, 1503 (11th Cir. 1986).

be a "completely fair and reasonable" option.[136] After looking at the congressional purpose of the statute, the court held that knowledge of the action and the lack of a permit should be required.[137] Citing *Liparota*, the Eleventh Circuit stated that "[r]emoving the knowing requirement from this element would criminalize innocent conduct."[138] The court also reiterated the Third Circuit's statement that this requirement does not create a heavy burden, as "[k]nowledge does not require certainty."[139]

3. First Circuit

The First Circuit in *United States v. MacDonald & Watson Waste Oil Co.* also held that for section 3008(d)(1), the defendant must have knowledge of his permit status. Although the issue was not on appeal, the First Circuit explicitly affirmed the district court's interpretation requiring the knowledge that the defendant lacked a mandatory permit. The court stated that this interpretation was correct because it removed the possibility of incriminating innocent transporters.[140]

4. Ninth Circuit

In *United States v. Hoflin*, the Ninth Circuit declined to follow the Third Circuit's analysis in *Johnson & Towers* for interpreting "knowing" in section 3008(d)(2).[141] The Ninth Circuit believed Congress's omission of "knowing" in subsection (A) was intentional, reasoning that under the Third Circuit's approach in *Johnson & Towers*, subsection (B)'s "knowing" would simply be redundant.[142] The Ninth Circuit also looked at RCRA's overall purpose, holding that RCRA is a public welfare statute and therefore does not require knowledge of the permit status.[143] However, the Ninth Circuit did note that the defendant *would* have to know that the wastes were hazardous in order to know that they were subject to regulation.[144]

Hoflin was appealed to the Supreme Court but was denied *certiorari*.

Two years after *Hoflin*, the Ninth Circuit was again asked to interpret "knowing" in RCRA, although a different subsection. In *United States v. Speach*, the Ninth Circuit held that for purposes of section 3008(d)(1), the defendant was

136. *Id.*

137. *Id.* at 1504.

138. *Id.* (citing Liparota v. United States, 471 U.S. 419, 426 (1985). However, court also stated that *Liparota* was not controlling, because the section does not contain the same "knowing violation" language.).

139. *Hayes Int'l Corp.*, 786 F.2d at 1504.

140. United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 48 (1st Cir. 1991).

141. United States v. Hoflin, 880 F.2d 1033, 1038 (9th Cir. 1989).

142. *Id.*

143. *Id.*

144. *Id.* at 1039.

required to know that the facility did not have a permit.[145] Citing *Hayes International*, the court held that "[r]emoving the knowledge requirement would criminalize innocent conduct."[146] The majority opinion distinguished *Speach* from *Hoflin* due to the interpretation of two different subsections.[147] The dissent to *Speach*, however, argued that "knowingly" was used the same way in both subsections so the Ninth Circuit should be precluded by its previous decision in *Hoflin*.[148]

5. Fourth Circuit

In 1990, the Fourth Circuit ruled on RCRA section 3008(d) generally in *United States v. Dee*. Like the Ninth Circuit's *Speach* opinion, the Fourth Circuit held that to be criminally liable, the defendants needed to know that the wastes they were transporting were hazardous in character, but did not need to know that the wastes were listed as hazardous wastes under RCRA.[149] Additionally, the *Dee* court mentioned that the *Johnson & Towers* court reached a different conclusion but did not go into detail distinguishing the two cases.[150]

Dee was appealed to the Supreme Court but was denied *certiorari*.

6. Sixth Circuit

In 1992, the Sixth Circuit also interpreted section 3008(d)(2) in *United States v. Dean*. Acknowledging that there was a circuit split, the Sixth Circuit chose to follow the reasoning of the Ninth Circuit's first interpretation in *Hoflin* (its decision on section 3008(d)(2)) and agreed that extending the "knowing" requirement from section 3008(d)(2) to subsection (A) would render the addition of "knowing" in subsections (B) and (C) redundant. The Sixth Circuit ultimately held that the defendant did need to know that the substances were hazardous and that the facility lacked a permit, but did not need to know that a permit was required.[151]

Later in *United States v. Kelley Technical Coatings, Inc.*, the Sixth Circuit reaffirmed *Dean* and stated that the Supreme Court cases *X-Citement Video* and *Staples*, both decided after *Dean*, did not overrule the decision.[152]

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145. United States v. Speach, 968 F.2d 795, 796 (9th Cir. 1992) (The Ninth Circuit recognized public welfare offenses, but created a narrow exception for those not in "the best position to know the facility's permit status.").

146. *Id.* (citing United States v. Hayes Int'l Corp., 786 F.2d 1499, 1504 (11th Cir. 1986)).

147. *Id.* at 797.

148. *Id.* at 798.

149. United States v. Dee, 912 F.2d 741, 745 (4th Cir. 1990).

150. *Id.*

151. United States v. Dean, 969 F.2d 187, 191 (6th Cir. 1992).

152. United States v. Kelley Technical Coatings, Inc., 157 F.3d 432, 437 (6th Cir. 1998) (holding that neither Supreme Court case discussed *mens rea* requirements in the scope of RCRA and that the cases were decided on a more mistake-of-fact basis than *Dean*).

7. Second Circuit

Lastly, the Second Circuit followed the Ninth and Sixth Circuit's interpretation of section 3008(d)(2). In *United States v. Laughlin*, the Second Circuit found that RCRA was a public welfare statute in line with *International Minerals*.[153] Because of this, the court stated that "it is clear that section 3008(d)(2)(A) requires only that a defendant have a general awareness that he is performing acts proscribed by the statute."[154] Additionally, the court found support from past courts, such as the *Dean*, *Hoflin*, and *Dee* decisions, by reiterating the textual argument regarding redundancy in later subsections.[155]

Laughlin was appealed to the Supreme Court but was denied *certiorari*.

8. Resource Conservation and Recovery Act: Summary

The Ninth Circuit first held in *Hoflin* that section 3008(d)(2) of RCRA was a public welfare statute and therefore does not require defendants to have knowledge of the surrounding circumstances that make their actions illegal. Two circuit courts (the Second Circuit and the Sixth Circuit) have followed the *Hoflin* decision.[156] Two years after *Hoflin*, however, the Ninth Circuit held in *Speach* that section 3008(d)(1) of RCRA required additional knowledge of the circumstances which made the defendant's actions illegal. The Fourth Circuit agreed with the *Speach* decision, holding that the government was required to prove the defendant knew that the substances were hazardous wastes under RCRA. Although the Eleventh Circuit held that section 3008(d)(1) of RCRA was a public welfare statute, both the Eleventh and the Third Circuits found that the defendant must know the illegality of his actions (e.g., that the facility lacked a required permit). The First Circuit also reiterated this interpretation, despite the fact that the interpretation was not on appeal.

III. ANALYSIS: INTENT, CRIMINAL LIABILITY, AND THEIR PLACE IN ENVIRONMENTAL LAW

EPA takes environmental crimes very seriously. Since the 1980s, criminal indictments and convictions for environmental crimes, as well as the number of special agents investigating these crimes, has risen.[157] EPA has special agents dedicated to pursuing environmental criminal enforcement, which are federal agents with the power of law to investigate and arrest those in violation of environmental statutes.[158] As of this writing, there are nine persons on EPA's list

153. United States v. Laughlin, 10 F.3d 961, 965 (2d Cir. 1993).

154. *Id.*

155. *Id.* at 966.

156. *Id. See also Dean*, 969 F.2d at 191.

157. Bruce Smith, *Criminal Liability for Environmental Crimes*, MORRIS, MANNING & MARTIN, LLP, https://www.mmmlaw.com/media/criminal-liability-for-environmental-crimes/ (last visited Mar. 13, 2021).

158. *Criminal Investigations*, U.S. EPA, https://www.epa.gov/enforcement/criminal-investigations (last visited Mar. 13, 2021).

of fugitives who have been charged with environmental crimes and have fled jurisdiction or the United States.[159]

During the Obama administration specifically, criminal enforcement was preferred over civil enforcement.[160] Two major reasons EPA would choose to use criminal sanctions over civil lawsuits are that they are generally quicker and have more deterrent power.[161] Specifically, criminal sanctions seem to allow for more punishment of the person responsible, showing that noncompliance with environmental laws is a serious violation of the law.[162]

Despite the frequency of its use, the proper level of *mens rea* required for criminal liability in environmental statutes is still unclear and there remains a circuit split, yet the Supreme Court continues to deny *certiorari*. Although the CAA, the CWA, and RCRA all explicitly include a *mens rea* of "knowing" in their statutes, many courts have interpreted them to not require any knowledge of the circumstances that make the action a violation.[163]

As shown, an often threshold question when interpreting *mens rea* is whether the statute is a public welfare statute. The regulated substance is not conclusive; while environmental statutes do regulate "dangerous or deleterious devices or products or obnoxious waste materials,"[164] they also regulate some conduct that appears to be innocent.[165] The environmental statutes discussed allow for prison sentences of anywhere from two to five years; public welfare statutes typically only have misdemeanor punishments, such as fines, rather than more severe punishments such as prison time.[166]

Are environmental statutes considered public welfare statutes? The Second, Third, Sixth, Eighth, Ninth, and Eleventh circuits have said "yes" for at least one environmental statute while only the Fifth Circuit has explicitly said "no." The remaining circuits have interpreted *mens rea* without making a determination as to public welfare status.

A. Three Approaches to Mens Rea in Environmental Law

Rather than the common, criminal law approach that differentiates between only knowledge of the actions and knowledge of the illegality, many of the circuit courts' interpretations fall into a middle category. This middle-ground approach

159. *EPA Fugitives*, U.S. EPA, https://www.epa.gov/enforcement/epa-fugitives (last visited Mar. 13, 2021).

160. Caroline Williamson et al., *Environmental Crimes*, 56 AM. CRIM. L. REV. 807, 809 (2019).

161. Smith, *supra* note 157.

162. Captain James P. Calve, *Environmental Crimes: Upping the Ante for Noncompliance with Environmental Laws*, 133 MIL. L. REV. 279, 284-85 (1991).

163. Williamson et al., *supra* note 160, at 813.

164. United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 563 (1971).

165. Bobby Yu, *Criminal Ambiguity: Redefining the Clean Water Act's Mens Rea Requirements*, 11 SETON HALL CIR. REV. 327, 340 (2015). *See also* Calve, *supra* note 162, at 281.

166. Alex Arensberg, *Are Migratory Birds Extending Environmental Criminal Liability?*, 38 ECOLOGY L. QUARTERLY 427, 432 (2011). *See also* Staples v. U.S., 511 U.S. 600, 616-618 (1994) (holding that the severity of punishment is a consideration for whether a statute is a public welfare statute).

requires more than just knowledge of the actions but does not require knowledge that extends to the law that makes the action illegal. The criminal liability cases discussed above can therefore be categorized in one of three ways: knowledge of the action, knowledge of additional facts making the action illegal, and knowledge that the action was illegal.

1. Knowledge of the Action

The first category of cases requires only knowledge of the action. When this more strict-liability approach is taken, knowledge is not required for any specific underlying elements *or* the statutory language. Public welfare statutes would fall under this category, as the Supreme Court has stated that public welfare statutes do not require proof of *mens rea*. This is the slight majority approach within the courts of appeals: the Second Circuit, the Sixth Circuit, the Eighth Circuit, and the Ninth Circuit (in most of its decisions) have all held only knowledge of the action is required for criminal liability.[167]

2. Knowledge of Additional Facts

The second category requires the additional knowledge of any facts that make the defendant's action illegal but does not require knowledge of the law (and therefore the illegality of the action). In the RCRA cases, for example, this category would contain those decisions that required knowledge that the substances were hazardous but did not require knowledge about the required permit status. In these cases, a mistake-of-fact defense can still prevent criminal prosecution when the defendant has a good-faith belief that the facts are somehow different than reality.[168] The Fourth Circuit, the Fifth Circuit, and the Ninth Circuit (for one section of RCRA) appear to follow this analysis.[169]

3. Knowledge of Illegality

The final category requires knowledge of the facts that make the action illegal and the statutory basis that makes it illegal; the defendant must therefore fully know that what he is doing is illegal. Under this interpretation, both a mistake-of-fact defense and a mistake-of-law defense would seemingly be applicable.[170] This is the most stringent interpretation and would implicate the smallest number of defendants. However, as the Third and Eleventh Circuits point out, this would not be a heavy burden for the government.[171] The First Circuit, the Third Circuit, and the Eleventh Circuit follow this approach.[172]

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167. Williamson, *supra* note 160, at 815.

168. *See id.* at 821.

169. *Id.* at 814.

170. *See id.* at 821.

171. *See* United States v. Johnson & Towers, Inc., 741 F.2d 662, 669 (3d Cir. 1984). *See also* United States v. Hayes Int'l Corp., 786 F.2d 1499, 1504 (11th Cir. 1986).

172. Williamson et al., *supra* note 160, at 814-5.

B. Reasons for the Different Categories

Reasonable courts have consistently come to different conclusions regarding the interpretation of the knowledge requirement in environmental statutes. In doing so, each court provided unique reasonings for their decisions.

1. Category One: Requiring Only Knowledge of the Action

The simplest reason for not requiring additional *mens rea* is that the statute is a public welfare statute. As discussed previously, public welfare statutes are those covering materials so dangerous that the people dealing with them can be presumed to know there is regulation governing the use of them. This is especially true for current environmental regulations, as these statutes have been in place for decades. It is likely that any person dealing with the subject matter of an environmental statute knows or should know that there are extensive regulations governing it. Furthermore, although some amount of pollution is inevitable, EPA must have discretion to punish those polluters that pose a great risk to public welfare.[173] Sometimes, the risk of harming the innocent public will outweigh the risk of harming an innocent violator of an environmental statute.

Another common reasoning for requiring only knowledge of the action is that ignorance of the law is not an excuse for not following it. This criminal law policy, mentioned previously, remains an important consideration for many courts.

2. Category Two: Requiring Additional Knowledge of the Facts that Make the Action Illegal

As discussed, courts are generally hesitant to read a statute as not having a *mens rea* requirement. When determining the *mens rea* required in the National Firearms Act, for example, the Supreme Court read in a knowledge requirement even when no *mens rea* was provided.[174] All the criminal provisions of the environmental statutes discussed have an explicit *mens rea* requirement of knowledge. For environmental statutes, criminal provisions will still generally require some element of *mens rea*, such as knowledge of the facts that satisfy the elements.[175] By requiring only that the defendant know he is committing a general act, courts are effectively reading the knowledge requirement out. Additionally, the Clean Air Act and the Clean Water Act contain criminal provisions for negligent violations. Negligence, as a reminder, is a level of *mens rea* below knowledge and requires only ordinary care. If Congress had intended the provisions requiring knowing violations to be read more broadly, the negligent violations would become almost redundant.

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173. Robert V. Percival et al., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 167 (8th ed. 2018).

174. *See generally* Staples v. U.S., 511 U.S. 600, 619 (1994).

175. Percival et al., *supra* note 173, at 167 ("Criminal prohibitions generally require some element of intentional conduct, though it need not necessarily be an intent to cause harm to the environment.").

One of the most prominent reasons provided by the courts for requiring additional knowledge in environmental statutes is the risk of criminalizing innocent behavior and people. When a statute includes seemingly innocent behavior, many courts have been reluctant to criminalize a defendant that has no knowledge that his actions were illegal, or at least immoral. The Ninth Circuit in *Speach*, for example, worried about defendants such as the "transporter who relied in good faith upon a recipient's fraudulent certificate."[176] In concurrence with this idea, courts have frequently clarified that this additional knowledge is not a heavy burden.[177] Particularly for those who are the most likely targets of EPA's criminal prosecutions, it would arguably not be difficult to prove that the defendant knew or should have known of the regulations he was violating.

The second category is a way of balancing all the policies discussed while still somewhat harmonizing the principle that ignorance of the law is not a defense. It allows for more protection of innocent conduct while not holding the standard so high as to only convict those with intricate knowledge of law.

3. Category Three: Requiring Knowledge that the Action is Illegal and What Makes it Illegal

The reasons for the third category are similar to those for the second category: not reading out *mens rea* and not criminalizing innocent conduct. The primary argument for the third category over the second category is a textual one. As the dissent in *Weitzenhoff* articulates, a normal, grammatical reading of "knowingly violates" requires the defendant to know that he is violating the statute.[178] For example, to know he is violating the statute a defendant would have to have knowledge that he is violating a permit condition.[179]

C. The Supreme Court's Responsibility

The Supreme Court should decide on the issue and interpret "knowingly" in the context of an environmental statute. Although this analysis compared three different environmental statutes, the acts share very similar texts and purposes. Between nine Courts of Appeals' interpretations, the three categories of interpretation were fairly evenly split. Currently, the threshold of what is required to criminally convict a defendant for violating environmental statues varies widely between jurisdictions. The same case could be decided differently based solely upon the jurisdiction in which it is brought. There must be consistency in what knowledge is required for criminal liability. By continually denying *certiorari* for decisions with opposite holdings, the Supreme Court has kept the circuit split in place.

176. United States v. Speach, 968 F.2d 795, 796 (1992).
177. *See, e.g.*, United States v. Hayes Int'l Corp., 786 F.2d 1499, 1504 (11th Cir. 1986).
178. United States v. Weitzenhoff, 35 F.3d 1275, 1294 (9th Cir. 1994).
179. *Id.*

CONCLUSION

While the Supreme Court has repeatedly denied *certiorari*, interpretations of "knowingly" in environmental statutes remain inconsistent. Despite analyzing the same legislative history, judicial precedent, and policy considerations, circuit courts have interpreted the same statutes very differently. Some circuit courts have determined that environmental statutes are public welfare statutes that do not require a showing of *mens rea*. Even without holding that the statute was a public welfare statute, other circuits courts have still required proof only that the defendant knew of his actions. Conversely, some circuit courts require more than knowledge of just the defendant's actions, also requiring knowledge of the circumstances making his actions illegal. And still, the remaining circuit courts require the defendant to know that his actions were illegal by requiring additional knowledge of the statute and its regulations. Because reasonable courts continue to interpret "knowingly" in environmental statues differently, it is time that the Supreme Court rule on the issue.