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Attempting to Legislate *Attempted* Environmental Crimes

HELEN M. MAHER*

I. Introduction

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage.¹

The development of environmental law is a story whose denouement is found in lengthy statutes that were sculpted by public policy reflecting the prevalent political, economic, and moral currents to which Justice Holmes referred.² It is a story whose plot has been rewritten with each change of the political guard, enduring the subsequent ebb and flow of economic support. The evolution of environmental law mirrors

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1. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1-2 (1881) [hereinafter HOLMES].

2. See HOLMES, *supra* note 1.

the Nation's development and cognizance of industry's effects on surrounding media. Society seeks to unify this environmental awareness with legal justice through statutes and regulations aimed to protect the environment.

Modern attempts to provide better environmental protection have emerged as legislation before the United States Senate and House of Representatives. Recently, Senator Frank R. Lautenberg co-sponsored the Environmental Crimes and Enforcement Act of 1996³ (ECEA) in the Senate for consideration by the 105th Congress. The ECEA originated in the Department of Justice through the involvement of federal, state, and local prosecutors.⁴ Drafted to strengthen the government's power in enforcing environmental laws, the ECEA would establish significantly increased penalties for environmental polluters.⁵

The ECEA "is aimed at bad actors who violate our environmental laws purposely, intentionally, or with knowing disregard for the impact of their actions. These are not people who accidentally miss a deadline or even negligently forget to file for a needed permit."⁶ This legislation increases penalties by providing for longer imprisonment terms and higher monetary sanctions in both federal and state prosecutions for those individuals who engage in the proscribed conduct.⁷

The ECEA, if adopted, will have a pervasive effect on the entire spectrum of environmental statutes, reflecting a legislative effort to create more uniform enforcement and penalty provisions.⁸ This bill creates liability for any person who vio-

3. S. 2096, 104th Cong. (1996).

4. See 142 CONG. REC. S11,033-04, 11,036 (daily ed. Sept. 19, 1996) (statement of Sen. Lautenberg).

5. See *id.*

6. *Id.*

7. See S. 2096, 104th Cong. § 4 (1996).

8. Environmental statutes supplemented by the Environmental Crimes and Enforcement Act are:

Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) §§ 1-31, 7 U.S.C. §§ 136-136y (1988); Toxic Substance Control Act (TSCA) §§ 1-412t, 15 U.S.C. §§ 2601-2692 (1992); Federal Water Pollution Control Act ((commonly referred to as the Clean Water Act) (CWA)) §§ 1-607, 33 U.S.C. §§ 1251-1387 (1988 & Supp. IV 1994); Marine Protection, Research, and Sanctuaries Act, 33 U.S.C.

lates or even "attempts" to violate an environmental statute.⁹ "None of these proposals, by themselves, will solve the problem of environmental crime. But, together, they would make a real difference."¹⁰ This legislation enables federal and state prosecutors to work together more effectively by creating a State, Local, and Tribal Environmental Enforcement Training Program to instruct law enforcement personnel about investigation techniques.¹¹ Additionally, the proposed bill extends the current statute of limitations for prosecution of environmental statute violations.¹²

This Comment analyzes, in general, the ECEA. More specifically, this Comment focuses on the ECEA's attempt provision and its impact on the Clean Water Act (CWA), while concentrating on the difficulty in establishing causation and the requisite proof in obtaining a conviction. Further, it compares the underlying rationales and social purposes of common law approaches to environmental law with the proposed ECEA.

Part II provides a history of environmental law, discussing common law nuisance, trespass actions, and the philosophy underpinning their utility in environmental suits. The public policy underlying the common law foundation of environmental law is described to compare it with the congressional reasoning for the ECEA. Moreover, the progression of environmental claims from a largely common law basis to de-

§ 1401 (1986); Act to Prevent Pollution From Ships, 33 U.S.C. §§ 1901-1908; Shore Protection Act of 1988, 33 U.S.C. §§ 2601-2609, 2622-2623; Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-26; Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992 (1976); Clean Air Act (CAA) §§ 101-618q, 42 U.S.C. §§ 7401-7671 (1990); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) §§ 101-405, 42 U.S.C. §§ 9601-9675 (1986 & Supp. IV 1994); Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) §§ 301-330, 42 U.S.C. §§ 11001-11050 (1986); Federal Land Policy and Management Act of 1976 (FLPMA) §§ 102-603, 43 U.S.C. §§ 1701-85 (1976); Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. §§ 5-645 (1899).

9. See S. 2096, 104th Cong. § 7 (1996).

10. 142 CONG. REC. S11,033-04, 11,036 (daily ed. Sept. 19, 1996) (statement of Sen. Lautenberg).

11. See S. 2096, 104th Cong. § 5 (1996).

12. See *id.* § 6.

pendence upon federal statutes is examined. Several cases involving criminal and civil sanctions are explored to illustrate typical defenses raised in environmental crime cases. The designation of the CWA as a public welfare statute will be examined, in addition to the rule of lenity. The ECEA will be contextually evaluated, focusing on its individual sections and the supplementary historical information underlying the Act's development. Attempt as it is defined in the Model Penal Code and other legal environments is applied to the bill in order to demonstrate the possible legal obstacles the provision may present.

Part III compares the reasoning underlying the historical development of environmental law in relation to the ECEA's objectives to determine if the two can be harmonized. Supplementary to this analysis is an application of the proposed attempt amendment to applicable cases discussed in Part II, serving as indicators of the amendment's possible pragmatic successes and failures. Based on the reasoning provided in these cases, the designation of the CWA as a public welfare statute will be examined in relation to the bill's attempt amendment. Further, the "knowingly" mens rea of applicable CWA provisions will be evaluated in relation to its interpretation in other federal statutes. Finally, the ECEA's attempt provision will be analyzed based on case law prescribing the elements of attempt. A solution to the weaknesses of the attempt provision is proffered, along with an analysis of the social effects of the attempt clause.

Part IV provides a conclusion summarizing both the positive and negative aspects of implementing the proposed bill, illuminating its effects on the CWA. Additionally, the rationale supporting why the CWA is not a public welfare statute is summarized in relation to the ECEA's attempt provision.

II. Background

Justice Holmes' statement that in order to understand what law is, we must know what it has been, is apropos in discussing the historical development of environmental

law.¹³ Today, environmental law is referred to as “an amalgam of common law and statutory principles.”¹⁴ Before environmental statutes were enacted, aggrieved citizens relied on the common law to abate environmentally offensive conduct.¹⁵ Two principle causes of actions that address environmental concerns have been, and continue to be, nuisance and trespass.¹⁶ The common law causes of action may be utilized individually or in conjunction with federal statutes.¹⁷ However, federal and state statutes are more effective because they address specific types of pollution and offer varied forms of relief.¹⁸ Environmental statutes, which are more comprehensive than common law actions, have reduced the need for common law civil prosecutions.¹⁹ “In those instances where the environmental criminal statutes are not sufficient to redress the offense, the modern prosecutor likely will employ other more serious common law criminal statutes, which appear to be more specifically applicable and which offer greater opportunities for deterrence than public nuisance.”²⁰

A. History of Environmental Law's Common Law Basis

The foundation of modern environmental law is derived from nuisance.²¹ Actions brought in nuisance have addressed “virtually every major industrial and municipal activity which is today the subject of comprehensive environmental regulation — the operation of land fills, incinerators, sewage treatment facilities, activities at chemical plants, aluminum,

13. See HOLMES, *supra* note 1.

14. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 2.1 at 112 (2d ed. 1994) [hereinafter RODGERS].

15. See GERALD W. BOSTON & M. STUART MADDEN, LAW OF ENVIRONMENTAL AND TOXIC TORTS 213 (1994).

16. See *id.*

17. See RODGERS, *supra* note 14.

18. See DONALD A. CARR ET AL., ENVIRONMENTAL CRIMINAL LIABILITY: AVOIDING AND DEFENDING ENFORCEMENT ACTIONS 5 (1995) [hereinafter CARR].

19. See John J. Gibson, Esq. & Richard M. Greenberg, Esq., *Environmental Crimes at Common Law*, in ENVIRONMENTAL CRIMES 25, 34 (1995) [hereinafter GIBSON].

20. *Id.*

21. See RODGERS, *supra* note 14.

lead and copper smelters”²² There are two types of nuisance actions: public nuisance and private nuisance. Public nuisance is an unreasonable interference with a general communal right of the public.²³ Public nuisance actions may allege harm to public health, exemplified by cases such as the keeping of infectious cattle or maintaining a pond that breeds malarial mosquitos.²⁴ Other public nuisance actions may include impediments with the public comfort, such as a rampant circulation of malodors, or may include an interference with the public convenience, such as the trammel of a public highway or a navigable body of water.²⁵ Some states have codified the action of public nuisance while providing criminal penalties.²⁶ Remedies for public nuisance may include damages and/or injunctive relief.²⁷ Even though the birth of the environmental movement was decades away, “the nuisance action was viewed as a vehicle for prosecuting polluters.”²⁸

Representative early environmental cases included claims based on foul odors emitted from a fat-processing facility²⁹ and noxious odors discharged from a pig farm.³⁰ The interference is considered unreasonable if “(1) the conduct involved a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience; or (2) the conduct was of a continuing nature or produced permanent or long-lasting effect upon the public right.”³¹ A defendant in a public nuisance case is liable if his “interference with the public right was intentional or unintentional and otherwise actionable under the principles controlling liability for negligent or reckless conduct or for

22. See RODGERS, *supra* note 14.

23. See RESTATEMENT (SECOND) OF TORTS § 821B (1977).

24. See *id.* at cmt. b.

25. See *id.*

26. See *id.* at cmt. c.

27. See *id.* at cmt. i.

28. See GIBSON, *supra* note 19, at 29.

29. See *Commonwealth v. Brown*, 54 Mass. 365 (1847).

30. See *Commonwealth v. Perry*, 29 N.E. 656 (Ill. 1885).

31. RESTATEMENT (SECOND) OF TORTS § 821B (1977).

abnormally dangerous activities.”³² To determine if an interference is significant, the court must balance the utility of the harms and benefits³³ of the questioned act.³⁴ The common law crime of public nuisance established a means by which government could address and prevent degradation of the environment.³⁵

Private nuisance is a “nontrespasory invasion of another’s interests in the private use and enjoyment of his land.”³⁶ A perpetrator of a private nuisance, similar to a defendant in a public nuisance action, may be liable if the conduct is intentional or unintentional.³⁷ Private nuisance actions, for example, have abated noxious odors emitted by a feedlot³⁸ as well as secured damages caused by an air-polluting cement plant.³⁹

Trespass is another common law action utilized to address pollution. “One is subject to liability to another for trespass irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove.”⁴⁰ The basic difference between trespass and nuisance is the requirement of an intentional invasion of the plaintiff’s possessory interest in trespass actions. Nuisance actions, however, require a substantial unreasonable interference with the plaintiff’s use and enjoyment of land.⁴¹

32. *Id.* at cmt. e.

33. “The utility of conduct was determined by identifying (1) social value that the law attaches to the primary purpose of the conduct; (2) suitability of the conduct to the character of the locality; and (3) impracticability of preventing or avoiding the invasion.” *Id.* at § 828.

34. *See id.* at § 827.

35. *See* GIBSON, *supra* note 19, at 27.

36. RESTATEMENT (SECOND) OF TORTS § 821D (1977).

37. *See id.* at § 822.

38. *See* *Spur v. Del Webb*, 494 P.2d 700 (Ariz. 1972).

39. *See* *Boomer v. Atlantic Cement*, 257 N.E.2d 870 (N.Y. 1970).

40. RESTATEMENT (SECOND) OF TORTS § 158 (1977).

41. *See* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 2.13 at 154 (1st ed. 1977).

B. The Rivers and Harbors Act as a Precursor to the CWA

As society became more concerned with environmental harm, the common law approaches to redressing grievances gave way to a codified approach addressing specific violations. The Rivers and Harbors Act of 1899,⁴² also referred to as the Refuse Act, was the precursor to the contemporary CWA.⁴³ "At first, the pressure favoring such regulation was prompted, almost entirely, by the need to protect trade by keeping national waterways and harbors free from obstruction."⁴⁴ While the Refuse Act was utilized to protect the navigability of waters rather than to criminalize pollution, it nevertheless signaled the genesis of public environmental awareness.⁴⁵ Even prior to the enactment of the CWA, the Refuse Act became a potent tool for addressing environmental crimes.⁴⁶

Federal enforcement agencies sought regulatory authority independent of state or local enforcement agencies.⁴⁷ The federal agencies therefore combined the infrequently used Refuse Act with the investigatory capabilities of the grand jury, and initiated prosecutions of water polluters.⁴⁸ This approach existed ". . . until Congress struck the balance mostly (but not entirely) in favor of control at the source in the 1972 [Clean Water Act] Amendments."⁴⁹ The Refuse Act's capability as an instrument to eliminate pollution nevertheless was reflected in *United States v. Republic Steel Corp.*⁵⁰ There,

42. 33 U.S.C. § 403 (1899).

43. See CARR, *supra* note 18, at 194-95.

44. CHRISTOPHER HARRIS ET AL., 1 ENVIRONMENTAL CRIMES § 1.07 at 1.11.12 (1995).

45. See *id.*

46. See, e.g., *United States v. Republic Steel*, 362 U.S. 482 (1960).

47. See CARR, *supra* note 18, at 194.

48. See *id.*

49. See RODGERS, *supra* note 14, § 4.1, at 252.

50. 362 U.S. 482 (1960). *Republic Steel* was based on a claim by the United States to prevent steel companies from "depositing industrial solids in the Calumet River . . . without first obtaining a permit from the Chief of Engineers of the Army" who had ordered the companies to remove the deposit of solids and restore the channel's depth to twenty-one feet. *Id.* at 483. The defendant companies operated mills along the Calumet River in their production of iron and related products. See *id.* The companies captured the water for production pur-

the Court found the deposit of industrial solids in a river to be an "obstruction" of a navigable waterway.⁵¹

Enacted in 1948, the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act (CWA)),⁵² premised its enforceability on state and local governments' cooperation to satisfy federal water quality standards.⁵³ The Refuse Act and the early version of the CWA "are schizophrenic in conception, one espousing the water quality standards⁵⁴ approach, the other stressing effluent⁵⁵ limita-

poses and returned it polluted to the river through numerous sewers. *See id.* The industrial waste created by the defendants usually accumulated in settling basins; however, minuscule particles from the waste "flocclulate[d] into larger units . . . and deposited in the river bottom." *Id.* Although reports revealed that the depth of the river in the defendants' mills vicinity had degenerated, the defendants refused the Corps. of Engineers' order to dredge the river. *See id.* The Court examined the Refuse Act, and more specifically, what type of material constituted an obstruction as defined in the Act. *See id.* at 484. The Court found the deposit to be an obstruction and then addressed the Court of Appeals' determination that the Act provided no basis for injunctive relief. *See id.* at 491. The Court stated that the United States had an "interest" to protect as stated in § 10 of the Refuse Act. *See id.* at 492. The Court stated that "Congress has legislated and made its purpose clear; it has provided enough federal law in § 10 [of the Refuse Act] from which appropriate remedies may be fashioned even though they rest on inferences." *Id.* at 492.

51. *See* 362 U.S. at 484. Section 10 of the Refuse Act states:

That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1899).

52. CWA §§ 101-607, 33 U.S.C. §§ 1251-1387 (1988).

53. *See* CARR, *supra* note 18, at 194.

54. [A water quality] standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as

tions.”⁵⁶ Throughout the 1950s, however, public concern escalated regarding the country’s water quality.⁵⁷ By the 1960s, “isolation and autonomy of the state water pollution control agencies gradually eroded as public concern with federal authority over water pollution grew.”⁵⁸ Therefore the CWA was amended in 1965 to create federal water quality standards that were to be enforced by state and local agencies via negotiations and arbitrations.⁵⁹ Progress in management of pollution control subsequent to the amendments, however, was unprolific. Presidential input addressed in Executive Order No. 11,574⁶⁰ established a program for the Corps of Engineers to issue permits to point source dischargers in addition

to protect the public health or welfare, enhance the quality of water and serve the purpose of [the Clean Water Act]. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A).

55. The term ‘effluent limitation’ means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

CWA § 502(11), 33 U.S.C. § 1362(11).

56. See RODGERS, *supra* note 14, § 4.1, at 252.

57. See Carr, *supra* note 18, at 194.

58. JEFFREY MILLER & NANCY LONG, INTRODUCTION TO ENVIRONMENTAL LAW STATUTES 1996-97, 33.

59. See CARR, *supra* note 18, at 194.

60. 35 Fed. Reg. 19,627 (1970). The order states:

SECTION 1: The executive branch of the Federal Government shall implement a permit program under the aforesaid section 13 of the Act of March 3, 1899 (hereinafter referred to as ‘the Act’) to regulate the discharge of pollutants and other refuse matter into the navigable waters of the United States or their tributaries and the placing of such matter upon their banks.

SECTION 2: Responsibilities of Federal agencies.

(a)(1) The Secretary shall, after consultation with the Administrator respecting water quality matters, issue and amend, as appropriate, regulations, procedures, and instructions for receiving, processing, and evaluating applications for permits pursuant to the authority of the Act.

to prescribing effluent guidelines developed by the Environmental Protection Agency (EPA).⁶¹

C. 1972 CWA Amendments

In 1972, Congress amended the CWA and strengthened the federal government's regulatory authority.⁶² The CWA requires "industrial and municipal pollution sources to achieve pollution reduction produced by use of specified levels of control technology, where previously the strategy had been based exclusively on requiring such sources to achieve pollution reduction necessary to meet specified levels of water quality."⁶³ The CWA authorizes the EPA Administrator to issue technology-based effluent limitations⁶⁴ in addition to point source⁶⁵ discharge permits.⁶⁶

(2) The Secretary shall be responsible for granting, denying, conditioning, revoking, or spending Refuse Act permits. In so doing:

(A) He shall accept findings, determinations and interpretations which the Administrator shall make respecting applicable water quality standards and compliance with those standards in particular circumstances, including findings, determinations, and interpretations arising from the Administrator's review of State or interstate agency water quality certifications under section 21(b) of the Federal Water Pollution Control Act (84 Stat. 108). A permit shall be denied where the certification prescribed by section 21(b) of the Federal Water Pollution Control Act has been denied, or where issuance would be inconsistent with any finding, determination, or interpretation of the Administrator pertaining to applicable water quality standards and considerations.

Id.

61. *See id.*

62. JEFFREY MILLER & NANCY LONG, INTRODUCTION TO ENVIRONMENTAL LAW STATUTES 1996-97, 141.

63. *Id.*

64. CWA § 301(b), 33 U.S.C. § 1311(b). *See also supra* note 55 and accompanying text.

65. "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." CWA § 502(14), 33 U.S.C. § 1362(14).

66. *See* CWA § 402, 33 U.S.C. § 1342.

D. The Genesis of Criminal Liability in Environmental Statutes

The EPA's administrative authority under the CWA has been challenged by industry in various cases.⁶⁷ In 1977, the Sixth Circuit held that the CWA prohibited any discharge without a permit regardless of proper dissemination of standards by the EPA.⁶⁸ The penalties for violating the CWA were only civil until the Amendments of 1972 were implemented, thus broadening criminal liability.⁶⁹

In 1970, the amended Clean Air Act (CAA), marked the beginning of contemporary law that provided criminal sanctions for environmental crimes.⁷⁰ The amendments embodied congressional intent to provide rigorous sanctions for polluters in order to deter purposeful violations.⁷¹ In 1990, Congress enacted amendments to the CAA which "attempted to remove all economic incentive for violation[s] by setting fines ranging up to twice the gross pecuniary loss caused to a third party or twice the gross pecuniary gain to the defendant, whichever [was] greater."⁷² Stricter sentences for environmental crimes became the legislative objective of both citizen groups and concerned politicians as more comprehensive regulations were developed.⁷³ Ultimately, the courts administered criminal penalties to environmental offenders. For example, in *U.S. v. Frezzo Brothers, Inc.*,⁷⁴ the defendant

67. See *Republic Steel Corp. v. Train*, 557 F.2d 91 (6th Cir. 1977) (explaining that the steel company successfully challenged EPA's authority to object to a NPDES permit issued by the Ohio EPA), *vacated sub nom.* *Costle v. Republic Steel Corp.*, 434 U.S. 909 (1978) (mem.), *overruled by* *Republic Steel Corp. v. Costle*, 581 F.2d 1228 (1978). See also *United States v. GAF Corp.*, 389 F. Supp. 1379 (S.D. Tex. 1975) (holding that EPA has no authority to regulate discharges to subsurface waters under the CWA).

68. See *United States v. Hamel*, 551 F.2d 107 (6th Cir. 1977).

69. See CARR, *supra* note 18, at 4.

70. See *id.* at 2.

71. See *id.* at 3.

72. *Id.* See also Clean Air Amendments of 1990, Pub.L.No. 101-549, § 70, U.S.C.A.N. (104 Stat.) 2399, 2675; 18 U.S.C. § 3571 (West. Supp. 1993).

73. See, e.g., *Beartooth Alliance v. Crowne Butt Mines*, 904 F. Supp. 1168 (D. Mont. 1995); *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1991), *rev'd on other grounds*, 484 U.S. 49 (1987).

74. 602 F.2d 1123 (3d Cir. 1979).

corporation and its operators were charged with violating the CWA for discharging pollutants illegally.⁷⁵ Frezzo Brothers Inc., was a Pennsylvania mushroom farming business that produced compost for the cultivation of mushrooms.⁷⁶ Composed of hay, horse manure, and water, the compost fermented outside on wharves.⁷⁷ The individual defendants, Guido and James Frezzo, were alleged to have "willfully discharged manure into the storm water run-off system"⁷⁸ The Frezzos were convicted of illegally discharging pollutants without a permit and individually received thirty days of imprisonment and fines totaling \$50,000.⁷⁹ The appellants argued that, under the CWA, the EPA "must either give them some notice of alleged violations . . . , or institute a civil action before pursuing criminal remedies under the Act."⁸⁰ The court, however, stated that "[t]here is nothing in the text of [the Act]⁸¹ that compels the conclusion that prior written notice, other than administrative or civil remedies are prerequisite to criminal proceedings under the Act."⁸² The court rejected the defendants' argument that the government should have procured civil sanctions prior to implementing a suit for criminal sanctions and stated that:

[a]lthough continued discharges after notification could be one way for the Government to prove scienter, it is certainly not the only way to establish willful violations. The

75. *See id.*

76. *See id.*

77. *See id.*

78. *Id.*

79. *See* 602 F.2d at 1124.

80. *Id.* at 1125-26.

81. The court, more specifically was referring to § 1319(c), which states: Any person who — (A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328 or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State

CWA § 309(c)(1)(A), 33 U.S.C. § 1319(c)(1)(A).

82. 602 F.2d at 1126.

Government could logically argue . . . that the circumstances surrounding the alleged discharges manifested willful violations of the Act and that it had the power to pursue criminal rather than civil sanctions.⁸³

E. Penalties in Environmental Statutes

Civil penalties for conventional environmental violations generally are fines and/or injunctions.⁸⁴ A more serious penalty, also found in the CWA, is the determination that companies and individuals convicted of violations are banned from participating in or receiving contracts from the government.⁸⁵ Another example of civil penalties is found in the Resource Conservation and Recovery Act (RCRA),⁸⁶ which imposes fines of up to \$50,000 for each day of each violation by a person who transports hazardous waste.⁸⁷

An example of civil penalty imposition is highlighted in *Beartooth Alliance v. Crowne Butt Mines*.⁸⁸ The case involved several environmental groups' demand for injunctive and declaratory relief, in addition to civil penalties for defendants' unpermitted pollutant discharge into surrounding bodies of water.⁸⁹ The court stated that the citizen groups would have to "prove that defendants (1) discharged or added⁹⁰ (2) a pol-

83. 602 F.2d at 1126-27.

84. See, e.g., CWA § 309(c)(1), 33 U.S.C. § 1319(c)(1).

85. CWA § 508(a), 33 U.S.C. § 1368(a).

No Federal agency may enter into any contract with any person, who has been convicted of any offense under section 1319(c) of this title, for the procurement of goods, materials, and services if such contract is to be performed at any facility at which the violation which gave rise to such convictions occurred, and if such facility is owned, leased, or supervised by such person. The prohibition in the preceding sentence shall continue until the Administrator certifies that the condition giving rise to such conviction has been corrected.

Id.

86. 42 U.S.C. §§ 6901-6992 (1976).

87. RCRA § 3008(d)(1)(2), 42 U.S.C. § 6928 (d)(1)(2).

88. 904 F. Supp. 1168 (D. Mont.1995).

89. See *id.* at 1170.

90.

The term 'discharge of a pollutant' and the term 'discharge of pollutants' each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to

lutant⁹¹ (3) to navigable waters⁹² (4) from a point source (5) without a permit.”⁹³ The court held that the acid mine drainage, which consisted of copper and zinc, constituted a pollutant as defined in the CWA.⁹⁴ The defendants claimed that the acid mine drainage existed in that area due to “naturally occurring conditions which predate any historic mining activities.”⁹⁵ The court rejected the defendants’ argument based on the Ninth Circuit’s interpretation of the CWA, stating, “any reliance on historical pollution to evade current liability misapprehends the focus of the [CWA].”⁹⁶ The court concluded that the plaintiffs proved that the defendants illegally discharged into navigable waters without a permit and were thus subject to civil penalties.⁹⁷

The objective of environmental penalties is to deter potential polluters from engaging in illegal conduct.⁹⁸ In recent years, federal prosecutions for environmental crimes have continuously increased.⁹⁹ “Unlike common law criminal offenses that prohibit specific acts, environmental statutes often provide for criminal penalties for *any* violation of regulations.”¹⁰⁰ Regulated companies are often in compliance with environmental statutes due to the fear of being convicted of a criminal violation, along with the possibility of incurring sub-

the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

CWA § 502(12), 33 U.S.C. § 1362(12).

91. 904 F. Supp. at 1172. “A pollutant means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage, sludge, munitions, chemical wastes, biological material, radioactive materials, heat, wrecked or discarded equipment, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into the water.” CWA § 502(6), 33 U.S.C. § 1362(6).

92. “The term ‘navigable waters’ means the waters of the United States, including the territorial seas.” CWA § 502(7), 33 U.S.C. § 1362(7).

93. 904 F. Supp. at 1172.

94. *See id.*

95. *Id.*

96. *Id.* at 1173.

97. *See id.*

98. *See CARR, supra* note 18, at 5.

99. *See* Michael S. Elder, Esq., *Federal Enforcement Programs*, in ENVIRONMENTAL CRIMES 1, 3-4 (1995) [hereinafter ELDER].

100. Benjamin S. Sharp, *Environmental Enforcement Excesses: Over Criminalization and Too Severe Punishment*, 21 ENVTL. L. REP. 10,658, 10,659 (1991).

stantial fines, imprisonment of officers or employees, and loss of government contracts.¹⁰¹ Some scholars, however, suggest that prosecutorial discretion may be abused under the CWA.¹⁰² Discussed below are several examples of the archetypical claims, defenses, and penalties raised in environmental crimes litigation.

F. Representative Environmental Crime Cases

In *Unites States v. Strandquist*,¹⁰³ a marina manager was convicted of illegally discharging raw sewage generated by the marina into navigable waters.¹⁰⁴ In attempting to remove sewage when the tanks of the marina were full, Strandquist and his employees "frequently dumped the sewage from the sewage truck into a storm grate . . ."¹⁰⁵ Strandquist was found guilty of violating CWA § 301(a)¹⁰⁶ and § 309(c)(2).¹⁰⁷

101. See Testimony of Roger Clegg regarding H.R. 5305, The Environmental Crimes Act of 1992, before the House Subcommittee on Crime and Criminal Justice (June 11, 1992).

102. See Benjamin S. Sharp, *Environmental Enforcement Excesses: Over Criminalization and Too Severe Punishment*, 21 ENVTL. L. REP. 10,658, 10,659 (1991).

103. 993 F.2d 395 (4th Cir. 1993).

104. *Id.* at 395.

105. *Id.* at 397.

106. "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." CWA § 301(a), 33 U.S.C. § 1311(a).

107. The cited section enhances the punishment for "knowingly" violating the Clean Water Act:

Any person who — (A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; 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 or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State; *shall be punished by a fine of not less than \$5,000.00*

The defendant received a five-month imprisonment for each count and a subsequent one-year supervised release, which included five months of home detention.¹⁰⁸ Strandquist appealed his conviction, contending (1) that there was insufficient evidence to prove that he discharged pollutants into navigable waters; and (2) that the penalties under the Sentencing Guidelines,¹⁰⁹ as applied to his case, contradicted congressional intent.¹¹⁰

More specifically, Strandquist argued that the Sentencing Guidelines failed to distinguish varying levels of seriousness among different environmental statutes, and that "as a result, prison terms will be imposed on virtually all environmental offenders, be they first or repeat offenders."¹¹¹ The court affirmed Strandquist's conviction despite his argument "that the Sentencing Guidelines for environmental offenses, in particular U.S.S.G. § 2Q1.3 for the mishandling of environmental pollutants, as applied to the instant case, exceed[ed] the authority granted to the Sentencing Commission"¹¹² The court stated that "through the [CWA] and other environmental laws, Congress has determined that harm to the environment—even absent imminent threats to public health, welfare, or safety—is a public policy concern of the greatest magnitude."¹¹³ The court continued to state that "Congress itself emphasized the importance and seriousness of its envi-

nor more than \$50,000.00 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

CWA § 309(c)(2)(A) & (B), 33 U.S.C. § 1319(c)(2)(A) & (B) (emphasis added).

108. See 993 F.2d at 398.

109. Congress created a Sentencing Commission to devise uniform and appropriate sentencing practices for federal crimes. "The vehicle adopted to accomplish this objective was a detailed set of guidelines that establish appropriate sentences under given circumstances for most federal crimes." See CARR, *supra* note 18, at 328.

110. See 993 F.2d at 398.

111. *Id.* at 399.

112. *Id.*

113. *Id.*

ronmental goals by creating severe penalties—both fines and imprisonment—for willful violations of the [CWA].”¹¹⁴

In *United States v. Boldt*,¹¹⁵ an Astro Circuit Corporation manager was convicted of violating the CWA because he authorized illegal discharges into a sewer system.¹¹⁶ Astro used an electroplating process to manufacture printed circuit boards¹¹⁷ and was required under the CWA to “pretreat [its] industrial waste in order to remove toxic metals such as copper before discharging that waste into a city sewer system.”¹¹⁸ Astro’s pretreatment system consisted of a “flow system designed to treat 45 gallons per minute of wastewater,” but was “handling approximately 90 gallons per minute”¹¹⁹ When the system was unable to accommodate all of the wastewater, the company discharged the water “directly into the city sewer.”¹²⁰ On two occasions, Boldt “knowingly” allowed untreated water to be discharged into the city’s sewer system.¹²¹ The first instance involved a bypass,¹²² which caused the “copper level in Astro’s effluent [to] exceed[] the federal regulation by nearly four times [the permitted amount].”¹²³ Boldt was allegedly aware of the bypass and did not attempt to prevent it.¹²⁴ The City of Lowell alerted Astro of the violation and Boldt’s answer alleged that a failure of two pumps caused a serious flood.¹²⁵ Boldt stated that “[i]n order to remove the floodwaters so as to protect electrical equipment and controls and permit maintenance access, it was necessary to transfer the[] wastewaters into the treatment systems at a higher-than-normal rate.”¹²⁶ The

114. *Id.* (citing *United States v. Ellen*, 961 F.2d 462, 468 (9th Cir. 1992)).

115. 929 F.2d 35 (1st Cir. 1991).

116. *See id.* at 37.

117. *See id.*

118. *Id.*

119. *Id.*

120. 929 F.2d at 37.

121. *See id.* at 37-38.

122. Bypass is the “intentional diversion of waste streams from any portion of a treatment facility.” 40 C.F.R. § 122.41(m)(1)(i) (1994).

123. 929 F.2d at 37-38.

124. *See id.* at 38.

125. *See id.*

126. *Id.*

city claimed Boldt's statement was "misleading and false in that it failed to mention the almost daily bypassing of the pretreatment system at Astro, nor did it mention that the company had consistently found high amounts of copper in its effluent."¹²⁷

The second alleged discharge was caused by clogged lines that were supposed to deliver caustic solution to a treatment tank.¹²⁸ Subsequent to an unsuccessful manual attempt to add the caustic solution to the tank, Boldt ordered an employee to "dump the . . . 3,100 gallons of partially treated wastewater [] into the city sewer."¹²⁹ Boldt was convicted of a one-day committed sentence on each count.¹³⁰

In *United States v. Weitzenhoff*,¹³¹ a manager and an assistant of a community services sewage treatment plant were convicted of violating the CWA § 1319 (c)(2).¹³² Weitzenhoff managed an East Honolulu plant which was "designed to treat [nearly] 4 million gallons of residential wastewater each day by removing the solids and other harmful pollutants from the sewage so that the resulting effluent [could] be safely discharged into the ocean."¹³³ The plant generated waste-activated sludge that the defendants usually had removed to another treatment plant.¹³⁴ At one point "improvements were made to the . . . plant and the hauling was discontinued."¹³⁵ Therefore, waste-activated sludge began to build up in the plant. The defendants instructed employees to "dispose of it on a regular basis by pumping it from the storage tanks directly into the . . . ocean."¹³⁶ The waste-activated sludge "thereby bypassed the plant's effluent sampler so that the samples taken and reported to Hawaii's Department of

127. *Id.*

128. *See* 929 F.2d at 38.

129. *Id.*

130. *See id.* at 42.

131. 1 F.3d 1523 (9th Cir. 1993) *amended by* 35 F.3d 1275 (9th Cir. 1994).

132. *See supra* note 107.

133. 1 F.3d at 1527.

134. *See id.* at 1527-28.

135. *Id.*

136. 1 F.3d at 1528.

Health and the EPA did not reflect its discharge.”¹³⁷ The discharge from April 1988 to June 1989 amounted to “436,000 pounds of pollutant solids being discharged into the ocean” and “violated the plant’s 30-day average effluent limit under the permit for most of the months during which they occurred.”¹³⁸ The managers were found guilty of six out of thirty-one charges of violating the CWA.¹³⁹ Weitzenhoff, sentenced to twenty-one months of imprisonment, filed an appeal contesting the court’s interpretation of “knowingly” as found in the CWA.¹⁴⁰

The court analyzed congressional intent and the legislative history of the CWA to determine what constituted “knowingly.” The court stated:

Because they speak in terms of ‘causing’ a violation, 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.¹⁴¹

The court stated that the CWA is a public welfare statute¹⁴² and therefore, the “knowingly” component did not refer to the legal violation, but to the act itself.¹⁴³ “The criminal provisions of the CWA are clearly designed to protect the public at large from the potentially dire consequences of water pollution, and as such fall within the category of public welfare legislation.”¹⁴⁴ Subsequently, the court held that the government did not have to prove¹⁴⁵ the defendants “knew that

137. *Id.*

138. *Id.*

139. *See id.*

140. *See id.*

141. 1 F.3d at 1529.

142. *See id.* “Many of [the public welfare] offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty.” *Morissette v. United States*, 342 U.S. 246, 255 (1952).

143. 1 F.3d at 1529.

144. *Id.* at 1530 (citation omitted).

145. *See id.*

their acts violated the permit or the CWA.”¹⁴⁶ The defendants additionally argued that “their dumping of . . . toxic sludge into the ocean . . . was an effort to restore the plant’s biological balance so as to avoid a complete plant shutdown and avert environmental disaster.”¹⁴⁷ The defendants argued that the discharges should be construed as bypasses allowed by their permit.¹⁴⁸ However, “[u]nder the permit, bypass is generally prohibited, except to ‘prevent loss of life, personal injury, or severe property damage’ and in the absence of feasible alternatives.”¹⁴⁹ The court held that the discharges were not “permissible bypasses because they were not for essential maintenance to assure efficient operation.”¹⁵⁰ The defendants’ criminal convictions, therefore, were affirmed.¹⁵¹

In *United States v. Hopkins*,¹⁵² the defendant assumed corporate responsibility for CWA compliance for a corporation that manufactured metal shims and fasteners.¹⁵³ The manufacturer discharged water containing excessive amounts of toxic materials, including zinc, into a Connecticut river.¹⁵⁴ The manufacturer signed a consent order with the State of Connecticut’s Department of Environmental Protection (DEP), “requiring Spirol to pay a \$30,000 fine for past zinc-related discharge violations and to comply in the future with discharge limitations specified in the order.”¹⁵⁵ Two years subsequent to the decree, the “DEP issued a modified ‘waste-

[P]ublic welfare [statutes] . . . impose a form of strict criminal liability through statutes that do not require the defendant to know the facts that make his conduct illegal. In construing such statutes, we have inferred from silence that Congress did not intend to require proof of mens rea to establish an offense

United States v. Staples, 511 U.S. 600, 606 (1994).

146. 1 F.3d at 1530.

147. *Id.*

148. *Id.*

149. *Id.* at 1531 (citations omitted).

150. *Id.* at 1532 (citations omitted).

151. *Id.*

152. 53 F.3d 533 (2d Cir. 1995).

153. *See id.* at 534-35.

154. *See id.* at 534.

155. *Id.* at 535.

water discharge permit' . . . imposing more restrictive limits on the quantity of zinc and other substances that Spirol was permitted to release into the river."¹⁵⁶

Hopkins, Spirol's vice-president for manufacturing, was charged with "deliberately tamper[ing] with Spirol's wastewater testing and falsify[ing] its reports to DEP."¹⁵⁷ Spirol, in compliance with its permit, was supposed to "collect a sample of its wastewater and send it to an independent laboratory every week and report the laboratory results to DEP in a discharge monitoring report once a month."¹⁵⁸ Two Spirol employees testified that prior to the samples being sent to the laboratory, Hopkins determined if a new sample was to be taken the next day.¹⁵⁹ If the sample taken the next day also exceeded the permit limitations, Hopkins ordered the employees to "dilute [it] . . . with tap water or to reduce the zinc concentration using an ordinary coffee filter."¹⁶⁰ One of the employees testified "that in some of the samples submitted to the laboratory, there was more tap water than wastewater,"¹⁶¹ and that "the samples had been tampered with about 40 percent of the time."¹⁶²

Hopkins was alleged to have "(1) . . . knowingly falsified or tampered with Spirol's discharge sampling methods . . . ; (2) . . . knowingly violated the conditions of the DEP permit, in violation of the CWA . . . ; and (3) . . . conspired to commit these offenses."¹⁶³ Hopkins was convicted of all three charges and sentenced.¹⁶⁴ On his appeal, Hopkins alleged that the jury was erroneously instructed of the "knowingly" element because it needed to be proven that "he knew he was acting in violation of the CWA or the DEP permit."¹⁶⁵ Citing to congressional intent in developing the CWA, the court stated, "in

156. *Id.*

157. 53 F.3d at 535.

158. *Id.*

159. *See id.*

160. *Id.*

161. *Id.*

162. 53 F.3d at 536 (citations omitted).

163. *Id.*

164. *See id.* at 537.

165. *Id.*

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."¹⁶⁶ The court also stated that since a government permit was issued regarding discharge limitations, the defendant should have had increased awareness of there being a regulation.¹⁶⁷ Additionally, the court stated that the kind of pollutants the CWA refers to "are of the type that would alert any ordinary user to the likelihood of stringent regulation[s]."¹⁶⁸ The court addressed the fact that the mens rea required under CWA § 1319 (c)(2)(A) was reduced from "willfully" to "knowingly" during the formulation of amendments, and thereby indicated that "Congress intended not to require proof that the defendant knew his conduct violated the law or a regulatory permit."¹⁶⁹ The court concluded that "the government was required to prove that Hopkins knew the nature of his acts and performed them intentionally, but was not required to prove that he knew that those acts violated the CWA, or any particular provision of that law, or the regulatory permit issued to Spirol."¹⁷⁰

The court employed an analysis similar to that applied in *Weitzenhoff*, by relying on *United States v. International Minerals & Chemical Corporation*,¹⁷¹ to establish the appropriate mens rea application. In *International Minerals*, the Court addressed the issue of what constituted "knowingly" in an environmental regulation.¹⁷² The defendant was alleged to have violated the Transportation and Explosives Act (TEA)¹⁷³ by failing to accurately reveal in required shipping papers the contents of an interstate shipment of acids.¹⁷⁴ The government charged the defendant with "knowingly" vio-

166. *Id.*

167. *See id.* at 539.

168. *Id.*

169. *Id.* at 540.

170. *Id.* at 541.

171. 402 U.S. 558 (1971).

172. *See id.*

173. 18 U.S.C. §§ 831-837 (1994).

174. 402 U.S. at 559.

lating the TEA.¹⁷⁵ The Court stated that the government only had to prove that the defendant *knew* he was shipping substances that he *knew* were hazardous materials; it was not required to prove that the defendant knew of the TEA, of which he was allegedly violating.¹⁷⁶

The rule of lenity, had it been applied in the *International Minerals* case, may have altered the outcome. The rule of lenity requires courts to strictly construe ambiguous statutory and regulatory provisions in a manner most favorable to defendants.¹⁷⁷ In several environmental crime cases involving the CWA, the courts have presumed a defendant's intent, rather than applying the rule of lenity.¹⁷⁸ The courts' presumption of a defendant's intent emerges from those courts' deeming the CWA a public welfare statute.¹⁷⁹ The *International Minerals* case inferred that the rule of lenity was not applicable "to resolve ambiguity in statutes intended to protect human health and the environment."¹⁸⁰ Therefore, in the jurisdictions where the CWA is designated as a public welfare statute, the rule of lenity usually is not applied.¹⁸¹ However, in a recent case, *United States v. Plaza Health Laboratories, Inc.*,¹⁸² the Second Circuit, recognizing that several provisions in the CWA were ambiguous,¹⁸³ applied the rule of lenity in resolving an alleged violation of the CWA.¹⁸⁴

Illustrative of the harmonization of the rule of lenity with a public welfare statute is the analysis in *Liparota v.*

175. See *id.* at 559.

176. See *id.* at 563-64.

177. See CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 12, at 59-60 (14th ed. 1978).

178. See, e.g., *United States v. Weitzenhoff*, 1 F.3d 1523 (9th Cir. 1993) *amended by* 1 F.3d 1275 (9th Cir. 1994); *United States v. Hopkins*, 53 F.3d 533 (2d Cir. 1995).

179. See *United States v. Weitzenhoff*, 1 F.3d 1523 (9th Cir. 1993) *amended by* 1 F.3d 1275 (9th Cir. 1994); *United States v. Hopkins*, 53 F.3d 533 (2d Cir. 1995).

180. David E. Filippi, *Unleashing the Rule of Lenity: Environmental Enforcers Beware!*, 26 ENVTL. L. 923, 936 (1996).

181. See, e.g., *Liparota v. United States*, 471 U.S. 419 (1985).

182. 3 F.3d 643 (2d Cir. 1993).

183. See *id.* The court analyzed CWA §§ 309(c)(2)-(3), 502 (14), 33 U.S.C. §§ 1319(c)(2)-(3), 1362 (14).

184. 3 F.3d at 649.

United States.¹⁸⁵ Although the case involved an alleged knowing violation of the Food Stamp Act,¹⁸⁶ the Court "hinted . . . that the rule of lenity may be improper to resolve lingering ambiguities in environmental statutes."¹⁸⁷ The Court established a test to determine what constituted a public welfare offense.¹⁸⁸ The Court stated that such an offense is "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety."¹⁸⁹

There are two distinct classifications of public welfare statutes. The first classification consists of statutes in which mens rea in the statutory language has been intentionally omitted by Congress.¹⁹⁰ The second classification involves statutes in which mens rea is included in the language, but the courts construe only the intended prohibited activity to be modified by the mens rea terminology.¹⁹¹ Pursuant to this second classification, a person may be convicted of engaging in an activity even though he was unaware of the statute regulating the conduct.¹⁹² The second approach as applied to the CWA has been adopted by a few courts, yet vehemently rejected by others.¹⁹³ In *Morissette v. United States*,¹⁹⁴ the Court examined the elements required to classify a statute as a public welfare statute. The Court stated:

Many violations of such [public welfare] regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law

185. 471 U.S. 419 (1985).

186. 7 U.S.C. §§ 2011-2032 (1994).

187. David E. Filippi, *Unleashing the Rule of Lenity: Environmental Enforcers Beware!*, 26 ENVTL. L. 923, 937 (1996).

188. 471 U.S. at 433.

189. *Id.*

190. Kevin Phillip Cichetti, *United States v. Weitzenhoff: Reading Out the Knowingly From Knowingly Violates in the Clean Water Act*, 18 U.S.C. § 1319(c)(2)(A), 9 ADMIN. L.J. AM. U. 1183, 1190 (1996).

191. *See id.*

192. *See id.*

193. *Compare* *United States v. Weitzenhoff*, 1 F.3d 1523 (9th Cir. 1993) *amended by* 1 F.3d 1275 (9th Cir. 1994) *with* *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996).

194. 342 U.S. 246 (1952).

seeks to minimize Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element [P]enalties . . . are relatively small, and conviction does not grave damage to an offender's reputation.¹⁹⁵

It still remains, however, that the defendant who violates a public welfare statute must know that his conduct may "seriously threaten the community's health or safety."¹⁹⁶ For example, in *Staples v. United States*,¹⁹⁷ the Court stated that, "we essentially have relied on the nature of the statute and the particular character of the items regulated to determine whether congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional mens rea requirements."¹⁹⁸ The Court determined that unless Congress has stated that a mens rea is not required for a particular regulation, courts should not "apply the public welfare offense . . . as dispensing with mens rea."¹⁹⁹ Additionally, the Court stated that by interpreting public welfare offenses to require, minimally, that the defendant know he is handling a hazardous substance, the Court has avoided construing criminal regulations to impose a stringent form of strict liability in interpreting public welfare offenses.²⁰⁰

In *United States v. Ahmad*,²⁰¹ the defendant was convicted by the lower court of "knowingly" discharging a pollutant into navigable waters. Ahmad, owner of a combination convenience store/gas station, discovered that one of the gasoline tanks contained a leak.²⁰² The leak allowed for water to enter the tank, but did not permit gasoline to seep out, so Ahmad did not consider it to be a hazard.²⁰³ Gasoline was

195. *Id.* at 256.

196. *Liparota v. United States*, 471 U.S. 419, 433 (1985).

197. 511 U.S. 600 (1994).

198. *Id.* at 607.

199. *Id.* at 618.

200. *See id.* at 607 n.3.

201. 101 F.3d 386 (5th Cir. 1996).

202. *See id.* at 387.

203. *See id.*

pumped from the bottom of the tank where the water had settled, thereby forcing Ahmad to remedy the leak in order to continue dispensing gasoline.²⁰⁴ Despite an environmental testing company's recommendation that it remove the 800 gallons of water from the tank, Ahmad decided to procure the removal himself.²⁰⁵ Ahmad rented a motorized water pump and discharged the water-gasoline mixture into a manhole, resulting in contamination of a nearby creek and the city's sewage system.²⁰⁶ Ahmad alleged that he did not "knowingly" discharge the gasoline because he was not present at the removal process the entire time; however, he admitted that he negligently left possession of the pump to his employees.²⁰⁷ Ahmad also maintained that he thought he was simply discharging water and not gasoline.²⁰⁸

Ahmad contended that the government had to prove he "knowingly" acted upon each element of the offenses with which he was charged.²⁰⁹ The court, stating that "[t]he language of the CWA is less than pellucid,"²¹⁰ reversed Ahmad's conviction and remanded the case for another trial.²¹¹ The court stated that the "principal issue is to which elements of the offense the modifier 'knowingly' applies."²¹² Citing to the first judicial pronouncement that "statutory crimes carrying severe penalties are presumed to require that a defendant know the facts that make his conduct illegal,"²¹³ the court held that in order to convict Ahmad, it must be proven that he "knowingly" violated each element of the provisions under which he was charged.²¹⁴

204. *See id.* at 387-88.

205. *See id.* at 388.

206. 101 F.3d at 388.

207. *See id.* at 389.

208. *See id.*

209. *See id.*

210. *Id.* at 389.

211. *See* 101 F.3d at 393.

212. *Id.* at 390.

213. *Id.* (citing *Staples v. United States*, 511 U.S. 600, 619-20 (1994)).

214. *Id.* at 390.

In contrast to the holdings in *United States v. Hopkins*²¹⁵ and *United States v. Weitzenhoff*,²¹⁶ the *Ahmad* court focused on the statutory construction of the CWA and whether the “knowingly” requirement of the CWA falls within the designation of a public welfare offense.²¹⁷ The court noted that “the public welfare exception is narrow”²¹⁸ and outlined the test as being whether “dispensing with mens rea would require the defendant to have knowledge only of traditionally lawful conduct.”²¹⁹ The violations “of which Ahmad was convicted have precisely this characteristic, for if knowledge is not required as to the nature of the substance discharged, one who honestly and reasonably believes he is discharging water may be himself guilty of a felony if the substance turns out to be something else.”²²⁰ The court held that the elements of CWA § 1319(c)(2)(a)²²¹ do not constitute public welfare offenses because (1) public welfare offenses “have virtually always been crimes punishable by relatively light penalties such as fines or short jail sentences rather than substantial terms of imprisonment”;²²² and (2) the knowing violations of the CWA require a knowing mens rea of each element of the offense.²²³

In some instances, convictions are vacated because of the environmental statute’s inapplicability to the facts of the case. In *United States v. Borowski*,²²⁴ the defendant was president of a manufacturing facility that produced “optical mirrors for use in aerospace guidance and sighting systems.”²²⁵ The facility used multiple rinses and dips to “plate nickel onto its mirrors.”²²⁶ The liquids from the baths were disposed of into plating room sinks which drained into under-

215. 53 F.3d 533 (2d Cir. 1995).

216. 1 F.3d 1523 (9th Cir. 1993) *amended by* 35 F.3d 1275 (9th Cir. 1994).

217. 101 F.3d at 390-91.

218. *Id.* at 391.

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

220. *Id.* at 391.

221. *See supra* note 107.

222. 101 F.3d at 391, *construed in* *Staples v. United States*, 511 U.S. 600 (1994).

223. 101 F.3d at 390.

224. 977 F.2d 27 (1st Cir. 1992).

225. *Id.* at 28.

226. *Id.*

ground pipes that ultimately fed into the Massachusetts Water Resource Authority's treatment works.²²⁷ "[Since] the pollutants were ultimately discharged into a publicly-owned treatment works, [the facility] was subject to the EPA's pretreatment regulations."²²⁸ The manufacturing plant's discharge significantly exceeded the applicable pretreatment standards.²²⁹ The nickel and nitric acid discharges from the facility were sufficient to raise major health concerns.²³⁰ In addition, the plant's employees were told to scrape and dispose of the harmful solutions by hand in discharging the substances.²³¹ The defendant was aware of the harmful effects of nickel and nitric acid because in addition to his receiving information from suppliers regarding the chemicals' dangers, the chemical containers included warnings.²³² The defendant was indicted for violating the knowing endangerment felony provision of the CWA.²³³ The court vacated the defendant's conviction because it concluded that "a knowing endangerment prosecution cannot be premised upon danger that occurs before the pollutant reaches a publicly-owned sewer or

227. *See id.*

228. *Id.*

229. *See id.*

230. *See id.*

231. *See id.*

232. *See id.* at 29.

233.

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, . . . and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than \$1,000,000. If a conviction of a person 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 fine and imprisonment.

CWA § 309(c)(3)(A), 33 U.S.C. § 1319 (c)(3)(A).

treatment works. The provision, therefore does not apply to the defendants' conduct."²³⁴

G. Federal Enforcement of Environmental Crimes

As demonstrated by the discussion of criminal environmental cases, the penalties imposed on defendants are often disputed. New regulations and governmental departments have been created to address environmental crimes in order to produce impervious cases against environmental criminals. Unfortunately, "[the] growth in environmental criminal law has generated considerable commentary, raising questions as to whether the expanding environmental law violates norms of fairness to the targets of prosecution, whether the laws 'over-deter,' and whether the Department of Justice and its U.S. Attorneys throughout the country are administering the new laws soundly."²³⁵

At the federal level, the Department of Justice's Environmental Crimes Section and the U.S. Attorneys' Offices are responsible for investigating and prosecuting environmental crimes.²³⁶ Additionally, the Department of Justice also contributed resources and training to the U.S. Attorneys' Offices.²³⁷ "Between October 1, 1987 and May 31, 1993, the Environmental Crimes Section and U.S. [A]ttorneys' [O]ffices handled cases against 630 defendants, achieving a conviction rate of 91.1 percent. More than one-third of all individual defendants received prison terms."²³⁸

Consequently, the EPA implemented a Criminal Enforcement Program. Since the Criminal Enforcement Program's creation in 1982, through 1992, federal prosecutors indicted 911 corporations and individuals for environmental

234. 977 F.2d at 32.

235. Christopher H. Schroeder, *Cool Analysis Versus Moral Outrage in the Development of Federal Environmental Criminal Law*, 35 WM. & MARY L. REV. 251, 252 (1993).

236. See ELDER, *supra* note 99, at 3.

237. See *id.*

238. *Id.*

crimes.²³⁹ Over two-thirds of the indictments resulted in guilty pleas and convictions.²⁴⁰ Jail time for the convictions amounted to over 388 years, of which 191 years were served.²⁴¹ Additionally, federal courts imposed criminal fines amounting to over \$ 333 million.²⁴² The EPA published its Enforcement Accomplishments Report disclosing two criteria to predicate an environmental case for criminal enforcement: (1) significant environmental harm; and (2) culpable conduct.²⁴³

Unfortunately, "federal efforts to introduce criminal sanctions into the existing noncriminal regulatory scheme have encountered significant impediments."²⁴⁴ For example, inadequate staffing may cause EPA personnel to prematurely refer cases to the Department of Justice.²⁴⁵ Thus, the Department of Justice may not prosecute the cases vigorously.²⁴⁶ Additionally, the legal approaches favored by the EPA's staff which is "comprised of scientists, administrators, and attorneys" compared with the "criminal government lawyers" may foster tension that undermines successfully prosecuting environmental crimes cases.²⁴⁷ Roger J. Marzulla, of the Resources Division of the Department of Justice, in testimony before the Judiciary Committee of the House of Representatives, stated that "the environmental enforcement program has not yet adjusted to the reality that most companies comply with most major environmental regulations al-

239. Testimony of Roger Clegg regarding H.R. 5305, the Environmental Crimes Act of 1992, before the House Subcommittee on Crime and Criminal Justice (June 11, 1992).

240. *See id.*

241. *See id.*

242. *See id.*

243. *See ELDER, supra* note 99, at 5.

244. Theodora Galacatos, *The United States Department of Justice Environmental Crimes Section: A Case Study of Inter- and Intrabranh Conflict Over Congressional Oversight and the Exercise of Prosecutorial Discretion*, 64 *FORDHAM L. REV.* 587, 601 (1995).

245. *See id.*

246. *See id.* at 602.

247. *Id.*

most all of the time.”²⁴⁸ Marzulla contended that since most companies comply with environmental regulations, the environmental enforcement divisions are forced to bring “marginal cases” and attempt to attach major penalties to them.²⁴⁹ Marzulla advocated a more prudent approach to bringing environmental crime cases.²⁵⁰ He claimed the foundation of the problem to be the “fact that the EPA and the Justice Department measure the success of the environmental enforcement program not on the basis of environmental improvements made, but rather on the number of convictions and the size of penalties obtained.”²⁵¹ Additionally, Marzulla stated “[t]he plain fact is, that as long as success is measured in numbers of cases filed and penalties obtained, we will continue to see the waste and heartache of unnecessary and unjustified environmental prosecutions”²⁵²

H. The ECEA

The ECEA, in some aspects may be an answer to the interagency controversies because it fosters cooperative approaches to environmental crimes. The bill was introduced in the U.S. Senate by Senator Lautenberg.²⁵³ It is an attempt not only to create better environmental protections, but also to level the playing field for companies that are in continuous compliance with environmental statutes.²⁵⁴ “Expenditures of environmental controls are a cost of business that, in the short run, can adversely affect a company’s bottom line.”²⁵⁵ Companies that do not comply with, or blatantly disregard environmental laws, enjoy a competitive advantage and pos-

248. *Commercial and Administrative Law: Hearings on Regulatory Warning, Before the Judiciary Committee of the House of Representatives Subcommittee* (1996) (statement of Roger J. Marzulla).

249. *See id.* “Examination of the environmental enforcement docket discloses far too many cases in which actual environmental injury (or even the threat of injury) is totally lacking.” *Id.*

250. *See id.*

251. *Id.*

252. *Id.*

253. *See* S. 2096, 104th Cong. (1996).

254. *See* 142 CONG. REC. S11,033-04, 11,036 (daily ed. Sept. 19, 1996) (statement of Sen. Lautenberg).

255. *Id.*

sible economic dominance over companies that spend capital for compliance with environmental regulations.²⁵⁶ Advocates of the bill assert that "when a business invests in environmental protection to comply with [the] laws, it should not be placed at a competitive disadvantage as a result."²⁵⁷ The bill does not address companies that have inadvertently or accidentally violated the laws; it is aimed at "criminals who know what they're doing, and who generally are flouting [the] laws simply to make a buck."²⁵⁸

The bill contains nine sections as well as a section-by-section analysis. Section 2 of the bill simply states Congress' finding that because the federal prosecution of violators of environmental crimes is a vital role in protecting human health, public safety, and the environment, further legislation is required.²⁵⁹ The stated purpose of the "legislation is to increase protection by strengthening Federal law enforcement and by increasing the effectiveness of joint Federal, State, local, and tribunal criminal environmental enforcement efforts."²⁶⁰ The third section of the bill allows for a party convicted of violating an environmental statute to be ordered to reimburse states, localities, and tribes for the costs of investigation and prosecution of the crime the party committed.²⁶¹ The purpose of this section is to foster synergism between federal, state,

256. *See id.*

257. *Id.*

258. *Id.*

259. *See* S. 2096, 104th Cong. § 2 (1996). Congress finds that—

- (1) Federal investigation and prosecution of environmental crimes play a critical role in the protection of human health, public safety, and the environment;
- (2) the effectiveness of environmental criminal enforcement efforts is greatly strengthened by close cooperation and coordination among Federal, State, local, and tribal authorities; and
- (3) legislation is needed to facilitate Federal investigation and prosecution of environmental crimes and to increase the effectiveness of joint Federal, State, local, and tribal criminal enforcement efforts.

Id.

260. 142 CONG. REC. S11,033-04, 11,038 (daily ed. Sept. 19, 1996) (statement of Sen. Lautenberg).

261. *See* S. 2096, 104th Cong. § 3 (1996).

local, and tribal units.²⁶² Often the non-federal enforcement units initiate an investigation and continue assisting their federal counterparts throughout the trial of a violator.²⁶³ The cost of this assistance, if the bill is approved, will be reimbursed if a federal court orders the violator to pay for all costs incurred for the pollution it discharged.²⁶⁴ Since a federal court may "order reimbursement only upon the motion of the United States, the discretion of both the Federal prosecutor and the court will serve as a check against unwarranted cost awards."²⁶⁵ The reimbursement would be designated for environmental law enforcement use and made payable directly to the state or local government.²⁶⁶

An important provision of the bill creates a twenty-year maximum prison term and/or a maximum fine of \$500,000 for any person, who, in committing an environmental crime, causes serious bodily injury or the death of any other person.²⁶⁷ If the violator is a corporation, a two million dollar fine is imposed.²⁶⁸ The drafters of the bill cited that "[p]olice

262. See 142 CONG. REC. S11,033-04, 11,038 (daily ed. Sept. 19, 1996) (statement of Sen. Lautenberg).

263. See *id.*

264. See S. 2096, 104th Cong. § 3 (1996).

265. 142 CONG. REC. S11,033-04, 11,038 (daily ed. Sept. 19, 1996).

266. S. 2096, 104th Cong. § 3 (1996).

Joint Federal, State, Local, and Tribal Environmental Enforcement
(a) Chapter 232 of title 18 is amended by adding after Section 3673 the following new Section 3674:

Sec. 3674. Reimbursement of State, local, or tribal government costs for assistance in Federal investigation and prosecution of environmental crimes.

(a) Upon the motion of the United States, any person who is found guilty of a criminal violation of the Federal environmental laws set forth in subsection (b) below, or conspiracy to violate such laws, may be ordered to pay the costs incurred by a State, local, or tribal government or an agency thereof for assistance to the Federal government's investigation and criminal prosecution of the case. Such monies shall be paid to the State, local, or tribal government or agency thereof and be used solely for the purpose of environmental law enforcement.

Id.

267. See *id.* at § 4.

268. See *id.*

Protection of Government Employees and the Public

officers, firefighters, paramedics, and other public safety and health personnel often are the first on the scene of an environmental crime. In their efforts to protect others from harm, they themselves may suffer injury or death resulting from other people's criminal mishandling of dangerous materials"²⁶⁹ Section 4 provides for an enhanced penalty for criminals who cause such harm.²⁷⁰ "For enhanced punishment to be imposed, section 4 requires that the defendant commit the underlying environmental crime and that the crime be the direct or proximate cause of serious bodily injury or death."²⁷¹ This section requires that actual harm occur, but does not require the defendant to intend or know that his act will or does cause death or serious injury.²⁷²

Section 5 of the bill creates another act entitled, Environmental Crimes Training Act of 1996, which allows the EPA Administrator to establish a new division designated the "State, Local, and Tribal Environmental Enforcement Training Program."²⁷³ This section attempts to address enforce-

(a) Chapter 39 of title 18, United States Code, is amended by adding the following the section:

Sec. 838. Protection of government employees and the public from environmental crimes

(a) Any person who commits a criminal violation of a Federal environmental law identified in this subsection that is the direct or proximate cause of serious bodily injury to or death of any other person, including a Federal, State, local or tribal government employee performing official duties as a result of the violation, shall be subject to a maximum term of imprisonment of twenty years, a fine of not more than \$500,000, or both and, if the defendant is an organization, to a fine of not more than \$2,000,000.

Id.

269. 142 CONG. REC. S11,033-04, 11,038 (daily ed. Sept. 19, 1996) (statement of Sen. Lautenberg).

270. *See id.*

271. *Id.* at S11,038-39.

272. *See id.* at S11,039.

273. S. 2096, 104th Cong. § 5 (1996).

Environmental Crimes Training for State, Local, and Tribal Law Enforcement Environmental Crimes Training Act of 1996:

(b) The Administrator of the Environmental Protection Agency, as soon as practicable, within the Office of Enforcement and Compliance Assurance, shall establish the State, local, and Tribal Environmental Enforcement Training Program . . . State, local, and

ment officials' training needs that are created by the burgeoning number of environmental statutes. "State and local governments are undertaking an expanded role in environmental enforcement, not only of their own laws but also of federal statutes pursuant to delegated authority."²⁷⁴ In addition, the section addresses the expansion of the EPA's National Enforcement Training Institute where non-federal enforcement personnel are often trained in environmental crimes investigation.²⁷⁵

The statute of limitations for prosecuting an environmental crime is lengthened by the bill.²⁷⁶ The statute of limitations that applies to a violator who has engaged in "affirmative acts of concealment of specified crimes" is extended by three years.²⁷⁷ Most federal crimes are presently subject to a five-year statute of limitations.²⁷⁸ "Criminals who are the most deceptive, and thus able to hide their wrongdoing the longest, are most likely to escape the legal consequences of their acts through expiration of the statute of limitations."²⁷⁹ Section 6 ameliorates this problem by extending the statute of limitations "for up to three years beyond the traditional 5-year period when the defendant commits an affirmative act of concealment."²⁸⁰ The bill does not extend the period beyond eight years after discovery.²⁸¹ "For example, if a violator committed an affirmative act of

tribal law enforcement personnel shall include, among others, the following: inspectors, civil and criminal investigators, technical experts, regulators, government lawyers, and police.

Id.

274. 142 CONG. REC. S11,033-04, 11,039 (daily ed. Sept. 19, 1996) (statement of Sen. Lautenberg).

275. *See id.*

276. *See* S. 2096, 104th Cong. § 6 (1996).

277. *Id.*

278. 18 U.S.C. § 3282.

279. 142 CONG. REC. S11,033-04, 11,039 (daily ed. Sept. 19, 1996) (statement of Sen. Lautenberg).

280. *Id.* at S11,039.

281. S. 2096, 104th Cong. § 6 (1996).

Statute of Limitations

(a) Chapter 213 of title 18, United States Code, is amended by adding after section 3294 the following new section: Sec. 3295. Felony environmental crimes

concealment and the environmental crime[s] were not discovered until three, four, or five years after it was committed, Section 6 would extend the statute of limitations to 6, 7, or 8 years after the crime was committed.”²⁸² If a concealment violation were discovered immediately subsequent to its commission, then the normal five year statute of limitations would appertain.²⁸³

Section 8 authorizes the federal courts to administer restitution to environmental crime victims.²⁸⁴ Current federal statutes provide restitution to victims of violent and economic crimes but, do not adequately address the costs incurred by environmental crimes.²⁸⁵ For instance, “an environmental crime may cause more widespread and longstanding damage, with the harm inflicted on all members of a community or

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- (a) No person shall be prosecuted, tried, or punished for a violation of, or a conspiracy to violate, any of the offenses listed in subsection (b) unless the indictment is returned or the information is filed within five years after the offense is committed; however, when a person commits an affirmative act that conceals the offense from any Federal, State, local, or tribal government agency, that person shall not be prosecuted, tried, or punished for a violation of, or a conspiracy to violate, any of the offenses listed below in subsection (b) unless the indictment is returned or the information is filed within five years after the offense is committed, or within three years after the offense is discovered by a government agency, whichever is later but in no event later than eight years after the offense is committed.

Id.

282. 142 CONG. REC. S11,033-04, 11,039 (daily ed. Sept. 19, 1996) (statement of Sen. Lautenberg).

283. *See id.*

284. S. 2096, 104th Cong. § 8 (1996).

Environmental Crimes Restitution

Section 3663(b) of title 18, United States Code, . . . is amended by . . . adding after paragraph (5) the following new paragraph — (6) in the case of an offense resulting in pollution of or damage to the environment, pay for removal and remediation of the environmental pollution or damage and restoration of the environment, to the extent of the pollution or damage resulting from the offense; in such case, the term ‘victim’ in section 3663(a)(2) includes a community or communities, whether or not members are individually identified.

Id.

285. *See* 142 CONG. REC. S11,033-04, 11,039 (daily ed. Sept. 19, 1996) (statement of Sen. Lautenberg).

communities affected by the environmental pollution or damage."²⁸⁶ The harm caused to collective communities is addressed by this section, and no longer limits federal imposition of restitution exclusively to individuals.²⁸⁷

The bill also prevents defendants from hiding their assets in order to avoid paying for environmental violations.²⁸⁸

286. *Id.*

287. See S. 2096, 104th Cong. § 8 (1996).

288. See 142 CONG. REC. S11,033-04, 11,039.

Prevention of alienation or disposal of assets needed to remedy environmental harms caused by environmental crimes.

(a) Chapter 39 of title 18, United States Code, is amended by adding after section 838 the following new section—

Sec. 839. Prejudgment orders to secure payment for environmental damage.

(a) At the time of filing of an indictment or information for the violation of any of the statutory provisions set forth in section 838(a) of this chapter, or at any time thereafter, if, after notice to the defendant, the United States shows probable cause to believe that—

(1) the defendant will conceal, alienate or dispose of property, or place property outside the jurisdiction of the Federal district courts; and

(2) the defendant will thereby reduce or impair the defendant's ability to pay restitution, in whole or in part, including removal and remediation of environmental pollution or damage and restoration of the environment resulting from the statutory violation, the district court may order the defendant not to alienate or dispose of any such property, or place such property outside the jurisdiction of the Federal district courts, without leave of the court. The United States shall bear the burden of proving, by a preponderance of the evidence, the projected cost for the removal and remediation of the environmental pollution or damage and restoration of the environment.

(b) Defenses

The defendant may establish the following affirmative defenses to a motion by the government under this section—

(1) that the defendant possesses other assets sufficient to pay restitution, including the costs of removal and remediation of the environmental pollution or damage and restoration of the environment resulting from the statutory violation, provided that the defendant places those other assets under the control of the court, or

(2) that the defendant has made full restitution, including the removal and remediation of the environmental pollution or damage and restoration of the environment.

In addressing pending criminal environmental charges, the court may get an order preventing the defendant from disposing of assets without leave of the court.²⁸⁹ The purpose of this section is to ensure the defendant's ability to pay restitution fees.²⁹⁰

The focus of this Comment is the attempt provision of the ECEA. The bill states (as would be added to CWA § 309 as section (d)): "Any person who attempts to commit the conduct that constitutes any offense under paragraphs (2), (3) or (4) of this subsection shall be subject to the same penalties as those prescribed by such offense."²⁹¹

The bill's notably absent definition of attempt may lead to varied interpretations. Attempt may be defined as "an intent combined with an act falling short of the thing intended. It may be described as an endeavor to do an act, carried beyond mere preparation, but short of execution."²⁹² The Model Penal Code, however, defines attempt as:

(c) Procedures—

Any proceeding under this section is governed by the Federal Rules of Criminal Procedure.

(d) Property Defined—

For the purposes of this section, 'property' shall include—

(1) Real property, including things growing on, affixed to, and found in land; and

(2) Tangible and intangible personal property, including money, rights, privileges, interests, claims, and securities.

(e) Expiration of Order—

The court may amend an Order issued pursuant to this section at any time. In no event, however, shall the Order extend beyond sentencing, in the case of a conviction, or a dismissal or acquittal of the prosecution.

Id. at 11,040.

289. *See id.*

290. *See id.*

291. S. 2096, 104th Cong. § 7 (1996).

292. BLACK'S LAW DICTIONARY 127 (6th ed. 1990). *See, e.g.,* State v. Stewart, 537 S.W.2d 579 (Mo. Ct. App. 1976), in which the court defined attempt to commit a crime as: (1) an intent to commit it; (2) an overt act toward its commission; (3) failure of commission; and (4) the apparent possibility of commission. *Id.* at 581.

Acting with the kind of culpability otherwise required for commission of the crime, [the perpetrator]:

- (a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
- (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or
- (c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.²⁹³

The Model Penal Code also states:

Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negating the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law: (pertinent parts listed)

- (e) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;
- (f) possession, collection, or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances.²⁹⁴

Other legal scholars state that "[t]here is a point, however, somewhere between formation of the intent and actual commission of the crime at which the criminal taking overt action toward the accomplishment of the intended crime has gone so far in carrying out his purpose that he is guilty of an

293. MODEL PENAL CODE § 5.01 (1962).

294. *Id.*

attempt to commit the crime.”²⁹⁵ As stated in *State v. Damms*, “[s]ound public policy would seem to support the majority view that impossibility not apparent to the actor should not absolve him from the offense of attempt to commit the crime he intended.”²⁹⁶

*Braxton v. United States*²⁹⁷ illustrates the analysis for determining if an attempted crime has occurred. The defendant was charged with “(1) an attempt to kill a deputy United States marshal, (2) assault on a deputy marshal, and (3) the use of a firearm during a crime of violence.”²⁹⁸ Braxton pled guilty to assaulting the marshal and using a firearm, but pled not guilty to the charge of attempting to kill the marshal.²⁹⁹

The marshal had a warrant for Braxton’s arrest and attempted to contact the defendant at his apartment.³⁰⁰ As the marshal opened the apartment door, Braxton fired a gunshot at the doorway.³⁰¹ The contradictory evidence presented by the government alleged that the bullets had both lodged in the door and passed through the doorway.³⁰²

The Court relied on common law for the requisite elements of attempt since the elements were absent in the pertinent statute.³⁰³ The elements upon which the Court relied included a “specific intent to commit the unlawful act.”³⁰⁴ The Court held that since Braxton denied intending to kill the marshal, in addition to the lack of evidence that Braxton was “shooting at” the marshal, it could not be specifically established that he violated the attempt provision of the relevant statute.³⁰⁵

295. EDWARD ELDEFONSO & ALAN R. COFFEY, CRIMINAL LAW HISTORY-PHILOSOPHY-ENFORCEMENT 49 (1981).

296. *State v. Damms*, 100 N.W.2d 592, 596 (Wis.1960).

297. 500 U.S. 344 (1991).

298. *Id.* at 345.

299. *Id.*

300. *See id.*

301. *See id.*

302. *See* 500 U.S. at 344.

303. *Id.* at 351 n.*.

304. *Id.* at 351 (*construing* *Morissette v. United States*, 342 U.S. 246 (1952)).

305. *See id.* at 350-51.

I. The Attempt Provision of the ECEA

The ECEA creates equal liability for environmental crimes both committed and attempted. "There has been only one attempt provision in Federal environmental criminal enforcement statutes. As a result, Federal agents can be placed in the untenable situation of choosing between obtaining evidence necessary for a criminal prosecution and preventing pollution from occurring."³⁰⁶ The attempt provision allows enforcement personnel to prevent the environment from being harmed, while simultaneously prosecuting a would-be polluter. Additionally, the attempt provision "would allow prosecution where a defendant purposely engages in conduct that would constitute the crime if the circumstances were as the defendant believes them to be."³⁰⁷

Senator Lautenberg claims the rationale for the ECEA's attempt provisions is similar to that of attempt provisions in federal criminal statutes: "Under these existing attempt laws, when law enforcement authorities uncover planned criminal activity and a substantial step is taken towards the commission of the crime, the crime can be stopped before it is completed and the perpetrator may still be prosecuted."³⁰⁸ Citing to federal laws of attempted robbery, damage to government property, obstruction of court orders and obtainment of mail by fraud, Senator Lautenberg stated that the attempt of the crime is treated as if the crime were actually committed.³⁰⁹ Ultimately, the purpose of the attempt provision is to prevent the environment from being polluted and prosecute those citizens who "knowingly" attempt to pollute. Senator Lautenberg suggested that the attempt provision will make possible undercover investigations.³¹⁰

306. 142 CONG. REC. S11,033-04, 11,039 (daily ed. Sept. 19, 1996) (statement of Sen. Lautenberg).

307. *Id.*

308. *Id.*

309. *See id.*

310. Senator Lautenberg offered the following hypothetical:

While haulers are required by law to dispose of toxic materials in a permitted hazardous waste disposal facility, often renegade transporters dump in vacant lots, remote areas, and other unauthorized locales. Once they have received information that illegal dumping

III. Analysis

The rationale underlying the common law actions upon which environmental law is premised is contradicted by the rationale of the attempt provision in the ECEA as it is applied to the CWA. Neither trespass nor nuisance has a concomitant attempt cause of action. Although the public nuisance cause of action does not require an intentional act, it does require that some degree of harm occur. The attempt provision of the ECEA seeks to criminalize behavior *before* it imposes harm.

Courts, in deciding public nuisance actions, weigh the unreasonableness of the interference by its significant effect on the public or whether the harm to the public has a permanent effect. An attempted violation of the CWA does not have harm for the courts to weigh, nor does it provide a permanent effect of harm to the public for the courts to determine. Additionally, the trespass cause of action, as a precursor to environmental regulation, requires that an intentional invasion of a legally protected interest occur in order to render a defendant liable. An attempted violation of the CWA does not create an actual invasion of another's interest because a pollutant is not discharged. The practical effects of the attempt provision, therefore, are incongruous with the principles of environmental law's common law foundation.

is occurring, Federal agents conduct surveillance of hazardous waste transporters. But, because there is no attempt provision in statutes defining environmental crimes, if agents prevent a transporter from dumping hazardous waste, the perpetrator cannot be prosecuted for illegal dumping because no environmental crime has occurred. Under current law, only by damaging the environment by allowing the hazardous waste dumping to occur, can the Government build a case to prosecute a person for illegal dumping The [attempt] provision adds a new dimension to the protection of the environment: the capability of officials to engage in undercover operations. These investigations will allow Federal officers to conduct 'sting' operations by substituting benign substances for the actual pollutants, and prosecute, to the fullest extent of the law, those violators who engaged in behavior they know to be illegal.

142 CONG. REC. S11,033-04, 11,040 (daily ed. Sept. 19, 1996) (statement of Sen. Lautenberg).

An application of the attempt provision of the ECEA to several of the cases previously discussed in Part II, produces inequitable results. In the *Strandquist*³¹¹ case, at what point would the defendant's actions be considered an attempted crime? Strandquist was aware of the fact that he and his employees were pumping raw sewage into a storm grate. He testified, however, that he was not aware that the sewage traveled to the water basin thereby *constituting a discharged pollutant* into navigable waters under the CWA. Pursuant to the ECEA, Strandquist could potentially be guilty of attempting to violate the CWA at the time he became aware of the marina's septic tanks' inability to hold all of the marina's sewage.

Similar to the would-be polluter in Lautenberg's hypothetical, a pollutant would have been discharged if the facts were as Strandquist presumed them to be. Perhaps Strandquist and his employees would be convicted of attempting to "knowingly" commit an environmental crime at the point that they *possessed* the sewage prior to loading it into tankers to transport it to the storm grate. Strandquist possessed "pollutants" and intended to discharge them into navigable waters. However, the *possession* of pollutants is not what the CWA seeks to deter. It is a statute that addresses the prevention of discharged pollutants into navigable waters.³¹²

In *Boldt*, the plant manager was aware that partially treated wastewater would be discharged into navigable waters.³¹³ Boldt possessed knowledge similar to that of Lautenberg's hypothetical polluter—he was aware that pollutants *would be* discharged. The plant's system was designed to treat wastewater, but was being used at twice its capacity level at the time Boldt was hired as plant manager. Under the ECEA's attempt provision, Boldt could be found guilty of attempting to violate the CWA at the point he was hired and received corporate responsibility for the wastewater treatment.

311. *Strandquist*, 993 F.2d 395.

312. "[I]t is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985" CWA § 101(a)(1), 33 U.S.C. § 1251(a)(1).

313. *Boldt*, 929 F.2d 35.

In Boldt's case, a bypass was necessary because the plant's treatment system failed. The bypass contained four times the amount of copper allowed by federal regulation. The allowance of bypasses as defined in the CWA, is contradictory to the proposed attempt provision. For example, in a less egregious situation than Boldt's, suppose a plant manager knows that his treatment system is beginning to break down. At that point, the manager possesses pollutants that are inevitably going to enter navigable waters. Although bypasses are acceptable defenses to violations of the CWA, if the ECEA were enacted, it would be possible to convict the manager at the time a bypass occurs and the treatment system began to break down. The attempt provision would negate viable defenses provided in the CWA, and undermine the accepted understanding that machinery may malfunction, causing the plant manager to "knowingly" discharge pollutants.

The manager of a sewage treatment plant convicted of violating the CWA in *Weitzenhoff* defended the illegal discharges of pollutants on the basis of his interpretation of the plant's permit.³¹⁴ An application of the attempt provision to the manager's situation requires both a discussion of the CWA's designation as a public welfare statute and an examination of the elements required to constitute a knowing violation of the CWA. In *Weitzenhoff*, *Hopkins*, and *Ahmad*, the respective courts addressed the applicability of the CWA as interpreted as a public welfare statute. The courts' interpretation of "knowingly" in the CWA was the touchstone of the *Hopkins* and *Weitzenhoff* courts' designation of the CWA as a public welfare statute.

All of the defendants were convicted by the lower courts of "knowingly" violating the CWA. Pursuant to the reasoning espoused in *Hopkins*, where the court adopted the *International Minerals* analysis of what constitutes "knowingly" in federal statutes, in order to be convicted under the CWA, one does not need to know that he is in violation of a federal statute. He simply needs to know that he is committing the con-

314. 1 F.3d 1523 (9th Cir.1993) amended by 35 F.3d 1275 (9th Cir. 1994).

duct that is regulated. For example, he is aware of the fact that he is discharging zinc, not that his act violates a specific effluent limitation.

However, the courts following the reasoning in *International Minerals* did not consider the House of Representative's Report concerning the 1987 CWA Amendments, which asserted that the purpose of the proposed amendments was to "provide penalties for dischargers or individuals who knowingly or negligently violate or cause violation of the Act's requirements."³¹⁵ Ascertainable from both the legislative history and the statutory language of the CWA, it is evident that Congress intended to "require knowledge of both the physical activity resulting in the violation and the illegality of that activity."³¹⁶ The *Weitzenhoff* court, for instance, relied on legislative reports out of context.³¹⁷ The section of the CWA that *Weitzenhoff* was alleged to have violated was § 1319(c)(2)(A), which concerns a defendant who "knowingly" discharges a pollutant. The legislative text, however, which the court relied upon, referred to criminal liability for non-compliance with permit requirements in § 1319(c)(2)(B).³¹⁸

The *International Minerals* analysis, as applied to CWA violations, requires that the substance being handled by the defendant be such that it should place him on notice that the activity he is engaging in is comprehensively regulated. Unlike the hazardous acids that the defendant in *International Minerals* was handling, a person would not necessarily be aware that when he is discharging hot water into a river, he is violating the CWA. As explained by the U.S. Supreme

315. H.R. Rep. No. 189, 99th Cong. 29-30 (1985)(emphasis added).

316. Kevin Phillip Cichetti, *United States v. Weitzenhoff: Reading Out the Knowingly From Knowingly Violates in the Clean Water Act*, 18 U.S.C. § 1319(c)(2)(A), 9 ADMIN. L.J. AM. U. 1183, 1196 (1996).

317. See *United States v. Weitzenhoff*, 35 F.3d at 1295-96 (Kleinfeld, J., dissenting).

318. S. Rep. No. 50, 99th Cong. 29 (1985). The report stated, "[c]riminal 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 effluent limitations or conditions in any permit issued to the treatment works." *Id.*

Court in *Staples*,³¹⁹ “[a]utomobiles . . . might . . . be termed ‘dangerous’ devices and are highly regulated at both the state and federal levels,” but it would be doubtful that Congress would apply strict liability to someone whose car’s emissions levels exceed the acceptable amount.³²⁰

In *Liparota v. United States*,³²¹ the Court stated that the conduct involved in assessing whether an activity is a public welfare offense must be the “type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community’s health or safety.”³²² An application of this test to the CWA reveals that it is not a public welfare statute. It would be difficult for a reasonable person to ascertain that dirt and rocks, which are considered pollutants under the CWA, are subject to stringent regulation. Additionally, the allowance of bypasses by the CWA contradicts the *Liparota* analysis. The bypasses do “seriously threaten the community’s health or safety,” but they are viable defenses under the CWA which permits them to occur.

Conducting a simple syntax analysis of the “knowingly” provision of the CWA, reveals that “knowingly” applies to “violates.”³²³ If Congress wanted “knowingly” to apply to all elements of the relevant section, it could have altered the language to reflect its intent. As indicated by both statutory construction and legislative history, Congress intended for those convicted of “knowingly” violating the CWA to have a culpable state-of-mind, and not merely knowledge of their actions.

The status of the CWA as a public welfare statute is significant in analyzing the ECEA’s attempt provision. Most importantly, there has never been a recorded American case that addresses an attempted violation of a public welfare statute. It would be impossible to convict a person of at-

319. 511 U.S. 600 (1994).

320. *Id.* at 614.

321. 471 U.S. 419 (1985).

322. *Id.* at 433.

323. See *Weitzenhoff*, 35 F.3d at 1294 (Kleinfeld, J., dissenting) (citing GEORGE O. CURME, A GRAMMAR OF THE ENGLISH LANGUAGE 72 (1935)).

tempting to commit an act, which requires proof of a mens rea, for an offense that does not account for the scienter of the defendant. Secondly, the CWA provision that the bill's attempt provision is proposed to be attached, does contain a mens rea — "knowingly." If the CWA is deemed a public welfare statute, an attempt provision cannot be added.

The court in *Ahmad* did not consider the CWA a public welfare statute and reversed the defendant's conviction because the knowing element had to be applied to each element of the violation: (1) discharged or added; (2) a pollutant; (3) to navigable waters; (4) from a point source; and (5) without a permit. As has been established by the Court, a public welfare statute or offense does not require a mens rea to be proven, and those statutes that do require a knowing mens rea must have it applied to each element of the offense.³²⁴ Pursuant to this line of reasoning, the government would have to prove that a defendant attempted to "knowingly" discharge what he knew was a pollutant into what he knew were navigable waters. The question then becomes, how does the government prove that a defendant *attempted* to "knowingly" violate the CWA? The effect of the knowing mens rea of some of the CWA's criminal provisions along with an application of the attempt provision, would force the government to prove the defendant knew he was discharging a pollutant. Unlike other environmental statutes, the CWA prohibits the discharge of materials that may not put a would-be polluter on notice of possible federal offenses. For example, a handler of sulfuric acid knows that it is a hazardous material just by the existence of its dangerous properties. Pursuant to RCRA, a prosecution would be possible for an attempted disposal of that material. However, a person who is washing his car and discharges the car cleanser down a sewer hole may not be aware that he has discharged a pollutant into navigable water. Therefore, *knowing* what constitutes a pollutant

324. See, e.g., *Staples v. United States*, 511 U.S. 600 (1994); *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994); *Morissette v. United States*, 342 U.S. 246 (1952).

presents causation obstacles when combined with the ECEA's attempt provision.

The purpose of the attempt provision is, in theory, compatible with the purpose of the CWA. As applied, however, to practical situations, the attempt provision may cause judicial bedlam because providing sufficient proof that someone "knowingly" discharged a pollutant will create causation obstacles. The government would have difficulty ascertaining the state of mind of someone who is un"knowingly" discharging a pollutant, and thereby potentially convict innocent people. In proving a violation of the CWA, the government will be unable to substantiate, as required by basic attempt provisions, that a person intended to commit a violation of the CWA.

Assuming that the CWA is not a public welfare statute, the attempt provision still poses other problems. For example, in *Braxton v. United States*³²⁵ the Court applied the common law elements of attempt to a statute that failed to itemize the elements of what constituted an attempted violation.³²⁶ In the case of the ECEA, the proposed attempt provision does not specify what constitutes an attempted violation of the CWA. Since there is not a common law definition of "attempt to pollute," the courts will be left to adopt whichever application of attempt they choose. This judicial discretion, in interpreting a statute which is supposed to be uniform throughout the country, would lead to inconsistent sentences and penalties for violators of the CWA.

Senator Lautenberg's hypothetical of replacing hazardous material with benign substances also suffers from substantive deficiency. For example, in order to be convicted under the CWA, a person must actually discharge a pollutant into navigable waters. If federal officers, for example, have replaced what a distributor presumed to be copper-laced water, with pure tap water, then the distributor *has not discharged a pollutant*. The attempt clause may simply cloud

325. 500 U.S. 344 (1991).

326. *Id.* at 351 n.*.

what currently constitutes an environmental crime because of the procedural ambiguities created.

The only remedy for the attempt provision's deficiencies is not to attach it to the knowing provisions of environmental statutes. For example, in the CWA, an attempt provision may be added as an entirely new section that does not incorporate a mens rea requirement. However, any variation of an attempt provision would be inapplicable in those jurisdictions that interpret the CWA as a public welfare statute. It is both practically and judicially impossible to apply an attempt provision to a public welfare statute. Courts would have to recognize that the CWA is not a public welfare statute prior to the addition of the attempt provision, in its present form to the CWA.

Moreover, an attempt provision would have unreliable and inconsistent effects on those persons who handle regulated substances. An attempted violation of discharging such commonplace substances such as dirt or hot water, would not provide notice of a potential violation to the defendant. The ambiguity resulting from the attempt provision's attachment to the CWA would also allow many jurisdictions to apply the rule of lenity in interpreting the statute. The rule of lenity, which protects defendants by compelling courts to "strictly construe ambiguous statutory . . . [language] in a manner most favorable to defendants,"³²⁷ would allow many polluters to escape conviction based on legal technicalities.

IV. Conclusion

The ECEA, although meritorious in its objectives, should not be implemented in its present form. The legal uncertainty of the attempt provision may cause an abuse of prosecutorial discretion because of its boundless applications. In addition, the attempt of an environmental crime will be difficult to (1) define in a criminal law context; and (2) prove in court, as was illustrated by its application to the cases discussed in Part II. For example, in order to be convicted of

327. David E. Filippi, *Unleashing the Rule of Lenity: Environmental Enforcers Beware!*, 26 ENVTL. L. 923 (1996).

violating the CWA a violator must have discharged a pollutant into navigable waters. If the pollutant has been replaced with tap water by federal enforcement investigators, as Senator Lautenberg hypothesized, then a true pollutant has not been discharged. Distinguishing the exact point at which a defendant is attempting to commit an environmental crime may also create difficulties in proving causation.

Moreover, the rationale underpinning an attempt provision conflicts with both the CWA's common law foundational principles and its judicial classification as a public welfare statute. In both nuisance and trespass actions, judicial action redresses damages to the plaintiff's property, invasion of the property, or enjoyment of his land. The attempt provision undermines those common law rationales because no damages result from an attempted discharge of a pollutant. In addition, common law does not recognize a cause of action for attempting to violate either of the common law actions upon which environmental law is founded.

The attempt provision also contradicts the reasoning employed in those jurisdictions that classify the CWA as a public welfare statute. There has never been an attempt clause added to a public welfare statute. This results from the fact that public welfare statutes do not require *mens rea*, and therefore cannot have attempted violations which would require *mens rea*. The CWA regulates substances that are both hazardous and commonplace. Therefore, the usual "deleterious" nature of substances associated with public welfare statutes is not consistently present in CWA offenses. Potential violators would not be on notice that they are handling substances which are comprehensively regulated because discharging hot water or sand into a well, for example, would not necessarily reflect the serious nature associated with the offense.

Despite the ECEA's substantive deficiencies, it represents the continuing story of environmental law's progression. As Justice Holmes stated, "we must know what it has been and what it tends to become" in order to understand

it.³²⁸ The fact that some government officials are seeking to expand criminal liability and increase penalties for environmental crimes, however, suggests that environmental law may not only become more than it has been, but may even be more than innocent citizens expect.

328. See HOLMES, *supra* note 1.