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NEGLIGENCE-BASED ENVIRONMENTAL CRIMES: FAILING TO EXERCISE DUE CARE CAN BE CRIMINAL

JOSEPH J. LISA

I. INTRODUCTION

Criminal prosecutions for violations of federal environmental law have played an important role in the history of United States Environmental Protection Agency's (EPA or the Agency) enforcement strategy. According to the EPA enforcement data, the Agency initiated 372 criminal investigations during the 2005 fiscal year. These investigations resulted in criminal charges against 320 defendants, sentences imposing 86 years of imprisonment and approximately 100 million dollars in criminal fines and restitution.

The majority of the environmental statutes the Agency administers contain criminal enforcement provisions. Most of these...
criminal charging provisions address violations that are committed "knowingly." Such violations result from "voluntary or intentional conduct and not because of ignorance, mistake, accident or some other reasons." Generally, this standard for prosecution is consistent with well-established "principles of Anglo-American criminal jurisprudence" which require proof that a defendant has acted with a certain type of mental state (mens rea) with regard to his or her violative conduct (actual reus).

The Clean Water Act (CWA) and Clean Air Act (CAA), however, contain criminal enforcement provisions that have no mens rea component. These statutes provide for the imposition of criminal penalties for violations arising from negligent conduct. CWA section 309(c)(1)(A) makes it a misdemeanor for a person to negligently violate specific requirements of the CWA. Additionally, CWA section 309(c)(1)(B) makes it punishable if a person "negligently introduces into a sewer or publicly owned treatment works (POTW) a pollutant or hazardous substance which the person


Having taken firm root in the early English common law, the doctrine of mens rea was transplanted to the American colonies and became a part of the legal fabric of the criminal law in this country . . . . The historic recognition of mens rea as a requirement for criminal sanction is as widespread as it is longstanding. Id. at 838. See also Cole, supra note 6, at 3 and n.13 (quoting United States v. Gypsum, 438 U.S. 432, 436 (1978)).
10 See W. Page Keeton, PROSSER AND KEETON ON TORTS § 31 (5th ed. 1984) (noting that CWA and CAA impose criminal penalties merely for negligent conduct).

It is helpful to an understanding of the negligence concept to distinguish it from intent. In negligence, the actor does not desire to bring about the consequences that follow, nor does he know that they are substantially certain to occur, or believe that they will. There is merely a risk of such consequences, sufficiently great to lead a reasonable person in his position to anticipate them, and to guard against them.

Id.
knows or reasonably should have known could cause personal injury or property damage or which causes the POTW to violate an effluent limitation or condition of its CWA permit. Similarly, CAA section 113(c)(4) provides for misdemeanor penalties for persons who negligently release designated hazardous air pollutants or extremely hazardous substances and thereby negligently place another person in imminent danger of death or serious bodily injury.

To date, the federal government has charged defendants with these negligence-based crimes on a relatively limited basis. A 2002 study revealed that between 1987 and 1997, less than 7% of the prosecutions initiated by the Agency charged negligence-based offenses under the CWA. Still, these legal authorities have played an important role in the EPA’s enforcement activities and have been utilized in connection with a number of high profile cases. As part of the federal prosecution that arose from the 1989 oil spill from the M/V Exxon Valdez into Alaska’s Prince William Sound, Exxon Shipping Company, the owner of the supertanker, pled guilty to, among other things, one count of violating CWA section 309(c)(1)(A), and was sentenced, along with parent company, Exxon Corporation, to pay a total criminal fine of $125 million. Additionally, in March 2005, Motiva Enterprises, LLC pled guilty to, inter alia, a violation of CAA section 113(c)(4) for negligently releasing sulfuric acid into the air in connection with a 2001 tank explosion at its Delaware facility. Motiva was sentenced to pay a fine of $10 million and serve a three-year probation term.

12. See id. § 1319(c)(1)(B) (discussing misdemeanor releasing of pollutants into POTWs).
15. See id. at 11158 (stating that CWA negligence cases include, but are not limited to, those of extraordinary environmental harm).
16. See id. at 11158 n.29 (stating to which charges Exxon Shipping plead guilty).
The government's use of these negligence-based enforcement authorities has generated criticism, primarily focused on the standard of negligence required to secure a conviction.19 Neither the CWA nor the CAA defines the term "negligently."20 Their respective legislative histories are generally silent concerning the meaning of this term. Furthermore, only two federal courts have issued opinions concerning CWA section 309(c)(1)(A), with both courts holding that this charging provision requires evidence of ordinary negligence, as opposed to criminal or gross negligence.21 This ordinary negligence standard was subsequently criticized by two justices of the United States Supreme Court in a rare dissent to a denial of certiorari.22 Currently, there are no published federal court decisions enunciating the applicable standard of negligence for purposes of CWA section 309(c)(1)(B) or CAA section 113(c)(4).

The purpose of this Article is to provide an introduction to and a survey of the negligence-based criminal charging provisions of the CWA and CAA. More specifically, Part I of this Article provides a brief overview of the history/background of CWA section 309(c)(1) and a discussion of the standard of proof required to secure a conviction under both CWA section 309(c)(1)(A) and (B). Part II provides a brief overview of the history and background of CAA section 113(c)(4). It also provides a discussion of the standard of proof required for purposes of securing a conviction under this provision. Finally, Part III addresses the criminal penalties that are available under the CWA and CAA and the application of the federal Sentencing Guidelines to such negligence-based crimes.


21. See generally United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999), cert. denied, 528 U.S. 1102 (2000) (holding that § 309(a)(1)(A) only requires ordinary negligence); United States v. Ortiz, 427 F.3d 1278 (10th Cir. 2005) (holding that § 309(a)(1)(A) only requires ordinary negligence).

II. CLEAN WATER ACT SECTION 309(c)(1)

A. Statutory Language

CWA section 309(c)(1) provides that:

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; or (B) negligently 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 any 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 $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, 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 $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.23

B. Legislative History and Background

Congress comprehensively revised the legal framework under which the federal government regulates water pollution24 when it enacted the Federal Water Pollution Control Act Amendments of 1972, commonly referred to as the CWA.25 The 1972 amendments set forth the ambitious goal of restoring the "chemical, physical and

biological integrity of the [n]ation’s waters.” In order to achieve this goal, Congress provided the EPA with a number of new enforcement authorities, particularly in the area of criminal enforcement. More specifically, the 1972 amendments enacted misdemeanor-level criminal penalties for “willful” or “negligent” violations of certain requirements of the CWA. Congress, however, failed to define these terms and provided little, if any, explanation concerning the terms’ meanings. Coupled with the unavailability of felony-level penalties, this lack of guidance resulted in the relatively ineffective use of the CWA’s criminal enforcement provisions.

In order to address this situation, Congress substantially revised and strengthened the CWA’s criminal enforcement authorities as part of the 1987 amendments to the Act by making three major changes. First, Congress eliminated the “willful” standard


A major weakness of the prior federal program lay in the area of enforcement. Federal efforts to exact compliance with clean water objectives had languished for years. In fact, in over twenty years of the program’s existence, only one case against a polluter had been prosecuted in federal court. Thoroughly disenchanted by this experience, Congress set out in 1972 to ensure vigorous enforcement.

Id.


Any person who willfully or negligently violates section 301, 302, 306, 307 or 308 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator or by a State, shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both.

Id.


Mr. Chairman, I would like to call to the attention of my colleagues the fact that in this legislation we already can charge a man for simple negligence, we can charge him with a criminal violation under this bill for simple negligence. When a violation occurs, the Administrator or the State or the interstate agency, whoever may be involved, can either file a criminal charge under this law if there is negligence or if there is a willful violation of the law.

Id.

and in its place created two separate charging provisions: one addressing "knowing" violations (CWA section 309(c)(2)) and the other addressing violations that result from negligence (CWA section 309(c)(1)). Second, Congress expanded the scope of the applicability of the charging provisions by increasing the number and types of substantive requirements to which they apply. Finally, Congress increased the degree of the criminal penalties available under the CWA by making knowing violations of the CWA's requirements felonies subject to a maximum term of imprisonment of three years.31 Despite their efforts to increase the effectiveness of these enforcement authorities, however, Congress again failed to define or provide any guidance concerning the meaning of the term "negligently."32 Thus, Congress left it up to the federal courts to enunciate the applicable legal standard of negligence required to secure a conviction under CWA section 309(c)(1).

C. Standard of Proof for Conviction

In order to secure a conviction under CWA section 309(c)(1), the government must prove beyond a reasonable doubt that a defendant:

1. [Q]ualifies as a “person” for purposes of the CWA;
2. who negligently;
3. violated a specific substantive requirement of the Act (CWA section 309(c)(1)(A)); or, negligently introduced into a sewer system or POTW a pollutant or hazardous substance which either the person knew or reasonably should have known could cause personal injury or property damage, OR which caused the POTW to violate an effluent limitation or condition of its CWA permit (CWA section 309(c)(1)(B)).33

1. Covered "Persons"

Generally, under the CWA, the term "person" has been interpreted broadly to include a wide range of individuals. The CWA defines the term "person" to include "an individual, corporation,

31. See United States v. Weitzenhoff, 35 F.3d 1275, 1283 (9th Cir. 1993), cert. denied, 513 U.S. 1128 (1995) (discussing how increased penalties were considered necessary to deter would-be polluters).
partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body. For example, "federal employees acting within the course and scope of their employment" can qualify as "persons" and be subject to criminal prosecution for violations of the Act's requirements. Similarly, courts have held that an individual can be convicted under the CWA's criminal charging provisions for permit-related violations, irrespective of whether or not the person is legally obligated to obtain a National Pollutant Discharge Elimination System (NPDES) permit.

In United States v. Brittain, a public utilities director was convicted of falsifying Discharge Monitoring Reports submitted by the utility to the EPA pursuant to an NPDES permit. Although the utility and not the defendant was the permit-holder, the U.S. Court of Appeals for the Tenth Circuit held that the defendant qualified as a "person" for purposes of the criminal enforcement provisions of the CWA. Similarly, in United States v. Cooper, the U.S. Court of Appeals for the Ninth Circuit ruled that the defendant, a sewage hauling contractor, could be found guilty of violating the terms of an NPDES permit even though he was not the permit-holder but merely a contractor working for the permit-holder, the City of San Diego. As a result, it is not the status of an individual (whether he is a permit-holder), but rather his actions that are determinative as to whether he may be a "person" subject to criminal liability under the CWA.

Further, the definition of the term "person" under the CWA extends to business entities, like corporations. "Corporate liability for environmental crimes is 'based upon the imputation of agents' [or employees'] conduct to a corporation, usually through the application of the doctrine of respondeat superior.'" Under

34. See 33 U.S.C. § 1362(5) (defining what qualifies as "person" under CWA).
36. 951 F.2d 1413 (10th Cir. 1991).
37. See id. at 1419 (discussing what qualifies as "person" under Act).
38. 173 F.3d 1192 (9th Cir. 1999), cert. denied, 528 U.S. 1019 (1999).
39. See id. at 1201 (noting how NPDES permit requirements can be extended).
the *respondeat superior* doctrine, "a corporation may be held [vicariously and] criminally liable for the actions of its employees if the acts are done on behalf of the corporation and are within the scope of the employee's authority."\(^{42}\)

The 1987 Amendments to the CWA modified the definition of the term "person" to extend to "responsible corporate officers" (RCO).\(^{43}\) Basically, the RCO doctrine "permits the imposition of criminal sanctions against a corporate officer for violating a public welfare statute, regardless of his or her participation [in such violation], as long as he or she is in a position with power to prevent or correct the violation," but failed to act accordingly.\(^{44}\) In the context of environmental crimes, the federal courts have focused on the nature of the relationship between the defendant, the corporation and the violations at issue to determine whether a corporate officer may qualify as a RCO.

For example, in *United States v. Iverson*,\(^{45}\) the Ninth Circuit affirmed jury charges which provided that a defendant could be found criminally liable under the CWA as a RCO if the jury concluded, beyond a reasonable doubt, that the defendant: (1) had knowledge of the underlying discharge of pollutants; (2) had the authority or capacity to prevent the discharge of pollutants; and (3) failed to prevent the discharge.\(^{46}\) More specifically, the Ninth Circuit held that:

Under the CWA, a person is a "responsible corporate officer" if the person has authority to exercise control over the corporation's activity that is causing the discharges.

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45. 162 F.3d 1015, 1024 (9th Cir. 1998).
46. See id. at 1022 (holding corporate officer may be criminally liable under CWA where corporate officer had knowledge that discharged material was pollutant).
There is no requirement that the officer in fact exercise such authority or that the corporation expressly vest a duty in the officer to oversee the activity.47

Similarly, in *United States v. Hong*,48 the U.S. Court of Appeals for the Fourth Circuit upheld the use of the RCO doctrine in connection with the prosecution of a corporate officer under the CWA.49 The defendant James Ming Hong was held to be a RCO and criminally liable under CWA section 309(c)(1)(A) for negligent discharges by his company in violation of the CWA's pretreatment requirements. In classifying the defendant as a RCO, the Court focused on his substantial control of corporate operations and finances, and his regular presence at the corporation's facility at the time of its illegal discharges.50 The Fourth Circuit noted that "[t]he pertinent question is whether the defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the charged violations of the CWA."51 The fact that Hong was not formally designated a corporate officer did not preclude him from being held criminally liable under the RCO doctrine.52 In sum, the CWA's very encompassing definition of the term "person" means that CWA section 309(c)(1) is potentially applicable to a broad category of individuals and entities.

2. Standard of "Negligence"

As previously noted, the primary challenge for prosecutors, defense counsel and members of the regulated community is that CWA section 309(c)(1) does not specify the standard of negligence required for purposes of securing a criminal conviction. Only two federal courts of appeal have addressed this issue to date in written opinions. The Ninth and Tenth Circuits have held that, for purposes of CWA section 309(c)(1)(A), the government is required to

47. See id. at 1025 (explaining CWA's definition of corporate officer).
48. 242 F.3d 528 (4th Cir. 2001).
49. See id. at 531 (holding RCO doctrine valid in connection with prosecution of corporate officer under CWA).
50. See id. at 532 (describing court's focus in holding defendant liable under CWA).
51. See id. at 531 (identifying main focus of analysis).
52. See id. (citing example of instance where defendant was found criminally liable under RCO doctrine without being designated corporate officer).
prove a defendant has acted with ordinary negligence.\textsuperscript{53} In other words, the government must prove beyond a reasonable doubt that:

1. The defendant had a duty to act in a particular manner or to abide by a particular standard of care (duty);
2. the defendant breached that duty by failing to use such care as a reasonably prudent and careful person would have used in similar circumstances (breach of duty);
3. the defendant’s breach was the cause-in-fact of a violation of the CWA (cause-in-fact); and
4. the defendant’s breach was the proximate cause of the violation of the CWA (proximate cause).\textsuperscript{54}

Currently, no federal court has issued a written, published opinion concerning the applicable standard of negligence for prosecutions under CWA section 309(c)(1)(B). As discussed in more detail below, however, a number of factors justify the use of an ordinary negligence standard for purposes of this charging provision.

\begin{itemize}
\item[a.] \textit{CWA section 309(c)(1)(A)}
\item[i.] \textit{United States v. Hanousek}\textsuperscript{55}
\end{itemize}

In \textit{United States v. Hanousek}, the U.S. Court of Appeals for the Ninth Circuit held that in light of the plain language of CWA section 309(c)(1)(A) and the CWA’s status as a “public welfare statute,” the federal government is required only to prove that a defendant has acted with ordinary negligence to secure a conviction.\textsuperscript{56} The Ninth Circuit also ruled a defendant must be convicted on the basis of his own negligent conduct, not vicariously for the negligence of another person, and a defendant’s conduct must be both the cause-in-fact and proximate cause of the violation at issue.\textsuperscript{57}

Defendant Edward Hanousek, Jr. was hired as a roadmaster for a railroad line, operated by the Pacific and Arctic Railway and Navigation Company, which ran between Skagway, Alaska and

\textsuperscript{53} See \textit{U.S. v. Hanousek}, 176 F.3d 1116, 1120 (9th Cir. 1999); \textit{U.S. v. Ortiz}, 427 F.3d 1278 (10th Cir. 2005) (holding defendant liable for negligently violating pretreatment requirements under CWA).
\textsuperscript{54} See \textit{generally Restatement (Second) of Torts} § 281 (1965) (explaining elements of a cause of action for negligence).
\textsuperscript{55} 176 F.3d 1116 (9th Cir. 1999).
\textsuperscript{56} See \textit{id.} at 1120 (holding that under CWA, government is required to prove defendant acted with ordinary negligence to properly secure conviction).
\textsuperscript{57} See \textit{id.} at 1123-26 (explaining court’s reasoning).
Whitehorse, Yukon Territory, Canada. 58 His job responsibilities included supervising a project involving the blasting of rock outcroppings to reconfigure a six-mile curved section of the railroad's track. 59 This area of track was bordered by the Skagway River and an above-grade section of pipeline used to carry petroleum-based products. 60 Although the previous roadmaster had implemented measures to protect the pipeline from falling rock, when Hanousek assumed operational oversight for the project, he discontinued using many of these protective measures. 61

On the evening of October 1, 1994, a backhoe operator struck the pipeline while attempting to remove a number of rocks that had fallen close to an unprotected section and were partially blocking the neighboring tracks. 62 The pipeline ruptured and released oil, some of which reached the Skagway River and created a sheen on its surface. 63 Hanousek, who was off-duty and at home when the incident occurred, immediately reported to the scene and investigated the matter. 64 Finding the pumps for the pipeline had been shut-off, Hanousek elected to delay the repair of the break in the line and the clean-up of the released oil until the following day. 65 U.S. Coast Guard officials estimated that between 1000 and 1500 gallons of oil were released from the pipeline. 66

Hanousek was charged pursuant to CWA sections 311(b)(3) and 309(c)(1)(A) for negligently discharging a harmful quantity of oil into navigable waters of the United States. 67 As part of its charge

58. See id. at 1119 (explaining Hanousek's job title and responsibilities).
59. See id. (stating that Hanousek was responsible for every safety detail for maintenance of tracks, structures and marine facilities).
60. See Hanousek, 176 F.3d at 1119 (discussing Hanousek's six-mile project, located on embankment above Skagway River).
61. See id. (stating that after Hanousek took over project 1000-foot worksite was almost totally unprotected). The only area of the worksite that was protected was the movable backhoe work platform. See id.
62. See id. (finding that pipeline ruptured from fallen rocks that were attempting to be loaded on train).
63. See id. (discussing how oil continued to discharge over many days after rupture).
64. See Hanousek v. United States, 528 U.S. 1102 (2000) (stating that Hanousek was home and off duty at time of accident).
65. See Brief of the Petitioner-Appellee at **9-10, United States v. Hanousek, No. 97-30185, 1998 WL 34078917 (9th Cir. Jan. 8, 1998) (discussing how no clean-up began until October 2, 1997, even though spill occurred one day prior).
66. See Hanousek, 176 F.3d at 1119 (finding oil was discharged over many days into Skagway River).
67. See id. (indicating that Hanousek was also indicted for conspiracy to provide false information to U.S. Coast Guard concerning release). In addition, Paul Taylor, Jr., a corporate officer with Arctic & Pacific and Arctic & Pacific Pipeline, Inc., was indicted for negligently discharging oil into the navigable waters of the

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to the jury, the district court defined the term "negligently," for purposes of CWA section 309(c)(1)(A) as:

[T]he failure to use reasonable care. Reasonable care is that amount of care that a reasonably prudent person would use in similar circumstances. Negligence may consist of doing something which a reasonably prudent person would not do or it may consist of failing to do something which a reasonably prudent person would do. A reasonably prudent person is not the exceptionally cautious or skillful individual, but a person of reasonable and ordinary carefulness.\(^{68}\)

The jury convicted Hanousek of negligently violating the CWA.\(^{69}\) He was fined $5000 and sentenced to six months in a halfway house and six months of supervised release.\(^{70}\)

On appeal, Hanousek argued that the district court erred by failing to instruct the jury that the government was required to prove that he had acted with criminal negligence (a gross deviation from the standard of care that a reasonable person would observe in the situation), rather than ordinary negligence.\(^{71}\) The Ninth Circuit affirmed the conviction, however, holding that the CWA’s criminal enforcement provisions only require a showing of ordinary negligence.\(^{72}\)

The Ninth Circuit began its analysis by focusing on the plain language of CWA section 309(c)(1)(A).\(^{73}\) Whereas the CWA statute does not define "negligently," the court assumed that Congress intended that its definition be consistent with the ordinary usage and recognized meaning of the term ("failure to use such care as a reasonably prudent and careful person would use under similar cir-

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\(^{69}\) See United States v. Hanousek, 176 F.3d at 1120 (noting Hanousek’s acquittal on charge of conspiracy). The jury also acquitted Taylor on all charges, excepting two counts of making false statements to Coast Guard officials. See id. at 1119.

\(^{70}\) See id. (discussing Hanousek’s sentence at district court level).

\(^{71}\) See id. (discussing Hanousek’s arguments on appeal).

\(^{72}\) See id. at 1121 (finding that criminal negligence is not required for conviction under CWA).

\(^{73}\) See id. at 1120-21 (explaining Ninth Circuit’s analysis of CWA section 309(c)(1)(A)).
 Furthermore, the court held that if Congress intended to incorporate into the CWA's criminal charging provisions a "heightened negligence standard," it would have explicitly used language to that effect as it had in other provisions of the CWA. As an example, the court cited CWA section 311(b)(7), which provides for increased civil penalties "in any case in which a violation . . . was the result of gross negligence or willful misconduct." The Ninth Circuit noted that, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."

The court next rejected Hanousek's claim that an ordinary negligence standard violated his due process rights under the U.S. Constitution. The Ninth Circuit held that the CWA qualifies as public welfare legislation enacted to protect the public from "potentially harmful or injurious items" (e.g., water pollution). The court noted that "[i]t is well established that a public welfare statute may subject a person to criminal liability for his or her ordinary negligence without violating due process." One of the effects of such legislation is to "render criminal 'a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threatened the community's health and

74. See Hanousek, 176 F.3d at 1120 (noting that Congress had not intended to implement heightened negligence standard). "[W]e 'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.'" Id. (quoting Russello v. United States, 464 U.S. 16, 21 (1983)).

75. See id. at 1121 (analyzing congressional intent).

76. See id. (noting 35 U.S.C. § 1321(b)(7) exemplifies section where Congress intended increased penalties) (emphasis added).

77. See id. (citing Russello, 464 U.S. at 23) (concluding Congress acts willfully and consciously in "inclusion or exclusion" of statutory terms).

78. See id. at 1122 (explaining why permitting criminal penalties for ordinary negligence does not violate due process).

In light of our holding in Weitzmehoff that the criminal provisions of the CWA constitute public welfare legislation, and the fact that a public welfare statute may impose criminal penalties for ordinary negligent conduct without offending due process, we conclude that section 1319(c)(1)(A) does not violate due process by permitting criminal penalties for ordinary negligent conduct.

Id.

79. See Hanousek, 176 F.3d at 1121 (discussing goals of public welfare legislation).

In the context of a public welfare statute, "as long as a defendant knows that he is dealing with a dangerous device of a character that places him 'in reasonable relation to public danger,' he should be alerted to the probability of strict regulation." The Ninth Circuit also rejected Hanousek's claim that he had been convicted vicariously for the negligence of the backhoe operator, noting that the district court's instructions to the jury adequately charged the jury on this matter. The jury instructions specifically provided that the jury had to find that the defendant's negligence caused the discharge. Furthermore, the jury instructions charged that Hanousek's conduct had to have a "direct and substantial connection" to the discharge of oil from the pipeline, in order to satisfy the requirements of causation-in-fact and proximate cause.

The U.S. Supreme Court subsequently denied Hanousek's Petition for Writ of Certiorari. In a rare written dissent from the denial of certiorari, however, Justice Thomas, joined by Justice O'Connor, criticized the district court's rejection of Hanousek's due process claim. First, the Justices challenged the classification of the CWA as a public welfare statute, focusing on a split among U.S. Courts of Appeal on this issue. Furthermore, Justice Thomas emphasized that "[a]lthough provisions of the CWA regulate certain dangerous substances, this case illustrates that the CWA also imposes criminal liability for persons using standard equipment to engage in a broad range of ordinary industrial and commercial ac-

82. See id. at 1122 (citing United States v. Staples, 511 U.S. 600, 607 (1994)) (describing nature of regulation under CWA).
83. See id. at 1129 (holding that instructions on vicarious liability were unnecessary and did not constitute reversible error).
84. See Hanousek, 176 F.3d at 1123 (noting Ninth Circuit findings for discharging defendant).
85. See id. at 1124 (explaining defendant's culpability).
87. See id. at 1102 (criticizing decision of district court).
88. See id. (citing United States v. Kelley Technical Coatings, Inc., 157 F.3d 432, 439 n.4 (6th Cir. 1998)) (noting challenges in Supreme Court). The Court held that "[v]iolations of the CWA fit squarely within the public welfare offense doctrine." See also United States v. Weitenhoff, 35 F.3d 1275, 1286 (9th Cir. 1993) (recognizing challenges to district court decision). The court noted that "[t]he 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." Compare United States v. Ahmad, 101 F.3d 586, 591 (5th Cir. 1996) (rejecting argument that CWA is public welfare legislation).
tivities. This fact strongly militates against concluding that the public welfare doctrine applies.\textsuperscript{89} The two Justices also indicated that the severity of the criminal penalties potentially available under the CWA warranted a finding that the violations were not public welfare offenses and required proof of more than ordinary negligence.\textsuperscript{90}

\textit{ii. United States v. Ortiz}\textsuperscript{91}

In \textit{United States v. Ortiz}, the U.S. Court of Appeals for the Tenth Circuit utilized an analysis similar, if not identical, to that in \textit{Hanousek} and held that CWA section 309(c)(1)(A) requires evidence of ordinary negligence.\textsuperscript{92} The court also ruled that the government does not need to prove that a defendant knew that a discharge would enter a covered water of the United States in order to secure a conviction.\textsuperscript{93}

The defendant, David Ortiz, worked as the operations manager and sole employee of Chemical Specialties, Inc.'s distillation facility which manufactured propylene glycol, an airplane wing de-icing fluid.\textsuperscript{94} The distillation process also produced significant amounts of wastewater.\textsuperscript{95} Rather than obtain a permit to discharge the wastewater to a local treatment plant, Chemical Specialties, Inc. represented to city officials that it would ship the wastewater to a local business for treatment and disposal.\textsuperscript{96} In reality, however, Ortiz disposed of the wastewater by discharging it into a toilet at the facility which was connected to a storm water sewer that drained into the Colorado River.\textsuperscript{97}

Ortiz was charged with both negligently and knowingly discharging a pollutant into waters of the United States without a per-

\textsuperscript{89} See Hanousek, 528 U.S. at 1003 (noting Justice Thomas's analysis of liability and public welfare doctrine).
\textsuperscript{90} See id. (explaining Justices' opinions on penalties of CWA).
\textsuperscript{91} 427 F.3d 1278 (10th Cir. 2005).
\textsuperscript{92} See United States v. Ortiz, 427 F.3d 1278 (10th Cir. 2005) (noting analysis and decision of court on CWA).
\textsuperscript{93} See id. at 1283 (explaining Court's holding concerning government burden of proof).
\textsuperscript{94} See id. at 1279 (describing operation of Chemical Specialties, Inc.).
\textsuperscript{95} See id. (explaining process of distilling propylene glycol).
\textsuperscript{96} See id. at 1279-80 (stating Chemical Specialties, Inc. told city officials it would ship wastewater to nearby facility); see also Opening Brief of Petitioner-Appellant at **6-8, United States v. Ortiz, No. 04-1228, 2005 WL 2124379 (10th Cir. Apr. 7, 2005) (stating Chemical Specialties, Inc. said "no discharge would occur from facility").
\textsuperscript{97} See United States v. Ortiz, 427 F.3d 1278, 1280-81 (detailing violation).
omit in violation of CWA sections 309(c) (1) (A) and 309(c) (2) (A).98 In its instructions to the jury, the district court defined the term “negligence” for purposes of section 309(c) (1) (A) as:

[T]he doing of some act a reasonably prudent person would not do, or the failure to do something a reasonably prudent person would do, when prompted by considerations that ordinarily regulate the conduct of human affairs. In other words, it is the failure to use ordinary care under the circumstances in the management of one’s person or property, or of agencies under one’s control.99

Although the jury convicted Ortiz, the district court granted defendant’s motion for judgment of acquittal on the negligence count.100 The court ruled that as a matter of law the government had failed to prove the defendant knew that the discharge into the toilet would ultimately reach a covered water of the United States.101 The Court then sentenced Ortiz to twelve months in prison.102

On appeal, the Tenth Circuit reversed, holding that the district court “misinterpreted” the requirements of the CWA and that a reasonable jury, based upon the evidence adduced at trial, could have concluded that the defendant was guilty under CWA section 309(c) (1) (A). The Tenth Circuit utilized an analysis which mirrored that used in Hanousek. First, the court held that, although the CWA does not define the term “negligently,” the language of the statute is unambiguous and should be interpreted based on its ordinary meaning.103 As a result, the court ruled that the CWA section 309(c) (1) (A) requires proof of only ordinary negligence.104 “Under the statute’s plain language, an individual violates the CWA

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98. See Opening Brief of Appellant at **18-19, United States v. Ortiz, No. 04-1228, 2005 WL 2124379 (10th Cir. Apr. 7, 2005) (noting charges against defendant).
100. See Answer Brief of Petitioner-Appellant at *10, United States v. Ortiz, No. 04-1228, 2005 WL 4747656 (10th Cir. June 30, 2005); see also Opening Brief of Petitioner-Appellant at **2-3, United States v. Ortiz, No. 04-1228, 2005 WL 2124379 (10th Cir. April 7, 2005) (holding that Ortiz could not be guilty of negligence for risk of which he was unaware).
101. See Ortiz, 427 F.3d at 1281 (finding no evidence of defendant awareness).
102. See id. (assigning criminal penalty for negligent violation of CWA section 309(c) (1) (A)).
103. See id. at 1282-83 (describing ordinary usage of “negligently”).
104. See id. (holding that ordinary usage standard applies to CWA section 309(c) (1) (A)).
by failing to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance, and, in so doing, discharges any pollutant into United States waters without an NPDES permit." 105 Additionally, the court held that the CWA does not require proof of knowledge by a defendant that a discharge will enter a covered water to secure a conviction under CWA section 309(c) (1) (A). 106 "Negligence is conduct, and not a state of mind. In most instances, it is caused by heedlessness or inadvertence, by which the negligent party is unaware of the results which may follow from his act." 107

b. **CWA section 309(c)(1)(B)**

Utilizing the legal reasoning and holdings of *Hanousek* and *Ortiz* for guidance, a reasonable argument can be made that the term "negligently" as used in CWA section 309(c) (1) (B) should be interpreted as requiring proof of ordinary negligence. First, the clear language of CWA section 309(c) (1) (B) makes reference only to negligence, as opposed to a standard of gross or criminal negligence. 108 As previously discussed, if Congress had intended to incorporate into this provision a standard of negligence greater than ordinary negligence, it would have used explicit language to that effect in the statute. Second, as explained by the Ninth and Tenth Circuits, the terms of a statute usually are interpreted in light of their ordinary usage and recognized meaning. The commonly understood meaning of "negligently" is one of ordinary negligence. Third, the fact that CWA section 309(c) (1) (B) is part of a public welfare statute favors an ordinary negligence standard. This standard better effectuates the underlying purpose of the charging provision—preventing the introduction into sewers and POTWs of pollutants or hazardous substances that may cause property damage, personal injury or actually result in the disruption of a POTW's treatment processes. Finally, in light of the manner in which Congress drafted CWA section 309(c) (1) and how subsections (A) and (B) are intertwined into one comprehensive charging provision, it is a more consistent and logical interpretation to conclude that

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105. See *id.* at 1283 (emphasizing application of ordinary negligence standard).

106. See *Ortiz*, 427 F.3d at 1283 (explaining that knowledge of resulting hazard not necessary).

107. See *id.* (quoting W. Page *Keeton, Prosser and Keeton on Torts* § 31 (1984)).

Congress intended for a single standard of negligence to be applicable to both provisions. As a result, an ordinary negligence standard should be utilized in connection with prosecutions under CWA section 309(c)(1)(B).

3. Covered Violations/POTW Interference

In order to be convicted under CWA section 309(c)(1)(A), the government must prove that a defendant negligently violated a substantive requirement of the CWA.109 This charging provision is very broad in scope and covers a significant number of substantive requirements of the CWA, the violation of which can trigger criminal prosecution.110 For example, in Hanousek, the defendant was convicted of negligently violating CWA section 311(b), which prohibits the discharge in harmful quantities of oil or a hazardous substance into a navigable water of the United States.111 In convicting the defendant, the government proved that Hanousek’s negligence resulted in a discharge of oil from a pipeline into the Skagway River creating a sheen on its surface (i.e., a harmful quantity).112 In Ortiz, the defendant was convicted under CWA section 309(c)(1)(A) for negligently discharging a pollutant into waters of the United States without a NPDES permit, in violation of CWA sections 101 and 402.113

For purposes of CWA section 309(c)(1)(B), however, the analysis is more complicated. First, the government must prove that a defendant negligently introduced a pollutant or hazardous substance


111. See United States v. Hanousek, 176 F.3d 1116, 1125-26 (9th Cir. 1999) (holding that evidence was sufficient to convict under 33 U.S.C. §§ 1319(c)(1)(A) and 1321(b)(3)).

112. See id. at 1119 (discussing details of charge).

113. See United States v. Ortiz, 427 F.3d 1278, 1281 (10th Cir. 2005) (noting charges against defendant).
into a sewer system, or a publicly owned treatment works.\textsuperscript{114} The term "introduced" is not defined for purposes of this charging provision. It is similar to the phrase "discharge of a pollutant," however, which is used throughout the CWA and broadly defined to mean any "addition" of a pollutant to a navigable water.\textsuperscript{115} As a result, the phrase "negligently introduces" should be interpreted similarly, covering a broad range of conduct that results in pollutants or hazardous substances being added or entered into a sewer system or POTW.

POTW is defined by the CWA and includes, \textit{inter alia}, "any devices or systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature."\textsuperscript{116} Furthermore, for purposes of the CWA, a POTW is not limited to the actual physical plant that constitutes the treatment works. It also includes "sewers, pipes and other conveyances" that bring wastewater to a POTW.\textsuperscript{117}

With regard to the \textit{hazardous substances or pollutants} that are covered by CWA section 309(c)(1)(B), a "hazardous substance" is defined by CWA section 309(c)(7) as encompassing: substances designated for purposes of CWA section 311(b)(2) (A); substances designated for purposes of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) section 102; hazardous waste identified or listed pursuant to the Resource Conservation and Recovery Act (RCRA) section 3001; any toxic pollutant listed under CWA section 307(a); and any imminently hazardous chemical substance or mixture addressed by the Toxic Substances Control Act (TSCA) section 7.\textsuperscript{118} The term "pollutant" is similarly defined very broadly to include, among other things: solid waste; radioactive materials; sewage; garbage; sand; rock; and heat.\textsuperscript{119}

The second part of the analysis under CWA section 309(c)(1)(B) requires proof that either the person responsible for the negligent introduction knew or reasonably should have known that such a hazardous substance or pollutant could cause personal

\textsuperscript{115} See id. § 1362(12) (providing definitions for Water Pollution Prevention and Control General Provisions).
\textsuperscript{116} See id. § 1292(2)(A) (specifying what is considered to be "treatment works").
\textsuperscript{119} See id. § 1362(6) (providing broad definition of "pollutant").
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injury or property damage, or that the negligent introduction of a hazardous substance or pollutant actually caused a POTW to violate an effluent limitation or condition of its CWA permit.\textsuperscript{120} With regard to the issue of a person's knowledge, actual harm (i.e., actual personal injury or property damage) is not required for purposes of a conviction. Rather, only evidence that the person either subjectively knew that these materials could cause such injury or harm or that a reasonable person objectively would have known of such potential for harm is required. The second condition of CWA section 309(c)(1)(B), however, requires that the negligent introduction causes an actual violation by a POTW of its operating permit.\textsuperscript{121} In light of the fact that this is a negligence-based charging provision, it is reasonable to assume that this negligent introduction will need to be both the cause-in-fact and proximate cause of the POTW's permit violation. One potential source of evidence concerning such a violation may be the POTW's monthly Discharge Monitoring Reports.

4. Summary

CWA section 309(c)(1)(A) and (B) allow the government to address situations in which evidence of a knowing violation is unavailable, but imposition of a criminal penalty is warranted in light of a defendant's actions and the resulting potential harm to human health and the environment. To date, courts have held that the applicable standard of negligence required to secure a criminal conviction is one of ordinary negligence.\textsuperscript{122} These rulings have greatly enhanced the enforcement value of these charging provisions. Additionally, these criminal enforcement provisions provide prosecutors and defense counsel with an effective and legitimate tool for the purposes of plea negotiations.

III. CLEAN AIR ACT SECTION 113(c)(4)

A. Statutory Language

The CAA section 113(c)(4), provides:

Any person who negligently releases into the ambient air any hazardous air pollutant listed pursuant to section 7412

\textsuperscript{120} See id. § 1319(c)(1)(B) (citing language of statute).
\textsuperscript{121} See id. (citing language of statute).
\textsuperscript{122} See United States v. Hanousek, 176 F.3d 1116, 1120 (9th Cir. 1999); United States v. Ortiz, 427 F.3d 1278 (10th Cir. 2005) (holding defendant liable for negligently violating CWA).
of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section 7412 of this title, and who at the time negligently places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment for not more than 1 year, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.\textsuperscript{125}

B. Legislative History and Background

In 1990, Congress dramatically changed the manner in which hazardous air pollutants are regulated under the CAA.\textsuperscript{124} The 1990 Amendments to the CAA came in response to the 1984 release of methyl isocyanate in Bhopal, India, which killed more than 2000 people, and a chemical release in Institute, West Virginia, which caused more than one hundred people to seek medical attention. In addition to significantly expanding the number of hazardous air pollutants that are regulated by CAA section 112, Congress substantially revised and strengthened the CAA’s criminal enforcement authorities.\textsuperscript{125} More specifically, Congress increased the penalties


In practice, however, the old criminal provisions were hardly enforced. Between fiscal years 1988 and 1992, only 68 defendants were charged with violating the Clean Air Act, as compared to 317 defendants who faced criminal prosecution under RCRA, and 205 defendants charged under the CWA. Those violations that could be criminally prosecuted [under the pre-1990 CAA] carried lenient penalties when compared to other federal environmental statutes.

\textit{Id.}
that are available under many of the CAA's criminal enforcement provisions from misdemeanors to felonies.\footnote{126}{See \textit{id.} at 374 (noting that Congress increased some penalties to felonies). According to one commentator, one immediate improvement in the enforcement potential of the Act is the upgrading of these violations from misdemeanors to felonies. \textit{See id.}}

Additionally, Congress enacted two new charging provisions to address situations in which releases of certain air pollutants endanger the health and safety of the public. First, Congress enacted CAA section 113(c)(5)(A), which provides felony-level sanctions for a knowing release of certain hazardous air pollutants or extremely hazardous substances that the person responsible for the release knows places another person in imminent danger of death or serious bodily injury.\footnote{127}{\textit{See} 42 U.S.C. \$ 7413(c)(5)(A) (2000); John Gibson, \textit{The Crime of "Knowing Endangerment" Under the Clean Air Act Amendments of 1990: Is It More "Bark Than Bite" as a Watchdog to Help Safeguard a Workplace Free From Life-Threatening Hazardous Air Pollutant Releases?}, \textit{FORDHAM ENVTL. L.J.} 197, 198 n.8 (1995) (noting that CWA Amendments incorporate crime of "knowing endangerment").} Congress modeled this provision on similar enforcement authorities in the CWA and RCRA.\footnote{128}{\textit{See} Senate Committee on Public Works, 103rd Cong., 1st Session, \textit{A Legislative History of the Clean Air Act Amendments of 1990}, Serial No. 103-38, Vol. I at 941 (1993) (noting criminal provisions of section 113(c) of CAA as similar to those of CWA and RCRA).} Second, Congress elected to move one step beyond the CWA and RCRA, and enacted a precedent-setting negligent endangerment offense. Codified at CAA section 113(c)(4), the CAA's negligent endangerment provision provides for the imposition of misdemeanor penalties for negligent releases of certain designated hazardous air pollutants or extremely hazardous substances that, at the time of the release, negligently place another person in imminent danger of death or serious bodily injury.\footnote{129}{\textit{See} Clean Air Act, 42 U.S.C. \$ 7413(c)(4) (2000) (summarizing negligent endangerment provision of CAA).} Consistent with past practice, Congress failed to define the operative term of this charging provision "negligently." Additionally, no federal court to date has issued a decision addressing the applicable standard of negligence. As explained in more detail below, however, a reasoned argument can be made that CAA section 113(c)(4) should be interpreted as requiring evidence of ordinary negligence.

C. Standard of Proof for Conviction

Under CAA section 113(c)(4), the government must prove beyond a reasonable doubt that a defendant:

\begin{enumerate}
\item [Q]ualifies as a "person" for purposes of the CAA;
\end{enumerate}
2. who negligently;
3. released into the ambient air;
4. a hazardous air pollutant, as provided by CAA section 312, 42 U.S.C. § 7412, or an extremely hazardous substance, as provided by the Emergency Planning and Community Right-to-Know Act (EPCRA) section 302(a)(2), 42 U.S.C. § 11002(a)(2); and
5. which, at the time of the release, negligently placed another person in imminent danger of death or serious bodily injury.\textsuperscript{130}

1. \textit{Covered “Persons”}

The term “person” for purposes of the CAA is defined very broadly to mean “an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent or employee thereof.”\textsuperscript{131} As part of the 1977 Amendments, the definition of “person,” for purposes of the CAA’s criminal enforcement provisions, was expanded to include RCOs.\textsuperscript{132} As previously discussed, with regard to public welfare statutes, the RCO doctrine extends criminal liability to corporate officers who, because of their position in a corporation, possess the authority to prevent or correct violations but fail to act accordingly with regard to such violations.

Whereas the RCO doctrine expanded the definition of “person,” a provision added by the 1990 Amendments to the CAA significantly restricted the applicability of this term. More specifically, CAA section 113(h) provides that “an employee who is carrying out his normal activities and who is not a part of senior management personnel or a corporate officer” does not qualify as a person for purposes of CAA section 113(c)(4), unless the employee’s actions are both “knowing and willful.”\textsuperscript{133} As a technical matter, CAA section 113(h) does not alter the definition of the term “person,” so much as to impose on the government a scienter or \textit{mens rea} re-
quirement as a condition precedent to convicting certain types of employees under CAA section 113(c)(4).\textsuperscript{134}

On its face, CAA section 113(h) may appear relatively straightforward.\textsuperscript{135} In reality, however, it presents a number of significant challenges for both prosecutors and defense counsel. First, the terms "employee" and "senior management personnel" are not defined. To date, one federal court has held that a supervisor may qualify as an employee for purposes of CAA section 113(h).\textsuperscript{136} Neither Congress nor the federal courts, however, have definitively stated what level of supervisory or management authority may render a person "part of senior management" of a company. Second, CAA section 113(h) does not define what constitutes "normal activities" on the part of an employee. One commentator has posited the following question: "Would such activities include unlawful, but regularly ordered by-passes of statutorily mandated control measures? Or does the phrase ‘normal activities’ presume only conduct which is lawful under the requirements of the Act?"\textsuperscript{137}

Finally, it is unclear who bears the burden of raising and proving the applicability of CAA section 113(h). In United States v. Pearson,\textsuperscript{138} the Ninth Circuit heard arguments in a prosecution for violations of the CAA’s National Emissions Standards for Hazardous Air Pollutants (NESHAP) with regard to asbestos.\textsuperscript{139} The court held that CAA section 113(h) is an affirmative defense and that a defendant bears the burden of raising and proving the applicability of the provision.\textsuperscript{140} As a matter of general criminal procedure, the U.S. Supreme Court has held that the government normally bears not only the burden of proving all elements of a charged offense, but also the burden to "disprove beyond a reasonable doubt any defense that [may] negate an element of the charged offense."\textsuperscript{141}

\textsuperscript{134} See id. at 384 (noting that CAA section 113(h) does not alter definition of term "person" so as to impose additional requirement on government for conviction).

\textsuperscript{135} See 42 U.S.C. § 7413(c)(6) (2000) (citing language of section 113(h)).

\textsuperscript{136} See United States v. Pearson, 274 F.3d 1225, 1231-32 (9th Cir. 2001) (defining "employee" as "person employed by another for salary or wages").

\textsuperscript{137} See Miskiewicz, supra note 117, at 388 (speculating what constitutes "normal activities" on part of employee).

\textsuperscript{138} 274 F.3d 1225 (9th Cir. 2001).

\textsuperscript{139} See id. at 1228 (stating facts of case).

\textsuperscript{140} See id. at 1232 (noting defendant has burden of proving he or she was performing usual duties or acting under direction of employer).

\textsuperscript{141} See, e.g., United States v. Dodd, 225 F.3d 340, 344 (3d Cir. 2000) (stating although Due Process Clause requires government to prove all elements of charged offense beyond a reasonable doubt). See also In re Winship, 397 U.S. 358 (1970) (requiring government to disprove beyond a reasonable doubt any defense
One can reasonably argue that CAA section 113(h) negates an element of the negligent endangerment offense under CAA section 113(c)(4) by imposing a scienter requirement on the government to prove that a release and endangerment resulted not from negligence, but from "knowing and willful" conduct. Under this analysis, the government would bear the burden of proving that CAA section 113(h) does not apply to a particular defendant. Ultimately, CAA section 113(h) significantly complicates the issue of who qualifies as a "person" for purposes of the CAA's negligent endangerment charging provisions.

One final point that must be considered when addressing the meaning of the term "person" is that CAA section 113(c)(4) does not require a violation of a substantive requirement of the CAA. This is significant and has direct implications concerning the types of individuals and organizations who may be convicted under this charging provision. The CAA's asbestos NESHAP standards are applicable to owners and operators of demolition or renovation activities.\(^1\)\(^2\) As a result, in a criminal prosecution under CAA section 113(c)(1) for a knowing violation of the asbestos NESHAP standards, the government must prove not only that a defendant qualifies as a "person," but also that the defendant is an "owner" or "operator" of a renovation or demolition activity.\(^1\)\(^3\) With regard to prosecutions under CAA section 113(c)(4), however, the government does not need to prove an underlying substantive violation and, therefore, does not need to prove that a defendant, in addition to qualifying as a "person," is also an "owner" or "operator.

2. Standard of Negligence
   a. Proposed Standard

   Despite the previously noted lack of guidance by Congress and the federal courts concerning the meaning of the term "negligently," a reasonable argument can be made that CAA section 113(c)(4) requires proof of ordinary negligence. As explained in more detail below, such a standard is justified by, among other things, the explicit language of the statutory section and the CAA's status as a public welfare statute.

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1. Patterson v. New York, 432 U.S. 197, 201-11 (1977) (finding there is no constitutional bar to defendant bearing burden of persuasion on defenses that do not negate element of offense).
3. See Pearson, 274 F.3d at 1229-30 (explaining required proof of "person" qualification).
First, the language of CAA section 113(c)(4) can be interpreted as indicating that Congress intended an ordinary negligence standard. As a matter of statutory interpretation, courts first look to the plain language of the statute to determine its meaning.\(^{144}\) The commonly accepted meaning of the term "negligently" is one of ordinary negligence ("failure to use such care as a reasonably prudent and careful person would use under similar circumstances").\(^{145}\) Nothing in CAA section 113(c)(4) suggests a different or heightened standard of negligence.

Second, in drafting CAA section 113(c)(4), Congress specifically used the term "negligently," as opposed to specifying a heightened standard (gross or criminal negligence). As the U.S. Court of Appeals for the Ninth Circuit noted in Hanousek, "if Congress intended to prescribe a heightened negligence standard, it could have done so explicitly" in the statute.\(^{146}\)

In fact, when Congress has wanted to incorporate a heightened standard of negligence into the enforcement provisions of a statute, it has explicitly provided for such a standard. For example, CWA section 311(b)(7) provides for increased civil penalties "in any case in which a violation . . . was the result of gross negligence or willful misconduct."\(^{147}\) The lack of similar language in CAA section 113(c)(4) is further evidence that Congress intended an ordinary negligence standard.

Third, an ordinary negligence standard is warranted in light of the CAA's status as a "public welfare statute."\(^{148}\) Currently, a number of federal courts have held that the CAA is a "public welfare statute."\(^{149}\) Additionally, such a classification is warranted in light of the regulatory nature and goals of the CAA. As one commentator noted:


\(^{145}\) See id. at 1120-21 (citing Black's Law Dictionary 1032 (6th ed. 1990); The Random House College Dictionary 891 (Rev. ed. 1980)). See also Ortiz, 427 F.3d at 1283.

\(^{146}\) See Hanousek, 176 F.3d at 1121; Ortiz, 427 F.3d at 1283 (analyzing congressional intent).

\(^{147}\) See Hanousek, 176 F.3d at 1121 (reinforcing plain language) (emphasis added).

\(^{148}\) See United States v. Kung-Shou Ho, 311 F.3d 589, 606 (5th Cir. 2002) (stating CAA as whole is public welfare statute, involving heavily regulated area with great ramifications for public health and safety); United States v. Buckley, 934 F.2d 84, 88 (6th Cir. 1991) (expanding on "public welfare statute").

There is no clear-cut test to determine whether a law is a public welfare statute. However, public welfare statutes do share several characteristics. First, the statutory scheme must protect the public health, safety or welfare. In applying this prong, courts have looked to the plain language of the statute and to the legislative purpose for enacting the law. Second it would be difficult for bystanders to protect themselves against the type of violations targeted by the law . . . Third, the law has either a reduced mens rea requirement or none at all.150

Utilizing this analysis it is clear that the CAA qualifies as a “public welfare statute.” The CAA was enacted by Congress to protect public health, safety or welfare151 because the public generally is not able to protect itself from the dangers of air pollution, but rather must rely upon federal, state and local governments.152 Furthermore, in enacting CAA section 113(c)(4), Congress eliminated the mens rea element of the offense, requiring only a finding of negligence for purposes of imposing criminal penalties. An ordinary negligence standard for the provision will also be more effective in achieving one of the CAA’s stated goals, “to protect and enhance the quality of the [n]ation’s air resources so as to promote the public health and welfare.”153

Fourth, interpreting CAA section 113(c)(4) as requiring an ordinary negligence standard is consistent with a number of federal and state court decisions that have upheld the use of such a standard of negligence in connection with prosecutions under various federal and state statutes. For example, as discussed in Part I of this article, the Ninth and Tenth Circuits in Hanousek and Ortiz held that the term “negligently” requires a showing of only ordinary negligence to secure a conviction under the CWA section 309(c)(1)(A). Similarly, in connection with the prosecution of the captain of the oil tanker Exxon Valdez for a negligent discharge of


151. See id. at 319 (quoting 42 U.S.C. § 7401(a)(2) (2001)) (holding that one goal of CAA is to protect and enhance quality of Nation’s air resources so as to promote public health and welfare and productive capacity of its populations).

152. See id. (stating “[i]f a company pollutes the air in a community, there is simply no reasonable measure that individuals can take (either to clean the air or not to breathe it) to effectively protect themselves from the contamination”).

oil, the Supreme Court of Alaska held that the term “negligently” as used in the criminal charging provision of the state’s environmental law required proof of only ordinary negligence. The Supreme Court of Alaska also noted that such a standard for criminal prosecution is not unique and that “the overwhelming majority of jurisdictions” in the United States provide for the prosecution of “crimes based on ordinary negligence.”

Finally, there is precedent for such a standard in conjunction with a prosecution under CAA section 113(c)(4). Although there are currently no published federal court decisions addressing the applicable standard of negligence under this charging provision, there have been prosecutions. In United States v. Hammer, a CAA negligent endangerment prosecution brought in the U.S. District Court for the Western District of Missouri, the jury instructions defined the term “negligently” as:

An act is done negligently if one fails to use due care under the circumstances. Ordinary care is that care which reasonably prudent persons would exercise in the management of their own affairs. Because the amount of care exercised by a reasonably prudent person varies in proportion to the danger known to be involved in what is being done, the amount of caution required in the use of ordinary care will vary with the nature of what is being done, and all the surrounding circumstances shown by the evidence of the case. To put it another way, any increase in foreseeable danger requires increase care.

As a result, it is appropriate to interpret the term “negligently” as used in CAA section 113(c)(4) as requiring proof of ordinary

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154. See State of Alaska v. Hazelwood, 946 P.2d 875 (Alaska 1997), rev'd, 912 P.2d 1266 (Alaska Ct. App. 1996). The Alaska statute under which Hazelwood was charged provided in pertinent part that “a person may not discharge, cause to be discharged, or permit the discharge of petroleum . . . into, or upon the waters or land of the state except in quantities, and at times and locations or under circumstances and conditions as the department may by regulation permit . . . .” Id. at 878 (quoting ALASKA STAT. § 46.03.740 (2005)).

155. See id. at 885 (disclosing applicable standard). The standard demands "the risk must be of such a nature and degree that the failure to perceive it constitutes a deviation from the standard of care that a reasonable person would observe in the situation." Id. at 877 (citing Hazelwood, 912 P.2d at 1278).

156. See id. at 884 n.17 (citations omitted) (demonstrating frequency of prosecution for ordinary negligence crimes).


negligence, as opposed to a heightened standard of gross or criminal negligence.

b. Elements

Under an "ordinary negligence" standard, the government would be required to prove beyond a reasonable doubt that:

1. The defendant had a duty to act in a particular manner or to abide by a particular standard of care (duty/standard of care);
2. the defendant breached that duty by failing to use such care as a reasonably prudent and careful person would have used in similar circumstances (breach of duty);
3. the defendant's breach was the cause-in-fact of the release of hazardous air pollutants/extremely hazardous substances, and placing another person in imminent danger of death or serious bodily injury (cause-in-fact); and
4. the defendant's breach was the proximate cause of such release and endangerment (proximate cause).\(^{159}\)

With regard to the issue of the applicable standard of care or duty for purposes of CAA section 113(c)(4), one potential source of guidance may be found in CAA section 112(r)(1), otherwise commonly referred to as the "General Duty" clause. The stated objective of the General Duty clause is to "prevent the accidental release and to minimize the consequences of any such release" of regulated substances, including, but not limited to, those extremely hazardous substances listed pursuant to the Emergency Planning and Community Right-to-Know Act (EPCRA).\(^{160}\) The clause imposes a number of obligations on owners and operators of stationary sources, including: identifying hazards which may result from accidental releases using appropriate hazard assessment techniques; designing and maintaining a safe facility in order to prevent releases; and minimizing the consequences of accidents when they occur.\(^{161}\)

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\(^{159}\) See generally Restatement (Second) of Torts § 281 (1965) (explaining elements of cause of action for negligence).


The General Duty clause does not prescribe the measures an owner or operator must take in order to comply, but rather requires owners and operators first to look to "applicable industry practices or standards, or state or federal regulations." If no such industry standards or regulations exist, they are required to take "appropriate measures" to prevent releases or minimize the consequences of such releases. In effect, these industry standards, regulations and appropriate measures provide a basis for evaluating whether a person has breached his or her standard of care/duty and, therefore, acted negligently for purposes of CAA section 113(c)(4).

3. Release into Ambient Air

In order to secure a conviction under CAA section 113(c)(4), the government must prove that a defendant is responsible for negligently releasing into the ambient air certain designated hazardous air pollutants or extremely hazardous substances.

a. Release

The CAA does not define the term "release" for purposes of CAA section 113(c)(4). This term is defined in a number of other federal environmental statutes and regulations, and generally refers to some type of emission or discharge. Under CAA section 112(r)(2)(A), an "accidental release" is defined to mean "an unanticipated emission of a regulated substance or other extremely hazardous substance into the ambient air from a stationary source." Similarly, the CERCLA and the EPCRA both define the term "release" to mean "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." There is nothing either in the language of CAA section 113(c)(4) or its legislative history to sug-

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162. See Guidance, supra note 161, at 12 (offering aspects to consider when assessing compliance).
163. See id. (describing how to best comply with general duty clause of CAA).
164. See United States v. Grace, 429 F. Supp. 2d 1207, 1239 n.31 (D. Mont. 2006) (disclosing five-year statute of limitations applicable to CAA’s Knowing Endangerment offense). Offenses under CAA § 113(c)(4) are subject to the five-year statute of limitations provided by 18 U.S.C. § 3282(a).
166. See id. § 9601(22) (defining "release"); 42 U.S.C. § 11049(8) (defining "release"). See also Amland Props. Corp. v. Aluminum Co. Am., 711 F. Supp. 784, 793 (D.N.J. 1989) (demonstrating for CERCLA purposes, "courts have been inclined to give a broad reading to the terms 'release' and 'threatened release'").
suggest that Congress intended a different or narrower definition of the term for purposes of the charging provision.

Additionally, it is important to note that CAA section 113(c)(4) does not contain a size or quantity threshold for purposes of triggering a criminal prosecution. Rather, the “offense covers all release of all hazardous air pollutants listed in § 7412 [or extremely hazardous substances under section 112 of the EPCRA] regardless of size or quantity of the release so long as the release causes imminent danger.”

CAA section 113(c), however, does contain a limitation or shield to prosecution under the CAA’s knowing and negligent endangerment provisions. More specifically, CAA section 113(c)(5)(A), commonly referred to as the “emissions clause,” provides that for any air pollutant for which the Administrator has set an emissions standard or for any source for which a CAA permit has been issued, a release of such an air pollutant either in accordance with its emission standard or the terms of an applicable CAA permit does not constitute a violation for purposes of either the knowing or negligent endangerment provisions of the CAA. To date, at least one federal court has held that the “emission clause” constitutes an affirmative defense and that the burden to raise and prove the applicability of the clause rests on a defendant.

One final matter that has yet to be resolved, but may have significant implications for the government and defense bar, is whether CAA section 113(c)(4) is limited to releases from stationary sources, or whether releases from mobile sources may also trigger criminal liability. For example, it is unclear whether the CAA’s negligent endangerment provision would apply to a negligent release of a hazardous air pollutant from a tanker truck on the nation’s highways that causes imminent danger of serious bodily injury to passing motorists. The language of the CAA provision on its face does not make a distinction between releases from stationary or mobile sources. Such an interpretation, however, may be in conflict with the underlying regulatory structure of the CAA. CAA section 112, the primary section of the CAA addressing the regulation of hazardous air pollutants, is limited in scope to releases from

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167. See Grace, 429 F. Supp. 2d at 1232 (stressing imminence as determinative factor for offense).
169. See id. (describing effect of obtaining permit).
170. See Grace, 429 F. Supp. 2d at 1236 (discussing legislative intent to include affirmative defense).
stationary sources. As a result, an argument can be made that CAA section 113(c)(4) should also be interpreted as applying only to releases from stationary sources.

b. Ambient Air

Under CAA section 113(c)(4), the government must prove that a release has been made into "ambient air." The term "ambient air" is not defined for purposes of the criminal enforcement provisions of the CAA. Guidance concerning its meaning can be found in the legislative history of the 1990 Amendments to the CAA. The House bill that was part of the conference process for the 1990 Amendments "limited the scope of the endangerment provisions to releases into the ambient air." The corresponding Senate bill was much broader in scope, covering "all releases into the air . . . not only the ambient air but also the air inside the workplace." In reconciling these two bills, the Conference Committee ultimately adopted the House version and the term "ambient air" was enacted into law. As a result, the legislative history for the 1990 amendments indicates that the CAA's negligent endangerment provision is limited to releases that occur outside of buildings or confined spaces.

Such a position is consistent with how this term has been defined in other federal statutes and regulations. For example, as part of the regulations promulgated by the EPA for National Primary and Secondary Ambient Air Quality Standards under the CAA, the term "ambient" is defined as "that part of the atmosphere, external to buildings, to which the general public has access." Similarly, as part of the Agency's regulations implementing CERCLA, "ambient air" is defined to mean "air that is not completely enclosed in a building or structure and that is over and around the grounds of a facility." As a result, releases that occur inside a building or structure, and which either do not escape or have the

172. See id. § 7413(c)(4) (identifying element of statute).
174. See id. at *34 n.182 (citing S. 1630 at section 601(c)(2) and (c)(5)) (discussing benefits of broad interpretation).
175. See id. at *34 n.183 (interpreting narrower definition into statute).
176. See 40 C.F.R. pt. 50.1(e) (defining ambient air).
potential to escape outside the structure, will most likely not qualify as releases into “ambient air” for purposes of CAA section 113(c)(4).

4. **Hazardous Air Pollutants/Extremely Hazardous Substances**

In order to be covered by CAA section 113(c)(4), there must be a release of either a hazardous air pollutant provided under CAA section 112 or an extremely hazardous substance listed pursuant to EPCRA section 302(a)(2).\(^{178}\) For purposes of the CAA, the term “hazardous air pollutant” is defined as “any air pollutant listed pursuant to [CAA section 112(b)].”\(^{179}\) As part of the 1990 Amendments, Congress established in CAA section 112(b) an initial list of 189 hazardous air pollutants that are regulated by the CAA.\(^{180}\) Pursuant to CAA section 112(b)(2), EPA is tasked with periodically revising and/or modifying this list as appropriate.\(^{181}\) A list of “extremely hazardous substances” that are subject to regulation under EPCRA section 302(a) is set forth at 40 CFR part 35, Appendices A and B.\(^{182}\)

5. **Negligent Endangerment of Another Person**

As part of a prosecution under CAA section 113(c)(4), the government is required to prove that, at the time of the release, a person other than the individual or entity responsible for the release was negligently placed in “imminent danger of death or serious bodily injury.” The term “imminent danger” is not defined for purposes of the CAA’s knowing and negligent endangerment offenses. As previously discussed, these provisions were modeled on similar provisions in the CWA and RCRA.\(^{183}\) In connection with a prosecution under RCRA’s knowing endangerment provision, the term “imminent danger” was defined as “the existence of a condition or combination of conditions which could reasonably be expected to

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\(^{179}\) See id. § 7412(a)(6) (defining hazardous air pollutant).


\(^{183}\) See Grace, 429 F. Supp. 2d at 1235 (quoting S. Rpt. No. 103-38(I) (1993), reprinted in Legislative History of Clean Air Act Amendments of 1990, at 941 (1993). The criminal provisions of CAA section 113(c) “are largely modeled upon those contained in the [Clean Water Act (CWA)] and [the Resource Conservation and Recovery Act (RCRA)], and we expect them to operate in the same fashion as those have operated.” Id.
cause death or serious bodily injury unless the condition is remedied.”

In United States v. Hansen, a prosecution under RCRA’s knowing endangerment provision, the U.S. Court of Appeals for the Eleventh Circuit held that “danger” for purposes of the offense can be proven through the introduction of expert testimony and reports addressing potential injuries. Additionally, with regard to the phrase “imminent danger,” courts have held that the danger associated with a release must be imminent, while the consequences of such imminent danger (the death or serious bodily injury) need not manifest themselves for a period of time, if at all.

The term “serious bodily injury” is defined in the CAA’s criminal charging provisions to mean “bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty.” This definition is most likely not exhaustive, and other types of injuries that are comparable, but not specifically listed in the aforementioned definition, will probably be held to constitute “serious bodily injury” for purposes of CAA section 113(c)(4).

Finally, it is important to note that the government does not bear the burden of proving that a person has actually suffered death or serious bodily injury in order to convict a defendant under CAA section 113(c)(4). Rather, it is sufficient that a person is placed in imminent danger of either death or serious bodily injury as a result of a defendant’s actions.

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184. See United States v. Protex Indus., Inc., 874 F.2d 740, 744-45 (10th Cir. 1989) (affirming court and rejecting defendant’s argument that term should be defined as requiring “substantial certainty” as opposed to “reasonable expectation”).
186. See id. at 1243-44 (providing example of proving criminal offense).
187. See Protex Indus., Inc., 874 F.2d at 743 (explaining enhanced “risk” of contracting some indeterminate type of cancer at some unspecified time in future is sufficient to constitute serious bodily injury).
6. Applicable Defenses

The CAA specifically provides that:

It is an affirmative defense to a prosecution that the conduct charged was freely consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards or – (i) an occupation, a business, or a profession; or (ii) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent.190

Furthermore, a defendant retains under the CAA “[a]ll general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other Federal criminal offenses, including, but not limited to [c]oncepts of justification and excuse.”191

IV. CRIMINAL PENALTIES AND SENTENCING

A. CWA section 309(c)(1)(A)

1. Criminal Penalties

Negligence-based offenses under CWA section 309(c)(1) are Class A misdemeanors192 subject to either a term of imprisonment of up to one year, a fine of not less than 2500 dollars nor more than 25 thousand dollars per day of violation, or both.193 Subsequent convictions under the statute are subject to a term of imprisonment of not more than two years and/or a fine of not more than 50 thousand dollars per day of violation.194 Unlike the other major federal environmental statutes enforced by the EPA, the CWA’s charging provisions are unique in that they provide not only for a statutory maximum fine amount, but also prescribe a statutory minimum of 2500 dollars in those cases in which a fine is imposed on a defendant.195

191. See id. § 7413(c)(5)(D) (noting all criminal defenses apply in current situation).
194. See id. (explaining punishment for subsequent convictions for negligence-based offenses).
195. See id. § 1319(c)(1) (stating minimum fine under CWA).
With regard to the calculation of a fine for purposes of CWA section 309(c)(1), the terms and requirements of the Alternative Fines Act (AFA) must be considered. Generally, the AFA applies to all federal crimes, unless the law setting forth an offense "specifies no fine or a fine that is lower than the fine otherwise applicable" under the AFA, and the charging statute specifically exempts the offense from the AFA. In situations where it is applicable, the AFA sets forth a separate fine schedule. More specifically, under the AFA, an individual convicted of a Class A misdemeanor may be fined the greater of: 100 thousand dollars for an offense that does not result in death; 250 thousand dollars for an offense that results in death; twice the gain or loss resulting from the crime; or "the amount specified in the law setting forth the offense."\(^{196}\) With respect to organizations, the AFA establishes a maximum fine for a Class A misdemeanor the greater of: 200 thousand dollars for an offense that does not result in death; 500 thousand dollars for an offense that results in death; twice the gain or loss resulting from the crime; or "the amount specified in the law setting forth the offense."\(^ {197}\) To date, the government has argued successfully to at least one U.S. Court of Appeals that the AFA is applicable to criminal prosecutions under the CWA and that, more specifically, fines for convictions under the CWA section 309(c)(1)(A) should be calculated in accordance with the AFA.\(^ {198}\)

Finally, in addition to the aforementioned criminal penalties, a person convicted under CWA section 309(c)(1) also may receive the following sentences: a term of probation;\(^ {199} \) an order to provide restitution to victims of the crime;\(^ {200} \) special court assessments;\(^ {201} \) and community service.\(^ {202} \) Additionally, an organization, like a corporation, that has been convicted under CWA section 309(c)(1) will be precluded from entering into certain types of contracts with the federal government concerning the procurement of goods, materials or services.\(^ {203} \)

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196. See id. §§ 3571(b)(1), (d) (describing fines).
197. See id. §§ 3571(c), (d) (describing fines).
198. See United States v. Ming Hong, 242 F.3d 528, 533 (4th Cir. 2001) (holding that fines under CWA should be determined pursuant to AFA).
200. See id. § 3663 (describing order of restitution).
201. See id. § 3013 (describing special assessments on convicted persons).
202. See id. § 3563(b)(12) (describing conditions of probation).

No [f]ederal 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 sentence of a defendant convicted under CWA section 309(c)(1) will be determined in accordance with the sentencing factors set forth in Title 18 of the United States Code section 3553, which require that a federal judge take into consideration, inter alia, the United States Sentencing Commission's Guidelines Manual (Guidelines Manual or Guidelines). The Guidelines were issued by the United States Sentencing Commission pursuant to the Sentencing Reform Act of 1984 and became effective on November 1, 1987. Their stated goals are to provide honesty, uniformity and proportionality in sentencing. In 2005, the U.S. Supreme Court in United States v. Booker held that the Guidelines are no longer mandatory, but only advisory for sentencing purposes. More specifically, the Court held that "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." District courts are still required to make an accurate Guidelines calculation as part of the sentencing process, and sentences determined in accordance with the Guidelines are deemed to be "per se" reasonable.

Guidelines calculations for individuals convicted of environmental crimes are governed by Part 2Q of the Guidelines Manual. Generally, the Part 2Q Guidelines establish a base offense level and provide for upwards or downwards adjustments based on 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 conviction occurred, and if such facility is owned, leased, or supervised by such person.

Id.

209. See id. at 262-64 (stating necessity of Guidelines Manual).
210. See id. at 264 (citing statute).
211. See id. at 261-63 (stating court of appeals review sentencing decisions for unreasonableness, helping to avoid excessive sentencing discrepancies and maintaining flexibility).
212. See Barrett, J., Criminal Enforcement of Environmental Laws: Sentencing Environmental Crimes Under the U.S. Sentencing Guidelines – A Sentencing Lottery, 22 ENVTL.

https://digitalcommons.law.villanova.edu/elj/vol18/iss1/1
upon case specific characteristics.\textsuperscript{213} Most federal environmental crimes are governed by Guidelines sections 2Q1.2 or 2Q1.3, depending on the particular pollutant involved in a case.\textsuperscript{214} Guidelines section 2Q1.2 pertains to offenses involving the mishandling of hazardous/toxic substances or pesticides.\textsuperscript{215} Guidelines section 2Q1.3 concerns offenses involving the mishandling of pollutants not covered by Guidelines section 2Q1.2.\textsuperscript{216} Organizations convicted of an environmental offense are subject to the provisions in Chapter 8 of the Guidelines.

Defendants convicted under CWA section 309(c)(1) will have their Sentencing Guidelines calculations performed under either Guidelines section 2Q1.2 or 2Q1.3 depending upon the nature of the pollutant involved in their cases.\textsuperscript{217} As a result, Guidelines section 2Q1.2 will be applicable to cases of negligent violations of the CWA involving hazardous/toxic substances or pesticides. Guidelines section 2Q1.3 will govern cases of negligent violations of the CWA involving other types of pollutants.

In most respects, the Guidelines function identically with regard to both knowing and negligence offenses. Application Note 4 for Guidelines section 2Q1.2 and Application Note 3 for Guidelines section 2Q1.3, however, specifically provide that in cases involving crimes based upon negligent conduct, a downward departure may be warranted in light of the offense characteristics of a specific case.\textsuperscript{218}

3. Case Applications of Guidelines

a. United States v. Hanousek

In \textit{Hanousek}, the defendant’s sentencing guidelines were calculated pursuant to Guidelines section 2Q1.3 because the district court considered oil, which was the pollutant discharged into the

\textsuperscript{213} See generally \textit{Guidelines Manual} § 2Q (2005) (describing point system used to calculate the offense).

\textsuperscript{214} See Barrett, \textit{supra} note 212 at 1426 (stating applicable sentencing guidelines for environmental crimes).

\textsuperscript{215} See \textit{Guidelines Manual} § 2Q1.2; see also Barrett, \textit{supra} note 212 at 1426 (describing Section 2Q1.2).

\textsuperscript{216} See \textit{Guidelines Manual} § 2Q1.3 (describing section 2Q1.3).

\textsuperscript{217} See id. §§ 2Q1.2, 2Q1.3 (noting that each section applied to specific substances).

\textsuperscript{218} See id. at §§ 2Q1.2 cmt. n.4, 2Q1.3 cmt. n.3 (noting availability of downward adjustment of sentence when negligence present).
Skagway River, neither a hazardous nor a toxic substance.219 Under Guidelines section 2Q1.3 the defendant’s calculation started with a base offense level of six.220 The district court increased the calculation upwards by four offense levels under Guidelines section 2Q1.3(b)(1)(B) because the defendant’s crimes involved a discharge or release of a pollutant and also made a two-level adjustment upwards based upon the defendant’s supervisory role in the offense.221 Combining the defendant’s total offense level of twelve and his Criminal History Category of I, resulted in a Guidelines range of ten to sixteen months (Zone C).222 Hanousek was sentenced to six months in a halfway house, and six months of supervised release.223 The Ninth Circuit affirmed the sentence and ruled that the district court had correctly calculated the Guidelines.224

b. United States v. Ortiz

In Ortiz, the defendant also was sentenced pursuant to Guidelines section 2Q1.3 because the district court determined that the nature of the pollutant involved in the case was neither hazardous nor toxic.225 The district court started with a base offense level of six but then refused the government’s request to increase the calculation by six offense levels under Guidelines section 2Q1.3(b)(1)(A).226 The court held that the government had failed to prove that the defendant discharged pollutants on a continuous

219. See Brief of Petitioner-Appellant at **59-60, United States v. Hanousek, No. 97-30185, 1997 WL 33487093 (9th Cir. Nov. 28, 1997) (stating on which section of Guidelines Manual court relied in calculating sentence). It is important to note that the Hanousek case was decided prior to the U.S. Supreme Court’s decision in Booker.

220. See Guidelines Manual § 2Q1.3(a) (stating base offense level of section 2Q1.3).

221. See Brief of Petitioner-Appellant at *60, United States v. Hanousek, No. 97-30185, 1997 WL 33487093 (9th Cir. Nov. 28, 1997); (explaining how guidelines affected defendant’s penalty); see also Guidelines Manual at § 3B1.1(c) (citing statutory authority for aggravating role).

222. See Guidelines Manual § 1A1.1 at Sentencing Table (noting defendant must have been organizer, leader, manager or supervisor of one or more of participants).


224. See Hanousek, 176 F.3d 1116, 1126 (affirming sentence imposed by lower court).

225. See United States v. Ortiz, 427 F.3d 1278, 1284 (10th Cir. 2005) (showing on which section of Guidelines Manual court relied).

226. See id. at 1285-86 (explaining how court determined sentence); see also Opening Brief of Appellant at *15, United States v. Ortiz, No. 04-1228 (10th Cir. Apr. 27, 2005) (describing sentencing tables employed by court).
The court also refused the government's request to increase the calculation by four levels in light of the defendant's discharge without a permit under Guidelines section 2Q1.3(b)(4).\textsuperscript{228} It held that the enhancement is only applicable when a permit is available for the activity and in this case the defendant had failed to obtain one.\textsuperscript{229} The court sentenced Ortiz to twelve months imprisonment.\textsuperscript{230} On appeal, the Tenth Circuit reversed and remanded. With regard to the four level increase for a discharge without a permit, the Tenth Circuit held that "factual impossibility of obtaining a permit is not a defense to 2Q1.3(b)(4) enhancement."\textsuperscript{231} The Tenth Circuit also held that Guidelines section 2Q1.3(b)(1)(A) applies to negligent discharge violations.\textsuperscript{232} It did note that a downward departure may be warranted in such cases due to the fact that negligence, as opposed to knowing conduct, was involved.\textsuperscript{233} As of the writing of this Article, the defendant in Ortiz has yet to be resentenced.

B. CAA section 113(c)(4)

1. Criminal Penalties

CAA section 113(c)(4) provides for the imposition of Class A misdemeanor-level penalties.\textsuperscript{234} More specifically, a defendant convicted pursuant to CAA section 113(c)(4) is subject to a fine to be determined in accordance with Title 18 of the United States Code (i.e., the Alternative Fines Act) and/or a term of imprisonment not to exceed one year.\textsuperscript{235} If the defendant is a repeat offender previously convicted under CAA section 113(c)(4), "the maximum punishment shall be doubled with respect to both the fine and imprisonment."\textsuperscript{236}

\textsuperscript{227} See Ortiz, 427 F.3d at 1285-86 (holding government had to establish more than two discharges).
\textsuperscript{228} See id. at 1284 (stating holding of Ortiz).
\textsuperscript{229} See id. (finding it unlikely defendant could obtain permit to dump chemical waste into river).
\textsuperscript{230} See id. at 1281 (finding no evidence of defendant's awareness).
\textsuperscript{231} See id. at 1284 (reviewing defendant's decision de novo).
\textsuperscript{232} See Ortiz, 427 F.3d at 1286 (holding that lower court is erroneous for finding that Ortiz's offense did not result in ongoing, continuous or repetitive discharge of pollutant).
\textsuperscript{233} See id. at 1285-86 (explaining in Application Note 3 that cases involving negligent conduct downward departure may be unwarranted).
\textsuperscript{234} See 18 U.S.C. § 3559(a)(6) (2000) (imposing sentence of one year or less but more than six months).
\textsuperscript{236} See id. (providing punishment for second conviction).
2. **Sentencing Factors and Sentencing Guidelines**

Defendants convicted under CAA section 113(c)(4) will have their sentences determined in accordance with the sentencing factors set forth in Title 18 United States Code section 3553, including the Guidelines.237 Because offenses under CAA section 113(c)(4) involve either hazardous air pollutants or extremely hazardous substances, sentencing guidelines calculations are governed by Guidelines section 2Q1.2.

Generally, Guidelines section 2Q1.2 establishes a base offense level of eight and then provides for various upward or downward adjustments depending upon case specific factors. For example, up to a six offense level increase may be applicable if the underlying offense involves a release of a hazardous or toxic substance.238 Nevertheless, application of this part of the Guidelines is fact-specific and “[d]epending upon the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, a departure of up to two levels in either direction” may be appropriate.239 Additionally, up to a nine level increase may be warranted if the offense resulted in a substantial likelihood of death or serious bodily injury.240 Further, if death or serious bodily injury results, a departure pursuant to Sentencing Guidelines Chapter Five, Part K may be warranted.241 Because CAA section 113(c)(4) addresses negligent offenses, the Guidelines specifically provide that a downward departure may be warranted.242 Ultimately, a term of imprisonment imposed for a conviction under CAA section 113(c)(4) may not exceed the one-year statutory maximum per count.

V. Conclusion

The very idea of the federal government being able to charge a person with an environmental crime, albeit a misdemeanor, while not having the burden to produce evidence of either criminal in-

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237. See Guidelines Manual § 1B1.9 (2005) (describing sentence determination for defendants convicted under CAA section 113(c)(4)).

238. See id. § 2Q1.2(b)(1)(A)-(B) (describing offenses).

239. See id. § 2Q1.2(b) cmt. n.5 (noting important characteristics of offenses).

240. See id. § 2Q1.2(b)(2) (describing punishment for offenses resulting in death or serious bodily injury).

241. See id. § 2Q1.2(b) cmt. n.6 (recommending departure from normal sentencing when death or serious bodily injury results from offense).

tent or criminal negligence, may seem to some an anathema to the American criminal justice system. As previously discussed, however, the negligence-based criminal charging provisions of the CWA and CAA are neither novel nor contrary to notions of constitutional due process. Rather, they represent a careful balancing between the rights of a defendant and the need of the public to be protected from certain conduct that may have serious adverse consequences on human health and the environment.

Although infrequently used, these charging authorities still play a vital role in the EPA’s efforts to enforce the nation’s environmental laws. They provide a substantial deterrent and incentive to members of the regulated community to institute preventative measures to ensure that regulatory violations and releases of certain pollutants into our environment do not occur.

An ordinary negligence standard for purposes of securing a criminal conviction under these charging provisions is not only warranted in light of the plain language of the statutes, but it is also essential for purposes of achieving the primary goal of these laws — the protection of public health and the environment. The overwhelming majority of the federal courts have yet to issue rulings concerning the applicable standard of negligence required under the CWA and CAA negligence-based charging provisions. The case holdings in the Ninth and Tenth Circuits, however, are virtually identical and the opinions are firmly grounded in well-accepted canons of statutory interpretation. These rulings will most likely serve as harbingers as to how other Circuits will address this issue, and it is likely the government will argue in the future for an ordinary negligence standard under the CWA and CAA.