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ENVIRONMENTAL CRIMINAL PROSECUTIONS: SIMPLE FIXES FOR A FLAWED SYSTEM

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I. Introduction

As Benjamin R. Civiletti stated while Attorney General:

The manner in which federal prosecutors exercise their decision-making authority has far-reaching implications, both in terms of justice and effectiveness in law enforcement and in terms of the consequences for individual citizens. A determination to prosecute... recognize[es] both that serious violations of federal law must be prosecuted, and that prosecution entails profound consequences for the accused and the family of the accused whether or not a conviction ultimately results.¹

It is impossible to disagree with this perception by the Department of Justice. First, it is generally recognized that although civil enforcement actions by the government can have serious consequences, including monetary penalties; the consequences of a criminal prosecution or investigation are even more significant, including substantial monetary penalties, the possibility of hard jail time, and a recognized "stigma of criminality."

Moreover, it is not unusual for an environmental criminal defendant to incur several hundred thousand dollars in attorneys' fees if a case goes to trial. Indeed, it is because of the potency of criminal charges that regulators increasingly view criminal enforcement as a preeminent deterrent to serious environmental

violations. Second, the recognition of former Attorney General Civiletti that "[t]he manner in which federal prosecutors exercise their decision-making authority has far-reaching implications" cannot be disputed. This conclusion, in fact, leads to periodic efforts on the part of law enforcement officials, judges, and panels establishing sentencing guidelines, to seek uniform penalties for comparable crimes. Similarly, the establishment of federal sentencing guidelines seeks to assure national uniformity in penalties (i.e., defendants found guilty of similar crimes in California and Maine will be punished similarly).

However, criminal enforcement of environmental law is a relatively new and vigorously evolving practice. There are, accordingly, few established standards for determining which environmental violations rise to the level of criminality and who within the governmental enforcement hierarchy makes that determination. There is also little assurance of centralized supervi-

2. See, e.g., E. Dennis Muchnicki, Only Criminal Sanctions Can Ensure Public Safety, 7 ENVTL. FORUM 31 (May/June 1990).

Moreover, the U.S. Sentencing Commission setting guidelines for environmental criminal offenses noted that "[t]he Commission was also aware that Congress has expressed views in favor of tougher penalties for white collar offenses, a category that includes many environmental offenders. Environmental offenses can — and quite often do — pose a threat to society that far outweighs their numbers." Address by the Honorable William A. Wilkins, Chairman, U.S. Sentencing Commission, National Conference on Local and State Enforcement of the Environmental Laws (Mar. 30, 1989).

3. DOJ MANUAL, supra note 1.


5. The standards for criminal environmental violations can be surprisingly low. Under the Clean Water Act, mere negligent violation can be sufficient. See 33 U.S.C. § 1319(c) (1987). Thus, as a technical matter, a company discharging in violation of its National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act may be held criminally responsible. Id. If there is a pattern of violation of minor permit parameters, even a knowing violation might be established. Id. at 3. Giving substantive content to imprecise statutory standards like this is a pressing and difficult project for the EPA and the Department of Justice. In addition, certain presumptions water down the knowledge element that the government typically must show to prove a felony offense under an environmental statute, easing the government's evidentiary burden. See, e.g., United States v. Freed, 401 U.S. 601 (1971) (in prosecutions under public welfare statutes, proof of knowledge of legal offense not required); United States v. Park, 421 U.S. 658 (1975) (under "responsible corporate officer theory," officers with authority over area of violation can be held criminally liable under health and safety laws without proof of intent to commit violative act). See generally infra notes 7-36 and accompanying text.

James N. Strock, until recently EPA's Assistant Administrator for Enforcement, has acknowledged the difficulties in enforcing complicated regulatory re-
sion over local prosecutions by United States Attorneys' offices in the fifty states, which may be influenced by local political agendas. Also, regional offices frequently lack expertise in environmental criminal law, and generally are without knowledge of, or appreciation for, well-established civil and administrative prosecution options for environmental violations.6

In sum, there are inadequate mechanisms for encouraging uniform application of environmental criminal law across the country. Indeed, whether a violation is treated criminally, civilly or administratively is more a function of what type of investigator learns of the violation first and in what judicial district the violation occurs, not the nature or environmental severity of the violation.

This article first considers the Justice Department's centralized review procedures for civil environmental enforcement actions, whether proposed by regulatory agencies, U.S. Attorneys, or the Justice Department itself, and examines the contrasting lack of such oversight of criminal environmental prosecutions, as well as a possible model for such oversight. We note at the same time that the complex issue of centralized review of proposed criminal environmental prosecutions has been the subject of long-standing debate at the Department of Justice.

Second, this article considers the culpability requirements in environmental crimes. The statutory and judicial definition of "knowing" is discussed in detail because the majority of the environmental statutes require a "knowing" violation. Given the serious nature of the crimes and the penalties involved, the complexity of the laws, and the broad applicability of the federal environmental laws to American society; a higher level of culpability should be imposed, either as a matter of prosecutorial discretion or through statutory amendment. This higher standard would establish a bright line between those environmental violations that are criminal and those that are civil and administrative,


6. Meanwhile, as noted by former EPA Assistant Administrator for Enforcement Strock, "[w]here a regulation becomes tremendously complex or ambiguous to a person of reasonable intelligence, it is hard to comply with . . . . If it is hard to comply with it is hard to enforce." Strock Statement, supra note 5 at 771.
thereby guiding prosecutors and establishing standards of conduct that the public can understand.

II. THE CASE FOR CENTRALIZED REVIEW OF ENVIRONMENTAL CRIMINAL ACTIONS

A. Uniform National Enforcement of Civil Environmental Laws

It is generally recognized that compliance requirements under environmental laws are complex and technical and growing more so by the day. EPA’s regulations alone, without explanatory preambles and agency guidance, total over 10,000 pages in the Code of Federal Regulations and are constantly changing. The regulatory scheme is so complex that environmental regulators, consultants, and lawyers necessarily specialize in discrete facets of the regulations. Consistent with recognition of this complexity, the Justice Department has, in cooperation with EPA, established procedures to review and assess the appropriateness of proposed enforcement actions involving civil environmental violations.

The Environmental Enforcement Section of the Justice Department’s Environment and Natural Resources Division (Enforcement Section) has Departmental responsibility for civil matters initiated on behalf of the United States to secure control and abatement of environmental pollution. In the case of civil enforcement referrals by EPA — the primary source of enforcement cases — normal procedure involves compilation of a referral package by an EPA attorney, followed by internal EPA review according to established procedures. After EPA approval of the referral package, it is forwarded to the Enforcement Section, where it is carefully reviewed by a trial attorney and his supervisors, including the chief or deputy chief of the Section. An approval memorandum compiled by the Section based on the EPA referral, together with the related complaint, are then presented for formal approval by the Assistant Attorney General for the Environment, who must sign the complaint before it can be filed.

With limited exceptions, all enforcement cases arising under the environmental statutes entrusted to the Enforcement Section require the prior review and approval of the Assistant Attorney

7. See DOJ Manual 5-12.111 at 5-98.
8. See Kevin A. Gaynor, Too Many Cooks . . ., 6 ENVTL. FORUM 9, 10 (Jan./Feb. 1989).
10. Id.
General before they can be filed. Only a limited category of cases may be handled by U.S. Attorneys as direct referrals without specific authorization: (1) cases referred by the Coast Guard for collection of cleanup costs or civil penalties under the Clean Water Act; or (2) miscellaneous proceedings, such as warrants, in aid of agencies seeking investigative entry under environmental statutes. For example, where a case has been directly referred to a U.S. Attorney by a regulatory agency or an FBI agent, the U.S. Attorney is required to notify and keep the Section informed of the proceeding. Even where circumstances present a need for swift enforcement, U.S. Attorneys are directed to contact the chief of the Enforcement Section.

The centralized review procedures under which civil environmental enforcement cases are brought may not guarantee, but can help to ensure both that the cases that are pursued by the government meet minimum standards and that national precedents resulting from local enforcement actions will be good precedents for the government. At the same time, this review process helps to ensure uniform application of the law on a national basis, the original impetus for a comprehensive environmental regulatory structure.

B. Limited Justice Department Oversight of Environmental Criminal Enforcement

By contrast, in the case of criminal enforcement of environmental laws, the Justice Department has established no approval process like that established in the civil environmental arena. Justice Department procedures acknowledge that certain en-
mental crimes cases, although subject to the ultimate authority of the Assistant Attorney General for the Environment, may be handled entirely by U.S. Attorneys, with no consultation of the Environmental Crimes Section. The procedures recognize that other environmental cases may be developed and referred by regulatory agency personnel to FBI agents who work with U.S. Attorneys or by regulatory agency personnel referring matters directly to U.S. Attorneys’ offices. For such cases, the Crimes Section procedures provide that the Section’s expertise is available to the U.S. Attorneys’ offices if they choose to use it.

U.S. Attorneys are authorized to commence prosecution of any matter arising under enumerated environmental statutes, provided that notification of the decision to prosecute is given to the Environmental Crimes Section. U.S. Attorneys also retain authority to prosecute cases under environmental statutes which are not developed or referred to them by a federal agency, subject to notification of the Assistant Attorney General for the Environment Division. Pursuant to this authority, cases can be brought without any involvement of EPA or any other federal regulatory agency, in contrast to the formal referral process found in the civil enforcement procedures.

U.S. Attorneys are notably unsupervised in initiating criminal environmental investigations. Although the Manual “encourages” U.S. Attorneys to contact the Crimes Section to take advantage of the Section’s expertise in drafting affidavits for warrant applications and grand jury subpoenas, nothing compels them to do so. Meanwhile, these elements of an investigation are in themselves potentially more invasive than a discreet inquiry by an investigator, and an investigation brings with it a stigma that can significantly affect morale in the workplace.

Thus, the Environmental Crimes Section frequently has the role of a bystander, while the prosecution is carried on by the U.S. Attorney. Under the relatively laissez-faire framework established by the Department for oversight of environmental criminal prosecutions, there is nothing to prevent the U.S. Attorneys from in-
vestigating, issuing subpoenas, convening grand juries, and initiating prosecutions without consultation with the Justice Department.\(^\text{23}\)

This arrangement is far different from the enforcement established for civil violations of environmental laws, yet governs an area — criminal enforcement — in which the need for uniform application of the law is often much higher, given the enormous impact a criminal investigation has on individuals and companies. The reason for the substantially different supervisory authority of the Enforcement and Crimes Sections is not clear, but is certainly not justified by the difference in expertise of U.S. Attorneys compared with the Crimes Section. Environmental law is notoriously technical and complex and few U.S. Attorneys or Assistant U.S. Attorneys have extensive expertise in this area. None have resources akin to those of the Environmental Crimes Section, and, most importantly, none have the vantage point of the Crimes Section to assure consistent application of the law on a national basis.

Further, although U.S. Attorneys have traditionally undertaken local prosecution of certain federal criminal statutes\(^\text{24}\) the standards of liability, evidence, and proof under such statutes are often long-established and well understood. Environmental law, by contrast, is continually evolving through rulemaking and litigation that results in new interpretations of these laws. Moreover, the detailed centralized approval procedures established in the

\(^{23}\) In fact, the Department of Justice has not established standards by which federal prosecutors should decide whether or not to even bring a criminal case or how to assess the strength of such a case. For example, federal prosecutors have been "encouraged" by the Department of Justice to consider an environmental offender's audit program and voluntary disclosure of violations when contemplating criminal prosecution and in assessing the need for leniency. See U.S. Department of Justice, Environmental and Natural Resources Division Memorandum from Richard B. Stewart, Assistant Attorney General to all United States Attorneys, regarding Exercise of Criminal Prosecutorial Discretion for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator, June 3, 1991.

This guidance sets forth factors to be considered in assessing the strength of the criminal case, such as cooperation with the government, voluntary disclosure, and compliance programs. It provides examples of situations whereby the presence of certain criteria might suggest leniency. However, DOJ falls short of actually setting standards for criminal prosecution and reassures prosecutors that prosecutorial discretion still prevails.

\(^{24}\) But see, e.g., discussion infra notes 26-35 and accompanying text (regarding criminal tax prosecutions). See also DOJ Manual 7-5.000 - 7-5.628 (Assistant Attorney General for Antitrust Division must authorize U.S. Attorney investigation, grand jury proceedings and indictments based on violations of antitrust laws); DOJ Manual 9-2.132 (criminal prosecutions relating to national security may not be instituted without express authority of Criminal Division).
case of environmental civil enforcement indicates a recognized interest in uniform federal enforcement of the environmental laws. However, such uniform enforcement would seem even more important in the case of potentially more invasive and threatening criminal prosecutions in the environmental area.

At the same time, Justice Department procedures to ensure uniform application of criminal environmental laws are clearly feasible. The Justice Department has established centralized procedures for criminal enforcement of the tax laws, indicating that such procedures do not unreasonably restrict enforcement of tax laws, but serve an important countervailing public interest: the uniform national application of tax requirements so that a taxpayer living in Maine is treated no differently from one living in California for a particular violation, resulting in the fair application of these laws.25

Like tax laws, environmental laws present a pervasive statutory scheme affecting many Americans, and this number grows yearly as the trend towards stricter and more broadly applicable requirements continues. Not only are persons being more heavily regulated in their business activities, but non-business activities are increasingly being regulated also. For example, the new Clean Air Act Amendments are likely to generate requirements covering such things as automobile usage and use of lighter fluid for outdoor grills.

C. A Model for Uniform National Standards for Criminal Prosecution: Criminal Enforcement of Federal Tax Laws

Guiding criminal enforcement by the Justice Department’s Tax Division is the objective of obtaining “maximum deterrent value from the cases prosecuted.”26 The Justice Department recognizes that “[t]o achieve this objective, the government’s tax enforcement activities must reflect uniform enforcement of the tax laws.”27

Thus, with limited exceptions, all basic prosecutorial functions are subject to the prior approval of the Justice Department’s Tax Division.28 These functions include investigations, empaneling of grand juries, filing of bills of information or returning in-

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25. DOJ Manual 6-4.010 at 6-25.
26. Id.
27. Id.
28. DOJ Manual 6-4.211 at 6-34.
dictments, and otherwise initiating prosecutions. In the normal course, when the Internal Revenue Service (IRS) has concluded an administrative investigation, a report detailing the investigation and its results, approved by the IRS district counsel, is forwarded to the Tax Division for review and authorization. Moreover, U.S. Attorneys are required to obtain prior Tax Division authorization before initiating grand jury inquiries into possible violations of the criminal tax laws and expanding a grand jury investigation to include targets not previously authorized by the Tax Division. Further, recommendations for prosecution based on grand jury investigations pursued with Tax Division authority by a U.S. Attorney must be submitted to the Tax Division for authorization. Generally, even search warrants must be authorized by the Assistant Attorney General for Tax. Moreover, in any case in which U.S. Attorney's offices have been authorized to pursue prosecutions, the Tax Division monitors all matters associated with that case.

These centralized review procedures are established to ensure uniform application of the criminal tax laws. At the same time, these elaborate review procedures are evidently consistent with the Tax Division's stated goal of achieving maximum possible deterrence. Thus, centralized review both addresses the need for uniform application of criminal environmental law and serves the goal of effective deterrence.

D. Conclusion

The concern discussed here for centralized oversight of environmental criminal prosecutions is not merely academic. Such prosecutions are on the increase, and the public mood currently favors imposition of the severe penalties mandated by the U.S.

29. See, e.g., DOJ Manual 6-4.120, .122, .123, .127.
30. DOJ Manual 6-4.127 at 6-32. The centralized procedures followed by the IRS may facilitate central Justice Department review better than the case referral process in place in EPA regional offices.
31. DOJ Manual 6-4.120, .123.
32. DOJ Manual 6-4.120 at 6-28.
33. DOJ Manual 6-4.130 at 6-33. Significantly, EPA itself is currently moving toward more centralized control of enforcement activities. Strock Statement, supra note 5 at 770. EPA Assistant Administrator for Enforcement Strock noted that part of the role of the EPA Headquarters Office of Enforcement was to "ensure that regional actions conform to national EPA priorities." Id. However, EPA has little control over the activities of FBI agents or Assistant U.S. Attorneys.
34. DOJ Manual 6-4.213.C.
35. DOJ Manual 6-4.010 at 6-25.
Sentencing Commission guidelines, which apply to violations occurring since November 1987. However, even the staunchest advocate of criminal enforcement of the environmental laws can have no principled objection to a policy that might encourage uniform enforcement of environmental laws clearly national in application. Uniform enforcement is fully consistent with the prosecutor's interest in deterrence, and will more likely be recognized as fair by the regulated community.

III. CULPABILITY IN ENVIRONMENTAL CRIMES

Exacerbating the lack of centralized review of environmental criminal cases is the minimal level of culpability required for a case to become a criminal case. As discussed below, a citizen can be convicted for a felony under the typical environmental statute by displaying a level of mens rea that is a watered-down version of general intent, which results in the government needing to show little to establish the knowledge element under these statutes. Further, some of these statutes require the government to show only negligence to establish criminal liability. Because the threshold standard is so low, whether a violation is treated criminally, civilly or administratively is not necessarily made through the principled and predictable application of the statutory scheme, but rather, can be made on the whim of an Assistant U.S. Attorney. As a consequence, virtually any environmental violation can be prosecuted criminally, if an Assistant U.S. Attorney so chooses.

A. The Mens Rea of Environmental Crimes Today

1. Knowledge

   a. The federal environmental statutes

For many criminal acts, including white collar crimes such as fraud and embezzlement, a defendant must be shown to have acted with the specific intent to violate the law. By contrast, most


37. See, e.g., Kevin A. Gaynor, A System Out of Control, 7 ENVTL. FORUM 28 (May/June 1990).

38. "A person acts with specific intent when his conscious objective is to cause the specific result proscribed by the statute defining the offense." 22 C.J.S. 2D § 33, p. 38 (citing People v. DeHerrera, 697 P.2d 734 (Colo. 1985); State v Kohler, 434 So.2d 1110 (La. App. 1983); State v. Soft, 329 N.W.2d 128 (S.D. 1983)).
federal environmental statutes only require the defendant to have "knowingly" performed an illegal act. Although not generally defined by statute, "knowingly," in the environmental context, has been judicially determined not to require knowledge that one is violating the law, but merely requires an awareness of one's act. This deviation from general criminal law emanates from the history of "public welfare statutes" and the continuing line of cases which hold that neither knowledge of the law nor a specific intent to violate the law is required to convict a person of a criminal offense. This section will discuss the degree of knowledge which must be shown to convict a defendant charged with an environmental crime, in light of existing precedent in the "public welfare" realm.

b. Judicial decisions

Cases involving criminal penalties under environmental statutes have typically centered on three inquiries with respect to the degree of knowledge required:

(1) whether knowledge of the law or regulation is required;
(2) whether knowledge of the permit status of the activity is required; and

39. See, e.g., Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136(l)(b)(1) & (2) (1988) ("[a]ny registrant, applicant for a registration or, any producer who knowingly violates . . . any commercial applicator of a restricted use pesticide, or any other person . . . who distributes or sells pesticides or devices, who knowingly violates . . . [a]ny private applicator or other person . . . who knowingly violates . . . "); Endangered Species Act, 16 § 1540(b) (" . . . knowingly violates . . ."); Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d) & (e) (1982 and Supp. 1986) (1)(d) "knowingly transports or causes to be transported any hazardous waste . . . to a facility which does not have a permit . . . knowingly treats, stores, or disposes of any hazardous waste . . . without a permit . . . or in knowing violation of any material condition or requirement of such permit . . . or of any applicable interim status regulating or standards . . . knowingly omits material information or makes any false material statement . . . knowingly generates, stores, treats, transports, disposes of exports, or otherwise handles any hazardous waste or any used oil . . . and who knowingly destroys . . . documents required to be maintained . . . knowingly transports without a manifest . . . knowingly exports a hazardous waste . . . without the consent of the receiving country. . . knowingly stores, treats, transports, or causes to be transported, disposes of . . . in knowing violation of any material condition . . . of a permit . . . or of any applicable regulations or standards . . . ", (e) " . . . Any person who knowingly transports, treats, stores, disposes of, or exposes any hazardous waste . . . who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury . . . "); Clean Air Act, 42 U.S.C. § 7413(c) (1983 and Supp. 1991) (" . . . knowingly violates any requirement or prohibition of an applicable implementation plan . . . knowingly makes any false statement . . . knowingly fails to pay a fee . . . knowingly releases into the ambient air any hazardous air pollutant . . . ").
Knowledge of the law

The case law on the first issue, the violator’s knowledge of the law which prohibits his conduct, establishes that ignorance of the law is no defense to an environmental enforcement action. The Supreme Court addressed the issue of ignorance of the law in a number of “public welfare” cases before the issue was addressed in the environmental context. The result was the creation of two lines of precedent. In United States v. Freed, the defendant was convicted of illegally possessing hand grenades that were not properly registered pursuant to the National Firearms Act. The Court held that the prosecutor was not required to prove as an element of the offense the defendant's knowledge that the grenades needed to be registered. The Court reasoned that an individual in possession of grenades should not be surprised that registration of the devices was required. In United States v. International Minerals & Chemical Corp., the defendant was charged with “knowingly” violating an Interstate Commerce Commission regulation mandating that corrosive liquids be identified in the shipping papers. The appellee claimed that knowledge of the regulation was a prerequisite to the commission of a “knowing” violation. The Court disagreed, holding that use of the word “knowingly” in the statute required only general knowledge that the materials being shipped were dangerous. The Court further held that ignorance of the law was no excuse. Moreover, as in Freed, persons handling hazardous materials are presumed to know that the activity is heavily regulated. The Court indicated: “But where, as here . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.”

41. Id. at 607.
42. Id. at 609.
44. Id. at 560.
45. Id. at 565.
46. Id. at 563.
47. Id. at 565; see also Boyce Motor Lines v. United States, 342 U.S. 337 (1952).
The Supreme Court adopted a different standard in *Liparota v. United States*.\(^{48}\) In that case, the statute in question provided criminal penalties for anyone who "knowingly uses, transfers, acquires or possesses" food stamps or authorization cards in an unauthorized manner. The Court held that knowledge of the illegality was required, distinguishing the statutes at issue in *Freed* and *International Minerals* from the food stamp statute, stating that the proscribed conduct was not "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health and safety."\(^{49}\)

The courts rendering the earliest interpretations of environmental criminal statutes were thus faced with two divergent lines of authority regarding knowledge under public welfare statutes. In *United States v. Johnson & Towers, Inc.*,\(^{50}\) the government prosecuted the defendant corporation, a foreman, and a service manager of the trucking department for the unlawful disposal of hazardous waste under the Resource Conservation and Recovery Act (RCRA). The trial court had specifically concluded that the government was not required to prove that defendants knew they were acting in violation of the law. The Third Circuit reversed the trial court's dismissal of the case, holding that the word "'knowingly' applies to all elements of the offense."\(^{51}\) The court made clear, however, that with respect to the defendants' knowledge of the law "the government need only prove knowledge of the actions taken and not the statute forbidding them."\(^{52}\) Thus, the knowledge required under RCRA is *general* knowledge of one's conduct, rather than *specific* knowledge of illegal conduct.\(^{53}\)

In *United States v. Hayes International Corp.*,\(^{54}\) the defendants argued that the *Liparota* rationale should apply and the government must prove the defendants' *specific* knowledge that their actions violated RCRA section 6928(d)(1). The court rejected the defendants' argument that they did not commit a "knowing" violation because they misunderstood the regulations, holding that

\(^{48}\) 471 U.S. 419 (1985).

\(^{49}\) *Id.* at 433; see also Brian E. Concannon, Jr., Comment, *Criminal Sanctions for Environmental Crimes and the Knowledge Requirement:* United States v. Hayes International, 786 F.2d 1499 (11th Cir. 1986), 25 AM. CRIM. L. REV. 535 (1988) [hereinafter "Criminal Sanctions"].

\(^{50}\) 741 F.2d 662 (3d Cir. 1984), cert. denied sub nom., Angel v. United States, 469 U.S. 1208 (1985).

\(^{51}\) *Johnson & Towers*, 741 F.2d at 669.

\(^{52}\) *Id.* at 669.

\(^{53}\) *Id.*

\(^{54}\) 786 F.2d 1499 (11th Cir. 1986).
knowledge of illegality of the acts committed is not an element of the offense. 55

Two years later, the same court in United States v. Greer, 56 under a different provision of RCRA section 6928(d)(2)(A), held that the owner of a waste recycling and transportation business could be found to have “knowingly” violated the hazardous waste laws regardless of his knowledge of those laws. The evidence in the trial court had shown that Greer ordered the disposal of waste knowing that the waste had the potential to be harmful. 57 The Eleventh Circuit found such evidence to be enough to sustain the conviction. 58

In United States v. Dee, 59 a chemical engineer and his superiors were convicted of “knowingly” violating RCRA regulations regarding procedures for management and disposal of solid and hazardous waste materials. On appeal, the defendants claimed that there was insufficient evidence to show that they knew violations of RCRA were crimes, and also that they were unaware that the chemicals they managed were hazardous waste. 60 The Fourth Circuit affirmed the convictions, stating that the government was not required to prove either that the defendants knew violations of RCRA were crimes, or knew that there were regulations listing and identifying the chemical wastes as RCRA hazardous wastes. 61

It is notable that Johnson & Towers, Greer, Hayes and Dee dealt with the handling of hazardous wastes under RCRA. These cases demonstrate that, where hazardous wastes are concerned, the courts seem to follow the Freed/International Minerals line of precedent, which dispenses with knowledge of the law as an element of the crime. There are other environmental criminal statutes, however, which do not fall squarely into the category of public health regulations, but rather, seek to promote the policy of preserving the environment. For example, the Clean Water Act proscribes the dredging and filling of protected wetlands without a permit. 62 Such conduct is less obviously “subject to stringent public regula-

56. 850 F.2d 1447 (11th Cir. 1988).
57. Id. at 1451-52.
58. Id. at 1452.
60. Id. at 745.
61. Id. at 745.
62. See 33 U.S.C §§ 1319(c)(2) and 1344.
tion” than is the transportation of hazardous materials, the release of which could severely affect public health. The argument that Liparota applies to such violations may therefore still be a viable one.

(2) Knowledge of the permit status

The circuit courts are divided on the issue of whether knowledge of the permit status must be demonstrated in order to convict a defendant of an environmental criminal violation. In Johnson & Towers, the Third Circuit held that the government must prove the defendant knew the facility lacked a permit, but that such knowledge may be inferred from conduct. In Hayes, the Eleventh Circuit clarified the rule that such knowledge may be proved by inference, holding that “in this regulatory context a defendant acts knowingly if he willfully fails to determine the permit status of the facility.”

In contrast, the Ninth Circuit has adopted the position that knowledge of the absence of a permit is not an element of the offense defined by RCRA section 6928(d)(2)(A). In United States v. Hoflin, the defendant was charged with violating the same RCRA provision at issue in Johnson & Towers. Relying on that decision, he argued that the government was required to prove his knowledge that the plant where he had ordered paint cans to be disposed was not permitted. The government contended that under Johnson & Towers, knowledge should be inferred. The court declined to adopt or to distinguish the Third Circuit’s ruling in Johnson & Towers, instead dispensing with knowledge of the permit status as an element of the offense.

(3) Knowledge of underlying material facts

(i) In general

In International Minerals, the Court held that the government must prove the defendant’s knowledge that the material being shipped was hazardous, stating that “[a] person thinking in good faith that he was shipping distilled water when in fact he was ship-

63. Johnson & Towers, 741 F.2d at 669.
64. Hayes, 786 F.2d at 1504.
65. 880 F.2d 1033 (9th Cir. 1989), cert. denied, 493 U.S. 1083 (1990).
66. Id. at 1037.
67. Id.
68. Id. at 1038.
ping some dangerous acid would not be covered" by the regulation under which the defendant was prosecuted. Thus, even in cases involving public welfare statutes, the government must prove the defendant's knowledge of certain underlying material facts to obtain a conviction. 70

In Hayes, the defendants raised a "good faith" mistake of fact defense, arguing that they believed the paint waste which they transported was being recycled. 71 Although the court found there was "sufficient evidence for the jury to have rejected the defense of mistake of fact," 72 it recognized the existence of such a defense and gave some indication of its elements. 73 The court noted that, once the defense is raised, the defendant bears the burden of persuasion; the government is "not required to disprove the [defendant's] mistake of fact defense." 74 Moreover, the good faith defense may be rebutted by facts from which knowledge may be inferred. 75

(ii) Objective versus subjective standard

The government often tries to water down the knowledge standard by attempting to impose, through jury instructions, an objective standard on the mens rea requirement, that is, to hold the defendant liable for factual knowledge she should have had, rather than only for that which she actually possessed. 76 However, it has been generally held that when a statute penalizes an act performed "knowingly" there must be actual knowledge of the circumstances. 77 Under this line of cases, the government should not be able to argue that a person should have known, for exam-

70. Johnson & Towers, 741 F.2d at 668; Hayes, 786 F.2d at 1505; Hoftin, 880 F.2d at 1039.
71. Hayes, 786 F.2d at 1505.
72. Id. at 1506.
73. Id.
74. Id.
75. Id.
76. See United States v. Ellen, 90-0215 D.Md., Jury Instruction No. 33B. It should be noted that jury instructions are the critical document setting forth the government's interpretation of what constitutes the crime at issue. Yet, because there is no centralized review of environmental criminal cases there is no assurance that a particular instruction sought by an Assistant United States Attorney comports with legal positions advocated by EPA or Main Justice in other cases.
ple, that the waste was hazardous, she should only be held liable if her subjective belief was that the waste was hazardous.

The government has also made attempts under the Responsible Corporate Officer doctrine to hold corporate officers liable for any knowledge which might be imputed to the officer even though he lacked actual or inferred knowledge of the crime.78 However, the current application of the doctrine indicates that the officer's position in the company merely raises the inference that he possessed the requisite knowledge. In United States v. MacDonald & Watson Waste Oil Co.,79 the defendants were charged with, and later convicted of, knowingly transporting contaminated soil to an unpermitted facility under RCRA. The court instructed the jury as follows on the responsible corporate officer doctrine:

When an individual Defendant is also a corporate officer, the Government may prove that individual's knowledge in either of two ways. The first way is to demonstrate that the Defendant had actual knowledge of the act in question. The second way is to establish that the defendant was what is called a responsible officer of the corporation committing the act. In order to prove that a person is a responsible corporate officer three things must be shown.

First, it must be shown that the person is an officer of the corporation, not merely an employee.

Second, it must be shown that the officer had direct responsibility for the activities that are alleged to be illegal. Simply being an officer or even the president of a corporation is not enough. The Government must prove that the person had a responsibility to supervise the activities in question.

And the third requirement is that the officer must have known or believed that the illegal activity of the type alleged occurred.80

On appeal, the defendant corporate president argued that the court's instruction permitted the jury to ignore the element of knowledge contained in the criminal provisions of RCRA by instructing it that proof that a defendant was a "responsible corpo-

79. 933 F.2d 35 (1st Cir. 1990).
80. Id. at 51-52 (emphasis added).
rate officer" would satisfy the knowledge requirement. The government tried to argue that the jury instruction given in the district court was not an objective standard. The First Circuit agreed with the defendant and stated:

[K]nowledge may be inferred from circumstantial evidence, including position and responsibility of defendants such as corporate officers, as well as information provided to those defendants on prior occasions. Further, willful blindness to the facts constituting the offense may be sufficient to establish knowledge. However, the district court erred by instructing the jury that proof that a defendant was a responsible corporate officer, . . . , would suffice to conclusively establish the element of knowledge expressly required . . . .

As this language makes clear, the applicability of the responsible corporate officer doctrine is not intended to displace the mens rea requirement of the statute under which an individual is charged. If the statute requires that the misconduct or omission be "knowing," the government must still prove the defendant's knowledge. The fact that a corporate officer had responsibility to supervise the activities in question should simply raise the inference of guilty knowledge.

In sum, while generally knowledge of one's act is required, and knowledge of one's permit status is often required. As the courts have interpreted the environmental statutes, knowledge of the law is generally not required to sustain a criminal conviction.

(iii) Legislative history

While the courts have interpreted the environmental statutes to require minimal mens rea, the legislative history of the criminal provisions did not provide the courts with much assistance in this area. With little exception, Congress was silent on this issue. For example, in neither the new Clean Air Act, the Clean Water Act, the Federal Insecticide, Fungicide and Rodenticide Act, nor generally in the Resource Conservation and Recovery Act, did Congress ever address the concepts of specific versus general intent and the ramifications of each. In fact, in RCRA, in its Hazardous
Waste Amendment of 1984, Congress freely acknowledges that it did not seek to define the culpability standard it imposed in its general criminal penalty section.\(^8\)^5

In one of the few instances where Congress did discuss the criminal provisions of any environmental statute, it stated that its purpose in amending the provision was to increase criminal conduct from a low penalty crime (misdemeanor) to higher one (felony) — to be consistent with other federal environmental statutes, thereby increasing the penalty without review or regard for the level of culpability.\(^8\)^6 Congressional failure to adequately explain the state of mind required for a criminal act permits the courts great leeway in their interpretation at a time when environmental criminal convictions are attracting much publicity.

Even where there was some Congressional intent to define the necessary level of culpability, the courts have not chosen to recognize it. Under RCRA (the Act in which “knowingly” has been most frequently interpreted and found not to require scienter with respect to knowledge of the law) at least a part of the legislative history, however unwittingly,\(^8\)^7 indicates that Congress intended that a purposeful and specific intent to violate the law is necessary.\(^8\)^8

In reality, even with some minor Congressional intent to create specific intent crimes evident, Congress has not provided the courts with ammunition to deviate from the backdrop of the public welfare cases, or reject the public pressure to convict alleged violators of environmental laws.

Even under the statutes with seemingly higher levels of cul-

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87. See supra, note 85.

88. Conservation and Recovery Act, H.R. REP. No. 1491, 94th Cong. 2d Sess., reprinted in 1976 U.S.C.C.A.N. 6319, 6321 (“[t]he criminal [versus the civil] penalties are often more appropriate where there is a clear knowing disregard for the law. In practice, criminal sanctions are sought in cases of blatant or repeated acts which cause significant harm to the environment or involve fraud upon the Government.” Agency Comment, Executive Office of the President, Office of Management and Budget, Comment of Hon. Fred B. Rooney, Chairman, Subcommittee of Transportation and Commerce). Neither similar nor contradictory language ever made it to the conference reports.

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pability, (for example, the Emergency Planning and Community Right-to-Know Act (EPCRA)\(^\text{89}\) and the Toxic Substances Control Act (TSCA),\(^\text{90}\) Congress still failed to alleviate confusion. In EPCRA, Congress declared:

Any person who \textit{knowingly and willfully} fails to provide notice in accordance with Section [$\S\ 11004$ of this title] shall, upon conviction, be fined not more than $25,000 or imprisoned for not more than two years, or both (or in the case of a second or subsequent conviction, shall be fined not more than $50,000 or imprisoned for not more than five years, or both).\(^\text{91}\)

And, in TSCA, the criminal provision reads:

Any person who \textit{knowingly or willfully} violates any provision of section $2614$ of this title, shall, in addition to or in lieu of any civil penalty which may be imposed under subsection (a) of this section for such violation, be subject, upon conviction, to a fine of not more than $25,000 for each day of violation, or to imprisonment for not more than one year, or both.\(^\text{92}\)

Both EPCRA and TSCA appear to have higher levels of culpability than do the other statutes which only have a "knowing" standard. However, the "or" in knowingly or willfully and the "and" in knowingly and willfully still confuses the issue of whether criminal conduct under those acts requires specific or general intent. Congress has chosen not to explain its intent in either of these statutes.\(^\text{93}\)

93. Emergency Planning and Community Right-to-Know Act of 1986, H.R. REP. No. 962, 99th Cong. 2d Sess. 308-309, reprinted in 1986 U.S.C.C.A.N. 3276, 3401-02 ("[the criminal provision] established . . . penalties for any person who knowingly fails to provide notice in accordance with Section 304. Such criminal penalties, of course, would not be mandatory should EPA determine that a violation has occurred, and standard prosecutorial discretion would apply."); Toxic Substances and Control Act, S. REP. No. 698, 94th Cong. 2d Sess. 4, reprinted in 1976 U.S.C.C.A.N. 4491, 4516 ("[p]rovides criminal penalties of up to $25,000 per day in addition to or in lieu of a civil penalty, for any person who knowingly (having actual knowledge) or willfully violates this act."); Joint Explanatory Statement of the Committee of Conference, H.R. REP. No. 1679, 94th Cong. 2d Sess., reprinted in U.S.C.C.A.N. 4539, 4577 (the Senate Bill "[p]rovides for criminal
2. Other Standards

The above discussion summarizes the "knowledge" culpability standard as it is currently interpreted. Although there are some federal environmental statutes which have higher standards of mens rea, this does not appear to be the trend, as the most recent federal statutory amendments, including the 1991 amendment to the Clean Air Act,\textsuperscript{94} have not increased the level of mens rea required. Additionally, two of the recently enacted statutory amendments, the Clean Air Act Amendments and the amendment to the Clean Water Act,\textsuperscript{95} include negligent levels of culpability in their criminal provisions, and another, the Endangered Species Act, actually decreased the culpability level in its criminal provisions from willful to knowing.\textsuperscript{96}

Originally, the Clean Water Act (CWA) proscribed negligent or willful conduct.\textsuperscript{97} United States v. Frezzo Brothers, Inc.,\textsuperscript{98} involved the first criminal prosecution of corporate officers for violations of the CWA. In Frezzo Brothers, the defendants were convicted of willfully and negligently discharging pollutants associated with their mushroom farming business into the navigable waters of the United States without a permit.\textsuperscript{99} The court held that the prosecution, in order to support a conviction for criminal negligence, needed only to establish that "the water pollution abatement facilities were negligently maintained by the Frezzos and were insufficient to prevent discharges of the wastes."\textsuperscript{100}

In United States v. Oxford Royal Mushroom Products,\textsuperscript{101} the government penalties of up to $25,000 per day or up to one year's imprisonment, or both, per violation, for any person who knowingly or willfully violates this Act.\textsuperscript{94} conference substitute, 4578 ("Criminal penalties may be imposed on persons who 'knowingly or willfully' violate . . .").

\textsuperscript{94} 42 U.S.C. § 7413(c).
\textsuperscript{95} 33 U.S.C. §§ 1319 & 1321.
\textsuperscript{96} Endangered Species Act, H.R. CONF. REP. No. 1804, 95th Cong. 2d Sess. 26, \textit{reprinted in} 1978 U.S.C.C.A.N. 9493-94 (Congress changed standard in 1978 from "willful" to "knowing," indicating at the time that knowledge of the law is not meant to be an element of the crime). \textit{See also} United States v. Nguyen, 916 F.2d 1016, 1018-19 (5th Cir. 1990) (court acknowledged and followed legislative history and held that knowledge of the law is not intended to be element of crime).

\textsuperscript{97} Prior to being amended in 1987, § 1319(c)(1) read: any person who willfully or negligently violates section 1311, 1312, 1316, 1317 or 1318 of this title . . . shall be punished by fine . . . or by imprisonment . . . . \textit{Id.}


\textsuperscript{99} Frezzo Bros., 602 F.2d at 1124.

\textsuperscript{100} \textit{Id.} at 1129.

ernment again prosecuted corporate officers of a mushroom farming business. The defendants' claimed that the indictments charging them with willfully and negligently discharging pollutants were duplicitous. The court responded: "the *mens rea* required for negligent conduct and that required for willful conduct cannot be viewed as entirely distinct. It is well settled that intentional conduct may be imputed to a tortfeasor because of grossly negligent conduct."\textsuperscript{102}

This language raises the possibility that the negligence standard contemplated under the CWA is "gross" or "willful." The language contained in the proposed Environmental Crimes Act\textsuperscript{103} supports this view. The proposed bill would create a new misdemeanor offense of negligently endangering life or causing an environmental catastrophe. In contrast to the CWA, which is silent as to the meaning of the term "negligence," the bill defines negligence as follows: "A person is negligent if he or she is unaware of a risk so severe that the lack of awareness is a gross deviation from a reasonable person's standard of care."\textsuperscript{104} The 1987 amendments to section 1319(c) of the CWA separated "negligent" offenses, which are misdemeanors, from "willful" ones, which are felonies. The language of the statute indicates that criminal penalties can indeed be imposed under the CWA for simple negligence. Additionally, prosecutors have sought and obtained jury instructions for negligence under the CWA.\textsuperscript{105}

3. Culpability Under State Laws

With much of the criminal prosecutions occurring at the state level, the culpability levels in the state statutory schemes should also be of concern. Indeed a decreased level of *mens rea* is also evident in the state environmental laws. Although a few states

\textsuperscript{102} Id. at 857.


\textsuperscript{104} Id.

\textsuperscript{105} In Clean Water Act cases, the government has requested the following jury instruction:

The term "negligence" means failure to use reasonable care. Reasonable care is the care which a reasonably careful person would use under similar circumstances. Negligence may consist of doing something that a reasonably careful person would not do under similar circumstances or failing to do something that a reasonable person [sic] would do under similar circumstances.

have imposed higher mens rea requirements in at least some criminal provisions (i.e., willful or intentional).\textsuperscript{106} Many states have adopted statutes which require similar or even less culpability than their federal counterparts—some requiring as little as reckless or negligent conduct. Some states even impose a strict liability standard.\textsuperscript{107} Overall, there have been few judicial decisions

\textsuperscript{106} See, e.g., Connecticut, Wisconsin and Wyoming.

interpreting such state statutes.

B. The Hazards of a Reduced Culpability Level

1. Practical Application

With both federal and state enforcement systems lowering the standards for showing culpability, the public should be concerned. No longer are criminal prosecutions limited to the "midnight dumpers." Instead, the criminal remedy has become a pivotal weapon against all segments of the regulated community. Often, what was previously considered administrative or regulatory can now be criminal. Not only is "corporate america" subject to the laws, but so are all businesses, including the neighborhood auto repair shop and the local dry cleaner. Any business whose water goes into the sewer system is subject to the provisions of the CWA. Any business which produces more than a de minimis volume of a waste, even nonhazardous waste, is subject to the RCRA.

It is not just businesses that are subject to criminal prosecution, but individuals employed by businesses as well. Under the current system, everyone must adhere to the environmental laws even if they are not cognizant of how to comply. A foreman, unaware of strict compliance requirements, can wind up behind bars for failure to seek out this information, either because the knowledge of law is not an element of the violation or because of the concept of willful blindness. Company presidents, completely unfamiliar with environmental regulations, can be liable under the responsible corporate officer doctrine, a theory which raises the inference of guilty knowledge.

Also subject to the criminal environmental provisions of the federal statutes is the average citizen outside of his employment. For instance, the landowner who builds vacation property can be held criminally liable under section 404 of the CWA for accidental


109. Under the concept of willful blindness, a defendant can be found to have had knowledge where he has deliberately avoided discovery facts that would show environmental violations. See Hayes, 786 F.2d at 1505 (court held that officer's willful failure to determine the permit status of a facility to which hazardous waste was transferred satisfies the requirement of knowledge under RCRA). But see United States v. Pacific Hide & Fur Depot, Inc., 768 F.2d 1096 (2d Cir. 1985)(court reversed conviction under TSCA; defendant's conduct was merely reckless).

110. See MacDonald & Watson, supra notes 79-84 and accompanying text.
development on wetlands property. Similarly, farmers can become criminal violators for disposing of pesticides.

The criminal provisions of the statutes are written as if compliance was easy to comprehend and achieve by those to whom it applies. In fact, the knowledge assumed by the government in these cases is very complex and hardly intuitive. As stated earlier, there are over 10,000 pages of federal environmental regulations, many of which are overwhelmingly complex and are continually changing. Due to the relatively recent nature of the statutes and regulations, many of these provisions have not yet been interpreted or subject to differing interpretations. Determining, for example, what is a solid waste under RCRA can be a mind-bending, counter-intuitive leap into unreality. How can we require companies, let alone individuals, to comply with this volume of material which has yet to be fully interpreted, and then hold them criminally liable for failure to do so? Indeed, contrary to what Congressperson Rooney stated in the legislative history of the RCRA,112 many of the new environmental "criminals" are first time offenders. Growing environmental awareness should not grant Congress carte blanche to impose sweeping criminal laws with little or no discussion of the standard of intent under those laws and the ramifications of violations. Clarifying statutory requirements is particularly important because criminal environmental provisions could potentially affect virtually every business and individual in this country.

Where the law is so complex that it becomes too difficult to comprehend by the average citizen, Congress should compensate, as it has in the tax area, by insisting that only defendants acting with specific intent be criminally convicted. This concept has been highlighted by the United States Supreme Court in United States v. Cheek.113 In Cheek, the defendant believed that he was not required to file a tax return under the scope of the tax laws. The Court held that a good-faith misunderstanding of the law or a good-faith belief that one is not violating the law negates willfulness, whether or not the claimed belief or misunderstanding is objectively reasonable.114 In other words, the defendant must have voluntarily intended to violate a known legal duty.115

112. See supra, note 87.
114. Cheek, 111 S. Ct. at 611.
115. Id. at 610.
If the defendant did not know of the law or honestly did not believe he was violating the law, he could not be held liable for willful violation.\textsuperscript{116} Although there is disparity in the courts as to whether willfulness requires general or specific intent, several courts have also held that specific intent is required.\textsuperscript{117}

As stated in \textit{Cheek}:

\begin{quote}
[T]he proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common law presumption by making specific intent to violate the law an element of certain federal offenses. This . . . is largely due to the complexity of the tax laws.\textsuperscript{118}
\end{quote}

The environmental laws are more complex than the tax laws. Indeed, their recent introduction to society, as compared to the tax laws, makes the case even more compelling.

\subsection*{2. A Constitutional Argument}

Given that the present environmental laws are complex, that they have such broad applicability, and that the penalties for violation can be substantial, a constitutional dilemma associated with a reduced level of culpability arises. To convict a defendant of a serious felony without a high degree of \textit{mens rea} may be a violation of his Fifth Amendment right to due process.\textsuperscript{119} In fact, the

\begin{itemize}
    \item \textsuperscript{116} \textit{Id.} at 611.
    \item \textsuperscript{117} \textit{See, e.g.}, \textit{Screws v. United States}, 325 U.S. 91 (1945) (construing 18 U.S.C. § 242, dealing with violations of civil rights, as requiring specific intent in a federal criminal prosecution of local law enforcement officers who arrested a black for a state offense and then wrongfully beat him to death); \textit{United States v. Sehnal}, 930 F.2d 1420, 1427 (9th Cir. 1991), \textit{cert. denied}, 112 S. Ct. 300 (1991) (jury instruction which read "[a]n act is done willfully if done voluntarily and intentionally with the purpose of violating a known legal duty" is effectively the same as one which would state that the defendant must have had a specific intent to do something the law forbids (citing \textit{United States v. Cheek}, 111 S. Ct. 604 (1991))); \textit{United States v. Fletcher}, 928 F.2d 495, 501-02 (2d. Cir. 1991), \textit{cert. denied}, 112 S. Ct. 67 (1991) (trier of fact may properly consider educational background and expertise of defendant in order to establish whether he had the subjective belief that his conduct was illegal (citing \textit{United States v. Cheek}, 111 S. Ct. 604 (1991)); \textit{United States v. Moran}, 757 F. Supp. 1046, 1049 (D. Neb. 1991) (recognizing divergent line of cases but finding for purposes of criminal copyright infringement that willful requires specific intent (citing \textit{United States v. Cheek}, 111 S. Ct. 604 (1991)).
    \item \textsuperscript{118} \textit{Cheek}, 111 S. Ct. at 609.
    \item \textsuperscript{119} It is a deeply-rooted notion in American law that crime requires the concurrence of an evil-meaning mind with an evil-doing hand. The existence of
Supreme Court in *Kennedy v. Mendoza-Martinez* has indicated that one of the hallmarks distinguishing a criminal from a civil penalty is that the imposition of a criminal penalty requires a finding of scienter.120 However, due to judicial decision, the intended bright line distinction has been obfuscated.121

In fact, one could argue that there should be a direct relationship between the culpability level of a crime and the penalty assessed. This theory is supported by the case law regarding imposition of penalties for strict liability offenses. While strict liability offenses have been found to be acceptable when the punishment is a civil penalty, they are "generally disfavored" by the Supreme Court of the United States in which criminal penalties may be imposed.122 When strict liability offenses have been imposed criminally, the criminal penalty was so minor it was more akin to a civil penalty. In *United States v. Wulff*,123 the Court, relying on *United States v. Holdridge*,124 concluded that strict liability would violate the due process clause unless the penalty attached to a criminal conviction was relatively small and the conviction would not "gravely besmirch" the defendant's reputation.125 Following this rationale, it can be argued that the higher the penalty, the more mens rea that should be required to commit the criminal act.126

By contrast, due to statutory language and subsequent judi-

a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." Dennis v. United States, 341 U.S. 494, 500 (1951) (quoted in United States v. U.S. Gypsum Co., 438 U.S. 422, 436 (1978)).

120. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). If a criminal penalty is sought, all of the constitutional protections required as part of a criminal proceeding are called into play. *Id.*

121. *See generally supra*, notes 37-39 and accompanying text.


125. *See United States v. Heller*, 579 F.2d 990, 994 (6th Cir. 1978), *cert. denied sub nom.*, Engler v. United States, 481 U.S. 1019 (1987) ("[c]ertainly, if Congress attempted to define a malum prohibitum offense that placed an onerous stigma on an offender's reputation and that carried a severe penalty, the [C]onstitution would be offended... ").

126. In the few other cases that have found strict liability to be acceptable for imposition of a criminal violation, generally, the theory has been that it is an acceptable method of allocating liability where the balance weighs against those with the opportunity of informing themselves. In *United States v. Dotterweich*, the Supreme Court stated:

Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before
cial interpretation, federal environmental laws no longer have culpability distinctions between civil and criminal offenses. Nor do they generally require a high level of culpability for criminal offenses. These factors taken together potentially offend a defendant's due process rights.

IV. RECTIFYING THE SITUATION

Three possible ways exist to rectify the current mens rea situation. First, as discussed in Section I, there is no government-wide procedure for determining when conduct becomes criminally prosecutable. The Department of Justice could institute a procedure similar to that in effect in the civil arena, which would cover both the Environment and National Resource Division, as well as the United States Attorneys' offices. This policy should implement required standard procedures for deciding what conduct is civilly, administratively or criminally prosecutable. Coupled with centralized review, it should assure far greater consistency in the selection of cases to be prosecuted criminally.

Second, as a matter of prosecutorial discretion, the Assistant Attorney General for the Environment and Natural Resources Division could mandate that no environmental criminal cases will be brought unless the higher standard of specific intent is met by the actions of potential targets of an environmental criminal investigation. Targets not meeting this elevated standard would be handled in the civil or administrative area. This would create a bright line between criminal environmental enforcement on one hand, and civil and administrative on the other. The cloud that currently hangs over the practice of any environmental violation being criminally enforced would be removed. At the same time, the government's limited criminal prosecutorial resources could be focused on the truly bad actors; those that are engaging in an act that is an environmental violation and understand, or should understand, that the act in question violates the law. Many of the cases the government currently brings would be unaffected since presumably prosecutors could make this higher showing. However, that portion of the government’s docket where knowledge is

sharing in illicit commerce, rather than to throw the hazard in the innocent public who are wholly helpless.

320 U.S. 277, 285 (1943). However, as discussed above, this argument can not withstand scrutiny in the current environmental climate given the broad area over which, and persons over whom, the environmental laws span.

127. This mandate would presumably take the form of a directive in the U.S. Attorney’s Manual.
questionable, given the enormous complexity of the regulatory scheme involved, would be treated civilly or administratively.\footnote{128}

Third, Congress could amend the current federal environmental statutes and increase the culpability levels for criminal conduct to "willful," creating specific intent crimes. Alternatively, Congress could specifically declare that "knowingly" denotes knowledge of the applicable law. This can be accomplished by either amending each individual environmental statute or through the passage of an omnibus statute. In this way, Congress could send a clear message to law enforcement agencies and the judiciary that the level of culpability needs to be substantial before steps are taken towards criminal conviction. As more and more federal environmental laws will be passed over the next few decades, Congress should take heed of how its laws have been interpreted and to whom they have been applied. With this new knowledge, Congress can amend current statutory law and prepare for the certain new wave of environmental regulation.

Any of these methods, particularly the last two, would go a long way to make criminal prosecutions uniform throughout the country; regardless of which government office initiates the investigation.

V. Benefits

Modification to the current environmental laws and to their enforcement provides several benefits. It would send clear signals to the public as to what is, and what is not, criminal conduct. In addition, it would help focus government criminal resources on only the worst offenders, leaving other violators for the civil or administrative process. Strict environmental laws are necessary. No one can deny the need for increased enforcement in this area. However, environmental laws should be uniformly enforced using a bright line established to delineate criminal conduct from

\footnote{128. According to Joseph G. Block, formerly Chief of the Environmental Crimes Section in the Environmental and Natural Resources Division of the Department of Justice, currently a partner at the law firm of Venable, Baetjer, Howard & Civiletti, Washington, D.C., the specific intent standard would not hurt the government's efforts since its stated focus is supposedly on cases where the defendants had full knowledge of the law and intentionally avoided it. Although there is a general intent standard for many of these violations, we were looking to prosecute egregious situations where the defendants knew what the regulations were, knew how to follow them and intentionally decided to violate them. A number of the prosecutions would involve situations where defendants were actively trying to hide non-compliance by lying on discharge monitoring reports and other reports required by the government.}
persons who failed to comply with complex laws and regulations of which they were unaware. This is a nation of laws. The critical decision to prosecute a member of this society for criminal violations should be made in a predictable fashion that allows members of the public to pattern their conduct to avoid criminal liability, and not on the whim of an Assistant U.S. Attorney, no matter how principled or well intentioned she is.