Criminal Ambiguity: Redefining the Clean Water Act's Mens Rea Requirements

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INTRODUCTION

Four decades ago, Congress passed the Clean Water Act, the most important legislation regulating water pollution in United States history. Surprisingly, attorneys, legal scholars, and judges still grapple with the level of criminal intent the Clean Water Act requires—the mens rea requirements—for a person to commit a Clean Water Act crime today. The prevailing "offense analysis" approach to assess the appropriate mens rea has produced inconsistent results in different courts for decades. Congress never considered whether to require proof that the defendant had

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actual knowledge that his or her conduct violated any Clean Water Act provisions. As a result, courts now use the Clean Water Act's language to deal with environmental circumstances and changed prosecutorial priorities than Congress could never have contemplated when it passed the Act.

This Article reviews environmental changes since the Clean Water Act and explains why most mens rea analysis of Clean Water Act crimes is indeterminate, resulting in federal courts of appeals remaining deeply and persistently divided on which standard to apply. Over the decades, case law has expanded—not always consistently—on what constitutes a public welfare offense. Public welfare offenses have been described as offenses that impose more stringent duties on those connected with particular activities that affect public health, safety or welfare, by not requiring proof of criminal intent for one or more elements of an offense.[1] Contrary to its general policies of resolving circuit court splits, the United States Supreme Court has denied judicial review—certiorari—time and time again.[2]

This Article suggests that the Supreme Court continue to decline certiorari in a select group of important cases where it is unlikely that Congress and courts would be able to clarify the ambiguity. The Article suggests a legislative solution to the Clean Water Act's mental state requirements. Congress, the political branch, should draft restyled criminal enforcement provisions that specify mens rea requirements for each individual element of the offense. It is the role of the legislature, not courts, to define priorities in enforcing current violations, deterring future violations, and protecting defendants' due process rights. This Article provides a new approach to help Congress achieve these goals. In doing so, Congress can make a fresh decision on how to balance enforcement and due process concerns.

I. 40 YEARS OF CLEAN WATER ENFORCEMENT

In 2012, the nation's environmentalists celebrated the fortieth anniversary of the Clean Water Act. The Clean Water Act legitimized the young U.S. environmental movement at a key time in its history and gave

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[1] *See* Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 323-24 (2003).

[2] *See* United States v. Maury, 695 F.3d 227, 259 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 1600 (2013); United States v. Hopkins, 53 F.3d 533, 541 (2d Cir. 1995), *cert. denied*, Hopkins v. United States, 516 U.S. 1072 (1996); United States v. Weitzenhoff, 35 F.3d 1275, 1284 (9th Cir. 1993), *cert. denied*, 513 U.S. 1128 (1995).

the even younger United States Environmental Protection Agency ("EPA") the tools to punish polluters.[3]

When Congress passed the Clean Water Act, two-thirds of U.S. water was so fouled by sewage, oil, pesticides and heavy metals that it was unsafe for swimming or fishing.[4] Thirty percent of tap water samples exceeded federal limits for certain chemicals.[5] Eighty-seven percent of U.S. swordfish samples contained so much mercury they were unfit for human consumption.[6] In response to such findings, Senator Ed Muskie, the principal Senate sponsor of the 1972 Clean Water Act,[7] proclaimed, "The cancer of water pollution was engendered by our abuse of our lakes, streams, rivers, and oceans; it has thrived on our half-hearted attempts to control it; and like any other disease, it can kill us."[8]

Over the last forty years, the country has made huge strides in reducing pollution from wastewater treatment plants and industries.[9] Many waterways are no longer dumping grounds for pollutants. Forty years after passage of the Clean Water Act, sixty-five percent of U.S. waterways now pass the fishable and swimmable test.[10] Now, 90.7 percent of U.S. community water systems meet "all applicable health-based standards."[11]

Despite the Clean Water Act's successes, Congress has not amended the legislation since 1987. As we learn more about how to protect human health and the environment, circumstances and public norms about the environment have changed. Because of changed agricultural practices, the Clean Water Act has become less effective at dealing with runoff from cities, farms, and other intensive land uses.[12] The drafters in the 1970s were not aware of new chemicals, pharmaceuticals, and hormone-disrupting chemicals like parabens and BPA that can contaminate water.[13] Meanwhile, attention has shifted from environmental issues like sewage and stormwater to fracking, rare earths, and climate change.[14] These

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[3] Russell McLendon, *Clean Water Act Is 40 Years Old: Landmark Water Law Hits A Milestone During Critical Time*, HUFFINGTON POST, Sept. 11, 2012, http://www.huffingtonpost.com/2012/09/11/clean-water-act-2012_n_1874980.html.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *See* EPA v. National Crushed Stone Ass'n, 449 U.S. 64, 71 n. 10 (1980) (referring to Senator Muskie as the principal Senate sponsor of the Act).

[8] 118 CONG. REC. 33,692 (1972), *reprinted in* 1 LEGISLATIVE HISTORY 1972, at 161-62.

[9] McLendon, *supra* note 3.

[10] McLendon, *supra* note 3.

[11] McLendon, *supra* note 3.

[12] McLendon, *supra* note 3.

[13] McLendon, *supra* note 3.

[14] McLendon, *supra* note 3.

changed circumstances have made it particularly difficult for modern courts to interpret Congress's intent in 1972. As the Clean Water Act continues to age, courts now use its language to deal with circumstances that Congress could never have contemplated when it passed the Act.

Over the last few decades, the Supreme Court has frequently refined its definition of what a public welfare offense entails.[15] Examples of public welfare offenses include sales of adulterated food, sales of misbranded articles, violations of anti-narcotics acts, criminal nuisances, violations of traffic regulations or motor-vehicle laws, and violations of general police regulations passed for safety, health, or wellbeing of the community.[16]

In 1971, one year before the Clean Water Act's passage, the United States Supreme Court considered in *United States v. International Minerals & Chemical Corp.* whether a defendant violated 49 C.F.R. § 173.427 by transporting sulfuric and hydrofluosilicic acids.[17] The former 18 U.S.C. § 834 provided that anyone who "knowingly violates any such regulation" such as the "transportation of any hazardous material" pursuant to 49 C.F.R. § 173.427 would be fined or imprisoned.[18] The Court held that the defendant only needed to know about the transportation of the sulfuric and hydrofluosilicic acids to knowingly violate the statute, not that he was knowingly violating the particular regulation.[19] Specifically, the *International Materials* Court stated that where apparently dangerous products are involved, such as sulfuric and hydrofluosilicic acids, "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."[20]

For thirteen years after Congress passed the Clean Water Act, the Supreme Court did not consider the implications of the lack of mens rea requirements on apparently innocent conduct. Finally, in 1985, the Court in *Liparota v. United States* analyzed 7 U.S.C. § 2024(b)(1), which provided that "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations" would be guilty of a criminal offense.[21] The Court held that knowledge of illegality was essential because 7 U.S.C.

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[15] *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994); Staples v. United States, 511 U.S. 600, 607-09 (1994); Liparota v. United States, 471 U.S. 419, 433 (1985).

[16] Carpenter, *supra* note 1, at 327.

[17] United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 559 (1971).

[18] *Id.*

[19] *Id.* at 564-565.

[20] *Id.*

[21] *Id.* at 420.

§ 2024(b)(1) could criminalize otherwise innocent conduct such as a food stamp recipient that "used stamps to purchase food from a store that, unknown to him, charged higher than normal prices to food stamp program participants."[22] Nine years later, the Court in *Staples v. United States* considered whether a defendant charged under 26 U.S.C. § 5845(a)(6), which criminalized unregistered firearms such as machine guns, must have known the firearm in question was an automatic weapon. The Court focused on the harsh ten-year imprisonment penalty attached to violations of the statute as a "significant consideration in determining whether the statute should be construed as dispensing with *mens rea*."[23]

Two decades later, the circuit courts finally attempted to interpret Congressional intent in resolving the Clean Water Act's ambiguous mental state requirements.[24] As explained in depth below, the federal circuit courts have applied the factors articulated in *International Minerals*, *Liparota*, and *Staples* without coming to a definitive conclusion on whether a Clean Water Act defendant needs to know what substance was being discharged to commit a Clean Water Act violation. The circuit courts remain divided on which elements the mental state requirements apply to.[25]

After forty-two years, the challenges of interpreting the Clean Water Act's mens rea requirements have become enormously complex. There are too many variables at play, and the legal grounds have shifted accordingly. Without a reliable answer as to which mens rea requirements should apply, different interpretations of the Clean Water Act can lead to different results in its application. For example, the defendant could be convicted for a felony if she knew that she had discharged a pollutant, or merely for knowledge that she discharged the substance regardless of whether she knew that the substance was a pollutant. There is only one institution that can resolve the inherent ambiguity from the text combined with four decades of changing environmental, public, and judicial norms. That institution is Congress.

Section II of this Article explains the confusion that arises from a linguistic analysis of the mens rea requirements under the Clean Water Act. Section III turns to circuit court decisions over the past two decades that addressed the standard required to convict a defendant under the Clean

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[22] Liparota v. United States, 471 U.S. at 425-26.

[23] Staples v. United States, 511 U.S. 600, 607-09 (1994).

[24] *See* United States v. Weitzenhoff, 35 F.3d 1275, 1284 (9th Cir. 1993), *cert. denied*, 513 U.S. 1128 (1995).

[25] *See* United States v. Hanousek, 176 F.3d 1116, 1122 (9th Cir. 1999); United States v. Kelley Technical Coatings, Inc., 157 F.3d 432, 439 (6th Cir. 1998); United States v. Sinskey, 119 F.3d 712, 715 (8th Cir. 1997); United States v. Hopkins, 53 F.3d 533, 541 (2d Cir. 1995), *cert. denied*, Hopkins v. United States, 516 U.S. 1072 (1996).

Water Act, and finds courts deeply and persistently divided. Section IV analyzes why despite the circuit split, the Supreme Court should continue to deny certiorari, and why Congress should re-draft the Clean Water Act's criminal enforcement provisions. Section V provides a framework to sharpen the issues that Congress should address in drafting new mens rea requirements for Clean Water Act crimes, and then examines the relevant policy considerations that Congress should consider, particularly as the considerations relate to enforcement and due process.

II. LINGUISTIC AMBIGUITY IN THE CLEAN WATER ACT

In drafting the Clean Water Act, Congress used the prevailing offense analysis approach of understanding mens rea, where each offense generally only has a single mental state. As a result, linguistic interpretation does not clarify which elements the mens rea requirements apply to.

Traditionally, the concurrence of two factors, an actus reus and mens rea, determine criminal liability.[26] Courts presume in most cases that the defendant must possess a mens rea to commit a crime.[27] Mens rea is best defined in what is known as "element analysis," as a particular kind of criminal intent to commit an element of a crime.[28] There is no common principle of universal application to discover the necessary mens rea for each element, because it is highly contextual.[29] Few areas of criminal law pose more difficulty than determining the proper definition of the mens rea required for each element of any particular crime.[30] Sometimes, it is difficult to determine what the elements of a particular crime are, in addition to what mens rea attaches to each of those elements. For example, burglary requires the intent to commit a felony within a dwelling place at night.[31] This intent, however, could refer to the intent to enter, the intent to act at night, the intent that the building be a dwelling place, or the intent to commit a felony within. [32]

Under the traditional offense analysis approach of understanding mens rea, as opposed to the more precise and more modern element analysis, each *offense* generally only has a single mental state.[33] For example, under the Clean Water Act, "Any person who knowingly (or

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[26] United States v. Bailey, 444 U.S. 394, 402 (1980).

[27] In re Jorge M., 4 P.3d 297, 301 (Cal. 2000).

[28] Paul H. Robinson, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 686-87 (1983).

[29] *Id.* at 687.

[30] *Bailey*, 444 U.S. at 403.

[31] Robinson, *supra* note 28, at 688.

[32] Robinson, *supra* note 28, at 688.

[33] Robinson, *supra* note 28, at 688.

negligently) . . . violates [a section] . . . shall be punished."[34] Section 1319(c)(1)(A) only lists one mens rea requirement: "negligently." Section 1319(c)(2)(A) only lists one mens rea requirement: "knowingly." Congress has not defined the adverbs "knowingly" or "negligently" anywhere in the statute.[35] As explained below, an offense analysis approach, present in the Clean Water Act, creates ambiguity in enforcement because different mens rea requirements may be intended to apply to different elements of an offense.

Adding to the confusion of interpreting the Clean Water Act is the fact that inconsistent interpretations by attorneys, scholars, and even judges have rendered chaotic most distinctions between different kinds of culpability.[36] Terminology relating to mens rea has been used so many different ways that they no longer have a set meaning. Scholars continue to speak of "general intent offenses" and "specific intent offenses."[37] This is, however, overly simplistic, and may be misinterpreted. General intent could mean criminal intent.[38] General intent could encompass all forms of the mental state requirement.[39] And general intent could also mean intent to do something on an undetermined occasion.[40] Specific intent could mean the mental state required for a particular crime.[41] Specific intent can mean that only one mental state of intent applies.[42] Furthermore, specific intent could mean intent to do something at a particular time and place.[43] As a result, this Article deliberately uses none of these terms in discussing the mens rea requirements.

The Clean Water Act has three distinct mens rea requirements: negligent, knowing, and knowing endangerment.[44] The first two of these are mens rea types recognized in the Model Penal Code—the third, "knowing endangerment," is not.[45] The Clean Water Act establishes separate sections for each type of violation.[46] The two statutory provisions that relate to negligent and knowing violations are the focus of the majority

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[34] 33 U.S.C. § 1319(c)(1)(2).

[35] United States v. Hopkins, 53 F.3d 533, 537 (2d Cir. 1995); United States v. Hanousek, 176 F.3d 1116, 1120 (9th 1999).

[36] Rebecca S. Webber, *Element Analysis Applied to Environmental Crimes: What Did They Know and When Did They Know It?*, 16 B.C. ENVTL. AFF. L. REV. 53, 79 (1988).

[37] Robinson, *supra* note 28, at 688 n.33 (citing examples).

[38] United States v. Bailey, 444 U.S. 394, 403 (1980) (quoting W. LaFave & A. Scott, HANDBOOK ON CRIMINAL LAW § 28, at 201-202 (1972)).

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] 33 U.S.C. § 1319(c)(1)(3) (2014).

[45] *Id.*; *see* MODEL PENAL CODE § 2.02(2) (Proposed Official Draft 1962).

[46] *See* 33 U.S.C. § 1319(c)(1)(3) (2014).

of the litigation over mens rea provisions and are the focus of this Article. Section 1319(c)(1)(A) states the law as it relates to negligence requirements:

> 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 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.[47]

Section 1319(c)(2)(A) states the law as it relates to knowing requirements:

> Any person who – (A) *knowingly violates* section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both.[48]

Each of the individual sections refers to acts and harms, and most provisions do not explicitly include any mens rea requirements. To illustrate, § 1311(a) focuses on all effluent limitations:

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person *shall be unlawful*.[49]

Section 1318(b) relates to unlawful disclosures of confidential information:

> . . . Any authorized representative of the Administrator . . . who *knowingly or willfully* publishes, divulges, discloses, or makes

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[47] 33 U.S.C. § 1319(c)(1)(A) (2014) (emphasis added).
[48] *Id.* § 1319(c)(2)(A) (emphasis added).
[49] *Id.* § 1311(a) (emphasis added).

> known in any manner or to any extent not authorized by law any information which is required to be considered confidential under this subsection shall be fined not more than $1,000 or imprisoned not more than 1 year, or both.[50]

Section 1321(b)(3) refers to unlawful discharge of oil or hazardous substances into U.S. waters:

> The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone . . . in such quantities as may be harmful as determined by the President under paragraph (4) of this subsection, *is prohibited* . . . .[51]

Finally, § 1342(k) concerns the national pollutant discharge elimination system:

> Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health.[52]

For decades, courts have looked at the syntax to determine whether the mens rea requirement modifies "violates" in the Clean Water Act statute.[53] The phrases "negligently violates" and "knowingly violates" appear in a different section of the Clean Water Act from the language that defines the elements of the offenses.[54] The "negligently" or "knowingly" requirement is applied to every offense in sections 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, 1342, and 1345. These sections, which define the offense elements, list the illegal actions, such as operating a source in violation of an applicable pretreatment standard,[55] the discharge of oil or hazardous substances into U.S. waters,[56] or the disposal of sewage sludge out of permit conditions.[57]

In every one of the aforementioned offenses, the mens rea requirement could be understood linguistically to apply to one, some, or all of the requisite elements. Each provision's intent requirement has several distinguishable parts. For example, in § 1311, the intent

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[50] *Id.* § 1318(b) (emphasis added).
[51] *Id.* § 1321(b)(3) (emphasis added).
[52] 33 U.S.C. § 1342(k) (2014).
[53] *See e.g.,* United States v. Hopkins, 53 F.3d 533, 537-38 (2d Cir. 1995).
[54] 33 U.S.C. §§ 1311, 1312, 1316, 1317, 1318, 1319(c)(1)(3), 1321(b)(3), 1328, 1342, 1345 (2014).
[55] *Id.* §§ 1316(e), 1317(d) (2014).
[56] *Id.* § 1321(b)(3).
[57] *Id.* § 1311(h).

requirement could apply to the intent to discharge a substance, the intent to discharge a pollutant, the intent to discharge a pollutant out of compliance, and the intent to specifically violate that section. Because the offense analysis approach does not recognize the multifaceted nature of the mental state for each offense,[58] it is not viable in understanding which elements the Clean Water Act mens rea requirement applies to.

Unfortunately, the statutory language has provided no guidance as to what the intent requirement applies to. For example, the most natural grammatical reading of § 1319(c)(2)(A) suggests that the adverb "knowingly" modifies only the verb "violates," which follows it.[59] This seems to imply that the defendant needs to know that he or she is violating the law. When Congress uses the language "knowingly violates" or "negligently violates," however, the nouns that follow "violates" refer to section numbers that prescribe very different crimes.[60] This could suggest that the defendant must knowingly violate all the elements of the offenses prescribed in those section numbers.[61] Problematically, either interpretation would accord with ordinary usage. As a result, the "negligent" or "knowing" intent in this provision is ambiguous, and subject to interpretation among prosecutors, defense attorneys, and judges.

Although legislatures commonly draft ambiguous statutes because they do not draft in accordance to the clearer Model Penal Code, the Clean Water Act is unique. Courts often resolve cases of ambiguity through various forms of statutory construction and legal doctrine. The Clean Water Act's ambiguous mens rea requirements, however, are particularly difficult to interpret because of its complex statute structure and time since enactment, which has resulted in decades of changed environmental circumstances and judicial norms.

Realizing that the Clean Water Act inadequately regulated toxic pollutants, pollution from nonpoint sources, and stormwater discharges, Congress passed the Water Quality Act of 1987, which amended the original 1972 Act.[62] In 1985, the House Report stated that the proposed amendments would provide penalties for individuals who "knowingly or negligently violate or *cause* the violation" of the Act's requirements.[63] In 1986, the Senate Report spoke of a person who "causes a publicly owned

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[58] Robinson, *supra* note 28, at 689.

[59] *See* 33 U.S.C. § 1319(c)(2)(A) (2014).

[60] *See e.g., id.* § 1319(c).

[61] *See* United States v. Ahmad, 101 F.3d 386, 390-91 (5th Cir. 1996).

[62] Kenneth M. Murchison, *Learning from More Than Five-and-A-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future*, 32 B.C. ENVTL. AFF. L. REV. 527, 566 (2005).

[63] H.R. REP. NO. 189, 99th Cong., 1st Sess. 29–30 (1985); H.R. REP. NO. 1004, 99th Cong., 2d Sess. 138 (1986).

treatment works to violate any effluent limitation or condition in any permit issued to the treatment works."[64] Congress's stated goal was to increase the criminal penalties to "reflect the commensurately serious nature of the violations to be criminally prosecuted under the Clean Water Act."[65]

In passing the Amendments, however, Congress made the mens rea requirements even less clear, using language that may or may not have eliminated mens rea requirements. Because the lowest mens rea requirement governs, the word "cause" seems to imply that one or more elements lacks mens rea requirements, as one could cause a result without any knowledge. It is unlikely, however, that Congress ever actually considered whether to require proof that the defendant had actual knowledge that his or her conduct violated any statutory provisions. The legislative history and text is silent on whether Congress wanted to penalize a defendant who simply caused a violation. As a result, the statute remained ambiguous when the circuit courts began to consider the issue in the 1990s.

III. AN INDETERMINATE JUDICIAL SPLIT

Courts have had great difficulty with complex statutes in which Congress has created an offense of "knowingly violating a regulation,"[66] such as the Clean Water Act. Without consistent syntax or controlling legislative history, courts have made rulings based on the more abstract determination of whether the Clean Water Act constitutes a public welfare offense statute. Under court doctrine, an offense is a public welfare offense when Congress intended that one or more elements of an offense have no mens rea requirement.[67] Courts believe Congress intended to create a public welfare offense when the statute regulates dangerous and deleterious activities, lacks a mens rea requirement for an element, and inflicts a light penalty.[68] If the Clean Water Act is a public welfare offense statute, the defendant does not need to know that it was a prohibited act in order to knowingly violate the Act.[69] If the Act is not a public welfare offense statute, however, the defendant must also know that he discharged a dangerous and deleterious substance to knowingly violate the Act.[70]

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[64] *See* United States v. Hopkins, 53 F.3d 533, 539 (2d Cir. 1995).

[65] *Id.*; *see also* H.R. NO. 1004 at 138.

[66] *See e.g.,* United States v. Hayes Int'l Corp., 786 F.2d 1499, 1502 (11th Cir. 1986).

[67] Susan F. Mandiberg, *The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example*, 25 ENVTL. L. 1165, 1210 (1995).

[68] Morissette v. United States, 342 U.S. 246, 254 (1952).

[69] *See* United States v. Weitzenhoff, 35 F.3d 1275, 1286 (9th Cir. 1993).

[70] *See* Staples v. United States, 511 U.S. 600, 607, n. 3 (1994)

Statutes are naturally limited by their choice of measures and their language.[71] As a result, there may be several answers to a disputed issue of law.[72] Virtually all canons of statutory interpretation have at least one counter-canon that could refute it.[73] Nonetheless, courts resolve pervasive ambiguities in statutes, including criminal statutes, all of the time, making use of various canons and interpretive strategies.[74] And once a federal court of appeals has clearly decided on an interpretation, lower courts bound by that decision must simply follow it to remain consistent with the Circuit Court's ruling.

Since 1993, the federal courts of appeals addressing the Clean Water Act mens rea requirements have split on whether the Clean Water Act constitutes a public welfare offense. The Second, Sixth, and Ninth Circuits have all stated that the Act is a public welfare statute.[75] The Second, Sixth, Eighth and Ninth Circuits have held that the prosecution only needs to prove that the defendant knew of the prohibited act (the actus reus) was taking place—but not that the act was in fact prohibited.[76] In contrast, looking at the same statutory language and legislative history, the Fourth and Fifth Circuits require the government to prove that the defendant knew *what* was being discharged to commit a Clean Water Act violation.[77]

Because Congress spoke in terms of "causing" a violation, the Second and Ninth Circuits held that the polluter does not need to be cognizant of the requirements or even the existence of the permit to violate the law.[78] Both courts implied that following the grammatical rules strictly would defeat the stated remedial purpose. The Fifth Circuit, however, declined to characterize the Clean Water Act as a public welfare offense, stating that Congress remained silent on whether mens rea was required.[79]

In 1993, the Ninth Circuit became the first circuit court to address the Clean Water Act's mens rea requirements in *United States v.*

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[71] *See generally* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules of Canons About How Statutes Are to be Construed*, 5 GREEN BAG 301 (2002).

[72] *Id.* at 298.

[73] *Id.* at 302.

[74] *Id.* at 298.

[75] United States v. Kelley Technical Coatings, Inc., 157 F.3d 432, 439 n.4 (6th Cir. 1998); United States v. Hopkins, 53 F.3d 533, 540-41 (2d Cir. 1995); United States v. Weitzenhoff, 35 F.3d 1275, 1286 (9th Cir. 1993).

[76] *E.g.* United States v. Sinskey, 119 F.3d 712, 715-17 (8th Cir. 1997); *Weitzenhoff,* 35 F.3d at 1286; Thomas Richard Uiselt, *What A Criminal Needs to Know Under Section 309(c)(2) of the Clean Water Act; How Far Does "Knowingly" Travel?*, 8 ENVTL. LAW. 303, 311-12 (2002).

[77] *See* United States v. Cooper, 482 F.3d 658, 666-68 (4th Cir. 2007); United States v. Ahmad, 101 F.3d 386, 390-91 (5th Cir. 1996).

[78] *Hopkins*, 53 F.3d at 540; *Weitzenhoff*, 35 F.3d at 1284.

[79] *Ahmad*, 101 F.3d at 391.

Weitzenhoff, in a case involving the discharge of waste activated sludge by a sewage treatment plant manager.[80] The Ninth Circuit held that the sludge was analogous to the "deleterious devices or obnoxious waste materials" referenced in *International Minerals* and therefore, the government did not need to prove that the defendants knew that their acts violated the statute to be culpable.[81]

In 1995, the Second Circuit affirmed *Weitezenhoff* when it analyzed the mens rea requirements in *United States v. Hopkins*, where the defendant tampered with wastewater samples that would be sent to independent laboratories for monitoring.[82] The Second Circuit cited *International Minerals* and stated that the vast majority of the regulated substances, the need for a governmental permit, and the legislative goal to strengthen the criminal penalties in the 1987 amendments would alert a reasonable person to the likelihood of stringent regulation.[83] The Second Circuit specifically noted that the Clean Water Act's provisions regulate water quality related effluents,[84] toxic pollutants,[85] oil and hazardous substances,[86] incinerator residue,[87] munitions,[88] chemical wastes,[89] biological materials,[90] and sewage sludge,[91] all substances that constitute dangerous and deleterious substances.[92] Both the Ninth and Second Circuits emphasized that Congress drafted the Act's criminal provisions to protect the public from the potentially dire consequences of the Act's regulated activities, thus serving a remedial purpose.[93] The Second and Ninth Circuits distinguished the Supreme Court's decision in *Staples* by contrasting the apparent innocent ownership of guns to the handling of "obnoxious waste materials."[94]

In 1996, however, the Fifth Circuit in *United States v. Ahmad* reached a different conclusion in a case involving the defendant's discharge of nearly five thousand gallons of gasoline into a city's sewer

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[80] *Weitzenhoff*, 35 F.3d at 1281-82.
[81] *Id.* at 1284-87.
[82] *Hopkins*, 53 F.3d at 535.
[83] *Id.* at 539.
[84] 33 U.S.C. § 1312 (2014).
[85] *Id.* § 1317.
[86] *Id.* § 1321.
[87] *Id.* § 1362(6).
[88] *Id.*
[89] 33 U.S.C. § 1362(4) (2014).
[90] *Id.*
[91] *Id.*
[92] United States v. Hopkins, 53 F.3d 533, 539 (2d Cir. 1995).
[93] *Id.*, 53 F.3d at 540; United States v. Weitzenhoff, 35 F.3d 1275, 1283-86 (9th Cir. 1993), *reaffirmed in United States v. Hanousek*, 176 F.3d at 1121, *cert. denied,* Hanousek v. United States, 528 U.S. 1102, 1102 (2000).
[94] *Hopkins*, 53 F.3d at 540; *Weitzenhoff*, 35 F.3d at 1280.

system.[95] The Fifth Circuit distinguished the case from *Weitzenhoff* and *Hopkins* because the two prior cases dealt with the concept that ignorance of the law was not an excuse.[96] In *Ahmad*, the Fifth Circuit held that the discharge of gasoline was no more harmful than the possession of machine guns in *Staples* and that the violation, punishable by years in prison, could not be a public welfare offense because public welfare offenses are generally punishable only by fines or short jail sentences.[97]

The U.S. Supreme Court has consistently held that after 1985 that mens rea requirements apply to each of the statutory elements that criminalize otherwise innocent conduct, especially when Congress is silent on a mens rea requirement.[98] The Clean Water Act regulates rock, sand, and cellar dirt that are discharged into water, conduct that appears to be innocent.[99] Applying the *expressio unius est exclusio alterius* canon of construction, the Fifth Circuit stated that because Congress left non-dangerous items in the statute, it could not have intended the Clean Water Act to be a public welfare offense statute.[100]

The Supreme Court had previously held that when Congress authorizes a severe penalty for a crime, it tends to suggest that Congress requires that a defendant must know the facts that make his conduct illegal.[101] In *United States v. Weitzenhoff*, *United States v. Hopkins*, and *United States v. Hanousek*, the defendants appealed to request the U.S. Supreme Court to review the decision of the circuit courts through a petition for a writ of certiorari.[102] The Supreme Court, however, denied certiorari to the Second Circuit's decision in *Hopkins* and to the Ninth Circuit's decisions in *Weitzenhoff* and *Hanousek*,[103] in which the Ninth Circuit had affirmed *Weitzenhoff*.[104] Not all Supreme Court Justices agreed.[105] In Justice Thomas's dissent to the denial of certiorari which was joined by Justice O'Connor, he stated that the Clean Water Act could not be a public welfare offense statute because the Act regulates a broad range of ordinary and industrial commercial activities and imposes some harsh penalties.[106]

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[95] *See* United States v. Ahmad, 101 F.3d 386, 387-88 (5th Cir. 1996).
[96] *Id.* at 390-91.
[97] *Id.* at 391.
[98] Liparota v. United States, 471 U.S. 419, 426 (1985); Staples v. United States, 511 U.S. 600, 607-09 (1994); United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994).
[99] *See* 33 U.S.C. § 1362(6); Mandiberg, *supra* note 67, at 1219-20.
[100] *Ahmad*, 101 F.3d at 391.
[101] *Staples*, 511 U.S. at 618-19.
[102] *See* West's Tax Law Dictionary § C1070 (2013 ed.).
[103] Hanousek v. United States, 528 U.S. 1102, 1102 (2000).
[104] United States v. Hanousek, 176 F.3d 1116, 1122 (9th Cir. 1999).
[105] Hanousek v. United States, 528 U.S. 1102, 1102 (2000).
[106] *Id.*

Neither side has the more compelling reasoning based on the legislative history and the statute. Given these rulings, it is difficult to predict how the other Circuit Courts would—*or should*—interpret the Clean Water Act's mens rea requirements. In 1991, for example, the Sixth Circuit held that a Clean Air Act statute that uses the language "knowingly violates" requires only knowledge of the emissions themselves, not knowledge of the statute or of the hazards that emissions pose.[107] This holding, however, preceded the Ninth Circuit in *Weitzenhoff* and did not refer to the Clean Water Act.

IV. WHY THE SUPREME COURT MUST DENY CERTIORARI

The Supreme Court should continue to deny certiorari on clarifying the Clean Water Act's mens rea requirements despite a general rule that makes circuit splits paradigmatic cases for granting certiorari.[108] There have been dozens of disputes that arise from the Clean Water Act's unclear mens rea standards. Congress, however, has given the courts no legal tool to settle these disputes. The Clean Water Act's mens rea requirements are so open-ended in light of the changed circumstances that Congress should redraft those mens rea requirements. If the Court decided this issue, it would be no more than a judicial flip of the coin. Although the Supreme Court should typically review court splits, the Court should not do so when there is no governing law, and when circumstances have changed significantly.

In many ways, this is an ideal circumstance for the Supreme Court to grant certiorari. Officially, the Supreme Court Procedures state that the justices look primarily at the national importance of the question presented, the potential to resolve a split of opinion in the federal circuit courts, or the potential for the decision to have important precedential value.[109] The Supreme Court has primarily granted certiorari under three scenarios. First, when there is an actual conflict between the lower courts or between the lower court and a Supreme Court precedent.[110] Second, when a lower court decision directly and substantially affects the federal government, or when the federal government is required to operate differently in various parts of the country due to decisional conflicts.[111]

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[107] United States v. Buckley, 934 F.2d 84, 88 (6th Cir. 1991).

[108] Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 407 (2004).

[109] Corey Ciocchetti, *The Constitution, the Roberts Court, and Business: The Significant Business Impact of the 2011-2012 Supreme Court Term*, 4 WM. & MARY BUS. L. REV. 385, 394 (2013)

[110] Cordray, *supra* note 108, at 407.

[111] Cordray, *supra* note 108, at 408.

Finally, when there are amicus curiae filed in support of or in opposition to the petition for certiorari;[112] non-parties participate in the Court's decision-making process through the submission of amicus curiae, or friend-of-the-court, briefs.[113] In regards to the Clean Water Act's mens rea requirements, there is an actual conflict between circuit courts.

In particular, lower court and state court conflicts largely guide the certiorari decisions of the Court. The number of cases involving a conflict rose from forty-five percent in the mid-1980s to sixty-nine percent in the mid-1990s and has remained at that level since.[114] Under the Supreme Court Rules, the Supreme Court prioritizes "important" federal questions on which the lower courts have differed.[115] The Court, however, has even resolved circuit splits on less important matters, like whether a complaint delivered by facsimile has been properly served.[116] As a result, the scholarly debate on Supreme Court jurisprudence is moving away from when the justices grant certiorari to when the Justices *should* grant certiorari.[117]

In fact, Justices have significant latitude in granting or denying certiorari.[118] "Because decisionmaking at the certiorari stage is completely unfettered, the voting behavior of each Justice is constrained only by his or her own individual sense of what kinds of cases merit the Court's attention."[119] Individual justices might be more inclined to grant or deny certiorari based on their own ideological predilections, and based on the likely outcome when ruling on the merits.[120] Furthermore, the justices' law clerks, who have some influence with justices but lack a broad outline of the Court's trends, typically find a circuit conflict most worthy of certiorari in a petition for review.[121]

In *Arizona v. Evans*, Justice Ginsburg favored a period of diverse and independent evaluations of a legal issue from different state and federal appellate courts before a better-informed and more enduring national

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[112] Cordray, *supra* note 108, at 408.

[113] Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 744 (2000)

[114] David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk by Todd C. Peppers, & Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court by Artemus Ward & David L. Weiden*, 85 TEX. L. REV. 947, 981-82 (2007) (book review).

[115] Cordray, *supra* note 108, at 436-37.

[116] Cordray, *supra* note 108, at 436-37.

[117] *See id.*; Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1570 (2008).

[118] Cordray, *supra* note 108, at 428.

[119] Cordray, *supra* note 108, at 418.

[120] Cordray, *supra* note 108, at 410-14.

[121] ARTEMUS WARD & DAVID L. WEIDEN, SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT 132 (2006).

binding rule from the Supreme Court.[122] Justice Stevens concurred, stating that "[T]here are decisionmakers other than judges who could perform the task of resolving conflicts on questions of statutory construction."[123] Former Justice O'Connor favorably described a practice of letting issues 'percolate' in the fifty states in the interests of federalism, although she qualified this interest in resolving emerging constitutional issues.[124]

In contrast, Justice White had an unswerving view that the Court should not let circuit splits linger, stating that the "Court has a special obligation to intercede and provide some definitive resolution of the issues."[125] Former Chief Justice Rehnquist concurred, expressing that "Congress should not be held to have laid down one rule in North Carolina and another rule in North Dakota simply because [the lower courts] disagree with one another on the meaning of a federal statute."[126] Although Justices O'Connor, White, and Rehnquist are no longer on the Supreme Court today, their views continue to shape the Court. Legal scholars have not yet considered the circumstances as to when to grant certiorari when lower courts or state courts are divided, other than the need to focus on questions of national importance.

This Article suggests that the U.S. Supreme Court decline certiorari in a narrow set of important cases where Congress and the courts have been unable to clarify the ambiguity in the first two decades with a consistent judgment. In those cases, the social circumstances and judicial norms have substantially changed over the course of two decades and interpreting the statute becomes especially difficult and complex. To that end, the Supreme Court should continue to deny certiorari on the Clean Water Act's mens rea requirements. As the Clean Water Act continues to age, courts apply evolved public welfare offense doctrine and new environmental norms to the Act's language in ways that Congress likely never contemplated when it passed the Act in 1972.

The Court cannot come with the "right" analysis for a "better" answer because legal doctrine and norms have substantially changed. Congress has not amended the Clean Water Act since 1987, over two and a half decades ago. Despite the amendments, the Clean Water Act remains a complex statute with a single mens rea requirement for multiple separate criminal offenses. Furthermore, the Clean Water Act's mens rea

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[122] Arizona v. Evans, 514 U.S. 1, 24 (1995); California v. Carney, 471 U.S. 386, 401 (1985).

[123] Cordray, *supra* note 108, at 439.

[124] Johnson v. Texas, 509 U.S. 350, 379 (1993).

[125] The Honorable Ruth Bader Ginsburg, *Remembering Justice White*, 74 U. COLO. L. REV. 1283, 1285 (2003); *see* Metheny v. Hamby, 488 U.S. 913, 915 (1988).

[126] Cordray, *supra* note 108, at 436.

requirements remain indeterminate despite two decades of decisions, even though court decisions usually clarify ambiguous statutes over time. The circuit courts' decisions could have led to a compelling outcome. The decisions, however, did not present more clarity on the mens rea requirements because of shifts in the understanding of what constituted a public welfare offense.

There are concerns that without uniformity, similarly situated litigants would be treated differently in different circuits, and that multi-state actors, such as corporations, would be forced to comply with divergent legal standards.[127] Nonetheless, the Supreme Court does not need to resolve circuit splits on the Clean Water Act's mens rea requirements when the law is still settled within the circuit. Here, despite four decades of ambiguity, citizens have clear notice of how mens rea requirements are applied within the circuits that have decided on the issue.

Instead, Congress should clarify the mens rea requirement so that it is not a true judicial coin toss. It would be inappropriate for courts to infer that voters have a preference either way on whether there should be a specific mens rea requirement to an element of a Clean Water Act offense. As the moral authority of the country and a political branch that is accountable to voters, Congress should draft new mens rea requirements in accordance to a fresh set of policy choices that balance enforcement and due process concerns.

V. REWRITING THE CLEAN WATER ACT IN LIGHT OF ELEMENT ANALYSIS

A. Why Element Analysis is Encouraged

The Clean Water Act criminal enforcement sections, more than most sections, must be rational, clear, and internally consistent, because a defendant faces possible imprisonment for violating a section. A precise code that sufficiently defines forbidden conduct gives fair notice, both to law enforcement and defendants.[128] Fair notice provides greater due process protection for defendants and increased fairness of penalties while reducing opportunities for arbitrary enforcement.[129] At the same time, fair notice helps achieve the goals of condemning and deterring defendants from violating the law again.[130]

To give fair notice of the prohibition's scope to defendants, Congress can draft mens rea requirements in terms of each element rather than each

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[127] Frost, *supra* note 117, at 1570.
[128] Robinson, *supra* note 28, at 682.
[129] Webber, *supra* note 36, at 79–80.
[130] Robinson, *supra* note 28, at 682.

offense, a process known as element analysis.[131] Element analysis helps provide the comprehensiveness, clarity, and precision to give fair notice of the minimum requirements necessary to commit a Clean Water Act criminal violation.[132] Furthermore, element analysis eliminates the need for judicial statutory construction that may expand or reduce that scope.[133] Under element analysis, Congress would regain authority to define the criminal liability requirements in the Clean Water Act that it had previously delegated to the courts.

Distilling the Clean Water Act provisions' elements using the same examples as above illustrates why element analysis is appropriate:

> Section 1311: (1) Any person who (2) negligently or knowingly violates (3) this section or any permit condition or limitation (4) by causing (5) a discharge (6) of any pollutant (7) except in compliance with the Clean Water Act.
>
> Section 1318: (1) Any person who (2) negligently or knowingly violates (3) this section (4) by knowingly or willfully (5) publishing, divulging, disclosing, or make known (6) in any manner or to any extent (7) not authorized by law (8) any information (9) which is required to be considered confidential.
>
> Section 1321(b)(3): (1) Any person who (2) negligently or knowingly violates (3) this section (4) by causing (5) a discharge (6) of oil or hazardous substances (7) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone (8) in harmful quantities.
>
> Section 1342: (1) Any person who (2) negligently or knowingly violates (3) this section (4) by not complying (4) with a permit (5) issued, (6) except any standard imposed for a toxic pollutant injurious to human health.

Each offense has several elements that are associated with only one culpable state of mind, creating a significant amount of confusion. Congress can refine an understanding of the mens rea requirements by adding detailed, precise definitions of the required culpable states of mind to each and every offense *element* in the Clean Water Act's criminal enforcement provisions.

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131 Robinson, *supra* note 28, at 703.
132 *See* Robinson, *supra* note 28, at 703.
133 Robinson, *supra* note 28, at 703.

B. Recommendations for Mens Rea Under Element Analysis for the Clean Water Act

Congress should redefine the mens rea requirements in accordance with the now fifty year old Model Penal Code, using only four mens rea terms: purposely, knowingly, recklessly, and negligently. Additional undefined terms would undercut clarity, consistency, and predictability.[134] A person would act "purposely" with respect to a result if his conscious objective and positive desire is to cause such a result.[135] A person would act "knowingly" with respect to a result if it is not his conscious objective, but is practically certain that his conduct will cause that result.[136] "Purposely" would require that the defendant have a positive desire to cause the result, well beyond knowledge of a result's near certainty in "knowingly."[137] A person would act "recklessly" with respect to a result if he consciously disregards a substantial risk of harm.[138] A person who "recklessly" acts would be punished for taking risks, not for intentionally acting even with knowledge of the consequences. A person would act "negligently" if she is unaware of a substantial risk that she should have perceived, a gross deviation from the reasonable person's standard of care—gross negligence.[139] In doing so, Congress should define the four mens rea terms in the Clean Water Act in a new definitions section, given the historic confusion of these mens rea terms.

Congress should also redraft the language to express each element of a Clean Water Act crime in a separate and distinct word. To do so, Congress will need to break the offense down into its material elements. Different elements of the same offense often require different culpability requirements.[140] Each mens rea term should be defined in relation to each objective element of an offense, such as the conduct, the attendant circumstance, or the result.[141] To guard against omissions, Congress can require a reckless mens rea for elements when it states no culpability term.[142] Congress could exclude simple civil negligence as a mens rea requirement, given that the criminal negligence standard is already

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134 Robinson, *supra* note 28, at 706.
135 *See* MODEL PENAL CODE § 2.02(1)(a)(i) (Proposed Official Draft 1962).
136 *See id.* § 2.02(2)(b)(ii) (Proposed Official Draft 1962).
137 Robinson, *supra* note 28, at 694.
138 *See* MODEL PENAL CODE § 2.02(2)(c) (Proposed Official Draft 1962).
139 *See* MODEL PENAL CODE § 2.02(2)(d) (Proposed Official Draft 1962).
140 Robinson, *supra* note 28, at 724.
141 *See* MODEL PENAL CODE § 2.02(2) (Proposed Official Draft 1962).
142 Robinson, *supra* note 28, at 735.

consistent with the Department of Justice's Principles of Federal Prosecution.[143]

More precisely, Congress should apply mens rea requirements only to the conduct, rather than to the circumstance or result. Otherwise, "knowing" conduct may always require that the actor be aware of every pertinent attendant circumstance of his conduct.[144] Congress should define conduct elements literally to mean a single, actual physical movement of the actor, instead of combining them with circumstance elements. The Clean Water Act uses terms that express both conduct and circumstance elements. This combination creates ambiguities and undermines consistency in the Clean Water Act.[145] For example, 33 U.S.C. § 1311 says that the "Except as in compliance with . . . various sections . . . the discharge of any pollutant by any person shall be unlawful."[146] The verb "discharge" is used to describe both an act and the result of that act. When rephrased as "knowingly engaging in conduct in which the person recklessly releases a pollutant," for example, it expresses greater clarity.

Congress would not need to articulate any mistake or ignorance defenses after revising the Clean Water Act's provisions. Mistake suggests a wrong belief about a matter under the consideration, while ignorance implies a lack of knowledge about the matter.[147] Under common law, a defendant may be excused from liability based on a mistake or ignorance of a fact.[148]

"Under element analysis, however, determining whether a reasonable or an unreasonable mistake as to a particular circumstance will provide a defense requires nothing more than determining what culpable state of mind is required as to that circumstance element."[149] For example, any mistake negates purposeful or knowing conduct.[150] Both unreasonable and reasonable mistakes negate reckless conduct; unreasonable mistakes would be better phrased as reckless mistakes.[151] Reasonable mistakes negate negligent conduct; reasonable mistakes would be better phrased as negligent mistakes.[152] Because the mens rea requirements will be clear for each element, Congress does not need to articulate mistake defenses.

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143 *See* Samara Johnston, *Is Ordinary Negligence Enough to Be Criminal? Reconciling United States v. Hanousek with the Liability Limitation Provisions of the Oil Pollution Act of 1990*, 12 U.S.F. MAR. L.J. 263, 305 (2000).

144 Robinson, *supra* note 28, at 722.

145 Robinson, *supra* note 28, at 709.

146 33 U.S.C. § 1311(a) (2014).

147 JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 153 (6th ed. 2012).

148 *Id.*

149 Robinson, *supra* note 28, at 726.

150 Robinson, *supra* note 28, at 728.

151 Robinson, *supra* note 28, at 728.

152 Robinson, *supra* note 28, at 728.

Congress should draft the new Clean Water Act mens rea requirements to deter past and potential violators. A primary purpose of the Clean Water Act is to ensure that offenders promptly return to compliance with the Act.[153] A prosecutor, however, may have difficulty establishing an actor's requisite mental state to convict him because intent, often the most difficult element to prove,[154] must be shown indirectly from an actor's statements and conduct.[155] Therefore, Congress should draft mens rea requirements that are not too cumbersome for prosecutors to meet.

Tough mens rea requirements convince corporations, which commit the overwhelming majority of antipollution law violations,[156] to act more responsibly to avoid violating any Clean Water Act provisions. Companies would find it more difficult to treat criminal prosecutions as a cost of doing business by putting profits before environmental compliance and public safety.[157] "Corporate officials are more likely to comply with the law when they fear that they may go to jail if their violations are discovered."[158] Moreover, tough mens rea requirements warn potential violators that they may also experience adverse criminal consequences for noncompliance.

At the same time, however, Congress must also protect the defendant's due process rights. Under the Fifth Amendment, "[N]o person shall . . . be deprived of life, liberty, or property, without, without due process of law."[159] Because society aims to convict only guilty people, the new mens rea requirements should still presume a defendant's innocence. When a defendant acted reasonably and without any intent to commit a crime, punishment serves no incapacitation, deterrence, or rehabilitation function. As a result, Congress should make a distinction between

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[153] THOMAS F.P. SULLIVAN, ENVIRONMENTAL LAW HANDBOOK 299 (Government Institutes, 19th ed. 2007). The other stated purpose is to minimize negative impacts on health and the environment.

[154] Commonwealth v. Smith, 44 N.E. 503, 504 (Mass. 1896); David E. Filippi, *Unleashing the Rule of Lenity: Environmental Enforcers Beware!*, 26 Envtl. L. 923, 924-25 (1996).

[155] Seventh Circuit Judicial Conference Comm. on Jury Instructions, *Manual on Jury Instructions in Fed. Crim. Cases* § 4.04, *reprinted in* 33 F.R.D. 523, 550 (Walter J. La Buy, Chairman 1963).

[156] David M. Uhlmann, *Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, 2009 UTAH L. REV. 1223, 1226 (2009); *see* Jeremy M. Miller, *Mens Rea Quagmire: The Conscience or Consciousness of the Criminal Law?*, 29 W. ST. U. L. REV. 21, 50 (2001).

[157] Uhlmann, *supra* note 157, at 1226; *see* Jeremy M. Miller, *Mens Rea Quagmire: The Conscience or Consciousness of the Criminal Law?*, 29 W. ST. U. L. REV. 21, 50 (2001).

[158] David M. Uhlmann, *After the Spill Is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Law*, 109 MICH. L. REV. 1413, 1443 (2011).

[159] U.S. Const. amend. V.

unwitting conduct and criminally culpable conduct by removing the possibility of elements lacking any mens rea requirements.

To accommodate all of the aforementioned concerns, a person could commit a Clean Water Act felony if the person knowingly engages in conduct in which the person recklessly commits the action leading to reckless consequences:

> Section 1311: A person commits a Clean Water Act felony if the person knowingly engages in conduct in which the person recklessly releases a pollutant in violation of permit conditions or limitations in this Act, and the unlawful substance is recklessly released into U.S. waters.
>
> Section 1318: A person commits a Clean Water Act felony if the person knowingly engages in conduct in which the person recklessly gives confidential information not authorized by law through publishing, divulging, disclosing, or making known in any manner or to any extent.
>
> Section 1321(b)(3): A person commits a Clean Water Act felony if the person knowingly engages in conduct in which the person recklessly releases oil or hazardous substances, and the substance is recklessly discharged into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone in harmful quantities.
>
> Section 1342: A person commits a Clean Water Act felony if the person knowingly engages in conduct in which the person recklessly fails to comply with a permit issued, except for any standard imposed for a toxic pollutant injurious to human health.

This proposal would not require that a defendant have knowledge of the conduct, circumstance, *and* the result, which would make enforcement especially difficult; the defendant need only consciously disregard a substantial risk of harm. At the same time, defendants only face possible prison time when they have a "reckless" state of mind as to the circumstance and result elements, a more forgiving standard than what the Second and Ninth Circuits currently require. Imprisonment would require that the person knew that what he or she was doing violated the law but chose to ignore a substantial and unjustifiable risk. A defendant who made an honest mistake and did not genuinely realize that their conduct could cause harm should not be morally culpable under the Clean Water Act.

Meanwhile, a person could commit a Clean Water Act misdemeanor for a negligent state of mind as to the circumstance and result elements, rather than a recklessness standard:

> Section 1311: A person commits a Clean Water Act misdemeanor if the person knowingly engages in conduct in which the person negligently releases a pollutant in violation of permit conditions or limitations in this Act, and the unlawful substance is negligently released into U.S. waters.
>
> Section 1318: A person commits a Clean Water Act misdemeanor if the person knowingly engages in conduct in which the person negligently gives confidential information not authorized by law through publishing, divulging, disclosing, or making known in any manner or to any extent.
>
> Section 1321(b)(3): A person commits a Clean Water Act misdemeanor if the person knowingly engages in conduct in which the person negligently releases oil or hazardous substances, and the substance is negligently discharged into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone in harmful quantities.
>
> Section 1342: A person commits a Clean Water Act misdemeanor if the person knowingly engages in conduct in which the person negligently fails to comply with a permit issued, except for any standard imposed for a toxic pollutant injurious to human health.

This proposal lowers the mens rea requirement from "reckless" to "negligent" in regards to the prohibited action when it is a misdemeanor. Because defendants would only face fines and probation time rather than possible imprisonment, however, the balance between competing interests shift towards enforcement, given the Act's significant regulation of dangerous and deleterious substances. These mens rea requirements would be consistent with the idea that defendants only need to know about the emissions, not knowledge of the statute or the hazards that the emissions pose.

This proposal remains consistent with Supreme Court decisions which hold that mens rea requirements should apply to each of the statutory elements that criminalize otherwise innocent conduct.[160] Furthermore, proving that a defendant is grossly negligent is higher than the current standard that "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in the same situation."[161] Therefore, proving that a defendant grossly deviated from

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[160] *See* Liparota v. United States, 471 U.S. 419, 471 (1985).

[161] BLACK'S LAW DICTIONARY 1061 (8th ed. 2004). Four Circuit Courts hold that 33 U.S.C. § 1319(c)(1)(A) requires only proof of simple negligence for Clean Water Act negligence violations. *See* United States v. Maury, 695 F.3d 227, 259 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 1600 (2013); United States v. Pruett, 681 F.3d 232, 243 (5th Cir. 2012);

the reasonable person's standard of care remains a sufficiently high standard.

CONCLUSION

The prevailing "offense analysis" approach for analyzing the appropriate mens rea for Clean Water Act offenses has produced inconsistent results in different courts for decades. Congress never considered whether to require proof that the defendant had actual knowledge that his or her conduct violated any of the statutory provisions. And in forty years, the focus and priorities of criminal prosecution under the Clean Water Act have changed, creating circumstances that Congress could never have contemplated when it passed the Act.

Even as federal courts of appeals remain deeply and persistently divided on which mens rea standard to apply, this Article nonetheless suggests that the Supreme Court continue to decline certiorari. The Supreme Court should decline certiorari in a narrow set of important cases where Congress and the courts have been unable to clarify the ambiguity in the first two decades with a consistent judgment. Instead, Congress should redraft the mens rea requirements necessary to commit a Clean Water Act crime. To do so, Congress should not only make the value judgments, but also implement the clarity of "element analysis" by attaching a particular mental state to each and every offense element in the Clean Water Act. It is the role of the legislature, not courts, to define priorities in enforcing current violations, deterring future violations, and protecting defendants' due process rights.

To that end, Congress should use a "knowing" standard for conduct elements and a "recklessness" standard for circumstance and result elements for Clean Water Act felonies. The "negligence" standard would apply for Clean Water Act misdemeanors in terms of circumstance and result elements. In doing so, Congress can resolve four decades of confusion.

United States v. Ortiz, 427 F.3d 1278, 1283 (10th Cir. 2005); United States v. Hanousek, 176 F.3d at 1120 (9th Cir. 1999).