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"Green Collar Criminals" and Wetlands Uncertainty: The Effect of Criminal Provisions in Public Welfare Statutes on Wetlands

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Under the public welfare doctrine, certain regulatory crimes require no showing of the traditional mens rea, or "guilty mind," as a predicate to criminal liability. The doctrine has been used to relax intent requirements in criminal statutes when the public welfare is at stake and is predicated upon the fact that the defendant had notice that the dangerous activity is regulated. A majority of courts place the criminal provisions of the Clean Water Act (CWA)[1] within the public welfare doctrine. In theory, therefore, prosecutors need not prove that a defendant acted with the requisite intent with respect to each element of the underlying statutory offense in order to convict.

The complexity of environmental statutes and the potential consequences of violating these laws have lead criminal defense attorneys to argue that the government should be required to prove that a defendant was aware of the illegality of his conduct. Such "green-collar" criminals would, in essence, claim ignorance of the law as a defense, an option generally denied persons accused of nonregulatory crimes, where "ignorance of the law is no defense." Courts are currently struggling with whether environmental criminal defendants should be segregated from other criminal defendants in such a manner.

The applicability of the public welfare doctrine to the criminal provisions of the CWA has not been clearly established by the courts. Regulatory ambiguity clouds the implementation of §404 of the CWA, the section permitting the otherwise prohibited discharge of dredge or fill material into a wetlands. The U.S. Army Corps of Engineers' (the Corps') jurisdiction over isolated wetlands was severely curtailed by the U.S. Supreme Court in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*,[2] and the Corps' "*Tulloch* rule" was recently overturned by the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit. Questions of fairness have arisen regarding the application of the public welfare doctrine when great uncertainty surrounds the authority of the Corps to regulate the activity.

The first section of this Article discusses the public welfare doctrine's origins and what it means in environmental regulation. The second addresses how the public welfare doctrine intersects with the CWA. The current state of wetlands regulation is described, including the confusion in the courts surrounding the jurisdiction of the Corps. Finally, the current state of the law is described and options to clarify this area of law are proposed.

The Public Welfare Doctrine

The public welfare doctrine initially raised its controversial head in the field of environmental law in a 1971 case, *United States v. International Minerals & Chemical Corp*.[3] In *International Minerals*, a shipment company transported sulfuric and hydrofluosilicic acid without recording the shipment as corrosive liquid in the shipping papers in violation of U.S. Interstate Commerce Commission regulations.[4] The United States filed suit against the shipper, but the federal district court dismissed the suit after finding that the statute required a knowing violation of the statute for criminal liability to be imposed. The Court granted review to determine whether "knowledge" of the actual violation was required.[5] It held that the statute only required knowledge that the shipment was dangerous, not knowledge of the regulation itself.[6] The Court relied on the principle that ignorance of the law is no defense and held that "where dangerous or deleterious devices or products or obnoxious waste materials are being shipped, 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 regulation."[7]

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1. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.
2. 531 U.S. 159, 31 ELR 20382 (2001).
3. 402 U.S. 558 (1971).
4. *Id.* at 559.
5. *Id.* at 560.
6. *See also* United States v. Dotterwich, 320 U.S. 277 (1943), in which the criminal penalties for shipping misbranded drugs in interstate commerce were held not to require awareness of wrongdoing by the defendant. *Id.* at 281. The legislative purposes behind the Food and Drugs Act affected "phases of the lives and health of the people, which in the circumstances of modern industrialism, are largely beyond self-protection." *Id.* at 280.
7. *International Minerals*, 402 U.S. at 565.

More recently, the Court limited the scope of the public welfare doctrine. In *Staples v. United States*,[8] the Court held that the National Firearms Act was not a public welfare statute. Police and agents of the U.S. Bureau of Alcohol, Tobacco, and Firearms obtained a search warrant for a home and discovered a semiautomatic weapon, modified for fully automatic fire.[9] After seizing the weapon, police charged the defendant with possession of an unregistered machine gun in violation of the National Firearms Act. Failure to register all fully automatic weapons with the National Firearms Registration and Transfer Record was a crime punishable by imprisonment.[10] The government argued that violation of the Act was a public welfare offense and required proof only that the defendant knew he possessed a firearm.[11]

The Court rejected this argument and held that the U.S. Congress' silence regarding the mens rea required for a violation did not destroy the traditional common-law presumption for mens rea.[12] Under general principles of common law, some degree of intent, or mens rea, is required before an action is considered a crime.[13] The Court recognized that an exception to the common-law rule existed for "public welfare" or "regulatory" offenses where Congress had imposed strict criminal liability.[14] The Court here, however, found that the public welfare doctrine was not applicable. First, the severity of the penalty—10 years of imprisonment—was at odds with the traditionally light penalties imposed for most public welfare offenses.[15] Second, possessing a gun is a common, lawful activity and does not give its owner notice of the likelihood of regulation.[16] Finally, holding this type of crime to be a public welfare offense would "criminalize a broad range of apparently innocent conduct."[17] Therefore, the Court held that the United States must prove the defendant knew of the features of his firearm to sustain a conviction.[18]

While *International Minerals* stands for the relaxation of the standards for proving intent in situations where the need to protect the public is significant, *Staples* establishes the boundaries of the public welfare doctrine. Although the CWA is generally considered a public welfare statute, courts have failed to agree on where the Act falls on the spectrum between *International Minerals* and *Staples*. Before the interaction of the public trust doctrine with the CWA is addressed, the current status of wetlands law is summarized in the next section.

Current State of Wetlands Law and Corps Jurisdiction

The U.S. Fish and Wildlife Service (FWS) estimates that during the 17th century, America was home to around 220 million acres of wetlands.[19] By 1997, wetland acreage in the United States had diminished to 105.5 million acres.[20] The federal government has taken numerous steps to promote wetlands protection. The regulation of wetlands by the federal government can be traced to the River and Harbors Act (RHA) of 1899. Congress enacted the RHA to ensure that the waters of the United States remained free from obstructions to navigation.[21] The RHA authorized the Corps to regulate any activity which may affect navigation.[22] The destruction of wetlands can affect navigation if streams are diverted or dammed.

In 1972, Congress passed the CWA for the purpose of restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters."[23] The CWA prohibits the discharge of any pollutant into navigable waters. Section 404 of the CWA gives the Corps the authority to regulate the discharge of dredge and fill materials into "navigable waters," defined as "waters of the United States."[24] Section 404 permits are not required for every dredge and fill activity taking place in a navigable water. Congress exempted certain normal agricultural practices, discharges occurring while conducting regular maintenance on dams, and projects specifically authorized by Congress.[25] For all other dredge and fill activities taking place in a navigable water, however, a permit is required.

As the Corps has authority to issue permits for the discharge of dredged or fill material only into a navigable water, the scope of the Corps' jurisdiction is dependant on the

8. 511 U.S. 600 (1994). *But see* United States v. Freed, 401 U.S. 601 (1971) where the Court held the National Firearms Act only required knowledge the defendant possessed a firearm, not knowledge of the law. *Id*. at 607. It rejected applying knowledge to whether the defendant knew the hand grenades were unregistered as this was an exception to the common-law mens rea requirement in "the expanding regulatory area involving activities affecting public health, safety, and welfare." *Id.* at 607. The *Staples* Court rejected the reasoning in *Freed* and followed Liparota v. United States, 471 U.S. 419 (1985) instead. In *Liparota*, the Court reviewed a federal food stamp fraud statute which penalized knowingly possessing or using food stamps in a manner not prescribed by law. *Id.* at 420. The Court held the statute required the government to prove the defendant knew his conduct violated the law or agency regulations. *Id.* at 425. The Court expressed concern that without a mens rea the statute would "criminalize a broad range of apparently innocent conduct." *Id.*
9. 511 U.S. at 603.
10. *Id.* at 602-03.
11. *Id.* at 607.
12. *Id.* at 619. For a more in-depth analysis, see Stephen B. Chapman, *Are Obnoxious Wastes More Like Machine Guns or Hand Grenades? REA Under the Resource Conservation and Recovery Act After* Staples v. United States, 43 U. Kan. L. Rev. 1117, 1135 (1995).
13. 511 U.S. at 605-06.
14. *Id.* at 607.
15. *Id.* at 616.
16. *Id.* at 612.
17. *Id.* at 609 (quoting *Liparota*, 471 U.S. at 426).
18. *Id.* at 619.
19. Thomas E. Dahl & Gregory J. Allord, U.S. Fish and Wildlife Serv. & U.S. Geological Survey, U.S. Geological Survey Water Supply Paper No. 2425, Technical Aspects of Wetlands, History of Wetlands in the Conterminous United States 1 (1985). However some estimate that America contained 225 million acres of wetlands during the late 18th century. Jon Kusler & Teresa Opheim, Our National Wetland Heritage, A Protection Guide 1 (Envtl. L. Inst. 2d ed. 1996).
20. Jeffery A. Zinn & Claudia Copeland, Congressional Research Brief No. ib97014: Wetland Issues (2001). The FWS estimates that between 1986 and 1997, the annual wetland loss rate was 58,500; whereas, the Natural Resource Conservation Service estimated wetland losses at a rate of 32,600 acres annually from 1992 until 1997. *Id.*
21. RHA of 1899, ch. 425, 30 Stat. 1121 (1899) (codified as amended at 33 U.S.C. §§401-418 (2002)).
22. 33 U.S.C. §§401-403.
23. 33 U.S.C. §§1257-1376, ELR Stat. FWPCA §§107-517, Pub. L. No. 92-500, §101, 86 Stat. 816 (1972) (quoting §1251(a)).
24. *Id*. §§1344, 1362(7), ELR Stat. FWPCA §§404, 502(7).
25. *Id*. §1344(f)(1)(A), ELR Stat. FWPCA §404(f)(1)(A). Specifically, this exemption applies to "normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices." *Id.*

agency's interpretation of "navigable waters."[26] In 1985, the Court, in *United States v. Riverside Bayview Homes, Inc.*,[27] upheld the jurisdiction of the Corps over wetlands adjacent to navigable or interstate waters and their tributaries.

After the Court's decision in *Riverside*, the Corps extended §404 of the CWA to waters that provide habitat for migratory birds. This so-called migratory bird rule was adopted without public notice and comment under the Administrative Procedure Act and was extremely controversial. The Corps defended the rule, maintaining that there was a logical link between the degradation of wetlands and interstate commerce, which brought any wetlands regulated under the new rule within the scope of the CWA.

After a split in the circuits over the validity of the rule, the Court reviewed the Corps' jurisdiction over isolated wetlands in *SWANCC*. The Corps required the Solid Waste Agency of Northern Cook County (SWANCC) to obtain a §404 permit after learning that several ditches in a proposed waste disposal site were migratory bird habitat. SWANCC's permit was later denied when no suitable habitat could be established elsewhere.[28] SWANCC challenged the Corps' denial of the permit. The Court held that the CWA did not give the Corps jurisdiction over intrastate, non-navigable, isolated waters if the sole basis for jurisdiction was migratory bird habitat.[29] After the *SWANCC* decision, Corps jurisdiction became entirely dependent on the wetlands' connection to navigable waters. Confusion also reigns over what exactly constitutes a discharge of dredged material. Initially the Corps' regulations considered a discharge "any addition of dredged materials into the waters of the United States."[30] Originally, the agency exempted incidental movement of dredged material during normal dredging operations for navigation purposes. In 1986, however, the Corps revised its regulations to require permits for landclearing activities where heavy equipment was used.[31] Permits were also required for redeposits of large amounts of dredged material using mechanical equipment such as sidecasting.[32] An exemption still existed, however, for "de minimis, incidental soil movement occurring during normal dredging operations."[33] This exemption was referred to as the "incidental fallback exception."

Environmentalists attacked the regulations when a developer drained wetlands using the incidental fallback exception.[34] The developer drained the wetlands using equipment with all its openings welded shut, so there was no incidental fallback and a permit was not needed. The U.S. Environmental Protection Agency (EPA) and the Corps settled with the environmental groups and in 1993 promulgated a new rule, called the *Tulloch* rule, which required permits for fallback and spill during excavation of wetlands.

This rule was challenged in the D.C. Circuit in 1998, in *National Mining Ass'n v. U.S. Army Corps of Engineers*.[35] A mining organization brought suit against the Corps, arguing the *Tulloch* rule exceeded the Corps' authority under the CWA.[36] The plaintiffs claimed that the CWA's grant of jurisdiction only extended to discharge, or the addition of any pollutant to navigable waters, not fallback under the *Tulloch* rule.[37] Since fallback returns dredged material to the place it was taken from, the plaintiffs claimed that it did not constitute an addition of anything, and consequently was not under Corps jurisdiction to regulate.[38] The court agreed, and held that removal of materials from wetlands was not a discharge because nothing was being added to the waters.[39] The *Tulloch* rule defined all incidental fallback to be a discharge, so the Court enjoined the Corps from regulating under the rule.[40] Although the court invalidated the *Tulloch* rule, the Corps can still regulate certain types of redeposit.[41] However, the *Tulloch* rule cannot be used to require permits for fallback during wetland destruction.

Today, the Corps' and EPA's definitions of "waters of the United States" and "discharge of dredged material" continue to undergo changes. On January 17, 2001, the agencies issued a final rule on the regulatory definition of "discharge of dredged material." The agencies stated that the "discharge of dredged material" means "any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States."[42]

The agencies are also reevaluating the jurisdictional issues. On January 15, 2003, the agencies published an advance notice of proposed rulemaking on the regulatory definition in the CWA of "waters of the United States." The Corps and EPA issued the advance notice "to obtain early comment on issues associated with the scope of waters that are subject to the [CWA], in light of the U.S. Supreme Court decision in [*SWANCC*]."[43] A joint memorandum attached to the advance notice stated the agencies' current position on the scope of jurisdiction. The agencies stated that field staff should continue "to assert jurisdiction over traditional navigable waters . . . and, generally speaking, their tributary systems."[44] Field staff were also instructed to refrain from asserting jurisdiction over isolated waters "where the sole basis available for asserting CWA jurisdiction rests on any of the factors listed in the 'Migratory Bird Rule.'"[45] Until a new rule is issued clarifying the scope of jurisdiction, many previously regulated wetland areas will go unprotected.

This confusion among the courts, federal agencies, and the regulated community regarding when a permit is required is one of the arguments against application of public

26. *See* Virginia S. Albrecht, Wetlands Enforcement, SA 83 ALI-ABA 33, 42-43. A major defense to wetland enforcement is whether there is a jurisdictional wetland. The wetland must meet certain hydrological factors including hydrophytic vegetation and hydric soils. There must also be a nexus between the loss of a wetland and interstate commerce for the wetland to fall under federal jurisdiction.
27. 474 U.S. 121, 16 ELR 20086 (1985).
28. 511 U.S. at 603.
29. *Id*.
30. 42 Fed. Reg. 37145 (July 19, 1977).
31. 51 Fed. Reg. 41206 (Nov. 13, 1986).
32. *Id*. at 41210. Sidecasting occurs when excavated soil is redeposited back into the water.
33. *Id*. at 41232.
34. Northern Carolina Wildlife Fed. v. Tulloch, No. C90-713-CIV5-BO (E.D.N.Y. 1992).
35. 145 F.3d 1399, 28 ELR 21318 (D.C. Cir. 1998).
36. *Id.* at 1401.
37. *Id.* at 1403.
38. *Id.*
39. *Id.* at 1404.
40. *Id.* at 1409-10.
41. *Id.* at 1405-10.
42. 40 C.F.R. §232.2 (2002).
43. 68 Fed. Reg. 1991, 1991 (Jan. 15, 2003).
44. *Id.* at 1998.
45. *Id.* at 1997.

welfare principles to the CWA.[46] Public welfare principles require the activity be so inherently destructive that the actor is automatically put on notice there is regulation of the activity. In other words, the activity must be so obviously dangerous or hazardous that any person engaging in it would realize it must be regulated. If the courts are confused over the scope of the Corps' jurisdiction, the argument runs, it would be ridiculous to expect individuals to understand the dangerous nature of their conduct. Conversely, while a court may not be sure of the Corps' jurisdiction, the action does not appear any less dangerous. The confusion over wetland jurisdiction is related to the limits imposed on federal agencies by Congress and the U.S. Constitution, not the nature of the activity. An actor could still recognize that his action is regulated, even if it is regulated by the state rather than a federal agency.

The public welfare doctrine may be a strong tool in obtaining convictions for CWA violations, but its use will not come into play when the applicable permits themselves are in question. In addition to the jurisdiction questions surrounding the Corps, numerous questions have arisen regarding the application of the public welfare doctrine to the CWA. The next section discusses how the federal circuit courts are split on the question of mens rea in criminal penalties under the CWA and what role, if any, the public welfare doctrine has.

The Public Trust Doctrine and the CWA

Consensus has yet to emerge in the federal circuit courts over the mens rea required to sustain a conviction under the criminal provisions of the CWA. The U.S. Court of Appeals for the Second Circuit and the U.S. Court of Appeals for the Ninth Circuit view the CWA as a public welfare statute and only require the defendant to have knowledge of the nature of his/her conduct.

The Court's decision in *International Minerals*, the first case to apply the public welfare doctrine to an environmental statute, led the Ninth Circuit in *United States v. Weitzenhoff*[47] to apply the public welfare doctrine to the CWA. The manager and assistant manager of a sewage treatment plant attempted to make improvements to their plant to decrease an excessive amount of waste activated sludge (WAS), normally hauled away to another treatment plant.[48] After the improvements failed, the managers told two employees to dump the waste directly into the ocean. The managers failed to report the excess WAS to the Department of Health and EPA. On 40 different occasions pollutant solid, totaling 436,000 tons, was dumped into the ocean. The managers were convicted under the provision of the CWA which makes it a felony to "knowingly violate" a provision of the Act; in this case, the discharge of pollutants into navigable waters without a permit.[49]

Weitzenhoff turned on whether "knowingly" referred to knowledge of the discharge or to knowledge of the terms of the statute or permit.[50] Congress amended the CWA in 1987 to increase penalties for violators. Congress also changed the mens rea requirement from "willfully" to "knowingly." The Ninth Circuit noted that the legislative history referred to a person "causing" a violation of the requirements. From this history, the court inferred Congress meant to criminalize the actions of a person who knowingly committed the prohibited conduct, regardless of his/her knowledge of the law or the permit. After reviewing the pertinent public welfare doctrine case law, the Court announced that the CWA was a public welfare statute.[51] It stated the criminal penalties of the CWA were designed to protect the public from water pollution and clearly fell within the category of public welfare offenses. Therefore, the government was not required to prove the defendants knew their acts were unlawful or in violation of their permit.

The Second Circuit also construed the CWA as a public welfare statute in *United States v. Hopkins*.[52] There, the vice president of a metal shims and fasteners manufacturer tampered with the plant's wastewater testing. As a result, wastewater containing toxic materials was expunged into the Five Mile River in Connecticut. The discharges were regulated by the Connecticut Department of Environmental Protection (DEP). The vice president was convicted of violating the conditions of the DEP permit, knowingly falsifying or tampering with the discharge sampling methods, and conspiring to commit those offenses.[53] On appeal, the defendant contended that he could only be found guilty if the jury found that he knew he was violating the CWA or the DEP permit.[54]

As the statute did not specifically state whether "knowingly" meant the defendant knew he was violating the Act or the permit, the Second Circuit looked to the intent of Congress. The court noted the legislature's change of the intent requirements for violations of the CWA from "willfully" to "knowingly" in 1987.[55] It also pointed to the congressional goal that the 1987 Amendments strengthen the criminal provisions of the Act. One method utilized by Congress to strengthen the provisions was the reduction of the mens rea, which the transition from "willfully" to "knowingly" apparently had done. Relying on the Ninth Circuit's interpretation in *Weitzenhoff*, the Second Circuit adopted the interpretation that the CWA required proof that the defendant knew the nature of his acts, and performed them intentionally, not that the defendant had any knowledge they violated the CWA or the regulatory permit.

46. *See* Kepten D. Carmichael, *Strict Criminal Liability for Environmental Violations: A Need for Judicial Restraint*, 71 IND. L.J. 729 (1996). Kepten D. Carmichael argues that CWA point source discharge permits are more complex than the CWA itself. He finds employees in day-to-day management will be faced with felony convictions for unknowingly violating their permits. This would have an adverse impact on the environment by punishing the individuals who are trying to protect it. *But see* Jane F. Barrett, *"Green Collar" Criminals: Why Should They Receive Special Treatment?*, 8 MD. J. CONTEMP. LEGAL ISSUES 107, 116-17 (2000). Jane Barrett counters that jury instructions illustrate that businessmen will not be convicted for ignorance, mistake, accident, or other innocent reason. Instead, she points out, all the public welfare doctrine does is not require the government to prove the defendants knew the legal status of wetlands, the materials discharged, or that they were violating the law.

47. 35 F.3d 1275, 24 ELR 21504 (9th Cir. 1993).

48. *Id.* at 1281-82, 24 ELR at 21505.

49. 33 U.S.C. §§1311(a), 1319(c)(2), ELR STAT., FWPCA §§301(a), 309(c)(2).

50. *Weitzenhoff*, 35 F.3d at 1283-84, 24 ELR at 21506-07.

51. *Id.* at 1284-86, 24 ELR at 21507-08.

52. 53 F.3d 533, 25 ELR 21178 (1995).

53. *Id.* at 536-37, 25 ELR at 21179.

54. *Id.*

55. *Id*. at 539-41, 25 ELR at 21180.

Accordingly, in the Second and Ninth Circuits, the CWA is a public welfare statute under which prosecutors need not prove that a defendant knew he was violating the law or the conditions of a permit to convict defendants. In these circuits, the public welfare doctrine protects wetlands by giving prosecutors substantial leeway in proving mens rea. The remaining circuits have, however, failed to agree on the CWA's status as a public welfare statute.

The U.S. Court of Appeals for the Fifth Circuit directly rejected the concept of the CWA as a public welfare statute in *United States v. Ahmad*.[56] The defendant bought a gasoline station and convenience store and discovered one of the underground gasoline tanks was leaking.[57] The leak allowed water to seep into the tank effectively rendering the gas unsellable. Ahmad hired CTT Environmental Services to test the tank and they advised him the tank should be emptied.[58] Ahmad asked if he could empty the tank himself and was told by the CTT representative it would be dangerous and illegal to do so.

Ahmad proceeded to rent a handheld motorized water pump that he used to pump gasoline into the street and into a manhole. The gasoline pumped into the street eventually found its way into Possum Creek, which flows into Lake Houston. The gasoline pumped down the manhole went through the sanitary sewer system and into the city sewage treatment plant. Ahmad was indicted on three violations of the CWA, including knowingly discharging a pollutant into a navigable water without a permit. Ahmad argued he did not "knowingly" discharge, as he believed he was releasing water, not gasoline from the tank.[59]

Ahmad appealed his conviction, arguing the jury was required to find mens rea for each element of the offense and was only charged with finding knowledge of the discharge.[60] The Fifth Circuit granted review to determine to which elements of the offense the mens rea applied.[61] The court discussed the plain language of the statute. The phrase "knowingly violates" was found in a separate section of the CWA from elements of the criminal offenses. The court then looked to relevant Court cases to resolve the issue. In *United States v. X-Citement Video*,[62] the Court found "knowingly" applied to every element of the offense regardless of the plain language of the statute. The court also relied on *Staples*,[63] and the presumption that severe penalties require a defendant know the facts that make his conduct illegal. The court decided gasoline was no more harmful than machine guns, the "dangerous item" at issue in *Staples*, and rejected this as a public welfare offense.[64] Like the Court in *Staples*, the Fifth Circuit expressed concern over employees being held criminally liable for mistakes. The court held knowledge applied to each element of the crime.[65]

The U.S. Court of Appeals for the Eighth Circuit, on the other hand, has taken a position closer to the Ninth and Second, but with no reliance on the public welfare doctrine. In *United States v. Sinskey*,[66] the defendant was a plant manger at a large meat-packing plant. The meat-packing plant produced a significant amount of wastewater, which was treated both at the plant and piped to a municipal treatment plant. After treatment at the meat-packing plant, the water was discharged into the Big Sioux River. Sinskey's permit, issued by EPA, limited the amount of ammonia nitrate that could be put into the river after treatment, and required Sinskey to conduct a series of weekly tests of ammonia nitrate in the water and report the results to EPA. In 1991, the plant doubled the number of hogs it slaughtered, resulting in levels of ammonia nitrate that would violate the permit. The management at the treatment facility manipulated the testing results to show lower levels and when this failed to work, the test results were simply falsified. Sinskey was charged with multiple CWA violations as a result of his complicity in the matter. He was found guilty and appealed. Sinskey argued that the government must prove he knew his actions violated the CWA or the permit to find him guilty of the offense.[67]

The Eighth Circuit evaluated the generally accepted construction of "knowingly" in criminal statutes, the CWA's legislative history, and decisions of other courts to reject Sinskey's arguments. The court pointed to cases where it had construed similar language to mean that "knowledge" modified the acts constituting the underlying conduct. While the court did not specifically mention the public welfare doctrine, it discussed the *International Minerals* case as a basis for the construction that knowingly refers to the defendant's actions and not the law.[68] The court also relied on Congress' 1987 Amendments, which changed the mens rea standard as a method of increasing criminal sanctions in the 1987 Amendments. Finally, the court based its decision on the holdings in the Second and Ninth Circuits that the United States need not offer proof the defendant knew his/her actions were violating the law and the permit. It distinguished *Ahmad*, stating *Ahmad* involved a mistake of fact defense, while this case was about a mistake of law defense.[69] The court decided the government must prove only that the defendants knew of their relevant conduct and not that their acts were illegal.[70]

The U.S. Court of Appeals for the Fourth Circuit's stance on this issue can be found in a case dealing with wetlands, *United States v. Wilson*.[71] James J. Wilson, the chairman of the board of directors of publicly traded land development company Interstate General, appealed his felony conviction

56. 101 F.3d 386, 27 ELR 20557 (5th Cir. 1996).
57. *Id.* at 387, 27 ELR at 20557.
58. *Id*. at 388, 27 ELR at 20558.
59. *Id.* at 389, 27 ELR at 20559.
60. *Id.*
61. *Id.* at 390, 27 ELR at 20559.
62. 115 S. Ct. 464, 467 (1994).
63. In *Staples*, the Court rejected applying public welfare principles to the National Firearms Act holding that a firearm was a lawful possession and not the type of harmful or injurious item generally regulated by strict liability. Staples v. United States, 511 U.S. 600 (1994).
64. *Ahmad*, 101 F.3d at 391, 27 ELR at 20560.
65. For discussion of whether the Fifth Circuit adopted a mistake of law defense *see* Andrew J. Turner, *Mens Rea in Environmental Crime Prosecutions: Ignoratia Juris and the White Collar Criminal*, 23 CLMJEL 217 (1998). The author argues that since the Fifth Circuit failed to state whether knowledge of the elements meant knowledge of the facts underlying the elements or knowledge of the law, the question is still up in the air. *Id.* at 230. He states that the rejection of mistake of law by other circuits does not support a Fifth Circuit mistake of law defense, but the Fifth Circuit itself has remained mum on the matter. *Id.* at 236.
66. 119 F.3d 712, 27 ELR 21468 (8th Cir. 1997).
67. *Id*. at 715, 27 ELR at 21469.
68. *Id*. at 716, 27 ELR at 21470.
69. *Id*. at 717, 27 ELR at 21470.
70. *Id*.
71. 133 F.3d 251, 28 ELR 20299 (4th Cir. 1997).

for knowingly discharging fill material into wetlands in violation of the CWA.[72] Interstate General was the general partner of St. Charles Associates, a limited partnership that owned the land developed in the planned community of St. Charles. St. Charles was created under the New Communities Act and was planned in a partnership between Interstate General and the U.S. Department of Housing and Urban Development (HUD). The project called for the creation of schools, parks, recreational areas and required no less than 20% of the community be "open space." It further provided that 75 acres of wetlands were to be preserved.

The case involved four parcels of land containing wetlands that Interstate General attempted to drain by digging ditches. The dirt was deposited next to the ditches in a manner known as "sidecasting." Interstate General also transported fill dirt and gravel and deposited it in the parcels. No permits were obtained for this action. The government introduced evidence that Wilson and Interstate General were aware this area contained wetlands. After conviction Wilson challenged the jury instructions on appeal, arguing the statute required proof a defendant was aware that their conduct was illegal and that mens rea applies to each element of the offense.[73] The court, relying on common-law principles and legislative history held that mens rea applied to the facts behind each element of the offense, but the defendant did not have to know the conduct was a violation of the CWA.[74]

The U.S. Court of Appeals for the Sixth Circuit and the U.S. Court of Appeals for the Seventh Circuit have not ruled directly on the knowledge requirement and the CWA, but case law from each circuit illustrates certain trends. The Sixth Circuit, for example, has held that the Resource Conservation and Recovery Act (RCRA) is a public welfare statute.[75] While it has not extended this treatment to the CWA, the court relied on the application of the public welfare statute to the CWA in the other circuits in making its analysis.[76] Based on its treatment of RCRA, the Court would probably hold similarly regarding the CWA.

The Seventh Circuit, on the other hand, would probably refuse to treat the CWA as a public welfare statute. A lower court in the circuit has already held that where the defendant asserts a mistake of fact defense, the knowing requirement should apply.[77] The Seventh Circuit distinguished, in *Kelly v. U.S. Environmental Protection Agency*,[78] between the knowledge mens rea for civil and criminal penalties under the CWA. In *Kelly*,[79] a landowner challenged monetary penalties against him after he filled wetlands. Kelly argued that the CWA did not apply because he did not knowingly violate the law.[80] The court rejected this argument, finding that while negligence or knowledge was expressly required under the Act to find a criminal violation, civil liability was strict.[81]

The division in the circuits over the requirement for mens rea in criminal cases under the CWA illustrates some of the current frustration over wetlands protection. Depending on the circuit, the opinions range from no mens rea to applying "knowledge" to each element of the offense. Embedded in this is the illusive nature of the statutory language that proscribes penalties for "knowing violations" in one section and defines what the violations are in another. The public welfare doctrine is an important vehicle for courts to discern the intent of the legislature where the public welfare is at stake and legislative intent is unclear. The application of the doctrine, however, is frustrated also by the confusion evident in the courts surrounding exactly which wetlands and what discharges the Corps may regulate. Until a stronger consensus develops in this area of the law, wetland destruction will continue to escalate.

Conclusion

As a result of recent Court and federal court rulings, substantial confusion surrounds the CWA §404 permitting scheme. Both the Corps and EPA are struggling to provide regional and district offices and agents with the guidance necessary to properly implement the new jurisdictional perimeters. Unfortunately, the various districts are claiming jurisdiction over wetlands in inconsistent ways. Citizens conducting actions in wetlands may interpret these recent legal decisions limiting the jurisdiction of federal agencies to mean that their actions do not require permits. If they conduct their activities without permits, those citizens may be subject to criminal penalties. They will then argue in court that they did not know that their activities violated the law.

In this era of confusion, the need for the public welfare doctrine is even greater. Wetlands protection fits into the category of offenses that traditionally have been considered public welfare offenses. The recent court rulings regarding the jurisdiction of the Corps do not change the fact that environmental degradation is a public welfare issue. There is a distinction between the Act itself, and the jurisdiction of the agency charged with implementing the Act. In the age of mass media, developers should realize that wetlands development is regulated. Wetlands excavation should instantly trigger the developer's knowledge that the activity is probably regulated, even if the federal agencies do not retain jurisdiction over the act. Therefore, prosecutors should not have to prove that a defendant was aware that his conduct violated the law. Jurisdiction is, and should be, a separate issue from the regulated activity.

The problem of the level of mens rea required to gain a conviction under the CWA could be solved if Congress amended the Act to reject the mens rea completely, define "knowledge" as knowledge of the conduct not the law, or define "knowledge" as knowledge of the conduct and the law. Until Congress amends the language of the statute, a

72. *Id.* at 254, 28 ELR at 20302.

73. *Id*. at 260, 28 ELR at 20303.

74. *Id.* at 262, 28 ELR at 20304. *See* Lawrence Friedman & H. Hamilton Hackney, *Questions of Intent: Environmental Crimes and "Public Welfare" Offenses*, 10 VILL. ENVTL. L.J. 1 (1999), where the authors argue that the Fourth Circuit reconciles the conflict between protecting the environment and common-law principles of fairness. *Id*. at 23. They postulate that *Wilson* reconciles the CWA, public welfare doctrine, and common-law mens rea intent by refusing to hold that mens rea has no place in the CWA but also rejecting a mistake-of-law defense. *Id.* at 23-24.

75. United States v. Kelley Tech. Coatings, Inc., 157 F.3d 432, 29 ELR 20022 (6th Cir. 1998).

76. *Id.*

77. United States v. Metalite Corp., 2000 WL 1234389 (S.D. Ind. July 28, 2000).

78. 203 F.3d 519, 30 ELR 20379 (7th Cir. 2000).

79. *Id.* at 519, 30 ELR at 20380.

80. *Id.* at 522, 30 ELR at 20381.

81. *Id.*

safe interpretation for the federal courts would be to require only knowledge of the prohibited conduct. This would comport with the statute's use of the term "knowledge," while not extending the knowledge requirement to every aspect of the offense as urged by many developers.

Unfortunately, until the CWA is amended to be more specific, developers and federal agencies will continue to fight in the courts to determine the exact boundaries of the Act. As long as such fights continue, wetlands will continue to be destroyed. Courts will need to balance the ambiguity present in wetlands regulation and enforcement with the public welfare doctrine and the need to uphold criminal penalties for crimes that put the public health in jeopardy. The public welfare doctrine should continue to be used by prosecutors and accepted by the federal courts to obtain convictions. Environmental offenders should not be given special treatment. Ignorance of the law is not, and should not be, a defense.