KA NU HOU

The Newsletter of the Real Property & Financial Services Section of the Hawaii State Bar Association

From the Chair

December 2003

Dear Section Member:

Happy New Year, and welcome to 2004. Before beginning the new year, I'd like to express the Section's appreciation to Lorrin Hirano, who served nobly as the Section's chair this past year, and provided a solid base for me to work from in 2004. Welcome also to our new board member: Jaime Cheng, and our returning member: ex-Section President, Rick Kiefer, now the representative from Maui. Finally, my congratulations to Chair-elect Andy Bunn, Secretary Jack Wong and Treasurer Janel Yoshimoto, who together with other board members will help guide us through 2004.

We have a great many exciting activities in store for the Section in 2004, including our regular litigation and legislative updates later this year. Coming up in the near future is the Land Use Law Seminar on January 15th and 16th (please see the information elsewhere in this issue) and a session with Wayne Hyatt of Hyatt & Stubblefield (Atlanta, Georgia). Mr. Hyatt is the "dean" of the planned community bar, with a reputation that extends well beyond Georgia – in fact, many of you may be looking at Covenants, Conditions and Restrictions in which he or his firm had a hand (for me, personally, we benefit from his efforts out at Ko Olina daily). We'll have more information on Mr. Hyatt's session in the next month, but for now ***please save the date and time: March 5th, 8am to noon.***

This issue features the second of two award-winning articles from students at the William S. Richardson School of law. This one is from Anne Matsunaga, and is titled *Murky Environment, Murkier Laws: How Environmental Laws Punish the Innocent and Reward the Guilty*. I think you'll find it challenging, and of interest to the general real estate practitioner (not only those tree-huggers over at the Environmental Law Section <g> . . .). I hope you find it as engaging as I did.

As mentioned by Lorrin in the last newsletter, Gordon Arakaki, Mitch Imanaka, and a number of attorneys and Real Estate Commission staff members have been working hard on the recodification of Chapter 514A relating to Condominium Property Regimes. This first major re-write of the law in over twenty-five years will go to the Legislature in January 2004; if and when the bill passes, the Section plans to organize a special session to explore the new law. We encourage all interested Section members to testify before the legislature on this, as well as H.B. 1471 (relating to the deregistration from Land Court of fee simple timeshare interests), so that our views as attorneys are known – if we don't speak out, the important advantages to be gained from the legislation may well be lost to those who can find a reason to avoid action.

Finally, Lorrin Hirano and I continue to serve as the representatives of the Bar to a working group whose focus is to help Land Court more effectively work with the real estate bar. Please contact either Lorrin (lhirano@TGHAWAII.com) or me (ken@starnlaw.com) with any issues you'd like to see addressed. Specific examples and details of challenges you have had and would like to see addressed are welcome, so that we can attempt to address them in our group.

This is the first edition of the Newsletter to go out electronically to some of you. Unfortunately, few of you responded to our request last time to indicate whether you are willing to receive the Newsletter electronically; putting aside the savings to the Section (and thus our ability to put our dues to work for more useful purposes) I know I personally prefer receiving such information electronically, and I hope that those of you who feel as I do will let us know, to the benefit of all.

Mahalo for all of your continuing support!
Ken Marcus

Murky Environment, Murkier Laws: How Environmental Laws Punish the Innocent and Reward the Guilty

By Anne K. Matsunaga

Anne K. Matsunaga is a third-year law student at the William S. Richardson School of Law and the recipient of the *Hawaii State Bar Association Real Property and Financial Services Section Award for Best Paper on a Real Property Related Topic.*

I. INTRODUCTION

One hundred vials of human blood. Over four thousand gallons of gasoline. More than four hundred thousand pounds of untreated sludge. These pollutants have been discharged into our nation's waters in contravention of the Clean Water Act. In each of these instances, the defendant was an intentional violator, someone who knew that disposing of these items into navigable waters violated the law. And yet, despite the culpable conduct of these defendants, only one of them faced criminal sanctions.

Of course, not all violators of environmental laws pollute intentionally. Unintentional, or "accidental" violators are those whose breach occurs as the unintended consequence of their conduct. Accidental violators do not act with the knowledge that their conduct is in defiance of the law, yet the current system of environmental law enforcement does not distinguish between these two kinds of violators and subjects both to the same criminal penalties despite exhibiting dissimilar levels of culpability.

To compound the unduly harsh criminal penalties imposed on accidental violators, the public welfare doctrine and the rule of lenity encourage, albeit indirectly, unfair treatment of accidental and intentional violators. The public welfare doctrine allows courts to dispense with a statute's mens rea requirement in misdemeanor cases where a public welfare law has been breached. Application of the doctrine relieves the Government of the burden of proving a defendant's "guilty intent" to commit a violation. Therefore, courts do not need to consider a defendant's culpability, or lack thereof, when imposing criminal sanctions.

When a court is faced with an ambiguously-worded statute, the rule of lenity requires the court to find in favor of the defendant. Thus, intentional violators have used the rule of lenity to avoid criminal sanctions. This is especially problematic in the environmental enforcement context in which environmental statutes commonly contain ambiguous mens rea standards.

This Paper examines the negative effects of judicial application of the public welfare doctrine and the rule of lenity in criminal environmental cases. Part II of this Paper surveys the history of the public welfare doctrine and the rule of lenity. Part III examines recent case law and proposes that the public welfare doctrine and the rule of lenity, which, respectively, heavily penalizes accidental violators and grants leniency to intentional violators, should be abandoned in criminal environmental cases. Part IV proposes a three-part solution to this problem, which involves: (1) eliminating the public welfare characterization of environmental statutes; (2) creating a uniform interpretation standard of environmental statutes' mens rea requirements; and (3) abolishing the application of the rule of lenity to criminal environmental cases. Finally, Part V concludes with an assessment of the future of environmental law enforcement.

II. BACKGROUND

A. Mens Rea Requirements in Environmental Statutes

Our criminal justice system requires that the Government prove two basic elements to convict a defendant of a crime: a wrongful act ("actus reus") and a guilty mind ("mens rea"). Proving that a defendant has committed a wrongful act is not a significant issue in environmental criminal cases. The issue of proving a defendant's corresponding intent to commit the act,

however, has become the "Pandora's box" of environmental law enforcement.

At issue here is the ambiguous wording of the mens rea ("scienter") requirements in the major environmental statutes. The Clean Water Act ("CWA"), the Clean Air Act ("CAA"), and the Resource Conservation and Recovery Act ("RCRA") all provide for heavy criminal penalties where there has been a violation of the statutes' provisions. These provisions also contain mens rea requirements that the Government must prove to obtain a conviction. The ambiguous structure of these requirements has confused courts and has led to disparate treatment of intentional and unintentional violators.

1. The Evolution of the Mens Rea Requirement in Environmental Statutes

In 1970, Congress amended the Clean Air Act to provide criminal penalties for statutory violations, marking the beginning of criminal enforcement of environmental statutes. At about the same time, the Department of Justice ("DOJ") and the Environmental Protection Agency ("EPA") created the Environmental Crimes Section within DOJ. DOJ also increased the number of special agents from the Federal Bureau of Investigation ("FBI") assigned to environmental criminal cases to further the Government's new policy of environmental law enforcement.

Despite these efforts, the new policy on environmental criminal enforcement was lost on DOJ's attorneys, due in large part to the inherent difficulty in, and substantial financial costs of, pursuing a criminal environmental case. Attorneys were also discouraged by the "minor" misdemeanor penalties imposed on convicted violators, preferring to prosecute felony-level, or "big penalty" crimes.

In response, Congress fortified environmental statutory criminal provisions throughout the 1980's, raising misdemeanor offenses to felonies and imposing larger fines and longer prison terms on convicted violators. In 1987, Congress amended CWA and lowered the intent standard of the Act's criminal provisions from "willfully" to "knowingly." Legislators rationalized that lowering the intent standard would ease the burden on prosecutors and bring about an increase in environmental crimes cases pursued by DOJ.

While the CAA amendments achieved Congress' goal of increased enforcement, they also imposed unduly harsh penalties on accidental violators. Today, the CAA, RCRA, and CWA all contain criminal provisions that include felony-level offenses and penalties. None of the criminal provisions in these statutes currently provide less severe penalties for accidental violators.

2. Mens Rea Requirement under RCRA's Criminal Intent Provisions

RCRA's criminal provisions provide an example of a mens rea requirement with a "knowing" intent standard. The Third, Sixth, and Eleventh Circuit Courts of Appeals have found that this standard requires only that the defendant must have known that its activities were regulated by a federal RCRA permit. Additionally, the courts have rejected defendants' arguments that the "knowing" standard requires

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prosecutors to show that the defendant must have known that its acts were illegal.

In 1986, the Eleventh Circuit Court of Appeals interpreted RCRA's intent standard in United States v. Hayes International Corp. The defendant Hayes operated an airplane refurbishing plant in Birmingham, Alabama that generated hazardous waste products during the refurbishment process. The plant's waste consisted of airplane fuel (drained from the planes prior to refurbishment), paint, and solvents. In an effort to dispose of the waste, Hayes entered into an agreement with an airplane fuel recycler in which the recycler agreed to buy Hayes' supply of airplane fuel. The recycler, though not permitted to dispose of paint and solvents, nevertheless agreed to dispose of these wastes for Hayes. Over a year after Hayes entered the agreement with the recycler, the Government discovered metal drums of the paint and solvent waste that the recycler had dumped in yards and buried underground.

Following their convictions, Hayes and one of its employees appealed to the Eleventh Circuit. On appeal, the defendants contended that the trial court should have instructed the jury that RCRA's "knowing" standard required the Government to show that the defendants acted with the knowledge that their acts violated the law. The court rejected this argument, reasoning that if Congress had intended such a result, it would have included language that specified "knowing violation of a regulation."

After making the determination that RCRA's criminal provisions did not require that the defendants know the illegality of their acts, the court then reached a seemingly contradictory conclusion with regard to RCRA's "knowledge" standard that applied to permit status. The court concluded that while the language of RCRA's "knowing" standard precluded the defendants' "knowledge of illegality" defense, the provision did require knowledge of Hayes' permit status. The court admitted that these two conclusions appeared contradictory and attempted to explain its reasoning. The court reasoned that if the defendants did not know that a permit was required, but did have knowledge of the recycler's permit status, or lack thereof, then the "knowledge" requirement is satisfied. In response to the Government's argument that such a standard would put an increased burden on the prosecutor, the court concluded that circumstantial evidence would be sufficient to show defendant's knowledge. In addition to the Eleventh Circuit, the Third and Sixth Circuits have also come to the same conclusion regarding the "knowing" standard in RCRA.

3. Mens Rea Requirement under the Clean Water Act's Criminal Intent Provisions

RCRA's mens rea requirement represents only half the story. CWA's criminal provisions include two distinct mens rea standards, "negligence" and "knowing" standards. Courts have generally interpreted the "knowing" standard as requiring that the Government prove only that the defendant was aware of its acts, not the illegality of those acts. This standard puts intentional and accidental violators in the same position with regard to the imposition of harsh criminal penalties. Because the Government is not required to show that an accidental violator knew that its conduct was in violation of the law, the likelihood of successfully convicting and imposing harsh criminal penalties on accidental violators increases.

In 1995, the Second Circuit Court of Appeals interpreted CWA's "knowing" standard in United States v. Hopkins. This oft-quoted case illustrates the general standard among the Courts of Appeals regarding interpretation of the Act's "knowing" requirement.

Spirol International Co., a metal shims and fasteners manufacturer based in Connecticut, generated huge amounts of wastewater as a part of its manufacturing process. Because Spirol was able to discharge this wastewater into a nearby river (under the authority of the EPA), the state required Spirol to submit wastewater-sampling reports showing the levels of pollutants in the discharged wastewater. Hopkins, Spirol's vice-president, supervised the wastewater monitoring process and submitted the sampling reports

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to the state's Department of Environmental Protection.

Upon discovering that Hopkins had directed employees to re-test and doctor wastewater samples to achieve desirable results for its monitoring reports, the Government charged Hopkins with knowingly falsifying and tampering with monitoring devices and methods, a felony criminal violation under CWA. A jury found Hopkins guilty and the lower court sentenced him to twenty-one months imprisonment and ordered him to pay a $7,500 fine.

On appeal, Hopkins contended that the lower court misconstrued CWA's "knowing" standard. Specifically, Hopkins argued that the court should have interpreted the requirement to mean that the Government must show the defendant acted with the knowledge that his acts violated the law. Because the statutory language did not clearly state what kind of knowledge the defendant had to possess to meet the standard, the court reasoned that "as a matter of abstract logic, it would seem that a statute making it unlawful to "knowingly violate" a given statutory or permit provision would require proof that the defendant both violated and knew that he violated that provision."

Despite this finding, the court rejected the defendant's argument, relying on the Act's legislative history. Specifically, the court looked to Congress' decision to amend CWA's original "willful" intent standard to a "knowing" standard and reasoned that, "if Congress had wished to require proof that the defendant knew his acts were unlawful, it could have used the word "willfully." By lowering the mens rea standard, the court determined, Congress clearly intended to punish defendants for violations of environmental laws, regardless of their intent to commit a violation.

When Congress amended the intent standards within the nation's major environmental statutes, it provided little guidance to the courts interpreting the new statutory language. The inherent ambiguity of the new intent standard would lead to inconsistent interpretations, exacerbated by the application of the public welfare doctrine and the rule of lenity.

B. Introduction to the Public Welfare Doctrine

When a court classifies a statute as a "public welfare" law, the mens rea requirement of the statute's criminal provisions is reduced to a general intent standard. As a result, the defendant is held strictly liable for the offense. Prosecutors have embraced the public welfare doctrine because it relieves them of the burden of proving that the defendant had the requisite intent to commit the crime and thus improves prosecutors' chances for success.

Early case law recognized that courts applied the public welfare doctrine to statutes that possessed four common characteristics. Generally, the courts applied the public welfare doctrine to statutes that: (1) aimed to protect public health and safety; (2) regulated activity of such a nature that a reasonable person should know is subject to regulation; (3) did not include a mens rea requirement; and (4) imposed a light fine or penalty. While some courts continue to consider some of these factors in deciding whether or not a statute is a public welfare statute, these considerations are by no means mandatory, leaving judicial application of the doctrine marred by inconsistency.

United States v. Weitzenhoff illustrates the application of the public welfare doctrine to environmental statutes. In Weitzenhoff, the Ninth Circuit applied the public welfare doctrine to CWA and interpreted the statute's "knowing" intent standard in a case involving a violation committed by employees of a municipal treatment plant. Weitzenhoff, the manager of the East Honolulu Community Services Sewage Treatment Plant, directed plant employees to dump excess sludge into the ocean, thereby bypassing the plant's effluent sampler so that effluent monitoring reports, sent to the EPA and the Hawaii State Department of Health, did not reflect the illegal discharges. To further conceal the plant's illegal activities, defendant-Weitzenhoff directed treatment plant employees to dump the sludge at night and to keep quiet about the discharges.

In the course of its analysis, the court determined that

CWA constituted a public welfare statute. Thus, the court dispensed with the specific intent requirement of the Act's criminal provisions. The court reasoned that:

> [t]he dumping of sewage and other pollutants into our nation's water is precisely the type of activity that puts the discharger on notice that his acts may pose a public danger. Like other public welfare offenses that regulate the discharge of pollutants into the air, the disposal of hazardous wastes, the undocumented shipping of acids, and the use of pesticides on our food, the improper and excessive discharge of sewage causes cholera, hepatitis, and other serious illnesses, and can have serious repercussions for public health and welfare.

The court did not make a special exception with regard to accidental violators or those who dispose of substances that do not necessarily constitute a threat to public health and welfare.

Following the majority opinion, Judge Kleinfeld, writing for the five dissenting judges, criticized the majority for characterizing CWA as a public welfare statute. He argued that the doctrine's application suggested that "more aggressive criminalization" was justified in the absence of statutory command. Judge Kleinfeld also observed that although CWA was designed to protect the public from the consequences of water pollution, the majority panel did not explain:

> how the public is to be protected by making felons of sewer workers who unknowingly violate their plant's permits. . . . We have now imposed on these vitally important public servants a massive legal risk, unjustified by law or precedent, if they unknowingly violate their permit conditions . . . [t]he panel suggests that criminalizing . . . innocent conduct will protect the public from water pollution.

Despite Judge Kleinfeld's concerns, most courts of appeals continue to follow the example set by the majority opinion in Weitzenhoff and characterize CWA and other environmental statutes as public welfare statutes.

While Judge Kleinfeld's dissenting remarks may not have persuaded the majority to refrain from applying the public welfare doctrine, they do highlight an important problem. Specifically, such broad classifications of environmental statutes as public welfare laws fail to distinguish between intentional and accidental violators, thus leaving accidental violators more vulnerable to prosecution and unduly harsh criminal penalties. In applying the doctrine to an environmental statute, courts eliminate the traditional requirement of showing the defendant's requisite intent to commit the offense. While this streamlines the prosecution and conviction of environmental violators, convicted accidental violators are subject to the same harsh penalties as intentional violators, despite their lack of morally culpability.

C. Application of the Rule of Lenity to Criminal Environmental Cases

The rule of lenity, also known as the rule of strict construction, states that when a court is faced with an ambiguous statute, the court shall find in favor of the defendant. The rule is applied at the court's discretion and at the end of the statutory interpretation process. This application helps to ensure that the rule is used as a "last resort" and not as a customary consideration.

English courts in the late seventeenth and early eigthteenth centuries created the rule of lenity and used it as an instrument of mercy against England's strict enforcement of capital penalties. In 1820, the U.S. Supreme Court in United States v. Wiltberger, shifted the focus of the original rationale for the rule and established new constitutional justifications for the rule's application to criminal cases. Justice Marshall's first justification for application of the rule was the preservation of fair notice of the law for defendants. Proponents of this argument assert that

applying the rule to ambiguous statutes forces Congress to draft clearer statutes that are more easily understood. Marshall's second justification for the rule is a separation-of-powers rationale based on "the practical principle that the power of punishment is vested in the legislative, not the judicial department."

Because courts can apply the rule of lenity at their discretion, its application in environmental criminal cases has been rather inconsistent. While this Paper does not attempt to evaluate the discretion of all of the environmental cases in which the rule has been an issue, it is important to note that intentional violators have successfully shielded themselves from criminal sanctions, using the rule as a defense.

III. ANALYSIS

Courts have applied the public welfare doctrine and the rule of lenity in criminal environmental cases, resulting in unfair treatment of accidental and intentional violators. Application of the rule of lenity has become a means by which intentional violators have effectively dodged criminal sanctions. Courts of appeals, which have previously found the "knowing" intent standard in federal environmental statutes to be ambiguous, makes the intent standard a prime target of intentional violators looking for a basis to argue for the application of the rule.

A. Misapplication of the Public Welfare Doctrine Leads to Unfair Treatment of Accidental Violators

English common law established our modern notion of what constitutes criminal intent. Courts' characterization of environmental laws as public welfare statutes effectively eliminates mens rea, leaving accidental violators of environmental laws at the mercy of prosecutorial and judicial discretion.

In Morissette v. United States, the U.S. Supreme Court placed a specific limitation on the public welfare doctrine's application to federal statutes. The Court prohibited application of the doctrine where "the purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries." Allowing courts to continue to dispense with mens rea standards conflicts with the basic notion that criminal sanctions should be reserved for those who commit culpable acts and possess a vicious will.

When courts apply the doctrine and eliminate a prosecutor's basic duty to show a defendant's intent, accidental violators are essentially treated as though they have committed offenses just as heinous as those committed by intentional violators. As a result, accidental violators are penalized with unduly harsh criminal sanctions.

1. United States v. Hanousek: Unduly Harsh Punishment for Accidental Violators

In 1995, the Ninth Circuit Court of Appeals interpreted CWA's "negligent" scienter requirement in United States v. Hanousek. Hanousek, a roadmaster employed by the Pacific & Arctic Railway and Navigation Company, was charged with overseeing "every detail of safe and efficient maintenance and construction of track, structures and marine facilities of the entire railroad." In 1994, Hanousek assumed the supervision of a rock-quarrying project located alongside a portion of the railroad. An oil pipeline, owned by Pacific & Arctic's sister company, also ran alongside the railroad.

One evening, a railroad employee working on the rock-quarrying project accidentally punctured this pipeline, sending an estimated 1,000 to 5,000 gallons of oil into the nearby Skagway River. Hanousek was charged and convicted of "negligently discharg[ing] a harmful quantity of oil into a navigable water of the United States, in violation of the Clean Water Act," and sentenced to six months imprisonment, six months in a halfway house, and six months of supervised release. The court also imposed on Hanousek a $5,000 fine.

Murky Environment, Murkier Laws (continued)

On appeal, Hanousek contended that the trial court failed to instruct the jury that the Government had to prove the defendant acted with "criminal negligence," as opposed to ordinary negligence. The Ninth Circuit rejected Hanousek's argument and concluded that CWA's legislative history indicated Congress intended to subject persons acting with ordinary negligence to criminal penalties. The court went on to classify CWA as a public welfare statute, stating:

> [p]ublic welfare legislation is designed to protect the public from potentially harmful or injurious items, . . . and may render criminal "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety.

Hanousek also argued that unlike other criminal environmental cases in which the defendant was or should have been aware of CWA's provisions, he was a roadmaster overseeing a rock-quarrying project and therefore was not required to know CWA's provisions as a part of his duties. The court rejected this argument, explaining that "in the context of a public welfare statute, 'as long as a defendant knows he is dealing with a dangerous device of a character that places him in responsible relation to a public danger,' he should be alerted to the probability of strict regulation." The court found that because Hanousek knew of the pipeline and the dangers that a puncture to the pipeline would have caused, he should have been alerted to the probability of strict regulation.

The Ninth Circuit concluded that even when an individual does not know that his actions might lead to a CWA violation, that individual may still be convicted and subjected to excessively harsh criminal sanctions. Despite Hanousek's occupation as a roadmaster, arguably an occupation in which one would not be expected to know of CWA's provisions, the court determined nevertheless that the Act's criminal penalty provisions applied to accidental violators like Hanousek. This issue becomes even more problematic when the defendant is not the party responsible for causing the actual violation. Even though Hanousek did not play an active role in puncturing the pipeline, the court still imposed heavy criminal penalties on him following his conviction. In applying the public welfare doctrine, the court, in effect, equated Hanousek's benign involvement in the offense to that of an intentional violator who intentionally punctures a pipeline. Under these circumstances, the intentional violator would have received the same criminal penalties as Hanousek even though he commits a clearly culpable act that is "more deserving" of the harsher penalty.

Conversely in Weitzenhoff, the defendants, as the manager and assistant manager of a municipal sewage treatment plant, held positions in which they should have been aware of CWA provisions regulating the plant's activities. Their conduct in committing the violations also strongly suggests that the defendants were intentional violators. Specifically, the defendants ordered employees to dump the sludge at night and to keep quiet about the practice. For these violations, the court sentenced Weitzenhoff and the plant's assistant manager to twenty-one months and thirty-three months in prison, respectively.

Notwithstanding the accidental nature of the violation committed in Hanousek, the court sentenced Hanousek to eighteen months of various forms of criminal supervision within the criminal justice system. Despite his occupation as roadmaster, which likely did not require a working knowledge of CWA, Hanousek was subjected to a hefty criminal penalty that can be directly traced back to the court's characterization of CWA as a public welfare statute. In comparison, Weitzenhoff, who directed employees to dump sludge into the ocean and to keep quiet about it, received twenty-one months imprisonment, roughly equivalent in duration to Hanousek's punishment. Public welfare characterization of environmental statutes, though inconsequential when applied to cases of intentional violators, has an unduly harsh effect when imposing punishment on accidental violators.

Murky Environment, Murkier Laws (continued)

Those opposed to the idea of differential treatment for accidental and intentional violators will likely argue that such treatment is an unnecessary and frivolous exercise. These critics may argue that when a violation has been committed, intent is irrelevant. While it is true that an accidental violation may result in the same amount of destruction to the environment as an intentional one, imposing unduly harsh criminal penalties on accidental violators discourages otherwise productive behavior and compromises the goals that criminal penalties are designed to achieve.

Criminal penalties are designed to punish and deter environmental law violations. Punishing an accidental violator for committing a violation that occurred as the result of normal everyday activities essentially punishes that violator for engaging in those normal everyday activities. Under those circumstances, criminal sanctions serve little purpose. The following example, perhaps, best summarizes these concerns:

> A key factor in the quality of environmental management is the quality of the people in control of its management. It is in the best interest of the environment and society to have the most capable people overseeing environmental management operations. The possibility of criminal sanctions . . . without any proof that the defendant knew of the violation, deter the most capable people from assuming these extremely important positions. . . . [These highly capable people] will seek comparable employment elsewhere that does not post the threat of felony conviction and prison sentences in the event of inadvertent and unknown violations of the applicable permits.

The law's general function of deterring criminal behavior serves no purpose and alienates the most qualified individuals from those occupations in which they can best serve the public.

2. Courts Apply the Public Welfare Doctrine in Contradiction to the Doctrine's Original Justification

Another problem associated with the public welfare doctrine, illustrated in Hanousek, is that courts currently do not limit application of the doctrine to only those statutory provisions containing "relatively light penalties." Although traditional justification for applying the doctrine included considerations of statutes' light penalties like fines and misdemeanor penalties, the penalty imposed on Hanousek can hardly be characterized as "light." This sentiment is echoed by dissenting U.S. Supreme Court Justice O'Connor and Justice Thomas in Hanousek v. United States, in which the majority declined Hanousek's petition for writ of certiorari.

Justice Thomas, the author of the dissenting opinion, stated that, "although provisions of the CWA regulate certain dangerous substances, this case illustrates that the CWA also imposes criminal liability for persons using standard equipment to engage in a broad range of ordinary industrial and commercial activities." Justice Thomas further reasoned that this "strongly militates against concluding that the public welfare doctrine applies," and concluded that CWA's negligence and felony criminal penalty provisions impose serious penalties that warrant against the classification of CWA as a public welfare statute.

Adding to the injustice posed by the public welfare doctrine's application to environmental statutes' criminal provisions, the rule of lenity compounds this injustice by providing a means by which intentional violators may avoid criminal sanctions.

B. Intentional Violators Find Refuge in Ambiguous Statutory Language and the Rule of Lenity

The rule of lenity, which gives deference to the defendant when a court is confronted with an ambiguous statute, should be eliminated from consideration in environmental criminal cases. When argued successfully, defendants, particularly intentional violators, can use the rule to shield

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themselves from criminal convictions. Most violators who argue in favor of the rule often do so in spite of the fact that statutory ambiguity has little if any influence on the defendant's decision to act. United States v. Plaza Health Laboratories is a court of appeals case in which the intentional violator-defendant successfully argued for the application of the rule and won a reversal of his criminal conviction.

1. Using the Rule of Lenity to Avoid Harsh Criminal Sanctions

In United States v. Plaza Health Laboratories, Plaza Health Laboratories owner and vice-president, Geronimo Villegas, admitted to taking vials of blood from the laboratory and disposing of them by wedging them along the bulkhead of the Hudson River. After the authorities caught him, Villegas was indicted and found guilty on four counts of violating criminal provisions of CWA.

On appeal before the Second Circuit, Villegas claimed that the pertinent parts of CWA were ambiguously worded and that the rule of lenity applied. The Second Circuit agreed and found that the ambiguity warranted application of the rule. While noting the "heinous character" of Villegas' actions, the court stated that, "we must nevertheless ensure that we apply the statute as congress wrote it, giving Villegas the benefit of the substantial ambiguity in its meaning."

Judge Oakes' dissenting opinion in Plaza Health criticized the majority's decision to apply the rule: "I do not think the Clean Water Act is ambiguous with respect to an individual physically disposing of medical wastes, in quantity, directly into navigable waters, by means of a controllable, discrete conveyance and course of action." Oakes argued that the court's narrow interpretation of the alleged ambiguity was inconsistent with the U.S. Supreme Court's 1990 decision in Moskal v. United States in which the Supreme Court defined "ambiguity" and articulated an accompanying test for determining the applicability of the rule:

> We have declined to deem a statute 'ambiguous' for purposes of lenity merely because it was possible to articulate a construction more narrow than that urged by the Government . . . . Instead we have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to 'the language and structure, legislative history, and motivating policies' of the statute.

Adopting the Supreme Court's test in Moskal, Judge Oakes concluded that CWA did not contain any ambiguities, pointing out that Villegas' activity was "not the sort of activity that Villegas could honestly have believed violated no statute. . . . Thus this is not a case in which the defendant had no fair warning that his actions were illegal."

Villegas successfully argued for the application of the rule of lenity and obtained a reversal of his criminal conviction despite his morally culpable conduct. This case illustrates how applying the rule of lenity in criminal environmental cases assists intentional violators in successfully evading criminal penalties.

2. Fair Notice and Separation-of-Powers Justifications for Applying the Rule of Lenity Are Irrelevant in Criminal Environmental Cases of Intentional Violators

One justification for current application of the rule is the notion of fair warning and notice. Justice Harlan explained that "in a civilized state[,] the least that can be expected of Government is that it express its rules in language all can reasonably be expected to understand." The second justification for the rule relies on a separation-of-powers argument that generally states that it is the job of the legislature, not the judiciary, to create and define crimes. While these justifications are theoretically sound, they have little real-world application in environmental criminal cases.

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Proponents of the rule of lenity will likely argue that abolishing the rule jeopardizes defendants' constitutional rights because defendants will not have fair warning of the law. While this is a valid argument in theory, case law reveals that a lack of fair warning is not the reason for defendants' violations of the law. In Plaza Health and Weitzenhoff, there was no evidence that the defendants had even consulted the provisions of CWA prior to their decisions to act. The "knowing" standard and any other statutory ambiguities, under these circumstances, is therefore irrelevant and should be precluded as a basis for a rule of lenity defense.

With regard to the separation-of-powers justification for the rule of lenity, Professor John Calvin Jeffries, a staunch critic of the rule, asserts that, "where a statute is ambiguous, separation of powers provides no sure guide." Jeffries explains that:

> [s]trict construction is required only if the legislature commands that approach. If, as is usual, the legislature does not speak to that question or specifies a rule of 'fair construction,' interstitial judicial lawmaking is at least tolerated and perhaps affirmatively authorized. More to the point, it is inevitable. Any resolution of statutory ambiguity involved judicial choice. The resulting 'gloss' on the legislative text is both politically legitimate and institutionally unavoidable.

Jeffries' argument, favoring abolishment of the rule, points out that while the separation-of-powers justification sounds good in theory, new laws unavoidably require some extent of judicial lawmaking.

Critics of the rule of lenity argue that the fair-notice-of-the-law and separation-of-powers justifications for keeping the rule have no real-world application in environmental law enforcement. Defendants who have not acted based on a misinterpretation of the law should not be allowed to advance this argument to avoid criminal sanctions.

3. Courts' Acknowledgment of an Ambiguous Intent Standard May Lead to Future Rule of Lenity Defenses

One of the prime targets for the application of the rule of lenity lies in the "knowing" intent provisions in environmental statutes. Courts acknowledgment of the ambiguous nature of the standard provides defendants with just the right fodder for arguing in favor of the rule's application. The following section demonstrates how courts' acknowledgment of this ambiguity increases the likelihood of future rule of lenity defenses.

Courts have recognized that a plain reading of the "knowing" requirement shows an ambiguity. In United States v. Sinskey, the Eighth Circuit Court of Appeals acknowledged this ambiguity and held that CWA's "knowing" standard required that the Government prove only that the defendant knew of his actions that caused the violation. Sinskey, the manager of a large meat-packing plant in Sioux Falls, South Dakota, approved and signed wastewater monitoring reports containing false data. Sinskey sent the reports to the EPA as a condition of the plant's National Pollutant Discharge Elimination System ("NPDES") permit. Although Sinskey himself never directly participated in doctoring the reports or ordered the tampering of the monitoring process, the Government charged Sinskey with "knowingly" tampering with the plant's wastewater monitoring method," and "knowingly" discharging a pollutant into navigable waters of the United States, exceeding the plant's CWA permit limitations.

On appeal, Sinskey asserted that under CWA's mens rea requirement, the Government was required to show that he knew that his conduct was in violation of the law. Examining the wording of the Act, the court admitted that:

> [u]ntangling the statutory provisions . . . to define precisely the relevant underlying conduct . . . is not a little difficult. At first glance, the conduct in question might appear to be violating a permit limitation, which would imply that [the pertinent CWA section] requires proof that the

defendant knew of the permit limitation and knew that he or she was violating it.

Despite this acknowledgment, the court rejected Sinskey's arguments, basing its decision on CWA's legislative history and the previous Court of Appeals' decisions in Weitzenhoff and Hopkins. Stating that there was no reason to "depart from that commonly accepted construction" of the "knowing" requirement, the court confirmed Sinskey's convictions.

The court's analysis in Sinskey shows that the ambiguity of the "knowing" standard in environmental statutes has not gone unnoticed. While the Sinskey court analyzed only CWA's intent requirement, other federal environmental statutes such as RCRA and CAA also contain "knowing" intent provisions. Should a court decide that the ambiguity of these provisions warrants the application of the rule of lenity, intentional violators may be able to successfully escape criminal sanctions by asserting this defense.

IV. Proposal and Challenges

A three-part solution that: (1) eliminates the public welfare characterization of environmental statutes; (2) creates a uniform interpretation standard of environmental statutes' mens rea standards, thereby preempting a rule of lenity defense; and (3) abolishes the rule of lenity, can help to rectify some of the inconsistent statutory interpretations by the courts and further remedy the unfair treatment of accidental and intentional violators.

A. Eliminate the Public Welfare Characterization of Environmental Laws

Courts should refrain from classifying environmental laws as public welfare statutes. When the statute at issue imposes only "light sentences," dispensing with the statute's mens rea requirement as a consequence of public welfare characterization does not violate a defendant's due process rights. Recently, courts that have applied the public welfare doctrine to environmental statutes have largely ignored this justification, subjecting accidental violators to the same harsh criminal penalties as those imposed on intentional violators. U.S. Supreme Court Justice Thomas cautions against this form of "blind classification" of statutes as public welfare laws.

1. Abolishing the Public Welfare Doctrine from Criminal Environmental Cases Makes Prosecutions of Intentional Violators the Priority

Pursuing violators of the nation's environmental statutes is the job of the Environmental Crimes Section and the U.S. Attorneys' Offices within DOJ. U.S. attorneys exercise broad discretion in choosing which cases to prosecute, showing obvious preferences for those that are "easier" to prosecute. Traditionally, these cases involve intentional violators.

Proponents of the public welfare doctrine may argue that DOJ's unwritten policy makes abolishment of the doctrine unnecessary because federal prosecutors already make prosecution of intentional violators a priority. These proponents may also argue that the doctrine serves an important purpose by streamlining the prosecution of violators. By dispensing with mens rea requirements, the public welfare doctrine aids prosecutors by relieving them of the burden to show that a defendant had the requisite intent to commit a violation.

Although prosecutors prefer to pursue cases in which the defendant's moral culpability is easily proven by the facts, this is not the only factor considered. Former Chief of the DOJ's Environmental Crimes Section, Ronald A. Sarachan stated that DOJ makes its case selection decisions based on what will get the Government "the 'biggest bang for its buck,' and that is generally felonies, not misdemeanors." Sarachan also stated that federal prosecutors and agents are uniformly trained in case selection with an emphasis on pursuing intentional violators. Despite this, the DOJ still pursues misdemeanor offenses committed by unintentional violators, as exemplified in Hanousek.

Sarachan acknowledged the discrepancy between attorney-training and ultimate case selection by explaining that because environmental enforcement is a largely reactive system, "criminal cases most commonly [result] from calls from a disgruntled former company employee" who may be disgruntled for reasons other than its employer's environmental practices. As a result, DOJ has pursued criminal prosecutions of companies with serious employee and labor problems, "but not necessarily companies with the worst environmental practices." So although DOJ prefers to prosecute the nation's worst environmental violators, accidental violators have been occasionally prosecuted as well. Public welfare characterization of environmental statutes, which allows prosecutors to seek convictions of defendants more readily, puts accidental violators in a vulnerable position in which they face increased risk of serving felony-level prison sentences if convicted.

While it is true that the public welfare doctrine should be credited for increased prosecution of environmental violators, this justification should not overshadow the duty of prosecutors to prove a defendant's specific intent to commit a crime. This is especially true in high stakes cases in which the defendant faces possible felony-level penalties. Dispensing with mens rea requirements through the application of the public welfare doctrine also undercuts DOJ's own policy of pursuing intentional violators. If prosecutors are not required to show evidence of a defendant's moral culpability, the distinction between innocent and intentional violators in case selection becomes irrelevant.

2. Abolishing the Public Welfare Doctrine from Criminal Environmental Cases Coincides with the Doctrine's Original Justification

In the past, courts applied the public welfare doctrine to criminal statutes that imposed "relatively light penalties such as fines or short jail sentences, rather than substantial terms of imprisonment." Courts that have applied the doctrine in criminal environmental cases have largely overlooked this aspect of the doctrine's application. By abolishing the doctrine's application to criminal environmental cases, courts are prohibited from dispensing with mens rea requirements where defendants are tried on felony-level charges and receive correspondingly harsh criminal sanctions if convicted.

B. Congress Should Implement a Uniform Mens Rea Standard in Federal Environmental Statutes to Preempt Rule of Lenity Defenses

The ambiguity of environmental laws' scienter requirement contributes to the unfair treatment of accidental and intentional violators. By setting out a clearer "knowing" standard, Congress would help to resolve two problems that arise from the current ambiguous standard. A clearer standard would: (1) prevent inconsistent interpretations of the intent standard among the Courts of Appeals, and (2) prevent intentional violators from claiming that "knowing" provisions are ambiguous, and thereby arguing for application of the rule of lenity.

Some may argue that if Congress does clarify the "knowing" standard, it may decide to align the new standard with the interpretation reached by the general consensus of the appeals courts, in which case accidental violators would still be subject to the same criminal penalties as intentional violators. A clarified standard that incorporates language that allows for a distinction in penalties for the two kinds of violators would help remedy this situation.

Congress can address this problem by incorporating special "considerations" into statutory language of intent requirements. Such "considerations" would help the court to distinguish between accidental and intentional violators and help them to determine whether a defendant actually knew that the item that it was handling was hazardous. For example, if under the "knowing" provision, Congress required courts to consider both the status of the violator and the nature of the violation, the number of intentional violators claiming that they did not know they were handling hazardous materials would decrease.

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Using the facts in Plaza Health as an example, if the court had been forced to consider defendant Villegas' status and the nature of his violation, it seems unlikely that the court would have reached the conclusion that it did. As the owner and vice-president of a blood testing facility, Villegas' status would have alerted the court to the fact that he was someone who was presumably aware of the laws regarding the safe handling and disposal of biohazardous substances. Although a court might reject the violator-status argument as a weak basis for denying a rule of lenity defense in this case, the nature of Villegas' violation, dumping glass vials of infected human blood near the shore, indicates that he was an intentional violator who should have been subject to felony criminal penalties.

A clarified "knowing" standard that: (1) specifies which elements of the offense the word "knowing" modifies, and (2) includes language that requires courts to consider the status of the violator and the nature of the violation in determining criminal liability, benefits environmental law enforcement in two ways. First, a uniform standard would create consistency among the courts with regard to the interpretation of the "knowing" requirement. Second, this standard, which would include language that requires courts to consider the violator's status and the nature of the violation, will help to prevent intentional violators from abusing rule of lenity defenses to avoid conviction. A new standard can resolve this problem by giving courts a clear and uniform standard with which to interpret environmental statutes' criminal intent requirements and preclude potential rule of lenity defenses.

C. Courts Should Refrain from Applying the Rule of Lenity Where Defendants Have Not Consulted the Statutory Language Prior to Their Decision to Act

Even if Congress clarifies the "knowing" standard and effectively eliminates future inconsistent interpretations of the standard, other ambiguities in the statutory language are still available as bases for rule of lenity defenses. Altogether abolishing the rule of lenity from criminal environmental cases closes this loophole to intentional violators by precluding such arguments. Intentional violators, like Villegas in Plaza Health Laboratories, commit heinous acts in violation of federal environmental statutes and yet are able to escape criminal sanctions through ambiguities in statutory language that have nothing to do with their decisions to act in the first place. Abolishing the rule of lenity cinches the final gap with regard to the unfair treatment of accidental and intentional violators by closing off the "escape hatch" to intentional violators.

By abolishing the rule of lenity's application in environmental criminal cases, defendants will be precluded from using the rule as a defense where notice of statutory provisions did not influence the initial decision to act in violation of the law.

V. Conclusion

The public welfare doctrine and the rule of lenity, in concert, have resulted in the unfair treatment of accidental and intentional violators. The public welfare doctrine, applied in contradiction to its original purpose, has resulted in the imposition of excessively harsh criminal penalties on accidental violators. The rule of lenity compounds this inequity by providing an "escape hatch" for intentional violators who have committed particularly heinous environmental violations. The proposals posited here represent an effort to remedy these inconsistencies in the law.

While these proposals argue for large-scale reforms of environmental law enforcement that includes policy considerations other than those asserted here, this Paper has highlighted some important concerns from which reform may begin.

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