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THE CLEAN WATER ACT'S MENS REA REQUIREMENT: ESTABLISHING A "BRIGHTER LINE" TEST

United States v. Sinskey[1]

by Douglas L. McHoney

I. INTRODUCTION

This Eighth Circuit Court of Appeal's decision is a case of first impression in its jurisdiction and examines the mens rea requirement of the Clean Water Act ("CWA"). The Eighth Circuit avoids the difficulties other jurisdictions have encountered when interpreting the "knowingly" requirement by developing a "brighter line" test. As a result of this "brighter line" test, both companies and the officers who work for them will have major incentives to avoid violations of the CWA while still maintaining protection from over prosecution.

II. FACTS AND HOLDING

John Morrell & Co. ("Morrell"), a large meat-packing plant in Sioux Falls, South Dakota, created a substantial amount of wastewater throughout the packaging process.[2] Some of this wastewater went to a sewage treatment plant, and the rest was treated at Morrell's own wastewater treatment plant ("WWTP").[3] The primary function of the WWTP was to decrease the amount of ammonia nitrogen in the water before it discharging it into the river.[4]

The Environmental Protection Agency ("EPA") issued a permit for the WWTP under the Clean Water Act ("CWA"),[5] requiring the company to not only limit the amount of the ammonia nitrogen to specified levels, but also to perform weekly tests monitoring the amounts.[6] The permit also required that Morrell file monthly discharge-monitoring reports concerning the results of these tests.[7]

In the spring of 1991, Morrell doubled the number of hogs slaughtered at the plant.[8] The increase caused the level of ammonia nitrogen in the discharged water to exceed that allowed by the CWA permit.[9] To compensate, Morrell manipulated the testing process so that it would appear to be within the permitted limits.[10] One technique employed was "flow manipulation" or the "flow game."[11] The technique was to discharge low levels before the weekly testing.[12] Once the tests were completed, Morrell would discharge an exceedingly high level of ammonia nitrogen.[13]

In addition, Morrell employed the "selective sampling" technique.[14] This involved performing more than the number of tests required by the EPA, but only reporting those test results that reflected levels below the permissible limits.[15] Finally, when either of these techniques failed to produce ac-

[1] 119 F.3d 712 (8th Cir. 1997).

[2] *Sinskey*, 119 F.3d at 714.

[3] *Id.* After the water was treated at the WWTP, the water was dumped into the Big Sioux River. *Id.*

[4] *Id.*

[5] 33 U.S.C. §§1251-1387 (1998).

[6] *Sinskey*, 119 F.3d at 714.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* Ron Greenwood, the manager, and Barry Milbauer, the assistant manager, manipulated the testing process.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

ceptable results, Morrell simply falsified the tests' results and the monthly EPA reports.[16] Timothy Sinskey signed these reports and sent them to the EPA.

As a result of these actions, Sinskey, the plant manager, and Wayne Kumm, the plant engineer, were charged with criminal violations of the CWA.[17] The jury found both Sinskey and Kumm guilty of knowingly rendering an inaccurate monitoring method required under the CWA.[18] The jury also found Sinskey guilty of knowingly discharging a pollutant into waters in amounts exceeding those permitted by the CWA.[19] Both men appealed their convictions to the Eighth Circuit Court of Appeals.[20]

Sinskey and Kumm based their appeal on several issues.[21] First, the trial court gave an instruction that for the jury to find that Sinskey had acted "knowingly," the government must have shown that Sinskey was "aware of the nature of his acts, perform[ed] them intentionally, and [did] not act or fail to act through ignorance, mistake or accident."[22] Further, the instructions told the jury that Sinskey did not have to know that his acts violated the CWA or permits issued under that act.[23] Sinskey contended that because the word "knowingly" immediately precedes the word "violates" in Section 1319(c)(2)(A), the government had to prove that he knew his conduct violated the CWA or the permit.[24]

Second, Sinskey and Kumm challenged the trial court's instructions with respect to their violation of Section 1319(c)(4).[25] The men argued that the government should have been required to prove that they knew their acts were illegal.[26]

The Eighth Circuit Court of Appeals, in affirming the district court's decision, held that the "knowingly" requirement in both statutes required only that Sinskey and Kumm had knowledge of the relevant activities, not that they knew their activities violated the law.[27]

III. LEGAL BACKGROUND

A. Clean Water Act

In 1948, Congress first provided funding to municipalities in an attempt to control water pollution when it passed the Federal Water Pollution Control Act.[28] Throughout the 1960's and 1970's, as environmental awareness in-

[16] *Id.*

[17] *Id.*

[18] *Id.* The Court held that the men violated 13 U.S.C. § 1319(c)(4).

[19] *Sinskey*, 119 F.3d at 714. This was in direct violation of 13 U.S.C. § 1319(c)(2)(a).

[20] *Id.*

[21] *Id.* Sinskey appealed several other points beyond the scope of this Casenote. Sinskey contended that the trial court abused its discretion by admitting Milbauer's secret logs because, he claimed, the logs did not meet the requisite standards of accuracy and reliability for scientific evidence. *Id.* at 717. Further, Sinskey asserted error in the trial court's decision not to grant his motion seeking to limit the government's ability to cross-examine an unindicted co-conspirator. *Id.* Kumm also appealed several other points beyond the scope of this casenote. Kumm contended that the government's evidence was insufficient to establish he affirmatively participated in the deceit either directly or by aiding and abetting those who did. *Id.* at 718. Kumm also asserted that the jury instructions were incorrect because he had no duty to report the violations and to intervene to stop their continuation. *Id.* at 718-19. Kumm contended that the prosecutor's closing argument alleged incorrectly certain legal duties of Kumm. *Id.* at 719. Finally, Kumm contended that the prosecutor misstated the law in regards to the knowledge requirement. *Id. See infra* note 26.

[22] *Sinskey*, 119 F.3d at 715.

[23] *Id.*

[24] *Id. See infra* for the statutory language.

[25] *Id.* at 717.

[26] *Id.*

[27] *Id.* The Eighth Circuit also held that admitting the secret logs was within the trial court's discretion. *Id.* In addition, the Court held that because the witness could have invoked his fifth amendment privilege after direct examination, the trial court did not error in denying Sinskey's motion to limit the government's ability to cross-examine. *Id.* at 718. The Eighth

creased, the government introduced regulations controlling the amount of pollutants in waterways.[29] The Clean Water Act, as it is now titled, reached its current form after amendments by Congress in 1972 and subsequently in 1977.[30]

The purpose of the CWA was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[31] The CWA uses a technology-based approach where all discharges are required to adhere to federal regulations.[32] The National Pollution Discharge Elimination System ("NPDES") is the centerpiece of the regulatory scheme, regulating the pollution through permits.[33] The NPDES requires that anyone discharging pollutants into the nation's waters must obtain a permit from the EPA.[34] In order to implement the standards stated in the CWA and EPA regulations,[35] the NPDES limits the quantity or concentration of pollutants a facility may discharge.[36] Within these regulations, Congress provided methods of enforcement, which have become more severe over the past several decades, including civil, criminal and administrative penalties, to help reach the goals as provided in the CWA.[37]

B. The "Knowingly" Requirement

The mens rea element of the CWA has caused controversy throughout not only the court system, but also the entire environmental field.[38] Section 1319(c)(2)(A) provides that, "Any person who *knowingly* violates...this title, or any permit condition or limitation...shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both" (emphasis added).[39] In Section 1319(c)(4), Congress states that, "Any person who *knowingly* makes any false material statement, representation, or certification in any application, record, report...or other document required to be maintained under this chapter or who *knowingly* falsifies...or renders inaccurate any monitoring device...shall be punished by a fine of not more than $10,000, or by imprisonment for not more than 2 years or by both" (emphasis added).[40]

Circuit also found that the evidence supported a verdict that Kumm aided and abetted the misleading monitoring scheme by encouraging Greenwood to render inaccurate monitoring methods and discouraging him from complaining about it to others at the WWTP. *Id.* For these same reasons, the court found that the jury instructions regarding his duty to report were not incorrect. *Id.* at 719. Further, the court held that the prosecutor's closing arguments referred only to Kumm's job duties, not legal duties. *Id.* Finally, the Eighth Circuit ruled that the trial court's jury instructions limited any harm caused by the prosecutor's misstated the law in regards to the knowledge requirement. *Id.*

[28] Federal Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948). The original statute has evolved through numerous amendments. *See infra* note 30 and accompanying text for the most dramatic amendment.

[29] *See* Patrick W. Ward, *The Criminal Provisions of the Clean Water Act as Interpreted by the Judiciary and the Resulting Response from the Legislature*, 5 DICK. J. ENVTL. L. & POL'Y 399 (1996).

[30] Federal Water Pollution Control Act (Clean Water Act), Pub. L. No. 95-217, '2, 91 Stat. 1566. Codified as amended in scattered sections of 33 U.S.C. and 42 U.S.C.

[31] 33 U.S.C. § 1251(a) (1972).

[32] Mary J. Houghton, *The Clean Water Act Amendments of 1987: A BNA Special Report*, ENV'T REP., Sept. 4. 1987, at 2.

[33] Christine L. Wettach, *Mens Rea and the "Heightened Criminal Liability" Imposed on Violators of the Clean Water Act*, 15 STAN. ENVTL. L. J. 377, 380 (1996).

[34] 33 U.S.C. § 1342(a)-(c) (1997). 33 U.S.C. § 1311(a) prohibits the discharge of "pollutants" into waters by any "person" without an NPDES permit. "Person" includes any individual, corporation, municipality, or corporate officer. 33 U.S.C. §§ 1319(c)(6), 1362(5). "Pollutant" refers to any solid and other waste, sewage sludge, heat, rock sand, biological and radioactive materials. 33 U.S.C. § 1362(6).

[35] *See* 40 C.F.R. §§ 131(1), 1221(a) (1994).

[36] Wettach, *supra* note 33, at 380.

[37] Houghton, *supra* note 32, at 15-16.

[38] *See* Ward, *supra* note 29, at 399.

[39] 33 U.S.C. § 1319(c)(2)(A)-(B) (1997).

1. Legislative History

Since Congress established the CWA, the government has had the power to impose criminal sanctions on violators.[41] In 1972, Congress provided for enforcement of penalties for willful or negligent violations of the CWA through penalties of $2,500 to $25,000 per day of violation, prison sentences of up to two years, or both.[42] In addition, the government could require a person who knowingly made false statements to pay a fine of up to $10,000, serve up to six months in jail, or both.[43] However, Congress recently amended the CWA to enhance these criminal provisions and increase the criminal sanctions on violators.[44]

The recent amendments to the CWA have not only expanded the behavior subject to criminal penalties, but also increased the severity of the penalties.[45] The Water Quality Act Amendments of 1987 separated intentional and negligent violations and assigned different penalties to each.[46] Most significantly, Congress changed the word "willfully" to "knowingly" in order to classify the violations as felonies.[47] Because the use of the term "willfully" in a criminal statute generally requires polluters to know their conduct violated the law, the change of the term reflects Congress's desires to end this requirement.[48] Consequently, the current tougher penalties increased both the maximum fine and the amount of time that can be spent in jail.[49] Both Section 1319(c)(2)(A) and 1319(c)(4) double the potential fines and prison time for a second offense.[50]

The preamble to the 1987 amendments reveals Congress's intent in amending the above provisions.[51] The Senate Report stated that "criminal liability shall also attach to any person who is not in compliance with all applicable Federal, State and local requirements and permits and causes a publicly owned treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 402 of the Act."[52] The House Report stated that Congress intended to "amend section 309 of the [CWA] to provide penalties for dischargers or individuals who knowingly or negligently violate or cause the violation of certain of the Act's requirements."[53] In a joint conference report, the House and the Senate only discussed the change in the criminal penalties caused by the amendments.[54] The lack of an explanation regarding the change in the provision's language reflects Congress's desire only to strengthen the penalties and not alter the interpretation of the term "knowingly."[55]

2. Public Welfare Offense Doctrine

The public welfare offense

[40] 33 U.S.C. § 1319(c)(4) (1997).

[41] Wettach, *supra* note 33, at 381.

[42] 33 U.S.C. § 1319(c)(1) (1986).

[43] *Id.* § 1319(c)(2).

[44] H.R. Rep. No. 961, 104th Cong. (1987). Codified as amended at 33 U.S.C §§ 1319(c)(2) and 1319(c)(4).

[45] Wettach, *supra* note 33, at 381.

[46] *Id.* at 382.

[47] Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987) amending 33 U.S.C. § 1319(c).

[48] *See* United States v. Hopkins, 53 F.3d 533, 539 (2d Cir 1995); H.R. Conf. Rep. No. 1004, 99th Cong., 2d Sess. 138 (1986).

[49] *See supra* notes 39 and 40. (33 U.S.C. §§ 1319(c)(2)(A) and (c)(4). *See supra* notes 39 and 40 and accompanying text for the new increased amounts.

[50] 33 U.S.C. §§ 1319(c)(2)(A)-(B), 1319(c)(4) (1998).

[51] Wettach, *supra* note 33, at 389.

[52] *Id., citing* S. Rep. No. 50, 99th Cong., 1st Sess. 29 (1985).

[53] *Id., citing* R. Rep. No. 189, 99th Cong., 1st Sess. 29 (1985).

[54] *Id., citing* H.R. Conf. Rep. No. 1004, 99th Cong. 2d Sess. (1986).

[55] Wettach, *supra* note 33, at 390.

doctrine states that knowledge of the act itself is sufficient moral culpability for conviction under environmental regulations.[56] Neither knowledge of the actual statute nor knowledge of the existence of any statute is required.[57]

The principle case in this area is *United States v. International Minerals & Chem. Corp.*[58] The Supreme Court held that the "knowingly" language required the government to prove that the defendant knew of the nature of the acts, not that the defendant knew his actions violated the applicable statute.[59] The Court applied what is known as the public welfare offense doctrine when it stated that "where...dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation."[60]

3. Relevant Precedent

Appeals courts throughout the nation have seen a variety of cases pertaining to the mens rea element of the CWA.[61] The courts have consistently held that the CWA's criminal enforcement provisions require only that polluters knew of their actions, not the relevant law.[62] More significantly, to be guilty, these criminal defendants did not need to act with a specific intent to violate the law.[63]

The Eighth Circuit dealt with the issue of general versus specific intent when interpreting a criminal statue in *United States v. Farrell.*[64] In *Farrell*, the Court analyzed a statute that penalizes anyone who "knowingly violates" a statute that prohibits the transfer or possession of an automatic weapon.[65] The court determined that the term "knowingly" only applied to the conduct prohibited by statute, not the illegal nature of the activities.[66] It was thus held that the term "knowingly" modified the acts constituting the underlying conduct, thus not requiring the government to prove that the defendant knew his actions were illegal.[67]

In *Ratzlaf v. United States*, the Supreme Court analyzed a "willful violation," thus dis-

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[56] Brad A. Gordon, *Criminal Knowledge and the New Clean Air Act: Potential Judicial Constructions*, 25 ARIZ. ST. L.J. 427, 437 (1993). The Clean Water Act, Clean Air Act, Toxic Substances Control Act, Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation and Liability Act, and the Federal Insecticide, Fungicide and Rodenticide Act have provisions for "knowing" criminal violations that employ the public welfare offense doctrine. Ward, *supra* note 28, at 406. For a complete historical perspective of the public welfare offense doctrine. *See* Katherine H. Setness, *Statutory Interpretation of Clean Water Act Section 1319(c)(2)(A)'s Knowledge Requirement: Reconciling the Needs of Environmental and Criminal Law*, 23 ECOLOGY L.Q. 447, 459 (1996).

[57] Gordon, *supra* note 55, at 437.

[58] 402 U.S. 558 (1971). The Supreme Court interpreted a provision of the Federal Explosives Act, which imposes misdemeanor penalties on any individual who "knowingly violates any...regulation" promulgated by the Interstate Commerce Commission of the safe transportation of corrosive liquids. *Id.* at 559.

[59] *Id.* at 565.

[60] *Id.*

[61] *See* United States v. Schallom, 998 F.2d 196 (4th Cir. 1993) ("'knowingly' means that the defendant acted voluntarily and intentionally and not because of mistake, accident, or other innocent reason."); United States v. Borowski, 977 F.2d 27 (1st Cir. 1992) (regarding a violation of Section 1319(c)(3)(A)); United States v. Baytank (Houston), Inc., 934 F.2d 599 (5th Cir. 1991) (dealing with the pre-1987 amendment statute); United States v. Frezzo Brothers, Inc., 461 F. Supp. 266 (E.D. Pa. 1978) aff'd, 602 F.2d 1123 (3d Cir. 1979) (permitted factual evidence to establish willful actions regardless of knowledge of statute or that actions violated statute); and United States v. Hamel, 557 F.2d 107 (6th Cir 1977) (allowed circumstantial evidence). For a complete analysis on these and other cases, *see also* Wettach, *supra* note 32, at 390-93.

[62] Wettach, *supra* note 33, at 392.

[63] *Id.*

[64] 69 F.3d 891 (8th Cir. 1995) (analyzing a violation of 18 U.S.C. § 924(a)(2)).

[65] *Id.* at 892-93.

[66] *Id.*

[67] *Id.*

tinguishing it from the statute that is the subject of this casenote.[68] The Court held that the term "willfully" required that the defendant be aware of the illegality of his actions in order for a crime to be committed.[69] The *Ratzlaf* Court also held that a term that appears in a statute at more than one point should be construed the same way each time.[70]

In *United States v. Ahmad*, the Fifth Circuit held that the environmental laws do not impose strict criminal liability.[71] In *Ahmad*, a convenience store owner discharged gasoline into a city sewer system.[72] At trial, the defendant asserted that he thought he was discharging water, not gasoline, and ultimately was not convicted.[73] The court reasoned that the Act "uniformly requires knowledge as to each of the elements rather than only one or two."[74] The dourt concluded that to hold Ahmad guilty would subject mere accidents or other lawful conduct to harsh criminal penalties.[75]

4. Hopkins and Weitzenhoff

Two recent Court of Appeals cases in other districts have addressed the precise issue presented the *Sinskey* case.[76] The *Weitzenhoff* case regarded the criminal charges of two officers who ordered employees to pump waste activated sludge directly into the ocean on 40 different occasions in violation of Section 1319(c)(2)(A) of the CWA.[77] The *Weitzenhoff* court held that it would impose sanctions on a person "who knowingly engages in conduct that results in a permit violation, regardless of whether the polluter is cognizant of the requirements or even the existence of the permit."[78] The court based its decision on the public welfare offense doctrine as stated in *International Minerals* and the legislative history from the 1987 amendments.[79]

In *United States v. Hopkins*, the Second Circuit made a decision pertaining to Section 1319(c)(2)(A) of the CWA.[80] In *Hopkins*, the defendant's corporation generated a substantial amount of toxic waste water.[81] Its NPDES permit required the corporation to take samples of the water and send them to an independent laboratory for analysis.[82] Hopkins instructed his employees that if the levels did not meet the requisite standards, they should either not send the samples, take them the next day, or dilute them with water.[83] The court relied upon the public welfare offense doctrine and prior examination of environmental legislation under the CWA in holding that the government only needed prove that Hopkins knew of the nature of his acts and that he performed them intentionally, not that he knew the acts vio-

[68] 114 S.Ct. 655 (1994) (pertaining to Section 5324 of the Money Laundering Control Act). For a detailed analysis of the *Ratzlaf* case, see Setness, *supra* note 55, at 468.

[69] *Id.* at 657.

[70] *Id.* at 660.

[71] 101 F.3d 386 (5th Cir. 1996). For a comprehensive analysis of the *Ahmad* case, see David Gerger, *Fifth Circuit Rejects Strict Criminal Liability for Pollution*, 34-JUN HOUS. LAW. 32, (1997); Stanley A. Twardy, Jr. & Michael G. Considine, *What Must One "Know" To Be Convicted Under the Environmental Laws?*, 11-SPG NAT. RESOURCES & ENV'T 48 (1997).

[72] *Id.* at 388.

[73] *Id.* at 390.

[74] *Id.* at 388.

[75] *Id.*

[76] United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1993); United States v. Hopkins, 53 F.3d 533 (2d Cir. 1995). For further analysis and comparison *see* Ward, *supra* note 28, at 406, and Setness, *supra* note 55, at 481.

[77] *Weitzenhoff*, 35 F.3d at 1281.

[78] *Id.* at 1284.

[79] *Id. at 1283-86.*

[80] *Hopkins*, 53 F.3d at 534.

[81] *Id.*

[82] *Id.* at 535.

[83] *Id.*

lated the CWA.[84]

IV. INSTANT DECISION

U.S. v. Sinskey first brought the issue of the definition of "knowingly" in the CWA context to the Eighth Circuit Court of Appeals.[85] Sinskey was found guilty of knowingly discharging a pollutant into waters of the United States in amounts exceeding CWA permit limitations in violation of Section 1319(c)(2)(A).[86] Sinskey claimed that a prerequisite to a conviction was proving he knew his actions violated either the CWA or the NPDES permit.[87] In deciding this issue, the Eighth Circuit analyzed generally accepted constructions of the word "knowingly" in criminal statutes, the CWA's legislative history, and other case history that has addressed this issue.[88]

The court first looked at *United States v. Farrell*[89], an Eighth Circuit decision analyzing the "knowingly" element in a statute governing illegal possession of a machine gun.[90] The *Farrell* court held that the conviction did not require that the defendant knew that his actions violated the law, only that the defendant knowingly committed the act of transferring or possessing a machine gun.[91] Based on this logic, the court found that the Section 1319(c)(2(A) "knowingly" requirement applied only to the underlying conduct prohibited by the statute.[92]

Next, the court addressed the conduct that Sinskey must have known was occurring.[93] While the court initially recognized that the conduct required might appear to be the violation of a permit limitation, this would require that Sinskey knew of the permit limitation and knew that he was violating it.[94] Instead the court reasoned that to violate a permit limitation, one must engage in the conduct prohibited by the statute.[95] The court concluded that the "permit is...another layer of regulation in the nature of a law, in this case, a law that applies only to Morrell."[96] Because of this, the underlying conduct that Sinskey must have known was that conduct prohibited by the permit.[97]

The Eighth Circuit said that this interpretation comported with our legal system's general rule that ignorance of the law is no excuse.[98] Further, the court noted that this interpretation is consistent with past Supreme Court interpretations of statutes containing similar language and structure.[99]

The court then addressed the act's legislative history.[100] The Eighth Circuit noted that in 1987,

[84] *Id.* at 536-41.

[85] *Sinskey*, 119 F.3d at 715.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] 69 F.3d 891 (8th Cir. 1995). The court also cited United States v. Hern, 926 F.2d 764 (8th Cir. 1991).

[90] *Sinskey*, 119 F.3d at 715. The relevant machine gun possession statute was 18 U.S.C. § 924(a)(2).

[91] *Farrell*, 69 F.3d at 892-893.

[92] *Sinskey*, 119 F.3d at 715.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.* The court said that, for example, Sinskey had to have known that Morrell was discharging ammonia nitrates that were higher than one part per million. *Id.*

[98] *Sinskey*, 119 F.3d at 716 (citing Cheek v. United States, 498 U.S. 192, 199, 111 S.Ct. 604, 609, 112 L.Ed.2d 617 (1991)).

[99] *Sinskey*, 119 F.3d at 716 (citing United States v. International Mineral & Chemical Corp., 402 U.S. 558, 91 S.Ct. 1697, 29 L.Ed.2d 178 (1971)). *See supra* notes 57-59 and accompanying text.

[100] *Sinskey*, 119 F.3d at 716.

Congress changed the word "willfully" to "knowingly".[101] It sought to broaden the application of the statute and ultimately increase deterrence by strengthening criminal sanctions for the violations.[102] The court held that this change decreased the mens rea requirement from having acted with the knowledge that one's conduct violates the law, to simply having acted with an awareness of one's actions.[103]

The Eighth Circuit next discussed other courts' decisions on the same issue.[104] The Court cited both *Hopkins*[105] and *Weitzenhoff*[106] as decisions that were consistent with the court's interpretation of Section 1319(c)(2)(A).[107] The court also distinguished Sinskey's case from *Ahmad*, the Fifth Circuit case that dealt with a mistake of fact defense, not a mistake of law.[108]

Regarding Sinskey and Kumm's violation of Section 1319(c)(4), the Eighth Circuit noted that in the plain language of the statute, the adverb "knowingly" directly "precedes and explicitly modifies the verbs that describe the activities that violate the act."[109] As a result of this language, the court concluded that Sinskey and Kumm's "knowingly" argument had even less force.[110] The court cited several cases that support the argument that the term "knowingly" only referred to knowledge of the relevant activities.[111] Further, in *Ratzlaf v. United States*,[112] the Supreme Court ruled that a term that appears in a statute more than once should be consistently construed.[113]

The Eighth Circuit Court of Appeals, affirming the district court's decision, held that the "knowingly" requirement in both statutes does not require that Sinskey and Kumm knew of the illegal nature of their conduct, only that they were knowledgeable of the relevant activities.[114]

V. COMMENT

Since the amendments to the CWA in 1987, the United States Courts of Appeals have heard three cases regarding the

[101] *Sinskey*, 119 F.3d at 716. *See* 133 Cong. Recd. H131 (daily ed. Jan. 7, 1987) (statement of Rep. J. Howard), *reprinted in* 1987 U.S.C.C.A.N. 5, 28, and 33 U.S.C. § 1319, historical and statutory notes, 1987 amendment, at 197 (West supp. 1997).

[102] *Id.* See H.R. Conf. Rep. No. 99-1004 at 138 (1986) and S.Rep. No. 99-50 at 29-30 (1985).

[103] *Sinskey*, 119 F.3d at 716. The court compared *Cheek*, 498 U.S. at 201, with *International Minerals*, 402 U.S. at 562-63. The court also cited Babbitt v. Sweet Home Chapter of Communities, 515 U.S. 687, 696-97, 115 S.Ct. 2407, 2412, 132 L.Ed.2d 597 (1995) and *Hern*, 926 F.2d 767.

[104] *Sinskey*, 119 F.3d at 716.

[105] United States v. Hopkins, 53 F.3d 533, 541 (2d Cir. 1995), *cert. denied*, 516 U.S. 1072, 116 S.Ct. 773, 133 L.Ed.2d 725 (1996).. *See supra* notes 79-83 and accompanying text.

[106] United States v. Weitzenhoff, 35 F.3d 1275, 1283-86 (9th Cir. 1993), *cert. denied*, 513 U.S. 1128, 115 S.Ct. 939, 130 L.Ed.2d 884 (1995). *See supra* notes 76-78 and accompanying text.

[107] *Sinskey*, 119 F.3d at 716.

[108] *Id.* (citing United States v. Ahmad, 101 F.3d 386 (5th Cir. 1996)). *See supra* notes 71-74 and accompanying text.

[109] *Sinskey*, 119 F.3d at 717.

[110] *Id.*

[111] *Id.* (citing *Hopkins*, 53 F.3d at 541, United States v. Enochs, 857 F.2d 491, 492-94 (8th Cir. 1988), and United States v. Udofot, 711 F.2d 831, 837 (8th Cir. 1983).

[112] 510 U.S. 135, 143, 114 S.Ct. 655, 660, 126 L.Ed.2d 615 (1994).

[113] *Sinskey*, 119 F.3d at 717.

[114] *Id.*

mens rea requirement for Section 1319 of the CWA. *United States v. Sinskey* presented an issue of first impression to the Eighth Circuit Court of Appeals. While prior cases may have lacked in their reasoning and their application of legislative history and case precedence, *Sinskey* appears to use sound logic while ultimately reaching a result that will further the goals of the CWA.

While both the *Weitzenhoff* and *Hopkins* decisions concurred that knowledge of the law is not an essential element to a prosecution under Section 1319(c)(2)(A) of the CWA, the cases have been criticized because they fail to address the role of the rule of lenity and its use in relationship to legislative history.[115] Specifically, *Wietzenhoff* was criticized for citing another subsection of the CWA and its lack of discussion of the changes that the 1987 amendments had on the CWA.[116] The *Hopkins* court, on the other hand, did discuss the change of language caused by the 1987 amendment, but failed to explain how the change should translate into the specific acts to be proven.[117]

In the *Sinskey* case, the court used the legislative history, specifically the 1987 amendment, simply to establish that the term "knowingly" means "acting with an awareness of one's actions."[118] The court made no attempt to use the legislative history to establish the actions of which a defendant must be aware.

Another noted fault of the *Weitzenhoff* and *Hopkins* decisions was failing to consider whether some CWA violations might fall outside of the scope of the public welfare offense doctrine.[119] A criticism was that the cases were "impermissibly vague" about the prima facia case that the government must prove to sustain a criminal conviction.[120] Both the *Wietzenhoff* and *Hopkins* decisions failed to address whether some CWA violations might fall outside of the public welfare offense doctrine.[121]

The Eighth Circuit, on the other hand, is more deliberate in its application of the public welfare offense doctrine. The court stated that the *International Minerals* court focused on the nature of the regulatory scheme at issue, noting that where dangerous substances are at issue, anyone dealing with these substances should be presumed to be aware of the regulation.[122] The Eighth Circuit thus concluded that such reasoning should apply to the CWA, which regulates the discharge into the nation's waters of such "obnoxious waste material" as the byproducts of slaughtered animals.[123]

The court protected the public welfare offense doctrine's far-reaching interest when it stated that the doctrine should apply to the CWA as a whole, because the Act regulates the discharge of "obnoxious waste material" into the nation's waters. More importantly, the specific language used in the case[124] seemed to imply that any CWA violations would fall within the scope of the doctrine.[125] The court's failure to address whether some violations might fall outside the scope of the public welfare offense doctrine appears to be intentional, thus

[115] Katherine H. Setness, *Statutory Interpretation of Clean Water Act Section 1319(c)(2)(A)'s Knowledge Requirement: Reconciling the Needs of Environmental and Criminal Law*, 23 ECOLOGY L.Q. 447, 482 (1996).

[116] *Id.*

[117] *Id.*

[118] *Sinskey,* 119 F.3d at 716.

[119] Setness, *supra* note 115, at 482.

[120] *Id.*

[121] *Id.*

[122] *Sinskey,* 119 F.3d at 716 (citing *International Minerals*, 402 U.S. at 558).

[123] *Id.*

[124] *Sinskey,* 119 F.3d at 716. After reviewing the reasoning of *International Minerals,* 402 U.S. at 558 (where the Court held that where "dangerous or... obnoxious waste materials" are present, anyone dealing with the materials "must be presumed" to be aware of such regulations), the *Sinskey* Court stated, "Such reasoning applies with equal force, we believe, to the CWA, which regulates the discharge into the public's water of such 'obnoxious waste material' as the byproducts of slaughtered animals." *Id.*

allowing the inference that the doctrine covers all CWA violations. Ultimately, the Court seemed to avoid any "impermissibly vague" language like that for which the other cases have been criticized.

The Eighth Circuit also stated that because of the public welfare offense doctrine applied in *International Mineral*, requiring knowledge only of the underlying actions would not raise substantive due process issues.[126] Constitutional due process limits the ability of government to extend criminal sanctions over the conduct of citizens.[127] The CWA does not violate due process limits, because it has a narrow definition of what it considers criminal.[128] Further, because the conduct bears a substantial relationship to legitimate public welfare, safety, and health concerns, courts rarely question Congress's power to define mens rea in environmental statutes and the criminal provisions used to enforce these statutes.[129]

Finally, the *Weitzenhoff* and *Hopkins* opinions also have been criticized for citing "a hodgepodge of opinions with differing definitions of knowledge in support of [their] holding[s]."[130] Obviously, different definitions of knowledge would ultimately effect the burdens of production and proof in a given case.[131]

While the Eighth Circuit cites a variety of cases throughout its opinion to support different aspects of its analysis, the court focuses on the reasoning of *Farrell*, a prior Eighth Circuit ruling.[132] The court uses the reasoning in *Farrell* to conclude that the underlying conduct of which Sinskey must have had knowledge is the conduct that is prohibited by the permit, not the terms of the permit itself.[133] For example, Sinskey must only have been aware that Morrell's discharges of ammonia nitrates were higher than one part per million in the summer of 1992.[134] The court determined that the government did not need to prove that Sinskey knew that his actions violated the CWA or NPDES permit, only that Sinskey was aware of the underlying conduct that resulted in violation of the permit.[135] The Eighth Circuit thus made the first step in the history of interpreting Section 1319(c)(2)(A) in holding that the mens rea element is satisfied if the defendant had knowledge of the underlying conduct that is prohib-

[125] The *Hopkins* Courts was criticized for stating that "the vast majority of [substances regulated by the CWA] are of the type that would alert any ordinary user to the likelihood of stringent regulation," thus implying that some substances would not alert the user about stringent regulation. Setness, *supra* note 55, at 482.

[126] *Sinskey,* 119 F.3d at 716.

[127] Wettach, *supra* note 33, at 397.

[128] *Id.*

[129] *Id.*

[130] Setness, *supra* note 115, at 483. Specifically, Setness states that Hopkins makes no distinguish between cases that require "knowledge of the facts that make the defendant's conduct illegal", knowledge of "the nature of his acts", and knowledge "that he was discharging the pollutants in question, and knowledge that he "was aware of his acts". *Id.*

[131] *Id.*

[132] *Farrell,* 69 F.3d at 891.

[133] *Sinskey,* 119 F.3d at 715. The Court stated:

> At first glance, the conduct in question might appear to be violating a permit limitation, which would imply that § 1319(c)(2)(A) requires proof that the defendant knew that he or she was violating it. To violate a permit limitation, however, one must engage in the conduct prohibited by that limitation. The permit is, in essence, another layer of regulation in the nature of a law, in this case, a law that applies only to Morrel. *Id*

[134] *Id.*

[135] *Id.* at 715-16.

ited by the statute or regulations.

The court then applied this logic and that of *Ratzlaf* to Section 1319(c)(4).[136] The Court held that "knowingly" refers to knowledge of the relevant activities, specifically "the defendants' knowledge that they were rendering the monitoring methods inaccurate by aiding and abetting in the flow games and selective sampling."[137] As a result of this, the Eight Circuit established a "brighter line" test for both Sections 1319(c)(2)(A) and 1319(c)(4). In the Eighth Circuit, prosecutors who file these charges and the defendants that these charges are brought against will have less ambiguities when faced with allegations of criminal violations of the CWA.

As a result of these recent decisions regarding the CWA, academics have argued that prosecutors are now armed with "a new arsenal of felony level environmental crimes and accompanying sanctions" that can be considered "effective weapons against recalcitrant environmental violators."[138] While some have argued that this puts too much power in the hands of prosecutors, the EPA and the Department of Justice's guidelines in case selection help protect people engaging in truly innocent conduct from criminal prosecution.[139]

In addition, because of the narrowed ruling in *Sinskey* and the "brighter line" test established within the decision, corporate officials will have a greater incentive to not only learn but also follow the rules established by the CWA and the NPDES. The criminal sanctions that can be imposed on officers and corporations provide protection from abuse by companies that simply pay civil penalties as a cost of doing business. The corporate officers who permit or simply allow these violations to take place will potentially face criminal sanctions. This will ultimately deter companies from participating in activities that can harm the nation's waterways, without exposing these companies to undue risk from overzealous prosecutors.

VI. CONCLUSION

The Eighth Circuit's ruling in *Sinskey* was based on sound logic in its analysis of relevant case law, legislative history, and general policy issues. Because of this sound logic, the Eighth Circuit established a "brighter line" test than other jurisdictions have established in their analysis of the mens rea requirement in Sections 1319(c)(2)(A) and 1319(c)(4) of the CWA. Consequently, corporations and their officers will have incentives to follow the laws established by the CWA and its regulations or risk severe criminal sanctions.

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[136] *Id.* at 717.

[137] *Id.*

[138] John Gibson, *The Crime of "Knowing Endangerment" Under the Clean Air Act Amendments of 1990: Is it More "Bark Than Bite" as a Watchdog To Help Safeguard a Workplace Free From Life Threatening Hazardous Air Pollution Releases*, 6 FORDHAM EVNTL. L.J. 197, 201 (1995).

[139] *See* Wettach, *supra* note 33, at 398 for a complete analysis of prosecutorial discretion through EPA and Department of Justice guidelines.