Protecting Public Welfare: Mens Rea under Section 308(d)(2)(A) of the Solid Waste Disposal Act

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Protecting Public Welfare: Mens Rea Under Section 3008(d)(2)(A) of the Solid Waste Disposal Act

David A. Gordon†

Harris Goldman stands alone before a railroad tanker in the dead of night.1 Although he lacks the legal permit to do so, he turns a release valve, allowing thousands of gallons of hazardous creosote sludge to spill upon the soil. In doing so, he saves his corporation both time and money, but exposes himself to criminal prosecution. Must the United States Attorney prove that Goldman knew of his failure to obtain a permit, of the hazardous character of the waste, or of the existence of the regulation? Will Goldman go unpunished?

Determining the requisite intent necessary to violate § 3008(d)(2)(A) of the Solid Waste Disposal Act2 ("SWDA") presents a question that divides federal courts and raises larger issues of criminal law. In a variety of contexts, courts have struggled to properly balance principles of personal culpability against the strong deterrent measures of a strict liability regime.3 In United States v Johnson & Towers, Inc., the Third Circuit required proof that the defendant had knowledge of all elements of the statute to sustain a conviction.4 In contrast, in United States v Hoflin, the Ninth Circuit held that the statute did not require the defendant to have knowledge of permit status,5 providing a model of analysis for the majority of circuits that have decided the question.6 Finally, in United States v

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1 The following facts provided the basis for United States v Laughlin, 10 F3d 961, 963 (2d Cir 1993).
2 Pub L No 94-580, 90 Stat 2795, 2811 (1976), codified at 42 USC § 6928(d)(2)(A) (1994). Commentators commonly refer to SWDA provisions by their section in the original act. To maintain consistency, this Comment does so in the text. All citations in the notes will be to the codification for ease of reference. Criminal liability is available under the Resource Conservation and Recovery Act, 42 USC § 6901 et seq (1994) ("RCRA"). The SWDA comprises one of the acts included in RCRA.
3 See, for example, United States v Balint, 258 US 250 (1922).
4 741 F2d 662, 668-69 (3d Cir 1984).
5 880 F2d 1033, 1039 (9th Cir 1989).
6 See, for example, United States v Wagner, 29 F3d 264 (7th Cir 1994); United States
Laughlin, the Second Circuit found a middle ground, holding that the statute required the defendant to possess knowledge of permit status, but applying several different standards in defining elements of the offense.7 The Supreme Court has denied certiorari on several occasions, leaving the issue unsettled.8

This Comment argues that the courts can properly accomplish the deterrent purposes of Congress by interpreting the SWDA to impose a lower mens rea standard for criminal violations. This approach should increase the effectiveness of environmental statutes by forcing affected parties to pay closer attention to them.9 This Comment argues that analyzing the SWDA as a public welfare statute allows the courts to expand the power of the criminal justice system and eliminate the mens rea for some elements of the offense.

This Comment evaluates the problem of mens rea in two parts. Part I places the issue of hazardous waste disposal in three separate contexts. It examines the traditional strict liability framework, the special problems of environmental regulation, and the various approaches courts have taken toward the SWDA itself. Part II examines the text of the statute, its legislative history, analogous environmental statutes, deterrence rationales, and the counterargument of liability proportionate to fault. This Comment concludes that, as a public welfare statute, the SWDA does not require knowledge of permit status to sustain a criminal conviction.

I. DEFINING THE PROBLEM: CONTEXT AND CONTENT

A. Strict Liability in the Criminal Law: A Historical Analysis of the “Public Welfare” Exception

The problem of interpreting mens rea requirements in public welfare statutes10 extends across the criminal law. Traditionally, public welfare statutes do not require the defendant to have

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7 Dean, 969 F2d 187 (6th Cir 1992); United States v Dee, 912 F2d 741 (4th Cir 1990).
8 10 F3d 961, 965-67 (2d Cir 1993).
9 See, for example, United States v Johnson & Towers, Inc., 469 US 1208 (1985); United States v Hoflin, 493 US 1083 (1990).
11 A public welfare statute involves conduct that “a reasonable person should know is subject to stringent public regulation and may seriously threaten the community’s health or safety.” Liparota v United States, 471 US 419, 432-33 (1985).
knowledge of each element of the offense to sustain a conviction.\textsuperscript{11} In order to place the debate over the SWDA in context, this Comment first examines the Supreme Court's approach to strict liability and public welfare statutes.

The Supreme Court first encountered strict liability criminal provisions in two early drug cases. In \textit{United States v Balint}, the Court penalized pharmaceutical distributors despite their ignorance of the unlawful character of their product.\textsuperscript{12} By creating a strict liability regime, the Court accomplished two central purposes. First, it allowed a substantial punishment to deter harmful behavior.\textsuperscript{13} Second, and more importantly, the Court provided incentives for potential wrongdoers to discover the law. The Court placed the burden of following regulations on the potential wrongdoer by presuming that she knew about them.\textsuperscript{14} Although the Court acknowledged the general rule that "\textit{scienter} [is] a necessary element in the indictment and proof of every crime,"\textsuperscript{15} it did not require a mens rea for the distribution of narcotics.\textsuperscript{16}

Similarly, in \textit{United States v Dotterweich}, the Supreme Court eliminated any mens rea requirement for violation of a federal drug law applied to a corporation and its senior officers trafficking in mislabeled drugs.\textsuperscript{17} The Court suggested that an otherwise innocent actor warrants punishment if she violates "a familiar type of legislation whereby penalties serve as effective means of regulation."\textsuperscript{18} In both \textit{Balint} and \textit{Dotterweich}, the Court sacrificed potential unfairness to defendants for the sake of protecting public health.

The Court took a major step toward defining the "public welfare statute" in 1952, when \textit{Morissette v United States} provided a more concrete test for the application of strict liability.\textsuperscript{19} The Court refused to affirm the defendant's conviction for the theft of bomb casings from a government airfield, finding that because the violation did affect the public welfare, it failed to pass the threshold requirement for implementing a strict liability

\begin{itemize}
  \item \textit{Morissette v United States}, 342 US 246, 253-55 (1952).
  \item 258 US 250, 254 (1922).
  \item Id at 252-53 ("[I]n order to stimulate proper care, [the policy of the law may] require the punishment of the negligent person though he be ignorant of the noxious character of what he sells.").
  \item Id at 252, 254.
  \item Id at 251.
  \item \textit{Balint}, 258 US at 254.
  \item 320 US 277 (1943).
  \item Id at 280-81.
  \item 342 US 246 (1952).
\end{itemize}
scheme. In defining the “public welfare offense,” the Court offered several limiting principles. First, the “public welfare offense” is part of a class of offenses that, while not posing a direct threat to individuals or property, create an unacceptably high probability of injury. Second, the Court insisted that under the “public welfare offense” doctrine the potential violator, by adhering to the law, could have prevented the harm caused by such offenses “with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities.” Finally, the Morissette Court suggested that the statutory penalties should neither greatly harm the accused’s reputation nor impose any terrible penalty.

Despite the fact that the Court overturned the defendant’s conviction, Morissette has proved useful by establishing fundamental guidelines for public welfare offenses.

In Staples v United States, the Court refused to apply strict liability to the National Firearms Act’s regulation of firearm possession because it imposed felony-level penalties. In examining the history of the public welfare statute in the context of strict liability, the Court distinguished the instant case from United States v Freed, in which the Court held that a similar statute required no knowledge of the defendant’s failure to register hand grenades. While the Court conceded that a hand grenade was an inherently dangerous device, it differentiated firearms, citing their widespread lawful use across the United States. Because of the popularity of firearms, the Court worried about overinclusiveness, not wishing to impose overly harsh punishments on “a broad range of apparently innocent conduct.” The danger of punishing innocent action militated against the desire to protect the public welfare.

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20 Id at 256 (“While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted.”).
21 Id at 255-56.
22 Id.
23 Morissette, 342 US at 256.
24 Indeed, most strict liability cases since 1952 cite Morissette as relevant authority. See, for example, Liparota v United States, 471 US 419, 425-26 (1985); Staples v United States, 511 US 600, 606-07 (1994).
27 Staples, 511 US at 608-12.
28 Id at 610-12.
29 Id at 610, quoting Liparota, 471 US at 426.
Staples raised important questions regarding the definition of the “public welfare offense.” Although the Court hesitated to apply strict liability broadly, Staples suggests that it remains willing to do so subject to two exceptions: It would not apply strict liability to any felony or to seemingly innocent behavior. With those exceptions, however, the Court seems to remain committed to following its Balint-Dotterweich line of analysis.

B. Focusing the Problem: Placing Strict Liability in the Environmental Context

Special problems of environmental protection demand a fresh look at the debate over public welfare offenses. An examination of two important decisions, United States v International Minerals & Chemical Corp. and United States v Weitzenhoff, illustrates the need for a lesser standard of mens rea in the environmental context.

In United States v International Minerals & Chemical Corp., the Supreme Court created a framework to evaluate the viability of a strict liability regime within the environmental context. The Court, addressing a violation of a corrosive liquid transportation statute, held that a “knowing” violation of the statute required only knowledge of the action, not of its illegality. It advanced the familiar rationale that, in the case of public welfare statutes, “the probability of regulation is so great that anyone who is aware that he is in possession of [corrosive liquids] or dealing with them must be presumed to be aware of the regulation.

The Court distinguished the standard it established from strict liability. The Court explained that it merely refused to apply the knowledge requirement to awareness of the regulation. A conviction still required knowledge of the activity itself.

Most importantly, the Court suggested that environmental hazards, like dangerous narcotics and hand grenades, may in-
volve the public welfare. The Court required no knowledge of the statute's existence where "dangerous or deleterious devices or products or obnoxious waste materials are involved." This analysis supported more stringent penalties for environmental violations and lower standards of culpability for environmental perpetrators.

The Ninth Circuit's decision in United States v Weitzenhoff heralded a dramatic expansion of the "entire spectrum of environmental criminal statutes." It applied the rationale of International Minerals to hold that the knowledge requirement of the Clean Water Act referred only to the criminal action, not to the regulation itself. In doing so, the court relied on three rationales. First, it found that Congress intended to enact increased penalties to accomplish its deterrence goals. Second, it categorized the Clean Water Act as a public welfare statute, comparing it to the statutory construction used in International Minerals. Finally, and most significantly, the Ninth Circuit distinguished from Weitzenhoff two intervening Supreme Court decisions which had called the application of strict liability into question, United States v Ratzlaf and Staples v United States. The court distinguished Ratzlaf because the statute in that case did not affect the public welfare. In distinguishing Staples, it suggested that while both guns and environmental discharges pose dangers to society, sewage dumping involves deleterious products and obnoxious waste materials. This fact puts the "discharger on notice that his acts may pose a public danger." By distinguish-
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ing the Court's holding in Staples, the Ninth Circuit effectively reaffirmed the place of environmental protection in public welfare law. Consequently, it also solidified the arguments for strict liability readings of similar environmental statutes.53

Within this framework, the SWDA provides a battleground for principles of deterrence and culpability. On one side, the recent Supreme Court cases suggest that strict liability may not apply to the Act.54 On the other, deterrence, congressional intent, and the threat of public harm may make environmental jurisprudence an exception to that trend.

C. Three Interpretations of Section 3008(d)(2)(A)

The criminal provision of the SWDA requires the defendant's awareness of certain elements of the offense, but the Act does not clearly identify the extent of that requirement. It imposes criminal penalties on any person who:

(2) knowingly treats, stores or disposes of any hazardous waste identified or listed under this subchapter—
   (A) without a permit under this subchapter ... or
   (B) in knowing violation of any material condition or requirement of such permit.55

Courts have taken three approaches to the question of whether and for what elements this statutory language allows for strict liability or, alternatively, imposes a knowledge requirement.

In United States v Johnson & Towers, Inc., the Third Circuit interpreted the SWDA to require knowledge of all three major elements of the offense to sustain a conviction, despite recognizing the jurisprudential tradition of allowing diminished mens rea for public welfare statutes.56 In doing so, it held that the offense required knowledge of the action, of the waste's hazardous character, and of the status of the permit.57 Though citing liberally to United States v Dotterweich,58 as well as agreeing that Congress enacted RCRA to accomplish purposes similar to those

because they can cause "cholera, hepatitis, and other serious illnesses, and can have serious repercussions for public health and welfare." Id.

54 See text accompanying notes 25-31.
55 42 USC § 6928(d)(2).
56 741 F2d 662, 668 (3d Cir 1984).
57 Id at 670.
envisioned by other public welfare statutes, the court insisted on the necessity of a comprehensive mens rea requirement to sustain a conviction.\textsuperscript{59}

The court based its holdings on both congressional intent and statutory syntax. First, it found that Congress must have intended the word "knowingly" in Section 3008(d)(2) to apply to both (A) and (B), even though only (B) contains an additional "knowing violation" clause. The court reasoned that the two subsections should impose similar standards of intent for similar offenses, finding it unlikely that "Congress could have intended to subject to criminal prosecution those persons who acted when no permit had been obtained irrespective of their knowledge ... but not those persons who acted in violation of the terms of a permit unless that action was knowing."\textsuperscript{60} Second, it followed the Eighth Circuit's reading of a similar section of RCRA that asserted that the term "knowingly" modified all elements of the offense, "purely as a verbal matter."\textsuperscript{61}

In \textit{United States v Hoflin}, the Ninth Circuit explicitly rejected \textit{Johnson & Towers}, holding that some portions of the statute required no mens rea.\textsuperscript{62} In \textit{Hoflin}, the defendant did not know that his employer lacked a permit for disposing of hazardous paint and sludge.\textsuperscript{63} Still, the court found that Congress passed RCRA in order to "protect the national health and environment."\textsuperscript{64} Therefore, as a public welfare statute, the court reasoned, RCRA did not mandate that the offender had to know that the government forbade her activities, only that the government regulated them.\textsuperscript{65} Unlike \textit{Johnson & Towers}, \textit{Hoflin} emphasized the effect of toxic dumping on the public welfare. Indeed, the court reiterated the principle that Congress regulates hazardous activities so often that courts could presume that defendants must know of a statute's existence.\textsuperscript{66} Finding irrelevant the defendant's ignorance as to the lack of a permit, \textit{Hoflin} held that

\begin{itemize}
  \item \textsuperscript{59} 741 F2d at 666.
  \item Id at 668.
  \item Id at 668, quoting \textit{United States v Marvin}, 687 F2d 1221, 1226 (8th Cir 1982).
  \item 880 F2d 1033, 1038 (9th Cir 1989).
  \item Id at 1035-36.
  \item In doing so, the court relied on its decision in \textit{Wyckoff v EPA}, 796 F2d 1197 (9th Cir 1986), to assert that RCRA was a public welfare statute. \textit{Hoflin}, 880 F2d at 1038.
  \item 880 F2d at 1038.
  \item Id, citing \textit{United States v International Minerals & Chemical Corp.}, 402 US 558, 565 (1971).
\end{itemize}
the defendant need only know that the waste "had the potential to be harmful." 

Several circuits have followed the Ninth Circuit's ruling in Hoflin. In United States v Dee, the Fourth Circuit emphasized the presumption that anyone handling potentially hazardous materials should know their permit status. Similarly, in United States v Dean, the Sixth Circuit adopted Hoflin's finding that the SWDA was a public welfare statute, making it one of the "more likely candidates for diminished mens rea requirements." In each case, the courts read the knowledge requirement narrowly with respect to the permit section of the statute. Dean claimed that in doing so, however, the court did not impose a strict liability standard, because individuals working with hazardous waste have "every reason to be aware that their activities are regulated by law." In a sparse opinion, the Seventh Circuit also followed the Hoflin line of analysis in United States v Wagner. Similarly, in United States v Baytank, Inc., the Fifth Circuit held that the term "knowingly" did not require knowledge of permit status under the SWDA.

The Second Circuit attempted to find middle ground. In United States v Laughlin, the court sustained the conviction of a corporate officer who had personally dumped hazardous waste in the middle of the night. As in Hoflin, the Laughlin court held that criminal liability did not depend on knowledge of permit status, but rather only upon knowledge of the act of disposal. However, the Laughlin court did suggest that the mens rea for the character of the waste should be higher. By doing so, Laughlin may have undermined the deterrent effect of the SWDA. The

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67 Id at 1039.
68 912 F2d 741, 745 (4th Cir 1990).
70 Id.
71 29 F3d 264 (7th Cir 1994).
72 934 F2d 599, 612 (5th Cir 1991).
73 Laughlin, 10 F3d 961 (2d Cir 1993). For an in-depth factual analysis of Laughlin and the events surrounding the case, see Bruce R. Bryan, The Battle Between Mens Rea and the Public Welfare: United States v. Laughlin Finds a Middle Ground, 6 Fordham Envir L J 157 (1995), in which the appellant's lawyer describes the appellant's arguments in the limited context of this central case.
74 10 F3d at 966.
75 Laughlin held that a jury instruction defining hazardous waste as any solid waste that might pose a "potential hazard to human health or the environment," in place of the statutory requirement of a "substantial present hazard" did not constitute plain error. Id at 967. In contrast to Hoflin, however, the Laughlin court suggested that the jury "should have the benefit of the statutory definition," in order to properly identify "not simply a potential hazard, but a substantial potential hazard." Id.
court left unanswered whether the defendant need truly recognize the hazardous character of the waste.\textsuperscript{76} This uncertainty may lessen the frequency of convictions under the regulation, making potential offenders less concerned with the consequences of their actions. Still, the \textit{Laughlin} court cited \textit{Balint}\textsuperscript{77} and \textit{International Minerals}\textsuperscript{78} to indicate its serious regard for public welfare statutes. By raising the knowledge requirement for the hazardousness of the waste, while eliminating it for permit status, \textit{Laughlin} applied a pragmatic view to the dispute, attempting to balance principles of culpability with the value of protecting public welfare.\textsuperscript{79} Whether the court's view struck the proper balance remains open for debate.

\section*{II. Addressing the Issue: Why the Solid Waste Disposal Act Permit Provision Demands a Strict Liability Reading}

The Second Circuit's careful shift in \textit{United States v Laughlin}\textsuperscript{80} leaves open the possibility of unsettling the Ninth Circuit's often-followed interpretation of the Solid Waste Disposal Act.\textsuperscript{81} In analyzing this issue, this Comment discusses several approaches to the problem. First, it applies a textual analysis, hoping to bring focus to ambiguous portions of the statute. Second, it examines the legislative history of the statute in order to determine what Congress intended. Third, it compares the Solid Waste Disposal Act to other environmental statutes, focusing on the effect of the Ninth Circuit's recent decision in \textit{United States v Weitzenhoff}.\textsuperscript{82} Fourth, it places environmental criminality into the larger scheme of public welfare jurisprudence established by the litany of cases leading up to \textit{Staples v United States}.\textsuperscript{83} Finally, it addresses the culpability concerns that remain the most difficult counterargument for proponents of strict liability to overcome.

\begin{footnotes}
\item[76] Bryan, 6 Fordham Envir L J at 194 (cited in note 73).
\item[77] 258 US 250 (1922). See text accompanying notes 12-16.
\item[79] Bryan, 6 Fordham Envir L J at 196 (cited in note 73).
\item[80] 10 F3d 961 (2d Cir 1993).
\item[81] \textit{United States v Hoflin}, 880 F2d 1033 (9th Cir 1989) (interpreting 42 USC § 6928(d)(2) (1994)).
\item[82] 35 F3d 1275 (9th Cir 1993).
\item[83] 511 US 600 (1994).
\end{footnotes}
A. The Textual Argument

When interpreting any statute, the text itself provides an excellent starting point. The dispute here revolves around the language in § 3008(d)(2) of the SWDA. Specifically, it focuses on the word “knowingly,” and how much of the section this adverb modifies. As a matter of syntax, “knowingly” should at least modify the phrase immediately following it: “treats, stores or disposes.” After that clause, the statute presents two interesting ambiguities: whether the knowledge standard affects either the hazardousness or permit requirements.

No court has yet taken the position that “knowingly” does not modify “hazardous waste,” imposing true strict liability upon dumpers who did not know the character of their waste. Indeed, in United States v Johnson & Towers, Inc., the government unsuccessfully attempted to convince the court of this “overly literal” approach. Even in United States v Hoflin, the court refused to exempt the hazardous character of the waste from a knowledge standard.

As a textual matter, however, this portion of the statute remains ambiguous. The Laughlin court’s determination that the “better course” demands the defendant know that the waste poses a “substantial” hazard suggests that this issue remains open to interpretation. A careful reading of the statute might allow a court to find a person liable for knowingly disposing of material that she did not know was hazardous. Although no court has yet adopted this position, the public welfare rationale for strict liability may compel its future use should current deterrent measures fail.

Subsection (2)(A) of the provision presents an entirely different situation. While subsection (2)(B) requires a “knowing violation,” subsection (2)(A) merely requires not “having obtained a permit.” It makes no mention of knowledge. In fact, by mentioning knowledge in the beginning of § 3008(d)(2) and again in subsection (2)(B), its omission in subsection (2)(A) draws greater notice. If anything, the plain language leads to a presumption

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85 The sentence structure of § 3008(d)(2) suggests this reading. United States v Marvin, 687 F2d 1221, 1226 (8th Cir 1982).
87 880 F2d 1033, 1039 (9th Cir 1989).
88 10 F3d at 967.
89 42 USC § 6928(d)(2).
that one need not have knowledge of permit status to violate the statute. Still, the term “knowingly” at the top of subsection (2) at least provides an argument for ambiguity, forcing a more probing analysis.

As a final textual note, § 3008(d)(1) provides an interesting comparison. It provides for the conviction of any person who “knowingly transports... any hazardous waste... to a facility which does not have a permit.”90 In United States v Hayes International Corp.,91 the Eleventh Circuit discussed the question of “how far down the sentence ‘knowingly’ travels.”92 The court held that in order to convict under § 3008(d)(1), the defendant must have knowledge of its lack of permit.93 Although it provides analogous text, the fact that no structural division exists, as with subsections (2)(A) and (2)(B), suggests that the textual analysis may lead to different conclusions. As such, it does not resolve the ambiguity of § 3008(d)(2). Because Congress has failed to clarify the language of the statute, the burden of interpretation falls on the courts. If courts find the text ambiguous, they must examine legislative history and policy rationales to determine the proper scope of the knowledge requirement.

B. Congressional Intent

The Solid Waste Disposal Act’s legislative history, both in its 1976 passage94 and its 1980 amendment,95 fails to provide a clear resolution to the textual ambiguity. Indeed, Congress did not seek “to define ‘knowing’ for offenses under subsection (d); that process [was] left to the courts under general principles.”96 Further, Congress enacted RCRA in 1976 within the context of “sufficiently narrow” criminal penalties,97 because, at the time, the

90 42 USC § 6928(d)(1).
91 786 F2d 1499 (11th Cir 1986).
92 Id at 1503 (discussing the contrary approaches of Liparota v United States, 471 US 419 (1985), and United States v Yermian, 468 US 63 (1984), to the scope of knowledge requirements).
93 786 F2d at 1504.
SWDA contained misdemeanor, not felony provisions. Congress did not implement a felony liability scheme until 1980, significantly upgrading the penalty level and thereby changing the relevant analysis.

RCRA's legislative history supports the contention that environmental crimes affect the public welfare. By enacting a cradle-to-grave statute designed to include all environmental regulation, Congress intended for RCRA to serve as the primary environmental caretaker of public welfare. Indeed, Congress passed RCRA in order to “protect the national health and environment.” In every instance, Congress has noted the increasing importance of this inherently public problem.

Congress emphasized the deterrent effect of environmental laws. Upon passing the bill in 1976, the House acknowledged the seriousness of “disposal of hazardous wastes without a permit.” The report indicated that, by solving the hazardous waste problem, RCRA would accomplish its purpose of eliminating “the last remaining loophole in environmental law.” Upon upgrading to felony-level penalties for violations of the act in 1980, Congress stated that it “intended to prevent abuses of the permit system by those who obtain and then knowingly disregard them.” Congress sought to exempt those who commit “minor or technical” violations of the permit scheme, but nonetheless indicated a desire to deter the more calculating offenders.

C. Analogous Environmental Statutes: Operating in a Post-Weitzenhoff World

Examining another environmental statute, the Ninth Circuit, in United States v Weitzenhoff, agreed that legislative history indicating strong support for environmental protection suggested a public welfare approach to statutory interpretation. The court held that the Clean Water Act's “knowingly violate” provi-
tion did not make awareness of the regulation an element of the crime. Despite the fact that Weitzenhoff examines a mistake of law, the similarity of both the language and the subject matter suggests that Weitzenhoff may present a situation analogous to disputes under the Solid Waste Disposal Act. The importance of the environment has led many to believe that the need for strong deterrent measures supersedes principles of culpability. By examining the far-reaching implications of Weitzenhoff for the interpretation of the SWDA, courts can better balance these principles.

Weitzenhoff may effect radical changes in environmental regulatory schemes. Because of its recognition of the increasing importance of environmental protection, enforcement of RCRA may now criminalize previously “lawful, permitted activity.” This change would directly affect analysis of the SWDA. Indeed, the dissent in Weitzenhoff warned of its implications, arguing that “[d]ilution of the traditional requirement of a criminal state of mind, and application of the criminal law to innocent conduct, reduces the moral authority of our system of criminal law.” This argument did not overcome the deterrence analysis in the majority opinion, because the majority emphasized protecting the public from the hazards of pollution.

Weitzenhoff itself acknowledged its similarity to the Hoflin line of analysis. Discussing Hoflin, International Minerals, and Dotterweich, the court reaffirmed the strength of the public welfare rationale. Most importantly, Weitzenhoff distinguished itself from United States v Liparota and Staples v United States by holding that the “dire consequences”

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107 33 USC § 1319(c)(2) (1994).
108 Weitzenhoff, 35 F3d at 1284.
111 Id at 14.
112 35 F3d at 1293 (Kleinfield, dissenting from order rejecting rehearing en banc).
113 Id at 1286.
114 880 F2d 1033 (9th Cir 1989).
116 320 US 277 (1943).
117 Weitzenhoff, 35 F3d at 1284.
of environmental contamination require a higher standard of protection.120

Given that the Second Circuit in *United States v Laughlin* recently sought to constrain the strict liability analysis of the SWDA,121 the *Weitzenhoff* decision takes on added importance. Although *Laughlin* agreed with *Hoflin* in refusing to require knowledge of the permit requirement,122 it suggested a higher standard of knowledge with regard to the hazardous character of the waste.123 *Weitzenhoff* argued that pollution represents the "type of activity that puts the discharger on notice that his acts may pose a public danger,"124 so perhaps lessening the knowledge requirement for the "hazardous waste" clause makes sense.125 If nothing else, such an interpretation might encourage potential violators to carefully examine their disposal systems. This result achieves the purposes established by the Supreme Court in *International Minerals*, where it noted that laws regulating environmentally dangerous substances warranted more generous interpretations.126 Since that time, congressional silence has aggravated problems of ambiguity. The rule of lenity gives Congress the responsibility to clarify its deterrent purposes.127 Absent new legislation, however, the courts must attempt to effectuate the statute's purposes without ignoring its language.

D. Public Welfare and the Deterrence Rationale: Applying Strict Liability After Staples

1. Public Welfare.

Deterrence of environmentally harmful activity provides the best argument in favor of a strict liability regime. By their very nature, strict liability statutes eliminate the knowledge requirement in order to force potentially criminal actors not only to heed the law, but to seek it out.128 While strict liability may punish without regard to individual culpability, limiting principles can

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120 35 F3d at 1286.
121 10 F3d 961 (2d Cir 1993).
122 Id at 966.
123 Id at 967.
124 35 F3d at 1286.
125 Should the application of strict liability to the permit provision prove ineffective, the hazardous character of the waste is the element for which lessening the mens rea will most likely improve deterrence.
126 402 US at 564-65.
ameliorate concerns of proportionality while retaining the deter-
rent purpose of Congress.

The Supreme Court's ruling in *Staples v United States* provides two examples of placing limits on strict liability. First, although *Staples* refused to apply strict liability to the possession of illegal firearms, it acknowledged the importance of regulatory measures. Indeed, the Court itself stated that although it did not advocate strict liability, it required only that "a defendant know[] that he is dealing with a dangerous device . . . ." This reasoning would not mandate the imposition of a knowledge requirement on permit status.

Second, the *Staples* Court focused on the magnitude of the penalty, refusing, absent clear Congressional instruction, to apply felony punishment to a crime with no mens rea. Even so, courts may impose some balancing scheme to retain strict liability regimes, if at lesser penalty thresholds. At the very least, the substantial monetary penalties imposed by the SWDA survive the *Staples* ruling.

The public welfare rationale provides additional support for lessening the mens rea requirement under the SWDA. In both *United States v Balint* and *United States v Dotterweich*, the Supreme Court held public welfare offenders to a lesser standard of intent. In *International Minerals*, the Court suggested that environmental statutes regulating dangerous materials warrant public welfare treatment. Because the SWDA presents a situation analogous to *International Minerals*, courts interpreting the statute should follow the Supreme Court in applying the public welfare offense doctrine. Therefore, courts should not require knowledge of the permit as a criterion for conviction.

\footnotesize{\begin{itemize}
\item[129] 511 US 600.
\item[130] Id at 619.
\item[131] Id at 607.
\item[132] Id at 616-19.
\item[134] 258 US 250 (1922).
\item[135] 320 US 277.
\item[136] 402 US at 564-65.
\item[137] *International Minerals* interpreted the phrase "knowingly violates any such regulation" under 18 USC § 834(a) (1976), repealed by Pub L No 96-129, 93 Stat 1015 (1979), while the SWDA contains the phrase "knowingly treats, stores or disposes." 42 USC § 6928(d)(2). See text accompanying note 55.
\item[138] For a discussion of strict liability and public welfare, see Note, The Criminal Provi-}


2. Deterrence.

Imposing higher penalties to accompany lower standards of knowledge may enhance the deterrent effect of the SWDA. If held to a presumption of knowledge, environmental actors should conform to legal standards with greater frequency by investigating their responsibilities. This interpretive scheme may lead to a slight chilling effect, creating incentives for actors to reduce the incidence of dumping or even the generation of hazardous waste. Still, those individuals who stay in business should not have to compete with those who wish to gain an unfair advantage by increasing production in jurisdictions that are less strict against "accidental" dumpings. If courts apply the Solid Waste Disposal Act in a uniform manner, compliance should not unfairly burden companies.

E. The Culpability Objection: The Case Against Strict Liability

Although congressional intent and public policy support reading strict liability into the Solid Waste Disposal Act, the culpability objection remains a significant counterargument. Quite simply, the principle of culpability suggests that the law should hold no one disproportionately liable to their level of fault. Indeed, some commentators suggest that the Third Circuit properly interpreted the SWDA to require knowledge of the action, the character of the waste, and the permit status. While acknowledging the importance of environmental protection, they suggest that the variety of enforcement mechanisms alleviate the need to lessen mens rea.

This conclusion, however, downplays the need for effective deterrent measures in the environmental context. Courts can

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140 "The requirement that punishment be proportional to the seriousness of the offense has traditionally been a salient principle of punishment." Sanford H. Kadish and Stephen J. Schulhofer, Criminal Law and Its Processes 282 (Little, Brown 6th ed 1995).

141 Johnson & Towers, 741 F2d 682.

142 See, for example, Michael Vitiello, Does Culpability Matter?: Statutory Construction Under 42 USC § 6928, 6 Tulane Envir L J 187, 256 (1993).

143 Id at 256-57, citing 42 USC § 6928(d), (g), (h) (1992).

144 Vitiello notes a general disillusionment with strict liability, but fails to truly ad-
distinguish environmental criminality from other types of offenses in several ways. First, and most important, because of their sophistication, those actors most likely to commit offenses against the environment have presumptive knowledge of their permit status.\textsuperscript{146} Second, environmental crime does not carry the same stigma as more personal crimes of violence.\textsuperscript{146} Finally, economic penalties imposed by the courts may actually succeed in effective deterrence, because of the explicit cost-benefit choices at stake in environmental risk scenarios.

Although commentators can legitimately argue the respective values of deterrence and culpability, all agree that the circuit split has caused offenders to receive "unequal treatment under the law" for Solid Waste Disposal Act violations.\textsuperscript{147} Now that Staples and Weitzenhoff have created added confusion over the proper use of strict liability in environmental law, the Supreme Court should provide guidance for the interpretation of this and other environmental regulations.

CONCLUSION

The problem of hazardous waste disposal, like other environmental concerns, seems certain to occupy a place of public importance in the coming years. In order to create an effective scheme of environmental protection, the law must deter. Punishment must occur often enough, and with enough force, to change the behavior of individuals and corporations. One may worry that innocent actors will face unjust prison sentences and outrageous fines. In reality, a strong set of environmental laws puts all those involved in waste disposal on fair notice to follow the government's restrictions upon them. Further, a stricter regime would cause actors to err on the side of environmental integrity if any uncertainty remains.

In order to provide strong environmental protection, courts should read the Solid Waste Disposal Act to not require knowledge of permit status. Further, although knowledge of the character of disposed waste protects the innocent actors, the courts should consider the mens rea as to that element carefully. If low-
erating the bar of knowledge to include permit status does not create the desired deterrent effect, lowering the bar on the "hazardous waste" clause presents the next best option.

Most circuits have followed the correct line of analysis to find a strict liability regime with regard to knowledge of the regulation and permit status. Still, until the Supreme Court explicitly adopts this position, it will not send the message that environmental concerns retain a place of primacy. The Court should affirm a stricter reading of the Solid Waste Disposal Act, so parties will take the deterrent purposes of the statute more seriously and the Act can accomplish its preventive goals.