A Proposed Narrowing of the Clean Water Act's Criminal Negligence Provisions: It's Only Human?

Brigid Harrington
A PROPOSED NARROWING OF THE CLEAN WATER ACT’S CRIMINAL NEGLIGENCE PROVISIONS: IT’S ONLY HUMAN?

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Abstract: The Senate Subcommittee on Fisheries and Wildlife is considering an amendment to the Clean Water Act (CWA) that would require human endangerment for a finding of criminal negligence under section 309(c). This proposal is in reaction to United States v. Hanousek and United States v. Hong, seen by some as overly harsh punishment for mere “accidents,” contrary to the intent behind the CWA. Others have defended the decisions, arguing that requiring human endangerment for section 309(c) violations would unjustifiably excuse negligent conduct harmful to the environment and the public welfare. This Note reviews the criminal negligence standard under section 309(c), its application in Hanousek and Hong, and the major arguments proffered by the amendment’s proponents and opponents. It concludes that the amendment is ill-advised, risking failure to capture significant environmental harms and depriving prosecutors of leverage in plea-bargaining.

Introduction

The year 2003 saw debate in the Senate Subcommittee on Fisheries and Wildlife for the purpose of amending the Clean Water Act (CWA or the Act). The dominant proposed amendment would require that human endangerment be shown before criminal negligence for a violation of section 309(c) of the CWA could be found. The driving force behind this appears to be great concern among some regarding two recent federal appeals court cases dealing with section 309(c), a CWA criminal negligence provision, which have been seen by some as contrary to the intentions of the negligence provisions in the Act and

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as overly harsh punishment for mere “accidents.” Others, however, have argued that the decisions in these two cases, *United States v. Hanousek* and *United States v. Hong*, were justified and did not represent a significant departure from the traditional view of negligence under the CWA. These supporters further argue that amending section 309(c) to require human endangerment would unjustifiably excuse negligent conduct that could cause real harm to the environment and the public welfare. This Note will explore these arguments by first reviewing criminal negligence under section 309(c) of the CWA, its current application in *Hanousek* and *Hong*, and the major points of each side’s arguments. Finally, the Note concludes that the criminal negligence provision of section 309(c) should not be amended because section 309(c) suits the definition of public welfare legislation, and any other standard risks failing to capture significant environmental harms and deprives the system of prosecutorial discretion. Part I will explore the background of section 309(c) and the debate over whether violating it is a public welfare offense. Parts II and III will explain the decisions in *Hanousek* and *Hong* as well as relevant criticisms of those decisions. Parts IV and V will outline the arguments for and against explicitly enacting a heightened standard of negligence under section 309(c), and will demonstrate why the current standard is preferable.

I. THE “KNOWING” PROVISION OF SECTION 309(C): DOES A VIOLATION CONSTITUTE A PUBLIC WELFARE OFFENSE?

Since before the decisions in *Hanousek* and *Hong*, there has been a split among the federal courts of appeals regarding the standard of intent required for a knowing violation of section 309(c), a criminal provision of the CWA. The Court of Appeals for the Fifth Circuit has held that a violation of section 309(c) does not constitute a public welfare offense (PWO), and that therefore in order to hold a defen-

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3 See id. (statement of Sen. Inhofe); id. (statement of Prof. Robin Greenwald).
4 United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999) [*Hanousek I*], cert. denied, 528 U.S. 1102 (2000) [*Hanousek II*].
5 United States v. Hong, 242 F.3d 528 (4th Cir. 2001).
7 Oversight Hearing, supra note 1 (statement of Prof. Robin Greenwald); see Solow & Sarachan, supra note 6, at 11,158.
8 See United States v. Ahmad, 101 F.3d 386 (5th Cir. 1996); United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1993).
dant criminally liable for a “knowing” violation, it must be shown not only that his actions were intentional, but also that he was aware that they were unlawful. The Court of Appeals for the Ninth Circuit, on the other hand, has held that a violation of section 309(c) is a PWO, and that therefore in order for a defendant to be held criminally liable for a “knowing” violation, it must be shown only that his actions were intentional, but not that he knew they were unlawful. In order to later describe the controversy surrounding the level of intent required for criminally negligent violations in Hanousek, it is crucial to first understand the controversy over the standard of intent for knowing violations, and whether or not a violation of section 309(c) is a PWO. Accordingly, this Part will first present the language of section 309(c), then outline the Supreme Court’s definition of a PWO, and finally discuss the two court of appeals cases differing over whether a violation is a PWO.

A. The Language of Section 309(c)

The Clean Water Act’s primary criminal enforcement provision, found in section 309(c), criminalizes both negligent and knowing violations of specified CWA provisions and permits relating thereto, as well as negligent or knowing activities that introduce pollutants into sewer systems and publicly owned treatment works. The inclusion of

9 Ahmad, 101 F.3d at 391.
10 Weitzenhoff, 35 F.3d at 1284, 1286.
11 See, e.g., Ahmad, 101 F.3d at 391; Weitzenhoff, 35 F.3d at 1284, 1286.
12 33 U.S.C. § 1319(c) (2000). One who commits a negligent violation is one who:

(A) negligently violates [certain sections of the CWA], or any permit condition or limitation implementing any of such sections in a permit issued under [the CWA] . . . or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person reasonably knew or reasonably should have known could cause personal injury or property damage or . . . which causes such treatment works to violate any effluent limitation or condition in any permit issued [under the CWA] . . . .

Id. § 1319(c) (1). One who commits a knowing violation is one who:

(A) knowingly violates [certain sections of the CWA], or any permit condition or limitation implementing any of such sections in a permit issued under [the CWA] . . . or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or . . . which causes such treatment works to violate any effluent limitation or condition in a permit issued [under the CWA] . . . .
negligent violations makes section 309(c) one of the few environmental statutes that criminalizes negligence.\textsuperscript{13} Under section 309(c), both negligent and knowing violations are punishable by substantial fines, imprisonment, or both for first offenses, and are subject to increased monetary or incarceration penalties for subsequent offenses.\textsuperscript{14}

B. “Knowing” Under Section 309(c) and PWOs

In interpreting the “knowing” provisions of section 309(c), courts have disagreed over the level of knowledge that an actor is required to have in order for his actions to be considered a violation, a determination that hinges on whether the violation is viewed as a PWO.\textsuperscript{15} Courts that consider violations to be PWOs require less knowledge on the part of the actor when finding a violation; those that do not consider violations to be PWOs require a showing that the violator’s act was knowingly unlawful.\textsuperscript{16}

1. What Is a PWO?

The public welfare offense doctrine modifies the traditional level of intent required both at common law and under conventional meth-

\textsuperscript{13} Id. § 1319(c)(2).

\textsuperscript{14} Those who commit negligent violations:

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

\textsuperscript{15} See Hanousek II, 528 U.S. 1102, 1103 (2000) (Thomas, J., dissenting); Ahmad, 101 F.3d at 391; Weitzenhoff, 35 F.3d at 1284.

\textsuperscript{16} Ahmad, 101 F.3d at 391; Weitzenhoff, 35 F.3d at 1284.
ods of statutory construction.\textsuperscript{17} At common law and under conventional statutory construction, a defendant must have conventional mens rea, which requires that he must not only be aware of and have intended his conduct, but must also be aware that this conduct was criminal or involved “some wrongdoing.”\textsuperscript{18} The courts, however, have designated certain crimes as PWOs.\textsuperscript{19} In these cases, a court interprets Congress as having intended that the level of required mens rea be lowered for a violation, and that the defendant is not required to know that his actions are criminal in order to be found liable for them.\textsuperscript{20} Courts sometimes refer to such laws as public welfare statutes (PWSs).\textsuperscript{21}

In determining whether a criminal provision is a PWS, a court looks to the character of the subject regulated and the seriousness of the corresponding punishments for violations.\textsuperscript{22} Typically, a PWS involves “conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community’s health or safety”\textsuperscript{23} or involves “dangerous or deleterious devices.”\textsuperscript{24} The nature of the regulated activity or substance in such a statute is so potentially harmful that the defendant should know that its character puts him “in responsible relation to public danger,”\textsuperscript{25}—that is, he should know from the nature of the item that there is a probability of strict regulation.\textsuperscript{26} For example, in United States v. International Minerals and Chemical Corp. the Supreme Court found that regulation of the shipping of hazardous materials as applied to acids was a PWS because the materials regulated were “dangerous or deleterious devices or products or obnoxious waste material [for which] 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.”\textsuperscript{27}

Similarly, in United States v. Balint and in United States v. Freed, the Court found regulations of the sale of narcot-

\begin{itemize}
\item\textsuperscript{17} See Staples v. United States, 511 U.S. 600, 605–07 (1994).
\item\textsuperscript{18} Id.
\item\textsuperscript{20} Staples, 511 U.S. at 606; Int’l Minerals, 402 U.S. at 564; Freed, 401 U.S. at 609; Balint, 258 U.S. at 252–53.
\item\textsuperscript{21} See Hanousek I, 176 F.3d 1116, 1121 (9th Cir. 1999).
\item\textsuperscript{22} Staples, 511 U.S. at 607, 616.
\item\textsuperscript{23} Liparota v. United States, 471 U.S. 419, 433 (1985).
\item\textsuperscript{24} Int’l Minerals, 402 U.S. at 565.
\item\textsuperscript{25} United States v. Dotterweich, 320 U.S. 277, 281 (1943).
\item\textsuperscript{26} Int’l Minerals, 402 U.S. at 565.
\item\textsuperscript{27} Id.
\end{itemize}
ics and regulations of hand grenades, respectively, to be PWSs because the materials that they regulated were so inherently hazardous that anyone in possession of them should be expected to be on notice that they were regulated.\textsuperscript{28}

Dangerousness of the item alone, however, is not enough to make a regulation a PWS.\textsuperscript{29} If the item is dangerous but also “commonplace and generally available,” it may not be of a nature that would alert individuals to the probability of strict regulation.\textsuperscript{30} For example, in \textit{Staples v. United States}, the Court found that although guns are potentially harmful and dangerous, the fact that gun ownership is common in the United States and can be a perfectly innocent activity meant that the regulation of guns was not a PWS.\textsuperscript{31} Moreover, regulations dealing with items that are not inherently dangerous are not PWSs.\textsuperscript{32} In \textit{Liparota v. United States}, the Court found that a statute governing the illegal transfer of food stamps was not a PWS because food stamps are not inherently dangerous, and the holder of food stamps should not be expected to be aware of specific regulation pertaining to their transfer.\textsuperscript{33}

Finally, the Court considers the severity of punishments for violations of the regulation when determining whether or not the regulation is a PWS.\textsuperscript{34} While there is no bright-line rule as to what kinds of punishments might correspond to PWSs, the Court has noted that the first PWSs involved only small financial penalties or short sentences in jail, and never imprisonment in the state penitentiary.\textsuperscript{35} In \textit{Staples}, the Court found that a statute whose penalty included up to ten years in prison was not intended to be a PWS, partly because of the substantial severity of the available punishment.\textsuperscript{36}

The final aspect of PWO analysis that is relevant here is that the Court has suggested—but has not held—that, under the PWO doctrine, a person might be found liable for a PWO by committing an act


\textsuperscript{29} \textit{Staples v. United States}, 511 U.S. 600, 611 (1994).

\textsuperscript{30} \textit{Id}.

\textsuperscript{31} \textit{Id.} at 610.


\textsuperscript{33} \textit{Id.} at 432–33.

\textsuperscript{34} \textit{Staples}, 511 U.S. at 616.

\textsuperscript{35} \textit{Id.} at 616, 618.

\textsuperscript{36} \textit{Id.} at 616.
of ordinary negligence. In *United States v. Balint*, the Court cited several examples of conduct that could be considered PWOs, including one example of criminal negligence:

[W]here one deals with others and his mere negligence may be dangerous to them, as in selling diseased food or poison, the policy of the law may, in order to stimulate proper care, require the punishment of the negligent person though he be ignorant of the noxious character of what he sells.

The Court also explained the policy behind PWOs in terms of negligence in *United States v. Dotterweich* and *Morissette v. United States*. In *Dotterweich*, the Court stated that public welfare legislation “puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.” In *Morissette*, it stated that, in PWOs, “the accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities,” and further that the purpose of PWOs was “to require a degree of diligence for the protection of the public which shall render violation impossible.” Thus, the Court has described PWO policy in terms of requiring reasonable care, and has cited examples of negligence that might constitute a PWO. However, none of these cases in which the Court analogized negligence to a PWO has involved the prosecution of an explicitly negligent action under a PWO.

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38 *Balint*, 258 U.S. at 252–53.

39 *Dotterweich*, 320 U.S. at 281.

40 *Morissette*, 342 U.S. at 256.

41 *Dotterweich*, 320 U.S. at 281.

42 Morissette, 342 U.S. at 256, 257 (quoting People v. Roby, 18 N.W. 365, 366 (Mich. 1884)).


44 *Morissette*, 342 U.S. at 248 (involving the knowing conversion of government property); *Dotterweich*, 320 U.S. at 278 (involving a violation of the Federal Food, Drug, and Cosmetic Act for knowingly shipping misbranded and adulterated drugs); *Balint*, 258 U.S. at 251 (involving the knowing sale of narcotics).
2. The Fifth Circuit: Knowing Violations of Section 309(c) Are Not PWOs

In *United States v. Ahmad*, the Court of Appeals for the Fifth Circuit held that “knowing” violations of section 309(c) are not PWOs, and therefore section 309(c)(2)(A) requires “knowledge as to each [element of the offense] rather than only one or two.” Following *Staples*, the court in *Ahmad* focused on whether “‘dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct,’” and held that discharging in violation of sections 301 and 309(c)(3), thereby triggering the criminal provision of section 309(c), might reasonably be perceived as traditionally lawful conduct if the discharger did not know the nature of the substance he was discharging. The court reasoned, “[O]ne who honestly and reasonably believes he is discharging water may find himself guilty of a felony if the substance turns out to be something else.” Thus, because a defendant might not know that the substance he is dealing with is inherently hazardous, he cannot be expected to know that it is strictly regulated, and thus section 309(c) cannot be a PWS. The court also noted that violations of the CWA were punishable by significant prison time, indicating that it was not PWS. Therefore, because knowing violations are not PWOs, a defendant in the Fifth Circuit must act intentionally, knowing the nature of his acts and also knowing that these acts violate a criminal provision, in order to be found guilty of a section 309(c)(2) violation.

3. The Ninth Circuit: Knowing Violations of Section 309(c) Are PWOs

In *United States v. Weitzenhoff*, the Court of Appeals for the Ninth Circuit followed the reasoning of *International Minerals* and *Staples* to determine that violations of the “knowing” provision of section 309(c) were PWOs. In *Weitzenhoff*, the defendant knowingly discharged in violation of a permit issued under the CWA, but argued that this was

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45 United States v. Ahmad, 101 F.3d 386, 390 (5th Cir. 1996).
46 *Id.* at 391 (quoting *Staples* v. United States, 511 U.S. 600, 618 (1994)).
47 *Id.*
48 *Id.*
49 *See id.*
50 *Id.* Under section 309(c) violators may be punished by up to one year in prison if it is their first offense, and up to two years if it is their second. 33 U.S.C. § 1319(c)(1) (2000).
51 *See Ahmad*, 101 F.3d at 391.
52 United States v. Weitzenhoff, 35 F.3d 1275, 1283–86 (9th Cir. 1994).
not a criminal violation under section 309(c)(2) because he did not know the discharge violated his permit or the statute. 53 Like the material regulated in *International Minerals*, the court held that the material regulated by the CWA in *Weitzenhoff* was “dangerous or deleterious,” such that “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.” 54 The material regulated by the CWA in *Weitzenhoff* was distinguished from the material regulated by gun control statutes in *Staples*. 55 The court noted that the *Staples* Court distinguished guns from “obnoxious waste material,” regulation of which would be considered a PWS. 56 Thus, the court in *Weitzenhoff* held that the CWA is more similar to the regulations in *International Minerals* because “the criminal provisions of the CWA are clearly designed to protect the public at large from the potentially dire consequences of water pollution,” and the object of regulation was not generally innocent, but rather “obnoxious waste material.” 57 Because the nature of the object of section 309(c) was “obnoxious,” “deleterious,” and not “commonplace,” and because section 309(c) was “to protect the public at large,” the court determined that the regulation was a PWS. 58

II. *United States v. Hanousek*: Extending the Ninth Circuit’s Interpretation of Section 309(c) as a PWS to Negligent Violations

In *United States v. Hanousek*, the Court of Appeals for the Ninth Circuit extended the public welfare offense doctrine to include not only knowing violations but also negligent violations of section 309(c) of the CWA. 59 The import of this decision is that ordinary negligence is enough to establish criminal liability under the CWA, at least in the Ninth Circuit. 60 This broadening of the already controversial PWO doctrine to include negligent as well as knowing violations of the

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53 Id. at 1283.
55 Id. at 1286.
56 Id. at 1285.
57 See *Weitzenhoff*, 35 F.3d at 1286.
58 Id.
59 *Hanousek I*, 176 F.3d 1116, 1122 (9th Cir. 1999).
60 Id.
CWA has drawn criticism in the Senate, and is the major reason behind the proposed amendment.\textsuperscript{61}

### A. The Hanousek Decision

In *United States v. Hanousek*, the court held that negligent violations of section 309(c) are PWOs, and therefore, in order to establish a violation under section 309(c) (1)—the “negligence” provision of section 309(c)—the government must prove only that the defendant acted with ordinary negligence, as opposed to the higher standard of criminal negligence.\textsuperscript{62} Hanousek, a roadmaster of the White Pass & Yukon Railroad running between Skagway, Alaska, and Whitehorse, Yukon Territory, Canada, was responsible for “every detail” of the “safe and efficient” execution of a rock-quarrying project, the labor and equipment for which was provided by a contracting company.\textsuperscript{63} After Hanousek took over responsibility for the project, the contracting company under his supervision ceased taking measures to protect a petroleum pipeline running parallel to the tracks on which they were working.\textsuperscript{64} One day, an employee of the contracting company noticed that some rocks had caught the plow of the train, and had been deposited to the side of the tracks near the pipeline.\textsuperscript{65} He attempted to use a backhoe to remove the rocks, striking the pipeline, which ruptured and spilled 1000 to 5000 gallons of heating oil into the Skagway River.\textsuperscript{66}

Hanousek was convicted of a “negligent” violation under section 309(c) (1)(A), but argued on appeal that the jury should have been instructed that section 309(c)(1)(A) required a higher standard of “criminal negligence” as opposed to ordinary negligence.\textsuperscript{67} “Criminal negligence,” under Hanousek’s definition, is a significant “deviation from the standard of care that a reasonable person would observe in the situation,” as opposed to ordinary negligence, which the district court defined as “the failure to use reasonable care.”\textsuperscript{68} Hanousek first argued that criminal negligence standards should apply because Congress intended them to apply; alternatively, he argued that due process

\textsuperscript{61} See discussion infra Part IV.
\textsuperscript{62} *Hanousek I*, 176 F.3d at 1120, 1122.
\textsuperscript{63} Id. at 1119.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} Id. at 1120.
\textsuperscript{68} *Hanousek I*, 176 F.3d at 1120.
insulated him from liability because, as a roadmaster, he did not know nor was he in a position to know what was required of him by the CWA.\textsuperscript{69}

In rejecting Hanousek’s argument that Congress intended a criminal negligence standard to apply, the court looked to the plain language of the statute.\textsuperscript{70} Since the statute did not define the word “negligently,” the court concluded that Congress intended it to have its ordinary meaning: “failure to use such care as a reasonably prudent and careful person would use under similar circumstances.”\textsuperscript{71} The court noted that Congress had prescribed explicitly heightened negligence standards in other sections of the Clean Water Act, such as section 311(b), which applies to owners or operators of oil vessels or facilities in spills.\textsuperscript{72} Since Congress provided for high negligence standards in some instances, but not in the CWA’s general criminal negligence provision, the court concluded that Congress did not intend a higher standard of criminal negligence.\textsuperscript{73}

The court also rejected Hanousek’s argument that the application of ordinary negligence violated his due process rights because he did not have notice of what was required of him under the CWA.\textsuperscript{74} Instead, the court held that section 309(c) was a PWS, rendering such notice unnecessary.\textsuperscript{75}

In \textit{Hanousek}, then, a court for the first time extended the public welfare offense doctrine beyond mere knowing violations of the CWA to include negligent violations as well.\textsuperscript{76} In holding that a negligent violation could be a PWO, the court relied on dicta from \textit{United States v. Balint}, \textit{Morissette v. United States}, and \textit{United States v. Dotterweich}, all of which suggested that negligence could constitute a PWO.\textsuperscript{77} The court stated that these cases “established that a public welfare statute may subject a person to criminal liability for his or her ordinary negligence without violating due process.”\textsuperscript{78} Thus, because Hanousek was engaged in conduct where his mere negligence posed a danger to the

\textsuperscript{69} Id. at 1120–21.
\textsuperscript{70} Id. at 1120.
\textsuperscript{71} Id.
\textsuperscript{72} Id. at 1121 (citing 33 U.S.C. § 1321(b)(7)(D)).
\textsuperscript{73} Id.
\textsuperscript{74} Hanousek I, 176 F.3d at 1121–22.
\textsuperscript{75} Id. at 1122.
\textsuperscript{76} Id.
\textsuperscript{78} Hanousek I, 176 F.3d at 1121.
public at large—the supervision of a project and failure to instruct that the pipeline be protected—criminal sanctions could be applied even though he was unaware that his activity was proscribed.\textsuperscript{79} Furthermore, he might be found criminally liable for his negligence because he could have prevented the harm that his negligence caused with no more care and exertion than might be expected of any other reasonable person who assumed his responsibilities.\textsuperscript{80} Finally, the court put the burden to act upon Hanousek, not only because it was in the public’s interest to do so, but also because Hanousek should have been on notice that his activity was probably strictly regulated, given the dangerous nature of oil.\textsuperscript{81}

In holding that negligent violations could be PWOs, the court rejected Hanousek’s argument that he did not have the same kind of constructive notice as had the plaintiffs in \textit{Weitzenhoff} who had obtained a CWA permit and thus reasonably should have been aware that the regulation applied.\textsuperscript{82} The court stated that the difference between Hanousek and the defendants in \textit{Weitzenhoff} was “a distinction without difference,” and that “as long as the defendant knows that 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.’”\textsuperscript{83} Because Hanousek knew that he was working close to a pipeline, he should have been alerted that his activity was likely regulated, making his negligence a PWO.\textsuperscript{84}

In sum, the \textit{Hanousek} court reasoned that, because it is in the public interest that people dealing with material or activities regulated under a CWA criminal negligence provision be required to exercise due care, and because it is reasonable to expect people working with or around material regulated under the CWA to be on notice of probable regulation, criminal negligence under section 309(c) is a PWO.\textsuperscript{85} In order to violate section 309(c), then, a defendant is not required to know that his negligent activities violate the CWA; he must merely fail to exercise reasonable care.\textsuperscript{86}

\begin{itemize}
\item[79] See \textit{id.} (citing \textit{Balint}, 258 U.S. at 252–53).
\item[80] See \textit{id.} (citing \textit{Morissette}, 342 U.S. at 256).
\item[81] See \textit{id.} at 1122 (citing \textit{Dotterweich}, 320 U.S. at 281).
\item[82] \textit{Id.}; see United States v. \textit{Weitzenhoff}, 35 F.3d 1275, 1286 (9th Cir. 1994).
\item[83] \textit{Hanousek I}, 176 F.3d at 1122 (quoting Staples v. United States, 511 U.S. 600, 607 (1994) (in turn quoting \textit{Dotterweich}, 320 U.S. at 281)).
\item[84] \textit{Id.}
\item[85] See \textit{id.} at 1121–22.
\item[86] See \textit{id.}
\end{itemize}
B. Criticism of Hanousek

The decision in Hanousek has been criticized by academic observers, in Congress, and by two Supreme Court justices.87 The criticisms generally fall into two categories: criticisms of the view of CWA criminal provisions as public welfare legislation,88 and criticisms of the ordinary negligence standard imposed by the Court of Appeals for the Ninth Circuit.89 The criticisms address two sides of the same issue: if the CWA is not public welfare legislation, then necessarily a higher standard of knowledge than ordinary negligence would apply.90 Thus, under the critics’ preferred interpretations of the CWA, Hanousek would have needed a higher level of knowledge, either of the law that he was breaking, or of the potential that his actions could cause harm.91

1. Violations of Section 309(c) Should Not Be PWOs

Several commentators have argued that Hanousek is incorrect because negligent violations of the CWA should not be considered public welfare offenses.92 If section 309(c) is not considered a PWS, Hanousek would have had to have known that his negligent behavior was regulated before he could have been found to have violated it.93

Perhaps the most notable criticism of Hanousek’s application of the public welfare offense doctrine appears in Justice Thomas’s dissent, joined by Justice O’Connor, from the Supreme Court’s denial of certiorari in that case.94 Justice Thomas argued that the CWA should not be considered a PWS because, although it does regulate some dangerous activities and substances, it also “imposes criminal liability for persons using standard equipment to engage in a broad range of

88 See Hanousek II, 528 U.S. at 1103 (Thomas, J., dissenting).
90 Hanousek I, 176 F.3d at 1122.
91 See id.; Oversight Hearing, supra note 1 (colloquy among Sens. Domenici, Inhofe, and Breaux); White, supra note 87, at 111.
92 Hanousek II, 528 U.S. at 1102 (Thomas, J., dissenting); Abate & Mancuso, supra note 87, at 336–38.
93 See Hanousek II, 528 U.S. at 1102–03 (Thomas, J., dissenting).
94 Id. at 1103–05 (Thomas, J., dissenting).
ordinary industrial and commercial activities. This fact strongly mili-
tates against concluding that the public welfare doctrine applies.”

Justice Thomas cited *Staples v. United States*, where the Court held that
dangerous items that are commonplace and readily available should
not be regulated under the public welfare offense doctrine, and
analogized such regulation of ordinary things to the regulation of or-
dinary industrial activities in the CWA. Justice Thomas wrote, “I
think we should be hesitant to expose countless numbers of construc-
tion workers and contractors to heightened criminal liability for using
ordinary devices to engage in normal industrial operations.”

Justice Thomas also noted the severity of the penalty imposed upon violators
of the CWA, and juxtaposed that with the Court’s statement in
*Morissette v. United States* that, for PWOs, “penalties commonly are rela-
tively small, and conviction does no grave damage to an offender’s
reputation.” He argued that the appeals court should have looked
beyond whether a statute regulates a “conduct that is known to be
subject to extensive regulation and that may involve a risk to the
community” in determining whether it was a PWS. He also con-
tended that the court should have considered such factors as the or-
dinariness of the substance or activity regulated by the CWA as well as
the severity of the resulting punishment for violations.

Commentators agreeing with Justice Thomas have expressed dis-
appointment that the majority did not grant certiorari in *Hanousek*. For example, Ronald Abate and Dayna Mancuso state that the appli-
cation of the public welfare offense doctrine to negligent violations of
the CWA extends the doctrine beyond its already erroneous applica-
tion, in their opinion, to knowing violations of the CWA.

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95 *Id.* at 1103 (Thomas, J., dissenting).
96 See *id.* (Thomas, J., dissenting) (citing *Staples*, 511 U.S. at 611).
97 *Id.* (Thomas, J., dissenting).
98 *Id.* at 1103–04 (Thomas, J., dissenting). Negligent violators of the CWA, such as Edward Hanousek, Jr., may be punished by imprisonment for up to one year or by a fine of up to $25,000 per day of violation, or both. See 33 U.S.C. § 1319(c)(1) (2000); *Hanousek I*, 176 F.3d 1116 (9th Cir. 1999). Repeat offenders may be subject to up to two years in prison, or a fine of up to $50,000 per day of violation, or both. 33 U.S.C. § 1319(c)(1).
99 *Hanousek II*, 528 U.S. at 1104 (Thomas, J., dissenting) (quoting *Morissette v. United States*, 342 U.S. 246, 256 (1952)).
100 *Id.* (Thomas, J., dissenting).
101 *Id.* at 1103–04 (Thomas, J., dissenting).
103 *Id.* at 336–37.
2. Ordinary Negligence Should Not Be a Ground for Criminal Liability

Other arguments against the interpretation of section 309(c) by the Court of Appeals for the Ninth Circuit in *Hanousek* assert that using ordinary negligence as a basis for criminal liability is illogical, either because it has limited deterrent value due to its deviation from the standard of criminal negligence in other environmental statutes, or because it is fundamentally unfair.\(^{104}\)

a. *An Ordinary Negligence Standard Has Limited Deterrent Value*

One argument against the application of ordinary negligence in situations like the one in *Hanousek* focuses on the actor’s inability to foresee the deleterious result.\(^{105}\) Because Hanousek could not have been expected to foresee the oil spill, there is no deterrent value in holding him criminally liable for his negligence, and such punishment is thus harsh and unreasonable.\(^{106}\) Ordinarily, the logic behind holding some negligent actors criminally liable is that punishment of negligence will deter others from failing to exercise reasonable care, and that such deterrence will benefit the society as a whole.\(^{107}\) Critics of ordinary negligence as a standard for criminal violations of section 309(c) believe that these justifications do not apply to *Hanousek* because Hanousek’s actions represent accident more than a lack of foresight or care, and so there is no deterrent value in punishing him.\(^{108}\) They assert that Hanousek as a roadmaster could not have foreseen that rocks would be pushed into the train tracks, and that a backhoe operator of a contracting company he had hired would attempt to remove those rocks, accidentally puncturing an oil line in the process.\(^{109}\) Hanousek’s supervision could not be said to have caused the rupture, because there was a superseding cause, the train, which Hanousek could not have foreseen.\(^{110}\) In effect, this argument presumes


\(^{105}\) White, *supra* note 87, at 111.

\(^{106}\) Id. at 111–12.

\(^{107}\) Id. at 111.

\(^{108}\) Id. at 112.

\(^{109}\) Id. at 111; see *Hanousek I*, 176 F.3d 1116, 1119 (9th Cir. 1999).

\(^{110}\) White, *supra* note 87, at 112; see *Hanousek I*, 176 F.3d at 1119.
that Hanousek was not truly negligent, or that his negligence was insignificant.\(^\text{111}\)

Even if Hanousek’s supervision was in fact negligent, critics further argue that, by imposing criminal liability, the court overstepped the bounds that the Supreme Court set in previous cases finding criminal liability for violations of PWOs.\(^\text{112}\) The dicta in \textit{Morissette}, \textit{Balint}, and \textit{Dotterweich}, critics argue, do not compel a finding that ordinary negligence should constitute a PWO, even if they do suggest that a violation of some higher standard of negligence could be a PWO.\(^\text{113}\) \textit{Morissette}, for example, stated that negligent actors may be found criminally liable if the negligent actor “is in a better position to prevent the violation with no more care or exertion than would be reasonably expected given his or her duties.”\(^\text{114}\) Critics argue that a higher standard of negligence should apply in the case of negligent violations that are PWOs.\(^\text{115}\) Punishing ordinary negligence such as the conduct in \textit{Hanousek} has little deterrent value because ordinary negligence involves less of a mental element than heightened standards of negligence such as recklessness or Hanousek’s “criminal negligence.”\(^\text{116}\) Because Hanousek could not have foreseen the spill, there was no mental element to his crime, and punishment of such a “criminal” serves no societal purpose and instead deters qualified individuals from taking risky jobs.\(^\text{117}\)

\textbf{b. Criminalizing Ordinary Negligence Is Incongruent with Other Environmental Statutes}

Other arguments that the decision in \textit{Hanousek} was erroneous focus on the standard of negligence articulated in environmental and oil regulation statutes other than the CWA.\(^\text{118}\) The only environmental statute other than the CWA that contains a criminal negligence provision is the Clean Air Act (CAA).\(^\text{119}\) In order to violate the criminal negligence provision of the CAA, the offender’s negligent behavior

\(^{111}\) White, \textit{supra} note 87, at 111–12.

\(^{112}\) \textit{Id.} at 112; \textit{see} Morissette v. United States, 342 U.S. 246 (1952); United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Balint, 258 U.S. 250 (1922).

\(^{113}\) \textit{See Hanousek I,} 176 F.3d at 1121; White, \textit{supra} note 87, at 107, 112.

\(^{114}\) White, \textit{supra} note 87, at 112 (citing \textit{Morissette}, 342 U.S. at 256).

\(^{115}\) \textit{See id.} at 113.

\(^{116}\) \textit{See id.}

\(^{117}\) \textit{See id.}

\(^{118}\) \textit{See Oversight Hearing, supra} note 1 (colloquy among Sens. Peter Domenici, James Inhofe, and John Breaux); Johnston, \textit{supra} note 104, at 266.

\(^{119}\) 42 U.S.C. § 7413(c)(4) (2000); \textit{see} Solow & Sarachan, \textit{supra} note 6, at 11,153 n.3.
must “place[ ] another person in imminent danger of death or serious bodily injury.” The requirement of imminent danger to a human being makes the negligence standard of the CAA higher than that of the CWA, and as a result, there have been very few prosecutions under this CAA provision. In his statement in support of the proposed amendment to the CWA, Senator Inhofe used the CAA provision as an example of what he believed environmental criminal negligence should look like.

The criminal negligence provisions of the CWA also can be seen as incongruent with laws that might work simultaneously with it, specifically, the limited liability section of the Oil Pollution Act of 1990 (OPA). Samara Johnston points out that, while the OPA provides for limited liability in a spill caused by ordinary negligence, the CWA’s criminal negligence provisions have no such limitation, and thus unlimited liability could apply to the same spill under the CWA. However, to reconcile these provisions, Johnston asserts that ordinary negligence actually is an appropriate standard for criminal liability under the CWA because prosecutorial and judicial discretion can limit liability to an appropriate level in the case of an oil spill governed by both the CWA and the OPA. Nonetheless, this discrepancy between the statutes exists and could potentially result in unfair or disparate results in the case of a spill that violates both the CWA and the OPA. In the Oversight Hearing colloquy discussing the CWA, Senator Breaux of Louisiana pointed out that unlimited liability could

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120 42 U.S.C. § 7413(c) (4).
121 See Solow & Sarachan, supra note 6, at 11,153 n.3.
122 Oversight Hearing, supra note 1 (statement of Sen. Inhofe). Senator Inhofe stated:

Unlike other environmental statutes—including the Clean Air Act—to be convicted of a negligent violation [of the CWA], a person does not have to be guilty of an intentional or a reckless act. The person—entirely by accident, without any forethought and without any malice or intent—may have caused a pollutant to spill into nearby waters and as a result could be sent to jail, convicted of a federal offense.

Id.

124 Johnston, supra note 104, at 282; see OPA § 1004(a). The OPA provides for unlimited liability in the presence of gross negligence or willful misconduct. OPA § 1004(c).
125 See Johnston, supra note 104, at 310.
126 Id. at 309–10.
attach to oil spills, and used this as the basis for his position in favor of amending the CWA.\textsuperscript{127}

c. An Ordinary Negligence Standard Is Fundamentally Unfair

The final argument against the ordinary negligence standard for criminal violations of section 309(c) is that it is fundamentally unfair and Congress did not intend it to apply.\textsuperscript{128} Senators Domenici, Inhofe, and Breaux, in their colloquy in support of amendment, repeatedly emphasize the idea that criminal liability for ordinary negligence under the CWA is fundamentally unfair.\textsuperscript{129} Senator Domenici refers to violations of the CWA’s criminal negligence provisions as “clear accidents involving ordinary people.”\textsuperscript{130} Senator Inhofe states that a person “entirely by accident, without any forethought and without any malice or intent,” could be found criminally liable under the current CWA, and expresses his belief that this result is “an unintended consequence” of the Act.\textsuperscript{131} Accordingly, the Senators advocate amending the CWA to explicitly require a higher standard of negligence, similar to that of the CAA, which would require “risk of physical harm to the public” for criminal prosecution.\textsuperscript{132} Senator Inhofe expresses his belief that such an amendment would constitute “a more appropriate provision of negligent endangerment.”\textsuperscript{133}

III. \textit{United States v. Hong} and the Possibility of Status Offenses for Negligent Violations of the CWA

Further concerns about criminal negligence under the CWA have been raised in the wake of \textit{United States v. Hong}, a decision holding that responsible corporate officers might be liable for their subordinates’ negligence under section 309(c) of the CWA.\textsuperscript{134} When read in light of \textit{Hanousek}, critics have expressed concern that \textit{Hong} raises the possibility of status offenses leading to criminal convictions: when a company has been ordinarily negligent, a responsible corporate

\textsuperscript{127} See Oversight Hearing, supra note 1 (colloquy among Sens. Peter Domenici, James Inhofe, and John Breaux).

\textsuperscript{128} Id.

\textsuperscript{129} See id.

\textsuperscript{130} Id.

\textsuperscript{131} Id.

\textsuperscript{132} Id.

\textsuperscript{133} Oversight Hearing, supra note 1 (colloquy among Sens. Peter Domenici, James Inhofe, and John Breaux).

\textsuperscript{134} United States v. Hong, 242 F.3d 528, 531 (4th Cir. 2001).
officer who had no part in or knowledge of the negligence might be successfully prosecuted.\textsuperscript{135}

\section*{A. The Hong Decision}

In \textit{United States v. Hong}, the Court of Appeals for the Fourth Circuit affirmed a lower court decision that the responsible corporate officer doctrine applied to the CWA, meaning that a person who has authority to exercise control over a corporation’s activities causing discharges may be held liable if those discharges violate the CWA.\textsuperscript{136} Further, the court held that, in order to be liable as a responsible corporate officer, an individual need not be a formally designated corporate officer, but instead must be shown to bear “such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the charged violations of the CWA.”\textsuperscript{137}

The defendant in \textit{Hong} had acquired a wastewater treatment facility in Richmond, Virginia, which was operated under the name of Avion Environmental Group.\textsuperscript{138} Hong was not a corporate officer and “avoided any formal association with Avion,” but he “controlled the company’s finances and played a substantial role in company operations.”\textsuperscript{139} Along with Avion’s general manager, Hong began to investigate possible wastewater treatment systems for the facility.\textsuperscript{140} Avion then purchased a treatment system component that Hong specifically had been told was intended to be used only as the final step in treating wastewater, and not as an independent treatment system.\textsuperscript{141} Apparently disregarding this information, Avion used the component as its only means of wastewater treatment.\textsuperscript{142} When the component became clogged, Hong was informed of the situation and performed an inspection.\textsuperscript{143} No additional components were installed, and Avion employees began discharging wastewater directly into the Richmond sewer system in violation of Avion’s permit.\textsuperscript{144}

\begin{thebibliography}{99}
\bibitem{135} Solow & Sarachan, \textit{supra} note 6, at 11,154; see \textit{Hanousek I}, 176 F.3d 1116, 1121 (9th Cir. 1999).
\bibitem{136} \textit{Hong}, 242 F.3d at 531; see \textit{United States v. Iverson}, 162 F.3d 1015, 1025 (9th Cir. 1998).
\bibitem{137} \textit{Hong}, 242 F.3d at 531.
\bibitem{138} \textit{Id.} at 529.
\bibitem{139} \textit{Id.}
\bibitem{140} \textit{Id.} at 530.
\bibitem{141} \textit{Id.}
\bibitem{142} \textit{Id.}
\bibitem{143} \textit{Hong}, 242 F.3d at 530.
\bibitem{144} \textit{Id.}
\end{thebibliography}
In determining that Hong was guilty of a negligent violation of section 309(c)(1)(A), the court applied the responsible corporate officer doctrine, which is expressly authorized in the statute.\textsuperscript{145} Section 309(c)(1) provides that any person who negligently violates a permit condition or limitation issued under the CWA, or who negligently introduces into a sewer system pollutants which caused violation of permit limitations or conditions, shall be guilty of a criminally negligent violation of the CWA.\textsuperscript{146} However, section 309(c)(6) expressly provides that, for the purpose of section 309(c), “the term ‘person’ means, in addition to” the standard definition under the CWA, “any responsible corporate officer.”\textsuperscript{147}

In determining whether Hong qualified as a corporate officer, the court reviewed previous decisions related to the responsible corporate officer doctrine.\textsuperscript{148} In \textit{United States v. Dotterweich}, the Supreme Court held that the responsible corporate officer doctrine applied to “all who had ‘a responsible share’ in the criminal conduct.”\textsuperscript{149} In \textit{United States v. Park}, the Court further held that a “responsible share” in criminal conduct could be shown by evidence that “defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so.”\textsuperscript{150} A case in the Court of Appeals for the Ninth Circuit, \textit{United States v. Iverson}, specifically held that under the CWA a responsible corporate officer was any person who “has authority to exercise control over the corporation’s activity that is causing the discharges,” regardless of whether that person in fact exercised such control.\textsuperscript{151}

Applying this precedent to the case at hand, the \textit{Hong} court concluded that, although he was not a formally designated corporate officer, Hong met the definition of a corporate officer under the responsible corporate officer doctrine.\textsuperscript{152} In doing so, the court formulated the rule that “the pertinent question is whether the defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the charged violations

\textsuperscript{145} Id. at 530–31 (citing 33 U.S.C. § 1319(c)(6) (2000)).  
\textsuperscript{146} 33 U.S.C. § 1319(c)(1).  
\textsuperscript{147} Id. § 1319(c)(6).  
\textsuperscript{148} See \textit{Hong}, 242 F.3d at 531.  
\textsuperscript{149} Id. (quoting \textit{United States v. Dotterweich}, 320 U.S. 277, 279 (1943)).  
\textsuperscript{150} Id. (quoting \textit{United States v. Park}, 421 U.S. 658, 673–74 (1975)).  
\textsuperscript{151} Id. (quoting \textit{United States v. Iverson}, 162 F.3d 1015, 1025 (9th Cir. 1998)).  
\textsuperscript{152} Id.
of the CWA.” Because Hong controlled corporate operations, was involved in the problems with the treatment system, and was aware of its problems but did nothing to remedy them, he could be considered to have a responsible share in the criminal conduct, and could thus be held liable under the responsible corporate officer doctrine.154

B. Criticism of Hong

Hong has been criticized primarily because the application of the responsible corporate officer doctrine in criminal negligence cases raises the possibility of prosecution for “status offenses.”155 That is, defendants successfully could be prosecuted “not for a proscribed act or failure to act, but in the accused’s having a ‘certain personal condition or being a person of a specified character.’”156 The responsible corporate officer doctrine raises this particular problem in the specific context of ordinary negligence, rather than in the context of a heightened standard of negligence such as criminal negligence.157 In the case of the heightened criminal negligence standard, a corporate officer must have “knowledge of the facts plus the authority to take action that would prevent a violation” in order to be held liable for negligence under the responsible corporate officer doctrine.158 Because criminal liability can be established by a showing of ordinary negligence under Hanousek, this raises questions about the application of the responsible corporate officer doctrine in CWA criminal negligence cases.159 Under simple negligence, a violation can occur if an offender has no knowledge of the problem but has not taken reasonable measures to prevent it; therefore, it is conceivable that corporate officers could be held liable for a corporation’s refusal to adopt certain precautions, merely because they happen to be the manager of a corporation that has committed an environmental violation.160 Solow and Sarachan state that, “[t]he concern is that the doctrine will be used to hold corporate officials and managers criminally negligent

153 Id.
154 Hong, 242 F.3d at 531–32.
155 Solow & Sarachan, supra note 6, at 11,154.
156 Id. at 11,154 n.14.
157 See id. at 11,154.
158 Id.
159 See Hanousek I, 176 F.3d 1116, 1122 (9th Cir. 1999); Solow & Sarachan, supra note 6, at 11,154.
160 Solow & Sarachan, supra note 6, at 11,154.
by virtue of their status as officials and managers without regard to their knowledge of, or causal role in, an environmental violation.”

Additionally, *Hong* raises the possibility that non-designated corporate officers could be found liable for status offenses. That is, since the rule under *Hong* is “whether the defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the charged violations,” individuals are no longer able to shield themselves from criminal liability simply by avoiding the title of corporate officer.

While the responsible corporate officer doctrine was not specifically addressed in the Senate hearing on the proposed amendment, it was implicitly addressed by the concerns of Senator Breaux about potential criminal liability for “responsible operators” who are “unavoidably exposed to potentially immeasurable criminal fines and, in the worst case scenario, jail time.” Senator Breaux goes on to state that criminal negligence provisions are often unfair, because they target certain industries and work contrary to the public welfare.

**IV. Arguments for a High Standard for Criminal Negligence Under Section 309(c)**

Thus far, this Note has discussed several controversial cases interpreting the CWA section 309(c) criminal negligence provision and critics’ subsequent arguments regarding the appropriate standard of intent. This Part will argue that central to all of these arguments is the designation of section 309(c) as a PWS. Behind the objections to the ordinary negligence standard and the responsible corporate officer doctrine is an objection to negligence under these CWA provisions being treated as a PWO. This Part will then summarize the arguments against treating the section 309(c) negligence provisions as a PWS.

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161 Id.
162 See United States v. Hong, 242 F.3d 528, 531 (4th Cir. 2001).
163 See id.
164 See *Oversight Hearing*, supra note 1 (colloquy among Sens. Peter Domenici, James Inhofe, and John Breaux).
165 Id.
A. Arguments for a Higher Standard of Negligence Under Section 309(c)

Are Arguments Against Finding that the Negligence Provision of the CWA Is a PWS

The arguments for weakening the criminal negligence provisions of section 309(c) mainly relate to the issue of whether it is a PWS.\textsuperscript{167} Justice Thomas specifically stated in his dissent from the denial of certiorari in \textit{Hanousek} that negligent criminal violations of the CWA should not be considered PWOs because of the ordinariness of the activities that could otherwise lead to negligent violations of the CWA, and because of the seriousness of the potential consequences of violation.\textsuperscript{168} Arguments that ordinary negligence should not be criminalized under the CWA are variations of this theme.\textsuperscript{169} Commentators such as White, as well as Senator Inhofe, argue that section 309(c) is flawed because it criminalizes ordinary negligence, and section 309(c) criminalizes ordinary negligence because it is considered a PWS; thus, the objection to the criminalization of ordinary negligence at heart is an objection to the designation of section 309(c) as a PWS.\textsuperscript{170}

Furthermore, the observation that the ordinary negligence standards of section 309(c) are inconsistent with the OPA because they create increased liability for certain oil spills also hinges on the designation of section 309(c) as a PWS.\textsuperscript{171} Johnston points out that the OPA limits liability in spills caused by ordinary negligence, while the CWA provides for unlimited liability in such spills.\textsuperscript{172} Were the CWA considered not to be a PWS, however, higher standards of knowledge would apply, and violators would have to know that their actions violated regulations in order to be held liable.\textsuperscript{173} Thus, ordinary negligence would not be punishable under section 309(c) at all because ordinary negligence applies to situations where people act without a reasonable degree of care, as opposed to reckless or knowing violations, where people act with knowledge that they are violating regulations.\textsuperscript{174} Thus,

\textsuperscript{167} \textit{See Hanousek II}, 528 U.S. at 1103 (Thomas, J., dissenting); \textit{Oversight Hearing}, supra note 1 (statement of Sen. Inhofe); Solow & Sarachan, \textit{supra} note 6, at 11,154; White, \textit{supra} note 87, at 112–13.

\textsuperscript{168} \textit{Hanousek II}, 528 U.S. at 1103–04 (Thomas, J., dissenting).

\textsuperscript{169} \textit{See Oversight Hearing}, supra note 1 (statement of Sen. Inhofe); White, \textit{supra} note 87, at 113.

\textsuperscript{170} \textit{See Oversight Hearing}, supra note 1 (statement of Sen. Inhofe); White, \textit{supra} note 87, at 113.

\textsuperscript{171} \textit{See Johnston}, \textit{supra} note 104, at 282.

\textsuperscript{172} \textit{Id}.


\textsuperscript{174} \textit{See Hanousek I}, 176 F.3d 1116, 1120, 1121 (9th Cir. 1999).
recklessness or “criminal negligence” would be punished equally under the CWA and OPA, while the congruence problem between the ordinary negligence provisions of the CWA and OPA would disappear.

Finally, arguments against the Hong court’s interpretation of the responsible corporate officer doctrine also hinge on the interpretation of section 309(c) as a PWS because the possibility of status offenses exists only if the standard for criminal negligence under section 309(c) is ordinary negligence. Under the responsible corporate officer doctrine, if the standard for liability is higher, a corporate officer must have knowledge of the violation plus authority to act in order to be found “responsible.” Under ordinary negligence standards, however, there is the possibility that corporate officers could be found “knowing” despite a lack of specific knowledge of the violation simply because they failed to adopt reasonable precautions to prevent a violation. Indeed, one might argue that this was the case in Hanousek, where Hanousek (as supervisor) halted the previous supervisors’ practice of protecting the pipeline. Hanousek himself had no knowledge that rocks were on the tracks, or that the backhoe operator intended to use his backhoe to remove them, fracturing the pipeline; his only deliberate, knowing action was to cease protecting the pipeline. Although it was not framed under the responsible corporate officer doctrine, Hanousek’s offense might be likened to a status offense because he had no knowledge of the specific events leading up to the violation; rather, he merely failed to take precautions for which he was responsible that would have prevented the violation.

B. Summary of Arguments that Section 309(c) Should Not Be Considered a PWS

The real problem that opponents of section 309(c)’s current language have with criminal negligence in the CWA, then, is that they believe that it has been wrongly interpreted as a PWS, and that therefore its reach has become too broad. Opponents of considering

176 See Johnston, supra note 104, at 282.
177 See Solow & Sarachan, supra note 6, at 11,154.
178 See id.
179 See id.
180 See Hanousek I, 176 F.3d 1116, 1119 (9th Cir. 1999).
181 See id.
182 See id.; Solow & Sarachan, supra note 6, at 11,154.
section 309(c) to be a PWS believe that courts incorrectly apply PWO analysis to negligent activities causing CWA violations because these violations involve ordinary, everyday activities, such as gun ownership in *Staples.* They assert that ordinary negligence is simply too ordinary in nature. Although ordinary negligence violations under the CWA might involve the handling of dangerous substances that the handler should know are regulated, as in *International Minerals,* negligent violations of the CWA might also “impose[] criminal liability for persons using standard equipment to engage in a broad range of ordinary industrial and commercial activities.” Thus, they argue, because of the potential for negligent violations caused by standard, everyday behavior, section 309(c) should not be considered a PWS, following the Court’s analysis in *Staples* and *International Minerals.*

Furthermore, opponents argue that section 309(c) should not be a PWS because of the severity of the potential consequences of violations. Justice Thomas stated that penalties designated as PWOs are traditionally “relatively small, and conviction does no grave damage to an offender’s reputation,” and that since penalties for violating the CWA involve imprisonment and significant fines, section 309(c) should not be considered a PWS. Similarly, White argues that section 309(c) should not be considered a PWS because of the harshness of its penalties, noting that ordinary negligence is not likely to be deterred by prison sentences because of its inherently accidental nature.

Thus, opponents of considering section 309(c) to be a PWS do not necessarily argue that section 309(c) should be eliminated, but rather that violations of the criminal negligence provisions should

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184 *See Hanousek II,* 528 U.S. at 1103 (Thomas, J., dissenting); *Staples* v. United States, 511 U.S. 600, 611 (1994); *Oversight Hearing,* *supra* note 1 (colloquy among Sens. Domenici, Inhofe, and Breaux); White, *supra* note 87, at 113.

185 *See Hanousek II,* 528 U.S. at 1103 (Thomas, J., dissenting); *Staples,* 511 U.S. at 611; *Oversight Hearing,* *supra* note 1 (colloquy among Sens. Domenici, Inhofe, and Breaux); White, *supra* note 87, at 113.


187 *Id.* (Thomas, J., dissenting) (citing *Staples,* 511 U.S. at 611; *Int’l Minerals,* 402 U.S. at 565).

188 *See id.* at 1103–04 (Thomas, J., dissenting); White, *supra* note 87, at 113.

189 *Hanousek II,* 528 U.S. at 1104 (Thomas, J., dissenting) (quoting *Morissette v. United States,* 342 U.S. 246, 256 (1952)).

190 *See White,* *supra* note 87, at 113.
require a higher standard than ordinary negligence. Because section 309(c) is not a PWS, they argue, an ordinary negligence standard would violate due process. Amendments to section 309(c), then, are intended to combat the interpretation by the Court of Appeals for the Ninth Circuit of section 309(c) as a PWS—by requiring a heightened standard of negligence, supporters of the amendment would be counteracting the effect of a PWS designation for section 309(c).

V. JUSTIFICATIONS FOR THE NINTH CIRCUIT’S INTERPRETATION OF A LOWER NEGLIGENCE STANDARD UNDER SECTION 309(c)

This Part will argue that section 309(c) of the CWA should be considered a PWS. While arguments to the contrary—summarized in the previous Part—are forceful, the arguments for interpreting section 309(c) to be a PWS are still stronger. The CWA does in fact regulate “deleterious devices”—pollutants in our nation’s waters—and the primary aim of the CWA is to protect the public welfare. Moreover, arguments against treating section 309(c) as a PWS are incorrect in asserting that PWS status allows section 309(c) to criminalize “clear accidents.” If the proposed amendment were adopted, the resulting gaps in the CWA would allow severe environmental harms to go unpunished. Finally, in looking at the history of negligence prosecutions under the CWA, it is clear that prosecutors have not abused the standards of section 309(c) to punish mere accidents.

A. Arguments in Weitzenhoff and Hanousek for Interpreting Section 309(c) as a PWS: The CWA Regulates “Deleterious Devices” in Pursuit of the Public Welfare

The reasoning of the Weitzenhoff and Hanousek courts justifies interpreting criminal negligence under the CWA as a PWS because of the nature of the activities regulated, and because of the potential conse-

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191 See Hanousek II, 528 U.S. at 1103–04 (Thomas, J., dissenting); Abate & Mancuso, supra note 87, at 338; White, supra note 87, at 113.
192 Hanousek I, 176 F.3d 1116, 1121 (9th Cir. 1999) (citing United States v. Balint, 258 U.S. 250, 252–53 (1922)).
195 Oversight Hearing, supra note 1 (colloquy among Sens. Peter Domenici, James Inhofe, and John Breaux).
196 See id. (colloquy among Sens. Domenici, Inhofe, and Breaux).
197 See Solow & Sarachan, supra note 6, at 11,161.
quences of such violations to public welfare. In *Weitzenhoff*, the Court of Appeals for the Ninth Circuit stated that because the CWA regulated “deleterious devices or products or obnoxious waste material” whose very nature as such puts the violator on notice that his activities are likely to be heavily regulated, knowing violations under section 309(c) were PWOs. In this case, the objects regulated by the CWA are potentially harmful pollutants discharged into the public water supply. The court reasoned that pollutants regulated by the CWA are more like the harmful chemicals in *International Minerals* than like the guns regulated in *Staples*, the common ownership of which in the United States serves to counteract any notice that the average citizen might have that owning an unregistered gun is against the law.

In addition to the nature of the substance regulated, the *Weitzenhoff* court pointed to the potential consequences of violation as another reason that criminal violations of section 309(c) should be considered PWOs. The court noted that, like statutes regulating “discharge of pollutants into the air, the disposal of hazardous waste, the undocumented shipping of acids, and the use of pesticides on our food”—all of which had been determined to be PWSs—the pollution of water caused by violations of the CWA could result in a variety of serious illnesses to members of the public at large. Since “the criminal provisions of the CWA are clearly designed to protect the public at large from the potentially dire consequences of water pollution,” they constitute public welfare offenses.

In reasoning that criminal violations of section 309(c) are PWOs, the Ninth Circuit addressed the argument later advanced by Justice Thomas that the PWO doctrine should apply only to offenses whose penalties or damage to reputation was negligible. They noted that that may have been true in the past but that “modern statutes now punish public welfare offenses with much more significant terms of imprisonment,” including several felonies. Although *Staples* ex-

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198 *Hanousek I*, 176 F.3d at 1121–22; *Weitzenhoff*, 35 F.3d at 1286.
199 *Weitzenhoff*, 35 F.3d at 1286.
200 *Id.*
201 See *id.* at 1285–86.
202 *Id.* at 1286.
203 *Id.*
204 *Id.*
205 See *Weitzenhoff*, 35 F.3d at 1286 n.7.
206 *Id.*
pressed concern with this trend, it stopped short of holding that PWOs may not be punished as felonies.\textsuperscript{207}

\textit{Weitzenhoff} thus determined the rule for the Ninth Circuit that criminal violations of section 309(c) are PWOs.\textsuperscript{208} \textit{Weitzenhoff} involved a knowing violation of the CWA; thus, the designation of PWO was not explicitly extended to \textit{negligent} violations of section 309(c) until \textit{Hanousek}.\textsuperscript{209} The court in \textit{Hanousek} rejected the defendant’s attempt to distinguish \textit{Weitzenhoff} and argue that negligent violations of section 309(c) were not PWOs.\textsuperscript{210} The court noted that \textit{Balint}, \textit{Morissette}, and \textit{Dotterweich} indicated that ordinary negligence may be considered a PWO without violating due process.\textsuperscript{211} Furthermore, it noted that the material regulated in \textit{Hanousek} (heating oil) was a “dangerous device,” and that the very existence of the oil pipeline should have put Hanousek on notice that his activities related to it were likely regulated.\textsuperscript{212} Given that \textit{Weitzenhoff} had established that criminal violations (and implicitly criminally negligent violations) of section 309(c) were PWOs, and given that previous Supreme Court cases permitted finding negligent violations to be PWOs, the court in \textit{Hanousek} concluded that the criminal negligence provisions of section 309(c) were PWSs, notwithstanding defendant’s due process rights.\textsuperscript{213}

\textbf{B. Holding Violations of Section 309(c) to Be PWOs Does Not Mean that “Simple Accidents” Will Be Punished, nor Does It Increase the Likelihood of Status Offenses}

Many of the arguments against considering negligent violations of section 309(c) to be PWOs focus on the ordinary negligence standard and assert that it is so low that innocent individuals conducting routine activities will accidentally violate the CWA and be subject to criminal liability.\textsuperscript{214} This is not the case because, to meet the standard of ordinary negligence, violators must somehow fail to exercise reasonable care.\textsuperscript{215} In her testimony at the Senate hearing, Professor

\begin{itemize}
  \item \textsuperscript{207} Id. (citing Staples v. United States, 511 U.S. 600, 618 (1994)).
  \item \textsuperscript{208} Id. at 1286.
  \item \textsuperscript{209} See \textit{Hanousek I}, 176 F.3d 1116, 1122 (9th Cir. 1999); \textit{Weitzenhoff}, 35 F.3d at 1286.
  \item \textsuperscript{210} \textit{Hanousek I}, 176 F.3d at 1122.
  \item \textsuperscript{211} Id. at 1121.
  \item \textsuperscript{212} Id. at 1122.
  \item \textsuperscript{213} Id. at 1122.
  \item \textsuperscript{214} \textit{Hanousek II}, 528 U.S. at 1102 (Thomas, J., dissenting); \textit{Oversight Hearing, supra} note 1 (statement of Sen. James Inhofe).
  \item \textsuperscript{215} See 33 U.S.C. § 1319(c) (1) (2000).
\end{itemize}
Robin Greenwald points out that any spill or discharge that is truly an accident will not be punishable under the current CWA, even though it is a PWO. It is only when a person “fail[s] to exercise the care that a reasonable person would have taken under similar circumstances” that that person would be liable for violating section 309(c); thus, some degree of violator culpability is always required, and no pure accidents can create liability under the CWA. Greenwald further points out that neither the conduct in Hanousek nor that in Hong was a true accident: in both cases there was a failure to exercise reasonable care. In Hanousek, the defendant stopped taking precautionary measures to protect the pipeline that the project manager before him had taken, while in Hong the defendant authorized the installation of a system that he had been informed would be inadequate for treating wastewater on its own, and was aware of the discharge of wastewater into the sewer system. Thus, violators in CWA negligence cases do have some degree of mental culpability under the ordinary negligence standard, in that they failed to take reasonable measures under the circumstances.

Moreover, the concern that a manager could be held liable under the responsible corporate officer doctrine for ordinary negligence does not imply that status offenses will occur. If a manager is held liable, it will not be a manager who is entirely innocent. Under the responsible corporate officer doctrine, as articulated in Hong, a corporate officer must have “responsibility and authority . . . to prevent . . . the violation” in order to be eligible for liability. Under ordinary negligence, the manager or employees that were under his authority must have failed to exercise a reasonable degree of care. Thus, a manager who is exercising reasonable care in supervising employees’ activities will not be guilty of a violation: only a manager who fails to exercise such care will have committed a violation.

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216 Oversight Hearing, supra note 1 (statement of Prof. Robin Greenwald) (“Indeed, in the case of an ‘accident’ that results from conduct that was reasonable under the circumstances . . . no criminal liability would attach under Section 309.”).
217 See id.
218 Id.
219 Id. (reviewing the facts of Hanousek I and Hong).
220 See id.
221 See United States v. Hong, 242 F.3d 528, 531 (4th Cir. 2001).
222 See id.
223 Id.
224 See Hanousek I, 176 F.3d 1116, 1120 (9th Cir. 1999).
225 See id.
C. If the Standard of Harm to Humans Is Inserted into Section 309(c), Some Grave Environmental Harms Would Not Be Punishable Under the CWA

In his statement at the Senate hearing, Senator Inhofe suggested that, if the standard for negligent criminal violations of section 309(c) could be amended, one model might be the criminal negligence provisions of the CAA, which provide for liability where negligence results in human endangerment.226 Opponents of amending the CWA argue that this human endangerment standard is problematic for two main reasons: it allows several types of grave environmental harms to go unpunished, and gives government prosecutors less flexibility in bargaining with corporate defendants to arrange for cleanups of environmental disasters.227

Were the standard for liability in CWA criminal negligence cases to be amended to necessitate human endangerment, major environmental disasters involving gross negligence or recklessness would not be punishable under the CWA.228 For example, Greenwald pointed out at the hearing that under the proposed standard the 1989 Exxon Valdez oil spill in Alaska would not have been eligible for prosecution under the CWA.229 This case involved negligence on the part of Exxon, which allowed a captain with a history of alcohol abuse to navigate an oil tanker in Prince William Sound, off the coast of Alaska.230 Eleven million tons of oil were spilled, and harm to the environment was devastating: according to the Exxon Valdez Oil Spill Trustee Council, at least thirty “resources or species” were injured by the spill, many of which had been considered to be still “not recovering” ten years later.231 The defendant eventually pled guilty, and an agreement to pay millions for cleanup was reached because of the specter of liability under the negligence provisions of the CWA.232 Be-

226 See Oversight Hearing, supra note 1 (colloquy among Sens. Peter Domenici, James Inhofe, and John Breaux).

227 Id. (statement of Prof. Robin Greenwald); see Solow & Sarachan, supra note 6, at 11,158–59.

228 Oversight Hearing, supra note 1 (statement of Prof. Robin Greenwald); see Solow & Sarachan, supra note 6, at 11,158–59.

229 See Oversight Hearing, supra note 1 (statement of Prof. Robin Greenwald).


232 Oversight Hearing, supra note 1 (statement of Prof. Robin Greenwald); Solow & Sarachan, supra note 6, at 11,158 n.29.
cause only Alaska’s wildlife and natural environment were harmed, and no human was injured or put at risk of death or serious bodily injury, the proposed amendments would dictate that the CWA would not have applied in that case.\footnote{233} The Exxon Valdez is not the only example: Greenwald references Colonial Pipeline, where a corporation decided to over-pressure a pipeline, knowing that it was much more likely to burst, causing a spill into a river; and Solow and Sarachan cite to a case where one hundred tons of fish were killed in the White River in Indiana.\footnote{234} Amending the criminal negligence provisions of section 309(c) so that they are applicable only in cases where humans are harmed or endangered would leave a gap in the nation’s environmental regulation, making it profitable for corporations to engage in reckless behavior that might result in spills so long as it is not likely that those spills will affect human health.\footnote{235}

D. The History of Prosecutions Under the Negligence Provision of Section 309(c) Shows that It Has Not Been Abused and Is an Important Prosecutorial Tool

Opponents of the amendment also argue that history shows that there is no need for an amendment because prosecution under the negligence provisions of the CWA has been directed against cases of serious environmental harm or gross negligence—or used as a negotiation tool in plea-bargaining.\footnote{236} Changing the standard for criminal negligence under the CWA will not change the types of cases that are being prosecuted.\footnote{237} Rather, it will serve only to weaken prosecutors’ bargaining power.\footnote{238}

In their statistical analysis of criminal negligence prosecutions under the CWA, Solow and Sarachan find that CWA negligence prosecutions fall into four categories:

(1) extraordinary environmental harm or human injuries;

\footnote{233} Oversight Hearing, supra note 1 (statement of Prof. Robin Greenwald).
\footnote{234} See id.; Solow & Sarachan, supra note 6, at 11,158.
\footnote{235} See Oversight Hearing, supra note 1 (colloquy among Sens. Peter Domenici, James Inhofe, and John Breaux); id. (statement of Prof. Robin Greenwald); Solow & Sarachan, supra note 6, at 11,158–59.
\footnote{236} See Oversight Hearing, supra note 1 (statement of Prof. Robin Greenwald); Solow & Sarachan, supra note 6, at 11,158.
\footnote{237} Oversight Hearing, supra note 1 (statement of Prof. Robin Greenwald); Solow & Sarachan, supra note 6, at 11,158–59.
\footnote{238} Oversight Hearing, supra note 1 (statement of Prof. Robin Greenwald); see Solow & Sarachan, supra note 6, at 11,158–59.
(2) very serious harm and gross negligence;
(3) “compromise” cases, in which negligence charges serve as a means to reach a plea agreement; and
(4) “combination” cases, in which negligence charges are combined with felony charges under environmental statutes and/or traditional Title 18 criminal charges.

In order to be prosecuted for a CWA negligence violation alone, cases have traditionally involved either human harm or gross negligence. Thus, it has not held true that corporate defendants are being attacked for status offenses, or that individuals are being prosecuted for “accidents” resulting from daily activities. This restraint is not due merely to prosecutorial discretion, but also to institutional policies within investigating agencies, which prioritize cases involving significant environmental harm or placing humans in danger of death or serious bodily injury. Moreover, agencies such as EPA and the Coast Guard require that harm be coupled with “culpable conduct,” which includes factors such as intent, history of violations, deliberate behavior, and efforts to conceal the violation. Because of the number of agencies involved in investigating environmental crimes and the reluctance to change in both investigatory and prosecutorial policies, Solow and Sarachan assert that these norms of prosecution are unlikely to change rapidly in the future.

Solow and Sarachan further point out that Hanousek and Hong do not deviate significantly from the model of cases traditionally prosecuted under the CWA’s negligence provisions. In Hong, the defendant personally was involved in decisions not to remedy the violations of which he was aware, resulting in gross negligence; therefore, a case could have been made for a knowing violation. In Hanousek, the CWA charges were combined with charges of obstruction of justice and destruction of evidence when the defendant attempted to hide evidence of the spill’s magnitude from the government, and thus the CWA charges were part of a larger prosecution for more serious

239 Solow & Sarachan, supra note 6, at 11,158.
240 See id.
241 See id.
242 Id. at 11,160.
243 Id.
244 Id. at 11,161.
245 Solow & Sarachan, supra note 6, at 11,159.
246 See id. (citing United States v. Hong, 242 F.3d 528, 529–30 (4th Cir. 2001)).
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Thus, Hanousek and Hong may represent relatively standard CWA prosecutions, conforming to past standards and practices, and do not raise alarm or call for a change in the current standard.

While an amendment to section 309(c) may not drastically change the type of straight negligence cases that are prosecuted, it may serve to change the frequency of cases where section 309(c) is used as a plea-bargaining tool, giving prosecutors less flexibility and perhaps resulting in actually harsher consequences for environmental violators. For example, Greenwald argues that cases such as Hong would have to be prosecuted under the “knowing” provision if the negligence standard were altered, and believes they might actually be successfully prosecuted that way.

In this way, for some defendants the amendment would have the opposite of its intended effect—forcing harsher punishment for borderline offenders.

Conclusion

The current language of the CWA’s section 309(c) negligence standard should remain unchanged, and courts that have interpreted it as a public welfare statute have done so correctly. The CWA fits the traditional definition of a PWS—the pollutants regulated by the CWA are noxious and deleterious devices—and that is why they have been designated as pollutants under the CWA. Furthermore, serious pollutants that could cause significant harm are not ordinarily handled in everyday life—few Americans deal with possible sources of pollutants such as oil pipelines on an everyday basis, and those who do should be required to exercise an appropriately higher degree of care. Finally, those who are dealing with potential pollutants should be aware that they are strictly regulated. Anyone working near an oil pipeline can reasonably be expected to know that oil spills are potentially hazardous, that the transport and treatment of such a potentially dangerous substance is heavily regulated, and that they should act accordingly.

247 Id. (citing Hanousek I, 176 F.3d 1116, 1119 (9th Cir. 1999)).
248 See id. at 11,161.
249 See Oversight Hearing, supra note 1 (statement of Prof. Robin Greenwald); Solow & Sarachan, supra note 6, at 11,158–59.
250 Oversight Hearing, supra note 1 (statement of Prof. Robin Greenwald).
251 See United States v. Weitzenhoff, 35 F.3d 1275, 1286 (9th Cir. 1993).
252 See Staples v. United States, 511 U.S. 600, 610–11 (1994); Hanousek I, 176 F.3d 1116, 1122 (9th Cir. 1999).
253 See Hanousek I, 176 F.3d at 1122.
The one aspect of criminal violations of the CWA that does not fit the PWO mold is the possible punishment.254 While it is true that, historically, PWOs do not involve the possibility of heavy penalties, this is not a bright-line rule, nor a defining characteristic of PWOs.255 The Court in Staples specifically did not hold that PWOs had to have light penalties, but only that this was something that the courts should consider in determining whether a statute is a PWS.256 Furthermore, as the court in Weitzenhoff noted, some statutes that have been determined to be PWSs do carry heavy penalties, such as the statute regulating the transport of acids in International Minerals.257

An ordinary negligence standard is also appropriate not only because criminal violations of the CWA fit the definition of a PWO, but also because the negligence punished by the CWA does not encompass spills that occur because of mere “accidents,” as its critics suggest.258 In order to violate the criminal negligence provisions of the CWA, an individual must fail to exercise a reasonable degree of care.259 When dealing with dangerous pollutants, it is entirely appropriate that individuals be expected to be careful, and not to create a situation in which “accidents” are unreasonably likely to happen.

A standard requiring human endangerment would fail to adequately achieve the objectives of the CWA because it would not capture all the possible environmental harms that could occur by negligent violations of the CWA.260 Some harms to the environment can be tremendously damaging without endangering humans, such as the Exxon Valdez oil spill.261 Furthermore, a standard requiring more than ordinary negligence might make it profitable or allowable in some instances for corporations to pollute—as long as a corporation does not cause human endangerment, it can engage in risky, negligent behavior that might lead to accidents that harm only wildlife or plants.262

254 See 33 U.S.C. § 1319(c) (2000); Staples, 511 U.S. at 616.
255 Staples, 511 U.S. at 618.
256 Id.
258 See Oversight Hearing, supra note 1 (colloquy among Sens. Peter Domenici, James Inhofe, and John Breaux); id. (statement of Prof. Robin Greenwald).
259 33 U.S.C. § 1319(c)(1); Oversight Hearing, supra note 1 (statement of Prof. Robin Greenwald).
260 See Oversight Hearing, supra note 1 (statement of Prof. Robin Greenwald); Solow & Sarachan, supra note 6, at 11,158–59.
261 See generally Oversight Hearing, supra note 1 (statement of Prof. Robin Greenwald).
262 See Oversight Hearing, supra note 1 (colloquy among Sens. Domenici, Inhofe, and Breaux).
An amendment like that proposed to change section 309(c) would likely have the further undesirable effect of handicapping prosecutors in plea-bargaining.\textsuperscript{263} History shows that the CWA criminal provisions have not been used to prosecute accidental or minimally negligent conduct.\textsuperscript{264} Moreover, agency protocol limits the possibility that the CWA will be abused by overzealous prosecutors in the near future.\textsuperscript{265} Weakening the negligence provision of section 309(c) could handicap prosecutors for no reason by taking away a powerful bargaining tool that has not yet been abused.\textsuperscript{266}

Thus, because section 309(c) fits the definition of public welfare legislation, because it is reasonable to require care when one is dealing with pollutants, and because changing the standard of negligence would fail to address certain environmental harms and would handicap prosecutors in plea-bargaining, violations of section 309(c) should be considered PWOs, and the current negligence language should remain in place.

\textsuperscript{263} See id. (statement of Prof. Robin Greenwald); Solow & Sarachan, \textit{supra} note 6, at 11,158–59.
\textsuperscript{264} See Solow & Sarachan, \textit{supra} note 6, at 11,160–61.
\textsuperscript{265} See id. at 11,160.
\textsuperscript{266} See \textit{Oversight Hearing, supra} note 1 (statement of Prof. Robin Greenwald); Solow & Sarachan, \textit{supra} note 6, at 11,158–59.