133 F.3d 251
45 ERC 1801, 28 Envtl. L. Rep. 20,299, 48 Fed. R. Evid. Serv. 384
(Cite as: 133 F.3d 251)

UNITED STATES of America, Plaintiff-Appellee,
v.
James J. WILSON, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,
v.
INTERSTATE GENERAL COMPANY, L.P.; St. Charles Associates, L.P., Defendants-Appellants.
UNITED STATES of America, Plaintiff-Appellee,
v.
James J. WILSON, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,
v.
James J. WILSON, Defendant-Appellant.

Nos. 96-4498, 96-4503, 96-4537 and 96-4774.

United States Court of Appeals,
Fourth Circuit.

Argued March 3, 1997.

Decided Dec. 23, 1997.

Defendants were convicted in the United States District Court for the District of Maryland, Alexander Williams, Jr., J., of knowingly discharging fill material and excavated dirt into wetlands without permit. Defendants appealed. The Court of Appeals, Niemeyer, Circuit Judge, held that: (1) regulation defining "waters of the United States," as used in Clean Water Act, exceeded congressional authorization and was invalid; (2) to establish felony violation of Act, government must prove defendant's knowledge of facts meeting each essential element of substantive offense, but need not prove that defendant knew his conduct to be illegal; and (3) instructions concerning requirements for proving felony violation of Act did not adequately impose on government burden of proving knowledge with regard to each statutory element of offense.

Reversed and remanded.

Luttig, Circuit Judge, concurred in the judgment and filed a separate opinion.

Payne, District Judge, sitting by designation, concurred in part and in the judgment and filed a separate opinion.

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***253** ARGUED: Steven Alan Steinbach, Williams & Connolly, Washington, DC, for Appellants. Jane F. Barrett, Assistant United States Attorney, Baltimore, MD, for Appellee. ON BRIEF: Paula M. Junghans, Martin, Junghans, Snyder & Bernstein, P.A., Baltimore, MD, for Appellant Wilson; Bruce A. Baird, Covington & Burling, Washington, DC, for Appellants Interstate General and St. Charles Associates. Lynne A. Battaglia, United States Attorney, James C. Howard, Assistant United States Attorney, Baltimore, MD, for Appellee.

Before NIEMEYER and LUTTIG, Circuit Judges, and PAYNE, United States District Judge for the Eastern District of Virginia, sitting by designation.

Reversed and remanded by published opinion. Judge NIEMEYER wrote the opinion for the court in parts I, II, V, and VI and Judge LUTTIG joined in parts I and V and Judge PAYNE joined in parts I, II, V, and VI. Judge LUTTIG wrote a separate opinion concurring in the judgment. Judge PAYNE wrote a separate opinion.

OPINION

NIEMEYER, Circuit Judge, writing for the court on parts I, II, V and VI:

The defendants in this case were convicted of felony violations of the Clean Water Act for knowingly discharging fill and excavated material into wetlands of the United States without a permit. On this appeal they challenge: (1) the validity of federal regulations purporting to regulate activities that "could affect" interstate commerce; (2) the district court's application of the Clean Water Act to wetlands that do not have a "direct or indirect surface connection to other waters of the United States"; (3) the district court's application of the Clean Water Act to a practice known as "sidecasting" (depositing excavated material from wetland drainage ditches next to the ditch); (4) the district court's interpretation of

the mens rea required for a felony conviction under the Act; (5) evidentiary rulings of the district court; and (6) aspects of their sentences.

Because we conclude that 33 C.F.R. § 328.3(a)(3) (1993) (defining waters of the United States to include those waters whose ***254** degradation "could affect" interstate commerce) is unauthorized by the Clean Water Act as limited by the Commerce Clause and therefore is invalid, and that the district court erred in failing to require mens rea with respect to each element of an offense defined by the Act, we reverse and remand for a new trial.

I

In February 1996, after a seven-week trial, a jury convicted James J. Wilson, Interstate General Co., L.P., and St. Charles Associates, L.P., on four felony counts charging them with knowingly discharging fill material and excavated dirt into wetlands on four separate parcels without a permit, in violation of the Clean Water Act, 33 U.S.C. §§ 1319(c)(2)(A) & 1311(a). The district court sentenced Wilson to 21 months imprisonment and 1 year supervised release and fined him $1 million. It fined the other two defendants $3 million and placed them on 5 years probation. The court also ordered the defendants to implement a wetlands restoration and mitigation plan proposed by the government.

Wilson, a land developer with more than 30 years of experience, was the chief executive officer and chairman of the board of directors of Interstate General. He was personally responsible for various decisions relevant to the defendants' convictions in this case. Interstate General was a publicly traded land development company with 340 employees, 2,000 shareholders, and assets of over $100 million. It was the general partner of St. Charles Associates, a limited partnership that owned the land being developed within the planned community of St. Charles, which lies between the Potomac River and the Chesapeake Bay in Charles County, Maryland. The convictions involve discharges onto four parcels that are part of St. Charles.

St. Charles currently consists of approximately 4,000 developed acres and 10,000 housing units with 33,000 residents. At completion, it is expected to be a 9,100 acre planned community of some 80,000 residents. The community was created under the New Communities Act of 1968 and developed initially in partnership between Interstate General and the United States Department of Housing and Urban Development ("HUD"). The project agreement provides for the creation of schools, parks, and recreational areas and designates at least 20% of the community to be reserved as "open space." It also provides for the preservation of 75 acres of wetlands near Zekiah Swamp. In connection with the initial plan, HUD and Interstate General prepared an environmental impact statement, but that statement did not reflect any specific development plans for the four parcels involved in this case nor did it constitute a development permit under the Clean Water Act.

At trial, the government introduced evidence that during the period from 1988 to 1993, the defendants attempted to drain at least three of the four parcels of land involved in this case by digging ditches. The excavated dirt was deposited next to the ditches--a process known as "sidecasting." The government also introduced evidence that the defendants transported a substantial amount of fill dirt and gravel and deposited it on three of the parcels; only one parcel involved sidecasting without the addition of fill. The government presented evidence that all four of these parcels contained wetlands and that the defendants failed to obtain permits from the Army Corps of Engineers, the agency charged with issuing permits under the relevant section of the Act, 33 U.S.C. § 1344, prior to making efforts to drain and fill the parcels.

Although the parcels in question were not, because of neighboring development, located in pristine wilderness areas, the government presented substantial evidence about the physical characteristics which identified them as wetlands, including testimonial and photographic evidence of significant standing water, reports of vegetation typical to hydrologic soils, and infrared aerial photographs showing a pattern of stream courses visible under the vegetation. Evidence also showed that the properties were identified as containing wetlands on public documents including the National Wetlands Inventory Map and topographical maps of Charles County and the State of Maryland. The government demonstrated that water from these lands ***255** flowed in a drainage pattern through ditches, intermittent streams, and creeks, ultimately joining the Potomac River, a tributary of the Chesapeake Bay.

The government also produced evidence of the defendants' awareness of the physical conditions of their land. The very development work underlying the present prosecution involved efforts to improve

the drainage of the areas to make building feasible. Substantial fill was later added in an attempt to raise the ground level of the parcels. Some construction work involved repeated reshoring efforts because of wetness-induced ground shifting and collapse. Evidence was introduced that bids for work at one of the parcels actually contained different price quotations for wet and dry work because of the level of moisture on parts of the property. And witnesses gave testimony that despite the attempts at drying the property through ditching and draining or through the pumping off of standing water, and even after hundreds of truck loads of stone, gravel and other fill had been added to three of the parcels, wetland-loving plants continued to sprout through the fill.

Witnesses also testified at trial that a private consulting firm retained by the defendants informed the defendants that its observations of conditions on the parcels led it to conclude that the parcels contained wetlands. The firm recommended seeking permits from the Army Corps of Engineers before beginning development. The defendants were also contacted by Charles County zoning authorities concerned about the possible presence of wetlands in the vicinity of the new construction projects. Finally, the government presented evidence that even as the defendants complied with an Army Corps of Engineers order to cease construction on one of the parcels and remove fill dirt that had already been added, they continued to develop the other parcels without notifying the Corps or making an effort to ascertain whether a permit was necessary.

The defendants introduced contradictory evidence suggesting that whether the four parcels were wetlands under the Clean Water Act was unclear. They offered evidence which they claim showed that the Army Corps of Engineers was inconsistent in asserting jurisdiction over the parcels in question, claiming that the Corps took action on only one parcel, even though it had been aware for years of the ongoing development. Defendants also introduced an internal Corps memorandum that stated that while the areas in the St. Charles community have the "necessary parameters ... to be considered wetlands when using the Corps Wetland Delineation Manual," "it is not clear to me that these areas can be interpreted as 'waters of the United States' within the meaning or purview of Section 404." That memo suggested obtaining guidance from higher authority as to what constitutes "waters of the United States." The defendants also introduced evidence indicating their belief that they had legally drained three parcels prior to introducing fill, and that no fill was discharged into the fourth which was being drained by the digging of ditches.

Following 15 hours of deliberation, the jury convicted all defendants of the four felony counts. Because of the felony convictions, the defendants were not convicted of four misdemeanor counts for the "negligent" violations of the Clean Water Act involving the same parcels.

II

The defendants challenge the authority of regulation 33 C.F.R. § 328.3(a)(3) (1993) (defining waters of the United States to include those waters whose degradation "could affect" interstate commerce) to extend jurisdiction of the Clean Water Act to the four parcels in question. They also challenge the district court's instructions to the jury which were based on that regulation. They argue that the regulation and instructions exceed not only the authority of the Clean Water Act (which regulates "waters of the United States" without defining them), but also the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. They maintain that in allowing the jury to find a nexus with interstate commerce based on whether activities "could affect" interstate commerce, the court authorized a "limitless view of federal jurisdiction," far more expansive than the standard recently summarized ***256** in United States v. Lopez, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995).

While the defendants argue that the regulation and jury instructions are fatally flawed under Lopez because of their invocation of "potential" uses and effects on commerce, they do not challenge the constitutionality of the Clean Water Act itself.

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[1] Accordingly, we believe that in promulgating 33 C.F.R. § 328.3(a)(3) (1993), the Army Corps of Engineers exceeded its congressional authorization under the Clean Water Act, and that, for this reason, 33 C.F.R. § 328.3(a)(3) (1993) is invalid. For the same reason, the district court's instruction based upon this regulation is also erroneous.

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V

The defendants also contend that the district court erred in instructing the jury about the criminal intent, the "mens rea," required to prove a felony violation of the Clean Water Act. They argue (1) that the statute requires a showing that they were aware of the illegality of their conduct, and (2) that the required mens rea, however it is defined, must accompany each element of the offense. They note that the district court's jury instructions comported with neither requirement.

The district court charged the jury that the government must prove each of four elements of the offense beyond a reasonable doubt:

> First, that is the defendant knowingly ... discharged or caused to be discharged a pollutant.
>
> Second, that the pollutant was [dis]charged from a point source.
>
> Third, that the pollutant entered a water of the United States; and fourth, that the discharge was unpermitted.

The court defined an act as "knowingly" done "if it is done voluntarily and intentionally and not because of ignorance, mistake, accident or other innocent reason." For each felony count, the court stated,

> the government must prove that the defendants knew, one, that the areas which are the subject of these discharges had the general characteristics of wetland; and, two, the general nature of their acts. The government does not have to prove that the defendants knew the actual legal status of wetlands or the actual legal status of the materials discharged into the wetlands. The government does not have to prove that the defendants knew that they were violating the law when they committed their acts.

(Emphasis added). Finally, the court instructed on willful blindness, which it stated could stand in the place of actual knowledge.

Determining the mens rea requirement of a felony violation of the Clean Water Act requires us to make an interpretation based on "construction of the statute and ... inference of the intent of Congress." United States v. Balint, 258 U.S. 250, 253, 42 S.Ct. 301, 302, 66 L.Ed. 604 (1922), quoted in Staples v. United States, 511 U.S. 600, 605, 114 S.Ct. 1793, 1797, 128 L.Ed.2d 608 (1994). We thus begin our analysis by looking at the language of 33 U.S.C. § 1319, as well as its place in the larger statutory structure.

Section 1319(c)(2)(A), making an illegal discharge of a pollutant a felony if accompanied by the defined mens rea, provides: "Any person who knowingly violates section 1311 ... shall be punished." (Emphasis added). Section 1311 makes unlawful "the discharge ***261** of any pollutant" without a permit. And finally, § 1362 defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source" and defines "navigable waters" as "waters of the United States." 33 U.S.C. §§ 1362(7) & (12). Within that statutory structure, we must determine the nature of intent that the statute requires for each element of the offense.

On a first reading of the clause, "any person who knowingly violates section 1311 shall be punished," the order of words suggests that "knowingly" modifies "violates" so that the clause imposes punishment only when one violates the statute with knowledge that he is violating it, i.e. with knowledge of the illegality of his conduct. But the statute's structure, the architecture of which includes a series of sections incorporating other sections, its legislative history, and the body of Supreme Court jurisprudence addressing mens rea of federal criminal statutes caution that our first reading may not so simply lead us to the proper interpretation.

Our first concern is a pragmatic one engendered by the overall structure of the Clean Water Act. The conduct that is made criminal with the "knowingly violates" language encompasses numerous elements from other substantive statutory sections. See 33 U.S.C. § 1319(c)(2)(A). Each of those substantive sections may also be enforced with other civil and criminal penalties if the actions proscribed therein are performed with different scienter. See generally 33 U.S.C. § 1319. If Congress intended that the "knowing" mens rea accompany each element of the offense, as we have previously assumed is the case, see United States v. Ellen, 961 F.2d 462, 466 n. 2 (4th Cir.1992), the task of inserting the alternative mens rea requirements for the multiple civil and criminal enforcement provisions within each substantive prohibition would require confusingly repetitious drafting. A shorthand method of accomplishing the same purpose thus would be to insert "knowingly" in a single place where the conduct is made criminal, in this case, § 1319(c)(2)(A). See United States v. International Minerals & Chemical Corp., 402 U.S. 558,

562, 91 S.Ct. 1697, 1700, 29 L.Ed.2d 178 (1971) (the phrase "knowingly violates [applicable regulations]" was "a shorthand designation for specific acts or omissions which violate the act").

[2][3] Our second and more profound problem with our first-blush interpretative proposal arises from a recognition of two general common law principles regarding mens rea. First, in Anglo-American jurisprudence, criminal offenses are ordinarily required to have a mens rea. Staples, 511 U.S. at 605, 114 S.Ct. at 1796-97. This supposition is based on "the contention that an injury can amount to a crime only when inflicted by intention." Id. (quoting Morissette v. United States, 342 U.S. 246, 250, 72 S.Ct. 240, 243, 96 L.Ed. 288 (1952)). Indeed, statutes requiring no mens rea are generally disfavored. See Staples, 511 U.S. at 606, 114 S.Ct. at 1797-98. But a second and deeply-rooted common law principle is that ignorance of the law provides no defense to its violation. See Cheek v. United States, 498 U.S. 192, 199, 111 S.Ct. 604, 609, 112 L.Ed.2d 617 (1991); Barlow v. United States, 32 U.S. (7 Pet.) 404, 411, 8 L.Ed. 728 (1833) (Story, J.). Thus, while some level of deliberateness is usually required to impose criminal punishment, it is also usually true that the defendant need not appreciate the illegality of his conduct. Applying those principles to a statute similar to the one before us, the Supreme Court in International Minerals declined "to attribute to Congress the inaccurate view that [the] Act requires proof of knowledge of the law, as well as the facts." International Minerals, 402 U.S. at 563, 91 S.Ct. at 1701. In that case, the statute--which provided that whoever "knowingly violates any such regulation" shall be fined or imprisoned--was held to be a "shorthand designation" for knowledge of the specific acts or omissions which violate the Act. Id. at 559, 562, 91 S.Ct. at 1698-99, 1700. When so viewed, the Court noted, "the Act ... does not signal an exception to the rule that ignorance of the law is no excuse." Id. at 562, 91 S.Ct. at 1700. Compare Liparota v. United States, 471 U.S. 419, 423 & 425 n. 9, 105 S.Ct. 2084, 2086-87 & 2088 n. 9, 85 L.Ed.2d 434 (1985) (holding that a statute providing "who[ ]ever knowingly uses, transfers, acquires, alters or possesses [food stamps] in a manner not ***262** authorized by [the law]" was subject to a fine and imprisonment requires knowledge that the defendant know possession of food stamps was "unauthorized," but stating that this interpretation creates no mistake-of-law defense). In light of these background rules of common law, we may conclude that mens rea requires not that a defendant know that his conduct was illegal, but only that he "know the facts that make his conduct illegal," Staples, 511 U.S. at 605, 114 S.Ct. at 1797, unless Congress clearly specifies otherwise. And this knowledge must generally be proven with respect to each element of the offense. See, e.g., United States v. X-Citement Video, Inc., 513 U.S. 64, 78, 115 S.Ct. 464, 472, 130 L.Ed.2d 372 (1994) (construing a statute prohibiting knowingly shipping a visual depiction which involved "the use of a minor engaging in sexually explicit conduct" to require the defendant's knowledge that the person depicted was in fact a minor); Ellen, 961 F.2d at 466 n. 2.

Finally, our first-blush reading of the phrase "knowingly violates" is cast into doubt by the legislative history, which suggests that Congress, by amending the statute in 1987, intended to facilitate enforcement of the Clean Water Act and increase the impact of sanctions by creating a separate felony provision for deliberate, as distinct from negligent, activity. Before the amendment, the Act imposed a single set of criminal penalties for "willful or negligent" violations. See 33 U.S.C. § 1319(d)(1) (1986). The 1987 amendments, however, segregated the penalties for negligent violations, making them misdemeanors, and added felony provisions for knowing violations. See 33 U.S.C. § 1319(c)(1)(A) ("negligent" violation) & § 1319(c)(2)(A) ("knowing" violation). Thus, before 1987, the statute proscribed "willful or negligent" violations and after 1987 it proscribed separate "knowing" and "negligent" violations. In changing from "willful" to "knowing," we should assume that Congress intended to effect a change in meaning. See United States v. Hopkins, 53 F.3d 533, 539 (2d Cir.1995); United States v. Sinskey, 119 F.3d 712, 716 (8th Cir.1997). Because "willful" generally connotes a conscious performance of bad acts with an appreciation of their illegality, see Ratzlaf v. United States, 510 U.S. 135, 141, 114 S.Ct. 655, 659, 126 L.Ed.2d 615 (1994), we can conclude that Congress intended to provide a different and lesser standard when it used the word "knowingly." If we construe the word "knowingly" as requiring that the defendant must appreciate the illegality of his acts, we obliterate its distinction from the willfulness.

Based upon these interpretative guides, then, we cannot conclude that Congress intended to require the defendant to know that his con duct was illegal when it stated that "Any person who knowingly violates [incorporated statutory sections] ... shall be punished." The ready alternative interpretation is that Congress intended that the defendant have knowledge of each of the elements constituting the

proscribed conduct even if he were unaware of their legal significance. This interpretation would not carry with it the corollary that the defendant's ignorance of his conduct's illegality provides him a defense, but would afford a defense for a mistake of fact. Thus, if a defendant thought he was discharging water when he was in fact discharging gasoline, he would not be guilty of knowingly violating the act which prohibits the discharge of pollutants. See United States v. Ahmad, 101 F.3d 386, 393 (5th Cir.1996); see also International Minerals, 402 U.S. at 563-64, 91 S.Ct. at 1700-01.

[4] Accordingly, we hold that the Clean Water Act, 33 U.S.C. § 1319(c)(2)(A), requires the government to prove the defendant's knowledge of facts meeting each essential element of the substantive offense, see Ellen, 961 F.2d at 466 n. 2, but need not prove that the defendant knew his conduct to be illegal, see International Minerals, 402 U.S. at 563, 91 S.Ct. at 1700-01.

Urging us to reach a different conclusion, the defendants argue that we should be governed by the decision in Liparota v. United States, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985), where the Court concluded that in proving a violation of a food stamp statute, the government had to prove that the defendant knew that his action or his possession of food stamps was unauthorized. The Court reached the conclusion there largely because, if it were not to require such ***263** a mens rea, the result would be to outlaw a number of acts which a reasonable person would very likely believe were entirely unregulated, including actions that were wholly accidental. The statute provided that "whoever knowingly uses, transfers, acquires, alters, or possesses[food stamps] in any manner not authorized by [the statute] or the regulations" was subject to a fine and imprisonment. 7 U.S.C. § 2024(b)(1). If the court did not apply a requirement that the defendant appreciate that his conduct was unauthorized, the result would render criminal "a nonrecipient of food stamps who 'possessed' stamps because he was mistakenly sent them through the mail due to an administrative error, 'altered' them by tearing them up, and 'transferred' them by throwing them away." Id. at 426-27, 105 S.Ct. at 2089. The Court concluded that the evidence of Congress' intent to create such a harsh regime was too meager to justify the interpretation. At the same time, however, the Court reiterated its conclusion that even then it did not provide a mistake-of-law defense, stating that no defendant could escape culpability by demonstrating that it did not know it to be illegal to use food stamps in an unauthorized way. Id. at 425 n. 9, 105 S.Ct. at 2088 n. 9.

In our case, we believe the several factors we have already discussed indicate a different congressional intent than that found by the Court in Liparota, as we too resist the temptation to create a mistake-of-law defense. As we noted, interpreting the phrase "knowingly violate" to mean violation with knowledge of an act's illegality would require us to ignore the distinction between a knowing and a willful violation, a distinction that Congress recognized in amending the law in 1987. We also note that at the time the penalty provisions of the Clean Water Act were first written, the Supreme Court had already held in International Minerals that the use of the same construction at issue here--"knowingly violates [applicable regulations]"--was "a shorthand designation for specific acts or omissions which violate the Act." 402 U.S. at 562, 91 S.Ct. at 1700. Thus, it is logical to conclude that Congress would have used a similar shorthand designation to incorporate the mens rea requirement against each of the substantive requirements found in the incorporated sections of the Clean Water Act without also intending to create a defense of ignorance of the law.

[5] The defendants argue, however, that International Minerals has no bearing on this case because it was a case involving a "public welfare" offense. Under this somewhat amorphous exception to general common law scienter requirements, a threat to public health and safety posed by an object or activity and the inherent dangerousness or deleterious nature of the prohibited item are considered sufficient in themselves to place the defendant on notice of the likelihood of regulation and thus to excuse the need to prove mens rea with respect to one or more elements of the offense. Even under this public welfare doctrine, however, true or rigid strict liability does not generally follow, as ignorance of the facts usually remains a defense. See Staples, 511 U.S. at 607 n. 3, 114 S.Ct. at 1798. Thus, International Minerals held that prosecution for transporting sulfuric acid without following proper regulatory procedures under a statute prohibiting one from "knowingly violat[ing] any such regulation" did not establish an ignorance of-the-law defense by requiring the government to prove the defendant knew of the regulation and appreciated that his conduct violated it. 402 U.S. at 563-64, 91 S.Ct. at 1700-01. Rather, the government would have to prove that the defendant knew of the operative facts which

themselves were the essential elements of the regulatory violation. Id. The Court thus preserved mistake- of-fact defenses and did not, at the same time, create true strict liability. Later cases which did not involve "public welfare" offenses have required no more than knowledge of the facts. See, e.g., Staples, 511 U.S. at 606, 114 S.Ct. at 1797-98.

The fact that International Minerals involved regulations of an inherently deleterious substance of a type not involved in the present prosecution does not undercut our belief that Congress did not here intend to create a mistake- of-law defense. Even though the materials involved in this case, fill and native soil from a wetland, may not be inherently deleterious, the Clean Water Act is, as a general matter, largely concerned ***264** with pollutants that are inherently deleterious. The legislative history of the Act records Congress' explicit concern with public health. See S.Rep. No. 92-414 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3670-71. And the Act specifically authorized research to determine the harmful effects of pollutants on the health or welfare of persons. See 33 U.S.C. § 1254(c). To date, three other circuits have concluded that the Clean Water Act involves public welfare offenses, recognizing that in each of those cases the pollutants were inherently deleterious. See Sinskey, 119 F.3d at 716 (meat packing plant waste water containing large amounts of ammonia nitrate); Hopkins, 53 F.3d at 534 (waste water containing zinc and other toxic chemicals); United States v. Weitzenhoff, 35 F.3d 1275, 1284 (9th Cir.1993) (sewage).

[6] While a statute which in some applications is a public welfare statute may in other applications be held to require a different mens rea, see Staples, 511 U.S. at 605, 114 S.Ct. at 1796-97, even in the latter situation, the government need prove only that the defendant knew the operative facts which make his action illegal. The government need not prove that the defendants understood the legal consequences of those facts or were even aware of the existence of the law granting them significance. Compare United States v. Freed, 401 U.S. 601, 609, 91 S.Ct. 1112, 1118, 28 L.Ed.2d 356 (1971) (holding that violation for possession of unregistered hand grenade under 26 U.S.C. § 5861(d) was public welfare offense and the government was not required to prove that defendant knew grenade to be unregistered) with Staples, 511 U.S. at 619, 114 S.Ct. at 1804 (holding that violation for possession of unregistered machine gun under 26 U.S.C. § 5861(d) was not a public welfare offense and the government thus was required to prove defendant's knowledge of the specific characteristics which qualify the weapon as a statutory machine gun); see also Hamling v. United States, 418 U.S. 87, 119-121, 94 S.Ct. 2887, 2908-10, 41 L.Ed.2d 590 (1974) (requiring government to prove that a defendant knew the contents of a mailed package, but not their legal status as obscene materials); accord Rosen v. United States, 161 U.S. 29, 32-33, 16 S.Ct. 434, 435 (1896).

[7][8] In light of our conclusion that the government need only prove the defendant's knowledge of the facts meeting each essential element of the substantive offense and not the fact that defendant knew his conduct to be illegal, in order to establish a felony violation of the Clean Water Act, we hold that it must prove: (1) that the defendant knew that he was discharging a substance, eliminating a prosecution for accidental discharges; (2) that the defendant correctly identified the substance he was discharging, not mistaking it for a different, unprohibited substance; (3) that the defendant knew the method or instrumentality used to discharge the pollutants; (4) that the defendant knew the physical characteristics of the property into which the pollutant was discharged that identify it as a wetland, such as the presence of water and water-loving vegetation; (5) that the defendant was aware of the facts establishing the required link between the wetland and waters of the United States; [FN*] and (6) that the defendant knew he did not have a permit. This last requirement does not require the government to show that the defendant knew that permits were available or required. Rather, it, like the other requirements, preserves the availability of a mistake of fact offense if the defendant has something he mistakenly believed to be a permit to make the discharges for which he is being prosecuted.

> FN* These facts might seem to fall into the category of "jurisdictional facts" which under United States v. Feola, 420 U.S. 671, 676 n. 9, 684, 95 S.Ct. 1255, 1260 n. 9, 1263-64, 43 L.Ed.2d 541 (1975), the government need not prove the defendant knew. In Feola, however, those facts served only the purpose of designating which of two authorities would prosecute the crime, the underlying crime of assault being criminal at all times either under state law or, if involving a federal official, as in that case, under federal law. See Feola, 420 U.S. at 683, 95 S.Ct. at 1263. Maryland does, by statute, regulate the discharge of pollutants into certain waters within its jurisdiction, as well

as prohibiting the destruction of wetlands, see Md.Code Ann., Envir. §§ 4-101 to 4- 708; § 16-302, but as those statutes do not appear to cover the property here in question, we do not find this situation to be governed by Feola.

***265** [9] While we thus reject the defendants' challenge to the district court's instructions based on the contention that the government must prove awareness of the illegality of their conduct, we agree that the instructions did not adequately impose on the government the burden of proving knowledge with regard to each statutory element. For this reason, a new trial is required.

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VII

In summary for the reasons given in parts II and V, we conclude (1) that 33 C.F.R. § 328(a)(3) (defining, in part, "waters of the United States") exceeds statutory authority and therefore is invalid; and (2) that the district court erred in failing to apply the statutory mens rea to each element of the offense. For these reasons, we order a new trial. Because we are ordering a new trial, we need not reach the defendants' sentencing issue.

REVERSED AND REMANDED FOR A NEW TRIAL.

LUTTIG, Circuit Judge, concurring in the judgment:

I concur only in the ultimate disposition of this case, and only for the reasons stated in Part V of Judge Niemeyer's opinion. While I believe the analysis in Part II of Judge Niemeyer's opinion is convincing, that analysis is directly foreclosed by our court's decision in Brzonkala v. Virginia Polytechnic & State University, 132 F.3d 949 (4th Cir.1997), an opinion which is nowhere discussed by my colleagues in either of their opinions. In Brzonkala, in stark contrast to the majority herein, the court dismisses the decision of the United States Supreme Court in United States v. Lopez, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), as an aberration, essentially limiting the reach of that opinion to section 922(q), of Title 18, of the United States Code. See Brzonkala, 132 F.3d at 977 (Luttig, J., dissenting). As long as Brzonkala remains the law of the Circuit, I believe that we are bound by, and should faithfully adhere to, that precedent.

PAYNE, District Judge:

I concur with the ultimate disposition of the appeal and with Parts II, V, and VI of Judge Niemeyer's opinion. However, for the reasons set forth below, I disagree with Parts III and IV of that opinion.

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